

WOMEN'S RIGHTS UNDER THE SHARI'A



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**WOMEN'S RIGHTS
UNDER THE SHARI'A**

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PREFACE

Following the introduction of the Shari'a in some parts of the Northern states of Nigeria women have been convicted of *Zina*, (adultery) which punishment is stoning to death.

It would be recalled that Safiyyah Tudun Wada was the first victim to be convicted for the offence of *Zina* {adultery} and there was hue and cry every where which aroused the attention of the international community condemning the conviction as been barbaric as well as begging for clemency for the victim. Eventually, the Shari'a court of appeal later quashed Safiyyah's conviction and she was discharged and acquitted. To show its sympathy the government of Italy arranged and took Safiyyah to Rome in Italy, and was made a Roman citizen as well.

It was not too long after Safiyyah's case that another woman Amina Lawal was also convicted for the same offence. People were upset again and become skeptical; to them there was nothing good about the Shari'a other than the cutting of hands in cases of theft, and stoning to death in cases of adultery. However, this book aims to highlight the various and abundant provisions in respect of women's rights available under the Shari'a.

Similarly, it is also meant to enlighten the public and Muslim women, in particular, to be conscious of their rights as far as the Shari'a is concerned, and to make it a reality as it was during the life time of the Prophet (SAW).

This book starts by examining the general rights of human beings as provided under the Shari'a, it goes further to discuss the basic rights of women, as well as the reproductive rights of women with views of both old and contemporary Muslim

jurists. It also looks at modern forms of contraception, whether they are Islamic or not.

Similarly, the contemporary issues and positions as they affect the reproductive rights of women are also discussed, hence, the references made to CEDAW and other international instruments.

Finally the book also talks about the rights of women based on their status, and it is my belief that the both Muslims and non-Muslims alike will benefit immensely from this book insha Allah.

INTRODUCTION

Women have inalienable rights under the Shari'a and nothing whatsoever can deprive them of these rights. According to Dr. Yusuf Al Quradawy Islam considers the woman as a worthy human being with a share in humanity equal to that of man".¹ It is this worthiness that enables a woman to compete with a man so much that there is no level of piety or spiritual upliftment attained by a man that cannot be attained by a woman. Similarly, both man and woman are expected to work harmoniously with one another, this is because the Quran describes the Muslim man and woman as friends and companions of one another because both of them have been given the same tasks which is commending what is good and forbidding what is bad and they both believed in Allah (SWT) their creator.

However, under the Shari'a the needs, conditions and status of a woman are considered in line with her rights. That is, aside from the general rights, women get their rights according to their status, or as the need arises, at times it depends on their conditions.

¹ Dr. Yusuf Quaradawi: *The Status of Women in Islam*: Islamic home publishing and distribution. p.3

GENERAL RIGHTS OF HUMAN BEINGS UNDER THE SHARI'A

The general rights of not only women but of all human beings have being clearly defined and stated in the Glorious Qur'an and the Sunnah of the prophet of Allah (SAW). The human rights provisions under the Shari'a are so comprehensive that the provisions first cover the general rights of human beings, making them equal before their creator, and these provisions even extend to non-Muslims who may be living within the Islamic state, since the human race originated from a single soul.

Quran 4:1 says" *O you mankind fear your Lord who has created you from a single soul and He created from him his mate {wife} and from them brought many men and women..."*

These general rights of human beings are as follows:

RIGHT TO LIFE

The right to sanctity of life is so fundamental that any person that kills will be killed, except in the cause of justice; that is if the person to be killed or that has being killed is guilty of murder.

Quran 5:32 states:" *whoever kills a soul except guilty of murder or spread corruption on the earth it is as though he has killed entire mankind and whoever save a soul it is as though he has save the entire mankind "*

Muslim scholars have said that this verse gives sanctity to human life, irrespective of race, creed, colour, and sex.

Quran 6:151 went further: "*Do not kill a soul which Allah made sacred except through the due process of law "*

The prophet {SAW} says: *"The greatest sins are associating partners with Allah, killing human being and disobedience to parents"*.

RIGHT TO EQUALITY

Human race has a single source as far as Islam is concerned, that is human beings were created from a single soul.

Quran 4:1 says: *"O Mankind fear your lord who created you from a single soul and created from him his wife and from the two created countless men and women..."*

It is on this premise that Islam has regarded every human being as being equal, irrespective of background, status, colour, tribe, religion, and race. One's background should not be a barrier to his/her attainment of the highest good in life; neither does it make one to be treated in a special or different way from others.

Quran 49:13 says: *it is we that created you from male and female and we made you in nations and tribes so that you would be able to recognize one another the most honourable amongst you all are the pious ones "*

It is on this basis that man and woman are treated equally most especially in areas affecting their interest.

The prophet {SAW} said: *"There is no difference between an Arab and a non Arab, No difference between a white man and a black man all are from Adam and Adam is from dust"*

Discrimination on whatever ground is forbidden under the Shari'a. The prophet {SAW}" *listen and obey even if a slave is placed over you as your leader."*

RIGHT TO JUSTICE

Under the Shari'a everybody has equal access to justice, irrespective of religion, tribe, sex, etc. A non-Muslim has equal rights in matters of justice with a Muslim. A woman also has equal rights to justice like a man. Similarly, the poor has equal right to justice like the rich, and the ruled has equal access to justice like the ruler, so much that there is no immunity for a ruler who has wronged one of his citizens.

Quran5: 2 says: "Do not let the hatred of a people debar you from doing justice be just that is next to piety".

It was reported that a man engaged in a horse race with the son of the then governor of Egypt Amr bn As won and the son of the governor started beating the man; the man went to Madinah and reported the matter to the then second caliph, Umar bn Khattab, the caliph sent for the governor and his son, and when they got to him, he said "did your son engage in a horse race with this man, and he won and he thereafter beat him" The governor said "yes" the caliph then said to the governor, "when have you turned human beings into slaves, while they were born free from their mother's womb". The caliph gave the man a whip and ordered him to whip the governor.

FREEDOM OF RELIGION

The Shari'a guarantees freedom of religion for its citizens, the non-Muslims living in the Islamic state enjoys freedom of religion; they are not to be compelled to adopt Islam as their own religion.

Quran 2: 256 says "Let there be no compulsion in the matter of religion"

Everybody is allowed to practice the religion he/ she chooses as a citizen in an Islamic state, a person who is not a Muslim will not be compelled or forced to accept the religion of Islam. The only time a person may be compelled is, for instance, if one neglects his/her duty. Under no circumstance should a Muslim refuse to observe *salat* and pay *Zakat* once he/she has the wherewithal to do so, as the state is expected to ensure the regular observance.

Similarly, a Muslim is not expected to make mockery of other people's faith or abuse whatever they worship as their god even if they are one's parent. A Muslim is still expected to treat them kindly and be companionate towards them.

Quran 6:108 says *"Do not abuse what they worship beside Allah..."*

Religious differences should not prevent a Muslim from being kind and honest to a non-Muslim, he should not be cheated, nor should he entertain any ill feeling towards any because he is not a Muslim.

RIGHT TO PERSONAL LIBERTY AND HONOUR

The liberty of everybody living in an Islamic state is guaranteed under the Shari'a, irrespective of religious background, sex, race or colour. Nobody can be arrested or tried for any offence, except according to the due process of law. The liberty of an individual is so fundamental under the Shari'a that the Prophet {SAW} said He will be a plaintiff against anybody that sells a free man into slavery and spends the money on the Day of Judgment.

The second caliph Umar chided the then governor of Egypt when his son beat the man who had engaged in horse race him and the governor could not prevent/ punish his son for

beating the man. Nobody is to be held in bondage or imprisoned in violation of his/her liberty. This is why human and child trafficking is a serious offence under the Shari'a

FREEDOM OF EXPRESSION AND MOVEMENT

There is freedom of movement and expression guarantee under the Shari'a, once it is not done in disobedience to undermine the rule of law. Everybody is given the right or permission to express his/herself, except in things forbidden to be spoken in the public; for instance, cursing one another or one's parents or speaking vices in the public are prohibited under the Shari'a. Similarly, the freedom of expression granted does not extend to making jest of or defaming one another.

Quran 49: 11 says: *"O ye who believe Let not some men Among you laugh at others: it may be that the {later} are better than the {former}; Nor let some women laugh at others: it may be that the {later} are better than the {former}; Nor defame nor be sarcastic to each other. Nor call each other by {offensive} nicknames..."*

Similarly, a woman is also expected to express herself whenever the need arises contrary to the view or belief that a woman should not talk, especially in public, a woman could talk either in private or public once she fulfils the conditions governing her utterances just like a man.

A Woman once corrected the second caliph, Umar in the mosque when the later was about fixing the bride price a woman could take; the former said "oh Umar would you fix what Allah and his prophet have not fixed, the bride price is wholly a woman's affair and should be left as such". Umar said: *"I am wrong and the woman is right"*.

In the same vein, everybody is granted freedom of movement both women and men are granted the freedom to move from one place to another without let or hindrance. A non-Muslim

living within the Islamic state is also not restricted as far as his/her freedom is concerned. It was reported that Sauda, one of the wives of the Prophet {SAW} went out one night after the verse concerning the veil had been revealed and was accosted by Umar who was disgusted by seeing one of the Prophet's wives outside, Sauda reported the matter to the Prophet {SAW} who said that Allah permits you to go out for your needs. Scholars have said that whether veil or not a woman's freedom of movement is fully guaranteed under the Shari'a. Allah even enjoins us to walk and travel on earth.

FREEDOM OF ASSOCIATION

The freedom to form an association is guaranteed under the Shari'a once the association is not meant to destabilize the state, also the association should be formed with good and righteous people, and with good intent, devoid of malice and enmity.

Quran 9:119 say: *"O ye who believe fear Allah and be with those who are truthful"*

Similarly, the Quran also enjoins a group of Muslims coming together as a group to invite what is good and forbidding what is evil. Both Muslim men and women can come together to form an association collectively towards a particular purpose that is permitted by the Shari'a.

RIGHT TO PRIVACY

The right to privacy is so fundamental that Allah told the Prophet in the Quran that he had not been sent either as spy to watch peoples affairs, but that he should just deliver the message he was being sent with and judge the cases as presented to him. Muslims were also warned in like manner that no Muslim should look for another's fault or pry into others affairs as this is regarded as intruding into others affairs.

Quran 49: 12 says:” *O ye who believe avoid suspicion as much {as possible}: for suspicion in some cases is a sin: And spy not on each other, nor speak ill of each other Behind their backs...”*

It is not expected of a Muslim or anybody within the community to intrude into someone’s privacy, even if the person is a law enforcement agent. The Quran even warns that before entering into any habitable house, permission should be sought, if granted one can enter, but if refused one is expected to go back according to the Quran.

Quran 24:27-28 says as follow: *“O ye who believe: Enter not houses other than your own, until ye have asked for permission and saluted those in them: that is best for you in order that ye may heed {what is seemly}”*

“If you find no one in the house enter not until permission is given to you: if you asked to go back, go back: that makes for greater purity for yourselves: and Allah knows well what ye do”

A man was reported to be peeping on the Prophet {SAW} and when he got to know, he said, “had I known you are peeping at me I would have put a sharp object into your eyes”. Based on this, the Prophet said to his companions “should you see somebody intruding into your privacy put a sharp object into his eyes”.

The prophet {SAW} also warned on intruding into the privacy of women that one should be careful on going in to women this is not just because of the delicacy of women but also to protect their honour and integrity and also to remove anything that is likely to cause suspicion.

It is for this reason that a person who accuses another of either adultery or fornication will be required to produce four impeachable witnesses otherwise he will be liable.

All the above-mentioned rights are to be enjoyed by both men and women alike without discrimination and if any of these rights is infringed upon, the victim can seek redress in the court of law.

THE BASIC RIGHTS OF WOMEN UNDER THE SHARI'A

In the world over today the womenfolk have suffered a lot, ranging from sexual and domestic violence, discrimination, human rights abuse, denial of inheritance etc. The condition of women having deteriorated was so pathetic that there were series of moves both at local and international levels to salvage these problems; these led to series of conferences like the one at Vienna and the most recent one held in Beijing in China in 1995.

These conferences produced several documents the prominent among these documents was CEDAW Though there is universal declaration of human rights it is not peculiar to women alone, but all human beings.

Muslim women the world over are not left out of the predicaments women in other jurisdiction have found themselves in as if their interest was not taken care of by the Shari'a so much that the belief was that Shari'a had suppressed the rights of its womenfolk and that Muslim women are being subjected to series of abuse in the name of Shari'a.

However, the Shari'a has made adequate provisions for women even more than what obtains in other jurisdictions. Shari'a not only caters for the human rights of women but makes provisions for every thing affecting the personality of the womenfolk, and this has placed the women in an honourable status, even more than what is available to women in other jurisdictions.

The basic rights of women under the Shari'a are as follows:

1. INHERITANCE RIGHT

All women are entitled to inherit from the relatives depending on the circumstance of each case. Unlike the common law where the inheritance of woman depends the husband making a WILL that includes his wife as one of those to inherit him. Similarly, the person making a WILL must fulfill some conditions as laid down by the WILLS Act, like possessing testamentary capacity. He must not be induced or forced into making the WILL; otherwise the WILL will become invalid. However, under the Shari'a whether there is a WILL or not, the Muslim woman need not prove anything especially in the court of law, since there is a fixed share for her by the Quran. A woman can inherit as a mother, sister, daughter, wife, aunt, and grandmother. All these categories of women will inherit, with each having her own fixed share for instance the wife takes $1/8$ if her late husband has children but if not, she takes $1/4$.

The daughter takes $1/2$ if she is the only child of her father, and if they are two they take $2/3$ but if there is a male child he takes twice what his sister takes. In the same vein the sister of the deceased will only inherit if there is no male child or no child at all. The mother will take $1/3$ of the estate if there is no child, but takes $1/6$ if there are children. The grandmother only inherits if she survives the mother of the deceased.

2. ECONOMIC RIGHT

Women have economic rights as this has been enunciated in the Qur'an and the Sunnah. The economic right of a woman is such that she is permitted by the law to own property independent of either her father, brother, mother and her husband. The right the husband has over his wife does not

extend to her property. The man cannot fuse his property with that of his wife.

Similarly, a woman can also work outside the matrimonial home once there is a conducive atmosphere, though it is not compulsory that a woman works, but if she decides to or she has put it as one of the conditions of the marriage then it is expected of her husband according to Sheik bn Ba'as to honour it, this is so because the prophet {SAW} said that of the one terms which must be honoured or fulfilled is that making conjugal relation lawful. That is, what the couple agreed upon as at the time of entering into the marriage contract.

3. POLITICAL RIGHT

Woman though cannot be made head of state under the Shari'a, however, they must have a say in the day-to-day affairs of the community. A woman could be elected in representative capacity to represent or champion the cause of her fellow women as women were often deputized to present the case of the women folk before the prophet {SAW} during his life time.

They have to give their allegiance to whomsoever assumes the leadership of the community; the men of whatever category cannot give allegiance on behalf of women. Where a leader is elected, women are entitled to vote a particular candidate and can refuse to vote another.

Similarly, under the Shari'a women could be consulted to give advise on matters either affecting the women or even the state in areas where women are considered to be experts or experienced.

4. EDUCATIONAL RIGHT

Women need to be educated, as seeking for knowledge is a must in Islam. The prophet {SAW} laid much emphasis on the educational rights of women that he said a person who

had two daughters and educated them properly, and they get married without any doubt that person will be his companion in paradise. The reason for this is to ensure that adequate care and provision is made for the women. The prophet himself trained and educated not only his daughters but also his wives and he used to tell his companions that they could learn half of their religion from this small girl, referring to his youngest wife

5. RIGHT TO CHASTITY AND HONOUR

A woman is highly regarded under the Shari'a; the Muslim woman is regarded as chaste, and must be respected by all and sundry. Many people often say that the *hijab* {outer garment} used by the Muslim women is an object of oppression to them, that the *hijab* has taken away the rights of these women, but this is not the case, as the *hijab* is meant to protect the integrity of the women.

Quran33: says: "O prophet tell your wife, your daughters, and the wives of the believers that they should put on their hijab when going out that is best for them, they will be recognized and not molested"

This verse shows that the essence of using *hijab* by a Muslim woman is to make her to be distinct in the society and to protect her chastity and save her from being molested. A woman will be molested if she is either raped or she is accused of an act of indecency.

A woman in her *hijab* is allowed to move freely within the community without let or hindrance, but she should not be accused falsely most especially of committing adultery or fornication, as this will bring her chastity into disrepute. Any body that accuses a woman of either adultery or fornication will be required by the law to produce four witnesses.

Quran 24:4 say: "And those who launch a charge against chaste women, and produce not four witnesses {to support their allegation}: flog them with eighty stripes; and reject their evidence Ever after: such men are wicked transgressors"

The chastity and honour of a woman is taken seriously by the Shari'a, both male and female Muslims are warned not to defame or slander one another.

Quran 49: 11-12 says: "O ye who believe let not some men among you laugh at others it may be that the {latter} is better than the {former} Nor let some women laugh at others it may be that the {latter} are better than the {former} nor defame nor be sarcastic to each other... O ye who believe avoid suspicion as much {as possible} for suspicion in some cases is a sin. And spy not on each other nor speak ill of each other behind their backs..."

These verses not only protect the integrity of women but men inclusive that anybody found wanting would be punished it was because of this that the prophet warned men not to go into women's privacy any how, he also warned that a strange man should not be in a secluded area with a strange woman, except somebody related or close to the woman is present so as not to jeopardize the interest of the woman.

6. RIGHT TO CUSTODY OF CHILDREN

The custody of children in the event of divorce will be given to the mother, the mother is always given priority except where she forfeits her right, and where she forfeits her rights, then the custody of the children goes to her mother in that order, to about six or seven persons before the father is considered at all. The woman retains the male child until he attains puberty and if a female until she gets married.

However, the father will still bear the cost of maintaining the children, as it is not the duty of the mother despite the fact that she has been given the custody of the child. The father is expected to maintain the child as if he were still in marriage union with the mother.

Similarly, the father is also responsible for the training of the child; he has the sole responsibility of educating his child to any level, irrespective of the sex of the child. The mother is not however precluded from maintaining her child once she has the power to do so, but it is not compulsory for her; she can also train the child if she has the wherewithal to do so, but the father has to give approval to the kind of training to be given to his child, most especially religious education.

It should however be noted that where a woman is breastfeeding a child in her custody, the father has to pay for the breastfeeding until the child is weaned. The mother will charge whatever amount from the father as she has been given the power and the discretion to charge. What will be okay for her must be reasonable, while the man has been given the power to bargain with the woman, and once they reach a compromise, it is incumbent upon the man to honour the agreement reached with his former wife.

7. RIGHT TO DIVORCE

The man is given the power of divorce; that is, the legal separation of the couple should be at the instance of the husband. However, this right could be given to the wife by the husband; that is, rather than the divorce coming at the instance of the husband it will be at the instance of the wife; this is called *Tamlík*.

The husband may give this right at the time the couple is entering into the marriage contract or any other time by simply telling the wife that "you could divorce me if you are fed up

or tired of me", and should the wife exercise the right, the divorce is as binding as the one initiated by the husband.

Similarly, the wife could also initiate divorce by a way of "khul", where the husband has not given the right of divorce to his wife, and the wife is finding the marriage very difficult so much that she can no longer cope within the marriage union; this permits the woman to initiate divorce by simply returning the bride price paid to her by the husband, so as to release herself from the marriage bond.

The returning of the bride price could be whole or in part, depending on what the couple agrees upon, and once the wife fulfills the obligation, the marriage stands dissolved, and is binding on the couple. The only difference between the divorce initiated by the husband and the one from the wife is that the divorce at the instance of the husband entails that he will forfeit everything he has spent on the wife, while at the instance of the wife, she only parts with all or part of the bride price, except in *tamlik* where the woman pays nothing back to the husband having waived his right by giving it to his wife.

REPRODUCTIVE RIGHTS OF WOMEN:

The Shari'a sanctions the reproductive rights of Women, but with some restrictions, which prevent not only women but also men from altering their natural positions.

Quran 30: says "... *Let there be no changes in the creatures of Allah...* "

It has been said that modern recognition of reproductive rights of women can be traced to the late 1960s. The international conference on Human Rights held in 1968 in Teheran gives recognition to parents to freely decide the number and spacing

of children and the right to education and information to do so.²

It was said that by 1984 at the international conference on population (ICP) in Mexico City, this right had been reformulated and it continued with the United Nations Decade for Women (1979-85) with article 16{1}{e} of Women's Convention urging state parties to ensure the equality of man and woman.³

However, the International Convention on Population and Development {ICPD}, held in Cairo goes further than the previous conventions including the 1993 world conference on human rights held in Vienna, which apart from determining the number and spacing of children, equality of man and woman, access of women to adequate health care and family planning, and access to equal education at all levels upheld by the previous conventions the Cairo ICPD programme of action, also upheld the right to attain the highest standard of sexual and reproductive health, to make decisions concerning reproduction free from discrimination, coercion, and violence.⁴

The Beijing conference held in 1995 reaffirmed the principles adopted in Cairo with the production of two documents, and goes further to say that women should control their sexuality and decide on these matters on equal basis with men. In July 1998, the Rome treaty adopted the creation of a permanent international criminal court to investigate and punish genocide, crime against humanity and war crimes. The treaty also recognized rape and other sexual violence as serious crimes,

²The Center for Reproductive Law and Policy: Reproductive Rights 2000 Moving Forward: New York. P.10

³ Ibid

⁴ Ibid pp.10-11

and finally in 1999 there was another conference, which was a five-year review of the 1994 ICPD, with advancement on reproductive rights.⁵

However, the reproductive rights of women under the Shari'a dates back to the time of revelations when the Prophet {SAW} was still alive receiving revelations from Allah {SWT}, this was about 1424 years ago. It is however a pity today that these rights have eluded women because Muslims worldwide have abandoned the Shari'ah which has led to the reversion of the situation of Muslim women to the condition they were before Islam; it now looks as if Muslim women are being oppressed by Islam whereas it is the Muslims themselves not Islam, that oppresses the Muslim women.

The reproductive rights of women will be discussed from modern/contemporary reproductive rights accorded to women worldwide to see whether Islam makes similar provisions or at least, says something on it in relation to it's women.

THE REPRODUCTIVE RIGHTS OF WOMEN UNDER THE SHARI'A ARE AS FOLLOWS:

1. FAMILY PLANNING:

Abdel Rahman Omran in the appendices to his book cited the *fatwa* {Religious verdict} of Dr. Tatawi who defined family planning as a means that the husband and wife use, with mutual agreement, to space pregnancies or stop procreation temporarily, with a view to reduce the size of the family in a way to enable the parents take good care of their children without physical hardship or economic embarrassment⁶

⁵ Ibid

⁶ Abdel Rahman Omran: family planning in the legacy of Islam: Routledge: New York / London 1992. p. 258

Family planning, to be precise, is a means to space and control the number of children a couple could have over their life time. Family planning has been argued from different points of view; while some have taken it as a means of checkmating population, some view it from the sexual and reproductive right of women, that is, a woman should have the right to determine the number of children she wants, and when to have them, while others also say the interest of a child needs to be considered in child bearing.⁷

The ICPD Programme of Action, Paragraph 7.16 enjoins that countries ensure safe and reliable family planning methods, and give couples the right to have children by choice. The Beijing platform of action also has similar provisions in its paragraph 94 .

Many countries of the world today are making policies legalizing the practice of family planning for their citizens; for instance, in China family planning is free for both sexes. Similarly, in Ghana family planning is also permitted, while that of Kenya extends to sterilization. In Brazil the practice of family planning is optional, while in Benin Republic it is still not yet in practice, though the new government policy has now made it lawful, but people still stick to the old law prohibiting the dissemination of contraception.⁸

However, family planning has generated a lot of controversy among Muslim Scholars; while some say that it is permitted others say no to it. Even contemporary Muslim Scholars like Maududi are not left out in the argument. He opines that

⁷ Reproductive Right 2000 Moving Forward: The Center for Reproductive Law and Policy: New York. Pp.15-16

⁸ Ibid pp. 16-17

children are gift from God, and preventing them amounts to forbidding what God has allowed.⁹

Similarly, some scholars say family planning is contrary to predestination and reliance on Allah, while those with contrary views say family planning cannot hold a child that Allah wills to be created, and that family planning has not removed the reliance a Muslim has on Allah, and that by practicing family planning, it is not that a Muslim does not believe Allah would provide for him and his children.¹⁰

The proponents of family planning say that though the continuous existence of human race is on procreation, this does not mean having too many children that one would not be able to bring them up the Islamic way while the opponents of family planning said that children are gift from Allah and the joy of the world and to crown it all it is the essence of marriage. The proponents of family planning said procreation is not exclusive purpose of marriage rather it entails more responsibilities.¹¹

It should be noted that the pro and con arguments being raised by the Muslim scholars could be view from two angles, one it could be viewed from their understanding of the religion as they relied on some verses of the Glorious Quran, for instance the Muslim scholars who opposed family planning said Allah says in Quran 18:46 that: "*Wealth and children are adornment of life*"

They also referred to the verse of the Quran where Allah warns against infanticide

⁹ Abdel Rahman Omran: Family planning in the legacy of Islam: Routledge: New York p.96

¹⁰ Ibid. Pp.89-90

¹¹ Ibid pp.92-95

Quran 6: 151: *“Kill not your children for fear of want. We shall provide sustenance for you and for them”*

These two verses are among the numerous verses being referred to by the Muslim scholars who opposed family planning. They also referred to some of the sayings of the prophet {SAW} that according to them prohibits the practice of family planning.

The second reason why these scholars oppose family planning is that it is Western oriented. In their view, it is meant to control population thereby inducing poverty and fear of want in the mind of the people whereas Allah has warned Muslims not to kill their children for the fear of want.

However, despite the arguments against family planning the majority of Muslim scholars both past and present agreed that family planning is allowed under the Shari'a but with restriction where necessary and depending on the circumstances. The modes of family planning as allowed by Muslim scholars under the Shari'a are as follows:

BREASTFEEDING

Breastfeeding as means of family planning is recognized under the Shari'a, as Allah the creator of mankind knows what is good and beneficial for him. It is for this reason He permitted breastfeeding as means of family planning in order to allow the mother to give adequate attention to the child who is being nursed by her and to preserve her health and physical fitness during breastfeeding and after the child is weaned.

Quran 2: 233 say: *“...a mother shall give suck to her child for two whole years for complete the breastfeeding but the father shall bear the cost of providing for his wife and the child on a reasonable term ”*

This verse give room for child spacing which the scholars who oppose family planning cannot controvert, but it however makes the completion of the two year term optional for the couple, but the verse warns that the father should be ready to face the consequence of his action. That is to say should the wife become pregnant before the child is weaned the husband must be ready to provide the means of meeting the expenses the pregnancy will cost his wife. Furthermore, the Quran stipulates that the rights of the nursing mother should not be undermined; if the two year term will not be completed then there must be a mutual consent between the couple, that is there should be no coercion.

Quran2: 233 says: ... "The mother shall not suffer hardship on account of her child nor the father on account of his child they shall be charged equally"

The Quran still maintains in sura 31: 14 that the period for both conception and weaning of a child should be thirty (30) months; it goes further to say that in travails upon travails was a child born and nursed by its mother, and if one looks at this, one will not hesitate to say that the mother needs rest. It is because of the hardship the mother bears for her child that made Allah (SWT) to enjoin upon man that after honouring Him {i.e. Allah}, man should honour and be grateful to his parents most especially the mother

In the past, artificial milk was advertised as being the best for children, but today breastfeeding has gained worldwide acceptance as being the best for the infant baby, and medical doctors have said that a new born baby should be breastfed for the first six months of its life without being given any additional supplements.

Additional supplements may be given to the child after six months, this why in Ethiopia breastfeeding is permitted as a means of child spacing as way of implementing it own family planning policy.¹²

A woman whose condition or that of her child becomes so critical as a result of the woman becoming pregnant while still nursing the child and the pregnancy threatens her life or that of her child is allowed according to Muslim scholars to carry out abortion to save her life. According to the scholars, this is a necessity, but one should not forget that a life has been lost in the process, which is why it is better to allow the mother of the child to rest during the period of breastfeeding. It should be noted that under the Shari'a having sexual intercourse with a nursing mother is not prohibited, that is why the Quranic verse quoted above makes completion of the two-year term optional. The Prophet {SAW} was even reported to have permitted sexual intercourse with a nursing mother once, or if the child would not be harmed, but Abdel Rahman Omran says the Prophet {SAW} said that having sexual intercourse with a nursing mother is an assault on the child if there is a possibility of the mother becoming pregnant. He quotes a hadith reported by Abu Dwoud where the prophet said thus:

*"Do not kill your children unconsciously. For al-gayla will have [in the future] the same effect as when a horseman is overtaken [by an opponent] and thrown off his horse"*¹³

¹² Reproductive Rights 2000 opcit p.16

¹³ Abdel Rahman Omran: family planning in the legacy of Islam: Routhledge: London/ New York.pp 97-174

AL-AZL (COITUS INTERRUPTUS)

This is one of the earliest methods of family planning, this practice is worldwide, and here in Africa it is still called traditional method. Coitus interruptus is also referred to as withdrawal method that is the removal of the man's penis during ejaculation to prevent the emission of semen into the woman's vagina during sexual intercourse.

The companions of the prophet {SAW} resorted to *azl* to prevent impregnating their wives during sexual intercourse. They resorted to this practice in order not to harm their wives, the children who are being breastfed, and to prevent unwanted pregnancy.

This practice was reported to the Prophet who replied thus:

"Abu Sa'id reported that when the prophet was queried about al-azl and he said 'Not out of all the semen a child is formed, and if Allah willed to create something nothing would stop Him from doing it'". {Reported by Muslim}

The right of the wife in the practice of *al-azl* is not undermined as far as the Shari'a is concerned. It was said that the prophet allowed the practice with the consent of the wife that is it should not be a one way traffic.

"Abu Huraira reported that the prophet said that al-azl is not allowed without the consent of the wife" (reported by Abu Dawoud).

This saying of the prophet gives recognition to the sexual right of a woman that the husband cannot just fell on his wife making sexual intercourse his exclusive right without considering the interest of his wife.

However, some Muslim scholars have argued against the practice of *al-azl*, saying that the prophet later forbade the

practice calling it hidden infanticide, however majority of Muslim scholars uphold the practice of *al-azl* saying that it is not a minor infanticide and that it is permitted under the Shari'a.¹⁴

It should however be noted that *al-azl* is not 100% safe in the prevention of pregnancy, this was why the Prophet said that what ever Allah wills to be created will be created

MODERN CONTRACEPTION:

The practice of *al-azl* {coitus interruptus} is traditional, and it is not 100% safe. However, with the advancement of science and technology modern methods of preventing pregnancy have been developed and they are as follow:

BARRIER METHOD

Barrier methods include condom, diaphragm, and spermicides. They are either worn by men or women; while men wear the condom the women make use of the diaphragm with the aid of spermicides during sexual intercourse.

Muslim jurists are unanimous that the Prophet permits the use of either of these methods by the couple to prevent pregnancy under the Shari'a basing their reasoning on the permission of *al-azl*.

However, the jurists are of the view that there must be justification of the use of contraception, for instance, to avoid health risks in a child still being breastfed, maternal health risks, prevention of pregnancy in an already sick wife, avoidance of transmission of contagious disease to progeny {*shaltout*} and to preserve the beauty and physical fitness of the wife etc.¹⁵

¹⁴ Ibid pp.115-131

¹⁵ Ibid p169

STERILIZATION

Sterilization is the temporary or permanent loss of ability of a man to impregnate a woman, or the ability of a woman to conceive. Sterilization in men is called vasectomy, this is done by dividing or tying the vas {seminal canal}, while in women it is called tubal ligation, and it is done by tying the fallopian tubes which are connected to the uterus which pick up the ovum from the ovary and allow the process of fertilization to take place within its cavity.¹⁶

Contemporary Muslim jurists have argued that temporary sterilization is allowed, but that permanent sterilization is forbidden.¹⁷ In essence, a woman can be sterilized temporarily once the husband consents.

Islam or the Shari'a is not the legal system that gives tacit approval to sterilization. For instance, in countries like Argentina, Poland, and Cote d'Ivoire, sterilization is illegal and a crime and it is an offence punishable with death in Cote d'Ivoire.¹⁸

INFERTILITY AND ARTIFICIAL INSEMINATION

Infertility is simply inability of a man to impregnate a woman or inability of a woman to conceive, this is mostly due to a disease or from a complication for instance, the failure of a female to produce viable eggs as a result of ovarian failure, infection, radiation, and hormonal imbalance. In males infertility may be due to hormonal imbalance, infection of scrotum and the, epididymis, which makes it impossible to produce motile non-deformed sperms in sufficient quantity.

¹⁶ Ibid p. 187

¹⁷ Ibid pp.187-190

¹⁸ Reproductive Right 2000 upcit p.21

A woman who is affected may seek solution to this problem, as the Prophet was reported to have said that there was no sickness or disease without a cure. This problem could be treated through hormonal or chemical therapy, surgical treatment, and artificial insemination.

ARTIFICIAL INSEMINATION

This is as a result of the inability of the sperm to reach the ovum in large quantity, which is either due to low sperm count or hostile mucus plug at the mouth of the cervix. Artificial insemination, according to Muslim scholars, is permitted once done by honest and experienced specialists but it depends on the circumstances.¹⁹

The procedure of insemination maybe done as follows: insemination of the wife the with the semen of her husband is allowed, while that of a donor other than the husband is forbidden artificial insemination of the wife in test tube baby with the semen of the husband is allowed, but that of a donor is forbidden.²⁰

It should be noted that according to some scholars, couples can seek divorce as a result of inability to procreate, if either the wife or the husband can procreate if he/she marries someone else. The husband can even take additional wife rather than divorce the present wife if the problem is from her.

This is because the insemination of the wife with a donor sperm other than the husband's will produce a child that does not belong to husband, which Muslim scholars liken to *Zina*

¹⁹ Abdel Rahman Ommen opcit p.186

²⁰ Ibid

{adultery in this case} This attributes the child who is the outcome of this procedure to a man other than its biological father, and this is why surrogate parenting is not allowed under the Shari'a because of the deception involved.²¹

ABORTION

Abortion as means of family planning is strictly forbidden under the Shari'a, except in a case of exigency, especially when the pregnancy threatens the life of the woman or that of her child; this is the view of majority of Muslim Jurists. However, the *Hanafis* allow abortion before 120 days, while in the Maliki school, it is not permitted, even before 40 days. In *Shafe'i* their opinion is divided; some say it²² could be done within, 80 days, while others say before 120 days, The Hambali school allow abortion before 40 days.

Allowing termination of pregnancy before the 4th month as allowed under the Shari'a has been said to be unscientific; this is because if a live sperm fertilizes a live egg, what results will be a live foetus, and there is no difference between a day old foetus and a four month old foetus, except in growth and development.²³

However, some countries like China, Russia, United States, France, etc allow abortion without any justification, while in countries like Barbados, India, Britain and Zambia, abortion is allowed on economic and social grounds, and in countries like Peru, Zimbabwe, Argentina, Ethiopia, Botswana etc abortion is allowed only as a necessity, when the health of the woman is threatened for instance, in a case of a mental problem as allowed in Malaysia.

²¹ Ibid

²² Ibid p.190-191

²³ Theresa Akumadu: Beasts of burden: Civil liberties organization: Lagos 1998. P.146

Some countries like Nigeria, Brazil, and Indonesia still permit abortion to save the life of a pregnant woman. In Chile abortion is illegal, and in Albania abortion is permitted during the first 12 weeks of pregnancy without restriction. Burkina Faso also allows abortion during the first 10 weeks of the pregnancy in cases of rape or incest. In Cambodia, it is during the first 14 weeks of the pregnancy. South Africa has the most liberal abortion law in the world because it could be done without limitation.²⁴ The positions adopted in our contemporary world some of which are similar to the position taken by the Shari'a while others are contrary to it. This shows that abortion could be permitted, but with restrictions as explained above.

This is because should man be given absolute freedom without checks and restraints he will grossly abuse it and also trample upon the rights of others. Human life is not only sacred it is also fundamental. Even that of the foetus is also fundamental as of Honourable Justice Chukwudifu Oputa notes:

*"The right to life is fundamental, including the life of the unborn child. What sort of authority can a nation claim for itself when a country should make abortion legal but tries to declare euthanasia, suicide or murder illegal? And how just can any woman do what is morally and illegally wrong? Rights do not derive from wrong? There should therefore be no such rights in Nigeria as women's abortion rights"*²⁵

Conclusively abortion under the Shari'a is permitted only as a necessity though majority of the scholars say abortion could be done before the 4th month. However, Abdul-Rahman Doi sharing the view of other jurists says Islam forbids abortion as means of family planning.²⁶

²⁴ Reproductive Right 2000 opcit p.p27-29

²⁵ Beasts of Burden opcit p.146

²⁶ Abdul-Rahman Doi: Women in Shari'a:

MARRIAGE

In the Universal Declaration and the Civil and Political Rights covenants, men and women have equal rights when entering into marriage, during, and after dissolution of marriage.²⁷

Today, many countries of the world have taken steps to make marriage conform to the international standard. For instance, in countries like Albania, Romania, and Argentina the minimum age for first marriage is 16 for girls and 18 for boys. In Ethiopia it is 15 for women and 18 for men. In Bolivia it is 14 for women and 16 for men.²⁸

It has been reported that more than ¾ of young men and women in Niger enter marriage or consensual union before the age of 18 while in Latin America and the Caribbean some 20%-40% enter marriage before the age of 18 and in North Africa and the Middle East 30% of women married young are below the age 18.²⁹

However, the Shari'a has not stipulated a specific age for both man and woman as the age of first marriage but depends largely to the attainment of puberty of each person. It is pertinent to note that many people, especially non-Muslims have criticized early marriage especially of girls in Islam, saying that at times the rights of these girls are undermined, secondly, that it has medical consequences like vesico-vaginal fistula {VVF}, and that about 96% of child-bride victims have still births and a very high maternal mortality rate due to lack of equipment and qualified surgeons to manage the problem.³⁰

²⁷ Reproductive Rights 2000 opcit p.52

²⁸ Ibid p.53

²⁹ Ibid

³⁰ Beasts of Burden opcit p.51

The Shari'a only permits marriage of girls when they are mature, and this differs from one girl to another, and if the education of the young girl is taken to be important, as the Prophet {SAW} put it, Muslim girls today may get married at the age of 17, since 16years is being taken universally as a minimum age to complete secondary school, and if a girl is educated up to secondary school level and wishes to get married she should be allowed to do so.

FORCED MARRIAGE AND CONSENT

The Shari'a has been criticized for allowing a father to marry his daughter to a man of his choice without the consent of the girl in question, regardless of her age,³¹ and that such marriages are done with impunity.³²

The Shari'a does not allow forced marriages without the consent of a woman or girl as the case may be, though it allows the father to give his daughter in marriage but such right is subject to the approval of the girl

The prophet {SAW}:" *A matron {i.e. a divorcee} should not be given in marriage without her approval and a virgin should not be given in marriage except after her consent is sought and he was asked what is the consent of a virgin the prophet replied her silence is her consent*".

This hadith of the prophet shows that there is no forced marriage and marriage without consent under the Shari'a. Thus the Prophet banned such marriages except by the free consent of the wife.³³ This means that should a woman or girl disapprove of a marriage it is null and void. The prophet was

³¹ Reproductive Rights 2000 opcit p.52

³² Theresa Akumadu opcit p.41-42

³³ Abdel-Rahman Omran opcit p. 15

also reported to have declared as null a marriage contracted without the consent of the wife during his lifetime.

Forced marriage is still in being practice today by Muslims and reports say it is very prominent in Northern Nigeria where they are predominantly Muslims. This is contrary to the Shari'a, it is said that they often claim that under the Maliki School, a father could compel his virgin daughter without her consent into marriage and this has even been upheld by the court of Appeal.³⁴

It should be noted that forcing a lady into marriage is illegal as far as the Shari'a is concerned. For the position of the court of appeal approving the practice citing the Maliki School of law, the issue is that the prophet takes precedent over Maliki, and once he approves a thing, doing the contrary is illegal under the Shari'a.

DOMESTIC VIOLENCE

The Muslim women have been protected from domestic violence the prophet says when asked about the right of wife he said:

** Feed her when you feed yourself, clothe her when you clothe yourself, do not revile her, do not slap her on the face and do not separate yourself from her except in the house".*

Though, the husband is allowed to take disciplinary action against an erring wife, this should not result to violence, and under the Maliki school a husband that injured his wife will pay compensation {blood money} for the wound inflicted on the wife.

It is worthy to note that Shari'a has made women worthy beings, and it has made the observance of their rights

³⁴ Theresa Akumadu opcit pp.41-43

compulsory, but the only thing is that it neither grants excessive rights to women nor men.

RIGHTS OF WOMEN BASED ON STATUS

- 1. Mother:** a woman having enjoyed all the above listed rights once she becomes a mother with a mature male child, the duty of care and maintenance falls on her male child.

According to the Prophet (SAW), the mother has a right over her male child before anybody else, even before his wife.

The Prophet (SAW) said that the paradise of the son was under the feet of his mother, and as such, it was expected of the son to clothe his mother, feed her and shelter her according to his means.

Quran 17:28 says:

"(Allah) your Lord does command you not to worship anything except Him and to be good to your parents, if they attain old age the two of them or one of them do not despise them, do not misbehave towards them but speak to them honourable words..."

In Sura 31 verse 14 the Quran says. *"We have decreed that man be grateful to his parent especially his mother who bore him with hardship, upon hardship"*.

- 2. Wife:** A woman as a wife has the right to be fed, clothed, sheltered and maintained by her husband. Jurists are of the view that a woman, if financially buoyant, is not legally bound to assist her husband financially or help in the maintenance of the family but she can however assist if the husband is poor, or if the husband is late she can maintain and look after her children,

rather than allow them to suffer as the Prophet (SAW) advised and permitted Umm Salama to look after her children

The woman as a wife is not expected to bear the name of her husband that is her maiden name. This is because the Shari'a has clothed her with a legal personality right from birth to death; that is she is a personality on her own who can own and dispose property can enter into a valid contract, and thus cannot be absorbed by her husband by bearing her husband's name (i.e. maiden name); rather she bear her father's name from birth to death, even in marriage. Also, her property should not be mixed up with that of her husband, except in the case of a joint venture or she voluntary surrenders it to assist the family.

It is for this reason that the Shari'a prohibits women inheritance since she is viewed as part of the man's estate, but Islam says the wife is not part of her husband's estate, but that she should rather inherit part of the estate should she succeed him, since her husband will also inherit her should he succeed her.

3. Daughter: A woman as a daughter has right to be maintained, trained, sheltered, and clothed by her father; she can inherit him when he dies. However, the father cannot force his daughter to marry anybody, she has a right either to accept or reject the offer.

4. Sister: A woman as a sister of whatever category has the right to be maintained and trained by her brother. According to the jurists, once a girl loses her father, the responsibility of the girl falls on her brothers, the same way the father would have done were he to be alive.

REFERENCES

1. Dr. Yusuf Al Qaradawy: The Status of Women in Islam, Islamic Home publishing and Distribution.
2. M. A. Ambali: The practice of Muslim family law in Nigeria: Tamaza Publishing company limited, Zaria 1998.
3. The meaning of the Glorious Quran by Dr Mushin Khan and Dr Hilali Taquden
4. Muhammad bin Abdut AziaAl- Musnad: Islamic fattawa Regarding women: DarussalamPublishers and Distributes Saudi Arabia
5. Sheik Abou Galib Ahmad Iysa: Everyday fiqh for the Muslim Women; Arabic Book concern 1996
6. Yoosuf Ibn Abdullaah Al- Aree Fee, Manners of Welcoming the New Born Baby According to Quran and Hadith; Al Fathi Islamic Publications Agbado, Lagos.
7. Hisham Al-Aref: Read then write your Will: International Islamic publishing House, Saudi Arabia
8. Mel M. B. Haddana: - Women in Islam Versus Women in the Judea O-Christian Tradition the Myth and Reality
9. Abul fadl Mohsin Ebrahim: Abortion, Birth control and surrogate parenting An Islamic perspective: American Trust Publication

10. Abdul-Rahman Dai: Women in Shari'a Al-Hidayat publication centre, Lagos.
11. Maulana Abul A'Ahah Maadoodi: The laws of Marriage and Divorce in Islam: Islamic Book Publishers
12. Muwatta Imam Malik: Translation: by professor Muhammad Rahimuddin; Alashela Islamic publication, Lagos.
13. Abdel-Rahman Omran: Family planning in the legacy of Islam: Routhledge: London/New York 1992.
14. The center for Reproductive law and policy: Reproductive Right 2000, moving forward: New York
15. Theresa Akumadu: Beasts of Buerden: Civil Liberties Organisation: Lagos 1998

ABOUT US

WACOL stands for Women Aid Collective. We are independent, non-governmental, non-profit making organisation. WACOL exists to help women and young people whose rights are threatened and/or have been denied and who are subjected to physical, mental and/or sexual abuse. The aim of WACOL is to increase legal protection and fight for better choices for abused women and children, facilitate flow of information and experiences between organisations, and develop appropriate Information, Education and Communication materials that will be used in advocacy for human rights of women and young people. It is registered with the Corporate Affairs Commission as a charitable organisation (No. RC 388132) and has an observer status with the African Commission on Human & Peoples' Rights. At the moment WACOL maintains combined staff strength of thirty-three in our three offices in Enugu (Head Office), Port Harcourt, Rivers State and Abuja the Federal Capital Territory.

OUR VISION: A democratic society free from violence and abuse where Human Rights of Women and young people are recognized in law and practice.

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