

ISLAMIC JURISPRUDENCE AND REPRODUCTIVE HEALTH: APPLICATION

By

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Abstract

Sexual and reproductive health of women has become a human right issue and as more human beings define who they are primarily by their faith, they will factor religious values into most of their decisions and choices regarding what is right, just and fair. An engagement of religion thus becomes necessary for advancing human rights and especially women's rights. This paper seeks to examine reproductive rights in Islamic law with the aim of bringing out the relationship between the ideals of religion and the values of human right. Whenever religious ideas play greater or equal part with secular ideas in shaping values, the struggle for human rights in whatever form, is likely to suffer unless people see it as being morally justified by their religion. It has become imperative therefore to show a justification for human rights as it will be greatly advanced when people stop seeing it as being at odd with their religious beliefs and begin to see it as an idea that they ought to rightly hold and put into practice in their lives as they practice their religious doctrines. There are some misconceptions that reproductive health and rights are about freedom to be promiscuous, freedom for sexual perversion and an enmity for family life and therefore an attack on the core values of the Islamic religion. This paper aim at providing information with a view to changing such misconception. The paper presents the accurate picture of provisions from texts on Islamic jurisprudence making use of the analytical method. In the North of Nigeria for example where the Muslim population is considered high, poor attitude to reproductive health issues has been attributed by some as being connected to the belief about expectation of religion. While one will not contest the fact that there are other several factors that could be responsible for this, the allegation that Islam is a factor makes it imperative to research into the position of Islam on these issues with a view to clearing such misconceptions. In this paper analysis of the Islamic jurisprudence and its position on reproductive health and rights are made.

Introduction.

Sexual and reproductive health and rights of women are an important aspect of women's human rights. The first international adoption of a definition for reproductive health dates only to 1994¹. Reproductive health was then defined as a state of complete physical, mental and social well being and not merely an absence of disease or infirmity, in all matters relating to the reproductive system and to its functions and processes...² It is an area of medical and health science which covers sex, child and maternal health, contraception and family planning. Reproductive health is an important component of health and it is of great importance to both the existence and sustenance of mankind. Though efforts have been made at the local and international levels to promote studies in reproductive health and a lot of literature had been written on it, little is the attention paid to the

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¹ United Nations International Conference on Population and Development (ICPD) held in Cairo, Egypt.

² United Nations, Department of Public Information, *platform for action and Beijing Declaration, Fourth World Conference on Women, Beijing, China 4-15 September 1996*(New York: UN 1995) para 94

religious dimension of the discussion, even though, sexuality and reproductive behaviour are usually conditioned by culture, laws and religion. The concept of reproductive health was internationally endorsed at the International Conference on Population and Development, (ICPD)³ Cairo but it remains controversial because of the challenges it presents to conservative agencies or religious persons. The 1995 Beijing Declaration and Platform for Action emphasizes that women's limited power with regard to their sexual and reproductive lives can adversely affect their health. Thus, Article 16 of the African Charter on Human and People's Rights guarantees the right to health.⁴ This paper is to examine reproductive health in Islamic jurisprudence, application in Islamic law- an integral part of Nigerian Legal system.

A religion that places so much power in the hands of the husband such as Islam makes it difficult if parties in a marriage are not equally enlightened about what the religion says about an issue as important as reproductive health. Incidences of *vestico vagina fistulae* (VVF)⁵ of the 2/1000 deliveries has the predominantly Muslim northern part of the country accounting for over 70% of reported cases. Of the estimated 200,000 to 400,000 cases in the country, it is estimated that 70% are from the North. The contraceptive prevalence rate in the north is 3.2% as opposed to 26.2% in the south. The maternal mortality ratio in the north of Nigeria is consistently over 1,000/100,000 live births compared to the south which is frequently below 300/100,000 live births. It has also been estimated that as high as 54%-65% of women in the north do not attend ante-natal clinics as compared to 4%-8% in the south⁶. Knowledge and access to information can go a long way in changing attitude. The majority of the maternal deaths that occur in Nigeria are preventable, and while the causal factors can be multiple or complex, a change of attitude on the part of both sexes can also go a long way in preventing or reducing to the barest minimum, the occurrence of maternal deaths.

³ Programme of Action of the International Conference on Population and Development held in Cairo, Arab Republic of Egypt, Sept 5-13 1994.par 72.1 UN Doc.A/CON/F. 171/13/RPV.1 1995 hereinafter to be ICPD Programme of Action.

⁴ African Charter on Human and People's Rights adopted on the 27th June 1981 by the 18th Assembly of Heads of State of the Organisation of African Unity at Nairobi, Kenya. Hereinafter to be called African Charter, art. 16. it states that individuals shall have the right to enjoy the best attainable standard of physical and mental health, it also states that state parties to the Charter shall take the necessary measure to protect the health of their people and to ensure that they receive medical attention when they are sick Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (hereinafter to be called Maputo Protocol), specifically called upon states to "ensure that the right to health of women, including sexual and reproductive health is respected and promoted" The Constitution of the Federal Republic of Nigeria specifically protects the Right to Life and recognizes the Right to Health.⁴Right to health is part of the fundamental human right provided for in chapter IV but right to health is in chapter II. Ss 17(3)(d) and s33 of CFRN, 1999, CAP C 23 LFN 2004.

⁵ An abnormal fistulus tract extending between the bladder and vagina that allows the continuous involuntary discharge of urine into the vagina vault. A medical condition which result as a hole that develops between the vagina and the bladder resulting in uncontrollable leaking of urine through the vagina. The most common cause of VVF is obstructed labour.

⁶Okigbo, Chinelo. C, Adegoke Korede K., Olorunsaiye Comfort Z. Trends in Reproductive Health Indicators in Nigeria using Demographic and Health Surveys (1990-2013) retrieved from <http://doi.org/10.1080/17441692-2016.1245350> on 14/02/18.

Due to the fact that human rights are best protected by states within their different cultures and domestic law, the relevance of Islamic law to the effective application of international human rights law in general and, sexual and reproductive rights in particular, in the Muslim world cannot be overemphasized.

Sexual and Reproductive Health: A Definition.

Health generally has been defined as “a state of complete physical, mental and social wellbeing. It is not just the absence of disease or infirmity; it is not just related to the physical wellbeing of the person and not just the ability to carry out day to day activities.”⁷ Health encompasses the physical, mental as well as the social wellbeing. Reproductive health will then imply health in terms of reproduction and all that are related to it. It offers a comprehensive and integrated approach to health needs in relation to reproduction and this will make it to be an important component of the state of physical and social wellbeing that defines health.⁸ Reproductive health, in the context of the World Health Organization (WHO)’s definition of health would have a number of basic elements. It would mean that people have the ability to reproduce, to regulate their fertility; and that women are able to go safely through pregnancy and child birth; and that reproduction is carried to a successful outcome through infant and child survival and wellbeing⁹. A comprehensive and all-encompassing definition of reproductive health was giving at the International Conference on Population and Development (ICPD) held in Cairo in 1994¹⁰ as:

“Reproductive health is a state of complete physical, mental and social well being and not merely the absence of disease and infirmity, in all matters relating to the reproductive system and to its function and processes. Reproductive health therefore implies that people are able to have a satisfying and safe sex life and that they have the capability to reproduce and the freedom to decide if, when and how often to do so”.

Implicit in this last condition are the right of men and women to be informed and to have access to safe, effective, affordable and acceptable methods of family planning of their choice, as well as other methods of their choice for the regulation of fertility which are not against the law and the right of access to appropriate health care services that will enable women to go safely through pregnancy and child birth and provide couples with the best chance of having a healthy infant.

Sexual health on its own is linked with sexuality which refers to a core dimension of being human- it includes sex, gender, sexual and gender identity, sexual orientation, eroticism, emotional

⁷ The Constitution of the World Health Organisation, s.1. available at <http://www.who.int.constitution/publicatio/em/115.pdf>

⁸ Cook, R. J.; Dickens, B. M. and Fathalla, M. F.,(2003):*Reproductive Health and Human Rights: Integrating Medicine Ethics and Law*, New York Oxford.

⁹ Fathalla, M. F (1988): ‘Promotion of Research in Human Reproduction: Global Needs and Perspectives’ *Human Reproduction*, Vol. 3:, 7-10

¹⁰ *United Nations Population and Development, Programme of Action adopted at the ICPD , Cairo, 5-13 September 1994* New York: United Nations Department for Economic and Social Information and Policy Analysis, ST/ESA/SER.A/149, (1994) Para 7.2

attachment/love and reproduction. It is the totality of the sexual expression which includes sexual relationships, sexually transmitted diseases, sexual behaviours and responsibilities. It is experienced or expressed in thoughts, desires, fantasies, beliefs, attitudes, values, activities, practices, roles and relationships. Sexuality is the result of the interplay of biological, psychological, social, economic, cultural, ethical and religion/spiritual factors. Sexual health as a component of sexuality is the ability to enjoy mutually fulfilling sexual relationships; freedom from sexual abuse, coercion or harassment; safety from sexually transmitted diseases and success in achieving or preventing pregnancy. Sexual health is the experience of the ongoing process of physical, psychological and socio-cultural wellbeing related to sexuality. It is evidenced in the free and responsible expression of sexual capabilities that foster harmonies, personal and social wellness, enriching individual and social life.

The relationship between sexuality and reproductive health becomes more apparent when one considers the devastating effect of sexually transmitted disease, unwanted pregnancies and unsafe abortions. Sexual violence such as coercion, assault, incest and rape have a far-reaching effect on reproductive health of young women and adolescents.

Reproductive Health as Human Right

Human rights are conventionally approached as a formal body of law codified in treaties, conventions and covenants. This was first articulated in its contemporary form in the Universal Declaration of Human Rights in 1948 and then further elaborated in legally binding instruments in the International Convention on Civil and Political Rights (ICCPR) and International Convention on Economic and Socio-Cultural Rights (ICESR) in 1966 all of which together formed what has sometimes been called International Bill of Rights. As an expression of basic values of human dignity and social justice, human rights draw inspiration from and resonates with historical and contemporary legal tradition of many different societies and cultures around the world.¹¹ Reproductive Health and Right movement grew from the conviction that at the core of human dignity lies the ability to be an effective agent in guiding the course of one's own life. The evolving understanding of reproductive health advocated by women's movement and many others in the public health field incorporates a broad, holistic, multifaceted approach to women's health and care.

The protection and promotion of rights relating to reproductive and sexual health has become a major issue in the global human right movement in general and women's human right in particular. The 1994 ICPD served as a platform for the formal launching of the agitations for the protection and promotion of rights relating to reproductive and sexual health unto the global agenda. The 1995 Fourth World Conference on Women held in Beijing China also serve as a platform for the reinforcement of the global readiness to address issues relating to the protection and promotion of women's human right in relation to reproductive and sexual health. These conferences led to the recognition that the protection of reproductive and sexual health is a matter of social justice, and the realization of such health can be addressed through improvement in the application of human

¹¹An-Naim, A. (1990) *Towards an Islamic Reformation: Civil Liberties, Human Rights and International Law*, New York: Syracuse University Press

rights as contained in national constitutions, regional and international human rights treaties. The protection of reproductive rights has evolved over time as individuals found the courage to step forward to address, and in some cases remedy the abuses of rights they or others have suffered. The result of efforts over time have been the knowledge of how human rights might be approved to prevent or remedy some of the causes of sexual and reproductive ill health¹²

Reproductive Health in Islamic Jurisprudence

Islam is one of the major civilizations of the world, and it is the fastest growing religion in the world today.¹³ Many member states of the UN are Muslim states that apply Islamic law either fully or partly as domestic law. Also, Islam influences one way or another, the way of life of more than one billion Muslims globally¹⁴ while Muslim states participate fully in the international human rights objective of the UN, they do enter into reservations based on the *shariah* or Islamic law when they ratify international human right treaties.¹⁵ Also in their periodic reports to the UN human rights treaty and charter bodies, many Muslim states do refer to *shariah* or Islamic law in their arguments¹⁶. Traditionally, Islamic law is not strictly speaking monolithic, its jurisprudence accommodates a pluralistic interpretation of its sources, which does produce differences in juristic opinions that can be quite significant in a comparative legal analysis. The difference of the jurists and schools of Islamic Jurisprudence represent different manifestations of the same divine will and are considered as diversity within unity¹⁷. This depicts the recognition of the pluralism that exists in human society.

Law is ultimately the product of its sources and its methods, and Islamic law is not an exception to that fact. It is important therefore to distinguish between *shariah* as the source from which the law is derived and *fiqh* as the method by which the law is applied¹⁸. Although either of the terms *shariah* or *fiqh* is often referred to as Islamic law, they are not technically synonymous. The differences are: *shariah* means the path to be followed or the right path while *fiqh* means understanding¹⁹, *shariah* refers principally to the source while *fiqh* refers principally to the methods of Islamic law. In the strict legal sense, *shariah* refers to the corpus of the revealed law as contained in the *Qur'an* and the authentic traditions of the Prophet Muhammad which is

¹² Cook, Rebecca J, et al

¹³ Freeman, B. K., (1998) 'Slavery, Freedom and the Doctrine of Consensus in Islamic Jurisprudence 11 *Harvard Human Rights Journal* 11...2 for a list of citations on the fast growth of Islam and importance of Islamic law in the world today.

¹⁴ African Charter on Human and People's Rights adopted on the 27th June 1981 by 18th Assembly of Heads of State of the Organisation of African Unity at Nairobi. Art 16

¹⁵ United Nations, *Multilateral Treaties Deposited with the Secretary General, status as at 31/12/1999*, Vol 1 Part 1, chapters I-XI

¹⁶ Badgering, M. A., A macroscopic Analysis of the Practice of Muslim State Parties to International Human Right Treaties: Conflict or Congruence?(2001) *Human Rights Law Review* 1 no 2: 262-303

¹⁷ Hassan, A. (1970) *Early Development of Islamic Jurisprudence* Islamabad: Ta-Ha Press

¹⁸ Kamali, M. H.(1999) *Law and Society: The Interplay of Revelation and Reason in The Shariah* in Esposito, J. L *The Oxford History of Islam* 107

¹⁹ In Q 45:18 the word *shariah* is used as straight path or right way. Prophet Muhammed used the word *fiqh* in one of his sayings to mean understanding, *fiqh* is also used in the *quran* to mean understanding

textually immutable while *fiqh* refers to the method of the law, that is, the understanding derived from, and the application of the *shariah* which may change according to time and circumstances.

The significance of these distinctions with respect to the Islamic law, are: that *shariah* as a source of Islamic law is divine and thus immutable while *fiqh*, as the understanding and interpretation and application of the *shariah* is a human process that may change according to time and circumstances; that *shariah* broadly cover the moral, legal, social and spiritual aspects of Muslim's life, while *fiqh* mostly cover the legal or the juridical aspect of the *shariah* as distinguished from the moral.²⁰ Islamic law, therefore, consist of the two components part of immutable divine law termed *shariah* and human interpretation of the *shariah* termed *fiqh*. The *Quran* and the *sunnah* primarily constitute both formal and material sources of Islamic law owing to the fact that they both contain corpus of the revealed law.

Islamic legislation is most comprehensive; it does not deal exclusively with questions of faith and worship. It regulates moral behaviour, social interaction and business dealings as well as a system of legislation, taxation, family formation, community development, societal structure and international relations. The legal basis of *fiqh* was drawn from the reported *hadith* of the prophet wherein he assigned Mu'adh bn Jabal of the task of Judge of Yemen.²¹ The response of *Muadh* was reported to have been the legal sanction on *fiqh* as a method of law and the concept of *ijtihad* was developed that is, legal reasoning and deduction to arrive at a ruling. With the passage of time and the expansion of Islam, the other methods of *ijma*, (juristic consensus) *qiyas* (legal analogy), *istihsan* (juristic preference), *istislah or maslaha* (welfare), *urf* (custom), *darurah* (necessity) through which the formal sources could be extended to cover new development in life emerged. The passage of time and the expansion of Islam after the death of the prophet brought many new cases that were not directly covered by the *quranic* texts or prophetic traditions and this necessitate the application of the principle laid down in the tradition of Muadh bn Jabar quoted above. Derivable from that principle are the secondary sources of Islamic law which unlike the revealed sources which were completed in the lifetime of the prophet were to be the vehicle by which the jurists would transport the *shariah* into the future.²² *Ijma* which means the consensus of jurists are judgements based on the agreements and the consensus of companions of the prophet and those close to the companions and the known qualified scholars of the religion.²³ *Qiyas* or analogy is referred to as parallel judgement which is done by working at practices that has been allowed and disallowed by the primary sources and then allowing and disallowing other things that are similar or of the same nature especially where the reasons for allowing and disallowing such practices were given. The rule in the original case upon which *qiyas* is done must be a rule that is generally applicable and must not be specific or directed to a certain matter alone. This method was used

²⁰ Kamali, M. H. *Freedom of Expression in Islam* New York: Oxford University Press

²¹ One of the companions of the Prophet. The prophet asked him as to what would be his source of law in deciding cases and he replied by stating that he would judge by the book of Allah and if answer is not there then by the *sunnah* of the prophet and if that is not sufficient then by using his own legal reasoning

²² Quadri, A. A (1986) *Islamic Jurisprudence in the Modern World* New York: Oxford University Press

²³ Those who were with the prophet and had listened and learnt directly from him

during the period of the companions of the prophet²⁴ there are four basic rules which serve as guidelines and pointers in the science of interpretation which are:

- 1) everything is allowed unless it is expressly stated to be forbidden by the text of the *Qur'an* or hadith.,
- 2) things that are inherently harmful should be forbidden,
- 3) that necessity may make act stated to be forbidden to become allowed,
- 4) things that are of lesser harm is preferable to that which will cause great harm.

In all the procedure that are used to arrive at a judgement or ruling, utmost caution and objectivity should be exercised. Meticulous search and research are needed to be sure that the judgement is within the requirements of Islamic jurisprudence.²⁵ These are that

- 1) any new ruling should be developed by only qualified jurists,
- 2) it must be on issue that is not categorically pronounced in the text of the *Qur'an* and *sunnah*,
- 3) the ruling should not be contradictory to acceptable norms and standard which have been supported by the text of the *qur'an* and *sunnah*,
- 4) the ruling must not impose undue hardship on the people,
- 5) the jurists to develop such ruling must be sound in all knowledge relating to the ruling.²⁶

Several general precepts of Islam provide a convenient context for the proper formation of the Muslim family in a changing society and lend support to the principle of reproductive health.²⁷ Based on the acceptance of these products of human reasoning in Islamic legal process from the earliest period of Islam, several scholars came together and developed what they called the Bill of Reproductive Health which states among others that :

- 1) families are planned, even before marriage through genetic and marriage counselling;
- 2) parenthood is a grave responsibility therefore every child is wanted, planned and cared for;
- 3) that the first child is postponed until the mother is eighteen years; that pregnancies are spaced 3-4 years apart;

²⁴ Used by the companions in appointing Abubakar as the first ruler of Muslims after the death of the prophet.

²⁵ Philipa, A. A. B.,(1988) *The Evolution of Fiqh* New York: Oxford University Press

²⁶ A jurist cannot, for example pronounced on family planning if he does not have a resounding knowledge on family planning.

²⁷ An- Naim, A. A.,Eds. (2002) *Islamic Family Law in a Changing World: A Global Resource Book* London: Zed Books

- 4) the optimal number of children varies according to the mother's health and the ability of the family to bring up good, healthy and pious Muslims;
- 5) high risk pregnancy should be avoided altogether, otherwise specialized care is provided
- 6) pre-natal care and natal care are mandatory for the first pregnancy and advisable for all pregnancies;
- 7) breastfeeding with timely supplements is basic for child health with no pregnancy throughout the period of breast feeding;
- 8) Infertility care are an integral part of family planning
- 9) Contraception is chosen after medical counselling and monitoring ²⁸.

The application of Islamic jurisprudence on reproductive health will be drawn from the provision of this Bill of Reproductive Health. Reproductive health is not limited to spacing of children and prevention of pregnancy, it also includes treatment of infertility, prevention of sexually transmitted diseases and all things doable to ensure that the reproductive system is in the best state to ensure optimal effectiveness and ensure the overall purpose of marriage and family formation.

That family is planned even before marriage through genetic and marriage counselling has its support in the *hadith* of the prophet that the prophet was reported to have said "choose and consider where you deposit your sperm for a conducive line of descent".²⁹ Islam encourages that the family is planned even before marriage, that consideration for the health of the mother, father and the unborn child are considered before a couple settle down in marriage. Diseases of reproductive or sexual nature like sexually transmitted diseases and genetic diseases or conditions like sickle cell anaemia or albinism will be detected early even before marriage if couple embarks on counselling before marriage. That parenthood is a great responsibility that should not be ill prepared for. Every child is wanted, planned and provided for with social and psychological equity between male and female. The cardinal rights of children espoused by Islam are: ³⁰

- 1) right to genetic purity,
- 2) right to life, right to breastfeeding, shelter, maintenance, support, health care and nutrition,
- 3) right to equitable treatment regardless of gender or other factors,
- 4) right to future security,
- 5) right to education, training in sport and self defence
- 6) right that all funds for their support comes only from legitimate sources³¹-

²⁸ Ten-point Bill of Reproductive Health developed by the gathering of several Muslim scholars to asses reproductive health status of countries of Islam. Khaduri M. (1966) *Shaybani's Siyar: the Islamic Law of Nations* Baltimore, Maryland: The John Hopkins University Press.

²⁹ Hadith of the prophet related through Malik bn Anas. Compiled in Bukhari Vol 1 pg 302

³⁰ The cardinal rights of children were drawn and developed from the quran and authentic traditions of the Prophet Muhammad (SAW) by Scholars in the field of Islam and Human Rights studies. See Abd Al 'Ati, H (1977) "Family Structure in Islam" Indianapolis: American Trust Publications

³¹ Phillips A. A. B, (1988) *The Evolution of Fiqh New York: Oxford University Press*

All these rights point to the fact that parenthood is a great responsibility such that everything that is done to support and ease the discharge of this responsibility is to be seen as important. Contraception, family planning or child spacing is one sure way to achieve this.

The *Qur'an* enjoins mothers to breast feed their babies³² and exclusive breast feeding is a method of family planning known as Lactation Amenorrhea Method. (LAM). The point that the first child is postponed until the mother is 18-20+ is in consonant with the minimum age at marriage which is fixed at 18 years in most jurisdictions of the world, although the Islamic law has no fixed minimum age of marriage, the importance of a woman marrying at not less than 18 years is emphasized by this point. The age of a girl at marriage has biological, socio-cultural and demographic significance. Biologically, sexual intercourse with a young physically immature girl may result in genital pain and lacerations or tears. Pregnancy at very young age carries a great risk for the mother and child and any attempt by an underage girl to deliver a baby may result in a medical condition called *vesico vagina fistulae* (VVF)³³ and the running of the household and taking care of children may be more than a young girl of immature mind can cope with. The basis for this position of age 18 years as minimum age of marriage ranging from 15years to 18years in Islamic law is by analogical deduction based on the principle of choice of lesser harm, no minimum age was mentioned in the *Qur'an*. However, it refers to age of sound judgement³⁴. This deduction was drawn from two verses of the *Qur'an* that marriage is meant to be a means of attaining peace and tranquillity between the parties and not to put hardship and suffering on any of the parties³⁵. Islam has a pervasive social character and the family is the core of its society. Islam considers the family as absolutely good and almost sacred. The texts of the *Qur'an* did not in any of the verses about marriage proclaim procreation as the sole purpose of marriage, rather it talked about love, peace and tranquillity but it enjoins procreation of healthy children.

The optimal number of children varies according to the mother's health and the ability of the family to bring up good, healthy and pious children, is another cardinal points which found support in all indicators from verses of the *Qur'an* and texts of *hadith* that the health of a mother must not be sacrificed on the altar of procreation. The importance of child spacing is directly linked to the commandment on breastfeeding and the *hadiths* of the prophet³⁶

³² 2:233 says "...And mothers shall suckle their children for two years..." right to breastfeeding is one of the cardinal rights of children.

³³ A medical condition where the sufferer, usually women leaks urine and faeces as a result of rupture in the membrane separating the vagina and the anus

³⁴ Ramadhan, S.(1970)Islamic Law: its Scope and Equity. New York: Oxford University Press

³⁵ 4:6 which states "...and one of His (Allah) 's signs is that He has created for you, mates from among yourselves, that you may dwell in tranquillity with them, and has ordained between you love and mercy. 20:32 which states "it is He who created you from a single soul and there from did make his mate that he might dwell in tranquillity with her"

³⁶ 2:33 states that ...and mother shall suckle their children two full years for those who wish to complete breastfeeding....31:14 states ...and the child's weaning is two years...46:15 states.... His bearing and weaning is

Contraception and Family Planning

Contraception, family planning or child spacing is the use of contraceptive methods by a husband or wife in order to prevent pregnancy so as to regulate fertility for whatever reason. Family planning include spacing of children to allow breastfeeding and safeguard the health of mother and child, timing of pregnancy to arrive at a safe age and adjusting the number of children to fit to the family's needs in regard to physical, financial, educational and child raising capabilities. In the early period of Islam, the only known method is *Al-Azl (coitus interruptus)*.³⁷ Other methods in the modern times which were unknown to Islamic law during the early period of Islamic civilization are: Hormonal contraceptives such Oral pills, injectables, Norplant implant,³⁸ barrier method,³⁹ fertility awareness-based method⁴⁰, lactation amenorrhea method⁴¹, emergency contraception⁴² and sterilization⁴³.

In line with the principle of Islamic law as treated above, the essence of all these methods are to prevent fertilization for the purpose of spacing children for effective family planning. Among the different doctrines and principles established by the founding jurists for an intelligible application of Islamic law, *maslahah* is considered the most viable means of bringing the ideals of Islam closer to realization for all time. *Maslahah* literally means the promotion of human welfare and the prevention of harm⁴⁴. This doctrine was originally introduced by *Imam Malik*- the founder of the *Maliki* school of Islamic Jurisprudence and later developed by other jurists such as *Al –Ghazali and Al-Tufi* of the *Shafi'i* and *Hanbali* schools respectively. The fourteenth century *Maliki* Jurist, *Abu Ishaq al-shatibi* further developed the concept as a basis of rationality and flexibility of Islamic law with changing circumstances and also as a fundamental principle for the universality

thirty months. The prophet was reported to have said that in several *hadiths* that pregnancy during the period of breastfeeding is an assault on the unborn child.

³⁷ This is when the husband withdraws before ejaculation, to prevent the sperm from having access to the ovum

³⁸ Use of pills or injection of hormones estrogen and progesterin. These are hormones that are naturally present in a woman especially high in pregnancy. The idea is to give the effect that a woman is pregnant such that ovulation will no longer occur at the period of use and the cervical mucus will thicken and prevent sperm from swimming through to the ovum.

³⁹ An external device is used to create a barrier between the sperm and the ovules. Male and female condoms, the cap (a small rubber cup to cover the cervix so that sperm will not reach the ovum) and diaphragm.

⁴⁰ This is where a woman times her highly fertile period by studying her menstrual cycle in order to be aware of when pregnancy is most likely to result from intercourse.

⁴¹ Wherein lactation prevents ovulation. This method is effective where the mother exclusively feeds the baby with breast milk. At the time of using this period, apart from carrying on an exclusive breast feeding, the woman will also be undergoing amenorrhea (a situation of no menstruation)

⁴² Used by women to prevent pregnancy if used a few days following unprotected sex. Most common is to use an increased dose of oral pills within 72 hours of intercourse. It does not prevent an already existing pregnancy or causes abortion. The use for this arises in case of sexual assault/rape.

⁴³ Male and female sterilisation done through surgery a safe and simple surgical operation which can be done with just local anesthesia or light sedation. The two most common procedure are *minilaparotomy* which is done by cutting, tying or clipping the fallopian tube so that semen and ovum will not pass through. and *laparoscopy* is done with an instrument called *laparoscope*. This method is permanent for those who no longer want children.

⁴⁴ Hallaq, W. A (1970). *A History of Islamic Legal Theories* New York, Oxford University Press

and certainty of Islamic law. It is an expedient doctrine of Islamic law acknowledged today by Islamic legalists as containing the seeds of the future of the *shariah* and its viability as a living force in society. It is usually used to express the principle of public welfare or public benefit.⁴⁵ The utilization of *maslahah* to achieve collective and communal benefit or welfare does not preclude the extension of its application to protect the right and welfare of the individual this is referred to as *maslahah shakhsiyyah*. In relating *maslahah* to the overall objective of the *shariah* al-shatibi, building on *Al-Ghazali's* theory, has advanced a three hierarchical classification for the determination of its scope. On the first and highest level are the benefits considered as indispensable benefits (*darurriyyat*), consisting of what has been described as the five universals namely: protection of life, religion, intellect, family and property. Due to their indispensability they must not only be protected but also promoted such that some contemporary scholars of Islam equate this with the fundamental human right (*al huquq al fitriyyah*)⁴⁶. On the second level are those considered as necessary benefit (*hajiyyat*). These are supplementary to the first category and consist of those benefits the neglect of which may cause hardship to life, but the upholding of which does not lead to the collapse of the society. They ensure accommodation of the necessary changes in life, within the law and therefore make life tolerable. The third level are those considered as improvement benefit (*tahsiniyyat*) and consist of those things that improve and embellish life generally and thereby enhance the character of the *shariah*.

Against the background of the nature and evolution of Islamic law established above, the doctrine of *maslahah* is thus advocated as a veritable Islamic legal doctrine for the realization of international human rights which includes the right to sexual and reproductive health; within the dispensation of Islamic law

Infertility and Abortion

Infertility is another area of reproductive health on which pronouncements have been made by Islamic Law jurists. It is the inability or failure to conceive or of the man to impregnate a woman after several months of unprotected intercourse. Infertility may be caused by one of several conditions. Abortion is another issue in reproductive health which has been a major concern for activist worldwide and a very controversial issue in Islamic jurisprudence. The basis of discussion and conclusion on abortion among jurists of Islamic law is the verse of the *Qur'an* which state thus “‘Man we did create from a quintessence of clay; then we place him as a drop of sperm in a place of rest, fixed; then we made the sperm into a clot of congealed blood; then of the clot we made a fetus lump. Then we made out of that lump bone and clothed the bone with flesh then we develop out of it another creation.’”⁴⁷

The above quoted verses of the *Qur'an* was further extended by the *hadith* of the prophet Muhammad which states “the germ of every one of you is concentrated on his mother’s womb in the form of a drop or life germ for a period of 40 days, then become a clot of congealed blood for a similar period, then he became a foetus lump for a similar period, then the angel is sent to him

⁴⁵ Al Shatibi, A. L(1997)*al-muwafaqat*(Arabic), and Masud, M. K(1995)..., *Shatibi's Philosophy of Islamic Law* vol 2 pg 151, Kamali, M. H (1991) *Principles of Islamic Jurisprudence*. New York: Oxford University Press

⁴⁶ Kamali, M. H., (1993) *Fundamental Rights of the Individual: an Analysis of Haqq(rights) in Islamic Law*. American Journal of Islamic Social Sciences(1993), 10. 3: 340 at 362

⁴⁷ Q23:12-14, Yusuff Alli, *The Holy Qur'an English translation of the Meaning and Commentary*

to ensoul him⁴⁸ the stages of conception described by the verses of the *Qur'an* were given a time frame by this *hadith* by dividing the stages as occurring at intervals of forty days. It is to the effect that before forty days, the product of conception is still a drop of life germ (*nutfa*) which is still without shape or soul and is like the semen from which it is found; it then becomes a clot of congealed blood (*alaqa*) for a similar period of forty days and placed in a place of rest translated as the implantation in the uterus. The second forty days, the drop of sperm has been fertilized and has undergone series of cell divisions to become a clot of congealed blood (*embryo*) and the third forty days it becomes a foetus. Once the cells are specialized, some cells grow into muscles; others become the brain, stomach and other organs. After one hundred and twenty days there is a specialization of cells and the foetus becomes a defined individual.

This illustration by the *Qur'an* and the *hadith* can be summarized in the light of modern embryology as follows:

___ fusion of sperm and ovum-----fertilization (1st forty days)

----series of cell division, the fertilized egg becomes an embryo (2nd forty days)

----the cells become specialized as cells of different organs of the body but are not yet functioning (3rd forty days)

After the period of 120 days, the embryo becomes a foetus, the organs are specialized and working, on the fifth month the mother can actually feel the baby move. In the *Hanafi* school of Islamic jurisprudence⁴⁹ abortion is allowed before the 120 days period when it was believed that the embryo is not yet ensouled. The breathing into man of the spirit of Allah as stated in the *Qur'an* was done after fashioning⁵⁰ which in this illustration is after specialization of cells. The analogy that resulted in the consensus of majority of Islamic jurist that abortion if done before twenty-one days of pregnancy is not forbidden was drawn from these verses of *Qur'an* and *hadith*.

The summation of opinion of Islamic scholars on the position of Islamic law on abortion is as follows:

- 1) Before 120 days=== unqualified permissibility even in the absence of justification (*Hanafi and shafi'I* scholars)
- 2) Conditional permissibility in the presence of an acceptable justification, if there is no justification it is disfavoured (*Hanafi and shafe'I* scholars)

⁴⁸ Shafi'I M., Al-Risalah(1983) pp52-53. English translation cited in Kamali M. H., Law and Society: the Interplay of Revelation and Reason in the Shariah in Esposito J. L, The Oxford History of Islam New York: Oxford University Press..

⁴⁹ There are four Sunni schools of Islamic Jurisprudence, the Maliki school founded by Imam ibn Anas Malik, the Hanbali school founded by Imam Ahmad ibn Hanbal, the Hanafi school founded by Abu Hanifa and Shafe'i school founded by Imam Shafe'i(Muhammad bn Idris). The shia schools are close to the sunnis in their interpretation except that they have preference for traditions of hadiths that emanated from Alli ibn Abutalib

⁵⁰Q 15 :29 where Allah says “when I have fashioned him(man)and breathe into him My spirit...”

- 3) Unqualified disfavour (most *Maliki, Hanbali and Ibadis* scholars)
- 4) Categorical prohibition after 40 days (*Maliki and Hanbali* scholars)

The unanimous position of scholars from all schools of Islamic jurisprudence is that abortion is totally forbidden after 120 days except where it is to save the mother's life and expel a deformed foetus. Some agree that it is permissible to abort a product of rape or incest after 120 days even if mother's life is not at risk. All Jurists are of the opinion that it is murder to expel the foetus once the stage of ensoulment is passed -this justifies the argument that contraception is neither killing nor infanticide. In accordance with the interpretation of Imam *Alli ibn Abutalib*⁵¹ as follows "...it cannot be infanticide until it passes seven stages of development..." the seven stages as stated in the *Qur'an* as (1) drop of sperm; (2) fusion of sperm with ovum; (3) implantation in the womb; (4) cell divisions to become lump of blood; (5) cell becomes specialized; (6)the specialized cells become working organs; (7) the spirit of God is breathe into it and it comes alive.⁵²

Summary of Legal Opinion on Application

Sheikh Abdul Majeed Salem⁵³, Sheikh Mahmoud Shaltout⁵⁴, Tunan Haji Ali Bin Muhammad Sai'd Saleh⁵⁵, Sheikh Abdullah Al Qalqili⁵⁶, Jalil Bin Haji Hassan⁵⁷, Al-Sayyid Yousof B. Ali⁵⁸, Al-Zawawi⁵⁹ and a host of other jurist of Islam are unanimous in their opinion that contraception or family planning is acceptable in Islam. All methods except vasectomy and all forms of permanent sterilization is acceptable. The legal opinion on abortion as a form of family planning is forbidden after 120 days of gestation except to save the mother's life. Sayyid Tantawi, the Mufti of Egypt and a representation of modern opinion on Islam sum it all up as follows:

"Certain Facts have to be made clear from the start: those heavenly religions are for the welfare of humanity. Speaking about religion should be based on correct knowledge and familiarity with jurisprudence. The opinion (by qualified persons) should be objective, without hiding the truth or fear of intimidation. We are living in a time where nations do not boast of their numbers or the size of their territory but of technical abilities, inventions and scientific achievements in such a way that other nations will be dependent on you rather than you on them. One of the characteristics of Islamic Jurisprudence is that a decisive text is given for things that do not change, but in cases where the welfare of people changes over time, leeway is given for the knowledgeable thinkers of the people to adjust rules to their welfare within the general principles and objectives of *shariah*.... Contraception is lawful both religiously and logically for justifiable reasons- this has been approved by early jurists like *al-Ghazali* and by contemporary jurist like Sheikh *Sayyid Sabiq*... this fatwa complements others already given

⁵¹ The fourth caliph of Islam, the cousin and son in law of the prophet. He was regarded as the most knowledgeable and competent jurist of Islam

⁵² Omran , Abdel Rahim (1994). ' *Family Planning in The Legacy of Islam*' (New York: Routledge) 192

⁵³ Salem was the Grand Mufti of Egypt in the 30's. fatwa issued from Dar-el-ifta; 20.81 regd: 43, on 25th Jan 1937; Journal of Egyptian Medical Association, Vol. 20, no 7 July 1937, pp55

⁵⁴ Grand Imam of Al- Azhar fatwa issued from the Al- Azhar Press, Cairo in 1959

⁵⁵ Chief Qadi of Singapore

⁵⁶ Grand Mufti of Jordan

⁵⁷ Assistant Mufti of Johara, Malaysia

⁵⁸ The Mufti of Trenggance, Malaysia

⁵⁹ The president of the High Court of Appeal, Yemen Arab Republic.(as he then was)

on the subject...it is not advisable that the state issues a law forcing family planning on people...family planning is not killing or minor infanticide; it does not contradict predestination or reliance on Allah or ability of God to provide for His people (rizq), neither is it a contradiction to the call for multitude (*kathrah*) - it is quality and not quantity that makes the prophet proud. The prophet was mocked at an inefficient, disorganized multitude...”

Conclusion

Islamic legal system is complete and all encompassing, the issue of reproductive health of women is well covered as outlined in this paper

The fatwa quoted above and the statement of *Dr. Sayyid Tantawi* is the opinion of majority of the schools of Islamic Jurisprudence (eight schools out of nine) and it is the summation of the position of Islam on sexuality and reproductive health of women. The fatwa covered all aspects of reproductive health except the issue of sexually transmitted diseases. There are however several pronouncements that emphasize the position that good health of a couple in marriage is the only way that the main purpose of marriage which the Qur’an states to be tranquility be achieved. Any disease state, including sexually transmitted disease is not acceptable and should be handled with all seriousness. Islam is a religion which is very strict on modesty and it assumes that reproduction or having sex is strictly within marriage. The hatred that Islam has for this will be seen in the severity of the punishment prescribed by *shariah* for adultery and fornication (*zina*)⁶⁰

⁶⁰ Q17:32 states that adultery is an evil thing and should be avoided by believers; Q24:2-3states that both men and women found to be guilty of adultery and fornication should be stoned and given 100 lashes in public. Verse 3 forbids believers from marrying an unrepentant fornicator; Q 24:4-10 talks about the rules of evidence by which adultery and fornication is proved and also prescribed punishment for false witnessing in cases of adultery and fornication.