

## Sharia Law, Traditional Justice and Violence against Women: Lessons from Sudan

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Received: 27/08/2019

Accepted: 30/11/2019

DOI: 10.22096/hr.2020.121463.1200

### Abstract

There has been a great deal written about the relationship between sharia law and international human rights law, particularly with regards to the treatment of women. The tensions between sharia law and international law norms of equality and non-discrimination have been well documented, and the possibilities for interpreting sharia law in a manner that accords with international human rights law have been insightfully explored by scholars of human rights and Islamic law. It has been shown that Islam is a religion of peace, tolerance, justice and equality. It has been said that the Qur'anic passages describing the role of women should be understood in the context in which they were written, which was a time in history in which women were seen as vastly inferior to men in almost every society throughout the world, particularly in the Arabian peninsula. Read in this context, it is argued, Islam must be seen as an advocate for gender equality, and should thus be interpreted as standing for gender equality today. This paper argues that, while this may indeed be the preferred interpretation of Islam, this is of little assistance to women in countries such as Sudan whose national legislation enshrines and enforces the most discriminatory aspects of sharia law.

**Keywords:** Sharia Law; Traditional Justice; Violence against Women; Sudan.

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## 1. Introduction

The tensions between sharia law and international law norms of equality and non-discrimination have been well documented, and the possibilities for interpreting sharia law in a manner that accords with international human rights law have been extensively debated.<sup>1</sup> It has been shown that Islam is a religion of peace, tolerance, justice and equality. It has been said that the Qur'anic passages describing the role of women should be understood in the context in which they were written, and that as such, Islam must be seen as an advocate for gender equality. This paper argues that while this may indeed be the preferred interpretation of Islam, this is of little assistance to women in countries whose national legislation enshrines and enforces the most discriminatory aspects of sharia law. Using Sudan as a case study, this paper explores the way in which sharia law is reflected and applied in national legislation, explores the link between the application of sharia law and the existence of inequality between women and men, and discusses the implications of gender inequality – and the violence that is often associated with inequality – both for development and for peace.

This paper commences with a brief outline of the principles enshrined in international human rights law regarding the right to equality and non-discrimination – because these principles set the standard against which the treatment of women under classical sharia<sup>2</sup> must be compared. Part 2 highlights some specific aspects of sharia law which, on a classical reading of the sources, violate international human rights law and contribute to an environment in which women are subordinated and violence is condoned, while part 3 considers the way in which these discriminatory aspects are reflected in national legislation in Sudan. Part 4 discusses the varying degrees to which sharia law has been incorporated into national legal systems across the Islamic world, and considers the way in which this is manifested in disparities between the basic capabilities of women and men, with significant implications for development. Part 5 explores the extent to which cultural norms of violence and subordination – such as can be found in traditional interpretations of sharia law – affect the likelihood of a state either engaging in conflict or achieving sustainable peace.

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1. For examples of Islamic scholarship that seek to reinterpret sharia law in a manner compatible with international human rights law, see: eg, Mayer, 3rd ed, 1999; Baderin, 2003.

2. The term 'classical sharia law' means a strict reading of the primary sources of sharia law - the Qur'an and the *sunna* (the words, or the teachings) of the Prophet. Throughout this paper I have adopted the definition of sharia used by Abdullahi Ahmed An-Na'im. An-Na'im defines sharia as including 'ethical and social norms, political and constitutional theory, and so forth, as well as codes of private, public, penal and commercial law,' and as referring specifically to 'historical formulations of this comprehensive system' rather than 'possible re-formulations of a modern Islamic legal system', See: An-Na'im, in Lindholm and Vogt (ed), 1992: 135.

## 2. Women's Rights in International Law

The most important statement of women's rights in international law is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).<sup>1</sup> CEDAW defines discrimination against women and sets a framework for national action to bring an end to such discrimination, and as such has become a critical tool in addressing discrimination against women and girls around the world. Art 15 provides that parties to the convention 'shall accord to women equality with men before the law,' and 'in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity' and 'shall treat [women] equally in all stages of procedure in courts and tribunals.' (CEDAW, art 15) Art 16 requires complete equality between men and women in all matters relating to marriage and family relations during marriage and upon its dissolution. (CEDAW, art 16)

While CEDAW is the only international treaty to comprehensively address the fundamental rights of women in political, social, cultural, economic, legal and family life, both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) contain important provisions regarding equality and non-discrimination. The ICCPR and the ICESCR both provide that state parties will ensure the equal rights of men and women to the enjoyment of all of the rights set forth in the respective Covenant.<sup>2</sup> The ICCPR obliges state parties to respect and ensure the equality of men and women before the law and the equal protection of men and women by the law,<sup>3</sup> the equality of men and women before courts and tribunals,<sup>4</sup> and the equal enjoyment by men and women of the right to liberty of movement.<sup>5</sup> The ICCPR also provides that state parties will take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution.<sup>6</sup> The ICESCR obligates state parties to take steps to ensure the progressive realization of the right of everyone to the opportunity to gain

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1. See: *Convention on the Elimination of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force on 3 September 1981).

2. See: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 3 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3, art 3 (entered into force 3 January 1976).

3. See: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 26 (entered into force 23 March 1976).

4. See: ICCPR art 14.

5. See: ICCPR art 12.

6. See: ICCPR art 23(4).

a living by work which he or she freely chooses or accepts.<sup>1</sup>

In addition to the rights specified in the ICCPR and the ICESCR, all states are arguably bound by the international law norms of equality before the law and non-discrimination in the application of the law – on the ground that these principles have obtained the status of customary international law.<sup>2</sup> These principles are enshrined in the Universal Declaration of Human Rights (UDHR), which states that all human beings are born free and equal in dignity and rights,<sup>3</sup> that everyone is entitled to all the rights and freedoms set forth in the Universal Declaration without distinction of any kind, including discrimination on the grounds of sex,<sup>4</sup> and that all are equal before the law and are entitled without any discrimination to the equal protection of the law.<sup>5</sup> There is a strong argument that *all* of the rights set forth in the UDHR have acquired the status of customary international law, and are thus binding on all states irrespective of their membership of treaty regimes.<sup>6</sup> While some argue that this statement goes too far, the principles of non-discrimination, equality before the law and equal protection by the law are widely accepted as having acquired the status of customary international law.<sup>7</sup> Thus, all states – irrespective of their treaty obligations – have the obligation to respect, protect and ensure enjoyment of these rights.

Notably missing from CEDAW and the international human rights covenants is an explicit statement that violence against women is a human rights violation. In 1993 the UN General Assembly went some way towards rectifying this omission, with the adoption of the Declaration on the Elimination of Violence against Women.<sup>8</sup> The Declaration affirms that ‘violence against women constitutes a violation of the rights and fundamental freedoms of women’ (CEDAW) and recognizes that ‘violence against women is one of the crucial

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1. See: *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3, art 6 (entered into force 3 January 1976).

2. See: Lillich, 1984: 115, 133 and McDougal, Lasswell and Chen, 1980: 564. An extensive list of authorities in support of the international law ‘norm of non-discrimination’ is provided by McDougal, Lasswell and Chen, 1980: 567.

3. See: *Universal Declaration of Human Rights*, GA Res 217A (III), art 1, UN Doc A/810/71 (1948).

4. See: UDHR, art 2.

5. See: UDHR, art 7.

6. See, eg, Sohn, 1982: 32. Pohl, *Report on the Situation of Human Rights in Iran*, UN ESCOR, CHR, 43rd Sess., Provisional Agenda Item 12, [4 - 5], UN Doc E/CN.4/1987/23 (1987); McKean, 1983: 274; McDougal, Lasswell and Chen, 1980: 272.

7. See: Lillich, 1984, McDougal, Lasswell and Chen, 1980: 564.

8. See: *Declaration on the Elimination of Violence against Women*, GA Res 48/104, 48th Sess, Agenda Item 111, UN GAOR, UN Doc A/Res/48/104 (1993).

social mechanisms by which women are forced into a subordinate position compared with men'. (CEDAW) Violence against women and girls is fundamentally disempowering, inhibits the enjoyment of the most basic human rights, and causes women and girls around the world to live in a climate of fear and shame. It is widely recognized as being the most pervasive human rights violation in the world today.<sup>1</sup> This paper considers the religio-legal basis of inequalities between women and men and of violence against women, and the relevance of sharia law in this regard.

### 3. Inequality and Discrimination in Sharia Law

This section highlights selected aspects of classical sharia law which violate most demonstrably the fundamental human rights of women, and which contravene the international law norms of equality and non-discrimination. The aspects of sharia law considered here are the value of a woman's testimony, the rights of women in marriage and restrictions on a woman's freedom to leave the family home. It will be suggested in the remainder of this paper that each of these aspects of sharia, as incorporated into domestic legislation in Islamic states (using Sudan as an example) plays a critical role in sustaining and entrenching an environment in which women are in a subordinate position relative to men, in which violence against women is seen as a legitimate means of addressing grievances, and in which women are prevented from exercising their economic, social and cultural rights.

#### 3.1. A The Value of a Woman's Testimony

One aspect of sharia that most violates the principle of equality between men and women, and specifically the principle of equality before the law, is the Qur'anic principle that the testimony of a woman is worth half that of a man. The clearest statement of this principle is found in *Sura 2 Verse 282* of the Qur'an:

Whenever you give or take credit for a stated term, set it down in writing ... And call upon two of your men to act as witnesses; and if two men are not available, then a man and two women from among such as are acceptable to you as witnesses, so that if one of them should make a mistake, the other could remind her. (Asad, 1984: 63)

Much has been written about the value of a woman's testimony in sharia law,

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1. See: Bunch, 'The Intolerable Status Quo: Violence against Women and Girls,' *The Progress of nations 1997* <<http://www.unicef.org/pon97/40-49.pdf>> at 25 June 2007.

and the reason for the differentiation between men and women in this regard. A number of explanations have been offered, including the fact that women were, in the time of the Prophet, 'less familiar with business procedures than men, and, therefore, more liable to commit mistakes in this respect'. (Asad, 1984: 63) While the testimony of a woman is acceptable in non-criminal matters, provided that it is confirmed by the testimony of another woman and a man,<sup>1</sup> classical Islamic jurisprudence provides that 'in the time of the Prophet and his two immediate successors it was an invariable rule to exclude the evidence of women in all cases inducing punishment or retaliation' (al-Marghinani, 1982: 353) – that is, in criminal cases. The lack of value accorded to a woman's testimony is not only significant insofar as it makes a statement about the relative value of men and women, but –as will be shown below– it creates a situation in which certain crimes, such as rape, are rendered almost impossible to prove. This has been an important factor in creating a climate of virtual impunity for these crimes.

### 3.2. Women's Rights in Marriage and in the Family

On no other topic does sharia speak with such clarity about the rights and duties of men and women as it does on marital and family relations. It is an area in which, as noted by Islamic law scholar Lisa Hajjar, '[t]here is strong and pervasive opposition to the notion that men and women *should* be equal ... [and a] belief that domestic relationships are legitimately ... hierarchical'. (Hajjar, 2004: 29)

The most often cited description of the hierarchical marital relationship, and of the behaviour expected of husbands and wives, is found in *Sura 4* verse 34 of the Qur'an:

Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means. Therefore the righteous women are devoutly obedient, and guard in (the husband's) absence what Allah would have them guard. As to those women on whose part ye fear disloyalty and ill-conduct, admonish them (first), (Next), refuse to share their beds, (And last) beat them (lightly); but if they return to obedience,

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1. See: al-Marghinani, 1982: 353; An-Na'im in Lindholm and Vogt (ed), 1992: 145. Although it is generally agreed that the testimony of women may be accepted in all non-criminal matters, there is support in the *hadith* literature for the proposition that a woman's testimony should never be accepted in matters of marriage and divorce. See, for eg, Anas, 1989: 297.

seek not against them Means (of annoyance) ...<sup>1</sup> (Ali, 1938: 190)

While a number of Islamic law scholars argue that the emergence of sharia law in the early seventh century improved the position of women,<sup>2</sup> that the Qur'an accords equality to men and women (in dignity if not in rights),<sup>3</sup> and that the reference to 'lightly' beating wives was intended only to restrict what was an already common practice,<sup>4</sup> dominant interpretations of sharia accept the following as basic tenets of the marital relationship: male authority or responsibility over women (*qawwama*),<sup>5</sup> a woman's duty of obedience (*ta'a*) to her husband, and a man's right (albeit a restricted one) to physically discipline his wife.<sup>6</sup> It will be suggested below that, in the case of Sudan and elsewhere, these basic principles permeate marital relations and family life, justify and condone domestic violence, and – because domestic violence is rarely seen to be a crime – ultimately bar women from accessing the formal criminal justice system and thus contribute to impunity for these crimes.

### 3.3. A Woman's Freedom to Leave the Marital Home

Another aspect of sharia that denies women the rights accorded to them by international law, and specifically the right to liberty of movement, is the doctrine that women do not have unrestricted rights of movement outside the marital home.<sup>7</sup> One *hadith* which speaks particularly strongly in support of this doctrine provides as follows:

'Oh Messenger of God, what is a wife's obligation towards her husband'.  
Muhammed said: 'Her obligation is that she does not go out of her house except by permission, and if she does, God, the Angels of mercy, and the Angels of anger will curse her until she repents or until she

1. With regards to the type of beating that is permitted by the *Qur'an*, Sahih al-Bukhari states 'beat them (lightly your wives, if it is useful) ie, without causing them severe pain': Bukhari, 1976: 100.

2. See: Nawaz, 1965: 328; Al-Hibri, 2001: 37, 47.

3. See: al-Hibri, 2001: 46; Badawi, 1995: 4.

4. See: al-Hibri, 2001: 60; Hajjar, 2004: 11 ('the notion that beating constitutes a right available to men certainly contradicts the Qur'anic ideal of marital relations as companionable and mutually supportive.') The approach taken by al-Hibri and Hajjar is supported by a *hadith* found in the collection of Maulana Muhammad Ali, which states that 'the best of you are the kindest of you to their wives': Tirmidhi 10:11, in Ali, 1945: 377.

5. See: Roald, 2001: 149. The interpretation of the word *qawwamun* as meaning man's authority over women is contested by some scholars of Islam. See, eg, al-Hibri: 2001, who notes that the word is translated as *protectors and maintainers*, and that '[a]ncient Arabic dictionaries ... include among the meanings of "qawwamun" those of guiding and advising' and that '[t]hese meanings are more consistent with the general Qur'anic view of gender relations than the one preferred by male jurists': at 51.

6. See: Roald, 2001: 149.

7. See: generally, Pearl and Menski, 1998: 178.

comes back'. She said: 'And if he oppresses her?' Muhammad said: 'Even if he oppresses her'. (az-Zuhaili, 2001: 336; Roald, 2001: 147)

This *hadith* has been interpreted by Az-Zuhaili to mean that '[t]he woman is not to go out of her house even to perform Hajj, except with the permission of her husband. And he [the husband] has the right to prevent her from going to the mosque and other places...' (az-Zuhaili, 2001: 34, Roald, 2001: 147) Az-Zuhaili's reliance on this *hadith* is criticized by Ann Sophie Roald, who argues that the *hadith* does not appear in 'any of the important *hadith* collections,' and that Az-Zuhaili's use of the *hadith* is 'an outstanding example of a person's ability to select those texts which are compatible with his/her own view on a non-verbalised level'.<sup>1</sup> While Roald may be correct in questioning the authenticity of the *hadith*, the understanding that a woman is not entitled to leave the marital home without her husband's consent, and the corollary to this –that a man may take disciplinary action when this is violated– is a critical component of a social, cultural and legal environment in which women are prevented from freely exercising basic human rights (such as the right to work), and as such from freely engaging in economic, political or social activity.

#### **4. The Role of the State in the Formalisation of Sharia Law: Sudan, a Case Study**

It has been shown above that there is a significant gap between the fundamental human rights accorded to women under international law, and the rights accorded by classical sharia law. The following section considers the extent to which this gap is reflected in current legislation in Sudan. As applied in the laws of Sudan, sharia law denies women the basic human rights accorded to men, and entrenches an environment in which women must live with the knowledge that a challenge to the established order –particularly as regards family relations– may result in their being subjected to violence.

While sharia law is critically important in explaining gender relations in Muslim societies, the existence of sharia cannot by itself explain the problem of inequality and violence. While there are considerable similarities in gender and family relations throughout Muslim societies, there are also variations in

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1. See: Roald, 2001: 147. As is the case with much of the *hadith* literature, *hadiths* can also be found to support the contrary view (that women are permitted to leave the home). One *hadith* contained in the collection of Bukhari, 1976, for eg, states that '[o]nce Sauda bint Zam'a went out at night for some need, and Umar saw her, and recognizing her, he said (to her) "By Allah, O Sauda! You cannot hide yourself from us". So she returned to the Prophet and mentioned that to him ... [and he said]: "O women! You have been allowed by Allah to go out for your needs": at 120.

the way in which sharia is interpreted and applied at the state level. The most important variable in explaining these differences is the state itself. It is the state that formalizes and regulates gender relations through the law, and it is the state alone that is formally “vested with the responsibility to prohibit and punish violence”. (Hajjar, 2004: 5) It is therefore important to consider the role played by the state in the interpretation and application of sharia law, and the way in which the principles of sharia law are reflected in the national legislative regime.

The formal legal system in Sudan is comprised of the Constitution (which came into force after the signing of the Comprehensive Peace Agreement in 2005) and national legislation which “has as its sources Sharia law and the consensus of the people”. (Interim National Constitution of the Republic of Sudan 2005) The current government came to power following a coup in 1989, committed to Islamization, fundamentalism and to the consolidation of a legislative regime based on sharia law.<sup>1</sup> The principles of sharia are today reflected in a range of legislative instruments including the *Criminal Act 1991*, the *Evidence Act 1993* and the *Muslim Personal Matters Act 1991*. This section discusses each of these Acts, with a focus on their sources in sharia law, their compatibility with international human rights law and their discriminatory impact upon women.

The *Criminal Act 1991* aims to observe ‘sharia as the main source of legislation, so that its spirit shall infiltrate into the Act and its principles intermingle with the provisions thereof, and its guidance manifest itself in the added or omitted provisions’. When read together with the *Evidence Act 1993*, the *Criminal Act 1991* has an enormously disproportionate impact upon women, and arguably plays a greater role than any other single legal instrument in creating an environment of impunity for violence against women (particularly rape and sexual violence) in Sudan.

In line with the principles of sharia, the *Criminal Act 1991* accords special status to six types of crime referred to as *hudud* offences: capital theft, armed robbery, false accusation of unchastity, apostasy, drinking alcohol, and adultery.<sup>2</sup> *Hudud* offences are distinguished in a number of important ways from other offences. Among other distinctions, the restriction on the death penalty to offenders over the age of 18 years does not apply to *hudud* offences,<sup>3</sup>

1. For a more detailed background and discussion of the ‘Islamization’ of the Sudanese legal system see: An-Na’im, in Lindholm and Vogt (ed), 1992: 138 - 140.

2. See: Criminal Act 1991 s 3.

3. See: Criminal Act 1991 s 27(2).

meaning that any 'adult' (aged 15 and above)<sup>1</sup> can be subject to the death penalty for the commission of a *hudud* offence.

The discriminatory way in which women are positioned within the *Criminal Act 1991*, and particularly in relation to the *hudud* offences, can only be fully understood when the legislation is read in conjunction with the *Evidence Act 1993* – also with its sources in sharia law. Section 63 of the *Evidence Act 1993* provides that, with the exception of adultery, all *hudud* offences shall be proved either by a confession before a court, or by the testimony of two men, or 'when necessary' by the testimony of a man and two women or the testimony of four women.<sup>2</sup> This provision, with its foundation in sharia law, is one of the aspects of Sudanese national legislation that most blatantly violates the principle of equality before the law enshrined in the UDHR and the ICCPR.<sup>3</sup> It also violates the guarantee in section 31 of the Constitution of Sudan that all persons are equal before the law.<sup>4</sup>

In the case of adultery, the *Evidence Act 1993* requires that the offence shall be proved either by express confession before a court, or by the testimony of four adult men, or by the pregnancy of an unmarried woman.<sup>5</sup> This is in accordance with the Islamic law doctrine, discussed above, that 'the testimony of women is not accepted in accusations involving *hadd* punishments'.<sup>6</sup> (Malik, 1989: 297 (and accompanying discussion)) This requirement means that while it is almost impossible to prove a man guilty of adultery, an unmarried woman who falls pregnant may *in the absence of any witnesses* be found guilty and convicted of the crime. An unmarried woman who finds herself in these circumstances has, as her only defence, the crime of rape. Yet while her pregnancy alone is sufficient to establish her guilt of adultery, she

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1. See: Criminal Act 1991 s 3.

2. See: *Evidence Act 1993* s 63. Note that this section of the Act arguably does not comply with a strict interpretation of sharia law, which as discussed above, does not allow the testimony of women in criminal cases: al-Marghinani, 1982: 353; Malik, 1989: 297.

3. See: Interim National Constitution of the Republic of Sudan 2005 s 31; The Universal Declaration of Human Rights, GA Res 217A(III), UN GAOR, 3rd Sess, 183rd plen mtg, [7], UN Doc A/810/71 (1948); International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171, art 14 (entered into force 23 March 1976). The Special Rapporteur on Sudan, in his 1994 report to the Commission on Human Rights, said of a similarly worded provision in the Personal Matters Act for Muslims 1991 that '[t]he Special Rapporteur cannot interpret this provision at this stage other than as meaning that the testimony of a woman is not equal to that of a man': Biro, Situation of Human Rights in the Sudan, UN Doc E/CN.4/1994/48 (1994), above n 57, [102].

4. See: Interim National Constitution of the Republic of Sudan 2005 s 31.

5. See: *Evidence Act 1993* s 62.

6. The term *hadd* is the singular of *hudud*, which means the liabilities incurred as a result of crossing the boundaries set by God.

must produce four adult male witnesses to establish her lack of consent.<sup>1</sup> The result is that for women who fall pregnant outside marriage, a finding of adultery is almost inevitable, while at the same time, there is virtual impunity for male perpetrators of rape. The discriminatory provisions in the *Criminal Act 1991* and the *Evidence Act 1993* are of critical importance in creating and sustaining an environment in which women are accorded a status subordinate to that of men, and must live with the knowledge that there is little likelihood of redress for sexual violence committed against them.

The other significant piece of legislation in Sudan which violates the international legal doctrine of equality between men and women, and that contributes to a social, cultural and legal environment in which domestic violence is condoned, is the *Muslim Personal Matters Act 1991* ('*Personal Matters Act*'). In accordance with sharia law, the *Personal Matters Act* provides that a wife should take care of and obey her husband,<sup>2</sup> and that in return she is entitled to maintenance, to be 'treated tenderly' and to 'visit her parents and those relatives whom she is prohibited to marry'. (*Personal Matters Act for Muslims 1991* s 51) Notably absent from this enumeration of rights are the right to work and the right to freedom of movement, including to leave the family home for reasons other than visiting her immediate family. Art 51 states that a wife does not deserve maintenance if, *inter alia*, she works outside the home without her husband's approval unless 'the husband's disapproval is coercive'. (*Personal Matters Act for Muslims 1991* s 51) The differentiation between a man and a woman's rights and duties in marriage manifestly violates the principle of equality enshrined in the ICCPR, the ICESCR and the Constitution of Sudan,<sup>3</sup> as well as the requirement in art 23(4) of the ICCPR that states must 'take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution'.<sup>4</sup> The restriction on a woman's ability to work without her husband's

1. See: The *Evidence Act 1993* does not specify the number of witnesses required to prove the crime of rape.

However, the crime of rape is defined (*Criminal Act 1991* s 149(1)) in the following terms: 'there shall be deemed to commit the offence of rape, whoever makes sexual intercourse, *by way of adultery*, or sodomy, with any person without his consent' (emphasis added). Thus, in order to prove the crime of rape, technically one must first prove adultery - requiring four male witnesses - and then prove lack of consent.

2. See: *Personal Matters Act for Muslims 1991* s 52.

3. See: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 3 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3, art 3 (entered into force 3 January 1976); *Interim National Constitution of the Republic of Sudan 2005*, s 32.

4. See: *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171, art 23(4) (entered into force 23 March 1976).

approval also violates art six of the ICESCR, which obligates Sudan to ensure the progressive realization of the right of everyone to ‘gain his [sic] living by work which he or she freely chooses or accepts’.<sup>1</sup> The *Personal Matters Act* plays an important role in formalizing and legitimating the hierarchical relationship between husband and wife, and this contributes in turn to an understanding that disciplinary measures, including the possibility of violence, may be imposed when the relationship is challenged. More broadly, the restrictions on economic, social and cultural rights significantly impede women’s ability to access economic and social resources, and thus to fully participate in public and private life.<sup>2</sup> The implications of these restrictions for development and for peace are discussed in the following sections.

### **5. The Status of Women in States Applying Sharia Law: Manifestations of Inequality**

Sharia law is not a positive law in the sense of a body of legislation, but rather, provides a social, cultural and legal framework –drawn from the Qur’an and the *sunna* of the Prophet– that prescribes the rights and responsibilities of men and women in almost every aspect of daily life. Across the Islamic world, sharia law is incorporated into the domestic legal systems of states in a number of different ways. At the most purely Islamic end of the spectrum is Saudi Arabia, the constitution of which provides that “God’s book and the Sunnah of his Prophet (God’s prayers and peace be upon him) are its constitution”. (*Constitution of Saudi Arabia 1992* s 1) The constitution of Iran, in slightly different terms, provides that all laws must be based on Islamic criteria.<sup>3</sup> More commonly, the constitutions of a number of states including Bahrain, Egypt, Kuwait, Oman, Pakistan, Qatar, the Syrian Arab Republic and Yemen stipulate that ‘the Islamic sharia’ law or ‘Islamic jurisprudence’ is the main or the primary source of state legislation.<sup>4</sup> The constitutions of Sudan (as has been shown), the Maldives and Afghanistan also identify sharia as one of the sources of law, albeit not necessarily the primary source.<sup>5</sup> A number of other states, including

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1. See: *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 999 UNTS 3, art 6 (entered into force 3 January 1976).

2. See: Sullivan, 1991: 795, 839.

3. See: Constitution of Iran 1979, article 4.

4. See: Constitution of the Kingdom of Bahrain 2002 s 2; Constitution of the Arab Republic of Egypt 1980 s 2; Constitution of Kuwait 1962 s 2; The White Book: The Basic Law of the Sultanate of Oman 1996 s 2; Constitution of the Islamic Republic of Pakistan 1973 s 2; Permanent Constitution of the State of Qatar 2003 s 2; Constitution of the Syrian Arab Republic 1973 s 2; Constitution of the Republic of Yemen 1994 s 3.

5. See: Constitution of Sudan 1998 s 65; Constitution of the Republic of Maldives 2008 s 10; Constitution of the Islamic Republic of Afghanistan 2004 s 2.

Libya, Gambia and Jordan, have hybrid legal systems – their constitutions stipulating that sharia courts will have jurisdiction over specified matters such as divorce, marriage, child custody and inheritance.<sup>1</sup>

One of the commonalities across almost all states that have reflected sharia even partially in their legal systems is the extent to which the principles of sharia law regulate marriage and family life. The importance of sharia law in this area, and the recognition of its potential incompatibility with international law norms of equality and non-discrimination, is reflected in the reservations entered by states to art 16 of CEDAW concerning the equality of men and women in all matters relating to marriage and family life.<sup>2</sup> Almost all of the Islamic states that have ratified CEDAW have entered reservations to art 16, most explaining in the text of their reservations that art 16 will not be observed insofar as is it incompatible with the Islamic Sharia.<sup>3</sup>

Where sharia law is reflected in national legal systems, the restrictions on women's ability to exercise economic, social and cultural rights, and associated norms of inequality and violence, are manifested in two important ways that have implications for development and –as will be discussed in the following section– for peace.

At the most basic level, a constant threat of violence, coupled with an understanding of the impunity that exists for the perpetrators of violence, is profoundly disempowering for the victims of violence and for those at risk of violence. Many women whose lives have been regulated by traditional interpretations of sharia law have been taught from childhood and throughout marriage that from time to time others –even those they love– will subject them to violence. They have been taught that challenging the established order within the family may properly result in violence that in the event of an unwanted pregnancy they may be accused of adultery, and that if they seek legal redress for sexual violence there can almost never be sufficient evidence to support their story. Thus disempowered and living in a climate of fear, many women are prevented from attaining a basically acceptable quality of life and are unable to either contribute to or benefit from development. It has thus been

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1. See: Constitution of Libya 1969 s 8; Constitution of The Second Republic of the Gambia 1996 s 7; Constitution of Hashemite Kingdom of Jordan 1952 s 105.

2. See: *Convention on the Elimination of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force on 3 September 1981) art 16.

3. See: UN Division for the Advancement of Women, Department of Economic and Social Affairs, 'Declarations, Reservations and Objections to CEDAW' <<http://un.org/womenwatch/daw/cedaw/reservations-country.htm>> at 7 January 2008.

recognised by UNESCAP that 'gender based violence is one of the greatest blocks to development worldwide'.<sup>1</sup>

The second way in which Islamic law norms of inequality are manifested, as has been shown in the case of Sudan, is through personal status laws that entrench patriarchal gender relations and prevent women from exercising economic, social and cultural rights. Restrictions on women's ability to participate freely and productively in society have been shown to manifest in high fertility rates, low literacy, high maternal mortality and limited labour force participation.<sup>2</sup> The causal relationship between the application of Islamic personal status laws and the status of women has been explored by feminist scholar Valentine Moghadam, who observes that personal status laws throughout the Middle East and North Africa region generally accord women the legal status of a minor, subordinate to men in the areas of marriage, divorce, child custody and inheritance. Moghadam notes that personal status laws sustain a social order whereby the male has 'direct access to wage employment or control over the means of production' and the female is 'largely economically dependent on male members of her family', (Moghadam, 2005: 107) and that this entrenchment of structural inequality is a critical factor in explaining the region's "high (though declining) fertility rates, gender gaps in literacy, limited access for women in paid employment, and under-representation [of women] in the political system". (Moghadam, 2005: 105)

Another way in which the relationship between sharia law and gender equality can be observed is to consider the gender-related development indicators (GDIs) in the UN Development Program's annual Human Development Reports. The GDIs measure achievement in the same basic capabilities as do the Human Development Indicators (HDIs) -life expectancy, educational attainment and income- but impose a penalty for inequality between women and men, such that the GDI falls either when the achievement levels of women and men in a country decrease simultaneously or when the disparity between their achievements increases.<sup>3</sup> A country's HDI rank minus its GDI rank shows the discrepancy between that country's ranking on general development indicators, and its ranking where those same indicators are adjusted to take

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1. See: United Nations Economic and Social Commission for Asia Pacific, 'Report of The Sub-Regional Training Workshop On Elimination Of Violence Against Women In Partnership With Men' (2-5 December 2003) 2-3.

2. See: Moghadam, 2005: 98-100.

3. See: United Nations Development Program, 'Human Development Report 2007/2008: Fighting Climate Change: Human Solidarity in a Divided World' (2008) 358.

account of gender equality. The greater the disparity between men and women in basic capabilities, the greater the discrepancy between a country's GDI as compared to its HDI.

Of all 157 states for which statistics are provided in 2007/2008 report, the states with the greatest discrepancy between HDI and GDI rankings are Oman and Saudi Arabia, each with a discrepancy of -13, meaning that these states fall 13 ranks lower on the development index once their rankings are adjusted to take gender inequality into account. The average discrepancy for states that explicitly recognise sharia as the primary source of legislation is -3.9.<sup>1</sup> If the selection is expanded to include states whose constitutions recognise the jurisdiction of sharia courts over specified matters (Afghanistan, Brunei, Libya, Gambia, Jordan and Malaysia), the average discrepancy between HDI and the GDI rank falls to -3.6.<sup>2</sup>

To sum up, then: social, legal and cultural norms which restrict women's ability to exercise basic human rights, support violence as an appropriate response when the norms are violated, and restrict women's ability to seek legal redress in response to violence, are fundamentally disempowering and as such limit women's ability to contribute to or benefit from development. Personal status laws, in particular, formalize and sustain patriarchal gender relations, and the application of these laws is manifested in significant inequalities in the basic capabilities of women and men. The disempowerment of women, coupled with significant gender disparities in basic capabilities, have significant implications not only for development but for the achievement of sustainable peace.

## **6. Violence against Women and Gender Inequality as a Threat to Peace**

The link between gender equality and gender based violence, development and peace has been increasingly recognized in conflict and development literature.<sup>3</sup> As stated by the Executive Director of the UN Population Fund in the open debate on Security Council Resolution 1325 (2004) on *Women, Peace and Security*, 'if women and girls, and communities as a whole, are threatened by

1. See: United Nations Development Program, 'Human Development Report 2007/2008: Fighting Climate Change: Human Solidarity in a Divided World' (2008)

2. See: United Nations Development Program, 'Human Development Report 2007/2008: Fighting Climate Change: Human Solidarity in a Divided World' (2008)

3. See, for eg, Warriner and Tessler, 1997: 250; Caprioli, 2003; Caprioli, 2005: 49; Caprioli, 2001: 503; Caprioli, 2000: 51; Caprioli and Trumbore, 2003: 5; Bussmann, 2007; Bouta, Frerks and Bannon, 2005.

gender-based violence, then there is no real chance for peace and security'.<sup>1</sup> Four years later the Security Council passed Resolution 1820 on *Women, Peace and Security*, stressing 'the importance of [women's] equal participation and full involvement in all efforts for the maintenance and promotion of peace and security', and acknowledging that the 'persistent obstacles and challenges to women's participation and full involvement in the prevention and resolution of conflicts' has a 'negative impact ... on durable peace, security and reconciliation'.<sup>2</sup>

In explaining the relationship between gender equality, freedom from violence and peace, two alternative approaches have been put forward. The first demonstrates that violence and inequality contribute indirectly to the likelihood of conflict by constraining a state's ability to pursue economic development and good governance. The second approach argues that violence and inequality between men and women reflect cultural norms of hierarchy, domination and the use of force, and that the existence of these norms increases the likelihood of a state's engagement in both internal and external conflict. These two approaches will be discussed in turn.

### **6.1. Gender Equality and Development; Development and Peace**

Gender inequalities, as has been shown above, have an enormous toll on the quality of women's lives. In addition to the significant personal costs, gender inequalities restrict women's ability to earn income, access resources and be productive, and this not only constrains the ability of women to influence resource allocation and investment decisions in the home, but constrains a state's ability to reduce poverty, raise living standards and ensure economic progress.<sup>3</sup> Gender equality also has important public health implications: poorly educated mothers are less likely to provide appropriate care for their children, and this results in higher infant and child mortality and malnutrition.<sup>4</sup> Gender equality has been shown also to improve a country's governance, because 'where the influence of women in public life is greater, the level of corruption is lower'.<sup>5</sup> Better governance means more effective development policies.<sup>6</sup> In a 2005 study on gender and development, the World Bank noted

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1. Thoyara Ahmed Obaid, 'Women, Peace and Security, Responding to the Needs to Victims of Gender Based Violence' (Statement, UN SC Open Debate on SC Res 1325 on Women, Peace and Security, 2004) <<http://www.unfpa.org/news/news.cfm?ID=523>> at 7 January 2009.

2. *Resolution on Women, Peace and Security*, SC Res 1820, UN SCOR, 5916th mtg, UN Doc S/Res/1820 (2008).

3. See: World Bank, *Engendering Development - Through Gender Equality in Rights, Resources and Voice*, 2001: 5.

4. See: World Bank, *Engendering Development - Through Gender Equality in Rights, Resources and Voice*, 2001: 8.

5. See: World Bank, *Engendering Development - Through Gender Equality in Rights, Resources and Voice*, 2001: 11.

6. See: World Bank, *Engendering Development - Through Gender Equality in Rights, Resources and Voice*, 2001: 8.

that while ‘identifying and measuring the full extent of [the costs of gender inequalities] is difficult, ... a wealth of evidence from countries around the world demonstrates that societies with large, persistent gender inequalities pay the price of more poverty, malnutrition, illness and other deprivations’.<sup>1</sup> The report concluded that gender equality is a ‘development objective in its own right’ in that it ‘strengthens countries ability to grow, to reduce poverty, and to govern effectively’.<sup>2</sup>

The causal effect between economic development and peace has been well established in civil war literature.<sup>3</sup> Hegre and Sambanis, in their 2006 analysis of factors that potentially increase the likelihood of civil war, note that the ‘key variables in economic theories – per capita income and, to a lesser extent, the rate of growth of income – are very robust’. (Hegre and Sambanis, 2006: 533) Their research shows GDP per capita to be ‘robustly significant’, with a 1% increase in income reducing the risk of civil war onset by 0.5%.<sup>4</sup> The finding is consistent with a significant body of literature supporting the relationship between economic development and civil war.<sup>5</sup> If it is well established that reducing disparities between women and men promotes development, and that development is one of the most significant factors determining the likelihood of peace, it may equally be said that gender equality is a significant contributor –albeit indirectly– to peace. As stated by the UN Economic, Social and Cultural Organisation at the Fourth World Conference on Women, ‘there can be no lasting peace without development, and no sustainable development without full equality between men and women’.<sup>6</sup>

## 6.2. Gender Equality as a Direct Contributor to Peace

More directly, a number of studies have highlighted the role of domestic gender inequality as an important predictor of both internal and external conflict. Professor Mary Caprioli, for example, explains the correlation between gender inequality and conflict as stemming from the fact that gender inequality is a manifestation of both structural inequality and structural violence.<sup>7</sup> ‘Structural

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1. See: World Bank, *Engendering Development - Through Gender Equality in Rights, Resources and Voice*, 2001: 8.

2. See: World Bank, *Engendering Development - Through Gender Equality in Rights, Resources and Voice*, 2001: 1.

3. See: Bussmann, 2007: 72-522.

4. See: Hegre and Sambanis, 2006: 524.

5. See: Hegre and Sambanis, 2006: 532.

6. See: UN Economic, Social and Cultural Organisation, ‘Statement on Women’s Contribution to a Culture of Peace’ (Statement presented to the Fourth World Conference on Women, Beijing 1995) <<http://www.unesco.org/cpp/uk/declarations/wcpbei.htm>> at 11 January 2008.

7. See: Caprioli, ‘Gender Equality and Civil Wars’, 2003: 72-5.

inequality' refers to the structural system of male domination/female subordination, created and sustained by religious, cultural or social norms of hierarchy and domination. Acceptance of these norms, coupled with an enduring threat of violence and often a lack of legal redress (as has been shown above), ensures acquiescence to structural inequality.<sup>1</sup> Structural inequality that subordinates women leads to gendered structural violence - an environment that supports and legitimizes violence against women.<sup>2</sup>

Where religious, social and cultural norms support relations of subordination and domination, and legitimize violence as a means of addressing grievance, this results in an increased societal tolerance of violence, which translates in turn to increased political violence. As stated by Caprioli,

when societal tolerance of violence is supported and legitimised by an environment of structural violence, the incidence of both inter and intrastate violence should increase, for violence becomes the way of life and a valid tool for settling disputes. (Caprioli, 'Primed for Violence', 2003: 72)

Norms of equality, on the other hand, evidence an absence of oppression and violence, and facilitate 'cooperation among groups who are then more likely to rely on influence and persuasion, rather than on violence'. (Caprioli, 'Gender Equality and Civil Wars', 2003: 72-5) In a study of intrastate disputes between 1960 and 2001, Caprioli found that states with high fertility rates (a measure of inequality, discrimination and structural violence<sup>3</sup>) were nearly twice as likely to experience intrastate conflict as states with low fertility rates. Caprioli's other measure of gender equality, female participation in the labour force, was also found to be statistically significant, with 'states with 10% women in the labour force nearly 30 times more likely to experience internal conflict than states with 40% women in the labour force'. (Caprioli, 'Primed for Violence', 2003: 72, 172) Caprioli concludes that 'the higher the level of gender inequality within a state, the greater the likelihood such a state will experience internal conflict'. (Caprioli, 'Primed for Violence', 2003: 72-172)

## **7. Conclusion**

Inequality and violence against women is prevalent not just in Islamic

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1. See: Caprioli, 'Gender Equality and Civil Wars', 2003: 72. 4-6.

2. See: Caprioli, 'Gender Equality and Civil Wars', 2003: 72. 4-6.

3. See: Caprioli, 'Gender Equality and Civil Wars', 2003: 72, 17.

societies, but throughout the world; in no region in the developing world are women equal to men in legal, social and economic rights.<sup>1</sup> There are myriad reasons for the prevalence of inequality and violence, and this paper does not purport to suggest that the existence of sharia law is the only, or even the primary, cause. It is clear, however, that the messages conveyed by sharia regarding gender relations, and the actions of governments in incorporating sharia into state legislation, are powerful forces in the entrenchment of inequality and violence throughout the Islamic world. Inequality and violence, as has been shown above, prevent women from contributing to and benefiting from development, inhibit a country's ability to ensure economic progress, and increase the likelihood of inter and intrastate conflict.

Islamic states, as well as all other states whose legal systems do not ensure equality of men and women before the law and equal protection by the law, must be encouraged to bring their domestic legislation into line with international human rights instruments to which the state is party, and with the principles of equality and non-discrimination enshrined in customary international law. Personal status legislation (and in the case of Sudan, the *Criminal Act 1991*, the *Evidence Act 1993* and the *Personal Matters Act 1991*) must be addressed as priorities. States that have not yet ratified CEDAW and/or its Optional Protocol should be encouraged to do so, and should be encouraged to do so without entering reservations that contradict the very purpose and spirit of the Convention. States that have entered such reservations, in particular to art 16 concerning equality in marriage and family life, should be encouraged to withdraw these reservations in light of their obligations under customary international law. States that have not already done so should be encouraged to adopt domestic violence legislation.<sup>2</sup> Until state legislation and practice is brought into line with standards in international human rights law, particularly as regards the equal rights of women in marriage and in family life, violence will continue to be a part of women's lives, women will be restricted from exercising the basic human rights to which they are entitled, and countries will be constrained in their progress towards development and ultimately towards peace.

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1. See: World Bank, above n 75, 1.

2. See: The UN Fourth World Conference on Women in Beijing called upon governments to 'enact and/or reinforce penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs done to women and girls who are subjected to any form of violence, whether in the home, the workplace, the community or society': *Beijing Platform for Action, Fourth World Conference on Women*, [125], UN Doc A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995).

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