

MEMORANDUM

PROTEST AGAINST AMENDMENTS TO THE SYARIAH COURT (CRIMINAL JURISDICTION) ACT 1965

Submitted by the Joint Action Group for Gender Equality (JAG) and G25

22 November 2016

This memorandum by the Joint Action Group for Gender Equality or JAG and G25 is handed over to members of Dewan Rakyat and Dewan Negara to request a withdrawal of the tabling of the amendments to the Syariah Court (Criminal Jurisdiction) Act 1965 hereafter referred to as Act 355¹, which is scheduled to be tabled during the 3rd Meeting of the 4th Session of the Thirteenth Parliament (2016). We are concerned that the passing of this Bill will lead to injustices in the administration of Islamic laws in Malaysia and greater discrimination against Muslim women. We are also concerned the Bill will further divide our society, as it will increase the contrast between criminal laws affecting Muslims and criminal laws affecting non-Muslims in Malaysia.

The implications of the proposed amendments are enormous and potentially damaging to the furtherance of justice and fairness in the administration of Islamic laws. With these amendments, the Syariah Courts are accorded the ability to impose any sentence under Islamic law except for the death sentence. It is an extreme stretch from the current limitations of the 3-5-6 provisions and insufficient justification has been provided for the need of this. A question that requires an informed answer is whether this is a proportional response to the needs of the country. Such radical changes in law and policy must be based on evidence to support the argument for its need. ***Law and policy cannot be driven by political expediency, ideology and rhetoric, and without regard to the delivery of justice.*** The Malaysian public deserves an informed, evidence based response to the questions below:

- What evidence is available that there is an increasing trend in negative moral and ethical conduct that requires such draconian and degrading forms of punishment?
- If such an issue is in fact impacting on society, which sector of society is the most vulnerable? What is causing these changes in these sectors of society? How can long term change be put in place, rather than stop-gap measures through punishment and shaming individuals?
- If there is a concern on the derogation of Muslims against “the precepts of Islam” and other Islamic offences, is the punitive approach the most effective manner to bring change in values?
- Is it not a better approach, and a more society-building approach, for the State to have programmes for a better society through education, exposure, tolerance and rehabilitation?
- Should government not be looking at more fundamental issues of poverty and the income gap of the rich and poor, corruption, creating jobs for the young, empowering vulnerable sectors of society such as women, youth, children, and other marginalised sectors, policing drug abuse, violence and promoting security and safety of the public?

¹ See Appendix 1 for the current and proposed provisions.

Whilst Act 355 is not strictly a Hudud law, it cannot be denied that the expansion of the ability to punish under the Syariah legal system will be applied to these Hudud laws. It is the obligation of the government to respond to the issues that the public has raised i.e. its direct connection to hudud laws which have raised similar fears that were voiced in relation to those hudud laws. It is critical that the whole picture be taken into account when looking at the amendments to Act 355.

On 24th April 2014, the YAB Prime Minister announced that “there are so many issues that need to be solved before the [hudud] law can be fully implemented in the country”. The YAB Prime Minister went on to say that: “The same goes to the non-Muslim community, they must be given the opportunity to understand the Islamic law clearly and comprehensively so that there will be no misunderstandings about the teachings of Islam”². We agree that there must be a good foundation within the Syariah legal system prior to providing it with expanded punitive powers. We also agree with the previous decision that there should be a national-level technical committee³ albeit with a fundamental difference : for a meaningful and inclusive debate, it is imperative that all interested parties must have the opportunity to voice their concerns – human rights groups, women’s groups and non-Muslim groups. **This is not to be simplified as merely an issue for Muslims.** It is an issue that determines and shapes the progress of our society and the values for which we stand for as a cohesive nation. Every single person in Malaysia has a stake in this.

We caution the Government that the call for stronger and more punitive Islamic laws has been viewed as a development that may be **subversive to the secularism** under which the Federal Constitution was drawn up. Malaysia has a multi-religious and multi-ethnic population. It should be seen as a concern that a country that has achieved significant progress through the contribution of citizens from various religions, ethnicity and backgrounds are now subjected to a **systematic process of Islamisation** where issues, behaviours, lifestyles, opinions etc. that do not conform to the narrow interpretation of Malaysia’s Islamic religious tenets (which are not necessarily adopted by other Muslim countries) as prescribed by the conservative Muslims in this country have penetrated the educational system, government service, the military, social institutions and people’s mindsets. It is urgent that the Government reviews the rise of religious extremism or religious fundamentalism and its political, economic and social impact and to what extent this could pose a threat to economic growth, unity of the different races and religions and peace of the country. **Government scrutiny is critical in ensuring that religious beliefs that translate into laws, rules and policies accord justice and fairness and achieve the objective of developing a tolerant and progressive society that respects human rights and civil liberties.**

Recent issues related to the administration of Islamic laws such as renaming the hot dog reflects how deep the puritanical Salafist ideology has penetrated government bureaucracy; to the point where its policies and pronouncements are met with public derision, not just by ordinary citizens, but also by others in religious authority. In the case of the hot dog issue, the Halal certification has gone beyond the substance of the issue (i.e. to ensure the ingredients and preparation of the food is Halal) to a requirement of the form of the food (i.e. the name of the food to be certified). We commend the Government in managing the vaccination issue⁴ effectively but caution that these are signs that extremist views which impact the health and wellbeing of the population are creeping into the country under the guise of the religion of Islam. These are issues which affect the nation as a whole and is changing the co-operative dynamic between the Muslim and non-Muslim communities.

² <http://www.thesundaily.my/news/1027438>

³ <http://www.thestar.com.my/news/nation/2014/04/27/umno-propose-hudud-comm/>;

<https://www.utusan.com.my/berita/politik/jawatankuasa-teknikal-hudud-bermesyuarat-bulan-depan-1.30097>

⁴ <http://www.themalaymailonline.com/malaysia/article/vaccine-refusals-up-over-100pc-putrajaya-reveals>

In the name of the religion, further barriers are being put in place which threaten the cohesiveness of the Malaysian society.

On the tabling of Act 355, it is clear that the country is not in unity and there is a great divide between its supporters and detractors. The tabling of this Bill requires a process that firstly assures the public that it will serve the intended purpose – to impart justice and fairness in the Islamic legal system. It requires extensive deliberation, greater transparency and an assurance that all the necessary safeguards are in place to ensure potential abuses do not occur. It is clear from the public debates in the newspapers and the social media that this level of comfort is not visible in large sections of the general public.

The Proposed Act 355 and its Relationship with the Hudud Laws

Taken together with the introduction of the hudud laws in Kelantan and Terengganu, it can only be surmised that this is a progression towards the implementation of those laws. Kelantan has already passed the Kelantan Syariah Criminal Code II (1993) 2015 whilst Terengganu enacted the Syariah Criminal Offense (Hudud and Qisas) Enactment 2003⁵.

The Acts prescribe hudud punishments for adultery, murder⁶, theft, robbery, sodomy, consumption of liquor and apostasy. The existing Act 355 doesn't allow the Syariah Court to impose the hudud punishments. However, the amendments proposed to Act 355 would allow the partial enforcement of these laws.

For example, offences such as zina (adultery), qazaf (false accusation of committing zina), syurb (alcohol consumption) and irtidad or riddah (apostasy) are all defined as hudud offences in Section 5 of the Syariah Criminal Code (II) (1993) 2015 Enactment (Kelantan), and carry the punishment of whipping ranging from 40 to 100 lashes.

If passed, the new provision will enable the following hudud punishments in Kelantan and Terengganu, which may soon be imitated by other states:

- 40 to 80 lashes for drinkers;
- 100 lashes for unmarried adulterers, and in addition shall be liable to imprisonment for one year;
- 80 lashes for persons convicted of qazaf (unsubstantiated accusation of adultery or sodomy) and his testimony shall not be accepted by the Court until he repented of his wrongdoings.;
- For persons convicted of irtidad or riddah (apostasy)⁷ - in Kelantan, indefinite imprisonment and property forfeiture before repentance⁸; in Terengganu, property forfeiture before repentance and imprisonment not more than five years after repentance.

⁵ See Sisters In Islam Memorandum on the Syariah Criminal Code (II) 1993 State of Kelantan, 25 December 1993.

⁶ Punishment for murder is a qisas punishment, not hudud. It is, however, included in the same enactment.

⁷ Defined as whoever voluntarily, deliberately and aware of making an act or uttered a word affects or against the aqidah. Words or acts against the aqidah (belief) are those which concern or deal with the fundamental aspects of Islamic religion which are deemed to have been known and believed by every Muslim as part of his general knowledge for being a Muslim, such as matter pertaining to Rukun Islam, Rukun Iman and matters of halal (the allowable or the lawful) or haram (the prohibited or the unlawful)

The record of failure, injustice and abuse in countries such as Nigeria, Pakistan⁹, and Sudan, which implemented hudud opportunistically to prop up unpopular ruling parties, is well documented at the national and international levels¹⁰. To quote from a report by Human Rights Watch in its report entitled “Political Shari’a”? Human Rights and Islamic Law in Northern Nigeria (September 2004)¹¹ : “The manner in which Shari'a has been applied to criminal law in Nigeria so far has raised a number of serious human rights concerns.”¹²

Already the record of enforcement of existing Islamic laws on the rights of women, citizens of other faiths and marginalised groups have wrought fear and distrust of the Syariah system, what more the expansion that empowers it to introduce more draconian laws and forms of punishments.

The Syariah Courts should be improved to serve Justice and Fairness

Our concerns on Act 355 are as follows:

- a. It is a progressive implementation of the hudud laws in Kelantan and Trengganu and paves the way for other States to impose similar laws. Suppression and punitive actions do not increase compliance. Instead, countries that have hudud laws been criticised as having inhumane punishments, torture, and instances of selective persecution, especially of women, the poor and marginalised in society¹³.
- b. The enforcement of the Kelantan and Trengganu hudud laws will lead to great injustices to women. As an example, under the Kelantan hudud laws, non-Muslims and women are not allowed to act as witnesses in a “zina” trial. Statements from the accused woman is not accepted by the Court and a woman cannot accuse her husband of “zina” and so on. In countries where there is hudud law, studies have shown that there are cases where husbands make an accusation of “zina” to shame and humiliate the wife and to force her to remain in a forced marriage. In Aceh, a rape victim was accused of committing “zina”. As a result of the biasness of the system, the woman was found guilty and imposed a punishment of lashings. As the proposed amendment enables all types of punishment save for the death penalty, States may now legislate to impose punishments such as severing of limbs, seizure of property, and so on.
- c. As laws are State based, it will not be applied consistently across the country. We will see a situation where offenders receive different punishments for the same offences in different States. This is not the situation envisioned when the Constitution of the

⁸ s23(3) Kelantan Syariah Criminal Code II (1993) 2015 : Whoever is found guilty of committing the offence of irtidat shall, before a sentence is passed on him, be required by the court to be imprisoned within such period deem suitable by the Court for the purpose of repentance. S23(4) Where he is reluctant but there is still hope for his repentance then the Court shall consider for continuance until no hope of repentance then the court shall pronounce the hudud sentence on him and order the forfeiture of his property.

⁹ Research done by the National Commission on Women in Pakistan showed that 80 per cent of the women in prison were there for offences under zina. Another earlier research showed that over 1,000 women were in prison for zina, compared to only two men.

¹⁰ See Appendix 2

¹¹ <https://www.hrw.org/report/2004/09/21/political-sharia/human-rights-and-islamic-law-northern-nigeria>

¹² Also refer to “Hudud In Malaysia : The Issues At Stake”; 1995 Sisters In Islam.

¹³ Whipping is considered a form of punishment that violates human rights principles, in particular the right to be free from cruel, inhuman, degrading treatment or punishment.

country was promulgated, which is the reason why criminal offences remain legislated under the Penal Code and other Federal laws.

- d. The Syariah Courts in Malaysia are not bound by the doctrine of precedent. In the administration of Islam in Malaysia, each case has to be decided based on its own merit and previous decisions can only be considered as guidance for the future cases.
- e. The record of enforcement of the Islamic Family laws and the Syariah Criminal Offences laws in Malaysia with the public record of gender bias and selective prosecution leave us with little confidence that justice can be indeed be done with further expansion of the Syariah jurisdiction in this country, especially with regards to women and those most disempowered. Selected decisions of the Syariah Courts have brought about great harm to women such as :
 - i. In 2007, Kartika Dewi Shokarno was found drinking beer at a hotel raid in Kuantan. Under Syariah law, Muslims are prohibited from consuming alcohol and if caught, can face a maximum fine of RM5000 and/or 6 strokes of the cane. Kartika was selectively victimised by a biased Syariah system. Through effective lobbying and vocal objection by Sisters In Islam and other human rights organisations Kartika was not whipped.
 - ii. In 2010, the Home Minister of Malaysia announced that three Muslim women were caned in prison for having illicit sex – being the first group of women to receive such punishment under Syariah law. The announcement was made while Kartika’s case remained unresolved. In addition, there was no announcement that the men who these women were allegedly engaged in illicit sex with were caned as well.
 - iii. In the case involving the unilateral conversion of the children by one parent, the Syariah Court in the case of Indira Gandhi¹⁴, granted custody whilst the issue of the conversion was still unresolved in the civil courts. And notwithstanding that the youngest child was only 11 months old and still being breastfed by the mother. On finding out about the conversion, and feeling distraught and being dissatisfied with the husband's action, the wife then filed an application for Judicial Review in the High Court. The wife had to take the case to the civil courts as, being a non-Muslim, she had no access to justice in the Syariah courts. The case is currently on appeal in the Federal Court.
 - iv. Syariah Court approved marriage of a rape victim who was 14 years old to the rapist who was 21 years old. The man was charged with statutory rape in April 2016. Following this, they received an approval from the Syariah Court to be married (underage marriage of Muslims requires consent of a Syariah Court judge). The charge was then dismissed at the civil court after the judge was told that the pair had married. The decision prompted condemnation from the public and rights groups which resulted in the court proceeding with the case. Notwithstanding this, child rights and human rights groups are appalled that the rapist was allowed, with the Syariah Court approval, to marry his alleged victim.
 - v. In another harrowing case, in March 2010, newspapers covered reports about the discovery of an 11 year old girl in a semi conscious state in a mosque near Batu Caves, Selangor. She was married to a 41 year old man in February 2010 after the man reportedly “convinced her father that there was nothing wrong with the

¹⁴ Pathmanathan A/I Krishnan v. Indira Gandhi in the Court of Appeal

- marriage.” This marriage was later annulled by the Kelantan Syariah court; albeit not because of the age of the child, but because Syariah law was not complied with¹⁵.
- vi. Fasakh divorce cases, where the wife initiates the divorce may take up to 2 years on average. Whereas a divorce where the husband grants the talak can be done almost immediately.
 - vii. From 2015 statistics compiled by Sisters in Islam which provides legal assistance through its Telenisa Helpline, the largest number of cases in the marriage category is in relation to polygamy (32) – where polygamy is entered into without the knowledge or consent of the wife, husband does not continue to provide for the wife and children, the division of time between the family is not equal, the husband abandons the first wife and the children by that marriage, unregistered polygamy marriages and so on.
 - viii. In relation to divorce, fasakh (divorce initiated by wife) is now the most common type of divorce assistance rendered (27), followed by ta’liq (divorce as a result of breach of marriage contract) (17). For the wife, cases we assisted include unpaid maintenance (nafkah) including unpaid maintenance during the marriage, and iddah and mutaah (gift or compensation for divorce) (58). In relation to the children, we continue to deal with cases involving unpaid maintenance for the children (62) and custody (78). 152 of the cases involved domestic violence. 5 women had cases that continued between 1-5 years, whilst 1 case was between 6-10 years. One of the major reasons for delay is that the husband just does not turn up. And so the court grants a new date for hearing and it repeats in this manner. Many times, the Courts have not assisted in resolving the case thus creating difficulties for the wife in paying the high legal fees, maintaining a job, caring for the children and obtaining the appropriate compensation for the divorce as she needs to attend court.

Fundamental reforms to the Syariah legal system needs to be instituted to improve its delivery of justice and fairness. Punitive measures and expansion of powers should not be introduced until structural, ethical and procedural reforms have been put in place. In strengthening the Syariah Courts, many other areas require urgent attention such as:

- a. Review the provisions of the Syariah Criminal Offences Law/Enactment, in particular those provisions that deny citizens their fundamental right to freedom of speech and expression, and provisions that overlap federal crimes, such as indecency¹⁶. We also urge that the interpretations of the Qur'anic verses and the legitimacy and acceptability of the juristic opinions upon which the provisions were based be reviewed.
- b. Appoint representatives of women's groups in all policy and decision-making religious institutions, councils and committees, including the Syariah Judiciary Department, Syariah Courts, Majlis Agama, the National Committee on Religious Affairs; etc. For 1400 years as men interpreted the Qur'an for the ummah, the woman's voice, experience and realities had been silent and silenced. The participation of Malaysian women as partners in the country's socioeconomic development should be seen to add strength to the process of administration of Islamic laws in this country.

¹⁵ The BBC news dated 23 December 2010 <http://www.bbc.co.uk/news/world-asia-pacific-12066910>

¹⁶ Refer also to the Memorandum to the Prime Minister on the Syariah Criminal Code (II) 1993 State of Kelantan From Sisters In Islam; 25 December 1993.

- c. Timelines in resolving family matters such as divorce, custody, alimony must be compressed as this has a dire impact on the stability of families. Syariah courts in all States should place strict KPIs in resolving and concluding cases of divorce, custody and maintenance of children;
- d. In the State of Selangor, more than 65% of the cases relate to divorce and related cases. Thus, this is the area which requires the most urgent attention. The Syariah Courts may wish to consider innovative ways to improve the efficacy and capacity of the judges in managing, in many cases, very traumatic individuals including troubled and displaced children. One suggestion is to establish specialised family courts which can lend the necessary emotional and psychological support to victims of a family breakdown;
- e. Enforcement of court order across the different States must be made more efficient with greater co-operation between States;
- f. We also urge that Parliament and each State Legislative Assembly have the necessary experts to consider Islamic laws from a human rights and women's rights perspective in tandem with Quranic principles. In Federal legislation, scrutiny is provided by NGOs, CSOs as well as many other interested parties. State legislation may not be challenged to that level prior to being tabled at the State Legislature. A similar approach should be adopted prior to the adoption of fatwas as having legal force of law.
- g. Cases which impact on non-Muslims must be managed carefully. It must be noted that non-Muslim do not have access to the Islamic judicial system. Thus, they are trapped in a lacuna in dealing with matters affecting them. This is a serious derogation of justice. For example, the issue of unilateral conversion of children to Islam still has not been dealt with by the legislators. The families affected has been severely traumatised by the inaction of the Syariah and civil courts. It is most likely with the expansion of Islamic criminal cases, the overlap on non-Muslims will also increase.

The most ideal structure would be to federalise the Syariah legal system with uniform Syariah laws for the whole country. The right to make laws on matters of religion would then reside in Parliament, and not 13 State Legislative Assemblies. Interim measures could also be put in place to add consistency and comparability such as by having a system of circuit judges that travel state to state to apply State laws. This will help to build common jurisprudence and standards of justice. In Malaysia, each state has independent jurisdiction over religion leading to inconsistencies and contradictions in the provisions of the law, in interpretation and in implementation, state by state. Whilst this may seem an insurmountable task at this point in time, the progressive move towards one standard of Islamic justice for all the Muslim citizens of this country must remain a long term goal to be pursued.

Conclusion

We as Muslims should engender love for Islam and its practices by concentrating our time, energy and resources in finding ways to end poverty and all forms of corruption, ensuring social justice for all citizens and establishing a rule of law that is just and fair. JAG firmly believes that the religious authorities need to focus their future action on more critical and substantive issues such as the problems of incest, rape, domestic violence and drug addiction through guidance and education, respect and compassion. Official statistics show that in cases of incest, rape, domestic violence, drug

addiction, and HIV positive patients, Muslim Malay men form a disproportionate majority of perpetrators. This is a social ill that indicates a fundamental misguidance of the way a Muslim man should respect their women. It is of great concern that certain quarters have used the religion of Islam to justify a man's right to control women, to indulge his lust through polygamy, and to beat his wife. Many of our religious leaders reinforce the Malay man's belief that these so-called rights should never be curtailed or questioned. For to do so is to question the word of God. It therefore makes it a struggle for Malay women to stop the injustice they suffer at the hands of their male partners and family members, and of many of those in religious authority. These social ills require a social response. Increasing punitive action without substantive social reform and education will not result in lasting improvements.

The vision of Islam among many caught up in the throes of Islamic revivalism, whether in government or in opposition, very often violate fundamental Islamic principles of justice, equality and freedom. They condemn those who challenge their intolerant and extremist interpretation of Islam as infidels and deviants. Too often, they hide behind the cloak of sanctity of religion to deny others the right to speak out and challenge their views. We urge the Government and all political parties to seriously consider the implications of such growing intolerance and discrimination on this multi-racial society and to take immediate action to halt this trend. We believe that the passing of the proposed Act 355 will have a serious and negative effect not just on standards of justice, societal values, gender and race relations, but also in public trust that the Government sincerely wants to develop into a progressive, tolerant and just society.

Appendix 1

The Proposed Amendment to the Syariah Court (Criminal Jurisdiction) Act 1965 or Act 355*

The relevant section proposed to be amended is currently as follows :

“Section 2. Criminal Jurisdiction of Syariah Courts.

The Syariah Courts duly constituted under any law in a State and invested with jurisdiction over persons professing the religion of Islam and in respect of any of the matters enumerated in List II of the State List of the Ninth Schedule to the Federal Constitution are hereby conferred jurisdiction in respect of offences against precepts of the religion of Islam by persons professing that religion which may be prescribed under any written law:

Provided that such jurisdiction shall not be exercised in respect of any offence punishable with imprisonment for a term exceeding three years or with any fine exceeding five thousand ringgit or with whipping exceeding six strokes or with any combination thereof.”

The proposed amendments are :

The (proposed) new Section 2 provides: “2. The Syariah Court shall have jurisdiction over persons professing the religion of Islam and in respect of offences of matters listed in Item 1 of the State List of the Ninth Schedule of the Federal Constitution.”

The (proposed) new section 2A provides: “2A. In the exercise of the criminal law under Section 2, the Syariah Court is entitled to impose penalties allowed by Syariah laws in relation to offences listed under the section mentioned above, other than the death penalty.”

* Translation by Sisters In Islam, original text in Bahasa Malaysia taken from the Parliament of Malaysia Order Papers dated 17 October 2016 : Rang Undang-undang Mahkamah Syariah (Bidang Kuasa Jenayah) (Pindaan) 2016: i. menggantikan Seksyen 2 dengan seksyen berikut: “2. Mahkamah Syariah akan mempunyai kuasa ke atas seseorang penganut agama Islam dan di dalam hal-hal kesalahan di bawah perkara-perkara yang disenaraikan di dalam Butiran 1 Senarai Negeri di bawah Jadual Kesembilan Undang-Undang Persekutuan.”; dan ii. memasukkan selepas seksyen 2 dengan seksyen berikut: “2A. Dalam menjalankan undang-undang jenayah di bawah Seksyen 2 Mahkamah Syariah berhak menjatuhkan hukuman yang dibenarkan oleh undang-undang syariah berkaitan hal-hal kesalahan yang disenaraikan di bawah seksyen yang disebutkan diatas, selain dari hukuman mati.”

The Bar Council’s assessment of the proposed amendment also requires careful consideration. “Article 8 of the Federal Constitution requires that all legislative action satisfy the test of proportionality. As such, a proposed statutory provision must be objectively fair, and proportionate to the object sought to be achieved by the Legislature. Legislative action that leads to arbitrariness or allows for excessive measures would fail this test of proportionality. It is improbable that the

open-ended and unrestricted (save for the death penalty) sentencing power that Section 2A purports to confer on Syariah Courts will meet the proportionality requirement, thus rendering the constitutionality of Section 2A questionable.”

Appendix 2

“Political Shari’a”? Human Rights and Islamic Law in Northern Nigeria (September 21 2004)

By Human Rights Watch

Excerpts :

The provisions for and imposition of sentences amounting to **cruel, inhuman and degrading treatment and punishment**, in particular the death penalty, amputations and floggings, are among the main human rights concerns arising in the context of Shari'a in northern Nigeria. Since 2000, at least ten people have been sentenced to death by Shari'a courts; dozens have been sentenced to amputation; and floggings are a regular occurrence in many locations in the north. Human Rights Watch is unconditionally opposed to the use of the death penalty, in any legal system and in any country, as it constitutes the ultimate violation of the right to life and an extreme form of cruel, inhuman and degrading punishment. Human Rights Watch is also unconditionally opposed to other cruel and degrading punishments, some of which, **such as amputations, constitute torture**.

The main failings documented by Human Rights Watch include **defendants' lack of access to legal representation; the failure of judges to inform defendants of their rights and grant them these rights; the courts' acceptance of statements extracted under torture; and the inadequate training of Shari'a court judges** which has resulted in these and other abuses.

Almost all the victims of these abuses have been vulnerable men and women from poor backgrounds who have little or no knowledge of their rights or of legal procedures, or who lack the financial means to obtain legal assistance, even when they know they are entitled to it

Human Rights Watch is also concerned at provisions within Shari'a that **discriminate against women, both in law and in practice**, and other patterns of human rights violations against women in this context. Some of these violations **do not stem directly from the legislation itself, but from the way it has been used and from a climate of intolerance** which has accompanied the introduction of the new legislation.

With the exception of state government officials and some conservative Muslim leaders, the **majority of people interviewed by Human Rights Watch expressed their dissatisfaction with the manner in which Shari'a was being applied in Nigeria**. Many had initially supported its introduction and continued to profess their commitment to Shari'a, but explained that they were **disillusioned with the way in which it had become politicized in the hands of state government officials**. The result, in their words, was that the Shari'a in application was **not "proper Shari'a," but "political Shari'a"**. They doubted the sincerity of state governors in introducing Shari'a and complained about politicians' **failure to implement the economic and social aspects**, pointing to the continuing poverty across northern Nigeria and the absence of visible improvements in their daily lives.

Ordinary people have found it very difficult to challenge decisions of the Shari'a courts, especially as **judicial officials, religious officials and others have often portrayed these as the decisions of God rather than the decisions of judges**—a view which has discouraged many from openly questioning the outcome of trials. Many Muslims who are in favor of Shari'a but critical of the manner in which it was introduced highlighted the failure of state government authorities to raise awareness and educate the population before introducing the system.

Safiya Hussein (Sokoto State)

Safiya Hussein, a divorced woman in her thirties from a poor background, was found guilty of adultery and sentenced to death by stoning by the Upper Shari'a Court in Gwadabawa, Sokoto State, on October 9, 2001. She did not have legal representation during her trial. Yakubu Abubakar, the man with whom she was alleged to have committed the adultery, denied the offense and was acquitted for lack of evidence. Safiya Hussein was convicted on the basis that **her pregnancy constituted evidence of adultery**, and on the basis of her confession. The court rejected a suggestion that a DNA test be conducted to establish if Yakubu Abubakar was the father of Safiya Hussein's child, on the grounds that there was no reference to such tests in Shari'a.

Following the sentence, several lawyers and nongovernmental organizations stepped in and helped file an appeal, which was heard in October 2001. On March 25, 2002, the Shari'a State Court of Appeal, composed of four judges, overturned the death sentence. One of the grounds of appeal, which was accepted by the court of appeal, was that the Shari'a legislation under which she had been sentenced was not yet in force at the time the alleged offense was committed, and could not be applied retroactively. The alleged offense took place in December 2000, whereas the Shari'a Penal Code and Criminal Procedure Code came into force in January 2001. The court of appeal also conceded that there had been several other areas in which due process has not been observed during the trial, including the failure of the upper Shari'a court judge to explain the nature of the offense clearly to the defendant and to inform her of her right to legal representation; and the fact that the court had convicted her despite the withdrawal of her confession.

SUDAN

New Islamic Penal Code Violates Basic Human Rights

Report by Human Rights Watch

April 9, 1991

Excerpts:

Many of the provisions of the new Penal Code raise human rights concerns. These include:

- Limitations on the status of non-Moslems, amounting to their relegation to the status of second-class citizens. Moslems who do not subscribe to Islamic fundamentalism also have their rights curtailed.

- Limitations on the status of women, including their right to give evidence in court.
- The "crime" of apostasy (renouncing Islam), for which the penalty is death.
- The proposed implementation of hudud penalties, including amputation for certain sorts of theft, stoning to death for adultery, and flogging for a wide variety of lesser offenses.
- The principle of retaliation, "an eye for an eye".

The code contains articles, such as the prohibition on apostasy, which create new categories of essentially political offenses, which can be used to further the political aims of the Moslem Brothers.

Under the Shari'a penal code, women are treated as legal minors. They have limited rights to give evidence before a court in a trial for a haddi crime, no rights in the case of adultery, and for other offenses, their testimony is considered to be worth half that of a man. The difficulty of securing convictions for rape has been mentioned. In addition, other elements of Islamic law as interpreted by the Moslem Brothers may restrict the rights of women.

The provisions of the apostasy legislation are of concern to devout Moslems as well. The traditional rejection of heresy, which consists of announcing that there is no God but Allah, and Mohamed is his Prophet, may be considered inadequate. This is illustrated by the trial and conviction of Ustaz Mahmoud Taha in 1985. Mahmoud Taha was the leader of the Republican Brothers Party, which advocated a tolerance of different creeds and different forms of Islamic belief and practice within a secular political constitution. He consistently supported the policy of secularism followed during the early years of President Nimeiri's rule, but felt compelled to advocate non-violent opposition to the introduction of Islamic Law in 1983 and moves towards establishing an Islamic State. Mahmoud Taha was a Moslem who could make this announcement in good faith, but the Moslem Brothers did not consider this sufficient evidence for his renunciation. He was also given no time to ponder his predicament and recant his allegedly heretical views, but was speedily executed. His views were themselves branded as heretical, and his continued adherence to them as apostasy. Four other Republican Brothers who were simultaneously convicted of apostasy were given three days to announce publicly their rejection of Mahmoud Taha's "infidel" teachings before they could be cleared of apostasy. Their recantation, wearing prison uniforms and bound in chains, was broadcast on Sudanese television. Following this, the Moslem Brothers charged a number of prominent Sudanese Ba'athists with apostasy, though they were unable to obtain convictions.

Many Islamic scholars have objected to this provision. They have argued that the **hudud penalty of amputation for theft may only properly be imposed in a society which has provided for the welfare of all to such an extent that there is no need for any person to steal to satisfy basic needs, nor on account of his estrangement from society.** During a period of drought shortly after the death of the Prophet, Omer Ibn al Khattab, the Second Caliph, put this principle into practice and suspended the punishment of amputation for theft.

Rape is regarded as a version of adultery, in which force is used. The same rules of evidence apply as adultery cases. This has the consequence **that a victim of rape, being female, cannot testify in her own defence, and if she cannot bring four male witnesses to the act itself who are prepared to testify on her behalf, she cannot obtain a conviction of the man who raped her.** The testimony of the man who raped her can, however, be heard by the court. A non-Moslem woman who has been raped by a Moslem man, but who cannot bring forward Moslem witnesses to testify on her behalf, cannot obtain a conviction of her assailant.

The introduction of the Islamic Penal Code into Sudan on March 22, fails to guarantee basic human rights, and therefore gives rise to a number of serious concerns for Africa Watch. Some of the

punishments ordained by the code are **cruel, inhuman, or degrading**, and thus violate Sudan's international legal obligations. The code also discriminates against women, non-Moslems and Moslems who are not fundamentalists, denying them basic civil and political rights. The prohibition against apostasy is especially dangerous for both non-Moslems and Moslems, particularly those with non-fundamentalist political beliefs. The penal code leaves considerable latitude for variant interpretation and **political manipulation**, and the record of the current government gives little reason for optimism that the provisions of the code will be interpreted and utilized in anything but an aggressive and intolerant manner.

PAKISTAN

The Human Development in South Asia 2000 report :

Apart from the fact that the law is used to penalize rape victims as those who have indulged in extra marital sex, it has also been used by men to control and punish women in their own families, giving them a tool to enforce their own notions of women's conduct and to punish any deviations. Thus, a large proportion of women in jail on zina charges have been put there by their own fathers, brothers and husbands. These include girls who refuse to marry according to parental wishes, wives who wish to separate or terminate their marriages, women who leave their homes because of abuse, and women who refuse to go into prostitution.

Legal Injustices: The Zina Hudood Ordinance of Pakistan and Its Implications for Women

Rahat Imran Nov-2005

Excerpts:

The Safia Bibi Case Study

A sixteen-year-old blind girl, Safia Bibi, was raped by her landlord and his son in Sahiwal, eighty kilometers away from the Punjab capital of Lahore in 1983. A case was registered against the culprits in July 1983, and the court asked the blind girl to identify the rapists. As she failed to identify them, Bibi's consequent pregnancy was treated as evidence of fornication (as if pregnancy can only result from consensual sex), and therefore she was sentenced to three years in prison, fifteen lashes, and a fine of 1,000 rupees. The judge said the sentence was light because she was young and disabled.

Human rights groups in Pakistan report that a rape occurs approximately every two hours in Pakistan, half of all rape victims are juveniles, and seventy-two per cent of all women in police custody are physically and sexually abused by the jail staff and police. Most of those women are in prison on charges of violating the Zina laws. After the 1979 introduction of the Zina Hudood Ordinance, cases of reported fornication or adultery jumped from a handful to thousands. In 1980, seventy women were in prison in the Punjab province alone: by 1988 the figures jumped to 6,000. A very large number of women have been tortured, molested and raped by the police with impunity. "From 1980 to 1987 the Federal Shariat Court alone heard 3399 appeals of Zina involving female prisoners. This is only the tip of the iceberg, given the number of women arrested and released before reaching the appeal stage". Since the end of Zia-ul-Haq's era in 1988, the number of Zina cases has dropped. The Human Rights Commission of Pakistan (HRCP) estimates that in 2002 there

were 2,200 women prisoners in Pakistan, most of who are awaiting trial or were convicted under the Hudood laws.