

WHAT IF *SHARIA* WEREN'T THE ENEMY?: RETHINKING INTERNATIONAL WOMEN'S RIGHTS ADVOCACY ON ISLAMIC LAW

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Abstract

For many women's rights activists working internationally, especially those coming from a western context, sharia is believed to be a major obstacle to women's rights. In order to protect women from Muslim religious law, these advocates often position themselves aggressively against so-called sharia legislation and sharia in general. I believe that this approach is counterproductive and ultimately exacerbates, rather than improves, the situation for women living in Muslim-majority countries. In this article, I explain how current global feminist strategies have helped create an unwinnable and unnecessary war: that of sharia vs. women's rights. Drawing on observations incident to my work on the zina (extra-marital sex) laws in Nigeria and Pakistan, I argue for an alternative: women's rights advocates concerned about the situation of Muslim women around the world would do better not to mention Islamic law at all. This would be a major strategy shift, requiring significant restraint on the part of western secular feminist activists, but I believe it is worth it. I explain how, with this shift in approach, internationally-active women's rights advocates might more effectively contribute to securing rights for women in Muslim-majority countries. This shift could also open up a new appreciation for a wider spectrum of feminism, including that coming from a sharia-mindful perspective. In short, I argue for a world of advocacy for women that is nuanced and sophisticated and works with—not against—the reality of sharia in Muslim lives.

INTRODUCTION

In early 2001, I wrote a clemency brief arguing, on Islamic law grounds, that a young Nigerian woman, Bariya Ibrahim Magazu, should not be lashed for the Quranically-defined crime of *zina* (extramarital sex).¹ A week before the scheduled punishment, while appeals were still pending and before the clemency brief was submitted, the state of Zamfara unexpectedly carried out the lashing of Bariya Magazu, apparently as a direct response to the international pressure that had mobilized to prevent it.² A variety of international rights groups had opposed the punishment by, among other things, depicting the *zina* laws of Nigeria—and Islamic law generally—as anathema to human rights and women’s rights in particular, often doing so in a rigid and condemning tone.³ The approach did not work: in his acceleration of Magazu’s punishment, the

* Assistant Professor, University of Wisconsin Law School. This article draws inspiration from several sources, among them Kimberlé Crenshaw’s “Intersectionalities” course at Columbia Law School and her comments on a paper I wrote in the late 1990s, as well as comments from several University of Wisconsin audiences in the late 2000s, such as the Transnational Feminism Series and the Feminist Seminar. Thank you to Aili Tripp and all the organizers and participants in those events. I am also indebted to several individuals for their specialized feedback on an earlier draft of this paper. They include: Laila Al-Marayati, Andy Coan, Anver Emon, Sarah Eltantawi, Yasmeen Hassan, Mohja Kahf, Farah Michelle Kimball, Tamir Moustafa, Kristen Stilt, and Intisar Rabb, among others. My sincere thanks to all.

¹ See Asifa Quraishi, *Islamic Legal Analysis of Zina Punishment of Bariya Ibrahim Magazu, Zamfara, Nigeria*, MUSLIM WOMEN’S LEAGUE (Jan. 20, 2001), http://www.mwlsa.org/topics/marriage&divorce/islamic_legal_analysis_of_zina.htm.

² Ayesha Imam & Sindi Medar-Gould, *Open Letter from BAOBAB for Women’s Human Rights*, AFRICA ACTION: AFRICA POLICY E-JOURNAL (May 2, 2003), available at http://www.africa.upenn.edu/Urgent_Action/apic-050203.html (noting that execution of the sentence was “not despite national and international pressure; it was deliberately to defy it”).

³ See Nina Khouri, *Human Rights and Islam Lessons from Amina Lawal and Mukhtar Mai*, 8 GEO. J. GENDER & L. 93, 98 (2007) (describing portrayals of Islamic legal system as having no regard for human rights protections, describing punishments as cruel and unusual, and the *sharia* system as one rooted in a civilization that discriminates against women, depicting their “daily struggles against sexist regimes”).

governor of Zamfara specifically stated that he did so in order to flout these forces opposing Islamic law.⁴

I am concerned about this dynamic. In my years working both as a scholar and activist in the field of Islamic law and women, I have observed that when *sharia*-based legislation is opposed as contrary to international rights norms, such opposition often triggers an almost knee-jerk reaction among many Muslims to fiercely defend these laws as if they were defending their religion itself against a crusade-like attack. This can occur even when the laws themselves contradict established Islamic legal doctrine.⁵ Thus, it is common to see governments of Muslim-majority countries making *sharia*-based reservations to international rights documents such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).⁶ Influential Muslim leaders and scholars have been publicly disdainful of international conferences devoted to women's rights, such as the United Nations World Conference on Women,⁷ and at home, Islamically-oriented non-

⁴ See Imam & Medar-Gould, *supra* note 2.

⁵ This was one of the motivations for my Islamic critique of the *zina* laws in Pakistan. See Asifa Quraishi, *Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective*, 18 MICH. J. INT'L L. 287 (1997) [hereinafter Quraishi, *Her Honor*] (explaining how Pakistan's *Hudood Ordinance*, as written, contradicted the established *fiqh* regarding rape).

⁶ Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature Mar. 1 1980, 19 I.L.M. 33 (entered into force Sept. 3, 1981) [hereinafter CEDAW]. For a discussion of Muslim countries reservations to CEDAW, see Abdul Ghafur Hamid, *Reservations to CEDAW and the Implementation of Islamic Family Law: Issues and Challenges*, 1 ASIAN J. INT'L L. 121 (2006).

⁷ See *Middle East Women: Clerics Resist Beijing Conference*, IPS-TERRA VIVA BEIJING +15 (Aug. 31, 1995), www.ips.org/TV/beijing15/middle-east-women-clerics-resist-beijing-conference/. I observed this phenomenon first hand when I attended the Fourth World Conference on Women in Beijing in 1995, where I served as a delegate of the Muslim Women's League and Karamah: Muslim Women Lawyers for Human Rights. See KARAMARAH, <http://www.karamah.org/ABOUT/tabid/76/language/cn-US/Default.aspx> (last visited Oct. 16, 2011) (providing background on the organization); *Muslim Women's League in Beijing: United Nations Fourth World Conference on Women*, MUSLIM WOMEN'S LEAGUE, <http://www.mwusa.org/activities/beijing.html> (last visited Oct. 16, 2011) (providing documents pertaining to the Beijing Conference).

governmental organizations (NGOs) and political parties in Muslim-majority countries often lobby against women's rights activism in their own countries as if such activism were an attack on Islam. In response, those involved in global women's rights work often advocate that international rights norms should always trump *sharia*-based rules whenever a conflict appears.

I have observed that feminist advocacy strategies that situate themselves in opposition to *sharia* ultimately contribute to the presumed existence of this false dichotomy: one can be either "pro-Islam" or "pro-women," but not both. I believe that this imagined opposition between women's rights and *sharia* is not only unnecessary, but also counterproductive for both feminist actors⁸ and Islamically-minded political activists.⁹ I suggest that there is a better strategy for transnational feminist work for Muslim women. But my proposal requires a significant paradigm shift. Specifically, I ask internationally-active women's rights advocates, especially those in or from the west,¹⁰ to eliminate any reference to Islamic law (positive or negative) from their advocacy and international pressure campaigns. I make this request both as a feminist and as a Muslim. In my

⁸ Of course, feminism is a broad term, and there are many different types of feminists. For shorthand purposes only I use the term here to mean advocacy for women's rights generally, without specific details as to positions on particular issues. The primary issue addressed in this article—attitudes about *sharia* by mostly western-based advocates for women's rights—are equally relevant to a range of western feminists, regardless of their particular positions on a given topic.

⁹ Like feminists, Islamic activists are not monolithic, but exist in a variety of types with a wide range of goals. What I mean by *Islamic political activist* here is anyone working for the political and/or legal recognition of Islamic law in some form by a government constituted according to *sharia* principles of legitimate government. Even that description covers a wide swath of groups and movements, but it is conceptually narrow enough for my present purposes.

¹⁰ The terms *west* and *western*, of course, are imperfect. They are especially problematic in an article about Islam and Muslims because they are often used in opposition to each other, in a clash of civilizations sort of way. Muslim and western are obviously not mutually exclusive categories, most vividly illustrated by the significant population of American Muslims, to which I myself belong. Nevertheless, finding myself at a loss for a useful alternative adjective, I reluctantly use the term *western* to describe the type of women's rights activists central to the discourses described here, and hope the reader will forgive the over- and under-inclusiveness of the term.

observation, the presumed conflict between women's rights and *sharia* may have ultimately brought more harm than good to the women (like Bariya Magazu) that women's rights advocates seek to help.¹¹ I believe that a simple but serious change in the way these advocates address Islamic law would go a long way toward breaking this destructive pattern.

In this article, I hope to explain why this change is important. Part I will summarize some high profile *zina* prosecutions in Nigeria, especially highlighting the perspective of the local lawyers litigating these cases. These stories will illustrate how the current anti-*sharia* strategies have harmed the legal defenses of women being prosecuted for *zina*. In Part II, I will attempt to clarify what *sharia* is, for those readers who may not know much about it. As a further illustration, Part II includes a discussion of *sharia*-based women's rights advocacy in a variety of forms, including the use of strategies different from those familiar to secular feminists. Part III will give some historical context to the heated nature of western attitudes about *sharia* today, especially regarding women, by surveying the very old colonialist roots of the feminism vs. Islam paradigm. In contrast to all this, I present my proposal in Part IV. Here, I explain why no comment about *sharia* from international women's rights advocates would be better than the anti-*sharia* positions currently taken, given the charged political and social climate in which all activists for Muslim women's rights must operate. I end with a footnote on the veil, requesting that both sides let go of their overuse of and reliance upon this largely misleading symbol.

I. Why Bariya Got Lashed, and Other Stories

Over the last several decades, many countries with large

¹¹ I realize that global feminist strategies attacking Islamic law may have brought some relief to some Muslim women. But even if just one woman was lashed *because* of these strategies, I believe that is cause enough for a pause to consider whether there are other ways of accomplishing the same goals without causing this collateral damage. Moreover, I believe that there is harm beyond the specific backfire cases like Bariya Magazu: That is, I believe the pro-women vs. pro-Islam polarity has made it incredibly difficult for Muslims who work for women's rights from within an Islamic framework. See *infra* Part II.A. This phenomenon itself has seriously harmed the overall cause of Muslim women's empowerment.

Muslim populations have added provisions to their criminal codes derived from Islamic criminal law.¹² The new criminal codes criminalize some or all of the *hudood* crimes (crimes specifically addressed in the *Quran*), the most famous of these being *zina* (extra-marital sex). The *Quran* establishes *zina* as a punishable crime, but simultaneously creates a very high standard of proof for *zina* prosecutions: four eyewitnesses to the act of sexual intercourse.¹³ All but one of the many schools of

¹² These include Iran (following the 1979 Islamic Revolution), Pakistan (in the late 1970s), Malaysia, and Nigeria (beginning with Zamfara State in 1999, then the states of Kano, Niger, Sokoto, Jigawa, Borno, Yobe, Kaduna and Katsina). See PHILIP OSTIEN, *SHARIA IMPLEMENTATION IN NORTHERN NIGERIA 1999–2006: A SOURCEBOOK* (2007).

There is a great deal of literature and speculation on the reasons behind this legislation—far too much for me to summarize here. But I believe it is important to note at least that this Islamic-inspired lawmaking activity cannot be explained by simply pointing to increased Muslim religious extremism in these countries. Other factors include: ethnic identity politics (including residual influences of colonial favoritism), Christian missionary efforts, official corruption and the idea that Islam can check these injustices, the political power of religious rhetoric in general, socio-economic alliances, and the association of secularism with European/Western imperialism. See, e.g., Rhoda E. Howard-Hassmann, *The Flogging of Bariya Magazu: Nigerian Politics, Canadian Pressures, and Women's and Children's Rights*, 3 J. HUMAN RTS. 3, 12 (2004) (noting that Christian-Muslim conflicts in hitherto religiously tolerant Nigeria began in the 1980s, emerging in part from “the historic ethnic and regional splits in Nigeria, a federation created by British fiat at the time of decolonization,” and that “the current religio-political conflict in Nigeria . . . is in part a result of British colonial policies”).

¹³ See Quraishi, *Her Honor*, *supra* note 5. Moreover, if there are less than four witnesses, then the remaining witnesses are themselves punished for slander. This obviously makes it virtually impossible for a *zina* conviction to result from a criminal prosecution. That is why for apparently most of Islamic history *zina* punishments resulted only from voluntary confessions (by those seeking worldly expulsion of the sin before facing punishment in the afterlife), rather than criminal prosecution of an unwilling defendant.

Islamic law¹⁴ require four witnesses as the exclusive method of proving a *zina* case in court, making it virtually impossible for any case to actually be prosecuted. The Maliki school, however, allows unwed pregnancy to constitute a *prima facie* case for *zina*.¹⁵ This Maliki rule creates an unfair situation in which a woman can be prosecuted for *zina* merely for being pregnant and unmarried, while her male sexual partner can escape investigation entirely. The Maliki school dominates in Africa, making this minority position relevant in Nigeria in a different way than it is in, say, Pakistan, where the population is largely Hanafi.

The *hudood* laws in Pakistan and Nigeria have received widespread international attention due to some highly-publicized *zina* prosecutions in those countries. The case of Bariya Ibrahim

¹⁴ Islamic law is not a monolithic code; it is made up of several different schools of law, each with its own interpretive method and collected doctrine, often disagreeing with each other in significant ways. *Zina* evidence is just one example of the many significant real world impacts these inter-school disagreements can have. For more on these schools' interpretive methods, with a comparison to interpretive divergence in United States constitutional law, see Asifa Quraishi, *Interpreting the Quran and the Constitution: Similarities in the Use of Text, Tradition and Reason in Islamic and American Jurisprudence*, 28 CARDOZO L. REV. 67 (2006).

¹⁵ The Malikis do acknowledge that there are other ways besides *zina* that someone could end up pregnant outside of marriage, rape being the primary example. Under Maliki law, therefore, the *prima facie* case can be rebutted by counter-evidence (for example, coercion), thereby eliminating *mens rea*. The non-Maliki schools disagree with this shifting of the burden of proof to the female defendant. They insist that using unwed pregnancy as evidence of *zina* is akin to punishing someone for wine-drinking (*shurub al-khamr*, another of the *Quranic hudood* crimes) based only on observation of that person walking around drunk. This would be wrong, say the non-Maliki jurists, because *shurub al-khamr* is not the crime of *being drunk*, but rather, of voluntarily drinking. Thus, non-Malikis insist that the circumstantial evidence of unwed pregnancy cannot be used as even *prima facie* evidence of *zina*. See 8 MUHAMMAD IBN QUDDAMAH AL-MAQDISI, AL-MUGHNI 'ALA MUKHTASAR AL-KHARAQI [THE ENRICHING (COMMENTARY) ON KHARAQI'S COMPENDIUM] 129, 145 (Dar al-Kutub al-'Ilmiyyah 1994) (1994) (stating Hanafi and Shafi'i schools of thought hold that pregnancy alone does not constitute sufficient evidence for punishment of *zina*, but noting that the Maliki school of thought presumes punishment unless there are signs of coercion).

Magazu, a pregnant unmarried teenager¹⁶ in Nigeria's Zamfara state, was the first of these high-profile cases. The facts are as follows: Sometime in 1999, local police noticed that young Bariya Magazu was pregnant and reported her to authorities in her village. A *zina* prosecution soon followed. Bariya's defense was that she was raped—that she had been coerced into having sex with three male acquaintances of her father.¹⁷ The judge did not believe her. In September of 2000, she was convicted of *zina* and sentenced to 100 lashes by the Higher Sharia Court of Tsafe, in Zamfara Province.¹⁸ Execution of the punishment was scheduled for January 27, 2001 (following the Islamic legal waiting period of at least forty days after the birth of the baby, which in this case was mid-December, 2000). Although Bariya Magazu was initially denied a right of appeal, her lawyers eventually arranged leave to appeal to the Upper Sharia Court in Gusau on January 9, 2001, with assurances from officials that the flogging would be postponed indefinitely pending the result of that appeal.¹⁹

¹⁶ It is unclear exactly how old she was at the time. Reports range from between thirteen and seventeen years old.

¹⁷ The factual details leading to Bariya's pregnancy remain uncertain. There were some reports that Bariya's father owed these men money, implying that her rape was some sort of violent debt collection, but this story has not been wholly corroborated. There are also some indications that Bariya Magazu became pregnant from a boyfriend, corroborating with some local gossip about a man who had left his wife to pursue a romantic relationship with Bariya. It appears unlikely that the whole story will ever be conclusively established. See Stephanie Nolen, *The Twisted Tale of Bariya Magazu*, GLOBE & MAIL, Jan. 20, 2001, at A12 (describing various versions of Bariya Magazu's story gathered from in-person research in Nigeria, including under-reported facts such as the rarity of a seventeen-year-old girl remaining single in a village where nearly everyone weds at fifteen).

¹⁸ Her punishment initially also included another eighty lashes for slander (of the men she named as coercing her) but this was later repealed, apparently because she withdrew the rape accusation. See Ivan Watson, *Nigerian Teen Mother Fears Lashing*, TORONTO STAR, Jan. 14, 2001 (reporting Zamfara State's chief judicial registrar, Muhammed Tukur Anka, reduced Magazu's sentence to one-hundred lashes).

¹⁹ See *Women's Group Tackles Zamfara Governor*, AFRICA NEWS, Apr. 23, 2001 (describing involvement of the non-governmental organization BAOBAB, a Nigerian women's rights organization, in initiating an appeal in Bariya Magazu's case).

Meanwhile, the case sparked international surprise and condemnation, especially in the west, and for some reason most especially in Canada. A wide variety of organizations ranging from Amnesty International and the Feminist Majority to the Canadian Presbyterian Church appealed to their members to write to Nigerian authorities to save Bariya Magazu from this sentence.²⁰ Canadian press attention was especially intense,²¹ and the Canadian government itself made several official requests to Nigeria in the matter.²² Most of the international appeals centered on the premise that the sentence conflicted with international human rights norms, most especially prohibitions on corporal punishment and torture. For example, the Canadian High Commissioner to Nigeria, Ian Ferguson, filed a formal complaint with the Nigerian government, asserting that "corporal punishment on a young woman who is seventeen

²⁰ See *Amnesty International Appeal for Bariya Magazu*, NIGER DELTA CONGRESS, available at www.nigerdeltacongress.com/articles/amnesty_international_apcal_for.htm (last visited Oct. 16, 2011) [hereinafter *Amnesty Int'l Appeal*]; *Nigerian Girl Scheduled to Be Flogged Jan. 27: Take Action!*, MS. MAGAZINE, Jan. 12, 2001, available at <http://www.msmagazine.com/news/uswirestory.asp?id=5228>; *Flogging of Bariya Magazu: Urgent Action Message from Inter-Church Coalition on Africa*, THE PRESBYTERIAN CHURCH IN CANADA, <http://www.presbyterian.ca/ministry/justice/urgentactions/urgentactionsarchives/bariya2> (last visited Oct. 16, 2011) (asserting that overturning the sentence "will demonstrate that Nigeria is continuing to take its place among the community of civilized nations").

²¹ See David Jeffers, *The Borders of Compassion: The Canadian Imaginary and Its External Others*, 25 INT'L J. CANADIAN STUD. 43 (2002) ("In the six weeks between reporter Stephanie Nolen's first report and the flogging of Magazu in late January 2001, there was nearly daily coverage of the story in the Canadian national newspaper, The Globe and Mail. Canadian coverage of the story of Bariya Ibrahim Magazu's trial and punishment is remarkable in terms of its intensity. Magazu's experience is by no means uncommon; yet her story captured the imagination of the Canadian media and a large segment of the Canadian public for nearly two months.").

²² See Stephanie Nolen, *Nigerians try to halt girl's flogging*, GLOBE & MAIL, Jan. 10, 2001 (Quoting Canadian Foreign Affairs Minister John Manley: "The Nigerian case is an appalling case, and I think Canadians are quite disturbed by it. We've made a number of representations to the Nigerian government. We've asked them to respect their own commitments to the universal declaration of human rights, and we hope we're being heard.").

would be an abuse of international human rights standards.”²³ Many emphasized that flogging itself is inherently cruel and inhumane, and therefore a human rights violation.²⁴ It was only a small jump from this assertion to direct condemnations of Islamic law itself, given that flogging is directly mentioned in the Quranic verses on *zina*. Thus, demands that Zamfara officials comply with international human rights norms in Bariya Magazu’s case were often accompanied by assertions that *sharia* is barbaric and incompatible with contemporary human rights

²³ See *Morning Edition: Controversy over the Strict Sentence Handed Down to a Nigerian Girl for Having a Child out of Wedlock*, (NPR radio broadcast Jan. 17, 2001) [hereinafter *Controversy*].

²⁴ See, e.g., Osita Nnamani Ogbu, *Punishments in Islamic Criminal Law as Antithetical to Human Dignity: The Nigerian Experience*, 9 J. INT’L HUM. RTS. 165 (2005) (arguing that *sharia* criminal laws implemented in Nigeria, including corporal punishment, death by stoning, lashing, caning, amputation of hand or leg or both, and heavy fines “constitute a violation of the right to human dignity which is guaranteed by the 1999 Constitution of Nigeria and international human right instruments to which Nigeria is a party”). Press Release, Amnesty Int’l & BAOBAB for Women’s Human, Joint Statement on the Implementation of New Sharia-based Penal Codes in Northern Nigeria, AI Index: AFR 44/008/2002 (March 25, 2002) (listing, among their concerns regarding the extension of Sharia law, “[c]ruel, inhuman and degrading punishments,” “punishments such as stoning, flogging or amputation are considered cruel, inhuman and degrading treatment by international human rights standards”). This statement was issued after the conclusion of the Bariya Magazu case, but it specifically cites that case as an inspiration for the points asserted therein.

It is worth noting that Amnesty’s International’s initial appeal for Bariya Magazu, on the other hand, was careful not to cite international human rights violations as the basis for the appeal in part because “Zamfara State authorities have reportedly said they are unwilling to respond to appeals from human rights groups but that they are open to arguments based on Islamic law made through the courts.” *Amnesty Int’l Appeal*, *supra* note 20. This acknowledgement displays an insightful awareness of the limitations of international human rights activism, although the caution seems not to have been appreciated by many who raced to action in response to this appeal.

norms.²⁵

All of this became layered with gender-specific critiques of Magazu's sentence, which were generally of two types. On the one hand, these appeals emphasized the obvious and egregious injustice of punishing the victim of an apparently financially-motivated gang rape (and with such a harsh form of punishment), and portrayed Bariya Magazu as a helpless victim of a barbaric legal culture that dehumanizes women.²⁶ Simultaneously, rather than focus on the rape element of Magazu's story, some appeals chose instead to advocate for the decriminalization of extra-marital sex generally. These arguments insisted that flogging a teenager for engaging in premarital sex is itself a violation of a right to personal

²⁵ David Jeffers illustrates this association by tracing the presentation of Bariya Magazu's case in the Canadian media.

In one editorial, under the banner '180 lashes in Nigeria,' THE GLOBE uses images of the savage Other: the case 'reck(s) of injustice and barbarity,' and the reading of *sharia* is so 'extreme' that it seems 'closer to the spirit of witch-hunts and the Inquisition.' Under the banner 'Barbarity in Nigeria,' another editorial refers to the international protest as being 'spearheaded' by Canada, the flogging sentence is attributed to conservative Muslims' and is characterized as "barbarous," "repugnant" and "uncivilized."

Jeffers, *supra* note 21.

²⁶ See, e.g., MS. MAGAZINE, *supra* note 20 (quoting Eleanor Smeal, President of Feminist Majority Foundation: "These are very sad times when the world enters the year 2001 and women are still forced to live under draconian laws.").

autonomy and an affront to women's sexual freedom.²⁷

It is important to note that the first argument—that a rape victim should not be punished for *zina*—is also the unanimous position of all schools of Islamic law. This argument therefore can—and does—have a great deal of resonance with Muslims around the world who also recoil at the idea of prosecuting a rape victim for *zina*. Advocating sexual freedom for teenage girls, on the other hand, is much less likely to gain wide support within Muslim populations, due to strong Muslim norms about sexual relations and marriage. Therefore, it was counter-productive for international feminist advocates to combine the sexual freedom argument with the rape argument when lobbying for Bariya Magazu. Rather than emphasizing the injustice of *zina* prosecutions of rape victims (a position with which there is widespread Muslim agreement), western-led international advocacy that included an insistence on condoning premarital sex instead alienated most Muslim audiences (including potential allies), and appeared to many Muslims to be merely a pretext for western condemnation of Islamic law and intrusion

²⁷ See, e.g., *Nigeria: Woman Sentenced to Death under Sharia*, HUMAN RIGHTS WATCH NEWS, Oct. 23, 2001, available at www.hrw.org/en/news/2001/10/23/nigeria-woman-sentenced-death-under-sharia (quoting LaShawn R. Jefferson, executive director, Human Rights Watch Women's Rights Division: "Women have a basic right to control their sexual autonomy When a woman is punished so severely for having pre-marital sex, her right to make free decisions regarding her body is violated."). See also Howard-Hassmann, *supra* note 12, at 7 ("Canadians dismissed as entirely irrelevant the question of how Bariya had become pregnant. To them, it made no difference whether she had been raped (for which, under Muslim law, her rapist should have been punished) or had agreed to have sexual relations (for which, under Muslim law, she and her male partner should have been punished). Instead, they argued that although this might be a moral issue in some Muslims' eyes, it was hardly an issue for the courts."). For similar arguments made following the later *zina* case of Amina Lawal, see Amnesty Int'l, *Nigeria: Amina Lawal's death sentence quashed at last but questions remain about discriminatory legislation*, AI Index AFR 44/032/2003 (Sept. 25, 2003) ("Consensual sexual relations outside marriage between adults are not recognizable criminal offences under emerging international human rights standards Charging and detaining women for sexual relations violates their right to free expression and association, freedom from discrimination, and the right to privacy. Amnesty International continues the campaign to call for the abolition of all discriminatory laws and opposes the criminalization of consensual sexual activity between adults in private and the imprisonment of anyone solely on that basis.").

into Muslim values generally.²⁸

It should not be a surprise, then, that international appeals for Bariya Magazu were not welcomed by authorities in Zamfara. To the contrary, Zamfara officials responded by standing on principle, stating that they would not be pushed into compromising their newly-enacted *sharia* code. "We will not be intimidated by any human rights group," said a Zamfara spokesperson when asked about Bariya's flogging.²⁹ The firmness of the response was accompanied by the sentiment that Muslims and the religion of Islam itself must be defended from outside attack. This attitude was illustrated in the comments of Zamfara governor Ahmed Sani Yerima in a radio interview: "Look, are they saying that there shouldn't be justice? As far as we Muslims are concerned, this is justice. No amount of planning, no amount of pressure, no amount of tactics or whatever can make a Muslim change his attitude towards his religion."³⁰ It was also reported that Governor Sani Yerima turned down requests for executive clemency specifically "on

²⁸ See Howard-Hassman, *supra* note 12 ("In the eyes of the Muslim Court, the Canadians who tried to persuade the authorities in Zamfara not to flog Bariya Magazu condoned pre-marital sexual relations Canadians did not agree that Bariya should be punished in any way for being pregnant out of wedlock. In this, they reflected a worldview now prevalent in Canada, that issues of sexuality such as adultery, pre-marital sex, even homosexuality, are strictly private matters, of no interest to society as a whole and not of any concern to the courts. Thus it appears that in the eyes of some Zamfara Muslims, Canadians possessed no sense of moral rectitude: they inhabited an 'anything goes' sexual universe in which young girls had sexual relationships without considering any religious or social strictures on their actions."). Sam Amadi provides further elaboration of this ideological disconnect. See SAM AMADI, CARR CENTER FOR HUMAN RIGHTS POL'Y, RELIGION AND SECULAR CONSTITUTION: HUMAN RIGHTS AND THE CHALLENGE OF SHARIA (2004), available at <http://www.hks.harvard.edu/cchrp/pdf/Amadi.pdf>. Says Amadi, to frame the key issue as one of sexual autonomy "is to step into a crisis": "First it invokes the problem of different conceptions of the good. Secondly it abstracts from the questions of power and sociological dialectics behind the implementation of Sharia." *Id.* at 35.

²⁹ Stephanie Nolen & Murray Cambell, *Nigerian Girl Flogged*, GLOBE & MAIL, Jan. 23, 2001, at C (quoting Bashir Sande, spokesman for Zamfara state governor Ahmed Sani).

³⁰ See *Controversy*, *supra* note 24 (featuring audio of Governor Sani Yerima).

the grounds that this would be detrimental to Islam.”³¹

In other words, the debate in Nigeria surrounding Bariya’s case quickly polarized into a “pro-Islam” versus “pro-rights” (and often specifically “pro-women’s rights”) fight.³² The consequences of this polarity became even more serious when Governor Sani Yerima declared that he would ignore all human rights-based appeals for clemency, yet would be “willing to consider arguments made from the point of [view of] Muslim laws.”³³

It is this suggestion that brought Bariya Magazu’s case to my attention. Because I had previously written an Islamically-based critique of the *zina* laws in Pakistan,³⁴ I was approached

³¹ BAOBAB FOR WOMEN’S HUMAN RIGHTS, SHARIA IMPLEMENTATION IN NIGERIA: THE JOURNEY SO FAR 11 (2003), available at www.baobabwomen.org (reporting this as the Governor’s response when members of BAOBAB met in person with the Governor to ask for executive clemency for Bariya Magazu).

³² The pervasiveness of this polarity is evident in the “anti-Islam” attacks directed even at Muslim scholars who argued—on the basis of Islamic analyses—against the way *zina* punishments are carried out in some Nigerian states. For example, Nigerian Islamic scholar Sanusi Lamido Sanusi, after explaining why state implementation of the *hudood* punishments is a tragic misapplication of Islamic law, elaborates his frustration that his interventions “never seem to be read with an honest mind” and that likely he will receive attacks and accusations of being an “enemy of Islam” or an “enemy of shariah” by “the true believers.” Sanusi Lamido Sanusi, *Amina Lawal: Sex, Pregnancy and Muslim Law*, NIGER DELTA CONGRESS (Sept. 2002), available at www.nigerdeltacongrcss.com/articles/amina_lawal.htm (concluding with a declaration that he will “continue resisting the temptation to defend [him]self against diversionary personal attacks while focusing on the objective of educating Muslims about the abuse of their religion in the hands of ignorant people”).

³³ BAOBAB FOR WOMEN’S HUMAN RIGHTS, *supra* note 31, at 11 (“The Governor also dismissed letters and protests from human rights groups (especially from the global North) as these are neither Muslim groups nor their protests based on Muslim laws, and therefore those groups were not qualified to comment on sharia issues. However, the governor agreed that he would be willing to consider arguments made from the point of Muslim laws.”). BAOBAB then, in preparing legal assistance for an appeal for Bariya Magazu, “sent out an appeal around the Muslim world requesting information and arguments in Muslim Laws on Zina” and received a strong response, enabling BAOBAB to include a strong Islamic law basis for the appeal. *Id.* at 11.

³⁴ See Quraishi, *Her Honor*, *supra* note 5.

by an international coalition of Muslim activists seeking to answer the challenge presented by Governor Sani Yerima. The goal was to present a convincing case for lifting Bariya Magazu's sentence based exclusively on established Islamic law. The task was complicated by the fact that the Maliki school of Islamic law is the predominant school in most of Africa. The Maliki school is the only school of Islamic law which allows prosecutions of *zina* to be based solely on the fact of an unwed pregnancy,³⁵ although Maliki law does leave some room for mitigating the harshness of this evidentiary rule. Specifically, unwed pregnancy establishes only a *prima facie* case for *zina*; it is rebuttable by contrary evidence, such as rape, mistake (of the fact of marriage), or indeed any element of doubt.³⁶ In Bariya's case, it turns out, there appeared to be several bases upon which rebuttals could be made, the most important being her claim of coercion, which alone should have ended a *zina* prosecution under classical Maliki law. As I undertook the project of writing out these and other arguments in a clemency brief, the coalition that had solicited my help drafted a cover letter to then-Governor Sani Yerima emphasizing that this was a specifically Muslim-voiced appeal for executive clemency.³⁷ The documents were finalized just before the scheduled date of punishment, but unfortunately we will never know whether our effort could have saved Bariya from it, because Governor Sani Yerima surprised the world by quietly and quickly carrying out Bariya Magazu's

³⁵ See citations and accompanying text, *supra* note 14.

³⁶ Alleviating *hudood* punishments if there is any evidence of doubt is, in fact, common to all schools of Islamic law. Indeed, it is one of the legal maxims centrally important in Islamic jurisprudence. See Intisar A. Rabb, *Islamic Legal Maxims as Substantive Canons of Construction: Hudud-Avoidance in Cases of Doubt*, 17 ISLAMIC L. & SOC'Y 63 (2010).

³⁷ My brief can be found online. Asifa Quraishi, *Islamic Legal Analysis of Zina Punishment of Bariya Ibrahim Magazu, Zamfara, Nigeria*, MUSLIM WOMEN'S LEAGUE (Jan. 20, 2011), www.mwlsa.org/topics/marriage&divorce/islamic_legal_analysis_of_zina.htm. The cover letter (redrafted in consideration of the flogging having already been carried out) is also online. *The Draft of a Letter Sent to the Governor of Zamfara, Nigeria About the Adultery Case*, MUSLIM WOMEN'S LEAGUE (Feb. 12, 2001), <http://www.mwlsa.org/news/governornigeria.htm>.

punishment one week early.³⁸

The resulting shock and disappointment felt by Bariya Magazu's legal team (who were simultaneously preparing her appeal³⁹) was intensified by the realization that the extra-legal acceleration of her sentence happened precisely *because of* (not in spite of) the international pressure that had sought to help Bariya Magazu. That is, Governor Sani Yerima apparently personally ordered the early lashing in large part because of his worry that "an appeal would be successful, or that public outcry would prompt the Nigerian [federal] government to intervene."⁴⁰

The governor's rash action illustrates the dangerous consequences that can result when international rights campaigns are inattentive to local realities, especially religiously-charged ones. As Ayesha Imam, Director of Baobab for Women's Rights⁴¹ (the organization leading the Magazu appeal) emphasized,

Ms. Magazu's sentence was quite illegally brought forward with no notice, despite the

³⁸ The flogging was scheduled for January 27, 2001, but many believed it would soon be further postponed, due to the pending appeals. Remi Oyo, *Rights-Nigeria: Caning of Teenager Delayed, for at Least a Year*, IPS-INTER PRESS SERVICE/GLOBAL INFORMATION NETWORK, Jan. 15, 2001. Instead, Bariya Magazu was lashed on January 19, 2001, in front of a few hundred people gathered in a dirt clearing in front of the courthouse in Tsafe, Zamfara, Nigeria. Nolen & Campbell, *supra* note 29.

³⁹ Nolen & Campbell, *supra* note 29 (reporting that a BAOBAB lawyer who went to the Tsafe courthouse to pick up trial records for use in the appeal was told nothing of the caning that had just taken place; quoting Ayesha Imam of Baobab: "We are completely shocked and stunned . . . [t]his has very bad implications for law enforcement in Zamfara and it leaves a bad taste in the mouth of anyone arguing that sharia [Islamic law] can be implemented fairly.").

⁴⁰ Stephanie Nolen, *Nigerian Activists Rally in Wake of Teen's Caning*, GLOBE & MAIL, Jan. 27, 2001, at A22.

⁴¹ BAOBAB for Women's Human Rights is a Lagos-based advocacy organization for women's rights, and, among other things, has been involved in the defense of several women charged with *zina* in Nigeria. *Herstory*, BAOBAB FOR WOMEN'S HUMAN RIGHTS, www.baobabwomen.org/history.htm (last visited Oct. 16, 2011).

earlier assurance of the trial judge that the sentence would not be carried out for at least a year... The extra-legal carrying out of the sentence was not despite national and international pressure; it was deliberately to defy it. . . . Thus, we would like you to recognize that an international protest letter campaign is not necessarily the most productive way to act in every situation. On the contrary, women's rights defenders should assess potential backlash effects before devising strategies.⁴²

Making a similar point, Canadian human rights scholar Rhoda Howard-Hassmann, focusing on the particularly intense Canadian interest in Bariya Magazu's case, has asserted that "[r]esentment of Canadians' interference may have pushed the authorities of Zamfara to take more precipitate action than they might have taken, had their only criticism come from fellow Muslims or fellow Nigerians."⁴³

Bariya Magazu's case is not the only *zina* prosecution to

⁴² See Imam & Medar-Gould, *supra* note 2.

⁴³ See Howard-Hassman, *supra* note 12, at 5 ("Although motivated only by compassion for the victims of human rights abuses, foreigners who try to protect those rights are seen as cultural imperialists, introducing decadent values and undermining local moral codes. . . . What Canadians saw as benign, universalistic acts to protect Bariya Magazu were interpreted as a conspiracy against the culture and laws of the state of Zamfara.").

make international headlines. The case of Amina Lawal⁴⁴ triggered one of the largest, most intense letter-writing campaigns in the world.⁴⁵ Lawal's conviction for *zina* on March 22, 2002, in the Nigerian state of Katsina, placed the *hudood* laws under particularly intense public scrutiny because it carried a death sentence by stoning.⁴⁶ The idea that a woman might be stoned to death for having a child outside of marriage grabbed headlines around the world, especially in the west. Pictures of Lawal and her infant daughter featured prominently in bulletins of concerned organizations like Amnesty International, Human Rights Watch, the National Organization of Women (NOW), the African National Congress Women's League, and many others. Internet petitions titled "Save Amina Lawal" went viral, repeatedly circling through inboxes and websites around the

⁴⁴ Contemporary to Amina Lawal, there was also Safiyatu Hussaini, sentenced to death for *zina* in 2002. Her case did not rise to the same level of international prominence as Amina Lawal because she was rather quickly acquitted on technical grounds. See Pernille Ironside, *Reconciling Rights and Obligations: an Examination of Shari'a Penal Reform in Northern Nigeria*, 20 AM. J. ISLAMIC SOC. SCI. 140, 146 (2003). See also Aliyu Musa Yawuri, *On Defending Safiyatu Hussaini and Amina Lawal*, in SHARIA IMPLEMENTATION IN NORTHERN NIGERIA (Phillip Ostien ed., 2007) (commenting that, although the acquittal was based on procedural errors, the Safiyatu Hussaini acquittal nevertheless "set excellent precedents for any future *zina* cases," including: (1) no third parties may initiate *zina* prosecution against another person; only the *zina* actor him/herself can submit him/herself for *zina* proceedings, (2) *zina* confessions may be retracted, and (3) the pregnancy of an unmarried woman divorced for less than five years will be deemed the result of sexual relations during the marriage, and not *zina*).

⁴⁵ Note, *Saving Amina Lawal: Human Rights Symbolism and the Dangers of Colonialism*, 117 HARV. L. REV. 2365, 2365 (2004) [hereinafter *Saving Amina Lawal*] (describing the "millions of concerned people" who signed "Save Amina Lawal" petitions and the thousands who wrote letters or made phone calls: "Ms. Lawal's case drew the attention of the international human rights community to Nigeria and its struggle with Islamic fundamentalism in a way that has overshadowed other problems in Nigeria—poverty, exploitation by oil companies, and the nation's difficult transition to democracy.").

⁴⁶ The harsher sentence for Amina Lawal as compared to Bariya Magazu (stoning rather than lashing) is due to a distinction in Islamic criminal law between *zina* committed by unmarried persons and *zina* committed by (currently or previously) married persons. The dominant opinion in all schools of Islamic law is that the punishment for the former is lashing, and for the latter, stoning. See RUDOLPH PETERS, *CRIME AND PUNISHMENT IN ISLAMIC LAW: THEORY AND PRACTICE FROM THE SIXTEENTH TO THE TWENTY-FIRST CENTURY* 61–64 (2005).

world.⁴⁷ NOW organized a protest outside the Nigerian embassy in the United States, and the International Committee Against Stoning held an international day of protest.⁴⁸ Amina Lawal's story was featured in European and American fashion magazines and on the Oprah Winfrey show.⁴⁹ Italy and Brazil offered her asylum, the French ambassador's wife drove nearly six hours to visit her in her remote village, and former President Clinton requested a pardon.⁵⁰ As David France put it, almost overnight, she became "the Muslim Rosa Parks," symbolizing the harshest

⁴⁷ The "Save Amina Lawal" internet appeal is a powerful illustration of how electronic petitions have become, in the words of Alison Jaggar, "a popular means by which Western feminists endeavor to 'save' women in other countries" by "often us[ing] sensational language to denounce some non-Western culture for its inhumane treatment of women and girls." Alison Jaggar, "Saving Amina": *Global Justice for Women and Intercultural Dialogue*, 19 ETHICS & INT'L AFF. 55 (2005). Some have pointed out the ineffectiveness of e-petitions in general, asserting that the reason for the "viral" nature of some online pleas is that they provide a easy way to feel that one is doing good, without actually having to do much more click a mouse—in a word, "slactivism." See Barbara Mikkelsen, *Internet Petitions*, SNOPEs (June 9, 2007), www.snopes.com/inboxer/petition/internet.asp.

⁴⁸ See *FMF And NOW Protest Woman's Death Sentence At Nigerian Embassy*, MS. MAGAZINE, Aug. 29, 2002, available at www.msmagazine.com/news/uswirestory.asp?id=6837; *Amina Lawal must be saved: A day of international protest to save Amina Lawal and to abolish stoning law*, INT'L COMM. AGAINST STONING (May 28, 2003), stopstoningnow.com/English/AllAction2705031.htm (listing rallies in the Hague, London, Berlin, Ankara, and Copenhagen).

⁴⁹ Oprah Winfrey devoted her entire one-hour show on October 4, 2002 to Amina Lawal's story. See *Amina Lawal's Case on M-Net*, ALLAFRICA GLOBAL MEDIA, Nov. 20, 2002, <http://allafrica.com/stories/200211200199.html> (reporting on an Oprah episode titled "Can We Save Amina Lawal's Life?").

⁵⁰ Luke Copping, *Clinton calls for Lawal pardon*, TIMES (LONDON), Sept. 28, 2002, at 46.

plight of women under *sharia* rule.⁵¹

But in all this fury, there was little evidence that western activists rallying to Amina Lawal's cause had incorporated strategy lessons from the Bariya Magazu story. Rather than carefully crafting their appeals to protect Amina from the sort of knee-jerk reaction that unjustly sped up Bariya's sentence, international pressure on behalf of Amina Lawal included the same anti-*sharia* tone and arguments, now amplified in intensity.⁵² One thing made it distinctively worse: a widely-circulated "Save Amina Lawal" petition contained serious errors, including mistakenly listing an appeal date as the date of

⁵¹ See David France, Amina Lawal: Center of the Storm (2004) (unpublished article), available at www.davidfrance.com/article.asp?ID=21 (describing Amina Lawal as an "instant international *cause celebre*"; quoting Isobel Coleman from the Council on Foreign Relations: "Amina was *huge*—I've never seen anything like this, I personally must have received somewhere between five and ten e-mails urging me to try to help save Amina Lawal. That's got to be a record.").

In addition, several contestants of the Miss World beauty contest, to be held in Nigeria in 2002, pulled out of the contest to protest against Amina Lawal's treatment. See, e.g., Hugh Dougherty, *Boycott of Miss World: Nine girls quit contest in protest at host nation's plan to stone "adulteress."* EVENING STANDARD (LONDON), Nov. 5, 2002.

⁵² See Ayesha Imam, Presentation at launch of Global Stop Killing and Stoning Women Campaign entitled "Stopping Stoning Women in Nigeria: Half Way There?" (Nov. 26, 2007), available at www.wemc.com.hk/web/Dec_07/3_Ayesha%20Imam.ppt (describing international petitions in Lawal's case as examples of "what did not help" because "the language of the petitions assumed the 'cruel,' 'inhuman,' and 'barbaric' punishments of Islamic law and 'inherent misogyny' of Islam," which "helps fuel defensiveness and backlashes in Muslim communities"). Commentators picking up the story in local western news were often directly disdainful, with intense and condescending condemnations of *sharia* as inhumane and barbaric. See, e.g., Editorial, *Where's the Islamic Outrage?*, CHI. TRIB., Aug. 22, 2002, at N18 ("Aside from its medieval barbarism, Shariah carries an equally abhorrent streak of sexism."); Jules Elder, Editorial, *World Pleads for Mom; Nigerian Woman Faces Death By Stoning*, TORONTO SUN, Sept. 1, 2003, at 15 ("I find it troubling that any country would condone such a barbaric act as death by stoning. And to do so because a woman has given birth outside of marriage is discriminatory, unacceptable and outrageous."); Leonard Pitts, *Standing Up for Women's Rights Around the World*, CHI. TRIB., Oct. 19, 2004, at C23 ("I'm too stupefied by the thought that a society exists where such a barbaric sentence can be so selectively imposed. Stupefied, but not truly surprised.").

execution.⁵³ This injected a spirit of alarm and urgency into the existing intense international attention, exacerbating an already very volatile situation.⁵⁴ Nigerian politicians began vigorously defending Lawal's sentence, and Zamfara Governor Sani Yerima repeated his position that, while he welcomed "constructive criticism" of *sharia*, he denounced the "pressures and blackmail" that he perceived as trying to stop *sharia* altogether. "There is no stopping the *sharia*," he said, echoing the passions of many in the Nigerian public.⁵⁵ Amina Lawal and her local advocates began to face crowds chanting "defilers!" and

⁵³ Somini Sengupta, *When Do-Gooders Don't Know What They're Doing*, N. Y. TIMES, May 11, 2003 ("In recent weeks, an e-mail petition of mysterious origin, carrying the name and logo, in Spanish, of Amnesty International has been zapped around the globe. Recipients were asked to 'sign' electronically, then send it along to others. Ms. Lawal's execution was imminent, the message warned; the Nigerian Supreme Court had already upheld the death sentence. It soon appeared, however, that the e-mail petition had problems. Amnesty International said it had nothing to do with it, though it has been campaigning vigorously on Ms. Lawal's behalf. And the case hasn't reached the Nigerian Supreme Court, much less been ruled on."); see also Michele Landsberg, *E-petition to Save Amina Could Harm, Not Help*, TORONTO STAR, May 10, 2003, at M1 ("Every time I was deluged with forwarded copies of this e-mail petition, I turned to BAOBAB for confirmation of the facts and was told that the petition was wrong. No one seems to know how the accursed thing gets started - is it a malicious hoax, or an innocent misunderstanding?—but BAOBAB isn't confused about one thing: The petition is harmful.").

⁵⁴ See France, *supra* note 51 (stating that "far from helping her, these well-meaning" interventions galvanized the sentiments of conservative Muslims against her—and may even have put her life in graver danger" and quoting Akbar Ahmed, chair of Islamic Studies at American University, saying the western pressure "backfired").

⁵⁵ Agaju Madugba, *Sharia is Justice, says Buhari*, THIS DAY (NIGERIA) AAGM, ASIA-AFRICA INTELLIGENCE WIRE, Oct. 12, 2003, available at <http://allafrica.com/stories/200310130524.html> (quoting Sani Yerima speaking at the launching of the book *SHARIA AND JUSTICE*: "We [] welcome and cherish any debate or constructive criticism on the sharia to the extent that they serve to enrich our knowledge or correct human errors. [But w]hat we will never subscribe or succumb to, are pressures and blackmail aimed at stopping the sharia. There is no stopping the sharia.")

“betrayers!” at court appearances as she pursued her appeal.⁵⁶ Ultimately, the situation became so dangerous that members of Lawal’s own legal team publicly pleaded with the world to stop the letter writing campaign.⁵⁷ Here is an excerpt of the plea written by Ayesha Imam, Founding Director of BAOBAB for Women’s Human Rights, an organization working on Lawal’s legal defense:

Contrary to the statements in many of the internationally originated appeals for petitions and protest letters, none of the victims received a pardon as a result of international pressure. None of them has received a pardon at all - or needed to, so far. . . . None of the sentences of stoning to death have been carried out. Either the appeals were successful or those convicted are still in the appeals process. . . . However, if there is an immediate physical danger to Ms. Lawal and others, it is from vigilante and political further (over)reaction to international attempts at pressure. . . . Dominant colonialist discourses and the mainstream international media have

⁵⁶ See Yawuri, *supra* note 44, at 134 (describing the 2002 Upper Sharia Court hearings: “On the day the judgment was delivered the courtroom was crowded and the atmosphere was tense. A group of Muslim radicals numbering about fifty were present to see whether Sharia law would be enforced. There was a considerable presence of police and other security agents. Whenever the judge made a finding or a ruling which went against Amina Lawal, the group of radicals would chant the *takbir* (*Allahu akbar!* [God is great!]). After the judgment the group broke into jubilation, chanting that Islam had overcome *kufir* (unbelief).”).

⁵⁷ Ayesha Imam & Sindi Medar-Gould, *How Not to Help Amina Lawal: The Hidden Dangers of Letter Campaigns*, COUNTERPUNCH (May 15, 2003), www.counterpunch.org/iman05152003.html; Jaggar, *supra* note 46; *A Letter from BAOBAB for Women’s Human Rights regarding the case of Amina Lawal* (Aug. 27, 2003), available at www.wluml.org/node/1127 (“The petitions currently being circulated (one is posted below) are WRONG in fact again. Amina’s appeal hearing at the Katsina State Sharia Court of Appeal had been postponed and is to be heard on August 27. Her case has not yet been heard in the Katsina State Sharia Court of Appeal. Therefore, it has not reached the Supreme Court—not even the Federal Sharia Court of Appeal. In addition, implementation of any sentence is stayed until the final results of any appeals.”).

presented Islam (and Africa) as the barbaric and savage Other. Please do not buy into this. Accepting stereotypes that present Islam as incompatible with human rights not only perpetuates racism but also confirms the claims of right-wing politico-religious extremists in all of our contexts. . . . But when protest letters represent negative stereotypes of Islam and Muslims, they inflame sentiments rather than encouraging reflection and strengthening local progressive movements. They may result in behaviour such as that of the Zamfara State governor over Bariya Magazu, or even more threatening, hostile and violent behaviour by vigilantes Consequently, such letters can put in further danger both the victims who are easily reachable in their home communities, and, the activists and lawyers supporting them (who are particularly vulnerable when they have to walk through hostile crowds on their way to court, for instance).⁵⁸

Although Ayesha Imam's cease-fire request was heard by some,⁵⁹ it was largely drowned out by the tsunami of international condemnations of Amina Lawal's sentence. Many signatories to the "Save Amina Lawal" petition remained unaware of its factual mistakes and the dangers it created, and

⁵⁸ Imam & Medar-Gould, *supra* note 2 (also asking for "international solidarity strategies that respect the analyses and agency of those activists most closely involved and in touch with the issues on the ground and the wishes of the women and men directly suffering rights violations" and noting that "[t]here is an unbecoming arrogance in assuming that international human rights organisations or others always know better than those directly involved, and therefore can take actions that fly in the face of their express wishes").

⁵⁹ It prompted some thoughtful reflections such as Somini Sengupta's *When Do-Gooders Don't Know What They're Doing*. See Sengupta, *supra* note 53; see also Landsberg, *supra* note 53 ("Protests from Western 'infidels' are not taken seriously by fundamentalist sharia courts. In fact, contemptuous e-mails from Western sources merely inflame the defiant attitudes of Taliban-type local leaders and spur them to ever harsher and more extreme actions. E-mail petitions imply that villagers are helpless victims who must await rescue from the Great White North.").

even years later continued to believe that it was their campaign that saved her life.⁶⁰

Amina Lawal's life eventually was saved by an acquittal from the Sharia Appeals Court in Katsina on September 23, 2003.⁶¹ Some believe that the result reached by the Sharia Appeals Court was itself influenced by the intense international

⁶⁰ See Margot Badran, *Liberties of the Faithful*, AL-AHRAM WEEKLY, May 2005, at 19–25, available at <http://weekly.ahram.org.eg/2005/743/fe2.htm> (“As evidenced in the media, Westerners took credit for their campaigns on behalf of the accused, even though Nigerian activists had to ask outsiders to halt their intervention, which often included deprecating Islam, and which was becoming a distinct liability.”); Helon Habila, Editorial, Op-Ed., *Justice, Nigeria's Way*, N.Y. TIMES, Oct. 4, 2003, <http://www.nytimes.com/2003/10/04/opinion/justice-nigeria-s-way.html> (“The human rights groups have been widely praised for saving Ms. Lawal, but in fact by putting pressure on Mr. Obasanjo they unwittingly abetted the cause of the judges and the politicians who support them.”).

⁶¹ On August 19, 2002, Amina Lawal's first appeal was rejected by a lower *sharia* court in Katsina, but her second appeal was successful, when a five-judge panel of the Upper Sharia Court of Appeal in Katsina State overturned her sentence on September 25, 2003. See Jare Ilclaboye, *Amina Lawal: Court Quashes Death Sentence*, THIS DAY (NIGERIA), ASIA AFRICA INTELLIGENCE WIRE, Sept. 26, 2003. See also Hauwa Ibrahim, *Reflections on the Case of Amina Lawal*, 11 HUM. RTS. BRIEF 39 (2004).

One explanation that Lawal was even convicted in the first place is that the *sharia* judges in Nigeria (especially those at the trial court level), are extremely poorly trained in Islamic law. See RUUD PETERS, *THE REINTRODUCTION OF ISLAMIC CRIMINAL LAW IN NORTHERN NIGERIA: A STUDY CONDUCTED ON BEHALF OF THE EUROPEAN COMMISSION* (2001) 17–18 (“The judges of the new Sharia Courts were the same judges who had sat in the area courts, but they had not been prepared nor trained to apply the changes in the legal system. Ignorance of the law of procedure . . . seriously hampered the course of justice.”).

pressure in this case.⁶² Whether or not the international campaigns actually had this effect is contestable and largely unprovable. More significantly, I believe the question tends to inflate the role of western actors at the expense of some important facts. First, it did not take western interest to begin the appeals in any of these *zina* cases; Nigerian lawyers were already involved (and potentially succeeding) in legal appeals before these cases caught the attention of western media. Second, Lawal's own lawyers specifically pleaded with the world to stop the petitions—a very strong indicator that the international pressure was *not* helping their cause. Finally, even if it were true that the Katsina Sharia Appeals Court acquitted Lawal because of international pressure, it is also true that the Zamfara governor *punished* Magazu because of international pressure. If there is an equal chance that international pressure could make things worse, not better, I believe the responsible thing for international actors to do is to at least seriously consider alternatives.

Separate from the question of the impact of international pressure, I believe it is also crucially important for western observers to realize the significance of the Lawal acquittal

⁶² For example, referring to a different Nigerian *zina* case, Caroline Nicolai wrote that Amina Lawal's "life may have been saved by international pressure forcing Nigeria into compliance with CEDAW." Caroline Nicolai, *Islamic Law and the International Protection of Women's Rights: The Effect of Sharia in Nigeria*, 331 SYRACUSE J. INT'L L. & COM. 299, 325 (2004). Similarly, a report on an appeal from the Law Society of South Africa asking for pressure on the government to overturn another "barbaric" stoning sentence ends with the following two sentences: "Last year, the case of Amina Lawal succeeded in uniting women across party and religious lines in protest. Lawal's sentence to death by stoning for adultery was overturned last September by a Sharia court of appeal following sustained international pressure." *Another Nigerian Sentence Triggers International Outrage*, PAN-AFRICAN NEWS AGENCY, Jan. 4, 2004.

coming from a *sharia* court on *sharia* grounds.⁶³ This is

⁶³ There were several legal grounds for the acquittal, some based on classical Maliki law, and others on the due process principles established in the enacted *sharia* code of Katsina. See Aminu Ahmadu Bello, *If Amina Lawal Had Failed: Issues in Constitutional and Islamic Criminal Law in Nigeria* (Islamic Law and Law of the Muslim World Paper No. 08-23, 2008), available at <http://ssrn.com/abstract=1118011> (listing (1) incomplete judicial panel at initial conviction, according to enacted *sharia* code procedures, (2) the Maliki "sleeping fetus" doctrine, and (3) Lawal's initial accusers should have been flogged for slander, because they accused her of *zina* without four witnesses to the act). See also Illelaboye, *supra* note 61 (adding acquittal grounds of (1) too much lapsed time between act and arrest, (2) insufficient corroborating evidence according to basic court evidentiary rules; also noting minority judicial opinion by Sule Kofar Sauri, that Lawal was not given the right to withdraw her confession).

The widely-reported *sleeping fetus doctrine*, a concept in Maliki law which posits that a fetus might be in gestation *in utero* for up to five years, served as the most clearly classical Maliki legal ground for Amina Lawal's acquittal, since she had previously been married less than five years before the pregnancy. This doctrine is an example of how the Maliki school allows for in-practice judicial adjustment for unjust outcomes that could result from its unique evidentiary rules for *zina* prosecution (allowing unwed pregnancy instead of four eyewitnesses to begin a prosecution). On this point, Ayesha Imam is mistaken when she asserts that in its acquittal of Amina Lawal, "[t]he Katsina State Sharia Court of Appeal expressly departed from the dominant view of the Maliki school by holding that pregnancy outside of marriage is not evidence of *zina*." Imam, *supra* note 52, at slide 10. Imam fails to acknowledge that there are internal Maliki work-arounds to alleviate the impact of its strict unwed pregnancy rule. Of course, the sleeping fetus doctrine does not offer much relief to pregnant single women who have never before been married, nor to women who are pregnant more than five years after divorce or widowhood, and for these women, more significant departures from (or evolutions of) Maliki law may be the only option for relief within an Islamic legal context.

It is significant to note that the Katsina Sharia Appeals Court did *not* accept the following substantive argument offered by Hauwa Ibrahim, assisting in Lawal's defense: "to consider pregnancy as evidence of a crime inherently discriminates against women, and therefore violates an important tenet of Islamic thought: that men and women are equal before the law." See Somini Sengupta, *Facing Death for Adultery, Nigerian Woman Is Acquitted*, N. Y. TIMES, Sept. 26, 2003. The failure of this argument is significant because, while it may reflect international women's rights norms and the view of some Muslims (and is even articulated in Islamically-resonant language), it represents a progressive re-configuration of classical Islamic law principles. It assumes contemporary constitutional formulas of equality, and is quite disconnected with the way established Islamic legal principles would address issues with unfair treatment of women. It will be useful to remember and compare Ibrahim's approach to

important first because it seriously reduces the likelihood that Nigerian Muslims will angrily protest the ruling as a rejection of Islam or *sharia*, as might have occurred following a secular Supreme Court acquittal or executive pardon on constitutional or human rights grounds.⁶⁴ As BAOBAB points out, “winning appeals in the Sharia courts . . . establishes that [*sharia*-based] convictions should not have been made [in the first place]. A pardon means that people are [Islamically] guilty but the [secular] state is forgiving them for it. It does not have the same moral and political resonance [among religious Muslims].”⁶⁵ Second, a *sharia*-based acquittal illustrates the idea that activists working within the contours of *sharia* might be able to accomplish at least some of the same goals sought by secular

⁶⁴ See, e.g., South African Press Ass’n, *Islam Vindicated By Lawal Acquittal, Say Muslims*, AFRICA NEWS, Sept. 25, 2003, quoting Moulana Rafeek Shah, former chairperson of the Muslim Youth Movement:

Islam triumphed in today’s ruling, which showed that Shariah (Islamic Law) can work if the principles are strictly adhered to. . . . What is most important is that Amina Lawal was not pardoned. She was acquitted. This case was judged on a point of law and not because of international pressure or pressure from groups within Nigeria. Justice has been served and Islam vindicated. . . . The ruling today shows that Islamic law is human, and it is fair.

This point was also made by two American Muslim organizations, the Muslim Women’s League and the Muslim Public Affairs Council (MPAC), in a joint-press release following the Lawal acquittal. Press Release, Muslim Public Affairs Council & Muslim Women’s League, MPAC Hails the Quashing of Amina’s Sentence (Sept. 25, 2003), *available at* www.mpac.org/article.php?id=235 (“Muslims need to be aware that this overruling does not represent some sort of secular dismissal of Islamic law and values. Rather, it is an internal Muslim legal review of the accuracy and propriety of punishments carried out in the name of Islam.”).

⁶⁵ Imam & Medar-Gould, *supra* note 2.

rights advocates, even if by a different route.⁶⁶ This presents another reason to be concerned if in fact the Sharia Court's acquittal of Lawal had come in response to international pressure: it would taint the Islamic nature of the result, and thus weaken the strong Muslim support for the acquittal.⁶⁷

In fact, it was faith in the potential and power of an Islamically-based acquittal that guided many on Amina Lawal's legal team when they crafted her appeal strategy. As attorney Aliyu Musa Yawuri describes, when the diverse collection of advocates for Amina Lawal met to plan their appellate strategy, they specifically deliberated over whether they should appeal through the *sharia* courts or the secular courts (based on the argument that the application of Islamic criminal law is *per se* unconstitutional).⁶⁸ Lawal's lawyers chose the route of a *sharia*-based appeal due to the positive association of *sharia* with justice and the rule of law in the minds of much of the Nigerian

⁶⁶ In other words, most western observers and activists seem to have assumed that if Islamic law were applied all the way through, Amina Lawal would surely die, and that the only way to avoid this was to demand recognition of secular human rights principles. As Rhoda Howard-Hassmann puts it, commenting on the Bariya Magazu story, "Ordinary readers of the *The Globe and Mail* and other sources were under the impression that Bariya Magazu had no recourse under Muslim law." Howard-Hassman, *supra* note 12, at 5.

⁶⁷ See *Saving Amina Lawal*, *supra* note 45, at 2382 ("Even if the Sharia Appeals Court decision was completely unaffected by the international outcry (as indeed it purported to be), it remains tainted by the suspicion that it was a submission to the demands of the 'savior' group. Those who do not want to be viewed as submitters must act in ways blatantly antagonistic to the desires of the international human rights community. This pressure creates a backlash that pushes nationalist leaders into increasingly extreme positions. In an earlier case involving a teenage girl sentenced to flogging for premarital sex, letters of complaint from 'infidels' provoked the state governor to push the execution of her sentence forward.").

⁶⁸ See Yawuri, *supra* note 44, at 132-33 (describing "lengthy deliberation" on this suggestion).

Muslim public.⁶⁹ Yawuri describes his client Amina Lawal herself as an example of this internalized Muslim faith in the inherent justice of *sharia*:

[A]t my initial and subsequent meetings with Amina Lawal, she had persistently maintained that she had no quarrels with the Sharia law per se. Her hope was that her appeal would succeed on grounds of misdirection, misapplication, or some technical or procedural flaws in the trial. Amina Lawal is a Muslim; she lives in a Muslim community. She believed that the Sharia, under which she was convicted and sentenced to death, should contain some mechanism that could allow her

⁶⁹ *Id.* See also Imam, *supra* note 52, at slide 6 ("even if the constitutionality of the Sharia Acts and Sharia Penal Codes themselves could be challenged successfully in the general courts, doing so would certainly have alienated the majority of the Muslim communities in Nigeria, given their initial support for Sharianization"); Landsberg, *supra* note 53 ("when BAOBAB argues from a basis of serious Islamic legal expertise, it accomplishes several useful aims. It strengthens the local people's confidence that there is a remedy in law that is worth pursuing, stimulates the discussion of human rights and gender fairness within Islam and deepens the experience of local activism"); Imam & Medar-Gould, *supra* note 2 ("Using local structures and mechanisms (as a means of resisting retrogressive laws or interpretations of laws and the forces behind them) is the priority. It strengthens local counter-discourses and often carries greater legitimacy than 'outside' pressure. . . . The political Islamists and vigilantes . . . have also been promoting the view that any criticism or appeal of conviction is anti-Islam and tantamount to apostasy, and thereby trying to get people to submit quietly and voluntarily. One of the means of countering this was our choice to pursue the appeals in the Sharia system, and thereby demonstrate that people have a right to appeal and to challenge injustices, including those made in the name of Islam. . . . Every appeal in the local sharia courts strengthens this process. . . . If we don't want such abuses to go on and on, then we have to convince the community not to accept injustices even when perpetrated in the name of strongly held beliefs.").

appeal and set her free.⁷⁰

Ayesha Imam, also working on Lawal's defense, has similarly explained that "Amina's appeal [wa]s couched first in terms of Muslim laws, with the argument that due process has not been followed in Muslim laws," and then secondarily in terms of Nigerian secular law, on constitutional grounds.⁷¹ When asked why they were not making appeals to international human rights, Imam answered:

At the moment there is no need. In all the cases where we have won appeals, we have not needed it. Not a single case we have brought has been lost; higher Sharia courts always quashed the conviction. We have won both on Muslim and Nigerian secular laws, but usually on Muslim laws.⁷²

The approach taken by Amina Lawal's attorneys—and the successful end that they were able to achieve—exemplifies a type of advocacy for women that takes *sharia* on its own terms, as something to work with, rather than an obstacle to be removed. As illustrated by Lawal's acquittal compared to Bariya Magazu's lashing, these *sharia*-friendly efforts have been able to secure rights for Muslim women where secular feminist approaches have failed. Thus, international women's rights advocates would benefit from knowing more about *sharia* and *sharia*-based advocacy, if not to inform their own strategic

⁷⁰ Yawuri, *supra* note 44, at 133 (also describing himself as having a similar faith in ultimate *sharia* justice); see also Amadi, *supra* note 29, at 29 ("[N]one of the women who have been tried for adultery has conceived their ordeal and struggle as extricating themselves from the web of the collective. At best, they have seen themselves as agents who should take up the challenge of reforming Islamic justice to conform to its pristine virtuous qualities. It is noteworthy that those who have taken aught against Sharia as implemented have not challenge the legal norm that makes adultery a sin and punishable. They have either deplored the implementation of the penal rigor of Sharia without entrenching an egalitarian Islamic state, or . . . they hallow Sharia as inviolable and urge departure based on the doctrine of necessity (*darura*).").

⁷¹ Ayesha Imam, *Working within Nigeria's Sharia Courts* (Interview with Ayesha Imam), 2 HUM. RTS. DIALOGUE 22 (2003).

⁷² *Id.*

planning, then at least to know how to refrain from handicapping the work of these Muslim-minded advocates where they share common goals. To that end, the next section will explain some basic concepts of *sharia* and survey some examples of *sharia*-mindful women's rights activism, taking care to note where their strategies and approaches differ from those familiar to western secular feminists.

II. What is *Sharia*, Exactly? And Is It Bad for Women?

Sharia is a big word for Muslims.⁷³ In English, the word is usually translated as "Islamic law," but the Arabic carries a broader feeling of ultimate justice, a divine rule of law. Literally, *sharia* means a "street," "way," or "well-trodden road," (originally, to a watering hole). In the *Quran*, *sharia* corresponds to the idea of God's Way—a divine exhortation about the ideal way to behave in this world—thus, "God's Law." There are two tangible sources of information about this Law of God. The first is the *Quran*, which Muslims believe is the actual word of God revealed to the last prophet, Mohammad. The second is the life example of the Prophet Mohammad—the *sunna*. Muslim legal scholars carefully studied the texts of the *Quran* and *sunna* to elaborate what they understood to be the detailed rules of the Law of God—a process called *ijtihad*. These rules are called *fiqh* (literally "understanding"), and cover a wide range of topics, from contracts and property to inheritance and criminal law. When referring to the specific doctrinal rules of Islamic law, therefore, one should use the term *fiqh* rather than the more abstract term *sharia*.

Moreover, the scholars performing *ijtihad* did not always arrive at the same conclusions, which led to a variety of *fiqh* rules. The accommodation of this *fiqh* diversity is one of the most important attributes of Islamic jurisprudence. It makes

⁷³ What follows is an excruciatingly brief description of *sharia* and Islamic jurisprudence. For those interested in more detail, I have elsewhere provided fuller introductions to the basic concepts. See, e.g., Asifa Quraishi, *The Separation of Powers in the Tradition of Muslim Governments*, in CONSTITUTIONALISM IN ISLAMIC COUNTRIES: BETWEEN UPHEAVAL AND CONTINUITY (Tilman Roder, Rainer Grote & Katrin Gengen eds., 2011); Asifa Quraishi, *Who Says Sharia Demands the Stoning of Women? A Description of Islamic Law and Constitutionalism*, 1 BERKELEY J. MID. E. & ISLAMIC L. 163 (2008).

Islamic law inherently and unavoidably pluralistic. This is because of a self-conscious recognition by the *fiqh* scholars that the process of *ijtihad* is an inherently human and therefore fallible enterprise that produces rules that can be, at best, only probable articulations of God's Law. No one could claim with certainty that his or her answers were "the right answer," at least in this lifetime. Thus, as long as it is the result of sincere *ijtihad*, any *fiqh* conclusion qualifies as a possible—and thus legitimate—articulation of *sharia*. Eventually, the variety of *fiqh* opinions coalesced into several definable schools of law (the Maliki school, addressed above, being one), each with equal legitimacy and authority for Muslims seeking to live by *sharia*. Thus, for a Muslim, there is one Law of God (*sharia*), but there are many versions of *fiqh* articulating that ultimate Law here on earth. This is why the use of the term *fiqh* ("understanding") and not *sharia* ("God's Law") for the actual legal rules of Islam is so important. The distinction reflects the reality that every *fiqh* rule (including rules like the evidentiary rules for *zina*) is a human-created approximation of *sharia*, but there may very well be an equally legitimate alternative *fiqh* rule on the same issue.

In contemporary discourses, especially in a legal advocacy setting, it is very important to keep the terms *fiqh* and *sharia* distinct. Sloppy use of the term *sharia* can (and does) generate unnecessary resistance to what otherwise would be legitimate and uncontroversial statements. Remember that *fiqh*—the product of human legal interpretation—is inherently fallible and thus open to question, whereas *sharia*—God's Law—is not. Thus, it is unnecessarily provocative to advocate, for example, changing or reforming *sharia*, because this implies that God's Law is not itself already perfect, a suggestion likely to generate resistance on the part of many Muslims. But advocating a change or reform of *fiqh* is quite a different matter, because *fiqh* is fallible, and in fact its many manifestations already reflect the consideration of a variety of different social norms. Thus, simple attention to language could play a significant role in alleviating some of the perceived deadlocks in global debates over what is and is not legally negotiable for Muslims.

A. What Does *Sharia*-Based Advocacy Look Like?

Women's rights activism and advocacy from a *sharia* perspective is both different from and similar to advocacy from secular frameworks. We have already seen examples of this in the legal advocacy strategies chosen by lawyers for Amina Lawal. Another potent example, this one occurring outside of the courts, is the way in which Pakistan's *zina* laws were ultimately amended in 2006.

1. Amending Pakistan's *Zina* Ordinance

The *zina* laws in Pakistan are older than those in Nigeria, having been enacted in 1979 as part of then-President Zia ul-Haq's campaign to "Islamize" the laws of Pakistan.⁷⁴ Like Nigeria, Pakistan criminalizes extra-marital sex (*zina*), a *hudood* crime carrying a punishment of either lashing or stoning depending on the marital status of the defendant. Unlike Nigeria, Pakistan's *zina* law follows the majority *fiqh* position that requires four eyewitnesses to prove that an act of *zina* has occurred.⁷⁵ Under the Hanafi school, dominant among Pakistani Muslims, pregnancy alone is not enough to prosecute a woman for *zina*. One might think that this difference would alleviate in Pakistan much of the disproportionate impact suffered by women under Nigeria's *zina* laws. But there is one twist: the Pakistani *zina* ordinance made the egregious mistake of requiring the same evidentiary rules for rape as for *zina*, thus requiring four eyewitnesses to prosecute a rape.⁷⁶ This not only made it virtually impossible to convict a rapist in Pakistan, but also left pregnant rape victims vulnerable to *zina* prosecutions (the pregnancy being taken as an indication of *zina* if the victim could not prove with four witnesses that the act was

⁷⁴ See Offense of Zina (Enforcement of Hudood) Ordinance, No. 7 of 1979 (VII of 1979) (Pak.), reprinted in 31 P.L.D. 1979 Central Statutes 51 (1979) (Pak.) [hereinafter Offense of Zina Ordinance]. See also ASHFAQ BOKHARY, LAW RELATING TO HUDDOD CASES 162 (1979).

⁷⁵ Offense of Zina Ordinance, *supra* note 74, § § 4-6.

⁷⁶ Offense of Zina Ordinance, *supra* note 74. This is in direct contradiction to the established *fiqh* on *zina* (and rape). See Quraishi, *Her Honor*, *supra* note 5.

nonconsensual).⁷⁷ As international media reported more and more apparent rape victims being sent to Pakistani jails on *zina* convictions, the idea that Islam punishes women for being raped began to pervade international discussions of Islamic law and women.

The Pakistani Code's confusion of *zina* and rape, combined with police corruption and apparently some manipulative family politics, created a situation on the ground so egregious for some women that Pakistan became the target of condemnation from human rights and women's rights voices around the world. In the decades since 1979, international and domestic groups have

⁷⁷ See, e.g., *Jehan Mina v. State*, (1983) PLD (FSC) 1983 (Pak.); *Safia Bibi v. State*, (1985) PLD (FSC) 120 (Pak.). One might wonder how these prosecutions can go forward without the four eyewitnesses required to prove *zina* under Pakistan's Ordinance (and, for that matter, all *fiqh* schools besides the Maliki). The answer lies in the fact that there are two types of criminal law in the view of Islamic *fiqh*: *hadd* and *ta'zir*. *Hadd* crimes correspond to the finite number of crimes that are Quranically-listed, often termed "rights of God." *Ta'zir* denotes all other possible crimes and punishments, leaving the details to the discretion of the state. Thus, Pakistan's *Hudood* Ordinance provides for two ways of prosecuting *zina*: first, as a *hadd* crime (proven with four witnesses) and as a *ta'zir* crime (not requiring four eyewitnesses and admitting all types of other evidence, including unwed pregnancy). Thus, if a woman alleges rape, it is considered "*zina* by force" (*zina bil jabr*), which requires four eyewitnesses under the Ordinance. If she is not able to bring four eyewitnesses as evidence (a virtual certainty), then she opens herself up to *zina* prosecution under *ta'zir*, where unwed pregnancy has been taken to be sufficient evidence that *zina* has occurred. In 2002, the Federal Shariat Court finally stated—in *dicta*—that unwed pregnancy should not be used as proof of *zina*. See *Zafran Bibi v. State*, (2002) PLD (FSC) 1 (Pak.), at ¶ 14 ("[M]ere pregnancy, by itself when there is no other evidence at all, of a married lady, having no access to her husband, or even of an unmarried girl is no ground for imposition of Hadd punishment if she comes out with the defence that that was the result of commission of rape with her."). In the same case, the Sharia Court also made a clear statement that a rape victim ("a person coerced to commit *zina*") should not be punished for *zina*, whether as *hadd* or *ta'zir*. *Id.* at ¶ 17. This statement seems obvious, both under ordinary logic and according to established *fiqh*, but the issue had become confused under the odd drafting of Pakistan's *Zina* Ordinance (causing several women who were most likely victims of rape to be convicted of *zina* under *ta'zir*). Unfortunately, these statements from the Court were only *dicta*, and they seem to have had little legal effect beyond adding tangential support to the acquittal of *Zafran Bibi*.

urged Pakistani administrations to amend or repeal the law.⁷⁸ The pressure contributed to the creation of several official commissions who recommended change, but for many years, none came.⁷⁹ Every move toward official parliamentary reconsideration of the Ordinance generated strong resistance from Pakistan's influential religious leaders. Twenty seven years of stalemate seemed to indicate that legislative change was impossible.

This all changed in 2006, when *Zara Sochieye* ("Just Think"), a popular Pakistani television show,⁸⁰ aired a series of episodes centered on the question "Is the *Hudood* Ordinance divine law?" The episodes sparked an intense nationwide conversation about *zina* laws in Pakistan, especially the requirement of four eyewitnesses for rape and the realities of its application on the ground. *Zara Sochieye* "broke the myth that it is sinful to amend the ordinance,"⁸¹ by shifting the weight of

⁷⁸ See, e.g., *Hudood Ordinances—The Crime and Punishment for Zina*, AMNESTY INT'L IN ASIA & THE PACIFIC, http://asiapacific.amnesty.org/apro/aproweb.nsf/pages/svaw_hudoo (last visited Oct. 16, 2011); HUMAN RIGHTS WATCH WOMEN'S RIGHTS PROJECT, THE HUMAN RIGHTS WATCH GLOBAL REPORT ON WOMEN'S HUMAN RIGHTS 150 (1995); HUMAN RIGHTS COMM'N OF PAKISTAN, ANNUAL REPORT (1999).

⁷⁹ See PAKISTAN NAT'L COMM. ON THE STATUS OF WOMEN (NCSW), REPORT ON HUDOOD ORDINANCES 38 (2003) (reporting that members were "unanimous in arriving at the conclusion that the Hudood Ordinances as enforced are full of lacunae and anomalies and the enforcement of these had brought about injustice rather than justice," and twelve of fifteen of the members of the commission recommended repeal). See also MAHBUB-UL HAQ HUMAN DEV. CTR., FROM VICTIM TO THE ACCUSED—THE ZINA ORDINANCE IN PAKISTAN: HUMAN DEVELOPMENT IN SOUTH ASIA 2000: THE GENDER QUESTION (2000).

⁸⁰ *Zara Sochieye* describes itself as "a formal drive initiated by GEO Television Network that attempts to highlight issues that promote and/or represent imbalance and injustice in our society and have divided us for years." *FAQs*, GEO TELEVISION NETWORK, www.geo.tv/zs/questions.asp (last visited Oct. 16, 2011). It aims to "include all such issues that have become so integrated into our society that we have stopped thinking about them . . . to explore new dimensions of an existing problem and create a platform for creative thinking and discourse between diverse people and ideas." *Id.*

⁸¹ J. Edward Mendez, *Pakistan Moving to Revise Islamic Laws*, RELIGION NEWS SERV., July 14, 2006, available at www.pcusa.org/pnews/2006/06359.htm (quoting *Zara Sochieye* producer Aliya Salahuddin).

influence on Pakistani public opinion from the religious stalwarts who had stridently defended the *Hudood* Ordinance against any and all criticism to a broader set of Muslim *fiqh* experts who recognized inconsistencies between the Ordinance and established *fiqh* doctrine and *sharia* principles generally.⁸² Soon after the show, amid continuing public discourse, Pakistan's Council on Islamic Ideology, tasked by President Musharraf to review the Ordinance,⁸³ proposed several amendments.⁸⁴ In November 2006, the Pakistani Parliament passed the "Women's Protection Act" which, among other things, moved rape prosecutions out of the *Hudood* Ordinance

⁸² See *Experts Commentary*, GEO TELEVISION NETWORK, www.geo.tv/zsarch/expert.asp (last visited Oct. 16, 2011) [hereinafter: GEO EXPERTS] (summarizing analyses of several experts, including members of the Islamic Ideology Council, International Islamic University, Sheikh Zayed Islamic University, Iqbal Academy, Jama-e-Darul-Khair, Jama'e-Abu-Huraira, Sarparasat-e Aala, Tanzem ul Muktalib, Jama-e-Darul Uloom Islamia, Tehreek-e-Imaarat Shariat, Jamaat Ahl-e-Sunnat, advisors to the Federal Shariat Court, along with several well-known independent Islamic scholars).

⁸³ See Ashraf Khan, *After TV Series, Pakistan Rethinks Rape, Sex Laws*, CHRISTIAN SCI. MONITOR, July 11, 2006 ("President Musharraf promised five years ago to amend the Hudood Ordinances, only to backtrack in the face of opposition from hard-line Islamic groups. However, a groundbreaking television series has taken the issue to a wider set of religious authorities. The overall verdict of this unprecedented public debate—that the laws are not rooted in the Koran—appears to be giving Musharraf the cover needed to consider changes. . . . In the wake of the Geo campaign, Musharraf asked a religious panel to review the Hudood laws and propose amendments, saying that the changes should be 'compatible with Islamic law and values.'").

⁸⁴ See Anwar Mansuri, *CII Wants Hudood Law Reformed*, DAWN (June 28, 2006), <http://archives.dawn.com/2006/06/28/nat1.htm>. For the Council's Report and proposed amendments, see COUNCIL OF ISLAMIC IDEOLOGY, A CRITICAL REPORT ON HUDOOD ORDINANCE 1979 (2007), available at www.cii.gov.pk/reportarch.asp.

and into the ordinary criminal code, without any eyewitness proof requirement.⁸⁵

How was *Zara Sochieye* able to so drastically effect a change that was socially and politically infeasible in Pakistan for

⁸⁵ The Pakistani Penal Code Act, No. 45 of 1860, amended by Protection of Women (Amendment) Act, available at <http://www.pakistan.org/pakistan/legislation/2006/wpb.html> (stating the Act's objective as "to bring . . . the laws relating to *zina* and *qazf* in conformity with the stated objectives of the Constitution and the injunctions of Islam"). The Act makes several key changes:

First, "*zina-bil-jabr*" ("*zina* by force") is deleted from the *Hudood* Ordinance and is left to the Pakistan Penal Code, prosecutable with ordinary evidence. *Id.* at ¶¶ 5, 14, 15. From a *sharia* perspective, what this does is make rape exclusively a matter of *ta'zir*, rather than including it as a state-prosecuted *hadd* crime. (See *supra* note 84 for details on the difference between *hadd* and *ta'zir* under classical *fiqh* doctrine.) The drafters of the Act had this change specifically in mind, including it in the Act's "Statement of Objects and Reasons." Protection of Women Act. ("Any offence not mentioned in the Quran and Sunnah or for which punishment is not stated therein is Ta'zir which is a subject of State legislation. It is for the State both to define such offences and to fix punishments for these. The exercise of such authority by the State is in consonance with Islamic norms which the State is authorized to both define and punish. Accordingly, all these offences have been removed from the two Hudood Ordinances and inserted in their proper places in the Pakistan Penal Code. . . . There is no *hadd* for the offence of *zina-bil-jabr* (rape). It is a Ta'zir offence. The definition and punishment of rape is, therefore, being incorporated in the PPC in sections 375 and 376 respectively.").

A second major change is that the *ta'zir* version of *zina* is deleted from the *Hudood* Ordinance, and instead the crime of "fornication" carrying a penalty of up to five years and ten thousand rupees (about \$150 US) is added to the Pakistani Penal Code. See *id.* ¶ 7. This creates the odd situation that extra-marital sex can be prosecuted both as the *hadd* crime of *zina* under the *Hudood* Ordinance (with proof of four eye-witnesses and a penalty of lashes or stoning) and as fornication under the ordinary penal code (proven by ordinary evidence, but carrying a lesser penalty). It is not clear what this potential for dual-track prosecution will mean, but it seems likely that the *Hudood* Ordinance track will become moot, given its nearly-impossible burden of proof.

Finally, among the significant changes brought by the Act is an amendment to the *Hudood* Ordinance's definition of "confession" to explicitly require clear and voluntary confession, *id.* ¶ 10, thus apparently eliminating the problem of unwed pregnancy being taken as tacit confession of *zina*. *Id.* at ¶ 10. Under the previous *Hudood* Ordinance, "[w]here a prosecution for rape against a man fails but sexual activity is confirmed by medical examination or on account of pregnancy or otherwise the woman is punished for *zina* not as Hadd - four eye witnesses not being available—but as Ta'zir. Her complaint is, at times, deemed a confession." *Id.* at Statement of Objects and Reasons.

nearly three decades? The key feature was its *sharia*-mindful approach. Its invited guests did not include any of the usual suspects in the debate: there were no women's rights groups (domestic or international), no representatives of foreign non-governmental organizations at all, and no academics other than Islamic scholars, ranging from conservative to moderate.⁸⁶ This carefully-selected collection of speakers enabled the resulting conversation to have a new Islamic credibility with the Pakistani Muslim public. As Gretchen Peters, NBC's Pakistan correspondent, explained:

[O]ne of the reasons past governments have failed to repeal or amend the Hudood Ordinance is that the religious parties here, and they are very powerful, although they are a minority – the minute anyone tries to go against something like this, whether it is the Hudood Ordinance or other religious edicts that have become law, they denounce the person or the group as un-Islamic, and then the entire public swings behind them. And, of course, we have a relatively uneducated populace here in Pakistan, so that's something that has been a major stumbling block for previous efforts to do something about the Hudood Ordinance. This program took a very, very clever approach to the situation by bringing Islamic scholars, some of them moderate, some of them more conservative. It's also a debate that has Pakistani people, for the first time in public, using the Internet, using telephones. The public is calling in, taking part in this discussion. That's the real issue here.⁸⁷

⁸⁶ See GEO EXPERTS, *supra* note 81 (providing links to analyses by Muslim scholars). For program transcripts, see *Transcripts*, GEO TELEVISION NETWORK, www.geo.tv/zsarch/transcript.asp (last visited Oct. 16, 2011).

⁸⁷ *On the Media: Primetime Pakistan*, (NPR radio broadcast, July 14, 2006) (hosted by Brooke Gladstone), available at www.onthemedial.org/transcripts/2006/07/14/03.

Facilitating the public conversation, *Zara Sochিয়ে*'s website features the text of the *Hudood* Ordinance, detailed comments from these scholars on the question of its legitimacy as an Islamic matter, arguments on "both sides of the story," full transcripts of each episode, related news articles, the final *Zara Sochিয়ে* declaration and a summary of the overlapping consensus of all the featured scholars in the form of specific suggestions for legislative amendment.⁸⁸ Notably, a common theme recurring in nearly all of the scholars' opinions was that while the concept of punishing *hudood* crimes is indeed a religious mandate from God the particular version that had manifested itself in Pakistan's *Hudood* Ordinance was a human-made creation, and therefore could have mistakes that should be corrected.⁸⁹ All the scholars were open to amendment to correct these mistakes, but several specifically pointed out that "to demand a complete repeal has no space in Islam."⁹⁰

The demand for amendments to the *Hudood* Ordinance rather than its full repeal is one of the bright lines distinguishing the strategies of *sharia*-minded advocates from others. Full repeal has consistently been the position of some of the most active domestic and international voices criticizing Pakistan's *Hudood* Ordinance, such as Shirkat Gah,⁹¹ NSER (National

⁸⁸ The *Zara Sochিয়ে* Declaration features these telling words "Thank You for Thinking; When Will Parliament Think?" *Declaration*, GEO TELEVISION NETWORK, www.geo.tv/zsarch/ads/20_c.htm (last visited Oct. 16, 2011).

⁸⁹ See *Pakistan Thinks with Geo—Hudood Ordinance*, SATURDAY POST (SPOTLIGHT), available at www.thesaturdaypost.com/spotlight_42_gcozarasochিয়েc.html (last visited Oct. 16, 2011). There was, of course, a diversity of opinions on exactly which provisions were mistaken and/or should be changed, but there was overwhelming consensus on the injustice of the most egregious provisions, such as the requirement of four eyewitnesses to prove rape. See *Experts Comments*, GEO TELEVISION NETWORK www.geo.tv/zsarch/expertcomments26mayenglish.asp (last visited Oct. 16, 2011).

⁹⁰ Salman Masood, *Pakistan Ponders Altering Islamic Rape Law*, N.Y. TIMES, July 9, 2006 (quoting Shahid Shamsi, a spokesperson for Jamaat-e-Islamic, Pakistan's largest Islamic party, who stated that, although his party was not averse to changing the *Hudood* Ordinance, it did not support repealing it).

⁹¹ SHIRKAT GAH WOMEN'S RESOURCE CTR., WHY THE HUDDOOD ORDINANCES MUST BE REPEALED (2004), available at www.apwid.org/pdf/Why_Hudood_Ordinances_must_be_Repealed.pdf.

Solidarity for Equal Rights),⁹² the Human Rights Commission of Pakistan,⁹³ and Equality Now,⁹⁴ who all took this position publicly both before and after the recent amendments.⁹⁵ Even the official National Commission on the Status of Women, set up by the Pakistani government in 1999 “to advise on eradicating laws discriminatory to women” submitted a report in 2003 recommending, based on the position of the majority of its members, that the *hudood* laws be repealed.⁹⁶

Notably, some extremist *sharia*-minded voices opposed amendment too, but on very different grounds: that it is un-

⁹² See *Activists Call for Repeal of Hudood Ordinances*, ASIA NEWS, July 1, 2006 (reporting National Solidarity for Equal Rights (NSER), a group of eleven human rights organizations calling on the Pakistani government “to repeal the Hudood Ordinances, Islamic-inspired laws on property, adultery and rape that make for discrimination”).

⁹³ See *Women's Protection Bill a Farce: HRCP*, INT'L. NEWS, Sept. 13, 2006, available at www.global-sisterhood-network.org/content/view/1267/76 (noting that in response to the Women's Protection Bill, the Human Rights Commission of Pakistan “reiterated its demand to repeal the Hudood laws”).

⁹⁴ See Press Release, Equality Now; Press Statement on Women's Protection Bill in Pakistan (Dec. 1, 2006), available at www.equalitynow.org/english/pressroom/press_releases/pakistan_20061201_en.html (“While welcoming Pakistan's attempt at addressing its unjust rape laws under the Hudood Ordinances by signing into law the Protection of Women (Criminal Laws Amendment) Rights Bill, Equality Now regrets that the government did not take the opportunity to revoke the Hudood Ordinances in their entirety, as women's and human rights groups in Pakistan have called for. . . . Equality Now will continue to campaign for the complete repeal of the Hudood Ordinances and for the government of Pakistan to promote and protect the rights of women.”).

⁹⁵ See *Civil Society for Repeal of Hudood Laws*, DAWN, June 7, 2006, <http://archives.dawn.com/2006/07/06/nat4.htm> (quoting statements at a press conference of civil society organizations: “Over the last more than two decades, we had been fighting hard to get rid of Hudood ordinances introduced by a despot just for his personal interests. Therefore, total repeal is the only way out and those who talk about amendments, are actually supporters of these laws.”)

⁹⁶ See NCSW REPORT, *supra* note 79 (noting that two members favored amendment over repeal).

Islamic to suggest any changes to the *hudood* laws at all.⁹⁷ The absolutist positions from, on the one hand, women's rights activists insisting on full repeal, and on the other, extremist Muslims opposing any change at all, is significant. One Pakistani reporter described the "fiery nationwide debate" in this way: "[a]t one end of the spectrum are Islamic integralists, who claim it is a sacrilege to even think of cutting down laws inspired by the Koran. At the other end, human rights and civil rights groups are calling for the total repeal—not just the amendment—of the laws, held to be draconian and increasingly abused to settle personal scores."⁹⁸ This situation makes strange bedfellows of the most strident secular feminists and the most extreme Muslim conservatives because, despite their attacking each other's goals, both agree on a worldview that places women's rights activism in direct opposition to *sharia*. In contrast, the strategies chosen by people like the producers of *Zara Sochieye* and Amina Lawal's legal team are *sharia*-mindful, but still pay serious attention to women's rights. Rather than lobbying for the outright repeal of *hudood* legislation, or insisting on the unconstitutionality of religious laws in a secular state, the actions of *sharia*-mindful voices like these undertake more subtle and context-sensitive efforts towards women's rights activism in Muslim environments.

2. *Sharia*-Minded Women's Activism: An Overview

⁹⁷ See Mohammad Imran, *Clerics Say No to Changes in Hudood Laws, Demand New CII*, DAILY TIMES [PAKISTAN], July 7, 2006, available at http://www.dailytimes.com.pk/default.asp?page=2006\07\07\story_7-7-2006_pg7_11 ("Clerics representing various schools of thought [gathered at the *Ulema-Mashaikh* Convention, the *Majlis-e-Tahafuz-e-Hudood-e-Islami*] . . . pledged not to allow changes to Hudood laws and demanded that the Council of Islamic Ideology (CII) be reconstituted. . . . [The religious scholars stated that] all punishments mentioned in the Hudood Ordinance had been mentioned in the Quran, but some NGOs with the support of the government were criticising it. Such statements were 'blasphemous' and the government should take action against the responsible people . . .").

⁹⁸ Qaiser Felix, *Ulemas Meet to Save Islamic Laws*, ASIA NEWS, July 4, 2006, available at <http://www.asianews.it/news-cn/Islamabad-Ulemas-meet-to-save-Islamic-laws-6602.html> (reporting on a July 2, 2006, meeting of influential Pakistani scholars in Islamabad to discuss how to save the *Hudood* Ordinance from amendments proposed by the Council of Islamic Ideology).

Just as there are a great variety of western feminist organizations, *sharia*-mindful women's rights groups also are widely diverse, each with their own agendas and strategies for improving women's lives, and they are far too numerous to catalogue here. But they do share a common methodology: they look to Islam (especially the *Quran* and *sunna*) as the basis of women's empowerment. Azizah al-Hibri, founder of U.S.-based Karamah: Muslim Women Lawyers for Human Rights, explains the ideology in this way:

[M]ost Muslim women tend to be highly religious and would not want to act in contradiction to their faith. . . . The only way to resolve the conflicts of these women and remove their fear of pursuing rich and fruitful lives is to build a solid Muslim feminist⁹⁹ jurisprudential basis which clearly shows that Islam not only does not deprive them of their rights, but in fact demands these rights for them.¹⁰⁰

I do not have the space here to list what these rights are, nor explain how Islamically-based arguments would successfully advocate for them. That is better left to the many authors in this already voluminous and growing literature. For present purposes, however, it is important to include a basic introduction to the field for a better appreciation of the sorts of Islamically-minded alternatives that exist to mainstream secular feminism.

Women's rights activists operating from a self-consciously Islamic ideology usually take the difference between *fiqh* and *sharia* very seriously, pointing out that many gender biases in

⁹⁹ It is important to note that al-Hibri's use of the term "feminist" here is not representative of the terminology used by all Islamically-oriented Muslim women's rights groups. Most seem to refrain from calling themselves "feminists," because of a negative association (true or not) of that term with anti-men, anti-religion, and the secular west. See, e.g., NADIJE SADIQ AL-ALI, SECULARISM, GENDER AND THE STATE IN THE MIDDLE EAST: THE EGYPTIAN WOMEN'S MOVEMENT 82 (1994) ("Rauf resists being labeled a feminist because she perceives feminism to be "anti-men" and negating religion.").

¹⁰⁰ Azizah al-Hibri, *Islam, Law and Custom: Redefining Muslim Women's Rights*, 12 AM. U. J. INT'L L. & POL'Y 1, 3 (1997).

the *fiqh* rules and their application can be attributed to the fallible human element in *ijtihad* reasoning. This enables them to remain firmly within an Islamic methodology while still challenging specific *fiqh* rules that they believe harm women. Thus, many *sharia*-mindful Muslim women's rights organizations have actively engaged those aspects of established *fiqh* that they believe are not (or at least are no longer) beneficial to women. The use of unwed pregnancy to prove *zina* is one example. Others include a husband's unilateral power of divorce, limitations on women as witnesses, marital obedience, restrictions on women's leadership, and rigidity in women's dress code. These are, of course, topics that have been the subject of both secular women's rights and general international human rights attention, but what is significant here is the way in which these topics are addressed. Self-identified Muslim women's groups tend to critique injustices such as these with explicitly *sharia*-focused arguments rather than appeals to universal human rights principles. For example, here is a statement from Sisters in Islam, a Malaysian Muslim women's rights organization:

Islam has been used to justify laws and practices which oppress women. This occurs as a result of customs, traditions, and values which regard women as inferior and subordinate to men. [Our] group advocates a reconstruction of Islamic principles, procedures and practices in light of the basic Quranic principles of equality and justice.¹⁰¹

Sisters in Islam argues that wherever Islamic legal rules oppress women, it is due to cultural and male biases that influenced the *fiqh* as it was articulated in classical periods. Their solution is to reconstruct these rules based on a return to the scriptural sources of *sharia* itself that, they believe, are inherently gender-egalitarian and will guide the way to equality and justice for

¹⁰¹ Press Release, Sisters In Islam, Dr. Riffat Hassan, Sharifa Amina, Muslim Women's League, Nefisra Viviani, Fatima Hussain, & Muslim Welfare Organization (Sept. 1995), available at http://www.mwlusa.org/activities/bcijing_malay.html.

Muslim women today.¹⁰² In other words, Sisters in Islam, along with many other Muslim women's rights activists and scholars, believe that change in oppressive *fiqh* laws is best achieved by critiquing them on Islamic grounds and offering *sharia*-based arguments for their amendment or reinterpretation.¹⁰³

It is useful here to note the significant respect that BAOBAB (which led the defenses of Bariya Magazu and Amina Lawal in Nigeria) has for legal arguments from Islamic *fiqh*, placing them alongside those based on international human rights norms and Nigerian secular law.¹⁰⁴ In contrast to the widespread skepticism towards *sharia* in the international human rights and women's rights communities, BAOBAB

¹⁰² The belief in the inherent gender-fairness of the *Quran* and Prophetic practice is widespread with Muslim women (although it manifests in different particular details). The literature in English articulating this idea is far too numerous to list here. For a very brief sampling of works in English, see, e.g., NIMAT HAFEZ BARAZANGI, *WOMAN'S IDENTITY AND THE QURAN: A NEW READING* (2004); ASMA BARLAS, "BELIEVING WOMEN" IN ISLAM: UNREADING PATRIARCHAL INTERPRETATIONS OF THE QUR'AN (2002); AMINA WADUD, *QUR'AN AND WOMAN: REREADING THE SACRED TEXT FROM A WOMAN'S PERSPECTIVE* (1999); Azizah al-Hibri, *An Introduction to Muslim Women's Rights*, in *WINDOWS OF FAITH: MUSLIM WOMEN SCHOLAR-ACTIVISTS IN NORTH AMERICA* (GISELA WEBB ED., 2000); Maysam J. al-Faruqi, *Women's Self-Identity in the Qur'an and Islamic Law*, in *WINDOWS OF FAITH: MUSLIM WOMEN SCHOLAR-ACTIVISTS IN NORTH AMERICA* (Gisela Webb ed., 2000).

¹⁰³ Again, examples are far too numerous to comprehensively list here. For just one of many, see Mohammad Fadel, *Two Women, One Man: Knowledge, Power and Gender in Sunni Legal Thought*, 29 INT'L J. MID. E. STUD. 185 (1997) (deconstructing the classical *fiqh* evidentiary rules which limit women's testimony).

¹⁰⁴ *Herstory*, BAOBAB FOR WOMEN'S HUMAN RIGHTS, www.baobabwomen.org/history.htm (last visited Sept. 10, 2011) (BAOBAB's mission is "to promote women's human rights principally via improving knowledge, exercise and development of rights under religious laws, customary laws and statutory laws."). Moreover, in its use of international human rights arguments, BAOBAB "insists on being able to reclaim and contribute to international human rights discourse rather than allowing it to be seen as only western." *Working within Nigeria's Sharia Courts*, *supra* note 71, at 3. See also *A Letter from BAOBAB*, *supra* note 57 ("[For] most of us defending Amina and others in similar situations (including BAOBAB, WRAPA, the Nigerian Human Rights Commission and several of the lawyers) . . . the reception is extremely hostile of our message that women's and other human rights can and should be respected in sharia . . . and, that Muslim laws and international human rights are not necessarily mutually incompatible.").

Director Ayesha Imam insists that there are several benefits to advocating for women from a *fiqh*-based perspective: First, “the use of arguments in *fiqh* would help to expose the deficiencies in the acts and the bias against women in their implementation.”¹⁰⁵ It also “promote[s] alternative juristic views to the conservative positions being insisted upon by the religious right and conservatives as the only authentic, legitimate position in Muslim laws.”¹⁰⁶ Thus, Imam believes that presenting *fiqh*-based arguments helps to illustrate the inherent pluralism of Islamic legal doctrine, in contrast to the picture presented by international media and protests “which largely ignore[] the existence of dissent among Muslims.”¹⁰⁷ In Imam’s opinion, “the tendency to treat the Muslim world as monolithic only helps to legitimize the religious right’s monopolistic claim to speak for all Muslims and to de-legitimize the assertions of progressive scholars and rights activists.”¹⁰⁸

That is not to say that *sharia*-minded women’s activism is exclusively about reforming classical *fiqh*. Although interest in the re-interpretation of established *fiqh* doctrine (on women’s rights as well as other topics) is alive at the moment, it is important to remember an important strategic point: many Muslims are quite satisfied with established *fiqh* doctrine, and do not support the idea of its reform. That means that reforming, for example, the rules of divorce to equalize the gender imbalances of the classical *fiqh* (no matter how solidly and piously it is reasoned) will only ever appeal to a *part* of a given Muslim audience. But this does not mean that Islamically-oriented women’s rights activists have nothing to work with. In fact, there is a lot of women-empowering material in the uncontroversial, un-reformed, established *fiqh* rules that do have persuasive

¹⁰⁵ Imam, *supra* note 52, at slide 7.

¹⁰⁶ *Id.*

¹⁰⁷ Ayesha Imam, *Women’s Reproductive and Sexual Rights and the Offence of Zina in Muslim Laws in Nigeria*, in *WHERE HUMAN RIGHTS BEGIN: HEALTH, SEXUALITY & WOMEN IN THE NEW MILLENNIUM* 65, 85 (Wendy Chavkin & Ellen Chesler eds., 2005).

¹⁰⁸ *Id.* This is why BAOBAB includes in its goals the “demystification” of Islamic law to the Nigerian Muslim public, making the diversity of Islamic law much more widely appreciated by the lay public.

weight with the vast majority of practicing Muslims. For example, established *fiqh* not only insists on the spiritual equality of women and men but it also affords women several significant specific legal rights, most of which went unrecognized in western societies until quite recently. These include the right to consent (or refuse to consent) to marriage, to initiate divorce, to own and inherit property, to maintain exclusive control over one's income and property, to be free from physical harm inflicted by one's husband, to gain an education (including becoming a scholar of religious law), and to serve in military combat (including on the front lines).¹⁰⁹ Using only established, uncontested women's *fiqh* rights, it is thus possible for classical, un-reformed, Islamic law to do much of the heavy lifting in improving the lives of many Muslim women. This explains why a major strategy of many Muslim women's rights groups is to extensively utilize classical *fiqh* rules to, for example, combat forced marriages and domestic violence and inspire Muslim women to become intellectually and financially self-empowered, all in the spirit and language of

¹⁰⁹ Of course, the details of the *fiqh* of family law cover much more than just the issues of marriage and divorce listed above, and do include several aspects that place men in a position of more power than women. For more details, see generally JOHN ESPOSITO & NATANA J. DELONG-BAS, *WOMEN IN MUSLIM FAMILY LAW* (2d ed. 2002). I have listed above some examples of clearly-established rights for women in Islamic *fiqh*, even as the larger scheme advantages men in some ways. It is also worth noting that Islamic law also created the potentially very empowering device of the marriage contract that women can use to counteract the default family law *fiqh* that advantages men. Thus, a Muslim marriage contract may (and historically often did) include clauses giving the wife equal access to divorce, limiting the marriage to monogamy, protecting the wife's completion of her education, ensuring the wife's communication and proximity to her family, and many other legal conditions the couple wish to place on their relationship. For more details, see THE ISLAMIC MARRIAGE CONTRACT: CASE STUDIES IN ISLAMIC FAMILY LAW (Asifa Quraishi & Frank Vogel eds., 2009); Asifa Quraishi & Najeeba Syeed-Miller, *No Altars: An Introduction to Islamic Family Law in US Courts, in WOMEN'S RIGHTS AND ISLAMIC FAMILY LAW: PERSPECTIVES ON REFORM* (2004); Azizah al-Hibri, *The Nature of the Islamic Marriage: Sacramental, Covenantal, or Contractual*, in COVENANT MARRIAGE IN COMPARATIVE PERSPECTIVE (John Witte and Eliza Ellison eds., 2005).

familiar (even conservative) Muslim literature and legal doctrine.¹¹⁰

Nadia Yassine, spokesperson for the officially outlawed but tolerated Islamist *'Adl wal Ihsan* (Justice and Welfare) association in Morocco, explains the appeal of Islamically-oriented (as opposed to secular) women's advocacy this way:

The secular feminists are only part of a small elite. They live in an intellectual bubble. They imitate the West. They have removed themselves from Islamic culture. . . . The Islamists, on the other hand, are popular. They represent the people. How else should the women's movement work than on the basis of Islamic values? . . . Women have no problem with Islam. They have a problem with power."¹¹¹

In other words, whereas secular feminist arguments for liberation have often been rejected as a new colonialism, Islamically-oriented women's rights groups operate on the

¹¹⁰ The work of the Muslim Women's League is one such example. MUSLIM WOMEN'S LEAGUE, www.mwlusa.org (last visited Sept. 10, 2011); see also KARAMAH: MUSLIM WOMEN LAWYERS FOR HUMAN RIGHTS, www.karamah.org (last visited Sept. 10, 2011) (working for legal rights); PEACEFUL FAMILIES PROJECT, www.peacefulfamilies.org (last visited Sept. 10, 2011) (opposing domestic violence). Some Muslim women scholars and activists argue instead for more aggressive re-thinking of even the larger framework of some classical *fiqh* that, even with the rights above, still box in the greater cause of women's rights. See, e.g., KECIA ALI, *SEXUAL ETHICS IN ISLAM: FEMINIST REFLECTIONS ON QUR'AN, HADITH AND JURISPRUDENCE* (2006) (arguing that the framework of the *fiqh* of marriage is flawed because based on a contract of sale, and should be reconfigured entirely for the modern world).

¹¹¹ Interview with Moroccan Islamist Nadia Yassine, DER SPIEGEL ONLINE INT'L, July 3, 2007, available at <http://www.spiegel.de/international/world/0,1518,492040,00.html>. Egyptian Islamist and women's rights activist Heba Ra'uf Ezzat expresses similar thoughts: "The Islamists have always considered women's liberation a western idea. This prevented them from making their own interpretations about women's problems. It is time to launch a new women's liberation movement – an Islamic one, not only for the benefit of Muslim women and Muslim societies, but for all women everywhere." AL-ALI, *supra* note 99, at 82 (quoting MIDDLE EAST RESEARCH AND INFORMATION PROJECT, Nov/Dec. 1994, at 27).

principle that advocacy based on the common ground of Islam will have persuasive power with more of the Muslim public.¹¹²

Activists operating from a *sharia*-mindful worldview often display a different set of priorities and strategies for what will improve the lives of Muslim women. Returning to Nigeria as an example, the Federation of Muslim Women's Associations in Nigeria (FOMWAN), is illustrative.¹¹³ Formed in 1985, FOMWAN's stated mission is to "liberat[e] Muslims within the parameters of Muslim law," taking the position that it is culture and tradition, not the precepts of Islam, that subordinate women.¹¹⁴ FOMWAN's arguments for women's rights are self-consciously and almost exclusively Muslim in their orientation and sensibilities. In voicing support of the Nigerian states enacting new *sharia*¹¹⁵ laws, FOMWAN urged these states to

¹¹² The strategic role of these *sharia*-mindful strategies can be seen in Pakistani *sharia* scholar Ms. Misbah Sobuhi's comments in the *Zina* Ordinance debate: "Convince the mullah that you are not echoing the anti-Islam agenda of outsiders . . . that [the *hudood*] law is Islamic but its results are un-Islamic." Mansuri, *supra* note 84.

¹¹³ See FED'N OF MUSLIM WOMEN'S ASS'NS IN NIGERIA, www.fomwan.org (last visited Sept. 10, 2011) ("The vision of FOMWAN is a world where women are totally empowered to be role models in making positive impacts in religious and secular matters.").

¹¹⁴ H. J. Abdullah, *Religious Revivalism, Human Rights Activism and the Struggle for Women's Rights in Nigeria*, in BEYOND RIGHTS TALK AND CULTURE TALK 96, 108–11 (Mahmoud Mamdani ed., 2000). See also FED'N OF MUSLIM WOMEN'S ASS'NS IN NIGERIA, *supra* note 113 ("Our mission is to propagate the religion of Islam in Nigeria through . . . establishment of educational institutions and other outreach activities. And to improve the socio-economic status of the populace, especially women, youth and children through training, provision of qualitative education, health and humanitarian services, micro enterprise schemes and advocacy.").

¹¹⁵ Of course, although these laws (as with other laws in Muslim majority countries) were named *sharia* legislation, I believe it is more accurate to say that they were enactments of selected *fiqh* rules. See *supra* Part II for further explanation of the important distinction between *sharia* and *fiqh*.

practice the Muslim tradition of *shura* ("consultation").¹¹⁶ By this they meant, among other things, the inclusion of women in the process of *sharia* interpretation and implementation.¹¹⁷ Rather than oppose *sharia* legislation as inherently barbaric and gender discriminatory (as many secular activists have done), the women of FOMWAN demanded a seat at the Muslim legislative

¹¹⁶ Abdullah, *supra* note 114. FOMWAN also urged the new states "interpreting and implementing the sharia" to "set an example of honesty, transparency and fear of Allah." Jamila Nasir, *Sharia Implementation and Female Muslims in Nigeria's Sharia States*, in OSTIEN, *supra* note 12, at 76, 94. This plea not only reflected the Muslim sensibilities of FOMWAN, but it also exemplified the only real reservation that many Muslim women seem to have about *sharia*-based legislation: skepticism that the men managing it will live up to their Islamic obligations. In other words, from the perspective of Muslim women like those in FOMWAN, the implementation of *sharia*-inspired laws is welcome, but what puts women's rights at risk is men failing to apply them fully and honorably. Thus, for example, Abuja attorney Maryam Iman wrote in a newspaper commentary:

How many [Muslim men] discharge their responsibilities and fulfill their primary duties and obligations as fathers, husbands, neighbours, leaders, and the sundry roles they find themselves in, as provided under the Sharia? Which of them can sincerely claim that they are fair in their relationships with others, or between their wives, if in a polygynous setting? How many are guided by the precepts of even-handedness and honesty in their business dealings with Muslims and non- Muslims alike, rather than their personal interest? How many more are transparent and accountable to the public, in all matters of leadership and governance?

Maryam Iman, *Punishments Under Sharia and their significance*, NEWSWATCH, Nov. 3, 2002. Similarly, Anna Wali, a Lecturer at Katsina State Polytechnic and Financial Secretary of WRAPA, believes that *sharia* is a good, liberating thing for women "because it makes their husbands live up to their family responsibilities of providing maintenance." See Nasir, *supra*. And Amina Maude, Director of Women Affairs at the Ministry of Women Affairs and Social Development at Kano State says that "if Sharia is fully and correctly implemented, it would be in [women's] interest." *Id.* (citing positive impact of the revival of traditional methods of conflict resolution which accompanied *sharia* implementation).

¹¹⁷ See, e.g., Nasir, *supra* note 116, at 94 (describing memoranda submitted by women to the Committee Set Up to Advise the State Government on the Implementation of Sharia in Sokoto State detailing roles played by women in Islam, and articulating "the need to involve and encourage women to participate in the process and implementation of Sharia in Sokoto State").

table. Their demand has met with only limited success,¹¹⁸ but it is nevertheless important to recognize the significance (and popularity) of this *sharia*-focused approach to women's empowerment. In contrast to those of their secular counterparts, these sorts of demands seem to have generated much less knee-jerk resistance for being pro-western or anti-Islamic than the anti-*sharia* strategies of other women's rights activists in Nigeria.¹¹⁹

FOMWAN's work is part of a growing Nigerian Muslim public discourse about women's rights and *sharia*. Motivated in part by startling *zina* cases like that of Amina Lawal, many women's rights activists with a *sharia*-friendly mindset have become motivated to study Islamic law more deeply in order to investigate the appropriateness and necessity of these punishments¹²⁰ as well as to empower themselves to engage in *sharia* discourses on a more equal basis with men, including religious legal scholars.¹²¹ To this end, there is growing interest in *sharia* education and critical examination of all women's

¹¹⁸ According to Jamila Nasir, women's requests for involvement were "hardly ever honoured." *Id.* at 95. Still, it is worth noting that women did sit on one state's Sharia Implementation Committee (numbering two of a twenty-nine person committee in Bauchi), and another (Katsina) actively solicited the views of a woman's organization. That organization was FOMWAN. *Id.*

¹¹⁹ Consider that the plenary session of a conference on "Promoting Women's Rights Through Sharia in Northern Nigeria" featured not only the same Zamfara governor Ahmad Sani Yerima "who had insisted on being unswayed by human rights arguments in Bariya Magazu's case" (speaking about structures he used to "enforce *sharia*") in Zamfara, but also his wife, a medical doctor, "listing a litany of women's rights and duties." Badran, *supra* note 60.

¹²⁰ See, e.g., Iman, *supra* note 116 (questioning from within Islamic law the correctness of punishments such as amputations and stonings in present-day Nigeria).

¹²¹ Nasir *supra* note 116, at 99–100.

issues impacted by the new *sharia* laws.¹²² As conferences, workshops and other civil society forces create more Islamically-oriented conversations about women's rights and empowerment,¹²³ many interesting proposals have emerged. To take some brief examples, there seems to be an emphasis on

¹²² See, e.g., Nasir, *supra* note 116, at 100 (citing S. Mahdi, Conference on The Sharia Debate and the Shaping of Muslim and Christian Identities in Northern Nigeria at the University of Bayreuth: The Role of Women in Sharia Implementation in Nigeria (July 11–13, 2003) (describing the role of Muslim women in *sharia* implementation as “attempting to educate women about, and to vindicate in many concrete cases all over the North, the rights of women under the Sharia to equity and fairness in their dealings with men”)).

¹²³ For example, in 2007, a National Conference titled “Promoting Women's Rights Through Sharia in Northern Nigeria” was organized by the Centre for Islamic Studies at Ahmadu Bello University in Zaria. According to Georgetown professor and specialist in gender and Islam Margot Badran, who attended the conference, this was an event in which the voices of women (and men) came together “in a grand crescendo . . . for the delivery of women's rights as a necessary aspect of justice in the new Sharia dispensation.” Badran, *supra* note 60. She reports that conference participants were made up of women and men in equal numbers, including “high government officials, traditional leaders, Islamic scholars of both genders, qadis and judges, lawyers, academics, health professionals and activists,” that both men and women led prayers, delivered plenary addresses, and deliberated at length the theory and practice of *sharia* in Nigeria, with special attention to the contemporary realities of Nigeria today. In Badran's words:

As I listened to speeches, moving around discussion groups, I saw Muslim society in Nigeria in deep conversation with itself. . . . Stakeholders appeared intent on realising women's rights as society's rights, and rights enjoyed by the poor as the hope of the umma. It looked to me as if the people were taking the implementation of the Sharia into their own hands; social justice, not hudud, was at the centre.

Id. A corresponding publication is U.N. GIRLS' EDUCATION INITIATIVE, PROMOTING WOMEN'S RIGHTS THROUGH SHARIA IN NORTHERN NIGERIA (2006), available at http://www.ungei.org/resources/1612_800.html. Written by a team of research consultants with expertise in Islamic law, human rights and sociology, the report aims to document “both exemplary and harmful practices affecting Muslim women in Northern Nigeria, and evaluate[] them according to Sharia.” *Id.* at 1. The authors of the report posit that the expansion of *sharia* in northern Nigeria has created the opportunity to question practices that harm women “by subjecting them to the scrutiny of *sharia*,” and also “opens an avenue for concerned Muslims to embark on projects that seek to promote positive practices and challenge harmful and negative ones, relying on an authentic understanding of Sharia.” *Id.*

several women-empowering doctrines from classical *fiqh*, especially those regarding education and property. There is also a revival of *fiqh* rules stating that a wife has no religious obligation to do her family's housework,¹²⁴ and that a husband is financially responsible for supporting his family, including ensuring the equal treatment of any multiple wives.¹²⁵ There is a strong tone in this discourse that if men were to properly abide by their Islamic obligations, then the lives of many Muslim women would improve.¹²⁶

There is also some interest in *fiqh* reform, such as critiquing the fairness to women of rules giving men an exclusive unilateral right of divorce.¹²⁷ Similarly, some *sharia*-minded scholars and activists in Nigeria have suggested new *ijtihad* on the Maliki evidentiary rule that allows unwed pregnancy to prove *zina*, because it unfairly impacts women more than men.¹²⁸ There has also been a proposal for the

¹²⁴ See *id.*

¹²⁵ See *id.* In an interesting example of the merging of classical *fiqh* principles with pragmatic modern realities, the authors of this report directly address the serious danger of the spread of AIDS that can result from multiple polygynous partners: because of the Islamic principle that "one should do no harm nor permit harm to be done to oneself," the report cites a recent *fatwa* that existing wives may request medical tests and verification of health status of a husband planning to marry another wife. *Id.* at 9.

¹²⁶ See, e.g., *Equality and Justice Before Allah and the Muslim Family*, MUSAWAH FOR EQUALITY IN THE FAMILY, www.musawah.org/docs/research/country-reports/Nigeria-report.pdf (last visited Oct. 16, 2011) [hereinafter *Equality and Justice*] (Musawah's Nigeria report).

¹²⁷ Unless it is adjusted by the terms of the marriage contract. See Asifa Quraishi & Najecba Syeed-Miller, *No Altars: An Introduction to Islamic Family Law in US Courts*, in *WOMEN'S RIGHTS AND ISLAMIC FAMILY LAW: PERSPECTIVES ON REFORM* 179, 190–91 (2004).

¹²⁸ See U.N. GIRLS' EDUCATION INITIATIVE, *supra* note 123, at 32 (citing the "lack of consensus" on *zina* evidentiary rules because the Maliki rule diverges from that of the other four Sunni schools, and therefore asserting "the need for Nigerian scholars (*Ulama*) to come up with the most appropriate and just ruling for our situation") (using a term for scholars (*ulama*) that generally indicates scholars of *fiqh*, rather than secular legal scholars).

inclusion of women *qadis* (judges) in *sharia* courts,¹²⁹ because the rules of classical *fiqh* that negatively impact women might become more naturally moderated if women were bringing their sensitivities and personal knowledge to courtroom implementation of *sharia* in the real world.¹³⁰

Working toward the goal of female *qadis* has several beneficial side effects for Muslim women's rights. First, because one of the obstacles to women becoming appointed as judges in *sharia* courts is the general inadequacy of Islamic legal education for most Nigerians, this project naturally directs attention to the importance of a particular kind of education for women and girls: *fiqh* education. The idea of increasing Islamic legal education may seem an oxymoron to a western feminist, probably because the western idea of Islamic education is dominated by images of Taliban-style *madrasas* depicted as the very antithesis of women's empowerment. So, although western women's activists tend to be wholeheartedly supportive of enhancing secular education for women and girls around the

¹²⁹ Nasir, *supra* note 116, at 96. Malaysia recently ventured into implementing this idea, with some predictable resistance, but overall, apparent acceptance. See Marina Mahathir, *Malaysia moving forward in matters of Islam and women*, COMMON GROUND NEWS SERVICE, Aug. 17, 2010, available at www.commongroundnews.org. From a classical *fiqh* perspective, this is not an uncontroversial proposal. Of all the established schools of Islamic law, the Hanafi school is the most open to the idea of women judges, but even that school allows for it only with significant limitations. As a purely historical matter, some women have served as judges to varying approval by the societies in which they served. See, e.g., 5 UMAR KAHHALA, A'LAM AL-NISA, 67-70 (entry on "Umm al-Muqdadir billah") (describing Umm al-Muqtadir billah's appointment of a woman judge in a Baghdad tribunal in the tenth century A.D., noting that initially, the people did not solicit her judgment, but on her second day on the job, when she brought the famous scholar/judge Abul Hassan to illustrate scholarly approval, the people overcame their resistance). In promoting the idea of women as *sharia* court judges in Nigeria, Jamila Nasir acknowledges the difficulty of establishing *fiqh* precedent for this idea, but nevertheless makes a case for it, citing among other things, the "growing numbers of women versed in Islamic studies and in the Arabic language . . . growing numbers of women, in other words, among the *ulama*." *Id.* at 96-97.

¹³⁰ Nasir, *supra* note 116, at 96 (commenting that "it might be as judges, administering Islamic law on a daily basis, that women could do the most to close the gap between the rights of women in Islamic legal theory and women's practical enjoyment of those rights, at present impaired by the prejudices and practices of male judges derived not from Islam but from culture and self-interest").

world, they are generally very resistant to the idea of more Islamic education. However, as Muslim female scholar-activists have pointed out, Islamic education is an indispensable tool of empowerment for practicing Muslim women who believe in the ultimate justice of *sharia*. For these women, Islamic education (and especially Islamic legal education) is crucial to giving Muslim women necessary tools to fight for their rights, because fluency in Islamic law is a very effective way to overcome patriarchal customs in Muslim communities.¹³¹ Islamic legal knowledge also often instills a new self-esteem in Muslim women, giving them confidence to resist exercises of power by fathers and husbands attempting to violate their *fiqh* rights. Finally, increased Islamic education for those interested in women's rights creates a positive feedback loop with the advocacy work of organizations such as BAOBAB which use religious as well as secular legal and human rights arguments to defend Muslim women in *zina* prosecutions and other cases.¹³²

¹³¹ See Nimat Hafez Barazanji, *Muslim Women's Islamic Higher Learning as a Human Right: Theory and Practice*, in *WINDOWS OF FAITH: MUSLIM WOMEN-SCHOLARS IN NORTH AMERICA* (Gisela Webb ed., 2000) ("knowledge, particularly religious knowledge, means authority, and religious authority is power").

¹³² Nasir, *supra* note 116, at 99–100 ("[T]he resulting enhanced knowledge of women and women's organizations, of Islamic law and of the rights of women under it, has in turn fed back into the work of individual women lawyers and of NGOs like WRAPA and BAOBAB, of providing legal education and counsel and representation to women in legal matters of all sorts—not only criminal cases, but especially family matters such as marriage contracts and divorce settlements, child custody, maintenance, and widows' inheritances."); *Equality and Justice*, *supra* note 126 ("A lot of work is going on i.e. researches and trainings are going on within the Muslim communities, which include working with both the conservative and progressive ulama. In work being done by WRAPA an equal number of conservative and progressive ulama's were engaged in research, which involved interviewing and talking to the community. The results were fed back to them and they had to accept it . . . one of the ulama members Sheikh Ibrahim Khalcel of Kano has made a public challenge on the gross neglect and abuse of the rights of women in the Muslim family.").

The usefulness of these types of contributions has already been acknowledged by Ayesha Imam.¹³³

Unfortunately, the anti-*sharia* strategies taken by many western advocates have handicapped the work of these *sharia*-minded women's rights activists in Muslim countries. That is, it has become very difficult for Muslims to advocate for women's rights without being branded as co-opted (or deluded) by the west.¹³⁴ This attack often results in their work being discredited and dismissed by Muslim audiences, even if the activists themselves are believing Muslim women who quote the *Quran* and *sunna* in their work.¹³⁵ A Muslim advocate for women's rights today can reasonably expect to be ridiculed as a pawn of (or sell-out to) the west, or a corruptor of Islam—a situation especially frustrating for those who want their message to be received by those within their own Muslim communities.

¹³³ See Ayesha Imam, BAOBAB for Women's Human Rights, Acceptance Speech on Islam and Women's Rights (Dec. 9, 2002), reprinted at www.waado.org/nigcrdelta/humanrights/WomenRights/AyeshalImam.html (expressing, upon receipt of the Canadian John Humphrey Freedom Award in 2002, gratitude to domestic and international Muslim scholars and lawyers, who shared their expertise in these cases).

¹³⁴ See France, *supra* note 50 (quoting Akbar Ahmed: "What in effect happened was these elements in Nigeria who want to reject modernity now find it very easy to say, 'This [appeal of Amina Lawal's *zina* conviction] is coming from the West, which is humiliating us, which is on a warpath against Islam and our culture, so we will reject this, therefore we have to be very strict with our women, because America wants them in bikinis and skimpy clothes'"); Yawuri, *supra* note 44, at 139 (narrating how, after being identified in the courtroom as one of Lawal's lawyers, "four people met me and proceeded to remind me that I am a Muslim and that it was a clear betrayal of my religion to allow myself to be used by western countries to destroy my religion"); *Saving Amina Lawal*, *supra* note 44, at 2367–68 ("Women cannot speak out against injustices or rights violations in their countries without risking the label of culture-traitors, as their own opposition to practices and customs targeted by the Western or international human rights community will be interpreted as 'siding with' the colonialist intervenors.").

¹³⁵ Egyptian activist Heba Ra'uf Ezzat echoes this sentiment when she complains that the nature of western women's advocacy in Muslim countries has "prevented [Muslims] from making their own interpretations about women's problems." Karim El-Gawhary, *An Interview with Heba Ra'uf Ezzat*, M.I.D. E. REPORT, Nov.-Dec. 1994, at 26, 27.

In other words, one of the unfortunate consequences of aggressive western-originated women's rights activism in Muslim countries is that it directly *disempowers* those Muslims (especially women) who are working for women's rights from a Muslim perspective.¹³⁶ To illustrate with a Nigerian example again, consider how the negative effects of association with western rights groups reverberated throughout the Nigerian Muslim community when Safiyatu Hussaini, an early Nigerian *zina* defendant, was invited to Rome for a roundtable discussion about her case and an honorary citizenship.¹³⁷ This caused public uproar back home that Nigeria's "most famous adulteress" was being honored in that most Christian of cities, some even adding suspicions of missionary motives.¹³⁸ Anticipating this sort of reaction, WRAPA (Women's Rights Advancement and Protection Alternative) turned down an invitation to join the roundtable, "in order to avoid endorsing what many perceived to be westerners taking ownership of Ms. Hussaini's acquittal."¹³⁹ For similar reasons, "[d]espite serious financial constraints, Ms. Lawal's legal team refused offers of financial assistance from international donors for fear that such assistance would damage its credibility."¹⁴⁰ The result of the publicity surrounding Safiyatu

¹³⁶ Western advocates are usually unaware of the silencing effect their actions put on indigenous Muslim activists at home, often promoting their work with little sensitivity to their potential damage. As Ayesha Imam puts it, headlines like "Nigerian woman wins award for Anti-Sharia Campaign," are written in a style that is "likely to damage a reasoned critique of the sharia acts from within Muslim discourses." Imam, *supra* note 52, at slide 12.

¹³⁷ The invitation was part of the Annual Festival of the Dionysia International Center for Arts and Cultures. *Saving Amina Lawal*, *supra* note 44.

¹³⁸ See Ali M. Ali & Isah Ibrahim, *We'll Send Adulterers to Rome-Yerima*, THIS DAY, Sept. 15, 2002, available at www.thisdayonline.com/archive/2002/09/15/20020915news01.html; Nduka Uzuakpundu, *Honour on Safiya May Prompt Death Penalty Ban Worldwide, Says Mayor of Rome*, ASIA AFRICA INTELLIGENCE WIRE, Sept. 10, 2002; *Safiya Hussein: Celebrating an Adulteress*, AFRICA NEWS, Sept. 26, 2002.

¹³⁹ See Yawuri, *supra* note 44, at 135. *Saving Amina Lawal*, *supra* note 44, at 2382.

¹⁴⁰ *Saving Amina Lawal*, *supra* note 44, at 2382. (And even so, "[d]espite the efforts that Nigerian human rights activists took to distance Ms. Lawal's case from the international attention it was receiving, many activists were labeled 'anti-Islam' by other Muslims." *Id.*)

Hussaini's Rome honor was unfortunate on many levels. As one commentator put it, it "caused a situation in which the voices of Nigerian women's rights activists were excluded from an event that was intended to 'promote dialogue and understanding among peoples and cultures.'"¹⁴¹ It also "predictably outraged many of Nigeria's Muslims and probably set back, in their hearts and minds at least, the very pro-women and pro-human rights agendas the sponsors of the trip said it was meant to advance."¹⁴² It also provides a powerful lesson to those western organizations interested in publically honoring someone who has been presented in the western media as a victim of Muslim extremism and *sharia* implementation in the Muslim world: the very act of western "honoring" could force other (even supportive) Muslims to distance themselves from the honoree, and potentially marginalize her voice within her own community.¹⁴³

¹⁴¹ *Id.* at 2384.

¹⁴² Yawuri, *supra* note 44, at 135.

¹⁴³ It is for this reason that, when Glamour Magazine announced Pakistani gang rape survivor and education pioneer Mukhtaran Mai would receive one of its "Woman of the Year" awards, I and a coalition of American Muslims (unofficially self-titled "Muslims for Mukhtaran") quickly drafted an Islamically-oriented statement in solidarity with Mukhtaran Mai's inspiring story and sought signatures from mainstream American Muslim organizations in support. See *Muslims Support Pakistani Rape Survivor Mukhtaran Mai*, MUSLIM WOMEN'S LEAGUE NEWS (Nov. 2, 2005), www.mwlnusa.org/news/mukhtar_mai.htm. The goal of the collective statement was not only to highlight the Islamic nature of Mukhtaran Mai's actions (and the un-Islamic nature of the tribunal which originally sentenced her to be gang-raped), but also to try to reclaim her name as an inspirational hero for Muslims, before it became associated with a western agenda. Gathering signatures was not easy, because such suspicions had already permeated the Muslim community's brief knowledge of Mukhtaran Mai's story. See, e.g., Aslam Abdullah, *Mukhtaran Mai's Human Rights*, June 16, 2005, available at www.iviews.com/Articles/articles.asp?ref=IV0506-2716).

3. The Intersectionality¹⁴⁴ of Muslim Women's Activism

It is crucially important for secular western feminists to appreciate the nuanced, complicated and vulnerable position in which *sharia*-mindful Muslim women activists stand, and why anti-*sharia* advocacy impacts them so directly. As described above, Muslim women's rights groups insist that "Islamic law" and "women's rights" are not opposites. For this they are misunderstood, dismissed, and opposed by—on the one hand—conservative Muslims who often suspect them of threatening Islam through western cooptation, and—on the other—feminists who often dismiss their work as that of religious apologists insufficiently committed to feminist principles. There is, in other words, a distinct intersectionality to these activists: they are committed to women's liberation but they are not secular feminists, and they are committed to Islam but they are willing to challenge certain Islamic laws and norms that hurt women. They challenge patriarchal and male-centered *fiqh* doctrine and cultural practices in ways that western feminists find difficult to categorize accurately, because they operate in the intersection of

¹⁴⁴ See generally Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991) (describing the problem of definitions of identity as an "either/or" proposition of woman or person of color, causing "[c]ontemporary feminist and antiracist discourses have failed to consider intersectional identities such as women of color. . . . Because of their intersectional identity as both women and of color within discourses that are shaped to respond to one or the other, women of color are marginalized within both.").

spaces where those in the west normally locate Muslim women's identities.¹⁴⁵

Secular feminists who have internalized the idea that *sharia* is inherently bad for women will have an especially difficult time appreciating the value of the *sharia*-minded strategies used by Muslim women activists. Some secularists wonder about Muslim women who speak of women's liberation in the same breath as they support Islam and *sharia*, suspecting them of denial and false consciousness that limits their ability to really challenge the causes of their oppression.¹⁴⁶ As a result, entrenched western feminist resistance to *sharia* can thus result in a tendency to deny full agency to the choices of Muslim women when they choose to incorporate Islamic principles and *fiqh*-based arguments in their advocacy strategies. Instead, many western feminists still exhibit traits of a rescue mentality that imagines itself to be bringing liberation to Muslim women from

¹⁴⁵ Scholar and novelist Mohja Kahf has entertainingly described the nature of Western discourses on Muslim women thusly:

The neo-orientalist "Pity Committee" sees each "Muslim Woman Victim Chick of the Month" as either a "Mute Marionette" in desperate need of rescue by the enlightened and liberated west, or an "Exceptional Escapee" who has miraculously escaped from (one or all of) a "Forbidding Father," a "Rotten Religion" or a "Cruel Country"—usually to live in the an enlightened and liberated west.

See Mohja Kahf, *Writing on Muslim Gender Issues in the West Today: Slipping Past the Pity Committee*, in *ARAB & ARAB AMERICAN FEMINISM: GENDER, VIOLENCE, & BELONGING* 111 (Rabab Abdulhadi, Evelyn Alsultany, & Nadine Naber eds., 2010).

¹⁴⁶ For example, secular activists dismiss the work of Egyptian activist and scholar Heba Ra'uf Ezzat, "mistakenly underscoring her association with the Muslim Brotherhood. By viewing her merely as a voice of Egypt's Islamic movement, secular feminists find an excuse to avoid engaging with her discourse—even though she is equally conversant with Islamic interpretation and western social theorists such as Habermas." Ezzat herself insists on her "ability to engage in high-level debate with secular feminists and the 'ulama [religious *fiqh* scholars] alike." MEENA SHARIFY-FUNK, *ENCOUNTERING THE TRANSNATIONAL: WOMEN, ISLAM, AND THE POLITICS OF INTERPRETATION* 149 (1988).

the outside.¹⁴⁷ To fully understand how entrenched and subconscious this idea is (and why those being “rescued” are so tired of it), it is important to realize that it has roots going all the way back to colonialism.

III. “Feminism vs. Islam”: Unpacking Some Very Old Baggage

Feminist rhetoric, it turns out, played a major role in the psychology of western European colonization of Muslim lands. As Leila Ahmed has famously explained, colonialist discourses of the nineteenth century depicted Muslim women as oppressed and powerless, and utilized this image to justify colonialism as rescuing these women from barbaric and oppressive Muslim men.¹⁴⁸ The ideology of feminism just emerging in European countries became a useful tool in the “civilizing mission” of this colonialist enterprise overseas, despite the fact that these men rarely supported feminist movements back home.¹⁴⁹ In the words of Leila Ahmed:

Even as the Victorian male establishment devised theories to contest the claims of feminism, and derided and rejected the ideas

¹⁴⁷ Many have written on the problems of this rescue paradigm. See, e.g., Aili Tripp's comments in *Challenges in Transnational Feminist Mobilization*, in GLOBAL FEMINISM: TRANSNATIONAL WOMEN'S ACTIVISM, ORGANIZING, AND HUMAN RIGHTS 296, 302 (Myra Marx Ferree & Aili Mari Tripp eds., 2006).

¹⁴⁸ LEILA AHMED, WOMEN AND GENDER IN ISLAM: HISTORICAL ROOTS OF A MODERN DEBATE 144-68 (1992) (describing how protection of women played a crucial role in the “moral crusade” and “civilizing mission” of colonialism).

¹⁴⁹ An example is Lord Cromer, a prominent British diplomat and major player in British colonialism in Egypt. In that capacity, he advocated on behalf of Muslim women, writing that the inferiority of Muslim men could be traced to the “degradation of women,” which was a “fatal obstacle” to the Egyptian’s “attainment of that elevation of thought and character which should accompany the introduction of Western civilisation.” *Id.* at 152-53 (citations omitted). Cromer’s policies in Egypt were not only detrimental to women (for example, restricting the school for *hakimas* – which had previously provided medical training to women—to midwifery, based on his reasoning that, although some women like to be attended by female doctors, “throughout the civilized world, attendance by medical men is still the rule”), but also at home in England, he was a founding member and sometime President of the Men’s League for Opposing Women’s Suffrage. *Id.* at 153.

of feminism and the notion of men's oppressing women with respect to itself, it captured the language of feminism and redirected it, in the service of colonialism, toward Other men and the cultures of Other men. It was here and in the combining of the languages of colonialism and feminism that the fusion between the issues of women and culture was created. More exactly, what was created was the fusion between the issues of women, their oppression, and the cultures of Other men. The idea that Other men, men in colonized societies or societies beyond the borders of the civilized West, oppressed women was to be used, in the rhetoric of colonialism, to render morally justifiable its project of undermining or eradicating the cultures of colonized peoples.¹⁵⁰

For those on the receiving end of all this, the focus on liberating women as a justification for demanding adherence to western colonialist rules casts a large shadow over the language of western feminism and its women's rights agenda. From the perspective of colonized populations, the idea of feminism—and women's rights activism generally—has become fused in many minds with the project of western domination. This association is perpetuated today when western-based voices lobby against a *sharia*-based law or practice in the name of women's rights.

Western feminists today, of course, do not imagine their mission as a new colonialist invasion of Muslim lands, but they are largely unaware of the colonialist echoes in many of their strategies. That is, although today's international women's rights advocates are generally motivated by a genuine desire to improve women's lives and not by a desire to re-colonize the Muslim world, the imagery they invoke has not drastically changed. There has been remarkably little shedding in the west of the idea of the stereotypical Muslim woman as disadvantaged and oppressed by her religion and her men. There are exceptions, of course, but generally speaking, even after the

¹⁵⁰ *Id.* at 151.

thoughtful self-reflection introduced by minority feminist voices and Third Wave Feminism, old visual symbols and tropes about the subjugated and helpless Muslim woman persist into the twenty-first century and directly influence the nature of western feminist work regarding Islam and Muslim women.¹⁵¹ Contemporary examples are many. To take a familiar one, consider the imagery accompanying the “Save Amina Lawal” campaign: in photographs, she was consistently depicted “with downcast eyes, swathed in her veil, baby in tow, silent, in need of ‘saving.’”¹⁵² As one commentator points out:

The Western media’s response to Sharia in Nigeria demonstrates the continued influence of colonialist rhetoric in its focus on Ms. Lawal and other women sentenced to stoning [T]he intervention was couched in terms of ‘saving’ a woman from a gender-oppressive religious regime [T]he letter-writing campaigns and interventions from interested foreign leaders all directed themselves to the Nigerian government and the Sharia courts, while Ms. Lawal herself remained an ‘object,’ to be written about, spoken for, or acted upon, with little agency or voice of her own.”¹⁵³

The overwhelming English-language media coverage of the *zina* cases of Amina Lawal and others also exemplifies a western near-obsession with the issue of Islamic law and women in particular. Male experiences under Islamic law generate significantly less attention in the west. Thus, Amina Lawal and Bariya Magazu’s stories generated emotional headlines that

¹⁵¹ Some of this phenomenon has been detailed by Cyra Akila Choudhury in *Empowerment or Estrangement?: Liberal Feminism’s Visions of the “Progress” of Muslim Women*, 39 U. BALT. L.F. 153 (2009) (examining how “liberalism’s justification for colonialism has become sublimated in liberal (legal) feminism, which subconsciously continues traditional liberal political theory’s judgments about the ‘East’”).

¹⁵² *Saving Amina Lawal*, *supra* note 44, at 2377.

¹⁵³ *Id.* at 2380–81 (also noting that “an exuberant, smiling, powerful woman probably would have made for a less effective campaign photo”).

sharia mandates the “stoning of women,”¹⁵⁴ despite the fact that, at the time of Lawal’s case, two men had also been sentenced to death by stoning. Yet no foreign leaders sought to intervene in their cases, nor were vast letter writing campaigns started on their behalf.¹⁵⁵ The importance of rescuing oppressed Muslim women is still so entrenched in western culture that it can even help to justify military intervention, as was illustrated during the 2001 United States invasion of Afghanistan. In the weeks immediately before and after the invasion, American media repeatedly featured print and video images of *burka*-clad women

¹⁵⁴ A new global women’s rights organization, the Violence is Not Our Culture: The Global Campaign to Stop Violence Against Women in the Name of ‘Culture’, VIOLENCE IS NOT OUR CULTURE, <http://www.stop-stoning.org/> (last visited Oct. 16, 2011). As I have pointed out elsewhere, to criticize *sharia* because it requires the “stoning of women” (as if the stoning punishment does not also apply to men convicted of *zina*) presents an inherently skewed picture of Islamic law. See Asifa Quraishi, *Who Says Sharia Demands the Stoning of Women? A Description of Islamic Law and Constitutionalism*, 1 BERKELEY J. MID. E. ISLAMIC L. 163, 168–69 (2008). It is in the disproportionately high numbers of real-world *zina* prosecutions of women *as compared to those of men* (and the media emphasis of these cases over those of male *zina* defendants) that causes the impression that the stoning punishment applies only to women. It is my opinion that emphasizing the injustices of this disproportionality should be the emphasis of women’s rights activism, rather than a self-serving (and anti-*sharia* sounding) partial description of Islamic law.

¹⁵⁵ See *Saving Amina Lawal*, *supra* note 44, at 2366 (noting Ahmadu Ibrahim and his girlfriend, Fatima Usman, were convicted for having an affair and sentenced to death by stoning in October 2002), 2373 (noting also that at the time of the U.S. House of Representatives resolution on stoning, several amputations had already been carried out against men under Nigeria’s new *sharia* laws, but there was no mention in the resolution listing these among the “cruel” punishments condemned by the US representatives; “instead, [the *zina* case] inspired a resolution referencing women’s rights violations in other Muslim states”). A similar emphasis on the incompatibility of Islamic law with women’s right was exhibited by Paul Bremer during the Interim Period of the Coalition Provisional Authority in Iraq. Bremer vowed to veto any constitution that incorporated Islamic law, because he “feared that women’s rights would be ‘rolled back in the interim constitution . . . [through] Islamic restrictions.” Jim Krane, *Touting Women’s Rights, U.S. Administrator Threatens Veto of Iraqi Islamic Law Measure*, A.P., Feb. 16, 2004.

suffering under the *sharia* of the Taliban.¹⁵⁶ In a presidential radio address, First Lady Laura Bush herself appealed to the American public to help liberate Afghani women and children from the Taliban and its terrorist allies, even asserting that the war on terrorism was “a fight for the rights and dignity of women.”¹⁵⁷

The uniquely political ends served by Laura Bush’s emotional appeal about the plight of Afghan Muslim women illustrates an interesting phenomenon: the “suffering” of Muslim women under *sharia* has become a major theme in the politics of American feminism today. It turns out that, as multiculturalism has moderated the more liberal strains of western feminism (reducing the rescue mentality rhetoric), a right-oriented counter-liberal feminist voice condemns this change as evidence of the very weakness of liberalism. In other words, those critical of the American political left have complained that multiculturalism is exactly the problem with liberal feminism, because it leads to relativism, which in turn leads to a

¹⁵⁶ See Cheryl B. Preston, *Women in Traditional Religions: Refusing to Let Patriarchy (or Feminism) Separate us from the Source of Our Liberation*, 22 MISS. C. L. REV. 185 (2003) (“The picture of Afghan women under the *burqa* may be the feminist ensign of our age. This image is a powerful one in enlisting the support of feminists, typically pacifists, for war—and if not for war in the sense of an armed invasion of another country, at least for a revival of the feminist disdain for traditional conservative religions.”). See also Laila Al-Marayati & Semeen Issa, *Muslim Women: An Identity Reduced to a Burka*, L.A. TIMES, Jan. 20, 2002 (“We don’t mean to make light of the suffering of our sisters in Afghanistan, but the burka was—and is—not their major focus of concern. Their priorities are more basic, like feeding their children, becoming literate and living free from violence. Nevertheless, recent articles in the Western media suggest the burka means everything to Muslim women, because they routinely express bewilderment at the fact that all Afghan women didn’t cast off their burkas when the Taliban was defeated. The Western press’ obsession with the dress of Muslim women is not surprising, however, since the press tends to view Muslims, in general, simplistically.”).

¹⁵⁷ James Gerstenzang & Lisa Getter, *Laura Bush Addresses State of Afghan Women*, L.A. TIMES, Nov. 18, 2001; see also *NBC Nightly News: First Lady Laura Bush Kicked Off an International Public Relations Campaign in a Radio Address, Speaking Against Taliban Mistreatment of Women* (television broadcast Nov. 17, 2001) (“I’m delivering this week’s radio address to kick off a world-wide effort to focus on the brutality against women and children by the al-Qaida terrorist network and the regime it supports in Afghanistan, the Taliban. That regime is now in retreat across much of the country, and the people of Afghanistan—especially women—are rejoicing.”).

compromise of core feminist values like equality and empowerment.¹⁵⁸ Perhaps not surprisingly, the question of liberating Muslim women has been placed at the center of this very American debate. For example, in an article titled "Why Feminism is AWOL on Islam," Kay Hymowitz explains the lack of feminist outrage at the "appalling [mounting] miseries of women in the Islamic world" with the following analysis:

[L]ook more deeply into the matter, and you realize that the sound of feminist silence about the savage fundamentalist Muslim oppression of women has its own perverse logic. The silence is a direct outgrowth of the way feminist theory has developed in recent years. Now mired in self-righteous sentimentalism, multicultural nonjudgmentalism, and internationalist utopianism, feminism has lost the language to make the universalist moral claims of equal dignity and individual freedom that once rendered it so compelling.¹⁵⁹

In other words, it has become a "truism on the right"¹⁶⁰ that the liberal obsession with political correctness and diversity has weakened its ability to combat the oppression of Muslim women

¹⁵⁸ For a sense of the conversation see, e.g., SUSAN MOLLER OKIN, *IS MULTICULTURALISM BAD FOR WOMEN?* (1999) (featuring an essay of the same title by Susan Moller Okin, with responses from Azizah al-Hibri, Abdullahi An-Naim, Homi Bhabha, Sander Gilman, Janet Halley, Bonnie Honig, Will Kymlicka, Martha Nussbaum, Bhikhu Parekh, Katha Pollitt, Robert Post, Joseph Raz, Saskia Sassen, Cass Sunstein, and Yael Tamir).

¹⁵⁹ Kay S. Hymowitz, *Why Feminism is AWOL on Islam*, CITY JOURNAL, Winter 2003, available at www.city-journal.org/html/13_1_why_feminism.html.

¹⁶⁰ Katha Pollitt, *Feckless? No Way!*, NATION, June 11, 2007 ("That selfish Western feminists have abandoned Muslim women has become a truism on the right.").

by Islamic fundamentalists implementing *sharia*.¹⁶¹ Therefore, according to radio host and Fox News commentator Tammy Bruce, “the greatest force for women’s rights around the world has been the United States military. . . . [They] have been doing the feminist work by liberating women and children around the world,” because liberal feminists have been too “afraid of offending people.”¹⁶²

Liberal feminists have responded to this attack by rejecting the accusation that they have been silent, as well as explaining the superior merits of their strategies. For example, Katha Pollitt (displaying an appreciation of the intersectionality challenges experienced by Muslim women) counters that “US invasions have made the work of Muslim feminists much more difficult” because

The last thing they need is for women’s rights to be branded as the tool of the invaders and occupiers and cultural imperialists. . . . Smart Western feminists support Muslim women’s rights through carefully targeted international campaigns and by lending quiet support to groups on the ground, by funding schools and battered women’s shelters and microenterprises rather than rushing in and telling everyone how to live.¹⁶³

¹⁶¹ The literature is too voluminous to list here, but we can see that the asserted failure of liberal feminists to sufficiently combat the oppression of Muslim women (because of their embracing of multicultural relativism) seems to have become Exhibit A in the conservative critique of the American left. *See, e.g.,* PHYLIS CHESLER, *THE DEATH OF FEMINISM: WHAT’S NEXT IN THE STRUGGLE FOR WOMEN’S FREEDOM* (2006) (attributing the feminist establishment’s unwillingness to take on Islamic sexism to its support of “an isolationist and America-blaming position”); Christina Hoff Sommers, *The Subjection of Islamic Women and the Fecklessness of American Feminism*, WEEKLY STANDARD, May 21, 2007; Pollitt, *supra* note 160 (responding to Sommers).

¹⁶² Op-Ed., *See Bad News Bear*, INVESTOR’S BUS. DAILY, Nov. 30, 2007.

¹⁶³ Pollitt, *supra* note 160.

The debate between Hymowitz, Bruce, Pollitt and others is part of a larger American socio-political discourse about multiculturalism. As Alison Jaggar puts it, the nature of liberal-conservative discourses in the west has presented an apparent dilemma for its feminists: "western feminists who are concerned about the well-being of women across the world are confronted with a choice between colonial interference and callous indifference."¹⁶⁴ This debate, of course, says more about the state of American feminist politics than it does about the best strategies for Muslim women's rights, but it is important to note that both sides seem to agree on one thing: that *sharia* inhibits the lives of Muslim women. This idea simply resonates with western audiences. Indeed, the fact that there is even a debate over whose approach (left or right) is the best way to help Muslim women shows that so many Americans still believe that

¹⁶⁴ Jaggar, *supra* note 47.

these women are in need of help.¹⁶⁵ In other words, the core colonialist tale of oppressed Muslim women in need of western rescue remains a powerful trope for motivating American public opinion.¹⁶⁶ The Muslim woman's plight has now become a key contest in the ongoing competition of left-right feminism in the United States, and producing the "liberated Muslim woman" is the sought-after trophy. In this battle, the uncontested canon

¹⁶⁵ One of the most entertaining, concisely-written critiques that I have read of the entrenched idea that the west must continue to rescue Muslim women (and the disconnect between this view and that of the people being "rescued") is this:

When the white knight knows so little about his damsel in distress, how does he expect to rescue her? When she turns around and tells him to call her "Ms." and to stop telling her what to do, will he be outraged at her ingratitude? When she says she's quite happy wearing a traditional outfit, thank you, but could she please get maternity leave, will he snort in disgust at his charge? When she wraps her head in a veil and stands up for her Islamic prayer, will he throw up his hands at her inability to throw off Islamic slavery? When she says why thank you for your help, but I need my husband out of Guantanamo and my son out of *your* Musharraf's jail, and then I'd like to open a Quran school for girls—what will he say then? When she says she's got her own ways of effecting the revolution, and it doesn't involve selling out brown men to America, will he decide against trying to rescue her after all?

Shabana Mir, *How Not to Rescue Muslim Women*, RELIGION DISPATCH MAG., Jan. 24, 2008, available at www.religiondispatches.org/archive/sexandgender/26/how_not_to_rescue_muslim_women. Though Mir here writes about western paternalism generally, using the male pronoun, and is not focused on western feminists, her point applies to all "rescue" efforts by western actors, including feminists.

¹⁶⁶ For example, in 2007, The David Horowitz Freedom Center launched a national "Islamofascism Awareness Week" on two-hundred American college and university campuses to confront "the two Big Lies of the political left: that George Bush created the war on terror and that Global Warming is a greater danger to Americans than the terrorist threat." *A Student's Guide to Hosting Islamofascism Awareness Week*, TERRORISM AWARENESS PROJECT, www.terrorismawareness.org/islamofascism/49/a-students-guide-to-hosting-islamofascism-awareness-week/ (last visited Oct. 16, 2011). The Center's suggested campus activities included holding sit-ins outside Women's Studies department to protest the "silence of feminists over the oppression of women in Islam." *Id.*

shared by both conservative and liberal feminists is that Muslim women are oppressed, and that someone should do something about it. Even further, there seems to be left-right consensus that *sharia* has a lot to do with that oppression, so something specific must be done about that.

This shared presumption about *sharia* is precisely what limits American feminists' range of motion. If today's women's rights activists—right or left—operate from the same presumptions that were once used by colonizing powers (and are still used by western governments in support of military action), they will likely generate suspicion of all women's rights work as being a pretext for a new western takeover of Muslim peoples and cultures. As we have seen above, Muslim resistance to western-originated women's rights advocacy has become predictable, rather understandable, and potent. As long as today's western women's rights activists (of all types) remain unaware of the historical echoes invoked by their presumptions, they will continue to feed that resistance. I hope I have shown the importance of shifting international women's rights advocacy into more nuanced and careful strategies when interacting with Muslim populations, so that it can more clearly separate itself from the past, and can much more effectively secure rights for women now and in the future. My specific suggestion of how to begin that shift follows.

IV. A Different Strategy: "*Sharia*? Islamic Law? No Comment."

I believe things could change for the better if international women's rights activists seeking to help Muslim women did not address Islamic law (as either *sharia* or *fiqh*) in their advocacy at all. This simple but powerful change could dramatically help transform the reputation of feminism in Muslim populations. After all, women's rights activists and international feminist NGOs are an invaluable source of powerful, detailed data about injustices to women around the world. I believe it would be easier for Muslim populations to appreciate the importance of this information without suspecting it of an anti-Islam agenda if feminists simply eschewed any commentary on *sharia* in their advocacy work.

If non-Muslim feminist activists detailed women's real life stories but did not publicly blame *sharia* for their plight, it might also help open up a productive space for internal Muslim public discourses to reconsider laws and practices that are otherwise blindly defended in the women's rights vs. *sharia* fight. The fact that many Muslims naturally associate *sharia* with perfect justice can thus serve as an important tool in shifting Muslim attention away from a simple-minded defense of laws touted as *sharia* and instead toward thoughtful and critical investigation of those laws when injustice is reliably documented. That is, because *sharia* means true justice to so many Muslims, if secular feminists were able to present them with incontrovertible evidence of injustice to women, and this information was believed to be coming from a neutral (not anti-Islam) source, I believe many Muslims would look for a way for *sharia* to heal those wrongs, just as Amina Lawal believed that a true application of *sharia* would save her from execution. But if evidence of injustice is accompanied by arguments against *sharia*, the effort can backfire, causing Muslim audiences to question or ignore the evidence in order to defend against a perceived attack on Islam. Once the conversation is set up in this way, there is virtually no safe space for Muslims to ask a very different question: did the "*sharia* legislation" get the "*sharia*" right?

It is very important for international feminist activists to appreciate the importance of that safe space in the greater goal of achieving rights for women in Muslim countries. It is the same sort of space that the *Zara Sochieye* producers carved out when they chose not to include secular feminist critiques of the *Zina* Ordinance in their broadcast. By limiting the participants in their *zina* debate exclusively to *sharia*-mindful individuals, *Zara Sochieye* gave its Pakistani Muslim audience the opportunity to draw much more nuanced conclusions about their so-called *sharia* laws because they did not have to take sides in a pro-*sharia* vs. pro-women fight. I believe that international women's rights advocates can also help move us toward a world where taking sides in a pro-*sharia* vs. pro-women fight is irrelevant by simply not engaging in it anymore. The best way for them to do so, I believe, is to deliberately keep all opinion about Islamic law to themselves.

I realize that I ask a lot. After all, why should feminist activists withhold their opinions about *sharia* if they firmly believe that it is a major cause of injustice to women? And wouldn't much worse happen to Muslim women in the vacuum created by their silence? First, I am arguing for this primarily as a strategic shift, not an ideological one. I am not asking feminists to change whatever beliefs they have about *sharia* itself; I am asking only that they resist broadcasting them, in order to better serve the greater goal of women's rights. Second, I realize that from the perspective of many western feminists, if Muslims choose to see shadows behind contemporary human rights work simply because it uses similar language and symbols to those used during colonialism, that is not the fault of today's feminists, who should not have to restrain themselves from doing honest work for women's rights, even if (maybe especially if) it includes criticizing *sharia*.¹⁶⁷ I also recognize that this attitude reflects a genuine desire among western actors to work

¹⁶⁷ Most western women's rights advocates see themselves as seeking to improve the lives of women based on modern internationally-recognized values of equality and opportunity for all, regardless of religion, culture, or nationality. And, from their perspective, if these international values are in conflict with a given religious norm, that is simply unfortunate for those who insist on clinging to old ways. The real problem, under this view, is conservative religious resistance to the evolution of global values, rather than a continuation of age-old religious crusades. There is persuasive force in this argument, but it ignores a global conversation about just how "universal" these globally-recognized norms really are, considering especially the western-dominated drafters and ratifiers of the key international documents. Many assert that international human rights work is really another form of western global domination. The literature on this point is far too voluminous to cite here, but as an example, consider the argument made by Sam Amadi, asserting that adherence to "global" human rights norms is counter-productive in post-colonial contexts:

The common belief outside the West is that human rights are western notions and the promotion of these rights is post-cold war equivalent of colonialism. This belief is reinforced by the politics of hypocritical engagement with human rights violation around the world by western powers. Although foreign NGOs may be motivated by charitable considerations devoid of hidden agendas the suspicion lingers. In this context it is counter productive to respond to human rights programs in these post-colonial states by 'urging individual rights as universal virtues that override specific cultural norms.

for the improvement of women's lives—a motivation that is decidedly different from the motivations of their colonialist predecessors. But all this nevertheless begs the question of what actually *is* the most effective way (or ways) to improve women's lives. If secular western strategies are backfiring in cases like that of Bariya Magazu and hindering the efforts of other types of feminism, such as *sharia*-mindful women's advocacy, is that not sufficient cause to pause, reflect and rethink one's strategy? Again, I am challenging only the effectiveness of the strategic choices—not the sincerity—of western feminist advocates when they engage questions of Islamic law and women.

Finally, western feminist concerns about Islamic religious extremists swooping in on Muslim women if feminists were to fall silent on the topic of *sharia* implies that current anti-*sharia* advocacy is something like a finger in the *sharia* dike, holding back waves of radical Muslim oppression of women. I hope that I have debunked this idea. Not only does anti-*sharia* advocacy sometimes make things worse for Muslim women, but also, secular feminist advocacy is not the only game in town when it comes to women's rights-based critiques of Islamic law. *Sharia*-mindful activism has had a tangible positive impact on women's rights in Nigeria, Pakistan and elsewhere. Maintaining an absolute anti-*sharia* stance tends to hinder the ability of secular feminists to appreciate the power of these internal Muslim discourses regarding Islamic law and women's rights. I hope I have shown how a shift in strategy and awareness could light the way for secular feminists to see *sharia*-minded Muslim voices as powerful potential allies. In the end, I believe that not much would be lost, and a great deal could be gained if international activists could choose, for strategic reasons, not to take a public position on *sharia* in their advocacy for Muslim women's

rights.¹⁶⁸

V. A Footnote on the Veil: Can We Take it Down a Notch?

I am conflicted about this section, because I believe there is already too much public attention on Muslim women's dress. But because western attitudes about the veil¹⁶⁹ have, like their attitudes about *sharia*, had a negative impact on the effectiveness of *sharia*-minded women's rights work, I conclude this article with a comment, and specific request about western attention on the Muslim veil.¹⁷⁰

It is popular today for western observers to measure the liberation of women in a given Muslim-majority country by, literally, counting heads: the more headscarves, the less liberated the women. Simply put, I believe western feminists generally have quite a limited appreciation of Muslim women's agency

¹⁶⁸ One might wonder if (instead of just ceasing all commentary about *sharia* altogether) it would be beneficial for secular feminists (who want to) to make positive comments about *sharia*, perhaps pointing out those aspects of *fiqh* law which are empowering and consistent with international human rights and women's rights norms. While this suggestion does reflect a deeper appreciation for the nuances of *sharia* and *fiqh*, I nevertheless believe that it would be an unwise strategy in the present global situation of Muslim women's rights. That is because non-Muslim secular organizations speaking about Islamic law, no matter how well-referenced, cannot have sufficient credibility in Muslim circles to engage topics of Islamic substantive law with an authoritative voice. Moreover, it could ultimately jeopardize the persuasive power of Muslims arguing for certain *fiqh* conclusions or reforms if they have been selectively chosen and promoted by secular non-Muslims.

¹⁶⁹ I do not like the word "veil" when addressing topics of Muslim dress, because the term linguistically refers to both a head covering as well as a face veil. I use the term here only because of its dominant role in western literature. There are a number of other terms that Muslim women use when describing the varying types of Islamic dress, including *hijab* and *khimar* (Arabic), *dupatta* (Urdu), and many others. When speaking about my own personal attire, I prefer to use the English word "scarf" or "headscarf."

¹⁷⁰ The veil is a particularly problematic topic because it has been so politically loaded for so long. It was one of the key visual symbols used by colonialists to depict the subjugation of Muslim women, see AHMED, *supra* note 148, at 169, and figures prominently in western imagery today. To take just one of many indicators of this phenomenon, peruse the section on Islam in an average American bookstore and count the (likely disproportionate) number of books featuring a veil on the cover.

with regard to dress. They often begin with the presumption that a Muslim woman dressing in a covered manner is forced (or at least influenced) to do so by the men or governments in her life. Thus, even when Muslim women in secular countries choose to cover their hair, many suspect that someone else is behind it.¹⁷¹ Simply put, the dress demographics of Muslim women do not track the symbolism that western feminists usually apply to them. Intersectionalities are at work here, too. Some Muslim women cover their hair but defend against Muslim distrust of women who don't; some Muslim women do not cover their hair and defend against feminist distrust of women who do. And some Muslim women cover at different times and places, depending on the context. Thus, whether or not there is a piece of cloth on the head of a Muslim woman at any given time (not to mention the variety of styles of the headcovering and the rest of her attire), says almost nothing about her views on the question of Islamic dress itself, and says absolutely nothing about whether or not she is empowered as a woman.

More importantly for our subject here, secular feminists are almost completely unaware of the *dis*-empowerment that can result from *un*-veiling (an act most westerners consider liberating). Consider the situation of a Muslim women activist who takes a *sharia*-based approach to educate Muslim audiences about the *fiqh*-based rights of Muslim women in marriage, for example by articulating why, on the basis of Islamic principles, a Muslim woman should not tolerate domestic violence or should insist on her right to complete graduate school. If the activist does this work bareheaded, she will often have less Islamic authority with her Muslim audience than if she is dressed in traditionally-recognized Muslim clothing. The reverse also turns out to be true. A Muslim feminist speaking in a headscarf to a secular feminist audience about the empowerment and liberation

¹⁷¹ This is a central argument in the European debates over schoolgirls wearing the veil to public schools, and the corresponding bans: many insist that the girls' choice of dress is not a matter of individual religious expression, but rather, examples of coercion from their families and communities, which the bans protect them. See, e.g., Olivier Guitta, *The Veil Controversy: Islam and Liberalism Face Off*, WEEKLY STANDARD, Dec. 4, 2006. For a response to this suspicion, see, e.g., Sumayyah Hussain, *Why Do Muslim Women Wear the Hijab?* ISLAM FOR TODAY, available at www.islamfortoday.com/hijabcanada4.htm (last visited Oct. 16, 2011).

of Muslim women is likely to be seen as less than fully liberated compared to a woman who does this presentation without a veil.¹⁷²

Simply put, it is impossible for a Muslim woman to avoid the socially- and politically-charged symbolic speech that the veil has become. No matter how she chooses to dress, she simultaneously symbolizes two contradictory messages: wearing recognizably Muslim dress, she is viewed as oppressed by many western observers but as Islamically credible by most Muslims; without it, westerners are likely to consider her liberated, but to many Muslims she is western—corrupted and un-Islamic. In other words, where she gains power and voice in one circle, she loses it in the other. This catch-22 is not fully appreciated by either side. To the contrary, the symbolism of the veil is more alive than ever, regularly gracing the covers of English language books and accompanying western news headlines about Islam and Muslims. Muslim popular attention to women's dress, as illustrated in contemporary video and literary media, vastly dwarfs the attention given the subject in most, if not all, periods of Muslim history. This obsession with the veil on both sides just serves to perpetuate and deepen the symbolic power of this single item of clothing, and heighten the empowerment dilemma for Muslim women. Moreover, the more entrenched the symbol, the more intensely it affects public passions—making veiled Muslim women the population most vulnerable to violence directed at Muslims when religious tensions flare.

So this is my request: can both sides tone it down a bit? The symbolic speech externally attributed to this dress style almost never accurately reflects the beliefs and attitudes of the women wearing it. Mostly, emphasizing and re-emphasizing the image of the veil has served to deepen the imagined chasm between Islam and women's rights. That chasm, as I have detailed above, ultimately harms women. Instead, I would like us all to move toward a world where whether or not a woman is wearing a scarf is as inconsequential to our appreciation of her words and actions as whether or not a man is wearing a tie.

¹⁷² I make these assertions based on three decades of personal experience and observation.

CONCLUSION

I have noticed a type of karma at work in rights activism: one tends to get back what one puts out. Thus, aggressive emphasis on the evils of oppressive religious law tends to generate aggressive defenses of those religious laws. As I have illustrated, strident anti-*sharia* positions have generated equally strident anti-feminist positions on the part of Muslims emotionally pulled to defend Islam against a perceived attack. The battle of women's rights advocates versus *sharia* advocates is ultimately destructive to women's rights in Muslim contexts. I have tried to show how anything that ratchets up the tension in the Islam vs. women's rights paradigm ultimately serves to undercut the efficacy of much of the work of both secular and *sharia*-minded women's rights advocates. Thus, in populations where Muslim identities are strong, there will be resistance to women's rights activism wherever it is perceived as being against *sharia*. Whether it is in fact against *sharia* becomes almost irrelevant, once this perception is created.

The lashing of Bariya Magazu should prompt us to ask this question: Could there have been a better way? What other strategies might international activists take when advocating for the rights of Muslim women that might be less likely to incite the same defensive Islam-protectionist reaction? I believe a crucial step is for international women's rights activists to make it a point to exclude *sharia* commentary from their advocacy. The world's committed feminists do not have to attack *sharia* in order to work for Muslim women's rights. I believe it would be much more effective for these activists to focus on elucidating, in factual detail, the injustices occurring to women around the world, without adding anti-*sharia* commentary and tone. In this way, international feminist organizations could make the most effective use of their impressive data-gathering and public campaign skills without creating an excuse for *sharia*-minded audiences to reject the information they present. This allows for a constructive secular feminist activism that does not compromise its own values and desire to help women, but also does not harm the efforts of others working—some in self-identified *sharia*-mindful ways—for women's rights.

In the end, I believe it is important for secular western feminists to remember that they are part of a world of interconnected chess pieces in a continuing game. Western pressure against *sharia* generates negative Muslim attitudes about feminism that in turn restrict how far Muslim women's rights groups can go without being branded as corrupted by the west. I have tried to articulate that there is instead a very valuable role for international women's rights groups to play in working for Muslim women's empowerment. They can artfully and persuasively show the real-life impact that various laws currently on the books in Muslim majority countries have on women. To perform this role effectively, however, requires a major strategy shift by secular feminists, one that involves leaving out an element that many might consider crucial to their work, namely a condemnation of *sharia*. My goal is not to handicap secular feminists' work, but to point out how their strategies have handicapped not only other forms of feminist work, but also their own effectiveness. Over time, I hope that my approach might have the effect of giving international secular feminist advocates a different understanding of *sharia* itself, one that enables them not to rescue Muslim women, but to stand beside them and work together for mutually-desired goals.