

## The Right to Abortion: An Analysis of Zambian Law Vis-À-Vis Sharia Law

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**ABSTRACT:-** This comparative study examined Zambia's domestic abortion laws in contrast to Sharia law to determine if Muslim women can assert their Freedom of Conscience to terminate pregnancies conceived through incest. Objectives included assessing Zambian abortion laws, analysing Sharia law, and determining the challenges Muslim women face in obtaining abortions. The study found that while both legal systems permit abortion in certain circumstances, various barriers exist, contributing to increased female mortality rates. Recommendations include allowing Muslim women to exercise their Freedom of Conscience, codifying Sharia law into Zambian law, improving abortion accessibility, and providing rural areas with adequate medical facilities. In conclusion, implementing these recommendations could enable Muslim women to legally terminate pregnancies resulting from incest, enhance abortion awareness, and reduce female mortality rates through safe abortion practices.

**Keywords:** Abortion, Sharia law, Zambian law, Muslim women, Human Rights, Women's Rights, Religious Freedom.

### I. INTRODUCTION

This study explores the complex intersection of Zambian domestic law and Sharia law, especially concerning the critical issue of abortion. It examines the unique challenges faced by Muslim women in Zambia who seek to terminate pregnancies, often due to situations like incest. By analysing the legal frameworks of both systems, this research aims to illuminate the complications that occur when religious and secular laws come into conflict. The main goal is to assess how much Muslim women in Zambia can exercise their right to freedom of conscience and access abortion services according to their religious beliefs. It seeks to identify the specific barriers that may prevent them from doing so, and to suggest viable solutions to address these issues. By exploring the interaction between Zambian law and Sharia law in relation to abortion, this research contributes to a broader discussion on women's rights, religious freedom, and the challenges of legal pluralism in modern societies.

### II. BACKGROUND

This background highlights the diverse population of Zambia and their shared fundamental human rights. It outlines Zambia's Termination of Pregnancy Act, enacted in 1972 to legalise abortion under specific circumstances, influenced by cases like the [People v Bwanausi, 1976, \[1\]](#) where unsafe abortions led to fatalities. Sharia law is derived from the Quran and Hadith. While opinions vary over when a pregnancy can be terminated, there is no complete ban on a woman's right to end a pregnancy under Islamic law. The study thus aims to explore the juxtaposition between abortion laws under the Zambian common and statutory law, rooted in Christianity, against Sharia law based on Islamic religious law, rooted in customary law. It focuses on challenges faced by Muslim women in their attempt to exercise their freedom of conscience when terminating pregnancies under Sharia law's provisions.

### III. STATEMENT OF THE PROBLEM

The problem addressed is the conflict between [Zambia's Termination of Pregnancy Act, 1972 \(TPA\)\[2\]](#), which regulates legal abortion, and Sharia law, which governs Muslim religious practices and allows abortion under certain circumstances. Despite Zambia's predominantly Christian population, there is a minority Muslim community for whom Sharia law is significant. While the termination of pregnancy in Zambia is grounded on the TPA and various cases under common law provide legal grounds for abortion, Sharia law

provides criteria and time limits for Muslim women to follow should they be required to undertake the procedure. The issue is whether a Muslim woman in Zambia can assert her freedom of conscience, as guaranteed by the Zambian Constitution, to adhere to Sharia law's provisions on abortion, even if they differ from domestic legislation. Zambia has implemented the TPA, which caters to the circumstances under which abortion will be legal. Additionally, the [Constitution of Zambia 2016](#) [3], the *Grundnorm* of Zambian legislation under Part V of the Constitution, the Bill of Rights, Article 33 (1)-(5), [3] guarantees the freedom of conscience, belief, and religious freedom. Thus, it provides the right for each person to practice their religion without having their freedom infringed or curtailed. These rights are particularly important given that Zambia's current population stands at approximately 21.3 million people. Of this number, circa 95.5% of the population is said to be Christians, while Muslims are said to be in the minority at about 2.7%. [4] Therefore, Islam is the second most practised religion in the country after Christianity. Hindus, Buddhists, and Jews comprise a smaller percentage of the population. [4] Sharia law, which is law derived from the Quran and Hadith, provides a timeframe and circumstances under which a Muslim woman can perform an abortion.<sup>i</sup> [5] Despite there being a domestic law present that makes abortion legal under certain circumstances, a Muslim woman will still be able to exercise her freedom of conscience and perform an abortion under Sharia Law.

#### IV. OBJECTIVES OF THE STUDY

##### 4.1. General Objective

To analyse the extent to which a Muslim woman can exercise her freedom of conscience to perform an abortion legally according to Sharia law in Zambia.

##### 4.2. Specific Objectives

1. To assess the Zambian Law on the acceptance of abortion.
2. To analyse Sharia Law to determine the circumstances under which abortion will be allowed.
3. To determine the impact and challenges for a Muslim woman to perform an abortion under Sharia law and Zambian domestic law.

##### 4.3. Research Questions

1. What are the laws on abortion in Zambia?
2. What are the circumstances under which abortion will be allowed in Sharia Law?
3. What are the impacts and challenges a Muslim woman will face while performing an abortion under Shari'a law and Zambian domestic law?

#### V. LITERATURE REVIEW

The literature Review considered authors such as [Haaland et al. \(2019\)](#)[6] who discussed Zambia's Termination of Pregnancy Act. [Creswell et al. \(2018\)](#)[7] outlined circumstances allowing abortion under Zambia's TPA. [Blystad et al. \(2019\)](#)[8] compared abortion policies in African countries. Iman Omar Suleiman (2017) discusses Islamic perspectives on abortion, emphasising the sanctity of life and the permissibility of abortion in Islam. [Shapiro \(2013\)](#)[9] explores exceptions to Islam's general discouragement of abortion. [Abdulrahman Al-Matary et al. \(2014\)](#)[10] affirm Islam's conservative stance on abortion, permitting it before 120 days post-conception if the mother's life is at risk or fetal abnormalities threaten her health. [Abbasi \(2014\)](#)[11] reiterates Sharia's acceptance of abortion within the first four months of conception, underscoring the strict conditions set by Islamic jurists for its permissibility. [Motagi et al. \(2013\)](#)[12] highlight socioeconomic barriers to abortion in Islam. [Tonnessen et al. \(2019\)](#)[13] discuss Sudan's criminalisation of abortion under Sharia law, and finally, [Coast \(2014\)](#)[14] address challenges within Zambia's liberal abortion laws, including prohibitive costs, lengthy approval processes, and insufficient public awareness. These ideas are expanded further below.

In Zambia, [Haaland et al \(2019\)](#)[5] have commented on the TPA, which was enacted to cater to abortion by stating that even though Zambia has in place legislation that legalises abortion, it is still something that is frowned upon in society due to the morals that are deemed acceptable. Particularly that Zambia was declared a Christian state by President Chiluba in December. 29, 1991 [15], and the majority populous is Christian; therefore, those morals are the basis for the laws enacted. The circumstances under which abortion will be allowed according to [Creswell et al \(2018\)](#)[6] are found in the TPA, it is stated in their article that these circumstances are where there is a risk to the mother's life, where there is the risk to the pregnant woman may it be physical or mental, if there is harm to the mental or physical health of any existing children, if there is a risk that there are abnormalities present to the child being born and finally if a medical practitioner deems that the pregnancy should be terminated immediately. Even though these circumstances will enable a woman to conduct an abortion, society at large deems this procedure a heinous act due to how the act of abortion is looked at.

<sup>i</sup> B.M Cherif, *The Sharia, Islamic Law (Fiqh), and Legal Methods (Ilm Uşul al-Fiqh)* (Cambridge University Press 2014)

The laws governing abortion in Zambia are considered more liberal than those of other African nations due to specific legislation. [Blystad et al. \(2019\)\[7\]](#) conducted research in three African countries to assess how their abortion policies serve women in those regions. The authors observe that Zambia's laws are more liberal than those of Tanzania and Ethiopia because they permit abortion only when there is a clear risk to the pregnant woman's life. In contrast, the Termination of Pregnancy Act in Zambia allows for abortion on both health-related and socio-economic grounds.

Although abortion is not encouraged in Islam, [Shapiro \(2013\)\[8\]](#) states that there are instances in which abortion will be permissible before the lapse of 120 days after conception as it is believed by Muslims that life is breathed in the foetus on that day. She further goes on to mention the circumstances under which abortion is allowed and these include, where; rape has occurred, where the pregnancy is due to incest, where it has been medically proven that there are abnormalities to the foetus and this may result in the mother suffering from it and finally, where there is a risk to the mother's permanent mental wellbeing and the doctor has to be certain about this for it to be used as a circumstance under which abortion will be allowed.

As many authors before [Al-Matary et al \(2014\)\[9\]](#) have stated that abortion is allowed under strict circumstances in Islam, they too in their work have stated that abortion will only be allowed before the lapse of 120 days. They have stated that Islam is quite liberal regarding abortion, the circumstances under which abortion will be allowed are, where there is a danger to the life of the mother and where there are abnormalities present in the foetus that has been diagnosed by a doctor. They have also talked about the importance of the competency required of a doctor in diagnosing whether the foetus has abnormalities that may affect the mother; therefore, they claimed that the medical practitioner needs to be competent enough to conduct this procedure. Scholars that are experts in Sharia Law agree that abortion will only be acceptable within the first 4 months of conception, according to [Abbasi et al \[2014\]\[10\]](#) a point that further reiterates the circumstances which have been derived by the jurists in Islam under which abortion will be allowed and they have arrived at the same conclusion that abortion will only be allowed when the strict requirements are met.

The challenges Muslim women will face when performing an abortion under Sharia law according to [Motagi et al \[2013\]\[9\]](#) are that abortion cannot be performed solely for socio-economic reasons in Islam such as not being able to afford to pay rent to their landlords and not being able to afford education. This has led to many women performing unsafe abortions which has caused the mortality rate to increase by a sizable number. The Islamic State of Sudan, according to [Tonnessen et al. \[2019\] \[13\]](#) have made abortion a criminalised offense in line with Sharia law; however, they also allow abortion under Rape, if there is danger to the life of the mother and if the foetus has already died in the mother. Criminalising abortion has led to many women procuring unsafe abortions, which results in increased maternal mortality. In Sudan, abortion is politicised with *Zina*, which is fornication and one of the major reasons why abortion is criminalised.

Although there are liberal laws for abortion in Zambia, according to [Coast et al \[2014\]\[13\]](#) there are still challenges that women face such as the high cost of performing an abortion; the time taken to get approval under the Termination of Pregnancy Act to perform an abortion legally, and the fact that many people still do not have sufficient knowledge about the Act. This has impacted women negatively and has led to an increase in unsafe abortions.

## VI. MATERIALS AND METHODS

This research employs a qualitative methodology, combining secondary and primary data sources. Secondary data sources include textbooks, journal articles, articles, dissertations, and research reports. Primary data sources include legislation and case law. The research utilises historical analysis, systemic-structural analysis, comparative-legal analysis, logical reasoning, sociological research, and a comprehensive study of scientific sources. Data analysis involves thematic analysis, content analysis, comparative analysis, and case studies. Ethical considerations include confidentiality, informed consent, and objectivity. Potential limitations include limited access to primary data, cultural sensitivity, and generalizability.

## VII. RESULTS AND DISCUSSION

The results and the discussion of the paper are given below.

### 7.1. Results

The study presents a comprehensive analysis of the challenges faced by Muslim women in Zambia seeking abortions, exploring the interplay between Zambian domestic law and Sharia law. It highlights the conflict between the two legal frameworks, with Zambian law permitting abortion under certain circumstances and Sharia law allowing it only in specific cases. The study identifies several barriers that Muslim women face, including limited awareness of legal provisions, societal stigma, and the requirement for multiple medical practitioners' approval. It also notes the challenges arising from the conflict between Sharia law's conditions for abortion and Zambian domestic law's recognition of these conditions. The study emphasizes the need for

increased awareness of both Zambian law and Sharia law provisions regarding abortion, as well as the importance of addressing the societal stigma surrounding the issue.

## **7.2. Discussion**

The analysis presented in this paper highlights the complex interplay between Zambian domestic law, Sharia law, and the practical challenges faced by Muslim women seeking abortions in Zambia. While Zambia's Termination of Pregnancy Act provides a relatively liberal framework, its implementation is hindered by several factors, including limited awareness, societal stigma, and the conflict between Sharia law and Zambian domestic law.

## **7.3. The Zambian Legal Framework on Abortion**

This part of the paper examines the historical development of abortion laws in Zambia by focusing on the TPA, its legal framework, and the necessary regulations and procedures. It also considers the impact of these laws on Muslim women's access to abortion.

The Zambian Termination of Pregnancy Act offers a progressive legal framework for abortion, allowing it under various circumstances. However, the lack of clear definitions and the exclusion of certain circumstances recognised by Sharia law create challenges for its use by Muslim women. The requirement for multiple medical practitioners' approval, especially in rural areas, can also pose significant barriers to its use.

While the Zambian abortion law is derived from several sources, it is primarily a product of acquired English law. It thus includes the following:

1. The Zambian Constitution: The supreme law, invalidating any conflicting laws.
2. Customary Law: Uncodified, based on local culture and customs.
3. Judicial Precedent: Previous court rulings guide current legal decisions.
4. Legislation: Laws enacted by Parliament.
5. Common Law and the rules of equity, derived from case law in other commonwealth countries.

### **7.3.1. Development of Zambian Law on Abortion**

The development of Zambian law on abortion covers important jurisprudential questions like when a foetus is considered to be a person in law. Understanding abortion legislation in Zambia requires determining when a foetus is legally considered a living person. According to [Article 28\(2\) of the Zambian Bill of Rights](#)[3], life begins at conception, making a foetus a living person from that point. However, perspectives vary depending on whether the views are given by science or philosophy. Some schools of thought argue that a foetus lacks essential human characteristics like consciousness and reasoning, while others adopt a gradualist view, considering a foetus a person only at birth. Despite these differing views, Zambian law holds that life begins at conception.

In 1972, Zambia legalised abortion through legislation. This was aimed at addressing the unsafe abortion methods that women previously used to procure abortions, and which contributed to a significant increase in female mortality rates. Before this law, women often resorted to dangerous abortion methods like using wires or consuming poisonous substances to induce abortions, leading to severe health risks or death.[16] Additionally, traditional healers performed unsafe abortions, claiming to protect women from diseases like *'kafunga'*. [17]

As a former British protectorate, Zambia is not immune to the influences of English law and retains many British laws, which were passed down because of colonisation. Statutes like the English [Miscarriage of Women Act \(1803\)](#)[18] regulated abortion. Equally, under [section 1 of the UK Infant Life Preservation Act 1929](#), [19] it is a criminal offence to intentionally cause the death of a viable fetus. The Act specifies that this offence applies only when the fetus is 28 weeks or older (as defined by subsection 2)[19] and thus judged to be "capable of being born alive." Sections 58 and 59 of the [Offences Against the Person Act \(1861\)](#)[20], which is still considered good law in the UK, make abortion a criminal offence for any woman to self-procure an abortion. The Act does, however, allow abortion under specific circumstances, such as to preserve a woman's mental health. These three statutes were later to become part of the building blocks judges used when deciding the English case of [Rex v. Bourne \(1938\)](#). [21]

The case of [Rex v Bourne \(1938\)](#)[21] also had a profound influence on Zambian law, particularly in the case of [the People v. Gulshan, Smith, and Findlay 1971](#)[22], where three doctors were charged with unlawful abortion under the [Zambian Penal Code 1967](#)[23], well before the enactment of the TPA. The court acquitted the trio, following the Bourne Ruling, which allowed abortion to save a woman's life or prevent serious physical or mental harm to her. The case of [Rex v Bourne \(1938\)](#)[21] significantly influenced abortion laws in England and its colonies and protectorates, including Zambia, which involved considerations of saving a woman's life and protecting her mental and physical health. When deciding the case Justice Macnaughten used the [Infant Life \(Preservation\) Act 1929](#), [19] and asked the jury to consider the view that the doctor was "*not done in good faith for the purpose only of preserving the life of the mother*" [21] but warned of the that consequences of allowing the pregnancy to continue might result in the mother becoming a physical or mental wreck. [21] He emphasised that therapeutic exceptions to abortion laws should extend beyond immediate life-saving circumstances to

include broader health threats, thereby reforming restrictive abortion laws common at the time.[24] This nuanced approach acknowledged the intertwined nature of a woman's physical and mental health risks.

Before 1972, because Zambia was newly independent, it had no specific abortion legislation in place apart from the [Zambian Penal Code of 1967](#)[23], which was often deemed harsh and ambiguous. A turning point came with the case of the [People v Bwanausi 1976](#),[1] which involved a prominent Zambian family's daughter who died following an illegal abortion. The public outcry that resulted from this case led to the enactment of the [Termination of Pregnancy Act in 1972](#),[2] modelled after the English [Abortion Act of 1967](#). [25]

#### 7.3.1.2. The Termination of Pregnancy Act (1972)

The [Termination of Pregnancy Act](#)[2], legalised abortion under specified conditions. Despite being in existence since 1972, a lack of awareness among women who would benefit from the Act has led to continued unsafe abortions. Section 3(1) of the Act[2] specifies the circumstances under which abortion is lawful, considering physical, mental, and socio-economic factors affecting the pregnant woman and her existing children. Other key provisions and regulations of the Act include the risk to the woman's life: The Act prioritises a woman's right to abortion if her life is at risk. Abortion is also allowed to prevent injury to the woman's health, considering both her mental and physical condition. The Act also considers the well-being of any existing child or children who might suffer due to the birth of another child. Socio-economic conditions are also part of the consideration when conducting a lawful abortion. The procedure must, however, be approved by registered medical practitioners as per the regulations detailed in the TPA at section 3(1)–(4).[2] These provisions are covered in more detail below under the various risks that permit an abortion to take place, like risk to physical or mental health, risk to the health of existing children, risk of abnormalities in the child, and, lastly, regulations and procedures.

#### 7.3.1.3. Risk to Physical or Mental Health of the Pregnant Woman

[Section 3\(1\)\(a\)\(ii\) of the Termination of Pregnancy Act 1972](#)[2] allows for lawful abortion if carrying the pregnancy to term poses a risk to the physical or mental health of the woman. Medical practitioners must examine and confirm that continuing the pregnancy would harm her well-being. This includes documented evidence and compliance with specific regulations outlined in the Act.

#### 7.3.1.4. Risk to the Health of Existing Children

[Section 3\(1\)\(a\)\(iii\) of the Act](#)[2] also considers the physical and mental health of any existing children of the pregnant woman. If continuing the pregnancy would negatively impact the health or well-being of her other children, an abortion may be lawfully procured. This includes potential socio-economic impacts, such as financial strain leading to malnutrition, lack of medical care, and insufficient access to essential amenities for existing children. The psychological effects, such as anxiety and depression from lack of maternal attention, are also considered.

#### 7.3.1.5. Risk of Abnormalities in the Unborn Child

Further, [section 3\(1\)\(a\)\(iv\) of the Act](#)[2] allows for abortion if there is a substantial risk that the child, if born, will suffer from severe physical or mental abnormalities. This provision considers the additional challenges and financial burdens on the mother to care for a child with significant health issues. Confirmation by registered medical practitioners is required to ensure the foetus has such abnormalities before an abortion is deemed lawful.

#### 7.3.1.6. Regulations and Procedures

To lawfully procure an abortion under [Section 3\(1\), of the TPA 1972](#)[2] the opinions of at least three registered medical practitioners, including a specialist, are required. Their opinions must be formed in good faith, affirming the necessity of the procedure for the woman's safety. In emergencies, only two practitioners' opinions are needed. The case of [R v Smith \(1974\)](#)[26] emphasises the responsibility of medical practitioners to base their opinions on the Act's circumstances. Failure to follow these regulations renders abortion unlawful.

## VIII. SOURCES OF SHARIA LAW

Sharia law is based on primary and secondary sources. The primary sources include the Quran and Sunnah. While the secondary sources of Sharia are *Ijma* (or Consensus) *Qiyas* (or analogical reasoning), *Istihsan*, *maslahah* (or public interest), *Urf* (or custom) *Sadd al Dhari'a* (or blocking the means) and *Ijtihad* (or critical thinking) It evolved from divine revelations and teachings interpreted by Islamic scholars through consensus (*Ijma*) [27] Sharia law is considered to be a form of customary law, although in countries like the Sudan Sharia law has been codified. The sources of Sharia Law will be considered in more detail below, starting with the Quran.

### 8.1. The Quran

The Quran is the holiest text in Islam and like the bible and the Torah is inspired of God. It is thus the foremost source of Islamic law. According to [Hamidullah \(1981\)](#)[28], the Quran was revealed in the Arabic language to the Prophet Mohammed (PBUH) over approximately 23 years in fragmented texts addressing the needs of the time as well as providing solutions to different problems that arose at the time.

## 8.2. Sunnah

Sunnah is a primary source of Islamic law which contains three elements that consist of sayings, deeds and approval of others' acts by the Prophet Mohammed (PBUH) Sunnah is thus equal in importance to Quranic injunctions as they are inspired by God.[29]

## 8.3. Ijma (or Consensus of Opinion)

*Ijma* is defined as an agreement among Muslim jurists in a particular age on a question of Islamic law. Many scholars consider Ijma the third source of law after the Quran. Ijma and the other sources of Islamic law are used when there are no clear guidelines or explicit rules to follow in the Quran and Sunnah on the matter under consideration. Ijma is acceptable only when there is a general agreement among Muslim jurists and scholars, and this agreement applies only to secular matters.

## 8.4. Qiyas (or Analogical Deduction)

*Qiyas* are normally used as a way of deducing a rule from the earlier sources and are used only when a matter has never been discussed under the three sources mentioned above. It is an extension of a Shariah ruling from an original case to a new case because the new case has the same effective cause as the original case. In many respects, Qiyas resemble the English common law rule of *stare decisis*. *The Quran and Hadith also validate Qiyas (a form of Ijtihad or critical thinking)*. [30] There are also other sources like *Istihsan* (juristic preference), *Istislah* (public interest), and *Urf* (custom and usage), which are used in deriving the laws from the Quran and Sunnah. It is important to note that the other sources of Islamic law are weak in comparison to the primary sources, i.e., Quran and Sunnah. [31] [32]

Qiyas, once regarded as a secondary source of Sharia law, gradually gained prominence, eventually overshadowing the Qur'an and Sunnah. Disagreements among its supporters about its rules and a lack of concrete proof for its sanctity raised doubts about its validity. Furthermore, the heavy reliance on qiyas and its strict formalism alienated many Muslims. This caused widespread disputes among Islamic jurists, especially in Iraq, where the use of *ra'y* and qiyas led dissenters to view these principles with disdain. Additionally, some Islamic scholars, such as Ibn Hazm, rejected the use of qiyas in legal analysis due to concerns about the method's inherent uncertainty. This stance, influenced partly by al-Shafi'i's opposition to *istihsan*, significantly contributed to the development of modern Islamic law. [30] [31]

## 8.5. Urf

Urf refers to customs, traditions and usage of an area and people are considered an important source of lawmaking in Islam. (For example, see the [Qur'an 02:232 and 235; 04:25](#)[29] which talks about marriage) It has its basis in the Quran where Allah(SWT) commands the following: *"Make due allowance for man's nature, and enjoin the doing of what is right (in line with the tradition and custom)."*[29]

Unlike Western laws, Sharia is considered immutable and divinely perfect, guiding both religious and state matters. Its universal applicability transcends cultural and national boundaries, addressing the needs of all humanity.

When required, Muslims consult scholars (*Imams*) for Sharia interpretations, following one of four major schools of thought: Hanafi, Maliki, Shafi'i, and Hanbali. While drawing from the same sources, these schools have minor interpretative differences. For instance, a verse in the Quran about purification has varying implications between *Hanafi* and *Shafi'i* interpretations. This exemplifies how interpretation can vary within the same religious framework.

In terms of women's rights, Sharia law grants Muslim women a distinct and significant status. Contrary to some Western perceptions, it is argued that Sharia ensures women have rights and duties equal to men, as stated in the Quran: *"And for women are rights over men similar to those of men over women."*[29] Men, as household heads, must provide for and protect women and their families.

Thus, Sharia law offers Muslim women clear guidelines for living a life pleasing to Allah (SWT), emphasising equality and protection. Historically, Islam elevated the status of women, exemplified by the Prophet's (PBUH) prohibition of infanticide. While the Quran does not explicitly mention the Prophet's prohibition of infanticide of female babies, it condemns the practice of burying female infants alive, which was a common practice in pre-Islamic Arabian society. The Quran says: *"And do not kill your children for fear of poverty. We will provide for them and you. Indeed, killing them is a great sin."*[29] This verse condemns the act of killing children, regardless of their gender. While it doesn't directly mention female infanticide, it can be interpreted as a general prohibition against killing children in general, which would include the specific practice of burying female infants alive.

## 8.6. Permissibility of Abortion in Sharia Law.

Islam addresses life comprehensively, including birth, conception, and death. The Quran emphasises the sanctity of life, stating that life is a decree from Allah (SWT) and must not be taken unjustly. The verse, *"Whoever slays a soul, unless it is for manslaughter or for mischief in the land, it is as though he slew all men; and whoever keeps it alive, it is as though he kept alive all men"*[29] highlights the importance of preserving life. The development of a human being is detailed in the Quran, describing the stages from a drop of sperm to a fully formed being. However, the exact timeline for these stages is not specified in the Quran. The Hadith,

another source of Sharia law, provides further insight. According to the Prophet Muhammad, the soul enters the fetus after 120 days (or four months) of gestation in the mother's womb. This has led Islamic jurists to agree that abortion after 120 days is equivalent to murder, as the fetus is considered a living being at this stage. This may vary in other Sharia countries. For example, the Sudan's legal provisions for abortion differ in terms of interpretation, regarding the time limit for abortion after rape, which is 90 days in Sudan compared to 120 days for the *Maliki School*.<sup>[33]</sup> In Sudan, obstacles to obtaining abortion led many women to resort to unsafe methods, increasing maternal mortality rates in the process. Article 149(1) of the *Sudanese Criminal Code 1991* <sup>[34]</sup> categorises rape as fornication, a major sin under Sharia law. This places the burden of proving rape on the woman seeking an abortion, complicating the process. More recently, Sudan's legal system has undergone select reforms to permit abortion in more circumstances compared to its initial strict interpretation. This highlights variations in abortion laws even within the context of Sharia law itself.

Abortion is not permissible in Islam and is viewed negatively. Exceptions can only be made under certain circumstances and only during the first 120 days of the gestation of a foetus. After this period, abortion is considered murder, and the person performing it faces severe sanctions under Sharia law. This may, however, vary among the different schools of thought within Sharia law. Still, generally, abortion is permitted in Islam if the pregnancy endangers the mother's life or if the foetus has severe abnormalities *in utero*. The importance of time limits is central to the process, as abortion is only allowable within the first 120 days of gestation, when Muslims believe that the soul enters the foetus. This period reflects a balance between the sanctity of life and the mother's well-being, aligning with the belief that Islamic law caters to the holistic needs of the community. Sharia law's approach to abortion is thus rooted in its divine origin, comprehensive nature, and the balanced consideration of maternal and foetal health, providing a nuanced perspective compared to secular legal systems.

## IX. PERMISSIBLE CIRCUMSTANCES FOR ABORTION TO OCCUR UNDER SHARI'A LAW

Abortion in Sharia law is highly restricted and only allowed under stringent conditions, circumstances, including rape, incest, fetal abnormalities (*in utero*), and anything that might endanger the mother's life.

### 1. Forbidden Relationships of Consanguinity

In Islam, women are forbidden from having physical or intimate relationships with certain male relatives, known as *Mahram*. While there is no specific verse in the Quran that prohibits this, Surah an-Nisa aya 23 proclaims that:

*"Prohibited to you (For marriage) are: Your mothers, daughters, sisters; father's sisters, Mother's sisters; brother's daughters, sister's daughters; foster-mothers (Who gave you suck), foster-sisters; your wives' mothers; your step-daughters under your guardianship, born of your wives to whom ye have gone in, no prohibition if ye have not gone in; (Those who have been) wives of your sons proceeding from your loins; and two sisters in wedlock at one and the same time, except for what is past; for Allah (SWT) is Oft-forgiving, Most Merciful."*<sup>[29]</sup>

This includes sexual relations with a woman's father, brother, or indeed any close male relative. Women are also instructed to avoid men who are not their *Mahram* to prevent any intimate relations, which are considered major sins under Sharia law.<sup>[29]</sup>

### 2. Rape

Abortion is allowed if a woman has been raped, provided it is within the first 120 days. The woman must consult an Imam and be examined by a Muslim medical practitioner to confirm the claim. Abortion is permitted if a woman has been raped, as the act is recognized as a grievous violation in Islam. To prevent the victim from enduring further suffering, she may seek an abortion within the first 120 days. The procedure requires consulting an Imam and being examined by a Muslim registered medical practitioner to verify the claim of rape. This ensures that a victim, especially if she is a young girl or woman, is not burdened by an unwanted pregnancy resulting from such a traumatic event.<sup>[29]</sup>

### 3. Incest:

Pregnancy resulting from incest is another permissible reason for abortion, following similar procedures to confirm the circumstances. Pregnancy resulting from incest, an intimate relationship with a family member, is another circumstance where abortion is allowed. Islam categorizes relationships to prevent such situations, and abortion is permitted to avoid the consequences of this major sin.<sup>[29]</sup>

### 4. Foetal Abnormalities

If the foetus has serious abnormalities, such as HIV/AIDS, Down Syndrome, or anencephaly (absence of a brain), abortion may be permitted.

5. Threat to the Mother's Life

If the pregnancy endangers the mother's life, and this is confirmed by medical evidence from a competent Muslim medical practitioner, abortion is allowed within the first 120 days.

6. Mental Health Risks:

If carrying the pregnancy poses a permanent risk to the mother's mental health, such as severe depression or schizophrenia, abortion may be permitted to protect her well-being.

**X. THE CONFLICT BETWEEN THE ZAMBIAN LEGAL FRAMEWORKS AND THE SHARIA LEGAL FRAMEWORK BASED ON CUSTOMARY LAW**

The challenges of Abortion under Zambian Law will cover the conflict between the Zambian legal framework and the Sharia legal framework. It will also cover issues relating to performing an abortion in line with Sharia law. It will also evaluate the legal barriers Muslim women face despite Zambia having access to the Zambian Abortion Act. Additionally, socio-cultural factors will be examined to evaluate how they impact Muslim women's decision to conduct an abortion.

The TPA 1972 in Zambia is considered one of the most liberal abortion laws in Africa, as it allows for abortion under varied circumstances.[2] However, for Muslim women, this may not be the case as they face unique challenges due to the need to adhere to both Zambian law and Sharia law. As Zambia does not recognise Sharia law, this creates a conflict for Muslim women. Zambia's liberal abortion law is juxtaposed against Sharia law's stricter conditions for conducting an abortion, such as permitting it in cases of incest, which Zambian law does not acknowledge. These discrepancies pose significant challenges for Muslim women, especially in rural areas where they are in the minority and thus tend to have limited or no access to Muslim medical practitioners for guidance as required under Sharia.

Despite the liberal nature of the [TPA 1972](#)[2], practical implementation faces hurdles. The Act lacks clear definitions for critical terms such as "physical and mental health" and "reasonably foreseeable future," complicating the determination of valid reasons for abortion, which are cornerstones in Shari'a. Additionally, the exclusion of circumstances permissible under Sharia law, like incest, for example, highlights the inadequacy of the current legal framework on abortion for Muslim women living in Zambia. Others include limitations in the Zambian Penal Code, and social and cultural factors, to mention but a few:

(a) Exclusion of Incest Cases and Medical Practitioner Approval

The [Zambian TPA 1972](#)[2] fails to recognise termination of pregnancy in cases of incest, permitted under Sharia law, posing a barrier for Muslim women. Additionally, the Act requires approval from three medical practitioners, which can be challenging for women in rural areas with limited access to Muslim medical practitioners.

(b) Penal Code Limitations

The [Penal Code of Zambia](#)[22] criminalises self-induced abortions and only permits termination of pregnancy for raped female children, not adult women. Consequently, adult Muslim women who are raped cannot legally terminate their pregnancies under Zambian law, leading some to seek unsafe alternatives.

**10.1. Social and Cultural Factors**

Societal stigma, cultural norms, illiteracy and lack of awareness also contribute to the challenges faced by Muslim women seeking abortions in Zambia. The fear of social ostracism and the prevalence of unsafe abortion practices further exacerbate the situation. Under this heading, major factors that may impede abortion include social impact and awareness, cultural stigma and traditional norms, and the influence of international legal developments.

a) Social Impact and Awareness

The rise in female mortality rates in Zambia, due to unsafe abortions, is exacerbated by factors such as a lack of awareness of abortion laws and societal stigma. Many women, particularly in rural areas, are unaware of the TPA Act due to interpretation complexities and high illiteracy rates. Guttmacher Institute (2022) statistics show that between 2000 and 2008, the number of hospital admissions for abortion complications rose significantly, increasing from about 5,600 in 2003 to over 10,000 in 2008.[35] This trend points to a high incidence of unsafe abortions, with statistics from 2015–2019 showing 140,000 abortions occurred, and 497,000 pregnancies were unintended.[35]

b) Cultural Stigma and Traditional Norms

Customary laws in Zambia often view abortion as a taboo, leading to societal stigma and ostracisation of women who terminate pregnancies unnecessarily, especially for those who have been raped. This cultural stigma discourages women from seeking safe and legal abortions, contributing to higher mortality rates.

c) Influence of International Legal Developments

The recent overturning of the case of *Roe v. Wade* (1973)[36] by the US Supreme Court, which guaranteed a constitutional right to abortion to all its citizens in the US, in the case of *Dobbs v. Jackson Women's Health Organisation* (2022).[37] Notwithstanding, some state constitutions in the US still independently protect abortion rights. This decision may influence abortion laws internationally, potentially impacting women's rights in Zambia by making them more conservative, even though the Zambian Constitution has not made abortion a constitutional right. Changes resulting from this decision may reverse the liberal approach to abortion in favour of a more restrictive set of abortion rights, especially since Zambia has declared itself a Christian country. This could lead to an increase in the number of unsafe abortions and maternal deaths by endangering women's lives.

d) Limits on the timing of an Abortion

Under Sharia abortion is not allowed after 120 days of gestation as the fetus is considered a living being at this point. Terminating a pregnancy after this period is seen as murder in Islam, with severe consequences for the women doing so under Sharia law. This could include an "eye for an eye" (*qisas*)[29] or payment of blood money (*diyat*). The Quran warns:

*It is not for a believer [Muslim] to kill a believer unless (it be) by mistake. He who hath killed a believer by mistake must set free a believing slave, and pay the diya to the family of the slain unless they remit it as a charity. If he (the victim) be of a people hostile unto you, and he is a believer, then (the penance is) to set free a believing slave. And if he cometh of a folk between whom and you there is a covenant, then the diya must be paid unto his folk and (also) a believing slave must be set free. And whoso hath not the wherewithal must fast two consecutive months. A penance from Allah. Allah is Knower, Wise. [29]*

This rule not only poses a challenge for Muslim women seeking abortion under circumstances permitted by Sharia law but is further exacerbated by the differences between Sharia law and Zambian law, further complicating abortion decisions for Muslim women. These differences may result in a Muslim woman risking legal consequences under Sharia law to conduct an abortion after the stipulated time limit placed by Sharia Law.

e) Prohibition of Abortion for Socio-Economic Reasons

Sharia law prohibits termination of pregnancy for socio-economic reasons, as it is believed that sustenance is provided by the Almighty and ending a life without medical cause is forbidden. Allowing abortions for economic reasons could lead to a rise in abortions without valid grounds.

f) Lack of Uniform Interpretation of Sharia Law

Unlike Zambian law on abortion which is codified, there is no single uniform document addressing abortion in Sharia law because it is deemed to be a form of customary law it therefore suffers the same challenges as other forms of uncodified customary law, resulting in different interpretations among various sects of the Muslim faith, like *Sunni, Shi'a, Wabbi, Berelvi Suffi*, and *Deobandi* and schools. This leads to four differing views and interpretations on abortion in Sharia law. This lack of uniformity, compounded by the original Arabic form of Quranic texts, poses challenges for Muslim women seeking guidance on abortion that is in line with the teachings of Sharia Law.

## XI. RECOMMENDATIONS

The following recommendations are suggested to make the Zambian legal system more accommodating for Muslim and other minority women seeking safe and legal abortions in Zambia. This includes the following:

1. Inclusion of the Tenets of Sharia Law into Zambian Law

While codification of Sharia law on abortion is not possible in Zambia as it does not officially recognise Sharia Law as part of its law because Zambia was declared a Christian country by President Chiluba in 1996[38], widening the tenets Zambian Abortion Act to include more encompassing rules may work to accommodate minority groups with different norms that fall outside of the norm. This is not only relevant for Muslim women but also for other women, such as Baha'is, Buddhists, and Sikhs, who are part of the country's kaleidoscope of minority citizens living in Zambia and practicing different faiths. Equally, it does not help that Sharia Law is considered customary rather than formal and thus relegated to the back of the line.

2. Awareness Campaigns

Educate women, especially in rural areas, about their rights and legal options regarding abortion. Also, how this minority group can access safe abortions under Zambian law, legally and safely, where required.

3. Healthcare Accessibility

Improve access to safe abortion services, especially in remote areas, to reduce maternal mortality rates. As an alternative to changing the law, medical practitioners can be trained to deal with requirements for various minority groups so that they are able to advise on the requisite standards set by their various religious teachings.

4. Education on Freedom of Conscience

Educate Muslim women about their constitutional rights to exercise their freedom of conscience, particularly concerning abortion in cases of incest. This can be achieved through community programs and talks aimed at raising awareness.

5. Facilities in Rural Areas

Establish centres with qualified medical practitioners and hygienic facilities in rural areas to facilitate safe and lawful abortion procedures. This initiative aims to address the lack of necessary facilities in rural areas, which often results in unsafe abortion practices.

### XIII. CONCLUSION

This study examined the complex interplay between Zambian domestic law and Sharia law, particularly as they pertain to the rights of Muslim women seeking abortions. The research has revealed significant disparities between the two legal frameworks, posing significant challenges for Muslim women who wish to access abortion services outside of the rules of Sharia law. While Zambian law provides legal grounds for abortion under certain circumstances, the specific provisions may not adequately address the unique needs and challenges faced by Muslim women. Sharia law, on the other hand, offers peculiar criteria and time limits for abortion, which may conflict with Zambian law. The study has identified several key challenges faced by Muslim and other minority women in Zambia, including:

a) Limited recognition of Sharia law: Zambian domestic law does not fully acknowledge the provisions of Sharia law regarding abortion as it is based on Anglo-Saxon precepts, leading to potential legal conflicts between the two laws. Added to this, Sharia law is on the same level as Zambian customary law. It therefore must follow the same rules in that any acts based on the law shall not be repugnant to natural justice, equity and good conscience according to section 12(1) of the Local Courts Act.[39]

b) Lack of clarity in legal provisions: The specific criteria and procedures for obtaining an abortion under Zambian law may be clear for most Zambian citizens, but may create uncertainty for Muslim women, which contrasts significantly with Sharia law. In Uganda on the other hand where Muslims constitute circa 14 percent of its population according to a 2021 US State Department Report on Uganda,[40] the government has allowed the operation of special *Qadhi's* Courts to administer disputes relating to marriage, divorce, inheritance of property, and guardianship according to Article 129(1)(d) of the constitution of Uganda[41] In Zambia the current Muslim populations are estimated to be around 2.7 percent according to a 2023 US State Department Report on Zambia[42] too small to be a force for change. However, this group is growing quickly and, as such, could be a force for change like in Uganda.

c) Limited access to healthcare: Due to the lack of clarity and conformity to Sharia law, minority Muslim women in rural areas may face difficulties in accessing healthcare services, including those related to abortion. This is particularly apparent when they do not have a Muslim priest to give guidance.

d) Social stigma and discrimination: Women seeking abortions, particularly in rural areas, may face social stigma and discrimination, which can deter them from accessing these services. The authors declare that there are no conflicts of interest.

#### 8. About the Author(s)

Dr Douglas Walter Rolls II is an academic and legal expert with a deep commitment to advancing knowledge and legal practice. As Head of Department and Lecturer of Law at the School of Law at ZCAS University in Lusaka, Zambia, he has made significant contributions to the field through his scholarly work and teaching. With over 18 years of experience in banking, he brings a wealth of practical insights with him to his academic pursuits. His research interests are diverse and encompass a wide range of legal disciplines, including banking and regulation, securities markets, corporate law, education and learner development, jurisprudence, trust law, employment law, probate law, family law, company law, insolvency, and public international law. His interest in comparative law further enriches his scholarly contributions. In terms of qualifications, he holds advanced degrees from various tertiary institutions, including a degree in Economics and a degree in Law from the University of Zambia, a master's degree in Banking and Finance from the FinAfrica Institute in Milan, Italy, and a master's degree in Commercial Law from the University of Lusaka (UNILUS). Doctor of Laws (LLD) from the University of Pretoria (UP) School of Mercantile Law.

Faizan Ahmed Seedat is a resolute legal professional with a strong passion for international trade law. His academic journey has been impressive, culminating in a Bachelor of Commercial Law from the University of Zambia. His diverse areas of interest, including corporate governance, company law, banking law, and

comparative law, centred on Shari'a law to name but a few areas that reflect his commitment to a comprehensive understanding of the Zambian legal landscape. He is eager to contribute to the field by leveraging his knowledge and skills to address complex legal challenges and drive positive outcomes.

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