



PORT HARCOURT JOURNAL OF BUSINESS LAW

From Learning to Wisdom



Volume 3: Number 1, April, 2017

ISSN: 1595 – 1790

**Published by Faculty of Law
Rivers State University, Port Harcourt, Nigeria**

PORT HARCOURT JOURNAL OF BUSINESS LAW

The Port Harcourt Journal of Business Law is a peer refereed journal published by the Faculty of Law, Rivers State University, Port Harcourt Nigeria. It provides a forum for scholars and practitioners to reflect on diverse legal issues of national, regional and international significance and of local and regional relevance.

INTERNATIONAL EDITORIAL ADVISORY BOARD

Prof. Bob Watt
School of Law,
Buckingham University, UK

Prof. David Marcelo
Tulane Law School
Tulane University, USA

Prof. P. Ehi Oshio
Faculty of Law
University of Benin

Prof. C. N. Okeke
School of Law
Golden Gate University,
USA

Prof. Wilhelm Mohligh
Institute of African Studies
University of Cologne,
Germany

Prof. Chris White
School of Law
Flinders University,
Australia

Prof, Danwood Chirwa
Faculty of Law,
University of Cape Town
South Africa

Prof, C. M. Fombad
Department of Law
University of Botswana
Botswana

Prof. Sheldon Leader
School of Law
University of Essex, UK

Prof. Blessing C. Didia
Vice Chancellor,
Rivers State University,
Port Harcourt, Nigeria

Prof. D. O. Odeleye
Faculty of Law
University of Abuja

Prof. N. O. Obiaraeri
Faculty of Law
Imo State University
Owerri.

EDITORIAL BOARD

Prof. N.S. Okogbule
Prof. O.V.C. Okene
Prof. I N E Worudgji
Prof. Omari Omaka
Prof. E. E. Essien
Prof. U.S.F. Nnabue
Prof. U. U. Chukwumaeze
F. C. Ikeh, Esq.
B. C. Eddie-Amadi (Mrs.)
Chidi Halliday, Esq.

Executive Editor/Dean of Law
Editor-in-Chief/HOD, Business Law
Member
Member
Member
Member
Member
Member
Member
Secretary, Editorial Board
Case Note Editor

PORT HARCOURT JOURNAL OF BUSINESS LAW

A Publication of Faculty of Law, Rivers State University,
Port Harcourt, Nigeria

Volume 3: Number 1, April, 2017

ISSN: 1575-1799

Name	Articles	Page No.
Professor O.V.C. Okene	Political Strikes and the Limits of Legitimate Industrial Action: Policy Issues, Emerging Challenges and Way-Forward	1
Dandy Nwangu Chidiebere	Prosecution of Sexual and Gender Based Crimes: Prospects and Challenges in International Law	26
Dr Okubor Cecil Nwachukwu	A Reflection of Tax Assessment and Appeal Procedures in the Administration of the Petroleum Profit Tax Act Cap P13 Laws of the Federation of Nigeria 2004	46
✓ Dr. Abdulraheem Taofeeq Abolaji	Health Preservation in Islamic Law: A Scrutiny of Its Theory, Objectivity and Subjectivity	56
G. O. Akolokun	The Mirage of the Girl-Child's Right to Dignity of the Human Person in the Niger Delta: Examining the Relevance of Bride-Price	69
Chukuma O. Ajie	Toward Positive Corporate Governance: Some Reflections	71
Dr. A.M. Kontagora	An Overview of the Legal Challenges in the Administration of Property Tax in Nigeria	76
Obiora Anne Amuche	Enforcement of International Centre for the Settlement of Investment Dispute (ICSID) Award: The Plea of Sovereign Immunity	105
Huru Oghenerukewe Roy Esq	A Critical Appraisal of the Impact of International Law on Foreign Investment in Nigeria	115
Edoghiozho Eboigbe (UAs) and S. O. Daudu Esq	An Examination of Duress and Undue Influence in the Law of Contract	120
		126

A.S Amaramiro and D.U Ogbonnaya	The Powers of the Independent National Electoral Commission in Merger, Registration, De-Registration and Disqualification in Nigeria Constitutional Democracy	149
Obugheni William Arugu	Ministerial Waivers under the Coastal and Inland Shipping (Cabotage) Act: An Appraisal	161
Professor I. O. Omoruyi	Choice of Applicable Law in International Contracts: Towards a Nigerian Approach	171
Soboma Odimabo -Nsijilem (Mrs)	Should the Court Extend the Corporate Veil to Include Corporate Groups as a Single Entity	188
Dr. Theodore Okonkwo	Application of Environmental Impact Assessment Requirement to Proposed Projects: Case Law	196
Osaro, Ebiemere and Toby, Boma Geoffrey	The Impact of Degradation on the Agricultural Sector and Sustainable Development: A Global Perspective	206
Dr. (Mrs.) Emuobo Emudainohwo	Enforceability of Collective Agreements in Nigeria: A Possible Way Forward	217
Nuhu Abdulsalami	The Invaluability of the Central Bank of Nigeria from Inception till Date	229
Okparavero Prudence and and Okike Ajanwachuku	Plea Bargain: A Soft Landing for the Elites?	237
Chuks Dom-Chima & Amaechi Chinenyeze	Mandatory Disclosure & Investor Protection in Initial Public Offers: A Comparative Analysis of the Nigerian and the Uk Approach.	253
Bright Bazuaye and Flora Alohan Onomrerhinor (Mrs)	Recovery of Stolen Assets in Nigeria: A Case For Non Conviction Based Asset Forfeiture Regime.	264
K. O. Mrabure Ph.D	Budget Padding: Its Cognizance Under Our Extant Law	278
Eherechi N. A. Okere (Mrs)	Consumer Protection in the Banks and	285

Prosecution of Sexual and Gender based Crimes: Prospects and Challenges in international Law.

Chidi Halliday	Issues and Challenges in Corporate Rescue and Insolvency Practice in Nigeria	298
Dr. A. D. Obadina	Re-Thinking the Limited Liability Rule in Relation to Parent Companies	310
Fabian C. Ikeh, Esq	An X-Ray of the Legal Nexus of a Banker and a Customer.	332
Agent Benjamin Ihua-Maduenyi, Esq & Ijeoma Mgbeahurike, Esq (Mrs)	How binding is the Doctrine of 'Pacta Sunt Servanda' in Commercial Law?	340
Dr. Clifford Anaele Nwanyanwu*	The Doctrine of 'Last Seen Together' In Proof of Murder in India and Nigeria: An Appraisal	355

Health Preservation in Islamic Law: A Scrutiny of Its Theory, Objectivity and Subjectivity

Dr. Abdulraheem Taofeeq Abolaji*

Abstract

Health is very important in life of human being and it is duty of both government and the citizen to preserve and protect the health. Notwithstanding the available provisions relating to protection of health under Shari'ah, people are still suffering from various contaminating diseases such as AIDS/HIV and others. Therefore, this paper examines preservation of health with focus on Islamic family Law as a mechanism for the protection of health. The paper adopts qualitative method to carry out the research. The paper finds that there is health benefit in lawful sexual intercourse. The paper also argues that unlawful sexual intercourse breeds discomfort and incurable diseases. Therefore, avoidance of unlawful intercourse would be beneficial to health development of human beings.

Introduction

The issue of preservation of health in Islamic law cannot be understood until one clearly understands the fundamental questions relating to Islamic family law. It is true that a family is established through marriage and then grows through the ties of kinship into groups of clan, tribes and nations. The family is truly the fountain of progress, wealth and strength of human civilization. The family institution has always been the core of wellbeing of a community besides economic, material and physical security of man and woman. The teachings of Islam do not contravene with the interests of man as far as the Islamic family law is concerned. It has given full recognition to this aspect by providing its divine rules for safeguarding its interest and ensuring its smooth development which is considered as the main source for the preservation of human health. It thus not surprising that one third of the legal injunctions of the Quranic verses and *Aldith* of the prophet Muhammad S.A.W. relate to family affairs. These injunctions elucidate rules necessary for successful marriages and morally sound and stable society. Therefore, the paper examines some aspects of laws relating to the institution of family which are regarded as the basis in preserving of human health.

Marriage as Option for Health Preservation

In Islam, a family is established through the means of marriage, which is one of the legal contacts sanctioned by the principles of the *Shari'ah*. From the Quranic point of view, two terms are used for marriage, *nikah* and *zinaaj*. The term *nikah* means "embracing or bounding".¹ While under Islamic law, it means both the contract and cohabitation, or contract which purports to legalize cohabitation by words denoting giving in marriage, even if it were through a foreign tongue understood by contracting parties and witnesses.² From this point of view, the term *nikah* implies a connection, joining and intermingling in

love and affection. It also indicates the peace of mind; *nikah* provides a secure atmosphere for the growth and progress of human race and it enables the couples to undertake and fulfil their responsibilities conscientiously, with devotion and sincerity.³

One important components of marriage is the conjugal relations between the sexes should be based on mutual feelings of love and kindness for each other, so that both parties, with combined efforts, can lead a happy and peaceful family life. It is generally believed that there are different kinds of love. These are expressed as motherly love, brotherly love, sensual love, emotional love, sexual love, selfish love and universal love. Love is developed only for sexual or selfish ends and cannot last long. Marriage in Islam is not just a legal living arrangement nor the result of "free love" as practiced by in the *Jahiliyah* period and other system; it is for chastity and purity of purpose which are the fundamental elements for creating a loving and peaceful family life.

Marriage as a Therapy for Pure love

In order to avert mental diseases, Ibn al- Qayyim advised that if we agree that pure love and carnal desire are sicknesses that necessitate treatment, the satisfaction of such pure love is the best therapy. In order to highlight the importance of Islamic family law in relation to *Nikah*, ibnQayyim confirms that marriage is the best solution for two people who are in love. First, if the lover can reach and associate with the beloved in accordance with *Shari'ah* as decreed by fate, then, this is correct remedy.⁴ IbnQayyim substantiated this based on medical ground. He explains love and compassion not only enable spouses to lead a happy and peaceful family life, but enable the man to eject the semen as much as possible from his body during sexual intercourse. This, according to ibnQayyim and other Muslim physicians, is of utmost importance to preserve human health, for suppression or retention of congested semen can cause various kinds of diseases. Thus, it must be noted that when sexual intercourse is coupled with love and compassion, it intensifies love for another, heighten pleasure, lessens bodily exhaustion and maximizes emission of semen during sexual intercourse. On the other hand, when the husband lacks love or interest, or when he does not think highly of his wife, then sexual intercourse will weaken the body, reduces his ability to have an erection and mimizes the emission of semen during cohabitation. All the above facts are rooted from one of the *Quranic* verses which says:

*And among His signs that He created for you mates from among yourselves, so that you may dwell in tranquility with them and He has put love and mercy between your hearths verily, in that are signs for those who reflect.*⁵

Health Benefits of Lawful Sexual Intercourse

Lawful sexual intercourse is a wonderful gift from Allah and should be accepted graciously. It is observed that lawful sexual intercourse and considered as the primary means to maintain health. Thus, marriage is essential for the preservation of human health.

³ See Al- Quran 2 suratulbaqarah v 25, Al nisai- Quran 4 verse 19. In order to achieve the above quality, Islamic law is crucial to the development of Muslim society, not only because of its intellectual pre-eminence, but first and foremost, its moral and political

It is asserted that lawful sexual intercourse is considered by all learned physicians to be essential for health benefits.⁶ Islamic law has ordained the institution of marriage sanctioning sexual intercourse between the opposite sexes. This is the lawful means of fulfilling their natural inclinations in a responsible way and is considered by all physicians to be essential for a healthy and stable life. This is because by having lawful sexual intercourse, a husband may release semen from the body, for the suppression or retention of congested semen can cause various kinds of serious illness.⁷

The above position is supported by modern research that lawful sexual intercourse is one of the means to prevent sexually transmitted diseases. As agreed, sex represents a universal nature, but for the human being this universal phenomenon is special and unique in the animal kingdom. An unmarried woman submits sexually to men is considered unclean. Therefore, Islam strictly forbids any unlawful sexual intercourse. In this regards, Islam as a way of life which is harmonious with nature, provides human solution to complex situation and avoid extremes. In the case of men who are sexually overactive and are not content with one wife, they are permitted by law to have more than one wife but not exceeding four. This is to prevent them from having illicit sexual intercourse with other women, a situation that is not tolerated by the *Shari'ah*. Similarly, it said that abstaining from sexual intercourse for an extended period weakens one's nervous system, causes obstruction of the urethra and shrinks the penis. It is also observed that some people who vowed temporary abstinence from sexual intercourse had diminished sexual energy, suffered general weakness of their bodies, became doleful, lost their desire and their digestive system became corrupt.⁸

Preservation of Lineage

Shari'ah advocates for the preservation of lineage through the union of a man and woman through *Nikah*. In other words, there cannot be a sexual relationship without the marital bond.⁹ Prophet Muhammad S.A.W has said on many occasions that adultery is one of the three major sins. Islam considers adultery not only a great sin, but also an act which opens the gate for many other shameful acts which destroys the very basis of the family. Obviously, it leads to quarrels and murders which ruin reputations and property and spread numerous diseases both physically and spiritually. For these reason, Prophet Muhammad S.A.W. announced that:

"Whoever among you has the means to establish a family should get married, for marriage preserves the chastity of one's eyes and sexual organ and whoever cannot afford to establish a family must fast from desiring for abstinence in such a case will protect him from sin."¹⁰

...temperament is hot and moist, because of its being
...ness of semen, know that, ...

It is suggested by the learned physicians, healthy sexual intercourse relies on a variety of factors, the person's age, time of day, place, custom, physical characteristics of the body, diet, desire and the moisture of family genitals.¹¹ Therefore, it is better for a young man to avoid sexual intercourse with an old woman, with a sick woman and it is better to avoid having sexual intercourse with young girl who is immature, or who does not have sexual urges.¹² One of the *ahadith* of Prophet Muhammad places emphasis on the factors that contribute to the preservation of health as follows:

*Narrated by Jabir ibn Abdullah "when I got married, Allah's Messenger S.A.W said to me ' what type of lady have you Married ? I replied I have married a matron. He said why don't you have a link for the virgins and for fondling them. Jabir also said Allah's messenger S.A.W said why didn't you marry a young girl, so that you might play with her and play with you.'"*¹³

It is argued that the best for sexual intercourse is after food has been properly digested and the couple is not too exhausted. It is observed that it is healthier to have sexual intercourse after complete digestion and when body's temperament is stable, resulting in the balance of heat and cold, dryness, moisture or the stomach's fullness and emptiness. In addition, it is less harmful to have sexual intercourse while the stomach is full, rather when it is empty. Similarly, its harm is less with excessive body moisture versus dryness and with higher body temperature versus colder temperature. Under normal circumstances, one should approach his wife when his desire for sex has grown naturally and when he feels sexually fit.¹⁴

Preventing Sexually Transmitted Diseases through Prohibiting Unlawful sexual Intercourse

It is undisputed that one of the most causes of sexually transmitted diseases like Acquired Immunodeficiency Syndrome (AIDS) and other sexually transmitted diseases is through sex and resolves mostly around unhealthy human pleasures particularly through unlawful sexual intercourse. It is for these reasons that all revealed laws have prohibited adultery, fornication and homosexuality. It is therefore imperative to look at the prohibition of unlawful sexual intercourse under the *Shariah* as a means of preventing sexually transmitted and destructive diseases, most notable dangerous, AIDS.

i. Adultery and Fornication (al- Zina)

Shariah has given much attention to the health and wellbeing of society by allowing lawful sexual intercourse and strongly prohibiting all kinds of unlawful sexual intercourse. In order to prevent the transmission of sexually transmitted diseases, Islam and generally all other revealed religions do not content with simple declarations or warnings with respect to unlawful or harmful activities and behavior. Islam is eager to

corruption, but also is the main avenue for the spreading of sexually transmitted diseases. For this reason, Islam commands Muslims to move away from all means which lead to the performance of unlawful sexual intercourse. It should be noted that under the *Shariah*, the various organs of the body can be said to commit *zina* (*zina al-jawarih*), the eyes, the ears, the mouth, and even the legs that move a person from place to place. Obviously, they can be accessories to the ultimate sin of unlawful sexual intercourse. In this regards, the prophet Muhammad S.A.W said:

*"the place of adultery of legs is walking towards unlawful woman with bad intention and the adultery of the hands is touching and patting an unlawful woman and the adultery of eyes if casting passionate glances at a woman."*¹⁵

In line with this recommendation, the Holy Quran rules that:

*"Do not approach adultery"*¹⁶.

As a result of the above verse, the commentators of the Quran have interpreted that Islam not only prohibits unlawful sexual acts but also prohibits those paths that lead to it. By prohibiting the means to perform the prohibited, one may not become a vehicle for indulging in the prohibited. Under the *Shari'ah*, there is a principle known as *saddal-dhara'ir* blocking the means. Blocking the means is deemed necessary as any particular act that would lead to the prohibited or that would bring harm to mankind is considered unlawful and illegitimate.¹⁷

ii. Homosexuality

Shari'ah has prohibited not only unlawful sexual intercourse (*zina*) and all ways lead to it, but also the sexual deviation known as homosexuality (*al-liwat*) whether it be with one's own wife or with any other woman or man. Even though Muslim scholars agreed that homosexuality is forbidden in Islam. There are view of some scholars who regarded sodomy with their wives as permissible. They support their view by quoting the following verse *"Your wives are as a tilth unto you, so approach your tilth when or how you will."*¹⁸ To refute this idea, al-shafii in his *al-Umum* and al-Mawardi mention that actually the word *harth* (*tilth*) in the verse refers to a place where seed can be sown, produced and obtained.¹⁹ Rationally, there is no possibility of offspring having been obtained through the anus.

In Islam, the prevention of sexually transmitted diseases is the top priority while enjoying sex. Adherence to Islamic teachings, avoiding unlawful sexual relation leads to happiness in this world and in the hereafter and is considered an important means to protect one's self from HIV infection and other sexually transmitted diseases. In other words, having unnatural sexual relationships, particularly with members of the same sex is regarded as a means to new epidemic. In fact, there are many traditions which expressly declare sodomy as main reason for the emergence of new epidemic and new diseases. The Prophet Muhammad said:

If fornication and all kinds of sinful sexual intercourse become rampant and openly practiced without inhibition in any group or nation, Allah will punish them with new epidemic and new diseases which were not known to their fore father and earlier generations.²⁰

Based on the above hadith, the majority of Muslim scholars firmly sanction that homosexuality is both sin and crime, although they had various views on the prescribed punishment.

iii. The Role of Islamic Law in Preventing the Sexually Transmitted Diseases

In order to show case the role of the Islamic law in the prevention of sexual transmitted diseases, it is essential to highlight what has been proven by modern research. According to modern medical research, prohibiting unlawful sexual intercourse is one of the most effective methods of preventing the risk of AIDS infections and other transmitted diseases. Research has proven that diseases transmitted through sexual contacts whether between heterosexuals or homosexuals are the most common communicable diseases in the world.

It is a common belief that encouraging young couples to marry and satisfying their sexual needs within the marital unit is extremely important in preventing the spread of sexually transmitted diseases. In fact, this has been recommended by the prophet S.A.W. on different occasions:

"He who can afford to marry should marry because it will help him to lower his gaze (from looking at forbidden things and other women) and save his private parts (from committing illegal sexual acts e.t.c) and he who cannot afford to marry is advised to observe the fasts as it will diminish his sexual power."²¹

The importance of marriage is clear when Muslim jurists and others are unanimous in recommending marriage to any person whose soul longs for it and whoever fears that he might commit fornication. In Islam, there are rules and regulations stipulated to prevent any harms or diseases. These rules are for the benefit of the individual as well as society as a whole. Besides avoiding unlawful sexual intercourse as the primary important weapon in combating sexually transmitted diseases, one is advised to bear in mind the 'do's' and 'don't' while performing sexual intercourse, lest one may unknowingly transgress the limits and indulge in unlawful practice. If spouses follow the rules and regulations of matrimonial life as stipulated in the Quran and hadith, they will not have any diseases, such as AIDS and syphilis. They will continue to enjoy life by performing safe sex and at the same time, they will be rewarded in this life and in the hereafter.

Health Benefits of Ghusl Al-janabah

It is widely accepted that ghusl (bathing) is a necessary cleaning process which is used extensively in traditional health care. Bathing induces sleep, cleanses the skin,

²⁰IbnMajah, SunanIbnMajah. Kitab- al -Fitan. Bab al Uqubat,.Vol 2 hadith no. 4019.

²¹Al- Bukhari. Sahihbukhari. Kitabsawm. Bab al -sawmlimankhafaalanafsihi al- uzibah.

removes fatig
reported that

This e
obligatory pri
body, cloth an
ghusl is obliga
yourself."²³

Anoth
whether aslee
makes the ghu
other hand, th
the discharge
Similarly, if se
sexual arousal
intercourse, b
fatigue and b
for the enhanc

Conclusion

It is
preservation
implications
doer.Preserv
purposes of
own benefit
able to live in
fulfilled by
reproduce. T
to safe guard
marriage.

²² Al- Bukhar. Sa

²³ Al quran . al n

²⁴Sayyidsabitr.o

²⁵ n.a.2014. "In

Religion. Vol. 4.

removes fatigue, disposes waste and draws blood towards the surface of the skin. It is reported that the Prophet Muhammad S.A.W said: "cleanliness is one half of the faith."²²

This emphasis on cleanliness is not new in religion which makes cleanliness obligatory prior to performing *salat*, for the Muslim's *salat* is not acceptable unless his body, cloth and place where he performs his *salat* are clean. In addition to this requirement, *ghusl* is obligatory in the state of *janabah*. Allah says "if you are in a state of *janabah*, purify yourself."²³

Another situation which makes *ghusl* compulsory is on the discharge of semen whether asleep or in a wakeful state. According to shafii school, the discharge of semen makes the *ghusl* compulsory regardless of whether one is sexually aroused or not. On the other hand, the Hanafis, the malikis and the Hambalis hold that *ghusl* is not *wajib* unless the discharge is accompanied with pleasure. Without sexual arousal, no bath is required. Similarly, if seminal fluid flows due to sickness or medication without the accompaniment sexual arousal, *ghusl* is not required.²⁴ As noted above, the Islamic law requires that sexual intercourse, both husband and wife must *ghusl*. Besides being a means to remove body fatigue and bodily dirt, it brings about strength in the body and is an aid per excellence for the enhancement of the vitality of the body.

Conclusion

It is clear from the above discussion that *Shari'ah* plays a vital role in the preservation of health for the protection of progeny against diseases as well as its implications of having unlawful sexual intercourse and the punishment for the doer. Preservation of progeny is one of the *Maqasid al-Shari'ah*. Procreation is one of the purposes of marriage in Islam. It is an avenue of producing a healthy progeny for one's own benefit and the benefit of the entire community. With valid marriage, children are able to live in a complete environment for the betterment of the society.²⁵ The purpose is fulfilled by appropriate healthcare for children to grow into healthy adults able to reproduce. Therefore, preservation of health is very important under Islamic law in order to safe guard human being against diseases and to live a happy family life through lawful marriage.