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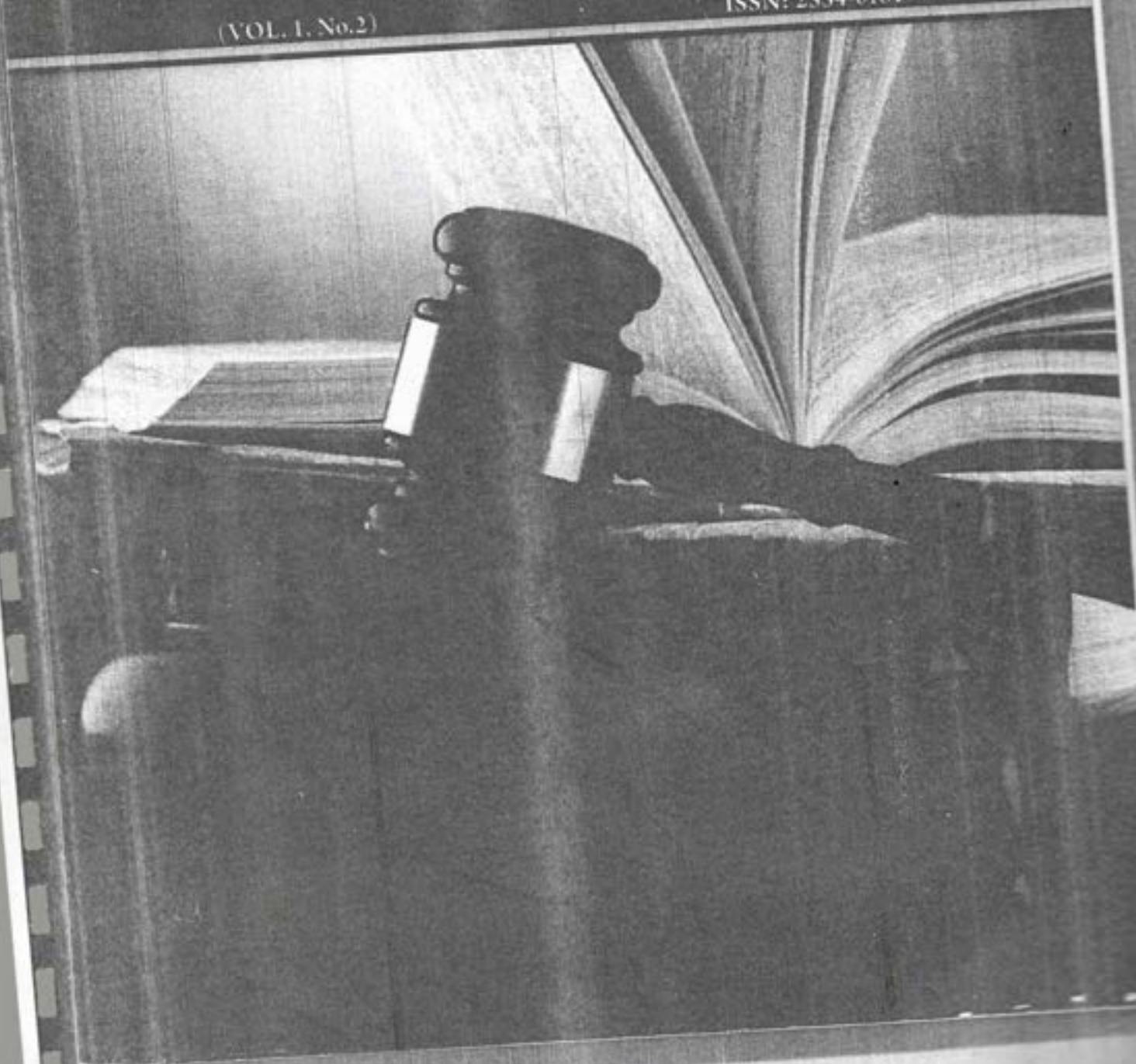
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A Contextual Analysis of the Relationship between Human Rights Obligations and the Activities of Non-State Actors in Africa

By

Amoloye-Adebayo, Azizat Omotoyosi.¹

1. Introduction

The traditional approach to human rights protection under International Human Rights Law is such that only States may be regarded as bearers of human rights obligations. In recent times, however, there have been converse arguments for extending the frontiers of duty bearers of human rights obligations to include non-state actors such as private organisations, belligerent political groups as well as abusive individuals. Given the on-going civic unrests in various African communities that have resulted in multiple human rights violations of such rights as the right to life, the precise nature of the relationship between human rights protection and violating acts by non-state entities appear to require primordial considerations in the process of nation building. Viewed from the traditional assumptions, where the human rights violations were essentially the result of private acts only the complicity of public institutions in such acts may require that the State concerned be held to be in breach of its vertical human rights obligations. However, this paper argues that more importantly for developing and transitioning contexts such as most African nation-states as well as all other contexts, it may be more fruitful to critically define who a non-state actor is and to thereafter explore the possibilities of diagonal frameworks that will enable States to better protect human rights in private and public spheres.

2. Security and Peace Challenges in African Countries

Gunmen have killed at least 20 people in a dawn attack in a remote village prone to bandit attacks in Northern Nigeria's Kaduna state Many of those targeted were worshippers leaving a mosque. . . . No group as yet admitted the attack. Some reports suggested it may have been linked to a running feud between villagers and bandits. After attacking the mosque goers, the raiders moved to the house of a community chief and killed him too.²

Some days earlier, on Friday 5 October, 2012, four men were seriously beaten and were burnt to death in Allu village in Port Harcourt, Rivers State.³ As well as constituting punishable crime under domestic law such as the Nigerian Criminal Law, the above incidents are clear human rights violations of the highest degree. They appear to, however, constitute almost normal and expected daily occurrences in Nigeria. Additionally, such incidents and other forms of structural violence appear to be emblematic of citizenry's experience in most of the other countries on the African continent as well, from Angola, to Sudan, to Zimbabwe, to Sierra Leone, to Egypt and Libya to mention but a little. For example, it has been reported that in some South African and Papua New Guinean communities⁴ and in Sierra Leone,⁵ collective male sexual violence against women of all ages such as group rape has almost assumed the status of a 'rite of passage' for its notoriety.

¹PhD; ACI arb, UK; Lecturer, Department of Islamic Law, Faculty of Law, University of Ilorin; Legal Practitioner, Yusuf O. Ali & co, legal practitioners, arbitrators and notaries. Email: azizatomoloye.adebayo@gmail.com.

²Reported as occurring on Sunday 14 October, 2012 by BBC News daily reports; similar accounts were also broadcasted on the same day by Al-Jazeera and Reuters News.

³Reported at <http://www.bbc.co.uk/news/world-africa-1989528>.

⁴Wood, K., 'Contextualizing Group Rape in Post-Apartheid South Africa,' (2005) 7(4) CH & S. Pp. 305-5.

⁵Sesay, F. L. 'Where there is no 'Safe Haven': Human Rights Abuses of Sierra Leonean Women at Home and in Exile,' (2004) (59) Agenda. Pp.22-31.

As earlier said, the various forms of violence highlighted above violates some human rights provisions guaranteed under existing international human rights instruments such as the right to life and the dignity of the human person, freedom from inhumane and degrading treatment as enshrined, for example, in the relevant articles⁶ of the International Covenant on Civil and Political Rights, 1966, as well as those of the Universal Declaration of Human Rights, 1948.⁷ However, these human right violations are clearly the result the activities of private persons and appear at face value to have little or nothing to do with any public institution or authority. More importantly, the lack-luster attitude or zero response to such gross human rights violations by the governments of some African countries where they occur evinces the lack of a sense of obligation for violations by private individuals. For this reason, it seems pertinent to determine whether and if so, the extent to which international human rights law (IHRL) can be said to envisage and accommodate private obligations.

3. Non-State Actors and IHRL in General

It has been argued that the traditional application of International law was to a considerable extent⁸ essentially State-centred.⁹ Further that, in line with the stated tradition, IHRL proceeded from perceptions of obligations which a State owes to individuals within its jurisdiction.¹⁰ The initial assumption, therefore, was that the only direct duty bearers of legal obligations under human rights instruments are States and as such human rights violations capable of protection by IHRL are only those arising out of State action.¹¹ However, this traditional assumption has come under intense criticisms in more recent times. Some feminist studies have, for instance, presented some strong aversions to this notion. According to one such study¹² - '[T]hose areas which are defined as inappropriate for state involvement, where the discourse of human rights is irrelevant, are those areas in which the majority of the world's women live out their days.' A consideration of the relationship between private acts and IHRL appears to make relevant two general, but fundamental, conceptual questions. The first is the question of who may be regarded as a private/non-state actor or of what constitutes private acts in IHRL. The other is the issue of whether or not the human rights discourse is in reality relevant and appropriate in the regulation of private relations. Put another way, can it be safely assumed that IHRL has the capacity to bring about its horizontal application between the rights-holders themselves? What follows is an analysis of these points in the order of formulation. Theoretically, private actors in relation to human rights obligations may broadly be defined along two categories.¹³ The first category involves an actor who though neither a State nor a State official, acts as, or is in complicity, with a State. The other category comprises actors who neither manifest State-like characteristics nor are connected to the State in any manner. The former category will include actors such as belligerent groups usurping State power,

⁶See articles 7 and 8.

⁷See articles 3-5.

⁸Acknowledged exceptions exist within International Criminal Law and International Humanitarian Law where the notion of individual criminal responsibility has long since been grounded. See Schwelb, E., 1946, 'Crimes Against Humanity,' (1946) (23) BYIL. Pp. 178-226.

⁹Mullerson, R.A. 'Human Rights and the Individual as Subject of International Law: A Soviet View,' (1990) (1) EJIL. P.34.

¹⁰McCorquodale, R. and La Forgia, R. 'Taking Off the Blindfolds: Torture by Non-State Actors,' (2001) (1) HRLR. P.189.

¹¹McCorquodale, R. 'Overlegalizing Silences: Human Rights and Nonstate Actors,' (2000) 96 ASIL Proceedings. P.384.

¹²MacKinnon, C.A. 'On Torture: A Feminist Perspective on Human Rights' in Mahoney, K.E. and Mahoney, P. (eds.) *Human Rights in the Twentieth Century: A Global Challenge*. (Nijhoff Publishers, Dordrecht, etc 1993). Pp.26-27. (Internal citations omitted).

¹³The discussion here is partly inspired by that given in Knox, J.H. 'Horizontal Human Rights Law,' (2008) 102(1) AJIL. P.20 and footnote 87.

International Financial Institutions (IFIs) such as the International Monetary Fund (IMF) and the World Bank, and transnational corporations (TNCs). The latter is essentially comprised of private individuals or entities. On the question of the relevance/appropriateness of IHRL in regulating human rights violations by the two identified categories of private actors, the issue appears divided. Except for some few objections¹⁴ there appears to be a strong convergence of opinion that the first category of actors ought to or in fact constitutes duty bearers of human rights obligations.¹⁵ The main thrust of the argument is that in a number of situations, some actors within this category have exhibited the capacity to exercise considerable State-like powers in military (e.g. belligerent groups) and economic (e.g. TNCs) terms.¹⁶ The State concerned may have been reduced to a weak contender or an unwilling accomplice. The citizenry of the State in question, therefore, become victims of any resulting human rights violation which may possibly be without any remedy.¹⁷ The idea therefore is that foisting direct obligations on such non-State actors is a realistic step towards strengthening human rights protection in the current era of globalization.¹⁸ These obligations are, however, regarded as merely extended from the traditional obligations on States without entirely absolving the relevant State as the traditional duty bearer of human rights obligations.¹⁹

The other mentioned category of private actors (that is, private institutions and individuals) is the focus of concern for the present paper. It is useful to identify the range of possible obligations that may be envisioned on the subject of this category of private actors and the boundaries of IHRL generally.²⁰ First, there are vertical/direct obligations requiring States, as the only duty-bearers, to refrain from acts and omissions that will violate the human rights of persons. Secondly, there are diagonal/indirect obligations, which seek to ensure that States as the main duty-bearers must guard against human rights violations in the private sphere by regulating relations between individual right-holders. Finally, and arguably the most contested, are the horizontal obligations which envisages direct international obligation on private persons regarding the human rights violations of others.

There are those of the view that IHRL does not give rise to private obligations in any way. In this respect, Henkin²¹ argued around three decades ago that - "Human Rights, I stress, are rights

¹⁴See for instance an objection that- "[T]he legal reality still indicates that in relation to IFIs, the EU, or private sector actors, we are still not dealing with "new duty-bearers" (sic) as much as with evolving international institutional structures through which "old duty-bearers" (i.e., states) must acknowledge their extended and extraterritorial human rights obligations." McInerney-Lankford, S. Book Review: *Casting the Net Wider: Human Rights, Development and New Duty-Bearers* (Margot E. Salomon, Arne Tostensen & Wouter Vandenhole, eds.) (2009) 31 HRQ. Pp.526-530.

¹⁵For further and in depth analysis of this notion, see Salomon, M.E., Tostensen, A. and Vandenhole, W., (eds.) *Casting the Net Wider: Human Rights, Development and New Duty-Bearers*. (Intersentia, Antwerp & Oxford 2007). Pp.3-16; Ssenyonjo, M. 'Non-State Actors and ESC Rights' in Baderin, M. A., and McCorquodale, R., (eds.) *Economic, Social and Cultural Rights in Action*. (University Press, Oxford 2007). Pp.134-135; Steiner, H.J. 'Human Rights: The Deepening Footprint.' (2007) 20 HHRJ. P.9; Clapham, A. *Human Rights of Non-State Actors* (University Press, Oxford 2007). Pp.30-32; Alston, P. (ed.) 2005. *Non-State Actors and Human Rights* (University Press, Oxford 2007). P.1; Hessbruegge, J.A. 'Human Rights Violations Arising From Conduct of Non-State Actors.' (2005) 11 BHRLR. Pp.21-88; McCorquodale, R., 2000. *Supra* note 9, P.384; McCorquodale, R. and La Forgia, R., 2001. *Supra* note 8, Pp.189-218; Jochnick, C. 'Confronting the Impunity of Non-state Actors: New fields for the Promotion of Human Rights.' (1999) 21 HRQ. Pp. 61-63; Shue, H. 'Mediating Duties'. (1988) 98(4) Ethics. Pp.697-699.

¹⁶Jochnick, C., 1999. *Supra* note 13, Pp. 61-63.

¹⁷*Ibid.*

¹⁸See again the cited works in note 13 above.

¹⁹Salomon, M.E., Tostensen, A. and Vandenhole, W., (eds.) 2007. *Supra* note 13, Pp.395-415.

²⁰Some of the ideas for the following discussion were inspired by the analysis in Hessbruegge, J.A., 2005. *Supra* note 13, Pp.25-6 and Dickson, B. 'The Horizontal Application of Human Rights Law' in Hegarty, A. and Leonard, S. (eds.) *Human Rights: An Agenda for the 21st Century* (Cavendish, London & Sydney 1999). Pp.59-60.

²¹Henkin, L. *The Rights of Man Today*. (Stevens & Sons, London 1979) P.2.

against society as represented by government and its officials by group definition." In the same vein, Rodley²² has suggested that it is a misconception to depict harmful/wrongful acts committed by private persons outside of State action as human rights violations. In his opinion, such private acts will have been more appropriately defined within domestic jurisdictions as crimes, torts, wrongful doing or legal rights.²³ Further, according to the same view, human rights properly so called and having regard to the concept as an 'historical construct', are 'rules that mediate the relationship between governments and their subjects.'²⁴ In a nutshell, to the proponents of the discussed point of view, IHRL generally or as located in the core treaties²⁵ establishes only vertical obligations for State Parties.

The notion of vertical human rights obligations may have informed the basis of strong criticisms, particularly in feminist studies, against the sphere of application of IHRL.²⁶ Two assumptions seemingly always underpin such critical views. In the first instance, there appears always to be an initial concession that IHRL in actual fact establishes only vertical obligations. The other assumption after the initial concession is the identification of the need to make a case for the horizontal application of IHRL to remedy, inter alia, its gender bias.²⁷ There also seems to exist much ideological support for the horizontal application of IHRL outside of feminist studies.²⁸ A central supporting argument in the other studies is that current developments are such that the 'State action paradigm' or the public/private divide in the protection of human rights is artificial and problematic.²⁹ The paradigm has also been described as dangerous because of the potentiality to undermine human rights.³⁰ In particular, it has been suggested that-

[T]he emergence of new fragmented centres of power, such as associations, pressure groups, political parties, trade unions, . . . universities, churches, interests groups, and quasi-official bodies, has meant that the individual now perceives authority repression, and alienation in a variety of new bodies, whereas it was once only the apparatus of the State which was perceived in the doctrine to exhibit these characteristics. This societal development has meant that the definition of the public sphere has had to be adapted to include these new bodies and activities.³¹

At the point of pragmatic considerations, however, much of the horizontal application arguments appear to suffer serious drawbacks. After initial criticisms of the 'traditional' notions of the vertical orientation of IHRL, recommendations for its horizontal application appear typically to assume two forms.³² The first is to locate the forum for the proposed application within domestic settings and to argue for an 'infiltration of human-rights norms into the private and public law of national States'.³³ The other is to recognise the need to build a 'framework for understanding human rights in the private sphere' which would be 'legally

²²Rodley, N.S. 'Can Armed Opposition Groups Violate Human Rights' in Mahoney, K.E. and Mahoney, P. (eds.) *Human Rights in the Twentieth Century: A Global Challenge*. (Nijhoff Publishers, Dordrecht etc. 1993). Pp. 298-302.

²³*Ibid.*

²⁴*Ibid.* Pp.298-299.

²⁵Ssenyonjo, M., 2007. *Supra* note 13, P.110.

²⁶See again MacKinnon, C.A., 1993. *Supra* note 10, Pp.26-27.

²⁷*Ibid.*

²⁸Clapham, A. *Human Rights in the Private Sphere*. (Clarendon Press, Oxford 1993). Pp. 91-94; Dickson, B., 1999. *Supra* note 18, P.60.

²⁹*Ibid.*

³⁰Clapham, A., 1993. *Supra* note 26, Pp. 94 and 137-8.

³¹*Ibid.* P.137.

³²Dickson, B., 1999. *Supra* note 18, P.60.

justified by a dynamic interpretation of . . . the international law of human rights.³³ To the current author, such recommendations are seemingly inconsistent with the premises of initial objections. They appear also not to make a clear distinction between the consequences of horizontal obligations under and the horizontal application of IHRL.

Contrary to critical notions, it may be argued that IHRL not only envisages but in fact establishes much ground for deducing some horizontal obligations as well as other kinds of obligations. In this regard, the UDHR in its opening paragraph requires that "every individual and every organ of society . . . shall strive by teaching and education to promote respect for these rights and freedoms and . . . to secure their universal and effective recognition and observance . . ."³⁴ In a similar manner, the two International Covenants of 1966 each contain identical provisions in their respective Articles 5 to the effect that-

Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms contained herein or at their limitation to a greater extent than is provided for in the present Covenant.

The European Convention on Human Rights (ECHR) mirrors the above provision in its Article 17 on the Prohibition of the Abuse of Rights. On its part, the American Convention on Human Rights also expresses similar provisions as contained in the stated articles of the two International Covenants of 1966 and the ECHR in its Article 29. The American Convention, however, took a step further than the other documents by specifically incorporating in the same Article 29, the provisions of the American Declaration of the Rights and Duties of Man, 1948. Part of the preambular provisions in this Declaration is to the effect that 'the fulfilment of duty by each individual is a prerequisite to the rights of all.' Adopting also the lexicon of duties, the African Charter on Human and Peoples' Rights³⁵ provides in its Article 28 that- 'Every individual shall have the duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.'

These provisions appear to provide justifiable basis for making a distinction between 'horizontal obligations under' and 'horizontal application of' IHRL. As Knox has rightly contended IHRL

has the legal capacity to place horizontal duties on all private actors not to violate one another's human rights. What it lacks is the practical and political capacity to enforce those duties. As a practical matter, international law could not possibly replicate the vast domestic resources devoted to regulating private invasions of interests denominated as human rights by international law, and as a political matter, it would be impossible even to try. . . Neither national governments nor the vast majority of their citizens would support the enormous expansion of the authority and resources of international institutions that would be necessary for them to protect . . . human right[s] from private interference.³⁶

³³Clapham, A., 1993. *Supra* note 26, Pp.139 and 134.

³⁴See the opening paragraph of the UDHR.

³⁵African (Banjul) Charter on Human and Peoples' Rights, 1981.

³⁶Knox, J.H., 2008. *Supra* note 11, P.19.

Thus, the argument here is that IHRL clearly envisages that human rights should be enjoyed by all individuals everywhere³⁷ regardless of the domain, be it private or public. As other analysts have also noted³⁸, the regime and fora for the protection of individuals from private and public violations of their human rights must as of necessity differ. This may be the result of the difference in power relations between the State and the individual on the one hand and mutual relations between individuals on the other.³⁹ The former is to a very large extent predictable - the weakest of States will for the most part be stronger than private individuals and entities.⁴⁰ Again, the powers of governments are not 'necessarily checked by any domestic laws, since governments may have the power to change the laws that purport to restrict them'.⁴¹ So for this reason, it may be deduced that IHRL seeks to regulate the powers of States in relation to the individual through the vertical application of human rights obligations. This notwithstanding, it is useful to emphasize, as noted in the below commentary, that-

the essential identity- of rules governing the conduct of states . . . is not asserted for the reason that states are *like* individuals; it is due to the fact that states are composed of individual human beings; it results from the fact that behind the mystical, impersonal, and therefore necessarily irresponsible personality of the metaphysical state there are the actual subjects of rights and duties, namely individual human beings . . . The individual is the ultimate unit of all law, international and municipal, in the double sense that the obligations of international law are ultimately addressed to him [or her] . . .⁴² {Emphasis added}.

The latter kind of relation (mutual relations between individuals), however, is regarded as always being contextually and chronologically relative - 'today's bully may be tomorrow's victim'.⁴³ For this reason, it may be argued that careful attention should be accorded to developing methodologies that would ensure a proper balance between conflicting rights and interests of various individuals. By this analysis, it may be surmised that as well as establishing vertical duties on States Parties, IHRL additionally envisages horizontal obligations to maintain a balance between private competing interests. However, for 'practical' and 'political' considerations, horizontal obligations must be diagonally or indirectly applied through the State apparatus. This in turn creates diagonal obligations for States in addition to, or reinforcing, their existing vertical human rights obligations. A consideration of the interpretation of human rights norms by the European, Inter-American and African regional bodies in response to applications by various individuals for private human rights violations further strengthens this line of argument. A number of judicial pronouncements by these bodies on matters involving private violations have considered the States concerned to have failed to discharge their responsibilities under the 'obligation to protect' human rights of the individuals concerned.⁴⁴

³⁷ See Article 2 of the UDHR.

³⁸ Raday, F. 'Privatising Human Rights and the Abuse of Power.' (2000) 13(1) CJLJ. Pp. 107-112.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ Knox, J.H., 2008. *Supra* note 11, P.20.

⁴² Lauterpacht, H. 'The Grotian Tradition in International Law.' (1946) 23 BYBIL. P.27.

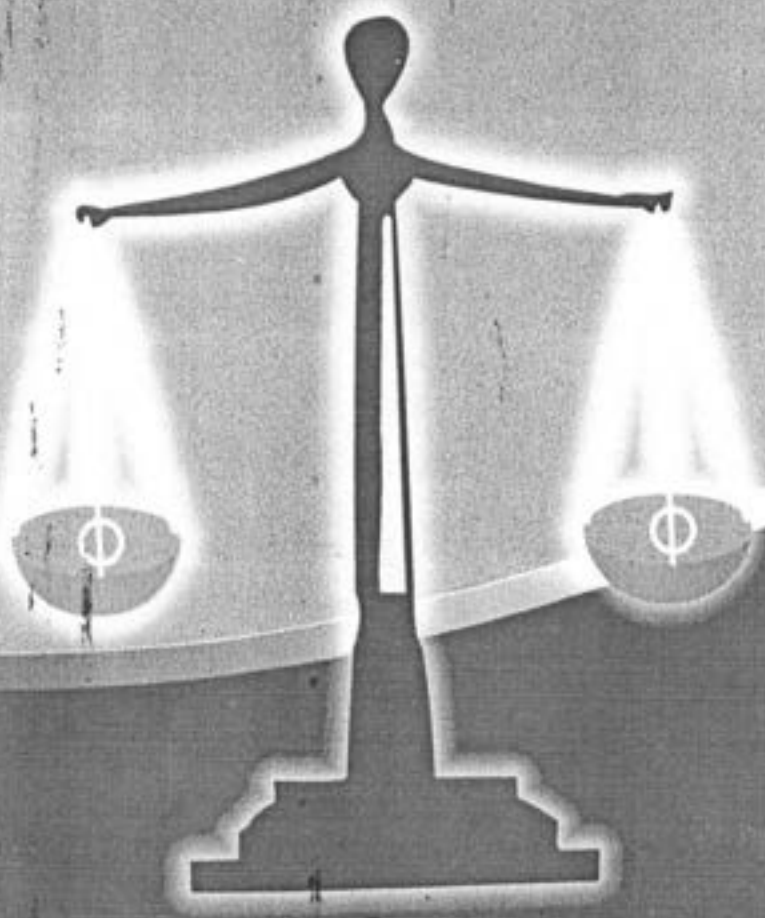
⁴³ Hessbruegge, J.A., 2005. *Supra* note 13, P.26.

⁴⁴ For analyses of some judicial decisions of the regional human rights courts in the area of ESC rights violation, see Nolan, A., 'Addressing Economic and Social Rights Violations by Non-state actors through the Role of the State: A Comparison of Regional Approaches to the 'Obligation to Protect.' (2009) 9(2) HRLR. Pp.225-255 and Tinta, M.F. 'Justiciability of Economic, Social, and Cultural Rights in the Inter-American System of Protection of Human Rights: Beyond Traditional Paradigms and Notions.' (2007) 29 HRQ. P.434.



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'CASHING IN' ON FEMINISM: A CRITICAL APPRAISAL OF SOME PROPOSALS FOR MODERN INTERPRETATION OF ISLAMIC PROVISIONS ON WOMEN IN INTERNATIONAL HUMAN RIGHTS LAW.

AMOLOYE-ADEBAYO AZIZAT OMOTOYOSI*

ABSTRACT

Feminist discourse on women's right and Islamic provisions generally appear to converge on the notion that the 'deterioration of women's rights in many Islamic countries' has little to do with their Islamic nature. On account of this, there have been various proposals for different regimes of interpretation of Islamic textual provisions on women in such ways that compatibility with principles and norms of International Human Rights Law is ensured. This paper argues that current debates and proposals for modern interpretation of Shari'ah provisions as they relate to women, for the most part, are not only as male dominated as the traditional jurisprudence they were meant to challenge; more dangerously, they appear to subtly serve masculinist interests. It is suggested that there is a need for the redirection of feminist jurisprudence on the subject towards constructive interpretative methodologies that may better serve the interests of women in deserving Islamic societies.

INTRODUCTION

Some feminist jurisprudence on the subject of women's right and Islamic provisions have propounded the notion that the 'deterioration of women's rights in many Islamic countries' has little to do with their Islamic nature¹. The situation is, according to this view, rather a result of conservative interpretation of Islamic texts as a 'result of traditional, patriarchal, male-dominated societies'.² Others have adopted a more radical stance to suggest that any system of family relations based on Shari'ah (or Islamic Law) must as of necessity accommodate a subversive and discriminate treatment of Muslim women.³ While the former category of feminists argue for a reconstruction of existing regimes of interpretation and application of Shari'ah,⁴ the latter seek total disengagement with some Islamic tenets on gender relations in favour of relevant prescriptions of internationally negotiated agreements on human rights.⁵ On account of this, there have been various proposals for structuring the relationship, as regards the existing applications of Islamic textual provisions on women in

* Lecturer, Department of Islamic Law, Faculty of Law, University of Ilorin. Email: azizatomoloyeadebayo@gmail.com

Mashhour, A., 2005. 'Islamic Law and Gender Equality-Could there be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt.' 27 *Human Rights Quarterly*. Pp. 562-565.

Ibid.

Memissi, F., 1987. *Beyond the Veil: Male-Female Dynamics in Modern Muslim Society*. Rev. ed. Bloomington: Indiana University Press. Pp.19, 24.

Al-Fassi, H.A., 2007. *Women in Pre-Islamic Arabia: Nabataea*. Oxford: British Archaeological Reports International Series.

Barlow R., and Akbaradeh, S., 2006. 'Women's Rights in the Muslim World: Reform or Reconstruction?' 8 *Third World Quarterly*. Pp.1484-5.

relevant contexts as well as the principles of International Human Rights Law (IHRL) in such ways that compatibility between both bodies of law is ensured.

The present paper argues that some of the current debates and proposals for interpretation of *Shari'ah* provisions as they relate to women, as well as those espousing the jettisoning of such provisions, for the most part, are equally as male dominated as the traditional jurisprudence they were meant to challenge. Even more dangerously, some of the existing proposals by accident or design appear to subtly serve androcentric interests. In other words, if some of the current proposals are adopted without critical consideration, there is the possibility for fresh violations of the rights of Muslim women to be reinforced and adorned with garbs of legitimacy with the human rights terminology. This paper concludes with suggestions for enriching feminist jurisprudence vis-à-vis relevant Islamic textual provisions to better protect the rights of Muslim women in deserving contexts.

FEMINISM AND ISLAM

As with most (if not all) political labels, feminism is a very controversial term which may simultaneously connote 'a wide range of attitudes, concerns and strategies'.⁶ As such, it may be difficult to provide a definition that is capable of conveying the multifarious connotations of the term across varied generations and contexts. Nevertheless, one definition of feminism that appears instructive describes it as:

... a set of ideas that recognize in an explicit way that women are subordinate to men and seek to address imbalances of power between the sexes. Central to feminism is the view that women's condition is socially constructed, and therefore open to change. At its heart is the belief that women's voices should be heard – that they should represent themselves, put forward their own view of the world and achieve autonomy in their lives.⁷

A detailed analysis of all existing feminist theories as well as the various ways through which they interrogate Islamic gender relations is not here intended, being far afield the focus of concern.⁸ However, a cursory perusal of relevant literature reveals that divergent issues

⁶Hannam, J., 2012. *Feminism*. Great Britain: Pearson. P.7. As another feminist writer has similarly argued: 'As with social theory generally, there is no agreed-upon perspective or unified notion of "feminism" in feminist legal theory; it is multifaceted and heteroglossic, which is at once its strength and Achilles heel. See Thornton M., 2004. 'Neoliberal Melancholia: The Case of Feminist Legal Scholarship.' 20 *Australian Feminist Law Journal*. P.9.

⁷Hannam, J., 2012, *Ibid*.

⁸For some detailed examination, however, see the following works: MacKinnon C. A., 1989. *Towards Feminist Theory of the State*. Harvard University Press, -1993. 'On Torture: A Feminist Perspective on Human Rights' in Mahoney, K.E. and Mahoney, P. (eds.) *Human Rights in the Twentieth Century: A Global Challenge*. Dordrecht, etc.: Nijhoff Publishers; Thornton, M., 1986. 'Feminist Jurisprudence: Illusion or Reality?' *Australian Journal of Law and Society*. P.5, - 2004. 'Neoliberal Melancholia: The Case of Feminist Legal Scholarship.' 20 *Australian Feminist Law Journal*. P.7; Ortiz, D.R., 1994-95. 'Feminisms and the Family.' *Harvard Journal of Law and Public Policy*. P. 526; Rhouni, R., 2010. *Secular and Islamic Feminist Critiques of the Work of Fatima Mernissi*. Women and Gender : the Middle east and the Islamic World, Vol 9. Boston: Bri Afshari, R., 1994. 'Egalitarian Islam and Misogynist Islamic Tradition: A Critique of the Feminist

underpin different feminist campaigns. For example, the traditional liberal feminism 'basically identifies women as the same as men and demands that they be treated equally'.⁹ On another level, difference feminist campaigns recognise a distinction between female and male values as well as qualities and argue for an inclusive guarantee and protection of all such values and qualities regardless of gender in public and private spheres.¹⁰ Another brand of feminism encapsulates the dominance ideology¹¹ wherein it is maintained that both the 'sameness' and 'difference' arguments of the earlier discussed two categories of feminism are premised on and measured by values and standards which are *a priori* dominated by masculinistic determinations. MacKinnon¹² (a major proponent of the dominance theory) concedes that both liberal and difference feminisms on some levels have ensured the protection/recognition of women's interests in some areas. She, however, underscores the concurrent backlash of both campaigns in the undermining of women's interests in general in the following words¹³ – As applied, the sameness standard has mostly gotten men the benefit of those few things women have historically had [on the other hand] For women to affirm difference, when difference means dominance, as it does with gender, means to affirm the qualities and characteristics of powerlessness.

The dominance theory has also been challenged as being unclear and uncertain about the modalities of reform which would allow women to reconstruct values and redefine themselves.¹⁴ According to this view, 'without a theory (however tentative) about our future, it is hard to imagine that any gains made by women will change anything than our relative positions in a world that continues to value, hunger and fight for power and autonomy'.¹⁵ While not specifically endorsing any brand of feminism as holding all the key answers to extirpating all conditions that perpetuate the oppression of women, the current author is in agreement with the critique by dominance theorists of some methodologies of both liberal and difference feminisms.

As later further demonstrated in this paper in the consideration of some feminist interpretation of some Islamic textual provisions, it is still possible for the interests of women to be violated even where either of the principles of 'sameness' or 'different but equal' are faithfully applied. However, in the current author's opinion, the solution might not lie in total disengagement with existing construction of reality simply because they are allegedly entirely based, according to the dominance theory, on values which espouse male hegemony. The current author subscribes to the idea that the process of construction of reality is a continuum.¹⁶ Women themselves would, therefore, need to accord very grave considerations to

Reinterpretation of Islamic History and Heritage,' 4 *Critique*. P. 13; Barlas, A. 2002. "Believing Women" in Islam: Unreading Patriarchal Interpretations of the Qur'an. Austin: University of Texas Press.

⁹ Ortiz, D.R., 1994-95. *Ibid*, p.524.

¹⁰ Hannam, J., 2012. *Supra*, p.8.

¹¹ A compelling analysis of this ideology is that by MacKinnon C., A., 1987. 'Difference and Dominance: On Sex Discrimination,' in *Feminism Unmodified: Discourses on Life and Law*. Cambridge, Mass: Harvard University Press. Pp.32-34.

¹² *Ibid*.

¹³ *Ibid*, Pp.35, 38-9

¹⁴ Bartlett, K.T., 1987. 'MacKinnon's Feminism: Power on Whose Terms,' 75 *California Law Review*. Pp. 1567 – 1570.

¹⁵ *Ibid*, p. 1568.

¹⁶ *Ibid*, p.1567.

the choices they require as well as the implications of those choices for the social relations they desire.

This line of argument has strong contextual relevance for the ways in which feminist jurisprudence has developed in the interrogation of male-female gender relations in Islamic societies. Certain textual provisions of Shari'ah and/or their application have been expressed to accommodate discriminate treatment of persons on the basis of gender.¹⁷ As a response, two brands feminism or 'feminist paradigms' as Badran puts it¹⁸, have been identified.¹⁹ These are secular feminism and Islamic feminism. Secular feminism captures the sense of liberal feminism challenging the male-female dichotomy in public spheres in Muslim countries. Islamic feminism, on the other hand, has simply been described as 'feminist discourse and practice articulated within an Islamic paradigm'.²⁰ It is useful to note that the categorization may, in a number of cases, merely signify the extent of a given feminist's expertise in the knowledge and interpretative methodologies of Shari'ah rather than the operational frameworks which the two categories may suggest. In other situations, whether or not a feminist is regarded as belonging to one or the other of the two categories identified under here may be the result of the implications of reform strategies proposed. For example, some frameworks of secular feminism may require that certain provisions of the Islamic textual sources that are perceived to accommodate the subservience of women are to be entirely disregarded for lacking contemporary relevance. In identical circumstances, on the other hand, the methodologies of Islamic feminism may merely seek a reconstruction/reinterpretation of relevant provisions free from male-centred inclinations and inclusive of women's experiences. Arguably, one of the most controversial provisions of the Qur'an on gender relations in an Islamic family in respect of which the divergence of reform proposals based on the two identified paradigms become readily apparent is enshrined in Q4:34.

SHARI'AH PROVISION IN Q4:34 IN THE LIGHT OF SOME CORE PROVISIONS OF IHRL ON WOMEN: TO ABANDON OR TO RECONSTRUCT?

In the above stated verse of the Qur'an, it is provided that – 'Men are the protectors and maintainers (*qawwamūna 'ala*) of women, because Allah has given the one more advantage (*bima faddala*) than the other, and because they support them from their means . . .'. According to some commentators, the classical interpretation of this verse promoted a doctrine of male superiority reflecting the mindset of the prevailing patriarchal cultures.²¹ If this is true, from the standpoint of the practitioners of IHRL, some core provisions enshrined in international human rights instruments will have been violated. Such provisions include Article 26 of the International Covenant on Civil and Political Rights, 1966, which stipulates that, 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and

¹⁷For example, some objections have been raised as regards perceived discriminate shares for some female heirs in relation to their male counterpart under the Islamic law of inheritance by Carroll, L., 2001. 'Life Interests and Intergenerational Transfer of Property: Avoiding the Law of Succession', 8 *Islamic Law and Society*. Pp. 245-246.

¹⁸Badran, M., 2009. *Feminism in Islam: Secular and Religious Convergences*. Oxford: Oneworld. P.2. According to her – '[T]hese two feminisms have never been hermetic entities.'

¹⁹*Ibid.*

²⁰*Ibid.* p.242

²¹*Ibid.* p.248.

guarantee to all persons equal and effective protection against discrimination on any ground such sex'

In addition, the Convention on the Elimination of All Forms of Discrimination against Women, 1979, (Women's Convention) also requires States parties by its Article 2 (a) to 'embody the principle of equality of men and women in the national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle'. Expanding its jurisprudence on the subject of equality, the United Nations Human Rights Committee has noted²² its awareness of the fact that:

Inequality in the enjoyment of rights by women throughout the world is deeply embedded in tradition, history and culture, including religious attitudes. . . . States parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women's rights to equality before the law and to equal enjoyment of all Covenant rights.

In view of the IHRL position on the subject of equality between men and women, there have been arguments based on the secular feminist's approach, it would seem, for abandoning such provisions of the Qur'an as 4:34 in Muslim contexts. Preferences would, thereafter, be for other Islamic textual provisions that are perceived to be more explicitly compatible with relevant human rights provisions. An authoritative proponent²³ of this position is Abdullahi An-Na'im.²⁴ According to his thesis on the provision of Q4:34, the Islamic position that men should provide for and maintain women, which he terms the 'principle of *qawama*' is expressed in the verse to be the 'consequence of two conditions: men's advantage over and financial support of women.'²⁵ He translates this 'advantage' as physical strength and argues that whether or not men are in general terms more physically stronger than 'most women is not relevant in modern times where the rule of law prevails over physical might.'²⁶ Additionally, in his opinion, contemporary situation is such that there are ready avenues for the realization of the economic independence of Muslim women making the Islamic requirement that they are to be maintained obsolete.²⁷ He concludes that none of the 'justification for the *qawama* of men over women is tenable today.'²⁸

An-Na'im's analysis, to the current author, presents an instance where androcentric considerations may possibly 'cash in' on equality/sameness paradigm of some feminist jurisprudence. In other words, implicit in An-Na'im's proposition is an opportunity for

²²See General Comment No.28, CCPR/C/21/Rev.1/Add.10, 2000, para 5.

²³Cited for critical exposition of 'Conflict in Culture, Tradition and Practices: Challenges to Universalism' in no less an authoritative textbook on human rights as Steiner, J. S., Alston, P., Goodman, R., 2007. *International Human Rights in Context: Law, Politics, Morals*. Third Edition. Oxford: University Press. Pp. 531-539.

²⁴An-Na'im, A.A., 1990. 'Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives.' 3 *Harvard Human Rights Journal*. P.13; 2010. *Islam and Human Rights: Selected Essays of Abdullahi An-Na'im*. Baderin, M.A., ed., Surrey, etc.: Ashgate. P.67.

²⁵*Ibid.*, p.47.

²⁶*Ibid.*

²⁷*Ibid.*

²⁸*Ibid.*

Muslim men to, to adopt MacKinnon's description, get 'the benefit of those few things women have historically had'.²⁹ Again, one wonders whether the term 'women' in An-Na'im's contemplation refers exclusively to those of more economically advanced societies or inclusive of those in all other contexts as well, especially in third world countries, in contemplation that 'modern circumstances are making the economic independence of women from men more readily realized and appreciated'. Is this really the case? In the first place, it is inaccurate to argue that the Islamic position that women are to be maintained and financially supported by men necessarily indicates that Muslim women are expected to always be economically dependent. Far from it, based on Islamic textual authority³⁰, women may undertake paid employment or pursue a profession of choice outside of the home. However, in matter the level of a woman's economic independence, it is legally expected that she incur a financial burden (unless she voluntarily decides to the contrary) regarding all family expenses in a Muslim setting. Thus, An-Na'im's proposition seemingly mistakenly constructs the Islamic bases of the 'principle of *qawama*' (that is to say 'of men's advantage and financial support of women') as its consequences.

This mistaken construction appears to be the result of his faulty conception of what 'men's advantage' in the verse connotes as well as his assumption based thereon. His conception is that the words indicate that men are 'generally physically stronger than most women'. He then assumes that in modern times 'might' does not mean 'right' because of the presence of the rule of law. In the current author's view, it may be difficult to substantiate both the conception as well as the related assumption for practical purposes. In his theorization of the rule of law prevailing over physical strength, the idea that what subsists in theory actually reflects the reality of the situation that women live out their lives in present times appears to be naive. In more developed societies where the institution of the rule of law is either more evolved or more responsive, the pervasiveness of domestic violence as well as other forms of physical abuse against women seems not to require further empirical validation. Thus, in developing and transitioning contexts where the legal as well as all other institutions are less developed and therefore not as effective, it should not be too difficult to imagine the extent of physical violations and abuses that some women suffer, even in their own homes. 'Might' may not mean 'right' in law textbooks and legal arguments. However, the works of such feminist as MacKinnon³¹ and others³² have demonstrated how even the prescriptions of IHRL have not translated effectively in relation to the protection of women from domestic as well as other forms of abuse in all contexts.

Moreover, if An-Na'im's reinterpretation of Q4:34 are meant to be iconoclastic of the classical male-centred application of that verse, then his definition of 'men's advantage' as physical strength is not only myopic; it elicits an elitist or bigoted male attitude to women issues. It is as though he was saying to women generally with a pat on the head: 'Do not worry, we know we are more physically endowed with brute strength than most of you women'.

²⁹ *Supra*, footnote 13.

³⁰ Illustrated, inter alia, by the provisions of Q4:32 which provides: '...to men is allotted what they earn (from their labour), and to women what they earn...'.

³¹ MacKinnon, C.A., 1993. 'On Torture: A Feminist Perspective on Human Rights' in Mahoney, K.E. and Mahoney, P. (eds.) *Human Rights in the Twentieth Century: A Global Challenge*. Dordrecht, etc: Nijhoff Publishers. Pp.26-27.

³² E.g., Charlesworth, H. and Chinkin, C., 1993. 'The Gender of *Jus Cogens*.' 15 *Human Rights Quarterly* P.67-70.

be, but we will be gentle'. While it may be scientifically sustained in biological terms that men are physically stronger than most women, it is equally possible to argue that in biological composition, women also have other advantages over men.³³ Based on scientific evidence therefore, it seems more reasonable to maintain the position that the words 'men's advantage' in Q4:34 refer to the fact that it is the women that are 'burdened' with all the exigencies of the reproduction process from monthly cycles through to pregnancy and birth to the nurturing of children. In all the various stages of reproduction, while a woman may be reduced to a total state of incapability as a result of all the life changing events, men may assume the position of a social (and possibly but not always compassionate) onlookers.

This position is, in the current author's view, the 'men's advantage' as a result of which the provision of Q4:34, they must care for the women concerned.³⁴ That this interpretation is more in tune with the objective of Shari'ah on the subject appears to be clear from the supportive position portrayed in the Qur'anic verse, Q2:233, that prescribed the period for nursing and weaning of a child in the following words-

The mothers shall give suck to their offspring for two whole years, for him who desires to complete the term. But he (the father) shall bear the cost of their food and clothing on equitable terms. No soul shall have a burden laid on it greater than it can bear. No mother shall be treated unfairly on account of her child nor father on account of his child,.....If they both decide on weaning, by mutual consent, and after due consultation, there is no blame on them; if ye decide on a foster-mother for your offspring, there is no blame on you, provided ye pay (the foster-mother) what ye offered on equal terms. But fear Allah and know that Allah sees well what ye do.

It is useful to note that it would be irrelevant, according to the dictates of Shari'ah expressed in Q4:34, whether or not a woman actually undergoes all the various stages of reproduction before the right to be maintained can be asserted. The instructing section of the verse provides for two conditions which are the legal bases (not 'consequences' as An-Na'im's postulates), these are - (a) 'because Allah has given the one more advantage (bima'addala) than the other' and (b) 'because they support them from their means'. What appears deducible from this provision is that there is a religious as well as a legal duty on men to maintain (a) their spouses because of the reason of 'advantage' and (b) all female family members including their spouses since the default position is that 'they (men) support them (women) from their means'. The Islamic logic, thus, appears to be that a woman should not

For example, some scientific studies have determined that 'certain "thinking" skills are more dependent on the hemisphere in the male brain, while women may use both hemispheres' and that 'women have more nerve cells in the frontal lobe, the area of the brain responsible for reasoning, planning, parts of speech, emotions, and problem solving.' Some other studies have also suggested 'that the corpus callosum, the largest white matter structure in the brain that serves as the major pathway connecting the brain's right and left hemispheres, is larger and more developed in women.' See generally, 'On The Brain', 2007, Vol. 13(2) *The Harvard Mahoney Neuroscience Institute Letter*, P.1. Available at http://www.hms.harvard.edu/hmni/On_The_Brain/Volume13/OTB%20SPRING_07.pdf.

This interpretation of the verse is inspired by personal discussions with a Nigerian Islamic scholar who is also the current author's late father and mentor, Dr. Abdulleil A. Amoloye (1950 - 2006). Similar interpretations have also been presented by some other Islamic women scholars and experts such as al-Hibri, A., 1999, 'Islamic and Muslim Women in America' in Garber, M., and Walkowitz, R., (eds.), *One Nation Under God? Religion and American Culture*, New York: Routledge. Pp.128-44; Naseef, F.U., 1999, *Women in Islam: A Discourse in Rights and Obligations*, Cairo: International Committee for the Woman and Child; Badran, M., 2009, *Supra*, 248-9.

feel constrained by financial responsibilities of the family to take up any vocation. It is up to her and she has the total freedom to decide whether or not the reproductive responsibilities which inevitably fall harder on her are such that she is able to manage personal and professional life effectively.

As earlier said, the proposition by An-Na'im, in the current author's view, may not necessarily bring about any meaningful reform as regards protecting the interests of women. Being supposed based, as it was, on the equality paradigm of liberal feminism, it appears to engage with the question of what women really want based on their subjective experience and not the objective 'male' standard of equality. Here the dominance ideology critique of liberal feminist jurisprudence appears to be apposite. On the other hand, the current author's critical analysis of An-Na'im's reform proposal has been attempted to demonstrate that the best way to bring about reform does not necessarily require total disengagement with existing structures. Rather, and agreeing with the critique of the dominance feminist ideology, it may be more constructive for women to simply identify their vision of social relations and to develop effective methodologies for contributing to the continual constructional process of what may be taken as the objective reality in all spheres.

CONCLUSION

For a number of Muslim women, Islam is a primordial consideration for the definition and protection of all rights, including women rights. Therefore, arguments that seek religious disengagement may be fruitless no matter how well intended. This is especially in view of Muslim belief that the mundane existence is transient and that sufferings endured will be rewarded to ensure spiritual success and bliss in the Hereafter. Therefore, propositions such as those of An-Na'im that argue for the jettisoning of some clear provisions on women are here considered unnecessary because they may at the end of the day better serve the interests of men. This is especially so when it is possible to seek some other legitimate approaches. The implication of An-Na'im's proposition on the subject for the interests of women may be summarised as follows: firstly, men become free of total economic responsibilities to their spouses and children, which responsibility is now equally shared between the spouses. Thus, they enjoy more economic freedom in addition to being free of responsibilities associated with the process of reproduction.

Secondly, even in developed contexts, there are women who may just be content to make motherhood and rearing of children their vocation, as is currently obtainable in a number of less developed societies. An-Na'im's proposal will take away this social freedom and thereby reify the denigration of women who may find it difficult to combine reproductive as well as child rearing responsibilities with paid employment outside of the home. Thirdly and finally, arguments for disregarding certain provisions (not their reconstruction or reinterpretation) of religious law such as Shari'ah may lead to subjectivism in the development of the rules that govern Islamic family relations. For them we may begin to reason on the basis of what is reasonable for contemporary relevance and the dominant voices may not necessarily reflect the interests of women. It is because some of the existing legislation in some Muslim countries is expressed to be based on Shari'ah, it has been possible to debate alternative interpretation/application on the same ground. Except to require therefore that the participation of Muslim women in the human rights enterprise or the protection of their rights through the methodologies of IHRL would necessarily entail the divesting of their Islamic identities.

must be seen to constructively engage with the provisions of the textual authorities of *Shari'ah* where they bear relevance. In this way, the agency of little informed and less enlightened Muslim women (who are the real victims of rights' violation and who are often unaware of existing avenues for redress) might be gained in the struggle for more meaningful protection of women's rights in local Muslim contexts.