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A NORMATIVE ANALYSIS OF THE RIGHTS OF THE ELDERLY TO SOCIAL SECURITY AND DEVELOPMENT IN INTERNATIONAL HUMAN RIGHTS LAW AND SHARĪ'AH.

By

Azizat O. Amoloye-Adebayo* and Waihab O. Egbewole**

ABSTRACT

This work is an investigation of the legal responses of international human rights law (IHRL) and Sharī'ah to the challenges of the welfare and development of the elderly. Arguably, the issue of old age constitutes an instance of vulnerability and possible abuse which appropriately is a human rights' issue and one which has enjoyed some measure of normative consideration by IHRL. Likewise, Sharī'ah appears to also recognise a regime for the protection and care of the elderly. However, both bodies of law are often times popularly viewed as contradictory in their prescriptions. On the contrary, this work argues that considerations that are presently accorded the welfare and development of the elderly within both IHRL and Sharī'ah are such that they must and can work together. The work concludes with suggestions on how IHRL and Sharī'ah could in actual terms mutually enrich each other on the issue of the welfare and development of the elderly.

1.1 Introduction

This work analyses the normative responses of IHRL and Sharī'ah to the challenge of the welfare of the aged. The choice of the bodies of law within which the subject is analysed merits some explanation. Firstly, it is widely acknowledged that 'growing old increases the risks of physical deterioration and consequently, of dependence.'¹ Old age, therefore, clearly constitute an instance of vulnerability and possible abuse which appropriately is a human rights' issue and one which has enjoyed normative consideration by IHRL. Likewise, Sharī'ah appears to also recognise a regime for the protection and care of the elderly. However, both bodies of law are often times viewed as contradictory in their prescriptions.² The idea is to investigate the extent to which their

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¹ Bourdieu, J., Kesztenbaum, L. and Grieve, M., 2007. 'Surviving Old Age in an Ageing World Old People in France, 1820-1940.' 62(2) *Population-E*, P.185.

² For example, Morten Kjaerum, Director, EU Fundamental Rights Agency, at a public lecture delivered on human rights in the School of Law, University of Nottingham on 28th January, 2009 expressed the view that

independent responses on the subject in reality resonates this contradiction. Although, the term 'social security' in general terms seemingly denotes economic assistance to persons faced with various forms of disabilities/social problems, in this paper it is adopted to refer to the various forms and quality of care and support that are considered necessary to ensure the welfare of old people.

This work is divided into 7 sections. Sections I and VII are introductory and conclusive remarks respectively. Section II is a background discussion on the existing and emerging concerns regarding the preparedness of any contemporary society regardless of context to protecting and guaranteeing the rights of the aged and ageing population. A theoretical basis for a joint normative analysis within two distinctive bodies of law- IHRL and Shari'ah- is presented in section III. Sections V and VI combine to serve as the main thrust of the present work by a doctrinal interrogation of the legal machinery for the protection of the rights of the elderly in IHRL and Shari'ah respectively. An examination of the varying degrees of the quality of care and protection for the welfare of the elderly depending on the economic and social development of society in question is presented in section VI.

1.2 'Surviving Old Age': Evolving Problems and Concerns

Although population ageing is one of humanity's greatest triumphs, it also presents today's societies with one of their most significant challenges.³

There appears to be no universal agreement as regards the numerical criterion to mark the threshold of old age.⁴ This is especially because senescence is necessarily not a consequence of the correlation between an individual's calendar age on the one hand, and biological age on the other.⁵ It appears that for legal purposes in most societies, the numerical age at which a person retires from active employment is the default definition. In this article, the terms 'the elderly' or 'old people' are taken to refer to those individuals for whom the weight of years has led to significant depletion of their faculties thereby creating for them circumstances of socio-economic dependence and vulnerability. Analysts have identified three major problems that most old people in all societies currently experience or may be in danger of experiencing. These are –

- a. the problem of isolation or neglect;⁶
- b. poverty as a result of having no regular income;⁷
- c. lack of or inadequate social security provisions;⁸ and

prescriptions of Shari'ah are not given consideration in the activities of the agency given that they are contradictory with existing human rights standards.

³ WHO Global Report On Falls Prevention in Older Age, 2007, p. 35.

⁴ See Roebuck, J., 1979, 'When does Old Age Begin? The Evolution of the English Definition,' 12(3) JSH, P.415.

⁵ Bourdieu, J. et.al., 2007. Supra note 1, p. 187.

⁶ See Ogawa, N. and Retherford, R.D., 1997, 'Shifting Costs of Caring for the Elderly Back to Families in Japan: Will it Work?' 23(1) Population and Development Review, pp. 75-76.

⁷ 'The Rights of Older People in Mozambique' HelpAge Research Summary, available at <http://www.helpage.org>. Last accessed 16 April 2016, p. 6.

⁸ Gauthier, A.H., 2002, 'Family Policies in Industrialized Countries,' 57(3) Population (English Edition), pp.449-450.

- d. physical and emotional abuse by people responsible for their care such as relatives or private or public health professionals.⁹

According to some estimates, persons aged over 60 may increase to around 2 billion by 2050 and it is expected that 85% of that figure will be living in developing countries.¹⁰ The traditional framework of care for the elderly existed essentially within the web of intergenerational relations between families. In most developed societies, the traditional modes have either been entirely supplanted or complemented by formal welfare services provided by the State.¹¹ For a number of developing societies, the elderly still depend almost entirely on the informal brand of care from family and relatives. At present, however, for all societies and regardless of the level of their development, there are evolving issues in respect of the sustainability of existing networks of care. For the developed worlds, the present economic depression seems to be coinciding with the estimated period of retirement¹² of the 'baby boom'¹³ cohorts who again are expected to retire into longevity.¹⁴ Most pension systems in these societies have since reached their periods of maturation and operate on the basis of 'pay-as-you-go' rather than being self-funding.¹⁵

Fertility rates which historically has witnessed drastic fall continues to fall simultaneously as life expectancy rates¹⁶ have risen to dramatic limits due to improved access to health care amongst others. The result is that at the time when there is an increase in the number of actual and potential beneficiary of government initiatives, States are either seeking ways to cut back social security costs or are not improving upon the appalling standards of facilities for the care of the elderly. For example, a 2007 report of care homes in United Kingdom states that resident of care homes were 'left lying in their own urine or excrement, suffering malnutrition and being abused by staff. Twenty one percent of care homes failed to reach minimum standards for privacy and dignity'.¹⁷ Similarly, in some developing countries particularly in the Asian and African contexts, although the elderly 'still hold traditional positions of respect'¹⁸, they face the risk of neglect and isolation. Families are increasingly assuming structures¹⁹ that threaten and indeed overturn the traditional network of filial support due to such factors as -migration and urbanization of family members;

⁹ 'The Right of Older People in Kyrgyzstan' HelpAge Research Summary, available at <http://www.helpage.org>. Last accessed 16 April 2016, p. 5.

¹⁰ WHO Global Report. Op.cit.n.7, p. 36.

¹¹ Miller, J.M., 2010. 'International human rights and the Elderly' *Marquette Elder's Advisor*, Vol. 11(2), p. 355.

¹² See Ney, S., 2009. *Resolving Messy Policy Problems: Handling Conflict in Environment, Transport, Health and Ageing Policy*. London: Earthscan, p. 94.

¹³ Baby boomers is the term used to define the American generation born between 1944 and 1964 after WW II.

¹⁴ Miller, T., 2001. 'Increasing Longevity and Medicare Expenditures.' *38(2)Demography*, p. 215.

¹⁵ See Ogawa, N. and Retherford, R.D., 1997. 'Shifting the Costs of Caring for the Elderly Back to Families in Japan: Will It Work?' *23(1) PDR*, pp. 66-7.

¹⁶ It is estimated that by 2050, 1 out of every 5 persons will be over the age of 60. See 'Social Development and Ageing: Crisis or Opportunity?' 2000 WHO publication, P.4.

¹⁷ Miller, J.M., 2010, *Supra* note 11, p. 357.

¹⁸ *Ibid.*

¹⁹ For instance in China, there is no social security system and the family system has a dominant role for the care of the elderly. However, the sustainability of the system is being undermined by the Chinese's program limiting fertility rates thereby reducing the capacity of the family system. See Jiang, L., 1994. 'Parity and Security: A Simulation Study of Old-age in Rural China.' *20(2) PDR*, pp.423-4.

the ever shrinking roles of women from being the main traditional homecare givers to professionals outside the home; and conflict situations and social disruptions resulting in excess mortality, family separation and forced displacement of persons.²⁰ It is clear that while the factors responsible for the changes in all societies cannot be homogenized, it may be argued that old people everywhere are potentially vulnerable to at least one or all of the problems of isolation, neglect, impoverishment and abuse.

1.3 The Common Goal of Ihrl and Shari'ah Vis-À-Vis Development of the Individual Person

The bodies of law considered in this work have been chosen for the perception that there is a shared objective for the all-round development of the individual who appears to be the focal point of both laws. For IHRL, it has been argued that the traditional application of international law was to a considerable extent²¹ essentially State-centred²² and as such the development of IHRL within international law generally proceeded from perceptions of obligations which a State owes to individuals within its jurisdiction.²³ Thus, human rights advocacy presents a powerful perspective from which one may critically assess all arenas of human existence such that any act of injustice is *prima facie* a human rights issue.²⁴ It may be argued that adopting a human rights approach in the resolution of human problems punctures bureaucratic and policy barriers by putting 'human faces' to those problems. In present times, a rights-based approach to issues appears to be an important strategy for establishing foundations that are expected to yield paradigmatic changes in conditions that help perpetrate human sufferings and the abuse of persons, and in the context of this work, the elderly.

In the same connection, Muslims believe that the overall goal of the Shari'ah is to secure the best interests of the individual both for spiritual and material success. As one observer has argued, the basis of the subsidiary sources of law in Shari'ah is that in the interpretation or application of the law, judges and jurists should exercise - 'equitable discretion to exclude the application of a certain rule, established by analogy or by a text, to a certain situation or event, on the ground that such application would lead to injustice or hardship.'²⁵ In support of this position, Islamic jurists cite the following Qur'anic provision- 'Those who listen to the word, and follow the best meaning in it: Those are the ones Whom Allah has guided, and those are the ones endowed with understanding'.²⁶

²⁰ Zimmer, Z., et.al, 2006, 'The Impact of Past Conflicts and Social Disruptions on the Elderly in Cambodia,' 32(2) PDR, pp. 333-334.

²¹ Acknowledged 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,' 23 *British Year Book of International Law*, pp. 178-226.

²² Mullerson, R.A., 1990, 'Human Rights and the Individual as Subject of International Law: A Soviet View,' 1 *European Journal of International Law*, p. 34.

²³ McCorquodale, R. and La Forgia, R., 2001, 'Taking Off the Blindfolds: Torture by Non-State Actors,' 1 *Human Rights Law Review*, p. 189.

²⁴ 'In a rights paradigm, rather than view powerlessness as simply bad luck or misfortune, we think of it as injustice...' See Yamin, A.E., 2009, 'Suffering and Powerlessness: The Significance of Promoting Participation in Rights-Based Approaches to Health,' 11(1) *Health and Human Rights*, p. 6.

²⁵ Omar, M.A., 1998, 'Reasoning in Islamic Law,' 13 *Arab Law Quarterly*, p. 186; Kamali, M.H., 1996, 'Methodological Issues in Islamic Jurisprudence,' 11 *Arab Law Quarterly*, p. 3.

²⁶ Q39:18.

It is in view of this shared objective that the work posits that the responses of both IHRL and *Shari'ah* can both be employed for the development of a robust regime on the protection of the rights of the elderly and their personal development.

1.4 The Elderly, Social Security and IHRL

IHRL consists of a network of international instruments for the protection of human rights of all persons, old people inclusive. Article 25 of the Universal Declaration of Human Rights, 1948, (UDHR), recognises the right of everyone to an adequate standard of living and access to social services and security in the event of old age. Further, in 1991 the United Nations (UN) adopted the 'Principles for Older Person' which details under five sections of independence, participation, care, self-fulfilment and dignity, how the human rights of old people including but not limited to social security are expected to be realized and guaranteed in all societies. However, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) both of 1966 contain no explicit reference to the rights of the elderly.²⁷

Nevertheless, the international supervisory bodies (usually referred to as Committees) for the implementation of the general provisions of internationally negotiated human rights treaties have always taken the initiative to interpret relevant provisions in such ways that State Parties' obligations in relation to the peculiar needs of the elderly are emphasized. For instance, the Committee on Economic, Social and Cultural Rights (CESCR) in one of its General Comments (GC) had stated that while article 9 of the ICESCR provides for 'the right of everyone to social security', it must be implied that this provision envisages also 'the right to old-age benefits', 'social services and other assistance for all older persons'.²⁸ Similarly, the Human Rights Committee (HRC)²⁹ has observed that 'the vulnerable situation of elderly persons placed in long-term care homes, which in some instances has resulted in degrading treatment'³⁰ violated their rights to human dignity protected by article 7 of the ICCPR. It is clear that the rights of the elderly to social security is reasonably recognised and guaranteed under IHRL and that the obligation to provide adequate measures resides entirely with governments and not private individuals. This fact notwithstanding, it is posited that it is important that an international instrument under the auspices of the United Nations is adopted which will exclusively tackle the various ways that the rights of the elderly are violated in both developed and developing contexts.

1.5 The Elderly, Social Security and *Shari'ah*

Shari'ah consists of the body of rules which Muslims believe were divinely ordained to govern their lives and mutual relations. In the Islamic hierarchical order of rules, as indicated in the Qur'anic provisions of 17:23-24 amongst

²⁷ See the statement by the CESCR in para 10, GC 6 'The economic, social and cultural rights of older persons.'

²⁸ *Ibid.*

²⁹ CESCR GC 19, 'The right to social security (art.9)', 2008.

³⁰ This is the international body responsible for the supervision of the implementation of the provisions of the ICCPR, 1966.

³¹ See the Concluding Observations (CO) by HRC on Germany, 2004, CCPR/CO/80/DEU, para 17.

others, kindness, care and support to parents is second only to worshipping God. The Islamic belief, therefore, is that the care of the elderly, being an important expression of worship, is an 'avenue' to Heaven.³² Therefore, the first port of call for the welfare of the elderly in Islam is their family. This appears to be one of the reasons why the religion of Islam encourages the extended family system 'to provide extra care of the young and the elderly.'³³ That Islam places the duty of care for the elderly on their children is also apparent upon a perusal of the Islamic system of inheritance. Parents are allocated specific and non-negotiable shares in the estate of their children in the event of a child's predecease.³⁴ According to the 'resolution on the subject of the rights of children and the elderly' adopted in 2000 in the twelfth session of the Islamic Fiqh Academy³⁵, a State is, however, expected to take over the care of those old people for whom the opportunity for family care and support are unavailable due to financial hardship of family members or in circumstances of destitution.³⁶

Perhaps, it is to reflect this Islamic position that Articles 10 and 27 of the Basic Law of Government of Saudi Arabia³⁷ were promulgated as part of that country's law. Article 10 contains the aspiration of the government to continually seek to strengthen family ties and care for all the members of family by making provisions for the 'growth of their resources and capabilities.' On the other hand, Article 27 guarantees the rights of the citizenry to social security 'in cases of emergency, illness and disability, and in old age.'

1.6 Conclusion

This analysis above has sought to show that while governments are the first and main duty bearer of the fulfilment of the rights of the elderly in IHRL, the reverse is the case for *Shari'ah*. Therefore, it is proposed that both bodies of law would enrich each other if a strong degree of complementarity between formal and informal welfare services is developed. The present conditions are such that States at this point in time cannot apply significant draw backs to their duties of ensuring the welfare and security of the elderly as IHRL envisages. This is especially in current situations where family support systems as envisaged by *Shari'ah* are increasingly becoming inadequate or non-existence. Thus, the way out is to develop an international regime based on the responses of IHRL and *Shari'ah* that is a synergy of state obligations and private duties to care for the elderly. Such a regime is expected to make private obligations as recognised by *Shari'ah* the business of IHRL but through the monitoring, supervisory and empowering apparatus of the state by the provision of social amenities and the right economic conditions.

³² In fact, according to a popular tradition credited to the Prophet of Islam, Muhammad, an individual's easy route to paradise lays under the feet of her/his mother.

³³ See Health Care Providers' handbook on Muslim patients by the Islamic Council of Queensland, 1996, P.13.

³⁴ See Q4:11.

³⁵ This is an organ of the Organisation of Islamic Conference (OIC). OIC is, perhaps, the largest intergovernmental organization of Muslim states and the IFA is responsible for research and the issuance of opinions on matters of the application of *Shari'ah* provisions in Muslim states.

³⁶ See resolutions 1-8. Original Arabic text available at <http://www.fiqhacademy.org.sa/qara/12-7.htm>. Accessed 23 June 2010. [Translations are the author's]

³⁷ Full text available at http://www.mideastinfo.com/documents/Saudi_Arabia_Basic_Law.htm. Accessed 23 June 2010.