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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.

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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, either 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

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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.

Leemissi, 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.

Farlow R., and Akbarzadeh, 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 (hereinafter 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 modern 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: '... 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 a 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*. Leiden, etc.: Nijhoff Publishers; Thornton, M., 1986. 'Feminist Jurisprudence: Illusion or Reality?' 15 *American 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,' 20 *American Journal of Law and Public Policy*. P. 526; Rhouni, R., 2010. *Secular and Islamic Feminist Critiques of Islam*. London: Routledge; Fatima Mernissi. *Women and Gender: the Middle east and the Islamic World*, Vol 9. Boston: Brill. -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 perpetuating 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 engagement 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

interpretation 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.

10. D.R., 1994-95. Ibid, p.524.

11. Annam, J., 2012. Supra, p.8.

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

13. Pp.35, 38-9

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

15. p. 1568.

16. 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 exposed 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 is the 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 Interest and Intergenerational Transfer of Property: Avoiding the Law of Succession'. 8 *Islamic Law and Society*. Pp. 200-246.

¹⁸Badran, M., 2009. *Feminism in Islam: Secular and Religious Convergences*. Oxford: Oneworld. P. 22. 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'ān 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 is inclusive of those in all other contexts as well, especially in third world countries, in his contention 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, no matter the level of a woman's economic independence, it is legally expected that she incurs no 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 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 feminists as MacKinnon³¹ and others³² have demonstrated how even the prescriptions of IHRI 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 will

²⁹*Supra*, footnote 13.

³⁰Illustrated, 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...'.

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

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

ever be, but we will be gentle'. While it may be scientifically sustained in biological terms that most 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 incidences of the reproduction process from monthly circles through to pregnancy and childbirth 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 merely 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 by 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_SPRING_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. Abduljelil 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 entirely 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 her 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 not to engage with the question of what women really want based on their subjective experiences 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 seek effective methodologies for contributing to the continual constructional process of what is to 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 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 implications 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 laws that govern Islamic family relations. For then 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 methodologies of IHRL would necessarily entail the divesting of their Islamic identities.

efforts 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.