

WOMEN'S RIGHTS AND GENDER EQUALITY ISSUES IN ISLAMIC LAW IN INDONESIA: THE NEED TO RE-READ WOMEN'S STATUS IN THE ISLAMIC RELIGIOUS TEXTS

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Abstract: Artikel ini adalah untuk membahas status perempuan dalam teks-teks agama Islam, terutama ayat-ayat Quran dan Hadis teks yang dianggap "misoginis." Ada kebutuhan mendesak untuk membaca kembali teks-teks agama Islam karena mereka digunakan oleh ulama klasik untuk menghasilkan fikih mereka. Fikih klasik tadi, bersama-sama dengan teks, diadopsi oleh umat Islam kontemporer di luar konteks dan, kadang-kadang, telah digunakan untuk mengabadikan ketidaksetaraan gender dalam kehidupan sosial. Contoh kasusnya antara lain adalah kritik, dan bahkan penolakan, terhadap reformasi hukum keluarga yang diusulkan oleh negara. Artikel ini berpendapat bahwa nilai-nilai universal yang terkandung dalam teks-teks agama Islam yang mempromosikan keadilan dan, dengan demikian, menghormati hak-hak perempuan serta bertujuan untuk mencapai kesetaraan di antara diferensiasi gender dalam kehidupan sosial perlu disosialisasikan. Pemahaman sensitif gender ini terhadap teks-teks agama Islam disosialisasikan untuk lebih meningkatkan kesadaran masyarakat terhadap hak-hak womens dan isu-isu kesetaraan gender dalam Islam.

Kata Kunci: Hak Perempuan, Kesetaraan Gender, Hukum Islam

I. Introduction

At the end of 2004, the drafting team of the Ministry of Religious Affairs for the revision of statutory Islamic law launched the *Counter Legal Draft Kompilasi Hukum Islam* (CLD KHI). This CLD KHI was intended as an alternative to the proposed bill on religious courts for marriage and inheritance, which still uses the Presidential Instruction No. 1/1991 on *Kompilasi Hukum Islam* (the Compilation of Islamic law of Indonesia). The draft sought to promote the universal principles of Islam such as gender equality, pluralism, and human rights. With regard to marriage, the CLD KHI, for example, allows interfaith marriage which is strictly banned by the existing marriage law in Indonesia, i.e. *Undang-Undang No 1/1974 tentang Perkawinan* and *Instruksi Presiden No*

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1/1991 tentang Kompilasi Hukum Islam, and bans polygamy which is allowed by the aforementioned regulations.¹

This effort quickly received strong objections from *ulama*, Islamic law scholars and Muslim groups. The CLD KHI was accused of infringing the doctrines of Islam in the *Qur'an* and the *Hadith*. Therefore, it had to be revoked so as not to create restlessness among Muslim communities.² Based on this, the incumbent Minister of Religious Affairs at that time, Said Agiel al-Munawar, issued a letter on 12 October 2004 No.: MA/271/2004 to the drafting team. That letter warned the team not to organize similar seminars or activities on behalf the Ministry of Religious Affairs, and to submit all working papers or original CLD KHI to the Minister.³

Nevertheless, this controversy has remained unsolved if the Indonesian legal system is taken into account. In 1984, Indonesia ratified the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) into the Act (*Undang-Undang*) No 7/1984.⁴ Article 1 CEDAW explains that:

"discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁵

Therefore, article 2 and 5 of CEDAW oblige the states which have ratified it to adjust its regulation so as to be compatible with CEDAW contents. This includes eliminating discriminative practices of its apparatus and institutions, repealing

¹ 'Govt Initiates 'Revolution' in Islamic Law', (Tuesday, 5 October 2004) *The Jakarta Post* 3.

² *Ibid.*

³ Chamzawi, *Sebuah Catatan Tentang Kontroversi Revisi Kompilasi Hukum Islam* (17/01/2005), available from <http://www.yarsi.ac.id/kolom_chamzawi/detail.php?id=26>, last visit 6 October 2005.

⁴ Alfitri, "Legal Reform Project, Access to Justice and Gender Equality in Indonesia", *Indonesian Journal of International Law*, Vol. 9, No. 2 (2012), h. 293.

⁵ *Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)*, art. 1.

discriminative law against women, and socializing cultures which promote equality as well.⁶

Further, article 15 (1) CEDAW asserts "States [sic] Parties shall accord to women equality with men before the law." According to article 16, these state parties are recommended to take "all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women." For example: article 16 (1a) concerns "The same right to enter into marriage;" article 16 (1b) concerns "The same right freely to choose a spouse and to enter into marriage only with their free and full consent;" article 16 (1c) concerns "The same rights and responsibilities during marriage and at its dissolution;" section 16 (1g) concerns "The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation."

According to International law, International treaties which have been ratified must be implemented (*pacta sunt servanda*).⁷ No single country in the world is exempted from this obligation. If the existing regulations in a country are in conflict with the ratification of International treaties, these regulations should be amended.⁸ Based on this stipulation, the government of Indonesia must amend its regulations which still perpetuate discrimination against women, including in the sphere of marriage law.⁹

However, the elimination of discrimination against women and the guarantee of women's rights through amending the existing regulations, or enacting new ones, sit uneasily in Indonesia. This is because these problems do not necessarily relate to the obligation to fulfill the CEDAW requirement in Indonesia laws itself. Yet, it is also closely tied to cultural practices and religious belief which are deeply entrenched into people's stance toward these issues. As matter of fact, the CLD KHI was strongly rejected by *ulama* and some Islamic

⁶ See *ibid*, art. 2(a-g), art. 5(a).

⁷ Mochtar Kusumaatmadja, *Pengantar Hukum Internasional I* (Jakarta: Bina Cipta, 1999), h. 63.

⁸ *Vienna Convention on the Law of Treaties 1969*, art. 26-27.

⁹ Alfitri, "Legal Reform Project", h. 304.

law scholars before it was brought to the legislative body (the DPR) because it was deemed to contravene the Islamic tenets. Finally, it was revoked by the Minister of Religious Affairs.

This paper, therefore, will analyze the status of women in Islamic Religious Texts so as to assess the standpoint of Islam in relation to women's rights and gender equality issues in Islamic law in Indonesia.

II. Islam and Women

One of the missions brought by Islam to mankind is to elevate the status of women and make it parallel with men's status. Prior to the advent of Islam, there was a tradition in *Jahilliyyah* Arabs to bury alive the daughters (female infanticide) because they were deemed as a burden or disgrace for the family.¹⁰ When Islam came, this tradition was abolished,¹¹ and, further, women were acknowledged as individuals who have rights, including property rights and inheritances.¹² Before hand, as a consequence of patriarchal-agnatic system, women in *Jahiliyyah* Arabs did not have access to inheritances. Instead, they were properties which were inherited by males. Widowed females sometimes were forced to marry their stepson or their husband's brother because of her status as a part of an estate. Again, Islam came to condemn and prohibit this levirate practice.¹³ Therefore, it is believed that the Islamic doctrines give a high status to women.

However, the picture of women in Islamic history was not always as encouraging as in the Prophet era. There was a time when women were only portrayed as sexual entities along with the development of harem institutions in some Islamic kingdoms.¹⁴ Nowadays, many have seen the increasing level of violence against women in many Muslim countries. In Indonesia for example, a report from the Ministry of Women's Empowerment in the year 2000 revealed

¹⁰ John L. Esposito and Natana J. DeLong-Bas, *Women in Muslim Family Law* (New York: Syracuse University Press, 2001), h. 13; Khoiruddin Nasution, *Fazlur Rahman tentang Wanita* (Yogyakarta, Tazzafa, 2002), h. 37.

¹¹ See *Al-Qur'an*, al-An'am: 151 and at-Takwir: 8-9.

¹² See e.g. *Al-Qur'an*, an-Nisa': 7, 11.

¹³ See Esposito, "Women," h. 13; Nasution, "Fazlur," h. 41; *Al-Qur'an*, an-Nisa': 19, 22.

¹⁴ Mochamad Sodik, 'Mendampingi yang Dibenci Membela yang Teraniaya' in Mochamad Sodik and Inayah Rohmaniyah (eds.), *Perempuan Tertindas? Kajian Hadis-Hadis Misoginis* (Yogyakarta: eLSAQ Press, 2003), h. xxi.

that 11.4% women (approximately 24 million women out of 217 millions of the Indonesian population) experienced domestic violence, either physically or psychologically, perpetrated by their husbands.¹⁵ In the realm of law and practice, Muslim women are still treated discriminatorily, especially with regard to personal status issues such as marriage, divorce and inheritance.¹⁶ All of these further confirm the findings of many studies that have been conducted in Muslim countries: the status of women in Muslim world is still dominantly inferior to that of men.¹⁷ This situation allows us to question whether Islam legitimizes gender inequality, inasmuch as the discouraging picture of women in Muslim countries. How the relationship between males and females are enshrined in Islamic Religious Texts (the *Qur'an* and the *Hadith*)?

III. Women in Islamic Religious Texts

The *Qur'an* comes with the mission of being God's mercy for the universe. It was revealed to Muhammad as Allah's messenger, whose core prophecy mission was also to spread the God's mercy to the universe.¹⁸ In one *Hadith*, the prophet, in relation to his core prophecy mission, clarified that the mercy is *makarim al-akhlaq* (noble morals).¹⁹ Having said this, it can be concluded that the aim of *Qur'anic* revelation is to maintain social life in which individuals behave with *makarim al-akhlaq*. They respect the universal human values, such as justice, liberty of expressing human rights, and equality.²⁰

With regard to the matter of the relationship between men and women, the basic principles of the *Qur'an* depict an egalitarian standpoint. In several Verses,

¹⁵ Siti Musdah Mulia and Marzani Anwar (eds.), *Keadilan dan Kesetaraan Jender (Perspektif Islam)* (Jakarta: Lembaga Kajian Agama dan Jender, 2001), h. xiv.

¹⁶ See Tad Stahnke and Robert C. Blitt, "The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries," *Georgetown Journal of International Law*, vol. 36 (2005), h. 21.

¹⁷ See e.g. Judith Romney Wegner, 'The Status of Women in Jewish and Islamic Marriage and Divorce Law' (1982) 5 *Harvard Women's Law Journal*; Elizabeth H. White, 'Legal Reform As an Indicator of Women's Status in Muslim Nations', in Lois Beck and Nikki Keddie (eds.), *Women in the Muslim World* (Cambridge, MA.: Harvard University Press, 1978).

¹⁸ See *Al-Qur'an*, Yunus: 57, al-Anbiya': 107.

¹⁹ Husein Muhammad, *Fiqh Perempuan; Refleksi Kiai atas Wacana Agama dan Gender* (Yogyakarta: LKiS, 2001), h. 15-16.

²⁰ See *ibid*, h. 16.

the *Qur'an* clearly asserts equal status to both genders. For example: in the *al-Hujurat* (13), it is written that God has created males and females of different nationalities and ethnicities, with the purpose that they acquaint themselves with each other.²¹ Another example is in the *an-Nisa'* (124), it is written that men and women will be rewarded equally by Allah in the Hereafter for whatever good deeds they conducted, as long as they have faith in Allah.²² Thus, if Allah, as the creator, has treated men and women equally, how can the created beings do differently?

Likewise, the *Hadith*, as the second source of Islamic doctrine, also stipulates some notions that strengthen the above *Qur'anic* provisions. In some texts, the *Hadith* even places women in a slightly 'superior' position to men, due to the Islamic mission's concern for elevating the status of women, who were deemed previously as no more than possession. For instance, it was narrated that the Prophet had said that Heaven was located under a mother's feet.²³ In another *Hadith*, the Prophet insisted three times that one's own mother is the most entitled to the best of one's companionship. It was only in the fourth place the Prophet answered 'father'.²⁴

However, some expressions which might indicate the inferiority of women to men are also found in the religious Texts. In the *Qur'an*, these are indicated by some Verses in the *an-Nisa'*, which mainly talks about women's issues. In Verse one, it has been generally accepted without reserve the notion that Eve was created from the rib of Adam.²⁵ This means that women are the secondary creature because their ancestor, Eve, was created from the existing creature, Adam. Verse 34 even seems to overtly stipulate the superiority of men to women and, sometimes, this Verse is misused by men to justify their violence in the domestic arena against their women. This Verse reads:

²¹ See *al-Qur'an*, *al-Hujurat*: 13.

²² See *al-Qur'an*, *an-Nisa'*: 124.

²³ See Mohammad Atho Mudzhar, *Islam and Islamic Law in Indonesia: A Socio-Historical Approach* (Jakarta: Litbang Depag, 2003), h.150.

²⁴ See Nicholas Awde (trans. and ed.), *Women in Islam; An Anthology from the Qur'an and Hadith* (New York, Hippocrene Books, 2000), h. 88.

²⁵ See *al-Qur'an*, *an-Nisa'*: 1.

Men are the protectors and maintainers of women, because Allah has made one of them to excel the other, and because they spend (to support them) from their means. Therefore the righteous women are devoutly obedient (to Allah and to their husbands), and guard in the husband's absence what Allah orders them to guard. As to those women on whose part you see ill-conduct, admonish them (first), (next), refuse to share their beds, (and last) beat them (lightly if it is useful); but if they return to obedience, seek not against them means (of annoyance). Surely, Allah is Ever Most High, Most Great.²⁶

Another Verse which brings such degrading statement about women status is in the al-Baqarah (282), which points out that the witnesses value of a woman in loan agreement is half of that of men.²⁷

Similar to the above *Qur'anic* preference for men, some *Hadith* also provide themes which confirm the inferiority of women to men. As a matter of fact, one *Hadith* reported by al-Bukhari, at-Tirmizi, an-Nasa'i and Ahmad Ibn Hanbal reads that a community will never reach a winning position as long as it is presided by women. This *Hadith* was said by the Prophet when he responded to the news that the people of Persia had elected Kisra's daughter as their leader. Based on this *Hadith*, many *ulama* argue that women's leadership, either as caliph or *imam*, is unlawful.²⁸ Some *Hadith*, which provide doctrine about the relationship between husband and wife, seemingly subordinates women to men. For example, in the collection of *Hadith* by Abu Dawud, at-Tirmizi, Ibn Majah and Ahmad Ibn Hanbal, there are *Hadith* the subject matter (*matn*) of which is interpreted by *ulama* as an obligation for a wife to 'enslave' herself to the husband.²⁹ It was reported in this *Hadith* that the Prophet did not accept the practice of *sujud* by his followers. Instead, he made a conditional situation that if he were the one with the authority to order human beings to perform *sujud*, he would order a wife to perform this to her husband, due to rights given by Allah to

²⁶ See *al-Qur'an*, an-Nisa': 34.

²⁷ See *al-Qur'an*, al-Baqarah: 282.

²⁸ See Nizar Ali, 'Kepemimpinan Perempuan dalam Dunia Politik' in Mochamad Sodik and Inayah Rohmaniyah (eds.), *Perempuan Tertindas? Kajian Hadis-Hadis Misoginis* (Yogyakarta: eLSAQ Press, 2003), h. 288.

²⁹ See Inayah Rohmaniyah, 'Penghambaan Istri pada Suami' in Mochamad Sodik and Inayah Rohmaniyah (eds.), *Perempuan Tertindas? Kajian Hadis-Hadis Misoginis* (Yogyakarta: eLSAQ Press, 2003), h. 91-96.

him. This statement was made by the Prophet to respond information conveyed by a companion who saw a community perform *sujud* to its leader.³⁰

Having discussed the above Texts, it can be understood why Islam is accused as a religion which 'oppresses' women. This is because one can simply conclude from some of the aforementioned Islamic Religious Texts, that Islam legitimizes gender inequality. This is because it is inherent in the sources of Islamic doctrines (the *Qur'an* and the *Hadith*). In addition, the marginalization and violence suffered by some Muslim women in Muslim countries further confirm this widespread opinion. However, it is unfair to hurriedly blame Islam for discriminating against women, based on some Texts which literally seem to provide for gender inequality. According to Asma Barla, a feminist Muslim, it is untenable to blame Islam for oppressing women because:

[W]omen's status and roles in Muslim societies, as well as patriarchal structures and gender relationships, are a function of multiple factors, most of which have nothing to do with religion. The history of Western civilization should tell us that there is nothing innately Islamic about misogyny, inequality, or patriarchy. And yet, all three often are justified by Muslim states and clerics in the name of Islam.³¹

Here, Asma Barla, together with other feminist Muslims, argues that the problem does not lie in Islam itself, because the fundamental value of Islam in gender relationship is 'stubbornly egalitarian'.³² However, this fundamental value might be distorted depending on who reads the Religious Texts and how the product of this reading is treated in the Muslim communities (*'ummah*).

IV. Re-reading Religious Texts with Sensitive Gender: A Necessity in Attaining Gender Equality

As mentioned above, the *Qur'an* and the *Hadith* depict some conflicting statements about gender. On the one hand, some provisions mention the equal status of women and men; on the other hand, some statements in the *Qur'an* and the *Hadith* can be found which degrade the status of women to be the subordinate

³⁰ See *ibid*, 92-96.

³¹ Asma Barlas, *'Believing Women' in Islam: Understanding Patriarchal Interpretations of the Qur'an* (Austin: University of Texas Press, 2002), h. 393.

³² See *ibid*.

to men. Thus, which group of provision should become the standard of Islamic doctrine with regard to the gender relationship? Some contemporary Muslim thinkers argue that the answer is more contextual than textual (merely normative-doctrinal approach).³³ More historical and sociological inquiries are needed. To them, the Religious Texts, primarily the *Qur'an* as the major source, were not revealed in a vacuum. There were backgrounds and circumstances underlying the revelation of the Texts. In addition, people who read the Texts also played an important role in shaping the opinion of what constituted the Sender's will or command. This is because they lived surrounded by historical and sociological circumstances at their era which, in the course of time, settled in their subconscious and was brought unconsciously into their reading.³⁴

Based on the above, it can be understood why contemporary Muslim thinkers criticize methods employed by the classical *Qur'anic* commentators (*mufasssir*) and challenge the products yielded from their reading. As it is the nature of a Text-centered society, the commentators of the Texts play a major role in shaping what constitutes God's command or will. The reason for this is because they are deemed as the authoritative agents who are capable of explaining the substance of the Texts.³⁵ However, to treat the products of their *Qur'anic* comment (*tafsir*) as absolutely true and, hence, everlasting is questionable. This is because the *Qur'anic tafsir*, which are produced from biased reading and neglecting the socio-historical circumstances of the Texts, might provide argumentation for perpetuating the gender inequality. As is pointed out by Asma Barla, the inequality and discrimination are derived not from the *Qur'an* but from

³³ See e.g. *ibid*, Mudzhar, "Islam," h. 153-154; Amina Wadud, *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective* (Oxford; Oxford University Press, 1999); Riffat Hassan, "Equal Before Allah? Woman-Man Equality in the Islamic Tradition", in *Women Living under Muslim Laws*, "Women Living Under Muslim Law: Dossier 5/6 Dec. 1988 – May 1989," (<http://www.wluml.org/node/253>), last visit 26 October 2005.

³⁴ See Asma Barlas, "Believing," h. 393.

³⁵ See Ulil Abshar-Abdalla, *Avoiding Bibliolatry: The Importance of Revitalizing the Understanding of Islam*, (2003) available from <http://islamlib.com/en/page.php?page=article&id=399> last visit 11 September 2005.

its *tafsir* or translation and some *Hadith*; thus, a reinterpretation of the Texts is important, since a different reading can yield a fundamentally different Islam.³⁶

As a matter of fact, the use of the *tahlili* (analysis) method is dominant in the history of *Qur'anic* comment.³⁷ This method is governed by interpreting the *Qur'anic* Verses chronologically and primarily using a textual approach (*ʿumum al-lafzh*) toward a Verse.³⁸ Contrary to its popularity among the prominent *Qur'anic* commentators in classical times, this method has recently been criticized since it will lead the mindset of interpreters to the middle-east traditional setting in commenting on women-related Verses. The middle-east tradition is andocentric (male-centered). As a result, it is unsurprising that this method tends to produce patriarchal biases when commenting on Verses about gender in Islam. For example, at-Tabari commented that what the *Qur'an* means with '*nafs wahidah*' in an-Nisa' (1) is Adam, while the word '*zaujaha*' refers to Eve; thus Eve was created from the rib of Adam based on this Verse (*wa khalaqa minha zaujaha*).³⁹

In contrast, feminist Muslims such as Riffat Hasan criticize such comment as patriarchally biased and flawed. They argue that it has a potentiality to make religion the tool for oppressing women.⁴⁰ Riffat Hassan disagrees that if the term '*nafs wahidah*' is certainly interpreted as Adam, because both the words '*nafs*' or '*zawj*' are neutral in nature, they do not refer to any specific gender. Even though the term 'Adam' is a masculine noun in Arabic, linguistic gender is not sex. Thus, if Adam is not necessarily a man, Adam's *zawj* is not necessarily a woman. Further, the term '*zawj*' is also a masculine noun in Arabic. However, unlike 'Adam', '*zawj*' has a feminine form that is '*zawjatun*'.⁴¹ The reason why the terms 'Adam' and '*zawj*' are left deliberately unclear in the *Qur'an* is 'because its

³⁶ See Asma Barlas, "Believing," h. 393.

³⁷ See Nurjannah Ismail, *Perempuan dalam Pasungan: Bias Laki-Laki dalam Penafsiran* (Yogyakarta: LKiS, 2003), h. 330.

³⁸ See Nasaruddin Umar, 'Metode Penelitian Berperspektif Gender tentang Literatur Islam' in Siti Ruhaini Dzuhayatin *et al*, *Rekonstruksi Metodologis Wacana Kesetaraan Gender* (Yogyakarta: PSW IAIN Sunan Kalijaga, 2002), h. 97.

³⁹ See *ibid*.

⁴⁰ Riffat Hassan, "Equal," h. 388, 390.

⁴¹ *Ibid*, h. 390.

purpose is not to narrate certain events in the life of a man and woman (i.e. the Adam and Eve of popular imagination) but to refer to some life experiences of all human beings, men and women together'.⁴²

Therefore, contemporary Muslim thinkers propose the *maudu'i* (thematic) method as an alternative to the *tahlili* method. This is because the former further tends to place women and men as equal in religious and social life. The *maudu'i* method employs the semantic and hermeneutic approach to the *Qur'an*. Meanwhile, the women-related Verses in the *Qur'an* are within a framework which will be easily accessed by means of the aforementioned approaches.⁴³ For example, in the polygamy-related Verses, if the reference to polygamy in Islam is only made to an-Nisa' (3), polygamy is easily committed. Yet, if it is connected to an-Nisa' (129), it appears that it is not easy to commit polygamy in Islam, because there is a specific condition should be fulfilled i.e. justice, which might imply that polygamy is not possible.⁴⁴

With regard to the *Hadith*, re-reading against what the feminist Muslims call 'misogynistic' *Hadith* (e.g. *Hadith* mentioned above) are indispensable. This is because many of these 'misogynistic' *Hadith* are sound in terms of transmission (*isnad*). However, they contain subject matter (*matn*) that contradicts the spirit of *Qur'an* and the mission of Muhammad's prophecy.⁴⁵ It has become an axiom in *Hadith* studies that, as long as the quality transmission of a *Hadith* is considered *sahih*, it is valid to become an argumentation (*hujjah*) in a legal matter.⁴⁶ Moreover, if the *Hadith* are available in one of the six canonical book of *Hadith*, they are taken for granted to be sound. However, what constitutes a *Hadith* is the *isnad* – the chains of transmission from the Prophet to *Hadith* scholars, who collected *Hadith* – and the *matn* – subject matter of a *Hadith* which come after the *isnad* – altogether. Unfortunately, criticism of *Hadith* (*matn* analysis), which was strongly recommended by Ibn Khaldun, has only received little attention from

⁴² *Ibid.*

⁴³ See Nazaruddin Umar, "Metode," h. 97-98.

⁴⁴ See *ibid.*, h. 98; Nurjannah Ismail, "Perempuan," h. 328-331.

⁴⁵ See Hamim Ilyas, *et al*, *Perempuan Tertindas? Kajian Hadis-Hadis "Misoginis*, Mochamad Sodik and Inayah Rohmaniyah (eds.) (2003); Cf. Riffat Hassan, "Equal."

⁴⁶ See Riffat Hassan, "Equal," h. 391; Mochammad Sodik, ""Perempuan," h. xxviii.

Hadith scholars.⁴⁷ Thus, in order to promote stubbornly egalitarian Islam the 'mysoginistic' *Hadith* need to be read contextually. For example the aforementioned *Hadith* about wife's enslavement to her husband (performing *sujud*), this *Hadith* contradict to the concept of *tawhid* (one indivisible God) in Islam. Further, it also has unsound *sanad* because two transmitters – i.e. Husain Ibn `Abd ar-Rahman and Shuraik Ibn Abd Allah Ibn Abi Shuraik – are criticized being lack of *dabit*.⁴⁸

Rereading the *Qur'an* and the *Hadith* on gender, make it a necessity for contemporary Islamic law scholars to critically utilize doctrines of *fiqh* (Islamic jurisprudence) on women. As a matter of fact, these doctrines are mainly the products of *ijtihad* (use of individual reasoning in matters of *fiqh*) carried out by `ulama in the classical period (approximately in the 8th and the 9th Century).⁴⁹ This period was known as a time when traditional patriarchal family structures prevailed in the Muslim world.⁵⁰ Nowadays, these doctrines of *fiqh* can be found in the books of Islamic jurisprudence (*kutub al-fiqh*) of the four schools of Islamic law (*madhhab*): the Maliki, the Hanafi, the Shafi'i and the Hanbali.

So far, the idea that since the emergence of the above *madhhab* means that Islamic law has been long established is widely spread among the Islamic scholars. This mainstream thinking, thus, has lead to unspoken agreement among the majority of *fuqaha'* (Islamic law scholars) to retain the formula of Islamic law as it is in the *kutub al-fiqh*. In other words, the gate of *ijtihad* has been already closed in Islam, and new interpretations over the *Imam madhhab's* (the founder of Islamic law school of thought) thinking are restricted.⁵¹ As the position of Islamic law became stronger than other disciplines of Islamic knowledge (such as *tafsir*, *Hadith* and *kalam*), the *kutub al-fiqh* became 'the authoritative guidance and the

⁴⁷ See Riffat Hassan, "Equal," h. 391; Cf. Mochammad Sodik, "Perempuan," h. xxviii-xxx.

⁴⁸ See Inayah Rohmaniyah, "Penghambaan," h. 104.

⁴⁹ See e.g. George Makdisi, 'The Significance of The Sunni School of Law in Islamic Religious History', (1979) 10 *International Journal of Middle East Studies* 3.

⁵⁰ Atho Mudzhar, "Islam," h. 95-96.

⁵¹ Joseph Schacht, *An Introduction to Islamic Law*, (Oxford: Oxford University Press, 1964), h. 70-71.

main providers of the established doctrine on women'.⁵² In *fiqh al-munakahat* (marriage law) for example, it is stipulated that the main obligation of a wife involves maintaining a home, caring for her children, and obeying her husband. Meanwhile, a husband is entitled to exercise his marital authority by restraining his wife's activities and preventing her from showing herself in public. This restriction of the wife mirrors the prevailing medieval social custom of veiling and seclusion of women, which is practiced to protect their honor.⁵³ Thus, the patriarchal nature of the established doctrine of Islam on women persisted without being questioned until feminist Muslims emerged at the beginning of the 20th Century began to challenge these doctrines.

There is an enormous consequence when such a notion (the closure of *ijtihad* gate) is considered absolute; Islamic law loses its élan vital in modern life. Instead of providing solution to newly arising problems experienced by the *ummah* (Muslim communities), Islamic law is accused of being 'misogynistic' and of being contrary to the human rights. This is because the classical concept of Islamic law remains entrenched, since contemporary Islamic law scholars are reluctant to disagree with the *Imam madhhab*. They believe that being in one *madhhab* means complete obedience. In fact, the development of Islamic law after the four great *Imam madhhab* had demonstrated a vibrant intellectual process: *ijtihad - fatwa - ikhtilaf* or *ijma' - munazara*. Some of the pupils of *Imam Mazhab* still gave their personal opinion while acknowledging that they were the adherents of one *madhhab*. To argue the *Imam madhhab's* remarks was common in their scholarly activities. In addition, the *Imam madhhab* never compelled others to follow their opinion, without exercising the methodology used before arriving at a conclusion.⁵⁴

Treating the doctrine of *fiqh* as absolute truth and, thus, unchangeable, has lead today's Muslims to confuse the *fiqh* with the *Shariah*. The *Shariah* is a living and growing body which guides mankind, so that Muslims can live their lives

⁵² Atho Mudzhar, "Islam," 154.

⁵³ John L. Esposito, "Women," h. 22.

⁵⁴ See Wael B. Hallaq, 'Was the Gate of Ijtihad Closed?', 16 *Internasional Journal of Middle East Studies* 4 (1984), h. 10; Joseph Schacht, "An Introduction," h. 73.

according to Islam in any given situation and time.⁵⁵ The ontological reality of the *Shariah* has given birth to the epistemology of law (*usul al-fiqh*). By means of *usul al-fiqh*, the Islamic jurisprudence is theorized and formularized, which is called the *fiqh*. Basically, the *fiqh* is a product of the interaction between the *'ulama* (Islamic scholars) and the social realities which surround them.⁵⁶ Unlike the *Shariah*, the *fiqh* constitutes legal formal stipulations which are local and temporal in nature. Given this differentiation, it now appears important to critically utilize the doctrines of *fiqh* in the *kutub al-fiqh*. This is because it is not sufficient to solve contemporary problems by simply applying the doctrine theorized and formularized about fourteen centuries ago, because of the difference contexts.⁵⁷

V. Conclusion

Sex differences are natural, and they usually give birth to gender differences in a society.⁵⁸ Gender differences, indeed, do not matter as long as they do not trigger gender inequalities. However, instead of being neutral, gender differences often allow injustice, especially to women.⁵⁹ Gender inequalities, which in turn create injustice, are manifested into marginalization, subordination, stereotyping, socialization the values of gender role, violence and double burden against women.⁶⁰ These manifestations have persisted in the individual mindset and state's policies. They are often justified by means of religious doctrines, which render the effort to promote gender equality difficult to realize.

Having re-read the Islamic religious texts, an effort to promote gender equality as well as pluralism and human rights in family law in Indonesia is badly needed. This is done to spread the more sensitive gender understandings towards

⁵⁵ Abdullah Ahmed an-Na'im, 'Kata Pengantar' in Mahmoud Mohamed Taha, *Syari'ah Demokratik*, [transl. Nur Rachman] (Yogyakarta: Pustaka Pelajar, 1996), h. 21.

⁵⁶ M Atho Mudzhar, 'Social History Approach to Islamic Law', 61 *Al Jami'ah Journal of Islamic Studies* 78 (1998).

⁵⁷ See Abdullahi Ahmed An-Na'im, "Syari'ah," h. 20.

⁵⁸ See Nasaruddin Umar, *Argumen Kesetaraan Gender Perspektif al-Qur'an* (Jakarta: Paramadina, 1999), h. 36.

⁵⁹ *Ibid.*

⁶⁰ Cf. Mansour Fakih, *Analisis Gender dan Transformasi Sosial* (Yogyakarta : Pustaka Pelajar, 1999), h. 12.

the so-called “misogynistic” texts in Islam. In order to do that, the instrumentalism approach, i.e. gender mainstreaming through the amendment of Islamic family law in Indonesia, must be accompanied with an alternative approach that is able to convey the ideal messages of Koran and Hadith pertaining women’s rights and gender equality discussed above. This alternative approach must be able to better raise public awareness of women’s rights and gender equality issues in Islam. In the course of family law reformation history in Indonesia, e.g. the Marriage Law Bill in 1970s, the KHI in 1990s and the CLD KHI in 2000s, it turns out that instrumentalism approach deemed to fail given socio-political context of Muslims in Indonesia which tend to be conservative when it comes to family law reformation informed by human rights.

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