

## Gender Analysis in Contemporary Islamic Discourse

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### Abstract

Islamic jurisprudence is a dynamic system. It is facilitated by some flexible methodologies. Nowadays, there are varieties of issues in Muslims' societies that are results or implications of developments in science and technology, and also results of changes that happen in the structures of the societies. In order to face this reality, a contemporary integrated approach has to be applied in Islamic Jurisprudence's research process. Hence, this paper will elaborate the integrated approaches that try to unify and integrate theories in Islamic jurisprudence with social research methods. Basically, there are models that have been introduced by several scholars that relate to this integrated approach. All of the models have their own strength and weakness in these approaches. This paper attempts to analyze the integration of Islamic jurisprudence theories with the gender analysis method and its relation to social critics methods. This is related to an issue in fiqh pertaining to polygamy that is always being debated nowadays and also to analyze the applicability of the practice in the social and contemporary conditions of our society.

**Keywords:** women's issues, Islamic jurisprudence, social science, gender analysis, polygamy

### 1. Introduction

Nowadays, Muslim society has two options which are the need to find their own Islamic solutions to their own socio-economic, legal, and political problems that suit the contemporary needs of society or they will eventually contribute to the isolation process of Islamic law from the public life. Therefore, in order to maintain the balance between the Islamic principles and modern context of society, the system of Islamic jurisprudence need to be revitalised. For this matter to be realised, Islamic jurisprudence needs a shift of paradigm especially in its epistemology. This shift is a move of Islamic jurisprudence from its static nature to a dynamic discipline of knowledge. (Syah, 2009)

Recent developments show that integrative approach of research is being welcomed and applied in the field of Islamic studies. This scenario is the result of the Islamisation of knowledge that had been taken by some contemporary scholars. (Syarifin, 2007), It encompasses integrations between Islamic traditions of knowledge with the traditions of social and natural sciences. In this article, the focus will be put in the integrations effort between the fields of Islamic jurisprudence and social science methodologies, which is the gender analysis approach in analysing some gender issues and its application in analysing the practice of polygamy in Islam.

### 2. Trends of Research in Islamic Jurisprudence Field

Integrated approach is a significant in contemporary trend of research. It is not new to the field of Islamic studies. However, Muslim world suffers from the disconnection with the developments in the field of science and technologies since the sixtieth century. By the time Europeans and western world went to the fore in those field of knowledges, Muslims suffer from intellectual isolation. (Ikhrom, 2001)

Dichotomies that happen are due to several factors such as the stagnation of thought in Muslim intellectual world since XVI to XVII centuries. This catastrophe being worsened by the fell of Baghdad in 1258AC that follows by series of conquests by Western powers on Muslim worlds. The negatives result from this dichotomy process is the unbalance orientation in Islamic studies as well as the disintegration in the system of Islamic knowledges (Fanani, 2007). This is in contrary with the earlier period of developments when Muslim scholars produced various kinds of findings and innovation in different field of knowledges, which are not only related to religiosities, but also regarding rational and empirical knowledges. These scholars range from Jabir Ibn Hayyan (750-803AH), al-Khawarizmi (780-850AH), al-Kindi (806-873AH), al-Farabi (870-950AH), Ibn Haytham (965-1039AH) to Ibn Sina (980-1037AH) (Azra, 2005). This dichotomy eventually resulted to the partial research approach between religious and non-religious field of knowledges.

Generally, classical scholars divided the field of Islamic studies into three difference subjects that are the Islamic creed, jurisprudence and ethics. Whereas in contemporary classifications it has being divided into four, seven, eight, eleven, thirteen, and even fourteen divisions that are based on different criteria. In this article, the focus will be on the field of Islamic jurisprudence.

### 3. Integrated Research Concept and Models

Basically, integrated research approach refers to the one that utilise unified paradigm and analysis. It is unification between Islamic and other disciplines of knowledges in resolving the research problems (Nasution, 2009). Some academics prefer another term to present the process, which is the 'Islamisation of knowledge' rather than 'knowledge integration' (Hussain (ed.), 2006). It is also identical with the inter-discipline approach that encompasses unification between Islamic knowledges either social or natural sciences. In other words, this monochotomic paradigm is the unification of two entities into an integrative and inter connective relationship, which is also a symbiosis relation of the two elements on the point of convergence between objective facts and the subjective convictions or believes (Arief, 2011). Hence, the development of this approach in the field of Islamic studies may contributes to the expansion of holistic and integrated tradition of knowledge.

### 4. Islamic Jurisprudence's Role on the Social Change

The new development in the focus of social studies shows that it had moved to the theory of social dynamic. In this new methodology, it sees society as a dynamic and ever changing forces. The existence of a society would be identified by its continuity of changes and developments. In other words, in ontological perspective, a society is not static but all its phenomena keep on changing by different phase and type of developments.

The concept of social change regards changes that occur in any part of the entire of any social system. This means that there are differences in the same social context at the different time. Therefore the theory of social change encompassing three main themes i) changes in any part of social structure ii) changes in the different period of time iii) changes in the same social system. There are some definitions from some sociologist pertaining to the social changes. Some of them focus on the type of changes that happened and others focus on the structural changes that relates to changes in organisations and relationships in society. According to Kingsley Davis, social changes are changes that occur in the functional structure of society. For instance, the development of an industrial society contributes to the organisation of labour class and its relation to the capitalist class. These changes will result to changes in the economic and political structure of the society as well. In short, social change is a change that happens in society that leaves it effects on the social system itself. (Davis, 1953)

Developments in the field of Islamic jurisprudence show the recognition and significant effects from the changes in social elements to Islamic jurisprudence and its rulings. It has been recognised by the prominent classical Muslim-scholars in various field of knowledges. For instance, Ibn al-Qayyim al-Jauziyyah argued in his work that:

*"The changes of fatwa (legal opinion) is due to change of place, conditions, and customs,"* (Al-Jauziyyah, 1996)

Despite of that, there are several legal maxims in Islamic jurisprudence traditions that relates to this subject matter. One of the clearest maxims is:

*"it is no dispute on the change of rulings due to the change of time,"*

According to Muhammad Zarqa', the term 'change of time' in the maxims also refers to the change of customs in certain context of society. This is especially when the existence customs being replace by another new customs. Therefore rulings that relates to certain customs will change with the change of that particular customs. Some maxims that relate to this particular matter are as such:

*'Custom may deduce rulings'*

*'The consideration is on the frequent events not the occasionals,'*

*'The consideration as frequent events according to custom is as legal according to the jurisprudence,'*

This is evident that Islamic jurisprudence recognise social change as a reality that never could be denied. It puts clear and suitable principles in approaching the reality of social dynamic in order for religion to play its role in managing changes in society in order to bring benefits into the peoples and the religion itself.

### **5. Integration between Islamic Jurisprudence and Social Science**

In recent development, there are proposals in the research of Islamic jurisprudence to the renewal and revitalisation of its epistemology. This renewal encompassing changes of its analytical methods and the addition of its sources in the juridical process. For instance, Muhammad al-Dasuqi suggested the need of renewal in the field of *usul al-fiqh* (the principles of Islamic jurisprudence) as most of works in that field were often suffer from redundancy. This - according to him - need to be modified with the inclusion of the discussion pertaining to the new concept in ascertaining the foundation of rulings (*ta`lil al-ahkam*) as well as the higher objectives of Shariah (*maqasid al-shariah*). These efforts may unable *usul al-fiqh* to be related to the contemporary realities and may leave its effects on them (al-Dasuqi, 1996).

The efforts of Islamic jurisprudence's renewal incorporated two different approaches, which are the normative-deductive approach and the empirical historis-inductive approach. The former is related to the process of analysing, choosing, and concluding meaning and rulings from the scripts in the divine texts whereas the latter is about the systematic and careful analysis on the context of formation and application of certain rulings. For the latter, scholars tend to apply others methods and discipline such a historiography, linguistic, anthropology, sociology, philosophy, and philology (Boestamam, 2006). In conjunction to this, Yusuf al-Qaradawi stated the importance of the application of some modern disciplines in the tradition of *usul al-fiqh* by saying:

*"Nowadays, among the efficient factors and the crucial needs in the studies of comparative jurisprudence that may help the students in Islamic studies to solve the disagreements and different opinions among classical scholars that is to choose the most relevant opinion (rajih) with reference to the scientific findings of in various kind of knowledge such as astronomy, physic, biology, chemistry, medic, and psychology. As this modern knowledges were never been discovered by the classical scholars, therefore there are possibilities that some of their legal opinions are in contradictory with the findings. If it is the case, their opinions will be considered as deficient in the discourse of jurisprudence,"* (Al-Qaradawi, 1998)

Nevertheless there are deficiencies in the traditions of *usul al-fiqh* that relates to the fact that is doesn't possess any methods to analyse the social phenomena (Safi, 1996). Therefore, the jurist and scholars should apply the social science methodologies a long with the methods in *usul al-fiqh*. This is important as it includes in the process of *usul al-fiqh* that is in identification the foundation of ruling (*tahqiq al-manat*) before he proses of *takhrij* and *tanqih al-manat* (Bakar, 1999). This discipline of knowledge may assist jurist in accomplishing their works as it contains several themes that are) the facts about the things that is really happening in society ii) the facts about factors of any actions and developments in society. Basically, the utilisation of sociological methods in Islamic jurisprudence relates to several themes that are:

- 1) The influence of Islamic rulings to the society and its changes
- 2) The influences of society's developments to the Islamic jurisprudence
- 3) The practice of Islamic rulings in society
- 4) Pattern of interactions in society pertaining to the practise of Islamic jurisprudence
- 5) Movements and organisations in society that support or against the implementation of Islamic law and jurisprudence. (Mudzhar, 2000)

However, during the period of Enlightenment in the history of European civilisations, there are influences of secularisation process that penetrated into the methodologies in social sciences especially by the emergence of positivistic approach in sociology. In this process of secularisation, the nature of social sciences was viewed as the same with the natural sciences. Positivistic approach stressed that truth and reality only could be analysed through empirical facts and quantitative data (Abdul Rahim, 2002). This principle certainly is in contradiction with Islamic perspective, which view knowledge in its holistic manner including the knowledge of revealed texts (*ulum al-naqliyyah*) as well as the human rational knowledges (*ulum al-`aqliyyah*). Moreover, the functional

approach in sociology tends to view the role of religious institution in society at the same status with other social, political, economic, or family institution (Wan Teh, 1986). Concepts in sociology also relate to certain ideological basis. For instance, the functionalist-structuralist approach found its basis in maintaining the status quo of the capitalistic and democratic society and took this modern capitalistic nature of society as their ideal model. On the contrary, the conflict theory views society as it contains exploitations and conflicts between different classes, which is actually the Marxist's ideology of dialectic materialism, and tends to put the communist society as the ideal model (Yunus, 1989).

## 6. Efforts in Islamization of Western Sociology

Through deep scrutinization on the problems inherited in the discipline of western sociology, Muslim scholars proposed the development of an Islamic discipline and methodologies in analysing realities in society. It is a method to analyse the Muslim society based on the main principles of Islamic teachings and the real experience of the Muslim ummah (Hussein, 2006). Shariati, among the modern Islamic scholars that put his efforts in underlying the fundamental basis for Islamic sociology. In other words he could be considered as the founder of Islamic modern sociology. In his theory of sociology he put the concept of *tawhid* as the foundation in the process of analysing phenomena, structures, and interactions in society. The concept of *tawhid* had been used by Shariati as the framework or world-view in analysing and describing the social reality in its holistic and unified manner. Therefore, *tawhid* must be taken as an ideological basis for a society that is built on the Islamic system of belief, intellectual, economy and politics those are not contradictory between each another (Shariati, 1979).

Al-Faruqi on the other hand had proposed that the result from the process of Islamisation of sociology is the science of '*Ummah*' which is the restructured model of sociology, supported by the principles of *tawhid*, and by the recognition of metaphysical power that is in control of human-being, humanistic elements, spirituality and noble moral values, and also to recognise the relations between the reality inspected and the ideal teachings of Islam. Faruqi also presented the practical aspects of his proposal (Al-Faruqi, 1989). Ilyas Ba Yunus also touch upon the same topics in his article titled '*Sociology and the Sociological Reality of Muslim Ummah*', presented an interesting proposal in the development of new Islamic social science tradition. He suggested that the Islamic methodologies in analysing society need to play certain imperative tasks such as recognising the roles of religion in the structure of society, developing the ideal social models in order to comparatively analyse the distortion of Muslim *ummah* from the ideal models. According to him the Muslim social scientist need to put their effort in bridging the gap between both macro and micro social phenomena with the ideal model of Islamic society (Yunus, 1989). There are several other Muslim scholars that contribute to the same initiatives that are to lay the foundations and Islamic principles for the Islamization of sociology (Abdul Majid, 1999).

Nevertheless, all the proposal of Islamisation of sociology carried its own deficiencies. Although most of the scholars agreed that Islamic sociology has to be underlied by the principles of Shariah but few of them clearly stated the details about the principles. There is no systematic methodology and accurate formula in extracting the principles from the text of al-Qur'an and Al-Hadis in Islamisizing the discipline of sociology (Safi, 1995). Other than that, the writer found that there are no application of Islamic sociology in the process of concluding Islamic rulings and jurisprudences.

## 7. Gender Analysis from Islamic Jurisprudence and Social Science

Gender analysis is an approach being used in investigating the pattern of relations between genders in society. It originated in the field of sociology and economy especially in the process of social reengineering of women. It refers to the systemic analysis process to record the level of normative participation of women and men in activities regarding productions of goods and services though its development move to the decrease of development planning quality to fulfill women's needs (Sugihastuti & Sastriyani, 2007). It also refers to the various methods in understanding the relations between man and woman, their access to sources, their activities, and constrains that they both experience in their relation. Gender analysis provides the facts about gender and its connection with ethnicity, culture, class, age, disabilities, and other type of status. This is imperative in understanding the different pattern of interactions, behaviours, actions among women and men in the structure of social, economical and law institutions.

Gender analysis shows various roles of woman, man, girls and boys in the structure of family, society, economic and politics (Canadian International Development Agency, 2012). According to Jean Davinson, gender analysis refers to a systematic research on the difference roles between man and woman in certain society (Davison, 2001).

In accordance to this, gender analysis is utilised to deeply analyse the distortion of roles, function, and relations between man and woman. In another words, it is an analysis that questions any social injustice that relates to the

relationship between genders. Its main roles are to describe the classifications, meanings, and concepts of new relationships between man and woman and its implications on the broad social life (including social, economy, politic, and culture). Hence, gender analysis being applied in order to support other type of social analysis and never to replace it.

In this article, this method is proposed as new methodology in the field of Islamic studies, specifically in the analysis of religious texts and classical scholars thought. The classical scholars thought especially the jurist is analysed in order to classify gender issues and to identify gender bias in their works and thought, which are considered as the legitimate reference in Muslim society.

## 8. The Criteria of Gender Analysis

In applying the gender analysis method, there are several criteria that should be taken in consideration such as:

### 8.1 Marginalization of Gender

It is an economic isolation that is imposed on both man and woman. Although not all marginalization is the result of gender discrimination, the focus of gender analysis is on that particular marginalization that is cause by the differences in gender between man and woman (Fakih, 2007).

In religious text, there are several elements of gender injustice, which resulted to deficiencies on woman rather on man. For instance, women are prohibited from holding any position in society, working, living in house, and only have the right to get half portion of male inheritance.

### 8.2 Subordination of Gender

It is the process to subordinate one of the gender types that mainly inflicted to woman. It does happen in family institution, society, and even in a country where women's opinion and benefits are not being considered in every decisions and policies that are taken into implementations. For instance, women are being domesticated with the belief that there is no use for woman to pursue their studies to the higher level of education as they will eventually be wives whose works are to prepare dishes for their husband. The pattern of subordination phenomena diverges by the differences of place and time(Fakih, 2007).

Religious interpretation also plays vital roles in allowing the domination of male on female. The critical question is why do al-Qur'an keep on prioritizing man's status over woman? In understanding these Quranic verse, it must be interpreted by considering that there are actually the illustrations of social norms and structures by the time they were revealed and not necessary to be applied universally (Siddique, 1983). Despite of that, there are also issues related to this phenomenon pertaining to the subordination of woman right in marriage, smaller portion for woman in inheritance, the need of legal companion (*mahram*) during travel, and the prohibition on Muslim woman to marry the non-Muslim man.

### 8.3 Gender Stereotype.

It is a negative labeling on certain gender type and it caused various kinds of discriminations and injustice especially towards woman (Fakih, 2007). For instance, there are negatives accusations on woman natures as emotional, soft hearted and seductive.

In reality, most of these stereotypes related to underestimation of the nature of woman due to the social construction in Muslim society that found its reference in the misleading interpretation of religion. For example, the view that women's menstruation that is a part of their nature, to be considered as 'dirty' and as a factor of bad things that normally happened on them (Fakih, 2000). Moreover, woman was also to be considered as seducer of man and the factor for Adam to be sent to the earth, suffer from low level of rational abilities, and also low ability of memorisation and highly emotional.

### 8.4 Gender Violence

It is the violence that relates to physical or mental harms that are inflicted on woman or man. The physical violence relates to actions, range from rape and beating to the softer type of violence such as the enforcement for sexual intercourse, and sexual harassment. As for the mental violence, it relates to the denial for sexual intercourse between husband and wife, and the abandon of wife in term of her material needs (Fakih, 2000).

One of the factors of gender violence in Muslim community is the misleading interpretation of religious teachings. It resulted to the misleading acts such as the beating of wives that were considered as disloyalty (*nusyuz*) as well as other domestic violence such as child abuses (Fakih, 2000). Pertaining to this issue is the circumcision of female child, the concept of legal companion (*mahram*) to restrict the women's movement, and the obligation for woman to limit her communication and movement (*i'ddah* and *ihdad*) after her divorce

(Subhan, 2004).

### 8.5 Double Burden

It is the double roles have to be played by women due to social expectations for them to manage the household and at the same time need run jobs due to economic pressures. In other words, the role of woman in the perspective of tradition and society's is mainly to maintain the household. This socialisation of gender role eventually cause women to feel guilty if they couldn't satisfy those requirements or fulfill their task at home although they already have they own carrier's obligations (Fakih, 2007).

In Islam, the roles of woman and man in their house are different, as man carries obligation as the leader and breadwinner for the family whereas woman is the manager of the household. Although there is no place in al-Qur'an that mentions about the preference of breadwinner role over the household manager, in reality there are discriminative appreciations on those roles (Fakih, 2007). In reality nowadays, women need to find jobs to support their family although they need to carry the burden of managing their household. Eventually, this kind of situation becomes a sort of dilemma in Muslim contemporary families.

In spite of that, this methodology of analysis needs to be consistence with the teachings in Al-Qur'an and al-Sunnah. Blind acceptance of western gender analysis which is merely based by the human rational faculty regardless of any religious principles and local values and traditions, is not an accurate approach in order to promote equality between gender. This is because, inequality is not necessary produces injustice and equality is not necessary brings justice. On the other hand, to put things accordingly on their proper place is the basic understanding of justice in Islam.

## 9. Methodologies in Gender Analysis

In order to apply gender analysis, there are several methodologies to be considered. Harvard Analytical Framework is among the earliest methodology being designed (Williams et al., 1994) and then applied in People-Oriented Planning Framework (March et al., 1999). Moreover, Women's Empowerment Matrix Framework was designed by Sara Hlupekile Longwe in her research project in Zambia (Longwe, 2004), Social Relation Analytical Framework was proposed by Naila Kabeer (Kabeer, 1992), while Gender Analysis Matrix was proposed by A. Rani Parker (Parker, 1993). The writer had identified that all these methods of gender analysis prone to the analysis of gender behaviours and roles in society especially relating to the pattern of relations between both genders in economic perspectives. Meanwhile, the research that analyse textual sources is the narratological approach, which analyse the textual inferences in certain society (Bal, 2004).

Nevertheless, in the tradition of Islamic studies, there are theories and methodologies that are able to be the alternative of western gender analysis. Among these contemporary methodologies are the 'Double Movement' theory introduced by Fazlur Rahman (1984), 'Abrogation Theory' by Mahmud Muhammad Taha (1987) and his disciple, al-Na'im, the theory '*al-Turath wa al-Tajdid*' by Hassan Hanafi (1981), 'Heurmenitical Exegesis' by Amina Wadud (1992), 'Double Investigation' theory by Fetima Mernissi (1991), '*al-Takwil wa al-Tadwin*' theory by Nasr Hamid Abu Zayd (1994), normativite and historiography by Amin Abdullah (1997), the 'Liberation Theology' by Ashgar Ali Engineer (1990), 'Suspicious Exegesis' by Zaitunah Subhan (1999), and the trilogy model of *Bayani*, *Burhani*, and *Irfani* thought by Muhammad 'Abid Al-Jabiri (1989).

In spite of those methodologies that were the results of post-modern approach in Islamic thought, there are some methodologies proposed by other contemporary Muslim scholars that are also illustrations of female-friendly approaches. Basically, these methodologies found their bases in the paradigm of jurisprudence renewal (*tajdid fiqhi*), which is the development in such field of knowledge due to contemporary needs of society (Al-Zuhayli (2002). Among these contemporary methodologies is the methodology of comparative school of jurisprudence

(*Muqaranah al-Madhahib*) by Mahmud Syaltut (2004), *ijtihad insya'i* and *intiq'a'i* by Yusuf al-Qaradawi (t.t.), the division between Shari'ah and *Fiqh*, the theory of jurisprudential change (Al-Jawziyyah, 1992), and the openness of Islamic jurisprudence to the contemporary and local values (Ab. Majid, 2000). All these methodologies are applicable in analysing gender relations in the works, opinions, and ideas relating to Islamic jurisprudence.

Severals methodologies that might be applied to analyse the pattern of relation between male and female in the works of Islamic jurisprudence are as such:

### 9.1 The Differentiation between Shari'ah and Fiqh

Al-Qur'an and the prophetic traditions are the two main sources to Islamic rulings, which is purely divine in their nature, absolute, comprehensive, universal, and eternal. However, the human's faculty of reason can identify the

mission that is embedded in those divine sources. Therefore, this task of acquiring the understanding of the divine scripts is the obligation for them who achieve the maturity of mind and sufficiency of knowledge that are the scholars (*mujtahid*).

Other than that, al-Qaradawi stated four main principles in the effort of interacting with the text of classical works (*turath*) in Islamic tradition that are : i) The fact that not all informations relating to classical works are Islamically acceptable due to the existence of fabricated facts and narrations in those scriptures. ii) Critical analysis in the framework of Shariah is imperative due to the nature of human being that is susceptible to fallacies and weakness. iii) The need to be fair and maintain moderate attitude towards the classical works in the subject of Islamic teachings and thoughts. iv) The critical analysis on the scholars' opinion is not to be related to their personalities (Al-Qaradawi, 2004).

In accordance to those principles, in their analysis of some rulings that are being taken from religious texts that contain some elements of gender bias, scholars need to be clear on the clear division between Shariah and *fiqh*. As stated before, Shariah is an absolute divine message that is eternal and never prone to any changes (Kuksal, 2000). On the other hand, *fiqh* is a dynamic concept, in responding to the changes of social and cultural differences between societies, embedded in its principles, methods and methodologies (A-Rukay, 1994). In short, *fiqh* as a systematic knowledge, possesses its own characteristics there are at odds with Shariah such as: i) it is an equivocal type of knowledge ii) the conclusions and opinions of some scholars pertaining to it could be tested and questioned by other scholars iii) it is susceptible to criticism and evaluation from knowledgeable and authoritative scholars or jurists (Afif, 1991).

Therefore, based on these differences, a scholar or jurist is permissible to be critical and either free to adopt or reject any rulings or opinion in the classical works of *fiqh* (Mohd Daud Bakar, 2001). This understanding is imperative even to very Muslim in order to avoid the fanatic attitudes towards any school of *fiqh*. On the same understanding, almost all scholars stressed that a work of *fiqh*, which is relative in its nature, is open to reevaluations and difference of perspectives and opinions (El-Muhammady, 2001). For example, it is permitted for scholars to state their preference (*tarjih*) between difference rulings in different schools of jurisprudence, which is a rational and systematic process in analysing certain classical works of *fiqh*. However, commoners should not take this kind of effort, as it will bring negative effects on the knowledge such as the judgement that it is merely a historical heritage that is full of Arabic cultural products such as the commands to cover the *aurah*, to keep the beard, and to apply the criminal punishment of *qisas*. It also being considered as the Arabs hegemony (Abdalla, 2005) on non-Arabs which such consideration may cause conflicts among Muslim societies. It is in contradiction with the spirit of Islamic renewal movements, which aim is to critically analyse the classical heritage of *fiqh* traditions, and then to re-arrange these wide range of opinions in order to offer the best Islamic solutions to the contemporary problems in human society.

### 9.2 The Differentiation between the Permanent (*Thabat*) and Mutable (*Mutghayyirat*) Elements in Islamic Jurisprudence

Generally, there are two main categories of Islamic rulings; the permanents (*thabat*) and mutables (*mutaghairat*), which are the manifestation of the categorical and equivocal rulings in Islam (Sya'ban, 1997). The permanent elements are the values and principles that are unchangeable with the changes in time and location. These principles are axioms which are known by all Muslims encompassing the basic acts of worship such as prayer, fasting, zakah, and pilgrimage, subjects pertaining to Islamic creed and belief systems such as the discussion on *sam'iyat* and *ghaybiyyat*, as well as the fundamental of ethics (*akhlaq*) which is among the main objectives of the prophetic messages. All these elements - according to all the scholars - is apart of the Shariah itself and never incline to developments in its approach or interpretation. In conjunction to this, al-Zuhayli stressed upon the unchangeable nature of these permanent elements are exclusive to their concept, however in their application and implementation, they still enjoy some space of flexibilities. It is due to its implementation in the dynamic society of human being and in order to adapt to different context of times and locations (Al-Zuhayli, 2002). All these is in accordance with the categorisations of Islamic jurisprudence done by classical scholars that are:

- 1) Rulings that are extracted or concluded from clear and categorical religious scripts whether in term of its status of transmission (*thubut*) or its content of meaning (*dilalah*). In this type of rulings there is no space for any human judgement or evaluation.
- 2) Rulings that are extracted or concluded from unequivocal religious scripts in term of its content of meaning (*dilalah*). In this type of rulings, there are limited space of human evaluation and judgement.
- 3) Rulings that have no reference from any religious scripts but are the consensus of the scholars. In this type of rulings there is no space for any human judgement and evaluation as all the scholars had agreed upon them.

Rulings that are in this category such as the prohibition for the grandson to get any portion in inheritance due to the existence of son, and the prohibition of marriage between Muslim female and non-Muslim male.

4) Rulings that have no reference from any religious scripts, or consensus of the scholars. Rulings that are in this category are open to reevaluations and they are the main contents of the rich heritage of classical Islamic jurisprudential works (Khallaf, 1993).

Hence, not all rulings should be reconsidered or reevaluate especially that is stated in the categorical type of scripts whether in term of its status of transmission (*thubut*) or its content of meaning (*dilalah*), such as the provision of 2:1 of male and female inheritance, the 100 times of beatings as the punishment for adultery, and the provision on covering the *aurah*. On the contrary, there is much space for reevaluation in the equivocal category of Islamic rulings.

### 10. Gender Analysis on the Issue of Polygamy

Polygamy in old tradition was being widely practised in the pre-Islam societies such as in China, India, Persian, Egypt, Greek, and Rome (Al-Hasin, 1990). In those practices, men didn't have any limitation to marry how many women they wished for, and this usually resulted to injustice on women (Ahmad, 2002). Husbands, during this period of time possessed unilateral right to choose and give his love on any of his wives. In Torah, polygamy is permissible without any limitation, whereas in the Bible, there is no any restriction to it, however Islam came and tended to rearrange this provision. Islamic jurisprudence on the other hand tends to offer some restrictions on this provision as it puts a limit (Abu Zahrah, 1976) for a husband to marry only four wives and put justice as the main condition to be fulfill by the husband (Ahmad Fa'iz, 1993). This is due to the fact that this practise is in accordance with human nature, that some of them possess more material and metal abilities over the other.

Islam permits polygamy with the condition that a guy is ready to be just to all his wives in term of the fulfillment of their needs, place of living, and the arrangement of time to be spent with them (Haji Ahmad, 2009). The legitimacy of polygamy is clearly stated in the al-Qur'an and the prophetic traditions. Nevertheless, according to the perspective of liberal feminist, polygamy is considered as the practice of ancient Arabic society (Al-Banna, 1998) that illustrated sexual condemnation and mentally and emotional abuse on women (Mulia & Anik, 2007). Therefore they promoted monogamy and rejected the practice of polygamy. They believe that the implementation of this provision should be delayed in contemporary society although there are clear-cut permissions of polygamy in the divine scripts. For instance, in the 3rd verse of al-Nisa', Allah stated that:

*“And if you fear that you will not deal justly with the orphan girls, then marry those that please you of [other] women, two or three or four. But if you fear that you will not be just, then [marry only] one or those right hand possesses. That is more suitable that you may not incline [to injustice].”*

al-Nisa' (4): 3

By referring to this verse, there are some conclusions that could be made such as:

- 1) There is limitation to the practise of polygamy in Islam that is the restriction for men to marry only four wives.
- 2) This provision is related to the injustice that are experienced by orphans, which is also a normal situation after certain battle, when many women became widow, burdened with the responsibilities to maintain the orphans, including the girls who were in the age of marriage.
- 3) Justice that needs to be maintained among wives is the main pre-requisite in polygamy. The justice encompassing material justice and equal distribution of time of a husband among all his wives. If this requirement is unattainable by a man, he then should only maintain with his first wife in order to avoid any injustice.

There is also a verse in al-Qur'an that stress upon the impossibility for a man to absolutely be fair and equal among all his wives and the difficulties in doing so, as being stated in the 129th verse from al-Nisa':

*“And you will never be able to be equal [in feeling] between wives, even if you should strive [to do so]. So do not incline completely [toward one] and leave another hanging. And if you amend [your affairs] and fear Allah - then indeed, Allah is ever Forgiving and Merciful.”*

al-Nisa' (4): 129

This verse actually touched upon the absolute and perfect justice among all wives, which is certainly hard to be attained due to the different inclination of love and sexual attractions of a husband on his wives. According to Khallaf and Qaradawi, the inclination of heart that is impossible to be equal, is being forgiven, as Allah doesn't



count for anything that is beyond the ability of humankind (Khallaf, 1990).

This provision and limitation of polygamy in Islam is a better approach if to be compared with the practice in the West where women are free to have sexual relations with any man without any restriction. It is in common with the practices in some Far East countries where the practice of keeping concubine is considered as legal as well as the normative relationships outside marriage. According to the polygamy provision in Islam, women and children enjoy the same rights as being enjoyed by women in western or eastern countries. Moreover the dignity and modesty of women are preserved in the ideal society of Islam, although in the real practice the situations are different. In reality, there are serious problems in the practice of polygamy among Muslims such as the abandon of the wives' daily necessities (*nafkah*) and also mental as well as physical abuses, which are in contradictory with religious teachings, and the values in Muslim societies. In fact, not all Muslims prone to practice polygamy due to the difficult conditions that needs to be satisfied. Hence, to fully dismiss this provision is not in accordance with the higher objectives of Shari'ah that aims to preserve social justice.

According to I. Doi, Muslims scholars had listed some tight conditions for someone to be involved in the practice of polygamy such as (I.Do, 1992):

- 1) Man need to possess financial stability in order to support the necessities of his new wives.
- 2) Man need to be just to all his wives and children in every aspect regarding the material, physical, physiology, psychology, and spirituality.

Notwithstanding, there are several benefits pertaining to the practice of polygamy that are being denied by the feminist that are:

- 1) Islam prohibits adultery that will ruin the family lineage and the dignity of women. In the same time, it promotes alternatives relationship that will be able to bring peace to human heart and mind, which is the marriage as well as polygamy. The prohibition of polygamy is a cruelty to men and women that may cause adultery eventually become normative in a society (Sayyid Jum'ah Sallam, 2007).
- 2) There are biological differences between man and woman that mainly relate to the sexual interest and ability. Man's sexual ability is usually consistence throughout his lifetime, whereas woman's ability is restricted either due to her monthly menstrual period, after pregnancy period, or her menopause. The prohibition of polygamy may cause man to involve in adultery.
- 3) Woman may suffer from sickness, impotency or disability to give birth. All these refrain man from having his own children to maintain and expand his family lineage. In this situation, polygamy is crucial.
- 4) Marriage is not merely the fulfillment of sexual need, but more imperative is it provides protection to women and children. This is crucial especially in the period of war, in order to protect widows and orphans.
- 5) In the preservation of progeny, polygamy play important roles in protecting the clear lineage of certain family structure, whereas polyandry ruins those lineages due to the mixture of seeds.
- 6) Polygamy is not an obligation but it is a permission in order to overcome certain difficult situations. This doesn't mean that men are free to involve in polygamy due to its tight requirements and difficult conditions. In reality, most of the Muslims practice monogamy rather than polygamy due to the sufficiency to live with a single wife as well as the difficulty to be equal and just among wives.

Among the earliest movements to restrict the practice of polygamy was initiated by Muhammad Abduh in 1899 which later being continued by his disciples, Rasyid Rida and Qasim Amin (Saqar, 1990). In his Tafsir al-Manar, Ridha stressed that polygamy is forbidden if there are harm and destructions resulting from its practises. According to him, government has its right in preventing this practice

(‘Abduh & Rida, 1947). Shahrur, on the other hand restricted the practice of polygamy only to the marriage with widows that have children and those second wives don't possess any right on inheritants (Shahrur, 2000).

In contemporary laws pertaining to polygamy, permission from the existing wife and physical and material abilities are compulsory. There are some Muslim countries that fully forbid this practice (Mulia, 2008) such as Tunisia in Majallah al-Ahwal al-Syakhsyah (personal status), Number. 66 Year 1956 (pindaan 1959, 1964, 1981 and 1993) and Turkey through its Turkey's Civil Law Year 1926 (Abdullah, 2006).

In spite of that, polygamy is not compulsory in Islam, and there is no encouragements for Muslim in doing so. While the ideal marriage in Islam is monogamy, Islam puts tight conditions for the practice of polygamy, which is justice (Nasution, 2009). The meaning of justice in this context is not merely equality, but the wisdom to put something in its proper place. This includes all the necessities such as foods, clothes, and accommodations.

Relating to this, the writer asserts that there is no element of gender bias in the practice of polygamy. Otherwise, it must be perceived as an alternative or solution for some sort of social problems that vary from one person to the other.

The prevention of this practice will eventually result to adultery, which is totally prohibited in Islam. The injustice on women that involve in polygamy on the other hand, is not originated from the teaching of Islam but mostly from the local practices or traditions. In some extent, it is actually a deviant act that is apposing to both religious and traditions values. Therefore, Muslim feminists shouldn't blindly imitate Western paradigm that try to promote gender equality, but in the same time tend to close the entire medium for women to enjoy legitimate sexual relationships that may produce them good family lineage. There is of women in the West that perceives sexual freedom, as the illustration of self-expression will eventually ruin the dignity of all women. This could be seen in the phenomena of interchangeable of sexual partner, pregnancy outside marriage, and man and woman living together without any legitimate relationships that eventually resulted to the birth of illegitimate children. It is among the beauty of Islam to put the provision of polygamy in order to solve social problems. Although it is not an obligation, it offers an alternative solution for such problems with tight requirement, which is justice.

## 11. Conclusion

The field of Islamic research is dynamic and able to adapt its mechanism with the contemporary trends. This adaptive ability could be seen in the efforts took by the classical and contemporary scholars and jurists in integrating various disciplines of knowledge and developing the efficient methodology of Islamic jurisprudence. This is imperative in order to ascertain rulings that are being concluded base on such methodology may offer effective solutions to the problems in society and in order to attain the higher objective of Shariah.

In conjunction to that, the integration of social science's research methodologies with Islamic jurisprudence is a crucial step that needs to be taken into consideration nowadays. This is due to the complexity that recently emerges in societies in contemporary time, as the result of developments in the field of science, technologies, and communication. These complex situations are difficult to be understood and require strategic and efficient method of research. Notwithstanding, Islamic scholars stressed upon the inaccuracy in applying western sociological research approach to analyse Muslim's societies as those sociological methods and theories are underlied by western philosophical, cultural, and religious basis that are not in consistency with Islamic principles and values.

There are exhaustive efforts that were been taken by Muslim contemporary scholars to reformulate Islamic methodologies in social research that suit the Islamic principles and its core values. Gender analysis is among social research methodologies that should be taken in consideration and applied in the field of Islamic law and jurisprudence. This is due to the existence of gender issues in this field of knowledge that often trigger polemics and hot intellectual debates. This kind of issues is also being focused and used by the Muslim modern and post-modern feminist thinkers in order to harshly criticize the Islamic classical heritage of knowledge traditions that are often being accused by negative labels.

Therefore, a systematic approach of research methodologies is a crucial need in analysing gender issues in the discourse of Islamic jurisprudence. However, as being stated before, this kind of research methodology that originated from Western tradition need some effort of reformulation in order to meet the Islamic core values and principles in term of its findings and solutions offers.

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