



MARRIAGE IN ISLAM AND THE PROBLEM OF GENDER EQUALITY: A PHILOSOPHICAL PERSPECTIVE

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Abstract: Marriage law in Islamic countries is still considered gender-biased. Indonesia, as the majority Muslim country, is not exception. Marriage Law No. 1/1974 and the Compilation of Islamic Law (*Kompilasi Hukum Islam/KHI*) are two examples of Muslim family law where discrimination against women persist. This paper will discuss the problem of gender biases in the Islamic marriage law in Indonesia, the imperative of gender-sensitive law reform, and the implementation of the principle of *maslaha* as solution. It sheds lights on such biases and offer alternative perspectives, as these are advocated by Muslim reformers. This study argues that it is necessary to reform the Islamic marriage laws, which are gender sensitives, by removing discriminatory clauses. The reform is meant to realize *maslaha* (well-being/welfare) and is based on the implementation of the highest objective of Islamic law, formulated as *maqāshid al-shari‘a*. These include preservation of religion (*hifz al-dīn*), mind (*hifz al-‘aql*), soul (*hifz al-nafs*), wealth (*hifz al-mal*), and descendants (*hifz al-nasl*).

Keywords: marriage law, Compilation of Islamic law, gender equality, *maslaha*, reform

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Introduction

ISLAMIC MARRIAGE LAW is a law governing marriage, personal status and family matters that apply in Muslim countries, including Indonesia. Muslims consider faithfully that marriage in Islam is a sacred covenant as part of religious duty (*ibada*). It is therefore subject to be bound by religious laws. The Indonesian

government has enacted codes concerning marriage, such as Compilation of Islamic Law (*Kompilasi Hukum Islam*/KHI).¹ This code has become a reference by religious court judges, functionaries of the Offices for Religious Affairs, and Muslims in general regarding marriage (*nikāh*), divorce/repudiation (*talāq*), and inheritance (*mawārith*). Compilation of Islamic Law adopts various Islamic schools of legal thought (*madhhab*) and was composed by many parties, including Muslim religious scholars (*ulama*), practitioners of law and academicians as part of their *ijtihad* (struggle to settle legal problems) to reformulate Islamic family law code that fits to the Muslim lifes in Indonesia. The code is recognized as a positive law.² Thus, the state has given considerable attention in family law issues, which has feature Indonesian values.³

However, critics arise as these laws are seen to have contained prescriptions that are insensitive to women and gender issues. Polygamy is one glaring example here. It is considered as one source of discrimination, human right violation, and degradation of Muslim women.⁴ Other similar biases still persist on the code as well as *fiqh* and their practice at large in society. Muslim scholars advocate gender equality from an Islamic perspective.⁵ They have played important roles in reinterpreting Islamic law and in promoting equal position of men and women.

¹ Abdurrachman, *Kompilasi Hukum Islam di Indonesia* (Jakarta: Akademika Pressindo, 1992).

² Some view Compilation of Islamic Law as elitist, since it is a product of views espoused by Religious Court judges, intellectuals, and “ivory tower” academician. Therefore, KHI represents modernist views that are capable of responding to social changes. See Saiful Ibad and Rasito, “Respon Kyai Pesantren Terhadap Materi Kompilasi Hukum Islam di Indonesia,” *Jurnal Kontekstualitas* 21, no. 1 (2006): 99.

³ As comparison, read M.B. Hooker, *Islam Mazhab Indonesia: Fatwa-Fatwa Dan Peruahan Sosial*, trans. Idin Rosyidin Hasan (Jakarta: Teraju Mizan, 2002).

⁴ As comparison, see Baouthania Shaaban, “The Muted Voices of Women Interpreters,” in *Faith and Freedom: Women Human’s Rights in the Moslem World*, ed. Mahnaz Afkhami (Syracuse: Syracuse University Press, 1995), 65.

⁵ Among active and enthusiastic women writers are Fatima Mernissi, *The Veil and the Male Elite: a Feminist Interpretation of Women’s Rigths in Islam*, and Amina Wadud, *Qur'an and Women* (Kuala Lumpur: Fajar Bakti, 1992).

This research aims at investigating gender biases in Islamic marriage.⁶ The term 'marriage' which is investigated here includes not only registered marriage, but also unrecorded (*sirri*) marriage, and contract marriage which bring about women's vulnerability. These various practices of marriages are indeed known in Indonesian society and cause social problems.

This paper argues that marriage stability for the sake of the couple harmony must consider not only theology and Islamic law but also gender justice.⁷ It further maintains that marriage in Islam should be seen as institution where welfare and the principle of Islamic law can be achieved. Since gender biases in the provision of Islamic legal interpretations, both traditional and contemporary, still exist, as it will be described throughout this paper, they should be reformed through a systematic effort to eradicate biases and to safeguard women against discrimination.⁸

Islamic Marriage and gender biases

A gender-sensitive marriage has several characteristics, such as putting forward the values of equality between husband and wife in quantitative and qualitative measures. Equality here could be manifested in a just and fair division, whether in domestic tasks, child nurturing, the responsibility of livelihood, and the like. There are many differences in opinion amongst Muslim religious scholars—either the pre-modern (*salaf*) ones or the contemporary (*khalaf*) ones. The differences lie on such wide ranges as witness, guardian rights, dowry, *talāq* rights, and so forth. Each scholar has their own arguments and method.

The diversity of arguments here is reasonable, since the details for provision of the laws are up to the intellectual reasoning of the

⁶ Gender is a term used to depict the differentiation between men and women socially. The differences of functions and roles between men and women are not determined by biological or natural differences, but by the position, function, and roles of each person in all ways of life and development. See Suzanne J. Kessler and Wendy McKenna, *Gender: An Ethnomethodological Approach* (New York: John Wiley and Sons, 1997), 154.

⁷ Musdah Mulia, *Kemuliaan Perempuan dalam Islam* (Jakarta: Megawati Institute, 2014), 49, 67.

⁸ Masdar Farid Masudi, *Islam dan Hak-Hak Reproduksi Kaum Perempuan* (Bandung: Mizan, 1999), 13.

respective scholars. Therefore, the differences emerge because of a scientifically-accepted reason. However, since the patriarchal system of Arabian society served as background of their *ijtihad*, then this shaped greatly their view on gender and women's status.⁹

Compilation of Islamic Law as positive law in Indonesia which regulates Muslim marriage reflects the efforts of contemporary Indonesian Muslim scholars to respond such issues. Women's rights become focus of attention, placing them on the perspective of gender equality, even though the biases remain in many ways. But this is a step forward for the betterment compared to the conventional Islamic law. The earlier books of *fiqh* still leave gender biases. Women have become a subject with limited roles and rights. The rights of seeking divorce, proposing marriage, acting on family problems, and many others are the fields where discriminatory exist and the high objective of Islamic law (*al-maqāṣid al-ahkām al-shar'iyyah*) is not fully implemented.¹⁰

Such biased is rooted in literal understanding of Islamic legal texts. In some narrations, for example, it is said that women cannot become leaders. They have to submit themselves completely to their husband. Furthermore, their witnesses are worth half of those of men and their inheritance share as daughter amounts half of those given to son. In terms of conjugal relation, they should ask their husbands for permission to travel, they should submit to the sexual needs of their husbands.¹¹ The texts place women as subordinates to men. Certainly, because of these texts, socio-political and cultural implications are formed against women, even if the texts are carefully and critically examined by referring to their social contexts.

The sources of social inequality between men and women in the realm of marriage are rooted in Islamic legal interpretation,

⁹ Compare with Nasaruddin Umar, *Argumen Kesetaraan Jender* (Jakarta: Paramadina, 2001).

¹⁰ About the concept of *al-maqāṣid al-ahkām al-shar'iyyah* see Abū Iṣhāq Ibrāhīm ibn Mūsā al-Ḥarṣanī al-Shāṭibī, *al-Muwaṭṭa fī Uṣūl al-Shari'ah*, vol. 2 (Beirut: Dār al-Ma'rifah, n.d.), 3, 16–17.

¹¹ 'Abd al-Rahmān al-Jazīrī, *Al-Fiqh alā al-Madhbāh al-Arba'ah*, vol. 4 (Beirut: Dār al-Fikr, n.d.), 4, 9 23.

such as the definition of marriage as '*aqd al-tamlīk* (contract of ownership), marriage as *ibādah*, and the concept of custody rights of the father. In this ownership contract, the wife is considered as "property" that could be used and commanded by her husband's wishes. This kind of definition results in the weakness of the position of the wife, and renders her wife susceptible to abuse.¹² The similar criticism is also applied to the concept of guardian right of the biological father which is permanent or irrevocable, even though he never takes care or maintains full responsibility of the children. According to Muslim reformers, these stipulations might create gender inequality in marriage.

Modern reforms of Islamic law have changed the concept of relationship between men and women. Women have taken steps of equality, defended by gender advocates, and concepts of gender mainstreaming. In fact, Indonesian government since mid-New Order era has established Ministry of Women Affairs whose main duties and functions are taking care of women's issues. This effort shows the collective consciousness of women rights and the importance position that women should take in the development of society and country.

In educational institutions, the thought of gender equality also thrives. This movement gives birth to the campus policy of establishing Center of Gender Studies that has the duty of designing, developing, and spreading gender awareness. Gender studies have also been themes of bachelor's degree final projects, theses, and dissertations. Books and journal publications on this topic as well as mass and electronic media follow the trend in gender mainstreaming. This massive movement takes a long time to achieve significant success in practical level, principally in marriage issues.¹³

¹² Compare with Musdah Mulia, "Menuju Undang-Undang Perkawinan yang Adil," in *Amandemen Undang-Undang Perkawinan dan Keluarga untuk Melindungi Hak-Hak Perempuan dan Anak* (presented at the Amandemen Undang-Undang Perkawinan dan Keluarga untuk Melindungi Hak-Hak Perempuan dan Anak, Yogyakarta: PSW UIN Yogyakarta, 2006).

¹³ Compare with the work of Budhy Munawar Rahman, "Penafsiran Islam Liberal atas Isu-Isu Gender dan Feminisme," in *Rekonstruksi Metodologis Wacana Kesetaraan Gender dalam Islam* (Yogyakarta: Pustaka Pelajar, 2002).

The Concept and Problems of Marriage

The nature of marriage is highly and beautifully illustrated by Allah as a reunification of the true form of human origin, which is *nafs wāhida* (one persona)—as stated in QS 7: 189. Allah uses the term *nafs wāhida* because the term represents that marriage, in essence, is a unification of will, aspiration, and vision between men and women. Moreover, in the Quran (30: 21), it is also stated that the relation between true units, *min anfusikum*, as a form of unity at idealistic esoteric level with the praxical unity of marriage which is full of harmony and compassion. These ideals of marriage are only materialized if there is no feeling of domination of one party against another.¹⁴

However, the weakness of Islamic marriage largely lies on praxical stage.¹⁵ Even Muslims do not accept the concept of gender equality because the concept is considered as coming from Western culture. The ambiguity of this view perhaps could be the reason of the uneven practice of gender equality in Islamic society, including marriage. They perceive the concept of gender equality made a distant leap of thought. It is, so distant, perceived to be nearly crossing the line of Islamic tradition.¹⁶ Meanwhile other Muslims disagree. Even so, the differences do not erase the principles of justice which Islam should continue to advocate for the fair goodness to men/husbands and women/wives. There are at least six principles of gender equality-based marriage, namely gender equality (*al-musawah al-jins*), pluralism (*al-ta'addudiyah*), human rights (*huqūq al-insān*), democracy (*al-dimuqratiyah*), justice (*al-'adalah*), and nationalism (*al-wataniyyah*). The six principles are values that could lead to harmonious marriage within the definition of *mīthāqan ghaliẓan* (solid covenant).

Even the new elements that in previous *fiqh* are not present are added. This is done to make Islamic law concerning marriage

¹⁴ Amir Syarifuddin, *Hukum Perkawinan Islam di Indonesia: Antara Fiqih Munakahat dan Undang-Undang Perkawinan* (Jakarta: Prenada Media, 2006), 41.

¹⁵ Musdah Mulia, *Islam dan Inspirasi Kesetaraan Jender* (Yogyakarta: Kibar Press, 2007), 62–63.

¹⁶ Musdah Mulia, “Menju Hukum Perkawinan yang Adil: Memperdayakan Perempuan Indonesia,” in *Perempuan dan Hukum*, by Sulistyowati Irianto (Jakarta: Yayasan Obor Indonesia, 2008), 158.

more implementable and easily practiced.¹⁷ However, there are still some deficiencies and even considered as not gender-sensitive. The breakthroughs made by the Compilation of Islamic Law have in fact been progressive enough. For instance, the Compilation stated that the minimum age to marry for women is 16 years old and for men is 19 years old.¹⁸ This provision has never been explicitly stated in classical *fiqh*s. However, for some gender advocates, the age of 16 years old is still too young to marry. The age of 16 years old can still be classified in teenage years, in which women in this age should have the opportunities to raise their life quality with access to education and future careers. From the medical point of view, for instance, women at the age of 16 years old are considered vulnerable to sexually transmitted disease and cervical cancer, and marriage at this age can decrease health quality and death with delivering a baby.

It should be admitted that measurements regarding marriage age have no precedent in Islamic history. If the marriage between the Prophet Muhammad and Aisha is to be referred, it is unacceptable to modern standard, since the Prophet Muhammad married Aisha when she was 7 years old and had sex with her when she was 9 years old. The marriage was itself only proper for the standard of that time. In the opinion of Muslim jurists, this might only apply to the Prophet himself and should not be practiced by his followers. Muhammad Assad, for example, stated that child marriage had become a tradition in the Arab countries even though their government has banned it. This means that the practice of child marriage is not allowed legally by the government, but may continue unnoticed in society.¹⁹

Child marriage also happens in Indonesia. The age falsification and child trafficking often become the modus operandi of this marriage. The most striking and infamous example of child marriage in Indonesia is the case of marriage

¹⁷ Seyyed Amir Ali, *The Spirit of Islam: A History of Evolution and Ideal of Islam with a Life a Prophet* (India: Idarah al-Adabiyyah, 1978).

¹⁸ Abdurrachman, *Kompilasi Hukum Islam di Indonesia*.

¹⁹ Moslem Women's League, "An Islamic Perspective on Violence Against Women," 1995, accessed July 12, 2015, <http://www.mwlusa.org/topics/violence&harrassment/violence.html>.

between Syech Pujiono and Lutfiana, a girl aged 12 years old, in Semarang, Central Java. Pujiono who himself was on his fifties married Lutfiana by taking example of marriage between the Prophet Muhammad SAW and Aisha. These practices often refer to classical *fiqh* arguments. Included in the practices is *sirri* marriage practice which has increasingly become trend for public figures.

All of the practices disadvantage women and violate the principle of gender equality. Thus, gender bias often enters through marriage.²⁰ The data have shown that early marriages and gender bias cause divorce to be rampant and the divorce causes women and children to suffer. The Ministry of Religious Affairs recorded that there are approximately 200,000 divorce cases in Indonesia each year. The number is far higher than it was ten years ago, in which there were about 50,000 divorces occurring each year.²¹ The divorce itself has been variously attributed to financial, communication, family, and sexual problems, domestic abuse, problems in personality, dependence, expectation, and other problems. If the parties entering marriage are not mature enough, and if the marriage itself commences from gender bias, then there will be a great potential of those problems to grow and to cause divorce.

Unrecorded marriage, for example, can weaken women in legal, economic, and social aspects.²² Legally, women married in *sirri* have a weak legal status. If there are problems or divorce, for instance, they cannot pursue legal actions for her rights.²³ There is no legal protection that protects them since all things in the marriage are conducted without written document. Economically,

²⁰ Compare with Musdah Mulia, *Pandangan Islam tentang Poligami* (Jakarta: Lembaga Kajian Agama dan Jender, 1999).

²¹ www.arrohma.workcom, accessed on July 16th, 2015.

²² The works with social, economic, and cultural approaches on the effects of polygamy have been done. As a comparison, see International Commision of Jurist, *Sexual Orientation, Gender Identity and International Human Rights Law*-Practitioners Guid No. 4, Genewa, 2009, 52 and so forth

²³ See also the work of Mulia, *Pandangan Islam tentang Poligami*; Muhammad Alfatiq Surya dilaga, "Sejarah Poligami dalam Islam," *Musāwa Jurnal Studi Gender dan Islam* 1, no. 1 (March 2002).

women married in *sirri* are insecure, since there is no written agreement concerning the amount of income from their husband. Socially, women married in *sirri* have no freedom in socializing with others since they have been prejudiced by general public as mistresses. Moreover, they are not free to choose any social, political, and organizational involvement to express their right as free human. Therefore, the three dimensions are simultaneously attacking women married in *sirri*. This practice is an open secret in Indonesia. It is being advocated by women activists to be changed to contract marriage. With contract marriage, legal, social, and economic rights of women can be more guaranteed.

On the perspective of Marriage Law No. 1/1974, it is stated that marriage is "physical and emotional bonds between a man and a woman as a husband and a wife with the objective of starting a happy and everlasting family or household based on the belief in One Almighty God." Meanwhile in Compilation of Islamic Law, it is stated more specifically that marriage according to Islamic law is "*nikāh*, which is a very strong contract or *mīthāqan ghaliẓan* to obey the command of Allah, and in doing so one has conducted *ibādah* (observance).²⁴ The concept and definition above seem ideal, even though in practical stage had arisen many problems, such as gender equality issue.

The term *mīthāqan ghaliẓan* is taken from al-Qur'an surah al-Nisā (4: 21) which means "a solid agreement". Muslim scholars connect the term with surah al-Baqarah (2: 231), which stated that "A wife should be treated well, but if not, she should be divorced in good terms." From this verse it is evident that there are only two options for a husband: to live with his wife and treat her well, or to divorce her in good terms. There is no other option than those two. Thus, to live together with wife by making her suffer—either physically or emotionally—is not recognized in Islam, and a husband should choose between the two options.²⁵ Here, Sharia shows a strong stance, so that the husband might be responsible to his family in terms of treatment which is just, compassionate,

²⁴ See the work of Abdurrachman, *Kompilasi Hukum Islam di Indonesia*; Wantjik Saleh, *Hukum Perkawinan Indonesia* (Jakarta: Ghalia Indonesia, 1976).

²⁵ Mulia, *Pandangan Islam tentang Poligami*, 10.

nondiscriminatory, and not violating the principles of justice, either in domestic or public sector.

Furthermore, Article 2 of KHI which mentions *mīthāqan ghaliẓan* also confirms the “physical and emotional bonds” which is found in Article 1 of Marriage Law No. 1/1974. This understanding symbolizes that marriage is different from the civil agreement—as stated in Article 26 of Book of Civil Law, and also different from other civil engagements, but marriage is an agreement which bonds each parties partaking it physically and emotionally.²⁶ The concept of “physical and emotional being” itself reflects the absoluteness of a relationship which is full of responsibility, happiness, and harmony based on Islamic teachings. Therefore, if the marriage in Islam is called as *mīthāqan ghaliẓan* which means a very strong bond, then it has a very strong message, intrinsically or in its implication.

The principle, too, condemns *sirri* marriage practice or polygamy. Polygamy practice, which has become an open secret, is a source of gender inequality. In polygamy, there contains the potential of gender bias and places women into subhuman level. By this meaning, polygamy practice which is condemned is the one which is not based on a good will. The initial concept of polygamy—as practiced by Prophet Muhammad on early days of Islam—is not a form of marriage which depicts the domination and hegemony of men over women, but a marriage which has the same objective as monogamy marriage.²⁷ From the lens of the regulations of monogamic principle as stated in Marriage Law No. 1/1974, Article 3, Paragraph 1, it is stated that “in principle, a man should have one wife in marriage. A woman should have one husband,” while concerning the regulations of exception for a husband to have more than one wife, it is stated in Article 3, Paragraph 2 which states that “the Court could grant permit to a husband to have more than one wife if desired by parties concerned.” The requirements of having more than one wife is then regulated in Articles 4 and 5 of the Marriage Law.

²⁶ See the work of Syarifuddin, *Hukum Perkawinan Islam di Indonesia*, 40.

²⁷ Amina Wadud, *Al-Qur’ān wa al-Mar’ah: I’ādah Qira’āh al-Naṣ al-Qur’ān min Maṇzūr al-Nisā’ī* (Cairo: Maktabah Madbūlī, 2006), 218 and so forth.

The strict concept of polygamy is then sharpened again by the Counter Legal Draft/CLD of Compilation of Islamic Law as "not permitted, but it is better to practiceg contract marriage." Contract marriage according to the CLD gives more protection to women in terms of law, economy, and life insurance.²⁸ The liberal view of the CLD regarding contract marriage is so far not accepted by many. The CLD itself is never included in the priority of legal reform of Muslim family law because it is viewed as a very controversial issue.

The views of the importance of marriage-based gender equality have gained continuous support. A or non-governmental organization recently petitioned for judicial review to the Constitutional Court regarding the amendments of Marriage Law in terms of minimum age of marriage.²⁹ It is proposed that the minimum age for women to marry is 19 years old and for men is 21 years old. This minimum limit has a little difference with CLD proposal, which is 19 years old for both men and women. However, the Constitutional Court rejected the petition, since it is the People Representative Council or that should amend the law. The debates concerning the concept presented above reflected the collective conscience of the *ummah* regarding the gender equality principle in marriage.

Islamic Marriage Law Reform

Islamic law, including family law, reform is part of Islamic reform. The essence of reform itself is to find back *elan vitae* of Islamic teachings—including Islamic law—in modern civilization. Writers such as Muhammad Abduh, Jamaluddin Al-Afghani, Hassan Hanafi, Fazlur Rahman, Bassam Tibi, Muhammad Arkoun, Abdullah Ahmed an-Naim and his teacher, and many others are thinkers who voice firmly the necessity of reinterpretation of Islamic teachings.

They formulate new methodology to reunderstand legal norms in the main Islamic scriptures, such as the Qur'an and the

²⁸ Mulia, "Menuju Hukum Perkawinan yang Adil: Memperdayakan Perempuan Indonesia," 3, 4, and 7.

²⁹ *Kompas*, June 29, 2015.

Prophet Tradition. New method and interpretative devices, such as hermeneutics, the theory of double movement, the theory of limit, Sharia evolution, were introduced born. Ahmad Muhammad Thaha, Abdullah Ahmed an-Naim, Muhammad Shahrur, Khaled Abou El Walid—to say the least—are very creative figures who propose new and unique methods.³⁰ This then results in new breakthroughs in basic concepts concerning Islamic law.³¹

Abdullah Ahmed an-Naim and his teacher formulated Sharia evolution theory in making law breakthrough. They theorize that the Sharia law has to be evolutionary, meaning that it should be understood as an evolutionary process which happens from Mecca values to Madina values. The Mecca period, according to them, is a very universal period, in terms of the verses revealed and the moral meaning. Therefore, *makki* verses, or Meccan verses, should be taken as references to modern world, since they have general and universal meaning. It is different with *madani* verses which are specific in nature. Therefore, according to this theory, the meaning should move from specific or particular meaning, to universal meaning.

On the other way, Muhammad Shahrur uses hermeneutics method by reinterpreting messages, words, or terms in al-Qur'an to define legal formulations.³² By this way, the messages of words in al-Qur'an do not recognize synonymity. With this method, Shahrur obtains legal conclusion approaching gender equality. Shahrur defines the word *walad* as "children, son or daughter". The word *walad* surely has a different meaning than the word *dhakar*, and therefore Shahrur concluded that the part of inheritance between sons and daughters could have an equal amount.

Khaled also cultivates gender-sensitive thinking. Khaled, for instance, stated firmly that critical thinking should be directed to

³⁰ As a comparison, see the work of Khaled Abou El Fadl, *Atas Nama Tuhan: Dari Fikih Otoriter ke Fikih Otoritatif*, trans. R Cecep Lukman Yasin (Jakarta: Serambi, 2004).

³¹ Ibid., 301.

³² See the work of Muhammad Shahrur, *Al-Kitāb Wa Al-Qur'ān: Qirā'ah Mu'āshirah* (Beirut: Sharikah al-Maṭbu'ah li Tawzi wa al-Nashr, 1992), 605–606.

gender-insensitive arguments. He used critical reasoning, for example, to *hadīth* which undermines women. Speaking in terms of a *hadīth* concerning the obligation of wife in fulfilling her husband's sexual desires, and that in not doing so will cause her to be condemned by the angels, he said that the *hadīth* itself is illogical. He argued that angels are not creatures having any interest in human sexual affairs, so that they should not be mentioned just to frighten wives.

In some Muslim countries, such as Egypt, Morocco, Tunisia, and Indonesia, the demands of gender equality to be included in law have appeared.³³ In Indonesia, criticism on Islamic Marriage Law No. 1/1974 has happened for a long time. The Marriage Law is considered to contain much gender bias.³⁴ The Compilation of Islamic Law which serves as an improvement for the Muslim Marriage Law is still considered not totally representing gender justice. The most crucial regulations to realize gender justice are Article 31, Paragraph 3 and Article 34, Paragraphs 1 and 3 of Marriage Law. In the regulations, it is visible that the making of Marriage Law was very ambivalent and gender-biased in nature in determining roles and functions of women and men in a family. The ambivalence, on one hand, states that the position of women and men are equal in household life and society. The Law, on the other hand, also rigidly specifies their roles in family: men as the head of households and women as wives.

The roles are firmly stated in Article 34, Paragraph 1, which states that a husband is obliged to provide income to his wife, and a wife is obliged to take care of the household. Nursyahbani Katjasungkana, an activists, sees that this provision will have further result in terms of salary payment. Men are paid more than women because of the existence of family allowance component, while women have always been considered as single even though

³³ Daniel Pipes, *In the Path of God: Islam and the Political Power* (New York: Basic Books, 1983), 177.

³⁴ For a comparison, see the work of Hussein Muhammad, "Pandangan Islam Untuk Seksualitas," in *Gender and Islam* (presented at the Gender and Islam, Surabaya, 2004) and Mansour Fakih, "Posisi Kaum Perempuan dalam Islam: Tinjauan Analisis Gender," in *Membincangkan Feminisme* (Surabaya: Risalah Gusti, 1996).

they in fact have been married and have children. The regulation which is not less important to be reconsidered is that concerning the position of children in family. Articles 42 and 43 of Marriage Law specify that legitimate children are children born in a legal marriage, while children born in illegal marriage only have legal relation with their mothers and their mother's families. These regulations are very discriminating in terms of the interest of children, and also put heavy burden on women.³⁵ It is given that there is no clear definition of legal marriage in this context, let alone be associated with Article 2.

Furthermore, the aspects which are criticized and still need to be improved in realizing gender equality are issues of dowry, marriage guardianship, *khijbah*, the division of inheritance, will, clothes or *hijab*, family rights, divorce and repudiation, leadership, and polygamy. Some of those aspects have been discussed above. They are often considered by gender advocates as the door leading to gender inequality. Many writers also raise the themes to describe how gender equality could be started by reinterpreting verses in smart and modern manner. Muhammad Shahrur, Khaled Abou El Fadl, and many others discussed the aspects in a critical perspective by using hermeneutics method and sociological approach. Even, to achieve sophisticated discussion, they start it by critically investigating old views which have been well established. Shahrur, for example, firstly defines the meaning of the Qur'an, *al-Kitāb*, al-Sunna, and others. Philosophically and methodologically, Shahrur leads his audience to reach a logical, qualitative conclusion which seems relevant with Islamic thought of life.

To reach logical conclusion, they use reliable and contemporary methods. The methods are hermeneutics,³⁶ semiotics, literary criticism, al-Qur'an language criticism, historical approach, sociological-anthropological approach, psychological

³⁵ Mulia, "Menuju Undang-Undang Perkawinan yang Adil."

³⁶ Hermeneutics in law context of WORK L. A. Hart as quoted by Bassam Tibi who claimed that legal texts must be viewed as "open textures", a written norm structure but open for interpretations. See the work of Bassam Tibi, *Islam and the Cultural Accommodation of Social Changes* (Oxford: Westview Press, 1991), 70.

approach, just to mention ones. Of course, the approaches are very scientific and they have fulfilled academic requirements. These approaches are also unknown before, in the era of companion and classical Islamic periods. These efforts are similar to the efforts of the founders of schools of thought who, before building theirs, define rules and convention as a way of decision or legal conclusion making. Al-Shāfi'i, for example, made a set of tool for *ijtihad*. The famous book considered as the first important works in Islamic legal logics is *al-Risālah*. This book contains rules of law or theories of law which eased al-Shāfi'i and his followers to declare a *fatwa* or legal formulation.

In the context of Islamic marriage law in Indonesia, sociological debates have long appeared in the society. The feeling of justice and knowledge of society concerning their rights have risen. Besides, gender equality movement in universities, city elites, to the villagers caused by mass and electronic media open the eyes of everyone to obtain justice.³⁷ It is here that the function of *ijmā'* will begin to happen through legislations by the government. It starts from the reform of thinking then leads to the collective consciousness to be realized in the form of binding legislations or government regulations. Here, the participation of community groups is very important to determine shared thoughts which concern the Islamic marriage law and the relation between the said law and non-Moslem marriage law.

Criticisms regarding articles in Marriage Law No. 1/1974 and the Compilation are the response of improvement to reach the gender equality. Islamic law is a law which is made for the benefit of *ummah*. If the benefit of *ummah* changes then the meaning of Islamic law has to be reinterpreted to fulfill the desire of justice, which also changes. The concepts of *maṣlaḥa* (benefit) and *al-maqāṣid al-ahkām al-shar'iyya* could be good methods of reinterpretation in addition to other methods.³⁸

³⁷ See the work of Ziba Mir-Hosseini, "Gender Rights and Islamic Law: New Horizons" (presented at the International Conference on Islam, Women, and the New World Order, Yogyakarta: Pusat Studi Wanita, 2005), 5–6 and so forth.

³⁸ Henry Laoust very much adored the theory of *maṣlaḥah* and *al-maqāṣid al-ahkām al-shar'iyyah* as the wealth of Moslem civilization. He claimed that the principle or the theory is a notion that makes the theory of Islamic Law is more

In the perspective of *maṣlaḥa* and *al-maqāṣid al-ahkām al-shar'iyyah*, new elements can be accommodated. The principle of the concept of *al-maqāṣid al-ahkām al-shar'iyyah* is the preservation of five aspects, preservation of religion (*hifz al-dīn*), brain/reason (*hifz al-'aql*), soul (*hifz al-nafs*), wealth (*hifz al-māl*), and descendants (*hifz al-nasl*).³⁹ These concepts have been agreed by all schools of thought and can be called as very universal. Therefore, amendments to legal regulations are very possible, as long as it can meet the preservation of those aspects. All things that can preserve the five aspects are compulsory. On the contrary, all things that can corrupt such aspects are forbidden. The five basic aspects are the keywords to how amendments to Islamic marriage law should be conducted.

Indeed, some debates still happen regarding the concepts of *maṣlaḥa* and *al-maqāṣid al-ahkām al-shar'iyyah* which question whether the concepts should be placed within the corridor of Sharia or could be placed outside the arguments found in Sharia. It means that the *maṣlaḥa* could be referred to as a source of law, as long as it does not contradict the arguments of Sharia.⁴⁰ However, the moderate opinions choose to put primacy to the *maṣlaḥa* of *ummah* (people), even though it is considered contradicting Sharia.⁴¹ According to this view, the law of Allah is not for His own interests but for the interests of human. This opinion legalizes that the objective of Sharia is the most important of all.

It is this kind of thinking that is practiced by contemporary Muslim reformers, such as Mahmud Muhammad Thaha, Abdullah Ahmed an-Naim, Shahrur, Khaled Abou El Fadl, just to mention

sophisticated than that of Christian Law. Because of this principle, Islam has a sophisticated awareness of reality than Christian. Quoted from the work of Muhammad Khalid Mas'ud, *Islamic Legal Theory: A Study of Abu Ishaq Al-Shatibi's Life and Thought* (Islamabad: Islamic Research Institute, 1977), 98.

³⁹ al-Shāṭibī, *al-Muwāfaqāt fī Usūl al-Shari'ah*, 2:13–14.

⁴⁰ This argument is supported by that of al-Ghazālī. See the work of Abū Hāmid Muḥammad ibn Muḥammad al-Ghazālī, *Al-Muṭashfā*, vol. 2 (Bagdad: Muthanna, 1971), 286–287; the work of Raghib al-İsfahānī, *al-Mufradāt fī Gharib al-Qur'ān* (Karachi: Tijarat al-Kutub, 1961), 286.

⁴¹ This argument is supported by that of Najmuddīn al-Ṭūfī. See the work of Muṣṭafā Zayd, *Al-Maṣlaḥah fī Tashrī' al-Islāmī wa Najmuddīn al-Ṭūfī* (Beirut: Dār al-Fikr, 1956), 133.

some. They seek the benefits as the focus. If it contradicts Sharia arguments they reinterpret the meaning through hermeneutics, semiotics, literary criticism, Sharia evolution, *nasakh mansūkh* (*abrogation*), and more. By this way the arguments which seem contradict each other could be compromised scientifically and reasonably. Their ways of working and thinking are backed up with the fact that Sharia verses have been stopped to be revealed since Muhammad SAW passed away, while legal events are still happening like geometrical progression. Contemporary issues such as human rights, democracy, gender equality, environmental crises, global partnership, and equitable development are issues that should be responded presently. In responding new issues, one needs new methods and breakthroughs.

The ways of work similar to the one practiced by the contemporary Muslim thinkers above is indeed not critics-free and is even considered very controversial. Those who disagree say that the intellectuals' movement is an effort to desacralize Islam. Desacralization is a term to point that religion is not sacred anymore and solely ordinary, should not be worshipped and could be criticized like the results of human thought. Therefore, in the movement of desacralization, the critic goes to say, there is an implicit meaning and a real effort to relativize all values. Whereas, according to them, Islam is the religion of Allah, could not be wrong and always right all the time. Of course this opinion is considered by some as unrealistic. Should not the Sharia be read with sense by people who are honest, intelligent, and real on this earth? Are not the social changes the work of God Himself and human asked to improve themselves year by year? To read the social reality is to read the laws of change and reform. This is the *Sunnah* of Allah and the regulation of Allah. Therefore, the responses should be always new, by exploring new meanings of Sharia with paying attention to the benefits and Sharia law objectives.

Conclusion

The Islamic marriage law as discussed in this paper is relatively still not gender-sensitive. It is shown by the evidence of ambivalent articles. The articles in the Marriage Law and the

Compilation are still bound to old interpretation works and not yet breaking through new dimensions. If observed from gender equality perspective, the Marriage Law and the Compilation still need to be amended to grant justice to men and women alike. The articles concerning the concept of dowry, witness, trustee, *talāq* rights, *ruju'*, *khiyah*, polygamy, pregnancy outside marriage relationship, the minimum age to marriage, and inheritance are still not reflected gender equity.

Gender injustice may start from marital union. If the marriage itself commences from gender-biased regulations, it will cause the problems of gender injustice. It causes domination of men over women, injustice in women rights, injustice domestic task division, and the vulnerability of marriage to divorce which disadvantages wives more. Therefore, marriage is the first key of the family to set a common goal of gaining happiness in inner and outer selves based on gender equality (*mu'asharah, musawa*).

Amendments to the Marriage Law and the Compilation are made in accordance to the six principles, namely: gender justice, human rights, democracy, justice, and nationalism. The six principles and their correct implementation could guarantee the preservation of gender equality. Amendments in Islamic marriage law are fully justified and urgently needed. Changes in life and more democratic and open sets of values have forced each institution to change and regenerate—including marriage law.

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