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Patriarchal *Fiqh*, the Use of *Maqasid* and Gender Equality

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Fiqh can be said to be seen as a discipline of the Islamic sciences which has a close connection with the ritual-practices of Muslim people. This is because *fiqh* covers almost all important dimensions of human life, such as *ibada* (ritual), *mu'amala* (human relationship), *akhwal al-shakhsiyya* (personal law). The understanding that *fiqh* is similar to Islam and Islam is similar to *fiqh* is very common among ordinary Indonesian Muslims. They do not know the deeper meanings of Islam and of *fiqh*. In other words, some Indonesian Muslims just equate the meaning of Islam with the meaning of *fiqh*, even though both of them have different meanings. The consequence of this misunderstanding makes *fiqh* become static and incapable of change. Any efforts dedicated to reform the static situation of *fiqh* will be suspected as an effort to change Islam.

The *fiqh*-centred orientation of Indonesian Muslims on *fiqh* can be seen as evidence that the Islamness of Indonesian Muslims is *fiqh*-oriented. This is visible, for instance, in the extent to which Indonesian Muslims use and refer to the discourse of *fiqh* in everyday life. The mindedness of Indonesian Muslims on *fiqh* can be also seen in how they usually place the institutionalisation of *fiqh* in the structure of their respective Islamic organisations. Some Islamic organisations, such as Nahdlatul Ulama (NU: Awakening of Ulama), Muhammadiyah (Fellow of Muhammad), Persatuan Islam (Persis: Union of Islam), usually have a *fatwa* council. The establishment of a *fatwa* council indicates the importance of *fiqh*. Although the *fatwa* council can also respond to questions outside *fiqh*-related issues and problems, questions addressed by the general Muslim society to this council generally pertain to *fiqh*-related issues and problems. For example, the fatwa council of Nahdlatul Ulama, the largest Islamic organisation in the world, has a very strong and strategic position within this organisation. It has the special privilege to regularly hold *bahtsul masa'il* forum (forum on current issues and problems). In addition we can say that the essence of NU is the existence of *fatwa* council because it usually holds places for the senior members of NU ulamas.

Similarly to NU, the Muhammadiyah, the second largest Islamic organisation, also places Majlis Tarjih (the council of *tarjih*) with a very significant mandate. The function of this council is to respond to religious questions from members of Muhammadiyah which relate to current issues and problems occurring in the Muhammadiyah community and the wider community. It seems to me that other Muslim organisations in some other Muslim countries in Southeast Asia, even in countries with minority Muslim populations such as the Philippines and Thailand, place the fatwa council in a very important position. From this, it is understandable if the *fiqh*-minded becomes the label of Islamic religiosity among Indonesian Muslims in particular and Muslims in Southeast Asia in general.

Islamic reform movements in Indonesia, which started in the Nineteenth Century, disseminated ideas on *al-ruju ila al-Qur'an wa al-Sunna*, meaning to go back to the primary sources of Islam, the Qur'an and Sunna. However, such efforts have failed to remove the *fiqh* mindedness of Muslims in Indonesia. Islamic reform movements have not succeeded in their attempts to offer a shift in orientation, from *fiqh*-orientedness to a more Islam-centred orientation. This has been the case because Islamic reform movements did not give more concrete alternatives to meet the practical needs of Indonesian Muslims. The movements usually promote theological reform: this involves very sophisticated discourse, but does not enter the daily practices of Muslims. A similar situation also occurs with Islamic reform movements in other Muslim countries such as Saudi Arabia and Egypt.

Patriarchal *fiqh*?

What is patriarchal *fiqh*? What does it mean and when does it emerge? Patriarchal *fiqh* is like other *fiqh*, but it contains patriarchal tendencies. It can be stated simply that patriarchal *fiqh* is *fiqh* that does not support equality and justice between men and women. Patriarchal *fiqh* is *fiqh* that discriminates and subordinates women's rights to the interests of men. The awareness that *fiqh* has patriarchal tendencies —*fiqh al-abawy*, an Arabic term -- is quite new among Muslim peoples. Historical records show us that the establishment of *fiqh* is, initially, stipulated by the need of Muslim-human beings to understand the will of God (*taffaqu fi al-din*). It is also backgrounded by the need of Muslims to worship God. On the basis of this,

the creation of *fiqh* was originally not designed to marginalise and subordinate the position of women. This is part of the prophetic dimension of *fiqh*. However, patriarchal tendencies can arise occur in specific situations, including those when books of *fiqh* are written down by the ulamas of *fiqh*.

The emergence of Muslim's awareness regarding the patriarchal tendency of *fiqh* is underpinned at least by two factors. The first is the weakness and backwardness of Muslim women. This situation is not only detrimental for Muslim women themselves but also for Muslim men. If a nation that wants to develop and become powerful, that nation has to empower and strengthen the position and rights of its women. This is what Qasim Amin witnessed when visiting a number of modern countries in Europe. Qasim Amin sees direct correlations between the advancement of a nation and its respect for the rights and position of women, as seen in Europe. In other words, Qasim Amin believes that if we want advance in our nationhood, we have to strengthen women. Qasim Amin elaborated his thoughts and ideas in his two seminal books, *Tahrir al-Mar'a* and *Mar'atun Jadidatun*. Qasim Amin was arguably the most vocal Muslim intellectual in the struggle for the empowerment of women's rights in all aspects of life of human beings.¹

The second factor is the cultural-encounter between Islam and modernity. The new generation of Muslim intellectuals was aware that, as a monotheistic religion, Islam is a religion of justice and equality. No slavery and subordination of Muslim women is permitted. Women are human beings, just like men; men are human beings, just like women (*al-nisa' shaqa'iq al-rijal*). In stating this, Muhammad Abdu has started with *al-Manar*.² He introduces a new interpretation to some of the verses of the Qur'an related to rights and the position of women. The most outstanding interpretation of the Qur'an carried out by Abdu is that regarding the verse of al-Nisa, 1, which discusses the creation (genesis) of human beings. Abdu stated that this verse implies that the creation of human beings did not begin from Adam. The content of the term *nafsin wahida* is not Adam, but a single source. Most

¹ He wrote very famous books of reformation of women's rights and position in Muslim societies, such as *Tahrir al-Mar'a* and *Mar'atun Jadida*. See Muhammad Imara, Qasim Amin, *al-A'mal al-Kamila*, Cairo: Dar al-Sharuq, 1989. This is a very complete account on the thought of Qasim Amin.

² *Al-Manar* was written by Muhammad Abdu and Rashid Rida.

importantly, Abdu argued the interpretation that *nafsin wahida*, which has been understood by great ulamas in the past as Adam, is an influence from within *israilliyat* tradition, not from within Islamic tradition.

As previously stated, the establishment of *fiqh* is not intended to construct the patriarchalism of *fiqh*. However, the patriarchal tendency of *fiqh* is obviously presented in many *fiqh* books. There are some reasons why *fiqh* has a patriarchal tendency. First, *fiqh* is a discipline of Islamic science derived (*istinbat*) from the Qur'an and Sunna in which the language (Arabic) of both Islamic primary sources can be understood and interpreted within patriarchal-biased perception – especially among the ulamas of *fiqh*. The understanding and interpretation of al-Nisa, 34, *al-rijaalu qawwamuuna ala a-nisa...*, the men are leaders of women...introduced by ulamas of *fiqh*, clearly indicates the patriarchal tendency of *fiqh*. The majority ulamas of *fiqh* interpret and use this verse as justification (*dalil*) that women cannot lead the prayer for men, while this verse is nothing to do with men's leadership in prayer. With reference to this verse, some *fiqh* books just disallow women to become the *imam* for male fellows in *salat jama'a* (collective prayer).

The ulamas of *fiqh* did not try to present the reality occurring in the case of Umi Waraqa that she did as the leader of prayer (*imam*) while some adult men were the *ma'mum* of her prayer. The ulamas of *fiqh* just present a hadith saying "*la taumanna rajulun imra'atan.*" Another example is that regarding *nushuz* (wife's disobedience to the order of husband). The ulamas of *fiqh* act on the assumption that *nushuz* is only specific for women, while in fact the Qur'an mentions that men can also be judged as *nushuz*. Although al-Nisa, 128 speaks about men's possibility for being *nushuz*,³ but the *fiqh* books do not elaborate on this topic. If I am not mistaken, Ibn Rushd in *Bidayatul Mujtahid*, often claimed as the prototype of modern *fiqh*, does not dedicate attention to any discourse on men's *nushuz*. We can find many other examples of the patriarchal tendency of *fiqh* in the interpretation of the Qur'an and Sunna which is against the principle content of the Qur'an and Sunna; that being justice and equality.

³ "Wa inim ra'atun khafat min ba'liha nushuzan au I'radlan fa la junaha 'alaihima au yusliha bainahuma sulhan wa sulhu khair."

Second, the founders of *fiqh* are mostly male ulamas. It is believed that individual male subjectivity is influential in the process of creating *fiqh* narrations. Evidence of this can be found in many *fiqh* books as previously mentioned. To date, the existence of female ulamas of *fiqh* is recognised, but their roles and thoughts are not extensively elaborated upon in the *fiqh* books. This remains the case, despite the fact that some great ulamas of *fiqh* in the past, such as al-Shafii and Ibn Hajar al-Asqalani, recognised the teaching and guidance of their female teachers. In addition, they learned and studied Islam from these female teachers, but they did not seek to acknowledge their role. If we go back to the first generation of Islam, Ai'sha is the teacher of many of the prophet companions, but any expose on A'isha's capabilities as a female ulama is rarely found in the books of *fiqh*.

Although patriarchal tendencies do not belong exclusively to male ulamas, the patriarchal subjectivity of male ulamas is nonetheless very much evident in the content of *fiqh* books written by male ulamas of *fiqh*. Sayyid Abdurrahman ibn Muhammad, in *Bughyatul al-Mustarshidin*, for instance states “*wa man jalasa ma'a al-nisa' zada'a llahu al-jahla wa al-shahwa*”, “anyone who sits down together with women, God will give him/her more stupidity and uncontrolled desire.”⁴ This statement is indicative of the high content of patriarchalism found within the books of *fiqh* (*al-kutub al-fiqhiyya*). If we put this statement next to the Qur'an, this statement is actual fact very much against the just principle of the Qur'an and Sunna that gives men and women equal rights and positions as human beings.

Yet another statement declares that women are not given obligation, are even prohibited, to seek knowledge other than specific knowledge related to “religious obligations” (*al-wajibat*) such as knowledge on five daily prayers (*salat*), pilgrim (*hajj*) and fasting (*saum*). This statement is also not in compliance with the Qur'an and Sunna. The Qur'an and Sunna endorse women as similar to men in their freedom to seek any knowledge. The Prophet Muhammad said that “*talab al-ilmi faridatun 'ala kulli muslimin wa muslimatin*, seeking

4 Sayyid Abdurrahman ibn Muhammad ibn Husain ibn Umar, *Bughyat al-Mustarshidin fi Talkhis Fatawa Ba'd al-A'imma min al-Ulama al-Muta'akhirin*, Bandung: Shirkah Ma'arif, p. 5. This is quoted by Sayyid Abdurrahman from Bujairimi ala al-Iqna, one of most highly-considered *fiqh* books among ulamas in Indonesia. The *Bughyal al-Mustarshidin* has become a famous reference for pesantren ulamas and students in Indonesia.

knowledge is obligation for Muslim men and women.” We can find many other examples of patriarchal tendencies within the books of *fiqh*.

The third patriarchal tendency of *fiqh* is evident in the model of transmission and dissemination of this field, both of which are dominated by male ulamas. This situation has further contributed to the formulation of more patriarchal tendencies within *fiqh*.⁵ Fourth, the socio-political and cultural structures of society in the past when the *fiqh* was created were very patriarchal. This situation has influenced the construction of *fiqh*. As an Islamic science, the development of *fiqh* began in the Arab peninsula since the third generation after the death of the Prophet Muhammad. The socio-political and cultural structures of society in the region at that time and afterwards in general were very male biased. This situation has also contributed the establishment of patriarchal tendencies within *fiqh*.

Indonesian *fiqh*

It is well-known that many factors that characterize Indonesian Islam are different from those that characterize Islam in other places, including the Middle East. Historically speaking, Islam in Indonesia has not spread and been disseminated through violence (war and violence) Islam came to the Nusantara islands peacefully, through commerce and Sufism. Commerce and Sufism enables Islam to spread and to interact and negotiate with the myriad localities of the Nusantara islands. On the basis of this assumption, *fiqh* in Indonesia is also different from *fiqh* in Middle East, although Indonesian Muslims use similar references and books to those of Muslim peoples in the Middle East. The difference in the case of Indonesian *fiqh* from other other *fiqh*, if we can call it that, is its adaptation to the localities –culture and values— of Indonesia.

Since the 1980s, Indonesian ulamas and scholars have sought to develop what they call Indonesian *fiqh*. Abdurrahman Wahid (Gus Dur) introduced *pribumisasi Islam* (indigenisation of Islam), a concept that emphasises the need for Islam to be negotiated with Indonesia’s localities in which Indonesian Islam is practised. Munawwir Sadjali introduces the ‘reactualisation of Islam’, giving attention to the need for *fiqh* reform. The idea of the

⁵ Syafiq Hasyim, Hal-hal Yang Tak Terpikirkan Tentang Isu-isu Keperempuanan dalam Islam, Bandung: Mizan, 2001, p. 133.

reactualisation of Islam is underpinned by the situation which many women are family breadwinners but do not hold a strong position within the family. As breadwinners, women contribute the family income, but the rights of execution in the affairs of household do not belong to women, but rather to men as husbands and heads of family, even though the husband may well be unemployed.

On this basis, Islam has to be reactualised, especially regarding the sharing of inheritance. It seems to me that what is meant by reactualisation of Islam here is the reactualisation of *fiqh*, not of Islam. Munawwir suggested the “reinterpretation of inheritance-formula” for men and women, which the Qur’an textually states as being two for man and one for woman. In the modern context, wherein the division of labour and family responsibility is not strictly separated and divided, the 2:1 formula is no longer effective. The formula has to be reinterpreted in light of social justice. Wahid’s *pribumisasi Islam* and Sadjali’s *reaktualisasi Islam* are both examples of efforts to bring *maqasid* concept down to earth to the localities of Indonesia.

Apart from individual efforts, institutional efforts of creating Indonesian *fiqh* have also been initiated by the Ministry of Religious Affairs and by Majelis Ulama Indonesia (Indonesian Council of Ulama). Both drafted and proposed KHI (Kompilasi Hukum Islam: Compilation of Islamic Law) to the government of Indonesia in the era of Suharto. According to the Ministry of Religious Affairs and MUI, the KHI is the result of collective *ijtihad* of Indonesian ulamas to create *fiqh* which accommodates the numerous localities of Indonesian Muslims. They therefore claim that the KHI is Indonesian *fiqh*. One of Indonesia’s localities adapted in the KHI is provision on *harta gono-gini* (equal sharing of properties for men and women). However, if we look at the content of KHI as a whole, we can sense the taste of Arabic *fiqh*.

***Maqasid* and its use for gender equality**

Maqashid theory is not new within the tradition of *fiqh* and *usul al-fiqh*. For those who are familiar with the study of *fiqh* and *usul fiqh*, *maqasid* is extensively discussed. *Maqasid* literally means objectives, intentions, and goals. The ulamas of *fiqh* and *usul al-fiqh* define in

maqasid that the creation of shari'a (God's law) is to enforce *al-maslaha* (goodness) and to avoid *al-mafasid* (uselessness, badness) by providing protection for the five basic rights of human beings; *hifz al-din* (the protection of religion), *hifz al-hayat* (the protection of life), *hifz al-aql* (the protection of thought), *hifz al-mal* (the protection of property) and *hifz al-nasl* (the protection of generations. Yusuf Qaradawi adds one more objective: *hifz al-'irdi* (protection of human dignity). This kind of definition is clearly evident in a statement made by al-Gazali, “*lakinnana na'ni bi al-maslaha al-muhafaza ala a' maqsudi al-shaari' wa maqsudu al-shari' khamsatun wa huwa an yuhfiza alaihim dinuhum, wa nafsuhum, wa 'aqluhum, wa nasluhum, wa maluhum, fakullun ma yatadammanu hifza hadihi al-usul al-khamsa, fahuwa maslahatun, wa kullu ma yafutu hazihi al-usul fahuwa mafsadatun wa daf'uha maslahatun,*”, “what we mean by goodness here is to protect the original objective of the law Maker, and that the objective of law Makers are five, that: is to protect the religion (belief) of human beings, the life of human beings, human reason, the generation of human beings, and the property of human beings. Everything that maintains the protection of these five foundations is categorised as *maslaha*, and everything that rejects the protection of the five foundations is categorised as *mafsada* (badness); to avoid the *mafsada* is *maslaha* (goodness).”⁶

In the discourse of *usul fiqh*, the protection of five basic rights of human beings is called *al-daruriyyat al-khamsa*, meaning *five necessities* of human being. Then, the majority ulamas of *usul fiqh* agree that the five necessities are *maqasid al-shari'a*.

Historically, the early development of the *maqashid* concept can be traced from al-Juwaini (478 H). Juwaini was the first ulama to emphasise the importance of understanding *Maqasid* behind the establishment of shari'a.⁷ Al-Gazali (505 H) developed a more complete concept of *maqasid* as the foundation of creating *maslaha* (goodness) and avoiding *mafsada* (badness, uselessness). After al-Gazali, the *maqasid* concept is developed by others, such as Fahuuddin al-Razi (606 H), Saifuddin al-Amidi (631 H), al-Ij ibn Abd al-Salam (660 H), Shihab al-Din al-Qarafi (685 H), Najmuddin al-Tufi (716 H), Ibn Taimiyya (728 H), Ibn

⁶ Al-Gazali, *al-Mustashfa*, Vol. I. p. 286

⁷ Ismail al-Hasani, *Nazariyyatul Maqasid 'inda al-Imam Muhammad al-Tahir ibn 'Ashur*, Virginia: IIIT, 1995.

Qayyim al-Jauziyya (751 H), and al-Shatibi Abu Ishaq (790 H). Among theoreticians of the *maqasid* concept, al-Shatibi through his masterpiece, *al-Muwaqat fi Usul al-Shari'a*, is proclaimed as among the greatest of innovators in the discipline of *usul al-fiqh*. Ali Shami' Nishar describes al-Shatibi's work as the most complete paradigm of *usul al-fiqh*.⁸

Reformist Muslim thinkers have attempted to develop the *maqasid* concept as a basic paradigm for identifying compatibilities between the discourse and practice of human rights in Islam on one hand, and the discourse and practice of universal human rights on the other. According to these thinkers, the five necessities of *maqasid* are equivalent with the content of universal human rights. The reformist Muslim thinkers point out that the essence of the five necessities of *maqasid* is to establish justice and equality, an essence very similar to the objective of universal human rights.

Furthermore, what is very interesting with the *maqasid* concept is that shari'a is not only read and interpreted in the perception of textual and inter-textual approach only, but the *maqasid* concept can accommodate social, cultural and political reality as considerations for making sharia law. This differs from other methodologies of *ijtihad*, such as *Qiyas* that can only accommodate the judgments of textual and inter-textual approaches. On the basis of this, there are many current problematic issues that we can find the solution to if we use the *maqasid* concept. In short, the *maqasid* concept provides two important aspects of making shari'a law: the first is the textual inter-textual aspect; and the second is the social fact aspect. The definition of *maslaha* as the main intention of *maqasid* has also to be consulted in the contexts of the text and also of social fact. This means when we define what *maslaha* means, we have to consider both what the text is saying and what social reality is saying. In the perception of the *maslaha* concept we cannot only depend on the power of text and also cannot depend solely on the power of social fact.

However, it has to be recognised that the use of the *maqasid* concept as the methodology of *ijtihad (istinbat al-hukm)* is still very limited, if we compare it with the use of other

⁸ Ali Shami al-Nishar, *Manahij al-Bahthi inda Mufakkir al-Islam Iktishaf al-Manhaj al-'Ilmi fi al-Alam al-Islami*, Cairo: Dar al-Ma'arif, 1978, p. 82.

methodologies such as *ijma* (collective agreement) and *qiyas* (analogy). Nonetheless, in the context of Indonesia, the use of *maqasid* concept is gaining familiarity among progressive Muslim thinkers and activists. Those who are using the *maqasid* concept are for instance Muslim feminists. Muslim feminists in Indonesia such as KH. Hussein Muhammad, Nasaruddin Umar and other kiais use this concept because it offers more flexibility and space for negotiating between the divine texts and social reality. In their perception, the five necessities (*al-daruriyyat al-khamsa*) is the principle foundation that enables the process of making a dialogue between the message of the sacred text and the message of social reality.

At the end, I should say that the concept of *maqasid* is very much compatible with the principle value of gender justice and equality.