

Mainstreaming of Gender Equality in Islamic Family Law: Opportunities and Challenges

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Abstract

This study discusses the mainstreaming of gender equality in Islamic family law. As it is known, gender equality and Islamic law have axiological links in realizing family household that practices the universal values such as justice, literature, peace, love, compassion, etc. This research is a qualitative study with a gender perspective linked to Islamic law. The discussion showed that a number of opportunities were found as normatively affirmed in the Qur'an which has the same spirit as the mainstreaming of gender equality in Islamic family law. Likewise, legal rules such as the Compilation of Islamic Law and the development of Islamic studies caused the normative theological understanding to support gender equality. However, it cannot be denied that the understanding of theological texts has begun to erode in the context of the implementation of Islamic family law. For the challenges, there were several aspects that hinder the mainstreaming of gender equality in Islamic family law, namely marginalization of women, community stereotypes against women, subordination of women, double burden on women, and violence against women.

Keywords: gender equality, Islamic family law, opportunities and challenges

***Pengarusutamaan Kesetaraan Gender dalam Hukum Keluarga
Islam: Peluang dan Tantangan***

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Abstrak

Kajian ini membahas tentang pengarusutamaan kesetaraan gender dalam hukum keluarga Islam. Sebagaimana diketahui bahwa kesetaraan gender dan hukum Islam memiliki kaitan aksiologis dalam mewujudkan situasi rumah tangga keluarga yang kental dengan nilai-nilai universal seperti keadilan, sastra, perdamaian, cinta, kasih sayang, dan sejenisnya. Penelitian ini adalah kajian kualitatif dengan perspektif gender dihubungkan dengan hukum Islam. Pembahasan ini menunjukkan bahwa sejumlah peluang ditemukan sebagaimana ditegaskan secara normatif dalam al-Quran yang memiliki semangat yang sama dengan pengarusutamaan kesetaraan gender dalam hukum keluarga Islam. Demikian pula aturan hukum misalnya Kompilasi Hukum Islam dan perkembangan kajian keislaman yang telah berkembang sehingga pemahaman teologis normatif juga menunjukkan adanya dukungan kesetaraan gender. Namun tidak dapat disangkal bahwa pemahaman terhadap teks-teks yang bersifat teologis mulai terkikis dalam konteks penerapan atau aplikasi hukum keluarga Islam. Terkait dengan tantangan, terdapat beberapa aspek yang menjadi tantangan pengarusutamaan kesetaraan gender dalam hukum keluarga Islam dalam hal ini adalah marginalisasi perempuan, kebencian terhadap perempuan, subordinasi terhadap perempuan, beban ganda pada perempuan, dan kekerasan terhadap perempuan.

Kata Kunci: Kesetaraan gender, hukum keluarga Islam, peluang dan tantangan

Introduction

Nowadays, gender is one of the hot issues being discussed in line with the higher pressure of women position in the spectrum of patriarchal culture which justifies the hegemony of men against women. In its practical framework, this hegemony can be found in various spheres of life, from the very private domestic environment of the household to public spaces with a more open social scale. Even, the hegemony sometimes involves religious institutions as described by Anthony Synnott, a father of world spirituality who are as famous as St. Augustine, that the first sin came through women, the sin that brought death to all mankind.¹ It is not surprising that there were critics demanding gender equality between men and women. In fact, gender issues which should be voiced by women such as Jeannette Rankin Pickering, Golda Meir, Haideh Moghissi, Toety Heraty, Aquarini Priyatna Prabasmoro, Aminah Wadud, Musdah Mulia, etc were also sounded by men, for instance, Nasaruddin Umar, Husein Muhammad, and others. This proved that the issue of gender and equality is a common issue regardless of the gender categories.

Responding to the gender inequality that befell women, who are usually at the control of men, Asghar Ali Engineer argues that the hegemony of men against women has occurred for a long time and has penetrated various aspects of social life in the society. The destructive effect is the emergence of a social justification, means that women are indeed under the command of men. As the result, this phenomenon initiated the doctrine of gender inequality.² When the doctrine has dominated the mindset of certain social communities, various genderly unfair actions were considered as a usual thing. consequently, this social phenomenon, which was abnormal, was later considered as something normal. In line with Asghar Ali Engineer, Eti Nurhayati argues that basically men and

¹ Eti Nurhayati, *Psikologi Perempuan dalam Berbagai Perspektif*, Yogyakarta: Pustaka Pelajar, 2012, p. 145

² Eti Nurhayati, *Psikologi Perempuan dalam Berbagai Perspektif*, Yogyakarta: Pustaka Pelajar, 2012, p. 145

women have the same potential in making social contributions. So, it is not appropriate to say that only men deserve to be positioned as the main actors in various social activities meanwhile women are only considered as a complement. In fact, both genders will make the same contribution as long as both are given the same opportunity.³

During its development, the doctrine of gender equality as the antithesis of the doctrine of gender inequality doctrine has started to be developed in various dimensions of human life including Islamic family law. It is considered as a part of the Islamic law that deals with various dimensions in the family formation such as engagement, marriage, to a wider context such as divorce, inheritance, waqf, etc. Islamic family law has a very close relationship with the mainstreaming of gender equality which needs to be elaborated across perspectives.

Mainstreaming of Gender Equality

Gender is a social identity which is not always immanent to a particular gender, either men or women. In response to this, Ratih Probosiwi argues that the concept of gender, feminist or masculine characters, is more directed as the practical implications for their social functions. Masculine characters such as brave, strong, rational, manly, mighty are usually associated with men. While feminine characters are described as gentle, beautiful, emotional, motherly, etc. In their development, all of these characters can change in both communities from a gender perspective. Also, they can change from time to time and differ from one place to another, even from one class to another.⁴

Muhammad Septiadi and Winati Wigna, quoting Handayani and Sugiarti, emphasizes that gender is an immanent trait in each individual, both male and female which is formed along with dynamic social interactions. In this process, each party, men or women, has a gender identity as a result of the social and cultural

³ Eti Nurhayati, *Psikologi Perempuan dalam Berbagai Perspektif*, Yogyakarta: Pustaka Pelajar, 2012, p. 145

⁴ Ratih Probosiwi, Perempuan dan Perannya dalam Pembangunan Kesejahteraan Sosial, *Natapraja: Jurnal Kajian Ilmu Administrasi Negara*, Vol. 3 No. 1, 2015, p. 42

construction that surrounds them. As a consequence, social and cultural constructions will later shape their functions, roles and positions in various fields of life. The gender differences constructed from generation to generation, in turn, will cause women to have different functions, roles and positions from men. These relate to social, geographic and cultural factors in their society. Gender differences are also closely related to the physical characteristics possessed by each with their social functions.⁵

Furthermore, Mardiyah describes various perspectives in comparing men and women as follows:⁶

Table 1. Comparison of Men and Women

Category	Men	Women
Character	Masculine	Feminine
Activity Domain	Public	Domestic
Profession	Productive	Reproductive
Meaning of Work	Professions and Skills	Volunteers and Obligations
Work Appreciation	Proper Wages	No Wages or Low Wages
Sample of Profession	Politicians, Lawyers, Judges, and of one type	Nurses, Midwives, Secretaries, and of one type

Kasrina et al. argues that gender equality, at least, can be identified from four indicators based on its factors, which are:

1. Access factors, women and men have equal access to development resources.
2. Participation factor, women and men both participate in development programs.
3. The benefit factor, women and men must both enjoy the benefits of the national development results.

⁵ Muhammad Septiadi dan Winati Wigna, Pengaruh Ketimpangan Gender terhadap Strategi Bertahan Hidup Rumah Tangga Buruh Tani Miskin di Desa Cikarawang, *Sodality: Jurnal Sosiologi Pedesaan*, Vol. I No. 2, 2013, p. 110.

⁶ Mardiyah, Isu Gender dalam Pendidikan Islam, *Jurnal Pendidikan Ilmu Sosial*, Vol. 25 No. 2, 2015, p. 102

4. Control factor, both women and men have full authority to make decisions over the use and outcome of nature resources.⁷

The effort to mainstream gender is a feminism discourse which is about time to be echoed in every corner of the world. Today, women are not to be put in a limited and rigid social space to understand massive social changes.

Gender and Islamic Family Law

The position of law as a normative juridical framework that regulates human life has a fairly complex dimension along with the complexity immanent to human life itself. The presence of Islamic family law which is also commonly referred as *al-Ahwal al-Syakshiyah*, can be understood as an attempt to describe Islamic normative values within the framework of national law. In turn, the existence of the Islamic law has penetrated several aspects in legislation, whether stated directly or indirectly. In response to this, Syahril Jamil argues that Islamic family law is the entire provision concerning legal relations regarding blood and family due to marriage. It includes the process of marriage, parental power, guardianship, etc. The family law that recently applied in Indonesia is family law which is regulated in the Marriage Law No. 1 of 1974, PP. 9 of 1975, Law No. 7 of 1989 and Compilation of Islamic Law. In other words, since the issuance of UUP No. 1 of 1974, Islamic law is firmly stated to be applied in the Republic of Indonesia although it is only limited to the field of family law.⁸ With the inclusion of Islamic law in the statutory system, there is a mutualism symbiotic relationship between Islamic law and positive law for the sake of the life of the people and of the nation. For Islamic law, this is very useful since it already has a strong normative juridical footing. While for the positive law, it provides a spiritual dimension in its development to build an ethical framework in it.

⁷ Kaslina dkk., Kesetaraan Gender Pegawai Dinas Pertanian, *Jurnal Equilibrium*, Vol. III No. 1, 2015, p. 112.

⁸ Sri Wahyuni, Pembaharuan Hukum Keluarga Islam di Negara-Negara Muslim, *Jurnal al-Ahwal*, Vol. 6 No. 2 Tahun 2013, p. 212.

What described above is part of the assimilation phenomenon of Islamic law and positive law in Indonesia. This reality was also put forward by Sri Wahyuni who states that the legalization of Law Number 1 of 1974 was an innovative step in the development of the legal system in Indonesia which formerly adopted and implemented the Western legal system. The law set the rules concerning marriage and adopted by many marriage laws in fiqh munakahat. This innovative effort is certainly inseparable from the spirit of the Indonesian people who are predominantly Muslim to accelerate the legal legislation strategy of Islamic law, starting from the legal drafting into a draft law which later stipulated into statutory law.⁹

The position of Islamic family law as part of the normative juridical framework within the domestic territory of the family has generally made a significant contribution to the construction of Islamic law. In the Compilation of Islamic Law, women are legally given rights and protections over the common property (*gono-gini*) even though they do not have a permanent job. When a divorce occurs or a husband dies, the wife will get half of the common property. Article 97 of *KHI* (Compilation of Islamic Law) states that the widow or widower of each divorce is entitled to one-half of the common property as long as it is not specified otherwise in the marriage agreement.¹⁰ This shows that the rule of law juridically provides protection for women. Furthermore, this rule of the common property has not been determined in classical Fiqh. It is a typical Fiqh that has long been practiced by the Muslim community in Indonesia, and it is considered to obey Islamic values or Islamic law.

Furthermore, Islamic values refer to the orientation of grace for the universe. Thus, Islamic family law as one of the

⁹ Sri Wahyuni, Pembaharuan Hukum Keluarga Islam di Negara-Negara Muslim, *Jurnal al-Ahwal*, Vol. 6 No. 2 Tahun 2013, p. 212.

¹⁰ Presidential Instruction Number 1 of 1991 concerning Compilation of Islamic Law. Zaiyad Zubaidi, Problematika Pembagian Harta Bersama di Samalanga-Bireuen, *Jurnal al-Ijtima'iyah*, Volume 5 No. 2 June 2019. Mursyid Djawas, Ijtihad Hakim dalam Penyelesaian Perkara harta Bersama di Mahkamah Syar'iyah Banda Aceh (Analisis dengan Pendekatan Ushul Fiqh, *Ar-Raniry: International Journal of Islamic Studies*, Vol. 1, No. 2, December 2014, p. 317.

formal descriptions of Islamic values must be able to provide a framework of justice for all without giving room for gender inequality. The family, the smallest unit of a social community, should become a pillar in strengthening the social community. The stronger a family in a social community, the better it guarantees the strength of the social community in general. On the contrary, the worse a family in a social community, the weaker the social community will be. Through Islamic family law, it is expected that a community will be formed within its social framework based on Islamic values.

Opportunities and Challenges of Mainstreaming Gender Equality in Islamic Family Law

The mainstreaming of gender equality in Islamic family law is an assimilation of two interrelated concepts, in this case, gender equality and Islamic family law. The relationship between the two can be seen from the axiological contact that brings these two concepts together on universal values such as justice, humanity, love, compassion, etc. It is considered as an opportunity because the two concepts have the same orientation in realizing the universal values. Islam, which is the theological normative reference from Islamic family law, is a religion that highly appreciates the mainstreaming of gender equality from the confinement of patriarchal culture. The culture is unilaterally benefiting men greatly on the one hand. On the other hand, it is very detrimental to women. History has recorded how the presence of Islam in the middle of the Arab community of ignorance was a way of freedom for women. It freed women from various forms of oppression in the name of gender which placed women as individuals who did not have a favourable position in the social strata at that time.

In seeing the opportunities for mainstreaming gender equality in Islamic family law, there are many normative signs in the Qur'an that illustrate the path to mainstream gender equality. Among these verses are when the Qur'an states that men and women are equal (QS. Al-Hujurat / 49: 13), men and women have the same personal responsibility in the hereafter (QS. Al-Mu'min / 40: 40), there are reciprocal rights and obligations of husband and wife in the household (QS. Al-Baqarah / 2: 228), and there are

many other verses that can be used as guidelines in mainstreaming gender equality.¹¹

The example of a responsive implementation of Islamic family law in the dimensions of gender equality can be portrayed in the following case. When a man, in his position as head of the household, could drop divorce on his wife for reasons justified by Islamic law, Islam also favours the women side, or the wife. When a wife finds out that her husband has several deficiencies, both physically and psychologically which cause him cannot carry out his obligations to the maximum, or when a husband always hurt his wife, cannot meet the physical and mental needs of his wife, has an infectious disease that is difficult to cure, is imprisoned in time for a very long time, disappears without news, etc, she can take the initiative to break off the marriage with *Fasakh*. The same concept can also be found in the framework of implementing Islamic family law. For example, in relation to the distribution of inheritance which stated in the verse that the share of men is equal to that of two women. During its development, the dynamics of the development of Islamic family law thinking have carried out many reinterpretations related to this division. The distribution of inheritance is now not only based on gender but also on the social roles developed by both men and women. As the result, it is highly possible for the distribution to be equal, or sometimes even female get more share than men with certain considerations. The development of Islamic family law has strengthened the axiological contact of gender equality and Islamic family law which based on universal values such as justice, humanity, love, compassion, etc.

Another opportunity for mainstreaming gender equality in Islamic family law can also be seen from the continues growth of Islamic family law within the legal system in Indonesia or in other Muslim countries. Looking at the role of Islamic law in the development of national law, Amrullah Ahmad points out several phenomena that can be found in practices, described as follows:

1. Islamic law plays a role in filling out the legal vacuum in the positive law. In this case, Islamic law is enforced by the nation as a positive law for Muslims.

¹¹ JM. Muslimin, Hukum Keluarga Islam dan Potret Interrelasi Sosial, *Jurnal Ahkam*, Vol. XV No. 1, 2015, p. 41.

2. Islamic law acts as a source of values that contributes in the process of creating legal rules. Since these laws are general in nature, regardless of religious differences, the values of Islamic law can also apply to all citizens.¹²

In mainstreaming gender equality in Islamic family law, several challenges that can be found in empirical reality cannot be separated from various indicators of gender inequality which described by A. Nunuk P. Murniati as, 1) marginalization of women, 2) community stereotypes against women, 3) subordination of women, 4) double burden on women, 5) and violence against women.¹³ The challenges can be further described as follows:

1. Marginalization of the women

Marginalization is a form of challenge in mainstreaming gender equality in which women are usually positioned as a marginalized community. In the context of Islamic law, marginalized women will become isolated communities in the social stage, and have no access to their rights as part of the social structure. In the marriage, for example, the capability of men to practice polygamy is sometimes one of the reasons women become marginalized. It is usually caused by the inability of husbands to treat their wives fairly after practicing polygamy.

2. Community stereotypes against women

In the social reality, women are sometimes positioned as parties to whom various stereotypes are attached. These stereotypes will cause practical implications for the social treatment they get in the midst of social life. Women are stereotyped as a weak community. Furthermore, the fact that they have a high dependence

¹² Amrullah Ahmad, *Dimensi Hukum Islam dan Sistem Hukum Nasional: Mengenang 65 Tahun Prof. Dr. H. Bustanul Arifin, SH.*, Jakarta: Gema Insani Press, 1996, p. 167.

¹³ A. Nunuk P. Murniati, *Getar Gender*, Magelang: Indonesia Tera, 2004, p. XX-XXIV. Bandingkan dengan Bani Syarif Maula, *Perlindungan Perempuan dalam Hukum Perkawinan di Indonesia: Wacana Pembaharuan Undang-Undang Perkawinan dalam Masalah Batas Usia Perkawinan*, *Yinyang: Jurnal Studi Islam, Gender dan Anak*, Volume 14, No. 1 June 2019.

on men also can trigger practical implications for the application of Islamic law itself. For instance, sometimes wills of parents are only given to boys as the successor of the family. This wills grant concept is highly influenced by these stereotypes. It differs from the concept of inheritance which is obviously the women have parts of their heirs. And, the mainstreaming gender equality activists are still questioning the *illat* or reasons of the concept of inheritance distribution of 1 and 2 between men and women. Although in some practices, the inheritance is equally distributed, even in certain cases girls are given more. For example, in the Bugis Bone tradition, house is granted by the parents for girls. This practice, however, is still rarely done in most communities.

3. Subordination of women

The spread of a patriarchal culture has created a vertical-coordinative relationship between men and women. In the process, women are positioned as the second-class community whose social function is to act as extras in the social context. This culture has practical implications for Islamic family law. For example, it can be portrayed in the case of marriage. When there is a conflict in the household that could lead to divorce, women are usually required to be more obedience to their husbands by not doing much complaints or refusals, even if it is just to defend their basic rights as a wife.

However, there are few exceptions of subordination in the culture. In Acehese and Minangkabau traditions for instances, the position of women seems to be different. In Aceh, women have a balanced position and their rights are well-protected. Married women will be given *peunulang* properties (inheritance), which is a gift from their parents, usually in the form of land, a house, even in the form of business capital.¹⁴ The same in Minangkabau, women are also protected through *pusako* assets which can be enjoyed because these assets cannot be sold. Also, the rules regarding the

¹⁴ Moh. Kalam Daud dan Rahmatul Akbar, Harueta Peunulang: Protection of Women in Aceh According to Customary and Islamic Law, *Samarah: Jurnal Hukum Keluarga dan Hukum Islam*, Volume 4 No. 1 January-June 2020.

assets are controlled mostly by women since they adhere to a matrilineal culture known as *bundo kanduang* and *ninik mamak*.¹⁵

So, it is not surprising that some female figures emerged in Aceh, and became rulers such as Sultanah Safiatuddin, Sultanah Naqiatuddin or became a heroine such as Cut Nyak Dhien. In Minangkabau, there were also important female figures, for example; Rasuna Said, Rohana Kudus and Rahma El-Yunusiah. Therefore, to a certain extent, the equality and equity of roles between men and women in Aceh and Minangkabau have been going well for a long time. It was proven in history that women could become kings, warlords, leaders of Islamic boarding schools, as also happened in Minangkabau.

In addition, the understanding of normative-theological texts such as verses in the Qur'an which are very scriptural also has a destructive role in perpetuating the subordination of women. This is a challenge in mainstreaming gender equality in Islamic family law. The verses that are still misunderstood and misinterpreted, which discriminate women as described by JM Muslimin, cannot be denied. For example, it is stated that men have double inheritance rights compared to women (QS. Al- Nisa / 4: 11), the husband has absolute divorce rights, while the wife does not (QS. Al-Baqarah / 2: 226-231), the husband is the head of the household (QS.al-Nisa / 4: 34), take preventive and coercive pre-divorce actions (QS.al-Nisa / 4: 34). Different from the wife, the husband has one degree more than the wife (QS.al-Baqarah / 2: 228).¹⁶

4. Double burden on women

Women has a strategic role in the domestic area of the household. Besides, they can also take an active role in various fields of work as career women. In relation to Islamic family law, it is actually okay for women, if they want, to develop their careers in addition to taking care of their household. It sometimes becomes a problem when women have double burden since they are obliged to work for a living on the one hand, and on the other hand they are

¹⁵Silmi Novita Nurman, Kedudukan Perempuan Minangkabau dalam Perspektif Gender, *Jurnal Al-Aqidah*, Volume 11, No. 1 June 2019, p. 90.

¹⁶JM. Muslimin, *Hukum Keluarga Islam dan Potret Interrelasi Sosial*, p. 41.

required to do various household chores such as washing, cooking, caring for children, etc. This phenomenon becomes a challenge itself in mainstreaming gender equality in Islamic family law. The excessive distribution of burdens on women sometimes makes them forget to examine their basic rights as a wife which have been regulated in Islamic family law.

5. Violence against women

Violence against women is commonly found in the domestic environment in various forms such as physical, psychological, economic violence, etc. There is a stereotype that one of the proves of the leadership of men over women in the household is when they are able to show their superiority. Over and above that, the superiority they want to show is wrapped and executed in the form of violences. It is not surprising that the phenomenon of violence against women in the household is increasing from time to time. This is evident from the high causes of divorce in Indonesia, one of which is caused by Domestic Violence (*KDRT*) which is committed by the husband to the wife. This phenomenon is one of the challenges in mainstreaming gender equality in Islamic family law when the wives are trapped in violence with various dimensions perpetrated by men. Women are becoming more afraid and closed off to convey the various violences they have experienced, including fighting for their basic rights as regulated and encouraged in Islamic family law.

Conclusion

Mainstreaming gender equality in Islamic family law is a structured effort to describe theological normative values. These values are actually very accommodating to realize the universal values such as justice, humanity, peace, love, compassion, etc, especially, in the household domestic locus which is the sector of Islamic family law studies. Juridically, apart from theological normative values, the rule of law also accommodates gender equality as stated in the *KHI* regarding the distribution of collective assets (which could be distributed half for the wife). However, in its application, the mainstreaming of gender equality in Islamic family law is faced with several opportunities and challenges. The opportunities are several normative signs in the Qur'an which have

the same spirit to mainstream gender equality in Islamic family law in addition to the development of the developed Islamic studies. As the result, the understanding of theological normative texts that are very scriptural has begun to be eroded in the conception and application of Islamic family law. Besides, there are also several aspects that become challenges of mainstreaming gender equality in Islamic family law, such as marginalization of women, community stereotypes against women, subordination of women, double burden on women, and violence against women. Even though, in some cases, the patriarchy culture has been scrapped away by the tradition of treating women and men equally as happened in Aceh and Minangkabau.

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