

## **Gender Equality in Islamic Family Law: Breaking the Chain of Domestic Violence to Achieve Harmonious Family**

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### **Abstract**

This paper describes some efforts to build gender equality in Islamic law against domestic violence. Family is the smallest institution in society as a mirror of a nation. Nevertheless, family problems continue to occur, including domestic violence. Domestic violence is a classic problem in a family resulting in caring for family functions to realize harmonious family. Based on the data collected, the number of women victims of domestic violence is still high, due to gender relations with patriarchal culture. This situation is legitimized by the sacred text which is still considered gender bias, such as in Islamic family law. Therefore, Islamic family law reform is obviously needed by discussing the concept of *sakīnah* (harmonious) family with gender equality through formal legal approach, legal culture, *uṣūl fiqh* (philosophy of Islamic law), and *al-maqāṣid al-syarī'ah* (the purposes of Islamic Law) and universal Islamic values as *rahmah li al-'ālamīn* (blessing for the universe) to establish harmonious family.

**Keywords:** *Family; Gender; Harmony; Law; Violence*

### **INTRODUCTION**

The compilation of Islamic Law (KHI) states that the marriage basis for Muslims in Indonesia is a very strong contract or *mītsāqan ghalīdzān* to obey Allah's orders and a form of worship. The purpose of marriage in Act Number 1 of 1974 is to form a happy and eternal family based on the One Godhead. The purpose of the marriage will be realized if each family carries out its functions continuously in the household life to reach a harmonious (*sakīnah*) family.

The glory of a nation is determined by some established values within a family. Socially, family is the smallest entity that becomes a real mirror of a nation. Like in a building, families in religious communities are symbols of human dignity. A person within a family can have a legitimate partner and live naturally in the community based on religious teachings and social norms in society. Family is the most basic social institution to build human quality. In addition, family can also be used as an institution of moral resilience. Then, family must be upheld, cared for, managed and

maintained properly. Therefore, religion, norms, and culture must regulate and protect this important institution.

To guarantee and preserve the family, every family member must carry out family functions as follows. First, the biological function, family aims to obtain offspring and maintain their honor and dignity as civilized creatures; Second, educational functions, family is a place of education for its members to fulfill their basic rights in developing their own potential; Third, religious functions, family is a place for planting religious-moral values through understanding, awareness, and practice; Fourth, the protective function, family becomes a safe place from internal and external disturbances; Fifth, the function of socialization, family is a place to prepare children to become good members of society, holding the norms of life, interrelating with pluralistic communities, including ethnic groups, races, ethnicities, religions, social classes, cultures and sexes; Sixth, the function of recreation, family becomes a place for its members to share feelings, mutual respect, help, democracy, a sense of peace, security, and fun, as the prophet Muhammad said "my house is my paradise"; Seventh, the function of the economy, family is a place to regulate the economy. Family has a livelihood activity, business coaching, budget planning, as well as wealth management and accountability (Cholil, 2014).

Furthermore, a family can be called a *sakīnah* family if the family is able to carry out family functions in terms of biological, psychological as well as social and spiritual matters. *Sakīnah* can be implemented by husband, wife, and every family member, both the nuclear family and the extended family (Keke Anisa Putri, 2014).

In fact, not all families can meet bio-psycho-social-spiritual health standards. Therefore, family functions often cannot

run normally. The impact is disharmony in the family which can lead to conflict and domestic violence. Violence occurs without considering social status, level of education, type of profession, and area of life. *Sakīnah* family is dynamic and can be realized through systematic and continuous efforts. However, various obstacles often occur in the midst of the dynamic life. Thus, every family must keep the commitment of "*mītsāqan ghalīdzān*" or sacred agreement to maximize family harmony. The concept of the *sakīnah* family is still abstract and not always understood by a Muslim family. There are many problems that hinder and disrupt family harmony along with social change and the development of science and technology, especially in the millennial era (*Ini, Ciri-ciri Pola Asuh Orang Tua Milenial! | Sahabat Keluarga*, t.t.). The family burden is increasing as a consequence of the complex problems.

## METHOD

This paper is a kind of normative research based on library resources. Some main literatures show the quantitative data explaining the real cases of domestic violence in society, such as the annual report from National Commission for Women (Komnas Perempuan.) In addition, some laws on women and children protection introduced by the Indonesian government as the basic regulations are carefully observed to see the aspects of gender equality. Several resources are used to provide the theories for the tool of analysis, such as gender, *maslahah*, and *maqāṣid al-syarī'ah*. Finally, the goal of this paper is to portray the exact problems of family and give some solutions to break the chain of domestic violence.

## FINDINGS AND ANALYSIS

### Construction of Gender and Its Impact on Families

Based on the collected literature, family problems are closely related to the status, roles, responsibilities, rights of men and women, and gender relations in society. For this reason, it is very crucial to specifically discuss the construction of gender and its influence on Muslim families. Gender discourse in the family cannot be separated from its socio-historical aspects. The culture before Islam has a psychological influence on understanding new values. Family structure and kinship in the Arab world are influenced by the classical pre-Islamic cultural heritage. Meanwhile, the classical history of the Arabs has been dominated by various myths and legends. The strength of patriarchal culture and the tradition of polygamy are two kinds of cultural heritages that have a wide influence in the region (Umar, 2010). This condition does not only occur in the ancient Arab community but also in Persian, Byzantine, and contemporary societies.

Islam brings the principle of social justice at the practical level to focus on defending those who are weak (*da'if*) or weakened (*mustad'afin*), oppressed and marginal groups. In general, women are part of the groups. Therefore, the Prophet responds to the condition of underestimated women by making special efforts to empower them to be equal. Justice in family life (Al-Nahl, 16: 90); the principle of justice in deciding cases for oneself, family and close people (QS. Al-Nisa', 4: 58, 135, QS. Al-An'am, 6: 152); and Justice for orphans (Al-Nisa', 4: 127) are mentioned in the Quran (Ministry of Religious Affairs of the Republic of Indonesia, n.d). This theological foundation emphasizes the importance of justice in building a family. The discriminatory action that may trigger conflict and violence can be avoided to actualize a *sakīnah* family. *ā ī ū*

In constructing the Islamic community, Muhammad p.b.u.h. makes

efforts to promote women's dignity through revisions of *Jāhiliyyah* (ignorance era) tradition. This is the basis for the formation of the concept of equality and justice in the Islamic law, namely: First, the protection of women's rights through law. Women cannot be treated arbitrarily by anyone because they are seen as equal before the law. The applicable legislation is also different from the period of *Jāhiliyyah* which still discriminates against women; Second, improving family law, women get the right to determine their mate, get dowry, inheritance rights, restrictions and regulation of polygyny, apply for divorce, regulate husband and wife balanced rights, and parenting rights. The overhaul of the rules shows the Islamic appreciation of women during the time of the Prophet Muhammad when women's rights in the *Jāhiliyyah* tradition were ignored (Cholil, 2003).

Furthermore, the concept of gender equality introduced by Qasim Amin emphasizes that the rights and responsibilities of men and women in the sacred text are the same. Gaps occur due to stereotypes and oppressive patriarchal culture, so women's access and participation in life are still limited. Women must have freedom of expression and make decisions independently. Through adequate education, women can realize equal positions with men. Amin gives special attention to the importance of family law to guarantee the absence of gender discrimination in the fulfillment of the rights of family members (husband, wife, and child). Husband and wife are equal partners. The marriage institution is expected to be the spearhead in fair communication and relationship (Amin, 2003).

The construction of gender that develops in society can influence family style roles and relationships. Family in a patriarchal culture with gender biased tends to show gender discrimination in the form

of gender stereotypes, subordination, marginalization, double burden, and violence. In general, women often have lower status, roles, responsibilities, and rights than men. On the contrary, family construction which is built on the basis of gender equality and justice reflects communication of mutual respect, protection, and empowerment. According to the gender analysis, the goal of marriage will be achieved if the family is built on the basis of gender equality. As stated in the concept of *qira'ah mubādalāh* (reflective reading), the meaning of text should be gained by understanding men and women equally to realize the complementary relations between the two sexes (Penulis, Faqihuddin Abdul Kodir; editor, Rusdianto, t.t.). Gender equality and justice in the family sector is a dynamic condition, where husband and wife and other family members, may have rights, obligations, roles and opportunities based on mutual respect and mutual assistance in family life (Cholil, 2014b). As the concept of *qira'ah mubādalāh*, the formulation of the meaning of the structure of the text must include men and women equally and gender equitably so as to realize the complementary relations between the two sexes.

### Reformation of Islamic Family Law

Humans are social creatures that require harmonious life to be in line with the law. Society and law are a very important mutual relationship. Twenty centuries ago, a Roman philosopher, Marcus Tullius Cicero, asserted that "where there is a society there is law", meaning that it is considered "no country where there is no law". These two statements show the importance of law in human life (Summa, 2005). As stated in surah al-Maidah (5) verse 48, humans from primitive to modern era require the presence of the law for the sake of the order of living together. So, the existence of law is as old as human life.

Furthermore, the family law commonly referred to *al-ahwāl al-syakhsīyyah* (personal statutes). Family law in jurisprudence is called *huqūq al-usrah* or *ahkām al-usrah*, *huqūq al-'āilah* or *ahkām al-'āilah* (family rights), while in English, it is called Islamic family law or Muslim family law. Family law is the law governing family relationships since the beginning of *'aqad* (marriage contract) until the end of time or the end of the family, such as marriage, *thalāq* (divorce), *nasab* (lineage), *nafaqah* (living) and inheritance (Al-Zuhaili, 1989). Family law is the law concerning the internal affairs of family members in a household with respect to certain issues, for example, *hadānah* (child rearing), guardianship, and inheritance (Summa, 2005). From these definitions of family law, family relationships are only restricted to the internal affairs of family members, not family-to-family relationships.

The Islamic family law reform in some Islamic countries has influenced regulations for better society. For instance, every marriage, divorce, polygamy must be registered and recorded by the government. It has a significant influence in protecting women and children (Amin, 2003). One Muslim country that has a problem with regulating family law is Egypt which gets the attention of a Muslim feminist, Qasim Amin. As a feminist observer of women's rights, he was concerned about the condition of Egyptian women. There were many cases of female marriages that were not guaranteed by the state. Child marriage contributes to lower education of women which makes women marginalized. Cases of polygamy and uncontrolled divorce have negative effects for women and their children such as economic violence, including income, inheritance, and protection. This marginalization and economic violence significantly contribute to poverty. This phenomenon does not only occur in Egypt, but also in other Islamic countries, such as Indonesia.

Family law reform in Islamic feminist perspectives as initiated by Qasim Amin in his book *al-Mar'ah al-Jadidah* basically provides great benefits to improve the status, role, and rights of women and children in the domestic sphere. It also may influence status, roles, rights and gender relations in the public sphere. This feminism movement in Islam spread to other Islamic countries and experienced ups and downs trend, especially in accordance with Islamic law. However, legal reforms, that accommodate the interests of men and women or respond to different gender needs, are contextual and different in each country as confirmed by Martha Chamallas as follows:

The concept of gender and its relationship to law (including Islamic Law) has fluctuated time to time and has been applied in different contexts. It may refer to a distinct set of legal rules and responsibilities governing men and women. Use of the term 'gender' often signals that the topic extends beyond biological differences between men and women and includes the legal significance of gender roles, gender norms, and common understandings of masculinity and femininity. Gender and the law has been tied to sexuality and personal identity, also covering laws relating to sexual orientation and gender identity, as well as legal responses to gender performances, such as appearance, speech, and dress." (Chamallas, 2015)

Indonesia responds slowly to Islamic family law. Pakistan has first formulated Islamic family law since 1961 while Indonesia was only stipulated in Law Number 1 of 1974 on Marriage. There was long debate about marriage registration and polygamy because marriage, divorce, and polygamy were considered family matters and privacy. On the other hand, marriage is

not only an individual problem but has entered the public sphere which must be regulated in positive law because marriage is directly related to order, peace, and harmony of society (Mudzhar & Nasution, 2003). For this reason, the presence of the state in making regulations does not only register marriage, divorce, reconciliation, inheritance and *hadānah* (child custody), but also provides protection for every family member to guarantee their basic rights and to realize *sakīnah* family.

### Issues of Domestic Violence in Indonesia

Gender-based violence is violence carried out by different sexes caused by biased views that place one sex superior and the other inferior. Unequal gender relations between the two sexes lead to gender discrimination and make the stronger tend to oppress the weaker. In general, gender based violence is more experienced by women than men. This topic will be explained in the sub-theme of violence against wives on this paper. In history, it is recorded that the ancient Greek elite treated women as prisoners held in the palace. As for the lower layers, women even were traded. When they were married, the husband had full power over his wife (Sa'dan, 2016). The violence was based on the dominant perception that women were portrayed as weak and deserved creatures to get arbitrary treatment. In line with Derrida's statement that in philosophy there are truth values that naturally must be upheld. But women often don't get a place in the truth. Therefore, it is not surprising that women are always blamed in many situations (Arivia, 2018).

Gender discrimination in the form of violence generally occurs in society, such as physical, psychological, sexual, and economic violence. Physical violence is like beating, kicking, and torturing to kill while psychic violence is like insulting verbally and nonverbally. The examples of Sexual violence are forced-sexual relations,

forced pregnancy, abortion and trafficking for prostitution while the examples of economic violence are neglect and deprivation of property rights. Violence does not only occur in certain classes or communities but can occur in all social strata and in various sub-cultures, where women are more vulnerable to be victims than men. Domestic violence is an iceberg phenomenon in the ocean. It looks small on the surface but it is very large in it. Not surprisingly, the number of cases reported to the authorities and recorded publicly is only a small part of the fact. The fact, of course, is far greater.

In general, gender inequality for women in various forms is caused by some factors. First, patriarchal culture, a system characterized by men (fathers) in which men have the power to determine, regulate, and make decisions; Second, religious texts interpreted as gender bias are caused by partial understanding. They do not reflect female-friendly religious messages, disconnected from their history and the method of interpretation of the text, resulting in gender-biased religious views; Third, less gender responsive sense in the implementation of government policies, such as in laws and government management. (Mufidah Ch, 2010). For example, the criminal legal system is still perceived as not in favor of women victims of violence because the rule of law has not fully accommodated women's experiences (Eddyono, 2018).

The concept of equality of men and women has not been fully accepted by religious leaders. The patriarchal culture has not been uncovered and no strategy has been found for integrating women and gender issues into the sub-culture of Muslims, where a patriarchal tradition has been strongly built so among the Muslim community. The view of gender bias that raises discrimination against women is a problem for Muslims in Indonesia (Cholil,

2017). The facts that domestic violence is still a family issue are as follows.

### **Violence Against Wives**

Key Factual Points of the Annual report (CATAHU) of the National Commission on Violence Against Women (Komnas Perempuan) in 2018 are as follows: Religious Court had the data that 335,062 cases were violence against wives which leads to divorce. 13,384 cases came from service partner institutions indicating that violence in the private/personal domain was 71% or 9,609 cases. Direct complaints data from Komnas Perempuan also showed the same trend. The private/personal domains were still the dominant cases, up to 932 cases (80%) of the total 1,158 cases. Meanwhile, the number of violence against wives is still the first position, with 5,167 cases (*Read News*, t.t.).

Community's perceptions on violence against wives are divided into two: myths and facts. In reality, myths is stronger than facts. There is a tendency for wives to keep the secrets without reporting their cases due to some reasons: First, domestic violence is a privacy problem that is inappropriate for public disclosure; Second, psychologically the victim's dependence on the perpetrator is very strong due to unequal gender relations. The perpetrator is in a powerful position, while the victim is in a powerless position; Third, the strong threat of perpetrators to victims, where victims feel weak and no strength to fight; Fourth, they still hope that this violence will end along with the husband's awareness; Fifth, there is a theological belief wrapped in patriarchal culture that the patience of the victim is a part of worship resulting in a heaven as the proper reward. One interesting fact during accompanying victims from 2000 to the present is that when victims are increasingly afraid to fight, the perpetrators

intensify their violence. The more victims can survive, the more the perpetrator feels victorious, demonstrating the existence of his masculinity.

### **Violence against Children**

Data from the Ministry of Women's Empowerment and Child Protection in Jusuf Kalla's 4-Year Report on Government Administration, in 2016 showed that the number of cases of violence was 11,723 cases. Meanwhile, in 2017 there were 17,099 cases. The increasing number of violence from 2016 to 2017 was 5,376 cases. The number of victims in 2017 was 18,507 people while in 2016 there were only 12,674 people. There was an increase of 5,833 people. The PPPA ministry claimed the percentage of served victims also rose 19.7 percent. In 2016 the number of victims served was around 69.7 percent and in 2017 it was 89.4 percent (Bisnis.com, 2018). In addition, the National Commission for Women's data also records complaints received by service procurement partners. There is an increasing number of violence against women, about 2,227 cases (*Read News*, t.t.).

According to Indonesian Commission for Children Protection (KPAI), among children in Indonesia, which amounted to 87 million, 6 percent of them experienced violence. The majority of the cases are not revealed to the public. Violence can occur because several factors, such as alcoholic drinks and pornography. In addition, the supporting factors are child marriage, conflict, and parenting mistakes, due to poverty and unbalanced-power relations (Mujib, 2009).

Violence against children, especially sexual violence often occurs in their neighborhoods, even in their own homes where the perpetrators are people who are well known and close to victims, such as biological fathers, stepfathers, siblings, half

brothers, siblings, stepbrothers, uncle, cousin, maid, gardener, and driver. In this context, families may no longer be safe and comfortable places for children.

### **Breaking the Chain of Domestic Violence in the Upper Part**

Based on the research conducted by the Ministry of Religious Affairs, there is a correlation between the bride and groom personality with the success of building a harmonious family. The maturity level of the couple before marriage is the main factor in the success of achieving marriage goals. Psychological readiness to build a household also influences the attitude and behavior of a couple when they plan to divorce, at least reducing the occurrence of post-divorce violence (*Melihat Tren Perceraian dan Dominasi Penyebabnya—Hukumonline.com*, t.t.).

The Ministry of Religious Affairs through its branch offices, *Kantor Urusan Agama* (KUA), as the institution which has responsibility for the administration of marriage, has carried out a Bride and Groom Course (*Kursus Calon Pengantin*). The course has a short duration of supervision conducted by the head of the KUA, regarding the rights and obligations of the husband and wife in a family. However, the implementation of the bride and groom course is considered not effective because the divorce number is still increasing.

The results of the research in Malang Regency revealed that the implementation of bride and groom courses had not been effective. This is caused by; First, the course is only a short lecture, formalistic, normative, less able to be implemented in real life; Second, the limitation of marital advisors, because the duties of Head of KUA are overloaded; Third, KUA has not found effective ways to implement bride and groom courses, including partnerships and operational

budgets. It is necessary to reformulate its implementation such as management, bride and groom course tutors, time and place of implementation, course strategies that are in line with the goals, funds and infrastructure and partnerships. This reform was also supported by socio-religious organizations that became KUA's strategic stakeholders (Cholil, 2014a).

Minister of Religion has issued Minister of Religion Regulation (PMA) Number 19 of 2018 in lieu of PMA Number 11 of 2007. PMA Number 19 of 2018 is more detailed in regulating Marriage Registration when compared to PMA Number 11 of 2007. To implement Premarital Course for Bride Candidates, the Directorate General of Islamic Community Guidance issued a Director General Decree on Islamic Community Guidance Number 379 of 2018 on the Implementation Guidelines for Premarital Marriage Guidance for Bride-Groom Candidates ("Juklak Bimbingan Perkawinan Pranikah Bagi Calon Pengantin Tahun 2018," t.t.). Hopefully, this will become a new way for the couple and the society to avoid domestic violence in the family.

### **Positive Legal Approach as a Solution to Domestic Violence, Is It Effective? Solution in the perspective of Legal Sociology**

According to Emil Durkheim, as quoted by Saifullah, social life can continue because society is able to organize themselves. Law is one means to organize. When there is law, the community can be stably sustainable (Saifullah, 2007). The shift from traditional agrarian societies to modern urban societies, a shift from rural communities (*paguyuban*) to urban communities (*patembayan*), from the generation of veterans and generation X towards generation Y in industrial society 4.0 may increase complexity of family issues. In this situation, regulations are

needed to make sure that a family can function properly and protect women and children from violence in the domestic area.

However, in a society with a simple culture and social structure, law arises and grows in line with the practice of citizens and social change. Law is a truly consolidation rather than a public legal awareness. There is rarely a conflict between legal awareness and what really applies, because the social control process takes place in the community. Conversely, it is difficult for modern society to identify awareness arising from citizens who have a diversity of interests. Usually, law arises from the part of society that has power and authority. Therefore, the law does not become a consolidation of the applicable value system in society (Soekanto, 2011). Even though the state has established and implemented a number of laws that protect families from domestic violence, they have not fully become legal awareness in the community (Rahardjo & Dimiyati, 2002).

In the perspective of legal sociology, the operation of law in society is a form of social reality that explains how law is actually treated by people in society and the social reality of law can be fully captured by sociological optics (Saifullah, 2007). The study of legal psychology assumes that the characteristics of the participants of the legal system affect the way the legal system works. A person's ability, perspective, value, experience, and quality of external environment may influence his/her behavior. The quality of the external environment and the pressure of the situation can affect a person's behavior. All citizens are active participants in the legal system, even though they do not directly hold the authority of justice (Ali, 2008).

The availability of regulations in fact does not guarantee that the law is able to work effectively. Instead of the problem of domestic violence, people tend to differ when responding to gender equality and



justice. In male patriarchal culture and a supra ordinate position, men culturally win easily and they are strengthened by the perception of society on the basis of stereotypical views. On the contrary, women in subordinate positions generally accept patriarchal cultural heritage that impacts on gender discrimination rooted in their subconsciousness. The strength of patriarchal culture that has lived in society for a very long time is considered a truth and norm. Such social construction is supported by myths that weaken women. The understanding of the sacred text, that is partial and sometimes considered to be final, become apart from its historical context. It ignores the noble values of Islam as a religion of grace, upholds the dignity of women (Rahman, 2017).

The legal consideration that protects women and children in the domestic area is the main instrument in upholding justice and gender equality. The government has equipped instruments for implementing laws and regulations with specific budgets and institutions. They can handle cases that arise in the community with a network model between government agencies and community organizations. For example, the Integrated Service Center for Women and Children Protection (P2TP2A) receives complaints and advocates for cases of violence against women and children for 24 hours. Every legal case in this place is treated completely based on the standard operating procedures (SOP) of positive law enforcement in Indonesia.

Positive law, according to Roberto Mangabeira Unger as quoted by Satjipto Rahardjo, is a modern law or legal system which has characteristics as follows: First, it is public, associated with centralized power; Second, it is positive principle; Third, it is general, for all groups in society; Fourth, it is substantively, institutionally, and methodologically autonomous (Rahardjo & Dimiyati, 2002) The positive

law is made, established and enforced to guarantee justice, benefit, and certainty.

Empirically, the assistance of victims of domestic violence as a criminal case is always referred to police using advocacy model. The process of advocacy faces some obstacles, for examples, in the cases in Malang Regency: First, children victims are still need special attention; Secondly, parents or families of victims often ask for services outside the standard rules; Third, families with middle to upper economies usually have more complex problems than those of victims whose economies are lower; Fourth, public figure actors do extra protection to victims when dealing with the law. The solution carried out by P2TP2A Malang Regency in assisting child victims of violence includes intensive communication with the family, home visit, awareness of law and SOP, and openness of information and active participation of families in mentoring victims. Thus, they understand the counseling and litigation process. It means that the sociological, cultural, religious, psychological and even political aspects cause the mentoring process to be convoluted, compared to the legal case itself. Thus, the implementation of the law regarding violence in the domestic area requires the support of interdisciplinary approaches and collaboration between normative law and sociological law.

### **Legal Culture: Another Way to Break the Chain of Domestic Violence**

Geiger, as followed by Bernald et al., distinguishes two types of norms: actual norms and not-actual norms. Actual norms refer to norms that have not entered state rules which are habitual norms. While the norms that are not actually are *normasatz*, which have been formulated in the rules of state legislation (Tanya, B. L., Simanjuntak, Y. N., & Y.Hage, M, 2007). This is where the law is actually not made but found in people's lives. Law is not a stand-alone

institution, but a law as a behavior of the people.

According to Lawrence M. Friedmann, the legal system includes three elements: legal substance, legal structure, and legal culture. In general, people see the legal system focusing on the substance or legal norms used in the legal process of work and how legal structures or legal institutions are used to support law enforcement. Nevertheless, legal culture often gets less attention. Legal culture is the attitude of society towards law. It is how the legal system gets a place in the developing culture in society. Even Friedmann called the legal culture as 'providers of fuel of motor for justice'. This is where the culture of law becomes very urgent in the relationship between law and society. Legal culture is also influenced by social constructions in a society, including social construction of gender.

Social construction of gender is largely determined by religious beliefs, and norms, cultural values in society. For example, the implementation of policies on gender mainstreaming in various fields is influenced by religion and culture (Mughni, 2009). If we want to build a *sakīnah* family, gender as a social construction cannot be released. Gender as a social construction cannot be separated from the culture and interpretation of religion.

Furthermore, in the perspective of legal sociology, law is an embodiment of public legal awareness. Law comes from customs and trust does not originate from the formation of law. Law cannot be separated from society or the history of a nation. Therefore, space and time are relative while law always changes along circumstances (Saifullah, 2007). Law is not always introduced by the government, but it must be recognized by the government. For instance, Islamic law and customary law to some extent are applicable in Indonesia. Likewise, international conventions must be ratified by the state, at least used as material

for consideration in reforming the law in Indonesia (Ali, 2008).

Some questions arise when customs are formed from values and norms rooted in patriarchal culture. Is it possible for the community to use them as a solution to domestic violence? Isn't patriarchal culture spreading throughout the world? Isn't it true that women, who do not have critical awareness, become supporters of patriarchal culture? Is there any female-friendly culture? Where can we find it?

To answer these difficult questions, it is considered wise to retrace the universal values of humanity, justice, equality that remains a part of a very rare practice of parental culture. Culture is expressed in the form of language (Mujib, 2009). In local languages in various tribes from Sabang to Meraoke, there are many poorly maintained wise words that are even feared to be extinct. They are not only less popular and less attractive to the millennial generation, but also covered by patriarchal culture. They need to be reinterpreted with new harmonious interpretations with *sakīnah* family goals. This new interpretation of culture is then widely socialized to stop domestic violence.

### **Universal Values of Islam, Gender Justice in *Uṣūl al-Fiqh* Perspective**

Abid Al-Jabiri in his book *al-Dīn wa al-Daulah* asserted that Islamic law was built on three pillars: *al-naskh* (removal), *asbab al-nuzūl* (the reasons of revelation for the decline of the verse), and *al-maqāshid al-syarī'ah*. Where good Islamic law is built upon the historical awareness and purpose of Islamic law (*Sekolah Pascasarjana / Hubungan Agama dan Negara*, t.t.). The purpose of the establishment of Islamic law known as *al-maqāshid al-syarī'ah* is based on Islam as the religion of *rahmah li al-'ālamīn*, that every commandment and prohibition of

God contains a profound purpose and wisdom.

As a blessing religion for the universe, Islam upholds universal values taken from the philosophy of the sacred texts of al-Qur'ān and al-Sunnah which bring benefits and *maṣlahah* to human beings. Such universal values include justice, humanity, equality, and democracy. Upholding the values of equality and justice in the family is an individual or collective task in the family, because the family is a system. Therefore, to ensure equality and justice towards the harmonious family, there are two forms of the *uṣūl al-fiqh* approach; First, upholding the goodness and perfection of life through the *maṣlahah* approach; Second, protecting the occurrence of discrimination and injustice in family life through *ẓarī'ah*.

### **Maṣlahah approach**

One method of *al-maqāṣid al-syarī'ah* which is developed in *uṣūl al-fiqh* is *maṣlahah* method. It is a fundamental method of building and verifying ratios developed from *qiyās* method (Hallaq, 2001). The method of *maṣlahah* departing from goodness is sometimes supported by *naṣ* (texts), some are not supported by *naṣ*, but they are not rejected and no basis for *ijmā'*. This kindness is supported through *istiqrā'* (induction of some *naṣ*). Imam al-Ghazali asserted that *maṣlahah* is to take advantage and reject harm in order to preserve the goals of the *syarā'* (Islamic teaching)(al-Ghazali, 1983).

In general, *uṣūl* scholars divide *maṣlahah* into 3 types: First, *maṣlahah darūriyyah* which is related to the basic needs of humans in the world and in the hereafter; Second, *maṣlahah hājiyyah* which aims to support basic needs; Third, *maṣlahah taḥsiniyyah* aims to complete the two previous *maṣlahah*. On the other hand, some scholars also divide *maṣlahah* into two types: *maṣlahah 'āmmah*, which

concerns the collective needs, and *maṣlahah khāṣṣah* which concerns individual goodness.

According to al-Shalabi, *maṣlahah* is divided into three categories: First, *maṣlahah thābitah* or unchanged *maṣlahah* such as prayer, fasting, zakat, and pilgrimage; Second, *maṣlahah mutaghayyirah* means that it can change and adapt to space, time, and legal subjects; Third, the *maṣlahah mu'tabarah* is kind of *maṣlahah* supported by *shara'*, such as a punishment for alcohol drinkers. In addition, other scholars divide *maṣlahah* into two: *maṣlahah mulghah* (rejected because it contradicts *syara'*) and *maṣlahah mursalah* which is not explicitly supported by *naṣ* but implicitly supported by *naṣ* (al-Shalabi, n.d).

However, al-Thufi divides *maṣlahah* differently. He argues that the principle of *maṣlahah mursalah* as a strong reason can be used as a legal basis. First, free reason can determine goodness and badness although without the support of texts; Second, *maṣlahah* is an independent proposition to establish the law; Third, *maṣlahah* applies to the problem of *mu'amalah* and traditions; Fourth, *maṣlahah* is the strongest proposition. Therefore, if *naṣ* or *ijmā'* (the consensus of Muslim scholars) is contrary to *maṣlahah*, both are abandoned by using *takhshish al-naṣ* (taking more specific text) (Zaid, M., 1964).

To address family issues, it is not easy to refer directly to *naṣ* or previous scholars' opinions. In social life, there has been a gap between sacred-normative texts and the social reality which continue to change. For example, in traditional agrarian societies, a single breadwinner can provide for the family. Now modern urban society requires double income by encouraging wives to work as breadwinners, not only working in the country but also working abroad. The problem arises. What is the status of a woman working as migrant

worker, far away from her family? Who is her *mahram* (self-protector) during working? Can the law be a substitute for *mahram*? In a number of cases, woman is also responsible for her family. Is it possible to change of inheritance for men and women from 2: 1 to 1: 1? Likewise, woman who is still in her *'iddah* (waiting time to remarry) because of husband's death. Is it forbidden for her to work outside her home because she has to earn living?

Based on the illustration above, Muslims will experience theological obstacles if the law is only explored by relying on a textual paradigm method. There are various problems that occur in the community, such as the problem of *mahrām* for women who work outside the home, dichotomous division of gender roles, and limitation on women's movement for safety reasons. Therefore, *uṣūl al-fiqh* is one approach in finding solutions, especially using *maṣlaḥah* method. In solving family problems, there are several considerations for determining the right choice in using *maṣlaḥah* method, for example *maṣlaḥah mu'tabarah*, *maṣlaḥah mughayyirah*, *maṣlaḥah mursalah*, *maṣlaḥah 'āmmah* or *maṣlaḥah khāshah*. It depends on family problems to solve.

### ***Zarī'ah* Approach**

In general, ulama' and writers of *uṣūl al-fiqh* include the *zarī'ah* as part of their discussion. There is a rule of jurisprudence that the danger must be eliminated and a person must not endanger oneself and the other person. Syarifuddin asserted that the *zarī'ah* was placed as one of the arguments in establishing the law even though it is debatable in use. It could be used as an indication of the law based on *syara'* (Islamic teaching) (Syarifuddin, 2001). *Zarī'ah* is divided into two: *fath al-zarī'ah* and *syazzu al-zarī'ah* (Haroen, 2001, Shathibi, 1975), some Malikiyah and Hanabilah scholars place *s syazzu al-*

*zarī'ah* as one of the arguments in establishing a law while the Hanafiyah (*Syarh al-Mahalli 'ala Matn Jam'i al-Jawami*, 1992) and Shāfi'iyah use it in certain cases (Al-Shafī'i, n.d.).

Mustafa Shalabi divides *syazzu al-zarī'ah* into 3 groups; First, the *zarī'ah* which carries definite damage, or is suspected of causing damage; Secondly, the *zarī'ah* which is likely to have an impact on harm; Third, the *zarī'ah* which is not feared will occur or give benefits (Haroen, 2001). The example of the first type is prohibition for men to do polygamy if there is an indication of domestic violence. In fact, there is a phenomenon that the practice of polygamy leads to injustice towards women (Nurmila, 2016; Reyneta, 2003). Next, the example of the second type is the attempts to place victims of violence at the shelter because it is possible to create uncomfortable feeling if they stay at home. Finally, the example of the last type of *zarī'ah*, is the provision of access for women to work or not to work in the public area based on their personal needs and choices.

A number of gender problems that occur in society result in the loss of human dignity. Gender discrimination which is manifested in the form of stereotypes, subordination, marginalization, multiple burdens, and violence will have an impact on disharmony in family life. Gender equality and justice are primary needs for human life. The issue of gender inequality is a problem for men and women. The most vulnerable party is the marginalized group by culture, such as harassment of women and children, pornography, commercial sex, trafficking, and child marriage cases. Nevertheless, the highest number of cases is domestic violence cases.

The *zarī'ah* approach is an alternative way of legal *istinbāt* (method to produce the law) in order to protect male and female individuals and communities from the emergence of inequality and even

tyranny based on gender differences. In some cases in Indonesia, the practice of *zarī'ah* has been carried out through state policy. Several laws that protect vulnerable women have been established, for example Law Number 23 of 2002 on child protection, Law Number 23 of 2004 on the Elimination of Domestic Violence, Presidential Decree Number 61 of 2003 on Indonesian Human Rights, including women's rights, and Law Number 21 of 2007 on Eradicating the Criminal Act of Human Trafficking.

Besides this policy, various parties have culturally made efforts to create a gender-friendly culture. For example, PKBG (gender-based family education) establishes a crisis center for victims as well as consultancy and advocacy bureaus. It also trains law enforcers to have skills in integrating gender equality and justice in their duties. The application of laws and the functions of each social institution in the community can protect women and men based on *zarī'ah* approach.

Thus, the approach to the study of *uṣūl al-fiqh* using gender perspective in Islam is a primary need to uphold human rights. At least, these two methods of *maṣlaḥah* and *zarī'ah* can complement the process of producing laws.

### ***Maqāṣid al-Sharī'ah: an Effort to Break of the Domestic Violence Chain***

Al-Syatibi concludes that the ultimate aim of Islamic law is to preserve the three categories of law: *ḍarūry*, *hājjiy*, and *tahlīyyah*. These three categories ensure the benefits of *mukallaḥ* (matured person), both in the world and the hereafter (Nasution, 2013). *Maqāṣid al-Syarī'ah al-ḍarūriyah* is the primary purpose to be maintained, consisting of five elements: First, guarding the religion (*ḥifzu al-dīn*); Second, guarding the soul (*ḥifzu al-nafs*); Third, guarding the mind (*ḥifzu al-aql*); Fourth, guarding descent/honor (*ḥifzu al-*

*nasl*); Fifth, guarding property (*ḥifzu al-māl*) (Djamil, 1987).

The five elements are guidelines for ideal Muslim life. al-Syatibi explained in detail how the elements of the primary objectives of Islamic law are based on the benefits of both general and specific nature. The purpose of the second category (*hājjiy*) is to provide convenience from the difficulties in applying the provisions that are *ḍarūry* so that the main goal can be carried out easily to realize the benefit. The purpose of the third category (*taḥsīnī*) is to perfect the previous two categories. In addition, Jasser Auda divides *Maqāṣid al-Syarī'ah* hierarchy into 3 groups: *maqāṣid 'ammah*, *maqāṣid khāṣṣah*, and *maqāṣid juz'īyyah* (Auda: 3) all of which refer to *maṣlaḥah* (benefit).

Muslim communities respond to the law differently. Sometimes there is a gap between *das sein* and *das sollen*, between reality and the ideal shape of Islamic law. Some cases of domestic violence using *Maqāṣid al-Syarī'ah al-ḍarūriyyah* arguments may cause disaster. For example, the perpetrator of domestic violence bases his argument to keep the five aims of Islamic law. Nevertheless, it obviously shows the different results. First, it strengthens the subordinate or asymmetrical position between the perpetrator and the victim; Second, it is used as a form of negative masculinity expression and self-actualization; Third, it keeps patriarchal culture; Fourth, it reduces communication in the family and causes hatred among family members; Fifth, it justifies violence with religious reasons.

More specifically, in cases of violence against polygamous wife, husband often forces his wife to accept her husband's wishes to marry again with another woman. Otherwise, husband will secretly commit adultery which leads to unregistered marriages. Husband who understands Islamic law frequently argues that polygamy is one step to apply the

*Maqāṣid al-Shari'ah al-ḍarūriyyah* with some reasons. First, to guard religion, polygamy will make the perpetrator to be calm in worship, closer to Allah. Wife will get big rewards from God if she sincerely accepts it. It is considered a kind of worship by obeying husband; Second, polygamy may keep the soul and mind so that the family (especially husband) remains healthy, both physically and spiritually; Third, polygamy may protect the offspring and family honor. Through polygamy, husband will avoid adultery and the born children have clearly legal status in the view of religion; Fourth, polygamy can protect the property of the husband so that it is not squandered illegally. Polygamy will lead a couple to spend their wealth wisely. Thus, it is obviously clear that domestic violence tends to continue due to theological reasons. Wives who are weak in their religious understanding do not have a bargaining position and critical power. They will easily accept the violence as destiny from God (Aisyah, 2012). This is what is called the voluntary discrimination.

The case of polygamy and other violence in the domestic sphere with engineered reasons is the politicization of religion supported by patriarchal culture, for the personal interests of the perpetrators by ignoring the rights of victims. The gender bias theological argument is actually against the purpose of Islamic law. Extreme changes occur from the goal of protecting a family to become destroying a family. The happiness of a family cannot only be owned by one party, but must be felt by all family members. For that reason, the practice of polygamy is categorized as a form of domestic violence.

Finally, the universal values of Islam as general principles need to be presented to complete the implementation of the *Maqāṣid al-Syarī'ah*: justice (*al-'adālah*); humanity (*al-Insāniyyah*); equality (*al-musāwā*), and democracy (*al-musyāwarah*). In applying universal Islamic

values, it is important to make concrete and practical formulations in order to be easily understood by all social clusters in Muslim societies. One urgent point to take into account is how the principles of the objectives of Islamic law are applied collaboratively with the practice of local wisdom, known as *'urf*. Jasser Auda stressed that it is really needed to elaborate revelation, hadith, *urf*, *fiqh*, and modern legislation. According to Jasser, the terms above have a relationship that cannot be separated. With this approach, gender equality in the family can be realized successfully.

## CONCLUSION

Gender equality in families in the millennial era is really needed. Increased education, insight, and professionalism of women in public and domestic sectors become social reality. Gender-oriented family buildings are characterized by mutual respect, care, mutual respect, mutual assistance, protection and empowerment as the expectation of each family. However, gender-based domestic conflicts and violence are often unavoidable due to patriarchal culture, gender-biased religious understanding, and policy implementation which are not yet fully gender responsive. The development of gender equality in family law by considering the universal values of Islam and the culture or local wisdom with gender-friendly interpretations will be able to break the ice of Islamic family law. It may contribute to solve gender discrimination, especially domestic violence in society.

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