

islamic-law-on-gender-based- sexual-violence.pdf

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1 ISLAMIC LAW ON GENDER BASED SEXUAL VIOLENCE

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Abstrak: Hukum Islam tentang Kekerasan terhadap Perempuan Berbasis Gender. Dalam pandangan hukum Islam, kekerasan seksual berbasis gender dikenal dengan istilah “*al-intihā’ ‘ala ḥurmah al-nisā’* or *al-waṭ’ bi al-ikrah*”. Di bidang hukum pidana Islam, ada tiga jenis hukuman terhadap kejahatan, yaitu: *qisās*, *ḥudūd*, dan *ta’zīr* (takzīr). *Qisās* adalah hukuman yang setara dengan kejahatan yang dilakukan, termasuk pembunuhan, melukai, atau serangan yang disengaja. *Ḥudūd* mengacu pada hukuman terhadap kejahatan spesifik sebagaimana terdapat dalam Alquran dan Sunah. Termasuk dalam kategori ini perzinahan, menuduh seseorang melakukan zina, mencuri, *ḥirābah*, dan tindakan memberontak terhadap Pemerintahan islami dan sah. Sedangkan takzīr adalah jenis hukuman terhadap kejahatan lain yang diputuskan oleh hakim Muslim. Kejahatan seksual yang berbasis gender dalam artikel ini dapat digolongkan dalam tiga bentuk yaitu: perzinahan yang dipaksakan, serangan terhadap *qisās*, dan prostitusi yang dipaksakan.

Kata Kunci: hukum Islam, kekerasan seksual, gender

Abstract: Islamic Law on Gender Based Sexual Violence. In the view of islamic law, gender based sexual violence is known by the term “*al-intihā’ ‘ala ḥurmah al-nisā’* or *al-waṭ’ bi al-ikrah*”. In the area of Islamic criminal law, there are three types of punishment toward crimes. They are: *qisās*, *ḥudūd*, and *ta’zīr*. *Qisās* is a short punishment equal to the crimes committed including murder, wounding or intentional attacks. *Ḥudūd* refers to punishment toward some specific crimes that have been explained by god through revelation. Kind of crimes and their corresponding form of punishment were discribed in the holy Quran and the prophet Muhammad’s traditions. Including in this category is adultery, accusing some one to commit adultery, stealing, *ḥirābah*, and organising rebellious actions againts an islamically legal and good government. Whereas *ta’zīr* is a type of punishment toward other crimes where its forms are left to consideration and decision of Muslim judges. Gender based sexual violence in this article can take three forms of crim which is a forced adultery, an assault in *qisās*, and a forced prostitution.

Keywords: Islamic law, sexual violence, gender

Introduction

It is natural that people differ in their opinions, their viewpoints and their concept for a problem or tackling an affair. It is also natural that each one argues for what one thinks right, giving explanations, and proofs. As such life goes on, and people never changing this behaviour as long as they are existing on this earth. If no one contests the existence of such behaviour, then the question is directed towards the way is manifested. Some people state their opinions and their reasoning, departing from what they believe, with all due respect and appreciation of what the others believe, as long as the other opinion would not contradict with the principles and foundations on which the existence of

the *ummah* is based. Such the difference¹ and dispute² about a view of Islamic criminal law to the gender based sexual violence in this discussion.

A Study about women with all their attributed problems is not morely an effort in trying to understand the women in their own world nor just to understand men as related to the gender system, but also to understand how a society—where the women are

¹ Difference here is the situation when two contemporaries are in dispute concerning their opinions on a question. The difference of the realities of the subject matters would mean their contradiction. Ibn Taymiyyah stated that the difference of contradiction is the one when two statements are opposing each other, each one saying the opposite.

² Disputation is when one refutes another’s argument by stating evidence with the purpose of correcting his statement. Disputation means the adherence to one’s opinions, be that from one or both sides of disputation. Disputation is prohibited because it may lead to conflicts and enmity and it opens the way of evil and mischief, Allah almighty said, “But let those know, who dispute about Our signs, that there is for them, no way of escape.” (Q.s. al-Shūrā [42]: 35).

1 separate part of its system—is organized. Furthermore, this study is meant to be an antisipative step toward the occurrence of a so called “social panic”.³

One of classical problems that never stops is the sexual violence. This Usually meant to be all criminal acts that are related to sexuality where both men or women can become the object. But, in reality this kind of crime more often positions, women as victims. This might be related to the gender inequality which manifest it self in the form of burdening, stereotyping, doing violence to, marginalising, and subordinating women in a society. This is a way such a crime is more commonly know as “gender based sexual violence”.⁴

From the background above the writer just take two problems are already explained. It can be summarized as follows: What is gender based sexual violence defined? And why do women often become the victims of sexual violence? How does the Islamic law respond toward such cases?

To answer those quastions the writer conducted by collecting both primary and secondary data: field and literatures. As a base to write up all realities about gender based sexual violence, reliable information will be gathered from some victims. Opinion and confirmation from some experts on feminine issues and findings from women advocacy forums are used as additional information as well as comparative data.

Studies of literatures are mainly used to have a look at how the Islamic criminal law responds toward gender based sexual crimes. An analytical aspect will be emphasized on finding answer for the question, “Why women very often become the victims of sexual crimes?” The same aspect will also be used in an attempt to trace any theological bases, if any, that may be used to justify the committing of such crimes.

The method to be used in this study based in the feminine perspective, employing a socio-anthropological approach. This perspective is used because the writer will true to interpret and elucidate the data and facts collected from a feminine point of view. It means that all data and facts will be seen whether they are favourable or not to women in their struggle to uphold egalitarianism.

The socio-anthropological approach is must be used, to approach all facts directly from the field within the frame of both social and anthropological theories. It

means that all data and fact collected will be observed and studied, firstly from the social theory’s point of view: why such cases occur, whether they occur repeatedly so there is found a repetition of a social behaviour that can be considered to contribute towards development of a social theory and secondly from the anthropological theory’s point of view: whether there is any theological doctrine that influences people (i.e. men) to commit such crimes, normative interpretation by scholars.

As an effort to take part in uplifting the women’s degree, esteem and dignity, in liberating them from the fetter of sub-ordination, burdening, stereotyping and marginalisation and from being the objects of victims or gender based sexual violence, and in refuting some misunderstood theological legitimations regarding these issues.

Islamic Law

The Islamic law (Sharia) is composed of principles and branches. These principles are of two parts. The first is the principles of jurisprudence, which are mostly the knowledge of the foundations of the rulings, particularly conveyed by the arabic terms and the process of abrogation and preference which undergoes the rulings, where it is found that the imperative is for obligation and the preventive is for prohibition and the like. The second part is juristic principles comprising the intricacies of *shara’* its wisdoms. This principles is a Sharia rule on a comprehensive question, from which the rulings on what comes under the rule are derived.⁵

In the development of the juristic principles went through three stages. The first stage is formation and birth, which was the time of the message and the source of legislation whence the first seed was sown. The sayings of prophet Muhammad had been considered as the general foundations for many rules under which come the numerous juristic branches, like his saying, “No damage and no harm”, and the saying of ‘Umar ibn al-Khaṭṭāb, in *Ṣaḥīḥ al-Bukhārī*, that the determination of the right is made at the time of the stating the conditions. This saying is a principle in the chapter of conditions. We may say that the first foundations of the juristic principles had been implemented within the first three centuries after *hijrah*.⁶

³ Jenny Morgan, “Sexual Harrassment and the Public/Private Dicotomy: Equality, Morality, and Manners”, in Margaret Thronthorn (ed), *Public and Private, Feminist Legal Debates*, (Australia: Oxford University Press, 1990), p. 158.

⁴ Maggie Humm, *The Dictionary of Feminist Theory*, (London: Harvester and Wheatsheaf, 2003), p. 91.

⁵ Summirized from ‘Abd al-Wahhāb Khalāf, *Maṣādir al-Tashrī’ al-Islāmī*, (al-Qāhīrah: Maktabah al-Da’wah al-Islāmiyyah Shab al-Azhar); Muḥammad Abū Zahrah, *Uṣūl al-Fiqh*, (Miṣr: Dār al-Fikr al-‘Arabī, 1990), p. 61-65; Ḥasan Abū Ṭālib, *Taṭbiq al-Shari’ah al-Islāmiyyah fī Bilād al-‘Arabiyyah*, (al-Qāhīrah: Dār al-Nahḍah al-‘Arabiyyah, 1990), cet.III, p. 201-210; Muḥammad Ismā’il Shā’bān, *Tashrī’ al-Islām Maṣādiruh wa Atwaruh*, (Miṣr: Maktabah al-Nahḍah al-Miṣriyyah, 1990), p. 100-104.

⁶ Summirized from Ṣaḥīḥ Muslim, No. 1056, p. 575.

¹ The second stage is grow and compilation in which the juristic principles were considered an independent art during the fourth century *hijriyah*. At this stage the jurists started to implement new styles for jurisprudence when it extended and widened its horizons. These styles are known by so many terms: some times they are named by bases and regulation, and other times as the riddles and disertations. However, this juristic principles were scattered in the books of (Hadith) and the juristic writings. Seeing this, these principles were extracted from these different sources and compiled in separate independent books.

The third stage is reinforcement and coordination in which the extraction of the principles from the different sources, in the different sources, in the different schools of thought had been completed. And the importance function place of the juristic principles in the Islamic jurisprudence are: (1) These principles have a noticable role in facilitating the comprehension of the Islamic jurisprudence and safe-keeping it. If not for the implementation of the principles, the juristic rullings would have been scattered branches with no roots to adhere to; (2) The study of this principles would have help contain the different question and arrive at definite answers for the raised problems when the principle is as a means of arriving at the rullings; (3) By studying these principles the leaner would develop a juristic ability which would render him capable of making annexations so as to arrive at the rullings which are not stated in the books of jurisprudence; (4) They would help the researcher follow up the particulars of the rullings and how to extract these rullings from the different subjects and how to compile them and put them under one subject; (5) Knowing the principles would pave the way for the knowledge of the numerous branches of jurisprudence; (6) This principles contain general rules used as evidence to prove the juristic questions; and (7) they are considered rich sources for the purposes of (*ifta*) and for the judiciary.⁷

Allah almighty said in surah Hūd [11] verse 118, "If thy Lord so willed, he could have made mankind one people, but they will not cease to dispute expect those on whom the lord hath bestowed His mercy and for this did he create them"⁸. Those who are bestowed with His mercy are the exception from disputes and disagreement. As the wisdom of almighty Allah called for the difference in people's intelects and their perception, with the difference in their tongues, colours and the

variation in their perceptions and ideas, the plurality of opinions and judgements came into existence as result of the difference between the people who state them. The differences of opinion between the ancestry is one component of this natural phenomenon. If the difference was of limited scale and dimensions, within the ethics and morals of good conduct, it would be a positive matter and a factor of health and not that of destruction.

Ib⁹ Taymiyyah stated, "The difference of contradiction is the one when two statements are opposing each other, each one saying the opposite". The evidential reason are about Islamic law sourceses (the Quran and Hadith). As the Islamic legislature is conveyed through the medium of Arabic language, this language has an effective influence in the derivation of the rullings. The dispute and disagreement on the understanding of a certain world or expression among the jurists might lead to the statement of different rullings. This can be shown by the following linguistic problems: (1) Ambiguity, when a word has different meaning, which can be used in different positions. The dispute between the jurists over understanding of the world takes places when each one of them acts according to his own understanding of what is meant by that word, different from the others⁹; (2) Ambiguity because of dual meanings of a word as in the saying of almighty Allah¹⁰; (3) Ambiguity because of doubling the word¹¹; and (4) ambiguity because of numerous usages.¹²

⁹ An example of this is stated in the surah al-Baqarah [2] verse 228, "Divorced women, shall wait concerning themselves, for three montly periods". The expression of monthly period here has two different meaning that of menstruation and the other is getting clean from it. The jurists, as result of this ambiguity, got into dispute and disagreement on wether the prescribed period or according to the time of getting clean from it? The jurist of Iraq said that the prescribed period is three periods of menstruation and the jurists of Hijāz said three periods of getting clean from menstruation.

¹⁰ An example of this is stated in the surah al-Baqarah [2] verse 237, "They remit it, or (the man's half) is remitted, by him in whose hands, is the marriage tie", here the one whose hands is the marriage tie might be the guardian or it might be the husband. Dispute between the jurists existed because of this duality.

¹¹ An example of this is stated in the surah al-Baqarah [2] verse 282, "And let neither scribe, not witness suffer harm". The jurists disagreed each according to his understanding, some of them said that what is meant by this verse is that harm comes from the scribe and the witness when the scribe writes. Something not dictated to him and the witness testifies on something which did not take place in reality. Others said that what is meant is that harm takes place when the scribe and the witness are prevented from doing what they have to do or asked to do that in an improper time.

¹² An example of this is stated in the surah al-Baqarah [2] verse 283, "And if one of you, deposits a thing, on thrust with another, let the trustee, faithfully discharge, His trust". In appearance this imperative seems obligatory, but the majority of the jurists say that it is only recommendable.

⁷ Hasan Abū Ṭālib, *Taṭbiq al-Sharī'ah al-Islāmiyyah fī Bilād al-'Arabīyyah*, p. 75; Muḥammad Ismā'il Sha'bān, *Taṣhrī' al-Islām Maṣādiruh wa Aṭwaruh*, p. 115-117.

⁸ Holy Quran and Translation, (Jakarta: Depag, 2003).

And about the evidential reason a lot of dispute among the jurists are related, these reason are: (1) Lack of knowledge about a certain Hadith, it mean that one who come across the Hadith would follow it and the one who did not know about it will of course have no means to utilise it as evidence, but in his statement he may agree with the meaning of that Hadith or he may not agree with it unintentionally; (2) The availability of a certain Hadith to one of the jurists but with disconnected chain of narration, while that some Hadith is available to another jurist in correct connected narration; (3) The affirmation of certain meaning of the Hadith for one independent reasoner while another does not have that affirmation; (4) The narration of one Hadith in different words and expressions where different meanings of the some Hadith are conveyed; (5) The report of the reason behind the narration of the Hadith to one *mujtahid* and not to other, the one to whom the reason behind the narration is reported will have clearer understanding than other one and hence difference in understanding exists; (6) The partial report of a Hadith to one *mujtahid* while the complete report is available to another; (7) One *mujtahid* may come across the situation of agrogation of previous rule, its particularization, or it limitation, while the other *mujtahid* would not have the some chane, and hence there is dispute between them.

He says that neglecting work according to a Hadith might be for a reason which we do not know. This implies that we should find excuses for those scular, with the emphasis that it would not permissible for us to neglect acting according to what appears to us as rules from the shariah evidence, and follow a saying schollar, insult him or say that he is an apostate.

The science of the principle of jurisprudence is a sort of collection of principles and regulations which were established by the (*mujtahids*) for the control of the process of (*ijtihad*) independent reasoning and inferring and deducing of the secondary Sharia rulling from the detailing evidence. This principles and regulation differ from one school of thought and the other. Some jurists follow the procedure that of abiding by a (*fatwā*) made by one compaion of the prophet, peace be upon if that (*fatwā*) was well known. These jurists thought that the companions were trustworthy and their (*fatwā*) were always based on evidence or direct hearing from the prophet. Other do not take the opinion of the companion but that which was narated by the companion about the messenger of Allah as evidence. In this way there was dispute among those jurists.

The fundamentalists had disputedover what was given the name the dispute over the disputed evidence

such as (*sadd al-dhariah*) the prohibition of evasive legal in different in the (*fiqh*) schools of thought. Also the significations and indications of the Sharia expressions and texts in the holy Quran and Hadith had a great influence on the dispute among the scholars, the thing with implies the impossibility of consensus on all the questions of jurisprudence and legislation. This can clearly be shown through some examples which are considered introductory to this kind of dispute summarized in the following: the evident texts with possible interpretation,¹³ the generalization of the texts, the possibility of having different correct interpretations.

About the texts with possible interpretation, it mean the evidence utterance is the one which gives prepoderant indication to its meaning with conjecture, or the possibility of another meaning, and hence the prepoderant and the possible occur together, resulting in dispute among the scholars because each one of them thinks that what he understood from the evident text is the prepoderant opinion while some one else would not have the some understanding. An example of this is found in the verse, "Or ye have been, it contact with women." (Q.s. al-Nisā [4]: 43).

The safies interpreted "contact" as meaning on touching skin of another skin, the thing which would result in the invalidation of ablution because of that more touching of the two skins. So the interpretation of "contact" as being intercourse or being more touching is based on evidence in both different opinions. The Ḥanafi jurists consider "contact" in this verse is referring to intercourse and here the mere touching of the man's skin on the foreign women's skin would not invalidate ablution, although in reality contact means touching of a skin on another skin.

About the generalitation of the texts, some texts are so generalized, giving rise to some interpretations. Example of the Hadith narration about prophet Muhammad that he prohibited the sale of a crop until it is ripe. This Hadith had been given some different interpretation because of the different understanding of that generalized text. May be it is enough to elaborate the Islamic law (Sharia).

Another concept of Islamic law, Sayyid Quṭub, as one of the figures that support the flexibility of the Islamic law, argued that the details and implementation of the Sharia needed by human kind to accommodate the contemporary needs are not out of the four possibilities. First, the Sharia has set a certain law with

¹³ An example of this is found in surah al-Nisā [4]: 43, "Or ye have been, in contact with women".

1 a clear and unequivocal text (*qaṭ'i al-dilālah*)¹⁴. In this regard, the stipulation of the law must be set according to its letter correctly without the slightest change or deviation. This particularly strict provision is primarily regarding to the laws that govern the elementary pillars of the society's life. Second, the Sharia stipulates laws with ambiguous texts, the law's instructions are unclear (*ẓannī al-dilālah*), so they open up the possibilities for conducting *ijtihād*.¹⁵

Third, the Sharia establishes a law about an issue globally/generally (*ijmālī*). Such provision provides a field and opportunities for conducting an *ijtihād*. Fourth, the Sharia does not mention any particular problem with specific provisions, so in this context, it opens widely the door of *ijtihād*, for example by analogical deductions (*qiyās*).¹⁶

This is where, according to Sayyid Quṭub, the flexibility of the Sharia is located which is mostly performed with global and universal principles so that in its shade emanates various forms of active and changing communities in their very wide circle of life. For this purpose of life and humanity, it was then sought the spirit of the provisions of Sharia as the ethical dimensions of the Quran and the Sunnah by previous performers of *ijtihād*.

Maḥmūd Shaltūt said that in applying the legal provisions of the Quran's verses and Hadiths of the Prophet to a new problem, it takes an in-depth understanding and analysis of the law concerned. Then, it should also be investigated the location/ place where the idea of the law is applied because it is so often found the problems that arise in this day and age is apparently the same as the past problems that have had their law provisions, but after in-depth investigation, they turn out to have different essences, so their law provisions cannot be applied but rather it must be sought legal provisions for those new problems which are more *maṣlaḥah* (beneficial to mankind).

1 Amir Syarifuddin in his book, *Pembaharuan Pemikiran Hukum Islam* (The Reformation of Thought on the Islamic Law), argued that the reformation towards

the Islamic law is a must. He offered the need for reformulation of *fiqh* (the Islamic jurisprudence) by reviewing the present situation and conditions to be compared to the past when the jurisprudence was formulated, then carrying out a reinterpretation of the legal texts. He called such a step as the new *ijtihād*.¹⁷

As to the question of gender based sexual violence in the perspective of Islamic law, let discuss about gender based sexual violence and Islamic criminal law.

Gender Based Sexual Violence

And let discuss about the gender based sexual violence, usually, meant to be all criminal acts that are related to sexuality where both men or women can become the object. But, in reality this kind of crime more often positions, women as victims. This might be related to the gender inequality which manifest it self in the form of burdening, stereotyping, doing violence, marginalising, and subordinating women in a society.¹⁸

Gender based sexual violence can take forms of any type of rape case involving different kinds of modus operandi such as anger rape, sadistic rape, domination rape, seduction turned into rape and exploitative rape. Violence in families and forced prostitution (commodification), despising/insulting are other forms of gender based sexual violence.¹⁹

A term "rape" has a literal meaning of taking somebody else's possession using one's force (forcibly) and often accompanied with threats and or violence. For this thesis purpose the term is given the meaning of having an intercourse with a women without her approval since she did it because she could not resist any force, threat and violence that was directed to her. Violence in family involves any kind of ill-treatment done by a husband due to the physical strength to his wife who is weaker naturally. While, the commodification or forced prostitution of women is usually done by stronger parties in families: fathers, brothers, husbands to their daughter, sisters, or wife respectively.²⁰

Progress in area of empowerment women—remains slow. In almost all countries, women have the right to vote on paper, to be eligible for election, appointment to public office, to exercise public functions on equal terms with men at local, national, and international

¹⁴ According to modern Islamic legal experts post Sayyid Quṭub, the concept of *qaṭ'i-zānī* actually is too modest and simple and not liable to be the patent parameters.

¹⁵ Shahrastānī also stated the same thing that the events faced by human kind can not be calculated and made finite, therefore it does not make sense that any event has been provided with a clear description of *naṣ*. So if the description of *naṣ* is limited while the issues and events are infinite, then the way out in searching for their legal certainty is through *ijtihād*. See, Shahrastānī, *al-Milāl wa al-Niḥāl*, (Bayrūt: Dār al-Fikr, [n.d.]), p. 200.

¹⁶ Sayyid Quṭub, *al-Muslimūn*, (al-Qāhirah: Dār al-Miṣriyyah, [n.d.]), p. 41-43.

¹⁷ Amir Syarifuddin, *Pembaharuan Hukum Islam*, (Padang: Angkasa Raya, 1993), p. 115.

¹⁸ Judith Butler, *Gender Trouble, Feminism and the Subversion of Identity*, (London: Routledge, 1990), p. 50.

¹⁹ George F. and Wilding P. *Welfare and Ideologi*, (London: Harvester and Wheatsheaf, 1990), p. 124.

²⁰ Maggie Humm, *The Dictionary of Feminist Theory*, (London: Harvester and Wheatsheaf, 1990), p. 91.

1 levels. But in most countries women participate only marginally at the highest levels of decision making. The higher one goes in either party or the state hierarchy, the fewer women there are, and when women are found in policy making and administrative positions, they typically hold soft position²¹. So, women always can't increase their power and can't deny what her father, brother want.

The problem that have been mentioned become more crucial when patriarchs purposively develop some myths to fetter women when they seek justice for the crimes done upon them. Victims of the crime have to be bear a double-burden, which is being the cause of the crime, even though there is not any of women's conduct that should legitimize men for using their "right" to commit sexual violence upon them. Another myth that is often raised and hurts victim feeling even more is an accusation that victims gave no effort to avoid nor defended themselves toward such crimes. More tragically, the society often puts victims in such a condition that they have to regard the crimes done upon them a bad luck written by God.

An obvious question arises from the topic being discussed is "why women become the object of this crime? And is there any theological ground behind it? Also, Why religion? Religious teachings are often used to be justifiable reasons to reject any ideas about emancipation and gender equality. Religions are considered to give a space in tolerating a gender-relation pattern that gives a greater to men than women. This situation has been creating a male dominated society (*al-mujtama' al-abawi*), and eventually masculine empire will be established.²²

This condition above are strengthened by a development of an anthropological politic that uses a mistaken religious consciousness in the society (i.e. a gender bias) in order to preserve the patriarchal tradition. The gender bias is followed by some order to preserve the patriarchal tradition. The gender bias is followed by some misogynical issues such as the creation of Eve, man's superiority over women, the testimony rule involving women, law of inheritance and some of the prophet's traditions that seem to put women in an unfavourable position.

An unbalanced gender-relation-pattern has been taking place for a long time and has occupied a space in the under-conscious world of our society as if it had been their god wish to be so. This makes it difficult to

differentiate between God's true messages and myth.

A patriarchal system emphasizes on the struggling aspect in the form of conquest, exploitation, domination, competition, and harshness. These are thought to be the main cause of subordination, marginalisation, burdening, and stereotyping of women and eventually open chances for men to commit cruelties and other crimes toward women.

However, the ruling class everywhere establishes its own ideology as dominant in society, and this indoctrinates subordinates who uncritically accept it as true. The Prosaic but constant struggle between the oppressed and the oppressor, where most of the forms this struggle takes stop well short of collective outright defiance. These everyday forms of resistance require little or no coordination or planning; they often represent a form of individual self help; and they typically avoid any direct symbolic confrontation with authority or with elite norms.

Islamic Law and Gender Based Sexual Violence

Any effort to reconstruct Islamic legal thoughts from the pre-modern era that had pre-scientific patterns which were still thick with theological-eschatological nuance up to the modern and post-modern era that have scientific anthropological patterns, are not undertaken just to perform mere intellectual adventure, but they are done as an attempt to harmonize the needs of the Muslim religious community in the midst of changing times and the rapid development of science and human problems.

Therefore, exploring the dynamic and progressive potentials of the Islamic law in this contemporary era is a necessity, especially to address new issues that arise as a logical consequence of the rapid development of human problems.

For that reason, the Islamic law has provided a space for any effort to create laws relating to new problems which is known as *ijtihad* based on the two transcendental sources of the Islamic law (i.e. the holy Quran and the Prophet's Sunnah) through various legal methodologies that had been commonly used by the founders of *madhhabs* (schools of thought).

Cases and events will continue to grow and develop because the society is always changing, so many new issues will arise and need the law's stipulation. Since not all events have clear *nash* (legal texts) in the Quran and the Sunnah, then *ijtihad*s must be employed so that each event can have its legal stipulation.

And now How does the Islamic criminal law present its concept dealing with the problems previously

²¹ Maria Nzomo, *Women in politics*, (Akwor-Kenya: Nairobi, 2002), p. 49-51.

²² Mansur Fakhri, *Gender Analysis and Social Transformation*, (Yogyakarta: Student Library, 1994), p. 17-20.

1 mentioned—while it is widely known that Islam as a religion has been ideally present with great humanity ideas? The religion has been indeed sent down by god the mankind as a guide to liberate them from any kind of cruel despotism, tyranny, rudeness, and slavery/each of these is a violation to human rights bestowed by their god.

Islam is one of religions which has discussed in detail women's right both in the Quran and in the formulation of Islamic law. These rights pertain to marriage, divorce, property, inheritance, custody of children, evidence, rewards, and punishments. Every right have been discussed in great detail. This book is an attempt to set out women's rights in Islam in the true Quranic spirit for there has been much deviation from the spirit in paractice. Islamic society began to be feudalist within a quarter of century after the death of the prophet and this feudalisation had a telling impact on the concept of the rights of women in Islam. It is this spirit which still predominates. The new consciousness among women makes it necessary once again to go back to the original Quranic spirit.

The Quran not only awards equal status to both the sexes in the normative sense but also concedes a degree of superiority to men in its own social context. However the religions ignored the context and made man superior in the absolute sense. I have attempted in this book to recapture the original spirit of the Quranic laws with regard to the male female relationship and to separate what is contextual from what is normative.

The holy Quran makes it abundantly clear that women have their own individual status and are not to be threated as an adjunct of their fathers, husband, and brothers. They enjoy all their rights as individuals, not merely by virtue of being a mother, wife or daughter though such status would be considered for purposes of their inheritance. Unlike some other religions, a woman in Islam enjoys respect not because she happens to be a mother or one who gives birth to children, but because she is a complete human being. Being a mother is incidental to her existence as an individual.

It can be seen from the above that the Quran does not make the slightest discrimination between women and man in any respect. Both are promised "might rewards" for their religious and secular virtues. How then, can anyone say that women are in any respect inferior than man? To maintain such a position would be totally injurious to the spirit of the Quran. In creation, too, men and women are of the same kind. They spring from "*nafs wāḥidah*" i.e. from one being. In Arabic the word *nafs* means either soul and essence and whatever meaning is taken here, it would be the same

source of origin for both man and women.²³ Also unlike the bible, the Quran does not maintain that Eve was born of the rib of Adam, which implies the inferiority of woman. Thus, in creation too, women according to the Quran, are in no way inferior to men.

The Islamic universality surpasses all differences among mankind. It has freed mankind from any factors that are considered to be normative sources of values such as genders, beliefs, nations, races, ethnics, and cultures. Thus the Universality of the Holy Quran as the holy scripture, on which Islamic teaching are based, signifies the equality of mankind in front of God, their creator. Furthermore Islam views mankind to be the noblest creature on the earth among others. Their dignity is unquestionably a birth-right, therefore it should not be abused, stained, treated rudely nor-at worst-started.

From the topic that was just briefly explained, it is interesting to formulate some Islamic principles regarding the matter by quoting the sayings of two prominent Islamic scholars: Imām al-Ghazālī (died 1111 AD) and Imām Ibn al-Qayyim al-Jawziyyah. Imām al-Ghazālī stated in his book, *al-Mustasfā min 'Ilm al-Uṣūl*, that the objectives of the religion is to protect five things: soul, minds, beliefs (faiths), dignities, and wealth.²⁴ Whereas Ibn al-Qayyim through his book, *I'lām al-Muwāqī'in*, explained that the Islamic law (Sharia) was built upon human needs and wisdom both here—in this world and there—in the hereafter. Sharia is totally for betterness as well as it is for wisdom.²⁵

In this study it is emphasized that any discrimination and cruel despotism in whatever forms they may manifest, including any type of violence, rapes and commoditification or forced prostitution towards women simply because of their nature for being women, are never acceptable nor justifiable. They obviously represent a violation toward two of the most valuable mankind's possessions—soul and dignity—which are highly regarded and protected by Islam through its law.

In the area of Islamic criminal law, there are three types of punishment toward crimes. They are *qisās*, *ḥudūd*, and *ta'zīr*.²⁶ *Qisās* is a short punishment equal to the crimes committed including murder, wounding, or intentional attacks. *Ḥudūd* refers to punishment

²³ The holy Quran al-Nisā' [4]: 1.

²⁴ Imām al-Ghazālī, *Al-Mustasfā min 'Ilm al-Uṣūl*, (Baghdad: Muthannā, 1970).

²⁵ Ibn al-Qayyim, *I'lām al-Muwāqī'in*, (al-Qāhira: Sa'ādah, 1955).

²⁶ 'Abd al-Qādir Awdah, *Tashrī' al-Jinā'ī al-Islāmī*, (Bayrūt: Mu'assasah al-Risālah, 1987), p. 187-189; Muḥammad Abū Zahrah, *al-Uqūbah*, (Bayrūt: Dār al-Fikr al-'Arabī, t.th.), p. 182.

toward some specific crimes that have been explained by god through revelation. Kind of crimes and their corresponding form of punishment were described in the holy Quran and the prophet Muhammad's traditions. Including in this category is adultery, accusing some one to commit adultery, stealing, *ḥirābah* (committing destructive actions on the earth) and organising rebellious actions against an Islamically legal and good government. Whereas *ta'zir* is a type of punishment toward other crimes where its forms are left to consideration and decision of moeslem judges.

The term of gender based sexual violence in the Islamic criminal law, for example: rape is known as (*al-waṭ' bi al-ikrāh* or *al-intihā' 'alā ḥurmah al-nisā' bi al-ikrāh*, it mean having enjoyment by using force). A rape to women considered in this research can take three forms of crime which is a forced adultery, an assault in *qisās*, while commoditification or a forced prostitution takes two forms of crime, which is a forced adultery and *ḥirābah*.

Closing Remarks

From the discussion above, can be concluded that the Islamic law (Sharia) is composed of principles and branches. These principles are of two parts. The first is the principles of jurisprudence, which are mostly the knowledge of the foundations of the rulings, particularly conveyed by the arabic terms and the process of abrogation and preference which undergoes the rulings, where it is found that the imperative is for obligation and the preventive is for prohibition and the like. The second part is juristic principles comprising the intricacies of *sharā'* its wisdoms. This principles is a Sharia rule on a comprehensive question, from which the rulings on what comes under the rule are derived.

Gender based sexual violence, usually, meant to be all criminal acts that are related to sexuality where both men or women can become the object. But, in reality this kind of crime more often positions, women as victims. This might be related to the gender inequality which manifest it self in the form of burdening, stereotyping, doing violence, marginalising, and subordinating women in a society.

Gender based sexual violence for example a rape to women considered in this study can take three forms of crime which is a forced adultery, an assault in *qisās*, while commoditification or a forced prostitution takes two forms of crime, which is a forced adultery and *ḥirābah*. []

Bibliography

- Abū Tālib, Ḥasan, *Taṭbīq al-Sharī'ah al-Islāmiyyah fī Bilād al-'Arabiyyah*, al-Qāhirah: Dār al-Nahḍah al-'Arabiyyah, 1990.
- Abū Zahrah, Muḥammad, *al-'Uqūbah*, Bayrūt: Dār al-Fikr al-'Arabī, t.th.
- Abū Zahrah, Muḥammad, *Uṣūl al-Fiqh*, Miṣr: Dār al-Fikr al-'Arabī, 1990.
- Awdah, 'Abd al-Qādir, *Tashrī' al-Jinā'i al-Islāmī*, Bayrūt: Mu'assasah al-Risālah, 1987.
- Butler, Judith, *Gender Trouble, Feminism and the Subversion of Identity*, London: Routledge, 1990.
- Fakih, Mansur Fakih, *Gender Analysis and Social Transformation*, Yogyakarta: Student Library, 1994.
- George F. and Wilding P, *Welfare and Ideologi*, London: Harvester and Wheatsheaf, 1990.
- Ghazālī, al-, Imām, *Al-Mustasfā min 'Ilm al-Uṣūl*, Baghdad: Muthannā, 1970.
- Humm, Maggie, *The Dictionary of Feminist Theory*, London: Harvester and Wheatsheaf, 2003.
- Ibn al-Qayyim, *I'lām al-Muwāqī'in*, al-Qāhirah: Sa'adah, 1955.
- Khallāf, 'Abd al-Wahhāb, *Maṣādir al-Tashrī' al-Islāmī*, al-Qāhirah: Maktabah al-Da'wah al-Islāmiyyah Shab al-Azhar, n.d.
- Morga, Jenny, "Sexual Harrassment and the Public/Private Dicotomy: Equality, Morality, and Manners", in Margaret Thronthor (ed), *Public and Private, Feminist Legal Debates*, Australia: Oxford University Press, 1990.
- Nzomo, Maria, *Women in politic*, Aaword-Kenya: Nairobi, 2002.
- Sayyid Quṭub, *al-Muslimūn*, al-Qāhirah: Dār al-Miṣriyyah, n.d.
- Sha'bān, Muḥammad Ismā'il, *Tashrī' al-Islām Maṣādiruh wa Aṭwaruh*, Miṣr: Maktabah al-Nahḍah al-Miṣriyyah, 1990.
- Syarifuddin, Amir, *Pembaharuan Hukum Islam*, Padang: Angkasa Raya, 1993.

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