

# A Socio-Historical Study of Women's Rights Advocacy in Islamic Legal Construction

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## Abstract

This article presents evidence that the construction of Islamic law is influenced by women's voices, experiences, and problems. It also offers a critique of the misogynistic narrative of Islamic law. Adopting a socio-historical approach with a women's perspective, this research demonstrates the inadequacy of current studies that argue that Islamic law places women in an inferior and subordinate position to men. Critical analysis of the *asbabun nuzul* text of the Qur'an is the primary analytical tool used in this study. Polygamy, *khulu'*, *zihar*, and inheritance are the four main issues examined, and the study shows that the complaints and advocacy of women played a critical role in shaping the Islamic law system. Women's perspectives serve as a spiritual foundation in the development of Islamic law and cannot be disregarded. By considering women's perspectives, fair benefits can be realised, and a sense of justice can be achieved for vulnerable groups, such as women.

Keywords: *Women's rights, women's perspectives, Islamic legal construction, discrimination*

## I. INTRODUCTION

The marginalisation of women within religious communities has been a persistent issue throughout history. Regrettably, women often face discrimination within religious contexts more frequently than men. These views have unfortunately become dogmatic in some religions. Christianity is a case in point, where the Bible's androcentric language and interpretation have contributed to the theological marginalisation of women.<sup>1</sup> Similarly, the Torah describes women as inferior to

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<sup>1</sup> Elizabeth S Fiorenza, *Untuk Mengenang Perempuan Itu: Rekonstruksi Teologis Feminis tentang Asal Usul Kekristenan*, translated by Stephen Suleman (Jakarta: BPK Gunung Mulia, 1997) at 68.

death<sup>2</sup>, while Jewish doctrine portrays women as cursed for tempting Adam to eat the fruit of Khuldi, which led to his expulsion from heaven.<sup>3</sup> It is important to note, however, that these negative perspectives on women stem from religious interpretation, rather than from the teachings of the religion itself.

How does Islamic religious interpretation view and position women? According to Munoz<sup>4</sup>, the dynamics of religious interpretation in Islam remain steeped in patriarchy. Social, economic, and political factors have influenced and determined patriarchal family relations in Islam. The dominance of religious interpretation based on patriarchal culture has significantly contributed to the marginalisation of women in the history of religious discourse. Women appear to be excluded from religious doctrines and beliefs, resulting in gender injustice.<sup>5</sup> This patriarchal construction has been highlighted by scholars and *fiqh* reformers in the contemporary era.

The presence of patriarchy within religious contexts can be observed through multiple patterns. One such pattern revolves around the concept of divinity. According to Armstrong, the emergence of monotheistic religions, such as Judaism, Christianity, and Islam, played a pivotal role in instilling patriarchal and sexist elements within religious systems.<sup>6</sup> She further highlights the replacement of goddesses and priestesses with male prophets as evidence of this phenomenon. However, it is important to recognise that this perception of misogyny is merely a product of religious interpreters who adhere to a patriarchal cultural framework. In reality, Islam, Christianity, and Judaism all embody principles that vehemently oppose gender discrimination, both in theory and in practice. This article aims to delve into the religious commitment to gender justice, with a specific focus on the Islamic faith.

Some studies suggest that Islam is not inherently supportive of patriarchy and gender injustice. For instance, Welzel<sup>7</sup> has found that rising levels of education, labour market participation and the trend towards gender equality are decreasing the support for patriarchy, especially among Muslim women. Similarly, Wadud<sup>8</sup> argues that the principle of *tawhid* in Islam provides a theological basis for gender equality. *Tawhid*, the belief in the oneness of God, can imply both the glorification of Allah and the assertion of human equality before him. Therefore, religious dynamics within

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2 Abdullah A Djawas, *Dilema Wanita Karir Menuju Keluarga Sakinah* (Yogyakarta: Ababil, 1996) at 13.

3 Iwan Setiawan et al, "Kajian Teologis Terhadap Status Perempuan Dalam Perjanjian Baru" (2021) 10:2 *Missio Ecclesiae* at 159.

4 Gema Martín Muñoz, "Patriarchy and Islam" (Semantic Scholar, 2006), [semanticscholar.org/paper/Patriarchy-and-Islam-Muñoz](https://www.semanticscholar.org/paper/Patriarchy-and-Islam-Muñoz).

5 Adrika Fithrotul Aini, "Agama Menolak Patriarkisme (Pendekatan Sosio-Teologis)" (2015) 15:1 *Anal J Studi Keislam* 258.

6 Karen Armstrong, *A History of God: the 4000-Year Quest of Judaism, Christianity and Islam* (New York: Ballantine Books, 1993) at 103.

7 Christian Welzel & Amy Alexander, "Islam and Patriarchy: How Robust is Muslim Support for Patriarchal Values?" (2011) 21:2 *International Review of Sociology-Revue Internationale de Sociologie* at 249.

8 Amina Wadud, *Qur'an and Woman: Rereading the Sacred Text from a Woman's Perspective* (New York: Oxford University Press, 1999).

Islam should be guided by this fundamental principle, both in normative religious interpretation and in social reality.

However, in actuality, numerous misinterpretations of Islamic scriptures persist, leading to discriminatory practices against women, particularly in the domain of family law. This can be comprehended as being due to the family unit serving as a framework that assigns women various roles, encompassing those of wives, mothers, and daughters. The roots of gender discrimination within women's roles can be traced back to the era of Jahiliyah, where historical practices included the widespread burial of newborn female infants by a majority of the Arab population, deeming them as sources of shame.<sup>9</sup> Moreover, during the pre-Islamic era, wives were treated akin to property, subject to being inherited.<sup>10</sup> Despite Islam's efforts to elevate the status of women, regrettably, patriarchal cultural influences frequently persist within the interpretation of Qur'anic verses.

In this context, Kodir<sup>11</sup> identifies issues pertaining to the existence and identity of women's humanity in Islamic family law. Matters such as divorce, *nusyuz* (spousal disobedience), maintenance, *iddah* (waiting period), *ihdad* (custody), and sexual needs are still commonly examined from a male perspective. Previous studies have also revealed various understandings of religious gender bias that stem from interpretations of Qur'anic texts. For example, the legality of polygamy is based on Qur'an 4: 3, which in practice has led to exploitative practices and the dehumanisation of women.<sup>12</sup> In cases of *nusyuz* (spousal disobedience), women are often depicted as the source of the problem.<sup>13</sup> In the practice of *nikah sirri* (unregistered marriage) and early marriage, women are highly vulnerable to legal uncertainty and injustice.<sup>14</sup>

Historical studies on the interests of women in Islamic law are of great significance. The patriarchal culture that dominates the practice of interpretation has led to the disregard of the Qur'anic spirit, which has always protected women's rights since its writing. Numerous case studies related to Islamic law have been conducted by previous scholars. Asni<sup>15</sup> argues that reinterpretations of the text are imperative, given the current conditions shaped by various developments. Fitriyani<sup>16</sup> stresses the

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9 Said Abdullah Seib Al-Hatimy, *Citra Sebuah Identitas Wanita Dalam Perjalanan Sejarah* (Surabaya: Risalah Gusti, 1994).

10 R Magdalena, "Kedudukan Perempuan Dalam Perjalanan Sejarah (Studi Tentang Kedudukan Perempuan dalam Masyarakat Islam)" (2017) 11:1 Harkat an-Nisa: Jurnal Studi Gender dan Anak at 21.

11 Faqihuddin Abdul Qodir, *Qira'ah Mubadalah* (Yogyakarta: IRCiSoD, 2019) at 325.

12 Hariyanto, "Dehumanisasi Terhadap Perempuan Dalam Praksis Poligami: Dialektika antara Normativitas dan Historisitas" (2015) 8:1 PALASTREN at 99.

13 Fitriani, *Perspektif Gender Kaitannya Tentang Istri Nusyuz Menurut Hukum Islam* (Skripsi, Institut Agama Islam Negeri Bone, 2020) [unpublished] at 59.

14 Nursalam Rahmatullah, "Marginalisasi Perempuan Dalam Perkawinan (Telaah Atas Nikah Sirri Dan Nikah Anak Di Bawa Usia Perspektif Hukum Islam)" (2021) 2:2 Familia: Jurnal Hukum Keluarga at 137.

15 Asni, "Membongkar Akar Bias Gender Dalam Hukum Islam (Telaah Fiqh Perempuan Perspektif Sejarah Sosial Hukum Islam)" (2016) 9:1 Jurnal Al-Maiyyah at 42.

16 Fitriyani, "Aspek-aspek Pembaruan Hukum Islam dalam Hukum Keluarga di Indonesia" (2019) 11:2 Tasamuh: Jurnal Studi Islam at 268.

need for Islamic law reform from a sociological perspective, considering material, methodological, and normative aspects. Hidayat<sup>17</sup>, and Andaryani<sup>18</sup> emphasise the importance of Islamic law reform in the context of legislation.

This research aims to address the gaps present in prior studies by investigating the involvement of women's interests in the formation of Islamic law. The primary inquiry guiding this discourse revolves around the reconstruction of a gender-equitable fiqh. The examination will commence by establishing a theoretical framework for the interpretation of gender within Islamic jurisprudence, emphasising women's rights as delineated in Islamic law. It will proceed to shed light on the portrayal of women in the Qur'an and the interpretation of verses that have been perceived as promoting misogyny, drawing upon a historical analysis. Finally, the principal focus will revolve around the recontextualisation of women's rights. In essence, this study endeavors to scrutinize women's rights within Islamic law through socio-historical investigations and to advocate for the recognition and protection of these rights.

## II. INTERPRETATIONS OF ISLAMIC LAW ON GENDER

The misinterpretation of religious texts is a continuing issue within the Muslim community. As Abdullah aptly asserts, errors arise from the sacralisation of the text itself. The phenomenon of text sacralisation underscores the absence of a causal correlation between the verses of the Qur'an and the socio-cultural and historical events that underpin them. Despite the presence of the *asbab al-nuzul* approach in the field of tafsir, which explicitly acknowledges the connection between the Qur'an's norms and the surrounding social, economic, and political circumstances, an ahistorical approach continues to prevail.<sup>19</sup> Consequently, religious interpretations become imbued with patriarchal elements which were deeply entrenched within the Arab lands even prior to the advent of Islam.

The existence of rigidity and gender bias in interpretation represents one of the prevailing challenges in the formulation of Islamic family law. It appears that the legal framework has been predominantly crafted to cater to the interests of men, while offering limited avenues for women's advocacy. With regards to textual evidence, Engineer posits that the Qur'an not only affirms the inherent perfection of women but also delineates their rights in areas such as property, marriage, inheritance, and divorce.<sup>20</sup> Building upon this assertion, a socio-historical investigation focusing on family law verses from a woman's perspective becomes imperative. Such a study

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17 Asep Syarifuddin Hidayat, "Pengaruh Wacana Gender Dalam Pembangunan Hukum Keluarga Di Indonesia" (2013) 1:1 Jurnal Cita Hukum.

18 Lilik Andaryani, "Relasi Gender dalam Pembaruan Hukum Keluarga Muslim" (2014) 2:2 Jurnal Diskursus Islam.

19 M Amin Abdullah, *Islamic Studies di Perguruan Tinggi: Pendekatan Integratif-Interkonektif* (Yogyakarta: Pustaka Pelajar, 2006).

20 Asghar Ali Engineer, *Hak-hak Perempuan dalam Islam* (Yogyakarta: LSPPA, 2000) See also Rosnaeni, "Pandangan Asghar Ali Engineer Tentang Kesetaraan Gender" (2021) 3:2 Tadarus Tarbawy at 349.

would shed light on the subject, offering valuable insights and deeper understanding of the issues at hand.

Qur'anic verses pertaining to Islamic law were driven by a conscientious consideration of the equitable interests of both men and women. Nevertheless, over time, the interpretation of these *nash* (Qur'anic texts) has frequently been influenced by contextual factors, effectively marginalising women. Consequently, women's voices within the legal framework have progressively diminished, overshadowed by the prevailing masculine lens through which Qur'anic verses are interpreted.

Drawing from Kodir's theory of *Qira'ah Mubadalah*, it is imperative to engage in a reevaluation of the theories governing text interpretations in both *tafsir* (Qur'anic exegesis) and *usul al-fiqh* (principles of Islamic jurisprudence). This reexamination is crucial to establish women as active readers of the text, ensuring that they are recipients of the same benefits as men from the fundamental mission conveyed within the text. Embracing the belief that Islam is intended for the welfare of both genders necessitates an interpretive approach that positions men and women as equal subjects, enabling them to benefit from the same advantages. This can be achieved, among other measures, by guaranteeing that both genders are regarded as subjects of Islamic source texts.<sup>21</sup>

The discourse on gender equality in Islam encompasses significant insights, as exemplified by Husein Muhammad's scholarly contributions. From a historical perspective, prior to the advent of Islam, women were relegated to the status of commodities, freely tradable and subject to ownership for various services or purposes. Regrettably, societal norms of that time disregarded fundamental rights afforded to women, such as the exclusion of girls from the *aqiqah* ritual, denial of inheritance rights, and the practice of marriage dowry being bestowed upon guardians rather than women themselves, among other rights. However, with the arrival of Islam, the position of women underwent a transformative shift. Prophet Muhammad, through his teachings and prophetic traditions (*hadiths*), emphasised the imperative of benevolence and the elevation of women's status. This served as an impetus for positive change, fostering an environment where women's rights were recognised and their societal standing was uplifted.<sup>22</sup>

Within conservative *fiqh* or *tafsir* circles, the interpretation of women's rights tends to exhibit a marked patriarchal bias. This bias becomes evident in the interpretation of the verse regarding the leadership of men over women (Al-Qur'an 4: 34). For instance, At-Thabari interprets the verse as granting men the role of mentors and educators for women, thereby reinforcing male authority.<sup>23</sup> Ar-Razi shares a similar interpretation, emphasizing the superiority of men over women.<sup>24</sup> Likewise, Zamakhsari perceives men as leaders and restricts women from assuming

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21 Qodir, *supra* note 11 at 122.

22 Husein Muhammad, *Islam Agama Ramah Perempuan* (Yogyakarta: IRCiSoD, 2021) at 188.

23 Abu Ja'far Muhammad bin Jarir Ath-Thabari & Jami' Al-Bayan an Ta'wil Ayi, *Al-Qur'an*, translated by Abdul Somad & Yusuf Hamdani (Jakarta: Pustaka Azzam, 2008).

24 Ar-Razi & Al-Imam Fakhr ad-Din, *The Mafatih al-Ghaib* (Beirut: Dar al-Fikr, 1995).

leadership roles, extending beyond the scope of mere mentoring or educating.<sup>25</sup> These interpretations, offered by conservative scholars, stand in stark contrast to prevailing contemporary thought in Indonesia.

However, even contemporary thinkers from Indonesia, such as Hamka and Hasbi, exhibit gender biases in their interpretation of verses concerning women, particularly regarding the understanding of the aforementioned verse on leadership, where their patriarchal perspective is still evident. Hamka asserts that men assuming leadership roles over women is not only a social reality but also an inherent instinct.<sup>26</sup> In a similar vein, Hasbi refrains from translating the term '*qawwan*' as leader but instead as administrator. According to Hasbi, men are responsible for safeguarding women, which explains the rationale behind men receiving a larger share of inheritance compared to women. Furthermore, within the household, Hasbi elucidates that it is the man who assumes the position of head and caretaker, while the wife independently tends to the household affairs within the boundaries set and approved by her husband.<sup>27</sup>

This study centers on investigating the role and status of women within the framework of Islamic law. Specifically, the research aims to highlight the equitable treatment of women as equal subjects to men. Islamic law, as revealed, encompasses provisions that cater to the needs and interests of both genders, without endorsing any form of superiority or hierarchy. The essence of Islam, when examining the position of men and women, rejects the notion of one gender being superior to the other.

### III. ISLAMIC LAW ON WOMEN'S RIGHTS

Islamic teachings have been criticised for oppressing women for a long time. The teachings, which have been dominated by men, have been used to justify societal perceptions that are harmful to women. However, this is contrary to the fundamental values of Islam. The Qur'an itself states that the position of men and women is equal as servants because both are created from the same substance (*min nafsin waahidah*), have the same task (*khalifatullah filardh*), and share the same obligations (*liya'budun*).<sup>28</sup> Islamic law does not support any form of discrimination against or subordination of women.

In contemporary society, a prevalent notion persists that posits the superiority of men over women. This belief is deeply entrenched and engenders a societal milieu where gender equality is not duly recognised. Men are viewed as being superior to women in all facets, from intellectual prowess to physical and psychological abilities. Regrettably, this perspective facilitates the perpetuation of religious interpretations

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25 Az-Zamakhsari al-Khawarizmi & Abu al-Qasim Jarullah Mahmud bin Umar, *The al-Kasysyaf 'an Haqaiq at-Tanzil wa 'Uyun al-Aqawil fi Wujuh at-Tauhid* (Beirut: Dar al-Fikr, 1997).

26 Hamka, *Tafsir Al-Azhar* (Jakarta: Pustaka Nasional, 1987).

27 Muhammad Hasbi Ash-Shiddiqy, *Tafsir Al-Quran An-Nur*, (Semarang: Pustaka Rizki Putra, 1995).

28 Aswiyanto, "Women, Reconciliation Right and Gender Justice in Islam Family Law" (2019) 16:2 Jurnal Penelitian.

that are founded on inadequate evidence. It is noteworthy that even among scholars, this viewpoint remains pervasive.

In accordance with the scholarship of Husein Muhammad<sup>29</sup>, a considerable number of classical tafsir scholars subscribe to the notion of male superiority over women when interpreting the Qur'an 4: 34. Eminent theorists such as Imam ath-Thabari, az-Zamakhshari, ar-Razi, and Ibn Kathir are among those who hold this view. However, they acknowledge that this perspective refers to the majority in general and does not pertain to either gender specifically. This stems from their recognition that individuals such as Siti Aisha surpass numerous men in their abilities and accomplishments.

*“Men are the caretakers of women, as men have been provisioned by Allah over women and tasked with supporting them financially. And righteous women are devoutly obedient and, when alone, protective of what Allah has entrusted them with” (4: 34).*

From the perspective of *mubadalah*, as interpreted by Kodir<sup>30</sup>, the aforementioned verse elucidates the leadership or responsibility of men towards women based on two criteria: ability and financial support. It does not espouse the notion of male superiority or greater excellence in leadership. Rather, this verse underscores the obligation of those who possess virtue (*fadhl*) and wealth (*inafaqah*) to bear the responsibility of supporting those who lack these resources. Although men are mentioned explicitly, due to the specific prevailing conditions during the time of the verse's conception, this injunction is intended for those who are capable of providing financial support for their family members. Hence, it is erroneous to construe this verse as a justification for the superiority of men over women.

Another premise that theoretically advocates the superiority of men over women is based on a fragment of 2: 228. This fragment appears to assert the superiority of men, as it states that *“men are one degree higher than women”*. However, this interpretation overlooks the broader context of the verse, which does not address the issue of superiority. The fragment has assumed such significance due to its isolation from the surrounding verses. The complete verse, for contextual clarity, is as follows:

*“Divorced women must wait three monthly cycles before they can re-marry. It is not lawful for them to conceal what Allah has created in their wombs, if they truly believe in Allah and the Last Day. And their husbands reserve the right to take them back within that period if they desire reconciliation. Women have rights similar to those of men equitably, although men have a degree of responsibility above them. And Allah is Almighty, All-Wise” (2: 228).*

If examined carefully and in conjunction with other verses, this particular verse pertains to the dynamics of marital relations during a *raj'i* divorce. A *raj'i* divorce enables the husband to reconcile with his wife without requiring a new marriage

29 Cited in Moh Fahmi Arofi, “Pemikiran Tafsir Gender Husein Muhammad Dan Implikasinya Dalam Pendidikan Islam (Studi Pustaka Buku Fiqh Perempuan)” (2020) 1:1 Journal Islamic Studies at 16.

30 Qodir, *supra* note 11 at 380.

contract. To initiate reconciliation, the husband simply needs to utter the phrase, "I return to you," and they are restored as husband and wife. This form of divorce is applicable in the first and second stages of separation. However, if there have been two divorces, the husband's right to reconcile is forfeited and exhausted. Regarding this right to reconcile, other men are prohibited from expressing an interest in marrying the divorced woman, whether implicitly (*fa'ridh*) or explicitly (*tashrihf*). In essence, for three months following the declaration of divorce, their relationship is not entirely severed. They remain in a phase that allows for the possibility of reconciliation, and during this period, the husband retains the full right to return. There is no requirement for a guardian, witnesses, a *nail*, or *walimahan* in this process.

As a consequence of the right of reconciliation, the statement "the husband of a divorced wife has more right to return to his wife" than any other man is justified. This is due to the fact that other men are not permitted to approach the woman, even with indirect and implicit expressions of interest. Conversely, the right of reconciliation is exclusive to the husband and not extended to the wife. Since it is the husband who initiates the divorce, he is granted the option to reconcile if he so chooses. Consequently, the expression "the husband has one degree more right than the wife" denotes the right of reconciliation. The right of reconciliation with one's wife is reserved for the husband and not another man who is not her husband.<sup>31</sup>

Due to the husband's right of reconciliation, a divorced woman is prohibited from concealing her pregnancy so that she can remarry immediately. Moreover, during the waiting period (*iddah*) of three months, the husband is still obligated to provide for and accommodate his wife in his house. This is what is meant by "one degree more than." The notion of male superiority is not established here.<sup>32</sup> In fact, as mentioned earlier, Islam advocates for a partnership of equality between men and women. The hadith texts of Prophet Muhammad prioritise faith and deeds over physical appearance.

Male and female genitalia are parts of the body, which do not increase or decrease the quality of a person's faith and piety. As a human being, a man does not increase in quality just because he has male genitalia, nor does a woman decrease in quality just because she has female genitalia. Both are complete human beings, whose quality will be seen by their faith and deeds rather than from their body, appearance, or gender. A similar idea is affirmed in the following Qur'an:

*"O humanity! Indeed, We created you from a male and a female, and made you into peoples and tribes so that you may get to know one another. Surely the most noble of you in the sight of Allah is the most righteous among you. Allah is truly All-Knowing, All-Aware" (49: 13).*

The Qur'an affirms that a person's gender, whether male or female, does not increase or decrease their level of honour or virtue. Similarly, the Hadith texts

31 Abdul Aziz, *Iddah Bagi Suami dalam Fiqih Islam: Analisis Gender* (Skripsi, Universitas Islam Negeri Maulana Malik Ibrahim, 2010) [unpublished] at 116.

32 Naqiyah Mukhtar, "Reinterpretasi Derajat Laki-Laki Lebih Tinggi Atas Perempuan Dalam Surat Al-Baqarah/2: 228" (2015) 4:2 Yin Yang.



confirm that maleness does not increase a person's honour and femaleness does not decrease their virtue, and vice versa. The only criterion for measuring a person's worth is piety, which is determined by their deeds and actions. Therefore, one's gender should not be a determining factor in their level of honour or virtue, as these qualities are solely based on their piety.

#### IV. THE STORY OF WOMEN'S INEQUALITY IN THE QUR'AN

The problem of gender bias arises within the interpretation of certain pivotal verses that directly impact gender justice. These verses have been subject to biased interpretations by some scholars, leading to a failure in fulfilling the true intention (*maqasid al-shariyyah*) of the verses. Several examples of such verses include those pertaining to polygamy (4:3), *khulu'* (2:229), *dhihar* (58:2), and inheritance (4:11).

The verse addressing polygamy, as stated in Surah An-Nisa, verse 3, which permits the marriage of two to four wives, possesses a distinct *sabab al-nuzul* (reason for revelation). According to the narration of 'Aisha, this verse was revealed in response to a specific circumstance involving a man who acted as the guardian of a wealthy orphan. The man intended to marry the orphan solely for her wealth, neglecting the customary norms of dowry payment or even leaving it unpaid. Unfortunately, it was not uncommon for mistreatment to befall orphaned woman after the marriage. Rather than abandoning the orphaned woman, Allah, through this verse, encouraged the man to consider marrying another woman who was not an orphan and whom he genuinely desired, even to take up to four wives, provided he maintains fairness among them.<sup>33</sup>

Al-Zuhaili posits that the command to marry in the verse signifies permissibility, supported by the phrase of Allah , "eat and drink you." However, an alternative viewpoint contends that the suggestion in the verse implies an obligation to limit the number of wives, as deduced from the phrase of Allah , "two or three or four," which does not entail a mandate for compulsory polygamy. Furthermore, the sentence does not indicate repetition. Its intended meaning is to grant permission to individuals engaging in polygamy to marry any woman they desire from the specified number.<sup>34</sup> Consequently, polygamy is permissible under specific conditions. Nevertheless, the verse's primary emphasis lies in safeguarding women from circumstances that contain elements of injustice.

The verse concerning *Khulu'*, the compensation given by a woman who seeks divorce from her husband, is found in Qur'an 2:229: "If you fear a breach between them (husband and wife), appoint an arbiter from his family and an arbiter from her family. If they desire reconciliation, Allah will cause it between them. Indeed, Allah is ever Knowing and Acquainted [with all things]." This verse was written in response to a specific case brought before the Prophet Muhammad by a woman named Umm Habibah, the wife of Thabit bin Qais, who expressed concerns about her husband's

33 Ibn Jarîr al-Thabarî, *Jâmi` al-Bayan li Ta`wil al-Qur'an*, Jilid III (Beirut: Dâr al-Kutub al-`Ilmiyah, 1999) at 574.

34 Wahbah Zuhaili, *Tafsîr al-Munîr*, Jilid 4 (Damaskus: Dar al-Fikr, 2009) at 566.

behavior. She sought the Prophet's guidance on whether she could return the date palm trees that her husband had given as compensation for her release from their marriage. The Prophet granted her request and accepted the garden as compensation.

According to Al-Khin, this verse highlights the right of women to assert control over their own lives. It affirms that even during the *iddah* period, when reconciliation is still possible, the husband does not possess the right of automatic reconciliation. If the husband wishes to reunite with his wife, the only way is through a new marriage contract and dowry.<sup>35</sup> This verse underscores the importance of women's agency and their ability to make decisions regarding their own wellbeing.

The verse concerning *zihar* addresses a husband who deeply hurts his wife by comparing her to his mother, as mentioned in the Qur'an 58:2. The revelation of this verse is connected to the complaint brought by a woman named Khaulah binti Tsa'labah, who had been subjected to humiliation (*zihar*) by her husband, Aus ibn Shamit. Aus uttered to his wife, "You are to me like the back of my mother". In the pre-Islamic custom, such a statement of *Zihar* was considered equivalent to pronouncing divorce. Upon hearing Khaulah's complaint, the Prophet Muhammad responded by saying that sexual relations with Aus were now forbidden for her. Khaulah then clarified that her husband had not explicitly uttered the words of divorce (*thalaq*). Subsequently, Khaulah persistently urged the Prophet Muhammad to make a definitive ruling in her case, which led to the conception of this verse and the subsequent verses.<sup>36</sup>

From a legal interpretation standpoint, the verse has significant implications. Al-Zuhaili posits that if the act of equating one's wife to his mother, brother, or any other party is intended to humiliate or demean, it would result in an automatic divorce (*thalaq*).<sup>37</sup> However, if the comparison is not meant to belittle, divorce does not occur. Nonetheless, the husband would be obligated to provide expiation or a fine, such as freeing a slave.<sup>38</sup> The purpose of this verse is to safeguard women's rights and prevent arbitrary adverse treatment at the hands of men. Its aim is to establish a fair and just framework in marital relationships, ensuring the protection and dignity of women.

The verse on inheritance, which stipulates that women receive half the share of a man, is elucidated in Al-Qur'an 4:11. Atho' argues that this verse relates to a Companion named Sa'ad bin Robi' who was martyred during the Battle of Uhud.<sup>39</sup> Sa'd bin Robi' left behind two daughters, a wife, and a brother. It is narrated from Jabir that Sa'd bin Rabi's wife and two children approached the Prophet of Allah seeking his intervention. The wife explained that her husband had died on the battlefield of Uhud as a martyr, and the uncle of the daughters had wrongfully claimed their inheritance, leaving nothing for them. The wife further emphasised that the

35 Mushthafa al-Khin, *Al-Fiqh Al-Manhaji* (Damaskus: Darul-Qalam, 2011).

36 M Quraish Shihab, *Tafsir al-Misbah: Pesan, Kesan dan Keserasian al-Qur'an* (Jakarta: Lentera Hati, 2002) at 60.

37 Wahbah az-Zuhaili, *Al-Fiqh Al-Islami*, juz IX, (Damaskus: Dar al-Fikr, 1986), 7138.

38 Mushthafa al-Khin, *Al-Fiqh*, 146.

39 'Ala'uddin Ali bin Muhammad bin Ibrahim al-Bagdadi, *Tafsir al-Khazin al-Musammas Lubab at-Ta'wil fii Maani at-Tanzil*, Jilid I (Beirut: Dar al-Kutub al-Ilmiyah, 2004) at 346.

daughters were in need of their inheritance to be able to marry. In response, the Prophet Muhammad stated that Allah would provide a resolution, and subsequently, the verse concerning inheritance (*mawaris*) was conceived.

The Prophet sent a representative to instruct the uncle of the orphaned girls to allocate two-thirds of their father's estate to his daughters, give one-eighth to their mother, and keep the remaining portion for himself. This incident highlights the context in which the verse on inheritance was written and the subsequent action taken to ensure the fair distribution of the deceased's estate.

The allocati'n of 2:1 in inheritance, as practiced in Arab customs during that period, represented a significant departure from the prevailing norms, which mandated that men bear the responsibility of providing for women and children. As societal dynamics evolved and women began to contribute to the financial support of their families, it became necessary to reassess the distribution of inheritance shares. Adjustments to the traditional framework could again today be contemplated in order to align with changing social realities, ensuring a fair and equitable distribution of wealth among family members.

## V. CHALLENGING MISOGYNISTIC INTERPRETATIONS THROUGH A HISTORICAL REVIEW

During the *jahiliyyah* period in Arabia, women were subjected to unfavourable practices. They were treated as 'commodities' and often exploited by their fathers, with their marriages sold to the highest bidder. Husbands were granted the power to dissolve the marriage contract at will, without justification. Some Islamic scholars contend that Islam stripped Arab women of their pre-existing liberties. These scholars draw upon pre-Islamic poetry and proverbs to assert that the quintessential Arab woman is one who embodies modesty, fortitude, virtue, and beauty, and who commands respect and esteem from men.<sup>40</sup>

Discrimination against women during the Arab Jahiliyah era is evident in various societal practices that were prevalent at the time. Historical evidence reveals certain practices, such as the distressing act of burying baby girls alive, which reflected the prevailing notion that they held less worth than their male counterparts. Furthermore, women were deprived of the right to choose their life partners, frequently subjected to arranged marriages orchestrated by their families, disregarding their personal desires and equal rights. Another notable aspect of gender inequality was the denial of women's ownership and control over property, even if they had acquired it through their own labor. Disturbingly, women were often objectified, viewed primarily as sexual commodities, and could be traded or gifted as part of transactions. Moreover,

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40 Niaz a Shah, "The Position of Women in Pre- and Post-Islamic Arabia" in *Women, the Koran and International Human Rights Law The Experience of Pakistan Studies in Religion, Secular Beliefs and Human Rights* (Leiden: BRILL, 2006) at 27.

women were denied the right to seek justice in court, often facing an automatic presumption of guilt in family-related matters.<sup>41</sup>

Given such a social structure, the position of women in the legal system was highly susceptible to marginalisation, much of which continues within present-day Islamic law. In the context of marriage law, for instance, there are several rights of women that are at risk of being neglected, resulting in injustices. There are at least two fundamental interests of women within the legal framework. First, women have the right to protection from violence and discrimination. Women are frequently subjected to various forms of violence and discrimination, both inside and outside the home. In this regard, the law must ensure that women are protected from all forms of violence and discrimination, including domestic violence, rape, sexual harassment, and workplace discrimination.

The vulnerability of women's legal interests can be traced back to the history of laws governing polygamy, *khulu'*, and *zihar*. Forced marriages were prevalent amongst Arabs prior to the advent of Islam, with women being married off without their consent and compelled to live in marriages that they did not desire. They were trapped in a life that they did not choose, subject to frequent divorces and forced reconciliation based solely on men's desires.<sup>42</sup> The practice of *zihar*, for instance, was used to demean women by likening them to their biological mothers.<sup>43</sup>

The second legal interest of women pertains to their right to property and inheritance. Women are often denied the same rights to ownership and inheritance as their male counterparts. As previously discussed in the *asbabun nuzul* of the verse on inheritance, the Jahiliyyah period saw women being excluded from inheritance and being treated as objects of inheritance. In the societal norms of that era, inheritance was bestowed upon families who could provide financial stability or ensure the security of the family, and not necessarily upon those who were in need, as mandated by Islam. Consequently, when Aus bin Tsabit passed away, leaving behind young children, his entire estate was unjustly taken by two of his adult nephews.<sup>44</sup>

The challenges and grievances faced by women as described above saw a glimmer of hope with the emergence of the monotheistic principle introduced by Islam in the Qur'an. However, it is important to acknowledge that the patriarchal system presented significant obstacles to the monotheistic perspective on men and women espoused by Islam. Consequently, the texts of the Qur'an and hadith both reflect this dynamic, depicting the struggle between the ideal teachings of Islam and the actual realities of Arab society. In this regard, the Prophet employed two strategies to establish a more equitable societal system for women. The first involved working

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41 Bagas Luay Ariziq, "Kedudukan Kondisiwanita Sebelum Dan Sesudah Datangnya Agama Islam" (2022) 5:1 Jurnal Keislaman.

42 Baso Mufti Alwi, "Poligami dalam Islam" (2013) 11:1 Jurnal Ilmiah Al-Syir'ah.

43 Azmi Siradjudin & Ibnu Akbar Maliki, "Zihar Contextualization in Indonesia: an Anthropo-Linguistic Study" (2022) 19:2 Jurnal al-'Adalah.

44 al-Thabarî, *supra* note 33 at 32.

directly towards the ultimate goal, while the second utilised intermediate goals to achieve the desired end result.

One of the direct strategies employed by the Prophet in building a fully humane social system for women was the strict prohibition of several practices, such as burying female babies alive, making women collateral for debts, using them as gifts, and inbreeding. The Prophet's stance on these practices was unequivocal; he prohibited them in no uncertain terms, and they remained prohibited throughout his lifetime. These measures were crucial in elevating the status of women in society and protecting them from the rampant injustices they faced during the Jahiliyyah period.

The strategy of intermediate targets towards the final goal included three aspects. Firstly, marriage. Initially, a man could marry an unlimited number of women without conditions. Islam then limited men to marrying a maximum of four women, and only if they could be fair to all of them, with a reminder that fulfilling this condition was practically impossible. Furthermore, Islam encouraged monogamy and emphasised that it would better preserve the sanctity of marriage from acts of tyranny. Secondly, the value of women's testimony. Initially, women's testimony was not recognised at all. Later, women were recognised as being worth half that of men in the case of *li'an* (accusation of adultery without evidence). Thirdly, inheritance for women. Initially, women did not receive any inheritance at all, even being inherited themselves as if they were property. Later, women were entitled to half of the inheritance that a man would receive. However, sometimes they both received an equal share.<sup>45</sup>

The Qur'an and the hadith literature serve as historical records of a protracted struggle between the values of tawhid and human dignity, including the dignity of women. These sources of Islamic law contain texts that reflect the ideal teachings of monotheism and the full humanity of women, yet simultaneously include texts that reflect the patriarchal traditions of an Arab society. The latter remains in the process of transformation towards the attainment of full gender equality within monotheistic teachings. Islamic interpretations and traditions continue to represent an ongoing struggle between the values of monotheism and patriarchy.

The initiatives undertaken by Muslim communities in different countries, particularly those with a significant Muslim population, contextualize the interpretation of the verses containing misogynistic elements.

In Indonesia, Hasyim highlights two avenues for women's rights advocacy efforts.<sup>46</sup> Firstly, there is a need for a paradigm shift regarding gender issues, grounded in a thorough comprehension of religious principles. The prevalent patriarchal interpretation of fiqh (Islamic jurisprudence), which has dominated the understanding of women's rights thus far, must transition toward a more gender-equitable paradigm, known as *fiqh al-nisa* (jurisprudence of women). Secondly, constitutional changes can serve as a means of reforming laws that exhibit biases

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<sup>45</sup> Qodir, *supra* note 11 at 33.

<sup>46</sup> Syafiq Hasyim, "Gender the problem of patriarchy and maslaha in Indonesian Islam: from fiqh al-abawi to fiqh al-nisa" (2012) J Peremp, online: <<https://www.jurnalperempuan.org/blog/gender-the-problem-of-patriarchy-and-maslaha-in-indonesian-islam-from-fiqh-al-abawi-to-fiqh-al-nisa>>.

against women's rights. Khanif observes that endeavors to effect change through constitutional channels have been undertaken, particularly the amendment of the 1974 Marriage Law.<sup>47</sup> However, despite these amendments, the law has not been entirely successful in guaranteeing the protection of women's rights, as exemplified by the continued permissibility of practices such as polygamy and *nikah siri* (secret marriages).<sup>48</sup>

In Morocco, women's and human rights non-governmental organisations (NGOs) engage in advocacy efforts to champion women's rights.<sup>49</sup> These endeavors stem from the recognition that legal regulations derived from rigid and patriarchal religious interpretations have curtailed women's rights. Activists within these NGOs strive to promote a comprehensive understanding of women's rights by considering the social context, human rights principles, and interpretations of religious teachings.<sup>50</sup>

These two examples of Muslim-majority countries have experienced varying degrees of progress in advocating for women's rights, although not comprehensive success. Consequently, the paradigm shift in comprehending women's rights remains a subject of ongoing discourse, limited to certain communities. Diverse religious understandings within multiple Islamic groups contributes to divergent interpretations of women's rights. Some groups still adhere to patriarchal perspectives, while others adopt more moderate or occasionally liberal viewpoints.<sup>51</sup> In other Muslim nations, such as Algeria, Yemen, Iraq, and Iran, significant advancements in women's rights have yet to materialise. Political dynamics and power struggles often overlook the imperative of advocating for women's rights.<sup>52</sup> According to Guessous, transformative changes can emerge not solely from revising religious understandings or considering social and human rights contexts but also from reconciling social and political interests.<sup>53</sup> However, in countries which have yet to experience complex political and social upheavals regarding women's rights, the absence of women's rights advocacy predominantly stems from prevailing misconceptions in the interpretation of religious teachings. Reluctance to challenge deeply rooted patriarchal cultures represents a formidable barrier to women's rights advocacy.<sup>54</sup> One approach to mitigating biased understandings of women's rights requires breaking away from patriarchal values. Education emerges as a vital tool for dismantling rigid and patriarchal interpretations, thereby facilitating progress towards gender equality.

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47 Al Khanif, "Women, Islam, and modern family construction in the perspectives of legal pluralism in Indonesia" (2019) 4:2 PETITA J Kaji Ilmu Huk Dan Syariah 141-151.

48 Khanif, 146.

49 Nouzha Guessous, "Women's rights in Muslim societies: Lessons from the Moroccan experience" (2012) 38:4-5 *Philos Soc Crit* 525-533.

50 Guessous, "Women's rights", 529.

51 Hasyim, "Gender the problem".

52 Guessous, "Women's rights", 537.

53 Guessous, "Women's rights",

54 Amy C. Alexander and Christian Welzel, "Islam and patriarchy: how robust is Muslim support for patriarchal values?", *International Review of Sociology - Revue Internationale de Sociologie*, Vol. 21, No. 2, July 2011, 249-276.

## VI. RECONTEXTUALISING FIQH FOR GENDER JUSTICE

The early Islamic society had a simpler structure than contemporary society, yet the social dynamics between men and women had many positive precedents. The various books of hadith, history, and biographies of early Islamic figures clearly show women who came to the Prophet as the first supporters of Islam, struggled alongside men, participated in preaching, migrated to other places, and even engaged in battles. They asked questions about religious and social issues, demanded their rightful entitlements, and challenged the violence they experienced, as outlined in the preceding section.

These precedents provide positive inspirations for the Islamic perspective that the public sphere is a shared arena between men and women, and that both genders are required to work together to achieve the common good that benefits both parties and is felt by both as members of society. In this context, neither gender should feel entitled to dominate or hegemonise the other, and both should be treated as equal partners in contributing to the betterment of society.<sup>55</sup>

The Prophet's advocacy efforts against the oppression of women serve as an inspiration for the discourse on the development of gender relations in Islamic family law. This discourse should not be limited to normative rules, but should be widely understood by the Muslim community. Elizabeth H. White's analysis suggests that the discourse on gender relations in the renewal of Muslim family law revolves around relations that do not restrict women's rights and those that do. The former view posits that women have equal rights and positions with men in family law, thereby emphasising that the relationship between men and women in family law is one of equality, rather than subordination.

Referring to Abdullah's framework<sup>56</sup>, the socio-historical approach within a scientific discipline aims to examine the historical-empirical reality. When viewed from a scientific perspective in the context of nature and humanity, the result is often a plurality of perspectives. Similarly, this article aims to present the diversity of thought in Islamic family law through a balanced historical and social analysis. The main objective is to recontextualise these laws in the current reality and present a humanistic perspective towards women. It cannot be denied that the original arguments of the Qur'an that glorify women have been obscured by interpretations influenced by patriarchal culture.

In contemporary times, the study of women's fiqh, or *fiqh al-Nisa al-Mu'asir*, has emerged as a paradigm for gendered legal reform. This historiographical study offers a critique of traditional fiqh, which tends to view women through a biological lens in relation to worship or rituals. Conversely, modern social fiqh examines women from a sociological standpoint, taking into account their roles in public life within the larger community. Additionally, this approach incorporates perspectives from other disciplines, such as anthropology, psychology, politics, law, and culture.<sup>57</sup> A

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<sup>55</sup> Qodir, *supra* note 11 at 462.

<sup>56</sup> Abdullah, *supra* note 19 at 315.

<sup>57</sup> M Amin Abdullah, *Multidisiplin, Interdisiplin, & Transdisiplin: Metode Studi Agama & Studi Islam di Era Kontemporer* (Yogyakarta: IB Pustaka, 2021).

multidisciplinary approach represents a fundamental value when advancing the cause of gender justice in family law reform.

Feillard offers a thought-provoking perspective aimed at reinstating women's rights to their rightful position within Islamic law.<sup>58</sup> His argument suggests that the interpretation of women's rights should be contextualised within the social, cultural, and political milieu of the local community. As an illustration, Feillard cites the historical understanding among the Javanese community that the practice of veiling aligns with the tenets of Islamic law. However, this perception sparked controversy with the emergence of diverse views propagated by Islamic organisations. A similar scenario arised regarding the issue of polygamy. Hasyim echoes similar concerns and underscores the significance of undertaking a revisionist approach to Islamic law (fiqh), wherein prevailing interpretations are revisited and reexamined.<sup>59</sup>

In practical terms, Indonesia has implemented legal reforms aimed at safeguarding women's rights. Al Khanif highlights that in 1973, the Soeharto government enacted the Marriage Law, which sought to protect women's rights concerning polygamy, early marriage, and divorce.<sup>60</sup> Following the reformation, further legal advancements were made to ensure women's rights. Notably, there is now a provision that guarantees legal recognition for children born out of "sirri" marriages, where previously the responsibility fell solely on the mother. Conversely, in a "sirri" marriage, the father is not burdened with legal maintenance obligations in the event of divorce.<sup>61</sup> This effort is intended to alleviate the sole burden placed on women. It is crucial to sustain and expand these endeavors to encompass other aspects of law, such as Islamic inheritance. In practice, individuals often adapt Islamic law while adhering to the principles of equal justice for both men and women. For instance, parents may create a will to distribute inheritance equally among sons and daughters as a means of achieving fairness.

The pursuit of women's rights through legal reform necessitates a comprehensive approach, encompassing both the realm of discourse and direct legal reforms. Among the aspects that require reformation in family law are polygamy, divorce, zihar, inheritance, maintenance, and other practices that have the potential to discriminate against women. The fundamental principle that should be applied is the maintainance of good interaction (*mu'asyarah bil al-ma'ruf*) between husband and wife. Such a relationship system, based on the principle of symbiotic mutualism, is one way to establish a sakinah household, as it eliminates practices of superiority and inferiority within the family.<sup>62</sup> By embedding the principle of partnership between men and women, it becomes necessary to realise a gender-friendly Islamic family law

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58 Andrée Feillard, "The Veil and Polygamy: Current Debates on Women and Islam in Indonesia" (1999) 99 *Moussons Rech En Sci Hum Sur L'Asie Sud-Est* 5-27.

59 Syafiq Hasyim, "Gender the problem".

60 Al Khanif, "Women, Islam, and modern", 147.

61 This decision can be observed in the decision of Mahkamah Konstitusi (MK) Nomor 46/PUU-III/2010. See also Al-Khanif, "Women, Islam and Modern", 147.

62 Anis Hidayatul Imtihanah, "Hukum Keluarga Islam Ramah Gender: Elaborasi Hukum Keluarga Islam Dengan Konsep Mubadalah" (2020) 14:2 *Kodifikasia : Jurnal Penelitian Islam* at 278.



order. This will ensure that gender-friendly Islamic family law is not just a discourse, but a reality that is implemented in household life.

## VII. CONCLUSION

This research substantiates the marginalised status of women's rights within the lives of individuals residing in certain Muslim or Islamic-majority countries, predominantly stemming from a pervasive patriarchal interpretation of Islam. Numerous factors have contributed to the formation of such gender roles. Notably, the interpretation of knowledge from classical texts has been a prevalent influencer. However, it is crucial to acknowledge that social, cultural, and political circumstances also played a significant role in fostering a biased perspective on women's rights. Therefore, there is a pressing need to foster a gender-equitable understanding of women's rights, aligning with the reformative spirit demonstrated by the Prophet when disseminating the teachings of Islam. This endeavor aims to restore women's rights in accordance with the principles of justice and equality.

The process of rectifying this understanding necessitates a reevaluation of verses that have historically been subject to biased interpretations, such as those pertaining to polygamy, *khulu'* (marital dissolution at the wife's request), *zihar* (a form of oath with negative implications on marital relations), and inheritance. Contrary to the patriarchal perspective and cultural norms that have curtailed women's rights, these verses, during the time of the Prophet, aimed to safeguard and defend the rights of women. Hence, it becomes crucial to initiate advocacy for women's rights by comprehending the gender-biased verses in their intended historical context, as well as in the contemporary social, cultural, and political landscape. This understanding will lay the groundwork for engaging in regulatory reforms within a country's existing legal provisions, thereby advancing the cause of women's rights.

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