

CEDAW AND THE RIGHTS OF KINSHIP IN ISLAMIC FAMILY LAW

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Abstract

The following article traces the issues of Human Rights (HAM) has always been the center of attention, including in relation to family law in Islam. The principles of equality, equal rights, and equal position for the relationship of husband and wife become a topic of interest for many people. The birth of the CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women), proves that the international community to pay more attention to this issue. Islam, as a religion which contains a comprehensive way of life certainly had her cover of this issue through the principles of Islamic family, because Islam was very attentive to the importance of the institution of family as one unit in society. The result of this article has been revealed that the basic principles of Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) for instances equality, equal position and equal rights in accordance with the principles of Islamic law.

Keywords : Islamic Family Law, Human Rights, CEDAW, Kinship.

ملخص البحث

تناقش المقالة قضية حقوق الإنسان الأساسية في علاقتها بقانون الأسرة، والتي طالما شغلت المجال العام، نظرا لما تنطوي عليه من تطبيق لمبادئ المساواة وتساوي الحقوق ووضعيتها الزوجات في مقابل الأزواج. وعلى المستوى الدولي، تمثل اتفاقية الأمم المتحدة للقضاء على كافة أشكال التمييز ضد المرأة (السيداو) صدى لهذه القضية. والإسلام، كدين يحوي تعاليمًا لكافة الأبعاد والأنشطة الحياتية، يقدم رؤية تقوم على العدالة أساسًا للعلاقة بين الأزواج والزوجات. وفي هذا الصدد، تدفع المقالة بأن المبادئ الأساسية لاتفاقية السيداو فيما يخص المساواة والوضعية لا تتعارض مع مبادئ الشريعة الإسلامية.

الكلمات الدالة : أحكام الأسرة في الإسلام ، الحقوق الأساسية للإنسان ، السيداو

Introduction

Islam as a whole has been set for the entire procedure its followers life, including family law (*al-ahwal al-shakhsiyyah*). In the family, the scholars have dug in detail the laws of the existing text passages, then to put a set of rules that aims to regulate the continuity *mu'asyarah* (association) in the household.

Over time, for centuries, the family laws that have made it, eventually undergo significant changes in the mechanisms and procedures. In some countries the majority of the population is Muslim, there is a change at some point considered to be irrelevant and require reinterpretation, as is the case in Turkey and Egypt, and other Muslim countries.¹

On the other side, when the problematic laws of family in modern times become increasingly complex, it is directly sue the scholars, thinkers, and Muslim scholars to reformulate existing and to do *ijtihad* in order to respond problematic. Thus, Muslims are not confused by the phenomena of the practices of household activities once considered taboo or even distorted.

One thing that becomes another pressure point is a matter of rights of women and families who are the two most important issues and cause controversy. In history in various civilizations, in particular human rights, the rights of women and families facing serious challenges. Therefore, in order to safeguard these rights, set the Universal Declaration of Human Rights (UDHR) adopted in 1948 in Paris by the United Nations. However, such declarations since the beginning of the preamble of the preparation has been causing controversies and considered to be very different from the principles and values of the culture in various nations.

Finally, as a follow up of the declaration of human rights, the United Nations made a convention that aims to protect against the rights of women who then called the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) or the Convention on the Elimination of All Forms of Discrimination against Women, which began in effect since December 3, 1981.

This article is going to try to review the principles of Islamic family law and its relation to government intervention in regulating family law in force in the community, including its association with the CEDAW has been ratified by over 180 countries.²

¹ Khoiruddin Nasution, *Pengantar dan Pemikiran Hukum Keluarga (Perdata) Islam Indonesia*, (Yogyakarta: ACAdEMIA & TAZZAFA, 2007), pp. 23-51.

² On March 18, 2005, 180 countries, or over 90% of UN member states are countries participating in the Convention.

CEDAW and the Issue of Human Rights

1. What it CEDAW?

The word 'CEDAW' seems still very unfamiliar to the people of Indonesia. Many do not know. Never know, just almost never heard at all. Twenty-nine years after Indonesia ratified the CEDAW convention in the United Nations (since 1984), but the knowledge of the CEDAW until now only limited to a handful of activists and academics only, while the public at large (including ours) are lacking or do not know, let alone understand more in on the CEDAW.

So whether it is CEDAW? CEDAW (*Convention on the Elimination of All Forms of Discrimination Against Women*) is an international convention on the elimination of all forms of discrimination against women were handled directly by the UN.

CEDAW establishes the universal principles of equality between men and women. This convention establishes equal rights for women, irrespective of their marital status, in all fields: political, economic, social, cultural and civil. Convention encourages the enactment of national legislation which prohibits discrimination to accelerate *de facto* equality between men and women, including changing practices and cultural habits based on the inferiority or superiority of either sex or stereotypical roles for women and men.

2. The History Birth of CEDAW

Precisely on December 18, 1979, the UN General Assembly approved a draft Convention on the Elimination of All Forms of Discrimination against women. The UN General Assembly invited UN member states to ratify it. This convention was later declared valid in 1981 after 20 countries agreed.

Approval of this convention is the culmination of international efforts in the 'decade of women' are aimed at protecting and promoting the rights of women worldwide. This is the result of initiatives taken by the Commission on the Status of Women (*UN Commission on the Status of Women*), a body established in 1947 by the United Nations to consider and develop policies that will improve the position of women.

In 1949 up to 1959, the Commission on the Status of Women prepare various international agreements including the Convention on the Political Rights of Women and the Convention on the Nationality of Married Women. In 1963, the UN General Assembly noted that discrimination

against women still continues, and asks to be made a draft Declaration on the Elimination of Discrimination against Women.

In 1965, the Commission began to prepare measures then in 1966 came out a draft Declaration on the Elimination of All Forms of Discrimination against Women. The result in 1967, the draft was approved into a Declaration on the Elimination of All Forms of Discrimination against Women pursuant to resolution 2263 (XXII). This declaration is an international instrument that contains universal recognition and the laws and standards of equality of men and women.³

3. The principle of CEDAW

CEDAW emphasizes on equality and justice (equality) between women and men, namely equal rights and opportunities, as well as treatment in all areas of life and activities. The CEDAW Convention also recognizes:⁴

- a. The existence of biological or natural difference between women and men.
- b. The existence of gender-based differences in treatment that resulted in a loss in women.
- c. The big difference between the condition and position of women and men, where women are in a weaker condition due to discrimination or bear the consequences for discriminatory treatment or because of the environment, the family and the community does not support the independence of women.

4. Equation principle towards Substantive Equality

In summary, the principle of substantive equality CEDAW is:⁵

- a. Measures to realize the rights of women aimed at overcoming their differences, disparity / gap or circumstances that disadvantage women.
- b. Step-follow environmental changes, so that women have equal access and opportunity to enjoy the benefits of the similarity of the opportunities that exist.
- c. CEDAW requires states to base policy and follow the following principles:
 - Equal opportunities for men and women.

³ See Wiyanti Eddyono, "Hak Asasi Perempuan dan Konvensi CEDAW" in diktat Seri Bahan Bacaan Kursus HAM untuk Pengacara X tahun 2004, published by ELSAM (Lembaga Studi dan Advokasi Masyarakat).

⁴ Achie Sudarti Luhulima, "Efektifitas Pelaksanaan Konvensi Penghapusan Segala Bentuk Diskriminasi terhadap Perempuan: Jaminan bagi Realisasi Hak-Hak Perempuan", in <http://www.cedawui.org>, accessed 20 of August 2008, p. 1.

⁵ *Ibid.*, p. 2.

- Equality for women and men to benefit from the results of the opportunity, which means that men and women enjoy the same benefits / fair.
 - The same legal rights for men and women: 1) in citizenship, 2) in marriage and family relations, 3) in the guardianship of children.
 - Legal equality and equal treatment before the law.
5. The principle of non-discrimination

The principle of non-discrimination contained in CEDAW is the core or base of the other chapters, which is the negation of discrimination is essential and urgent. Penjabarannya contained in CEDAW Article 1:

“Discrimination against women means any distinction, exclusion or restriction made on the basis of sex, which has the effect or purpose to reduce or eliminate the recognition, enjoyment or use of human rights and freedom of the main points in the political, economic, social, cultural, civil or any other field by women, irrespective of their marital status, on a basis of equality between men and women.”⁶

6. Principle of State Obligation

According to the basic principles of CEDAW state obligations include the following:

- a. Guaranteeing women’s rights through laws and policies, and ensure results.
- b. Ensure the practical implementation of those rights through acts or step-specific rules, create conditions conducive to meningkatkan akses women on the opportunities that exist.
- c. State not only guarantees but also the realization of women’s rights.
- d. Not only ensure the *de jure*, but *de facto*.
- e. Countries not only have to set it in the public sector but also to the actions of people and institutions in the private sector (family) and the tourism sector.

Ratification of CEDAW in Indonesia

Since 1984 by Law No. 7 1984, Indonesia has ratified the Convention on the Elimination of All Forms of Discrimination against Women (*The Convention on the Elimination of Discrimination Against Women / CEDAW*).

⁶ NOVIB dan LBH APIK Jakarta, “Lembar Info Konvensi Penghapusan Segala Bentuk Diskriminasi Terhadap Perempuan”, No. 13, p. 1.

On December 18, 1979, the General Assembly of the United Nations has approved the Convention. Because the provisions of the Convention are basically not contrary to Pancasila and the Constitution of 1945, the Government of the Republic of Indonesia at the World Conference of the UN Decade for Women in Copenhagen on July 29, 1980 have signed the Convention. The signing of an affirmation attitude Indonesia declared on December 18, 1979 at the UN General Assembly to vote on a resolution which then approves the Convention.

In voting that Indonesia voted in favor as the embodiment of Indonesia's willingness to participate in international efforts mengahpus all forms of discrimination against women because of the contents of the Convention in accordance with the basic state (read; Pancasila) and the Constitution 45 which stipulates that all citizens are equal footing in law and government.

The provisions of the present Convention shall not affect the principles and provisions of national legislation containing the principles of equal rights between men and women as the embodiment of the Indonesian legal system which we think is good or better and appropriate, harmonious and in tune with the aspirations of the Indonesian people.

This ratification will automatically make Indonesia as one of the countries that approve and enforce the agreed provisions of the present Convention. This is a consequence of ratification. Can be seen in Article 5, which states that:

States Parties shall take all appropriate steps follow:

- a. To change the pattern of social behavior and culture of men and women, with a view to achieving pengahpusan prejudices and customs and all other practices which are based on the inferiority or superiority of either sex or stereotypical roles of men and women.
- b. To ensure that family education includes a proper understanding of the pregnancy as a social function and the recognition of shared responsibility of men and women in the upbringing and development of their children, and understood that the interests of children are first and foremost consideration in all respects.

Despite all the participating countries shall comply with the contents of the Convention as set forth in Article 5 above, but in practice, the provisions of this Convention shall be adjusted to the system of people's lives that include cultural values, customs and religious norms are still applicable and widely followed by the people of Indonesia. Pancasila as the outlook of the nation and the Constitution of 1945 as a source of national law giving confidence and assurance

that the implementation of the provisions of this Convention in accordance with the desired order of life of the Indonesian nation.⁷

Principles of the Islamic Family

Islam encourages its followers to marry and form a happy family is supported by *mawadah* and *mercy*. After entering marriage, then both parties who did maintain mutual rights and obligations to one another. Because in fact, among men and women there who are capable of performing the marriage and there were not able to carry it out. Although it is in principle not the ability absolute requirement to carry out a marriage, but there is no ability and it can determine whether the marriage can or can not achieve its goals.⁸

Ability, a balance of rights. Someone who is able to marry means he is the one who could carry out the rights of the wife or husband. And vice versa, people who are not able to marry is a person who is not able to implement the rights of the wife or husband.⁹

Islam very concerned about the institution of family as an important unit in community development. Thus, the concept of Islamic family based on the basic principles. The principles of Islamic family law is as follows:

1. The principle of Freedom of Choice

Determining the choice of who will be our partner in marriage is free suffrage for men and women, to the extent not contrary to Islamic law, for example, marrying unbelievers, married people including mahram, and so forth.

In the pre-Islamic Arab tradition, the girls at all idak have the right to vote. Even he is positioned as a commodity which is wholly owned by the father and guardian. Fathers and guardians can determine who will be his life partner. But when Islam came, this tradition was later changed radically. In a hadith narrated that:

عن أبي هريرة عن النبي صلى الله عليه وسلم قال لا تنكح الثيب حتى تستأمر ولا البكر إلا بأذنها قالوا يا رسول الله وما أذنها قال ان تسكت.

⁷ Lembaran Negara Republik Indonesia Tahun 1984 Nomor 29: Penjelasan atas Undang-Undang Republik Indonesia Nomor 7 Tahun 1984 Tentang Pengesahan Konvensi mengenai Penghapusan Segala Bentuk Diskriminasi Terhadap Wanita. Dilansir dari <http://www.lbh-apik.or.id/uu-7-84.htm> accessed 27 of September 2013.

⁸ Kamal Mukhtar, *Asas-asas Hukum Islam tentang Perkawinan*, (Jakarta: Bulan Bintang, 1993), p. 39.

⁹ *Ibid.*

Meaning: *“It was narrated from Abu Hurairah, the Prophet Muhammad SAW said: ‘Do not marry a widow before consulted, and a virgin prior approval.’ The Companions asked, ‘How to ask permission virgin, O Messengers?’ He then said, ‘silence is consent’.*”¹⁰

Islamic morality offered in this case indeed provide a very significant space for women to establish their rights as human beings equal to men. In addition it also provides insights to a parent or guardian, so they barely make a dent in the problem determination mate children. Because, as an honorable man, women also have the right to determine the direction and outline his future life.

The principle of freedom in determining the actual mate over to grab a partner based on the beloved. Love becomes important in the marriage relationship. This love becomes important, because love will be able to bind relationships with strong, close, and lifelong.

2. Principle of mawadah

Mawadah has meaning emptiness and spaciousness. By definition, it means mawadah emptiness of the soul of ill will. M Quraish Shihab called it a love plus.¹¹ For, in the heart of someone who has germinated *mawadah*, he will not break the connection; his heart is so airy and empty of evil, so that the doors had been closed on the inner and outer ugliness.

This principle is based on Sura Al-Rum (30): 21:

ومن آياته أن خلق لكم من أنفسكم أزواجا لتسكنوا إليها وجعل بينكم مودة ورحمة
ان في ذلك لآيات لقوم يتفكرون

It means: *“And among His signs is His is He who created for you pairs of your kind itself, so you tend to be and feel at ease to him, and made him among you a sense of love and true saying, in that really There are signs for a people who think.”*

3. Principle of Grace

M Quraish Shihab interpreted the word *rahmah* as a psychological condition which arises in the liver as a result of witnessing the helplessness, so as to encourage the person concerned to undertake empowerment.¹²

¹⁰ Abu Dawud, *Sunan Abi Dawud*, “Kitab al-Nikah”, hadis no. 1791.

¹¹ M. Quraish Shihab, *Untaian Permata Buat Anakku; Pesan Al-Qur’an untuk Mempelai*, (Bandung: Al-Bayan, 2000), p. 15.

¹² *Ibid.*, p. 46.

Therefore, husband and wife, each will always try and earnestly in order to give a favor to a partner and reject all things disturbing relationship.

In this case, the *mercy* will produce patience, generous, is not easily burned fire of jealousy, not arrogant and does not seek its own advantage. Both of these principles (*mawadah* and *mercy*) solely devoted to men, not to other creatures. Therefore, marriage to animals and plants, the aim is solely to ensure the sustainability of their breeding. While the marriage of man, has intrinsic value, which obtain the pleasure of Allah SWT. Therefore, sebagaimana Musdah Mulia says, marriage is very simplistic when someone just based solely as a way to obtain offspring and even just impingement sexual desire.¹³ That means there is no difference with the animals.

4. Amanah Principle

In everyday communication is understood as a responsibility mandate. Said mandate comes from the same root with the *safe*, which means 'peace'. Also the same as the word *of faith*, which means 'trust'. People who give a mandate to someone means he has to trust the person who is given the mandate. She feels safe and trust the people who are given the mandate, that what it is mandated to be well maintained and safe existence in the hands of those who were given mandate.

Likewise with marriage, it is a contract of mandate, not a contract of ownership. Wife is a mandate in the arms of her husband, and the husband is trust in his wife's lap. The husband, as well as his wife, will never make a decision to get married with her partner, except in him has embedded a sense of security and confidence to the partner.

5. *Mu'asyarah bil Ma'ruf* principle

On the basis of the mandate, then spouses (husband and wife) must keep each other, respect, and protect. Islam teaches that the husband treats his wife as a polite and dignified. A commitment to hold the mandate, will give birth *mu'asyarah bil ma'ruf*. Because the husband-wife relationship is not submission to their partner alone. However, the relationship of husband and wife in marriage is a relationship of mutual space knit, woven with each other, which both have an equal role and position and partnering. Like the railroad, if the rails is only one, of course trains can not run. And also, when the rail was not balanced and aligned, the train journey will definitely stopped.

¹³ Siti Musdah Mulia, *Islam Menggugat Poligami*, (Jakarta: Gramedia, 2004), pp. 25-26.

According Shahrur, familial relationships between men and women could be divided into two main categories:¹⁴

First, emotional ties or who are feeling. These relationships form among others, relationships of affection, love, loyalty and commitment between men and women. In this regard the position of men is as *libas* for women, as well as women are *libas* for men, *libas* means mixing and intervention (taking care of each other). This understanding is implicit in the word of God in the Al-Baqarah (2): 187, which means: “Permitted to you on the night of the fasting month mixed with your wives; they are your garments and ye are clothing for them. “

Love affair affection is a complementary relationship between men and women. They both have the potential feelings and the same trend, which one is no more special than the others. We must understand that women are not ‘goods’ are men, and vice versa.

Second, the economic relationship that exists objectively and consequences of social relationships occur and not separate from it.

الرجال قوامون على النساء بما فضل الله بعضهم على بعض وبما أنفقوا من أموالهم ...

Meaning: “Men are in charge of women, because Allah has preferred some of them (men) on sebahagian another (female), and because they (men) spend out of their property ...” (QS. Al-n-Nisa ‘(4): 34)

This paragraph begins with an informative editorial “*ar-rijalu qawwamuna ‘ala al-Nisa’*”. This verse confirms the existence of an objective relationship between men and women, namely that man is *qawwam* which implies *guardian*, guardian, and protector for women. Term *al-qawwam* is placed in the context of a natural-universal relationship between man sex male and female, not in the context of exclusive among men who believe and women who believe. We, said Shahrur, do not meet the verse that says’ *al-mu’minuna qawwamuna ‘ala al-mu’minat’*. Therefore, this information should be universally applicable in all corners of the earth.

In this verse mentioned factors that make men had a protective role for women. If these factors disappear, vanish also the protective role of men. Or if these factors moved in women, the switch also the protective role

¹⁴ Muhammad Syahrur, *Prinsip Dasar Hermeneutika Hukum Islam Kontemporer*, terj. Sahiron Syamsuddin & Burhanuddin Dzikri, (Yogyakarta: elSAQ Press, 2007), pp. 268-270.

on the shoulders of women. The elements forming the factor that makes men or women as protectors are: a) physical strength (*bima faddlalallahu ba'dlahum 'ala ba'dlin*); b) the strength of the financial / economic (*wa min bima anfaqu amwalihim*).

Editors paragraph which states "*ba'dlahum 'ala ba'dlin*" implies a reciprocal relationship, if these factors are switching from one party to another, the role of protection will also follow the switchover. In other words, the whole human being, whether male or female, is objectively capable of having such factors. This can be explained through two perspectives as follows: 1) In cases where a husband sick, for example, are blind or crippled for life so that in everyday activities it is highly dependent on the care of the woman (wife), then under these conditions is clearly a role protection switch to the wife's shoulders; 2) If a husband has less income, while his wife's income is much larger so more of household expenditure borne by the wife, then the role of protection has been taken over by his wife.

In other instances, for example, when a wife managed a career that large income and he could support his family, he became a leader and role '*qawwamiyah*' in the field of family economy. While her husband, because of his physical superiority, he is still the leader in the things that require physical strength.

In this case it is clear that the relationship is objective and concrete can occur in people with two different faces, namely complementarity and mutual relationship between the male and female. The superiority of men over women is accompanied by a mention of the reasons and how the position normative social relationships between men and women can be reversed his position. The position of women can be stronger than men, given that paragraph begins with an explanation that the absolute and general, that the mention of men and women in general regardless of the status of his faith.¹⁵

Indeed, biologically, men and women are different. The Qur'an itself admitted: '*wa laisadz dzakaru kal untsa*' (see QS. Ali Imran (3): 36). However, the biological differences for Islam is not an excuse to do the practice of discrimination against women and grant privileges to men. Biological differences also not be the basis for placing women in a subordinate position and men in the superordinate position. Man is not the axis point for the circle of human life in the world. Male nor morality shaft civilization for

¹⁵ *Ibid.*, pp. 270-271.

women. Both existentially are on equal footing in the middle of the circle of human life.

Natural differences between men and women should lead men on one consciousness to help each other, filling and moving, so it will show up mutual cooperation and mutual love. This awareness will eventually create a peaceful and equitable society.¹⁶

Conclusions

Conclusions and writer on human rights issues and the CEDAW Convention against family law in Indonesia is, that as a good Muslim Indonesia should still adhere to the adage:

Which means that, maintaining the good of the system or the old law is still retained, but will not close the door to accept the new laws or statutes that are considered better and more appropriate to the context of life today.

Here, it is all the necessary intelligence, to filter what is born of human rights issues and the CEDAW Convention so that we do not get stuck or swallow the results of the Convention, because to borrow a phrase KH MA Sahal Mahfud, the necessary ‹local knowledge› to implement it was all so Islam in Indonesia, particularly in relation to family law does not become confused and give confusion to the people.

The state must ensure the welfare and legal certainty for all citizens (in terms of relation to family law). The implementation of Law No. 1 of 1974 on Marriage and Kompilasi Hukum Islam issued by Presidential Decree in 1991, should always be considered in conformity with the demands of the present era. Because after all, laws are constantly evolving in line with the development of human needs.

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¹⁶ Islah Gusmian, *Mengapa Nabi Muhammad SAW Berpoligami?* (Yogyakarta: Pustaka Marwa, 2007), p. 81.

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