

# Islamic Jurisprudence and Human Rights: At-Takhyîry Approach in Marriage Law

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**Abstract**—*The Declaration of Human Rights (UDHR) is one of human commitment in the world to preserve justice and human rights. It is claimed to universal regardless of religion ethnic and social. In Islam, is formed in the Quran and specially discussed in the Islamic Jurisprudence. Its doctrine concept, however, regretted in opposite to the values of Human Rights. The marriage law, for instance, in the Islamic Jurisprudence is often diminishing rights of the woman of being purposed or maintaining her status. Man and the woman's family have full rights to constrain a marriage even without her approbation. It seems that the coercion is practiced by many Muslim societies or countries. In this paper, I would like to answer those theses. Moreover, it is also to depict a new point of view till we are able to understand the main concept of human rights and the Islamic marriage law by providing a different aspect of Islamic Teaching and its jurisprudence method.*

**Keywords**— *Islam; Jurisprudence; Human Rights; Fiqh; Marriage Law; at-Takhyiri; Talaq.*

## I. INTRODUCTION

The concept of Universal Declaration of Human Rights which has been reference in social moral norms is a protection of legal rights and international rights. With this concept, therefor, all human has equal and equity rights to enjoy their lives (MacNaughton, 2009:2). Hence, it endorses all religions to maintain the concepts in all society layers. In modern society, Human Rights and its implementation stand as the fundamental core of human life and need to be maintained.

The term of marriage in Islam is accordance with a contract of law. This word, also, has been used in general meaning of legal contract between a man and a woman. Moreover, the term of marriage was prescribed by Allah SWT to unite a man and woman based on mutual interest and consent in his Law. As we knew that the Qur'an clarifies man as having more rights than a woman in some cases. In Islamic inheritance law, for instance, the share is not equal between man and woman in which a man has more share than woman. (Bulbul, 2013:112).

Comparing the UDHR's principals, Islam and its jurisprudence also stand in the same path with those concepts. In many explanations of Muslim scholars, the God has been creating the law to provide a justice among the believers and humankind or to cover all matters of life which guarantee human or non-human equity and equality. This statement can

be understood that Islam concerns about humanity and providing an equal justice to disadvantaged people.

## II. ISLAM AND HUMAN RIGHTS

The term of Human rights is considered as moral norms or principles that interpret certain standards of human behavior, and are commonly assured as legal rights in municipal and international law (Edwin Egede, 2013:207). They are generally presumed as inalienable fundamental rights (James W. Nickel, 1987:47), "to which a person is inherently entitled simply because she or he is a human being". This is the recognition of the fundamental dignity and of the quality and inalienable rights of the human. The doctrine of human rights has been highly influential within international law, global and regional institutions. The basic ideas that animated the human rights movement developed in the aftermath of the Second World War and the events of the Holocaust (Mamta Chandrashekar, 2016:3). Since then, the effort to establish and maintain the philosophy value of human rights will be continued to be fought. The success point of achievement is agreed and appointed by the Universal Declaration of Human Rights in 1948, and it was adopted by the United Nations General Assembly in response the atrocities of WWII.

Islam, on the other hand, theoretically, knows the concept of human rights ideology long before the declaration was set by the Europeans. The doctrine a whole form of justice for the man with the basic concept of Tauhid is the basic concept of Islamic culture, civilization, or the highest level of the development of human mind. This value also pours the understanding that all human beings have the equal rights and obligations in the sight of God with no physical differences between one another. On the other hand, several verses in the Qur'an state that man is also commanded to guard the creatures of God besides human beings (Cathrien, 2009:13).

Principally, there is no sharp distinction of the philosophy between UDHR and Islamic-view or the Islamic jurisprudence on Human Rights; both are, maintaining the concept of equity, equality, freedom (freedom of expressions), respect for human beings and honor. However, although its perspective is equal, Takwa (God consciousness) is different between Muslim one another (Jerusha Tanner, 2016:178) (Qur'an, 49:13).

In the earlier period of Dakwah, The Prophet has been maintaining all the values of Human Rights. The Medina charter (Shahifatu al-Madina) is also known as the first Islamic constitution (Vincent Depaigne, 2017: 175). The document is arranged by The Prophet and it's the first formal treaty between The Prophet and all tribes member of Yatsrib in 622 M or 2 H. Scholars named the document with the variety of term; The Constitution of Median, Charter, Treaty, and Agreement. Al-Shahifah is mentioned in its paper, and the name is also found in the text twice. The words "treaty and agreement" are referred to the main content of papers. The word "Charter" is more clarified to the formal text testified on one condition. The word "constitution" is referred to the predicament of the documents containing the main root of a state constitutional law. And the word of "Medina" is referred to the place of the document is agreed (Malise Ruthven, 2017:44-45).

The Constitution of Medina sets out general terms of the rights of various classes of citizens, their duties to each other, and the manner in which disputes would be resolved. Moreover, the document aim is to define their rights and duties (Akram Dīyā', 1991:99). A small number of the people of Yathrib were already Muslims having converted during the period when Muhammad (SAW) and his followers were being persecuted in Mecca. The rest of the people of Yathrib were non-Muslims, either pagans or Jews. The pact signaled these peoples' voluntary agreement to be ruled by Islamic law (Keith Hamilton, 2011:26).

Moreover, the main aim of arranging the document is an agreement to prevent conflicts between two tribes; Bani 'Aus and Bani Khazraj in Medina (William H. Brackney, 2013:169). The document specifies the rights and the obligations of Muslim, Jews and paganism community who have been living in Medina. The preamble declares the document to be "a book [kitab] of the prophet Muhammad to operate between the believers [mu'minin] and Muslims from the Quraysh tribe and from Yathrib and those who may be under them and wage war in their company". The achievement of that unites all of the tribes to a single line of understanding or in a single community declaring them to constitute "one nation [ummah wāḥidah] separated from all people". The constitution of Medina is the first Islamic constitution recognition and consists of 47 articles and forms the basis of multi-religious understanding. The agreement of creating one nation "Ummah" is the primarily depicted on the first page (Marjorie Kelly, 1984:37).

Islamic Jurisprudence enforcement, historically, or the form of Islamic Law, is divided into several periods. Ulama argue that the format began with the two main periods of the prophetic Dakwah (Teungku, 1967:32-33). The first is the Mecca period. The beginning of the period was at the same time with Muhammad (SAW) appointed as a God Messenger or since Muhammad (SAW) received the first verse of the Quran and ended with a migration of the prophet and his companion into Medina. It was certain that conveying the divine message, marked to introduce a new system of the Islamic jurisprudence. Converting society who has been living in lawlessness was not going to be easy. The time was undergoing the darkest and wildest period of history along the

rest of the world community in general. After enduring persecution of pagan tribes of thirteen years, the prophet began to migrate to Medina. Scholar argues although the Islamic jurisprudence in this period was high lightening on preparing people to accept the new system of divine law, clearing the pagan and converting into Tauhid were yet the main Dakwa targets.

The second is the period of Medina; it begins with the migration (Hijra) of the Prophet and his companions and ended with the death of Muhammad (SAW). It was the tenth year since the Prophet delivered the word's of God, and completed creating the chosen umma (Khaira Ummah) (Mamarinta, 2002:35-36).

Islamic jurisprudence, in the period of Medina, is highlighted by Muhammad on Law; the divine laws aspects; practical and Islamic dakwah. The scholar argues that within the period, the basic of foundation to complete on creating the Muslim society is to build the character of Aqidah and behavior which has been started in the beginning of the first period. After the believer faced the first period of formulating the soul spiritually and emotionally (Mohd Shukri, Vol 3), Muslim society is able to accept the new concept of the divine laws, which will regulate all aspects of their lives. Historically, we agree that the final revelation or verses of Quran delivered separately (Diane, 2010:33-34). The main purpose of the method is to answer believer questions, yet, to build a complete argumentation or understanding of the root of Islamic teaching as stated in Quran Surah Al-Maidah [5:3].

As the statement above, we are clearly able to conclude that generally the concept of Law; order or prohibition, to Mukallaf (religiously responsible or accountable person) revealed within the first prophetic period. However, the current law is only in several roles; such law of the ritual prayer (Salat) which was commanded by God in the Isra and Mi'raj event. The occurrence is one year before the migration. On the other hand, the law of Ibadah (matters of worship), Muamalah (dealings between people), Jinayat (criminal law) (Studia, Vol. 13:467), Hudud (limit, boundary) (Wael, 2009:173), Warisan (heir), Wasiat (testamentary disposition), marriage, and divorce revealed as those are to complete the divine law described in the second period of prophetic (Doi, 2008:347).

Based on the two periods of the Dakwah, the three basic origin definition of Islamic jurisprudence were formed. The first definition is Taklifi (defining law or obligations creating rules) (Ahmad Hasan, 1993:34); it is the injunctions and rights. According to the majority view, this is of five types: (1) Obligation or 'ijab'. (2) Recommendation or 'nadb'. (3) Prohibition or 'tahreem'. (4) Dislikeness or 'karahah'. (5) Permissibility or 'ibahah'. However, the Hanafis have maintained that it is of seven types: (1) Obligation or 'fardh'. (2) Compulsory or 'wajib'. (3) Recommendation or 'nadb'. (4) Prohibition or 'tahreem'. (5) Prohibitive dislikeness or 'karahah tahreemiyah'. (6) Dislikeness or 'karahah tanzeemiyah'. (7) Permissibility or 'ibahah'. The second definition is Wad'I (demand law). It is that which expounds on the conditions and qualifications of the defining law so that it is implemented properly (Ahmad Hasan, 1993:29). This is

also of five types: (1) Cause or 'sabab'. (2) The condition or 'shart'. (3) Obstacle or 'mani'. (4) Valid or 'sahih'. (5) Corrupt or 'fasid'. And the third is Takhyiri (option law).

### III. HUKM AT-TAKHYIRI: MARRIAGE LAW

Marriage in Islam is a sacred contract in which every Muslim should be a part of the law. In Islam and its law, it is a legal contract between two people. Marriage is also called as *Zawaj* or *Nikah*. In this thesis, the word *Nikah* will be used as it is a general translation meaning. Moreover, the word *nikah* comes from the Arabic verb *n-k-h* (*nakaha*) which means, also, *Tazawwaja*. In the lingual origin, *Nikah* means *dam* and *Jam*, the meaning of that is "to bring together" or "to unite" respectively (Al-Husari, 1967:3). The Encyclopaedia Britannica defines "marriage" as:

*"A legally and socially sanction of union between one or more husbands and one or more wives.... And is regulated by laws, rules, customs, beliefs, and attitudes that prescribe the rights and duties of the partners".* (Britanica, 1974:871).

Marriage, as prescribed by Allah, is the lawful union of a man and woman based on mutual consent (Hossain, 2003:101). It is a contract that results in the man and woman living with each other and supporting each other within the limits of what has been laid down for them in terms of rights and obligations (Spiro, 2013:922). It is a mutual contract between a man and a woman whose goal is for each to enjoy the other to become a pious family and a sound society.

Marriage is a solemn covenant that makes an incomplete human to become a complete one (Nichols, 2008: 604). It is supposed to take a person out of the hectic lifestyle that one is in and place him in an organized environment giving them a path to follow in life and a shoulder to lean on. Marriage arranges one's life and provides spiritual, physical, emotional and psychological companionship. This companionship generates and sustains love, kindness, compassion, mutual confidence, solace and succor (Dubagari, 2016:52). It lays a spiritual and legal foundation for raising a family.

The general purpose of marriage is that the sexes can provide company to one another, love to one another, procreate children and live in peace and tranquillity to the commandments of Allah (Laludin, 2014: 139). Marriage serves as a means to emotional and sexual gratification and as a means of tension reduction. It is also a form of worship because it is obeying Allah and His messenger. It is seen as the only possible way for the sexes to unite.

On the other hand, Islam and its jurisprudence explain about ending the contract of marriage. It is called *Talaq*. The word *Talaq* is used in Islamic law for divorce; it is an Arabic word and means "to set free". It is only in unavoidable circumstances that *Talaq* is being permitted in Islam as a lawful method to bring marriage contract to an end. The Islamic Jurisprudence takes reasonable and realistic circumstances of such as a sad situation where marriage contract becomes more impossible to continue. All means of the failed situation to bring the couple together is more irrelevant by permitting divorce as the last effort or result.

Although the sanctity of marriage by uniting two people is the essential basis of creating family life, it is also true that the incompatible or inconvenient situation of individuals cannot be kept together in a life of hell, for life. The divorce, therefore, necessary to give due allowance for human weakness and allow such people to separate for good.

Takhyir is derived from Arabic (تخييرا) which etymologically means choosing or giving freedom of choice (Adib, 1999:181). While in terms of epistemological takhyir is an act commanded by God (As-Shari ') to choose between doing or not doing. The scholars name this as *khatab ibah* (*mubah*) and so does the nature of the act (Murtaza, 2002:145-146). Whereas the dictionary of the term *Fiqh*, it is explained that the Law of Takhyiri is a law whose nature can choose, namely: may be done and may be abandoned. On this basis the scholars define that the Law of Takhyiri includes: Circumcision, Makruh and Mubah (Mujieb, 1994:107).

There are several verses of the Quran related to the understanding of this approach. First, revealing the argumentation that the act or behavior is permitted. It is explained in the Surah al-Baqarah [2:187]. Secondly, revealing the argumentation to avoid the consequence of being a sin of the action. It is also clarified by Quran surah al-Baqarah [2:173]. Thirdly, revealing the argument for avoiding the mistake of the deed. This argument is also revealed on Qur'an Surah al-Baqarah [2:235].

The verse of the main topic also relates to the Prophet Hadiths:

*"God has given one of His slaves the choice between this world and that which is with Him, and this slave has chosen that which is with God." Muttafaq alaihi*

In a specific perspective, the Islamic jurisprudence also provides woman freedom to determine their spouse without having imposed by her family or parents. The argumentation is in accordance with the hadith of the Prophet Muhammad which explains specifically.

*"A woman previously-married has more entitlement to herself than her guardian, and the virgin should be asked for permission (concerning her marriage)." [Riwayat Al-Bukhari and Muslim]*

The hadiths explain about the woman liberation of being spouse. Although her parents or family has rights to specify a man to be her life partner, the woman's consent yet becomes a primary condition to legitimate the marriage in Islamic jurisprudence both a girl or a woman with widow status. It also informs us on the circumstance of being silent is a girl assent to be marriage, yet the action means of her agreement.

According to Islamic law, marriage is a legal contract and divorces means of ending this contract whenever necessary. Divorce encompasses many religious-aspects and it is considered necessary and lawful only if reconciliation between the spouses is absolutely not possible (Mondal, 2005:25). The Holy Qur'an envisages marriage as a decent companionship which fulfills The noble purpose and commands the partners to talk every measure to make a happy companionship on a

concrete foundation (Qur'an), Yet on the other hand, the Holy Qur'an makes a realistic provision for divorce.

As the statement before, the term of at-Takhyir is to give an option or allowing her to have her opinion on a divorce case. The husband might assign the right for repudiation to his wife by allowing her choice (takhyir). However, the constitutive element of a *tamlík* contract is a predefined formula; for example: "Your divorce is in your hands" (talaquki bi-yadiki). The parties often set up conditions that delimit the wife's right to the occurrence of special circumstances (e. g., a prolonged absence of the husband, his marriage to another woman).

Despite husband has an important role in the family, the wife yet has a legal form of law to accept the word or decision of the husband to separate. The basic information was explained in the Quran Surah r al-Ahzab verses 28-29.

Ulamas argue, based on the verses provided, that a wife has rights to decide her legal law. If she refuses to be divorced and the divorce law consequences are invalidated, her spouse has clarified the divorce status. This also means that woman, in Islamic law point of view, has an equal right. It is also revealed on the Prophet Muhammad Hadiths.

*"A woman previously-married has more entitlement to herself than her guardian, and the virgin should be asked for permission (concerning her marriage)." [Riwayat Al-Bukhari and Muslim]*

Based on Hadith's narration, Ulamas argue that; first, if the husband gives the wife a circumstance to choose to stay or being divorced, and the wife does not provide a single argument of that, then the law of talaq raji (single verb of talaq) is established. On the second form, that, if the wife repatriates the decision after husband provides rights to choose, the divorce law statement is based on the husband's word. In Islamic jurisprudence perspective providing the woman a circumstance to choose is known as Talaq Tafwid.

*Talaq-i-tafwid* is constituted of two words. Talaq and Tafwid. The word "*Talaq*" means repudiation. It comes from a root "*tallaqa*" which means to release (an animal) from its tether, whence to repudiate the wife or free her from the bondage of marriage. In law, it signifies the absolute power which the husband possesses of divorcing his wife at all times (Majid & Herbert, 2010:148). The word "*Tafwid*" is derived from the root word "fawod" which means to delegate. When the husband delegates his power of divorce to the wife herself or to a third person this is called *talaq-etafwid*. This delegation may be absolute or conditional and it may be for once only or for a permanent time.

In Islamic personal status law, tafwid refers to a sub-type of divorce (talaq al-tafwid or tafwid al-talaq) in which the power of talaq (the type of divorce normally initiated by the husband) is delegated to the wife. This delegation can be made at the time of drawing up the marriage contract or during the marriage, with or without conditions. Classical jurists differed as to the validity of different forms of delegation. Most modern Muslim-majority countries permit this type of divorce in some forms (Furqan, Journal:484).

The majority of Ulamas convey that if the husband gives his wife rights to clarify her status, it has to be voted in the same time or the rights have to be revoked due to unable to decide in the provided time. "The doctrine of the delegation of the power of divorce is based on an incident mentioned in the Quran wherein the Prophet (peace be upon him) told his wives that they were at liberty to live with him or to get separated from him as they choose.

#### IV. CONCLUSION

To conclude the main aim of the Universal Declaration of Human Rights is to build an equal or equity for humankind in any circumstances. Providing that, it is narrated in article 1 and 2 in the agreement papers. The declaration was agreed by all nations to provide the norms and principles to all human being or on any level of society. However, in the root of Islamic teaching, the form of equality and equity is more profound than UDHR's articles. It became more relevant due to personal or individual aspects are also important in its point of view. There is no an ambiguous statement arguing that Islam and its jurisprudence contradicted with the aim of UDHR. Moreover, the teaching gives more rights even for the woman of a wife. At-Takhyiri law approach in marriage law provided to clarify that Islam has a special concern to establish the value of human rights. The method is to facilitate woman to choose in divorce circumstance, their marital status or her further life.

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