

Applicating Hermeneutica on Women Islamic Law

(Study on Khaled Abou el Fadl Thought on Women Fiqh in CRLO Fatwa)

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Abstract—The debateable issues of fiqh which is still considered an unfinished reading, are the questions about "female jurisprudence". So far, fiqh products on women issues are considered discriminatory, disrespectful of women's rights even seem to harass women. In this sense, sharia is always regarded as the best, fair and balanced, while fiqh is just an attempt to achieve the ideals and goals of sharia (maqashid al-syari'ah). This article aims to analyse the critique of Khaled Abou El Fadl to fatwa of Council for Scientific Research and legal Opinion (CLRO) which seems tend to textual authoritarianism model. Through hermeneutics approach this article finds that one of the most important breakthroughs presented by Khaled Abou El Fadl to fight authoritarianism is against the attempts of forcible conquest and the closing of the text by the reader. For him, the text remains free, open, and autonomous. In fact, the same idea was also presented by Farid Esack by understanding the Koran as "progressive revelation". The Living God is actively involved in the affairs of the world and Muslims. One of his manifestations is to send prophets as instruments of his progressive revelation. The characteristics of the Koran are also active and progressive as the gradual decline of the Qur'an (tadriji). Therefore, to avoid authoritarian attitudes is to remain aware that the text "a constantly changing work" or a "progressive revelation." So that all forms of interpretation and understanding will continue to be active, dynamic and progressive.

Keywords—Khaled Abou el Fadl, Women Islamic Law, CRLO, Fatwa

I. INTRODUCTION

One of the most important debatable in Islamic discourse is fiqh or Islamic law. It shows that the jurisprudence always gets in touch with reality and modernity. It should be relevant and balanced with the social settings of society because not all fiqh products can be applied at all times along with the dynamics of society, and changes of time. Islamic Jurisprudence has been experiencing a metamorphosis, it only experiences a "stagnant" phases in occasion of time.

The outstanding issues of fiqh which is still considered stagnant, are the questions about "female jurisprudence". So far, fiqh products on women issues are considered discriminatory, disrespectful of women's rights even seem to harass women. We can see this on verses about inheritance, testimony, and guardian that tend to favor men's superiority.

In every single aspect of life, the process of fiqh metamorphosis has begun. Moreover in modern times just like today, with the unstoppable great advances in science and technology. The issues of rights equality, freedoms, gender justice and others continue to develop in all around the world. These are very closely related to the development of Islamic jurisprudence. So that, it is needed a humanistic and non-discriminatory Islamic jurisprudence.

One of the fiqh products considered unfair and bias are the issue of equal rights between women and men as described above. The Qur'an as one of the main sources of Islamic Jurisprudence seems like to place the men over women, as stated in some verses about inheritance, the testimony of leadership and others. All of the verses explain the position women as a subordinate of men.

The contestation of woman discourse essentially talks about the future of Islamic jurisprudence or Fiqh itself. Is it still relevant in modern time? We can look at the case of *aqiqoh* for example, it requires two goats for male baby and only one goat for a baby girl. In other cases, a woman's testimony is regarded as half of the men's testimony. A murdered victim is not different if a man killed when the family could prosecute the murderer (or his/her family) 100 camels. In another side, if a woman is killed then the demands are only 50 camels. In term of inheritance law, the female portion is only a half of the male portion. If we examine the concept of Islamic jurisprudence, that is so contrary to the concept of equality, and justice both men and women in Islam, and we still find in many cases.

On the other side, we can see the Qur'an, chapter an Nahl: 97. Allâh promises to give a good reply for both men and women who did righteous deeds. In this context, we really need to analyze again the concept of fiqh which is considered *zhanny* and technical operational, accordance with the social setting of revelation time.

This means that there is a doctrine that cannot be changed. It is a teaching that is absolute and *qat'iy*. The problem appears is that there is no clear distinction between the teachings of *qat'iyyuddalalah* and the teachings of *zhanniyuddalalah*.

Islam essentially put women in a balanced position with men, see the chapter of al Baqarah: 182 "*hunna libassullakum waanta libasun lahunna*". Also in the legal system, Islam

equates men and women irrespective of the differences that exist, whether physical (An Nazm: 45), (ad Dariyyat: 49), as well as differences in the ability of reason (al Hujurat: 13) and (al Isro: 70).

So it is indispensable of *mafhum an-nash* and reinterpretation of the Quranic verses about women. Moreover, when the verses are categorized as *zanny* or temporal responding the conditions of society where the verse was revealed. To do the reinterpretation of gender bias verses, inevitably we need to reconstruct the method of interpretation. Anytime the methodology is gender biased, then the results of the interpretation will not be different.

Some methodologies considered bias gender according to Nasarudin Umar are the *tahlili* or *tajzi'i*. these methods tend to interpret verses partially. Another method which is quite fit to understand Qur'an is the *maudlui* or thematic method. It attempts to interpret the verse about polygamy, so the conclusion is that it is highly unlikely that a person can do justice under such conditions. For example, it can be seen in an Nisa chapter; verse 129, it means "And you will never be fair to your wives".

As mentioned above, what should be observed is that as a product of *ijtihad*, *fiqh* is still highly dependent on who the formulators which strongly connected with subjectivity. Moreover up today, a few of *fiqh* books attach a complete methodological and epistemological grounding. Admittedly most of the jurisprudence is still on the methodology or *manhaj* that the priests of the schools have practiced. The problem is the space where the *fiqh* is created with the social economic conditions that surround it, the geographical locus, what epistemology is used, is very influential on the process of *fiqh* formation, including in *fiqh* women.

II. THEORETICAL FRAMEWORK AND METHOD

The main question in hermeneutics is how the relation of text, author and reader in the dynamics of Islamic legal thought dialogue. El Fadl highlights how the mechanism of formulation and decision-making of the fatwas issued either by individuals, by public figures or religious institutions and organizations in general. Elementary competencies such as what qualification and standard should be actually owned by a person, group, organization or religious institutions who dare to name themselves as the sole holder of the interpreter and also the executor of God's authority? What kind of legitimate test tool is required to assess or examine the validity of divine authority claim which is inherent in religious fatwas? Why in the world of religious praxis, suddenly emerges a general phenomenon called authoritarianism or more properly called using the power of God justifying the arbitrary activities of the reader in understanding and interpreting the text.

One thing that cannot be avoided by anyone is the fact that divine instruction always rests on the "text" (*kitabah: qawliyyah*), while the text itself rests entirely on the

"language" (*lughah*) intermediary tool. It is this language that is the source of cross-references of all time, for it is nothing but the outcome of community agreement and the creation of human culture. The letters, words, sentences, adjectives are highly dependent on the symbol system. While the symbol itself requires the assistance and support of certain associations, images, and the emotions of listeners, and it may change over time.

Therefore, it seems that language has its own objective reality because its meaning cannot be determined effectively and unilaterally, either by the author or by the reader. Because of the complexity of the problems faced by the determinants of meaning, the understanding of the text cannot be determined by any group.

When the process of actual understanding of the text which is interpretive (many choices of meaning and interpretation) is closed (the door of *ijtihad* is closed), then a person or group has entered the area of despotic action.

Abou El Fadl comprehensively discusses the religious fatwa issued by *Lajnah al Daimah li al buhuts al ilmiyyah wa al ifta*, (Council for Scientific Research and legal Opinion-CLRO). El Fadl not only succeeds in demonstrating the despotic power of despotic hermeneutics embodied in textual authoritarianism after riding the authority of the sacred text. El Fadl also succeeded in providing "methodological proposals" based on endeavors to respect the authority of texts in order to save discourse from the arbitrary and arrogant treatment of puritan groups. The two points underlined by El Fadl to circumvent this authoritarian trap are perseverance and self-control. One must be conscientious and careful to exert all his reasoning and probing power. The weight of this obligatory burden of diligence and scrutiny is proportional to the seriousness of the social and theological implications of the question or the studied text.

El Fadl's sharp idea is when the links between law and morality. El Fadl's critique of puritanism is that puritanism holds the view of extreme positivism, which recognizes positive law as the ultimate moral value and ignores other normative considerations. Whereas for El Fadl, morality does not require the textual authority to be applicable-moral is something inherent in the human figure itself. Therefore, the logic and moral laws of truth, good also need to be studied in depth, for it will be a guide for the doctrine of religion to be anchored to the ever-changing human reality.

El Fadl's greatest idea of contemplative Islamic legal discourse is to dismantle the "malpractice of authoritarianism" in Islamic law or *fiqh*. This phenomenon according to El Fadl became mainstream of Muslims understanding Islamic law today. So that, it emerges the discourse of Islamic law and *fiqh* that are authoritarian, closed and static.

At early phase, el Fadl wants to show that Islamic law deserves to be praised as "the heart and core of the religion of Islam", or in Joseph Schacht's terms "the culmination of

Islamic civilization" and according to Al-Jabiri "Islamic civilization is the civilization of Jurisprudence" because Jurisprudence has flexibility and anti-authoritarianism. To achieve such kind of the point, preferably the Islamic legal framework, to El Fadl, is an inclusive, tolerant and progressive *fiqh*. El Fadl's obsession is to restore the Islamic law in the discourse of jurisprudence which is diversified, refreshed, reformed and progressive.

III. RESEARCH FINDINGS AND DISCUSSION

Several fatwas issued by CRLO, El Fadl felt that the fatwas were not oriented towards the interests of ummah. However, the fatwa is a reflection of scholars who have authority and should be more emphasis on the condition and needs of mankind.

To El Fadl (2003: 252 - 253), the fatwa issued tended to be discriminatory and incompatible with the original purpose of Islamic law. The more El Fadl studies and thinks of the fatwa, the more he feels that the fatwa should be reviewed, to remove the impression of rigidity or authoritarian on *fiqh*. However, the fatwa issued by CRLO is used as the legal basis for daily *fiqh* in Saudi Arabia.

In the view of El Fadl, provision of a fatwa by CRLO still referred to authoritative texts only, while other aspects have not yet been summarized, for example, honesty, diligence, self-restraint, comprehensiveness, and prioritization of reasonableness. Some of the aspects above according to El Fadl should be the part considered in establishing a fatwa. What CRLO does through its fatwa is absolute (despotic authoritarian) and a real corruption of God's text. (El Fadl, 2004: 251).

There are two reasons why El Fadl analyzed the fatwa. First: that intellectual product of jurists from CRLO represents an authoritarian form of interpretation. Second, the majority of CRLO experts are affiliated with the Wahabi school, i.e. *madhhab* which interprets the text literally and textually. And today Wahabi is the dominant school in the Islamic world. This textual understanding has been transplanted into various schools ideologically opposed to Wahabism, such as the school of Sufi thought, such as the Sufi thought of Nuh Ha Min Keller or Hisham al-Kabbani.

The characteristic methodology of the Wahhabi school is that all established legal issues produce definite and single determinations. In the determination of the fatwa CRLO, began searching for the law from the main sources i.e. the Qur'an and Hadith then carefully, sought, and declared the law clearly and valid all the time. (Baz, 1990: 31). In his analysis, El Fadl unravels some of the fatwas that are considered controversial and not oriented towards the public interest. As mentioned earlier, some of the fatwas are:

1. Cases About Bra, High Heel Shoes and Wedding Treaties.

A special representative of CRLO, Shaykh Ibn Jibrin explain when he was asked if the use of a bra is permissible in

Islamic law? Ibn Jibrin responds that some women get used to wearing extra clothes (bra) to give the impression that they are young or virgins, and if so their motives then it is seen as a form of prohibited fraud. Nonetheless, if a woman wears a bra for health and medication, then it is allowed (Jibrin, t.t. : 205).

The same thing happened on fatwas about whether women are allowed to wear high heels. The fatwa was issued by mufti of CRLO, Shaykh Ibn Baz, and Shaykh al-Utsaymin. They argue that "high heels are not allowed in Islam". The reason for the ban is, that such shoes are not healthy and harmful to women because it can cause a woman to sprain and fall. In addition, the shoes are also deceptive because it makes women look taller and can cause defamation because it will highlight the thighs of women (Baz, 1990: 294).

The argument built by CRLO in the perspective of El Fadl is totally unfounded in the objectives of Islamic Shari'ah, that is, the benefit is not difficult. About the legality of the marriage of *misyar*, the popular marriage model in Arabia where a man marries a woman with the intention of divorcing after a while, but without informing her of his future wife. Ibn Baz, CRLO, stipulates that the marriage is deemed legitimate and in no way condemns the man for his fraudulent behavior.

2. Slander arising from the Grave Pilgrimage Practices for Women

When some CRLO experts asked for their opinion about a Muslim woman who visits her brother's grave, her husband's grave, or even the grave of the Prophet, is it allowed or not? The answer of the jurists is assertive. They stipulate "that Muslim men are allowed to do the grave pilgrimage, even highly recommended, but it is forbidden for women" (al Utsaymin, t.t: 170).

The basis of their decree is attributed to the hadith of the Prophet who said that "do grave pilgrimage because it will remind you judgment day" (Munawir, 2007: 185). However, the provisions of the hadith according to CRLO does not apply to women. They affirmed that the Prophet once said: "May the Lord curse the women who make the grave pilgrimage" (al-Halqat, t.t. : 131).

3. Satan stays In The Car And The Dangers Of Women Who Traveled Without Mahram

A mufti, Ibn Baz of CRLO issued a fatwa on whether a woman is allowed to travel alone without being accompanied by her *mahram*, either the trip is for personal gain or to perform the pilgrimage. In that context, a woman asks if her husband is an accident, and she is asked to visit her, is she allowed to go alone without her male family on the way. In any circumstances shall a woman be allowed to travel more than eighty kilometers (two *dhira*). This provision is based on a hadith attributed to the prophet which mentioned "It is not justified for a believer to travel one day without the *mahram*" (Ibn Baz 1990: 351-355)

4. Sujud on Husband as Submission of wife to Husband.

Salih ibn Fawzan (tt: 262) representing CRLO, in Al Muntaqa, issued a fatwa that, a wife is required to obey her husband, as long as her husband's command is acceptable by the syari'a. It means that a wife must obey her husband if he orders not to leave home, not to work outdoors, and not to visit his friends, she must do that. In other words, a wife must obey her husband in all worldly affairs. If a husband takes his wife to bed (sexual intercourse), then she should immediately serve him, and should not refuse because if she refuses she will be cursed by angels from the night until the morning. And if a wife intends to fast outside the month of Ramadan, she must obtain permission from her husband first (Fawzan, t.t.,: 263).

The Mufti argued that this provision is based on the Qur'an verses which state that " Men are as leaders (*qawwamun*) of women, as God has given some of them an advantage over others, and because they spend out of their wealth" (QS an Nisa: 34).

From the arguments, above Fadl's greatest idea of contemplative Islamic legal discourse is to dismantle the "malpractice of authoritarianism" in Islamic law or fiqh. This phenomenon according to El Fadl became mainstream of Muslims understanding Islamic law today. So that, it emerges the discourse of Islamic law and fiqh that are authoritarian, closed and static

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First, El Fadl viewed the Qura'n and Sunnah-the authoritative source of Islamic law-as "open text" the logical consequence is to believe in Islamic law as a work in the movement. In term of the authoritative texts as the source of Islamic law, they should not be locked, closed and stashed so that the necessity of new interpretations and understandings will be constantly born. The open text will be able to accommodate the dynamic motion of human understanding with its diversity of contexts. Banning the meaning of the text is both criminal and intellectual arrogance because it has claimed to know the finest God's purpose. In addition, this attitude will close the meeting for the birth of new understandings (fiqh) which became the pride of Muslims throughout history.

Second is to restore the discourse of Islamic law to the initial spirit of reinforcing ijihad as an effort to mobilize the human ability to search, to sift and to understand the Divine

Will. In this context, El Fadl distinguishes between shari'a and fiqh. Shariah is God's Will in an abstract and ideal form, but fiqh is a human effort to understand God's Will.

In this sense, sharia is always regarded as the best, fair and balanced, while fiqh is just an attempt to achieve the ideals and goals of sharia (*maqashid al-syari'ah*). The purpose of Islamic law is to realize the goodness of human (*tahqiq mashalih al-'ibad*) and the purpose of fiqh is to understand and apply sharia. This distinction arises from the recognition of the human-effort's failure to understand God's purposes and determinations. In this context, human *ijtihad* is never final and perfect.

The third is revitalization methodology of classical Islamic law. According to El Fadl, Islamic law is strongly opposed to codification and uniformity (Islamic law has staunchly resisted codification or uniformity). Islamic legal methodology has an open characteristic and anti-authoritarianism (traditional Islamic methodology has been its open-ended and anti-authoritarian character).

today's problem is the tendency of Islamic legal practice to enact Islamic law as an established, static and closed set of rules (*ahkâm*) which must be applied without leaving a wide space for development and diversity. In short, modern Islamic law is seen as a set of rules (*ahkâm*) not as a process of understanding (*fiqh*). There is a big tendency for authoritarianism in the understanding of Islamic law that continues to be resisted by El Fadl.

IV. CONCLUSION

One of the most important breakthroughs presented by Khaled Abou El Fadl to fight authoritarianism is against the attempts of forcible conquest and the closing of the text by the reader. For him, the text remains free, open, and autonomous. In fact, the same idea was also presented by Farid Esack by understanding the Koran as "progressive revelation". The Living God is actively involved in the affairs of the world and Muslims. One of his manifestations is to send prophets as instruments of his progressive revelation. The characteristics of the Koran are also active and progressive as the gradual decline of the Qur'an (*tadriji*). Therefore, to avoid authoritarian attitudes is to remain aware that the text (al-Quran) is "a constantly changing work" or a "progressive revelation." So that all forms of interpretation and understanding will continue to be active, dynamic and progressive.

El Fadl is very pessimistic that Islamic jurisprudence is capable of interacting with modernity if it only represents the aspect of the authority of the text. He does not believe that the intellectual treasures are able to survive the rush of colonialism and modernity trauma. In fact, El Fadl noticed, the remains of the classical Jurisprudence treasury are on the brink of extinction

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