

A HUMANISTIC PHYLOSOPHICAL ANALYSIS ON WOMEN EXISTENCE IN THE FIQH OF SYAFII

Iffatin Nur

STAIN Tulungagung, Jawa Timur

Email: chusnultata@gmail.com

Abstracts: Abstract: In the fiqh of Shāfi‘ī, a humanistic philosophical analysis on women existence is given serious attention, particularly in his investigation on the matters of women. It is very vivid in his magnum opuses entitled *al-Umm* (*The Mother*), *al-Risālah fi Uṣūl al-Fiqh* and his periodicals *qawl qadīm* (old view) and *qawl jadīd* (new view). This article seeks to provide thorough analysis on the women empowerment through humanistic values from methodological and legal products aspects generated by Shāfi‘ī. In the aspect of methodology (*uṣūl fiqh*), the use of *qiyās* (analogy) is an indication of the humanistic value in the development of the *maslahah* (beneficial) principles. The legal products aspect can be explored through the following three classifications. Firstly, humanistic values of women in the law regarding the properties. Secondly, the humanistic values of women in the state law on economic issues related to religious conversion and social relations in political settings. Thirdly, the humanistic values of women in the marriage laws.

Keywords: fiqh, Shāfi‘ī, woman existence, humanistic, philosophical

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Background

IN THE ACTUAL-MODERN discourse in the Muslim world, the ethical, humanistic and legal aspects have become a central concern in the social sphere. Accentuation on these aspects can be detected from the vast attention given by Islamic jurists towards any efforts to women humanization, both as an individual figure or in conjunction with their position in a

family, as a common reaction against Western cultural outlook¹. Essentially, the modernists offer new Islamic humanism through social reform program in order to fight for women's dignity, freedom and humanization process.

The equality of level and status of women became a main stream to the modernists. They argued that Islam gives equal freedom and rights to women. In particular they fought for the rights of women in education and employment. In Egypt, Qasim Amin (1865-1908) published a book about the "*emancipation of women*", to give suggestions that they should have basic education if they are aimed to play a role in society. In his book, *al-Mar'ah al-Jadidah*, which was published two years later (1901), he called back the grand concept of the twentieth century, namely: freedom, progress, and civilization². In Iran, Mohammad Khatami, while being a Minister in the 1980s, gave hope to women that under his future presidential time, they may compete to achieve equal status along with men. He said that women were very competent to play the roles that were not only limited to their existence and the country should provide administrative opportunities even at the highest levels³.

As in Iran, the focus on the humanization of women was also given high attention related to human rights regarding political, religious, and social change aspects in other places. Some Islamic countries that paid high attention to that issue were Pakistan⁴, Uzbekistan⁵, and Afghanistan⁶.

¹Fazlur Rahman, *Islam*, 2nd ed. (Chicago: University of Chicago Press, 1988), 232.

²Dessouki, "Islamic Modernism," in *The Encyclopedia of Religion*, ed. Mircea Eliade (New York: Macmillan, 1987), 16.

³Anonymous, "Presidential Elections, Political Parties; Islam; Voter Behaviors; Social Change in Islam and Ballot Box," *Economist Journal* 343, no. May (1997): 42. Khatami also made easier for censorship, allowing some foreign publications and filmmaking. All of them were in the composition of his campaign for human rights, personal freedoms, and the rule of law. See also Barbara Smith, "Islam, Human Rights; Law Enforcement; Social Conditions and Trends in Bully Boys at Work," *Economist Journal* 342, no. June (1997): 8-10.

⁴George Melloan, "Foreign Policy, Human Rights, Religion: Who's in Charge of Human Right These Days?," *Wall Street Journal*, no. May (1998): 21-3.

The reality in those modern Islamic worlds indicated a core issue that the Islamic law is facing a developing and changing conditions and values. The Islamic modernist were keen to fight for a condition that the diversity in the modern era can express itself in the form of interpretation activities and religious experiences which are more organic to the area of cultural assimilation where their value system may give fresh meaning to human life.

The preface just mentioned gives rise to a question as to whether the modernists' ideas are completely new and had not been reviewed by the Islamic law or by classical Islamic jurists. The answer is of course *not* since both in the Quran and al-Sunnah and in the formative period of Islamic law such issues on emancipatory values and humanization of women had been elaborated, one of which was the conception of the Shāfiī's *madzhab* (school of thought).

Assessing the humanity of women in Islamic law conceptually or empirically can be observed through a dialogue presentation between Wahbah Zuhaylī's and Shāfiq Hāshim's views. Zuhaylī stated that inside women one can find entertainment and charm and a capacity to lighten the burdens of life and to support their men. So it is not logical if this condition is abandoned, the function is turned off, or their liberty is restricted without the right direction. It is verily not true to drown their rights, to disparage their honors or to leave them in the tradition and social shackles. Islam has raised the emancipation and gives due respect to women both in *mu'āmalah* (inter-human relation in the form of daily life activities) and *ibādah* (worship). There are no restrictions for both women and men to compete in doing good deeds in order to achieve a higher degree on the side of Allah SWT⁷.

⁵Anonymous, "Presidents: Political Behavior in the Getting There" *Economist Journal* 340, no. September (1996): 41.

⁶Hugh Pope, "Civil War: Islam; Economic Conditions in Reality Check: Afghan Taliban, For Better or Worse, Seems There to Stay," *Wall Street Journal*, no. September (1998): 2.

⁷Wahbah Al-Zuhaylī, *The Quran: Paradigm of Law and Civilization* [al-Qur'an: Paradigma Hukum dan Peradaban] (Surabaya: Risalah Gusti, 1996), 180.

The Zuhayli's views suggest that women in the conception of Islamic law have equal opportunities with men in scholastic achievement in life. In fact, Islam has raised the dignity of women, compared to their social historical background before Islam came. Therefore, Islam through its *shari'ah* (teachings) advocates women humanity. By this, it is then not legally justified if their condition is neglected, the function is turned off, their freedom is restricted, their rights are drowned, and their dignity as *human* is humiliated.

On the other hand, Syafiq Hasyim, in his editorial writing about the "value" of women, stated that in the case of reproductive rights of women in Islam, the *fiqh* that is developing around us - regardless of its authenticity and validity – has become an inhibiting factor just like culture, politics, and economic. Women are valued half the price of men, not only physically but also of their rights. Contrarily, their duty is bigger than men⁸. So, on this fact, the historical aspects of Islamic law are tested.

These conceptual and empirical-critical dialog needs to be analyzed philosophically⁹. This is so because, in general, in the view of Islamic law's philosophy, human welfare is always put forward¹⁰. This putting forward has formed a common ideality in the principles of Islamic law. Then, even if there is a gap between the ideals of Islamic law with empirical reality, the first question that needs to be studied thoroughly is the welfare aspects of the philosophy that produces the Islamic jurisprudence although it also requires further observation in its relation with social change issues¹¹.

⁸Syafiq Hasyim, ed. *Menakar 'Harga' Perempuan: Eksplorasi Lanjut atas Hak-hak Perempuan dalam Islam* (Bandung: Mizan, 1996), 6.

⁹Mustafa Abdul Raziq explained that the philosophy of Islamic law is not the same as the wisdom of Islamic law. Refer further to Fathurrahman Djamil, *Filsafat Hukum Islam* (Jakarta: Logos, 1997), 12-5.

¹⁰Djamil explained that the philosophy of Islamic law is the knowledge of nature, secret, and objectives of Islamic law, both concerning the material of the law as well as its adoption process. Refer further to *ibid.*, 14.

¹¹Muhammad Khalid Masud, *Islamic Philosophy of Law and Social Change* [Filsafat Hukum Islam dan Perubahan Sosial] (Surabaya: Al-Ikhlas, 1995). This book raised the concept of *maslahah* of Abu Ishaq al-Shatibi (d. 780 H

The second question is: How are the circumstances of socio-cultural and political at the time of the related *fiqh* (Islamic jurisprudence) being produced? This problem appears related to the *fiqh*'s productivity and application in human life that cannot be separated from the socio-cultural conditions. This problem requires solving through historical study.

The third question is: Does the *fiqh* advocate towards female humanity? This problem appears related to the evaluation of the gap between the ideal-juridical concepts of Islamic law with the empirical reality of social life.

Arising from the elaboration and relating to the three questions above, this paper attempts to capture comprehensively the values of women humanity in the Shāfi‘ī madzhab conception through his several monumental works, especially his magnum opus: *al-Risālah* and *al-Umm*. This paper tries to uncover humanistic values in Shāfi‘ī's *fiqh* advocacy towards women philosophically and historically.

Discussion

To be able to do an objective and valid scientific study on the mindset of a prominent figure, then it is necessary to elaborate in advance the setting of political, social, cultural, economic, educational and religiousness condition where and when he or she was born, educated, initiated his or her ideas until the time of his or her death. This is important as the academics agreed unanimously that the socio-cultural conditions affect a person's patterns of thought and ideas. Here's a global snapshot biography of the founder of the Shāfi‘ī school of thought.

The Historical Track of Imam Shāfi‘ī

His full name is Muhammad ibn Idris ibn al-Abbas ibn Uthman ibn Shāfi‘ī ibn al-Sabi 'ibn Yazid ibn 'Abd al-Muttalib ibn Hashim ibn 'Abd Manaf ibn Qasi ibn Kilab, later then

/ 1388 A.D.). The concept was developed as a fundamental characteristic of the theory of Islamic law which is adaptive to social change. In his *al-Muwafaqat*, al-Shatibi presented his doctrine, *al-Maqasid al-Shari‘ah* containing exposition of various aspects of the concept of *maṣlahah*.

known as Imam Shāfi‘ī (150-208 / 767-820)¹². Some authors disagreed about the place of birth, whether in Gaza, a small town in Palestine; in Ashkelon, a larger town not far from Gaza, or in Yemen. But most authors mentioned his birthplace was in Gaza¹³. His genealogy meets with the Prophet Muhammad on 'Abd al-Manaf¹⁴.

Imam Shāfi‘ī's lifetime was relatively not long. He lived for 53 years according to the calculations of the solar year or 54 years according to Islamic calendar. Even so, his short life was very contrast to his abundant works, indicating how productive he was when produced papers.

At the age of nine Imam Shāfi‘ī had memorized the Quran. At the age of ten years old, his father died and then he was taken along by his mother from Palestine to Mecca. In Mecca he learned to the experts of fiqh and Hadith. His first famous teacher in Mecca was Muslim bin Khalid, a *Sufi* which granted him a warranty to preach¹⁵. Later he studied in Medina under the guidance of al-Imam Malik ibn Anas, the chief judge of the Hejaz and the founder of the Maliki school. He was known as a follower of Imam Malik until his migration to Iraq. In Iraq, he learned the doctrines of the Hanafi school through al-Shaybani's books and through his contact with the followers of the Hanafi school. From these interactions, his scientific insight became broader so that he was able to analyze the strengths and weaknesses of both Maliki and Hanafi schools and tried to combine both.

In the year 804 AD, at the age of 37 years, Imam Shāfi‘ī left Iraq¹⁶. His scientific investigation onto many Islamic scholars

¹²Majid Khadduri, "al-Shāfi‘ī," ed. Mircea Eliade (New York: Macmillan, 1993). Al Mu'ti, *al-Imām al-Shāfi‘ī* (Beirut-Lebanon: Dār al-Kutub al-'Ilmiyah, 1992), 5. Here, it was written that Shāfi‘ī's life was in 150-204 H / 767-816 AD. His birth year coincided with the death of Imam Abu Hanifa.

¹³Khadduri, "al-Shāfi‘ī," 195.; Mu'ti, *al-Imām al-Shāfi‘ī*, 5-6.

¹⁴Jalāl al-Dīn 'Abd al-Rahmān ibn Abī Bakr al-Suyūtī, *'Uqūd al-Zabarjad 'Alā Musnad al-Imām Aḥmad* (Beirut: Dār al-Kutub al-'Ilmiyah, 1987), 6.

¹⁵Mu'ti, *al-Imām al-Shāfi‘ī*, 5.; al-Suyūtī, *'Uqūd al-Zabarjad*, 6.

¹⁶Mu'ti, *al-Imām al-Shāfi‘ī*, 195-6. The authors disagreed regarding this case; most of them suggested that he went to Syria and the Hejaz and then

from different schools of thought at various places and various subjects of study made him rich in scientific treasures and cultural experiences. Nevertheless, he insisted to combine what he learned keenly from both *madzhab*s with his own character, as evidenced by the birth and rapid development of his own *madzhab* in the area of Islamic jurisprudence (*fiqh*). The independence of his school of *fiqh* was not determined dominantly, or even it can be said that it was not affected, by the orientation of his teachers' thoughts or any other academic resources. He indeed even made a critical study of them.

Such independence was expressed in his innovation to the strategic tools needed by the field of jurisprudence, such as his pioneer work of Islamic legal methodology (*Uṣūl fiqh*) that can be found in his monumental book, *al-Risālah*. Shāfi‘ī was also known as a defender of *hadīth*¹⁷. Ahmad bin Hanbal, the owner of the honorable title as *The Leader of Hadith Experts* (regarding to traditional/orthodox schools of the *Ahl al-Sunnah wa al-Jama‘ah*)¹⁸, acknowledged that: Should there be no Shāfi‘ī, surely we would had not known the *fiqh* of *hadīth*¹⁹.

Shāfi‘ī's Islamic law system can be explored through his work, *al-Umm* (The Mother)²⁰, while his work of law principles

went back to Iraq in the year 810 A.D.; others did not mention his visit to the Hejaz and reported that he lived in Iraq in the year 814 A.D. and went to Egypt after a stop in Syria for a while. In Egypt, al-Imam al-Shāfi‘ī firmed his position and built his *madzhab* (school of thought). His activity went on until one day when he was attacked by some followers of the Maliki school so that he was seriously wounded and died a few days later.

¹⁷al-Jundī, *al-Imām al-Shāfi‘ī Nāsir al-Sunnah wa Wādī al-Uṣūl* (Cairo: Dar al-Kaib al-‘Arabi, 1966).; Moenawar Chalil, *Biografi Empat Serangkai Imam Mazhab* (Jakarta: Bulan Bintang, 1955), 207.

¹⁸W. Montgomery Watt, *Islamic Philosophy and Theology: An Extended Survey* (Edinburgh: Edinburgh University Press, 1985), 58.; Cyril Glasse, *The Concise Encyclopedia of Islam* (San Francisco: Harper Collins Publishers, 1991), 170-1. and GE von Grunebaum, *Classical Islam: A History 600 A.D -1258 A.D* (Chicago: Aldine Publishing, 1970), 90-2. HAR Gibb and et.al, *The Encyclopaedia of Islam*, vol. 1 (Leiden: ER Brill, 1960), 272.

¹⁹al-Jundī, *al-Qur‘ān wa al-Manhaj al-‘Ilmi al-Ma‘āṣir* (Cairo: Egypt's Dār al-Ma‘ārif, 1984), 255.

²⁰This book was the transcripts of his lectures written by his prominent followers, especially al-Rabi 'ibn Sulayman al-Muradi (d. 880 A.D.), al-

can be clearly read from his book: *al-Risālah fi Uṣūl al-Fiqh*. In these two magnum opuses, his law doctrines and methodology are found. His work of *Uṣūl fiqh* has been the most systematic and coherent book, which discusses the significance and relativity of every source of law, and how the rules of law are absorbed from them²¹. Shāfi‘ī also wrote several other books, like *Kitab 'Abkam Quran*, and *al-Musnad*, a hadith compilation.

Two major works of Shāfi‘ī, namely: *al-Umm* and *al-Risālah* was compiled by al-Rabi 'ibn Sulayman al-Muradi. In addition, there are other works that he wrote; *Jami'ul 'Ilm*²², *Ibtal al-Istihsan*²³, *Al-Radd 'ala Muhammad ibn Hasan*²⁴, *Siyar al-Ausha'i*²⁵, *Al-Fiqh*, all of which were compiled by al-Imam al-Haramayn bin Yahya; *Al-Mukhtasar al-Kabir*, *al-Mukhtasar al-Saghir*, *al-Faraid*, *al-Jami 'al-Kabir* and *al-Jami' al-Saghir*, which were compiled by al-Buwayti and al-Muzani. *Al-Hujjah*, was compiled by al-Za'farani and *Al-Sayr*, was compiled by Abi 'Abd al-Rahman Ahmad bin Yahya.²⁶

The involvement of Shāfi‘ī's students was highly significant in preparing some of his works. They contributed to his works based on the results of their study to Imam Shāfi‘ī with the method of *imla'* (dictation). His book titled *Ikhtilaf al-Hadith* (the Disagreement of Hadith), was the only book compiled by Shāfi‘ī himself.²⁷

Buwayti (d. 845 A.D.), and al-Muzani, (d. 877 A.D.), and was corrected by al-Shāfi‘ī when the transcripts were delivered to him.

²¹Khadduri, "al-Shāfi‘ī," 196. See also Ahmed Hasan, *The Early Development of Islamic Jurisprudence* (Delhi: Adam Publishers and Distributors, 1994), v, xv.

²²This book contains Shāfi‘ī defense to the sunnah of the Prophet Muhammad.

²³The book contains Shāfi‘ī's critics to the Islamic scholars in Baghdad (Iraq) that employed the method of *istibsan*, particularly Hanafi.

²⁴This book reviews Shāfi‘ī's arguments, rebuttal, and defense against the accusations and attacks done by al-Imam Muhammad ibn Hasan the second, a Medina scholar who was a follower of the Maliki school.

²⁵This book contains Shāfi‘ī's defense towards al-Imam al-Ausha'i (88-150 H) who was an expert on hadith and was regarded as a prominent hadith scholars in the period before Shāfi‘ī was born.

²⁶Mu'ti, *al-Imām al-Shāfi‘ī*, 47.

²⁷Chalil, *Biografi Empat*, 243. In addition to this book, other Shāfi‘ī's

In his fiqh's conception, there are terms known as *qawl qadim* (old sayings)²⁸ and *qawl jadid* (new opinions)²⁹. These two terms are closely related to historicity factor in his fiqh, especially from that of Baghdad to Egypt. This factor was in the form of academic and socio-cultural facts that he responded into these two forms of *qawl* (opinions). It was academic aspects that became the background for him to change opinions from *qawl qadim* to *qawl jadid*. From this latter *qawl* (opinions) Shāfi'i's school of thought began to spread and grow.

The socio-cultural aspects that caused him changing some opinions were new things in Egypt that were different from those he found in Baghdad (Iraq), such as people's customs, norms of social life and social needs. This difference obliged Shāfi'i to adapt legal provisions that could be applied in a new place.³⁰

Regarding to the dimensions of space, it can be stated that *qawl qadim* was born in the period of Iraq while *qawl jadid* was born in the period of Egypt. During the period of Iraq, there were two major works written by Shāfi'i, namely: *al-Risālah* and *al-Hujjah*. While other works, including *al-Umm*, was written in Egypt.

Humanistic Phylosophical Analysis On Women Existence In Shāfi'i's Fiqh Conception

Humanistic values in Shāfi'i's *fiqh* seem to get serious attention especially in his investigations³¹ to problems of

works with no compiler's identity were not given any information about their compilation, whether they were done by Shāfi'i himself or by others.

²⁸*Qawl qadim* relied on his work of *al-Hujjah*, produced in Baghdad, which was closer to the stream's character of *ahl hadith* (traditionalist faction) and bore a main purpose as a resistance to the stream of *ahl ra'y* (rationalist faction).

²⁹Later, when he was in Egypt, some of the students of al-Imam Malik visited him. When he proclaimed his Qawl jadid through some works intended as a rejection of the school of al-Imam Malik, they denied his views and harmed him. For more information, see Mu'ti, *al-Imām al-Shāfi'i*, 46-7.

³⁰Chalil, *Biografi Empat*, 246. Djamil, *Fiksat Hukum*, 116.

³¹Khadduri, "al-Shāfi'i," 195-6. Al-Shāfi'i in the study and production of

women. What he did was well recorded in his monumental work: "*al-Umm*" (The Mother)³², and periodicals of *Qawl qadīm* and *Qawl jadīd*³³. This article attempts to reveal - philosophically and historically - humanistic values in Shāfi'i's *fiqh* advocacy towards women which became a landmark in the humanistic values of Islamic law.

To be able to conduct a scientific study of the material of Shāfi'i's *fiqh*, a necessary conceptual insight of jurisprudence taxonomy which is widely accepted by scientists or jurisprudence experts is needed. In the modern discourse as explained by Khallaf and Zuhaylī³⁴, the jurisprudence taxonomy is divided into seven areas,³⁵ namely: (1) *Al-Abkam al-ahwal al-shakhsiyah* (civil law),³⁶ (2) *Al-Abkam al-Madaniyah* (law between individuals/ citizens),³⁷ (3) *Al-Abkam al-Jina'iyah* (criminal law),³⁸

Islamic law in Mecca, Medina and Baghdad. Then he proceeded his investigation on *fiqh* to Syria, Hejaz and Egypt. See also Auddin Nata, *Metodologi Studi Islam* trans. Metodologi Studi (Jakarta: RajaGrafindo Persada, 1998), 255.

³²Khadduri, "al-Shāfi'i," 196,8. It was described by Khadduri that the book of *al-Umm* consists of 7 volumes, edited by Ibn Jama'ah, (Cairo, 1904-1908). But, the editions by Shakir (Beirut-Lebanon: Dar al-Fikr, 1990) that the researcher found showed that *al-Umm* consists of 8 chapters and were packed into 5 volumes.

³³Among the works that discuss both *Qauls* of Imam al-Shāfi'i is Nahrawi Ahmad 'Abd al-Salam's paper, *al-Imam al-Shāfi'i fi madhabih al-qadim wa al-Jadid* (1988).

³⁴Abd al-Wahab Khallāf, *'Ilm Uṣūl al-Fiqh* (Kuwait: Dar al-Qalam, 1977), 32-3. Wahbah Al-Zuhaylī, *Uṣūl al-Fiqh al-Islāmī* (Damshiq: Dar al-Fikr 1986), 438-9.

³⁵In the perspective of *Uṣūl fiqh*, these seven regions are included in the region of interaction among fellow human beings, whether as individuals or as members of society. This is the third law contained in the Quran. For more information, see Khallāf, *'Ilm Uṣūl*, 32. and Al-Zuhaylī, *Uṣūl al-Fiqh*, 438.

³⁶With regard to the kinship that governs relationships between husband and wife, between relatives, and inheritance (there are 70 verses in the Quran);

³⁷With regard to the activities between individuals, which includes trade, pledge, mortgage, company, which aims to regulate the relationship between individual's honor and to protect an individual's rights (there are 70 verses).

³⁸With regard to the crime and law sanctions, which aims to protect human life, their properties and rights, and to limit relationships between

(4) *Al-Ahkam al-murafa'at* (*Law of Procedure*), 39 (5) *Al-Ahkam al-dusturiyah* (*law of regulations*), 40 (6) *Al-Ahkam al-dauliyah* (*state law*), 41 (7) *Al-Ahkam al-iqtisadiyah wa al-maliyah* (*law of properties*). 42

Furthermore, the humanistic values in Shāfi'i's *fiqh* are highlighted in two aspects, namely the methodological aspects and the material or production aspects.

Firstly, in the aspect of methodology (*Uṣūl fiqh*), the use of *qiyās* (analogy) in Shāfi'i's *fiqh* represents a landmark of the value of humanistic presence in developing principles in legal sources to cover issues that are not found directly in the Quran 'an and Hadith.

The humanistic values are characteristically common in the framework of *ijtihad* on jurisprudence due to the involvement of aspect of *ijtihadiah* thoughts on it. Therefore, they do no longer belong to Shāfi'i himself but also to every *mujtahid* (a Muslim of adequate capability to carry out *ijtihad* i.e. to study and present his or her own legal opinions regarding to Islamic laws or jurisprudence based on the Quran, Hadith and other acceptable Islamic law sources).

the criminals and the law upholders as well as the society (there are 30 verses)

³⁹With regard to the judicial process, sentences, testimony, and oath, which aims to regulate the practices in order to conceive justice and also aims to ensure the continuity of human life (there are 13 verses)

⁴⁰With regard to legal procedures and law resources, which aims to limit the relationship between the government and a statement of individual and public rights (there are 10 verses)

⁴¹The regulations of the relationship between the state and its citizens as well as with other countries; regarding to (a) Islamic government relationships with other countries i.e. the general state laws (*qanun*), (b) matters regarding to non- Muslims living within an Islamic system of government i.e. the specific state laws, aimed at limiting the Islamic government relations with other countries both in a peace and a war conditions and to limit the relations between Islamic community with other communities in Islamic countries. Also included in it are the regulations about asylum and political extraditions (there are 25 verses)

⁴²With regard to the rights of the individual properties and accountability in managing the properties as well as the states' rights and obligations, intended to regulate relations dealing with properties between rich and poor people and between the state and individuals (there are 10 verses).

With the trend of *qiyās*, he refused the model of "speculative reasoning" which was practiced by *ahl ra'y*, *istihsan*, and *al-maṣāliḥ al-mursalah*, *istishab* as the basis and method of *istinbāt* of the law⁴³. Shāfi'ī was extra careful against the involvement of sources outside the two principal ones of Islamic law (i.e. the Quran and Hadith). Even, according to Chalil, he was known as the "defender of hadith"⁴⁴, which is in tune with the assessment of al-Jundi and Hambali.⁴⁵

The humanistic existence of women in the Shāfi'ī's fiqh conception can be elaborated as follows:

Humanistic Philosophical Analysis on Women Existence in the Law of Properties

The first thing to elaborate is the rights and freedoms for women to do business transaction. Throughout Shāfi'ī's explanation about the law on trade activities, it was found that the rights and freedom of trade (*ahliyah al-tasarruf*) between women and men are equal, both considering terms, *khiyar*, or contract of sale⁴⁶. Shāfi'ī requires that in economic activities women must not be treated differently from men. Despite the fact that women are bound by ethical factors in their social status, this should not prevent them to obtain the same opportunities as men in the economic field.

The second thing to elaborate is business and economic opportunities for women in the context of the absence of obligation in performing Friday prayers. In his jurisprudence, Shāfi'ī does not oblige women and children to carry out the Friday prayers. By this, it is understood that Shāfi'ī insisted on

⁴³Ann Elizabeth Mayer, *Islamic Law: Shari'ah*, ed. Mirca Eliade, vol. 7, *The Encyclopedia of Religion* (New York: Macmillan, 1993), 434-5. See also Wahbah Al-Zuhaylī, *al-Fiqh al-Islām wa Adillatuhu* (Damshiq: Dār al-Fikr, 1996), 36.

⁴⁴Chalil, *Biografi Empat*, 207.

⁴⁵al-Jundi, *al-Imām al-Shafī'ī*,

⁴⁶Muhammad bin Idrīs Al-Shāfi'ī, *al-Umm* (Dār al-Kutub al-'Ilmiyah, 2002), 3-62. Equal opportunity for both women and men in the economic activities is different from their freedom in marriage. Women and men in *ahliyah al-nikāh* have a different freedom, although the humanistic values can still be found in it.

the obligation for men to perform Friday prayers along with the assertion in the context of trade activities.

In fact, he even states that any trade activities are prohibited when the call (*adhan*) to Friday prayer echoes and *khāṭib* (the Friday prayer preacher) is already in the pulpit. For other people who are not obliged to do Friday prayer, they can carry out the trade activities because the ban for doing so aims to meet the obligations of Friday prayers.

From this Shāfi‘ī’s explanation, it can be interpreted that he tried to reinforce his *fiqh* in providing opportunities for women to trade when men perform Friday prayers. This assertion is more obvious when the main reference, i.e. the Quran⁴⁷, only describes the order for leaving trade activities is only at the time whenever the call to Friday prayer is echoed while the Hadith of the Prophet⁴⁸ describes that there is no mandatory to women and children to perform Friday prayers.

If it is connected to the cultural *setting* of Baghdad and Egypt communities that had been cosmopolitan as well as a high level of women humanity there, it can be determined that at that very time women had played a significant role in the market economy. In these circumstances women have business opportunities for a longer time span than men since the latter have to allocate some of their time to perform Friday prayer obligations.

The third thing to elaborate is women's ownership rights in properties. Women have every right to manage, organize and spend their own property. Here there are two key terms, namely the rights and ownership⁴⁹. Any property that becomes a right

⁴⁷The Holy Quran, *Surah al-Jumu‘ah* / 62: 9.

⁴⁸Al-Shāfi‘ī, *al-Umm*, 218. The Prophet said: “*tajib al-jum’ah ‘ala kulli muslimin illa imra’ah aw ṣabīya aw mamlūk*” (The Friday prayer is obliged to any Muslim except women, kids and slaves) This hadith was narrated by Shāfi‘ī from Ibrāhīm ibn Muḥammad from Salmah ibn ‘Abd Allāh al-Khatamī from Muḥammad bin Ka'b al-Qurzī from a man of Banī Wa'il.

⁴⁹For the term ‘rights’, there are more or less some level terms, e.g. *beselit* (a Javanese term, means a certificate or a legal document of possession or right) or some sort of decrees for government officials regarding their wages. While ‘possession’ is realized if the right had been received actually from the parties obliged to give the rights.

of women, in turn, would be theirs if such property had been given to them by the obliged party. For example, when a woman is still under the responsibility of her parents, the necessities of life (e.g. income, wealth) becomes the obligation of her parents, as long as she is still immature and do not have her own income; when she gets married, her parents' obligation moves to her husband.

Nevertheless, Shāfi‘ī provides great opportunities to women to seek their own field of economics so long this does not cause any calumny that may threaten the harmony of their family life. Any wealth resulted from such effort becomes a wholly-owned property of women and is separated from the family's properties that are the responsibility of the husband. Such wealth is also separated from the property of *gono-gini* (a Javanese term which means any wealth that a family gathers during a marriage period resulted from the husband's business activities) in the family inheritance.

In this context, women can use the income obtained from their work, dowry and maintenance from her husband according to their own interests and needs, including her will to help the needs of her relatives.

Humanistic Philosophical Analysis on Women Existence in State Laws

The state laws that are discussed in Shāfi‘ī's fiqh begins with tax issues, and then develops onto the issue of jihad, the status of the war zones, migration, religious status of citizens and their social interactions (including inter-religious marriages), religion conversion, economic, prisoners and slaves , the political identity of citizens, and crime.

His advocacy towards women, in line with the focus of issues, covering economic issues in its close relation with religion conversion and social relations in a political *setting*, is elaborated as below:

The first thing Shāfi‘ī raised into concern was the economic security for *non-Muslim* women who converted to Islam/ *dhimmiyah*, as well as Christian, Jewish and *ahl al-Kitāb* (people of Book) women who converted to Islam while they were pregnant, they had a right for a guaranteed income until

they gave birth. If they were breastfeeding, they were entitled to breastfeeding wages. However Shāfi‘ī did not clearly point out who must bear the burden of being guarantors to these women. Nevertheless, it can be understood that the guarantor is the Islamic government through the funds of *bayt al-mal* (the state treasury).

Apart from that, a Christian woman who converted to Islam after *having intercourse* with her husband is entitled to receive her dowry. If she had not obtained the dowry from her husband, she is entitled to ask for it regardless the fact whether her husband had converted to Islam or not. In this case, the role of legal authority holders in Islamic government is very important, because should the husband had not entered Islam, demanding the dowry from him might not be an easy task. However, if the husband had converted to Islam, then it will be easier to handle because the couple have become the subject of Islamic law.

The second thing that Shāfi‘ī raised into concern was the dispensation of legal sanctions and economic consequences to women who convert out of Islam (*murtaddah*). Shāfi‘ī stated that if the woman concerned is a free person, she is just put into prison; if she is a slave, then the law sanctions is to serve the society in which she lives, and the community is obliged to pay the wages to her according to the Islamic rules. This is very different to the sanction against the person who converts out of the religion should the person concerned be a man, then he should be killed on charges of apostasy unless he repents and returns to Islam.

Shāfi‘ī's argument related to the case of not giving a capital punishment to Muslim women who convert out of Islam but rather 'only' putting them in jail was analogized to the *Sunnah* (practices of the Prophet Muhammad) that prohibits the killing of women even in the territory of war (*dar al-harb*). To Shāfi‘ī, such legal sanction is a declaration of respect shown by Islam to women. Such respect expressed by Shāfi‘ī is one of the essential humanistic values in Islamic law.

Humanistic Philosophical Analysis on Women Existence in Law of Marriage

The first thing to be elaborated is *khitbah* (engagement). Engagement is a preliminary event before marriage which may provide an opportunity for the prospective husband and wife to continue their relationship into marriage or to cancel it.

In Islamic law, engagement gains an important position for the purpose just mentioned, in order to avoid regrets in the future; as well as giving a chance for the prospective couple concerned to know each other's character and attitude through *naz̄hr*, not only with *ra'y* (literally means eyes, but it refers to looking at glance).

Shāfi‘ī's conception considering this case does not only apply unilaterally to benefit men, but also for the freedom of women in determining the choice of her future husband. Although a woman is bound by her guardian's role in marriage until the wedding carried out, Shāfi‘ī guarantees dispensation to her to publicly declare her judgment against her prospective husband.⁵⁰

Still in the same book, Shāfi‘ī offers his ideas about *al-mar'ah al-rashidah*, (a capable woman) - which is in a modern language may be translated as a woman who has a high spiritual, emotional and intellectual astuteness – can have the right to choose her prospective husband and to marry herself (i.e. without her guardian's permission).

In terms of prohibition to perform a marriage at the time of *'iddah* (period of respite for a woman after a divorce from her husband), Shāfi‘ī allows a man to propose her. Shāfi‘ī wants to give opportunities to women to enrich the alternatives at the time of her *'iddah*, because at that moment they are in transition, between *Ruju'* (back to their ex-husbands) or not. Here, the

⁵⁰ 'Ala tara 'ann al-mar'ah mustakhaffah law qalat la ankih rajul hatta arah mutajarrid aw hatta akhbarah bi al-fakhishah fa 'ardah fi al-halayn fa tajarrad laha. For more information see Al-Shāfi‘ī, *al-Umm*, 39. In the opinion of the writer the phrase "*la ankih rajul hatta*" is a statement of attitude for a woman to choose whether she agrees or not to accept a man who wants to propose and marry her. By this, a woman gains a complete freedom to decide what is best for her.

presence of one man who wants to propose a woman at the time of her 'iddah gives her more options rather than cornering her only with two options between taking *Ruju'* or not; so allowing this to happen gives the woman other alternatives with whom she decides to move on her family life after the divorce.

The second thing is regarding *mahr* (the dowry). *Mahr* is not a price (*thaman*) given by the husband to his wife. Women are married as "human beings" and not at all the same as the "goods or stuff" in the context of trade. *Mahr* is an identity of a husband's respect to honor his wife appropriate to his ability and willingness of his wives. So, *mahr* is a "fully reserved" right that belongs to the wife.

In common view of jurisprudence, such belongings can be used by a wife as she pleases, without the intervention of others, including her guardians or even her own husband. It is indeed intended that, *mahr* can be used by a wife as ransom payment in her divorce accusation against her husband which is known as *khul*. If the divorce accusation is taken without any payment of ransom, it is called *faskh*.

Shāfi‘ī compiled the discussion about the dowry in a topic titled "dowry and trade" (*al-mahr wa al-bay'*). The first impression that emerges is the comparison between the status of women in dowry and the status of items in a trade. However, in the middle of the discussion Shāfi‘ī affirmed that a transaction of a marriage is not the same as that of a trade; including should there be a case of a divorce which results in the return of the cost of a dowry.

Regarding a dowry given by the husband to his wife, should there be a divorce before a couple having intercourse, the wife is entitled to receive $\frac{3}{4}$ part of the dowry. This is so since half of the dowry is understood as the price of the '*trade transaction*' in a marriage while the other half is considered as the charity given by the husband to his wife. So, in a case of a divorce prior to having intercourse, the sum of the dowry that a wife must return to her former husband is $\frac{1}{4}$ of the whole dowry or $\frac{1}{2}$ of the value of the charity part. This $\frac{3}{4}$ part received by the ex-wife after the divorce amounts from the half ($\frac{2}{4}$) of the transaction value of dowry plus $\frac{1}{4}$ from the charity part to the overall value

of the dowry. Thus, the ex-wife is obliged to return only half of the amount of the charity part of the dowry while the price of the *trade transaction* part of the dowry is wholly owned by her.

Such is a practical illustration of the difference between dowry and trade. Regarding the transaction value of the dowry, the former wife is declared to be entitled wholly to it, which means that there is no obligation to her to return it despite a condition that a divorce occurs before an intercourse taking place. Contrarily to a trade, should there be a cancellation of a transaction all the price of goods not yet owned by a buyer is fully refunded.

It seems that Shāfi‘ī paralleled between cancellations of a transaction before the goods are received by a buyer with a divorce occurs in a marriage ‘transaction’ before a couple having intercourse. Nevertheless, the main subject is his assertion that a marriage is very much different to a trade, so applying a *qiyās* (analogy) between the two should be differentiated proportionally.

From this explanation of the dowry and trade, it can be obtained an understanding that in exchange for a dowry, a wife is not to be possessed, but merely to be taken benefit from her. This becomes the estuary of the issue of a wife’s rights to be treated well as a human, not as merchandise. Thus, intercourse activities done by the husband to his wife are lawful due to the dowry given by him, but the dowry concerned does not make him having a single bit of right to impose whatever he wishes onto his wife. While on the other hand, the goods in a trade can be wholly owned as well as used by the buyer as he or she pleases including reselling, mortgaging or leasing them.

In a methodological study by Esposito, *qiyās* was employed first time on the dowry issue. In this case, *qiyās* operated in an analogical situation established between the loss of virginity caused by a marriage and a penalty against theft written in the Quran in the form of cutting the thief’s hand. According to him, the minimum standard of dowry in Kufa and Medina was commensurate to the value of goods stolen that lead to hand cutting sanction. Unfortunately, Esposito did not give a

complete information about who was the first person using the method of *qiyās* in the dowry.

The third thing is the right to earn an adequate sustenance both physically and spiritually. In the Quran there are several verses stating that the provision of livelihood to all family members, especially to wives, is the responsibility of the husband as the head of a family,⁵¹ which were then referenced by Shāfi‘ī in his *fiqh*.⁵²

The next reference is the two hadith the Prophet; one of which is about a man consulting him in a matter of using his money worth one dinar for his family living⁵³ and the other is relating to the case of a woman complaining to the Prophet about her husband that was very stingy and did not pay enough attention to the needs of their livelihoods.⁵⁴

With his method of *istidlal*, Shāfi‘ī explains that a husband is obliged to provide adequate and decent provision to his wife and children. A good measure of provision is at least commensurate to the common economic conditions, including the home situation and property. So, if a husband is not able to comply with this obligation, then his wife should not be forced to stay with him. Even, according to Shāfi‘ī, it is preferable for them to be separated. When the husband decides to divorce her, he still remains obligated to give her a provision until the expiration of the *'iddah* time because during this interval period the husband still has the right to remarry her. Furthermore, in this period a husband is even obliged to provide a maid for his wife if she does not have one.

A husband's inability to provide a decent living to his wife results in her having the right of whether asking for a divorce or to remain living as a family with her husband, whether the

⁵¹A number of the verses alike are the Quran, *Surah al-Nisā'*/4: 3, 17, 33; *Surah al-Baqarah*/2: 228, 233; *Surah al-Talaq*/65: 6; *Surah al-Āhżāb*/33: 50.

⁵²Al-Shāfi‘ī, *al-Umm*, 93, 5, 114.

⁵³*Ibid.*, 94, 114. This hadith was narrated by Shāfi‘ī from Sufyān from ibn ‘Ajalan from Sā‘id ibn Abī Sā‘id from Abī Hurayrah.

⁵⁴*Ibid.*, 114.. This hadith was narrated by Shāfi‘ī from Sufyan from Hisham ibn ‘Urwah from his father from ‘Āishah (may Allah bless upon her).

couple has had intercourse or not. Exclusion to such matter is, when the wife agreed to marry her husband, she was equipped with a full awareness of the conditions of her husband or she was fully prepared with any upcoming situation. Shāfi‘ī underlines the romance and harmony of compassion between the husband and wife, more than just a transaction of providing sustenance in enduring a family life.

Whether the women's attitudes are like the picture just mentioned or not, Shāfi‘ī still staged his *fiqh* with a firm and clear explanation that receiving provision is the right of a wife from her husband, and she has the right to self-determine over her husband's treatment in the matter of sustenance. This is so because provision is one of the basic physical needs of living to every human being. This assertion is to meet the right upon this need, including providing protection for a wife against her husband's unjustified treatments as experienced by the wife of Abu Sufyan who complained to the Prophet as told in the hadith just quoted.

Similarly, in the case of the spiritual provision (i.e. biological desire needs), women have the right to determine her choice towards her husband's treatment and ability. Regarding to this matter, Shāfi‘ī even purposively associated closely with the physical provision. He stated that a woman can refuse or relinquish to have intercourse with her husband who has not given a dowry that becomes her legal right, while the husband still has to provide provision for her. But, if the dowry had been given to her in cash all or in part, she has no right to refuse having intercourse. When she volunteered herself to have intercourse with her husband even before receiving the dowry, then the value of such case is the same as the harmony of love just described, so much so that their marriage really becomes a union of feeling and wishes between a husband and his wife in embodying sexual relations in the form of the highest expression of love which means a total physical and emotional blend between the two.⁵⁵

⁵⁵Hassan Hathout, *Rerolusi Seksual Perempuan: Obstetri dan Ginekologi dalam Tinjauan Islam* (Bandung Mizan, 1994), 83.

The fourth thing is the right to be treated well and fairly. Shāfi‘ī, taking into account both sources of the Quran⁵⁶ and the hadith of the Prophet, explained that a wife should be treated well in the fulfillment of her physical, material and spiritual needs.⁵⁷

Specifically in the matter of spiritual sustenance (i.e. the fulfillment of biological desires), he explained that a woman should only be copulated through her *farj* (vagina), not through any other places, by any method desired by the husband, and must be carried out of her menstrual period. So, an intercourse in her menstrual period or carried out through any other places than her genital, for example through her rectum (i.e. anal sex) as ever stated in the hadith of the Prophet, is stated clearly prohibited in the Islamic law.

In the textual and contextual discourses, *farj* is often translated as "honor". Here it is then understood that copulating the woman only through her genital means upholding her honor. Contrarily, an intercourse which is done through other than her *farj* or during her menstrual period means insulting her honor and harming her both physically and psychologically. It is pointed out that an intercourse which is done while menstruating can cause an infection in the female genetic system and a bleeding in her uterus as well as contributing an etiological role in the urinary and sperm tracts in male genital.

Furthermore, apart from having the right to be treated well, a woman also has the right to be treated fairly among the wives of a husband. Each of a husband's wives has an equal right to their needs. To fulfill such rights, Shāfi‘ī suggested the husband organizing a fair distribution; including making a fair schedule in dividing the days and nights for his wives, and this method is mandatory. It is intended primarily to the kinship psychological influence. Dealing with this matter, he proposed a concept of dividing the days and nights among the wives that for a virgin wife (*bikr*) is allocated for seven days while for a non-virgin wife

⁵⁶The Holy Quran, Surah 4 (*al-Nisa'*) verse 18; Surah 2 (Al-Baqarah) verse 223.

⁵⁷Al-Shāfi‘ī, *al-Umm*, 93.

(*thayyib*) is allocated for three days. This is due to a consideration that virginity only happens once.

There is one critic regarding the practice of marriage in the form of *polygyny* (which is one form of polygamy), where a family is composed of one husband and more than one wife, as quoted in the study carried out by Turner and Frese.⁵⁸ The critic stated that polygyny can increase a man's dominance by increasing the number of family members. Tiv Nigeria viewed and analyzed this problem differently, he interpreted that in a polygyny the first wife becomes the "husband" for "young wife/wives" so much so that she might be very cruel to her/them.

Shāfi‘ī, legally through his jurisprudence, has given a guidance to do justice among the wives, including setting up a good organization among them. This is intended to avoid the abuse of an 'older wife' to younger one/ones or vice versa, the younger wife abuses her elders, in acquiring rights.

The fifth is the right for a wife to file for a divorce. A wife is given the opportunity to file for a divorce against her husband in front of judges due to some evidences that can be justified for the ground of filing. Such filing is called *al-khul'*, i.e. returning the dowry to the husband to obtain a divorce status. If after due processes based on the evidences presented by the wife that turn out to support her filing the judge determines that the wife is freed from the obligation to return the dowry, the case is called *faskh*.

Shāfi‘ī gives the opportunity for the wife to file a *khul'* against her husband, not only at the time of the husband being unhealthy, but also at other situations whether both are healthy, both are sick or one of them is healthy. *Khul'* has the same level with a trade transactions, even *khul'* is part of the trade transactions. On this basis, Shāfi‘ī argued that the permissibility prerequisite of *khulu'* is its equivalent status to the trade. According to Shāfi‘ī, a wife filing a *khulu'* must return all of the

⁵⁸*The Encyclopedia of Religion*, s.v. "Marriage," (New York: Macmillan, 1993), 220. One other form of polygamy is polyandry which is a family comprised of one wife with more than one husband.

value of the dowry to her husband, as a similar thing applies to a cancellation of a trade transactions.⁵⁹

There are three key words in the discussion about a divorce filed by a wife against her husband in the conception of Shāfi‘ī’s jurisprudence, namely: (1) *mahr*, (2) a wife’s willingness, and (3) a trade transaction. All of these three things work interactively.

A dowry given by a husband to his wife is not the same as a price in a trade. When the husband divorces his wife, the ex-wife is obliged to return only part of the dowry. However, if the wife is the person filing for a divorce (*khulu'*), then she is obliged to return all the value of the dowry as in this case, *khulu'* is considered equal to a trade transaction.

With this third keyword which is the trade transaction, a wife filing a *khulu'* is regarded to view that her marriage (through the dowry) is nothing more than a trade transactional activity, so she is subjected to a law sanction to return all the values of the dowry as a similar thing applies to a cancellation of a trade transaction. Nonetheless, Shāfi‘ī still insists that *khulu'* is a legitimate right of a wife. Whatever the difference in attitude of the wife/wives in accepting or rejecting the conditions that do not meet her/their rights, she/they still obtain legal protection in Islamic law.

From this discussion, it can be assessed Shāfi‘ī’s consistency in fighting for women humanization covering their dignity, protection for them, freedom, and their rights as individuals.

Conclusion

From the exploration of the literature on the monumental works of Shāfi‘ī, it can be concluded as follows:

Firstly, Shāfi‘ī concerns very much on the women existence in the law of properties, including: (1) Equal rights and the freedom of trade (*'ahliyah al-tasarruf*) between women and men, both in terms, *khijar*, or trade contracts. (2) The business and economic opportunities for women in the context of the absence of obligation in performing Friday prayers for them. (3)

⁵⁹The characteristics of *khul'* differs from *talq* (a divorce sponsored by a husband). Shāfi‘ī stated that the amount of dowry that a divorced wife to her husband is part of the dowry. Al-Shāfi‘ī, *al-Umm*, 215.

Women have every right to manage, organize and spend their owned property.

Secondly, the humanistic values of women in the state law on economic issues related to religious conversion and social relations in political *settings* as elaborated below: (1) economic security for *non-Muslim* women (*dhimmiyah*) who convert to Islam, besides Christians, Jews and *ahl book* Islam, in a state of pregnancy, they are given the right to get a living stipend from the state until childbirth; if they are breastfeeding, they are entitled to breastfeeding wages, (2) Christians women who convert to Islam after having intercourse with their husbands is entitled to obtain a dowry. (3) The dispensation on legal sanctions and economic consequences to women who convert out of Islam (*murtaddah*). Shāfi‘ī stated that if the woman concerned is a free person, she is just put into prison; if she is a slave, then the law sanctions is to serve the society in which she lives, and the community is obliged to pay the wages to her according to the Islamic rules. This is very different to the sanction against the person who converts out of the religion should the person concerned be a man, then he should be killed on charges of apostasy unless he repents and returns to Islam

Thirdly, the value of women in the marriage laws of humanity, including (1) In the process of *khitbah* or engagement, Shāfi‘ī guarantees dispensation to women to declare their assessment openly (whether they refuse or receive it) against her prospective husband. In fact, *Shāfi‘ī* furthermore brings up an idea that a good and knowledgeable woman (*al-mar‘ah al-rashidah*), has every right to determine her future husband and marry him. About *Mahr* or dowry is the identity of husband rewards to honor his wife, therefore *mahr* is a wife’s fully reserved right. (2) The right to earn an adequate sustenance both physically and spiritually from the husband as the head of the family. And the right to be treated well and fairly in the fulfillment of physical, material and spiritual needs. And a wife is given the opportunity to file for a divorce in front of the judges or *khulu’* by presenting some justified evidence.

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