THE CONTRIBUTION OF NAHDHATUL ULAMA'S GENDER IJTIHAD TO ENGENDERING INDONESIAN CIVIL SOCIETY

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Abstrak: Keterlibatan Nahdlatul Ulama (NU) dalam sejarah Indonesia telah memberikan peran yang signifikan bagi pembentukan negara Indonesia dan demokrasi DI Indonesia. Kontribusinya dimanifestasikan dalam berbagai bidang baik politik, sosial, budaya, agama dan ekonomi. Meski belum maksimal, namun ada upaya-upaya secara gradual untuk meningkatkan kontribusi bagi masyarakat Indonesia sebagai masyarakat sipil. Salah satu upayanya adalah meningkatkan keberdayaan perempuan yang telah mengalami subordinasi dan diskriminasi tidak hanya dalam ruang privat tapi terutama dalam ruang publik. Melalui beberapa fatwanya, NU berkepentingan untuk meningkatkan martabat perempuan dengan mengafirmasi kesetaraan gender di antara laki-laki dan perempuan dan memberikan ruang yang lebih luas bagi perempuan untuk merealisasikan dirinya. Dengan adanya hak dan kebebasan yang lebih besar, perempuan memiliki kekuatan moral untuk terlibat secara aktif dalam ruang publik dan berkiprah secara diskursif dan praktis dalam arena politik untuk memberikan aspirasi politiknya. Dengan demikian, perempuan mampu berperan sebagai agen-agen yang otonom dan kritis terhadap kebijakan-kebijakan negara.

Abstract: Involvement of Nahdlatul Ulama (NU) in Indonesia's history has given a significant role for the formation of the Indonesian state and democracy in Indonesia. Its contribution is manifested in various fields of politics, social, cultural, religious and economic. Although not at the maximum but there is a gradual efforts to improve contribution to the Indonesian people as civil society. One of the efforts is to increase the empowerment of women who have been subordinated and discriminated not only in the private but in public spaces as well. Through several resolutions, NU's interest is to increase the dignity of women by affirming gender equality between men and women and provide more space for women to realize themselves. With the greater rights and freedom, women have the moral strength to be actively involved in the public sphere and acting as a discursive and practical in the political arena to provide political aspirations. Thus, women are able to act as autonomous agents and critical of state policies.

Kata Kunci: Ijtihad, Gender, NU, Masyarakat Sipil.

A. INTRODUCTION

Nahdlatul Ulama is a religious organization founded by ulama in 1926 intended to develop and maintain Islamic orthodoxy. The orthodoxy is the appeal of *Ahlussunnah wal Jama'ah* where its understanding and practice are particularly based on Syafi'i, Hanafi, Maliki and Hanbali schools of thought (*madzhab*). It as well refers to the theology of Abu al-Hasan al-Asy'ari and Abu al-Qasim al-Junaydi for tasawuf views.[1] It is for its dependency to thoughts and traditions of previous ulamas attributed to the *Ahlussunnah wal Jama'ah* religious traditions that results on the label "traditionalist" attributed to this organization. In respect with this attribute, Martin van Bruinessen explores the term tradition attached to NU as refering to the use of *hadis* (prophet tradition) to be the legal source in "a processed form" as existed and used in *fikih* (Islamic law) books as well as its orientation of *taklid*, that is, following the previous Muslim scholars' thoughts.[2]

The label of traditionalist in contrast with modernist as used by Deliar Noer, generates some other perceptions such as conservative, anti modernism, anti reformation (Kahin, Geertz), political opportunism and cultural regression. These subsequent labels, as Anderson notes, show scholarly prejudices which cause of no sufficiently academic attention of scholars both Western and Indonesian to proportionally study NU.[3] They are mostly interested in modernist and reformist movements conceived as more dynamic and intelectually more interesting as well in accordance to the modernization-oriented tendency of American social scholars.

However, since studies on NU are gradually undertaken by some scholars, there is a shifting of discerning NU previously deemed as conservative and traditionalist. Greg Barton, for instance, questions the strict distinction between modernist and traditionalist which needs to reconsider for the development of groups attributed by both labels are continually changing in response to the growing social context. Using the framework of Fazlur Rahman which distinguishes classic modernist and revivalist, he includes Abdurrahman Wahid as a

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[1] The Central Board Team of the Ma'arif Education Institution of NU, *Nahdlatul Ulama: Ideology Politics and the Formation of Khaira Ummah*, (Yogyakarta: LkiS, 2004), p. 13.

[2] Martin van Bruinessen, "Tradisi Menyongsong Masa Depan: Rekonstruksi Wacana Traditionalis dalam NU", in Greg Fealy and Greg Barton, *Tradisionalisme Radikal: Persinggungan Nahdlatul Ulama-Negara*, (Yogyakarta: LkiS, 1997), p. 139-144.

[3] Van Bruinessen, *NU: Tradisi, Relasi-relasi Kuasa, Pencarian Wacana Baru*, (Yogyakarta: LkiS, 2009), p. 9.

neomodernist juxtaposed with other scholars such as Nurcholish Madjid, Djohan Effendy, and Ahmad Wahib.[4] Meanwhile, Mitsuo Nakamura calls NU as radical traditionalist for its opposition to the New Regime is strikingly regarded as deviating from its tradition of holding the mechanism of accomodative politics. Though this term is seemingly paradox, but for Nakamura, NU becomes radical for its being away from religious traditionalism and its political radicalism indeed stems from its religious traditionalism.[5] It means NU is traditional in its religiousity but radical politically.

The shift of viewing NU represented by the scholars also marks the transformation of NU's thought in response to the continually changing realities of society experience. The change of political, social, economical and cultural conditions in the midst of modernity has contributed to altering the orientation and interpretation of Islam to meet the present community demand. This thesis will examine NU's view on gender issues which has taken a quite important attention since its initial founding. Problems relating to women became one of some themes discussed in NU's muktamars. The early issue on women in the first muktamar was about wife who served as a servant in her husband's house deserved wage if she was not mature yet or insane. Conversely, the mature wife (*rasyidah*) did not deserve wage and a shared-marital property.[6]

In Muktamar 1933, NU allowed women to engage in religious activities[7] that is further used by women as a basis for their involvement in public sphere. Though women were not formally registered as members of NU, this decision has driven them to attend NU congress of Banten in 1939, and later insisted on the formally separated-women organization called Muslimat Nahdhatul Ulama (MNU). Requested by the MNU, NU permitted women as candidatures in parliament which resulted five Muslimat women selected as NU candidates

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[4] Azyumardi Azra, *Islam Reformis: Dinamika Intelektual dan Gerakan*, (Jakarta: PT RajaGrafindo Persada, 1999), p. 63.

[5] Mitsuo Nakamura, "Tradisionalisme Radikal: Catatan Muktamar Semarang 1979", in Greg Fealy and Greg Barton, *Tradisionalisme Radikal*, p. 60-61.

[6] Imam Ghazali Said and A. Ma'ruf Asrori (ed.), *Ahkam al-Fuqaha: Solusi Problematika Aktual Hukum Islam, Keputusan Muktamar, Munas dan Konbes Nahdhatul Ulama (1926-1999 M.)* (Surabaya: Lajnah Taa'lif wa Nasyr (LTN) NU and Diantama, 2005), p. 18-19.

[7] *Ibid.*, p. 127-128.

and being elected to the DPR in 1955 election.[8] This decision is quite progressive for it affirms the leadership of women in politically national level and encourages more women involvement in public sphere. It as well resists the state gender ideology of the New Order which Julia I. Suryakusumah calls it as "state ibuism".[9] This ideology evokes that women must perform as mothers (*ibu*) and wives (*istri*) of respectively their families and husbands. They must perform their household roles to support the success of husband and family as well as the social harmony. This ideology has effectively domesticated women in household sphere to preserve the state interest on social stability, harmony and integration.

NU's concern on gender issues continues to perform in current time. Some decisions have been made in response to the changing context of Indonesian society. For there are many decisions on gender range from its very beginning of NU founding up to now, this paper will be limited only in 1990s. This time is choosen for there was a peculiar shifting in reformulating its orientation to enlarge its religious discourse and to concern more on *syu'un al-ijtima'iyah* (social matters) as a result of "back to khittah 1926" implemented to empower the weak groups.[10] Instead, at the time there was a intense polemics among the Muslims on the leadership of women as president. While some Muslim groups rejected women as a president or a vice president, NU contended that there was no barrier for women to be a national leader.[11]

The description about NU's concern on gender arises some questions: what fatwas did NU promulgate in regard with gender issues in 1990s as an implementation of its new paradigm to enlarge its religious discourse and *syu'un al-ijtima'iyah*? Related to the first question, does NU's ijtihad play a significant role in supporting civil society in Indonesia? These questions will seek to answer through providing theory of civil society as a theoritical framework to discern NU organization. The second will elaborate the NU's fatwas on gender issues in

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[8] Katryn Robinson, *Gender, Islam and Democracy in Indonesia*, (New York: Routledge, 2009), p. 53. Imam Ghazali Said and A. Ma'ruf Asrori (ed.), *Ahkam al-Fuqaha…*, p. 286-287.

[9] Julia I. Suryakusumah, "The State and Sexuality in New Order Indonesia", in Laurie J. Sears, *Fantasizing the Feminine in Indonesia*, (London: Duke University Press, 1996). Susan Blackburn, *Women and the State in Modern Indonesia*, (Australia: Cambridge University Press, 2009).

[10] Bruinessen, *NU: Tradisi…*, p. 198-211, 225-233.

[11] Kathryn Robinson, *Gender…,* p. 168-169

1990s. The last discussion will explore the role NU play in supporting civil society through its gender views.

B.   CIVIL SOCIETY: A THEORETICAL FRAMEWORK

The idea of civil society emerges as a counter power of the authoritarian state which impose its domination toward society. Such idea implies the protection and self organizing of the social order against state. As pointed by Jean L. Cohen and Andrew Arato, this view aims to a twofold orientation. First, the juxtaposition of society against the state indicates not only the battle lines but also a shift concerning the target of democratization, from the whole social system to society outside of state institution. Second, the conception also points that the subject of the transformation must be an independent or rather a self-organizing society aiming not at social revolution but a structural reform achieved as a result of pressure from below.[12] It is worth to note that civil society is conceived not as revolution but "new evolution" or the "self-limiting revolution", for revolution not only demobilizes the social force but also establish dictatorial conditions as the new ruling will block any social power to prevent another revolution. As such, the project of the "self-limiting revolution" aims to the construction of a highly articulated, organized, autonomous and mobilizable civil society.[13]

The question arises what is the difference between society and civil society? The differentiation of these terms can be traced back from Talcott Parson view on societal community. He prefers to use this term rather than civil society for the latter is conceived as "a remnant of pre-social-scientific discourse about human affair", rather more proposes concept of societal community. The latter is distinguished from the economy, the polity, and the cultural sphere representing a synthesis of the liberal concept of civil society as differentiated from the state, emphasizing on social integration, solidarity and community. The differentiation of societal community is initialed by three revolutions, that are, the industrial, the democratic and the educational which are depicted by four antecedents. First, the coming of religious plurality and toleration which differentiates religion and the state and

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[12] Jean L. Cohen and Andrew Arato, *Civil Society and Political Theory*, (The United Stated of America: Massachusetts of Technology, 1992), p. 32.

[13] *Ibid*., p. 32.

as well to some extent freeing the societal community from a religious definition of full membership. Second, the establishment of purely economic relations through a market economy freed from social and political restraints. Third, the development of an aristocratic goverment that differentiates the goverment and its constituency and stabilizes their relations through parliamentary representation. Forth, the development of a form of law to inscribe a societal sphere not open to arbitrary intervention even by the state. Through these antecedents he seeks to construct a societal community in modern era[14].

This account obviously differentiates civil society or societal community with state and market. In the same line, Jurgen Habermas mentions that civil society is constructed as the civil people freely reach consensus to gain their social political aims and create an autonomous association apart from interests of beaureucarcy and market. His insistence of an autonomous public sphere and civil society from state and economy derives from his research on bourguisie salons or discussions which only represents the high class interests mostly for their economical interest. Giving communication rights for all people, the notion of public sphere enlarges the subjects and covers all people of different levels to engage in political discourses to aspire their interests. The actors involved within it, that is, civil society, must be as well independent from state and market to reach the balance. Based on this framework, he critisizes the authoritarian state which forms top-down regulations, undermines formations of civil society and minimilizes or even eliminates public spheres. Though such state perceives itself as autonomous and strong, actually it has deconstructed itself for not gaining loyality and legitimacy from its people which will diminish social solidarity and systemic integration of the state.[15]

Civil society is thus signified by voluntary and noncoercive nature or what Alexis de Tocqueville calls as intermediary associations vital for healthy democracy.[16] It is manifested in voluntary associations that could be motivated by interest, conviction, cultural or religious identities for pursuing wealth in partneship and companies, or power in parties and

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[14] *Ibid.*, 118-121.

[15] Jurgen Habermas, *The Social Transformation of the Public Sphere*, (Cambridge: the MIT Press, 1993).

[16] Robert W. Hefner, *Civil Islam: Muslims in Democratization in Indonesia*, (Princeton and Oxford: Princeton University Press, 2000), p. 23.

movements, salvation in churches and gathered organization, gathering some particular groups in interest groups and trade unions, distributing general benefit in philantropies and foundations, or to prevent some general evils in organizations of drug, AIDS and so on.[17] Concisely, all interests and aims can be included in civil society based on the virtue of consensual and free character. However since the diverse interests are embedded in civil society, interest conflict is something unavoidable. In this situation, the most important thing is that people learn in civil society how to live with different forms of social conflict. It is a school for competitive coexistence and toleration, that is, for civility.[18]

Civil society must be distinguished from political society, institutions, and organizations as well as from economic society consisting of production and distribution organizations. It is also different from tribe, clan and clientilism networks, for it constitutes the main variables such as autonomous, public and civic. As such, it professes reflective forces in society to eliminate the extent to which internal conflict could occur as a result of social process of modern formation.[19] Hence, in political sense, civil society aims to protect individual from the arbitrary state and functions as moral power to balance political practices of the goverment and any political institutions. In economical sense, civil society seeks to prevent society and individual from global economical uncertainty and conglomeracy grip by creating autonomous economical network to fulfil primary needs.[20] As such, civil society does not intend to gain power, rather to ensure the application of democratic principles in a sense of creating a greater space for freedom and shaping a fairer institutions.

Distinct from the previous view which posits civil society against state which is also asserted by Robert D. Putnam based on his research on the distinctive govermental patterns in northern and southern Italy, being convinced that "the real key of democratic culture is popular participation in laterally organized "civic" associations",[21] Hefner proposes that both state and civil society can mutually interrelate by which state in some extent is necessary to

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[17] Michael Walzer, "Equality and Civil society", in Simone Chambers and Will Kymlicka (ed.), *Alternative Conception of Civil Society*, (Princeston and Oxford: Princeston University Press, 2002), p. 35.

[18] *Ibid.*, p. 36.

[19] Muhammad AS Hikam, *Demokrasi dan Civil Society*, (Jakarta: LP3ES, 1996), p. 86.

[20] Haryatmoko, *Etika Politik dan Kekuasaan*, (Jakarta: Penerbit Buku Kompas, 2003), p. 212.

[21] Hefner, *Civil Islam…*, p. 23-24.

support civil associations and conversely civil society is as well needed for creating "the civilized state". Hefner holds that horizontalism does not guarantee of democratic civility, as the case of right wing militant organization, but need to add verticalism which can coexist with civic organizations, and by preserving the peace, it may strengthen a public culture of civility and participation.[22] Generally speaking, there must a synergic interaction between civic organization, public culture and the state. A vigorous tradition of extra state associations does not simultaneously warrant a democratic public culture. For civil structure to become effective precedents for civic ideals, three additional conditions must be met. First, the native intellectuals have to look into their own social experience and derive from it a model of political culture that affirms principles of autonomy, mutual respect, and voluntarism. Second, the influential actors and organizations must then work to generalize these democratic values and organizations beyond their original confines to a broader public sphere. Third, if these principles are to endure, they must be endorsed by an array of supporting institutions, including those of state.[23] This view marks a turn to conceive state not as a thread or barrier for fostering civil society, but it indeed insists on the importance of state support for civil society to reach its goal.

Interestingly, feminism takes a double position due to civil society. Anne Phillips expresses both criticism toward and attraction to civil society. Feminist critisizes that the existence of civil society based on interests or views of the members is frequently not open to women.[24] The second criticism is addressed to distinction between private and public sphere in which civil society is more related to the latter. While for feminist private is public for private construction will affect on public practices and otherwise the public practices will impact on the private ones.[25] However, civil society attracts feminism for it provides a wider space to contest its gender equality programs. It does have the effect of directing feminism

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[22] *Ibid.*, p. 25-26.
[23] *Ibid.*, p. 36.
[24] Anne Philips, "Does Feminism Need a Conception of Civil Society", in in Simone Chambers and Will Kymlicka (ed.), *Alternative Conception…*, p. 80
[25] *Ibid.*, p. 78.

away from excusively state-centric politics and highlighting the role of non govermental associations and groups.[26]

Due to relation between state and civil society, feminists perceive the state as one of the sources of gender justice believing:

> "(1) that publicly sanctioned principles of sexual equality will help to protect women to wage explotation, domestic violence, or cultural pressures of their communities or groups; and (2) that public provision for child care, health care, and age care is an intrinsic part of the "feminization" of policy and the creation of sexually egalitarian world".[27]

In a sense, state could interfere society by providing rules or provisions to warrant individual rights and freedoms and maximalizing public sphere in which civil society could freely aspire and participate discursively in policy making, accessing and controlling the distribution process of the policy product. As such, state intervention can be only torelated as it does not supress the civic force and public arena to contest the aspirations and interest of people to gain public acceptance.

C.   RECONSTRUCTION OF NU'S TRADITIONAL DISCOURSE

Martha C. Nussbaum in *Sex and Social Justice* elaborates cases of women oppression and discrimination under religious law in several countries such as India, Pakistan, Iran, and Bangladesh. Establishing religious law in those countries generates problems that contradict with preservation of human rights. Prohibition to women to earn wage outside their home, requirement of four witnesses in rape case, phenalty to women who do not adhere to the dress code, allowance of poligamous marriage, female genital mutilation,[28] practice *sati* or the immolation of a widow following her husband's death[29] and other provisions are some forms of religious provisions contrary with human rights. As such, some women scholars question whether Islam is compatible with human rights or not especially women rights, even for some feminists, such as, Haideh Moghisi, she thought that they undoubtedly are incompatible.[30] Such view reflects the existing tension or gap between religious laws and human rights. It

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[26] *Ibid.*, p. 79.

[27] *Ibid.*, p. 82.

[28] Martha C. Nussbaum, *Sex and Social Justice*, (New York: Oxford University Press, 1999), p. 82-83.

[29] *Ibid.*, p. 89.

[30] Dianne Mulligan, "The Discourse of Dangdut: Gender and Civil Society in Indonesia", in Jude Howell and Diane Mulligan, *Gender and Civil Society; Transcending Boundaries*, (London & New York: Routledge, 2005), p. 125.

becomes a serious dillemma of liberal states in which one side they have to admit freedom of conscience, but in other side the implementation of such conscience is contrary with the human rights.

Such tension has urged Muslim scholars to take more liberal and progressive stance in interpreting Islamic teaching to affirm the compatibility of Islam and human rights. Muslim figures such as Farid Essack[31] and Asghar Ali Enggineer[32], for instance, propose liberation theology to enhance the compatibility of Islam and human rights. While Fatima Mernissi,[33] Riffat Hasan and Amina Wadud Muhsin[34] use feminist perspective and hermeneutics in their interpretation of the Qur'an to provide less male bias siding on women equality. Nasr Hamid Abu Zayd as well proposes hermeneutics approach of Hirsch to interpret the Qur'an by differentiating between meaning and significance. Meaning (*ma'na*) is what intended by the author and it exists in text, while significance (*maghza*) is based on a number of relation between text and its reader. This mechanism is employed to reinterpret several themes in the Qur'an to affirm women's human rights.[35]

In Indonesia, the thoughts of these scholars were wellknown in 1990s through their translated books. As Robinson mentions, in the times, there has been growing range of religious based texts in Indonesian bookstores, and translated works of Islamic feminist figures appear alongside more conservative texts concerned with female piety. An Indonesian Islamic scholar, Lily Munir, regards Fatima Mernissi and Riffat Hasan as "opening our eyes to misogyny in our societies". There were also new Muslim women's groups emerging to produce less gender-biased and discriminatory interpretations of religious texts, such as Forum Kajian Kitab Klasik.[36] The growing interest to interpret the sacred texts in new ways

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[31] Farid Essack, *Qur'an, Liberation & Pluralism: An Islamic Perspectives of Intereligious Solidarity Against Oppression*, (England: Oneworld, 1977).

[32] Asghar Ali Enggineer, *Islam dan Teologi Pembebasan*, Trans. Agung Prihantoro, (Yogyakarta: Pustaka Pelajar, 1999).

[33] Fatima Mernissi, "Penafsiran Feminis atas Hak-hak Perempuan dalam Islam", in Charles Kurzman (ed.), *Wacana Islam Liberal: Penafsiran Islam Kontemporer tentang Isu-isu global*, (Jakarta: Paramadina, 2003).

[34] Amina Wadud, *Qur'an and Women: Rereading the Sacred Text from Women's Perspective*, (New York: Oxford University Press, 1999).

[35] Nasr Hamid Abu Zayd, *Dawair al-Khauf: Qira'ah fi al-Kitab al-Mar'ah,* (Beirut: al-Markaz al-Tsaqafi al-Arabi, 2000).

[36] Robinson, *Gender, Islam…*, p. 182.

appropiate with the demand of gender equality, creates a context and increasing need by which the Muslim scholars both traditional and modernist have to reformulate their understanding of the texts to meet the prevailing conditions.

This new orientation as well influenced religious discourse among NU's figures especially the youth. As pointed by Van Bruinessen, in the late 1980s, contextual understanding to Islamic teachings was the most discussed theme in Indonesian liberal Muslims. This contextual comprehension offers a more fluid and wider space to interpret Islamic teaching suit to the increasingly changing contexts. In NU's circumstance, this view was represented by the youth, such as K.H. Mustofa Bisri, Masdar F. Mas'udi, Abdurrahman Wahid, and other figures urging the ulamas not to depend much on *qauli* (opinion) of the previous imams, but more stress on the *manhaj* (methodology) they use to solve the problems. As K.H. Sahal Mahfudh explains, the foundation of law (*ushul fiqh*) and its product (*qauli*) of the previous ulamas have been successfully examined to cope with the social problems of Muslim community. Their thoughts in many cases are still relevant in the contemporary situation. However, he adds the need to contextualize them through developing applications of the foundation of law in contemporary context.[37]

Such emphasis simultaneously opens a greater chance for Muslims to exercise their rationality in interpreting text. Initially, this view were debatable among the NU's ulamas for it could degradate their authority which previously emphasize on textual interpretation of the Islamic law books (*kitab-kitab fiqh*).[38] However, though being iniatilly debatable, it was gradually accepted by them. In result, in Muktamar of 1992 in Bandar Lampung, *ijtihad* (rational exercise) by following the *manhaj* of the imams were accomodated in the system of law making decision in NU. Instead, influenced by contextual interpretation, to solve the problems, problem analysis needs to take into account by following the steps such as problem analysis, effect analysis, legal analysis and action analysis.[39] These steps enable NU's decision not only providing fatwa but also it does works to solve the faced problems.

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[37] KH. MA. Sahal Mahfudh, *Nuansa Fiqih Sosial*, (Yogyakarta: LkiS, 2007), p. xxv-xxvi.
[38] Martin van Bruionessen, *NU, Tradisi…*, p. 198-203.
[39] Imam Ghazali Said and A. Ma'ruf Asrori (ed.), *Ahkam al-Fuqaha…*, p. 470-478.

The most basic principles to which all the legal decision must subsume consist of five principles: (1) the protection of religious consciousness and observances (*hifzh al-Din*); (2) the protection of life (*hifzh al-nafs*); (3) the protection of thought and freedom of opinion (*hifzh al-aql*); (4) the protection of property (*hifzh al-mal*); and (5) the right to enter into marriage and protection of reproductive rights (*hifzh al-nasl*). Though this concept existed in the literature of Islamic jusriprudence called as *kulliyat al-khams* (five basic necessities), it was formally invoked at the deliberation of the religious committe during the NU's muktamar in 1994 and understood as *maslahah ammah* (common goods or public interest). At the NU's national conference of ulama in 1997, the concept was discussed and elaborated as embodying human rights principles in Islam.[40]

All these principles are objective behind any revealed law. In contemporary discourse, these principles are enlarged from the scope of protection and preservation to development and rights. Preservation of offspring, for instance, develops into a family-oriented theory. Similarly, preservation of mind evolves to include propagation of scientific thinking, travelling to seek knowledge, suppressing the herd mentality and avoiding brain drain. Likewise, preservation of soul and honor are replaced by preservation by human dignity. While preservation of faith turns to freedom of beliefs. The last, preservation of property or wealth becomes social assiatance, economic development well-being of society and diminishing the difference between economic levels.[41] The contemporarisation of these principles exhibits a great concern of Muslim scholars to contextualize their religious discourse in contemporary intellectual development. It also shows the dynamic of Islamic laws which are unfixed and open to change depending on the existing situations. As such, it could be a means to bridge the tension between Islamic law and human rights.

D. NU'S FATWAS ON GENDER ISSUES IN 1990s

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[40] Muhammad Fajrul Falah, "Nahdlatul Ulama and Civil Society in Indonesia", in Nakamura Mitsuo, Sharon Siddique and Omar Farouk Bajunid (ed.), *Islam and Civil Society in Southeast Asia*, (Singapore: ISEAS, 2001), p. 36.
[41] Jasser Auda, *Maqasid al-Shariah as Philosophy of Islamic Law: A system Approach*, (London and Washington: The Internation Institue of Islamic Thought, 2008), p. 21-24.

Elaboration of NU's fatwas on gender issues will follow the sequence of time the fatwa was promulgated. Hence, there are two kinds of fatwa or decision yielded from muktamar or conference, that is, *al-waqi'iyyah* and *al-maudu'iyyah*. The former points to fatwas which are generated based on particular cases or problems, while the later is based on certain theme which is sometimes broader than the former.

In NU's muktamar of 1994 in Cipasung Tasikmalaya, two gender cases were discussed. The first was about the legal status of putting sperm of man to woman womb who is not his wife. Its legal status is forbidden (*haram*) for there is no marriage relation between them, while child born by the woman is though bilogically man's child but legally not his child. As such the child does not deserve familial relation with the man and inheritence. Meanwhile, the owner of ovum can be legally the mother since there is no possibility that sperm and ovum mixes with the ovum of womb owner, but if there is possibility of mixing, the child belongs to the one who gives it birth. The arguments were derived from several traditions (*hadis*) and previous ulamas interpretations that forbid man to put his sperm to woman who is not his wife. As mentioned in work of Ibnu Katsir, the prophet states that no bigger sinner than *syirk* (worshipping other gods) unless man who put his sperm to other womb. Besides, ulamas as well quoted *qauli* or opinions of previous ulamas which has discussed about this in their works.[42] This fatwa implies that the legal status of that practice is discerned from the marriage framework, while the status of the child is determined not by marriage but by biological considerations. As such, the child could belong to the ovum owner or the womb owner depends on whose ovum mixes to the sperm.

The second fatwa is about employing women outside home in the night which commonly happens in factories or offices. Ulamas contended that women were allowed to earn woney outside home if they got permission from parents or husbands and not cause *fitnah* (degradating her honor). If not permitted and suspected to cause *fitnah*, it was unlawful and sinful. While if it was just worried of being *fitnah*, it became *makruh* (not sinful but better avoided).[43] The allowance of women to employ based on the husband permission as such

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[42] Imam Ghazali Said and A. Ma'ruf Asrori (ed.), *Ahkam al-Fuqaha…*, p. 489-492.
[43] *Ibid*., p. 502-503.

frequently results the justification to domesticate women. Without mentioning other reasons such as right of women to express and realize their potential and the urgent need of women to work out for fulfilling the family needs, the only permission of husband requires will dismiss women right of self realization in public sphere. This problem is as well underwent by women in other countries especially which put into effect Islamic law. As in a case in bangladesh, poor women who leave home to work are accused by the local mullahs as whores. They threaten them with religious and communal ostracism (refusal to officiate at any of women's social and religious function), or even with physical violence.[44]

In 1997, NU's national conference in Lombok Tengah Nusa Tenggara Barat discussed a case of contractual marriage (*nikah mut'ah*) and marriage of the AIDS sufferer. The first case arises from the increasing practices of the contractual marriage undertaken as a result of the spreading prostitution, sexual affair, the restricted polygamous marriage and the increasing economical capability. Responding to this problem, based on opinions of the four imams (Syafi'i, Maliki, Hanbali and Hanafi), ulamas forbad that practice.[45] This practice is not allowed, as Ibnu Qudamah says, for marriage is intended for everlasting not for a temporary pleasure.[46] Instead, it is not in line with the basic principle of Islam preserving offspring which it is not guaranted in contractual marriage. The children has no legal status of familial relationship with their father, thus in turn they do not deserve any financial support and heritance from their father.

The second case is about marriage of the AIDS victim with the same or non victim. Interestingly, before stipulating fatwa, there is an elaboration of AIDS phenomenon on how it spread and the effect. The ulamas allowed marriage between the AIDS victims or with non victim but it is *makruh* (better to be avoided but not sinful) considering the effect for the partner and their offspring.[47] The allowance is likely based on human rights that each person deserve to marry and yield offspring. However, since there is as well a great disadvantage, it is better to avoid behalf on preserving the offspring its self.

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[44] Nussbaum, *Sex and Social Justice…*, p. 82.
[45] Imam Ghazali Said and A. Ma'ruf Asrori (ed.), *Ahkam al-Fuqaha…*, p. 528-529.
[46] *Ibid.*, p. 530.
[47] *Ibid.*, p. 538-539.

In the same national conference, there was also a thematic discussion (*al-maudu'iyyah*) on women position in Islam. Distinguished from the methodology used in treating particular cases which mostly depended on the traditional ulamas' opinion, in the thematic discussion, ulamas mainly quoted Qur'anic verses and the prophet traditions to generate view on women in Islam. As such, ulamas exercised their rationality to interpret the text which took the contemporary context into account. It was mentioned that Islam did not posit women in subordinate position based on some traditions supporting the women honor. As well, women have the same rights as those of men to dedicate their potential for religion and nation asserted in some verses.[48]

The subordination underwent by the women is caused by the distortion of the texts which affirms the equal rights of women. It stems from the patrilineal culture which underestimates the principles of women honor. As such, Muslims need to reconsider those humiliating perceptions generated from cultural distortion based on the women honor insisted in the texts. Accordingly, though there are natural differences between men and women, there are as well unnatural roles that both sexes must perform in social life by mutual support and responsbility based on al-Taubah: 71 stressing the need of mutual help between men and women in appealing to perform good attitudes and preventing the bad ones.[49]

This notion directly evokes more involvement of women in public sphere, whether in political, social, economical and other spheres. The space in which the women could engage in is wider, for they have quality, capability, capacity and acceptability as prequisities to evolve in public sphere. As such, participation of women in non-natural sectors is a manifestation of NU's responsbility to perform cultural transformation and equality which in turn be able to become a dinamisator of national development in globalization era by empowering Indonesian women in an appropiate proportion.[50] This commitment reflects the NU's sensibility to the changing situation of the women condition who are currently more educated and skilled. Instead, the increasing demand to admit the human rights including the

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[48] *Ibid.*, p. 624-625.
[49] *Ibid.*, p. 626.
[50] *Ibid.*, p, 627.

women rights drives the ulamas to reconsider their previous interpretation on women position and role which emphasize more on domestic and private sphere.

Conversely, the insistence of certain groups to keep women in domestic roles as mentioned by Nussbaum, is perceived as attempts of the religious figures to maintain patriarchal domination. By using textual interpretation, they legitimized their subordinative practices as religious obligations that women should adhere. While, there are also progressive interpretation of the previous ulamas but they are seemingly neglected for their opinions could harm the existing patriarchal culture. As such, according KH Husein Muhammad, the long history of Islamic thought has concealed another side of Islamic thoughts not maintream that present progressive opinions on Islamic law, and thus are not popular and not occured in surface. It is because the Islam we inherits is political Islam colored and loaded by political powers which stand for certain interest by dismissing other views. For him, the opinions mostly appearing and supported by the regimes, obviously represents a form of patriarchal discources.[51]

In NU's muktamar of 1999 in Lirboyo East Java, gender issue discused was about women who still in *iddah* term (100-day waiting period before a widow or divorced woman may remarry) whether are forbidden to go pilgrimage or not. The ulamas conceived that basically that women were not permitted to go pilgrimage unless there was an urgent neccesity. Instead, there was also another opinion permitting women without any requirements.[52] This loose fatwa enables women to keep going pilgrimage as this ritual is not for pleasure and bad aims, rather for worshipping God. This ritual can also serve and function to have them closer to God in order to set their sadness away of being left by their husbands.

In the same muktamar, there were also a thematic discussion elaborating on Islam and gender equality. In this theme, problem of Islam and gender equality was profoundly scrutinized. It was noted that the spirit of Islam has affirmed gender equality, while the inequal practices was perceived as distortion of the spirit. There were three problems that hindered the construction of a fairer gender relation range from theological, cultural and

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[51] *http://islamlib.com/id/index.php?page=article&id=793*.
[52] Imam Ghazali Said and A. Ma'ruf Asrori (ed.), *Ahkam al-Fuqaha…*, p. 567-571.

political aspects. In theological aspect, there was interpretation of an-Nisa: 34 used to legitimate domestic roles of women and assert public roles of men. The cultural aspect evolved the so called patriarchal culture which gave priviledge of men over women. The political aspect covered the prevailing political practices discriminative to women. [53]

To cope with these problems, it needs some continual attempts to carry out. First, reinterpretion of religious texts and insights by using historical, sociological and antrophological approach. Instead, religious interpretation more appropriate with the principle of justice and common good is urgently needed. This would be a legitimacy and guarantee that gender equality and projects to realize this equality could run well. Second, critical review of the male bias of religious discourses (patriarchal culture). Opinions on women roles in the domestic sphere must be conceived as a continually result of socialisation within the society. Hence, these opinions are not natural and given, but precisely constructed by society based on certain values, that is, patriarchal values. As such, women could perform as leader, for leadership in national level in modern era is not a private and individual thing, but institutionalized. The future challengge is how to build a leadership and political structure that evolve feminity and femaleness emphasizing on compassion, solidarity, balance and peace. Third, deconstruction of political practices discriminative to women. This effort can be attained by forming democratic political and social system preceding five principles: *musawah* or equality, *'adalah* or justice, *hurriyyah* or freedom, excluding the use of force and violence, and *qudrah* or capability. Besides, it also requires state intervention by giving affirmative actions for women to involve in public sphere.[54]

This fatwa displays the commitment of NU to implement the five basic principles of Islamic teachings as human rights. This view is in accordance with that proposed by the liberal to enliven freedom and individual rights for all human being including women. Such view as well constitutes embodiment of women's human right prevailing in CEDAW (Convention on the Elimination of All Forms of Discrimination Against Women) consisting of some points:

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[53] *Ibid.*, p. 649.
[54] *Ibid.*, p. 650-652.

"(1) to embody "the principle of the equality of men and women in their national constitutions and other appropiate legislation; (2) to legislate against discrimination against women, providing appropiate sanctions; (3) to establish legal protection of the rights of women on an equal basis with men and to ensure this protection through "competent national tribunals and other public institutions"; (4) to ensure that public authorities do not discriminate against women; (5) to take "all appropiate measures" to eliminate existing discriminations " by any person, organization or enterprise"; (6) to change or to abolish any existing discriminatory "laws, regulations, customs and practices"; and (7) to repeal all provisions of the penal law that are discriminatory."[55]

E. RECONSIDERING NU'S CONTRIBUTION FOR ENGENDERING CIVIL SOCIETY

The elaboration on NU's ijtihad of gender exhibits a significant shift both in methodology and its result, that is, fatwa that gives more concern to create gender equality. Using contextual approach to interpret the sacred text, unables the ulamas to exercise their rationality or *ijtihad* and not strictly limit to textual interpretation. It then generates more contextual understanding demanded by current situations that are more complex than before. Holding on normative aspect of Islamic teachings, that is, common goods (*maqashid asy-syari'ah*), the contextualization is likely to manifest. As mentioned by asy-Syatibi, there are four forms of *maqasid*. First, *syari'at* (Islamic tenet) is revealed for human well being. Second, *syari'at* is revealed to be comprehended by human being. As such, this principle emphasizes contextuality and historicity. Third, *taklif* that obedience to religious teachings must be put in the framework of capability and weaknesess of human being. Fourth, removing human being from the desire grip in order to become a free God servant. This common goods implies that creating Islamic law is no longer merely limited to text, or Ahmad baso names it as, texualization that leads to text sacralization. Rather, the most important thing is implementing those common goods in form of contextualization which in one area the manifestation is probably different from others.[56]

This perspective decisively affects on the progressive thought in NU. Figures like KH Sahal Mahfudh, KH. Mustofa Bisri, Abdurrahman Wahid, and Masdar F. Mas'udi are some of NU's figures who have very progressive, active and transformative opinions that strive to

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[55] Nussbaum, *Sex and Social Justice…*, p. 87-88.

[56] Ahmad Baso, *NU Studies, Pergolakan Pemikiran antara Fundamentalisme Islam dan Fundamentalisme Neo-liberal*, (Jakarta: Penerbit Erlangga, 2006), p. 149-150.

review and reinterpret traditional thoughts in new ways not textually but more contextually[57] by which the thoughts of the previous ulamas are deemed as a product of their historicity. That is why, in Syafi'i thought there is a shifting view from the former and the latter opinions called as *qaul qadim* (the former opinion) and *qaul jadid* (the latter opinion). Such stance will urge ulamas to be critical of the previous ulamas' opinions and simultaneously drive them to contextually interpret the texts in regard with the contemporary situation.

Given the greater use of rationality will create, what Robert Wuthnow calls as, reflective morality, in opposition with customary morality. The latter depends on the force of habit, doing things in the way they always have been done. While the former emerges from conscious deliberation. It requires conscious efforts on the part of the individual involving questioning one's behavior, knowing what options and recognizing one's responsbility to choose wisely.[58] This morality is able to support the active and critical participation of the individual in public deliberation. In the sense, religion must in one hand provoke the followers to use more reflections for forming reflective religious morality which are consciously adhered without any pressure. While on the one hand, religious teachings must also be contested in reflective forms to derive the spirit and thus can be implemented in any context and importantly can be comprehended by other religions as well.

The NU's fatwas show this tendency that they stipulate them not merely based on textual understanding or customary morality by which the previous opinions are taken for granted as the only truth. Moreover, there is a gradually attempt to catch the essensial thing or *maqasid syari'ah* of the texts to implement it in different way. As in case of gender equality, the texts that by previous ulamas or contemporary ulamas are interpreted to legitimate the superiority of men over women, indeed get a new interpretation that the texts contextually do not imply the superiority of men and priviledge of leadership only for men but it also for women as long as both meet the requirements of being a leader. Such view allows NU not to reject women political leadership even in national level.

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[57] AS Hikam, *Demokrasi…*, p. 234.
[58] Robert Wuthnow, "A Reasonable Role for Religion? Moral Practices, Civic Participation and market Behavior", in Robert W. Hefner, *Democratic Civility: the History of Cross-Cultural Posibility of a Modern Political Idea*, (USA & UK: Transaction Publishers, 1998), p. 117.

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As a result of being equal with men, women possess the same rights as men as universal human being. Any discrimination, subordination, exploitation over the women in any aspect of women life must be dismissed. Otherwise, women's rights must be guaranted both by society and state. Nussbaum widely explain the women's rights range from life and health, the right to bodily integrity, employment rights, mobility and assembly rights, rights of political participation and speech, the right of free religious exercise, rights of property and civil capacity, nationality, family law, education rights and reproductive rights.[59] All there rights are as well affirmed and still fought for by the NU organization. Its fatwas (religious decisions) are expected to serve as moral, religious, and social forces for its members in particular and society in general to provide a greater space for women to engage in public sphere as a means for their self realization to society and state and also simultaneously create an equal society without any discrimination and subordination based on sex, race, class and other social differentiation.

In this sense, NU's dealing with gender issues has participated to support civil society. However, there is a criticism of Hefner to pesantren where most members and supporters of NU come from. For Hefner, pesantren actually professes cultural and social capital for constructing civil society. However, there is a problem on traditional authority in pesantren given more on the kyais (pesantren's leaders). The santris (students of pesantren) must totally obey them and not allow to critisize them. The authority of kyais is based on perception on them as not merely a teacher but the heir of knowledge and power transmitted in an unbroken line from the prophet Muhammad. As such, the nature of authority in pesantren makes it difficult for Muslim leaders to draw on the institution's critical membership with the state as a precedent for a democratic reformation of Muslim politics.[60] This criticism shows less critical attitude of santris or members which in turn affects on lacking active participation not condusive for creating, what AS Hikam calls as, reflective power as a prequisite of civil society.[61] Though such criticisism can not be overgeneralized for in the New Order, as NU, for instance, consistently critisizes and opposes the New Order policies which undermine the

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[59] Nussbaum, *Sex and Social Justice…*, p. 88-102.
[60] Hefner, *Civil Islam…*, p. 35.
[61] AS. Hikam, *Demokrasi…*, p. 86.

civic forces. However, it can be auto-criticism for the kyais or teachers to provide more space for the santris and the students to express reflectively their opinions and foster their critical capacities.

In the similar line, AS Hikam also mentions internal and external obstacles that impede NU in empowerment process of civil society. Internal obstacles contain: (1) different interpretation on normative frameworks; (2) institutional structure of organization; (3) problem of leadership. While external obstacle emerges from a result of dialectical relation between NU and external forces. In the sense, state and political structure of micro economy are dominant factors that significantly determine the NU in future. Instead, Islamic forces and groups outside NU and its interaction with other organization will as well influence for the development of NU.[62] This criticism is contructive for improving the better development of NU in future whether in exercising the methodology to generate a contextual interpretation, in consistently implementing its fatwas, and as well in improving the organizational quality. Those attemps will be significant in the project of empowering civil society and democracy.

F.   CONCLUSION

The involvement of NU in history of Indonesia has played a significant role in contsructing Indonesian state and promoting democracy. This contribution is manifested in many aspects as such political, social, cultural, economical, and religious ones. Though this contribution is imperfect yet, there are gradually attemps to improve its contribution for Indonesian people. One effort dedicated for empowering civil society is empowering women which undergo discrimination and subordination in society. Several fatwas were promulgated to uplift the dignity of women by proposing gender equality between men and women, and affirming of the women right to have a greater space for their self realization. Giving women wider rights and freedom has become moral power for Muslim women to engage in public sphere and discursively involve in political arena to aspire reflectively their interests. As such, women could perform as autonomous and critical agents toward goverment's policies.

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[62] *Ibid.*, p. 235.

Accordingly, the NU's support toward women to be leader in any level, both local and national is a representation of NU's commitment to posit women relatively equal with men.

Some efforts were undertaken to realize this empowerement, such as reinterpreting the male bias in religious texts that are frequently utilized to justify subordination and discrimination on women. Hence, cultural obstacle, that is, patriarchal culture must be deconstructed, for it becomes cultural capital that impedes the project of social transformation of gender equality. Political actions are as well needed to support gender equality by stipulating provisions and regulations responsive gender. This stance takes two forms simultaneously. In one side, NU strives to involving state to actively engage in protection and guarantee that women rights are really proportionally given to women. As such, any cultural, political, religious restrictions that cause women not get what they deserve, will be eliminated by both society and state. In this sense, NU promotes that civil society and state must cooperate to empower women and warrant their rights. While in the other side, NU takes a critical position to goverment policies which are discriminative to women issues. This stance represents a reflective power possessed by NU before the state.

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