



Family Fiqh in Malaysia
An Analysis of the Selected Issues

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Foreword by

Professor Emeritus Tan Sri Dato Dzulkipli Abdul Razak
Rector, International Islamic University Malaysia

Editors

Sayed Sikandar Shah Haneef

Mek Wok Mahmud

Mohammed Farid Ali Al-Fijawi

Mohd Abbas Abdul Razak

Raudlotul Firdaus Fatah Yasin

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I. Sayed Sikandar Shah Haneef. II. Mek Wok Mahmud.

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V. Raudlotul Firdaus Fatah Yasin.

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Foreword

Islamic Law (*Shariah*) and its Science of Islamic jurisprudence (*fiqh*) have always taken cognisance of the time-space requirements of the Muslim Ummah via their numerous inbuilt methodological principles (*usul al-Fiqh*). This is befitting of a legal system the overall underlying objective of which is the preservation of holistic human wellbeing not only by regulating human behaviour but guiding, inspiring and encouraging righteous conduct amongst its adherents. This necessitates accommodation of local factors (*urf* and *adat*) not only for the actualization of *Shariah* objectives of creating wholesome individuals and society but also to reaffirm that *Shariah* is a mercy to mankind as it is neither a harsh system of sovereign legal commands (ordinances) in the Austinian sense nor is a law without a solid foundation, always in a state of flux, vacillating on the basis of human whimsical desires (*hawa*), as American Realists contend. A compassionate approach to any discourse in general and family matters, in particular, has always been a salient feature of *fiqh* where Islamic legal commands have negotiated their ways through customary practices and usages of every communities at both levels of juristic constructions and application. In fact, by accommodating the customary practices of a community in family matters, the *Shariah* takes into consideration the needs (*daruriyat*), interests (*masalih*), and protection from corruption (*dar' al-mafasid*) for the family

institution. This is the very substance of *Rahmatan lil-Alamin* (Mercy for all).

The family institution is the very backbone of any civilization including Islamic civilization. It not only lumps up communities to make cities, but also builds individuals who steer the rise of civilization. Like the mother who is the first teacher, the family is the first nurturer (*murabbi*) of an individual. The innate disposition instilled in them will decide in which direction individuals will turn the civilization. Imbalanced individuals as history have witnessed were instrumental in moral decadence of civilisations deteriorating it to the ground. For this reason, IIUM has taken the *Insan Sejahtera* framework seriously in order to develop holistic individuals who can excel in the sustainable development of the Ummah while maintaining the values of humanity. In view of the above, I believe that the initiative by the Contemporary *Fiqh* Research Unit of Islamic Revealed Knowledge and Human Science, to publish its Seminar papers which it organizes in collaboration with Kulliyyah Ahmed Ibrahim Law and International Institute of Islamic Bank and Finance is a creative idea. The chapters are written by experts from *Fiqh*, law, banking and finance and other relevant fields who engage on discourses relevant to various themes of family *fiqh* with the prime purpose of underlining the paramount importance of evolving Malaysian family *fiqh*, on the face of erosive outside influences damaging to Islamic values of family, its enhancement and subsistence. I congratulate the authors and hope that the ideas raised in their papers not only educate the public but enlighten the stakeholders for policymaking to strengthen family institution to serve the national agenda of nurturing and building *insan sejahtera*.

Professor Emeritus Tan Sri Dato Dzulkifli Abdul Razak

Rector, International Islamic University Malaysia

Introduction

In the name of Allah, the Most Gracious, the Most Merciful.

The family institution stands as the most crucial pedestal for the creation, establishment and sustaining well balanced harmonious individuals and society from an Islamic perspective. The *Shariah* in the broad sense of a divine system of principles of belief, code of ethics and juridical-legal rules aims at realizing the overall wellbeing of humans and family. To actualise this, it regulates the minutest details of family issues and concerns primarily on the basis of mutual respect, care and sense of belonging as it is a private sphere whose smooth running requires more of moral commitment than coercive intervention by external parties on its domain unless it fails on its moral grounds. The Qur'an for instance, declares spousal mutual kind treatment (*mu'shirah bi al-ma'ruf*) as the bedrock of a fulfilling marital life and mandates benevolence(*ihsan*) as the core principle of fulfilling mutual expectations among family members without quantifying their amount but leaving them to what is customary(*bi al-ma'uruf*) and humanly possible in the circumstances. It is in this context that local customs (*urf/adat*) and usages occupy the most central positions in the juridical discourse on the legal formulation as well as judicial settlement of issues revolving around family. Consequently, practically local factors' presence in the *legal corpus* of Islamic family

jurisprudence, Islamic family law and Islamic finance continues to have their impacts on them in line with the established principles of legal theory and its supplementary legal principles. Therefore, being premised on this thesis, the chapters contained in this handbook offer a wealth of scholarly insights into various themes, encompassing financial mechanisms and institutions affecting family along with sociological factors which have strong bearings on women and children's wellbeing. These chapters, in a nutshell, being written by experts from multiple disciplines of *fiqh*, Islamic family law, Islamic banking and finance, economics and human sciences raise numerous *fiqhi* issues to enrich the local discourse on the development of family *fiqh* in Malaysia. The outlines of some of the crucial issues of family *fiqh* emerging from the chapters we thematically present here.

As a prelude to the pivotal place of *urf* in Islamic family *fiqh*, it is contended that custom must fulfil several mandatory juridical parameters to be assimilated into the body of Islamic family *fiqh*. It must be wholesome, rational and does not contravene fixed principles of family *fiqh* and their underlying philosophies and effects. To enunciate such a regulated use of *urf* in legal deduction and application, a selected sample of how the classical jurists pragmatically negotiated the way for the absorption of their local customs into family *fiqh* to establish and sustain a family and manage the aftereffects of its dissolution, featured in this book can be enlightening.

The applied family *fiqh* in Malaysia tends to be more pragmatic not only in terms of expanding the *Shariah* court structure, equipping it with modern technological facilities but also through judicial management of irregularities in the process of marriage, reconciliation, marriage dissolution and its aftereffects. Nevertheless, public perception of judicial management of family matter is a *fiqhi* point for clarification. For

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instance, matrimonial offences, such as non-registration of marriage and divorce or a husband's neglect to provide maintenance to his wife and children are seen as merely civil matters by the public. Hence, it is argued that legal authorities need to convince the public about *Shar'ī* bases of such criminalization.

Despite numerous milestones, critics, however, believe that *Shariah* courts and their laws are either slow in catching up with new requirements of families or they are not robust enough to minimize/overcome the problem of non-compliance with judicial procedures. For instance, it is argued that on account of the dichotomous position of the law and *Shariah* court practices on issues like non-legal recognition of extra-judicial *talaq* while still validating it subsequently, and its oppressive impact on women, there is a need for a consistent approach on the subject by abolishing the validation process of unilateral *talaq*. The process of reconciling quarrelling couples to save their marriage is another aspect which needs reform. It is contended that the current process is lengthy and involving family members in the process is also unnecessary. Hence, it is contended the courts need to involve professionals in the conciliation process and shorten the procedure in order to speedily dispose of the cases.

Likewise, the existing Laws and procedures for child protection in Malaysia are criticized as inadequate. For instance, although adoption laws declare “best interest of the child” as the paramount consideration in granting the application for adoption, its detailed elements need to be clearly spelt out to actualize it. The Islamic idea of *kafalah* to provide social placement for parentless children also needs to be incorporated in the present legislations on adoption as part of Islamization of the law, since adoption is unlawful in Islam. It is also contended that *kafalah* is important in ending the institutionalized child care system which is in vogue in Malaysia. This would serve better the

family needs of the child care which other mechanisms can not realise.

Technological advancement has both disruptive and positive effects on family values and its legal management. Its positive side to create healthy citizens such as the legal imposition of pre-marriage HIV screening on Muslims needs to be extended to all Malaysian citizens, regardless of their religious affiliation. However, some technological means are suspected to have negative effects on family wellbeing, such as immunization of children against serious preventable diseases through vaccination. For instance, it is found that 59% of parents in Malaysia do not prefer their children to be vaccinated, thus, it needs to be pragmatically resolved.

In addressing the problem of financial management of family wealth, it is argued that public education about prudent ways of managing family wealth and its finances in line with the hierarchies of *maqasid al-Shariah* would go a long way in saving families against lavish and unthoughtful spending as they can prioritize between necessities, needs and extravaganza on top of foreseeing the consequences of poor financial planning or not planning at all. This is particularly important for Malaysians as the present mismatch between the cost of living and family income makes it hard for families to counterbalance their incomes with what they spend.

The wellbeing of career women in the competitive global world is a subject of concern, especially where a working woman has to balance between family and work responsibilities. The amount of stress and mental pressure on working women and their wellbeing has impelled the government in Malaysia to formulate several policies and enact laws to manage work-family imbalance. However, it is contended that ultimately it is the religious awakening as a measure of self-regulation which can preempt the

occurrence of the phenomenon.

All in all, the foregoing deliberation leads us to conclude that local family *fiqh* in Malaysia at both theoretical and applied levels need not only has to strike a balance between the ideals of *fiqh* and pragmatic needs of its thoughtful application in real life but also has to take into consideration the dynamics of change in contemporary time. It has to reconstruct *fiqhi* postulates to solve practical problems of family anchored on Islamic framework for reform and renewal. It has to work out internal resistance mechanisms to sustain Muslim family institution against the destructive ideological and institutional onslaughts of ideologies alien to the Islamic conception of family and its wellbeing. This requires not only collaborative intellectual engagement amongst jurists and legal academics but also serious partnership with social scientists and finance experts.

Last but not least, we would like to record our heartfelt thanks to Professor Emeritus Tan Sri Dato Dzulkifli Abdul Razak, Honorable Rector of the International Islamic University Malaysia for penning a foreword to the book. We also express our thankfulness to Islamic Book Trust for facilitating its publication. Last but not least, our thanks to the funder of the research grant project, Yayasan Bukhary, through our former Head of Contemporary *Fiqh* Research Unit, distinguished Professor Dato' Mahmood Zuhdi Ab Majid, can hardly be expressed in words without whose generous sponsorship of our research project on local family *fiqh* in Malaysia, this would not have been possible.

Sayed Sikandar Shah Haneef

Mek Wok Mahmud

Mohammed Farid Ali Al-Fijawi

Mohd Abbas Abdul Razak

Raudlotul Firdaus Fatah Yasin

PART ONE

Family *Fiqh* Framework



Chapter 1

Legislative Significance of Custom in Developing Local *Fiqh* of Family: An Analysis of its Conceptual Framework

Sayed Sikandar Shah Haneef, Raudlotul Firdaus Fatah Yasin
& Rabia Ijaz



Chapter 2

Juridical Impact of *Urf* on Family Law:

An Applied Juristic Framework for Local *Fiqh*

Sayed Sikandar Shah Haneef, Mohd Abbas Abdul Razak
& Hayatullah Laluddin

Juridical Impact of *Urf* on Family Law: An Applied Juristic Framework for Local *Fiqh*

Sayed Sikandar Shah Haneef*

Mohd Abbas Abdul Razak*

Hayatullah Laluddin*

Introduction

Islamic law, at both foundational and juristic exposition of matters relating to a family, is heavily grounded on reality-oriented approach. Its textually founded rulings for their applications in human conditions have given space to the quantitative realization of Qur'anic commands in day-to-day matters of family affairs. Prophetic Sunnah supplements not only the Qur'anic legislation, but it also provides juridical solutions to real cases which were presented to him at that time and under certain circumstances. Building on this sociological aspect to realize divinely ordained ethos in the family arena, jurists, both classical and contemporary, have methodologically incorporated a

* Professor, IRKHS, International Islamic University Malaysia. Email: sayedsikandar@iium.edu.my.

* Assistant Professor, IRKHS, International Islamic University Malaysia. Email: maarji@iium.edu.my.

* Assistant Professor, IRKHS, International Islamic University Malaysia. Email: hayatul@iium.edu.my.

plethora of customary practices into the fabric of Islamic family *fiqh* including the following:

The Stipulation of the Uprightness of Wali's Character

Jurists were divided on the issue of '*adalah*' of a marriage guardian to contract the marriage of his ward. Hanafiyyah and Malikiyyah opposed it, while Shafi'yyah and Hanabilah stipulated it. Opponents, among others, argued that the Qur'anic command of ordaining the legal guardians to facilitate their wards' marriage does not predicate the uprightness of their character (al-Qur'an, 24:32). They also concluded by saying that the profligates were not prevented from contracting the marriage of their wards during the best of the periods nor thereafter. Hence, since the time of Prophet until the current time, people have been continuing to give their daughters in marriage without any inquiry into their characters albeit the existence of both *fasiq* (profligate) and '*adil*' (person of integrity) among them (al-Kasani 1982, Vol.3, p.349). Supporters, however, argued that although the Qur'an is not explicit on this, the Sunnah makes this as a caveat, "no marriage except with intermediary from a trustworthy (*murshid*) Wali" (al-Baihaqi n.d., Vol, p.112, al-Shirbini 1982, Vol.3, p.209). This hadith, however, is unacceptable to supporters not only on its validity ground but to them the word *murshid* in the *hadith* means a clever man and not a man of just character. As to what is a person of just character is again a matter of customary determination which varies from time to time and changes as the moral fibre of community vacillate.

Marriage Compatibility

Compatibility of a man to be a suitable suitor for a woman (*kafa'ah*) is a disputed condition of marriage. It is a condition of *luzum* (bindingness) which the Wali can drop or press for it

according to the majority while it is a condition of validity(*sihahah*) to Hanafiyyah and an opinion by Imam Ahmad, the absence of which renders a marriage invalid. Although primarily it derives its juridical validity from the Hadith texts¹, its rationale as being so is *urfī* from two aspects: first, as to why a man should be of the same social status as the woman and not *vice versa*, it is argued that: “A woman of noble descent would be reluctant to be married to a man of low social status because it would be despised by her community’s custom. If that is allowed, familial cohesion between families (*sihr*), as the underlying purpose of connecting two families by marriage would not be achieved. However, if a woman is of lower status than a man, the social custom has no qualm about it” (Ibn Qudamah n.d., Vol.7, p.374). Second, as to it why it has to be made a condition of marriage, the rationale is again due to its customary demand and sensitivity which is evident from the juristic assertion that, “it has been known in practice that the orderliness of family wellbeing can only be maintained and marriage subsists when the couples are compatible to each other. Moreover, it has been proven that a man of low social status would not only be disrespected by his wife but also be demeaned by his in-laws, thus leading to the fiasco of realizing the social purpose of creating solidarity between two families through marriage” (al-Kasani 1982, vol.3, p. 673).

Additionally, the juristic differences on the specification of the characteristic traits on the basis of which marriage compatibility of a man can be screened is heavily coloured by custom. For instance, the majority except for Malikiyyah when prescribing

¹ The main *ahadith* supporting *kafa’ah* are: “Do not give in marriage the women to their equals”; “Among three things which you should not procrastinate, one is contracting the marriage of an unmarried woman” (Sunan al-Timidhi 1996, Vol.3, p.387). The Prophet also allowed a woman not to stay in her marriage when she complained about the lower status of her husband (Sunan al-Nasa’i n.d., Vol.6, p.86).

compatibility in lineage (*nasab*) argue that it is necessary as Arabs place great significance on lineage and despise marrying their daughters to *mawali* (non-Arab Muslims) (Ibn Qudamah n.d., Vol.7, p.374). Similarly, when justifying profession as a requirement of *kafa'ah*, they reasoned: "A man from a low-class profession cannot be *kufu* for women from a noble family. For instance, a shepherd is not a suitable match for a businessman's daughter because it would be despised by the custom of his community" (Ibid). Hanabilah and Hanafiyyah when requiring wealth and prosperity as other elements of *Kafa'ah* argued that a poor man is not *kufu* of a rich woman because taking pride of one's richness is customarily more important than any other elements in marriage as indigence is demeaned by social custom (Ibid). Elucidating the significance of *urf* as a juridical basis of *kafa'ah* and its juridical delineation, Abu Zaharah (2008) puts a remark that therefore, *kafa'ah* is a matter determinable by *urf* because the subsistence of marriage greatly depends on the strength of the relationship between the spouses' families (p.56). Abu Husyan (2013) further argued that if the classical jurists set out criteria for a man to be above or of the same social status as that of the woman's family status, today's changes in the condition of women itself can also be made another element in considering the suitability of the suitor for their marriage (pp. 97-99). He further maintained that considering some other qualities such as the compatibility in terms of age between a man and his wife, which has emerged as another customary consideration in our time cannot be ignored. The silence of classical *fiqh* on this is because it was not leading to any harmful consequences to women during their epoch. The Prophet married Aisha at the age of six and consummated it when she was nine years old. Umar married Umm Kalthum when she was still a minor. However, marrying a woman of tender age to a very older man today may give rise to evil consequences such as marital infidelity when the husband

cannot fulfil his conjugal obligations towards her (p.118). One may retort, however, that this proposition cannot be overgeneralized although it can be a local issue in more open societies where the sense of abstinence from Zina is weak among the community.

Subjecting Marriage to Secular Conditions

Subjecting the marriage contract to certain stipulations which may be beneficial especially to the wife, such as obligating the husband not to take another wife, or do not take her from her village to other location or not to prevent her from furthering her studies or working is a disputed issue among the jurists. Majority refute it, and Hanabilah upholds it. The supporters aside from invoking hadith texts² supported their legal stand by proffering logical reasoning based on *urf* by saying that it has been customary that some people stipulate some conditions for the benefit of their daughters during the marriage contract, which if not contrary to the textual implications of marriage can be *mubah* (Abu Husayn 2013, p.108).

² Majority cited the ḥadith that, "Anyone who stipulates a condition which does not exist in the Qur'an is null and void", *i.e.* if it is not among the Shari'ah defined legal conditions of marriage (Sahih Muslim n.d., Vol.4, p.213). Similarly they relied on a ruling by Ali in a case where the husband made it a condition that he would not remove her from her own house, by holding that Allah's condition takes precedence over their condition, namely, Lodge them [in a section] of where you dwell out of your means...(al-Qur'an, 65:6; Malik 1985, Vol.2,p,531). Hanabilah, on the other hand, argued that the Prophet has said: "Muslims are bound by their conditions..." and "The conditions that are most deserving of fulfilment, are those by means of which the private parts become allowed to you" (Sunan al-Tirmidhi 1996, Vol.3, p.634; Sunan al-Nasa'i n.d., Vol.4, p.86).

The Minimum Age of Marriage

In the absence of natural signs of puberty (*bulugh*), the jurist differed on the minimum age of *bulugh* for both male and female to marry. Hanabilah and Shafi'iyah set it at 15 for both genders, while Hanafiyyah and Malikiyyah prescribed it at 17 for female and 18 for male (Ibn Qudamah n.d., Vol.4, p.551). Abu Husayn maintains that despite construing some legal texts in support of such juridical conclusions, the classical jurists relied on *urf*, i.e., on the basis of what was known by induction to be the age of *bulugh* for an average girl and boy in their localities at that time. Accordingly, the *Shariah* does not prescribe any age limit for marriage and has left it to be determined on the basis of the reality of puberty in each time and locality. The classical jurists resolved it according to their socio-environmental conditions, and it should be the course by the jurists in our time as well (p.115).

Allusive Divorce (*talaq kina'i*)

As to what kind of Arabic words which though clearly do not imply *talaq* but alluding to it is a question squarely determinable by its customary usage for intending a divorce. This is evident from the juridical exposition of allusive words of divorce and their intended legal effects. For example, Hanafiyyah classified them into words which denote revocable divorce, such as observe '*Iddah* and words which if uttered would imply irrevocable divorce, such as "you are left alone, freed or suspended" or, "she is haram on me". Malikiyyah considered them in two types: apparent allusive words which imply triple divorce, such as when being left alone (irrevocable), or being freed, and implicit allusive words which may imply divorce or otherwise depending on the intention of the husband, such as "go away" or "turn away from me". Hanabilah classified the allusive words into three categories: 1. apparent like when being left alone, 2. implicit, such as "go

away” and 3. disputed allusive words, such as join your family members (Abu Husayn 2013, p.137). Delineating the above, Abu Husayn concluded that juridical implication of allusive words of divorce is a matter of *urf* and varies from places to places. That is why the Hanafi resolved that: “Allusive words of divorce if they are meant to count as irrevocable divorce in a particular community, it would stand as *ba’in*. However, if they started to consider it as revocable, it would be *raj’i*. The *kina’i* words of divorce will not change, but people’s usage of them will change” (Ibn Abidin 1963, Vol.3, p.299).

Judicial Dissolution of a Missing Person’s Marriage

Jurists, among others, differed about the fate of a missing person’s wife. The majority argued for the subsistence of her marriage with him until the death of his contemporaries. While Hanabilah ruled that she is only bound to wait for four years and then can present her case to the judge and ask for judicial dissolution of her marriage, on the presumption of his demise, and can remarry if she wishes to do so. They based their view on the authority of a ruling by Caliph Umar. Supporters of the Hanabilah position further argued that to require the missing person’s wife to wait until the death of his contemporaries in the ordinary course of the event (*urfan*) would be oppressive to her (Ibn Qudamah n.d., Vol.9, p.131). Accordingly, the four-year grace period for the return of a missing husband, as prescribed by Umar, eases not only such a wife’s agony, but it is also a sufficient period for the return of her missing husband if he is still alive. Commenting on this, Amru (n.d.) maintained that if the duration of four years were customarily sufficient time to find about the whereabouts of a missing person during the time of Umar, in the age of fast means of communication shorter period would do so because it is a question of customary way of searching and finding a missing person (p.217).

The Minimum Amount of Dower

Jurists while agreeing that there is no ceiling on the maximum amount of dower (*mahr*) for a wife, they differed on its minimum amount. Hanabilah and Shafi'yyah maintained that it is determinable by custom while Hanafiyyah and Malikiyyah held that there is a set-minimum limit for *mahr* in Islamic law (Ibn Qudamah n.d., Vol.8, p.5). The first group, among others, cited the hadith to support their stand: "O Messenger of Allah, I give myself in marriage to you." She stood for a long time, then a man stood up and said: "Marry her to me if you do not want to marry her." The Messenger of Allah said: "Do you have anything?" He said: "I cannot find anything." He said: "Look (for something), even if it is only an iron ring." So, he looked, but he could not find anything. The Messenger of Allah said to him: "Have you (memorized) anything of the Qur'an?" He said: "Yes, Surah such and such and Surah such and such," naming them. The Messenger of Allah said: "I marry her to you for what you know of the Qur'an" (Sunan al-Nasa'i n.d., Vol.4, p.164). The second group, conversely, cited the Qur'anic verses:

"...And also forbidden to you are all married women (*muhsanat*) except those women whom your right hands have come to possess (as a result of war). This is Allah's decree, and it is binding upon you. But it is lawful for you to seek out all women except these, offering them your wealth and the protection of wedlock rather than using them for the unfettered satisfaction of lust. And in exchange for what you enjoy by marrying them pay their bridal-due as an obligation. But there is no blame on you if you mutually agree to alter the settlement after it has been made. Surely Allah is All-Knowing, All-Wise"—al-Qur'an, 4:24.

They also reasoned that Allah commands the *mahr* to consist of a

sum (or commodity) which can be customarily regarded as *mal*. Hence, a meagre amount of money or other things cannot customarily suffice as *mahr*. Both groups, however, ultimately based their judgment on *urfi* reasoning.

The Amount of *Mut'ah*

Regardless of the juristic differences on the ruling of *mut'ah* (consolation gift) after a divorce, they are unanimous that its amount is determined by *urf*. For instance, the Hanafi school regarded *mut'ah* to consist of a shield, scarf and spoon the value of which should not exceed half of the customary *mahr*. The Shafi'iyyah and Hanbilah while proposing its components as things like a maid and dress, basically regarded it as a matter to be determined by the judge (Ibn Qudamah n.d., Vol.8, p.53). The rationale, however, is that it is a customary matter the quantity of which changes from community to community in every epoch.

The Amount of Maintenance

The majority of the jurists do not prescribe any obligatory minimum amount for the wife's *nafaqah*. To them, the basic criterion is what customarily suffices for her daily subsistence according to her husband's income by virtue of the Qur'anic verses:

“...In such a case) it is incumbent upon him who has begotten the child to provide them (*i.e.* divorced women) their sustenance and clothing in a fair manner...”—al-Qur'an, 2: 233;

and,

“Let a man of wealth spend from his wealth, and he whose provision is restricted—let him spend from what Allah has given him. Allah does not charge a soul except

[according to] what He has given it. Allah will bring about, after hardship, ease”—al-Qur'an, 65:7.

***Nafaqah* of a Working Wife**

Classical jurists ruled that if a husband prevents his wife from working but she defies his command and continue working, her *nafaqah* would be dropped because she would be guilty of disobedience (*nushuz*), and thus losing her entitlement to *nafaqah* (Ibn Qudamah n.d., Vol.9, p.231). Commenting on this, Abu Husayn observes that classifying such a wife as disobedient was befitting the circumstances of the classical jurists' time, as for the women to pursue careers was neither a norm nor a necessity. Nevertheless, such a *fiqhi* position cannot be held as a true statement of the law in our time especially when the husband while marrying a career woman either implicitly or explicitly agrees to allow her to continue working even after the marriage. An additional complication in the modern era about the working women is that she is bound by the government or agency responsible for sponsoring her education to work for them up to a certain duration. Any husband if still thinks along with the classical mind, should not marry a career woman or insert a condition against it in the marriage contract (179-180). As to which position is the correct statement of the law, we maintain that it depends on the pervasiveness of women in the workforce in each community, in a country or village and township (*idtirad al-urf*) Thus, an overstatement on the matter ignores the diversity of customs across the Muslim communities and nations.

Providing Household Implements

Despite juristic difference on which one of the spouses is responsible for providing the necessary household items, they are unanimous that as to what it should consist of is a question of

customary specification, which differs from places to places. The majority held that it is the responsibility of the husband according to his affordability as the Qur'an ordains:

“Lodge them where you lodge according to your means”
—al-Qur'an, 65:6; Ibn Qudamah n.d., Vol.8, p.3.

The Malikiyyah, on the other hand, held that providing the household items is the responsibility of the wife which she must purchase from the *mahr* that she has taken. However, in case, she has not received her *mahr*, then it would be upon the husband unless there is a condition attached to the marriage contract to the contrary or the *urf* still obligates the wife to be charged with it. The reason is that it has been customary in the cities that the wife has to provide household effects (al-Dasuqi 1998, Vol.2, p.322). The majority view, however, is more in keeping with the *ratio legis* of *mahr* and representative of the prevailing customs in most Muslim countries at present.

Child Breastfeeding

The jurists differed about the obligation of breastfeeding on the mother. The majority held it not to be so, al-Awaza'i considered it obligatory, and Malikiyyah held the view that it depends on its customary imposition; requiring it from some women and not from others. For instance, to them, it is customary that the women of noble descent do not breastfeed their babies except if was stipulated in the marriage contract (Ibn Qudamah n.d., Vol.9, p.313). The basis of differences is the legal construction of the Qur'anic verse:

“Mothers may breastfeed their children two complete years for whoever wishes to complete the nursing [period]”—al-Qur'an, 2: 233.

The majority read this passage with another part of the same

verse: “No mother should be harmed through her child,” as an indicator (*qarinah*), discounted its obligatory effect. Al-Awaza'i construed the verse as self-evident on making it mandatory on the mother to breastfeed her baby. Malikiyyah differed with them by grounding its ruling on *urf*, i.e. if some category of women were not required to breast feed by *'urf*, the obligation would not apply on them although it generally is a mother's duty (*takhsis al-amm bi al-urf*) (al-Qara'fi n.d., Vol.4, p.170).

Child Custody

The governing ruling of child custody is heavily influenced by the custom in several respects including, first, the duration of custody with the mother: The majority distinguished between a male and female child but differed on its other details, Hanafiyyah holds that the mother's custody over her male child ends the moment the latter becomes self-reliant as he can manage his daily life without the mother's assistance, while her custody over her female child ends when the latter reaches puberty. Thereafter, it has been proved customarily that the father would be more qualified to care for her pubescent daughter during her early adolescence (al-Mirghinanin n.d., Vol.2, p.38). Malikiyyah, on the other hand, viewed that the mother is a better caretaker of a male child until he attains puberty and of the female child until she is married (al-Hattab 1975, Vol.5, p.594). The Shafi'yyah regarded the age of discernment (*tamyiz*) as a deciding factor for both male and female children to choose between the father and the mother (al-Shirazi 2010, Vol.2, p.271). The same is the position of Hanabillah concerning the mother's custody over a male child, but for the female child, *tamyiz* marks the end of compulsory return of child's custody to the father on the same *'urf*-oriented reasoning as advanced by the Hanafiyyah (Ibn Qudamah n.d., Vol.9, p.301). It is observed that the fact that the Hanafi is not limiting any age for the cessation of a male child's custody to the mother, but

leaving it to the fact of the child's independence is '*urf*-oriented which can vary from child to child and changing conditions in time and space (Abu Husayn 2013, p.200).

Secondly, the right to visitation and its frequency: The classical jurists differed on the frequency of visitation rights by the non-custodial parent based on what they thought was best for the child and the parent in their times (*urf*i consideration). Hanafiyyah requires daily visits by another parent irrespective of the sex of the child but outside the custodial home (Ibn Abidin 1963, Vol.2, p.345). Malikiyyah distinguishes between minor children and adult by holding that the visitation for a minor child should be on a daily basis, but after puberty once in a week by the mother and more frequent by the father to keep an eye on his/her socialization and education (al-Dardir n.d., Vol.2, p.512). Shafi'iyyah subjected the visitation requirement on the sex of the child and that of the custodian. In the case of a female child with the mother, the father can visit her once in two days or more during the day. But if she is with the father, the mother can visit her according to what is determined by *urf* and *adah*, but not every day. And if she visits her in the house of her ex-husband, she should not stay longer. In the case of a male child being with the mother, he should remain with the mother during the night and be sent to the father during the day for moral upbringing and educational care. However, if the child is with the father, he should remain with the father day and night provided that he is sent to spend some time with the mother on the basis of what is customary in a given community. Nevertheless, if the child falls sick, regardless of his/her sex, the mother is more suitable to take charge of his/her bed-care (al-Nawawi 2008, Vol.9, p.104). Hanabilah's position with respect to the male child's custodial visitation is the same as the Shafi'iyyah, but the female child should remain with the father after the age of seven and the mother still can visit her outside the ex-husband's house provided

that when he is out of the house. The reason is that after the divorce, the couple are strangers to each other, and the frequency of visitation is left to what is customary in the locality (Ibn Qudamah n.d., Vol.9, p.303).

Lastly, the implication of mother's relocation after divorce. The jurists, based on what could be in the best interest of the child, put some restrictions on the movement of the mother if the child is in her custody. The Hanafiyyah hold that if the mother married the child's father in her town and moved with him to another province, in the event of a divorce, the mother has the right to go back to her hometown with the child. The reason is that by marrying a non-local, the husband has implicitly agreed that the wife can go to her hometown once separated. But if she was married in the village and moved with her husband to town, upon divorce, she cannot take the child back to the village but loses her right of custody because of its harmful consequences on the child in terms of socialization and lack of amenities there (al-Kasani 1982, Vol.5, p.217). Malikiyyah, on the other hand, holds that the mother cannot relocate with the child if the place is far away from the residences of the child's father and other guardians (*awliya'*). The exception is when she travels for trade purposes or pilgrimage (Sahnun 1994, Vol.2, p.259). The Shafiyyah postulated that if the mother travels temporarily for fulfilling a need such as business or pilgrimage, her custody over the child would be unaffected provide that the child is in the care of some trustworthy people in her place of residence. However, if she wants to relocate, then the custody should be given to the father as he is best suited to bring him/her up (al-Shirbini 1982, Vol.3, p.600). Hanabilah maintained a stricter view by holding that regardless of the assurance about the safety of the child in the event of a relocation, the mother would lose the right of custody over the child provided that the place is equal or more than the distance of shortening *salah* from the place where the child's

father and male relatives reside (Ibn Qudamah n.d., Vol.9, p.305).

It has been observed that the issues raised by the classical jurists as above, were greatly impacted by the circumstances that prevailed then. In the current context, in some communities, the physical distance has lost its significance, and villages are as prosperous as cities and towns in terms of amenities and safety. Hence, these changing factors need to be taken into account when awarding custody to the mother by the courts (Abu Husayn 2013, p.205). Nevertheless, it is believed that the physical proximity of the child to the father (as the father figure) still cannot be taken lightly for the balanced and harmonious development of the child in terms of guiding him/her through the turbulence of formidable challenges as he/she matures to adulthood.

The Need for Empirical Proof to Establish Paternity (*Nasab*)

Unlike Hanafiyyah, it is a settled principle among the majority of the jurists that the mere existence of marriage contract does not suffice for the legitimacy of a child lineage in spite of the general import of the hadith, “The child is the bed’s and for the fornicator is the stone” (Sunan al-Nasa’i n.d., Vol.4, p.95), which purportedly makes it to be the case as maintained by the Hanafiyyah. The majority, however, argued that the general dictum of the hadith in question has been qualified by the customary necessity of the intimate opportunity for consummating the marriage as an empirical indicator for attributing the child to the couple, after the official solemnization of marriage which usually takes place in public (*i.e. taqyid al-‘amm bi al-urf*). This is clear from their statement, “The legitimacy of *nasab* can be proved by virtue of a valid marriage contract provided that the couple has the opportunity to have intimacy and consummate the marriage. In the absence of such indicators, the paternity of the child cannot be attached to the father” (Ibn Qudamah n.d., Vol.9, p117). It makes

sense as in the normal course of events (*'adatan*) pregnancy can only result from actual coitus between the couple and not by its mere solemnization through marriage contract (Abu Husayn 2013, p.208).

Conclusion and Implications for Local *Fiqh*

The main conclusion from the foregoing juridical deliberations on some essential points of family *fiqh* is demonstrative of pragmatic engagement of the jurists with sacred texts of the Qur'an and the Sunnah to ground them into the reality of real issues of family life. The most important lessons from juristic approach to contextualize *Shariah* rulings into their social environments are: 1. neglecting local sensitivities in juridical work would affect social cohesion among family members and between families which is clear from their insistence on *kafa'ah*, and *'adalah* of the legal guardian; 2. in case of conflicting interests, customary resolutions can vary in preponderating one over the other based on a bigger picture which the jurists would think is more sensible in keeping with Islamic vision of the family institution. For instance, the juristic ways of managing child custody are reflective of such an approach. 3. And lastly, custom cannot operate on its own but it has to be anchored in both literal and purposive import of religious legal texts as ultimately it is a subsidiary method of *ijtihad*. Hence, the lessons learnt for local family *fiqh* are:

1. It can assertively accommodate sound and useful *adat* within the frame of textual laws as Malikiyyah did in the case of ruling on child breastfeeding by the mother;
2. It can balance gender participation for household moral and material wellbeing by drawing on the classical enlightening discussion on child custody, providing household effects rather than tilting such issues in favour of one party or the other as feminism or orthodoxy cajole

us to adopt; and

3. Lastly, negotiate for the space of genuine local *urf* in family *fiqh* within the boundaries of the *Shariah* legal texts and their purposes for building strong family and producing balanced progeny.

References

- Abu Husayn, A. R. A. H. *Athar al-'Urf fi al-Ahwal al-Shakhsiyyah*, 2013. At <https://www.mobt3ath.com/uplode/book/book-17452.pdf>.
- Al-Bayhaqi, A. H. *al-Sunan al-Kubra*. Multan: Nashr al-Sunnah, Vol.4, n.d..
- Al-Dardir, A.M. *al-Sharh al-kabir*. Cairo: Ihya al-Kutub al-Arabiyyah, Vol.2, n.d..
- Al-Dasuqi, M. 'A. *Hashiyat al-Dasuqi*. Beirut: Dar Ihya al-Turath al-Arabi, Vol.3, 1998.
- Al-Hattab, M. A. *Mawahib al-Jalil*. Beirut: Dar al-Kutub al-'ilmiyyah, Vol.5, 1975.
- Al-Hattab, M.M. *Mawahib al-Jalil*, Beirut: Dar al-Fikr, Vol.1, 1978.
- Al-Kasani, A.D. *Bada'i' al-Sana'i' fi Tartib al-Shara'i*. Beirut: Dar al-Kutub al-'Arabiyyah, Vol.5, 1982.
- Al-Mirghinani, A. A. B. *al-Hidayah*. Pakistan: Idarat al-Qur'an wa al-Ulm al-Islamiyyah, n.d.
- Al-Nasai', A.R.A. *Sunan al-Nasa'i*, vol.4, n.d. at <https://sunnah.com/nasai/26/86> (accessed 10 February 2020).

- Al-Nawawi, Y. S. *Rawdat al-Talibin*. Dar 'Alam al-Maktabat.Vol.9, 2008.
- Al-Qarafi, A. I. *Al-Dhakhirah*. Dar al-Ghab al-Islami.Vol.4, n.d.
- Al-Shirazi, A. I. *Al-Muhadhdhab*. Dar al-Kutub al-'ilmiyyah.Vol.2, 2010.
- Al-Shirbini, M. K. *Mughni al-Muhtaj*, Beirut: Dar al-Fikr,Vol.1, 1982.
- Al-Timidhi, A. 'I. *Sunan al-Tirmidhi*. Dar al-Gharb al-Islami. vol.3, 1996.
- Amru, A. F. *Tatbiqat al-Siyasah al-Shar'iyyah fi al-Ahwal al-Shakhsiyyah*, n.d.
At <https://www.alkutubcafe.com/book/P2VEAD.html>
(accessed 13 February 2020).
- Ibn 'Abidin, M. A. *Radd al-Makhtar*. Kuwait: Maktabah al-Rashidiyyah, Vol.2, 1963.
- Ibn Qudamah, A. A. A. *Al-Mughni*. Riyadh: Maktabat al-Riyad al-Hadithah, n.d ,vols.4, 3, 9, n.d.
- Malik, A. *Al-Muwatta*. Dar Ihya' al-Turath al-Arabi. Vol.2, 1985.
- Muslim, H. *Sahih Muslim*. Beirut: Dar al-Kutub al-'Ilmiyyah. Vol.4, n.d..
- Sahnun. A. S. *al-Mudawwanah al-Kubra*. Dar al-Kutub al-'Ilmiyyah. Vol.2, 1994.