

**JURIDICAL IMPACT OF `URF ON  
FAMILY LAW: AN APPLIED JURISTIC  
FRAMEWORK FOR LOCAL *FIQH***

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# Position statement

`Urf being a subsidiary source of fiqh not only has enriched family fiqh in terms of making good local customs as part of its juristic corpus but also has played significant role on grounding revealed textual laws into day-to-day matters of family affairs. This is lucidly vivid from some paradigmatic examples of juristic issues discussed by the classical fuqha. For some lessons to be learnt from within the Islamic legal heritage for contemporary discourse on local family fiqh , we delineate some of such instances.

# `Urfi grounded rulings...

**1- Opposing the Stipulation of the Uprightness of Wali's Character-** Hanafiyyah and Malikiyyah argued 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”( differently construed the hadith of wali murshid on the point).

لا نكاح إلا بولي مرشد

**2- On the rationale for condition of marriage compatibility on the part of a man** and not of a woman,

ألا لا يزوج النساء إلا الأولياء ، ولا يزوجن إلا من الأكفاء

**the argument was `urfi:** “ 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....”

“ 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.

### **3-The Minimum Age of Marriage:**

In the absence of natural signs of puberty (*blugh*), the jurist differed on the minimum legal 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.

Abu Husayn maintains that in spite of construing some legal texts in support of such juridical conclusions, the classical jurists basically relied on '*urf*, i.e., on the basis of what was known to them by induction to be the age of *bulugh* for an average girl and boy in their localities at that time.

**4-On the Judicial Dissolution of a Missing Person's Marriage** ( jurists prescribe demise of all his contemporaries , waiting for four years).

- امرأة المفقود امرأته حتى يأتيها البيان -

Amru (n.d.) commented :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 because it is a question of the customary way of searching and finding a missing person.

## 5- on the amount *mut`ah*:

لَا جُنَاحَ عَلَيْكُمْ إِنْ طَلَّقْتُمُ النِّسَاءَ مَا لَمْ تَمْسُوهُنَّ أَوْ تَفْرِضُوا لَهُنَّ فَرِيضَةً  
وَمَتَّعُوهُنَّ عَلَى الْمَوْسِعِ قَدَرَهُ وَعَلَى الْمُقْتِرِ قَدَرُهُ مَتَّعًا بِالْمَعْرُوفِ حَقًّا  
عَلَى الْمُحْسِنِينَ

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 Hanabilah, proposed its components as things like a maid and dress...

## 6-the minimum amount of nafqah:

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).

وَعَلَى الْمَوْلُودِ لَهُ رِزْقُهُنَّ وَكِسْوَتُهُنَّ بِالْمَعْرُوفِ



## 7-On the duty of child breastfeeding:

وَالْوَالِدَاتُ يُرْضِعْنَ أَوْلَادَهُنَّ حَوْلَيْنِ كَامِلَيْنِ <sup>ط</sup>لِمَنْ أَرَادَ أَنْ يُتِمَّ  
الرَّضَاعَةَ

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.

## 10-On the Need for Empirical indicator to Establish Paternity (*Nasab*)-

الْوَلَدُ لِلْفِرَاشِ وَلِلْعَاهِرِ الْحَجَرُ

The majority argued that the general import of the hadith (The child is the bed's and for the fornicator is the stone" ) in question had 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(`aqd) which usually takes place in public.

# Implications for local family fiqh

`Urf as a subsidiary source of ijtihād can dynamically contribute to the discourse on local family fiqh by:

- accommodating sound and useful *'adat* within the frame of textual laws as Malikiyyah did in the case of ruling on child breastfeeding by the mother;
- balancing gender participation for moral and material wellbeing of the household 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 demand; and
- Legitimizing genuine local *'urf* in family *fiqh* within the boundaries of the *Shari'ah* legal texts and their purposes for building strong family and producing balanced progeny.