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Reality Jurisprudence and Its Impact on Legalizing Matrimonial Property

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Abstract--This research paper discusses the jurisprudence of reality and the reality of legalizing matrimonial property, along with expected familial problems upon application of matrimonial property. It concludes that it is prohibited to legalize or codify matrimonial property. The necessity of establishing research centers that follow the fatwa institutions or academies. It is no longer sufficient for understanding reality to follow up on social, historical, political, and possibly economic and medical studies subject to jurisprudence research. Rather, it has gone beyond that into the necessity of engaging realistic critical study.

Keywords--jurisprudence, legalization, property, reality, spouses.

Introduction

It is no longer sufficient in reality jurisprudence to have an accurate understanding of such reality and its constituents and relations. Rather, it has also become necessary to accurately understand the factors creating such reality, just as it has become necessary to consider the consequences of such reality and the potential results of applying certain jurisprudential rules to reality.

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Definition of reality jurisprudence

Reality jurisprudence, exactly like jurisprudence as a field in general, means understanding reality and introducing certain rules to it, or else it would be nothing more than abstract conceptions or thoughts. As a matter of fact, jurisprudence is the process of judging the reality. Hence, Reality jurisprudence means knowing the practical legal rulings acquired through detailed evidence. Undoubtedly, such rulings are specific to respective reality; otherwise, when the rulings conflict with the reality, it would be sort oblivion rather than sound jurisprudence. Naturally, all the inferences from the general evidence, including custom, consideration of the outcomes, blocking excuses, balancing between interests and evils, and the fulfillment of the objectives are contained in a relationship based on an understanding of reality, knowing that reality is the grounds in which rulings shall be embedded (Heffron & Talus, 2016; Kawalek, 2020).

Ibn al-Qayyim said in *I'lām al-Mwaqqi'īn*, "Neither the Mufti nor the Ruler can issue a fatwa and judge the reality except through two types of understanding: One of them is understanding reality and comprehending its respective rulings, and inferring sure knowledge of real occurrences, with clues, signs and indications, in order to fully grasp it. The second type is understanding what is due in such reality, which is an understanding of the Judgment of Allah that He has dictated in His Book or through the words of His Messenger (peace be upon him) in this reality, and then apply one of them to the other (rulings to occurrences). A jurist who exerts efforts and exhausts capacity in doing so, will not go unrewarded, but would rather be given one or two rewards. The true scholar is the one who, through knowledge of reality and understanding it, is able to know the rule of Allah and His Messenger" (Al-Qayyim & Abdullah, 1968).

The relation between reality jurisprudence and detailed evidence Inferring rulings through Qur'an verses (understanding causes of revelation)

Abdul Razzāq reported that Qudāmah ibn Maẓ'ūn, then governor of Bahrain, when accused of drinking wine, approached 'Umar ibn Al-Khaṭṭāb and said to him, "If I drank wine as they claimed, you would not be entitled to flog me, since Almighty Allah says, 'There is not upon those who believe and do righteousness [any] blame concerning what they have eaten [in the past] if they [now] fear Allah and believe and do righteous deeds, and then fear Allah and believe, and then fear Allah and do good; and Allah loves the doers of good' (Sarwar, 2011)." Then, 'Umar commented, "You misconstrued the verse, since if you fear Allah you would have avoided what He has forbidden for you" (Mujber et al., 2004; Snyder, 1984).

So, the verse, "There is not upon those who believe and do righteousness [any] blame concerning what they have eaten [in the past] if they [now] fear Allah and believe and do righteous deeds, and then fear Allah and believe, and then fear Allah and do good; and Allah loves the doers of good," was revealed with apparently general terms; yet the Qur'anic context and the reason behind its revelation indicate that it is related to a group of Muslims who died while having traces of wine in their bellies, before the revelation of the command forbidding it. Hence, the verse was an excuse for them and an argument against the rest of the

Muslims. This is asserted by the Hadith reported by Al-Bukharī and Muslim that when some Muslims said, “Some (Muslims) died while wine was in their stomachs,” Almighty Allah revealed the verse, “There is not upon those who believe and do righteousness [any] blame concerning what they have eaten [in the past]” (Al-Bukhari & Al-Sahih, 1998).

The relation between reality jurisprudence and reasoning based on the Prophetic Hadith (understanding the reason behind the Hadith)

An example to this Hadith-based reasoning is the Prophet’s Hadith, “I disassociate with whoever lives amongst the polytheists and disbelievers.” Some contemporary scholars conceived it literally as meaning religious disassociation, while it is interpreted by the report narrated by Abu Dāwūd, Ahmad and At-Tirmidhī from Jarīr that he said, “Allah’s Messenger sent an expedition to Khath’am. Some people sought protection by having recourse to prostration, and were hastily killed. When the Prophet (peace be upon him) heard that, he ordered half the blood-wit to be paid for them, saying: I disassociate with any Muslim who stays amongst the polytheists. They asked: Why, Messenger of Allah? He said: Their fires should not be visible to one another [they should not be close to each other]” (Abū Dawūd, 2009). Hence, it is known that disassociation means non-responsibility for paying blood money; it has nothing to do with religious disassociation.

Relation between reality jurisprudence and consensus-based reasoning

The relation between reality jurisprudence and consensus-based reasoning is grounded on understanding the reality of an issue where the respective ruling is unanimously agreed upon and the extent of its concurrence with the issue under scrutiny. An example to this is unanimous agreement to the impermissibility of having more than one caliph when the caliphate was the system uniting the Muslims and before the Islamic countries of different geographical locations multiplied. Then, when reality changed and Islamic countries multiplied, each country had its own caliph or president who is visited with authority and possesses the rights thereof (Wang et al., 2018; Cerdá et al., 2012).

The relation between reality jurisprudence and Qiyas (analogy)

Analogical reasoning draws on understanding the reality of the secondary ruling and of the primary ruling along with the grounds for each. Ash-Shatibī introduced as evidence of that the reports where the Prophet (peace be upon him) was asked on different occasions about the best deeds, and his answers varied. So, if the varying answers to the same question were taken literally, they may indicate contradiction, were it not for the different realities surrounding each case in which the question was raised (Szczeniak, 2002; Candes, 2008).

The relation between reality jurisprudence and custom-based reasoning

Custom-based reasoning draws on accurate understanding of the reality of respective customary practices, which differ according to time and place. In his I’lām Al-Muwaqī’in, Ibn Al-Qayyim noted that “whatever customary practices

change, you should take it into account, and whatever of it is dropped you should abandon it. Do not stick to bookish reports throughout your life. Rather, if a man from a different region than yours approaches you asking for fatwa, do not give him a fatwa based on the conventions of your country, but ask him about the customary practices of his own country and issue your fatwa accordingly and to the disregard of your own custom or what is stated in your books. It is claimed that such is the squarely right stance. While rigidly sticking to reported statements is an aberration in religion and ignorance about the objectives of antecedents and earlier scholars” (Alsharif, 2020; Suwija et al., 2019).

Al-Qarafi points out in his *Al-Furūq* subtle understanding of the reality of customary practices saying, “A Mufti in each era that is distanced from its preceding generation should investigate customary practices to know whether they are still living or have turned obsolete. If they are still living practices, he should issue his fatwa based on them, or else he should stop drawing on them in issuing fatwas. Such is the rule regarding rulings based on consequences... So, consider this point that is overlooked by many jurists who issue their fatwas according to the views of the earlier Imam which were built of examination of the customs in their time. So, later generation jurists adopted such earlier fatwas despite the changes in customs, and hence they are mistaken and are deviating from consensus. Indeed, fatwas built on obsolete realities go against consensus” (Weitzenkamp et al., 1997; Rintala et al., 2006).

Necessary alertness to reality falsification attempts

In light of the colossal developments in influential means of communication, both visual and auditory, some falsities are transformed into facts and fiction is made to appear as reality in manifest disfiguring of truth. Hence, a Mufti should be alerted to avoiding deceit of those disfiguring realities. In this regard, Ibn Al-Qayyim notes in his *I'lām Al-Muwaqqi'īn*, “So, if he (i.e. the Mufti) is not cognizant of affairs and is unaware of the people who picture the wrongdoer as wronged and the right as wrong and vice versa, he would be deceived by tricks and cunning means (Al-Ka'bi & Khalifah Ali, 2010). Accordingly, the atheist would be portrayed to him as a sincere believer and the liar as an honest person. Likewise, every trickster would don a false veneer, hiding underneath his sinfulness, lies and wickedness. The Mufti, however, due to his unawareness of the people's realities, their conditions and their traditions and customary practices, would not be able to tell which is which. In fact, he should be aware of the people's cunning means, their deceit, their cheating, their traditions, and their customary practices. For, the fatwa changes with change in time and place, potential consequences, and different conditions. All of these are recognized by the religion”. On the other hand, reality jurisprudence no longer means prevalent customary practices in a certain place in particular, but rather means knowledge about global affairs and the results of population conferences and charters of feminist groups around the world (Salem et al., 2021; Vorontsov et al., 2021).

Reality of codifying husband-wife common property ownership

Codification of matrimonial property started in France in 1803, before which women in Europe had no independent financial estate or any other financial

rights (<https://fr.wikipedia>). Then, with recent development, matrimonial property has become acknowledged in the Western legislative system. This was far from the Islamic countries, since the Muslim woman enjoyed her full rights that the Western woman was denied. A key characteristic of Islamic financial system is the independent financial estate of each spouse, as Almighty Allah says, “For men is a share of what they have earned, and for women is a share of what they have earned” [Ibn-Katīr & Muṣṭafā as-Saiyid Muḥammad \(2000\)](#), and “[in case] you have given her a great amount [in gifts], do not take [back] from it anything. Would you take it in injustice and manifest sin?”

Then, in 1979, the United Nations General Assembly adopted the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Article Thirteen of this convention demanded that women and men be given the right to family benefits on the basis of equality between them. This article was rejected at the time by Islamic countries on the grounds that legalizing matrimonial property contradicts the Islamic principle of independent estate of the husband and the wife ([Al-Qarafi & Al-Ibbas, 2001](#); [Boubakeur, 2018](#)). This in turn goes against the general order of Islamic legislation, which will affect the full capacity granted by the Shari‘ah to every human being to dispose of his/her money completely freely, because it will impose restrictions on the authority of the spouses to dispose of their money after it has become common money between them (As-Siddiq). Yet, following this convention, some Islamic countries began to legalize matrimonial property, although there was no discussion in the Islamic world before about the need to legalize it. What is meant by matrimonial property is that whatever is gained by either the husband or the wife during their marriage becomes a common property of them both. Here, matrimonial property is defined as “the money earned by the two spouses either directly or indirectly during their marital life.” (Shahid 5). Familial problems expected upon enforcement of matrimonial property law:

- Financial penalties such as fines, violations, and benefits imposed on one of the spouses.
- What one of the spouses gets during the marriage through inheritance, wills, gifts, or rewards.
- The effect of major change in the size of the income of one of the spouses, due to the change in the source of income or other reasons.
- The impact of the difference between spouses in how to manage and invest their matrimonial property on marital life.
- The impact of the deviation of one of the spouses financially, by including in his money what the other party thinks is forbidden or suspicious.
- The effect of one of the spouses withdrawing from the financial partnership agreement, or the change in mutual consent.
- The effect of spouses retaining bills and documentation for everything, no matter how small, to avoid betrayal and to prove his/her personal right when a dispute over marital life between them occurs.
- Ruling on legalizing matrimonial property
- It is evident from Western and other experiences in legalizing matrimonial property that such legalization leads to a wide range of prohibitions imposed by Islamic law, including:

- The breakdown of familial and marital relationships due to the different nature of the two contracts: marriage and financial partnership. The former involves affection and mercy and bountifulness, while the latter involves financial parsimony, quest for financial benefit through accountability and control. The latter approach may transform psychological tranquility turning marital life into suffering and psychological estrangement that has negative implications for societies, as is the case in Western countries.
- People's reluctance to get married and their attempt to fulfill their sexual desires away from marriage to evade the effects of this partnership, as is the case in Western countries. Another possibility is the person's choice of a spouse based on the amount of wealth owned by that spouse. This makes marriage based on material greed.
- Financial disputes, lawsuits and judicial charges that are expected upon divorce, as is the case in the countries that apply this law.
- The occurrence of injustice between the two spouses when one of them is the main source of wealth through his/her toil and labor. And while it may be thought that this law will achieve justice for the woman, still this is a mistake since the opposite is expected to happen. For if the husband loses his work or his income decreases, he will automatically turn to his wife's money for personal spending because it would have become a common money.
- The educational impact on the children after the marital relationship turns into an attempt to gain or to reduce material loss between the spouses as much as possible.
- The life-long financial partnership contract includes much risk and ambiguity, as the size of the future income of each of the spouses throughout their lives is known only to God. It also involves a breach of the condition of not contracting for the non-existent, which is the future income of both spouses throughout their lives.
- Violation of the inheritance system in Islamic law because it determines for each wife and husband half of the other's estate in all cases. This will go against and cause changes to what is established in Islamic Shari'ah regarding inheritance shares for the rest of the heirs, including the children and the relatives (see Al-Ka'bi).

Based on all previous effects and prohibitions that are expected to occur upon legalizing the matrimonial property, it becomes necessary to maintain that this legalization is prohibited when we aim to block the means leading to evil and considering its potential outcomes (Subiyanto, 2016; Wijaya, 2016).

Conclusion and Findings of the Study

- The necessity of establishing research centers that follow the fatwa institutions or academies. It is no longer sufficient for understanding reality to follow up on social, historical, political, and possibly economic and medical studies subject to jurisprudence research. Rather, it has gone beyond that into the necessity of engaging realistic critical study.

- It is prohibited to legalizing matrimonial property in order to prevent the means leading to evil and taking into account the consequences and prohibitions expected to occur upon the application of this law.

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