

How to Cite:

Soliman, R. A. M. M., Abdelgayed, A. F. R., Elbahrawi, S. M. M. M., & Salem, K. A. S. (2021). Guidelines for fatwas related to emergent issues affecting Muslim families: Matrimonial property in light of al-'Urf, ṅal-Masalih and al-Ma'alat. *Linguistics and Culture Review*, 5(S4), 2132-2138. <https://doi.org/10.21744/lingcure.v5nS4.1930>

Guidelines for Fatwas Related to Emergent Issues Affecting Muslim Families: Matrimonial property in Light of al-'Urf, ṅal-Maṣālih and al-Ma'ālāt

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Abstract--This study examines the issue of matrimonial property when a spouse claims a share of the other's wealth in cases of divorce, death, or husband's second marriage. That is different from other rights entailed by the marriage contract like *nafaqah* (alimony), *mut'ah* (post-divorce gift) and both prompt and deferred parts of the dower (*muqaddam al-ṣadaq wa mu'akharuh*). Studying this issue in light of 'urf (custom), *al-maṣālih al-mursalah* (public interest) and *al-m'ālāt* (consequences), I found that these types of evidence or Ijtihad instruments do not establish this financial right for any one of the spouses. The financial rights secured by *Shari'ah* during spouses' life by virtue of the marriage contract, or after they pass away through inheritance, are not matched by any positive law. Therefore, Muslims do not need such legislations that do not bring any real interest for spouses but rather result in numerous harms.

Keywords--emergent issues (Al-Nawāzil), family fiqh, Fatwā, matrimonial property, Muslim families.

Introduction

All praise is due to Allah; we praise Him, pray for His help and guidance and seek His pleasure; we rely on Him and gratefully acknowledge all His goodness. We testify that there is no true god but Allah; He has no partners. And we testify that Muhammad is His servant and Messenger. Emergent issues related to family are numerous and cannot be examined adequately in this brief paper. What this study will focus on is the matrimonial property in light of *'urf* (custom), *al-maṣālih al-mursalah* (public interest), *al-m'ālat* (consequences), the proper understanding of reality, and other guidelines for contemporary issues fatwa. The paper seeks to find the rulings related to matrimonial property in case of marriage termination by death or divorce (Goncharova et al., 2021).

Problem statement

The problem of this research is related to matrimonial property; in some Muslim countries, it is the custom that the wife takes half of the husband's property if he dies or divorces her. By the same token, the husband gets half of the wife's property if the divorce is based on her request, or if she dies. The question is whether this practice has any basis in *Shari'ah* or not.

Research questions

- When a husband dies, does his wife have the right to claim financial rights other than those stipulated by the *Shari'ah* such as *nafaqah* (alimony), *mut'ah* (post-divorce gift), *mu'akhar al-ṣadaq* (the deferred part of the dower) and the inheritance?
- Does the husband have the right to claim financial rights other than those stipulated by the *Shari'ah* such as the dower refund in case of *khul'* or the inheritance in case of the wife's death?

Research objectives

This research attempts to answer this main question about matrimonial property in the event of divorce or death, and the questions that stem from this main question.

Research outline

This research is composed of an introduction, three sections, and a conclusion. The introduction presents the research problem and goals and the questions that the paper attempts to answer. Section one examines *'urf* and its effect on the matrimonial property issue. Section two discusses *al-maṣālih* and their effect on matrimonial property. Section three focuses on *fiqh al-ma'ālat* (*fiqh* of acts' consequences) and its effect on the matrimonial property issue. The conclusion presents the research findings (Goldman, 2011; González & Viitanen, 2009).

***Al-‘urf* and its effect on contemporary issues related to family jurisprudence**

Linguistically, *al-‘urf* and *al-‘irf* mean patience, like in the statement, "he was struck by a calamity; yet he proved to be *saburan ‘arufan*, i.e. patient." *Al-‘urf* is the opposite of *al-nukr* (vile things); it is said, "*awlahu ‘urfan*", i.e. he did him a favor. *‘Urf* is reported to mean a favor you give and do. *Al-ma‘ruf* is a synonym of *al-‘urf*. *Al-‘urf* also means a smell, regardless of being good or bad (Lisan Al-‘Arab, Ibn Manzur). Technically, *‘urf* refers to sayings and actions that society is familiar with, is accustomed to and practices (Abdul Karim Zaydan: 252) (Ellman & Lohr, 1998; Karjono et al., 2017; Frémeaux & Leturcq, 2018).

Scholars position on ‘Urf

Perhaps the schools that applied *‘urf* most often are the Hanafī and Malikī schools, followed by the Shafi‘ī and Hanblī schools. I could not find any scholar who rejected *‘urf* in the process of *ijtihad*. After studying the position of the second Hijri century scholars on *‘urf*, Dr. Al-Bultagi states: "It is no wonder that all *fiqh* scholars established many of their *fiqhī* views on the customs prevalent in their societies. That applies to all *fiqh* scholars in the second century with no exception" (Dr. Salah Sultan: 99) (Buckle et al., 1996; Yeates, 1999; Hetherington et al., 1985).

Conditions of considering ‘Urf

- It must be in practice consistently (*muttarid*) or mostly (*ghalib*).
- It must be universal (*‘ām*).
- It must not violate a *Shari‘ah* text (*naṣṣ*).
- There must not be a stipulation contrary to it.
- It must be in practice at the time of the transaction initiation.

Based on the above definition and conditions of *‘urf*, it is clear that the practice of giving a spouse a share of the other spouse's property other than the rights stipulated by the *Shari‘ah*, which is prevalent in some Muslim countries, is not valid for the following reasons:

- One of the conditions of an applicable *‘urf* is to be free from any conflict with the *Shari‘ah*; yet, this practice clearly violates the *Shari‘ah* since it imposes a liability on spouses that is not obligated by Allah.
- The *‘urf* must be in practice at the time of the transaction initiation. These conditions did not exist when the marriage was contracted; had they existed, still they would have been invalid because of their conflict with the *Shari‘ah*.
- There must not be a clear stipulation contrary to the *‘urf*; since such stipulation does exist in this case, the *‘urf* is not recognized.
- The *‘urf* must be universal. The custom in question is limited to some Muslims only, so it cannot be codified as a general law for all Muslims.
- The *‘urf* must be in practice consistently or mostly, which is not the case here.

***Al-M'ālāt* (Consequences) and their effect on financial rights not prescribed by Allah**

Al-M'ālāt is the plural of *m'āl*. The word's root is '*āla*, *ya'ūlu*, *awlan* or *ma'ālan* which means to return. *Al-Maw'il* is a place to return to. *Iyāl* is a derivative noun. It is said, "*awwal al-hukm ila ahlihi*" which means to refer the decision and judgment to those who are qualified. In this context, *ma'ālāt* indicates the consequences of an action. 'Considering the consequences' means heeding the effects and implications of an act and its consequences to adapt the *fiqhī* ruling to such consequences no matter whether such consequences have been intended or not. (<https://www.alukah.net/sharia/> Walid bin Fahd Al-Wadaan).

Al-Shaṭībī pointed out that a mufti ought to be careful and should consider the consequences of his fatwa. Sometimes a legitimate act, meant to realize a benefit or ward off harm, leads to an opposite result. By the same token, some acts that are illegal because they result in harm or because they prevent an interest do have a different consequence (Al-Mwafaqat: 4/ 160) (Smith, 2007).

Considering the issue under study from a *fiqh al-ma'ālāt* perspective, we find that it is not lawful to impose certain financial obligations on a spouse in cases of divorce or death other than the rights established by the *Shari'ah* due to the following reasons:

- This law leads to undermining the objectives of the Islamic inheritance system, which grants younger generations, expected to live longer, more than older generations.
- If codified, this law is expected to dissuade people from marriage, especially the rich who will be worried about their wealth.
- It will make married couples eager for divorce or for the death of their spouses; it may cause them to press their spouses into divorce.
- This matter will lead to imitating non-Muslims as it is an established law among them.
- Combining the divine, infallible system of inheritance with this law will create a mix that is neither related to the divine system nor to the positive law.
- Some spouses may resort to undocumented marriage, known as customary marriage, to escape this unfair law.

***Maṣlahah* and its role in legislating financial rights not stipulated by Islam**

Istiṣlah stands for formulating *fiqhī* rules in harmony with *al-maṣalih al-mursalah* (public interest). *Al-Maṣlahah al-mursalah* indicates every interest intended by the Lawgiver; yet no specific text in the *Shari'ah* approves or rejects it particularly or its type. So, it is part of the general interests that bring about benefits and prevent harms, a goal that the *Shari'ah* aims at realizing in general; the *Shari'ah* texts and principles indicate the necessity of considering and applying such interests in managing life affairs. However, the Lawgiver has not specified the details or categories of these interests which is the reason they are called "*mursalah*", that is, indefinite and unlimited (Mustafa Al-Zarqa: 39) (Maksymova et al., 2021; Filladsen & Jordenzen, 2020).

The guidelines regulating the application of *al-maṣlahah* show that the question at hand, namely, imposing financial obligations on a spouse in the event of divorce or death other than the rights stipulated by Allah, do not fulfill the requirements and conditions of the *maṣlahah* due to the following reasons:

- The benefit that will be attained by a spouse in the event of death and divorce is a fake interest (*maṣlahah mutwahhamah*); it is not a real interest.
- Even if considered a real interest, it is not general. It is a specific interest that causes greater harm to the rest of the family members.
- Most importantly, this interest conflicts with the rules of *Shari'ah*.

Conclusion and Findings

- Each spouse is financially independent from the other and has the right to dispose of his/her wealth in any way approved by Islam.
- The property owned by each spouse, whether before or during marriage, is his/her own; it transfers to his/her legal heirs according to the *Shari'ah* inheritance system.
- Each spouse may give part of his/her property willingly to the other if he/she likes.
- The wife has the right to claim damages for harms caused by her husband's divorce or death; she may also claim her own money with which she participated in the purchase, development or investment of matrimonial property if she establishes evidence for this right (Seltzer & Garfinkel, 1990; Ainslie, 2015).
- The law in question leads to undermining the objectives of the Islamic inheritance system, which grants younger generations, expected to have longer life, more than older generations.
- If codified, this law is expected to dissuade people from marriage, especially the rich who will be worried about their wealth. At a time when immorality has become easy, accessible and costless, such law makes marriage more complicated and puts spouses at the risk of losing their property in cases of partner's divorce or death.
- Such law will make spouses eager for divorce or for partner's death; it can lead to coerced divorce or even murder in hope for the great wealth to be acquired after the partner's divorce or death.
- This practice will lead to imitating non-Muslims; it is an established law among non-Muslims that the woman takes half of the husband's property in case of divorce (Udu et al., 2016).
- Combining the divine, infallible system of inheritance with this law creates something that is neither related to the divine system nor to the positive law.
- Some spouses may resort to undocumented marriage, known as customary marriage, to escape this unfair law which results in the loss of rights.
- Benefit attained by a spouse in the event of partner's death or divorce through this law is fake interest (*maṣlahah mutwahhamah*); it is not a real interest even if it seems so at the first glance because the aversion from marriage created by this law and the deprivation of heirs from their due shares give rise to greater harm and bigger damage.

- Even if we consider it a real interest, it is not a universal interest. It is a specific interest that causes greater harm to the rest of the family members.
- Most importantly, this interest conflicts with the rules of *Shari'ah* which gives each party their due rights during marriage and after marriage termination (Gede Budasi & Wayan Suryasa, 2021; Raysuni, 1991).

References

- Ainslie, M. J. (2015, September). The 2009 Malaysian female circumcision fatwa: state ownership of Islam and the current impasse. In *Women's Studies International Forum* (Vol. 52, pp. 1-9). Pergamon. <https://doi.org/10.1016/j.wsif.2015.06.015>
- Buckle, L., Gallup Jr, G. G., & Rodd, Z. A. (1996). Marriage as a reproductive contract: Patterns of marriage, divorce, and remarriage. *Ethology and Sociobiology*, 17(6), 363-377. [https://doi.org/10.1016/S0162-3095\(96\)00075-1](https://doi.org/10.1016/S0162-3095(96)00075-1)
- Ellman, I. M., & Lohr, S. L. (1998). Dissolving the relationship between divorce laws and divorce rates. *International Review of Law and Economics*, 18(3), 341-359. [https://doi.org/10.1016/S0144-8188\(98\)00014-3](https://doi.org/10.1016/S0144-8188(98)00014-3)
- Filladsen, J., & Jordanzen, P. (2020). Translation based on cultural aspect: a study regarding how translating text different traditional in two countries. *Applied Translation*, 14(1), 16-22. Retrieved from <https://appliedtranslation.nyc/index.php/journal/article/view/1064>
- Frémeaux, N., & Leturcq, M. (2018). Prenuptial agreements and matrimonial property regimes in France, 1855-2010. *Explorations in Economic History*, 68, 132-142. <https://doi.org/10.1016/j.eeh.2017.10.004>
- Gede Budasi, I. & Wayan Suryasa, I. (2021). The cultural view of North Bali community towards Ngidih marriage reflected from its lexicons. *Journal of Language and Linguistic Studies*, 17(3), 1484-1497
- Goldman, S. R. (2011). Choosing and using multiple information sources: Some new findings and emergent issues. *Learning and Instruction*, 21(2), 238-242. <https://doi.org/10.1016/j.learninstruc.2010.02.006>
- Goncharova, A., Fursa, S., Chuikova, V., Danylenko, O., & Hlushchenko, N. (2021). Research of the experience of legal regulation and use of European inheritance certificates of the regulation on succession. *Linguistics and Culture Review*, 5(S3), 554-573. <https://doi.org/10.21744/lingcure.v5nS3.1553>
- González, L., & Viitanen, T. K. (2009). The effect of divorce laws on divorce rates in Europe. *European Economic Review*, 53(2), 127-138. <https://doi.org/10.1016/j.euroecorev.2008.05.005>
- Hetherington, E. M., Cox, M., & Cox, R. (1985). Long-term effects of divorce and remarriage on the adjustment of children. *Journal of the American Academy of Child Psychiatry*, 24(5), 518-530. [https://doi.org/10.1016/S0002-7138\(09\)60052-2](https://doi.org/10.1016/S0002-7138(09)60052-2)
- Karjono, M., Bakta, I. M., Karmaya, I. N. M., Pradnyaparamita, D., & Murtiananingsih, .-. (2017). Force, support, and endorsing factors of early marriage in adolescent Sasak (Sasak Ethnic) in Central Lombok. *International Research Journal of Engineering, IT & Scientific Research*, 3(2), 171-178. Retrieved from <https://sloap.org/journals/index.php/irjeis/article/view/545>
- Maksymova, N. Y., Hrys, A., Maksymov, M. V., Krasilova, Y. M., & Udovenko, J. M. (2021). Causes and criteria of disharmonies in family system

- functioning. *Linguistics and Culture Review*, 5(S4), 300-310.
<https://doi.org/10.21744/lingcure.v5nS4.1578>
- Raysuni, A. (1991). Nazariyat al-Maqasid inda al-Imam al-Shatibi.
- Seltzer, J. A., & Garfinkel, I. (1990). Inequality in divorce settlements: An investigation of property settlements and child support awards. *Social Science Research*, 19(1), 82-111. [https://doi.org/10.1016/0049-089X\(90\)90016-C](https://doi.org/10.1016/0049-089X(90)90016-C)
- Smith, I. (2007). Property division on divorce with inequity aversion. *International Review of Law and Economics*, 27(2), 111-128.
<https://doi.org/10.1016/j.irl.2007.06.006>
- Udu, H., Kusuma, I. N. W., & Alifuddin, M. (2016). Inheritance strategy for endangered oral tradition in the archipelago: (case study in inheritance of kangkilo oral tradition). *International Journal of Linguistics, Literature and Culture*, 2(3), 69-76. Retrieved from
<https://sloap.org/journals/index.php/ijllc/article/view/119>
- Yeates, N. (1999, November). Gender, familism and housing: matrimonial property rights in Ireland. In *Women's studies international forum* (Vol. 22, No. 6, pp. 607-618). Pergamon. [https://doi.org/10.1016/S0277-5395\(99\)00071-0](https://doi.org/10.1016/S0277-5395(99)00071-0)