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Al-Takyiif Al-Fiqhī (Fiqhī Characterization) of Matrimonial Property in Islamic Jurisprudence

Mahamed Fathy Mohamed Eletrebi

Universiti Islam Antarabangsa Sultan Abdul Halim Mu'adzam Shah (UniSHAMS), Kuala Ketil, Kedah, Malaysia

Hassan Suleiman

International Islamic University of Malaysia (IIUM), Gombak, Selangor, Malaysia

Abstract---*Urf* (custom) and *al-maṣlahah al-mursalāh* (public interest) are among the sources of law disputed by *uṣūlīs*; however, the majority of scholars are aware that public interest and its guidelines revolve around the *Shari'ah* Objectives and that custom is legally authoritative and can be referred to for judgment. It is widely known that the statement, "*Al-'ādatu Muhakkamah*", is one of the major universal maxims for the *Shafi'ite* school. Undoubtedly, referring to '*Urf* and *al-maṣlahah al-mursalāh*, within the legislative framework and according to the divisions recognized by *uṣūlīs*, aims at the realization of the public interests, and in some cases, private interests of certain society groups. The research seeks to reach a sound *fiqhī* characterization (*al-takyif al-fiqhī*) for the matrimonial property in view of two sources of law, namely custom and public interest, and for the rights of each spouse to the matrimonial property while marriage exists or in case of separation due to divorce or death.

Keywords---*al-maṣlahah*, *Al-Takyif al-Fiqhī*, *Al-'Urf*, jurisprudential, matrimonial property, *Shari'ah*.

Introduction

Urf (custom) and *al-maṣlahah al-mursalāh* (public interest) are among the sources of law disputed by *uṣūlīs*; however, the majority of scholars are aware that public interest and its guidelines revolve around the *Shari'ah* Objectives and that custom is legally authoritative and can be referred to for judgment. It is widely known that the statement, "*Al-'ādatu Muhakkamah*", is one of the major universal maxims for the *Shafi'ite* school. Undoubtedly, referring to '*Urf* and *al-maṣlahah al-mursalāh*, within the legislative framework and according to the divisions recognized by *uṣūlīs*, aims at the realization of the public interests, and in some

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Corresponding author: Eletrebi, M.F.M.; Email: fathyeletrebi@unishams.edu.my

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cases, private interests of certain society groups (Marcus, 2019; Sterns, 2000; Hashim, 2013).

Research objective

The research seeks to reach a sound *fiqhi* characterization (*al-takyīf al-fiqhī*) for the matrimonial property in view of two sources of law, namely custom and public interest, and for the rights of each spouse to the matrimonial property while marriage exists or in case of separation due to divorce or death (Frémeaux & Leturcq, 2018; Yeates, 1999). The importance of this paper stems from this objective of the study (Yusof & Jusoh, 2014).

Reason for Choosing the Topic

- The judicial and legal disputes related to matrimonial property that are continuously raised in both *Shri'ah* and secular courts of law.
- Clarifying the *fiqhi* characterization of the matrimonial property in few of the *ijtihadī* sources of law, including *'urf* and *al-maṣlahah al-mursalah*.

Research questions

- What is the definition of matrimonial property, bearing in mind the financial independence of each spouse before marriage?
- Does any spouse have the right to claim part of the matrimonial property while marriage exists?
- In case of separation due to divorce or death, is it lawful for a spouse to claim part of the private wealth of the other on the basis of being a partner in it?
- What is the effect of custom and public interest in the *fiqhi* characterization of matrimonial property in Malaysia?
- What is the wisdom behind legislating the right to claim matrimonial property when separation is caused by the woman's request or by the man's polygamy?

Previous studies

- a. *Al-Tawjjuhāt al-Madaniyyah li Mudawwanat al-Ussrah – Maghanim wa Magharim: 10 Sanawat mina al-Taṭbiq*, 'Abdul Karīm al-Talib, Ed. 1
- b. *Shar'iyat al-Māl al-Mushtarak bayn al-Zawjain fi al-Fiqh al-Islamī wa al-Qanūn al-Malīzī*, Mu'alimīn Muhammad Shahid, Malaysian Journal of Syariah and Law, Volume 4, 2016.
- c. *Tadbīr al-Amwal al-Muktasabah bayn al-Zawjyn wifq al-naṣ al-Qanūnī wa al-'Amal al-Qaḍa'ī*, Fatimah Malūl, Mujallat al-Fiqh wa al-Qanūn, Volume 62, December 2017.
- d. *Tadbīr al-Amwal al-Muktasabah bayn al-Zawjin Hasab al-Maddah 49 mina al-Mudawwanah al-Maghribiyah*, Proceedings of a Symposium on matrimonial property and spouses rights on December 19, 2019.

Problem statement

This paper answers some of the questions mentioned above and attempts to solve a problem faced by the Malaysian society due to the legislation of claiming matrimonial property in case of separation through divorce, death or the man's desire for a second marriage, etc. (Waldron et al., 1996; Robles & Kiecolt-Glaser, 2003).

Research Methodology

This research applies the descriptive, inductive and analytical approach. The researcher defines and describes the matrimonial property in the Malaysian society context (Hayati & Caniago, 2012; Zainul et al., 2004). Next he inductively explores the *Shari'ah ijthadi* sources of law to reach the *fiqhī* characterization of the issue, from the researcher perspective, and to analyze its legitimacy aspects in order to infer its *Shari'ah* ruling.

Research outline

This research is composed of an introduction, two sections, conclusion and the references.

Foreword: research terms **Al-Amwāl al-Mushtarakah**

Linguistically: *al-Māl* is derived from "*māla, yamīlu*" which indicates what one likes; "*tamīlu ilayhi*" means to love it. Technically speaking, *Al-Amwāl* are the material objects or the properties that can be possessed and all the personal properties like lands, real estate, movable properties, etc.

Al-Musharakah

Linguistically, it is the infinitive form of "*shāraka*"; the phrase, "*ashraktuhu fī al-amr wa al-bay'*" means to make somebody your partner in a matter or a business. The jurists define "*al-mushārah*" as a common noun that is opposite to "*al-mu'awadah*", a term that refers to exchange transactions. Since marriage is established on the partnership of the spouses in the objectives and fate, it is considered rhetorically a form of partnership (Al-'Atrabī, 2012).

Al-'Urf

In language, "*Al-Ma'rūf*" is the opposite of "*al-Munkar*"; it means patience, high place, nice smell, description and succession (Ibn Manẓūr, 2003). Technically, it means the prevalence of a certain trait among people; it is what common sense testifies to its popularity and sound human nature accepts. It is said that *al-'Urf* is what souls acknowledge based on ration and it is what is approved by sound human nature (Abū Sunnah, 1992).

Al-Maṣlahah al-Mursalah

It is the interest that is neither approved nor rejected by specific evidence; yet, it doesn't lack supporting universal evidence, such as the *Sharī'ah* Objectives and maxims (*maqasid al-Sharī'ah wa Qwa'iduhā*). The word "*mursalah*" means "renewed" (Biltagi 2009).

Effect of public interest on the Fiqhi characterization of matrimonial property

Uṣulīs define public interest (*al-maṣlahah al-Mursalah*) as the interest that is neither approved nor rejected by specific evidence. It can be used to support new means and regulations provided the following:

- It must not conflict with a text (*naṣṣ*) or consensus (*ijmā'*).
- No equal or more significant interest contradicts it.
- It cannot apply to fixed, unchangeable rulings, like specified quantities and obligations,
- It should be intended to maintain and protect the objectives of *Sharī'ah* (Al-Shanqīṭī. 1978: 6-169)

In view of the above conditions, I will explain below the effect of the public interest on the *fiqhī* characterization of the matrimonial property. Undoubtedly, the protection of wealth is one of the demands and objectives of *Sharī'ah*; money is the second pillar of a state and a necessity for life continuity. Marital property is one of the types of wealth as defined in the foreword (Suryasa, 2019). The *Sharī'ah* objective of wealth protection which is meant to maintain money and save it from loss, damage, destruction or coerced spending covers matrimonial property (Sudama, 2020). The spouses' joint ownership of and care for the matrimonial property is necessary for laying the foundations of the family and maintaining it; it makes it possible to care for and support the children and to provide them high quality education; it enables the family to attain all other forms of family welfare as well (Sobko et al., 2021).

Now, if one of the spouses decides to terminate the marriage relationship for a valid reason, like the husband's application of his right to divorce or the wife's use of her right to separation due to harm affected by the husband to her –for example, when he fails to fulfil his obligations to her or if he decides to have a second wife or because the wife hates something about him- in such a case, he or she needs to return his/her partner's property if its amount and description is known, such as a share of real estate, car, or money contributed by the wife as a business share not as a gift. That is intended to protect the legal rights, to achieve the *Sharī'ah* objective of wealth protection and to honor the spouses' previous relationship. There is no harm, in the researcher's view, in codifying that in light of *al-maṣlahah al-mursalah* (Abu-Zahrah 1948: 232)

However, the real problem occurs when one of the spouses passes away, which is beyond the control of the two spouses. In this case, can public interest, represented here by the protection of wealth which is an objective of the *Sharī'ah*, be cited as a *Sharī'ah* proof for suspending the distribution of the wealth among

the deceased's heirs until the other spouse gets his/her share of the property, as practiced in Malaysia?

My answer, in view of the public interest conditions mentioned above, is no. Why? Because the property left by the deceased belongs only to Allah; the deceased no longer has the legal, let alone, real authority he/she used to possess during his/her life; he/she can no longer be held liable unlike the cases of divorce or separation. So, distributing wealth left by the deceased according to the instructions of the wealth Owner, namely Allah the Almighty, is one of Allah's limits that cannot be violated. Allah, the Almighty, said:

"These 'entitlements' are the limits set by Allah. Whoever obeys Allah and His Messenger will be admitted into Gardens under which rivers flow, to stay there forever. That is the ultimate triumph!
But whoever disobeys Allah and His Messenger and exceeds their limits will be cast into Hell, to stay there forever. And they will suffer a humiliating punishment." (An-Nisā' 13-14)

This passage follows verses 11 and 12 that explain the inheritance distribution and the legal shares of the ascendants, descendants and blood relatives. Therefore, if the living spouse possesses no document that predates the other spouse's death and that proves his/her rights, then his/her claim is not substantiated; moreover, it is a claim against a party who is unable to respond to it. In addition, it is an intervention in the distribution of the deceased's wealth which is a right peculiar to Allah. A Muslim can by no means encroach on this right under the pretext of enforcing the law or achieving the public interest through the objective of wealth protection. There is no room for using the public interest argument here due to the existence of a relevant *Shari'ah* text.

The effect of 'Urf on the *Fiqhī* characterization of matrimonial property

According to *Uṣūlīs*, 'Urf is something that prevails among people to such an extent that their minds and hearts accept it (Abū Sunnah 1992:8). 'Urf is a legislative, procedural method that is established on the principle of ease and hardship removal as well as protection of rights and fulfillment of duties. In this context, rights refer to any financial benefit protected by law. *Uṣūlīs* have stipulated a number of conditions for it: it must be an established right that is often consistent and that is effective and recognized at the time of the transaction initiation; there must not be any declaration to its contrary and it must not conflict with a definitive *Shari'ah* text (Al-'Atrabī 2012).

In light of the above conditions, we find that the Malaysian society, like other societies in Algeria, Morocco and Palestine, views matrimonial property acquired during valid marriage as practical custom ('urf 'amali); a recognized 'urf has the power of a stipulated condition. Thus, a spouse, or his/her legal representative like a natural guardian (*wali*), testamentary guardian (*waṣī*), the court-appointed curator (*muqaddam*), has the right to claim his/her share of matrimonial property in case of separation due to divorce, death or wife's decision of separation to protect herself or her children from harm caused by the husband's plan of second marriage. This has been affirmed by a number of legislative decisions issued by fatwa committees and councils and religious affairs administrations in most

Malaysian states (Ma'lamīn 2016). The basis of custom here is the generality of the verse: "men have the portion they have earned; and women the portion they have earned" (An-Nisaa' 4:32) (see the explanation of the verse in Al-Qurtūbī 1984 and Al-Shanqīṭī 1992).

Conclusion and Findings

This study reaches the following findings:

First, matrimonial property is the wealth earned by the spouses for the marriage's interest; it includes real estate, movables and securities.

Second, The *Sharī'ah* protects marriage and maintains it through love and affection first and foremost and then through legal and customary rights and duties.

Third, public interest plays a big role in decisions made by courts and reconciliation councils regarding the management of matrimonial property.

Fourth, the legally authoritative custom (*al-'urf wa al-'adah al-Muhakkamah*) represents a procedural method when considering the parties' rights to the matrimonial property; thus, a spouse can claim his/her share in the matrimonial property when valid reasons exist.

Fifth, the legal procedure of claiming the matrimonial property starts with the recognition of the claimed right. Although the law doesn't specify its exact value and amount, they are determined in the light of the available evidence and clues.

Six, division of the matrimonial property is made by the *Sharī'ah* courts after valid reasons, like divorce, separation or death, exist.

Seven, it is necessary to submit evidence of shares in the matrimonial property at time of litigation.

Eight, judicial decisions, being expressive of the truth, represent a stability factor for our Muslim societies regarding the issue of marital properties and the procedures and rights related to it.

Recommendations

The study recommends giving attention to the stability factors of marriage in its various circumstances. It also recommends that the *Sharī'ah* courts expedite the processing and activation of the legal procedures to avoid prolonging disputes and wasting rights.

References

- Abū Sunnah, Aḥmad Fahmī. (1418M). *Al-'Urf wa al-'Ādah fī Ra'yi al-Fuqahā'*. Np.: Ṭab'ah al-Azhār.
- Abū Zuhrah, Muḥammad. (1997M). *Al-Aḥwāl al-Shakhṣiyyah* (3rd edn.). Al-Qāhirah: Dār al-Qāhirah.
- Al-'Atrabī, Muḥammad Fathī. (2012M). *Al-Tajdīd fī 'Ilmi Uṣūl al-Fiqh fī al-'Aṣri al-Hadith baina al-Nazariyyah wa al-Taṭbīq*. Miṣr al-Iskandariyyah: Dār al-Maṭbū'ah al-Jāmi'iyyah.
- Al-'Atrabī, Muḥammad Fathī. (2014M). *Fiqh al-Sharikāt baina Maqaṣid al-Amwāl wa Idāratu al-A'māl*. Miṣr al-Iskandariyyah: Dār al-Maṭbū'ah al-Jāmi'iyyah.
- Al-Nawawī, Abū Zakariyyā Yaḥyā ibn Sharaf. (n.d.). *Al-Majmū' Sharḥ al-Muhaddhab*. Bayrūt: Dār al-Fikr.

- Al-Nawawī, Abū Zakariyyā Yaḥyā ibn Sharaf. (n.d.). *Sharḥ al-Nawawī 'alā Saḥīḥ Muslim*. Bayrūt: Dār al-Jil.
- Al-Quran al-Karim*.
- Al-Qurṭubī, Imām Abū 'Abd Allāh Muḥammad ibn Aḥmad ibn Abū Bakr al-Anṣārī (1984M). *Al-Jami' li Aḥkām al-Qurān al-Karīm*. Miṣr: Dār al-Sha'bi wa Dār al-Kutub al-Miṣriyyah.
- Al-Ṣan'ānī, Muḥammad ibn Ismā'īl. (1408H/1988M). *Subul al-Salām Sharḥ Bulūgh al-Marām* (1st ed.). Bayrūt: Dār al-Kutub al-'Ilmiyyah.
- Al-Shanqīṭī, al-Shaikh Muḥammad Amīn. (1413H/1992M). *Aḍwā' al-Bayān lil al-Shanqīṭī* (2nd ed.). Al-Qāhirah: Maktabah Ibn Taimiyyah.
- Al-Shanqīṭī, al-Shaikh Muḥammad Amīn. (1978M). *Al-Maṣlaḥah al-Mursalāh wa al-Mudhakkirah*. Makkah al-Mukarramah: Ṭab'ah al-Sa'ūdiyyah Jāmi'ah Umm al-Qurā.
- Al-Shawkānī, Muḥammad ibn 'Alī ibn Muḥammad ibn 'Abd Allāh. (1993) *Nayl al-Awtār Sharḥ Muntaqā al-Akḥbār*. Al-Qāhirah: Dār al-Fikr lil al-Ṭibā'ah wa al-Nashr: 372-371/6.
- Fāṭimah Malūl. (2017). *Tadbīr al-Amwāl al-Muktasabah bayna al-Zaujāyn wifqa al-Naṣ al-Qānūnī wa al-'Amal al-Qaḍā'ī*. *Majallat al-Fiqh wa al-Qānūn*, 62.
- 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>
- Hashim, N. B. (2013). Moves towards Progressive Legal Framework and Energetic Jurisprudential Behavioral on the Enforcement of Public Interest Litigation in the New Millennium. *Procedia-Social and Behavioral Sciences*, 105, 484-490. <https://doi.org/10.1016/j.sbspro.2013.11.051>
- Hayati, K., & Caniogo, I. (2012). Islamic work ethic: The role of intrinsic motivation, job satisfaction, organizational commitment and job performance. *Procedia-Social and Behavioral Sciences*, 65, 1102-1106. <https://doi.org/10.1016/j.sbspro.2014.05.148>
- Ibn Ḥazm, Abū Muḥammad 'Alī ibn Aḥmad ibn Sa'īd. (n.d.). *Al-Muḥallā*. Bayrūt: Dār al-Fikr.
- Ibn Manẓūr, Muḥammad ibn Mukarram ibn 'Alī ibn Aḥmad al-Anṣārī al-Ifrīqī al-Miṣrī Jamāl al-Dīn Abū 'l-Faḍl. (2003M). *Lisān al-'Arab*. Bayrūt: Dār al-Kutub al-'Ilmiyyah.
- Ibn Qudāmah al-Maqḍīsī Muwaffaq al-Dīn, Abū Muḥammad 'Abd Allāh b. Aḥmad b. Muḥammad. (1984M/1404H). *Al-Mughnī wa ma'ahu al-Syarḥ al-Kabīr* (1st edn.). Bayrūt: Dār al-Fikr.
- Ismā'īl, Muḥammad Bakr, (1997M). *Al-Fiqh al-Wāḍih min al-Kitāb wa al-Sunnah 'Alā al-Madzāhib al-Arba'ah*. Miṣr: Dār al-Manār al-Qāhirah.
- Ma'lamin, Muḥammad Shahīd. (2016). *Shar'iyyatu al-Māl al-Mushtarik baina al-Zaujāyn fi al-Fiqh al-Islāmī wa la-Qānūn al-Mālīzī*. *Majallat al-Shar'iah wa al-Qānūn bi Mālīziyā (MJSL) Jāmi'at al-'Ulūm al-Islāmiyah*, 4, 6-9.
- Marcus, P. (2019). The Israel family court—Therapeutic jurisprudence and jurisprudential therapy from the start. *International journal of law and psychiatry*, 63, 68-75. <https://doi.org/10.1016/j.ijlp.2018.06.006>
- Robles, T. F., & Kiecolt-Glaser, J. K. (2003). The physiology of marriage: Pathways to health. *Physiology & behavior*, 79(3), 409-416. [https://doi.org/10.1016/S0031-9384\(03\)00160-4](https://doi.org/10.1016/S0031-9384(03)00160-4)
- Sobko, G., Muliar, G., Draliuk, I., Hryhorchuk, M., Holovko, O., & Lvova, I. (2021). Gaps, conflicts and contradictions regarding measures to ensure the

- right to a fair trial of the convention for the protection of human rights and fundamental freedoms. *Linguistics and Culture Review*, 5(S4), 1968-1984. <https://doi.org/10.21744/lingcure.v5nS4.1856>
- Sterns, P. M. (2000). SETI and space law: jurisprudential and philosophical considerations for humankind in relation to extraterrestrial life. *Acta Astronautica*, 46(10-12), 759-763. [https://doi.org/10.1016/S0094-5765\(00\)00044-8](https://doi.org/10.1016/S0094-5765(00)00044-8)
- Sudama, I. N. (2020). Conflict within tri hita karana's fields: A conceptual review. *International Journal of Linguistics, Literature and Culture*, 6(6), 8-23. <https://doi.org/10.21744/ijllc.v6n6.992>
- Suryasa, W. (2019). Historical Religion Dynamics: Phenomenon in Bali Island. *Journal of Advanced Research in Dynamical and Control Systems*, 11(6), 1679-1685.
- Waldron, I., Hughes, M. E., & Brooks, T. L. (1996). Marriage protection and marriage selection—prospective evidence for reciprocal effects of marital status and health. *Social science & medicine*, 43(1), 113-123. [https://doi.org/10.1016/0277-9536\(95\)00347-9](https://doi.org/10.1016/0277-9536(95)00347-9)
- Yeates, N. (1999). 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)
- Yusof, Y. M., & Jusoh, W. W. (2014). Islamic branding: the understanding and perception. *Procedia-Social and Behavioral Sciences*, 130, 179-185. <https://doi.org/10.1016/j.sbspro.2014.04.022>
- Zainul, N., Osman, F., & Mazlan, S. H. (2004). E-Commerce from an Islamic perspective. *Electronic Commerce Research and Applications*, 3(3), 280-293. <https://doi.org/10.1016/j.elerap.2004.01.002>