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The Extent of 'Urf's Authority in Establishing the Legality of Matrimonial Property

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Abstract---This research discusses the proofs cited by proponents of the legality of matrimonial property –during marriage or when marriage is ended by divorce or death- based on the prevailing custom in the Malaysian society. The paper reaches a number of findings, the most important of which is that the Malay custom in question is not in harmony with the requirements of the *uṣūlī* 'urf; therefore it is considered invalid 'urf and it cannot be used to establish the legality of matrimonial property from the Shari'ah perspective. The researcher recommends that for the matrimonial property to be legal, it should take the form of gift, partnership or loan and the specific rulings of these transactions are to be applied.

Keywords---establishing, legality, Malaysian society, marriage, matrimonial property.

Research objectives

This research seeks to examine the level of compatibility of the matrimonial property with the 'urf requirements (Fiske, 1992; Cumming et al., 2006).

Statement of the problem

In Malaysia, matrimonial property still represents a bone of contention among the scholars of the country's different states; some scholars support it while others reject it (Eletrebi & Suleiman, 2021; Otakhonova, 2021). This research refutes the arguments of the matrimonial property proponents (Willingham, 2009; Gray et al., 2002).

Research questions

- What is the definition of 'urf? And what are its conditions?
- What are the categories of 'urf in terms of validity and invalidity?

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- How legal is the matrimonial property according to *'urf*?

Research hypothesis

Is there any bar to the distribution of the matrimonial property among spouses?

Limitations of the study

This research has two limitations:

- Substantive limitation: The topic addressed in this research is the *'urf*, its control and the legality of the matrimonial property.
- Spatial limitation: The study is conducted within the college of Shariah and Law, University of Sultan Abdul Halim.

Research Methodology

The research uses the descriptive analytical methodology (Nugraha et al., 2020; Alsharif, 2020).

Previous studies

In his Master's thesis about the legality of matrimonial property, Mualimin Sahid concluded that matrimonial property is legal based on the fatwas of a group of Malaysian scholars; however, the thesis did not discuss the proofs cited in support of this opinion (Berkowitz et al., 2003; Caldas et al., 2007).

Theoretical framework

Concept of *al-'Urf*

- Linguistically, "*'urf*" is derived from *'arafa al-shay'* (to recognize something); *'urf* means what people customarily recognize and accept in their habits and dealings. The word *'urf* is used to indicate two meanings: first, the progression of something in sequential stages or pieces and second, the quietness and tranquility. This later meaning is what is intended in this context.
- Technically, jurists define *'urf* as what people customarily recognize of sayings, actions, or avoidances; it is also called *'adah* (habit). Scholars cited a number of proofs to establish the authority of *'urf*, including:
 - Allah the Almighty said: "The child's father will provide reasonable maintenance and clothing for the mother 'during that period". In this verse, "the maintenance is mentioned without determining its exact amount. Allah used the term "*rizq*" when He prescribed it; the term *rizq* means what is customarily and normally adequate for a human being".
 - Regarding the oath expiation (*kaffarat al-yamin*), Allah stated: "The penalty for a broken oath is to feed ten poor people from what you normally feed your own family, or to clothe them, or to free a bondsperson". The normal food or cloth that is to be provided to the poor

is "determined by the custom, not by a provision of *Shari'ah*, that applies to anything whose exact amount is not determined by the Lawgiver; *'urf* is to be referred to in such cases".

Categories of *'Urf* in terms of validity and invalidity

- Valid *'urf*
It is the *'urf* that does not conflict with the *Shari'ah* texts and does not lead to missing an interest or bringing about harm. One example of valid *'urf* is the
- Invalid *'urf*
It is the *'urf* that conflicts with the *Shari'ah* texts and goes against the interest like people's recognition and acceptance of interest loans or drinking.

***'Urf* conditions**

- It must not cancel a text and must not conflict with any definitive principle (*al-uṣūl al-qat'iyah*).
- It must be practiced consistently or often.
- It must exist at the time of the initiation of the transaction in question; an obsolete custom that is not in practice when the transaction is initiated is not effective. Similarly, a new custom that comes into being after the fact cannot be referred to.
- There must not be any provision that is contrary to the *'urf*; if an explicit provision is included it will be enforced rather than the custom.
- The *'urf* must be binding, that is, people must have the conviction that such custom is required and must be abided by because they view it as a legal rule that commands their respect just like the *Shari'ah* texts do.

Areas of applying *'Urf* regarding the wife

- Customary Treatment and Maintenance
Allah the Almighty said: "Live with them in the recognized manner." (Al-Nisa' 4:19). According to the Qur'an exegetes, the term *bil ma'ruf* mentioned in this verse refers to *'urf*.
Also, Allah the Almighty said: "Wives have [rights] similar to their [obligations], according to what is recognized to be fair" (Al-Baqarah 2:228). Ibn al-Qayim commented: "This verse covers all the rights and duties of women; people's custom is the reference to be resorted to in determining them".
The Prophet said: "They (women) have rights over you (the men) to provide them with their sustenance and clothing in a reasonable manner". Al-Ṣan'anī explained, "the word '*bilma'ruf*' indicates that the amount of the obligatory maintenance is only what is the customary; it varies from one person to another according to their situation0s".
Spouses' mutual consent
Allah the Almighty said: "And when you have divorced women and they have fulfilled the term of their prescribed period, do not prevent them from

marrying their (former) husbands, if they mutually agree *bilma'rūf*". Al-Mawardī commented: "There are two interpretations of Allah's saying, '*bilma'rūf*': first, if the two spouses mutually agree and second, if the woman is satisfied with a competent husband".

- Retention and separation
Allah the Almighty said: "And when you divorce women and they have [nearly] fulfilled their term, either retain them according to acceptable terms or release them according to acceptable terms". "Retention with *ma'ruf* means fulfill her rights. In case of separation, *ma'rūf* means to abstain from harming the wife by retaining her only to prolong her waiting period".
- Post-divorce gift
Allah the Almighty said: "But bestow on them (a suitable gift), the rich according to his means, and the poor according to his means, a gift of reasonable amount is a duty on the doers of good."

Definition of matrimonial property and discussion of the proofs cited by its proponents

Matrimonial property, according to the Malaysian Family Law, is "the property jointly acquired by husband and wife during the subsistence of marriage in accordance with the conditions stipulated by the Islamic law" (Story & Bradbury, 2004; Frémeaux & Leturcq, 2018). So it is "any asset acquired and developed by the joint effort of husband and wife, whether their contributions were direct or indirect. This property is divided between the spouses in proportion to the extent of the parties' contributions to the acquirement of the property" (Zaidan, Abdul Karim, 2001). "The wife is entitled to this property when marriage is terminated by death or divorce or because of the husband's intention to marry another wife." (Malaysian Family Law, Guardianship, Section 7: Matrimonial Property) (Yeates, 1999; Kaffashi & Shamsudin, 2019). '*Urf* is one of the proofs cited by the proponents of matrimonial property, which can be refuted with the following:

- Islam assigns to the mature woman an independent estate, just like the man; she has the right to freely dispose of her assets through gifting or exchange transactions. Jurists corroborate this view with the hadith: "Everyone is more entitled to his property than his father, children and all people".
In Islam, marriage does not cause the merging of the spouses' assets. The marriage contract does not give any spouse the right to control the property of the other because "the husband's estate is completely separate from the wife's; the marriage contract does not affect full or partial merging of the spouses' estates".
The wife has "the absolute right, within the rulings of Shari'ah, to what she gains from her work. She has her own estate and she has the rights of personal ownership and disposition of her property; her husband has no control over her assets and she does not need his permission to acquire properties or to dispose of her own assets" (International Islamic Fiqh Academy).
- One of the conditions of the application of '*urf* is that it does not conflict with the Qur'an texts, even if the custom concerned is recognized and practiced by a group of people; Arabs had some customary transactions like

pebble sale (*bay' al-haşāh*), aleatory sale (*bay' al-gharar*), usury and other types of sales that, although conducted with full agreement of the concerned parties, were rejected by Islam because they involved unfair exploitation of the property of one of its parties; Allah said: "Do not consume one another's wealth unjustly". The verse applies to cases where one spouse takes part of the other's property without his/her consent.

- The Quran specified the areas of matrimonial life where *'urf* can be applied; those areas do not include giving the wife a share of her husband's property upon his death or divorce. That was pointed out by the Prophet (peace and blessings be upon him) in the case of the wife of Thabit ibn Qays who wanted to be separated from her husband; the Prophet ordered her to return the garden to her husband and did not ask her to pay any compensation in return for her utilization of the garden during the marriage period.
- One of the conditions of *'urf* is to be binding. It is known that each spouse does not commit a specific portion of his property for the other spouse; rather, that occurs after dispute and going to court; thus, the binding element is not present and, consequently, the case for applying *'urf* is fallacious.
- Islam allows the woman to take part of her husband's property if he chooses to give her a gift in his life as a gesture of kindness and solidarity.
- If the wife "does contribute her money or the income of her work towards purchasing a house, a real estate or a business, she is entitled to a share of that house or business in proportion to the size of her contribution" (International Islamic Fiqh Academy, articles 4 – 6 of decision no. 144, 2/16)

Conclusion and Recommendations

- *'Urf* is not a valid basis for legalizing the matrimonial property because the conditions of its application are not met.
- The wife is entitled to certain rights upon divorce or husband's death; yet, taking a share of the husband's property because of marriage is not one of these rights,
- There is no legal bar against one spouse's gifting part of his/her property to the other, with the understanding that a gift is valid only after it is received and it is not permissible to revoke a gift after its reception.

Recommendations

- Spouses are recommended to treat each other with grace, benevolence and kindness in fulfillment of Allah's instruction: "And do not forget kindness among yourselves".
- Financial dealing should be separated from matrimonial life; each spouse should know his/her rights and assets and properly document them through the legal channels. Spouses are recommended to follow the opinions of the jurists and fiqh counsels regarding this issue to be on the safe side ([Zaghloul et al., 2021](#); [Gede Budasi & Wayan Suryasa, 2021](#)).

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