

Volume 18, No. 1  June 2021

JOURNAL OF

Islam in Asia

A Refereed International Biannual Arabic – English Journal

INTERNATIONAL ISLAMIC UNIVERSITY MALAYSIA

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JOURNAL OF *Islam in Asia*

Volume 18, No. 1. June 2021

ISSN: 1823-0970 E-ISSN: 2289-8077

Journal of Islam in Asia

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Three Fatwas on Marriage in South India

Tiga Fatwa Perkahwinan di India Selatan

Sayyed Mohamed Muhsin*

Abstract

With a history dating back to the era of Prophet Muhammad (ﷺ), Muslims in Kerala, the second largest community in the state, mark their centuries-evolved social and religious imprints in the south-western tip of India. Among the organisational platforms, Samasta (founded on 1926) led by traditional Sunnī Shāfi'ī scholars claims the largest number of followers and is deemed as a religious authority by the masses for setting their beliefs up and finding fatwas for their religious queries. In light of the manuscripts of fatwas, publications and interviews, this study scrutinises the genesis, craft, methods and legal bases behind fatwas of Samasta. Besides, it conducts a case study of three fatwas on marriage to cross-check the peculiarities specified in the craft of fatwa and analyse the matters surrounding the issuance of a fatwa in Kerala. This study concludes that the influence of 'past' is evident in the 'present' legal interpretation of Samasta scholars.

Keywords: Samasta, fatwa, marriage, Shāfi'ī, SFC, Legal basis, iftā', Kerala.

Abstrak

Berteraskan sejarah Zaman Nabi Muhammad (ﷺ), masyarakat Islam di Kerala yang merupakan kumuniti kedua terbesar di negeri ini mencorakkan evolusi sosial dan amalan agama di bahagian Tenggara India. Antara organisasi yang ada di Kerala, Samasta [yang diasaskan 1926] yang dipimpin oleh ilmuwan mazhab Shafiee Sunni mempunyai pengikut yang paling ramai. Mereka juga dianggap mempunyai kuasa dalam menentukan fatwa dalam hal ehwal agama. Ini jelas terlihat dari keterangan penulisan, pendokumentasi fatwa, penerbitan dan temubual yang telah dijalankan. Kajian ini menghalusi sumber rujukan, kaedah dan metodologi, penulisan fatwa serta rujukan perundangan fatwa yang dihasilkan oleh Samasta dan juga merupakan intipati kajian ini. Kajian kes terhadap tiga fatwa perkahwinan ini adalah untuk melihat persamaan, perbezaan dan keunikan dalam fatwa perkahwinan di Kerala dan menganalisa isu berkaitan fatwa di Kerala. Kajian ini juga menunjukkan pengaruh "lampau" adalah satu bukti jelas dalam menterjemahkan perundangan "semasa" oleh ilmuwan Samasta.

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Kata Kunci: Samasta, fatwa, perkahwinan, Shafie, SFC, asas perundangan, Kerala.

Muslims in Kerala

In analysing Islam and Muslims' history in Kerala, we could instantly perceive its distinctive characteristics due to its own social, economic, cultural, educational and religious movements.¹ While various scholars have studied the features of Muslims at a global level, Kerala Muslims' cultural and religious history remains out of scholarly attention, albeit its Islamic history traces back to the era of Prophet Muhammad (ﷺ).

Malabar, the northern part of Kerala had been the eventful cross-road of international trade which connects Arabia to Southeast Asia and China, until the second half of the 20th century. During the pre-British history, Kerala was called 'Malabar' and the people were identified as 'Malabārī'. As a result of the busy engagements with internationals, Kerala turned out to be at the forefront of the entire Indian sub-continent to host two major religions, Islam and Christianity.²

The history of Islam in Kerala from the 7th to 10th century developed with the arrival of Mālik Dīnār and his group as they stayed in dif-

¹ Kerala is a small South Indian state which was formed in 1956. It encompasses three regions with Travancore in the south, Cochin in the centre and Malabar in the north and retains its own distinct culture and nature. Karnataka borders Kerala's geographical area in the north, the Indian Ocean in the south, Sahya Mountains in the east and the Arabian Sea in the west. Starting with its language Malayalam, the separate arts, literature, culture, geographical attractions, educational achievements, and even in lifestyle, Kerala has a very distinct story compared to other states, especially India's northern states.

² According to dominant opinions, the story of Islam in Kerala began from the Prophet's (ﷺ) same period through some Arab merchants who on the way to Ceylon (Sri Lanka) landed in Kodungallur. They had a conversation with the Kerala local ruler Cheraman Perumal, which led to his visit to Makkah and conversion to Islam with the new name of Tāj al-Dīn. After conversion, though he returned to Kerala with a missionary group under the leadership of Mālik Dīnār, he died on the way. Nonetheless, he had written a letter to the then King of Kerala to facilitate the visitors from Makkah with generous hospitality. On the arrival of the missionary group of Mālik Dīnār, Kerala's people extended a friendly reception and were attracted to the truthfulness and honesty of their guests. Accommodating in this favourable ambience, Mālik Dīnār and his people interacted with the locals, engaged in *da'wah* activities and built mosques in the various littorals of Kerala. For details see Shaykh Zainuddin Makhdum, *Tuhfat al-Mujahidin: A Historical Epic of the Sixteenth Century*, translated from Arabic with annotations by S. Muhammad Husayn Nainar, (Calicut: Other Books, 2006); Hussain Randathani, *Mappila Muslims: A Study on Society and Anti-Colonial Struggles*, (Calicut: Other Books, 2007).

ferent parts of Kerala. It includes the history of Islam's spread across the state in general and along the coastline in particular. From the 10th to the 15th century, there was hardly any precise picture of Muslims' involvement in Kerala's social building. The only accessible accounts of these extensive five centuries are some of the travelogues of those who had visited India during the mentioned period.³

By the 16th and 17th centuries, Kerala Muslims had been actively engaging in society. During that period, *Tuhfat al-Mujāhidīn*, the first historical work of Kerala to be authored by a Keralite, was written by a prominent Muslim scholar, Zayn al-Dīn al-Makhdūm II, which sheds light on the various features of Muslims and other religious communities in Kerala, their lifestyle, customs and family structure. It was the period of Makhdūm family⁴ and Kozhikode Qāḍī family⁵ who enriched the life of Kerala Muslims with systematic dissemination of religious knowledge and its methodical operational processes. From the 18th century, the Kerala Muslim history was filled with wars with colonisers and freedom struggles. Some works that indicate to that period are also available.

³ Some of the voyagers who mentioned about tenth century Kerala Muslims are Ibn Faqīh (902 A.D.), Ibn Rustah (903 A.D.), Abū Zayd (905 A.D.), Mas'ūdī (945-955 A.D.). About the 11th century, the minimal information was cited by al-Bīrūnī (973-1048), though he had detailed accounts about India and its wide variety of cultures and religions. As far as the 12th and 13th centuries are concerned, the history of Kerala had been cited by al-Idrīsī (1154), Yaqūt (1189-1229), Rashīd al-Dīn (1247-1281), Marco Polo and al-Qazwīnī (1236-1275). Dimashqī (1325 A.D.), 'Abd al-Fidā (1273-1331 A.D.), Wang Tayuwan (1330-1349), Ma Hwan and Ibn Baṭūṭah are some of the historians who shed light on 14th century Kerala Muslims. In this series, Ibn Baṭūṭah deserves a special mention because he yielded sizable information concerning Kerala Muslims' religious and social survival aspects. In the 15th century, Persian traveller 'Abd al-Razzāq, also mentioned some information about Kerala Muslims. Although all these explorers wrote about their days and experiences in Kerala, it is worth mentioning that they hardly put any effort to describe Muslims' state and life in Kerala. Mahmood Kooria, "Islam in Kerala: from Advent to Samasta" in *Satya Saraniyude Charitra Sakhsyam*, (Chelari: Publication Committee of 85th Anniversary Conference of Samasta, 2012), 196-219.

⁴ This family had played a pivotal role in making Kerala a fertile ground for *Shāf'ī* school of Islamic law and contributed many important writings such as *Fath al-Mu'īn bi Sharah Qurrat al-'Ayn* which is being used as a major reference not only in Kerala but also in some Arab countries and some southeast Asian countries.

⁵ This family had contributed several great scholars who worked as *qāḍī* in Kozhikode from the ninth century onwards, and they were widely known as Kozhikode *qāḍī*. Bahaudheen Hudawi, *The Development and Impact of Shafe-i School of Jurisprudence in India*, (New Delhi: Readworthy Publications, 2013), 109.

Along with the piety of Muslims, their honesty in transactions, and factors like proselytiser activities and the Hindu rulers' favourable approach, worked as an impetus for the growth of Islamic society in Kerala.⁶ Moreover, the local ruler Zamorin ensured his categorical support for Muslims and stipulated that from “every family of fishermen (*makkuvans*) in his dominion one or more of the male members should be brought up as Muslims.”⁷

The Muslim community in Kerala had encountered a severe hostile experience during the colonial period which predominantly demolished their distinctiveness in the sea trade and largely shattered their identity as a pivotal society in South India. Consequently, Muslims had faced unparalleled economic decline, communal enmity; the factors that arguably shaped the existing scenarios of current Muslim society of Kerala.⁸

Some features distinguish Kerala Muslims, who form about one-fourth of state's population,⁹ from their counterparts in other parts of India. According to the prevalent tradition, Muslims in Kerala have an almost fourteen century-old history of existence, and as an individual society, it seems to be a vital characteristic to have the roots of Islam from the companions of the Prophet (ﷺ). The significant trade relations between West Asia and Kerala even before the time of Prophet Muhammad (ﷺ) (c. 570 - 632 AD) played a key role in this attainment.

Compared to India's Northern states, Islam expanded more peacefully in Kerala through the behavioural magnetism to the model character. As the majority of Indian Muslims are adherents of Ḥanafī *Madhhab*, it would be interesting to note that the vast majority of Kerala Muslims follow Shāfi'ī School of Islamic law.¹⁰

Kerala keeps ecological resemblances to the Southeast Asian provinces and differs from the northern part of India. Moreover, in terms of culture and behaviour, Kerala Muslims had considerably imbibed from

⁶ S. M. Mohamed Koya, *Mappilas of Malabar: Studies in Social and Cultural History*, (Calicut: Sandhya Publications, 1983), 7.

⁷ Malik Mohamed, “Early Arab Contacts and the Advent of Islam in India”, *The Foundations of the Composite Culture in India*, (New Delhi: Aakar Books, 2007), 73.

⁸ U. Mohammed, *Educational Empowerment of Kerala Muslims: A Socio-historical Perspective*, (Calicut: Other Books, 2007), 26.

⁹ Yoginder Sikand, ‘Traditional’ Ulema and ‘Modern’ Islamic Education in Kerala, *Countercurrents.org*, 2009. <http://www.countercurrents.org/sikand190309.htm>. Retrieved December 15, 2014.

¹⁰ Bahaudheen Hudawi, *The Development and Impact of Shafe-i School of Jurisprudence in India*, 92.

the Arabs who arrived there as preachers and merchants.¹¹ The religious leaders from *Sayyid* families [descendants of the Prophet (ﷺ)], pious scholars and international merchants from Arabia, Egypt and Yemen played decisive roles in the growth of the Muslim community's social well-being in Kerala.

Remarkably, though the Indian sub-continent has a long period of more than eight centuries of Muslim rule, Kerala remained under Hindu local rule except for rare occasions, which transformed the Muslim community there to become independent traders, fishermen, farmers and labourers. Also, Urdu has no grip in Kerala concerning both Muslims and non-Muslims. Consequentially, all people of Kerala speak the Dravidian language named Malayalam without any linguistic alienation among them. During India's division, which happened with the country's independence, while the majority of Muslims from all parts of the country drifted to Pakistan, Kerala Muslims had taken a different stance and preferred to stay in India as a significant community therein.¹²

One of the most significant features that occurred in the life of Muslims after the 1921 Malabar Rebellion¹³ was the immense change in the structure of leadership via establishing organisations and marshalling laypeople under this platform. It marked the end of the leadership of instrumental personalities and families and the emergence of different organisations according to the theological and epistemological divergence, regardless of the scholars of traditional background and modern elites.¹⁴

In analysing the post-independence history of Muslims in India, according to Sachar Committee Report,¹⁵ Indian Muslims, in general, have been experiencing a pitiful condition in all walks of life. Mean-

¹¹ K. Zubair. (2006). Development and Modernisation of Religious Education in Kerala: Role of Samastha Kerala Jam'iyat al-Ulama. Unpublished MPhil thesis, Jawaharlal Nehru University, 4.

¹² Ibid., 4.

¹³ Malabar Rebellion is an armed fight between British colonial and some Hindu people on one side and Mappila Muslims on the other. It requires an important mentioning in Kerala Muslims' history, given that many Muslims lost all their possessions and suffered much. Many people from Malabar were killed and expelled to distant places. In addition, as aftermath, different views in theological and juristic matters began to appear among Kerala Muslims.

¹⁴ Zubair K., "Development and Modernization of Religious Education in Kerala; Role of Samastha Kerala Jam'iyat al-Ulama," 8.

¹⁵ Former Indian Prime Minister Manmohan Singh appointed a committee headed by Rajinder Sachar in 2005 to formulate a report on India's Muslim community's educational, economic, and social state.

while, the committee noted that Muslims' state in Kerala was comparatively better due to apparent reasons like peaceful involvement in state politics, educational enhancement, religious identity, and religious harmony among various religious communities.

Samasta: An Organised Form for Islamic Activism

Samasta Kerala Jam'iyat al-'Ulamā' is an organisational platform consisting of prominent traditional Sunnī Shāfi'ī scholars of Kerala. Samasta came into existence on June 26, 1926, as a reply of traditional Muslim scholars against Muslim reformists' threat towards the basic principles of Islamic theology and jurisprudence. The supreme council of Samasta consisting of forty top scholars of the time is called *Mushāwarah*. After decades of establishment, a *fatwa* committee had been formed on December 12, 1964, from within *Mushāwarah*, which is known as Samasta Fatwa Committee to deal with the masses' queries by issuing fatwa and thousands of people had accepted it as an authoritative source of the *Sharī'ah* in Kerala.

Samasta scholars are believed to be committed and dedicated Islamic scholars, whose prolonged educational career is spent in the pursuit of mastering classical Islamic texts with special focus on Islamic jurisprudence. Regarding the schools of Islamic law, Samasta scholars strictly follow one of the four *madhāhib* and in theology any one of Ash'arī or Māturīdī schools. Moreover, the majority of them follow any *ṭarīqah* (Sufi order) like *Qādiriyyah*, *Rifā'iyyah*, *Shādhiliyyah*, *Naqshabandiyah*, *Chishtiyyah*, etc.

From the study of the biographies of the scholars who had been members in *mushāwarah*, it becomes clear that almost every one of them has marked his contributions by spending his whole life as *mudarrisūn* (religious instructors)¹⁶, *quḍāt* (unofficial judges) and *muṣannifūn* (authors). Nowadays, the majority of them are working as principals or *ṣadr mu'allim* in the advanced Islamic institutes of Kerala where thousands of *Sharī'ah* students are being brought up.

Samasta Fatwa Committee (SFC)

The fatwa institution achieved a spirited growth in response to the particular issues that stemmed in Muslim societies. Through the devel-

¹⁶ There are many Samasta scholars who were addressed and became famous by the name of the locality where they dedicated their whole life for the teaching of Islamic knowledge and leading the religious rituals, including congregational prayers.

opment of fatwa collections as a distinct literary genre, muftis' progressively important role in the judicial process becomes obvious.¹⁷ Remarkably, the fatawa collections deliver a large account of information for several societies' cultural, commercial, and religious history. The muftis and their *fatawa* have an indispensable impact in the history of Indian Muslims, which spanned from the pre-colonial period to the post-independence India. Before the colonial period, especially before British rule, the Islamic law was upheld in the Indian subcontinent by muftis and appointed *quḍāt*. Nevertheless, the British government substituted the *quḍāt* and muftis with professional judges. Until 1864, there were Mohammedan law officers involved in British-Indian courts to assist the judges in finding the Islamic law in the cases posed to them. Their duty was not to assume the role of judges but to assist them in finding the rulings of Sharī'ah in particular cases. Yet, muftis' role, even in the colonial period, flourished through private networks due to several typical reasons found in the subcontinent. Khalid Masud (1996) has identified three main factors that caused muftis' growth, though there was access to British appointed official judges. Firstly, the adherence of the majority of the Indian Muslims to the Ḥanafī School of Islamic law solicited the frequent presence of Ḥanafī muftis outside the British legal system. Secondly, Ḥanafī muftis invalidated the rulings of judges appointed by non-Muslim rulers, especially in personal laws. Thirdly, there were not sufficient translations of Islamic legal texts to make the British Judges independent from muftis.

Consequently, almost every Muslim institution and organisation had formed a *dār al-iftā'* (centre for issuing fatwa) by the first decade of the twentieth century.¹⁸ After India's independence, Muslims of this country underwent a sort of social and political situations different from many of their brethren in other parts of the world in many respects.¹⁹ Legally, Muslims in India are supposed to settle their issues and disputes through the government-approved Muslim Personal Law, a complex mixture of judge-made legal compromises composed from a few translations and textbooks. Although there have been some severe criticisms of this Muslim Personal Law from the point of view of Euro-American ju-

¹⁷ Masud and et al., "Muftis, Fatwas, and Islamic Legal Interpretation", *Islamic Legal Interpretation: Muftis and Their Fatwas*, 10.

¹⁸ Masud, "Apostasy and Judicial Separation in British India", *Islamic Legal Interpretation: Muftis and Their Fatwas*, 197.

¹⁹ Gregory C. Kozlowski, "A Modern Indian Mufti", *Islamic Legal Interpretation: Muftis and Their Fatwas*, 242.

dicial logic, the same system is still applicable to all Muslims in such vital matters of inheritance, marriage and divorce, all across the country. Despite the said system, Muslims in the subcontinent can rely on state-sponsored courts to resolve their legal quarrels. Simultaneously, they are not hindered from seeking a legal opinion (fatwa) from any religious scholar, who serves in private and public, so long as not going against the country's legal regulations.²⁰

The rulings judged from the courts authorised by India's government will be enforced by the state. However, as far as a fatwa in India is concerned, though it is only a legal "opinion" without the status of binding law, "its value may reside in its acceptance of social ambiguities and a desire for consensus that India's civil law, derived from British models, cannot countenance".²¹ Gregory C. Kozlowski underscores, "for uncounted thousands of Muslims, a *mufti* is a court of first resort".²²

Although the Samasta Fatwa Committee (SFC) was founded officially in 1964 by the *Mushāwarah* Committee, the history of *iftā'* of Samasta had begun in the earlier years of its establishment in 1926. Samasta *Mushāwarah* has followed the principle of collective *iftā'* throughout its history. The SFC remains independent of any state control.

The Samasta *Mushawarah* committee determined the works and rules which should be observed in the activities of the SFC. The members of the SFC are well known for their religious knowledge and piety, with special references to their capacity to deal with Islamic legal questions and are deemed widely qualified for this purpose. The significance of the work of the SFC rests on the towering extent of influence that could be carried by their opinions. People believe that their opinions to be unmistakably clear and not in need of any revisit. Moreover, people consider that their opinions would work as sufficient evidence of *Sharī'ah*, without requiring any other textual evidence. Nonetheless, their *fatawa* have acquired a public and official nature. Simultaneously, some members of the SFC became members of the state administration, though not for the purpose of *the fatwa*, rather for the administration of religious affairs of the state such as *hajj* or *waqf* affairs.²³

²⁰ Ibid.

²¹ Ibid., 243.

²² Ibid.

²³ For example, Kottumala Bappu Musliyar who was the convenor of the SFC, and at the same time, he worked as the Chairman of Kerala Hajj committee, which is part of Ministry of External Affairs, Government of India.

Examining one hundred and sixty-eight *fatawa* from the SFC manuscript collections, the present study has found that the localities of *mustaftūn* are spread almost in all areas of the state. Samasta has neither published nor compiled their fatwas; therefore, with special permission, I had access to their manuscripts preserved at the Samasta Book Depot at Kozhikode, Kerala. Moreover, some questions are from other states like Karnataka, which borders the north and north-east of Kerala, and Tamil Nadu, which lies to Kerala's east and south. Simultaneously, some questions stem from the Union Territories of Lakshadweep and the Andaman Islands which are governed by the Union Government of India. Also, some questions are sent from the Arab countries and Singapore. They are written in Malayalam, which indicates that those questions were sent from expatriates of Kerala, or permanent residents originally from Kerala.

The questions posed to the SFC for issuing fatwa encompass almost all aspects of a believer's personal, religious and social life. By a comprehensive categorisation, questions include areas of religious rituals, hygiene, affairs related to daily life, etiquette, contract law, inheritance, marital affairs, economics, banking, theological matters, social issues, local customs, medical issues, inalienable religious endowment, and criminal and political matters. Marriage, divorce, waqf, matters related *jumu'ah* are frequent areas of questions for fatwa by SFC.²⁴

Madhhab (School of Islamic Law)

Some scholars have argued that the reason behind the preponderance of Ḥanafī School in India is that almost all Muslim rulers who ruled India followed Ḥanafī School and they made Ḥanafī rulings as the official source of laws in many public affairs related to Muslims, such as educational system and court procedures. On the other hand, Shāfi'ī School spread in India through the traders, *sayyid* families from Yemen and Egyptian scholars.²⁵ Ḥadramī *sayyids* of Yemen, Makhdūm lineage of Egypt and scholars from *Hijāz* who migrated to India have played a pivotal role in the advent and popularity of Shāfi'ī School in Southern India.

One of the major dynamics which nourished the Shāfi'ī School in Kerala is the centuries-longed and deep-rooted religious leadership of the

²⁴ Zayn al-Dīn Musliyar, Interview by the Researcher, Kondotty, Malappuram, 4 March 2014.

²⁵ It has been noted that the Mughal Empire of Delhi and Deccan Sultanate of Hyderabad had implemented *Ḥanafī* School as a way of practice, in the educational system and court procedures that facilitated this school deepen in the grassroots level.

Makhdūm family. When the members of this family came to Kerala, the ruler then Zamorin welcomed and nicely hosted them. Moreover, Zamorin appointed Zayn al-Dīn al-Makhdūm, the prominent scholar from this family, as the *qāḍī*. Makhdūm lineage, which is believed to be the descendants of Abū Bakr Ṣiddīq, the first Caliph, is considered as the central figure in popularising Shāfi'ī School among south Indian Muslims. Moreover, the book *Fath al-Mu'īn bi Sharah Qurrat al-'Ayn*, the exceptional contribution of Zayn al-Dīn al-Makhdūm II in Islamic jurisprudence, has been arguably the key force for the nourishment of Shāfi'ī School in Kerala and uniting drive of the majority of Muslims under this umbrella. This book's advantage is that it discusses almost all issues come across by Kerala Muslims and its proper jurisprudential rulings. It has secured a permanent position as major study-material of Islamic jurisprudence in traditional Islamic educational systems and the modern systematic curriculum.

Considering the *madhhab* of most people in Kerala, SFC gives its first preference to the earlier texts of Shāfi'ī School. However, SFC also issues some *fatawa* based on the rulings of other *madhāhib* like Ḥanafī, Mālikī and Ḥanbalī, in order to facilitate the *mustaftī* with the applicable and practical solutions in critical situations.

Three Fatwas on Marriage

An analytical appraisal of the genesis of fatwa to know how it was crafted must focus on two elements: the style and contents of the *mustaftī*'s question and the way and basis of the *mufī* issuing a fatwa. In the process of *iftā'* always two parties are involved: the *mustaftī* (questioner) and the *mufī* (issuer of fatwa). For the selected *fatawa* in the current study, the *mufī* is always the SFC while the *mustaftūn* come from different backgrounds who request guidance on their personal, familial, ritual or social affairs. The identity of the *mustaftī*, taking into account the confidentiality of matters discussed, is kept unnamed in the current study.

The communication between the *mufī* and the *mustaftī* is exclusively in Kerala's mother tongue, i.e. Malayalam language except in very few cases. To understand more about fatwas of Samasta, three fatwas on marital issues are mentioned below with a brief introduction, translation and analysis.

Case One: Legality of Marriage of an Adulterous Woman

This fatwa background seems to have raised from a controversy concerning the legality of the marriage of a woman who was suspected as committing fornication and ascertained it by the illicit pregnancy. Moreover, in this case, the accused woman's delivery was after a legitimate marriage, but she gave birth to the child before the normal period, i.e. delivered after seven months of marriage. Afterwards, the question of fatherhood aggravated the existing controversy regarding the legality of marriage and twisted it into an issue of social concern. Given that the *mustafī* was the secretary representing the *maḥall* committee, it can be assumed that it did not remain a private problem but became a more serious issue of major concern for the majority of *maḥall* members. The translation of the question and fatwa is as follows:

Question

Sir,

We would like to request you to give us the answers to the following questions according to the Islamic perspective:

According to the Shāfi'ī School of Islamic law, is it legitimate to marry a woman, whom people suspect adultery or are assured of it through an illegal pregnancy?

The mentioned woman gave birth to a child after seven months of marriage. Reasonably, the husband doubted that his fatherhood of child because she gave birth before the normal delivery period, which is nine months and ten days. Subsequently, the child had undergone a DNA test, and it was found that the husband was not the father of the child. Based on this test result, the court confirmed that the husband was not the child's father. From the Islamic perspective, what is the relation between the husband and the child?

We hope of the answers for the mentioned questions with citation of sources.

Fatwa

The SFC replied to the above-mentioned question with the following fatwa:

“*Al-Salām 'Alaykum.*

We have received your letter.

The marriage with the woman mentioned in the letter is legitimate. In this marriage, as you mentioned in the question, the fatherhood of the child who has been delivered seven months after the marriage belongs to the husband, though the result of the DNA test went against this.”²⁶

Case Two: Unlawful Annulment of Marriage

In this case, the *mustafī* married a woman and lived happily together for almost five months. He impregnated her, but after he left home for some days, she aborted her pregnancy and annulled the existing marriage and married her relative. One noticeable thing is that the wife and her family risked doing all these things based on a local scholar's fatwa. When the *mustafī* found the family's moves, he requested the SFC to examine the local scholar's fatwa and reissue a fatwa concerning the actions taken by the family. The translation of the question and fatwa is given below.

Question

I married a girl from our neighbourhood in 1986, and a *khatīb* in our locality solemnised the marriage contract. My wife was the only daughter in her family's house. Therefore, I stayed for almost five months in their home. After five months of marriage, I left for Bombay for my job. When I returned after some days to their home, I realised that my wife had aborted our five-month-old fetus due to the pressure of some evil people in her family. When I probed the case more, I knew she did it by surgery at a private hospital in our locality. Moreover, she registered for marriage with her uncle's son. The man already has a wife and two children. The witnesses to the registered marriage contract were also relatives of my father-in-law.

My wife and her family dared to commit such heinous things with the support of the fatwa of a local scholar who told them that the wife has the right to invalidate the marriage contract if her husband stays away from her for

²⁶ Fathuva Committee, The Samasta Kerala Jem-iiyathul Ulama, Calicut, *Fatwa* No. 18/09, dated 2-7-2009.

more than three days. The local scholar also issued the fatwa that the abortion of a five-month-old foetus is just *makrūh* (disapproved).

Because of these issues, my family and I have encountered a major discredit to our reputation. Actually, is there any basis for the fatwa of the local scholar? What are the actual Islamic legal opinions on what happened and committed by my wife and her family? I expect from you, speedy replies to my questions.

Fatwa

The SFC replied to the above-mentioned question with the following fatwa:

“It is totally against the Sharī‘ah to issue a fatwa saying the wife has the right to terminate the *nikāh* contract if husband stays away from her for more than three days. To abort a five-month old foetus is a grave sin. Being a wife in a valid marriage, it is not allowed for her to remarry with anybody else”.²⁷

Case Three: Invalid Guardianship in a Marriage Contract

The following question was directed to the SFC by a welfare organisation that manifests the issue's social importance. The question dated 7th May 1984 dealt with the legality of marriage contract conducted by a guardian involved in several major sins and had possibly become a dishonest/gave sinner (*fāsiq*). Besides, the arranged marriage by this dishonest guardian was with an Arab citizen. The daughter hated the thought of having a marital relation with a foreigner and informed her father about her disagreement with the arranged marriage. At this juncture, a welfare organisation handled the issue by inquiring the Islamic standpoint on this case and the possibility of arranging a marriage for her with any local man. The translation of the question and *fatwā* is as follows:

Question

Respected,

²⁷ Fathuva Committee, The Samasta Kerala Jem-iyathul Ulama, Calicut, *Fatwa* No. 17/87, question sent on 18-12-1986.

One (lady) from our *maḥall* members was divorced by her husband (a) about 18 years ago; in that relation, they had a daughter (b). Recently, he (a) has visited our locality and informed us that he has arranged a marriage for the daughter (b) with an Arab (c) and showed the marriage certificate. The daughter (b) was by no means happy about the marriage with the Arab. Then the husband (a) told us that he will ask for a divorce on her behalf from him (c) and will send the *wakālat* notice of *ṭalāq* to our *maḥall*.

The father (a) has committed many severe sins in Islam. He has had children through adultery even with non-Muslim women. When a new marriage proposal came to the daughter, we informed the father (a) about it, but there has been no reply. We humbly request you to inform us of the *fatwā* of doing *nikāḥ* of the daughter (b) with someone other than the Arab.

Fatwa

The SFC replied to the above-mentioned question with the following *fatwā*:

“The *nikāḥ* which the father [the husband (a)] claimed that he has arranged is not legitimate. So, you can arrange another *nikāḥ* for her.”²⁸

Extraction of Rulings from the Earlier Legal Texts

To understand the genesis of fatwa, how does Samasta find rulings on contemporary issues is discussed first. Is it by directly referring to the Quran and Sunnah or extracting from the classical legal texts? Some modern muftis declare their independence from the boundaries of schools of Islamic law and derive rulings directly from the Quran and Sunnah.²⁹ Samasta argues for absolute reliance on the traditional authoritative legal texts of four schools of Islamic law. Since the majority of Kerala Muslims are followers of Shāfi‘ī School, the primarily used references by SFC are *Tuḥfat al-Muḥtāj* written by 16th-century Shāfi‘ī muftī Ibn ḥajar al-haytamī, the *Nihāyat al-Muḥtāj* authored by 16th-century scholar al-Ramlī. Both above-mentioned texts are comprehensive

²⁸ Fathuva Committee, The Samasta Kerala Jem-iyathul Ulama, Calicut, *Fatwa* No. 43/84, dated 12-5-1984.

²⁹ Masud & et al., “Muftis, Fatwas, and Islamic Legal Interpretation”, *Islamic Legal Interpretation: Muftis and Their Fatwas*, 30.

commentaries on al-Nawawī's (1234-1278) *Minhāj al-Ṭlibīn* which is widely known as a classical manual of Islamic law of Shāfi'ī School. Another major source for SFC is *Fath al-Mu'īn bi Sharah Qurrat al-'Ayn* by Kerala faqīh Zayn al-Dīn al-Makhdūm II.

If there is any difference between *Tuhfah* and *Nihāyah*, it is optional to choose any of them. If the issue was not found in *Tuhfah* and *Nihāyah* then it is optional to rely on any other earlier texts from Shāfi'ī fiqh. Because Kerala faqīh Zayn al-Dīn al-Makhdūm II was a disciple of Ibn Hajar, *Tuhfah* occupies an exclusively prominent position in Kerala.³⁰

The SFC prefers the dominant, weightiest and plausible opinion in Shāfi'ī School during *iftā'*. Nevertheless, sometimes it tries to acknowledge *mustafī* other less weighty opinions to introduce a comfortable way to him in the face of critical conditions.³¹ The SFC uses the texts of Ḥanafī School of Islamic law to answer some unusual questions or facilitate *mustafī* by giving more appropriate and practical solutions.³² The SFC rarely refers to the books of *Ḥanbalī* and *Mālikī* Schools.

The Samasta maintains that a contemporary Muslim can achieve the genuine meaning of obeying the Quran and Sunnah's legal rulings only by following any one of the four canonical interpretations of the law (*madhāhib*). The people of limited knowledge and restricted insight cannot disclose the rulings of Islamic Sharī'ah directly from the Quran and Sunnah. Therefore, the reasonable move is to follow the credible group of well-known scholars which, as a result, ends up following the Quran and Sunnah. They have enormously interpreted the Quran and *Sunnah* through volumes of written works and derived the rulings of the Sharī'ah on different issues.³³

In view of Samasta, the Quran is the elucidation of *al-Lawḥ al-Mahfūz* (the preserved tablet), which can be understood by a complementary reading of three verses. "We have sent down to you the Book as an explanation of all things" (al-Quran: *al-Naḥl*, 89). The word *Kitāb* in the aforementioned verse signifies the Quran because it has used the words 'sent down' as an attribute. The Quran has come up with the explanation of everything, which embodies the information of the past, present and the future. With regard to *al-Lawḥ al-Mahfūz*, the same credit of encom-

³⁰ Zayn al-Dīn Musliyar, Interview by the Researcher, Kondotty, Malappuram, 4 March 2014.

³¹ Ibid.

³² Ibid.

³³ Ibid.

passing the information of everything has been entitled. “We have not left out anything from the Book” (al-Quran: *al-An‘ām*, 38). In summary, two sources contain knowledge of everything: the Quran and *al-Lawḥ al-Mahfūz*. Here, certainly, a question will be posed: what is the relation between the Quran and *al-Lawḥ al-Mahfūz*? Its answer is depicted in the following verse: “This Quran is not such as can be produced by other than Allah. On the contrary it is a confirmation of (revelations) that went before it, and a fuller explanation of the ‘Book’ -wherein there is no doubt- from the Lord of the worlds” (al-Quran: *Yūnus*: 37). The statement ‘fuller explanation of the Book’ means that the Quran is the exegesis of *al-Lawḥ al-Mahfūz*.³⁴

Samasta asserts that the comprehension of the Quran's secrets and interpretation of the legal opinions will surely be impossible by the capacity of mere knowledge of the Arabic language or its basic meanings. Rather, ordinary scholars and common people must accept what erudite scholars with adequate credentials interpreted the Quran and Sunnah.

However, the view regarding the relation between Quran and *al-Lawḥ al-Mahfūz* can be challenged because the word ‘everything’ which has been encompassed by the Quran (*al-Nahl*, 89) and *al-Lawḥ al-Mahfūz* (*al-An‘ām*, 38) are not same and cannot be taken with equal emphasis. This is because *al-Lawḥ al-Mahfūz* has included more information than the Quran. The word ‘everything’ used by the Quran does not denote entire matters altogether. See below some comments of key interpreters of the Quran on the word ‘everything’. Al-Ṭabarī commented it is “an explanation of everything that people need to know from *ḥalāl* (lawful) and *ḥarām* (unlawful) and reward and punishment.”³⁵ Ibn Kathīr stated:

The Quran contains all kinds of beneficial knowledge, such as reports of what happened in the past, information about what is yet to come, what is lawful and unlawful, and what people need to know about their worldly affairs, their religion, their livelihood in this world, and their destiny in the hereafter.³⁶

³⁴ Ibid.

³⁵ Abū Ja‘far al-Ṭabarī, *Jāmi‘ al-Bayān fī Ta‘wīl al-Quran*, (Bayrūt: Mu‘assasat al-Risālah, 2000), 17:284.

³⁶ Ismā‘īl bin ‘Umar bin Kathīr, *Tafsīr al-Qur‘ān al-‘Azīm*, (Riyad: Dār Taybah li al-Nashr wa al-Tawzī‘, 1999), 4: 494. English translation from

Fakhr al-Dīn al-Rāzī commented:

Some people say that the Quran is the explanation of everything, i.e. all the knowledge of religious or non-religious affairs. But actually, the non-religious knowledge has no link with this verse. It is a well-known fact that the Almighty Allah has praised the Quran only because it encompasses religious knowledge. Religious knowledge includes both the fundamentals and the branches.³⁷

Al-Rāzī further explained:

But the jurists had said that the Quran gives the account of everything because it (the Quran) says that the consensus, solitary *hadith* and analogy are the evidence (*ḥujjah*). So, if any of these means has derived a ruling, then that ruling is also established by the Quran.³⁸

In light of the above explanations, the meaning of ‘everything’ is what people need to know from the lawful and unlawful, worldly affairs, destiny in the hereafter, etc. In the commentary of the second verse (*al-An‘ām*, 38), Qurtūbī and al-Rāzī explained that the intended meaning of the Book is *al-Lawḥ al-Maḥfūz*.³⁹ Ibn Kathīr commented:

‘We have neglected nothing in the Book’ means, the knowledge about all things is with Allah, and He neither forgets any of His creatures, nor their sustenance, nor their affairs, whether these creatures live in the sea or on the land.”⁴⁰

The third verse (*Yūnus*: 37) states that the Quran is the full explanation of the ‘Book’. However, no any authoritative commentary states that the meaning of ‘Book’ in this verse is *al-Lawḥ al-Maḥfūz*, or the Quran is the commentary of *al-Lawḥ al-Maḥfūz*, except *Tafsīr al-Ṣāwī* (*Ḥāshiyat al-Ṣāwī ‘alā Tafsīr al-Jalālayn*) of Aḥmad al-Ṣāwī. Ac-

http://www.qtafsir.com/index.php?option=com_content&task=view&id=2945&Itemid=71, Retrieved December 18, 2014.

³⁷ Fakhr al-Dīn al-Rāzī, *Maḥfūz al-Ghayb*, (Beirut: Dār al-Kutub al-‘Ilmiyyah, 2000), 20: 80

³⁸ Ibid.

³⁹ Al-Qurtūbī, *al-Jāmi‘ li Ahkām al-Quran*, (Cairo: Dār al-Kutub al-Miṣriyyah, 1964), 6: 420; al-Rāzī, *Maḥfūz al-Ghayb*, 12: 178.

⁴⁰ Ibn Kathīr, *Tafsīr al-Qur‘ān al-‘Azīm*, 3: 253.

According to *al-Ṣāwī*, the Quran is the explanation of what is in *al-Lawḥ al-Mahfūz*, and it includes entire details of events of the past, present and future.⁴¹ According to al-Qurṭubī, the word '*kitāb*' was used as 'common noun' (*ism jins*), and it signifies the previous divine texts like Tawrāh, Injīl, etc.⁴² Perhaps, the Quran is the explanation of the parts of *al-Lawḥ al-Mahfūz* which are related and relevant for the *ummah* of Prophet Muhammad (ﷺ).

In addition, Samasta argues that the Quran is the explanation of *al-Lawḥ al-Mahfūz* while hadith is the elucidation of the Quran and the classical texts are the explanation of *hadith*. So, the connection develops from *al-Lawḥ al-Mahfūz* to the Quran, to *hadith*, then to classical texts. Therefore, no case would emerge beyond these sources' boundary, and all the issues could be answered from the classical texts.⁴³

The discussion of the SFC's method to find the rulings also comes under the topic of the 'closing the gate of *ijtihād*' which is a highly debated subject among the Muslim jurists for many centuries. Based on the above-mentioned description, the SFC supports the argument of the 'closure of the gate of *ijtihād*' and asserts that nowadays people do not need to practice the *ijtihād*. The major two reasons behind the mentioned stance of the SFC are as follows. Firstly, a consensus was emerged that none might be deemed as fully qualified for independent reasoning for Islamic law by the beginning of the fourth century of *Hijrah* and onwards. Therefore, all the future attempts are confined to the elucidation, application and interpretation of the doctrines which had been established.⁴⁴ Secondly, earlier scholars had already derived all the essential answers by the beginning of the fourth/tenth century. The duty of con-

⁴¹ Aḥmad al-Ṣāwī, *Hāshiyat al-Ṣāwī 'alā Tafsīr al-Jalālayn*, (Egypt: al-Maṭba'ah al-Azhariyyah, 1926), 161.

⁴² Al-Qurṭubī, *al-Jāmi' li Aḥkām al-Quran*, 8: 344; al-Rāzī, *Mafātīḥ al-Ghayb*, 18: 86.

⁴³ Zayn al-Dīn Musliyar, Darul Huda Islamic University 10th convocation *Fiqh* Seminar, Darul Huda Islamic University. https://www.youtube.com/watch?v=R-APHS_p-cc. Retrieved December 19, 2014.

⁴⁴ For details see J. Schacht, *An Introduction to Islamic Law*, (Oxford: Oxford University Press, 1964), 70-71. Almost the same statements are found in the works of many others, such as J.N.D. Anderson, *Law Reform in the Muslim World*, (London: Athlone Press, 1976), 7; A. S. Tritton, *Materials on Muslim Education in the Middle Ages*, (London: Luzac & Co. Ltd., 1957), 163; N. J. Coulson, *A History of Islamic Law*, (Edinburgh: Edinburgh University Press, 1964), 81; F. Rahman, *Islam*, (Chicago: University of Chicago Press, 1966), 77-78.

temporary jurists is to protect the *madhhab* system and to extract rulings from the earlier legal texts.⁴⁵

The SFC asserts that the traditional texts glean light to answers of all possible legal questions even of contemporary times. Probably the technical terms used now and then in earlier texts are different. For example, artificial insemination and different kinds of surrogacy have been discussed by earlier scholars. Therefore, the SFC maintains that the duty of contemporary scholars is to extract their interpretations from those texts and strive to rightly place those texts in the present contexts. This kind of extraction itself requires earnest endeavour and deep knowledge.⁴⁶

M.T. Abdullah Musliyar, Vice President of Samasta and member of the SFC, elaborated that the bylaws furnished by classical scholars are sufficient to handle the entire issues which people face till the last day.⁴⁷ The rulings for all issues could be found in any one of the three means. Firstly, earlier scholars derived the rulings of several issues that did not exist in their time. So, the rulings of exact issues which people encounter in the contemporary world are mentioned in the earlier texts. Secondly, if earlier scholars did not point out to the rulings of exact cases at our hand, there might be certain similar cases available which were answered by them. So, the contemporary jurists could reach to the rulings of novel issues utilising the already explained similar issues. Thirdly, if earlier jurists explained no similar case, then the contemporary jurists should search for the rulings through various comprehensive statements and general maxims made by earlier jurists and form a ruling based on them.⁴⁸

M. T. Musliyar has supported his view with a statement of al-Nawawī's *al-Majmū' Sharah al-Muhadhdhab*. The statement is "It is far-fetched as stated by al-Haramayn to come across an issue that is not stated in the *madhhab*, does not come under the general meaning of the stated issues and does not come under a certain principle."⁴⁹

⁴⁵ For more details, see Al-Nawawī, *Majmū' Sharah al-Muhadhdhab*, (Jiddah: Maktabat al-Irshād, 1405 AH), 1: 44.

⁴⁶ Ibid.

⁴⁷ M. T. Abdullah Musliyar, Darul Huda Islamic University 10th convocation *Fiqh Seminar*, Darul Huda Islamic University. https://www.youtube.com/watch?v=R-APHS_p-cc. Retrieved December 19, 2014.

⁴⁸ Ibid.

⁴⁹ Al-Nawawī, *Majmū' Sharah al-Muhadhdhab*, 1: 44.

Regarding the term for ‘issuance of *fatwa*’, scholars used different names such as *ijtihād*, *tarjih* within the same *madhhab*, *tarjih* among all *madhāhib* or *naql*. As far as Samasta is concerned, it prefers to use the term ‘*naql*’ (transportation), i.e., to acknowledge *mustafī* that previous scholars had a particular opinion on the so and so issue.⁵⁰ Nevertheless, the SFC believes that to call this activity as *iftā*’ does not cause any issue because previous erudite scholars had employed the name of *iftā*’ for the work of ‘*naql*’.⁵¹ Nowadays, even for the activity of “transmitting already existing opinions”, the word “*fatwā*” is widely used.⁵²

Earlier Scholars on Case One

In case one, the mentioned fatwa established the legality of the marriage of a woman who became pregnant out of fornication. The legal basis of this fatwa could be seen in the al-Haytamī’s *Tuḥfat al-Muḥtāj*:

Sanctity (prohibition) of marriage should neither be established for the fornicator herself, nor for anyone of her parents or children by actual fornication.⁵³

This statement establishes the legality of marriage between a man and a woman, both of whom have committed fornication. Al-Haytamī also says:

If he (the husband) knows his wife’s fornication and the equal possibility of becoming a child from him or adultery remained because she gave birth in six or more than six months after his coitus with her and adultery and evacuation of the uterus was not undertaken. In this state, the denial of fatherhood is prohibited, given that it sustains the possibility of both ways. “The child is to be attributed to one on whose bed he is born”. This text that allows the denial should be interpreted only when the possibility of adultery is prevailing because of solid evidence. Likewise, doing slander and oath-taking (accusation of adultery) is also prohibited because there is no need to join the baby to him, while separation is possible through a divorce.

⁵⁰ Zayn al-Dīn Musliyar, Interview by the Researcher, Kondotty, Malappuram, 4 March 2014; Bappu Musliyar, Interview by the Researcher, Kalambadi, Malappuram, 7 February 2014.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Al-Haytamī, *Tuḥfat al-Muḥtāj bi Sharāḥ al-Minhāj*, (Egypt: Al-Maktabat al-Tijāriyat al-Kubrā, 1983) 7:304.

Moreover, by ascertaining the fornication; she will be in trouble because of people's bad tongues.⁵⁴

According to this statement, Sharī'ah prohibits the denial of a child's fatherhood delivered after six months of a valid marriage, agreeing to the possibility of the husband as the father of the child. Moreover, according to Ḥanafī and Shāfi'ī Schools, to marry a pregnant woman of adultery is permissible because the child of adultery has no sanctity. However, Malikī and Ḥanbalī scholars explained that marrying a pregnant of adultery is not allowed until her delivery. The majority of earlier scholars of Ḥanafī, Shāfi'ī and Malikī Schools do not approve any evidence for confirming the *ḥudūd*, except the confession or certification by witnesses as required by the Sharī'ah.⁵⁵

Regarding the issue of the relationship between a child born before normal period of delivery and the husband, *Tuhfah* pointed out:

It could be known that the child is not from him if he did not consummate in her vagina and she did not introduce his pure⁵⁶ semen at all, or undertook the sexual intercourse or she introduced his pure semen into her vagina but delivered before six months from the intercourse, though the contract has happened earlier than that, or after four years of intercourse, because of the knowledge then that the semen belongs to alien.⁵⁷

The case at hand is different from the above-mentioned situations because she gave birth after seven months from coition. That is the proof for the SFC to issue that the husband is the rightful father. The Islamic jurists unanimously agreed that the minimum period of pregnancy is six months. Therefore, if a woman delivers before six months since the consummation, the husband could not be considered the father.

⁵⁴ Ibid., 8:214.

⁵⁵ 'Ārif 'Alī 'Ārif, *Başmat al-Jīnāt wa Dawruhā fī al-Ithbāt al-Jinā'ī*, (Malaysia: Dār al-Tajdīd li al-Ṭabā'ah wa al-Nashr wa al-Tarjumah, 2002), 37.

⁵⁶ The purity or inviolability of semen in the time of ejaculation means it was gained in a legal way in Islam. So, the semen by prostitution or masturbation would be considered as impure. The modern way of taking semen by injection is not against Islamic law. That is because the semen can maintain its purity in this case. Likewise, purity at the time of insemination means the wedlock between husband and wife should remain at the time of introduction of semen into her.

⁵⁷ Al-Haytamī, *Tuhfat al-Muhtāj bi Sharāḥ al-Minhāj*, 8:214.

Earlier Scholars on Case Two

In the second case, the letter of *mustaftī* included mainly three questions. They are (1) what is the legal basis for the fatwa of the local scholar that a wife can terminate the *nikāḥ* contract if her husband is absent from her for more than three days? (2) what is the Islamic ruling on doing abortion of a five-month-old foetus? (3) what is the status of the second *nikāḥ* while still being the wife of another man?

For the first question, the SFC replied that the fatwa which explained the right of a woman to demand the dissolution of marriage on account of the husband's absence for more than three days is baseless and is against the authentic teachings of the Sharī'ah. Islamic law has specified certain situations where the wife owns the right to annul the *nikāḥ*. There are some occasions when any one of a couple has physical disorders like insanity, leprosy, elephantiasis, imperforate hymen, vaginal atresia, erectile malfunction, and castration, then other has the right to nullify the *nikāḥ* contract.⁵⁸ Likewise, it is permissible for a sane and adult wife to do *faskh* (annulment of the marriage contract) with an insolvent husband who does not have the money and a suitable job to fulfil his financial obligations for her.⁵⁹

Regarding the issue of absence, Faṭḥ al-Mu'īn explained:

According to the prevailing opinion, there is no authority of doing *faskh* on account of withholding of payments by the rich or moderate, whether he is present or absent unless all information about him is missed. If there are no more updates about him and he has no money available at the place, she can do the *faskh* provided that the disruption of her necessities on account of his missing is tantamount to disruption by the insolvency. The majority of erudite investigators from the late centuries have preferred the permissibility of *faskh* in the case of a man who is away, and getting payment from him became difficult.⁶⁰

According to the question, all the above-mentioned features were unfulfilled and the questioner was not too away to miss the updates about him. Moreover, no legal opinions support the idea of the permissibility of *faskh* simply because of the absence of the husband for three days. That

⁵⁸ Al-Makhdūm, *Faṭḥ al-Mu'īn bi Sharāḥ Qurraṭ al-'Ayn*, (Dār ibn 'azm, n.d.), 480.

⁵⁹ Al-Makhdūm, *Faṭḥ al-Mu'īn bi Sharāḥ Qurraṭ al-'Ayn*, (Beirut: Dār al-Fikr, n.d.), 4:

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⁶⁰ *Ibid.*, 4: 90.

is why the SFC pronounced that the fatwa of the local scholar was incorrect and baseless.

Although *qāḍī* appointed by the government is no longer existing in Kerala, each particular locality has its own *qāḍī* elected by the local people and *masjid* committee. The appointed *qāḍī* by *maḥall* committees are responsible for deciding the right of wife for *faskh*. After meeting with wife, husband and other concerned members of both families, and having convinced of the valid reason(s), *qāḍī* will ask her to do *faskh*. In the present case, the wife's family asked for fatwa with a local scholar and got the fatwa to do the *faskh*. They did not consult with their *qāḍī* but did *faskh* by themselves, which was not proper.

As far as the *istiḥṭā*' (seeking for fatwa) in Kerala is concerned, sometimes people ask the fatwa to the religious scholars or *imām* available in their localities. If people are not content with local scholars' fatwa, they will refer it to fatwa committees to revisit *fatawa*. In the above-mentioned case, the SFC explained that local scholar's fatwa is wrong and issued a new fatwa for them. In addition, in the case of missing of husband, the concerned authority and wife's family should conduct a rigorous search for him before they move to the marriage annulment procedures, which was also missing in the present case.

The second question is related to the Islamic ruling of abortion of the five-month-old foetus. *Faḥ al-Mu'īn* elucidated:

Abū Ishāq al-Marūzī issued a fatwa that it is allowed to give the drink of medicine to his slave in order to abort her child as long as it is leech or chew. The Hanafī scholars have gone to an extreme level, and they said it is allowable unconditionally. The words of *al-Iḥyā'* indicate that it is prohibited categorically. Our teacher stated that it is the preferred opinion.⁶¹

An almost similar statement could be seen in *Tuḥfah*.⁶² The argument that Ḥanafī scholars have allowed the abortion categorically has been criticised, for it has not been found in their texts permitting it without some conditions.⁶³ From the opinions of *Tuḥfah* and *Faḥ al-Mu'īn*, it is clear that abortion is not allowed in the case of the five-month-old foe-

⁶¹ Ibid, 4: 130-131.

⁶² Al-Haytamī, *Tuḥfat al-Muḥtāj bi Sharāḥ al-Minhāj*, 12: 38.

⁶³ 'Abd al-Raḥmān Mubārak, *Ḥukm al-Iḥḥād wa Tawābi'u hādha al-Miqrād Tahta al-Fiqh al-Murtādā*, (Master thesis, Darul Huda Islamic University, 2012), 60.

tus because it is no more at the stages of leech and chew, but it is human-shaped with life.

The Islamic jurists distinguished the ruling of abortion based on occurrence, whether before 120 days of pregnancy or after. When the foetus completes 120 days inside the womb, Allah sends his angel to blow the soul, and life starts within the womb. The majority of jurists agreed that abortion after 120 days is forbidden in Islam.

Marrying a man while being the wife of another was the issue in the third question. It is a well-known fact that Islam prohibits marrying a woman who remains in a valid marital contract, as it leads to polyandry. Given that the *faskh* of the wife in the present case was not legal and valid, she continues as the wife of the first husband, i.e. *mustafī*. Therefore, her second marriage is just like marrying a married woman, which is not allowed in Islam. Thus, the second marriage has no value from the Islamic perspective.

Earlier Scholars on Case Three

In case three, the SFC informed them that the dishonest guardian's marriage contract was null and advised them to arrange a new marriage for the daughter. The legal basis for this opinion is the following words of *Tuḥfah*:

According to the prevailing opinion in Shāfi'ī *madhhab*, there is no authority for a dishonest person except the great ruler. This is because of a hadith 'no (valid) marriage without a rightly guided guardian,' i.e. a just and sane. (If the guardian is a dishonest person,) then the marriage should be solemnised by a distant authority.⁶⁴

The above-mentioned statement indicates the invalidity of the marriage arranged by a dishonest guardian. The main criteria to decide somebody's dishonesty is based on his character and integrity. *Fath al-Mu'īn* stated:

Integrity (*adālah*) is realised by avoiding every major sin such as murder, adultery, slandering of adultery, consuming usury and stealing the wealth of the orphan, false oath, perjury, decreasing the weight, breaking of family ties, fleeing from holy war without excuse,

⁶⁴ Al-Haytamī, *Tuḥfat al-Muḥtāj bi Sharāḥ al-Minhāj*, (Cairo: Al-Maktabah al-Tijāriyah al-Kubrā, 1983), 7:255.

disobedience to parents and grabbing money that amounts a quarter of a dinar, missing of obligatory prayer, delaying of *zakāt* with aggression, slander and all other crimes that foreshadow the recklessness of the perpetrator towards religion and less concern for the religious affairs. (Moreover, it also requires) avoiding the insistence on minor sin or sins to the extent that they outnumber his good deeds. Therefore, whenever he committed a major sin or minor sin or sins and continued with them or not (contrary to the opinion who distinguished), it will invalidate his *'adālah* categorically. If his good deeds subdue his minor sins, then he is a man of integrity (*'ādil*). If his good deeds and minor sins become equal or minor sins become dominant, he is dishonest (*fāsiq*).⁶⁵

Based on this opinion, the guardian's authority in the present case is annulled because of his involvement in major sins. This is the legal basis of the SFC's *fatwa* of annulling the marriage contract initiated by the guardian and permitting a distant authority to proceed with a new marriage.

Although the SFC issued the *fatwa* in line with the sound opinion, the scholars from within Shāfi'ī *madhhab* and other three *madhāhib* have divergent opinions on the issue of the validity of a dishonest guardian in a marriage contract. According to the second opinion in Shāfi'ī School, a dishonest father can solemnise the *nikāḥ* contract of his daughter. In addition, the dishonest people were not barred from *nikāḥ* guardianship in the earlier eras. Some scholars like al-Bakrī described that integrity intended in marriage guardianship is not the same to integrity meant as a condition of witness.⁶⁶ According to the Mālikī School of Islamic law, the father's authority is more powerful, and guardianship in marriage contract does not demand the condition of piousness.⁶⁷ One group of scholars of Ḥanbalī *Madhhab* demanded the requisite of piousness of guardian while other group do not.⁶⁸ Since most fathers try to select the

⁶⁵ Al-Makhdūm, *Fath al-Mu'īn bi Sharah Qurrat al-'Ayn*, (Beirut: Dār al-Fikr, n.d.), 4: 273.

⁶⁶ Muḥammad bin 'Abd Allāh al-Kharshī, *Sharḥ Mukhtaṣar Khalīl li al-Kharshī*, (Beirut: Dār al-Fikr li al-Ṭabā'ah, 2010), 8: 375.

⁶⁷ Ibid.

⁶⁸ Al-Māwardī, *al-Inṣāf fī Ma'rīfat al-Rājiḥ*, (Beirut: Dār Ihyā' al-Turāth al-'Arabī, 1419 A.H.), 8:56.

best choice of possible suitors for their daughters, the contemporary jurists approve the marriage guardianship by a dishonest father. In addition, if we insist the guardian to have all the qualifications of integrity to be a valid *waliyy* in marriage, many fathers would be unable to make it happen, and it may lead to unfavourable consequences.

Considering the daughter's situation (mentioned in the letter of *mustafī*) and realising the consequences of marriage to Arab, the SFC issued the *fatwa* of invalidity of a marriage arranged by dishonest father. The Arab wedding (well known in the Malayalam language as 'Arabi Kalyanam') is observed as a social menace in Kerala because this sort of marriages is undertaken by forcing the minor girl to Arabs against her consent.⁶⁹ In most cases, girls are victims and are not cared well by their husbands. To check this plight for the mentioned daughter, it seems that the SFC issued the *fatwa* of invalidity of marriage set by dishonest father.

Contradiction with Scientific Evidence

The SFC prefers the verdicts and rulings mentioned in traditional texts, even if modern scientific evidence proves against them. As shown in case one, the SFC has dealt with a question regarding a woman who has delivered a baby after seven months of a valid marriage and has undergone a DNA test that verified that the existing husband was not the child's father. Furthermore, the court has judged that the husband is not the legal father of the child. Nonetheless, the SFC issued the *fatwa* that the husband is the father relying on the instruction of earlier text. It substantiates the extent of absolute reliance of SFC on views of the earlier scholars.

Part of the reason behind this stand is that there was a possibility of occurring similarities between two people in DNA test and so it was not entirely reliable. So, the *Sharī'ah* does not agree that the DNA is a piece of evidence, especially in fornication. Likewise, it is not proper to victimise any innocent person based on our assumption and calculation with modern technology's assistance.⁷⁰ The chances of having the same DNA for different people are agreed by the scientists, though it happens very rarely like one in 100 million.⁷¹ According to the earlier scholars of Ḥanafī, Shāfi'ī and Ḥanbalī schools of Islamic law, the pregnancy of a

⁶⁹ The pioneer, *Nikah to Hell*, <http://www.dailypioneer.com/sunday-edition/agenda/sports-feature/nikahs--to-hell.html>

⁷⁰ Zayn al-Dīn Musliyar, Interview by the Researcher, Kondotty, Malappuram, 28 October 2014.

⁷¹ 'Ārif, *Başmat al-Jināt wa Dawruhā fī al-Ithbāt al-Jinā'ī*, 25.

woman while she has no husband or master, will not entail her *ḥadd*. Rather, she should be asked about it. If she argues that she was compelled or disagreed with the fornication, then should not be punished.⁷²

Citation of Sources in *Fatwa*

As far as the citation of fatwa sources (proofs to support *fatwa* from the Quran and *hadith* or authentic classical texts), the scholars have diverged with different opinions. Like al-Nawawī, some authors did not stipulate the citation of the *fatwa*'s legal basis if the *mufti* is a non-specialist.⁷³ Some other scholars, such as Rashīd Riḍā maintain that *muftis* have to cite his *fatwa* source if it is a clear and short text.⁷⁴ Moreover, scholars like Ibn al-Qayyim criticised the *iftā'* without citation of evidence and argued that issuing *fatwa* with the source is part of the Prophetic traditions.⁷⁵ Another view says that "source citations should be avoided from a *fatwa* to distinguish it from other types of compositions."⁷⁶ Besides, Shaykh al-Islam of the Ottoman Empire did not cite any juridical sources, while his provincial *muftis* did support their *fatawa* with a citation from earlier legal authorities and texts.⁷⁷

In case one, although the *mufti* asked for the citation of sources, the SFC did not cite because it usually does not cite the sources. The *fatawa* of Samasta are inclined to be concise and straight to address the questions' crux and often consist of merely one or two sentences that include the meaning of "yes" or "no".⁷⁸ *Fatawa* may consist of one-word answers, such as "true", "false", and "permitted"; but sustain the clear and correct mode of expression. Nevertheless, the SFC conducts a discussion on *dalīl* orally in the presence of the *mufti* if he is a religious scholar.⁷⁹ The former Secretary of Samasta, E.K Abu Bakar Musliyar stated that "the SFC's issuance of a *fatwa* itself is a *dalīl* (evidence) of Islamic legal ruling for Kerala Muslims because of its authenticity and

⁷² Ibn Qudāmah, *Al-Mughnī fī Fiqh al-Imām Aḥmad bin Ḥanbal al-Shaybānī*, (Beirut: Dār al-Fikr, 1405 AH), 10: 186.

⁷³ Al-Nawawī, *Adab al-Fatwa wa al-Muftī wa al-Muftā*, 64.

⁷⁴ Muḥammad Rashīd Riḍā, *Fatāwā al-Imām Muḥammad Rashīd Riḍā*, (Beirut: Dār al-Kitāb al-Jadīd, 1970-1971), 4: 1258.

⁷⁵ Ibn al-Qayyim, *I'lām al-Muwaqqi'īn 'an Rabb al-'Ālamīn*, 4:123.

⁷⁶ Al-Nawawī, *Adab al-Fatwa wa al-Muftī wa al-Muftā*, 65.

⁷⁷ Masud and et al., "Muftis, Fatwas, and Islamic Legal Interpretation", *Islamic Legal Interpretation: Muftis and Their Fatwas*, 12.

⁷⁸ Zayn al-Dīn Musliyar, Interview by the Researcher, Kondotty, Malappuram, 4 March 2014.

⁷⁹ Ibid.

people's conviction about it".⁸⁰ Rarely citation of some sources are found in SFC'S fatawa. In one *fatwa*, the name of Shāh Waliyy Allāh al-Dahlawī and in another the name of Imām al-Bakrī were mentioned as source. In addition, the expressions like "according to the *ijmā'* (consensus)", "for the cause of *ittibā'* (adherence of earlier scholars) are also found in the manuscripts.

Comprehension and Precautionary Measures

The SFC ensures the comprehension of the issue raised to deliver *fatwa*, through personal discussion with petitioners and tries the means of conciliation in quarrels. The committee's ultimate opinion in the *iftā'*, which is used to be written like a *fatwa*, will only be the final segment of a chain of activities. It means that a *fatwa* text may appear to be a short sentence, but it rests on broad foundations of several negotiations and other procedures. The *fatwa* literature always retains the outcome, while omits all prior activities undertaken in relation to it.

In the case of SFC, many incidents occur before *fatwa* giving can be comprehended from the fatwa's written segments, along with the nature of the question and reply. Moreover, sometimes the letters between *mufti* and *mustafti* will also be made available. These letters manifest some procedures held before *iftā'*. As part of a thorough comprehension and precautionary measures, the SFC sustains its own particular procedures according to the case and issue encountered.

Moreover, SFC seeks from the *mustafti* the additional information, clarification, verification, if the question is ambiguous. Moreover, if any kind of suspicion remains with regard to the veracity of information included in the question, SFC adds in its answer "This is the *fatwa* if the matter is as you stated".⁸¹

The SFC stipulates to produce all relevant documents of the issue and asks to produce any evidence that might be crucial proof for *iftā'*. Ibn al-Qayyim stipulated two kinds of comprehensions before delivering a *fatwa*. They are (1) comprehension of the incident's actuality with proofs and the Islamic legal ruling on that incident. (2) knowledge of obligatory action in a particular incident and how to apply the ruling over the incident.⁸² Nevertheless, some scholars argue that the *mufti* is anticipated to offer a precise *fatwa* to the petitioner's question, while accountability for

⁸⁰ Ibid.

⁸¹ Ibid: 45.

⁸² Ibid: 1:69.

authenticating the applicability of a *fatwa* to the actual issue falls on the duty of a judge.⁸³

Conclusion and Findings

Over a period of more than nine decades, Samasta has become an essential part of the lives of Kerala Muslims. Samasta Kerala Jam‘iyyat al-‘Ulamā’ is a registered indigenous Islamic organisation in South India, founded to propagate Islam's beliefs and rituals and secure the religious and social rights and authorities of Muslim communities in the southern part of India. Samasta Fatwa Committee (founded on December 12, 1964) is the official body of Samasta to issue the *fatawa*, answer the questions and deal with any problems related to Islamic laws in Kerala. It has completed effectively fifty-six years in the service.

The SFC follows the idea of extracting the legal rulings from the earlier texts. The reasons behind, depending on earlier texts are mainly two. First, they think that on account of the lack of fully qualified scholars for direct legal derivation from the beginning of the fourth century of *Hijrah* and onwards, contemporary jurists' duties are the elucidation and interpretation of the texts which had been established by earlier scholars. Second, all the possible legal questions are already derived by earlier scholars by the beginning of the fourth century of *Hijrah* (tenth-century C.E).

The SFC argues that all questions until the last day could be found in earlier texts through any of three structures: exact cases, similar cases, general principles conducive to find a ruling. Basically, the SFC issues *fatwa* based on the weightiest legal opinions of the earlier texts of *Shāfi‘ī* School of Islamic law. However, occasionally in the face of necessity, the SFC replies with less weighty opinions or the legal opinions taken from either *Ḥanafī* or *Mālikī* or *Ḥanbalī* Schools of Islamic law. The case study proves the evident role and influence of earlier scholars in dealing with the contemporary issues and finding Islamic legal rulings on them.

The SFC maintains to prefer the rulings of texts to the extent that they would not be altered even in the presence of scientific evidence such as the result of DNA test or court order. The analysis of selected *fatawa*

⁸³ Haram, “Use and Abuse of the Law: A Mufti’s Response”, *Islamic Legal Interpretation: Muftis and Their Fatwas*, 85.

on marriage proves that all *fatawa* are highly supported by the legal bases mentioned in the earlier texts.

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Interview

As part of field study of this study, the researcher interviewed the key figures of the Samasta *Fatwa* Committee. The researcher had a discussion with late Zayn al-Dīn Musliyar, the previous chairman of the SFC, a few times and held three focused discussions in three different days as 19 August 2013, 4 March 2014, 28 October 2014. The researcher had a meeting with the previous convener of the SFC, late Bappu Musliyar on 7 February 2014. Moreover, the researcher discussed the topic and ideas with many experts in the area of present study including Dr. Zubair Hudawi (who completed Mphil thesis from Jawaharlal Nehru University on the topic “Development and Modernization of Religious Education in Kerala; Role of Samastha Kerala Jam’iyat al-Ulama,”), Dr. Jafar Hudawi Kolathoor (HoD, Fiqh and Usul al-Fiqh Department, Darul Huda Islamic University, Kerala) and C.P. Iqbal (senior staff in Samasta office in Kozhikkode).