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Local Family *Fiqh* in Malaysia: An Analysis of ‘*Urfi* Methodological Framework

Fiqh Keluarga Tempatan Di Malaysia: Suatu Analisis Rangka Kerja Metodologi ‘*Urfi*

Sayed Sikandar Shah Haneef,* Miszairi Bin Sitoris,** and Saidatolakma Binti Mohd Yunus***

Abstract

The ongoing advocacy for developing local *fiqh*, among others, emphasizes an indigenous approach to evolving *fiqh* by highlighting the flaws in the dominant approach to family law reform and renewal. One of their methodological tools is to examine the existing family *fiqh* from its ‘*urfi* based content as well to explore ways of resolving new emerging usages and customs, which differ from custom of people in other communities in the Muslim world. Critics, however, have some misgivings about this approach and see it as a kind of post-modernist thinking, the thrust of which is to raise skepticism about religious content of any intellectual argument or advocacy. To rebut such an argument, following content analysis method, this paper argues by concluding that an Islamic juridical approach to insist on legislative significance of local custom in evolving a local family *fiqh* is governed by a set of methodological frameworks and parameters which can safeguard it against any suspicion for secularization.

Keywords: Family *fiqh*, local, methodological framework, reform.

Abstrak

Sokongan umum yang berterusan untuk membangunkan *fiqh* tempatan, antara lain, menekankan pendekatan tempatan untuk mengembangkan *fiqh* dengan menonjolkan kekurangan dalam pendekatan yang dominan terhadap pembaharuan dan

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Local Family Fiqh in Malaysia: An Analysis of `Urfi Methodological Framework 118

pembaharuan undang-undang keluarga. Salah satu alat metodologi mereka adalah untuk mengkaji *fiqh* keluarga yang sedia ada dari kandungan '*urfi* yang berasaskannya juga untuk meneroka cara penyelesaian kegunaan dan kebiasaan yang baru muncul, yang berbeza dari kebiasaan orang dalam komuniti lain di dunia Islam. Pengkritik, bagaimanapun, mempunyai beberapa kekeliruan mengenai pendekatan ini dan melihatnya sebagai sejenis pemikiran post-modernis, teras yang menimbulkan keraguan tentang kandungan agama tentang sebarang hujah intelektual atau advokasi. Untuk menolak hujah sedemikian itu dengan menggunakan kaedah analisis kandungan, makalah ini telah berupaya untuk menyimpulkan bahawa pendekatan yuridis Islam untuk menegaskan kepentingan perundangan adat tempatan dalam mengembangkan sebuah *fiqh* keluarga tempatan ditadbir oleh satu set kerangka metodologi dan parameter yang dapat melindunginya daripada sebarang kecurigaan untuk sekularisasi.

Kata Kunci: Fiqh keluarga, tempatan, kerangka metodologi, pembaharuan.

Background

Shari'ah is divine in origin and as a comprehensive code of conduct, it aims at guiding and inspiring humans and regulating their personal and public behaviours. As a matter of principle, it operates in human context by taking into full account the believers' time-space circumstances. At the level of Qur'an-based laws, for example, the fact that the Qur'anic verses are classified as Meccan and Madinan and some other Qur'anic injunctions have their own occasions for revelation are cogent proofs of this legislative feature of Islamic law. Likewise, in the Prophet's traditions (Sunnah), some of them were enacted to serve certain socio-economic and political requirements of the first community of believers. Similarly, to rationally extend the Qur'an and Sunnah based laws to novel situations and non-Hijazi territories, local people's custom, their common interests and cultures were accommodated by way of various juristic methodologies, such as *Maslahah Mursalah*, *Istihsan* and '*Urf*. Accordingly, it can be argued that Islamic law at the level of application in human context not only is accommodative of local custom but also the exposition of its *legal corpus* draws on local variables in terms of understanding (*fiqh*) to achieve its full potential.

In view of the above, intellectual landscape in the evolution of *fiqh* has triggered a debate for a new approach for reinstating the application of *Shari'ah* in the contemporary context. This has given rise to several approaches in the discourse on construction and application of *fiqh*, among which the one which stresses the paramouncy of local factors in such an undertaking is postmodernist approach. Its main critic, however, is that postmodernist thinking has its root in the Western thought since 1960s, its main thrust is essentially to dispute the ultimacy

and finality of things as ‘truth’ and thus calling for deconstruction of all values which assert to be representing the truth. The topmost in its agenda is doubting the claim of truth by religion and all that it stands for. This philosophy is embedded in their discourse of meta-narratives which encompass “theories, knowledge and worldviews that claim to be the only truth.” For instance, Foucault and Derrida, French Philosophers, argued that no knowledge is able to describe the truth about reality of man and humanity regardless of its source (Ahmad Badri Abdullah *et al* 2013, p. 37). Subscribing to the same idea, some postmodernist have begun to question even some clearly explicit laws of the Qur’an as non-normative but historically and circumstantially relative, the relevance of which are determined by their context. Contemporary liberal and feminist approaches to the deconstruction of Islamic law represent some of the concrete offshoots of postmodernist trends especially in the domain of Islamic family law. Given the above scenario, how the advocacy for developing a local *fiqh* could evolve where it can balance between the normative aspects of the *Shari’ah* and its rejuvenated construction and application. And while doing so, it does not fall into the trap of postmodernist’s agenda and its dubious methodology by emphasising the significance of context over the text. But instead whilst catering for local custom/needs in juridical works, the local *fiqh* Islamicises those incongruent elements in the light of the core Islamic values which govern and sustain family. It is this methodological concern which this paper aims to address. To this end, in the pages that follow, a juristic exposition of custom, its role as methodological means of legislation, and its supportive principles for actualization of the *Shariah*-grounded local *fiqh* will be crafted.

Classical Framework

Urf in Arabic means beneficence and kindness as well as custom, tradition, and habit (Ibn Manzur 2010, p. 240, Ibn Nujaym 1999, p. 79). To al-Nasafi, *urf* stands for what has established itself among people as being reasonable and acceptable to people of untainted nature (quoted in al-Mufti 2006, p. 24). It can be a specific or common usage, verbal or in the form of customary practices. Some patterns of behaviour finding their expressions as custom among the people of sound nature can take the form of verbal expressions or they can be usages or specific ways of conducting individual or social events. For instance, certain words in the Arabic language carry customary meanings different from their dictionary connotations. For example, the word *walad* customarily

refers to a male child as opposed to its literal construction as a child regardless of its sex. Or certain daily transactions do not require the formalities of a valid contract for their conclusion, such as sale by grabbing an item in the grocery shop and paying its cost without talking (al-Gharabiyyah, n.d., pp. 4-5).

Additionally *urf*, in the scheme of Islamic legal theory plays multiple functions at various levels of deduction and induction of legal rulings in Islamic jurisprudence including: First, the legal rulings for matters the determination of which has originally been assigned to custom by the lawgiver, hinting to it by appending the legal text with the word *ma'ruf* (what is customary among people) (al-Hussaini n.d., p.12). For instance, the Qur'an commands the husbands to treat their wives in good manner in terms of maintenance and spousal behaviour (al-Qur'an, 4: 19; al-Qur'an, 2: 233). Even divorcing one's wife is commanded to be made in good manner (normative way befitting of a sound custom): (al-Qur'an, 2: 231). The Prophet also was taking this principle into account when laying down rules, one instance of which was his judgment in the case of Hind bint Utbah, the wife of Abu Sufian. On hearing her complaint that Abu Sufian was not giving her sufficient maintenance, he ruled: "Take from his wealth what is sufficient for you and your children in a good way—which one customarily needs," (Muslim, Vol. 3, p.1338), without specifying its amount or genus. Inducting a general principle from this hadith, Muslim jurists ruled that the yardstick on the basis of which the amount of maintenance to be awarded for a complaining wife is left to the custom of the locality where the dispute arises. For instance, Ibn Taymiyyah (2004) in summing up the preponderant juristic stands in the issue maintains: "The correct position about the quantum of *nafaqah* for a wife is that of the majority, who maintain that the determination of maintenance for a wife is on the basis of what is customary, and it is not predetermined by the text, the amount of which would vary depending on time, place and financial position of the husband based on what is customary on their locality" (Vol, 34, p.83).

Nevertheless, *urf* being a subsidiary and dependent source of Islamic jurisprudence, to be considered as a valid basis for juridical construction, it must not contradict the legal text, or *ijma'* or vatiante a legally recognised benefit or bring about a *Shar'i* defined harm. *Urf* in this sense includes not only those customs which were recognised by Qur'anic text or endorsed by the Prophet but even those good customs which were neither approved nor prohibited by the two foundational sources of Islamic law, namely the Qur'an and the Sunnah (al-Waraqi

n.d., p.12). As such for a custom to be valid, it should fulfill several legal stipulations including: First, it should not contravene a legal text or unimpeachable principle of the *Shari'ah*. That is why the legal scholars have held that 'urf is one of the methods of legal deduction provided it does not run against the Qur'an and Sunnah legal statements or a definitive principle derived from them. Because the lawgiver enacts what is advantageous to humans and prohibits what is damaging to them. Accordingly, Muslims should not persist on the continuation of customs which are contrary to the *Shari'ah*. The reason is that contradictory customs would not be considered *ma'ruf* by the lawgiver but *munkar* which should be eschewed and combatted (Ibid, p.20). Nevertheless, the condition in practice has puzzled the jurists when there has been instances of apparent contradiction between custom and a legal text. This issue has been resolved by holding that the role of 'urf is either one of *takhsis* or *taqyid*, i.e, the ruling of text applies on general populace and is the governing law but is dropped in favour of some from among them on account of custom. For example, the jurists have given approval to *bay' al-istisna'* on account of customary trade among people inspite of the general prohibition of selling a non-existent commodity in the time of sale by the hadith: "Do not sell something that you do not possess" (Ibn Majah 2009, Vol. 2, p. 737; al-Waraq, p. 22). Second, it should be widespread or represent the dominant practice of a people by virtue of the legal maxim: "The benchmark is the practise of the overwhelming majority and no legal weight is attached to marginal divergences." Third, it should be general and not specific. Forth, it should be in existence in the time of legislation/ or when pledging an undertaking. Fifth, it should not be countered by explicit wording of the contracting parties (Ibid, pp. 22-26). Finally, it should not be absurd in the sense that it is not estranged to custom. Stressing this, Ibn Qayyim held that circumstantial custom is like a verbal custom in serving as a clear proof provided it is sensible. Accordingly, a claim by a wife that her husband has not provided her any maintenance for the duration of two years from the date of their marriage cannot be sustained in view of its absurdity based on custom" (Ibn Qayyim 2010, p.79).

Custom in the Frame of *Ijtihad*

Local custom and cultural mores (*`urf and `adah*)¹ as the twin socio-cultural variables encompassing a wide array of other related circumstances and factors played significant roles during the formative period of Islamic law beginning from the period of the Prophet until the consolidation of the *fiqh* and methodology of Islamic jurisprudence. The Prophet not only incorporated good customs of the pre-Islamic era into the corpus of Islamic law but also Islamized a great deal of them, technically known as *sunnah taqririyyah* or even partaking on *sunnah ghayr tashri`iyyah* if they obtain on the questions of non-legal matters, such as war strategies or negotiation of peace treaties with belligerent enemies, just to name a few. The companions placed more importance on social factors and their vacillation to construe, reconstruct and implement Islamic law as embedded in its foundational sources. With the consolidation of *fiqh*, the classical jurists technically delineated custom as one of the subsidiary sources of Islamic law which ideally could play an expanded role in the construction and implementation of Islamic law in real life situations.

In Islamic scheme of *ijtihad*, *`urf* is regarded as one of the legislative instruments which is not only crucial for extrapolation of textual rules, appreciation of their context but also has legislative function on its own in the assimilation of good customary practices into the fabric of Islamic legal system provided that it is recurrent, longstanding and do not contradict textual laws as enshrined in the Qur'an and Sunnah. Accordingly, generally the importance of *`urf* was delineated in various legal maxims including: "*al-`adah muhakkamah*" (the custom is binding) and "*taghayyur al-ahkām bi taghayyur al-zamān wa al-makān*" (The rulings change according to changes of time and place), and "*al-`urf ka al-sharṭ*" (custom ranks as a legal stipulation) (Zaydan 2011, pp. 257-258).

Emphasizing its specific presence in *fiqh* construction, Ibn al-Arabi (1905) has stated that *`urf or `adah* is a principle from the principles of the *Shari'ah* which would become its basis (Vol. 4, p. 288). Al-Sayuti (1983) held that a great deal of juridical questions were resolved on the basis of *`urf and `adah* (p. 90). Ibn al-Najjar (2000) has held that from among the legal proofs are also *`urf and `adah*, the legislative sig-

¹ *`Urf* and *`Adah* in Arabic language are linguistically distinguished in the sense that *`urf* signifies sensible verbal and action-based habits of majority in a place while *`adah* can represent individual habits or majority usages and custom. However, for juristic purposes, both the terms are used to mean custom as one of the secondary sources of Islamic jurisprudence which we also imply in this study (Al-Sarakhsi, n.d., Vol.9, 15).

nificance of which has been embedded in the legal maxim (*al-`adah* is the governing principle) (vol. 4, p. 448).

In view of the above, while there is a consensus among the jurists on the legislative significance of ‘*urf* as the supplementary source of Islamic law, in the absence of a legal text on a legal point, juristic discussion is complex when it comes to discussing its mediating role with textual laws, which is an important issue in the context of discourse on local *fiqh* or the effect of change in ‘*urf* on the application of certain legal rulings. In the lines that follow, we offer a condensed view of juridical discourse to the effect:

1. Mediating role of ‘*urf* with the text

While there is a consensus among the jurists that ‘*urf* cannot override a categorical textual law, but they have differed in its mediating role in actualization of its imperatives in human reality. Firstly, on the question of as to whether a customary verbal word can supply operational meaning to a general text of the Qur’an, termed as particularizing the general ruling of a legislative text (*takhsis al-‘amm*)², it was argued that the principle is that it does provide such meaning provided that it existed during the time of revelation (*Risalah*). But for any post-revelation verbal custom to particularize a general text, it must have the backing of Prophet’s approval or consensus of the jurists. Underlining this, al-Shawkani (2000) maintains that a verbal custom during the time of *Risalah* can particularize a text if the Sunnah endorses it, but for any other post-revelation custom to delimit the general text, it must be sanctioned by juristic consensus (*ijma’*) (Vol. 2, p. 698). Nevertheless, the rule is not so settled in the case of practical custom in restricting the meaning of a general text. Its particularizing effect is a disputed point among the jurists (al-Qurtubi 2006, Vol. 4, p.124; al-Ghazali 2008, Vol. 2, p.111). Some support it, others disagreed. Supporters support their stand by citing the example of limiting effect of ‘*urf* on the general command of the Qur’an, such as the obligation of the mother to breastfeed her baby. Allah commands believing mothers to breastfeed their babies (al-Qur’an, 2: 233). Malikiyyah, however, held that if it was customary for a woman of noble descent no to do so, this general commandment does not obligate her

² *Takhsis al-‘Amm* means abandoning the application of a general law in the case of some people on account of proofs justifying such a departure. For example, all male and female legal heirs are entitled to specified shares from the estate of a deceased, by virtue of verse al-Nisa: 7 except of those found guilty of murdering the deceased by virtue of a hadith (Muhammad 2014).

(Ibn al-Arabi 1905, Vol. 1, p. 275). The majority, however, have argued that customary practices are not immutable legal proofs as they can be either good or bad. Hence, textually sanctioned legal proofs prevail over local customs even if they are widespread (al-‘Amidi 2010, Vol. 2, p. 407). They contend that :1) only a good custom is relevant for particularization; 2) particularization of a general text by good custom does not abdicate its authority but only helps its contextualization in a local context (al-Hawali 2010, p.14). Supporters nevertheless, defiantly cite several other instances of exclusion of some people from the general commands of the legal texts, such as permissibility of *istisna*’ for manufacturing traders *etc.*

Secondly, qualifying the scope of an absolute text (*taqyid al-Mutlaq*)³: Stressing this, al-Qarafi (n.d.) observes that:” Every community has its own custom, thus absolute command can accommodate such custom (Vol. 3, p.118). Likewise, Ibn Qudamah (n.d.) concludes: “The import of absolute words are understood on the basis of ‘*urf* and ‘*adah*” (Vol. 7, p. 170). For instance, the husbands are prohibited from coitus with their wives during their menses without specifying the duration of such menses (al-Qur’an, 2: 222). Hence, it is ‘*urf* which qualifies the minimum and maximum duration of menses, i.e., one day and night to three days; and ten to fifteen days varying from woman to woman and their climatic conditions (al-Mufti n.d., p. 201). Other notable examples found in classical *fiqh* include: 1) defining the minimum age of puberty, menstruation and the maximum duration of pregnancy; 2) customary determination of import and other implications of business transactions, such as description of defects in commodities which entitles the purchaser to ask for their replacement or their nominal value in fait money; 3) determination of what amounts to *hirz* ; 4) defining of which is arduous enough to warrant the activation of a legal concessions for a traveler ; 5) delineating the meaning of characters/traits or qualities which text does not detail, such as what amounts to ‘*adl*’/*adalah* which the Qur’an prescribes as a prerequisite for the credibility of a witness to be competent to testify before the court; 6) and imputation of defamatory words as to whether they constitute slander or libel (al-Hussaini n.d, pp. 30-38).

³ *Taqyid al-Mutlaq*: Words containing a command in the text of the Qur’an or Sunnah which are generic and amenable to qualification by another qualifying proof for fulfilling the requirement of a certain command. For instance, the Qur’an prescribes the punishment of hand amputation for theft without specifying its details by mentioning *faqta’u aydiyahuma* (chop off their hands) but the Sunnah supplies its full description (Islam Web, 2012).

2. Impact of Changes in 'Urf on Legal Rulings

Islamic legal rulings embody fixed and changeable laws. As far as fixed part is concerned, it is a settled principle that the textually proven categorical legal rulings are perennial, thus changes in 'urf cannot overrule them but their application may be put on hold in view of exigencies of believers' circumstances. The changeable laws, on the other hand, can dynamically evolve if the *ratio legis* for their existence is no longer present or they were originally based on 'urf and *maslahah*. Hence, it is from this aspect that the legal maxim, "changes of the rule on the basis of change of time and place is an irrefutable principle" was coined and given juridical explication. This was supplemented with other maxim to assimilate 'urf into the corpus of *fiqh* including: "People's usages are enforceable as legal proofs," "known customary practices are the same as the mutually agreed terms," and "fixation by 'urf is like fixation by a legal text" (al-Hussaini, *Ibid*, p. 40). Some examples include: 1) upholding customary lifestyle in maintaining one's appearance, such as shaving of facial hair by women, hairstyle by men etc.; 2) subscribing to customary way of considering the receipt of a commodity as legal grasping (*qabd*) prior and after the emergence of e-commerce; 3) adhering to customarily defined juristic concepts in Islamic law, such as specification of deferred and prompt dower, duty of a wife to do the household chores ; 4) and fulfilling the obligation of *zakat fitrah* from the staple food of a country (*Ibid*, pp. 39-51).

Elucidating the effect of change on the legal ruling, al-Qarafi (n.d.) held: "Sticking to legal rulings which were rooted in custom in spite of their changes is against *Ijma`* and is an indicator of ignorance in matters of religion. The reason is that all legal rulings which are grounded on 'urf are changeable if they become archaic in view of new custom replacing them" (Vol. 3, p. 29). There are numerous examples in classical *fiqh* which echo this. The Hanafi Legal School ruled that inspection of the specimen of certain merchandise by the purchaser is sufficient for the conclusion of the sale. On this vein, in the case of purchasing a house, the early Hanafi School held that the inspection of one room was customarily regarded as good for selling it. The later Hanafi Jurists, however, diverged from this ruling by requiring the sighting of all the rooms in a house on account of changes in practice of such a sale (Ibn 'Abidin 1903, Vol. 2, p. 598).

In elaborating this thesis, the jurists delineated two situations: first, changing of the rules on account of changed social circumstances where the existing law would not achieve its social objective in view of

the changing mores of the people. For instance, the jurists have different opinions on the correct *fiqhi* position on triple divorce, as to whether it amounts to three irrevocable divorce or is a single revocable one. The basis of this divergence is the *ijtihad* by `Umar bin Khattab. Triple pronouncement of divorce by a husband was regarded as one divorce during the time of the Prophet and Abu Bakr and the early phase of Umar's reign, when its frequency was less. During `Umar, it became rampant, and then he made it to be irrevocable, once uttered (Ibn Qayyim, 3: 330). Second, changing of the rules because of variation of places, For instance, the *fuqha* not only differed on the legal value of marriage equality (*kafa'ah*) but also differed on the criterion of *kafa'ah* between a suitor and a woman for marriage, ranging from religious piety to even profession, age, social class etc., all depending on what were the factors on the basis of which people of a particular locality were accepting men to be their son-in-laws (Ibn Qayyim 2008, Vol. 3, p. 398). Third, suspension of certain rules due to the non-existence of the requisites that warranted them. For instance, `Umar suspended the application of fixed penalty for theft during the year of famine on account of which people felt desperate to commit felony to survive (Ibid, p.399). And lastly, accommodating social custom on account of certain local considerations, such as rewarding a wife for her contribution to the family prosperity (or wealth) by giving her a share from her husband's asset upon divorce or the husband's death, which the *Ulama* in South East Asia have sanctioned.

Contemporary Trends and the Way Forward

The most puzzling methodological question in contemporary discourse on the position of *`urf* in *fiqh* which needs probing has been `balancing between the ascendancy of Islamic law in shaping societies and impacting social practices (realities) and serving the customary needs of the *Ummah*. This is in view of the fact that the origin of some prevailing custom, especially on family and social life, goes back to practices in societies whose worldviews and philosophy of life differ from what Islam envisions for Muslims. In this context, since early nineties in consequence of pulls towards a secular philosophy of life and global culture, approaches have varied in dealing with the question of reconciling between the changing nature of societies, their new demands, cultures and lifestyles, and divine base of Islamic law in general and family law in particular. The most central methodological instrument employed to embrace, resist or mediate with such a complex Islamic and family law is

urf. Beyond their ideological orientations and motivations, there are three main trends which dominate juridical discourse on the subject of Islamic law in the face of change (social/ familial, etc.). First, some have gone overly sociological by contending that Islamic law as a juristic law (*fiqh*) and a product of human *ijtihad*, has always been and is in a state of constant flux, i.e., had a humble beginning to evolve and unfold in response to changing needs of Muslims, and thus keeps on evolving with the change of time and circumstances and conditions of society. In support of this trend, such legal maxims are presented: “Custom is of force,” “what is established by custom is same as what is established by a *nass*,” “what is known by custom is like a stipulated condition,” “it is undeniable that rules change as time changes,” and so on. There is no doubt in the authenticity of these maxims. However the overzealous application of these maxims are becoming a matter of concern.

The above advocacy for change has run so wild that it demands rewriting *fiqh* by even changing the stable part of Islamic law, not only because of pragmatic argument that they are no longer upheld by Muslims anyway (are obsolete) but by casting doubt on their immutability as transcendental binding revealed laws, in the name of reform and new hermeneutics and the like. Implying this, Jeffery Lang (1995) points out that, “Our viewpoints do not originate in a vacuum: they are a synthesis of our environment, backgrounds, experience and personality” (p.137). Expressing his dismay with this approach, al-Qaradawi (1995) lamented by saying that there are those who will not leave anything in its current state of prohibition because they want to change every ruling in the name of change (p.117).

Others have reacted emotively against such dubious liberal approach by resisting any change in the *status quo* (classical *fiqh*) as being anti-Islamic and deviation from the path of truth by proffering numerous textual evidences to the effect. Nevertheless, by inductively inferring from the classical framework of *urf* as we referred to in this study, the middle-path approach, may call for accommodating change within the parameters of Islamic legal theory by emphasizing that: first, unlike obsessive sociological claim that Islamic law is an outcome of jurists’ *ijtihad* to address social needs, thus always being in a state of flux due to changing social needs, Islamic law is a composite of fixed laws and flexible elements. The reason is that its fixed parts beyond human imagination and their whimsical desires embody God’s prescriptions as what best benefits Muslims, as the everlasting code of conduct for managing their individual and social life including their personal affairs in area of family

institution. For example, marriage has to be a heterosexual affair not only for fulfilling human natural urge for intimacy but for other socio-ethical cum religious purposes, such as family wellbeing, human reproduction, building a righteous *Ummah* etc., as visualized by the lawgiver. Second, Islamic definition of *'urf* and its vacillation is subjected to two most non-negotiable parameters, one religious and another sociological. From religious aspect, both *'urf* nor its changing face can override fixed laws and permanent ethical imperatives of the *Shari'ah* or their underlying purposes. Islamic law has disbanded a host of contradictory pre-Islamic *'urf* in favour of divine system of social engineering and building a righteous *Ummah*. At the sociological level, accommodation of change is subject to two conditions: 1) changes should emanate from within the Islamic culture if it relates to matters which are not "purely secular affairs,"⁴ such as family matters, Islamic rituals and Islamic penal policies, food and nourishments etc. 2) If *'urf* is blended into the secular domain, then even if not *ultra-vires* of Islamic legal texts should be in line with the mega Islamic principles which ultimately lead to the preservation of the primacy of Islamic socio-political and economic systems and not to the contrary, i.e., subjugation to the hegemony of secular ideologies and their system of running the secular affairs in the world. The Prophet adopted Persian and other extant war strategies of his time to further the cause of building an Islamic civilization and not to advance their hegemonic ambition of controlling the world. This is what *al-hikmat dallat al-mu'min*⁵ means and not embracing "every apparently good" coming from other systems, especially the dominant ones (due to a sense of inferiority complex), the end result of which would be more entrenchment of alien systems than prosperity of Islam and local people.

⁴ What does "purely secular affairs" denote was made explicitly clear by Prophet, as the true interpreter, expounder and implementer of Islamic law, in the hadith reported by Rafi' b. Khadij when the Prophet came to Madinah and was that the people had been grafting the date trees. He said: "What are you doing? They said: We are grafting them, whereupon he said: It may perhaps be good for you if you do not do that, so they abandoned this practice (and the date-palms) began to yield less fruit. They made a mention of it (to the Holy Prophet), whereupon he said: I am a human being, so when I command you about a thing pertaining to religion, do accept it, and when I command you about a thing out of my personal opinion, keep it in mind that I am a human being. 'Ikrima reported that he said something like this" (*Sahih Muslim*, number 2362).

⁵ Abu Hurairah reported: The Messenger of Allah, peace and blessings be upon him, said, "The word of wisdom is the lost property of the believer. Wherever he finds it, he is most deserving of it" (*Sunan al-Tirmidhi*, number 2687).

Therefore, the legal recognition of *'urf* as an important element for realistic application of Islamic law so as to lead Muslims to the path of salvation by taking into consideration their time-space requirement does not mean a *laissez faire* wholesale borrowing (imitation) of non-indigenous cultures and their life styles. The reason is that every culture's family norms, custom and usages are intractably connected to their worldviews and philosophy of life and if secular, it is squarely concerned about "here and now". Accordingly, it is particularly dangerous to overturn Islamic ethico-legal norms of Muslim family laws in the name of reform because of changing secular views about women, family and familial relationships in liberal societies, and by reason of advocacy for their adoption by a fringe of Westernized segments in Muslim societies. Classical jurists like Ibn 'Abidin, unencumbered by secular vision of family and society was well aware of the danger of such liberal use of *'urf* when he said: "However, changing of the rulings in view of the changes in *'urf* as a time-space legal stratagem is subject to several parameters including: "1) Changing a ruling is permissible only in the case of those *'urf* whose *ratio legis* no longer exist; 2) the ruling was initially based on a specific custom; 3) changing such custom-based ruling is necessary; 4) and such a departure from an old custom to the new does not result in harmful conducts" (Ibn 'Abidin 1903, Vol. 2, p. 123).

In light of the above, the advocacy for developing local family *fiqh* with the twin end goals of strengthening families and nurturing and producing glocal human capital for nation building, is an important project in view of some specific indigenous distinct cultural traits and *'adah* of Muslims in Southeast Asia. Nevertheless, methodological realization of such a vision has to traverse the moderate path of neither assimilating unsuitable Muslim *'adah* of other parts of the Muslim world and nor aping the West. For it be local as well as Islamic, one may think of two methodological scenarios: 1) Eclectic in the sense of preserving the non-negotiable immutable characteristics of an Islamic family as defined by the Qur'an and the authentic un-circumstantial Sunnah, and selective use of classical *fiqh* and law; 2) Rewriting a new *fiqh* which some of its advocates envision, is rather an overly ambitious project, but its merit is that it would be more Malay-grounded than Arab (*fiqhi* imported) in terms of defining *'urf* and finding its space within the established methodological frame of *fiqh*. The first approach is traditionalist with some leaning towards accommodating local custom, and the second line of thinking which is still in the embryonic stage, we believe can benefit from technical views about *'urf* presented in this paper. Definitely, nei-

ther dogmatic insistence on upholding classical *fiqh* is realistic nor radical advocacy for secular-oriented sociological approach is befitting Muslim family here—the former somewhat alienates local cultures and custom and the latter secularizes/dilutes the Islamic content of the family *fiqh*.

Conclusion and Recommendations

In sociological terms, local custom in the sense of *urf* and *adah* broadly encapsulates all factors that define a community as distinct from another from cultural, economic, political, legal and religious and social aspects. In the context of family institution, it pervades all over from the process of its establishment, subsistence, post-dissolution management and reestablishment. All societies traditionally were built on the basis of families and had their own set of rule and custom for their management. In the case of Muslims, family management is done on the basis of a code of family *fiqhi* rules composed of religious and customary contents. As the traditional concept of family changes in the secular world of our time, both customary and religious bases of Muslim family *fiqh* face the formidable challenges of preserving them. The most daunting task for Muslims in this struggle is balancing between religious content of their family *fiqh* with contemporary custom, some of which are local and others have seeped into Muslim family structure from other cultures, “acronymed as glocal”. Muslims across the world have been boggled with the complex question of preserving their family values and Malaysia is not an exception. A discourse has ensued as to how to uphold religious aspects of family *fiqh* at the present age where not only the traditional family structure has constantly been changing but also the ways of managing it as well. It is here that several methodological questions about *urf*, its vacillation and its impact on *fiqh* construction dominate modern discourses on family *fiqh*. These were some of the issues which we discussed in this paper that may enrich the discourse on developing local family *fiqh* for Malaysia. Hence, we recommend the following:

- 1- *urf* content of *fiqh* only has juridical value if it helps operationalization of revealed laws in human reality or it helps the realization of moral vision of Islam for strengthening family and its value systems;
- 2- Absorbing new *urf* into the structure of family *fiqh* should not dilute its religious essence nor should it defeat its ethico-religious and legal philosophy; And
- 3- In an attempt to develop local *fiqh*, indigenous Islamic approach within the parameters of the *Shari'ah* should be the course.

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Local Family Fiqh in Malaysia: An Analysis of `Urfi Methodological Framework 132

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133 Sayed Sikandar Shah Haneef, Miszairi Bin Sitiris, and Saidatolakma
Binti Mohd Yunus

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