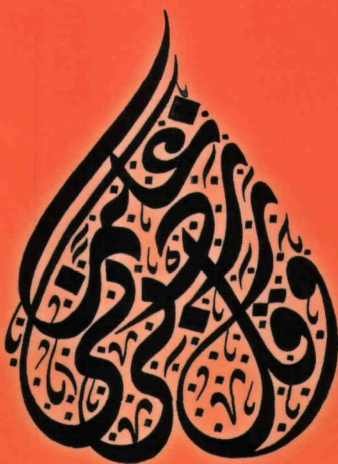


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# **Justification for State Intervention in Family Matters: An Analysis from the Context of Islamic Jurisprudence**

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## **ABSTRACT**

Can the State intervene in family life? Arguments for State intervention in family life usually contend with arguments that emphasise the right of the family to integrity and freedom from State encroachment. Studies have shown that there is a no-end debate on this issue. In view of that, this paper examines the justification of State intervention in family matters from the perspective of Islamic jurisprudence. For this reason, several Shariah principles and rulings are analysed to justify the state intervention and its limitations. As this writing is a conceptual paper, the method used primarily is based on library research, where references comprise extensive literature in the form of books, journal articles, relevant statutes, verses from the Quran and the traditions of the Prophet and his companions. It is found that, being the highest authority entrusted by Allah SWT to sustain the order of the community particularly the family institution, the state has the right to intervene in family matters by imposing both legal and non-legal mechanisms for the purpose of safeguarding the family as intended by Allah SWT. A number of justifications is highlighted in this paper to denote the discretionary power of the State in interfering in the family matters of its citizens.

**Keywords:** Family matters, Islamic jurisprudence, State intervention

## 1. Introduction

The topic on State intervention in family matters is normally dealt with the issue of human rights and liberties. In dealing with the concept of human rights, it is accepted by many scholars that Islam adopts different perspectives as compared to the western counterpart. Ahmad (2001) for instance, pointed out that human rights in Islam is based on the general interests of the society, which emphasized the strong relationship between individual freedom, the concept of justice and *maqasid al-Shariah* (objectives of the Shariah), whereas the western concept of human rights is based on individualism. The same idea is also emphasized by Shad Saleem, (2006) who stated that western concept of human rights is motivated by a militant brand of secularism or rationalism that denies any significant place for religious considerations in the human right discourse.

In light of the above, this paper analyses several justifications of state intervention in family matters from the Islamic perspective. It provides an understanding of the rights of the State or government and the limitations in taking such action. This research is significant as it highlights the distinguished concept of rights in Islam and the relationship between individual and the State in governing the family institution.

## 2. Literature review

With regards to the concept of State intervention in family matters, several research studies have been conducted by previous researchers. Mohammad Yusuf (2004) and Nailah (2004) for instance, emphasized on the specific duties and power of the State and the issue of human rights in family matters. Both writers also highlighted that the State has a special right to intervene in family matters, for example by regulating a strict law restricting the power of husband in pronouncing divorce (*talaq*).

Similar approach was taken by Zaleha (2002), who highlighted more on the important roles of the state in protecting the sanctity of family institution. When marital disharmony is regarded as one of major social problems, the writer proposed that the government should exercise its responsibility in preserving the family institution by providing comprehensive programmes of family life education, developing supportive system for working mothers, expending child care

programmes, promoting initiatives by individual and public agencies in exercising social concern to help those with marital problems.

In analysing the issue of State intervention in family matters from Islamic perspective, literature on *maslahah* (public interest) and *maqasid al-Shariah* are important since they are considered the rationale behind the intervention. Ibn Qayyim (1993) and Yusuf al-Qardhawi (1996) in their books explained that the main purpose of Islamic law is to preserve people's interest and preventing them from harm in this world and also in the hereafter. These objectives can only be achieved by acquiring what is good and beneficial (*maslahah*) and eliminating what is evil and harmful (*mafsadah*) in all matters concerning human beings, which should also cover their family matters. On the same note, as discovered by Mohd Farid (2008), one of the main roles of the government is to protect the interests of the citizens by enjoining right and forbidding wrong (*amal ma'ruf nahi munkar*). This idea has also been discussed comprehensively by several writers, including Noh (2002), Mohammad Hashim (2002) and Muhammad Ali (2007). These writers have tabled up the duties of rulers in Islam, the strong relationship between rulers and citizens, and the degree of obedience to be submitted by the citizens to the rulers. Although these issues have been discussed by scholars, the justification for State intervention in family matters from the perspective of Islamic jurisprudence, however, has not been comprehensively discussed.

### 3. Methodology

This paper takes a qualitative approach. Library research is used in obtaining the relevant data, where references comprise literature in the form of Quranic verses, traditions of the Prophet and his companions, books, journal articles and some relevant websites. As this paper is related to Islamic jurisprudence, earlier works of classical Muslim jurists are referred to, as it provide insights and information relating to the area of discussion. The current laws are also analysed, particularly the Islamic Family Law Act (Federal Territories) 1984 and related administrative procedures, to represent other States in Malaysia. Federal Territories are selected as they are the capital of Malaysia and directly administered by the federal government, whereas other territories are under State's government. For the legal discussion, legalistic and textual approaches are used in which the classical texts, as well as the laws are thoroughly analysed in order to highlight justifications for the State to intervene in family matters according to the principles of Islamic jurisprudence.



## 4. Result and Discussion

### 4.1 Justification of State Intervention in Family Matters

Although family matters are personal in nature, Islam allows the State to establish any rules and regulations in order to preserve the family institution. However, the State has to consider some limitations and such intervention must be justifiable. Various principles in Islamic jurisprudence indicate the discretionary power of the State, showing that it is important for it to justify the purpose of intervention done in regulating family matters. Among the principles are:

#### 4.1.1 *Maslahah*

The concept of *maslahah* is invoked to justify the State intervention in family matters. This doctrine authorises the government to take necessary measures, including legislation, to attain the well-being of its citizen (Mohammad Hashim, 1989). The State has the discretionary power to ascertain the items that could bring *maslahah* to its citizens. Nonetheless, the State shall not take excessive actions which could lead to abuse of its power in ruling the society. The power should, as prescribed by Mohammad Hashim (1989), be governed by a set of principles to which any action taken by the State must be precise for the interests of the public.

The doctrine of *maslahah* can also be referred to as unlimited approaches taken for the interests of the public which have not been regulated by the Lawgiver and no textual authority can be found, neither to support, nor to reject its validity (Badran, n.d.). In this regard, when the *maslahah* is identified and the explicit ruling in the Qur'an and Sunnah could not be found, necessary steps should be taken to secure it. It is therefore, in this area where the State enjoys greater freedom and has discretion to introduce laws and policies and adopt measures in realization the public interests. This is justified by several verses of the Quran, including al-Anbiya' (21):107, Yunus (10):75, al-Haj (22):78, al-Maidah (5):6 stating the purpose behind the revelation of the Shariah is to promote human's welfare and to prevent corruption in the world.

With regard to the doctrine of *maslahah*, scholars from the Malikis and Hambali's school of thought accepted that it is one of the sources of the Shariah that could be a proper ground for legislation, provided the *maslahah* should not conflict with the objectives (*maqasid*) of the

Lawgiver (Muhammad Abu Zahrah, n.d). However, this doctrine of *maslahah*, according to Mohammad Hashim Kamali (1988) is not fully utilised as there exists a wide gap in recent decade between *Shariah* and statutory legislation (Mohammad Hashim, 1988).

With regard to practice in Malaysia, the State intervention in governing family matters is basically based on the doctrine of *maslahah*. The implementation and enforcement of various laws, regulations and procedures relating to marriage and divorce are in line with the principle of *maslahah*, which among others is to maintain and preserve public interests. One of the practices is the pre-marital HIV screening programme which is compulsory for every couple before marriage contract can be concluded. It is made mandatory as the disease will bring harm to the spouse and the future generations (Fatwa, 2009). The same action has also been taken in some other Muslim countries such as Iraq, Saudi Arabia and Syria. Moreover, they have taken a step forward by widening the scope of pre-marital health screening, which is not only limited for HIV screening, but also for physical and mental illness (Welchman, 2010).

The principle of *maslahah* is also used to justify the requirement of pre-marital course in Malaysia. The purpose behind the course, which consists of a series of discussion, among others, is to educate young couples on the concept of marriage, rights and responsibilities of a husband and a wife and the effect of divorce. It is intended to provide various knowledge concerning marriage and family life to the new couple. The aim of the course is to reduce the number of marital problems and divorce rate among married couple in this country.

Interestingly, when the implementation of having a pre-marital course is accepted as part of marriage requirements in Malaysia, Singapore, the neighboring country, has offered a more comprehensive programme for their citizens. They have not only Pre-Marriage Guidance Course for new couple who are going to get married, but also Young Couples Programme for young people aged 18-20 years and Re-Constituted Marriage Programme for the older people. The purpose of having Young Couples Programme is to guide young couples aged 18-20 and to equip them with knowledge and skills about their future roles and responsibilities as husband, wife and parents. The Re-Constituted Marriage Programme is another programme to educate those who are having new families after separation or divorce ([http://app.romm.gov.sg/resources/romm\\_young\\_couples.asp](http://app.romm.gov.sg/resources/romm_young_couples.asp)). Hence, all

courses offered are for the sake of *maslahah* or public interests which allow the State authority to intervene in family matters of its citizens.

Another example showing the intervention of the State in family matters in Malaysia can be seen in the provision of the prohibition of underage marriage (section 8 of the IFLA 1984). The *maslahah* for this restriction is to avoid any harm to the families and society as both, the man and woman can be considered as physically and psychologically not ready to shoulder the responsibilities of marriage. To ensure such *maslahah* upon the society, the State has imposed a specific age limit for a formal marriage to be considered valid and can be registered. Although Malaysia still retain the minimum age of 16 for woman and 18 for man, some other Muslim countries have increased their minimum age for marriage, in which the age ranged between 17, 18, 19 and 20 years old (Tunisian Code of Personal Status, 1956 (amended in 1993); Moroccan Family Code (Moudawana) 2004; Algerian Code of Personal Status, 1984 (as amended in 2005); Tunisian Code of Personal Status, 1956 (amended in 1993).

#### 4.1.2 *Siyasah Shariyyah*

State intervention in family matters is also justified by the doctrine of *siyasah shar'iyah* (Shariah-oriented policy) which authorises the ruler to determine the manner in which the Shariah should be administered. Under this doctrine, the ruler or the government is deemed to take any discretionary measures, enact rules and establish policies which are considered for the best interests of the people, provided that no substantive principles of the Shariah is violated (Mohamad Hashim, 1989).

A clear definition of the term *siyasah shar'iyah* has been given by Ibn Qayyim who states that the term refers to any measures which actually bring people closer to good and virtuous; and to prevent them from disruption on matters for which no specific ruling could be found in the revelation and the Sunnah of the Prophet (SAW) (Ibn Qayyim, 1961). Based on this, any approach taken by the government in administering public affairs with the aims of realizing the interest of the people and preventing them from disruption, is considered in line with the general principles of Shariah (Abd al-Wahhab, 1984).

The doctrine of *siyasah shar'iyah* is seen as an instrument of flexibility and pragmatism as it is designed to serve the cause of justice and good government, especially when the rules of Shariah are silent in

addressing certain situations or development (Mohamad Hashim, 2005). It is because, government in Islam is a trust and the ruler exercises political power in the capacity of trustee, or vicegerents of Allah (al-Baqarah (2): 30, and al: Nur (24):55). It is in the nature of the concept of trust that the trustee is given the opportunity to exercise discretions in order to fulfil their trust as best as they can. Thus, *siyasah shar'iyah* is an instrument of the trust that Allah has placed on the shoulder of the community and their leaders (Mohamad Hashim, 1989).

In the context of Islamic family law in Malaysia, this principle is widely accepted and practised as the government has discretionary powers in introducing and imposing all regulations or procedures for the interest of the society. Marriage registration, for example, is imposed for the benefit of the society to govern a proper system in monitoring marriages, and to prevent any form of abuse (section 25 – 34 of IFLA 1984). The requirement of registration is extended further to cover illegal marriages, polygamous and non-polygamous marriages (Section 23 (1A) and Section 123 of IFLA 1984). Although allowing the registration of such marriages can be seen as defeating the purpose of controlling illegal marriage activities, the effect of not allowing such registration could bring a more severe impact. It could deprive the rights of woman who is involved in such marriages (the first or the second wife for polygamous marriage) as all of her rights to claim maintenance, custody over her children or even inheritance in the event of divorce or upon the death of her husband will not be recognized by the court.

The requirement of registration of marriage is also adopted by other Muslim countries. Article 65 of the Moroccan Family Code (Moudawana) 2004 for example, clearly states the formalities and administrative measures for the registration. Among the particulars needed for the registration are the birth certificates of both parties, medical certificate mentioning their health status and the government's approval letter for specific cases such as polygamous marriages. For non-citizens who want to get married and register their marriages under the law, they have to produce additional document which is called a certificate of capacity to marry. Similarly, article 10 of the Iraq Personal Status states that the marriage shall be registered at the appropriate court with specific conditions required.

The practice of *siyasah shar'iyah* is also clear when the government introduced various rules prior the marriage, such as the application for permission to marry to the Registrar and Shariah judge (Section 16 and 18 of the IFLA 1984). The IFLA 1984 provides that the

parties of marriage are required to apply for permission of marriage by using a prescribed form, to the Registrar of Marriage where the woman resides. After receiving the application, the Registrar will only issue the permission to marry when he is satisfied that all requirements are fulfilled. If there are some problems occur, for example as one of the parties is under the permitted age or the woman has no *wali nasab*, the Registrar will refer such application to the Shariah judge (Section 18 of the IFLA 1984). Thus, it is considered as *siyasah shar'iyah* for the State to introduce such procedures to ensure Muslim marriages are properly administered. This is important to avoid future conflicts and to ensure a smooth marriage process.

Another interesting example for the application of *siyasah shar'iyah* is the approach taken by the State in the codification of Islamic Family law. The laws codified are not confined to one particular school of thought or any specific opinion. In this process, placing the higher objectives of the law which is safeguarding the wellbeing of human beings as the priority, and to offer the best solution for the needs of the Muslim communities, opinions from several schools of thought have been considered. This is clearly explained in the definition of *Hukum Sharak* as stated in Section 2 of IFLA 1984, which defines *Hukum Sharak* as the law according to the Shafi'i, or according to the Maliki, Hanafi or Hanbali school of thought.

#### 4.1.3 *Maqasid al-Shariah*

*Maqasid<sup>1</sup> al-shariah<sup>2</sup>* also justifies the State intervention in family matters. The revelation of the Quranic verses in numerous places, and in variety of contexts explain this principle, which shows all rules and regulations revealed are meant, among others, to give benefit of individual and community (al-Anbiya' (21):107), to give guidance (Yunus (10): 57) and to establish justice (al-Hadid (57):25). In this regard, many prominent scholars, including Ibn Qayyim, (1993) and Yusuf al-Qaradawi (1997) emphasized that the aims of Islamic law are to

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<sup>1</sup> Literally, *maqasid* means aim, purpose, goal or intent, refer to Hans Wehr, *A Dictionary of Modern Written Arabic*, edited by J. Millon Cowan (Beirut: Libraire du Liban, 1980), 766-767.

<sup>2</sup> Al-Qurtubi interprets the word *Shariah* as the law enacted by the Lawgiver to guide humanity, refer to the interpretation of the word *Shariah* in Surah al-Jathiah (45):18, al-Qurtubi, *al-Jami' li Ahkam al-Qur'an*, vol. 16, 109.

preserve people's interest and prevent them from harm in this world and hereafter. It also aims at regulating the conduct of human beings and preventing them from making corruption and destruction upon one another (Mohamad Akram, 2006).

Al-Shatibi, in his book *al-Muwafaqa* explains that, the purpose of Shariah is to preserve the objectives (*maqasid*) of the creation which are of three types, the essential (*daruriyyat*), the complementary (*hajiyyat*) and the embellishment (*tahsiniyyat*). A clear definition of *maqasid al-shariah*, however, was given by Ibn Ashur as he described *maqasid* as the purpose and wisdom behind the enactment of all or most of the *Shariah* rulings (Muhammad Tahir, 2004).

With regard to this *maqasid al-shariah*, one of the areas of primary concern of Islamic law is protection and advancement of the five essentials which includes the protection of the religion, life, faculty of mind, progeny and wealth (Al-Shatibi, n.d ; Al Ghazali, 1938). The realisation of these essentials is very important for the community. All the necessary measures should be taken, either by individual or government for the purpose of preserving these essentials.

From among the five major purposes of Shariah, the preservation and promotion of posterity (*nasl*) or progeny (*nasab*) constitutes the primary goal for all rules that covered within the domain of Muslim Family Law in the Islamic view point. In other words, the corpus of Islamic Family law must yield to the procreation of quality, useful and principled humans so that they can build a civilization as Allah's vicegerents on earth (Sayed Sikandar, 2008).

Shariah guides the Muslims in achieving the *maqasid* or *maslahah* of marriage. For example, Shariah has strictly encouraged Muslims, both men and women to choose good and religious spouses (Qur'an, (24): 2). The choosing part is important as the husband would take the responsibility as the protector (*qawwam*) and would be responsible for the maintenance of the families. They are also leaders and caretakers who are responsible in managing the affairs of families which include the moral and religious matters (Qur'an, al-Nisa' (4): 24). Marriage and procreation are strongly encouraged and various laws of spousal marital obligations have been prescribed (Qur'an, al-Nur (24): 32, al-Rum (30): 21). At the same time, to achieve *maqasid al-shariah* of marriage, through its Qur'anic ruling and the Prophet's guidance have prevented any form of actions that could lead to harm or *mafsadah*. Some of the examples are, the prohibition of illegal relationships such as adultery, fornication, homosexuality, lesbian and cohabitation. They are forbidden



due to the negative impacts which could bring harm to the marriage relationship, and could lead to many evils, which could also destroy the family institution (Qur'an, (17): 32, (24): 30-31, (6): 151).

Thus, in regulating marriage and family matters, the application of the principle of *maqasid* should be given emphasis. If the purpose of Islamic law in regulating the marriage is to establish a stable family, such noble intention should be materialised through an effective system of family law. In order to achieve this objective, a number of legal rulings should be instituted, including the policies encouraging young people to get married through a systematic and informative course, a complete regulation prior marriage ceremony, a comprehensive set of laws to govern illegal marriage without proper approval by the authority, especially in the cases of polygamy and marriage outside territory. Offering hard punishment for those who commit offence including having sexual relationship outside marriage, and purposely neglect their duties and responsibilities as husband and wife, or parents towards the children.

In this regard, it is submitted that the available laws that govern marriage, divorce and family as provided in several pieces of legislation in Malaysia are in line with the principle of *maqasid al-shariah*, that is to guarantee the protection of the five interests of the Muslims i.e. Islamic religion, soul, mind, and descendants enshrined in *Qur'an* and *Sunnah*. On the same note, any amendments made to the present Islamic Family Law were done after re-examination of the Shariah laws according to present contexts and circumstances, for the purpose of *maslahah*. It did not deviate from Islamic Law principles as it is based on references from the authorities for Islamic Laws (Ahmad Hidayat, 1997; Siti Zalikah, 1998).

Numerous actions taken by the government in handling family matters in Malaysia are actually based on the principle of *maqasid al-shariah*, including the prohibition of marriage to non-Muslim as provided in Section 10 of the Islamic Family Law (Federal Territories) Act 1984 (hereinafter called IFLA 1984). The Act provides that no Muslim man shall marry a non-Muslim except a *kitabiyah* (People of the Book), while no Muslim woman shall marry a non-Muslim. Even though there is a variety of definitions given by the Islamic scholars concerning *kitabiyah* (Al-Shafi'i, n.d; Al-Baghawi, n.d), the IFLA 1984 has adopted a strict definition of those who can be categorised under the name of *kitabiyah* (Section 2 of IFLA 1984). It is to be noted that the main purpose of having such law is to preserve the religion of Islam, as any

action that may jeopardise the religion (*al-din*) either directly or indirectly should be rejected.

The other example is the introduction of laws on various matrimonial offences. Shariah Criminal Offences of Federal Territories, Act 1997 (hereinafter called Shariah Criminal Act 1997), for example, provides penalties for various matrimonial offences including, committing incest and having sexual intercourse out of wedlock (section 2, 20, 21, 22, and 23 of Shariah Criminal Offence Act 1997). The implementations of these laws are manifestation of the protection of religion, lineage, family or progeny and dignity as the important interests under *maqasid al-shariah*. These offences are considered immoral practices that would destroy the sanctity of a family and lead to social problems, including the possibility of having illegitimate children in the society. Moreover, if no action is taken to punish the doers, as well as to protect the interest of the society, such offence could obliterate and tarnish the good name of Islam.

Another example showing the application of *maqasid al-shariah* in Malaysia is the law regulating matrimonial property (*harta sepencarian*) (Section 58 of IFLA 1984). The purpose of the provision is to protect the interest of both husband and wife by offering a solution of fair division of property especially in the event of divorce or polygamous marriage. In this regard, the method of division is regulated by taking into consideration the extent of contribution made by both parties during the subsistence of their marriage. This law is essential to uphold *maqasid al-shariah* in preserving the individual's property from being illegally taken by others.

Thus, those interventions by the State in the family affairs are justified by the principle of *maqasid al-shariah* as the objective and the intention of the State is to protect both the institution of family and the interest of the public. The State is obliged to materialise the *maqasid* of marriage as it is part of necessities (*daruriyyat*) in Islam. Therefore, the harmonious of family is expected to be preserved through a good system of law and governance.

#### **4.1.4 *Sad al-Dhara'i***

One of the Shariah rulings on the justification of the State's intervention in family matters is *sad al-dhara'i*. This ruling implies blocking the means to an illegitimate end which is likely to materialise if the means towards it is not obstructed (Al-Mansur, n.d.; Badran, n.d.).

The objective of *sadd al-dhara'i* is preventing an evil before it arises by preventing its highly probable cause, although the cause may not necessarily result in such evil outcome (Feisal, 1998). Thus, this doctrine is a legal principle which generalizes the concept of recusing, so that the Muslim is taught to refrain from a permissible action that can open a can of worms (Feisal, 1998). In this sense, as mentioned in the earlier part of this paper, the *Shariah* is concerned with the ultimate five objectives. Therefore, it empowers the State to obstruct the means that lead to the failure in achieving such objectives. The State, for instance, is authorised to curb the permissible actions (*mubah*) which can be used by the people as a means to criminality and evil (Abd al-Rahman Taj, 1953).

In the family context, various examples based on the application of this principle can be seen in several actions taken by the State. The unregistered marriage, for example, is not allowed in order to avoid numerous problems and difficulties that might be faced by the couple in particular, and the public, in general. The restrictions imposed for those who want to apply for polygamy are intended to ensure the conditions and responsibilities in polygamous marriage are to be fulfilled by the practitioner. It also intends to guarantee the rights and the needs of the existing wife and children are protected (Section 23 25 of IFLA 1984).

Another practice of *sadd al-dhara'i* can also be seen in the process of solemnisation of marriage without a guardian. It is not allowed for a woman to enter into a contract of marriage without the approval of her *wali*. The reasons behind such ruling are to prevent the woman from being the victim of irresponsible man, and also to prevent her from marrying a man who is not suitable for her (Abdur Rahman, 1992; Section 13 of IFLA 1984). Under-aged marriage is not allowed in most Muslim countries as it could bring more harm than good for the well-being of families and society as a whole. Marriage conducted through illegal group is also rejected as it could lead to the issue of the validity of the contract. Thus, any marriage should be made publicly known by having proper witnesses and marriage ceremony (public declaration) (Muhammad al-Tahir, 2004).

This principle of *sadd al-dhara'i* is one of the justifications for the recognition of State intervention in family matters. The role of the State in providing various regulations and procedures is very important in preserving family institution and maintaining public order. Otherwise, great harm and damages to the family and the society could possibly occur. *Sadd al-dhara'i* is actually in line with the mundane idiom "prevention is better than cure".

## 5. Conclusion

It is undeniable that, from the Islamic perspective, the State or the government has the important task in preserving family institution of their citizens. The State can intervene in family matters. Apart from implementing their task to safeguard the safety and well-being of their people, there are various principles in Islamic jurisprudence available that justify such approach. Among others are the principle of *siyasah shar'iyah*, *maslahah*, *maqasid al-shariah* and *sad al-dhara'i*. Those principles are the baseline for any actions taken by the state, and act as the controlling milestones in placing limitation for State intervention in family matters. In other words, the State can interfere in family matters based on those principles, but the actions are subjected to some guiding principles. However, issues on the individual or family autonomy in handling their own personal matters should also be properly addressed to avoid conflict. The State has to ensure proper justifications in interfering into family matters and observe some limitations based on Allah's guidance. This stand is clear as Islam did not deal with human rights merely as individual rights, but as the rights of the community as a whole. Islam maintains both individual and public interests, and the public interest in many cases, are higher than the individual interests. For that reason, the State has the discretion to make laws or policies and adopt any measures in realisation of such interests.

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