



POLICY PAPER FOR PRACTITIONERS:

MAKING THE CASE FOR MATRIMONIAL PROPERTY RIGHTS IN MUSLIM FAMILY LAWS



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A. Introduction

Property rights, including the equitable distribution of matrimonial property for women is the key to gender equality within family and society. They are “*central to women’s economic advancement as well as their full incorporation in the polity*”¹. Such rights ensure that women can live and are given full autonomy, agency and dignity in marriage, family, community and within the state. They also contribute to economic development for communities and countries. When women have access to assets (especially those they already control and/or have contributed towards acquiring and building), the positive impacts are far reaching. It allows women improved access to income and livelihood opportunities, and allows them to invest in their families with positive outcomes for themselves and their children.

“*Muslim women have enjoyed an autonomous legal identity and separate property rights since the seventh century... That religious doctrine confers Muslim women strong property rights speaks little to whether they are able to exercise these rights.*”² Given that this right of women remains uncontested in Islam, there is a presumption that Muslim countries, particularly those which have adopted Islam as a state religion should demonstrate equal rights and ability of women to acquire, control and manage property. However, it is unfortunate that in many Muslim contexts, including Pakistan, that this is not so. According to the World Bank Group’s report on Women, Business and the Law 2020³, two-fifths of countries limit women’s property rights. In 19 countries, women do not have equal ownership rights to immovable property. In 44 countries, male and female surviving spouses do not have equal rights to inherit assets. Unfortunately, most of these countries are Muslim majority countries with discriminatory man-made Muslim family laws.

This, along with the fact that there is an inconsistent approach amongst Muslim countries in extending property rights to women, leads to the conclusion that there is something other than religiosity which is impacting the status of women’s property rights in these countries. Further examination into these countries reveals that there is evidenced a historical, systematic institutionalization of patriarchal norms in all systems of the country, resulting in the creation of social norms and political incorporation of patriarchal actors that demonstrate low respect for women’s property rights. This leads to the creation and interpretation of laws (including Islamic law) and policies from a perspective which holds a deeply entrenched patriarchal bias, resulting in discriminatory man-made laws and policies⁴. As a consequence, Muslim women remain governed by laws and practices that discriminate against them because they are based on conservative and patriarchal interpretations of Islam. This discrimination also extends to curtailing women’s access to matrimonial property and other forms of financial rights at the time of divorce.

Vast socio-economic changes have transformed the daily lives of Muslim women. Muslim women’s tangible contributions to their families as providers and protectors are growing and are increasingly being recognized. Present day family laws must reflect this shift in lived realities of women and men within families. Both Islamic principles and human rights call for this, as Islam mandates justice (*‘adl*), equality (*musawab*), human dignity (*karamah*), and love and compassion

¹ Bishin, B., & Cherif, F. (2017). *Women, Property Rights, and Islam. Comparative Politics*, 49(4), 501-519. Retrieved from <http://www.jstor.org/stable/26330985>

² Ibid

³ World Bank. (2020). *Women, Business and the Law 2020*. Washington, DC: World Bank. Retrieved from <https://openknowledge.worldbank.org/handle/10986/32639>

⁴ Bishin, B., & Cherif, F. (2017). *Women, Property Rights, and Islam. Comparative Politics*, 49(4), 501-519. Retrieved from <http://www.jstor.org/stable/26330985>

(*mawaddah wa rahmah*) in relations among humans and in the family.⁵ These principles are also recognised as universal values and enshrined as rights in many national constitutions and international instruments.

This paper explores the concept of matrimonial property regimes and non-financial contributions of spouses within these regimes, including financial rights of women at the time of divorce. It also explores the link between the lack of matrimonial property regimes and discriminatory Muslim family laws, and their compounded impacts on women. Lastly, this paper highlights arguments and evidence in favour of equitable distribution of matrimonial property through socio-economic and Islamic jurisprudential arguments.

B. What is Matrimonial Property?

The precise definition of matrimonial property differs from different jurisdictions. However, matrimonial property is generally considered as all property acquired by either spouse, or both of them, between the date of marriage and the date of separation. Under some regimes, as discussed below, it also includes property acquired by either party before marriage (pre-marriage assets or inheritances) such as a family home.

Matrimonial property regimes are legal systems and procedures within a country, by which property ownership between spouses are created, managed and distributed often at the end of the marriage. Division of property essentially covers any distribution of any assets owned by the individuals or the couple, including control and ownership of the matrimonial home. There are three main systems⁶ on which matrimonial property distribution are based upon:

Separate property regimes	In separate property regimes, each spouse owns whatever assets are in his or her name, whether acquired before or during the marriage, and retains that upon divorce. The assumption is that marriage is solely an interpersonal union and all property, pre-marital or marital, is owned separately.
Joint / Community property regimes	In joint or community property regimes, assets acquired during the marriage are owned by the spouses equally and are divided as such upon divorce. Community property is based on the theory that marriage creates an economic community between the spouses and that the marital property attaches to that interpersonal community, rather than to the spouses themselves. There are several types of community property systems.
Hybrid property regimes	There are also hybrid regimes that account for the amount of property brought into the marriage or inherited during the marriage or the amount contributed by individual spouses. For example: in some countries that follow separate property regimes, the court may determine an equitable distribution of the property if the majority or whole portion of the matrimonial asset were held by one spouse.

⁵ Musawah. (2016). *Vision for the Family*. Retrieved from <https://www.musawah.org/resources/musawah-vision-for-the-family/>

⁶ Stegman. M, et. al. (2012). *Matrimonial Property Regimes in a Cross-Border Context: Who Owns What (and When)?* NYSBA International. Retrieved from <https://www.kplaw.com/wp-content/uploads/Matrimonial-Property-Regimes-in-a-Cross-Border-Context.pdf>

Direct financial and non-financial contributions

Direct financial contributions in the form of earnings, fixed assets like property, etc., are usually the primary factor for courts in determining a couple's combined assets. However, many countries – especially those that follow hybrid or community property regimes – also take into account the non-financial contributions of spouses in the distribution of matrimonial property.

Non-financial contributions are contributions which may not be assessed in financial terms, but where a spouse has helped increase a couple's assets through labour or other non-monetary means. In other terms, non-financial contributions may be contributions or actions made by one spouse that allows the other spouse to directly pursue the acquisition of assets. Examples of non-financial contributions can be domestic labour, child care, care of elderly or ill family members - all of which allow a spouse to work outside the home, or labour towards household renovations, beautifying, landscaping, etc., especially over the course of a period of time, which increases the value of a property.⁷

A very common example of non-financial or indirect contributions is where a wife stops working after marriage and ends or temporarily halts her career to take care of the domestic care work, raise children, look after elderly parents, support her husband's career advancement, etc. This may enable the husband to stay employed, concentrate on his employment, and build up assets during the course of the marriage. Unfortunately, it is common for these assets to be placed and remain in the husband's name, which undermines the wife's contributions towards the acquisition and maintenance of these assets in the event of dissolution of the marriage.

It is common in Muslim marriages for husbands to primarily earn and control financial resources due to legal structures and social norms. Women often contribute less financially to the union and any property bought during a union. This is due to the fact that in most societies, women earn less, are more likely to work in informal sectors or sectors that pay less, own fewer assets, and/or bear the primary burden of managing the house and caring for children and other family members and enabling the husband to work, earn income and acquire assets. Resultantly, property purchased during a union is often purchased and registered in the husband's name. Upon dissolution of marriage, this property is thus retained by the husband. Women's vast non-financial contribution is mostly not considered in the court's determination of ownership of matrimonial property. This leaves women much more vulnerable in a marriage, particularly if it fails.⁸ The result is that women are often disadvantaged in the settlement of economic matters upon divorce, and thus are economically vulnerable in its aftermath.

⁷ Katju, A. (2003). 'Because Jack Did Not Build This House Alone: The Right to the Matrimonial Home as a Property Right.' *Student Bar Review*, vol. 15, 2003, pp. 24–36. JSTOR, Retrieved from www.jstor.org/stable/44306636.

⁸ Musawah. (2021). *Policy Brief 5: Ensuring Fair and Just Financial Rights Upon Divorce*. Retrieved from <https://www.musawah.org/resources/policy-brief-5-financial-rights-upon-divorce/>.

C. Financial Rights of Muslim Women upon Divorce

Protection of the financial rights of women in marriage and upon divorce is unanimously agreed by Muslim scholars and jurists on the basis of Islamic principles. These include a woman's right to maintenance during marriage, and while there is difference of opinion on extending this right after the marriage ends, a good number of experts on Islamic law contend that it is available to women.⁹

According to the Musawah Policy Brief 5 on 'Ensuring Fair and Just Financial Rights Upon Divorce, Musawah policy Brief'¹⁰, a number of financial matters must be settled during the divorce process. These include:

- ***Nafaqah al-'iddah***: Maintenance paid by the husband to the wife during the *'iddah* (waiting) period of three menstrual cycles (approximately three months), or, if there is a pregnancy, until the woman delivers.
- ***Mehr* (dower)**: *Mehr* is settled at the time of entering into marriage, but in some cases may be paid in different installments (prompt and deferred). Deferred *mehr* must be paid by the husband to the wife in certain types of divorce or some or all of the *mehr* must be returned to the husband by the wife in other types.
- ***Nafaqah al-mut'ah***: A gift of consolation based on Qur'anic verse 2:241, applicable for certain types of divorce (such as *talaq*, *tatliq*, and certain instances of *faskh* or *tafriq*, as discussed in Musawah Policy Brief 4 on Divorce). This may be a single monetary gift or longer-term maintenance.
- **Division of property**: The distribution of any assets owned by the individuals or the couple, including control and ownership of the matrimonial home. This is often decided based on the country's matrimonial property regime.

D. Lived experiences of Muslim women

In many Muslim contexts, including Pakistan, where there is no legal recognition of matrimonial property, the lack of an equitable regime has significant negative impacts on women at the time of dissolution of marriage. Many women may not be employed in the course of the marriage (or may forfeit their employment opportunities upon or during marriage) in order to undertake care work or increased household responsibilities. This denies or reduces their access to a source of income whereby they can afford property and valuable assets over time. In other instances, if wives are earning, their income often goes towards household expenditure, while the income of husbands may go towards acquisition of property and valuable assets. This significantly limits women's ability to own or acquire property while married.

⁹ Dr. Pereira, F. (2000). *Post Divorce Maintenance for Muslim Women and the Islamist Discourse*. Women Living Under Muslim Family Laws (WLUML).

¹⁰Musawah. (2021). *Policy Brief 5: Ensuring Fair and Just Financial Rights Upon Divorce*. Retrieved from <https://www.musawah.org/resources/policy-brief-5-financial-rights-upon-divorce/>

Khadija's story

At the time of marriage, Khadijah was a 25-year-old woman steadily progressing in her career as an assistant manager at a bank. When Khadija got pregnant in her first year of marriage, she stopped working to become a full-time stay-at-home mom as her in-laws did not approve of her working. At the time of her nikah, Khadija's family had gifted her with some gold, which she sold in her second year of marriage in order to cover repairs and renovations on the marital house. The marital property that they lived in was registered in her husband's name and remained so for the entirety of their marriage. Ten years into their marriage, Khadija's husband filed for *talaq* divorce, which he obtained through the court. Despite giving up her career to become a stay-at-home mother and homemaker, Khadija only received three months of *'iddah* maintenance along with child maintenance for her children following the divorce verdict. The matrimonial property to which Khadija contributed through financial and non-financial means during her 10-year marriage legally remained her husband's property.

Discriminatory and disproportionate treatment of women in obtaining a share in matrimonial property may be due to a number of reasons including: the fact that family laws, procedures and social norms do not recognize unpaid domestic and care work as 'productive work'. These very laws and societal ideologies they are based on, also consider it as men's responsibility to be protectors and providers of families, and women's responsibilities to take care of households and children, and as such condone or actively promote for women to give up employment opportunities to do so. According to a report¹¹ by the Pakistan National Commission on the Status of Women and UN Women, data and statistics of employment of women in Pakistan (26%) is significantly lower than that of men (89%). Upon divorce many women lose access to the matrimonial home and are often left in vulnerable situations where they are financially dependent on other family members for support. Many women also do not opt for divorce due to financial dependency.

Fatima's story

Fatima got married when she was 17 years old, right after her matric exams. She wanted to study further, but reluctantly agreed to marry due to pressure from family members. Fatima's husband was a businessman who acquired many properties during their 30 years of marriage. Throughout the marriage Fatima was a stay-at-home mom and caretaker to their three children and elderly and ailing mother-in-law. She wanted to pursue some income earning opportunity after the death of her mother-in-law and when her children were older, however her husband was against her doing so. He was also violent towards her on occasion and following a period of serious domestic violence, Fatima sought to divorce her husband at the age of 47 years. Upon hearing of her intentions to divorce him, Fatima's husband shut Fatima out of their marital home and cut off access to their children. He pronounced *talaq* on Fatima, effectively divorcing her. Fatima did not receive any compensation for being unfairly divorced or turned out of her marital home, nor any acknowledgement in kind for her non-financial contributions of 30 years, during which time her ex-husband built up his business and acquired multiple properties.

¹¹ National Commission on the Status of Women, UN Women. (2016). *Women's Economic Participation and Empowerment in Pakistan*. Retrieved from <https://asiapacific.unwomen.org/en/d>

Link between discriminatory Muslim family laws and women’s unequal access to matrimonial property

In Muslim contexts which have human-made Muslim family laws like Pakistan, the majority of contemporary Muslim family laws and practices are based on classical *fiqh* (Islamic jurisprudence) rulings, which are interpretations of male Muslim jurists, **decades** after the time of the Prophet Muhammed (PHUB). The origins of the inferior treatment of women in many Muslim family laws today therefore can be traced to interpretations that were based on vastly different historical, social and economic contexts with pre-existing patriarchal norms and practices.

At the root of the unequal construction of gender rights in Muslim legal tradition is the idea that men have authority over women. These inequalities are also rationalised and justified by other arguments based on incorrect assumptions about biological differences between the sexes.¹² These interpretations led the way for the framework of the ‘family’ to be based on twin legal concepts of ***qiwamah* (male authority)** and ***wilayah* (male guardianship)**.¹³

These two concepts have emerged through classical discourse as an umbrella social and cultural contract of ‘*protecting*’ women and girls, and yet, failing to consider the resulting discrimination.

<p>Legal concepts related to male authority (<i>qiwamah</i>) and male guardianship (<i>wilayah</i>)</p>	<p><i>Qiwamah</i> (male authority) and <i>wilayah</i> (male guardianship) are two legal concepts constructed in classical <i>fiqh</i> which place women in a subordinate position to men in the family. These concept in turn forms the basis of many contemporary laws and practices in Muslim contexts, including on women’s lack of or limited access to matrimonial property at the time of dissolution of marriage.</p> <p><i>Qiwamah</i> denotes a husband’s authority over and responsibility to provide to his wife. <i>Wilayah</i> denotes the guardianship rights of a father (or, in his absence, another male member of the family) over a girl prior to her marriage and over his children.</p> <p>These concepts, when codified in law or embedded in patriarchal social norms and practices, have resulted in contributing to restricting women’s full autonomy and decision making, limiting access to resources, property, education, livelihood and employment opportunities and curtailing access to sexual and reproductive health. Discrimination in the family also has wider implications on Muslim women’s societal and political participation by limiting her autonomy and decision-making abilities.</p>
<p>‘Maintenance-for-obedience’ legal framework of marriage</p>	<p>Related to <i>qiwamah</i> and <i>wilayah</i>, provisions in contemporary Muslim family laws are construed under a ‘maintenance-for-obedience’ framework formulated by primarily male scholars.</p> <p>Classical jurists considered men (e.g., husbands, fathers, uncles, brothers) to be ‘protectors’ of women and the sole providers for the household, such that their wives were not obliged to even do housework or suckle their babies without monetary payment for the</p>

¹² Mir-Hosseini, Z., Al-Sharmani, M., & Rumminger, J. (2015). *Men in charge?: Rethinking authority in Muslim legal tradition*. London: Oneworld Publications.

¹³ Ibid

	<p>task. According to these scholars, women, in turn, were required to obey their husbands completely or else risk losing the right to maintenance, among other marital rights.</p> <p>Unfortunately, under laws that are based on this framework even if men are unwilling or unable to take on the role of ‘protector and provider’, they continue to enjoy the legal and societal privileges over women. While women who take on responsibilities to support and protect their families are denied the corollary rights. In fact, regardless of circumstances and roles within families, women continue to be treated as perpetual minors by law and in practice.</p>
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Impacts of discriminatory legal concepts and framework on women and families

The model of the Muslim family and the family laws which have derived framework and provisions based on the above mentioned concepts usually rests on a series of flawed assumptions: that men are the sole protectors and providers of families and women do not contribute to household income and that a harmonious and stable family depends on men’s rights to own, to decide and to command.¹⁴ The discrimination faced by Muslim women with regard to limited access to matrimonial property, is often exacerbated under human-made family laws within which entrench these patriarchal concepts, norms and practices.¹⁵ The negative impact on women can be seen particularly in countries which have created legal frameworks laws based on these archaic and patriarchal interpretations.

The World Bank ‘Women, Business and 2021’¹⁶, found that legal frameworks related to women’s rights to inheritance, immovable property, and marital regimes are a reliable predictor of women’s actual property shares. While land ownership is recognized as the single most important factor keeping families out of poverty in Pakistan.¹⁷ Only 2% of women own property in the country. Legally women in Pakistan are able to acquire some property through inheritance, wills, gifts, direct purchase etc. however, the abysmally low percentage of women owning property in Pakistan is indicative of underlying social norms and constraints that limit women from doing so. For example, despite legal protections, widows often forgo their right to inheritance if they remarry outside of the family of the deceased husband and/or sisters end up giving their portion of property to their brothers.¹⁸

¹⁴ Mir Hosseni, Z. (2014). ‘Are Men the Guardians of Women? The Unmaking of a Legal Fiction in Muslim Family Laws.

¹⁵ Sait, M. Siraj. (2016). ‘Our Marriage, Your Property? Renegotiating Islamic Matrimonial Property Regimes’. In *Changing God’s Law: The Dynamics of Middle Eastern Family Law*, edited by Nadjma Yassari, pp. 245–286. London: Routledge.

¹⁶ World Bank. (2021). *Women, Business and the Law 2021*. Washington, DC: World Bank. © World Bank. License: CC BY 3.0 IGO. Retrieved from <https://openknowledge.worldbank.org/handle/10986/35094>

¹⁷ International Development Research Centre (IDRC). (2011). ‘Women and Land: Case study Pakistan’. Retrieved from <https://idl-bnc-idrc.dspacedirect.org/bitstream/handle/10625/52827/IDL-52827.pdf>

¹⁸ Syed Mohammed Ali, 2018. *Securing land rights for Pakistani women*. The Express Tribune, Pakistan. Retrieved from <https://tribune.com.pk/story/1861646/6-securing-land-rights-pakistani-women>

In addition to the impacts such discriminatory legal concepts have on women, Muslim men are also affected by the pressures and burdens placed on them to be sole providers and exert their legal authority. It is assumed that the identity of men and their worth in families and societies are dependent upon their ability to protect and provide. This unsustainable and often unattainable 'ideal', especially in contemporary times, results in unhealthy family environments and breakdown of marriages, and in turn harms Muslim women, men and children.

E. Muslim family laws and matrimonial property regime in Pakistan

Muslim family law related matters of Pakistani Muslims are governed by a number of acts and ordinances. These include the following:

- Muslim Family Laws Ordinance (MFLO) of 1961;
- Dissolution of Muslim Marriages Act (DMMA) of 1939;
- Child Marriage Restraint Act of 1929;
- Dowry and Bridal Gifts (Restriction) Act of 1976;
- Guardians and Wards Act of 1890; and
- Family Court Act of 1964.

There is a legal presumption that the majority of Muslims in Pakistan follows the Hanafi School of Islamic jurisprudence (*fiqh*), therefore any case falls under the rules of Hanafi jurisprudence unless either party proves to the contrary. A sizable population in Pakistan (approximately 30 per cent) follows the Shia Ithna Ashari School and there is a legal presumption that Shia Muslims follow this school in terms of its application of family law. Marriage and family relations of Pakistan's non-Muslim minority communities are governed by their own laws and customs. Family matters, including dissolution of marriage, provision of maintenance and child custody, are administered via the Family Courts established through the Family Courts Act of 1964.

Assessment of matrimonial property regime in Pakistan¹⁹

Is there a legal concept of matrimonial assets?	There is no legal concept of division of matrimonial property in Pakistan. ²⁰
Is there equal division of marital property upon dissolution of the marriage?	Unless specified in the marriage contract, equal division of marital property does not exist as a legal provision or practice in Pakistani divorce procedures.
Is the woman's role as wife and mother recognised as a contribution to the acquisition of assets?	There is no provision, procedure or practice in any Pakistan legislation or policy that acknowledges and recognises women's financial or non-financial role as contributors to acquisition of assets during marriage.
Can the couple agree to the division of assets acquired during marriage in the marriage contract? Can this stipulation be amended? If so, by who and on what basis e.g. mutual consent?	<p>The couple may agree on the division of assets acquired during the marriage in the marriage contract (i.e., the <i>nikkahnama</i>). Column 20 of the marriage contract inquires whether any document was drawn up at the time of marriage relating to financial and property matters (e.g., dower, maintenance etc.) and if so the contents in brief.</p> <p>However, women often find it a challenge claiming their rights to any marital property that they may be entitled to because civil cases in this regard are extremely lengthy and the expenses can be prohibitive.²¹</p>
Are non-financial contributions recognised during the time of divorce?	<p>Some Pakistani court judgements in the last decade support and recognize the reciprocal benefits a wife may receive post-marriage for her contribution during marriage.</p> <p><i>Cases include: Tubarat Firdos v. Imtiaz Khan (2019 CLC 1562); Abdul Rashid v. Shahida Parveen (2013 YLR 2616).</i>²²</p>

¹⁹ Musawah. (2017). *Country Overview Table on Muslim Family Laws: Pakistan*. Retrieved from <https://www.musawah.org/resources/country-table-pakistan/>

²⁰ Rah Center for Management and Development (RCMD). (2020). *Shadow Report on the Issue of Financial Protection Upon Divorce: Muslim Women's Rights under Family Laws in Pakistan*. Retrieved from https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fCSS%2fPAK%2f40942&Lang=en

²¹ Musawah. (2017). *Country Overview Table on Muslim Family Laws: Pakistan*. Retrieved from <https://www.musawah.org/resources/country-table-pakistan/>

²² Rah Center for Management and Development (RCMD). (2020). *Shadow Report on the Issue of Financial Protection Upon Divorce: Muslim Women's Rights under Family Laws in Pakistan*. Retrieved from

Are there other forms of financial rights available to Muslim women in Pakistan at the time of dissolution of marriage?

The Muslim Family Laws Ordinance 1961, the Family Courts Act 1964, and the Dissolution of Muslim Marriages Act 1939 include provisions on maintenance for wives at the time of separation and dissolution of marriage and the post-divorce *iddat* (waiting period) if a *'talaq'* of *'fasah'* divorce is pursued. Husbands are mandated to provide *iddat* maintenance for the wife, for a period of three months following divorce, or if she is pregnant, until the child has been delivered.

In the case of a divorce through *khula* (divorce obtained by wife upon payment of a dower (*'mehr'*)), the wife does not get maintenance by the husband, but in turn needs to return the *mehr* she may have received during the time of the nikah or during the course of the marriage.²³ However, in Punjab, as per the Punjab Family Courts (Amendment) Act 2015, a woman when filing for *khula* may be asked by court to surrender 25% of admitted dower or 50% of deferred dower as opposed to 100%.²⁴

https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=INT%2fCEDAW%2fCSS%2fPAK%2f40942&Lang=en

²³ Ali Shaik, 'Law of Divorce & Khula in Pakistan'. Retrieved from [https://www.malaw.org.pk/pdf/Law%20of%20Divorce%20in%20Pakistan%20\(Article\).pdf](https://www.malaw.org.pk/pdf/Law%20of%20Divorce%20in%20Pakistan%20(Article).pdf); and Gul & Gul Law Firm, 'Pakistan Divorce Law (FAQ)'. Retrieved from <https://gmlaw.wordpress.com/pakistan-divorce-law-faq/>

²⁴ Punjab Family Courts (Amendment) Act. (2015). Retrieved from [https://pcsw.punjab.gov.pk/Punjab%20Family%20Courts%20%28Amendment%29%20Act%2C%202015#:~:text=Women%20can%20now%20retain%20up,\(divorce%20by%20Judicial%20Order\)](https://pcsw.punjab.gov.pk/Punjab%20Family%20Courts%20%28Amendment%29%20Act%2C%202015#:~:text=Women%20can%20now%20retain%20up,(divorce%20by%20Judicial%20Order))

F. Making the case for an equitable matrimonial property regime

1. Marriage as a partnership of equals under Muslim family laws

Classical scholars defined marriage based on a contract of exchange: the wife's obedience and submission in return for maintenance and protection from the husband. Lived experiences of Muslim families are changing globally. Many women are heads of households, primary breadwinners, and main guardians of their children, or share equal roles with their husbands.

The teachings of the Qur'an and the objectives of the *Shari'ah* demand that relations between Muslim women and men in both the private and the public spheres be governed by principles and practices that uphold equality, fairness and justice. Qur'anic teachings encompass the principles of justice (*'adl*), equality (*musawah*), equity (*insaf*), human dignity (*karamah*), love and compassion (*mawaddah wa rahmah*) in marriage and family.²⁵

For instance, *Surah an-Nisa* 4:21 depicts marriage as a 'solemn covenant' (*mithaq ghaliz*), with *mithaq* derived from *thiqa* (trust). Marriage is seen as an intimate and serene union in *Surah al-Baqarah* 2:187 ("They are your garments and ye are their garments") and *Surah ar-Rum* 30:21 ("God created for you mates from among yourselves, that you may dwell in tranquillity with them, and God has put love and mercy (*mawaddah wa rahmah*) between your (hearts)").²⁶ This is a departure from the patriarchal interpretations of family relations, where the husband was considered to be the head of the family.

Many contemporary matrimonial property regimes are based on the theory that marriage is a partnership of two individuals, whereby both spouses have mutual rights and responsibilities towards marriage and household.²⁷ The recognition and fair division of matrimonial property is therefore in line with these Quranic principles and notions of relationship between spouses. By these principles, there needs to be a clear recognition of women's paid and unpaid contribution to the acquisition and maintenance of matrimonial property during marriage, regardless of whether the assets were in single or joint ownership, which warrants an equitable distribution of the matrimonial property at the time of divorce.

2. Qur'an mandates recognition of women's contribution to households and families²⁸

Verse 4:32 of the Qur'an reads: "...Men shall have a share according to what they have earned, and women shall have a share according to what they have earned. Do ask of Allah His bounty. Allah has full knowledge of

²⁵ Musawah. (2018). *Who Provides? Who Cares? Changing Dynamics in Muslim Families*. Kuala Lumpur: Musawah. Retrieved from <https://www.musawah.org/resources/who-provides-who-cares-changing-dynamics-in-muslim-families/>

²⁶ Musawah. (2020). *Policy Brief 1: Why Muslim Family Law Reform? Why Now?*. Kuala Lumpur: Musawah. Retrieved from <https://www.musawah.org/toolkit/policy-brief-why-muslim-family-law-reform/>

²⁷ Rechberger, W. (2003). *Study on Matrimonial Property Regimes and the Property of Unmarried Couples in Private International Law and Internal Law*, National Report Austria, in: Consortium Asser-UCL, European Commission. Retrieved from http://ec.europa.eu/justice_home/doc_centre/civil/studies/doc/regimes/austria_report_en.pdf

²⁸ Hajjami, A. (2017). *The religious arguments in the debate on the reform of the Moroccan family code. Gender and Equality in Muslim Family Law: Justice and Ethics in the Islamic Legal Tradition*. Retrieved from <https://www.bloomsbury.com/uk/gender-and-equality-in-muslim-family-law-9781784537401/>

everything”. It is clear that this verse refers to wealth pertaining to who earned it, regardless of their position in the family or the society. This specific verse is addressing the relationship among spouses, and that each of them has a share of the accomplishments achieved through the effort exerted.

But in the past, classical jurists and interpreters of the Qur’an considered it more generally, and didn’t specify a share of matrimonial property to women.

According to scholar Aicha El Hajjami, those who oppose the division of assets acquired during the time of marriage make the claim that a wife has no right to the husband’s fortune, as the wife is obtaining maintenance from the husband in exchange for her direct or indirect household contributions. However, El Hajjami argues that there is evidence in Islamic jurisprudence that a husband’s duty to provide for the wife was **not instituted in exchange for household chores**, as claimed by many jurists.

A wife is not under obligation to do any work at all, whether in the marital home or outside it. They quote Ibn Hajar: *‘To oblige the wife to work of any kind lacks a valid foundation.’* And as per Islamic custom (‘urf), a wife offers her husband the fruits of her labour of her own free will. For the Qur’an says: *‘And give the women (on marriage) their dower as a free gift; but if they, of their own good pleasure, remit any part of it to you, take it and enjoy it with right good cheer’* (Surah an-Nisa’ 4:4).

In contemporary times, women contribute financially and non-financially to the growth and well-being of families and the marital home through their efforts; the Qur’anic verse *Surah an-Najm* 53:39 states *‘and that each person will only have what they endeavoured towards’*. Therefore, any inequitable distribution of matrimonial property that does not recognise women’s efforts is a flagrant injustice condemned by many Quranic verses, which forbid appropriating other people’s property or right to property (e.g., *Surah al-Baqarah* 2:188, *Surah an-Nisa’* 4:29).

Furthermore, Islam recognises the financial independence and responsibility of each of the spouses. A woman’s contribution towards developing and maintaining the funds of the family makes her a partner in those assets and resources.

3. Unpaid care work must be recognised an women’s productive contribution within marriage

According to the International Labour Organization (ILO), “Care work consists of two overlapping activities: direct, personal and relational care activities, such as feeding a baby or nursing an ill partner; and indirect care activities, such as cooking and cleaning.”²⁹

Definitions of unpaid and paid care work:

Unpaid care work is care work that is provided by an individual without any monetary compensation or reward. These activities are considered work, because theoretically one could pay a third person to perform them.³⁰

Unpaid = the individual performing this activity is not remunerated

Care = the activity provides what is necessary for the health, well-being, maintenance, and protection of someone or something

Work = the activity involves mental or physical effort and is costly in terms of time resources

Paid care work is performed by care workers for pay or profit and includes a wide range of jobs and services including: domestic and personal care workers, nurses, doctors and teachers.³¹

As dictated by gender and social norms, the majority of the care work around the world is undertaken by women and girls who are unpaid carers - a key factor in determining both whether women enter into and stay in employment and the quality of jobs they perform.³²

Unpaid care work of wives has contributed towards the ability of husbands to seek income earning roles outside of home and stay employed throughout marriage and parenthood. In general, this has enabled men to have more access to educational, career and financial opportunities, resources, and acquisition of assets during the marriage, while many women remain financially dependent on male family members.

Globally, there is increased recognition of the quantifiable nature of women’s unpaid care work in the household. The work women do for free in the household in terms of domestic labour, child and elderly care, etc., can be calculated in monetary terms and has remunerative value if contracted to an external party.³³ For example, the norm in many countries has been that a matrimonial home was to be provided only by the husband and should remain in his name. However, with the changing times and contemporary lived experiences of families, it is clear that women are equally

²⁹ International Labour Organisation (ILO). (2018), *Care Work and Care Jobs for the Future of Decent Work*. Geneva, ILO. Retrieved from https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_633135.pdf

³⁰ Organisation for Economic Co-operation and Development (OECD). (2014). *Issue Paper: Unpaid Care Work: The missing link in the analysis of gender gaps in labour outcomes*. Retrieved from https://www.oecd.org/dev/development-gender/Unpaid_care_work.pdf

³¹ International Labour Organisation (ILO). (2018), *Care Work and Care Jobs for the Future of Decent Work*. Geneva, ILO https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_633135.pdf

³² Ibid

³³ Gammage. M, et.al. (2019). *The Hidden Cost of Unpaid Care Work. International Monetary Fund*. <https://www.imf.org/external/pubs/ft/fandd/2019/03/gender-equality-and-costs-of-unpaid-caregiving-gammage.htm>

contributing in the making of a matrimonial home through both financial and non-financial contributions like unpaid care work.

Regardless of which spouse is able to financially acquire or maintain a property, a marriage based on the partnership of equals also recognises the roles of spouses in an 'equal economic partnership'.³⁴ This acknowledges a spouse's financial and financial contributions or indirect actions which facilitate and support the acquisition of assets by his/her partner during the course of the marriage. This recognition translates into equitable distribution of matrimonial property at the time of dissolution of the marriage.

Progressive legislation on matrimonial property

The Islamic Family Law (Federal Territories) Act (IFLA) of Malaysia recognises the right to matrimonial property of both spouses and defines assets acquired during a marriage to include assets owned before the marriage by one party that have been substantially improved during the marriage by the other party or by their joint efforts. The law also recognises the contribution of labour towards acquiring property.

According to the government of Malaysia, "Islam acknowledges every individual's right to own property. Each individual including husband and wife is entitled to own any property as the bond of Islamic marriage does not nullify or limit their rights. The religion sees matrimonial property as a way to acknowledge the property owned by someone based on their efforts to own it."

Surah An-Nisa' 4:32 provides guidance for understanding matrimonial property rights as being dependent on each spouse's respective efforts:

And do not wish for (to get) that by which Allah has made some of you (to make them) exceed others (regarding property, knowledge or power). (This is because) for men is a share of what they have earned, and for women is a share of what they have earned. (And strive) and ask Allah of his bounty. Indeed, Allah is ever of all things, Knowing.

Source: *The Malaysian Administrative Modernisation and Management Planning Unit*
<https://www.malaysia.gov.my/portal/content/28827>

³⁴ Carmona, M.S. (2017), *Discussion Paper: A Contemporary View of 'Family' in International Human Rights Law and Implications for Sustainable Development Goals (SDGs)*. UN Women, Progress of the World's Women 2018.

G. Conclusion

Family laws and practices, including financial rights at the time of divorce, are connected with all aspects of women's lives. Discrimination faced by women pertaining to matrimonial property affects women in many other areas, including dignity, personal and financial security, mobility, access to livelihood opportunities and formal employment, improved health and well-being, and societal and political participation.

We live in an era in which women's unpaid contribution to families and households are being increasingly recognised and where women's rights in the family have been asserted as part contemporary Islamic jurisprudence, as well as of international human rights standards. Constitutions and national laws in many Muslim majority and minority countries guarantee equality and non-discrimination to all citizens regardless of gender. Moreover, the Qur'an and Islamic teachings recognise women's contribution to marriage and family and provide guidance for fair distribution of matrimonial assets between the spouses. A woman's contribution towards developing and maintaining the funds of the family makes her a partner in those assets and resources.

Islam also recognises the financial independence and responsibility of both women and men in a marriage, and regardless of which spouse is able to financially acquire or maintain a property, a marriage based on the partnership of equals also recognises the roles of spouses in an 'equal economic partnership'.³⁵ This acknowledges a spouse's financial and financial contributions or indirect actions which facilitate and support the acquisition of assets by his/her partner during the course of the marriage. This recognition translates into equitable distribution of matrimonial property at the time of dissolution of the marriage. A woman's entitlement to matrimonial property must be recognised in the family law and determined by a competent authority such as civil or *Shari'ah* courts.

Muslim family law regimes must evolve to reflect the Islamic values of equality and justice, reinforce universal human rights standards, and address the lived realities of families in the 21st century. Inequality in family relations and human relations must be replaced with mutual respect, affection, partnership and the recognition of various forms of contribution of spouses. Contemporary Muslim family laws and practices must therefore promote and uphold these principles and respond to the lived realities of Muslim women and men today.

³⁵ Carmona, M.S. (2017), *Discussion Paper: A Contemporary View of 'Family' in International Human Rights Law and Implications for Sustainable Development Goals (SDGs)*. UN Women, Progress of the World's Women 2018.

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www.musawah.org / musawah@musawah.org