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For Equality in the Family

Musawah Policy Brief #05

FAIR & JUST FINANCIAL RIGHTS UPON DIVORCE

Women often face economic challenges when they divorce. While this occurs in most contexts, regardless of religion or national legal regimes, the problem can be particularly pronounced in countries with Muslim family laws.

The challenges within Muslim family laws may relate to maintenance during the *'iddah* (waiting) period, payment of deferred *mahr* (dower), return of *mahr* in some forms of divorce, the award of a consolatory gift (*nafaqah al-mut'ah*), or most critically the division of matrimonial property owned by the individuals or the couple. Divorce can lead to financial difficulties for both spouses, but wives usually fare worse because of systemic inequalities.

> **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.**

This is further reinforced within Muslim legal tradition, where marriage is presumed as an exchange: the wife's obedience and submission (*tamkin*) in return for maintenance (*nafaqah*) and protection from the husband. Women therefore often contribute less financially to the union and are also more vulnerable if the marriage fails.

While dower amounts can be significant in some countries, giving wives a certain degree of power and a minimal safeguard against *talaq* (unilateral divorce), women may feel trapped in marriages because they could lose the *mahr* if they initiate certain types of divorce (e.g. *khul'*). In other countries where traditional *mahr* amounts are low, women have no insurance policy to protect them from unilateral divorce and financial ruin.

In many Muslim marriages, husbands predominantly or completely control financial resources because of legal structures or social norms. Property is often purchased by or registered in the names of husbands. Most Muslim-majority countries have separate property regimes, where each spouse retains property they acquire before or during the marriage in their individual names; thus property is often retained by husbands after divorce. But separate property rules fail to recognise non-material contributions to the acquisition of matrimonial property, such as the domestic work, care, and support a wife provides that enable her husband to work, earn income, and acquire assets.

The result is that women are often disadvantaged in the settlement of economic matters upon divorce, and thus are economically vulnerable in its aftermath.

Financial settlements upon divorce must be fair and equitable for both spouses.

OVERVIEW OF THE ISSUE

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.

MAHR

Dower given by the husband to the wife, which is settled at the time of the marriage contract but may be paid in different installments (prompt and deferred). While as a general rule deferred *mahr* must be paid by the husband to the wife at the latest when a marriage is dissolved, in certain types of divorces (e.g. *khul'*) the wife must waive some or all of the *mahr* in return for the dissolution of the marriage.

NAFAQAH AL-MUT'AH

A gift of consolation based on *Surah al-Baqarah* 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 Equal Divorce Rights). 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. 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. In **joint or community property** regimes, assets acquired during the marriage are owned by the spouses equally and are divided as such upon divorce. 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. Most Muslim-majority countries adhere explicitly or implicitly to the regime of separation of property as a default rule. While contractual agreements of joint or community property or other hybrid regimes are theoretically legally possible, only a few jurisdictions have enacted statutory law relating to contractual property regimes.

MAINTENANCE OF CHILDREN

The husband often bears an obligation to maintain the minor children and unmarried daughters from the marriage, regardless of who holds custody. Most countries have inadequate enforcement mechanisms, if any.

How each of these issues is decided and enforced may lead to either financial stability or financial crisis for women and their children.

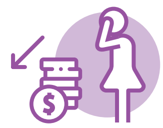
Financial settlements upon divorce must be reformed to be more fair and equitable because:

Women are disproportionately negatively affected by divorce.

The United Nations Committee on the Elimination of All Forms of Discrimination against Women has stated that women 'usually bear the greater cost of the breakdown of the family than men ... Research conducted in some countries has found that while men usually experience smaller, if not minimal, income losses after divorce and/or separation, many women experience a substantial decline in household income and increased dependence on social welfare, where it is available.' (CEDAW General Recommendation 29, paras. 1, 4)

Women face greater economic burdens than men.

Women on average earn less than men; women are more likely to work in lower-paying and/or informal sectors; women own less property than men; women-headed households are more likely to be poor. (UN Women, 2018)



Mahr (dower) is not a source of security for all wives in all circumstances.

In some countries and cultures, *mahr* amounts are high enough to give wives a certain degree of financial power in the marriage. But they may have to return the *mahr* or forfeit any deferred *mahr* if they initiate certain types of divorce, leaving them without financially viable options. Traditional *mahr* amounts are low in many other cultures, leaving women with no bargaining power or financial security.

Many wives are earning and contribute income to their families during marriage.

Yet husbands often still have complete control and decision-making power around finances, and still retain the ability to divorce their wives unilaterally. Often the wife's income is invisible because it is not documented or is used for consumable items such as food, clothing, household expenses, etc. Assets often remain under the husband's control.

Even if wives are not contributing monetarily, they often manage the household and/or care for children, elderly or infirm family members, etc.

The wife's unpaid work within the home, which often enables men to work and earn an income, is usually not compensated and often not recognised either during the marriage or in deciding how assets should be divided after divorce.

Property is disproportionately put in the husband's name, even if it is jointly paid for/owned because of custom or law.

This influences the division of resources upon divorce, especially in separate property regimes.

WHY THE LAWS CAN BE CHANGED

While some actors claim that current laws are equitable because women are entitled to *mahr* at the time of marriage and maintenance during the marriage and *'iddah* period, these financial provisions do not ensure fairness and justice for women upon divorce. Muslim family laws related to economic matters upon divorce can and should be changed, in accordance with Islamic teachings, human rights norms, and lived realities:

1 Basic principles of divorce—respect, kindness, graciousness, fairness—should be applied to financial matters.

The settlement of financial concerns is part of the divorce process, and should be undertaken with the same notions of respect, honor, and equity as the divorce itself. The Qur'an directs spouses to 'either hold together on equitable terms (*ma'ruf*), or separate with kindness (*ihsan*)' (*Surah al-Baqarah* 2:229) and to be gracious towards one another (*al fadl baynakum*) (*Surah al-Baqarah* 2:237); that husbands must 'either take them back on equitable terms or set them free on equitable terms; but do not take them back to injure them, (or) to take undue advantage' (*Surah al-Baqarah* 2:231).

2 The Qur'an expects equitable financial provision for wives and former wives, specifying that such support should be reasonable and given with graciousness.

Contemporary Muslim family laws are not sacred, but are derived from a combination of classical *fiqh*, colonial law, custom, and tradition, based on human interpretation and law-making processes. Thus they can change to be more equitable and fair, in line with Qur'anic guidance.

3 Matrimonial property can be divided evenly even if women received a generous amount of *mahr*.

While some claim that women should not be given a share of matrimonial property because they are given *mahr*, jurists and courts have made the point that these are separate issues, with *mahr* being an effect of marriage and division of property taking place only upon separation or dissolution of the marriage (Sait, 2016). In some jurisdictions, distribution of matrimonial property can also take place at the time of polygamy to ensure that the rights of the first wife—who would have been in the marital relationship for a longer period—are protected equitably.

4 The idea of recognising women's contributions to their households and caring for their children is supported by Muslim legal tradition.

Some classical *fiqh* texts stated that a wife had no obligation to do housework or to care for children, and was even entitled to wages for breastfeeding her babies. These classical *fiqh* rulings are reflected in some national Muslim family laws. For instance, Morocco's 2004 law reform gave mothers additional maintenance for breast-feeding children. Judges can divide matrimonial property based on both financial and unpaid contributions from each spouse. In Iran, women can be awarded monetary compensation upon divorce for housework performed during the marriage (Musawah, 2018).

Some international human rights obligations related to economic rights upon divorce:

- **Universal Declaration of Human Rights Article 16(1):** 'Men and women ... are entitled to equal rights as to marriage, during marriage and at its dissolution'.
- **International Covenant on Civil and Political Rights Article 23(4):** 'States Parties ... shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution'.
- **CEDAW Article 16(1):** 'States parties ... shall ensure, on a basis of equality between men and women, ... (c) The same rights and responsibilities during marriage and at its dissolution'.
- **CEDAW General Recommendations 21 and 29:** 'States parties are obligated to provide, upon divorce and/or separation, for equality between the parties in the division of all property accumulated during the marriage. States parties should recognize the value of indirect, including non-financial, contributions with regard to the acquisition of property acquired during the marriage.' (CEDAW General Recommendation 29, para. 46)

WHERE REFORM HAS HAPPENED

Many countries have acted to ensure fairness and justice for women and men in terms of economic rights upon divorce:

Consolatory gift or compensation (*mut'ah*):

Brunei, Egypt, Indonesia, Jordan, Kenya, Malaysia, Mauritania, Morocco, Oman, Qatar, Singapore, United Arab Emirates:

The court has the power to order a man to pay his former wife a consolatory gift or compensation (*mut'ah*), in addition to the financial maintenance he has to pay her during the waiting period after the divorce (*'iddah*). The amount of compensation varies in each country and may be based on a multiple of the *'iddah* maintenance or what the court deems as fair and just.

Iraq, Kenya, Palestine (West Bank), Syria:

If the court finds that a man has divorced his wife in an arbitrary, unfair, or unreasonable manner, the court can order him to pay his former wife compensation for the divorce in addition to the financial maintenance he has to pay her during the *'iddah* period.

Algeria:

If a judge finds that a man has divorced his wife in an arbitrary, unfair, or unreasonable manner, or that the wife has suffered harm during her marriage, the former husband can be ordered to compensate her for the divorce or for this harm in addition to the financial maintenance he has to pay her during the *'iddah* period.

Singapore:

A wife will almost always receive *mut'ah* payment even if she is the party petitioning for the divorce or she has 'misconducted' herself. Arguments that a wife is 'disobedient' (*nusyuz*) have generally not been accepted by the court to disqualify a wife from being entitled to *mut'ah* payment.

Tunisia:

If the court finds that a wife has suffered harm during her marriage, it will award maintenance and compensation upon the pronouncement of the divorce in the form of regular monthly payments that continue until the former wife's remarriage, death, or she no longer requires them. The amount awarded is based on the standard of living that the former wife was accustomed to during her marriage.

'Wages' for household chores:

Afghanistan (*Shi'a*):

A woman can claim that she is entitled to a share of her former husband's property as wages for the household chores she conducted while married to him.

Iran:

The Family Protection Act 2013 in accordance with the Civil Code enables the court to force the husband to pay the wife *ujrat al-mithl* ('wages in kind') for her housework during marriage based on a monetary value decided by the court, provided that divorce is not initiated by her or caused by any fault of hers.

Division of matrimonial assets:

Brunei, Malaysia, Singapore, Indonesia:

These countries adopt as a default rule joint property regimes in which a wife's unpaid care work is considered to be a contribution to her husband's ability to acquire assets. The court may order any assets acquired by the parties during the marriage (*harta sepencarian*), either through joint efforts or by the sole efforts of one spouse, to be divided between them or any such assets to be sold and the proceeds of the sale be divided between the parties. Depending whether the assets were acquired jointly or individually, the Court considers the extent of contributions of each party, including debts taken for their joint benefit and non-financial contributions such as looking after the home, family, or the needs of minor children of the marriage. In Malaysia, a woman's role as wife and mother are considered indirect contributions and she is usually granted at least a third of the share of assets even if she did not contribute financially. In Singapore, the court is obliged to consider what is 'just and equitable' and take into account all considerations, including the extent of both financial and non-financial contributions made by each party to the welfare of the family. In Indonesia, each party has the right to receive half of the matrimonial assets unless they had agreed otherwise in the marriage contract.

Turkey:

The default property regime is equal division of property and assets acquired during the marriage.

Tunisia, Morocco, Algeria:

The laws explicitly state that spouses have the option of choosing a matrimonial asset regime in which they have joint ownership of assets specifically intended for the family's use.

Enforcement of court-ordered maintenance:

Singapore:

A number of mechanisms are in place to enforce court-ordered maintenance, including: a specialised court to solely handle maintenance concerns, thus expediting claims and enforcement; a wide range of measures that the court can use against defaulters; the *Shari'ah* court having power to sign documents regarding selling or transferring ownership of property where there is a court order and the owner refuses to do so; the ability to report maintenance amounts to credit bureaus; the requirement that men declare debts and obligations towards former wives and/or children to prospective wives prior to remarriage.

Bahrain, Palestine, Tunisia:

These countries have established a fund that assumes responsibility for payment of court-ordered maintenance if a former husband or father is delinquent in his maintenance payment.

HOW TO ENSURE JUSTICE

Steps must be taken to ensure fairness and justice in economic matters for both wives and husbands when they divorce. During marriage, spouses decide how they will contribute to the partnership; neither should be advantaged nor disadvantaged when the marriage is dissolved. Governments can act in a multitude of ways to increase the chances that both spouses will have stable economic foundations when they separate. These include:

Reform divorce laws and procedures to ensure that husbands cannot manipulate divorce options and processes in a way that leads to the wives' financial ruin, husbands pay financial dues before they divorce, deferred *mahr* and *mut'ah* amounts are enough to allow wives to live independently and are actually paid, and compensations set in *khul'* divorces do not harm wives who have no other divorce options.

Reform laws relating to matrimonial property regimes to ensure the laws provide various matrimonial property regime options for the couple to choose from, making some form of community property the default regime, and ensuring couples are educated about the options before they marry.

In addition, religious officials, community institutions, family members, and individuals can assist the couple to ensure that they part with kindness, respect, and fairness.

Settlement of financial matters upon divorce must be fair and just for both spouses.

ISLAMIC TEACHINGS

Fairness, respect, and graciousness guide the divorce process and the norms for financial matters during marriage and settlement upon divorce.

INTERNATIONAL HUMAN RIGHTS

States must ensure that women and men have equal rights, including economic rights, during marriage and at its dissolution.

FINANCIAL SETTLEMENTS UPON DIVORCE MUST BE JUST & EQUITABLE

STATE LAWS

Equality and non-discrimination clauses in state laws and constitutions require equal treatment of women and men in marriage and upon divorce.

LIVED REALITIES

Financial settlements must be equitable to take into account women's paid and unpaid contributions and address the disproportionate financial harm suffered by women upon divorce.

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These briefs are available on the Musawah website at: ***www.musawah.org*** For general resources on economic rights after divorce and references to those resources used in this brief, visit the brief's page on the Musawah website.

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www.musawah.org | musawah@musawah.org | FB/IG: musawahmovement | TWITTER: @musawah