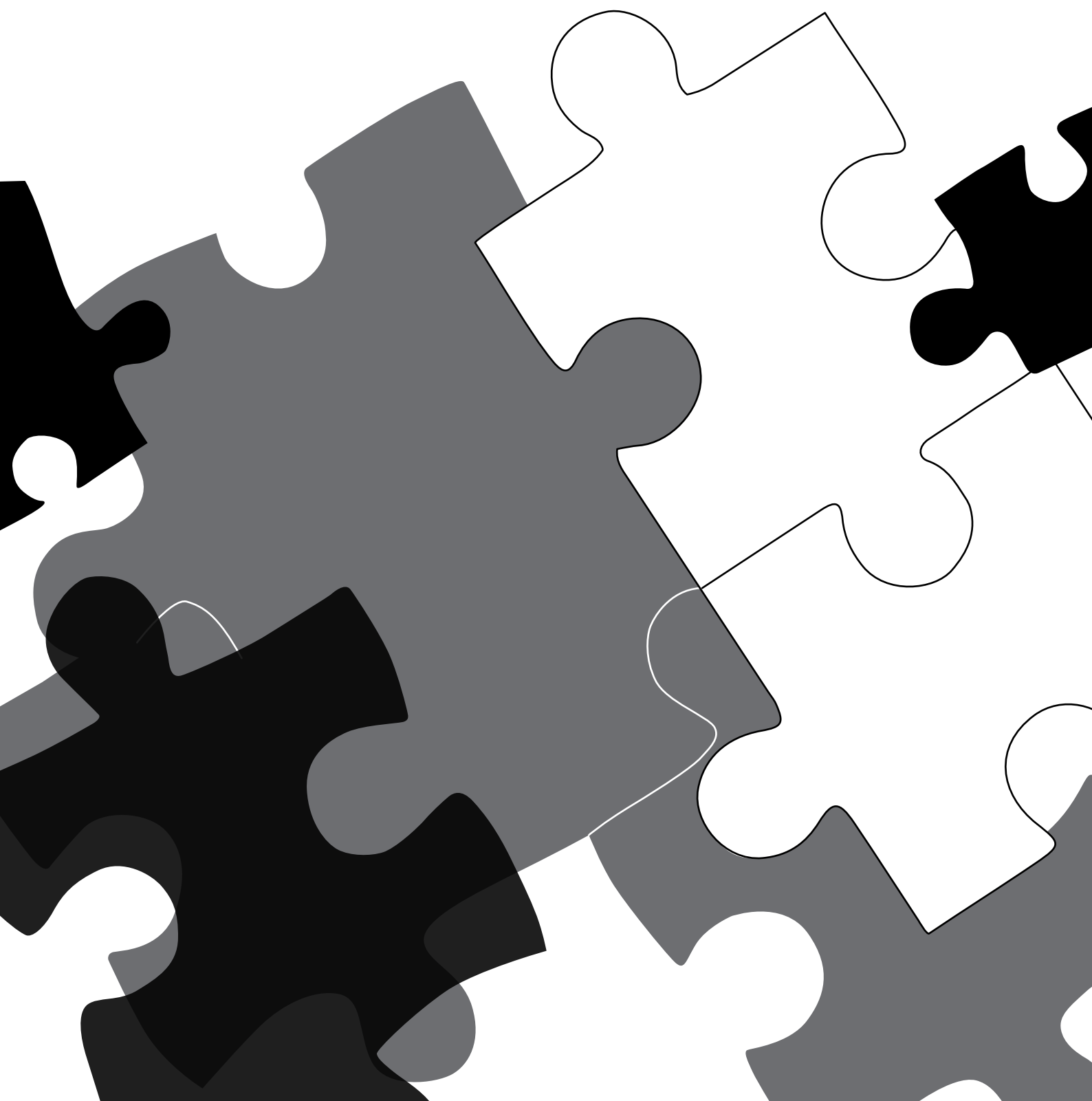


THE DISTRIBUTION OF MARITAL PROPERTY AFTER THE END OF A MARRIAGE UNDER INTERNATIONAL AND ISLAMIC LAW



Introduction

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) stresses that both spouses shall enjoy the same rights and guarantees in respect of the ownership and possession of the family property. While the Convention does not explicitly deal with the situation of divorce or death of a spouse, the CEDAW Committee stipulates that a clear, structured definition of both spouses' rights after the end of the marital relationship must be put in place. However, some countries do not acknowledge the right to equal division of marital property between spouses after divorce or the death of a spouse.

This book by Nasser El-Rayes compares the laws in various Arab countries (specifically Tunisia, Morocco, Algeria, and Palestine) regarding the distribution of joint property between spouses after the marital relationship has ended. It presents an analysis of the doctrinal sources in *Sharia* (Islamic law) that deal with this subject and summarizes the arguments for and against the equitable distribution of marital property in Islam, along with an overview of laws in selected non-Arab countries where this right has been applied in line with the supporting opinions in *fiqh* (Islamic jurisprudence).

It concludes with a number of recommendations that could be implemented in Arab countries to guarantee the equal rights of spouses to property acquired during the marital relationship.

The global context

According to international law, the financial and non-financial contributions of both spouses must be accorded equal weight and impact in creating marital assets.

However, in many countries where Islamic (*Sharia*) law is implemented, the focus is solely on the financial contributions of each spouse, with no acknowledgment of the non-financial contributions of the wife – such as raising children, caring for elderly relatives, and domestic duties – all of which can serve to protect and increase the earnings and assets of the family.

This means that after divorce, the husband who undertakes work of a financial nature retains exclusive ownership of the marital earnings and assets, even in cases where the domestic work by the wife has enabled the husband to earn an income outside the house.

Division of joint property in Arab countries' legislation

In Tunisia, which was the first Arab country to enact legislation for the distribution of marital property after divorce, spouses may choose between one of two regimes:

- The separation of property regime, which is governed by the Personal Status Code and is the most prevalent regime in most Arab countries. Sharing of assets is concluded under this regime unless the marriage contract specifies otherwise.
- The division of marital property regime (also called the joint ownership regime), which is governed by the law on joint financial assets and is limited to immovable property that is allocated for family use or the family's benefit. This regime may be included by spouses within their marriage contract if they choose to.

In Morocco, spouses can also choose between the separation and joint ownership regimes for property acquired during the marriage. However, there is no specific law regulating joint ownership of marital property, and the specification and regulation of the regime are separate from the marriage contract. The share allocated to each spouse is dependent on the agreement of both spouses, and when there is no signed agreement the judge sets the share in accordance with the work each spouse has undertaken. However, this

excludes domestic work, so if a wife does not work outside the home, her right to marital property is restricted to the general rules in force under the Personal Status Code.

In Algeria, the legislature followed a similar path to Morocco by not issuing a separate law on the distribution of marital property, instead adopting the principle of choice between the separation and joint ownership regimes. However, unlike in Morocco, the Algerian law permits agreement on joint ownership of property as an addendum to the marriage contract itself. As such, non-compliance by either party is considered a breach of the marriage contract, meaning the aggrieved party can ask for termination of the marital relationship.

In Palestine, the legislation does not contain any explicit clause regarding the distribution of joint marital property. The financial rights of the wife are confined to the *mahr* (Dowry), the alimony, and the inheritance (in the case of the death of the husband). While a wife does have the right to obtain a share of the family property after marriage in proportion to her contribution under the principle of *al-kadd wa al-se'aya* (or 'toil and effort'), in practice this principle excludes domestic work from consideration as 'effort'.

Division of joint property in *fiqh* (Islamic jurisprudence)

The subject of the division of joint property between spouses first appeared in *fiqh* under Caliph Umar bin Al-Khattab, when a case was brought by Habiba Bint Zureik against her husband's heirs, who had distributed his entire estate amongst themselves after his death. Her claim was to an equal share of her husband's wealth on the basis that she had contributed to its creation, as she had woven, sewn, and embroidered the clothing he sold.

Caliph Umar bin Al-Khattab decided to grant her this right, dividing the money left by Amro bin Al-Harith so that half was given to Habiba as a partner in growing the estate, with the other half distributed to the heirs (including Habiba) according to the rules on inheritance under *Sharia* law. Unfortunately, this precedent has not been adopted in practice and is largely absent from discussions by Islamic jurists. One reason for this is the traditional compliance of *fiqh* with social custom, which prioritizes the rights of men as husbands and fathers within the family.

The concept of *al-kadd wa al-se'aya* ('toil and effort')

The concept of *al-kadd wa al-se'aya* ('toil and effort') can be applied to any partnership involving the growth or creation of wealth. It establishes that upon the division of that wealth, all parties are entitled to receive a percentage of it commensurate with their contribution. The role of *al-kadd wa al-se'aya* in the division of joint property after the end of a marriage was first outlined in a *fatwa* (a considered opinion by an Islamic legal scholar) issued by Maliki jurist, Ahmed ibn Ardan (Died in 992 *Hijri* or 1585 AD). He said that if a woman's husband died she should take half of the estate, while the remainder should be divided as inheritance.

This *fatwa* underpins the Mahgreb *fiqh* in establishing the right of *al-kadd wa al-se'aya*, which can be claimed at any time. However, Islamic jurists differ in their approach to the distribution of marital assets, with some allocating shares to the wife on an equal basis and others dividing and allocating them according to the relative contributions of each spouse.

The position of *fiqh* on domestic work

Domestic work, which is typically carried out by women and which requires material effort and long hours, plays a significant role in the establishment and growth of a family's wealth. Indeed, the wealth creation in a marital partnership depends on both parties playing their roles. These roles can be described as consisting of an external role undertaken by the husband, and an internal role undertaken by the wife. This position is supported by the UN, which has estimated the financial value of domestic work to be between 20% and 60% of GDP (based on the relative market cost as of 2015).

Regarding domestic work, the majority position among Islamic *fuqaha* or jurists (which is supported by the Shafi'i, Hanbali, and some Maliki jurists) is that the service of a woman to her husband is neither an Islamic legal duty nor a legal obligation required by the marriage contract. This is based on the opinion that marriage is principally a contract of enjoyment, rather than a contract of service and an exchange of favors. When asked about the wife who carries out domestic work although she is not obliged to, Maliki jurist Ahmed ibn Ardun said: "The wife indeed has the right to share the wealth with her husband equally and she receives half of his wealth on divorce and receives half of his estate on death, aside from her share of the inheritance, as a reward to her for undertaking work [domestic work] which she was not obliged to do, or as a reward for her effort [or toil] during the marital life."

However a few Islamic jurists subscribe to the minority position, which is that a woman has a duty of serving her husband and doing domestic work, based on custom or tradition (*'urf*).

Division of joint property in non-Arab, Muslim-majority countries

The laws on the distribution of joint property after marriage in Indonesia, Turkey, and Malaysia can be summarized as follows:

- There is no Islamic legal impediment that prevents the division between spouses of joint property after marriage as it is considered an act of 'toil, effort and endeavor'.
- Provision may be made for this right in the marriage contract which does not conflict with the rules and laws of *Sharia*.
- The principle of choice allows for the preservation of separate ownership of property, or the division of joint property.
- Joint property is defined as property acquired during the marital relationship. Anything acquired by either spouse before marriage is a personal asset and is not subject to any subsequent division of property.
- Either spouse may request division at any time, since this right is not linked to divorce or death.

Recommendations

- Enact and implement an explicit provision on joint property, either as an amendment to existing personal status legislation, or through the enactment of specific legislation (as is the case in Tunisia). This should define the concept and nature of joint property based on equality; the rights and obligations of both parties; the rules and restrictions for its disposal by one party alone; when the right can be claimed; and the methods of calculation and proof.
- Adopt a regime under which spouses may choose their form of property ownership. In the absence of specification, joint property regime legislation should apply.
- Consider the wife's role in caring for and managing the family affairs as productive work, with a financial value calculated according to the principle of 'toil and effort' – i.e. as a basic component of joint property obtained for the family after the marriage.
- Follow the example of Indonesia, Malaysia, Turkey, and Tunisia in developing legislation regarding the division of property obtained after the end of a marriage. Unlike Arab countries (such as Morocco and Algeria), Muslim-majority countries are not content to just declare and acknowledge the right to the distribution of matrimonial wealth – instead they have discussed and regulated the various aspects related to it, such as the time for claiming it, the nature of joint property, ways of managing and disbursing of the property, and ways of protecting both spouses from arbitrary and exploitative practice by the other party.
- Reword the financial rights of the wife in the case of divorce and define what relates to alimony, such that it becomes a reasonable and fair compensation that takes the situation of the wife into account, including any material and/or mental harm that she may suffer as a result. To guarantee fair and effective implementation, consider basing the wording on the Tunisian legislation in which the husband involved in an unjustified divorce is obliged to pay alimony to the wife until her death or if she remarries.

