

Matrimonial Property: Protecting Women Financially

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Abstract

This paper analyses the concept of matrimonial property and the question whether such a concept – which is not prescribed in any principal source of Islamic jurisprudence – has a place in Islamic law. Pakistan follows the ‘pure separate property’ regime – whereby both spouses own property independently. However, several countries (including Islamic countries) have incorporated matrimonial property regimes in their legal frameworks. This paper aims to provide a theoretical justification for implementation of matrimonial property as a way of ensuring protection for women in Pakistan. In doing so, legal concepts such as equitability, quasi-contracts, *benami*, and taking account of reciprocal benefits will be explored. In other words, it will be argued that the courts in Pakistan need to understand that such a regime is not repugnant to Islam and existing legal concepts can warrant a more progressive approach in interpreting laws that concern division of assets at the time of divorce.

Keywords: Matrimonial Property, Equitable Property, Non-gratuitous Acts, Quasi-contracts, Constructive Trust, Reciprocal Benefits, Non-economic Contribution

Introduction

Marriage in Islam is a sacred institution, and its teachings underscore the need to protect the rights of the vulnerable segments in society. There are matters discussed in the principal sources of Islam which were not immediately clear; however, there has been adjudication and legislation upon such matters to bring clarity. This can be seen from the fact that the right to get *Khula* and *talaq-e-tafweez* are granted to a woman to bring both the spouses at an equal footing. The Apex Court of Pakistan has declared that the right to life – a fundamental right¹ – is a broad concept and expanded it to include “right of enjoyment of life, maintaining an adequate level of living for full enjoyment of freedom and rights.”² Men own or control nearly 90% of all households in Pakistan,³ and Pakistan is one of the lowest ranking countries in terms of gender equality.⁴ At the time of divorce, women not only have to deal with societal pressures and emotional turmoil, but also the financial ordeal of finding shelter and sustenance. A close analysis of Quranic teachings shows that Islam would not allow men to exploit or gain advantage from the fact that there were no explicit Islamic injunctions on the topic of division of property in case of separation. Islamic law, being silent on the matter of matrimonial property, puts no bar on making legislation to shield the rights of women on marital property (as what is not prohibited is allowed).

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¹ The Constitution of the Islamic Republic of Pakistan 1973, Article 9.

² *Younas Abbas v Additional Sessions Judge, Chakwal* PLD 2016 SC 581; *National Engineering Services Pakistan [NESPAK] (Pvt.) Limited v Kamil Khan Mumtaz* 2018 SCMR 211.

³ ESCAP, ‘Rural Poverty Alleviation and Sustainable Development in Asia and the Pacific,’ United Nations (1996).

⁴ Pakistan ranks 121 out of 145 countries on the Gender Inequality Index (GII). Zahid Pervez, Muhammad Irfan Chani, Sajjad Ahmad Jan and Amatul R. Chaudhary Department, ‘Gender Inequality and Economic Growth: A Time Series Analysis for Pakistan’ (2011) 10 Middle East Journal of Scientific Research 434, 434.

It is vital, then, to address the issue of matrimonial property - which is available widely in the Western world (equitable distribution regimes) that recognise the married couple as one unit and a woman's non-monetary contributions - but not accepted in most Islamic nations (pure separate property regimes). The paper will aim at exploring and elaborating the concept of matrimonial property. It will analyse whether such a theory has a place in Pakistani law, not only by using Islamic principles, but also by stressing on its necessity and equitability, using contract law, and utilising the concept of "best law" through a comparative legal analysis.

Manners of Dividing Property Upon Dissolution of Marriage

In case of separation between a married couple, whether unilateral or consensual, a major point of contention is how the assets, in particular immovable assets, should be divided. There are different theories developed on the subject, and most states rely on one of two major systems: pure separate property regimes and matrimonial property regimes.⁵

Pure Separate Property Regimes

Pure separate property regimes propound the idea that each spouse owns the property that they walked with into the marriage, or acquired with their own material efforts, as there is no economic partnership between the spouses.⁶ This means that neither spouse has a proprietary interest in the assets of the other unless that title is legally shared or they are co-owners.⁷ Under this regime, marriage does not affect property relations,⁸ and ownership of property, per se, acquired during the course of marriage is decided through evidence of title and possession.⁹ Thus, in case of dissolution of marriage, the spouses cannot claim share in the property of one another. While few modern states use this system to divide property, it is very common as a default regime in Islamic States as well as other developing countries.¹⁰

Matrimonial Property Regimes

The contrasting systems of 'matrimonial property regimes' can be broadly divided into two categories – community property systems and equitable distribution systems.¹¹ In the former, the property is jointly owned during the course of marriage, meaning that spouses share title and ownership of assets. This regime covers all assets acquired and liabilities (debts) arising during the marriage. Under this regime, the marital assets and liabilities are to be equally divided, with the focus being on the assets' net worth.¹² The latter concept (equitable distribution system) is

⁵ Rhona Schuz, 'Choice of Law in Relation to Matrimonial Property in the 21st Century' (2019) 15 Journal of Private International Law 1-2.

⁶ Vijender Kumar, 'Matrimonial Property Law in India: Need of the Hour' (2015) 57 Journal of the Indian Law Institute 500-501.

⁷ M. Siraj Sait, 'Our Marriage, Your Property? Renegotiating Islamic Matrimonial Property Regimes' *Changing God's Law: The Dynamics of Middle Eastern Family Law* (2016 London: Routledge) 245-286.

⁸ Schuz (n 5) 49.

⁹ Kenneth W. Kingma, 'Property Division at Divorce or Death for Married Couples Migrating Between Common Law and Community Property States' (2009) 74 ACTEC Journal 35.

¹⁰ Schuz (n 5).

¹¹ Ibid.

¹² James R. Ratner, 'Distribution of Marital Assets in Community Property Jurisdictions: Equitable Doesn't Equal' (2011) 72 La. L. Rev 21-22.

more complex and considers an array of factors while dividing the assets at the time of dissolution of marriage including, but not restricted to, the duration of their union, the needs of the spouses, and the financial contribution each party made during the marriage. This approach only comes into play at the time of the dissolution when the courts are to divide the property which was earlier held separately by parties during the marriage.¹³ A further distinction is made in different jurisdictions as to whether all assets (acquired before and during the marriage) should be divided or only the ones obtained during the marriage.¹⁴ Rather than treating both parties as equals, equitable distribution suggests that some factors make the ownership of property inherently unequal. Such differentiating factors include the attainment of educational and employability, the earning and spending of each party, the financial needs of each party, and the age and health of each party. The theory also considers the causes of the divorce, including whether one party was abusive or unfaithful. Thus, equitable distribution is forward-looking and all-encompassing as it considers the financial position of each party post-divorce as well. In certain jurisdictions, like England and Wales, courts even go beyond these factors and consider the interests of the minor children of the parties.¹⁵

The concept of matrimonial property developed in the West to provide proprietary rights to women. This was done in the UK through the Married Women's Property Act, 1882, which allowed women to own and control property in their own right. The Act reformed the common law view that marriage suspended a woman's property rights, transferring most incidents of ownership to her husband. The earlier concept merged the personality of the wife with the husband's, making them one financial entity. The creation of a coverture meant that women were the property of their husbands, and, in case of separation, they would get no rights in any property. There were other reforms, such as the one in Pennsylvania in 1718 and in France in 1791, by which women were allowed to own and manage property only when their husbands were incapacitated. These reforms granted ownership and control to married women over all property which she would have owned were there no marriage.¹⁶ Such reforms were introduced, however, nearly 1200 years after women's right to own property was recognised in Islam.¹⁷ Islamic principles intended to protect the interests of the vulnerable in a society – children, women, elderly, and travellers etc. Islam ensured that women's property, either inherited or self-acquired through personal earnings before or after marriage, was theirs exclusively and their male guardian(s) would not have any claim over that property.¹⁸ This was all done at a time when women themselves were often viewed as a private property.

Matrimonial Property in Pakistan and Islam

Pakistan has a separate property regime. The Married Women's Property Act, 1874 gives women an exclusive right to their property whether it is acquired before or after the marriage.¹⁹ Courts in

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Susan Prager, 'Sharing Principles and the Future of Marital Property Law' (1977-1978) (25) 1 UCLA L. Rev. 761-762.

¹⁷ Asghar Ali, Islam, *Women and Gender Justice* (New Delhi: Gyan Publication House 2001) 60.

¹⁸ Samar Fatima, *Study of The Status of Women in Islamic Law and Society with Special Reference to Pakistan* (Durham: University of Durham, 1986) 10.

¹⁹ The Married Women's Property Act 1874, s 4.

Pakistan have used this along with the *mehr* requirement to hold that spouses will have no legal claim against each other's property. However, it must be noted that this law serves to protect the proprietary rights of women and does not bar the distribution of property using principles of equity. Since courts in Pakistan are courts of law and equity,²⁰ principles of equity can be relevant when consideration for the acquisition of a property is given by both the parties, as well as in light of other factors discussed below.

It is a contested matter as to whether the equitable principles can be used to adjudicate on matters arising out of a *nikkah-nama* or whether it should be considered a prenuptial agreement with all matters being predetermined. Courts in the United States have applied equity and principles of Muslim Personal Law in an either/or fashion. This can be seen in the case of *Chaudry v Chaudry*²¹ and *Ahmad v Ahmad*.²² In the former case, the court applied the provisions of Muslim Personal Law and refused to give the wife anything above the stipulated *mehr* upon the dissolution of marriage. In the latter case, the court asserted that it was not applying principles of Muslim Personal Law and instead applied principles of equity. They considered factors like the wife being forbidden to work and forced to sacrifice her career while deciding how the assets were to be distributed. A critical analysis of these judgments shows that the use of equitable principles is compatible with Muslim Personal Law. The court held that the *nikkah-nama*, if applied in the case, would be treated as a prenuptial agreement which would bar equal distribution of property.²³ However, there are some fundamental differences between a prenuptial agreement and a *nikkah-nama* contract. These differences include the intention with which both these agreements are entered into – there is no formal disclosure of the finances between the parties and the *mehr* in a *nikkah-nama* contract is not seen as a settlement of all future financial dealings but only serves as protection for the wife. There is, therefore, nothing in the *nikkah-nama* that bars the court from granting equitable remedies in addition to those laid down in the *nikkah-nama*.

Justifying Matrimonial Property

Non-gratuitous Acts: Quasi-contractual Relationship

Women under no law – Islamic or national – are duty bound to perform any services as homemakers or provide any economic contribution to the household. There is an argument to be made that the performance of any service provided by wives should be reimbursed or taken as consideration for the marital property. Even conservative Muslim jurists argue that Muslim women have no obligation to perform household chores or provide any other services and contributions to the household. If, however, women do perform these services, it is a gratuitous act, and even though they may ask for gifts or compensation in return,²⁴ the same jurists argue these services do not give them entitlement to marital property. Courts in Pakistan have held that there is a legal

²⁰ *Pakistan National Shipping Corporation & Others v M/S. Coniston Limited* Suit No.1039 of 2018.

²¹ 59 N.J. Super. 566; (1978) 388 A.2d 1000.

²² No. L-00-1391, 2001 WL 1518116 (Ohio Ct. App. Nov. 30, 2001).

²³ *Ibid*.

²⁴ Lindsey E Blenkhorn, 'Notes, Islamic Marriage Contracts in American Courts: Interpreting Mahr Agreements as Prenuptials and Their Effect on Muslim Women' (2002) 76 Southern California Law Review 189-197.

presumption that no benefit and privilege can be conferred gratuitously on a party unless expressly stated otherwise.²⁵ This principle is also laid down in the Contract Act, 1872.²⁶

Therefore, based on the view that the Islamic marriage contract is a civil contract – especially notable due to the remedies that courts grant, such as restitution of conjugal rights by equating it with equitable remedies like specific performance²⁷ – it seems inconsistent with the jurisprudence of Pakistani courts that services rendered by Muslim women in a marriage would be considered a gratuitous act. A more consistent approach would be implying that unless it is specifically stated that a wife is offering those services gratuitously, a quasi-contractual relationship will be implied that leads to distribution of property at the time of divorce. This is akin to the courts implying that the rights of orphaned grandchildren can be protected using a concept of mandatory wills.²⁸ So, a woman would be entitled to a share in the matrimonial property due to the services rendered by her during the course of the marriage.

Constructive Trust and *Benami* Property

It is vital to consider the contribution of women during the course of the marriage (monetary and nonmonetary) and relate it to the implicit intention of the spouses to mutually benefit from any acquired property. A principle that can be applied in such circumstances is the principle of constructive trust. In the case of *Gissing v Gissing*, it was held that if there is a mutual intention of the spouses that they will both have a beneficial interest in an asset acquired during their marriage, it will be a breach of faith by the spouse in whose name the legal title was vested to refuse to give effect to that intention.²⁹ This intention can be inferred from the fact that both spouses contributed to the acquisition of the asset and, according to Lord Denning, the contribution of the wife may be in the form of “keeping up the house and, if there are children, in looking after them.”³⁰ This is similar to the argument of Muslim scholars who believe that monetary value should be attached to the household chores done by Muslim women.³¹ Such intention will be particularly clear when the wife sacrifices her career to take care of the household which enables the husband to work and acquire property. The wife does so because it is the common intention of the spouses that the wife will have a beneficial interest in the property along with the husband. This viewpoint is even accepted by classical Muslim jurists who believe that even though neither spouse will have proprietary interest in the property acquired by the other, the wife will have the right to access and use the husband’s property during the marriage.³² So, it will be unconscionable to allow the husband to retain the property in its entirety when it could not have been acquired without the contribution of the wife.

A similar concept exists in Pakistani courts where the concept of constructive trust is applied to *benami* properties. This concept is used when the consideration of the acquired property comes from one person, but the legal title belongs to another. It was held that where there is an

²⁵ *Sara Jewellery (Pvt.) Ltd., Lahore v Federation of Pakistan* 2007 CLR 1575, [8].

²⁶ The Contract Act 1872, s 70.

²⁷ *Hafiz Abdul Waheed v Miss Asma Jehangir* PLD 1997 Lahore 301.

²⁸ *Allah Rakha v Federation of Pakistan* PLD 2000 FSC 1.

²⁹ [1971] A.C. 886.

³⁰ *Hall v Hall* (1982) 3 F.L.R. 379.

³¹ *Sait* (n 7).

³² *Ibid.*

agreement that the property is owned by the person who provided the consideration and not the person in whose name the property is held,³³ the person who holds the title would be a *benamidar*, and the person who provided the consideration would be considered the lawful owner of the *benami* property. An extension of this principle can be that if the wife partly provided the consideration for a property, whether in terms of money or sacrificing her career to do household chores and take care of children, with the intention that she will have a beneficial interest in the property acquired by the husband, the husband should not be allowed to retain the property in its entirety, just as the *benamidar* is prevented from retaining the property.³⁴ So, the application of the *benami* principle would mean that the husband is not the lawful owner of the property and the property needs to be divided according to the consideration provided by the spouses to achieve a just and equitable solution.

Reciprocal Benefits

The concept of reciprocity corroborates the proposition that women have a stake in matrimonial property. This notion takes into consideration the benefits accrued by the husband by means of the sacrifices made by his wife, including those of a non-economic nature by performing tasks such as household chores, childbearing, and child rearing. The link then is that when the wife gives up her job and career, to care for the family, run the house, perform the chores, and look after the children, the husband is able to go out and earn for all of them which would otherwise not be possible had the wife refused to perform these tasks.³⁵ The courts quantify the value of such sacrifices, especially when determining the amount of dower that the wife must return in cases of *khula*.³⁶ In some cases, the courts have even taken the liberty to stretch this concept to the mere existence of conjugal rights:³⁷ the sheer performance of marital duties by the wife may be sufficient to qualify as reciprocal benefits that were accrued by the husband out of their wedlock and which were, consequently, accounted for.

With respect to the Islamic perspective on the matter, case law has taken the view that the Quran prescribes the return of some consideration when the marriage dissolves on the basis of *khula*. The courts have the power to determine the extent of repayment, depending upon the circumstances.³⁸ We can extend this notion beyond determining the amount of returnable dower to also ascertaining the fraction of matrimonial property that the wife is entitled to receive upon dissolution of her marriage.³⁹ The reasoning behind this remains the same: it was the reciprocal benefits accrued by the husband, which enabled him to earn the means that then translated to such assets, and thus the wife had contributed to their acquisition.

³³ *Bilqees Begum v Registrar of Properties* PLD 2008 Karachi 146.

³⁴ Nausheen Ahmed, 'Land Rights for Pakistani (Muslim) Women: Law and Policy' (2010) 23 Sustainable Development Policy Institute 3-4.

³⁵ *M. Saqlain Zaheer v Zaib un-Nisa Zaheer* 1988 MLD 427 SHC; *Aurangzeb v Gulnaz* PLD 2006 Karachi 563; *Dr. Fakhr-Ud-Din v Kausar Takreem* PLD 2009 Peshawar 92; *Nasir v Rubina* 2012 MLD 1576 Peshawar.

³⁶ Muhammad Zubair Abbasi, 'From Faskh to Khula: Transformation of Muslim Women's Right to Divorce in Pakistan (1947-2017)' in Javaid Rehman, Ayesha Shahid and Steve Foster (eds), *The Asian Yearbook of Human Rights and Humanitarian Law* (2019).

³⁷ *Balqis Fatima v Najm-ul-Ikram Qureshi* 1959 PLD Lah 566.

³⁸ (n 35).

³⁹ Abbasi (n 36).

Traditional Islamic law, with contrast to matrimonial property, takes a unique stance. It elaborates upon the duties of a wife as seemingly tacit, but which hold immense significance. “The wife’s contributions to the family are invisible and unaccounted for simply because she is not under any obligation to contribute anything materially.”⁴⁰ Therefore, the moral and emotional support, along with the nurturing, that the wife provides for the family, and the children that she bears, are not her duties under the classic understanding of Islamic law, which entitles her to be compensated. As Sait mentions, “Muslim wives who perform household chores are entitled to financial compensation from their husbands for this work”.⁴¹ The principal sources of Islam are found to protect women's rights in marriage, by establishing men as their maintainers.⁴² This concept can be extended to the share in matrimonial property which a wife is entitled to upon dissolution of the marriage. Cases state that, “despite giving ‘woman’ equal rights, [it] does not consider her “identical” with ‘man’”,⁴³ in that the wife is equal with respect to her share in those assets but is not identical, and that she need not necessarily be contributing economically to the acquisition of those assets. It is argued that husband is primarily in charge of earning for the household (wife and children) and thus attaches his name to everything.⁴⁴ Therefore, men as maintainers of women and by virtue of accruing reciprocal benefits from them, are entitled to give their wives their due share in the matrimonial property, by quantifying such benefits upon dissolution of marriage.

Matrimonial Property as an International Law Obligation

There are various international conventions that govern property matters and rights of women related to land distribution. Article 17 of the Universal Declaration of Human Rights states, “everyone has the right to own property alone as well as in association with others.”⁴⁵ Pakistan has ratified The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) in 1996, and under Article 16(h), parties are required to provide “the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property whether free of charge or for a valuable consideration.”⁴⁶ Additionally, under Article 14 (g), parties are required to take steps to provide women with “agricultural credit and loans, marketing facilities, appropriate technology and equal treatment in land and agrarian reform as well as in land resettlement schemes.”⁴⁷ However, CEDAW does not expressly mention division of property during dissolution of marriage, but its General Recommendation No. 21 on Marriage and Family Relations⁴⁸ covers this by providing for “equality in marital property during a marriage or long-term relationship and when that marriage or relationship ends.”⁴⁹ Accordingly, Pakistan is under an international law obligation to reconsider its provisions on matrimonial

⁴⁰ Sait (n 7) 251.

⁴¹ Ibid 252.

⁴² *Holy Quran*, Verses 4:19 and 65:7.

⁴³ *Afshheen v Province of Sindh* 2019 SHC 80.

⁴⁴ Sait (n 7) 252.

⁴⁵ UN General Assembly, Universal Declaration of Human Rights (UDHR), 10 December 1948, Art. 17.

⁴⁶ UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 18 December 1979, art 16(h).

⁴⁷ Ibid, art 14(g).

⁴⁸ CEDAW, ‘General Recommendation 2: Equality in Marriage and Family Relations’ (1994) U.N. Doc. A/49/38, 1.

⁴⁹ Ibid [30-33].

property and eliminate any chance of discrimination against women resulting from the division of property on divorce.

Matrimonial Property: Case Studies

Various Islamic states have merged the Western concept relating to marital properties and formulated a system that provides a broad range of options to allow spouses to choose a system that best suits them. Additionally, these regimes have based their ideas as stemming from Islamic law as well, and therefore denote a combination of the Western and Islamic concepts.

In Pakistan, there is an underlying assumption that men and women do not lie on an equal platform in terms of earning and hence, the man's abilities are given a higher standing in determining who contributes more to the household. For this reason, Pakistan follows more of a separatist model as opposed to the community ownership model, which is detrimental to non-working women, making them completely dependent on their husbands for finances.

Under the reformed Turkish Civil Code, 1926 spouses can choose among three property regimes: separation of property model, union of property, or an aggregation of property through a pre-nuptial.⁵⁰ This is based on the Swiss model whereby spouses are considered to hold marital property jointly.⁵¹ This system is a more flexible approach that gives spouses freedom to regulate their marital agreements and thereby empowers women in the process. Such an approach may be followed by Pakistan to diminish discriminatory effects that result from its laws governing matrimonial property. Additionally, Kazakhstan is another Islamic state that adopted communist ideas along with religious customs and moved towards a more progressive approach. Consequently, Kazakhstan's marital laws prevent any discrimination in terms of property that is by default considered jointly-owned if acquired during marriage, and also allow the couple to choose an alternate marital agreement if they so will.⁵² Moreover, the law in Kazakhstan defines marital property as including moveable and immovable property along with any other property regardless of who has title to it or who paid for it, including non-financial contributions.⁵³ As a result, these regimes take on a progressive approach that considers non-economic contributions of women as valuable enough to grant them part of the marital property.

Furthermore, the idea of community property is not mentioned in the Quran, or the Hadith and the Indonesians recognise this. However, it is nonetheless "found in the *adat* [habit] of the Muslim Indonesians" and therefore, is consciously considered an Islamic principle which was formally incorporated in the 1947 Indonesian Marriage Law.⁵⁴ The Moudawana Family Code, 2004 in Morocco has also provided an optional community property regime and the Tunisian Personal Status Code (*Majalla*), 1956 allows spouses to add favourable clauses on marital properties in their marital agreements which are derived from the Maliki school of thought under Islamic law.⁵⁵ Iran is another Islamic state that recognises equal division of marital property while

⁵⁰ Sait (n 7) 254.

⁵¹ Ibid.

⁵² Ibid 256.

⁵³ Ibid 257-258.

⁵⁴ Ibid 258.

⁵⁵ Ibid 260-64.

combining the Islamic and civil legal system and considers marriage as a contractual relationship.⁵⁶ Moreover, Maldives, despite putting a reservation on Article 16 of CEDAW, which provides for equality in respects of marriage and family, has decided that the courts will divide the property equally if the marriage is registered as a joint partnership, while taking into consideration the woman's domestic and child-care contributions.⁵⁷ Similarly, since Pakistan is also a signatory to CEDAW, Pakistani laws should be made consistent with the provisions of CEDAW so as to comply with its international law obligations.

In Singapore, the English reforms of 1969 were followed to introduce amendments to the Women's Charter.⁵⁸ Under Section 106 of this Charter, the court can issue decrees on matrimonial assets that are acquired by joint efforts during marriage, as well as by sole efforts, and will distribute these assets while taking into account the contributions of each party which will include the non-economic contributions (as a homemaker or caretaker).⁵⁹ Additionally, the provision also requires taking into consideration an asset that is owned before marriage and how it is improved during marriage through joint efforts.⁶⁰ Section 106 is similar to Section 73 of the Malaysian Law Reform (Marriage and Divorce) Act, 1976, except that the latter excludes the provision related to non-economic contribution; however, this has been recommended to be included following the English Matrimonial Proceedings Property Act, 1970 so as to consider a wife's efforts in looking after the house, children, and her husband as "work".⁶¹ Moreover, both the Malaysian and Singaporean regimes focus on the distinction between joint and sole efforts, whereby the former is bound to result in equal distribution of property; however, the court has the discretion to divide the property in proportions it deems reasonable while taking all sorts of considerations into account.⁶² The underlying idea is to provide equal distribution of assets between spouses, whereby the "economic achievements of the husband" are largely deemed to be due to the efforts of women at home.⁶³ Therefore, even where the legislation requires financial contribution for the division of assets, the courts can apply rules of equity to take into account others forms of consideration.

Various Islamic states have taken remarkable steps to provide possible frameworks for community property regimes and have formally implemented this regime as a way forward. Similarly, Pakistan can also combine the Western and Islamic systems and formulate a model that gives option to the spouses to choose from the various marital regimes like the French, Turkish, and Moroccan legal systems. Moreover, Pakistan may also allow marital property to be treated as community property. Like Indonesia, this would be considered an Islamic principle considering family laws fall within the ambit of *Sharia*.

Conclusion

⁵⁶ Ibid 264.

⁵⁷ Ibid 266; A reservation is a declaration made by a state by which it purports to exclude or alter the legal effect of certain provisions of the treaty in their application to that state. A reservation enables a state to accept a multilateral treaty by giving it the possibility not to apply certain provisions with which it does not want to comply. See Vienna Convention on the Law of Treaties (1969), 1155 U.N.T.S. 331, Art. 2 (1)(d).

⁵⁸ B. C. Crown, 'Property Division on Dissolution of Marriage' (1988) 30(1) Malay Law Review 34-35.

⁵⁹ Ibid 35-36.

⁶⁰ Ibid.

⁶¹ Ibid 38-39.

⁶² Ibid 44.

⁶³ Ibid 45.

Arguments condemning the concept of matrimonial property as being unnecessary or un-Islamic should not be entertained. The emphasis of Islamic Law to protect a woman's financial well-being is visible in other safeguards offered which include *mehr*, maintenance, *matah*, etc. Furthermore, there is a general notion in Islam that permissibility is the norm (*al-aṣl fī al-ashyā' ibāḥa*) and that whatever has not been prohibited or barred is allowed, as there is absence of original liability (*al-bara' a al-aṣliyya*). Thus, the state making a law addressing the change in the societal structures and needs of women cannot be said to be repugnant to the Quran and *Sunnah*'. While special consideration is given to female rights by the state policy in Pakistan, such policies have had a lacklustre effect. Noting that women are being exploited and are a vulnerable group in Pakistan, their financial dependence upon a male compels them to stay in abusive relationships, and if they are separated, they feel compelled to re-marry in order to survive.

Owing to the need of the hour, it is vital that the rights of divorced women be secured in concrete terms. It has been noted that as opposed to 'reformative legislation', judicial precedents have proven to be paramount to leading the process of change in a society.⁶⁴ In fact, the courts in Pakistan on several instances have acted as 'social engineers,'⁶⁵ leading the way in legal transformation to provide rights for the otherwise deprived groups in the country – including women and children. It has been seen numerous times that the courts have interpreted facts in a manner that would support women – even when it may lead to conflicting judgments.⁶⁶ This idea, though not an established judicial tool, has been proclaimed as the 'Women Protection Principle.'⁶⁷ The application of this principle, whereby the judiciary leads the way in progressive development of law, has been seen on numerous counts as the legal route for the protection of women from discriminatory laws, safeguard from unfair practices like forced marriages, and provision of family rights such as inheritance, dower, and maintenance.⁶⁸

While this does not negate the role of the legislature, which, in recent times has brought forth laws to secure the rights of women, it demonstrates that a proactive role of the judiciary has allowed the development of the legal framework in a manner that secures the interests of vulnerable groups. Moreover, judges in Pakistan have been attempting to strike a balance between modern needs and traditional interpretations of *fiqh*, and preserve the ideals of both.⁶⁹ Thus, it appears that the courts will once again have to act as catalysts of change to ensure the development of the concept of matrimonial property in Pakistan.

⁶⁴ Muhammad Zubair Abbasi and Shahbaz Ahmad Cheema, *Family Laws in Pakistan* (1st edn, Oxford University Press 2018) 515.

⁶⁵ Christopher Forsyth and Shimon Shetreet, *The Culture of Judicial Independence: Conceptual Foundations and Practical Challenges* (Martinus Nijhoff 2012) 434.

⁶⁶ *Safdar Iqbal v Tahira Parveen* 2010 YLR 582; *Faraz Naz v Judge Family Court, Sahiwal* PLD 2006 SC 457.

⁶⁷ Abbasi and Cheema (n 64) 516.

⁶⁸ *Khalida Shamim Akhtar v Ghulam Jaffar* PLD 2016 Lahore 865; *Abdul Rashid v Shahida Parveen* 2013 YLR 2616; *Muhammad Sajjad v Additional District and Session Judge* PLD 2015 Lahore 405.

⁶⁹ Abbasi and Cheema (n 64) 515.