



KARAMAH

MUSLIM WOMEN LAWYERS FOR HUMAN RIGHTS

Ask Zahra

Welcome to the Ask Zahra advice column! Sister Zahra is ready and willing to answer your questions about Islam. Her answers are based on years of studying Islamic scholarship and culture throughout the Muslim world. Zahra welcomes your questions, and looks forward to providing balanced and credible access to information on the many issues that are important to Muslim women. If you have you have more questions about Islam or Islamic law, contact us [here](#).

Question: Is it Islamically permissible for a woman to receive a pension or alimony from her ex-husband upon divorce? And is it permissible for her to take a share of the marital wealth/property especially if the woman did not have a job outside the house during the marital life while her husband worked?

Answer: Divorce is a last resort in Islam for couples who cannot live in kindness: “A divorce is only permissible twice: after that, the parties should either hold together on equitable terms, or separate with kindness.” 2: 229.

Marriage is a solemn covenant in Islam and is supposed to last. It is however permissible for couples who can no longer live with each other in harmony to resort to divorce. There are different forms of divorce with different legal and financial consequences, which also vary from one school of legal thought to the other and from Sunni to Shi'i traditions. While it is very important to keep in mind that both the husband and the wife have the right to initiate divorce through different procedures, we will only focus on the divorce initiated by the husband through no fault of the wife's own, which appears to be the case in the question and is also very common within Muslim communities.

When it comes to women's financial rights upon divorce, Muslim scholars agreed on a few points and disagreed on others. The first subject of unanimous agreement among them is that once the marriage is consummated[1], women are entitled to their deferred *mahr*, *mu'akhar*, which is the part of *mahr* that the husband chooses, with his prospective wife's consent, not pay immediately upon the contraction of marriage. Hence, deferred *mahr* is automatically granted to divorced women in all Muslim countries' family courts. Second, women's property is not divided upon divorce and is not part of the assets that could be part of litigation. Whatever a woman owns, earns or is given as a gift before and during the course of marriage remains her sole property when the marriage ends:

“But if you want to replace one wife with another and you have given one of them a great amount [in gifts], do not take [back] from it anything. Would you take it in injustice and manifest sin? And how could you take it while you have gone in unto each other and they have taken from you a solemn covenant?” 4: 20-21

Post-divorce financial support is another story. The Qur’an stated very clearly in more than one instance that divorced women are entitled to maintenance and financial gratification, *mut’ah*:

“For divorced women maintenance (should be provided) on a reasonable (scale). This is a duty on the righteous.” 2:241

However, while Muslim scholars unanimously agreed that the woman’s right to maintenance arises upon marriage, they widely disagreed on whether this right is extendable after the marriage ends. As far as the Qur’an is concerned, they differed on whether *mut’ah* is meant as real compensation or simply a consolation to the heartbroken wife. They also disagreed on whether such compensation and/or consolation is mandatory (*wajib*) or only recommendable (*mandhub*). The reason for their disagreement can be found in the wording of the above mentioned verse. The original Arabic word for maintenance in the verse is *mataa’*, sometimes also referred to as *mut’ah*[2], which literally refers to what is enjoyable and useful in life. In the context of divorce, it refers to a one-time payment made by a husband to his wife upon divorcing her. Some Qur’an interpreters, along with the majority of Muslim men, unhappy and culturally unfamiliar with this new protection granted to women, took the literal wording of the verse to address only “the righteous” not regular Muslim men and therefore claimed that it is optional not mandatory for Muslim men to pay *mut’ah* to their divorced wives. However, many authorities in the field of Qur’an’s interpretation ruled otherwise. Imam at-Tabari, for instance, stated that: “God almighty revealed [the verse] to His subjects as a proof that every divorcee is entitled to *mut’ah*.”[3] He also ruled that if the husband dies before he pays his ex-wife her *mut’ah*, it becomes a senior debt against the husband’s estate.

Following in the steps of Qur’an interpreters, the four Sunni Schools of legal thought have also differed on the subject. The Shafi’is stand alone in ruling that *mut’ah* is mandatory for divorced women with few exceptions. The Hanafis stated that it is mandatory in some cases and just recommendable in others whereas the Malikis ruled that it is just recommendable in all cases except when the divorce occurs before the marriage is consummated. However, Imam al-Qurtubi, a Maliki scholar and Qur’an interpreter, parted from this view and ruled that it is mandatory on men for all divorced women. Finally, the Hanbalis ruled that all divorced women are entitled to *mut’ah* except those who were divorced after *mahr* was agreed upon and before the marriage was consummated. It is worth noting however that even for scholars and jurists who believed that post-divorce financial support or *mut’ah* is obligatory on the husband, have not developed any mechanisms or rules to enforce it.

Ibn Hazm al Andalussi, in his *Muhalla bi al-Athaar*, offers a different perspective on the matter. He rules that: “*mut’ah* is a duty upon every man divorcing (his wife)... whether he consummated the marriage or not, whether he agreed on a set *mahr* or not ... and the ruler must force (the husband) to pay it whether he likes it or not... *Mut’ah* is not nullified in the event of the husband revoking the divorce before the end of the waiting period, *’iddah*, nor is it nullified by the husband’s death or the wife’s death. It still goes to her or her heirs and is taken from his capital.”[4]

Most jurists agreed that the divorce *mut’ah* could be monetary or/and property and must be proportionate with the ex-husband’s financial means in accordance with the Qur’anic verse:

“But bestow on them (A suitable gift), the wealthy according to his means, and the poor according to his means; – a provision according to what is acceptable, a duty upon the doers of good.” 2: 238

Except for the deferred *mahr* and the *mut’ah*, there is very little in Islamic jurisprudence on the subject of assessment of post-divorce financial support and almost nothing on marital property settlement. One exception stands out in the North African Maliki jurisprudence and tradition: the right of *Kadd* and *Si’ayah*, one’s right to the fruit of their striving, hard work, and contribution to accumulating the family wealth.

Literally, the word “*si’ayah*” means striving, hard-working, and acquiring property and wealth. In the context of marriage, the right of *Kadd* and *Si’ayah* refers to the management and distribution of property acquired during marriage upon divorce or death of one of the spouses. According to this long standing jurisprudential tradition, the wife, and in some cases siblings, are entitled to a share of the accumulated marital wealth proportionate to her efforts and contribution to the financial well-being of her family. They did not limit the wife’s contribution to her work outside the house, in agricultural or commercial activities for instance, but also included her work in the house.

Contrary to what one might think, the principle of *Kadd* and *Si’ayah* is not the product of Moroccan customary law. It is also totally different from community property law as known in some American states. The concept is deeply rooted in Islamic law and jurisprudence and draws from the Qur’anic principles of justice, equity and fairness. As explained above, when divorce occurs, except for the deferred *mahr* and a symbolic *mut’ah* set by the judge, women often find themselves outside the marital home, with no income or resources, forced to start over. Their hard work during the marriage goes un-rewarded. The husband, on the other hand, solely benefits from the wealth accumulated during the marriage, especially that most of the time all property is acquired in his name. The right of *Kadd* and *Si’ayah* addresses this injustice.

In establishing the principle of *Kadd* and *Si'ayah*, Moroccan jurists built their argument on the Qur'anic verse:

“That man can have nothing but what he strives for; That (the fruit of) his striving will soon come in sight: Then will he be rewarded with a reward complete.”
53:39-41.

From the records of the *sahabah*, jurists pointed out the story of Habibah bint Zurayk, a seamstress who worked hard with her husband, al-Harith Ibn Amr, making and selling clothes until they accumulated significant wealth. When the husband died, because the couple was childless, his heirs claimed three quarters of the inheritance leaving Habibah with only one fourth of the wealth in accordance with Islamic inheritance law. Habibah, feeling prejudiced, took her case to Khalifah Omar Ibn al-Khattab, who ruled that in addition to her inheritance share, the widow deserves half of the couple's wealth in return for her contribution in accumulating it. The rest of the estate was then divided among the other heirs.[5]

Subsequently, Imam Malik developed the concept of *si'ayah* into a jurisprudential rule that applies in the cases of divorce or death of one of the spouses. Great Maliki Moroccan scholars, like Mohamed Ibn 'Ardoon al-Kabeer, Abou al-Kacem Ibn Khajjou and Imam Abdullah El Habti from Northern Morocco all applied this principle in their fatwas and legal rulings. Other scholars from the South, such as al-'Abbassi and Ibrahim al Martini applied it systematically in their rulings.

In a famous fatwa, Ibn 'Ardoon, for instance, who was also an esteemed judge, ruled in favor of a woman who complained that her husband passed away and his heirs refused to give her more than her inheritance share. He also stated that any woman who helps her husband in tending to the land and in the house is entitled to a part of the wealth. Ahmad Ibn 'Ardoon, the brother, later on completed the fatwa and applied it to divorce cases as well.

Imam al-'Abbassi, a southern scholar and mufti, issued the same fatwa: “ it is customary among the jurists of Masmouda and Jezoula tribes (two southern Moroccan tribes) that the wife is a partner to her husband in the wealth they accumulate through their work and efforts during the time they spend together and cooperate. The husband should not monopolize the wealth by registering it in his name. His wife is his partner through her efforts and partnership, if he divorces her she has an equal share in it.”[6]

Although most of these fatwas are based on cases of rural women who are known for working side by side with their husbands in agricultural activities, modern Moroccan jurists deducted that a wife's work inside her house, such as doing household chores and raising the children, is worthy of the same treatment. Building on the jurisprudential rule that: “forcing a woman to do household chores is baseless, for the consensus is that the husband must tend to her needs;”[7] they concluded that if the wife does household's chores anyway, her work grants her a share of the wealth accumulated during the

marital life. It is refreshing to see that Moroccan family law have embraced this view in the 2004 reform and granted women the right to claim a share of the marital wealth and property accumulated during marriage.

Since then, many legal rulings in Moroccan family courts have enforced this principle.[8] The similarities between these jurisprudential/legal precedents and post-divorce support/settlement of marital property as legally defined and practiced in some western societies are obvious.

In a world that does not value the work of women and their contribution to the well-being of their families, some Muslim jurists set an unprecedented example in making women's work and role in the family visible and rewarded. It is our duty, as modern Muslim societies and communities, to follow this example and elevate some of the injustice that weighs on Muslim women in many parts of the world.

And God knows best.
Raja El Habti
Director of Research

[1] When divorce occurs before the marriage was consummated or at least before the two prospective spouses had the opportunity to consummate it (had been alone in a legal khulwah, solitude, the woman only gets half her mahr.

[2] Mut'ah in the context of divorce is different from mut'ah in the context of marriage. The latter used to refer to temporary marriage as practiced in the Shi'i tradition.

[3] At-Ṭabarī Mohammad b. Jarīr, Jaami' al-Bayān fi Ta'wīl Aayi al-Qur'an , Taḥqīq Aḥmad Shākir, vol.2 (Mu'assasat al-Risālah:2000), pp.80-82.

[4] Ibn Hazm, al Muhalla bi al-Athaar, 10:245. (in Arabic)

[5] The story can be found in Muwatta' Malik n. 2429 and also in a fatwa of Sheikh Ibrahim ibn Ali al-Martini al-Wardani, (1293, Manuscript). It was also reported in Omar al-Jeedi, Ibn 'Ardoon al-Kabeer: His Life, Work, Opinions and Fiqh. 1987. 1:198.

[6] Fatawa al-'Abbassi (11th century), manuscript. (in Arabic)

[7] Ibn Hajar al-'Asqalaani, Fath al-Bari 'ala Sharh Sahih al-Bukhari:

http://library.islamweb.net/newlibrary/display_book.php?idfrom=9790&idto=9791&bk_no=52&ID=2992

[8] For more on the subject see: al-Maliki al-Hussein ibn 'Abd as-Salaam, Nidham al-Kadd wa as-Si'ayah. 2002. (in Arabic)