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# Matrimonial Property Between Jurisprudence and Reality

**Saad Gomaa Gomaa Zaghloul**

Universiti Islam Antarabangsa Sultan Abdul Halim Mu'adzam Shah (UniSHAMS), 09300, Kuala Ketil, Kedah, Malaysia

**Ahmed Ramadan Mohamed Ahmed**

Universiti Islam Antarabangsa Sultan Abdul Halim Mu'adzam Shah (UniSHAMS), 09300, Kuala Ketil, Kedah, Malaysia

**Marina Abu Bakar**

Universiti Islam Antarabangsa Sultan Abdul Halim Mu'adzam Shah (UniSHAMS), 09300, Kuala Ketil, Kedah, Malaysia

**Masyitah Mohd Zainon**

Universiti Islam Antarabangsa Sultan Abdul Halim Mu'adzam Shah (UniSHAMS), 09300, Kuala Ketil, Kedah, Malaysia

**Abstract**---Matrimonial property plays an important role in achieving family stability and in building the society. Therefore, due attention must be given to the nature of matrimonial property, how it is managed and the guidelines governing it when disputes about it arise to protect the financial rights of both spouses from any damage that can threaten the stability and development of the society. Laws have been enacted in some Muslim countries like Tunisia and Malaysia to give a wife the right to have a share in the property acquired by her husband during the marriage. Thus, all the above prompted us to participate in highlighting this issue that was not discussed by classical jurists and to examine the types of wealth acquired during marriage and the ruling of each type in this research paper.

**Keywords**---jurisprudence, laws, matrimonial property, reality, spouses.

## Introduction

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**Corresponding author:** Zaghloul, S. G. G.; Email: [saad@unishams.edu.my](mailto:saad@unishams.edu.my)

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2168

### **Spouses' private property acquired before marriage**

Imam Abu Hanīfah and Imam al-Shafi'ī held that a rational woman can dispose of all her property through exchange transaction (*mu'āwadah*) or through gifting. The husband has no right to this property and he cannot prevent her from disposing of her wealth; she is on an equal footing with the rational man for that matter. It is stated in *al-Mughnī*: "A rational woman can dispose of all her property through exchange transaction or through gifting; that is one of two views narrated from Ahmad; it is also the opinion of Abu Hanīfah, al-Shafi'ī and Ibn al-Mundhir." (Ibn Qudamah 4/560). It is also stated in *Mukhtasar al-Muzanī*: "Once the woman shows signs of rationality and sound judgment, her property should be transferred to her no matter whether she is single or married, just like a boy is entitled to receive his properties [once he shows sound judgment] regardless of being married or not. That is because Allah the Almighty has made both men and women equal in terms of being in control of their wealth when they attain puberty and are mature enough" (Al-Muzanī 8/203). However, Imam Malik and Imam Ahmad, in one of his two opinions, maintained that a wife cannot gift more than one third of her property without the permission of her husband (Ibn Qudamah 4/560) (Ibn Qudamah, 1968).

### **The preponderant opinion**

The view of the majority of jurists seems to be the preponderant opinion because its proof is stronger. It is the view adopted in courts now. Moreover, it is fairer, especially in present times. Commenting on the hadiths that prohibit women from giving charity without the husband's permission, al-Bayhaqī said, "It is stated in *Mukhtasar Al-Bwaiṭī wa al-Rabī'*: This can be a matter of test; just like the report that a wife cannot fast a day when her husband is present without his permission (Al-Bayhaqī: 11891)" (*Al-Dhimmah al-Maliyah lilmar'ah*, Hasanīn Makhlūf, Dār al-Iftā') (Zahrah, 1957; Al-Qurtubi, & al-Ansari, 1964; Aisah, 2016).

### **Spouses' properties acquired after marriage through working outside the home**

Regarding women and men working outside the home and participating in the family expenses and savings, they jointly contribute to accumulating the family wealth, whether their contributions are in the form of cash or other assets like houses, cars, lands and real estates. This property that they have jointly acquired, developed and invested takes the rulings of the company of bodies (*sharikat al-abdān*) (Zhilina et al., 2021; Baranov et al., 2021).

### **Company of bodies (sharikat al-abdān)**

The definition of *sharikat al-abdān* is that two persons agree to share in certain work and the work revenue is divided between them according to the ratio they agree on. This type of partnership is common among carpenters, blacksmiths, porters, tailors, goldsmiths and other professionals. This company is valid whether the partners do the same work, such as a carpenter-carpenter partnership, or if their professions vary like a carpenter-blacksmith partnership.

It does not matter if all parties work or if only some of them work while the others do not; it does not matter also if they work individually or collectively. This type of company is called works company (*sharikat al-a'māl*), bodies company (*sharikat al-abdān*), crafts company (*sharikat al-sanā'i*) and acceptance company (*sharikat al-taqabbul*) (Kasane 6/75) (Fisher & Geiselman, 2010; Mikhail, 2009).

On the other hand, Al-Shafi'i held that this type of partnership is invalid because companies are associated with assets, not work (Al-Nawawī 14/74). The proof of the legality of this company is 'Abdullah's report: I partnered with 'Ammar and Sa'd in whatever we get in the Battle of Badr; Sa'd managed to take two captives while I and 'Ammar did not manage to get anything" (Al-Bayhaqi 114828) This view is adopted by the Islamic Fiqh Academy as it stated the following:

- "If the wife does share her money or her work's revenue to purchase a house, a real estate or a business, she is entitled to a share of that house or business in proportion to the size of her contribution." (Islamic Fiqh Academy)

### **Properties acquired during marriage if the wife does not work**

In this case, the wife doesn't work; she only takes care of the home while the husband works and solely supports the family and develops and invests the money without any participation from the wife in acquiring or growing wealth (Nugraha et al., 2020; Putrayasa, 2017). This case poses the question whether the wife is entitled to a share of the money acquired during the marriage period or not. If a dispute occurs or if the marriage is terminated because of divorce or husband's death, should the property be divided in such a way that the wife gets half of it before the distribution of the inheritance by heirs, which is demanded by some women advocacy organizations, on the basis that the wife has some contribution to the acquirement of the property?

This issue was not discussed by classical jurists. Therefore, we will address it in the following lines through answering the question:

- Is the wife entitled to compensation for housekeeping?

Jurists have differed about this issue; they have two opinions: First, the wife is not entitled to compensation for housework and for looking after her husband and children. The proofs cited in support of this view are the following:

- Narrated `Ali (may Allah be pleased with him): "Fatimah (may Allah be pleased with her) went to the Prophet (peace and blessings be upon him) complaining about the bad effect of the stone hand-mill on her hand. She heard that the Prophet (peace and blessings be upon him) had received a few slave girls. But (when she came there) she did not find him, so she mentioned her problem to `Aisha. When the Prophet (peace and blessings be upon him) came, `Aisha informed him about that." `Ali added, "So the Prophet (peace and blessings be upon him) came to us when we had gone to bed. We wanted to get up (on his arrival) but he said, 'Stay where you are.' Then he came and sat between me and her and I felt the coldness of his feet

on my `Abdomen. He said, 'Shall I direct you to something better than what you have requested? When you go to bed say '*Subhān Allah*' thirty-three times, '*Al hamduli l-lāh*' thirty three times, and '*Allāhu Akbar*' thirty four times, for that is better for you than a servant.'" (Al-Bukharī 5361). This Hadith indicates that the wife doesn't get paid for her housework; otherwise, the Prophet would have granted that right to his daughter.

- The custom prevalent in Muslim countries is that the wife doesn't get paid in return for staying at home and taking care of the house and raising the children; that is deemed her duty. The burdens are divided between the spouses: the husband is responsible for supporting the wife and the children while the wife keeps the house and raises the children. This opinion is held by the Hanafī and Malikī jurists and other scholars including Ibn Taymiyyah who said: "The wife is obliged to serve her husband; the nature of service varies according to the custom related to the spouses' social position and their different circumstances; the service required from a Bedouin wife is not as same as the service of a rural wife; and the service expected from a strong wife is not similar to the service required from a weak wife" (Ibn Taimiyah 561).

Al-Hafiz Ibn Hajar al-ʿAsqalanī said: "The preponderant view is that this matter depends on the people's customs since they vary from one place to another" (Ibna Hajar 9/324). *ʿUrf* is recognized in the Shariʿah and, in some cases, it can be a valid basis for rulings (Ibn ʿAbdīn 5/88). There are numerous proofs that establish *ʿUrf* as authoritative evidence that must be applied (Alsharif, 2020; Widana et al., 2020). The basis of this principle is the saying of the Prophet (peace and blessings be upon him): "What Muslims deem good is also good in the view of Allah." *ʿUrf* is authoritative as long as it does not conflict with a clear and absolute text of the Qur'an or the Sunnah or a legislative statement (*naṣ tashrīʿī*) such as an analogy (*qiyas*). Whatever is proven by *ʿurf* is deemed to be established by *naṣṣ* (Shariʿah text) according to the Shariʿah maxims, "what is established by *ʿurf* is on an equal standing with what is established by *naṣṣ*", "what is established by *ʿurf* is indeed established by a *sharʿī* proof", "what is proven by the *ʿurf*'s indication is equal to what is proven by the indication of a *naṣṣ*" or, as in another phrasing, "what is established by *ʿurf* is on an equal footing with what is established by a *naṣṣ* or *sharṭ* (condition)." (Sidqī 2/537) (Orenstein & Hinman, 1999; Reed, 2001).

Elaborating on the authoritativeness of custom and habit (*ʿurf* and *ʿādah*), Ibn Nujaim stated: "Know that the custom and habit are referred to in many juristic questions to the extent that they are deemed a principle (*aṣl*). It is mentioned in the Uṣul works, in chapters discussing things that justify bypassing the literal meaning of words and expressions, that the [customary] usage and habit justify turning away from the literal meaning, as stated by Fakhr al-Islām." (Ibn Nujaim 79). Al-Suyūṭī also said: "Know that *ʿurf* and *ʿādah* have been referred to as authoritative proofs in countless juristic questions" (Al-Syutī 90). So, although the wife is not obliged to serve her husband or do the housework because the marriage contract is only about the intimate relationship, yet her service has a basis in the Shariʿah. That is confirmed by the hadith narrated by Ahmad, al-Bukharī and Muslim from Jabir: "The Prophet (peace and blessings be upon him) asked me, 'Have you got married?' I replied, 'Yes.' He asked 'What, a virgin or a previously married woman?' I replied, 'Not a virgin but a previously married.' He

said, 'Why not a virgin so you could play with her and she could play with you?' I replied, 'O Allah's Messenger, my father was martyred on the day of Uhud and left nine (orphan) daughters; so I disliked to have another young girl of their age, but (I sought) an (elderly) woman who could comb their hair and look after them.' The Prophet (peace and blessings be upon him) said, 'You have done the right thing.' So, there is no problem if the husband aims that his wife serves him and those related to him like a child, brother or family. (Al-Nawawī 16/426). Although that is not obligatory on her, the hadith implies that it was the custom; therefore, the Prophet (peace and blessings be upon him) did not disapprove it (Frémeaux & Leturcq, 2018; Yeates, 1999).

However, Ahmad said, "Our companions and other jurists maintain that the wife is not obliged to serve her husband in kneading, baking, milling, cooking and the like". In *Sharh Thulathiyat al-Musnad*, al-Safarīnī said, "Yet, it is more befitting for her to do what is customary. Ibn Taimiyah considered it obligatory that she does the customary service. As for her own affairs, she is responsible for doing them on her own unless that the custom is that women like her don't serve themselves. Abu Thawr said that the wife must serve the husband in everything". So, the husband works on building the wealth, whether it belongs to his private estate or it is part of the property acquired during the marriage. But how could it be possible for the husband to work outside the home and develop the family wealth without the effort of the wife and her housework? Would the husband be able to focus on growing the family's wealth without the wife's attendance to the other needs of the family?

A UN report published in 1985 on the sidelines of the Nairobi conference emphasized the economic value of women's house work; it stated:

- "Had all women around the world been paid for their housework, their wages would have accounted for half of their countries' national income. Had all wives gone on a housekeeping strike, chaos would have reigned in the world; kids would have wandered in the streets; babies would have been left cold and hungry; piles of dirty clothes would have accumulated without washing; no food would have been ready to eat nor would there have been water available for drinking. Had such a strike happened, the world would have appreciated the significant value of women's housework. Women are not paid for this work despite its vitality and great importance. Many are not aware of women's struggle for long hours at home because it is unpaid." The report added, "If a woman were to be paid for housework, she would have made more than \$14500 per year. In industrialized societies, women contribute 25-40% of the national income through their housework".

Based on the above report, it makes sense to view the man's work outside the home and the wife's housework as complementing each other. Accordingly, we can say that any property acquired by the family during marriage is the result of the efforts of both the husband and the wife (Lester et al., 2010; Weitzenkamp et al., 1997). That necessitates that the money is evenly divided among them when marriage comes to an end. Women also engage in some other works in addition to their housekeeping such as sewing, weaving, farming and ranching. Many women practicing such unofficial work participate in building family wealth. The Egyptian

Central Agency for Public Mobilization and Statistics reports that 64.1% of rural women who have engaged in unofficial work do not get paid by their families compared to 57.5% of urban unofficial women workers. This percentage shows that a lot of women have extra work besides housekeeping and that they contribute to the family's wealth. Therefore, in view of this participation of women with men in acquiring the family property, they have the right to claim half of it when marriage is terminated (Mujber et al., 2004; Jones & Jew, 2007).

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