

Post-Divorce Maintenance (MAA'TA) For Muslim Women in Bangladesh, Pakistan and India

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Abstract: The concept of “maintenance”, under Muslim law, endorses an obligation of a husband to provide maintenance to his wife and this right arises from the very existence of the marital relationship between them. Traditionally it is the well-established rule of Islamic Sharia law that a woman is entitled to maintenance during the subsistence of the marriage and after divorce for *iddat* period. But the controversy arises when the issue of providing post-divorce maintenance (*maa'ta*) beyond *iddat* period comes as there are differences of opinion among the Islamic Scholars as to allowing post-divorce maintenance (*maa'ta*) beyond *iddat* period under Islamic Sharia law. But the judiciary of many countries is allowing such maintenance through judicial activism. The authors of this paper focus at the application of Islamic Sharia law through court's decisions on matters of Post-divorce maintenance (*maa'ta*) for Muslim women in Bangladesh, Pakistan and India. A number of cases relating to Post-divorce maintenance (*maa'ta*) from these countries are analyzed to find out whether the courts in these countries construe Islamic Sharia provisions progressively in making rules or not. The finding of this paper is that the judiciary of Bangladesh and that of Pakistan have not much progressed in this matter due to their adherence to the *fiqh* of the orthodox schools of law while the judiciary of India has made progress by allowing post-divorce maintenance (*maa'ta*) to divorced Muslim woman to meet the challenges of social justice by allowing liberal interpretation of the provisions of Islamic Sharia law.

Keywords - Post-divorce maintenance (*maa'ta*); Islamic Shariah; Judicial decisions; Bangladesh; Pakistan; India.

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I. INTRODUCTION

Marriage in Islamic law is a civil contract that gives rise to certain rights and the fulfillment of certain obligations including '*nafaqah*', or maintenance, which the husband is bound to provide to his wife (Shahid, 2013). In Islamic Sharia law, a husband is duty bound to provide maintenance to his wife during the subsistence of marriage and in the event of divorce, he is also responsible to provide maintenance to his wife only up to the expiration of *iddat*¹ period (Fyze, 1974). This is because after divorce it is considered unfair to burden a man with the obligation of post-divorce maintenance beyond *iddat* period². Moreover, according to Islamic Sharia, the deferred dower is seen as a safeguard for divorced women (Abdullah, Monsoor, Johari & Radzi, 2015). The High Court Division of Bangladesh in *Amena khatun vs. Mosomuddin* (1967 19 DLR HCD) held that a wife has been bestowed with an absolute right to be maintained and the husband is bound to maintain her even though she may have means to maintain herself and the husband may himself be without any means.

Traditionally under the provisions of Islamic Sharia, there is no dispute as to the wife's right to maintenance during the sustenance of nuptial knot and for the *iddat* period as there are provisions in the Holy Quran which make it obligatory for the husband to provide maintenance to her wife after divorce (The Quran 65:6). Though having the Quranic texts on this issue, the controversy arises and differences of opinion exist among the Islamic scholars regarding this beyond the *iddat* period in the form of post-divorce maintenance or *maa'ta* (Shahid, 2013).

In the Quran the word *maa'ta* has been used in the context of maintenance and gift and the support in favour of *maa'ta* i.e. post-divorce maintenance for a divorced wife after *iddat*, is based upon Quranic verses 236, 240, 241 in Chapter 2 and verse 49 in Chapter 33.³ Although the classical interpretation of Islamic law restricts post-divorce maintenance (*maa'ta*) up to *iddat* period, it has been substantially enhanced in many selective cases by legislation in Egypt, Iraq, Kuwait, Syria, Tunisia, Algeria, Morocco, Turkey and Malaysia, based on teleological interpretation of the Quranic verse 2:241 on post-divorce maintenance (Khaled and Hoque, 1999). Through judicial activism, judges of these countries have also attempted to meet the challenges of social

justice by allowing the law to be interpreted liberally, instead of following the views of the orthodox schools of thought. Unlike India, Bangladesh and Pakistan are still now in the position of firmly adhering to the standpoints of the orthodox schools of thought as developed by Muslim jurists and the literal interpretation of the provisions of Islamic Sharia law in this respect, which has created a dispute as to the issue of post-divorce maintenance (*maa'ta*) beyond the religiously prescribed waiting period.

In order to find solution for this dispute the authors of this paper examine specifically the application of the Islamic sharia law on matters of post-divorce maintenance (*maa'ta*) through court's decisions. In this regard, at first the relevant verses of the Holy Quran are examined along with the interpretation of the orthodox schools of law (*madhabs*) which reveals that the Quran asserts certain rights for divorced woman, not only at the time of the divorce but also beyond the *iddat* period. Then a number of case laws of Bangladesh, Pakistan and India relating to post-divorce maintenance (*maa'ta*) are analyzed in order to identify whether the courts in these countries construe Islamic Sharia provisions progressively or not. The cases of these countries are selected because they inherited the same legislative framework from British Colonial India and all personal laws enforced during that time are still operative with some changes, such as the Dissolution of Muslim Marriages Act 1939, the Child Marriage Restraint Act 1929, and the Shariat Application Act 1937. So these countries extremely suffer from legal vacuum to an adequate extent as to leading proactive actions in ascertaining maintenance for the divorced Muslim woman beyond the religiously prescribed waiting period. Nevertheless, the judiciary in these countries has played a significant role in interpreting and applying the provisions of Islamic sharia law to meet the challenges of social justice by contextualizing the liberal interpretation of these provisions. Therefore, this paper will be concluded by arguing the determination as to how much these countries are proceeding to progressive pathways in the elucidation and application of Islamic sharia provisions through judicial jurisprudence with regard to the legal sustainability of being entitled to maintenance by the wife beyond the religiously prescribed waiting period after the segregation of sacred wedlock.

II. METHODOLOGY

Qualitative research method is used in this paper and the primary information is collected from different articles, books, reported cases and websites. At the same time the Holy Quran, Sunnah and Tafsirs are referred to in this paper as a source of information. To accomplish and fulfill the aim of this paper a comparative analysis among the cases of Bangladesh, Pakistan and India is done.

III. WIFE'S RIGHT OF MAINTENANCE

Right of maintenance arises from the very existence of relationship between the parties to the nuptial bond and it is unanimously agreed among Muslim scholars and jurists that the wife is the first in order of priority to this entitlement even before the children, parents and relatives (Rashid, 2007). It is the lawful right of the wife to be provided at the husband's expense with food, clothing and accommodation and customarily extend to other necessities of life (Nasir, 1992). A Muslim man has the personal responsibility to maintain his wife and this obligation does not hinge upon the possession of any property whether ancestral or otherwise (Syed Mudassar Altaf vs. Deputy Commissioner, Lahore and three Others, PLJ 1994) and the husband cannot even transfer his obligation to maintain his wife (Said Ahmad vs. Sultana Bibi, AIR 1943). In Islamic sharia the wife has no legal obligation to maintain her husband in any circumstance howsoever indigent he may be (Mahmood, 2013). Rather the first duty of a Muslim wife is to submit herself to her husband and remain with him under his roof and protection. So maintenance of the wife is the prior duty of a husband and the entire burden of maintenance is on the husband even though she is capable of earnings. In the case of Sardar Muhammad vs. Nasima Bibi (PLD 1966 WP 703) it was held:

“Maintenance of a wife is the bounden duty of a husband irrespective of his minority, illness or imprisonment or the richness of the wife so much that the obligation devolves on the father of a minor with a right of recovery against him when he is in a position to repay the amount.”

On the other hand the wife has certain duties to be followed before claiming maintenance. Muslim law attaches a condition of obedience on the part of the wife as a condition precedent for claiming maintenance from the husband (Monsoor, 1998). The wife is under a duty to obey all the just and reasonable commands of the husband (Ali, 1985). But if she does not act upon her husband's lawful wishes or live apart from him, she becomes a refractory or *nashuza* and is not entitled to be maintained by her husband (Rahman & Moniruzzaman, 2017). In the case of Ahmed Ali Khan vs. Sabha Khatun Bibi (PLD 1952 Dacca), the court adjudged that when the wife works against the husband's wishes she becomes a rebellion or disobedient and is not entitled to maintenance from her husband. A wife is considered to be disobedient to his husband in the following circumstances: (i) if without a valid excuse she disobeys his reasonable orders; (ii) if she refuses to perform marital obligations without valid reasons; (iii) refuses to cohabit in the house he has chosen; (iii) goes on *Hajj* without his consent unless it is obligatory for her to go; (iv) takes employment outside the house without his consent (Ahmed Ali Khan vs. Sabha Khatun Bibi, PLD 1952 Dacca 385). Thus right of maintenance of wife

is subject to the condition that she is not refractory or does not refuse to live with her husband without the lawful cause (Ali, 1985). In Baillie's "Digest of Moohummudan Law" (London, 1875) it has been enumerated:

"If, when called upon to remove to his house, she refuses to do so of right that is to obtain payment of her dower, she is entitled to maintenance; but if she refuses to do so without rights, as when her dower is paid, or deferred, or has been given to her husband, she has no claim to maintenance. If a woman be a *nashizah* or rebellious, she has no right to maintenance until she returns to her husband's house. By this expression is to be understood that a woman who goes out from her husband's house (*manzil*) and denied herself to him, in contradiction to one who merely refuses to abide in her husband's apartment (*beit*), which is not necessary for the purpose of restraint. If, however, the house is her own property, and she forbids him from entering it, she is not entitled to maintenance unless she had asked him to remove her to his own house, or to hire a house for her. When she ceased to be a *nashizah* or rebellious, she is again entitled to maintenance."

In the case of *Ambia Khaton vs. Md. Yasin Bepari* (Family Suit No. 98 of 1990, unreported) it was held that where the wife is residing at a place other than her husband's home, it amounts to refusal to perform marital obligations and in that case, the husband is not liable to maintain his wife. It was also reiterated by the court in *Ali Akbar vs. Fatima Begum* (AIR 1929 Lahore 902) that if the husband is unable to have sexual intercourse with his wife because of any act or conduct of the wife then the husband is not liable to maintain her. The Family Court may also disallow the wife's maintenance on the ground that she was not present in her father-in-law's house while her husband was working abroad (*Monwara Begum vs. Md Hannan Hawladar*, Family Suit No. 15 of 1989, unreported). But mere refusal by the wife to live with her in-law in the absence of her husband is not a ground to disentitle her from maintenance. Thus in *Hosna Ara Begume vs. Md Rejaul Karim* (43 DLR 1991 HCD) the court ordered the husband to pay maintenance when the wife left the husband's residence on the ground of cruelty. It may be observed that negligence or refusal to maintain by husband may be express or implied. It may also be inferred from the conduct of the person. To give jurisdiction to a court it is not necessary to prove express refusal to maintain the wife or the child (*Begum Hamida vs. Abdul Hamid*, 26 DLR 1974 AD).

IV. POST-DIVORCE MAINTENANCE (MAA'TA) UNDER ORTHODOX SCHOOLS OF LAW

The basic sources of Islamic sharia are the Holy Quran and the Sunnah of the Prophet and therefore are the starting point to any inquiry into Islamic law. As the basic source of the Islamic sharia, the Quran, not only deals explicitly with some of the civil, criminal, and family law matters,⁴ but also incorporates general principles of social justice (Rehman, 1998). The ethical nature of the Holy Quran shows concern for the betterment of the weaker members of the society, fairness, good faith in commercial dealings and incorruptibility in the administration of justice (Coulson, 1964). The other main but secondary sources of the Islamic sharia law are *ijma* and *qiyas* which emerged to explicate the issues not clearly covered by Quran and Sunnah (Rehman, 1998). Subsequently, the traditional Islamic sharia Laws, derived from the basic sources, are elaborated through jurisprudential interpretations by different schools of law (*madhhabs*) prominently by Hanafi, Maliki, Shafi and Hanbali schools of law and their juristic interpretation is known as *fiqh*. Most of the modern Muslim countries have adapted their Islamic sharia laws either from the major Sunni or Shite schools of law or have codified their Islamic sharia laws adopting combined rules from two or more different schools of thought (Rehman, 1998).

Islamic law grants a Muslim wife the right to maintenance from her husband. Under Islamic sharia, the established principle that the male is the "provider" is largely drawn from the traditional translation and interpretation of Surah Al-Nisa (4): Verse 34 which begins:

"Men are the protectors and maintainers of women because Allah has given the one more (strength) than the other and because they support them from their means."

It is the established law of Islamic sharia that a Muslim wife is entitled to get maintenance during the subsistence of marriage. But there has been an inexorable debate on how long after divorce, the divorced wife is entitled to maintenance. It has been expounded in Sura-al-Baqrah in verses 225 and 240 that a Muslim wife has the right to maintenance from her husband not only during the subsistence of marriage but also reasonably after dissolution of marriage which Muslim jurists have argued that it would not go beyond the *iddat* period (Fyzee, 1974). It is clearly enumerated in Hedaya that a woman who is divorced on account of repudiation for any cause other than her own, is entitled to post-divorce maintenance and lodging during her *iddat* (Hamilton, 1982; Baille, 1875). The Quranic verse 65:6, considered in this context, directed man to pay financial support to their divorced wives during *iddat*. The traditionally established women rights of maintenance after dissolution of marriage, during *iddat*, are enforceable under the statutory laws of various Muslim countries. The Jordanian Code of Personal Status, 1976 in its Article 79 declares that the husband has to pay maintenance to the divorced wife during her *iddat* in the case of *talaq* as well as judicial divorce. According to the Iraqi Code of Personal Status, 1959-83, *iddat* commences immediately after the dissolution of marriage or demise, as the case may be, even if the woman is not aware of the cause and the husband is liable to maintain his wife up to *iddat* period even if she is not obedient, but a widow is not entitled to maintenance during *iddat* of death (Articles 49, 50 of

the Iraqi Code of Personal Status, 1959-83). In Lebanon, the Lebanese Law on Family Right, 1917-62 in Article 150 proclaims that the husband is liable to provide maintenance to the wife observing *iddat* for him. However, under Article 151 no maintenance can be granted to a wife who has been divorced on account of her disobedience. Under the Moroccan Code of Personal Statutes, 1958 in its Article 122, it has been elucidated that the maintenance of the wife lapses only by the demise of the husband, release by the wife, or by the exit of a wife observing *iddat* of a revocable divorce from the house of the husband without a lawful excuse and without the husband's consent.

It has been enunciated in Verse 241 of Sura-al-Baqrah that "For divorced women maintenance (should be provided) on a reasonable (scale). This is a duty on the righteous." That means the holy Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. But the scholars from four schools of law gave varying interpretations of relevant Quranic verses on the subject. Hanafi scholars have adopted a stricter approach. The Hanafis interpret *maa'ta* very narrowly. The same word appears in verse 236 of chapter II of the Quran which (together with verse 237) deals with divorce before consummation of the marriage:

"There is no blame on you if you divorce women before consummation or the fixation of their dower; but bestow on them (a suitable gift), the wealthy according to his means and the poor according to his means a gift of reasonable amount is due from those who wish to do the right thing. And if you divorce them before consummation but after the fixation of a dower for them, then the half of the dower (is due to them), unless they remit it or (the man's half) is remitted and the remission (of the man's half) is the nearest to righteousness (Quran, II: 236-237)."

Thus the Hanafi jurists recognized payment of *maa'ta* obligatory only when the woman has been divorced before consummation in circumstances where no *mahr* or dower has been set (Abdullah, Monsoor, Johari & Radzi, 2015). However, the Hanafi scholars do not consider verse 241 of Sura-al-Baqrah which refers to giving reasonable maintenance to the wife. It is, however, laudable to give the divorced woman a present in other cases as well (Burhanuddin, 1870). It is not contrary to or prohibited by Muslim law even as narrowly interpreted by the Hanafi jurists that the husband should make some consolatory offerings to his divorced wife. The mandatory *maa'ta* or gift due to the woman divorced both before consummation and before an amount of *mahr* had been settled, is defined by the classical Hanafi jurists in terms of clothing and the fabric which depend on the economic condition of the husband (Baillie, 1875). The Hanbali School also adopted a similar position and refused to recognize post-divorce maintenance beyond *iddat* period. Compared to Hanafi and Hanbali scholars, the other Sunni schools and the Shias regard *maa'ta* as something (in addition to her *mahr*) that the husband is obliged to provide to his wife in every case of divorce by *talaq* (Shahid, 2013). The Shaafi School has adopted a more balanced view, considering that any divorced woman who is not responsible for the divorce is entitled to post-divorce support (Rahman, 1998). The position adopted by the Shaafi and Maliki scholars is liberal and flexible compared to the strict approach followed by the other two schools of thought. However, the followers of these schools of thought later adopted stricter positions and ignored the egalitarian message of the Quran. Thus the Muslim jurists have differently interpreted the divorced woman's right of maintenance deviating from Islamic teaching. Subsequently the differences in such kind of interpretations have created the problems for Muslim women in the Indian-Subcontinent and in consequence, there appears to have become an almost dogmatic notion to the effect that the divorced women are not entitled to post-divorce maintenance beyond their religiously prescribed waiting period. In this circumstance, the divorced Muslim women are handicapped to the state of destitute (Rehman, 2003).

V. POST-DIVORCE MAINTENANCE (MAA'TA) IN BANGLADESH

Bangladesh adheres to the Hanafi School of Islamic Law. It is clearly encapsulated in the *Hedaya* that a woman who is divorced on account of repudiation for any cause other than her own, is entitled to post-divorce maintenance and lodging only during her *iddat* (Hamilton, 1982). The question at this point is what happens to those women whose natural families cannot provide such maintenance for them after dissolution of marriage? This has not yet been clearly articulated in Bangladesh. However, the issue of post-divorce maintenance was first raised in *Hafiz-ur-Rehman vs Shamun Nehar Begum* (47 DLR 1995 HCD). The Higher court, in Bangladesh, elaborately explained the concept of *maa'ta* in the light of relevant Quranic verses. According to Justice Latifur Rahman, *maa'ta* means certain benefits, privileges and gifts in any form by whatsoever name you call it, is incumbent on the righteous as enjoined by Allah in the Holy Quran. So it is given once at a time at the time of divorce (51 DLR 1999 AD 172). The amount of *maa'ta* shall be determined with reference to the means of the husband, the circumstances of the divorce, and the duration of the marriage. If necessary or convenient, the *maa'ta* may be paid by installments. Hence *maa'ta* is considered as consolatory gift, compensation or indemnity. It is basically different from regular maintenance of divorcee (Hefzur Rahman vs. Shamsun Nahar Begum, 51 DLR 1999 AD 205). Thus the Court, after interpreting the Holy Quran and judicial precedents, adjudged that "Considering all the aspects, we finally hold that a person, after divorcing his wife, is

bound to maintain her on a reasonable scale beyond the *iddat* period for an indefinite period that is to say till she loses the status of a divorcee by remarrying another person” (47 DLR 1995 HCD 54). This momentous decision came as a great beacon light of hope that Muslim law in South Asia would be capable of reforms by reference to the Quran itself. It was a glaring example of judicial activism and was contemplated as a landmark and an enlightened judgement (Serajuddin, 2011).

However, Islamic conservative groups criticized this decision and blamed those who supported it as anti-Islamic and therefore, the Appellate Division reversed the decision of the High Court Division (Serajuddin, 2011). However, at first the Appellate Division of the Supreme Court observed that it is naturally followed from the Quranic verse II: 241 that *maa'ta* is a something to which a divorced woman is entitled and which a former husband is under legal obligation to pay (4 MLR 1999 AD 41). But the question was whether *maa'ta* could be equated with maintenance as had been done by the High Court Division. The Court, relying on the commentaries of *Hedaya* and *Fatawa-i-Alamgiri*, reasoned that the word *maa'ta* as used in the Quranic verse was never understood as maintenance or provision in the sense of legal, formal and regular supply of necessities of life and livelihood to the wife. It is a consolatory offering or parting gift to a divorced woman as a comfort and solace for the trauma she suffers from divorce. Being a gift, it has never been judicially enforceable (Serajuddin, 2011). Eventually the learned Court held:

“But the right to *maa'ta* loosely used as maintenance beyond the period of *iddat* may be statutorily provided for the poorer women who are destitute and suffering in the hand of unjust and cruel husbands. It can be argued that for giving benefits to Muslim women, laws may be made as has been made in several Muslim countries and the beneficial legislation will not be against the Muslim personal law and will be consonance with the idea of justice, tolerance and compassion that the holy Quran enjoins upon all righteous and true Muslims” (4 MLR 1999 AD 41).

It is evident from all the Quranic verses on maintenance that the attitude of the Quran towards divorced women is one of compassion and concern. Judges should therefore emphasize on the egalitarian principles of the Quran as they apply to those who are destitute and in impecunious circumstances. Although the Court accepted *maa'ta* as a compensatory or consolatory gift to the wife, it appears that the judges in the Appellate Division missed a historic opportunity to take judicial action on post-divorce maintenance as other countries such as Egypt, Turkey, Brunei Darussalam, Tunisia, Yemeni, Iraq, Malaysia did through legislation (Serajuddin, 2011). However in *Mst Razia Akhter vs. Abul Kalam Azad* (Family Suit No. 193 of 1989 unreported) the court granted to woman maintenance for the *iddat* period, i.e. until the son was born five months after the *talaq*. This extension of the period is in line with the traditional Islamic law and the statutory enactment. Under section 7(5) of the Muslim Family Laws Ordinance of 1961, if the wife is pregnant at the time of *talaq*, it is not effective unless the pregnancy ends. But section 9 of this Ordinance⁵ is silent on the issue of post-divorce maintenance. In the absence of such legal provision, a divorced woman suffers from lack of financial support as during the post-divorce period, she may undergo a critical situation and go through the transitional shock immediately after the separation from wedlock on the happening of denial of the right to maintenance and granting post-divorce maintenance only for a shorter period and not beyond the *iddat* period. Post-divorce maintenance or support may also work as a valuable, alternative and effective tool for the empowerment of Muslim women in Bangladesh (Alam & Islam, 2015). Therefore the authors suggest that a clause in this section be inserted as to the issue of post-divorce maintenance beyond the *iddat* period which also shall entitle the divorced woman to claim before the Arbitration Council⁶ beside the right to go to the family court under section 5 of the Family Courts Ordinance, 1985.

VI. POST-DIVORCE MAINTENANCE (MAA'TA) IN PAKISTAN

As Sunni Muslim majority country, Pakistan follows Hanafi School of law. Though Pakistan is adherent to the traditional law of Hanafi School, a number of changes have been introduced in the traditional family laws of Pakistan including marriage, polygamy, divorce, maintenance and inheritance in 1961. But the most noticeable change has been incorporated by the judiciary of Pakistan that asserted two rights which no courts in other countries in the sub-continent had done, namely, a) their right to independent interpretation of the Quran and b) their right to differ from the doctrines of traditionally authoritative legal texts which are not based on any specific injunctions of the Quran and Sunnah (Serajuddin, 2011). In *Mst Khurshid Bibi vs Mohd Amin* (PLD 1967 SC 97) the Supreme Court of Pakistan adjudged that ‘the judges have competence to reinterpret Islamic law in light of present day situations and that they could depart from the ancient jurists, if the opinions of the jurists conflict with the Quran and the Sunnah, and that such opinions are not binding on the courts’.

Before 1961, maintenance to divorced Muslim wife was the subject matter of criminal law as well as Islamic law in Pakistan. At that time Judges used to grant maintenance for the deserted wives either under section 488 of the Code of Criminal Procedure, 1898 or under the provisions of Islamic law. In 1959 the judiciary of Pakistan, for the first time, dealt with the issue of maintenance of wives in *Sh. Azmatullah vs. Mst. Intiaz Behum* (PLD 1959 Lahore). In that case the court held that the wife is only entitled to maintenance till

her *iddat* period expired and the court fixed a meager sum of Rs. 90 as maintenance for the *iddat* period (PLD 1959 Lahore 167). Also in the case of the State vs. Muhammad Nabi Khan (PLD 1961 WP Karachi 12) the wife was granted maintenance at the rate of Rs. 30 per month up to *iddat* period. Thus it is very clear that the judges deprived divorced Muslim women of their full entitlement to maintenance even during the *iddat* period. It is further admissible that the judges, by ordering *iddat* period maintenance, also deprived divorced Muslim women of their Quranic right of post-divorce maintenance (*maa'ta*) (Rehman, 2003). So it is manifestly evident that the judiciary of Pakistan has restricted the provisions of maintenance up to *iddat* period based on the classical interpretation of Islamic law.⁷ Thus the superior courts have refrained from making any radical reform to the existing provisions of post-divorce maintenance.

The issue of granting maintenance beyond *iddat* period to the wife came under scrutiny in 1955, when the Commission on Marriage and Family Laws (Gazette of Pakistan, Extraordinary, 20 June 1956) in its Report made recommendations regarding the provisions of maintenance for the divorced Muslim women. It was recommended by the commission that the wife should have the right to sue her husband for maintenance and that the order of the court should be executable in a summary manner as arrears of land revenue (Shahid, 2013). Here the Commission, instead of following the views of any particular orthodox school of law, followed *ijtehad* and tried to follow a liberal interpretation of the injunctions of Quran and sunnah for the welfare of the woman who are arbitrarily divorced and rendered destitute. The Commission also recommended that in such cases the Matrimonial Courts should have jurisdiction to order a husband to pay maintenance to his divorced wife for the remaining span of her life (Report of the Commission, 1956: 1215). However, the report of the Commission was adamantly criticized by one of its members (Report of the Commission, 1956: 1505-1560) as well as strongly condemned by other Islamic scholars outside the commission (Islahi, 1958). They postulated payment of post-divorce maintenance to the divorced wife as a deprivation of the existing wife's rights to maintenance (Shahid, 2013). The views expressed by these religious scholars demonstrate their efforts at protecting former husbands from any further financial obligation in the name of post-divorce maintenance (*maa'ta*). Resultantly, the recommendation of the Commission on post-divorce maintenance was not incorporated in the Muslim Family Laws Ordinance 1961. Therefore, the courts refused to award maintenance to wives beyond the *iddat* period under section 9 of MFLO because of its silence on the subject of post-divorce maintenance though past maintenance as well as maintenance for the period of *iddat* was given in a number of cases under the same section.

As a stepping stone for uplifting the socio-economic conditions of women, the Report of Women Rights Committee 1976 and Pakistan Commission on the Status of Women 1983 recommended the issue of maintenance for divorced Muslim women keeping such observation that the Holy Quran has commanded to provide them for a comely maintenance even during post-divorce period (Report of Pakistan Commission, 1983: 135). However, the command of Islam has been absolutely disregarded throughout the country and the government has also made no serious efforts for legislating the provisions for such maintenance in this respect (Ali & Hasan, 2016).

The issue of post-divorce maintenance was then considered by the Pakistan Law and Justice Commission in 1998.⁸ The Commission in its report considered *maa'ta* as a parting gift or consolatory gift. It also denoted that the provisions of *maa'ta* are in force in other Muslim countries where it is to be paid in addition to the payment of dower and maintenance during the *iddat*. In 2004, the issue of maintenance of divorced woman demanding for herself and the minors on the ground that she was divorced with no reasonable cause was resolved by the court by way of granting maintenance beyond the *iddat* period on the reason of breast-feeding to the suckling baby (Muhammad Aslam v Muhammad Usman, 2004 CLC 473). Such observation of the court was taken into account by the Pakistan Law and Justice Commission in 2005. Therefore the Commission suggested to bring reformation into section 9 of the Muslim Family Laws Ordinance 1961 and Schedule of the Family Courts Act 1964 keeping the provisions of a divorced wife with suckling baby to get adequate cost of living for a period not exceeding two years (Report No. 77: 1-13).

Furthermore, in 2009 the Commission discussed in details a Working Paper 'Post-Divorce Mataa for a Wife' (Law and Justice Commission, 2009: 5-20). The Attorney-General observed that Pakistan is being criticized all over the world for the infringement of human rights and supported the recommendations made in the working paper by contending that it will raise the image of the country in the world community (Shahid, 2013). The Commission also proposed to include a column in the marriage contract (Nikahnama) and an amount may be fixed as *maa'ta* to protect women after divorce. It proposed that no time limit or period may be specified for *maa'ta*, and an interim *maa'ta* may also be awarded. Therefore, the Commission submitted a draft bill, 'the Muslim Family Law (Amendment) Bill 2009' in which the commission sought to insert a sub-section in the section 9 of the Muslim Family Laws Ordinance, 1961 on the issue of post-divorce maintenance which entitled the divorced muslim woman to claim maintenance only for her child not for herself for the period of two years. This sub-section encapsulates that a wife is divorced and has passed the *iddat* period but is still breast feeding her child out of previous wedlock may claim maintenance for her child for the period of two years from her past

husband and if the husband dies, from his property or legal heirs as the case may be. This bill, if enacted upon, shall acknowledge the right of maintenance for mother breast feeding child for a period of two years as the Holy Quran in Verse 233 of Chapter 2 has encouraged breast feeding a child for whole two years to benefit that would maintain her health and enable her to look after the infant properly. But this bill didn't see the light of the day yet, as a result of which the practice of not recognizing such kind of right is currently being made enormously which manifestly contradicts to clear and unambiguous injunction of the Quran (IPS Task Force, 2011). In fact, no efforts have been made to codify the family laws in general and specifically on maintenance. This portrays the epidemic existence of yet unresolved social and legal problem. The Pakistani Judiciary being adherent to the Hanafi dictum has usually stuck to the established restrictive juristic view that disentitles the divorced women to claim post-divorce maintenance beyond the *iddat* period (Ali & Hasan, 2016). Therefore it is evident that a divorced woman is entitled to maintenance for herself only for the *iddat* period and not beyond that (Mulla, 1977). So the inquiry of the legal position on the Muslim wives' rights to maintenance in the existing legal system of Pakistan within the framework of Islamic sharia law like the legal reforms introduced in line with Islamic precepts in other countries i.e. Egypt, Iraq, Tunisia, Brunei-Darussalam, Turkey may be the most probable way forward for protecting women including the divorcee in Pakistan (Ali & Hasan, 2016).

VII. POST-DIVORCE MAINTENANCE (MAA'TA) IN INDIA

The codified laws of both *Hanafi* and *Ithna-ashari* schools of Muslim jurisprudence are predominant in India where before the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1983, maintenance of wife was covered under criminal law. According to section 125 of the Code of Criminal Procedure, 1973 (hereinafter CrPC), an obligation has been imposed on the husband to maintain his wife beyond the *iddat* period till her remarriage. This legislative measure had been the subject of heated controversy and critique and protested by the traditional law and orthodox followers and, therefore, it was further amended under section 127, which stipulates that if the sum of dower amount paid to wife and other 'customary or personal law sum' is sufficient to fulfill the divorcee's need, the magistrate may exempt former husband from payment of maintenance (Malik, 1990). The harmonious construction of sections 125 and 127 was made by Justice Krishna Iyer without any controversy in *Fuzlubi vs. K. Khader Vali* (1980 4 SCC 125) and *Bai Tahira vs. Ali Hussain Fidaalli Chothia* (1979 2 SCC 316). However, the interpretation of these concepts raised controversy in *Mohd Ahmed Khan vs. Shah Bano Begum* (AIR 1985 SC). In this case Ahmed Khan drove his wife Shah Bano Begum out of the house in 1975. After three years in 1978, she filed a petition against him asking for maintenance under section 125 of the CrPC. In November of that year, she was divorced by way of irrevocable triple talaq. The lower court granted her maintenance at the rate of 25 rupees. The High Court increased this amount to 179.20 rupees but he refused to pay the amount and appealed to the Supreme Court on the ground that (i) under Muslim personal law, the liability of the husband to maintain a divorced wife is limited to the *iddat* period and (ii) he had paid the amount of dower and maintenance for the *iddat* period. The Court reasoned that it would be incorrect and unjust to extend the above principles of Muslim law to cases in which the divorced wife is unable to maintain herself. The Court, therefore, concluded that if the divorced wife is able to maintain herself the husband's liability ceases with the expiration of the *iddat* period but if she is unable to maintain herself after the *iddat* period she is entitled to have recourse to section 125 of the CrPC (Serajuddin, 2011). Here the court relied upon the translation of Qurainc Verses 241 – 242 of Sura Nisa which expressed that it was not possible to establish that the Muslim husband has no obligation to pay maintenance beyond the *iddat* period to a wife who is destitute (Tabari, 1987). The court further adjudged that the statutory right of a Muslim wife under section 125 of the CrPC to get maintenance from the former husband is not affected by the provisions of the personal laws applicable to her (AIR 1985 SC 945). Again the Court reiterated that there is actually no contradiction between section 125 of the CrPC and Muslim personal law and they proceeded to base their interpretation or argument on the Quranic texts (1988 SC 644).

The decision in Shah Bano case created a great chaos and encountered huge protest against the judgment from traditional law followers and afterwards through general Muslim masses. In order to overcome the situation, the legislature passed the Muslim Women (Protection of Rights on Divorce) Act, 1986 and accordingly divorced Muslim women are excluded from the purview of section 125 of the CrPC. However, the provisions under this law has been disarmed and substituted by another provision offered to the women (Latifi & Danial, 1993) as section 3(1) (a) of the Muslim Women (Protection of Rights on Divorce) Act, 1986 stipulates that a divorced woman shall be entitled to "a reasonable and fair provision and maintenance" to be made and paid to her within the *iddat* period by her former husband. In the case of *Ali vs. Sufaira* (1988 (2) K. L. T. 1994) it was held that under section 3(1) of the Act, a divorced Muslim woman is not only entitled to maintenance for the *iddat* period but also a reasonable and fair provision for the future. It implies the entitlement of a divorcee either for the rest of her life or at least till her remarriage; although the sum itself must be paid during the *iddat* period. Also in the case of *Daniel Latif vs. Union of India* (2011 3KLT 651 SC) the Court held:

“Fair and reasonable provision and maintenance include means that husband shall not only pay maintenance during the period of *iddat* but also after that period in a reasonably and fairly manner. The clause “fair and reasonable provision” means lifelong post-divorce maintenance to be paid by the husband within the *iddat* period.”

The Daniel Latif judgment argue that modern legislation is a step forward to protect the financial rights for women under Islamic law and to extend them towards the goal of achieving social justice (Aktar, 2012). The Kerala High Court in the case of Abdul Hammad vs. Fousiya (2004) has moved a further step to clarify that the past husband must pay maintenance from the date of divorce to the date of remarriage in case of remarrying (Uma, 2005). It is also evident that a Muslim divorced woman shall be entitled to a reasonable and fair provision and maintenance within the period of *iddat* by her former husband and in case she maintains the children born to her before or after her divorce, such reasonable provision and maintenance would be extended to a period of two years from the date of birth of the children. So the divorced wife, if neglected and deserted by her husband due to whims and caprice, then she is entitled to maintenance for milk of suckling baby (Utkal Contractor and Joinery Pvt. Ltd. and Ors. vs. State of Orissa and Others, AIR 1987 SC 1454) as ordained in the holy Quran II: 233.

“The mothers shall give suck to their children for two whole years; (that is) for those (parents) who desire to complete the term of suckling but the father of the child shall bear the cost of mother’s food and clothing on a reasonable basis. No person shall have a burden laid on him greater than he can bear. No mother shall be treated unfairly on account of her child and on (father’s) heir is incumbent the like of that (which is incumbent on the father). If they both decide on weaning by mutual consent and after due consultation, there is no sin on them. And if you decide on foster suckling mother for your children, there is no sin on you. Provided you pay (the mother) what you agreed (to give her) on reasonable basis. And fear Allah and know that Allah is all seer of what you do.”

She will also be entitled to *mahr* or dower and all the properties given to her by her relatives, friends, husband and the husband’s relatives. If the above benefits are not given to her at the time of divorce, she is entitled to apply to the court for an order directing her former husband to provide for such maintenance, the payment of *mahr* or dower or the delivery of the properties (Utkal Contractor and Joinery Pvt. Ltd. and Ors. vs. State of Orissa and Others, AIR 1987 SC 1454). It also needs to keep in mind that if the divorce is not communicated to her until after the expiry of that period, she is entitled to maintenance until she is informed of the divorce (Mulla, 1977). The court in the case of Shabano Bano v. Imran Khan (2010 1 SCC 666) adjudged that cumulative reading of the relevant portions of the judgments given in Danial Latif and Iqbal Bano makes it crystal clear that even a divorced Muslim woman would be entitled to claim maintenance from her divorced husband, as long as she does not remarry. This being a beneficial piece of legislation, the benefit thereof must accrue to the divorced Muslim women. In fine it can be said that in India by way of the Act of 1986, reforms were made to the right to maintenance of the Muslim woman including the divorcee which was extended entitling a divorced woman after the divorce to long life provision to be paid during the *iddat* period through judicial interpretation. Therefore, through the ascertainment of such right by judicial activism, India is moving forward so far in achieving the goal of social justice.

VIII. CONCLUDING OBSERVATIONS

The right to post-divorce maintenance (*maa'ta*) beyond the *iddat* period is an important and a positively helpful provision, which provides security to a divorced woman. But *Hedaya* and *Fatawa-i-Alamgiri*, the two authoritative texts based on the Hanafi School of law, allow the payment of maintenance only up to *iddat* period. The Hanafi School is predominant both in Bangladesh and Pakistan. As a result the judiciary of these two countries does not allow progressive interpretation of the original egalitarian text which referred to providing ‘reasonable maintenance’ after the completion of *iddat* period rather adopted its literalist interpretation under the patriarchal influences which has silenced the more egalitarian aspects of Islam. In consequence, men have absolved themselves from the responsibility of paying post-divorce maintenance to the divorced wife beyond *iddat* period. However, the Indian judiciary has progressed much more than the judiciary of Bangladesh and Pakistan. The judiciary of India in a number of cases has interpreted the Quranic verses by reviewing a range of Islamic sources of law as well as statutory enactments to uphold the egalitarian ethics of Islam so that divorced Muslim women can get post-divorce maintenance (*maa'ta*) on the basis of ‘fair and reasonable provision’. This clearly suggests that the judges in India have skillfully paved a way forward to provide post-divorce maintenance to Muslim women beyond *iddat* period without abolishing the Muslim personal law.

It is interesting to mention that many countries like Iran, Qatar, Egypt, Malaysia, and Morocco have included the provisions of post-divorce maintenance (*maa'ta*) in their respective family laws. In Egypt, a wife who after consummation of her valid marriage is divorced by the husband without her consent and without any fault on her part is entitled, in addition to maintenance of *iddat*, to *maa'ta* equivalent to at least two years

maintenance (Article 18A of the Egyptian Law on Personal Status, 1929). In Qatar, post-divorce maintenance can be awarded to women for 3 years (Section 115 of the Family Reform Code 2005). In Iran, the husband is bound to pay to the wife post-divorce maintenance (*maa'ta*) for 3 years if she is not at fault and not responsible for divorce (Article 1130–1133 of the Civil Code). It is therefore argued that Bangladesh and Pakistan can also make the provisions of post-divorce maintenance (*maa'ta*) for the divorced muslim woman either for such definite period or beyond the *iddat* period and accordingly can take pragmatic steps to insert such provision in the Muslim Family Laws Ordinance, 1961 by way of amendment or make a comprehensive legislation on this issue. The judiciary in Pakistan and Bangladesh can also learn from the experiences of the courts in India and echoing with the learned judges of India, can contribute to upholding maintenance jurisprudence not taking the recourse to abrogate the Muslim personal laws as developed by Islamic Sharia law and thereby can play a proactive role to provide legal protection to divorced Muslim women and rejuvenate their socio-economic conditions in the future.

END NOTES:

¹ *Iddat* is the four-month long (or completion of three menstrual cycles) period of waiting observed by a divorced woman before commencing a new contract of marriage with a view to ensure that she is not pregnant following her previous marriage.

² Post-divorce maintenance beyond *iddat* period is also referred as *Mutat-al-Talaq* or *Nafaqat-al-Muta*, i.e. a payment by the former husband to his ex-wife after the expiry of the *iddat* period. The word *maa'ta* has been used in the Qur'an at least in 14 places. As there is no standard method of transliteration from Arabic to English, there are numerous ways to spell certain key words. For consistency, in this article the word is herein spelt as *maa'ta*.

³ Verse 236 refers to a suitable gift according to the means of the husband to the wife at the time of divorce. Verse 240 deals with the provision of maintenance for widows, and requires Muslim men to make a bequest for 1 year's maintenance and residence for the wife after their death. Verse 240 states that maintenance can be provided for up to 1 year, if the marriage has ended not because of any fault on part of the wife. Whereas verse 49 states that if a marriage ends before consummation, men should make provision for women and release them in an honourable manner.

⁴ The Quran particularly deals with family matters, like marriage, dower, divorce, maintenance and inheritance, see, The Holy Quran. Verse 2:180-181, 221-223, 226-237,240-241; Verse 4: I, 3, 4, 7,9, 11-12, 19-25, 34-35, 128-130; Verse 65:1-2,4 6-7. Some of the criminal offences like *zina* (illegal fornication) and *sarriqa* (theft) are discussed in Verse 4: 15-16, Verse 17:32; Verse 24; 2-9; Verse 2:286; Verse 5: 41-42. Civil issues, such as, *riba*, business, and trade are treated in Verse 2:275-276, 278-281; Verse 3: 130.

⁵ Under section 9 of Muslim Family Laws Ordinance, 1961 a wife is entitled to claim maintenance for the period of *iddat* and past maintenance (i.e. for the period during the subsistence of marriage when wife was not maintained).

⁶ The divorced woman shall file an application to the chairman of the concerned union parishad who shall constitute an arbitration council. The council shall issue a certificate specifying the amount of post-divorce maintenance which shall be levied from the previous husband as land revenues for granting to the divorcee.

⁷ The courts have refused to consider awarding *maa'ta* to the extent that the court stated that 'maintenance beyond the period of *iddat* is illegal and without lawful authority'. See for details, Inamul Ahsan vs. Hussien Bano (18 PLD 1976 Lahore 1466); Sadia Begum vs. Jangreez (2004 Vol. LVI, Peshawar 213).

⁸ It discussed in detail the draft proposal submitted by the Commission's secretariat in 1994.

REFERENCES

- [1] A. Shahid, Post-divorce Maintenance For Muslim Women In Pakistan and Bangladesh: A Comparative Perspective, *International Journal of Law, Policy and the Family*, 27(2), 2013, 197–215.
- [2] A. Fyzee, *Outlines of Muhammadan Law* (Oxford University Press, Delhi, 1974).
- [3] R. Abdullah, T. Monsoor, F. Johari & W. M. Radzi, Financial support for women under Islamic family law in Bangladesh and Malaysia, *Asian Journal of Women's Studies*, 21:4, 2015, 363-383.
- [4] M. Khaled and R. Hoque, Right to post-divorce maintenance in Muslim Law, *Chittagong University Journal of Law*, vol. IV, 1999, 23.
- [5] S. K. Rashid, *Muslim Law* (Lucknow, 2007).
- [6] Nasir J. Jamal, *The Status of Women under Islamic Law*, London, 1992, at p. 59.
- [7] Dr. T. Mahmood & S. Mahmood, *Introduction to Muslim Law* (Universal Law Publishing Co. 2013).
- [8] T. Monsoor, Maintenance to Muslim Wives: The Legal Connotations, *The Dhaka University Studies*, IX (1), 1998, 63-85.
- [9] S. A. Ali, *Mohammedan Law* (Himalayan Books, New Delhi, 1985).

- [10] M. S. Rahman & Moniruzzaman, Trends and Issues of Judicial Protection of Women's Right to Maintenance under Muslim Law in Bangladesh, *Barisal University Journal (Part-2), Vol.1*, 2017, 111-120.
- [11] N.B.E. Baillie, *A Digest of Moohummudan Law* (London, 1875).
- [12] F. Rehman, Post-divorce Maintenance for Muslim Women in Pakistan and India, *Bangladesh Journal of Law*, 1998.
- [13] N. J. Coulson, *A History of Islamic Law* (Edinburgh University Press, Edinburgh, 1964).
- [14] C. Hamilton, *Hedaya or guide: Commentary to Musulman law* (Premier Book House, Lahore, 1982).
- [15] Burhanuddin al-Marginani, *Hedaya* (Grady edn, 1870).
- [16] Fayyaz-ur-Rehman, *Islamic Law of Maintenance for Wives in Pakistan and Afghanistan Since 1960*, Doctor of Philosophy, University of Peshawar, Peshawar, 2003.
- [17] A. M. Serajuddin, *Muslim Family Law, Secular Courts and Muslim Women of South Asia: A Study in Judicial Activism* (Oxford University Press, Karachi, 2011).
- [18] M. J. Alam & T. Islam, Revisiting Post-divorce Maintenance: An Alternative for the Empowerment of Muslim Women in Bangladesh, *Bangladesh Journal of Law, Vol. 15: 1 & 2*, 2015, 81-83.
- [19] Pakistan Law and Justice Commission, 'Report on Marriage and Family Laws', *Gazette of Pakistan*, 1956.
- [20] Islahi, A. H, *Ahilli Commission ki report par tabsara*. (Lahore, 1958)
- [21] Pakistan Law and Justice Commission, 'Report on the Status of Women', 1983.
- [22] Government of Pakistan, Fourth Periodic Country Report to CEDAW Committee, 2009.
- [23] A. Tabari, *The Commentary on the Quran* (Oxford University Press, USA, 1987).
- [24] IPS Task Force, Legislation on 'Women and Family' in Pakistan: Trends and Approaches-III, *Policy Perspectives, Vol. 8, No. 1*, 2011, p. 103
- [25] D.F. Mulla, *Principles of Mahomedan Law* (Tripathi Private Ltd, Bombay, 1977).
- [26] S. Malik, Once again Shah Bano: Maintenance and the scope for marriage contracts, *Dhaka Law Reports Journal Section, 42*, 1990, 34-40.
- [27] B. Ali & M. Hassan, Law of wife's maintenance in Pakistan: Exploring the Missing Islamic Spirit, *Research Journal Ulum-e-Islamia Vol. NO. 22*, 2016, p. 26.
- [28] Latifi & Danial, Women's Rights...paper presented at the International Conference of Lawyers on Changing Scenario of Human Rights, New Delhi, 20 and 21 February, 1993.
- [29] S. Aktar, Protecting Divorced Muslim Women's Right through Maintenance: A Comparative analysis based on the Present Legislative Reforms among the Muslim Community, *The Northern University Journal of Law, Volume III*, 2012.
- [30] S. Uma, Muslim Women's Rights to Maintenance in India, Law and Our Rights, the Daily Star, January 30, 2005.

Md. Sadekur Rahman "Post-Divorce Maintenance (MAA'TA) For Muslim Women in Bangladesh, Pakistan and India." *IOSR Journal of Humanities And Social Science (IOSR-JHSS)*. vol. 23 no. 2, 2018, pp. 01-10.