

Post-Divorce Maintenance: Rethinking and Re-examining the Islamic Discourse in Pakistani Context

Aatir Rizvi

LLM (Cambridge, UK); MPhil (International Relations-PU) Lahore
aatir.rizvi@gmail.com

Hafiz Muhammad Afzaal

MPhil (Islamic Studies-Egypt). Lecturer, Alley College of Law, Lahore

ABSTRACT

Maintenance is right of a woman, which has been acknowledged and protected by Sharia as well as, Pakistani law. However, there are divergent views on the post-divorce maintenance especially Hanafi scholars do not recognize it therefore in Pakistan it is still not granted to a divorced wife. Pakistan is not a welfare state and due to this, such women in many cases are left vulnerable. Further, joint family system is taking its last breaths in the Country, which also makes it difficult for divorced woman to sustain and maintain herself, especially when she is house bound or illiterate, unable to do job. There is no legal provision acknowledging mata'at-ul-talaq in Pakistan whereas, although Pakistani courts have been very progressive when it comes to protecting women rights in marriage and allied matters, yet they are hesitant to re-interpret and introduce it into Pakistani legal system, unless parliament introduces any law on the point. This article gives a brief introduction to the concept of post-divorce maintenance, views of different schools in this regard and builds a case for its award in Pakistan by quoting examples from other Muslim jurisdictions which directly or indirectly acknowledge it.

Key Words: Post-divorce maintenance; Family law; mata'; iddat.

Introduction:

Wife's right to maintenance during subsistence of marriage is unanimously agreed among scholars of different schools; what they do not agree is whether this right extends after the termination of marriage? General view is, a husband is not bound to maintain his divorced wife beyond the period of iddat. Difference of opinion for experts in this regard

is on meaning of the term mata'⁽¹⁾ i.e. a gift. In contemporary and classical jurisprudence, it is a matter of contention as to whether this gift/ gratification is to be treated as real compensation or just a consolation and further whether it is compulsory or optional⁽²⁾. In Pakistan there is no law directly or indirectly dealing with the post-divorce maintenance, hence the courts in Pakistan are reluctant to decide in favor of post-divorce maintenance. The social fabric especially pertaining to combined family system is deteriorated over the past few decades and divorced women, especially illiterate and those who are not independently earning, face hardships in sustaining independently. The times have changed and many Islamic states have opted for liberal interpretations when it relates to women rights and protections, post-divorce maintenance is one of those. In this brief article we will try to discuss the concept and debate revolving around post-divorce maintenance in Pakistani context.

The Concept

Where maintenance is long-term and it extends even after iddat, whether be till further marriage of woman or her death, it is termed as muta'at or mata'. It can be simply termed as a parting gift. This mata' must not be confused with mehr (dower) and nafqah (maintenance during marriage) as the three have existed independently in Islamic legal history. The Holy Quran specifically talks about provision for divorced as well as widowed women by way of maintenance as,

“Those of you who die and leave widows should bequeath for their widows a year’s maintenance; but if they leave (the residence) there is no blame on you for what they do with themselves, provided it is reasonable⁽³⁾”.

And,

“For divorced women maintenance (should be provided) on a reasonable (scale). This is a duty on the righteous...⁽⁴⁾”

And,

“There is no blame on you if ye divorce women before consummation or the fixation of their dower; but bestow on them (a suitable gift), the wealthy

(1) Literally this word mata' or muta't means gratification or a gift. It is used in two distinct senses; one as a temporary marriage (muta) and other as muta'at al-talaq i.e. payment by husband to his wife upon divorcing her.

(2) See, Dr. Faustina Pereira, Post-Divorce Maintenance for Muslim Women and the Islamist Discourse, available at www.wluml.org/node/334 last visited on 06-05-2015 at 10:00 PST.

(3) Sura-e-Baqara, Verse 240.

(4) Sura-e-Baqara, Verse 241.

according to his means and the poor according to his means, a gift of a reasonable amount is due from those who wish to do the right things⁽¹⁾”.

Divergent Opinions

There are divergent interpretations regarding amount of *mata'* in history⁽²⁾, as Abdullah bin Abbas (RA) is in favor of giving divorced wife such amount of money which should be sufficient for her life time maintenance; whereas Abdullah bin Masood (RA) says it can be just a token. Even few scholars make room for long term maintenance of divorced wife till sixty years of age while interpreting Shafai law⁽³⁾. However as per all schools, the quantum of maintenance/ *mata'* must depend upon the status, socio-economic and individual circumstances of the parties and their standard of living⁽⁴⁾.

Pakistani Perspective

Pakistani courts have not tried to interpret the right of maintenance of divorced wife beyond *iddat*, further there is no law in Pakistan dealing with the subject in hand⁽⁵⁾. Post-divorce maintenance is only recognized by Pakistani law, if a provision is written into *NikkahNama*⁽⁶⁾ or through separate agreement in this regard. Off and on questions

(1) Sura-e-Baqara, Verse 236. See also Holy Quran 33:49 stating, “O ye who believe! When ye marry believing women, and then divorce them before ye have touched them, no period if *iddat* have ye to count in respect of them. So give them, a present and set them free in a handsome manner”.

(2) In South Asia, *Hidaya* (1152-1197) and *Fatawa-i-Alamgiri* (1890), both based on Hanafi School, do not allow the payment of maintenance after the *iddat*; whereas scholars from the Middle East have challenged the narrow interpretations and have interpreted the verses dealing with post-divorce maintenance more liberally. Imam FakhralRazy and Al-Tabari strongly advocated for post-divorce maintenance. See, Ayesha Shahid, *Post-Divorce Maintenance for Muslim Women in Pakistan and Bangladesh: A Comparative Perspective*, *International Journal of Law, Policy and The Family* (2013), p-203.

(3) Such as Dr. Zeinab-al-Radhwan from Egypt.

(4) However, where there is a discrepancy in financial standards of spouses, the Malikis and Hanbalis go for ‘the average and medium level’ to be maintained in all cases. Hanafis adopt average level only where husband is wealthy and wife is poor and where husband is poor; they only consider the husband’s financial position as a guiding principle.

(5) As held in *Inamul Islam versus Mst. HussainBano & 4 others*, PLD 1976 Lah 1466, “maintenance beyond the period of *iddat* is illegal and without lawful authority”. Also see, *Saadia Begum versus Jangreez*, (2004) Vol. LVI, Pesh. 213. The Courts in Pakistan have adopted liberal interpretations in the matters of marriage, divorce, custody and have deviated from the classical interpretations; however when it comes to post-divorce *mataa'* they have refused to extend it beyond *iddat*. Their response suggests that in the absence of any legislative provision for post-divorce maintenance, the Courts in Pakistan are restricted to the payment of maintenance only for the period of *iddat* and for the arrears of maintenance, if the wife was not given any maintenance during marriage. See, Ayesha Shahid, p-206.

(6) See Column 20 in this regard.

regarding post-divorce maintenance have been raised in Pakistan⁽¹⁾, as the question pertaining to wife's maintenance as gratuity was also raised in mid-nineties⁽²⁾. Yet, due to pressure from religious circles and parties, liberal interpretations of verse 241 of Sura-e-Baqara have not been made and judiciary has been reluctant in this regard. Even Calcutta High Court once found itself helpless in this regard, where it was to enforce maintenance order in divorced wife's favor⁽³⁾. Due to criticism from renowned religious scholars of that time like Maulana Maududi⁽⁴⁾; MFLO 1961 does not talk about maintenance of divorced wife despite the recommendations of 1956 Commission on Marriage and Family Law⁽⁵⁾.

Other Jurisdictions

Regarding post-divorce maintenance many states have experimented and adopted liberal views. In Egypt and Jordan, law recognizes mataa' as an additional concept alongside maintenance of a divorced wife after consummation; in Malaysia the distinction between iddat maintenance and mataa' has been highlighted, where iddat maintenance is treated as maintenance to existing wife (as iddat being waiting period

(1) Even Law & Justice Commission of Pakistan in 1994 considered a draft on the provision of post-divorce mataa' and sought opinion of Council of Islamic Ideology, which in 1998 rejected it; this was once again taken up by the Commission in 1999 and in 2009 discussed the working paper 'Post-Divorce Mataa' for wife' and even approved a draft Bill for the amendments in MFLO, 1961 in which it defined mataa' as, 'a fair provision in kindness by the husband according to his means and includes anything in cash or kind either moveable or immoveable' and further proposed insertion of new section 9-A in MFLO, stating 'where the marriage is dissolved under section 7 or 8 other than khulaor mubarat, the wife shall be entitled to mataa' by the husband'. It also proposed the insertion of a new column in nikkahnamaregarding mataa'. Whereas, the Council of Islamic Ideology once again refused to accept, instead it proposed a draft legislative bill for providing nafqa or support to destitute family members including mentally or physically disabled.

(2) See, Iqbal Hussain versus Deputy Collector, PLD 1995 Lah 381.

(3) See, AbdurRohoman versus Sakhina, ILR Cal 558, 562 (1879).

(4) Maulana criticized the Commission's recommendations in these words, 'it seems quite unreasonable that a person, who has divorced his wife and is no more entitled to have any rights over her should be compelled to bear the burden of her expenses for the whole of her life or till her remarriage'. See, Ayesha Shahid, p-207.

(5) "Islam very justly claims to be a simple and liberal creed ... The Quran says that previous societies perished because they were burdened with too much inflexible law and too much unnecessary ritual ... No progressive legislation is possible if Muslim assemblies remain only interpreters and blind adherents of ancient schools of law", see, Report of the Commission on Marriage and Family Law, 1956. Also, the 1956 Commission, on questioning its members and hundreds of Muslims, whether husbands should pay maintenance to divorced wife for life or till her remarriage, part of the answer reads as, "a large number of middle aged women who are being divorced without rhyme or reason should not be thrown on the street without a roof over their heads and without any means of sustaining themselves and their children". See, www.wluml.org for details.

during which divorce can be revoked) and question of mataa' does not arise and it is only after the completion of period of iddat the question of post-divorce maintenance arise. In India, divorced wife can ask for maintenance from ex-husband if she is unable to maintain herself⁽¹⁾. In Syria, husband pays maintenance to divorced wife up to 9 months under Personal Status Law 1953 whereas, judge can grant her compensation up to 3 years as maintenance additionally in case of fault based divorce⁽²⁾. In Tunisia, concept of indemnity of divorced woman, even in shape of retention of matrimonial home is present and this indemnity can be changed as per changing circumstances of divorced wife until she is alive or remarries⁽³⁾.

Libya has unique feature, where post-divorce maintenance is determined by answering the question who was at fault; irrespective of sex, even a well off wife can be held liable to maintain her ex-husband who is needy, provided she was at fault. In Turkey too, any party who thinks itself as injured party and finds itself in financial difficulty may file a suit for alimony in court. In Iran even a wife can claim compensation for household services ⁽⁴⁾ rendered to husband during marriage. Qatar has option of 3 years' post-divorce maintenance ⁽⁵⁾.

Analysis of Different Schools

Hanafi law does not provide relief to the divorced wife ⁽⁶⁾ in this context, yet it is possible to adopt the principles from other schools ⁽⁷⁾, to make law and provide relief to destitute divorced wife for the reformation of family law. Hanbalis adopt same approach as of Hanafis; whereas Shafais and Malikis adopt liberal and flexible approaches towards the post-divorce maintenance, even Shafais provide a list of those who are eligible for

(1) See, sections 125-128 of 1973 Criminal Procedure Code. Also, most famous case in this regard is Shah Bano Case, AIR 1985 SC 945 which led to passing of Muslim Women (Protection of Rights on Divorce) Act 1986. See, also Daniel Latifi versus Union of India, 7 SCC 740, which while interpreting 'reasonable and fair provision' said it meant lifelong post-divorce maintenance to be paid by the husband within the iddat period.

(2) See, Sharmin Akhtar, 'Protecting Divorced Muslim Women's Rights through Maintenance; A Comparative Analysis based on the Present Legislative Reforms among the Muslim Community', The Northern University Journal of Law (Vol. III 2012), pp-23-48.

(3) See, section 37 (2) of the Code of Personal Status 1956.

(4) Termed as, ujrul-mithl.

(5) Section 115, Family Reform Code 2005.

(6) They only recognize payment of mataa' mandatory where dower is not fixed at the time of Nikkah and woman is divorced before consummation. They treat mataa' as a substitute for a woman's right of 50% of the dower in that case. See, Ayesha Shahid, pp-197-215.

(7) Such as in Bangladesh Maliki law is borrowed in this regard.

mata'⁽¹⁾. Major development as far as Shia law is concerned has been undergone in Iran, where wages for house work or *ujrat-ul-mithl* is introduced. In short, where equity and fairness demands, it is always better to borrow from other schools and jurisdictions, so that justice should prevail.

The Debate

A divorcee might go through one of the following situations i.e.

- a) no maintenance for her in any case
- b) post-divorce maintenance for a shorter period of time
- c) only some maintenance but no mata'

There have been debate on the above in many states and few have tried to resolve the issue by securing women rights in this regard like Egypt, Yemen, Iraq, Malaysia, Tunisia and Brunei Darussalam by introducing laws to clarify the position of mata'. Note that Bangladeshi Supreme Court in 1999 in famous HefzurRehman case⁽²⁾ settled the concept of three months' post-divorce maintenance along-with its difference with maintenance, as former is treated as consolatory gift⁽³⁾. Even if we keep the religious and legal aspects aside, this issue of post-divorce maintenance has socio-economic and socio-political aspects too, as it can serve as a tool to empower women and bring them into the main stream of societal key players.

If left alone, after divorce, a Muslim woman has right to claim maintenance from her opulent prescribed relations, otherwise state must be bound to maintain her either through zakat or bait-ul-mal or by establishment of some fund⁽⁴⁾ in this regard. But Pakistan is not a welfare state and there is official support system for such women who are not financially self-sufficient, further traditional joint family system is taking its last breaths, so poor divorced women are unable to have family support in majority cases. Therefore introduction of mata' seems reasonable and justified. As far as quantum of mata' is concerned, the same may be left for the determination by the courts, keeping in view the financial status of husband, duration of marriage and circumstances of divorce. As state is

(1) The list includes a woman divorced without any fault on her part; divorce occurred before consummation and before fixation of dower; divorce due to husband's impotence, bad attitude, physical and mental cruelty and discretion; the husband's failure to secure the necessary maintenance or divorce due to illa or zihar. See, Ayesha Shahid, p-213.

(2) Hefzur Rahman vs. ShamsunNahar Begum 51 (1999) DLR (AD) 172

(3) Alam, M. J., & Islam, T. (2015). RETHINKING POST-DIVORCE MAINTENANCE: AN ALTERNATIVE FOR THE EMPOWERMENT OF MUSLIM WOMEN IN BANGLADESH. Bangladesh law journal, 15(1-2), 81-110.

(4) As experimented in Iraq through temporary maintenance fund or in Egypt through payments from the Nasser Social Bank etc. Even waqf property can be used in this regard, where it is impossible, due to any reason, to legislate for compulsory post-divorce maintenance.

the protector of rights esp. of weak people, of its subjects, therefore Islamic commandments can be enforced through legislation. Therefore, post-divorce mata' for wives as ordained in Holy Quran should be included through amendments in MFLO, 1961 (Section 9) and Family Courts Act 1964, as per societal needs and latest developments and interpretations in different states esp. Muslim jurisdictions. Please note that post-divorce maintenance/alimony laws of certain Western countries have been badly criticized by different scholars as being in clash with Islamic injunctions⁽¹⁾. In Pakistan rate of divorce is increasing and female initiated divorce has risen almost 50% in the last few years, so it can be stated that due to this a provision regarding post-divorce maintenance has not been introduced into the law, fearing that reduction of economic uncertainty for divorcee, would encourage her to go for divorce⁽²⁾.

Conclusion

Further, it must be kept in mind that the revelations in Quran are for all times to come, they are universal in nature, so doors for fresh Ijtihad are always open for emergent issues, even the Supreme Court of Pakistan once declared, 'the judges have competence to reinterpret Islamic law in the 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⁽³⁾'. Example of Indian Supreme Court can be taken as a precedent, as it has very capably avoided the conflict between Muslim personal law and need to provide mata' to Muslim women; therefore Pakistani judges can make provision for such award by taking into consideration, the progressive interpretations of religious texts, guarantees and protections provided to women under its constitution as well as, international human rights instruments.



(1) Please note that the wife is not entitled to claim anything from assets of her husband after seeking khula. As per fatwa given by JamiaAshrafia, Lahore, "there is no claim of wife on the assets of husband except livelihood during the life of husband. Therefore the case under reference to divide 50% of the assets of husband to give to a divorced wife or after khula has no legitimacy as per Shari'a, which is done in UK and it is wrong to claim any such share by wife as per Shari'a". In another fatwa obtained from DarulIftaa, JamiaDarulUloom, Karachi it is stated, "the Britishlaw of divorce, where a wife typically gets half of her husband's assets is against Shari'a". See, www.zallp.com/divorce.html, last visited on 06-05-2015 at 11:00 PST for details.

(2) See, Ayesha Shahid, p-208.

(3) See, Mst. KhursheedBibi versus Muhammad Amin, PLD 1967 SC 97.