

POST-DIVORCE MAINTENANCE FOR MUSLIM WOMEN IN PAKISTAN AND INDIA

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INTRODUCTION

In traditional Islamic law, a Muslim woman's right of maintenance towards her husband becomes due once she starts cohabiting and places herself at the disposal of her husband.¹ The Arabic term for such maintenance is *nafaqa*, which in general terminology means to make provisions for one's necessities of life by another in consideration of his labour.² *Nafaqa* generally includes provision of "food, raiment, and lodging."³ However, on the quantum of maintenance there are divergent views among the different schools in Islam.⁴ Without going further into the differences of the above schools on the issue of maintenance during marriage, it becomes obvious that the amount of maintenance starts from the minimum of food, clothes and shelter and can further depend upon the economic conditions of husband and wife.

A Muslim husband, thus, is responsible for maintaining his wife during the marriage, but he also has the absolute power to dissolve the contract of marriage any time he wishes.⁵ A Muslim male can terminate the marriage contract in any of the three different modes, that is, *talaq-i-ahsan*, *talaq-i-hassan* and *talaq-i-bidat*.⁶ But Muslim scholars deviated from the express teachings of the Quran and the Sunnah.⁷ Some even favoured the *al-bida* form

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¹ See Rahman, T., A Code of Muslim Personal Law, vol 1, Karachi, 1979, at p.258.

² Ibid., at p.257.

³ Baillie, N.B.E., A Digest of Moohammudan Law, vol. 1, London, 1865, at p.441.

⁴ For a detailed discussion on the quantum of maintenance for a woman during her marriage according to the four Sunni Schools in Islamic jurisprudence see, for example, Pearl, D., A Textbook on the Muslim Personal Law, 2nd edition, London, 1987, at p.69 and Hodkinson, K., Muslim Family Law: A Source Book, London, 1984, at p.147.

⁵ Ali, S.A., Mahommedan Law, Vol. II, Calcutta, 1929, at p.472. See also Hodkinson, supra note 4, at p.220; and Pearl, *ibid.*, at p.100.

⁶ For further details see e.g. Fyze, A.A.A., Outlines of Muhammadan Law, London 1949, at pp.129-132. See also Pearl, supra note 4, at pp.100-102.

⁷ According to the sayings of the Prophet Muhammad, "In the eyes of Allah it (divorce) is the most hateful of the lawful things". Reported by Maudoodi,

of divorce and, thus, allowed Muslim men to get rid of their unwanted wives instantly.⁸ By patronising the *al-bida* form of divorce, the Muslim scholars have, on the one hand, made it easy for men to throw out their wives at their pleasure. On the other hand, they have left the divorced women indigent. This appears to be a violation of Quranic norms.

According to Islamic law, in the event of divorce, the wife is entitled to maintenance for a limited period of approximately three months, i.e. the *iddat* period. After the cessation of the *iddat* period, under the Islamic law, it appears that the man's obligation to maintain his divorced wife is over.¹⁰ Thus, as we shall see in detail below, there is a general consensus of opinion among the different schools, in Islamic jurisprudence, that a divorced Muslim woman should not be granted maintenance beyond the *iddat* period.

A divorced Muslim woman is free to remarry under Islamic law, after her *iddat* period has expired.¹¹ This reflects the prevailing opinion in Islamic law that a divorced Muslim wife should remarry, and that a woman who needs maintenance should attach herself to a man who can provide her with food and protection. Some desperately impoverished women may need to do this very soon after divorce.

The purpose of the present paper is to examine the literature on classical Islamic law, particularly with reference to the rights of the divorced Muslim woman, specifically after the expiry of the *iddat* period. In this regard we need to look first at the relevant verses of the Quran. This enables us to say that the Quran asserts certain rights of the divorced woman, not only at the time of the divorce, but even after her *iddat* period is over. But this is done in very general terms, necessitating interpretation of the divine revelation. Thus, first we look at the authority of the Prophet to interpret the Quran and see how he explained the Quran through his actions and deeds. After his death, the period of his companions, the *Khulafa-Rashdun*, is examined to see whether they enlighten us on the issue. In the last sub-section, the role of Muslim jurists in developing the rules on post-divorce maintenance is examined. They later assumed the role of sole interpreters of the Quran. In their interpretation, it appears that they ignored the relevant general Quranic injunctions and came up with the conclusion that there is no maintenance for a divorced woman after her *iddat* period is over. This paper, thus, focuses on how the *Sharia* law has gradually

S.A.A., *The Law of Marriage and Divorce in Islam*, translated by Fazi Amed. Safat, Kuwait, 1983, at p.29. See also supra note 5, at p.244.

⁸ The *al-bida* form of Muslim *talaq*, commonly known as triple divorce, is pronounced by the husband in one sitting. It terminates the marriage contract instantly and any chance for reconciliation is foregone. For further details on *talaq* see supra note 5, at pp.471-506; Fyzee, supra note 6, p.132; Pearl, supra note 4, at pp.100-137.

¹⁰ Fyzee, supra note 6, at p.184.

¹¹ Pearl, supra note 4, at p.54.

divested Muslim women of the Quranic protection from post-divorce destitution.

RELEVANT QURANIC PROVISIONS

In Islamic jurisprudence the Quran and the Sunnah are considered the primary sources of the Islamic law,¹² and therefore are the starting point to any inquiry into Islamic law. For Muslims, the Quran is the “Book of Allah sent through the last of the Prophets. Muhammad” and it contains commands of Almighty Allah for the guidance of the believers.¹³ While the Sunnah is the Prophet’s interpretation and description of these commands of Allah,¹⁴ the other main but secondary sources of the *Sharia* law¹⁵ are *ijma* and *qiyas*.¹⁶

The Quran cannot be confined to legal issues alone; it is a book of religious and moral principles.¹⁷ In other words, law is seen as part of ethics and morality, which is the case in all traditional societies.¹⁸ However, as the basic source of the Islamic law, the Quran, not only deals explicitly with some of the civil, criminal, and family law matters,¹⁹ but also incorporates general principles of social justice.²⁰ Further, it has been argued that the Quran is mainly ethical in nature.²¹ This does not mean that it is not legal, but stresses the point that the 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.”²² At the same time, it has also been argued that the Quran contains some eighty verses which deal unmistakably with legal topics.²³

¹² Doi., A.R. I., Shariah. The Islamic law, London, 1984, at p.64.

¹³ *Ibid.*, at p.21.

¹⁴ *Supra* note 1.

¹⁵ For details on secondary sources in Islamic law see Pearl, *supra* note 4 and Hodkinson, *supra* note 4.

¹⁶ *Supra* note 12, at p.64.

¹⁷ *Supra* note 1, at p.37.

¹⁸ Allott, A.N. The Limits of Law, London, 1980, at pp.24-25.

¹⁹ 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 4:1, 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.

²⁰ For details see for example *supra* note 1, at p.33.

²¹ See Coulson, N. J., A History of Islamic Law, Edinburgh, 1964, at p.12.

²² For details see *ibid.*, at p.11.

²³ *Ibid.*, at p.12.

There is widespread agreement in the literature that the Quranic provisions react to the pre-Islamic phenomenon of treating women as mere chattels.²⁴ In various verses of the Quran the position of women as individuals has been described.²⁵ The Quran speaks for the improved social status of women which otherwise in the society of Arabia was much degraded.²⁶ Women were sold in the name of marriage and their parents or guardians used to take money from the person interested in the union.²⁷ But at the same time it cannot be said for every woman, because we have the example of Khadija, who was a trader and married the Prophet Muhammad at her own initiative.²⁸ However, it could also not be said that every woman in the pre-Islamic era was a free agent regarding her contract of marriage and related issues.²⁹

Generally uplifting the position of the woman in conjugal matters, the Quran permits her to negotiate her contract of marriage. In this regard she is entitled to negotiate her dower, which may later become her property. This was

²⁴ Supra note 4, at p.228. On the issue that the Quran speaks for the betterment of women see also supra note 21, at p.14 and supra note 1.

²⁵ See The Holy Qura, Verse 33: 35 and Verse 24:30-31. For details on the status of women in Islam see generally: Hartmann, M., "Woman in Islam", IV.3 (1914) The Moslem World, 258-265; Woodsmall, R. F., Moslem Women Enter a New World, London, 1936; Amiruddin, S.M., "Woman's Status in Islam," XXVIII:2 (1938) The Moslem World, 153-163; Abbot, N., 'Women and the State in Early Islam,' 1(1942) Journal of Near Eastern Studies, 106-126; Siddiqi, M. M., Women in Islam, Lahore, 1952. Mernissi, F., Beyond the Veil, London, 1975; Beck, L. and Keddie, N. (eds), Women in the Muslim World, Cambridge, 1978; Maududi, S.A.A., Purdah and the Status of Women in Islam, Lahore, 1979; Minai, N., Women in Islam, New York, 1980; Esposito, J.L., Women in Muslim Family Law, New York, 1982; Hussain, F. (ed), Muslim Women, London, 1984; Shams, S., "Socio-Legal Rights and Privileges of Women in Islam", 4 (1984) Islamic and Comparative Law Quarterly, 213-225; Shehab, R., Rights of Women in Islamic Shariah, Lahore, 1987; Hussain, A., Status of Women in Islam, Lahore, 1987; Engineer, A.A., Status of Women in Islam, Delhi, 1987; Subbamma, M., Islam and Women, New Delhi, 1988; Iqbal, S., Woman and Islamic law, Lahore, 1989; Doi, A. R. I., Women in Shariah, London, 1989; Othman, F.H., "How Muslim Women Have Been Misunderstood by Muslims", 11(1990) Islamiyyat, 25-38; Khan, Q., Status of Women in Islam, New Delhi, 1990; Chaudhry, M.S., Women's Rights in Islam, Lahore, 1991; Mernissi, F., Women and Islam, Oxford, 1991; Ahmed, L., Women and Gender in Islam, New Haven, 1992; Khan, M.R., Socio-legal Status of Muslim Women, New Delhi, 1993.

²⁶ For further discussion on the status of women in early Islam see Stowasser, B.F., "The status of women in early Islam", in Hussain (ed.), *ibid.*, at pp.11-43.

²⁷ Levy, R., An Introduction to the Sociology of Islam. Vol. 1, London 1957, at p.137.

²⁸ Supra note 1, at p.28.

²⁹ Shams, supra note 25, at p.213.

apparently not the case in the Arab society.³⁰ Furthermore, the Quran in its various verses emphasises better relations between husband and wife.³¹ But at the same time it also permits that a couple may nullify their contract of marriage.³²

The Quran, in Verse 65:1 and 2, explains the procedure to be followed in the event of divorce in the following manner:

Verse 65:1: O Prophet ! When he Do divorce women, Divorce them at their Prescribed periods, And count (accurately) Their prescribed periods: And fear God your Lord: And turn them not out of their houses, nor shall They (themselves) leave, Except in case they are Guilty of some open lewdness, Those are limits set by God: and any Who transgresses the limits of God, does verily Wrong his (own) soul: Thou knowest not if Perchance God will Bring about thereafter Some new situation.

Verse 65:2: Thus when they fulfil Their term appointed, Either take them back On equitable terms Or part with them On equitable terms; And take for witness Two persons from among you, Endued with justice, And establish the evidence (As) before God. Such is the admonition given To him who believes in God and the Last Day. And for those who fear God, He (ever) prepares A way out.³³

Divorce, according to the above Quranic verses, is to be achieved in a regulated form that maintains dignity and morality. The Quran, in the above verses, not only explains the procedure for divorce, but also shows concern for the divorced woman's condition instantly after the pronouncement of *talaq*. Therefore, in the above verses, the divine obligation is that a divorced woman should not be turned out of the house immediately. This, on the one hand, apparently saves the woman from the danger of becoming destitute at once. On the other hand, it also gives time to the married couple for reconciliation.³⁴ Furthermore, the Quran in Verse 65: 6 explains the status of a divorced woman during her *iddat* period, in the following manner:

Let the women live (in *iddat*) in the same Style as ye live, According to your means: Annoy them not, so as to restrict them.³⁵

Here one can gather that the Quran shows respect for divorced women and indicates that during the *iddat* period the woman shall be enabled to live in the same manner as before divorce. The following verse, which is Verse 65:7 of the Quran, makes the above command more precise:

Let the man of means Spend according to His means: and the man Whose resources are restricted, Let him spend according To what God has given him.

³⁰ Supra note 27, at at p.137.

³¹ The Holy Quran, See in particular Verse 7:189 and Verse 30:21.

³² Ibid., Verse 2:229.

³³ Ibid., at pp.1562-1563.

³⁴ See Ali, supra note 5, at p.156, See also Bell, R., "Muhammad and divorce in Quran", XXIX:1 (1939) The Moslem World, 55-62, at p.62.

³⁵ The Holy Quran, pp.1564 -1565.

God puts no burden On any person beyond What He has given him. After a difficulty, God will soon grant relief.³⁶

In the above verse, the Quran clearly expects the husband to spend according to his means on his divorced wife during her *iddat* period. Moreover, in this verse it seems that the Quran not only safeguards the position of the divorced wife but also takes care that the husband is not forced to spend more than his earning capacity. This is the evidence of a balanced and equitable concern for both sexes.

The above verses could be seen as reflecting an increased concern about maintenance for divorced women. They certainly seek to alleviate the harsh consequences of sudden and immediate termination of marital relations. In this context, the Islamic institution of *iddat* is clearly very important. While it also serves to avoid confusion over legitimacy of any offspring and gives time to the husband and wife for reconciliation,³⁷ the relevant consideration for our present debate is that it seems to save women from the immediate threat of destitution.

The Islamic institution of *mahr* is also relevant in the present context. The Quran in sura 2, verses 236 and 237, further considers the position of women divorced before consummation of marriage and distinguishes the case of a woman whose *mahr* has been fixed already from that of a woman whose *mahr* has not been fixed. The two verses read as follows:

Verse 2:236: 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 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.

Verse 2:237: And if ye 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 By him in whose hands Is the marriage tie; And the remission (Of the man's half) Is the nearest to righteous. And do not forget Liberality between yourselves. For God sees well All that ye do.³⁸

It becomes obvious from the translation of the above Quranic verses that a man who divorces his wife before consummation should make a lump sum payment if no dower has been fixed as yet. The size of this payment, again, depends on the means of the husband, but there seems to be an indication that a reasonable amount should be given. In the case of a wife divorced after her dower was fixed, but where the marriage was not consummated, the husband should pay her half of the stipulated amount. Verse 237 also asks the husband to be liberal. These two verses clearly relate to a situation where the marriage is not yet consummated and where there is, therefore, no *iddat* period. The two present verses are therefore not primarily concerned about a particular length of

³⁶ Ibid., at p.1565

³⁷ See supra note 21, at p.15 and Pearl, supra note 4, at p.3.

³⁸ The Holy Quran, at pp.94-95.

time during which a husband has to maintain his wife after divorce, but are merely talking of a lump sum payment. There is no indication from the verse itself that the size of the payment should be able to sustain the wife over a specific time. The only concern the verses indicates is that the payment should be considerate and should be made in accordance with the man's means. If we compare the above translations of verses 236 and 237, we see that they also ask a man to remit the other half of the dower in favour of the divorced wife. It is indicated that this remission by the man is an act which is nearer to righteousness. Here we can conclude that the emphasis is on giving the full dower to the divorced wife, even if the marriage was not consummated. At any rate, there is no doubt that the husband has an obligation to provide for such a woman.

The Quran, in Chapter Two, further seems to focus on the suggestion of maintenance provisions for widows and divorced women whose marriage has been consummated. The relevant texts read as follows:

Verse 2:240: Those of you Who die and leave widows Should bequeath For their widows A year's maintenance And residence; but if they leave (The residence), There is no blame on you For what they do With themselves, Provided it is reasonable. And God is Exalted in Power, Wise.

Verse 2:241: For divorced women Maintenance (should be provided) On a reasonable (scale). This is a duty On the righteous.³⁹

In the first verse, it appears that the divine obligation is that Muslim men should make a bequest to ensure that their widows obtain a year's maintenance and residence after their death. However, this verse does not talk about the amount to be paid, but focuses instead on the length of time for which the husband should make provisions. In this regard the time limit could be, on the one hand, to ensure that by that time a widow may get a new husband and her burden of maintenance shifts to the new man. On the other, it also seems that the divine obligation is to make sure that a widow is provided for if pregnant. Similarly, in case of divorce, a Muslim husband is under an obligation in *Sharia* law to support his pregnant divorced wife until she gives birth to the child. But this important factor, in case of a pregnant widow, has been ignored by later Muslim scholars.⁴⁰

Verse 2:241 is central to our present discussion. There the Quran clearly extends the principle of the husband's responsibility for the maintenance of the wife after his death to the situation where he has divorced her. But, whereas in Verse 2:240 a stipulated period of one year is evident, Verse 2:241 does not reveal any time limit and merely provides that reasonable maintenance should be provided for the divorced woman. Before going into further analysis of Verse 2:241, it is useful first to examine the Arabic text of Verse 2:241, which reads:

³⁹ The Holy Quran, at p.96

⁴⁰ See Hodkinson, *supra* note 4, at p.219

Wa Lil-mutallaqaati mataa-un-bil-ma-ruuf. Haqqan alal-Muttaqiin

As a non-Arabist, my technique here is to present various translations of this verse and to compare them. In its word-to-word literal translation, Jamal-un-Nisa⁴¹ asserts the following:

<u>Words/Phrases</u>	<u>Meanings</u>
Wa Lil-mutallaqaati	And for the divorced women
Mataa un	Provision, maintenance
Bil-ma-ruuf	With fairness, honour, known ways
Haqqan	it is duty on
alal-Muttaqiin	the Allah fearing.

Below are now given some of the other translations of Verse 2:241 in chronological order of published translations:

And for the divorced let there be a fair provision. This is a duty in those who fear God.⁴²

And unto those who are divorced, a reasonable provision is also due; this is a duty incumbent on those who fear God.⁴³

For divorced women maintenance (should be provided) on a reasonable (scale). This is a duty on the righteous.⁴⁴

Women who are divorced have a right to a reputable maintenance — a duty upon those who act piously.⁴⁵

For divorced women a provision in kindness; a duty for those who ward off (evil).⁴⁶

And for the divorced women, let there be a fair provision. This is an obligation on those who are mindful of God.⁴⁷

For divorced women also there shall be provision according to what is fair. This is an obligation binding on the righteous.⁴⁸

⁴¹ Nisa, J., The Quran translation & study, London, 1987, at p.68

⁴² Rodwell, M., The Koran, London, 1909, at p.364.

⁴³ Sale, G., The Koran, London, 1923, at p.29.

⁴⁴ Pickthall, M., The Meaning of the Glorious Koran, London, 1930, at p.56.

⁴⁵ Bell, R., The Quran, Vol. 1, Edinburgh, 1937, at p.34.

⁴⁶ Ali 1934, at p.96.

⁴⁷ Azad, A.K., The Tarjuman al-Quran, vol. 2, London, 1967, at p.109.

⁴⁸ Khan, M.Z., The Quran, London, 1971, at p.38. In this particular translation Verse 2:241 is numbered as Verse 2:242.

And for the divorced women, provision (must be made) in kindness. This is incumbent on those who have regard for duty.⁴⁹

And for the divorced women maintenance should be provided according to a fair usage, this is a duty on the righteous ones.⁵⁰

And for the divorced women maintenance should be provided according to a fair usage, this is a duty on the righteous ones.⁵¹

Divorced women should be given an allowance commensurate with their husbands means. This is incumbent on all pious believers.⁵²

There shall be for divorced women provision honourable — an obligation on the God-fearing.⁵³

For the divorcees, equitable alimony shall be provided. This is an incumbent duty upon the righteous.⁵⁴

Making a fair provision for women who are divorced is the duty of those who are God-fearing and pious.⁵⁵

Likewise, let there be a fair provision for the divorced women; this is an obligation on the God-fearing.⁵⁶

And for the divorced women (too) (shall) be a provision in fairness; (this is) a duty on those who guard them-selves (against evil).⁵⁷

And for the divorced women the provision according to rule-incumbent on the pious ones.⁵⁸

⁴⁹ Ali, M., The Holy Quran, sixth edition, Lahore, 1973, at p.104

⁵⁰ Dawood. N. J., The Koran, London, 1978, at p.358.

⁵¹ Jullundri, A.A.K., Translation of the Glorious Holy Quran, Lahore, 1978, at p.230.

⁵² Ahmad, M.M., The Koran, London, 1979, at p.41.

⁵³ Arberry, A.J., The Koran Interpreted, London, 1980, at p.62.

⁵⁴ Khalifa, R., Quran: the Final scripture, Tucson, 1981, at p.26.

⁵⁵ Ali, A., Al-Quran, Princeton, 1988, at p.42.

⁵⁶ Maududi, S. A. A., Towards Understanding the Quran. Vol. 1, English version of Tafim-al-Quran. Leicester, 1988, at p.185

⁵⁷ Ali, M. A., The Holy Quran, New York, 1988, at p.167.

⁵⁸ Usmani, A.S.A., The Noble Quran, Tafseer-e-Usmani, (no place or date), at p.137.

And for the divorced women shall be a reputable present; a duty on the God-fearing.⁵⁹

If we go through some of the Urdu translations of Verse 2:241, the expressions “*kharch dena*” or “*naan nafaqa*” have been used.⁶⁰ The term *naan nafaqa* means maintenance allowance, whereas *kharch dena* means to advance money for expenses or to give someone an allowance.⁶¹ One can easily say that both these expressions mean maintenance.

All the above translations of Verse. 2:241 show that the Quran indicates generally that something should be given to the divorced woman. In this regard the Quran has used the word *matta-un*, which according to some translators means “maintenance”, while others have used the word ‘provision’. According to the Oxford Advanced Learner’s Dictionary of Current English, the word ‘maintenance’ means “maintaining or being maintained; (esp) what is needed to support life”. While ‘provision’ means “providing, preparation (esp. for future needs)”.⁶²

The long list of translations above confirms that the Quran asked the believers to give something to their divorced wives which could also take care of their future needs. However, it seems that the Quran has left it for the believers themselves to decide the quantum of maintenance. At the same time, it seems that the Quran has warned the believers by using the word, *bilma-ruuf* in Verse 2:241, which signifies fairness or reasonableness in almost all the translations given above or arrangements “in accordance with custom or usage”.⁶³ This could well mean that although the Quran has not fixed any amount or provision of maintenance in Verse 2:241, it asks the followers to decide a fair amount according to their customs. This seems to say also that men should be liberal in deciding the magnitude of maintenance or provision, but should made arrangements according to their means. We can, thus, establish a general right of Muslim women to post-divorce maintenance in principle, based on the Quran itself, but it is impossible to quantify this.

LATER DEVELOPMENT

⁵⁹ Doryabadi, M.A., The Holy Quran, (English translation by Mohammad Ashfaq Ahmed) (no place or date), at p.38.

⁶⁰ See, e.g., Qadir, S.A. (Ibn-i-Shah Wali Ullah), The Quran, Delhi, 1876, at p.35; Khan, A.Y. Tafseer-i-Naeemi, Gujrat, 1963, at p.503. See also, Hameed. F. Al Quran-ul-Kakeem, Lahore and Karachi, 1960, at p.63.

⁶¹ According to Atlantic’s Urdu-English Dictionary, (Revised edition). New Delhi, 1989, at p.767, and p.328. See also Standard Twentieth Century Dictionary. Urdu to English, New Delhi, 1980, at p.645, and p.285.

⁶² The Oxford Advanced Learner’s Dictionary of Current English, 24th Impression, Oxford, 1986, see p.512 and p.674.

⁶³ Supra note 51.

The purpose of this section is to examine the literature and material on the development of Islamic law subsequent to the divine revelations, in order to enable us to understand how it was possible that the general but liberal Quranic ideas about post-divorce maintenance for women were later interpreted more and more restrictively. Although there has been much discussion on the authority of certain individuals or institutions, it is almost impossible to find any specific statements on the position of divorced Muslim wives in the post-Quranic period. However, there are indications of important changes subsequent to the divine revelations. A prominent example is that of inheritance, where express provisions of the Quran were overlooked to accommodate the norms of Arab society.⁶⁴

The aim of the present section is, first of all, to show the scope for interpretation of the liberal, rather general, verses of the Quran by those in positions of authority allowed them to apply and interpret Islamic law in a particular manner. We shall see how this discretion has later been used to the detriment of divorced Muslim wives in socio-legal contexts which were shaped by patriarchal concepts and notions.

The Authority of the Prophet

There is general agreement that the Quran was revealed in piece-meal fashion during the prophetic career of the Prophet Muhammad.⁶⁵ The Quran in its present form was only compiled after the death of the Prophet, during the reign of the first caliph, Abu Bakr.⁶⁶ Whereas during the life of the Prophet the texts of the Quran were preserved, first of all in the Prophet's own memory, he then transmitted them to his followers who either learned them by heart or wrote them down on skins, bones, leaves or stones.⁶⁷ It is said that the Quranic verses were arranged under the supervision of the Prophet.⁶⁸ It becomes apparent that the Prophet not only knew the arrangement of the various verses, but it also seems that, as the Prophet of Allah, he alone understood the purpose

⁶⁴ See especially the decision taken by Caliph Umar, in the *al-Himriyya* case. For further details see Coulson, N.J., *Succession in the Muslim Family*, Cambridge, 1971, at p.73.

⁶⁵ Daura, B., "A brief account of the four Sunni schools of law, and some recent developments," 2 (1968) *Journal of Islamic and Comparative Law*, pp.1-12, at p.2. See also Hamidullah, M. *Muslim Conduct of State*, Revised edition, Lahore, 1954, at p.18.

⁶⁶ Hamidullah, *ibid.*, at p.19. See also Ramadan, S., *Islamic Law*, London, 1961, at p.31.

⁶⁷ *Supra* note 15, at p.19. See also *supra* note 1, at p.40.

⁶⁸ Haj Nour, A.M., "The Schools of Law: Their Emergence and Validity Today", 7 (1977) *Journal of Islamic and Comparative Law*, 54-71, at p.55. See also Ramadan, *supra* note 66, at p.23.

or message behind a certain command.⁶⁹ As a Prophet, it was his duty to transmit the divine message to the other people, and in this regard the Quran says in Verse 16:44;

(We sent them) with Clear Signs And Books of dark prophecies; And We have sent down Unto thee (also) the Message; That thou mayest explain clearly To men what is sent For them, and that they may give thought.⁷⁰

The Prophet, in order to make the people understand the divine commands, had to interpret the Quranic verses. For example, in the case of inheritance, the customary practice in pre-Islamic Arabia was that only the nearest male agnate relatives of the praepositus were entitled to inherit the property.⁷¹ However, in Saad's case,⁷² the Prophet deviated from the customary practice and allowed the wife and the daughters of Saad to inherit along with their uncle. The Prophet, by interpreting Verse 4:11-12 of the Quran on the Issue of inheritance, not only allowed the right of inheritance for male agnates, an issue on which the Quran is silent, but it also seems that the Prophet, by implementing the Quranic rights of inheritance for women, showed his concern for maintenance of the widow and her children.

In some other cases, like *zina*, the Prophet clearly used his position to decide contentious issues in a way he thought best. For *zina*, illicit sexual intercourse, the Quran has indicated punishment of a hundred lashes for the adulterers.⁷³ Yet the Prophet, at times, convicted the offenders with stoning to death.⁷⁴ This seems to mean that the Prophet dealt with every case according to the circumstances. But it can also lead to the argument that the Prophet's own views became an important factor while applying the Quranic rules. The practices of the Prophet were later, in Islamic law, came to be known as *Sunnah*; they have become the second source of *Sharia* law after the Quran. The critical question here is whether the Prophet made any pronouncements on maintenance for divorced or widowed women.

In pre-Islamic Arabia the concept of maintenance for divorced wives seems to have been unknown mainly because remarriage of divorced women

⁶⁹ Supra note 21, at p.22.

⁷⁰ The Holy Quran, at p.667.

⁷¹ Supra note 64, at p.29.

⁷² For details see id.

⁷³ The Holy Quran, Verse 25:2. See also Ali, M. The Religion of Islam, Lahore, 1973, at pp.616-617.

⁷⁴ Arberry, A.J., "Abu Ubaid on the Verses Missing from the Quran", XXVII:1 (1938) The Muslim World, 61-65, at p.62. However, on the point that stoning to death was introduced during the period of first caliphs, see, Schacht, J., An Introduction to Islamic Law, London, 1964, at pp.15-16. On the controversy in a recent case on the punishment of *zina*, see *Hazoor Baksh vs Federation of Pakistan*, PLD, 1981 FSC 145. Also *Federation of Pakistan vs Hazoor Baksh*, PLD, 1984 FSC 255.

was a common practice,⁷⁵ and also because the society was clan-based. Therefore, it can be presumed that the clan would look after such women. But there also seems to be no reason for men to support their ex-wives. When they were their chattels, once rejected, they could simply be sent away, rather than being supported. However, Verse 2:241 of the Quran, as we saw above, seeks to prevent that the divorced wives are just thrown out of the house in the event of divorce.

The Prophet, when he started preaching the religion of Islam, argued against the practice of guardians selling off their daughters/wards in the name of marriage. Instead, the Quran introduces the concept of marriage as a contract in which the dower (*mahr*) is the property of the wife, thus raising the status of the woman from a mere chattel to that of a partner. Legally she could now negotiate her marriage contract. In social reality, the guardians ended to negotiate, as is evident from the opinion of different Muslim schools.⁷⁶ However, the practices of the different schools indicate the strong influence of local patriarchal concepts which may have been opposed to the express ruling of the Quran.

We saw already that, at the time of the Prophet, remarriage of divorcees was a common practice. This is supported by the fact that the Prophet himself married a divorced woman.⁷⁷ Although some speculation has been added of this marriage of the Prophet,⁷⁸ not much has been written on the Prophet's marriage with Suda who was a destitute widow and, moreover, was not very alluring.⁷⁹ Here one can submit that on the one hand the Prophet himself set an example for his followers by marrying a divorcee and a destitute widow, while, at the same time, polygamy also became an example for the followers. Further, there is no evidence which could suggest that the Prophet ever divorced any of his wives irrevocably,⁸⁰ or denied them maintenance. Instead he held *talaq* to be the most detestable before God of all permitted things.⁸¹ If we assume that the Prophetic mission was to work for the weaker classes of society, he would not take away the rights of women, rather he would work for the enforcement of those rights. Further, he never claimed to supersede the Quranic verses. Rather he said, "When a saying is reported and attributed to me, compare it

⁷⁵ See Abbot, N., *Aishah - the Beloved of Mohammad*, Chicago, 1942, at p.22. See also Ahmed, supra note 25, at p.44.

⁷⁶ Supra note 15, at p.331. See also supra note 21, at p.94.

⁷⁷ Zainab, who was the wife of Zahid, the adopted son of the Prophet, was later divorced by her husband and the Prophet married her.

⁷⁸ For details see e.g., supra note 25, at p.22.

⁷⁹ Ahmed, supra note 25, at p.49.

⁸⁰ See Bell, supra note 34, at p.55. However, once the Prophet offered divorce to all of his wives. For details see id.

⁸¹ See also Westermark, E., *The History of Human Marriage*, Vol. III, London, 1921, at p.311; Doi, supra note 12, at p.169.

with Gods. Whatever is in accordance with that book is for me, whether I really said it or no."⁸²

The above saying of the Prophet, therefore, was concerned to show that he remained within the ambit of God's revelation, but he also claimed the right and need to interpret.

All this seems to mean that an alleged *Hadith* on the basis of which Muslim scholarship denies post-divorce maintenance for Muslim women, can be rejected as lacking authority. It would be contrary to the teachings of the Quran, as discussed above, for the Prophet to say that divorced wives have no entitlement to maintenance.

The Authority of the Companions

After the death of the Prophet, his most intimate companions, Abu Bakr, Umar, Uthman and Ali succeeded him, one after the other, as caliphs of the newly formed Muslim Empire.⁸³

The immediate task before the caliphs was not only to guide the people politically but also to carry forward the sacred mission of the Prophet. However, with the death of the Prophet, the caliphs were left only with the text of the Quran and evidence of the sayings and practice of the Prophet.⁸⁴

This means that further revelations were no longer available, and the caliphs had to depend on the teachings of the Quran and the Sunnah of the Prophet in their administration. But at the same time both these authorities, i.e., the Quran and Sunnah, were not complied and they required further interpretation. Priority was given to the compilation of the Quran.⁸⁵

At the same time, the caliphs who followed the Prophet as heads of the Muslim state were confronted with new problems, especially when the Muslim empire expanded beyond Arabia. In order to seek solutions they first referred to the Quran, then to the Sunnah of the Prophet, and in the absence of any clear injunctions they had to give their own judgments on different reasoning.⁸⁶ In this regard Nasir says that,

The Patriarchal Caliphs and Prophet's Companions (Sahaba) used reasoned personal opinion in three ways:

- (i) through the interpretation of texts, i.e., the Quranic verses and the Prophet's practices and saying known as the Sunnah;
- (ii) analogy (qiuas), that is deriving judgment from similar cases ruled upon the Quran, Sunna or previously established ruling by unanimity;

⁸² As cited by Goldziher, I., *Introduction to Islamic Theology and Law*, Princeton, 1981, at pp.43-44.

⁸³ On details see supra note 21, at p.23.

⁸⁴ An-Naim, A.A., *Towards an Islamic Reformation*, Syracuse, 1990, at p.16.

⁸⁵ Hamidullah, supra note 65, at p.18.

⁸⁶ Supra note 68, at p.57. See also Zakria, R., *The Struggle within Islam*, London, 1988, at p.58

(iii) deduction from the spirit of the Divine Law in the absence of any text or analogy.⁸⁷

Thus, it means that the Companions of the Prophet used two different techniques in their approach to personal opinion in the process of deriving any rule of law. One group of Companions believed in the supremacy of the Quran and the Sunnah, and became known as the School of Hadith (*ahl al-hadith*).⁸⁸ The other group preferred interpretation of the texts in the light of human reasoning, they were called *ahl-al-ray*, the School of personal opinion.⁸⁹

Two examples can be cited here when the caliph used their opinion to express provisions of the Quran and Sunnah were not available. The first example is well-known as the *Humariyya* or Donkey case.⁹⁰ In this case, a deceased woman was survived by her mother, husband, two full brothers and two uterine brothers. Umar, following the Quran,⁹¹ allotted the shares as one-sixth to the mother, one-half to the husband and one-third to the uterine brothers. This resulted in de facto exclusion of the real brothers, because the Quranic sharers exhausted the estate. The full brothers appealed to Umar, taking the plea that they had the same mother as the deceased, and submitted their plea to stand on equal footing with the uterine brothers. Umar, by accepting the appeal, entitled the real brothers to inherit equally with the uterine brothers in their share of one-third. Here it becomes obvious that Umar in this case not only applied the Quranic injunctions, but at the same time accommodated customary practices. Therefore, it has been validly argued by Prof. Coulson that it was a "compromise between the traditional heirs of the tribal law and the new heirs introduced by the Quran."⁹²

The second example is the ruling of Ali, the fourth caliph. The case is known as *Minbariyya* (the Pulpit case).⁹³ Here Ali was confronted with a problem in which distribution of an estate according to the Quran resulted in exhaustion of the estate, before the shares were distributed. In this case the sharers were a wife, father, mother and two daughters of the propositus. Ali applied the principle of proportional abatement,⁹⁴ thus the wife's Quranic share of one-eighth was reduced to one-ninth. The shares of other relatives were similarly also abated in proportion. This modification of the Quranic provisions is not explicitly allowed in the Quran, so here the Companions acted by adding to the body of rules in the Quran, seeking to uphold its conceptual principles.

⁸⁷ Nasir, I.I. *The Islamic Law of Personal Status*, London, 1986, at p.2.

⁸⁸ *Ibid.*, at p.6

⁸⁹ *Id.*

⁹⁰ See in detail supra note 64, at p.73.

⁹¹ *The Holy Quran*, Verse 4:11-12.

⁹² Supra note 64, at p.75.

⁹³ *Ibid.*, at p.47.

⁹⁴ Pearl, supra note 4, at p.6.

The above examples indicate that the Companions/Caliphs used their opinion or *ray*, in dealing with the problems relating to inheritance, especially where the Quran and Sunnah of the Prophet were silent. In other words, it can be argued that the companions in the presence of express provisions of the Quran avoided to use their *ray*, while in the absence of express provisions, they acted as a new source of guidance, thereby developing the rules of *Sharia* law.

There is no evidence which could suggest that the Companions/Caliphs denied any post-divorce maintenance to women. On the other hand, it seems that the Companions/Caliphs favoured maintenance for a divorced woman. This fact becomes evident on the ground that Umar rejected a reported Hadith which says:

Abu Salamah b. Abd at-Rahim reported on the authority of Fatimah daughter of Qais: Abu Amr b. Hafis divorced her (Fatimah daughter of Qais) absolutely when he was away from home, and his agent sent her some barley. She was displeased with it. He said: I swear by Allah, you have no claims on us. She then came to the Prophet (may peace upon him) and mentioned that to him. He said to her: No maintenance is due to you from him.⁹⁵

Umar, while rejecting the above Hadith, determined that he would not follow a woman, who may have forgotten, and instead he would prefer the Quran and the Sunnah.⁹⁶ This seems to mean that Umar not only favoured maintenance for a divorced woman but also made efforts to reject a Hadith which was contrary to the basic teachings of the Quran, as discussed above. However, the later jurists of different Muslim schools appear to have become wedded to the idea that there is no post-divorce maintenance for Muslim women. We will discuss the role of the jurists in the following section.

THE ROLE OF THE MUSLIM JURISTS IN DENYING POST-DIVORCE MAINTENANCE

After the death of Ali, the fourth Caliph, the Muslim Empire was turned into a kingdom. The Muslim rulers were now interested in their empire building.⁹⁷ During that time there was no authority left to carry on the task of the Prophet. The Prophet, during his life, had acted as both political and religious heads and had decided problems either on the basis of the Quranic revelations or his personal opinions.⁹⁸ When he died, the Quran was there, but his personal guidance was lost for his followers. Although the early Caliphs, as discussed above, inherited some of the Prophet's authority, their position

⁹⁵ Hasan, A., *Sunan Abu Dawud*, vol.2, Lahore, 1984, at p.619. See also *Al-Muwatta of Imam Malik ibn Anas*, translated by Bewley, A.A., London, 1989, at p.233.

⁹⁶ Haq, A.M., *Tafsir-e-Haqqani*, Deoband, (no date), at p.94. (Urdu, translation by me). See also Hasan, *ibid.*, at p.691.

⁹⁷ Schacht, *supra* note 74, at p.23.

⁹⁸ *Supra* note 1, at p.43. See also *supra* note 87, at p.6.

necessitated more and more involvement in the business of the state. While this would involve the settlement of disputes, the ruler's authority now derived more from his political position than proximity to the Prophet or his own learning. After the death of Ali (661 A.D.), the Muslim Empire was further expanded and Islam became the religion also of societies different from the Arabian culture.⁹⁹

During the process of empire building, a need was felt by the Muslim rulers to develop the Islamic law, which otherwise, as is obvious from the literature, was still in its rudimentary period.¹⁰⁰ Meanwhile, with the expansion of the Muslim empire, numerous norms of local societies crept in, many quite different from the patriarchal Arabian society.¹⁰¹ To this effect, some writers suggest that patriarchal norms about the inferior position of women also became part of the Muslim empire.¹⁰² This seems to mean that the position of women in Arabia was much better than in neighbouring countries. But this is a view contrary to the earlier one that a woman was a mere chattel in Arabia.¹⁰³ Here we are not centrally concerned about the status of women in Islam on which there is clearly no uniformly agreed position. However, it is accepted that the norms of various societies became part of the *Sharia* law.¹⁰⁴

During the Umayyad period (661-750 A.D.), the Umayyad kings indulged in 'unbecoming of Muslims' practices.¹⁰⁵ Some caliphs, even at the time of prayers, appeared drunk in public.¹⁰⁶ The people started disliking such un-Islamic practices and attitudes of the Umayyad rulers. Such abuses gave further impetus to a process of learning of the various aspects of Islam in different cities of the Kingdom.¹⁰⁷ Later, such learned people, due to their knowledge of the Quran and traditions of the Prophet, became experts,¹⁰⁸ and thus became jurists, theologians, interpreters and guardians of the Islamic law.¹⁰⁹ In the meantime, these jurists became part of the administration and some were appointed as *qadis* for the purpose of administering justice.¹¹⁰ In order to do so, and in the absence of codified law, the jurists interpreted the Quran according to their own knowledge: on this basis they used to give their opinion (*ray*).¹¹¹

⁹⁹ Supra note 21, at p.21. See also Ahmed, supra note 25, at p.67.

¹⁰⁰ Ibid., at p.89.

¹⁰¹ Supra note 24, at p.27.

¹⁰² See e.g. Ahmed, supra note 25, at p.69.

¹⁰³ Supra note 21, at p.14.

¹⁰⁴ For details see Schacht, supra note 74, and Coulson, supra note 21.

¹⁰⁵ Supra note 86, at p.69

¹⁰⁶ Id.

¹⁰⁷ Esposito, J.L., *Islam*, Oxford, 1988, at p.55.

¹⁰⁸ Ibid., pp.58-59.

¹⁰⁹ Ibid., p.58.

¹¹⁰ Supra note 21, at p.28. See also supra note 1, at p.72.

¹¹¹ Supra note 107, at p.30.

They gained their authority largely due to the limited knowledge of the rulers.¹¹² As the rulers wanted to strengthen their rule, they encouraged the inclusion of jurists in the administration for the interpretation of Islamic law. The same procedure was adopted not only by later Muslim rulers, but also by the British when they captured India in the name of trade and took over judicial administration.

The personal opinion (*ray*) differed from *qadi* to *qadi* because of the cultural diversity of the Empire.¹¹³ In this regard Professor Coulson pointed out:

Firstly, the basic feature of the *qadi's* work was the application of the local law and this varied considerably throughout the territories of Islam. Society in Medina, for instance, remained faithful to the traditional concepts of Arabian tribal law under which the arranging of marriage alliance was the prerogative of the male members of the family. No woman, therefore, could contract a marriage on her own account but had to be given in marriage by her guardian. In Kufa, on the other hand, a town in Iraq which had started as a military encampment, the admixture of diverse ethnic groups in a predominantly Persian milieu produced a cosmopolitan atmosphere to which the standards of a closely knit tribal society were alien. Woman occupied a less inferior position and in particular had the right to conclude her own marriage contract without the intervention of her guardian.¹¹⁴

The second reason for the diversity of Umayyad legal practice was the free use of personal opinion (*ray*) by the *qadis*.¹¹⁵ There was no central authority to check this personal opinion.¹¹⁶ Therefore, the interpretation of the Quranic provisions became a matter of personal discretion of the *qadi*, who at times added his own opinion to the simple and basic rules of the Quran.¹¹⁷ Thus, we find many differences of opinion among the Muslim jurists on the same verse of the Quran.

We have already seen that Verse 2:241 of the Quran is phrased in such vague terms that it is open to interpretation. Indeed, this verse has given rise to some debate in the context of interpretation, focusing on the legal implications of general moral injunctions of the Quran. According to Professor Coulson:

Verses of the Quran (2:236 and 241) urge husbands to make "a fair provision" for wives they have repudiated. Ibn-Hujayra, *qadi* of Egypt 688-702, considered such provision, which came to be called *mut'a*, to be obligatory. He fixed the amount at three *dinars* and arranged for its recovery by ordering the pay-roll official to make the necessary deduction from the husband's stipend. On the other hand, a

¹¹² N. Sen, in the 'Foreword' to Choudhury, M.L., The State & Religion in Mughal India, Calcutta, 1951, p.ii.

¹¹³ For details see supra note 107, at p.76.

¹¹⁴ Supra note 21, at p.30.

¹¹⁵ Id.

¹¹⁶ Id.

¹¹⁷ Ibid., at p.31.

later *qadi*, Tawba ibn-Namir, opined that the Quranic injunction was directed only to the husband's conscience.¹¹⁸

It needs to be pointed out that the *qadis* now started to interpret the Quran, usurping the authority enjoyed by the Prophet or the early Muslim caliphs, as discussed above. Moreover, the *qadis* were appointed by the Governor of the area, therefore, the influence of the rulers over them cannot be ruled out.¹¹⁹ To this effect, one can give the example of *talaq-al-bida* which was preferred by the jurists to please the rulers. In this regard Ali says;

The *talaq-al-bida*, as its name signifies, is the heretical or irregular mode of divorce, which was introduced in the second century of the Mahommedan era. It was then that the Omeyyade monarchs, finding that the Prophet on the facility of repudiation interfered with the indulgence of their caprice, endeavoured to find an escape from the strictness of the law, and found in the pliability of the jurists a loophole to effect their purpose.¹²⁰

Professor Shehab gives us more details on how *talaq-al-bida* found appreciation with Muslim kings:

In early Islamic society, the Muslims abided by their words of religious oaths, whatever the circumstances and whatever the consequences. Later on, however, during the reign of kings, a need was felt to apply sanctions against the breach of the oath. A contract which was entered upon in the second century read as follows:

If you make any change in the contract or act against what the Commander of the faithful had asked you to do, you will lose the protection of God, of His Prophet and of all the Muslims. The punishment for the defaulters among you will be that

- (i) all the wealth will be given away to the poor;
- (ii) they will walk as atonement;
- (iii) the slaves set free;
- (iv) three divorces will stand automatically pronounced on their wives and there shall be no exception to it.¹²¹

Professor Shehab further says that, in order to make the above contract feasible, "the people at the helm of affairs created such an atmosphere that three divorces in a single sitting began to be considered as the standard Islamic way of divorce."¹²²

This could then well mean that *talaq-al-bida* was promoted despite the clear Quranic injunctions and teachings of the Prophet.¹²³ While its promotion, on the one hand, might have found appreciation with the rulers, it may also have appealed to some Muslim husbands, who later found it an easy way to get rid of a wife immediately, and to be discharged from any further liability of maintenance towards their divorced wives. Further, it also resulted in divorced

¹¹⁸ Id.

¹¹⁹ Supra note 4, at p.8.

¹²⁰ Supra note 4, at p.75.

¹²¹ Shehab, supra note 25, at p.84.

¹²² Id.

¹²³ The Holy Quran, Verse 65:1. See also Ali, 1922, at p.244.

women leaving the husband's house immediately, without even waiting for the *iddat* period to be completed.¹²⁴ It is argued that here is another parallel case with post-divorce maintenance in Islamic jurisprudence where the moral statements of the Quran are over-looked in favour of local traditions. Yet, it is further argued that divorce and maintenance are not the only cases where the express rulings of the Quran for the welfare of women were bypassed by Muslim jurists. Rather, if we look at the pro-women Quranic verses, like those on *mahr*, *iddat*, and inheritance, and compare their interpretation by the Muslim jurists, we can clearly see that women have been systematically deprived of their rights established by the Quran.¹²⁵

After the downfall of the Umayyads, the Abbasids as the new rulers began to review the Islamic law, especially with the view that the Umayyads had deviated from the Quranic injunctions.¹²⁶ In particular the Umayyads were criticised for their patronage of pre-Islamic customary practices and the personal opinions of the qadis in their era.¹²⁷ However, the qadis of the Umayyad period, through their personal opinion (*ray*), had laid down further foundations of Islamic law.¹²⁸

The Abbasids rulers patronised the class of jurists that emerged through their learning and appointed them as *qadis*. Abu Yusuf, the famous Hanafi jurist, is an example of such an appointment.¹²⁹ Now the jurists, instead of Umayyad *qadis*, began the task of interpretation of Islamic law.¹³⁰ However, soon differences developed among this class of Muslim scholars,¹³¹ and various schools of thought in Islam emerged more clearly.¹³² The differences of these schools are visible in the teachings of the four Sunni Schools, with details of which we are not directly concerned here.

In order to examine the views taken by the Muslim scholars to deny maintenance to a woman whose marriage is terminated, either in case of death of the husband or divorce, we now concentrate on the commentaries to the Quranic verses 2:240-241, as discussed above which suggest maintenance not only for a widow but also for a divorcee. This discussion shows that jurists

¹²⁴ Schacht, J., The Origins of Muhammadan Jurisprudence, London, 1950, at p.197.

¹²⁵ See Coulson, N.J. and Hinchcliffe, D., "Women and Law Reform in Contemporary Islam", in Beck, L. and Keddie, N. (eds), Women in the Muslim World, Cambridge, 1978, pp.37-51, at pp.37-38.

¹²⁶ Supra note 124, at p.36.

¹²⁷ See Watt, W.M., Islamic Political Thought, Edinburgh, 1968, at p.65. See also supra note 107, at p.76.

¹²⁸ Supra note 124, at p.38.

¹²⁹ Supra note 4, at p.10.

¹³⁰ Supra note 107, at p.77.

¹³¹ Ibid., at p.60.

¹³² For details on different schools in Islamic jurisprudence see supra note 21, at pp.36-52.

were concerned to deprive women of maintenance rights. Although this discussion focuses largely on the rights of widows, it may well be relevant for the position of divorced women as well. Clearly, this discussion shows that the Muslim scholars are concerned to avoid liability of men to provide maintenance to women.

In commentaries to Verse 2:240, the Muslim scholars first of all deny the right of maintenance to a widow, by raising the point that if a widow inherited a share of 1/4th in case of an childless marriage, or a share of 1/8th in the presence of children of the *praepositus*,¹³³ should she then also be entitled to maintenance and residence?¹³⁴ This seems to mean that the Muslim scholars consider that a widow loses her right to maintenance when she is entitled to inheritance. The technique of Muslim scholars to get around this was to argue that Verse 2:240 of the Quran is abrogated by Verse 4:12. However, Verse 4:12 reads as follows:

Verse 4:12: In what your wives leave, Your share is half, if they leave no child; But if they leave a child, Ye get a fourth; after payment of legacies and debts. In what ye leave, Their share is a fourth, If ye leave no child; But if ye leave a child, They get an eighth; after payment Of legacies and debts.

If the man or woman Whose inheritance is in question, Has left neither ascendants nor descendants, But has left a brother Or a sister, each one of the two Gets a sixth; but if more than two, they share in a third; After [payment of legacies And debts; so that no loss Is caused (to any one). Thus is it ordained by God who is all-knowing, most forbearing.¹³⁵

Now, if we compare the translations of Verse 2:240 with Verse 4:12, it is found that the former clearly speaks for maintenance and residence rights for a widow up to one year. Verse 4:12 above speaks for inheritance rights of a widow in her deceased husband's property. The two subject matters are not quite the same. Indeed, we have contradictory views among the Muslim scholars on the issue of Verse 2:240 being abrogated by Verse 4:12. In this regard, Ali says:

Opinions differ whether the provision (of a year's maintenance, with residence), for a widow is abrogated by the share which the widow gets (one-eighth or one-fourth) as an heir (Q. iv. 12). I do not think it is. The bequest (where made) takes effect as a charge on the property, but the widow can leave the house before the year is out, and presumably the maintenance then ceases.¹³⁶

This seems to mean that the widow is entitled to maintenance and residence, but not to any other extra payment. This leads to the position that the widow is, on the one hand, entitled to a share in the deceased husband's

¹³³ Supra note 64, at p.41.

¹³⁴ Daryabadi, supra note 59, at p.38-A, note 611. See also Usmani, supra note 58, at p.137, note 402.

¹³⁵ The Holy Quran, at p.182.

¹³⁶ Supra note 15, at p.95, note 273.

property and, on the other, to provision of maintenance for one year.¹³⁷ As we saw, the Quran in Verse 2:240 further appears to envisage that a widow may leave her deceased husband's home during the one year period and seems to say that this is a matter of discretion for the widow. This could lead us to argue that a widow will lose her right of maintenance if she leaves the house of her deceased husband but she does not lose her Quranic right of inheritance.

Maulana Amrohi, who also advocated that Verse 2:240 was abrogated by Verse 4:12,¹³⁸ argued that the one year of stay in the deceased husband's house was a pre-Islamic practice and it was the *iddat* period for the widow.¹³⁹ He further writes in his commentary:

In Arabia it was a tradition that on the death of the husband, the widow had to remain in *iddat* for one year. She used to wear old clothes and abandon makeup. If she resided in a city then the widow had to live in the same house where her husband died. If the widow was a resident of a desert then in that case, a separate home was built for her and she was not allowed to come out of that house. The heirs of the deceased used to maintain her. However, if the widow went out of the house, the family's liability of maintenance was then terminated.¹⁴⁰

The Maulana adds that this divine obligation of one year's maintenance prevailed in the early days of Islam. Later, when the revelation on the widow's *iddat* of four months and ten days was revealed,¹⁴¹ this order of one year was abrogated.¹⁴² However, according to Ali:

There is nothing to show that this verse (The Holy Quran, Verse 2:240) is abrogated by any other verse of the Holy Quran. Neither Verse 2:234, nor 4:12, contains anything contradicting this verse. The former of these speaks of the period of waiting for a widow, but here we have nothing about the period of waiting; it simply speaks of a bequest on the part of the husband that the widow should be given as additional benefit, a year's residence and maintenance. The later portion of the verse plainly says that if a widow of her own accord leaves the house she is not entitled to any further concession, and there is not blame on the heirs of the deceased husband for what the widow does of lawful deeds i.e., if she remarries after her waiting period of four months and ten days is over.¹⁴³

While going back to the arguments forwarded by the learned Maulana Amrohi, it becomes apparent that he is not clear himself whether Verse 2:240 was abrogated by Verse 2:234, or Verse 4:12, as mentioned by some other scholars.¹⁴⁴ However, if Verse 2:240 is abrogated by Verse 2:234, then it seems to mean that the Quran has shortened the *iddat* period specifically to allow

¹³⁷ See Ali, *supra* note 49, at p.104, note 317.

¹³⁸ Amrohi, S.Z.H., *Tafsir ul Quran*, Vol. 1, Karachi, 1977, at p.180 (Urdu, translation by me).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See *The Holy Quran*, Verse 2:234.

¹⁴² *Supra* note 138, at p.180.

¹⁴³ *Supra* note 49, at p.104, note. 317.

¹⁴⁴ *Supra* note 59, at p.38-A, note 611. See also *supra* note 58, at p.137, note 402.

earlier remarriage, which could be for the benefit of the widow, but also to ease the burden on the family of the deceased. Otherwise, they both have to wait for one year, the widow to remarry and the family to get rid of her. Nonetheless, there is no indication in Verse 2:240 that it demands from a widow to remain secluded for a year. The verse clearly leaves it to the discretion of a widow if she wants to leave the house of her deceased husband before the year ends.

Whereas Verse 4:12 enunciates the right of inheritance of the widow,¹⁴⁵ it seems that Verse 2:234 and Verse 4:12 focus on different subjects matters. While Verse 2:240 proclaims the right of the widow to stay in the deceased husband's house for one year, Verse 2:234 describes the *iddat* period of the widow. In this particular Verse, there is no mention that after the expiry of *iddat*, a woman should leave the house of her deceased husband. However, the Quran here seems to exempt the other heirs of the deceased from any liability if the widow leaves. The only similarity which seems to be visible between verses 2:234 and 2:240 is that in both the Quran leaves it to the discretion of the widow whether to stay or leave the house, after her *iddat*, is over. As far as Verse 4:12 abrogating Verse 2:240 is concerned, Verse 4:12 explains the widow's right to inheritance in her deceased husband's property. But the Quran does not mention that a widow, after receiving her share, should leave the house. Rather after being entitled to a share, she becomes a full owner of her allotted share, which could be a house or other accommodation. However, it can be argued that by having a share in the deceased husband's property, a woman is in a better financial position than if she were dependent on maintenance from the legal heirs of her husband.

Here we submit that the Muslim scholars have in fact forgotten to think about a widow who may not inherit any property, either due to non-existence of any property, or due to some customary practice of not giving any immovable property to the widow, as is the case in classical Shia law.¹⁴⁶ We conclude this debate by suggesting that the Quran in Verse 2:240 has asked the husbands to provide a year's residence and maintenance in favour of their wives, before they die, but has given an option to the widow either to stay in her deceased husband's house after her *iddat* period comes to an end, or to leave it after that period expires. In that case, she may lose her right of maintenance.¹⁴⁷

This bequest is in addition to what a widow inherits.¹⁴⁸ This could then well mean that a widow, on the bequest made by the husband, becomes not only entitled to a year's stay and maintenance in the house of her husband but

¹⁴⁵ The Holy Quran. Verse 4:12. For details on the Muslim law of succession see supra note 64.

¹⁴⁶ For details see supra note 64, at p.113.

¹⁴⁷ Supra note 15, at p.96, note 273.

¹⁴⁸ Id.

also to her Quranic share in her deceased husband property.¹⁴⁹ This Quranic share, in particular, would probably sustain the widow beyond the one-year limit. In a society where widows were expected to marry again, this might not be a significant issue. In other words, pressure on widowed or divorced women to marry again would ease potential problems over women's rights to post-divorce maintenance, in particular.

Now from Verse 2:240, we move to some of the commentaries to Verse 2:241. It seems that here the Muslim scholars have taken a different view of their own translations, as discussed above. Now the scholarly debate links *mahr* and maintenance. For example, Maulana Ashraf Ali Thanvi says that *mataa-un* here means that those divorced women whose marriage is not consummated, and whose dower is fixed, are entitled to their full dower and this is their *mataa-un*.¹⁵⁰ Whereas, in his translation to Verse 2:241, he used the word '*fahida*' for *mataa-un*,¹⁵¹ which means 'benefit', 'advantage', 'profit' or 'gain'.¹⁵² Here one can assume that according to this commentary, a divorced woman whose dower is fixed is entitled to full dower and that is her *mataa-un* and 'benefit' or 'advantage'.

The Muslim scholars, as it seems, tried to give a new definition to dower (*mahr*) by connecting it with the provisions of maintenance. A wife, in Islamic law, is entitled to her full dower once her marriage is consummated. We have already seen that the Quran has not linked *mahr* and maintenance. Rather the Quran very clearly in Verse 2:237, as discussed above, says that those divorced women whose marriage is not consummated, but their dower was fixed, are entitled to half of the stipulated amount of dower. However, the Quran further asks men to be liberal and to give the full dower to their divorced wives, even if the marriage was not consummated. Seen in this light, the practice of splitting the amount of dower (*mahr*) into the so-called prompt dower and the so-called deferred dower seems to be an effort by the Muslim scholars to relieve men from financial burdens. On the other hand, this made life difficult for women, especially in the event of death of the husband or divorce. A woman, in order to claim her unpaid dower, as we found during our field-work in Pakistan, has to fight long legal battles.

Now if we go through some of the other commentaries to Verse 2:241, it seems that the Muslim scholars have gradually constructed a new argument. This may have happened hundreds of years ago, but as a non-Arabist I have had to concentrate on more recent writings in English and Urdu. For example, Maulana Amin Ahsan Islahi, in 1970, says that the Quran in this verse is again

¹⁴⁹ See Farid, M.G. (ed.), *The Holy Quran*, Lahore, 1969, at p.100. note 298.

¹⁵⁰ Thanvi, A.A., *Mukammal bayhan-ul-Quran*, Lahore, 1934, at p.143. (Urdu translation by me).

¹⁵¹ Id.

¹⁵² *Standard Twentieth Century Dictionary, Urdu to English*, New Delhi, 1980, at p.449.

reminding the followers of what was said earlier in Verse 2:236.¹⁵³ That is, a woman divorced without consummation of marriage and without fixation of her dower is entitled to a gift according to the means of the husband. But in his translation to Verse 2:241, Maulana Islahi has used the word, '*kuch dena dehlana hai*'¹⁵⁴ for *mataa-un*, meaning that the husband should give something or should arrange for her to be given something.¹⁵⁵ It seems that Maulana Islahi has here deviated from his own translation when commenting on Verse 2:241, because in his translation he says that a divorced woman should be given something according to custom. In his commentary, he says that this is a reference to Verse 2:236.¹⁵⁶ but here, as it seems, one can argue that Maulana Islahi forgot to compare the two different scenarios in Verse 2:236 and 2:241. Clearly the first verse describes the position in case of a divorced woman whose marriage is not consummated, while in the second verse the divine obligation relates to the divorced woman whose marriage is consummated.

Maulana Maududi, in his commentary to Verse 2:241, says some compensation is to be paid to the divorced wife,¹⁵⁷ whereas Maulana Daryabadi is of the opinion that a divorced woman is entitled to a 'reputable present'.¹⁵⁸ However, Alama Usmani considers that only a pair of clothes may be given to the divorced woman. He further adds that it is only voluntary and not obligatory.¹⁵⁹ This is contrary to his own translation to verse 2:241, as referred to above. From these recent South Asian commentaries, it becomes obvious that Muslim scholars are not in favour of any maintenance for a divorced woman. Rather they have been successful in brushing the issue of post-divorce maintenance under the carpet of Islamic law. However, it seems that it was not possible for them to run away from the express Quranic injunctions. Therefore, it appears that they twisted their arguments in a way that their interpretation could give two different meanings to the same verse of the Quran by interpreting the word *mataa-un* as gift or dower, rather than full-fledged maintenance. The present paper cannot conclusively determine as to what extent arguments about dower interfered with the discussion of maintenance rights, but there appears to be a strong link, leading to the established position that divorced Muslim wives are entitled to their *mahr*, but no provisions beyond the *iddat* period.

¹⁵³ Islahi, A.H., Taddubber-e-Quran, Vol.1, Delhi, 1979, at p.512. (Urdu, translation by me).

¹⁵⁴ Ibid., at p.513.

¹⁵⁵ Standard Twentieth Century Dictionary, Urdu to English, New Delhi, 1980, at p.312, 325 and also p.483.

¹⁵⁶ Supra note 153, at p.513.

¹⁵⁷ Supra note 56, at pp.183-184, note 260.

¹⁵⁸ Supra note 59, , at p.38-A, note 617.

¹⁵⁹ Supra note 58, at p.137, note 404.

The Muslim scholars may have defined away maintenance to divorced women. Yet we have the example of Imam Hassan, son of Ali (the fourth caliph) who gave twenty thousand dirhams or dinars, and a water-skin full of honey to his divorced wife.¹⁶⁰ The purpose behind giving large sums as *mataa-um* was to enable the divorced woman to remarry.¹⁶¹ Moreover, those divorced women who had passed the age of marriage were also not left behind; they were often provided with a servant to look after them.¹⁶² The salary of the servant was paid by the husband of the divorced wife till her death.¹⁶³ This seems to mean that there were people in the early Islamic period who, instead of throwing out their divorced wife, made efforts to prevent her from becoming destitute.

The preceding discussion shows very clearly that a number of issues relating to property and maintenance payments for widowed and divorced wives have been discussed over time by the Muslim jurists. The questions debated related, as we saw, to inheritance, *mahr*, and to the *iddat* period. But it seems nowhere is the issue of post-divorce maintenance debated in detail and on its own. This confirms that there has in fact been, for a very long time, a juristic consensus on the point that there is not entitlement to maintenance for divorced Muslim wives beyond the *iddat* period. All the discussions are focused on the *iddat* period, its duration, on *mahr* and its link with inheritance. These discussions are based on the assumption that there is no further entitlement for a divorced Muslim woman. At the same time, it remains a fact, as discussed in this chapter, that the general Quranic stipulations in favour of maintenance for divorced wives have been redefined and narrowly circumscribed. Further developments in Islamic law simply proceed on the basis that traditional Islamic jurisprudence denies divorced Muslim women any claims to maintenance beyond the *iddat* period.

¹⁶⁰ Shehab, *supra* note 25, at p.221.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*