

Protecting Divorced Muslim Women's Rights through Maintenance: A Comparative Analysis based on the Present Legislative Reforms among the Muslim Community

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1.0 Introduction:

In short, Maintenance signifies food, raiment and lodgings.¹ Beyond the dower, the husband's primary financial obligation towards his wife is that of maintenance.² Once it is due the maintenance of the wife is deemed a debt on the husband from the date of withholding it.³ Only on payment, such debt is settled under the Sharia.⁴ The obligation of the husband effectively lapses only when the wife is formally held to be disobedient.⁵ Tahir Mahmood has explicitly described the circumstances in which the husband might have withheld maintenance.⁶ In particular, if the wife is nashuza (disobedient) or refractory, under Muslim law, she is not entitled to maintenance and so her marriage cannot be dissolved on the ground of the husband's failure to provide maintenance for a period of 2 years.⁷ However, under certain conditions and under a valid marriage contract, maintenance is the lawful right of the woman.⁸ This right derives from the authority of the Quran, from the Prophet's traditions and from consensus.⁹

It is generally agreed that the wife is entitled to maintenance during the continuance of the marriage.¹⁰ Moreover, the wife is first in order of priority to

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¹ Fyzee, Asaf A. A., *Outlines of Muhammadan Law*, Oxford University Press, 4th ed., p. 211.

² Lynn Welchman, *Women and Muslim Family Laws in Arab States-A Comparative Overview of Textual Development and Advocacy*, ISIM Series on Contemporary Muslim Societies, Amsterdam University Press, p.93.

³ Monsoor , Taslima, *Maintenance to Muslim Wives: The Legal Connotations*, The Dhaka University Studies, Part F, Vol. IX (1), June 1998, p. 63.

⁴ Id.

⁵ Moors 1999 154. On the token dower in Tunis, see Dargouth-Medimegh 1992 76; and Sharif 1997 18.

⁶ Mahmood, Tahir: *The Muslim Law of India*, 1st edition, Allahabad 1980, pp. 97-101, 2nd ed. 1982, 3rd ed. 1987.

⁷ Rahman, Tanzilur: *A Code of Muslim Personal Law*, Vol. 1, Karachi 1978, p.288.

⁸ Nasir , Jamal J. Ahmad, *the Status of Women under Islamic Law and Modern Islamic Legislation*, Volume 1, 3rd ed., BRILL, LEIDEN"BOSTON, 2009, p. 105.

⁹ Id.

¹⁰ Huda , Shahnaz, *Personal Laws in Bangladesh: The Need for Substantive Reforms*, The Dhaka University Studies, Part F, Vol.XV (1), June 2004, p. 118.

this entitlement, even before the children, parents and relatives.¹¹ After divorce, she is entitled to maintenance during the iddat period but not during the iddat following the death of her husband.¹² Islamic law grants a Muslim wife right to maintenance from her husband not only during the subsistence of the marriage but also reasonably after dissolution of the marriage.¹³ There is no controversy that the husband is bound to maintain the wife during the three months of iddat period, but there is a considerable controversy whether the maintenance extends beyond the iddat period.¹⁴ It has been specifically provided in the holy Quran that the divorced women shall wait for remarriage for three monthly periods and the woman in iddat live in the same style as you live, according to your means.¹⁵ It is also provided that for divorced women maintenance should be provided on a reasonable scale.¹⁶

The concept of long-term maintenance of a woman after her iddat period is known as mut'at and generally extends till her death or remarriage to another man.¹⁷ In the Quran the word mut'at has been used in the context of maintenance and gift,¹⁸ but it should not be confused with nafaqah (maintenance) or mahr (dower) as the three have existed as independent institutions of Islamic law.¹⁹ In Islamic legal tradition the term also refers to mut'at al-talaq or nafaqat al mut'a, i.e. a payment by the husband to his wife upon divorcing her.²⁰

In fact, "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

¹¹ Mahmood, supra note 6, 2nd ed., 1983, pp.120-132.

¹² Huda, Dr. Shahnaz, supra note 10, p. 118.

¹³ The holy Quran, 2:228 and 2:241.

¹⁴ Monsoor, supra note 3, p. 64.

¹⁵ Ibid, p. 65.

¹⁶ The holy Quran, 2:228 and 2:241.

¹⁷ El-Alami, D.(1995) Mut'at al-Talaq under Egyptian and Jordanian Law, in 2 Yearbook of Islamic and Middle Eastern Law 54.

¹⁸ Id.

¹⁹ Quraishi, A. And Vogel, F E. (2008) The Islamic Marriage Contract: Case Studies in Islamic Family Law, Harvard University Press. P192

²⁰ Shahid, Ayesha; For the Sake of Justice: Protecting Divorced Women's Rights in Pakistan by Re-examining the Sharia Principle of Mut'at (Post Divorce Maintenance), available at <http://www2.warwick.ac.uk/fac/soc/law/events/globalsharia/a-shahid-paper.pdf>, access at 3.58 pm on 14th July 2010.

possible if Muslim assemblies remain only interpreters and blind adherents of ancient schools of law".²¹ That's why it is essential to bring reforms in the personal law prevalent in the Muslim community. Indeed, law reform processes in Muslim contexts have been every bit as diverse as the legal systems, political systems and social customs informing the interpretation and application of laws, and the interpretations of Muslim jurisprudence that prevail in these societies.²² There are diversities in terms of sources of law, ranging from various interpretations of the Qur'an and Sunnah, to colonial common law, the Napoleonic Code and Soviet code.²³

This paper reviews various legislative provisions in Muslim and some Non Muslim countries. These suggest that the concept of *mutat* has been incorporated in the family law codes as 'compensation' to be paid to the wife.²⁴

2. Textual concepts about post divorce maintenance

According to Jamal J. Ahmad Nasir, maintenance involves the husband providing for his wife, at his own expense and to a standard expected according to his means, food, clothing, suitable housing with bathing facilities, toiletry necessities, and all medical fees and medicines that may be required.²⁵ He encompasses in his book a number of countries, namely, Iraq, Syria, Kuwait, Algeria, Jordan, Egypt, Lebanon, Pakistan and Iran while discussing the statutory enactments relating to maintenance in chapter fourteen. In the book he points out that if the wife does not comply with the conditions imposed by Sharia, she loses her right to maintenance. Besides, if the marriage contract is void or irregular, then no question will arise for the spouses to claim maintenance. But should the wife have obtained an order for payment of the maintenance under a marriage contract which appeared to be regular, and then it transpired that it was void because, for example, it was discovered that the wife was in fact a foster sister of the husband, then the husband would have the right to claim back what he had spent on her maintenance. However, he would have no right to the return of the maintenance money if it had been paid without it

²¹ Gazette of Pakistan, Extraordinary, 20 June, 1956, P. 1231.²² Balchin, Cassandra, *Family Law in Contemporary Muslim Contexts: Triggers and Strategies for Change*, P. 210, available at <http://www.musawah.org/docs/pubs/wanted/wante----->, access at 7.45 am on 16th July 2010.

²³ Id.

²⁴ Shahid, *supra* note 20.

²⁵ Nasir, *supra* note 8, p.107.

being the subject of a court order. Whilst Jordanian law concurs with the ruling that there is no entitlement to maintenance whatsoever under an irregular contract subsequent to consummation and before or after separation (Art. 42),²⁶ Iraqi law limits any right under such circumstances to the lesser of the specified or proper dower, or to the latter in the absence of any specification (Art. 22).²⁷ Syrian law additionally grants the wife the right to matrimonial maintenance for as long as she remains unaware of the irregularity of her marriage (Art. 51(3)).²⁸

Cassandra Balchin in her work at first examined the legal systems from the Muslim context and embraces some of the countries, namely, Nigeria, Turkey, India, Cameroon, Egypt, Sri Lanka, Malaysia, Pakistan and Bangladesh in her discussion. She also showed by her paper as to how advocacy efforts have brought changes in the existing family laws that were prevalent in different countries. In both Morocco and Turkey, women's activists deliberately sought for, and won, a complete reconceptualisation of the spousal relationship. Further, she talked about the legal consciousness concept which is one of the important strategies for the long term empowerment of women.

Ayesha Shahid in her article addressed the issue of payment of mutaa (post - divorce maintenance) to women under Islamic legal tradition.²⁹ She argued that the dynamic and evolving nature of Sharia does provide room for awarding post-divorce maintenance to the ex-wife in legally pluralistic Muslim countries like Pakistan. Her prime focus was on the law of post divorce maintenance applicable in Pakistan and in doing so successfully she examined a number of Muslim and non Muslim countries. According to her, though the Hanafi school prevalent in Pakistan does not provide relief to the divorced Muslim women rather cause hardship and negate claims of Islamic principles of justice and goodness, that is why it is reasonable to adopt the principle of Takhayyur (eclecticism or process of selection). She also went through a number of cases and arrived at a conclusion that the higher judiciary in Pakistan have taken a sympathetic view with regard to maintenance towards women.

²⁶ Law No. 61 of 1976: The Law of Personal Status.

²⁷ Law No. 188 of 1959: The Law of Personal Status.

²⁸ Law No. 34 of 1975: The Law of Personal Status.

²⁹ Shahid, *supra* note 20.

According to Faustina Pereira, literally taken the word "mut'a" is "gratification" or "a gift" and it has two distinct senses, one being a form of temporary marriage, the other, in referring to mut'at al-talaq or nafaqat al mut'a, is a payment by a husband to his wife upon divorcing her.³⁰ She also observed the Quranic verses relating to the matter.³¹ She took Bangladesh as a base country for discussion and in dealing with it she went back to the history wherein the law of maintenance in British and Pakistani period automatically came.³² Her concluding observation is that Bangladesh, which has a predominance of Hanafi adherents, implements Maliki based Muslim laws too with regard to maintenance.³³ So with a view of reforming other family law affairs it can also borrow good principles from other schools of thought.

Taslima Monsoor in her article divided the development of the law of maintenance into three parts, although putting emphasis on the present Bangladeshi part. This paper is more concerned with the legal connotations of the law than the social implications. A number of reported and unreported cases for the law of maintenance in Bangladesh are highlighted here. She also identified lots of problems which arise in all maintenance cases and provide necessary suggestions accordingly. Besides that, she mentioned that if the natural family can not maintain the divorcee her maintenance will be a charge on collective resources of the Muslim community as a whole. If there is a Baitul Mal or a community fund the divorcee could be provided from it or savings out of waqf property can also be used for such purpose.

Furthermore, Taslima Monsoor in her book, chapter 4, discussed Quranic verses, Prophet's tradition and some of the text books while dealing with the law of maintenance in Bangladesh.³⁴ She gathered idea from the Hanafi law, the Muslim Family Laws Ordinance, 1961; the Family Courts Ordinance, 1985 and from numerous cases. In elaborating the idea of maintenance in Bangladesh, she also took into consideration the case of India. In the book she made a thorough analysis of the case namely, Md. Hefzur Rahman vs Shamsun Nahar Begum.³⁵

³⁰ Pereira, Faustina, Post Divorce Maintenance for Muslim Women and the Islamist Discourse, Dossier 22, Dossier Articles Fundamentalisms [law] Women and Law - WLUML Programme South Asia Bangladesh (January 2000), available at <http://www.wluml.org/fr/node/334>, access at 12.4 pm on 14.2.2011.

³¹ Id.

³² Id.

³³ Id.

³⁴ Monsoor, Taslima, Gender Equity and Economic Empowerment: Family Law and Women in Bangladesh, British Council, EWLR, Dhaka, 2008.

³⁵ 15 BLD (1995)

In accordance with Kamrul Hossain,³⁶ law of maintenance in Bangladesh has developed both through legislative acts as well as in judicial fashion. Though his main focus is on the law of marriage, even then he has told a few about maintenance. In discussing it he talked about the 1956 Commission on Marriage and Family Law and the recommendations provided by the Commission. He also examined the Quranic verses, the Muslim Family Laws Ordinance and showed the application of the principle of Takahyyur in Bangladesh in the case of 'Gul Bibi v. Muhammad Saleem'.³⁷

Lynn Welchman in his book pointed out that the obligation of the husband towards the wife with regard to maintenance effectively lapses only when the wife is formally held to be disobedient. Regarding this, he took into account a number of Arab countries, namely, South Yemen, Somalia, Iraq, Egypt, Palestine, Morocco, Tunisia, Libya, and Algeria. He in fine suggested a temporary maintenance fund which can be set up for the effective implementation of maintenance rulings for wives.

Ela Anil et al in their book highlighted the new Turkish Civil Code, 2001 wherein several reforms have been taken place with regard to family law matters. They included all the reforms relating to family law that affect women's lives in their day to day life.

Louise Halper presented several improvements that have occurred within an Islamic legal regime and made a distinction between those occurred in the pre revolutionary Iran and those of post revolutionary Iran.³⁸ Those improvements cover several fields and suggest that some of them are determining women's well-being, whereas others are detrimental to women.³⁹ Previously there was an Act namely, the 1967 Family Protection Law ("FPL"), which governed marriage, divorce, child custody and maintenance.⁴⁰ Later on, the Civil Code has been substituted and amended in 1992 and he tried to show as to how this is also not bringing good to woman rather in the name of sharia it is causing hardship.⁴¹

³⁶ Hossain, Kamrul; In Search of Equality : Marriage Related Laws for Muslim Women in Bangladesh, *Journal of International Women's Studies*, Vol. 5 # 1 Nov 2003.

³⁷ PLD 1978 Quetta 117.

³⁸ Halper, Louise; Law and Women's Agency in Post-Revolutionary Iran, *Harvard Journal of Law & Gender*, Vol. 28; also available at <http://www.law.harvard.edu/students/orss/jlg/vol28/halper.pdf>, access at 5.20 pm on 11th August, 2010

³⁹ Id.

⁴⁰ Id.

⁴¹ Id

The paper written by Valentine M. Moghadam examined Iranian changes connected to women's legal status and gender relations; legal disparities, contemporary social realities, and international norms; and the strengths and weaknesses of women's collective action.⁴² While discussing about maintenance with specific reference to the Civil Code, it is noted that the Iranian law undermines all norms and objectives of women's human rights and commercializes marital relations.⁴³

3. Laws regarding post divorce maintenance in different Muslim countries

On the basis of different books, articles, papers, web data, newspapers stated above, the law as regards post divorce maintenance of some leading and developing Muslim countries will be closely examined in the following way----

3.1 Bangladesh

The discourse on mataa and its import on maintenance and women's rights under family law are not new in the sub-continent.⁴⁴ There are some progressive judicial decisions,⁴⁵ because of which Bangladesh has come on and off into the limelight of the discourse on Islam and women's human rights.⁴⁶ Within the judicial arena a matter of crucial importance today for Muslim women around the world and in Bangladesh is the question of Muslim women's entitlement to maintenance from their husbands after their divorce.⁴⁷ However, the law of maintenance in Bangladesh is a combination of codified law, local traditions and the traditional Muslim law.⁴⁸

⁴² Moghadam M Valentine, *Women in the Islamic Republic of Iran : Legal Status, Social Positions and Collective Action*, The article was written in connection with her participation in the conference entitled *Iran After 25 Years of Revolution: A Retrospective and a Look Ahead* which was held at the Woodrow Wilson International Center for Scholars on November 16-17, 2004.

⁴³ Id.

⁴⁴ Pereira, supra note 30.

⁴⁵ See, for example, *Nelly Zaman v. Ghiyasuddin*, 34 DLR (1982), *Jamila Khatun v. Rustom Ali*, 48 DLR (1996), *Jesmin v. Muhammad Elias*, 17 BLD (1997), *Muhammad Hefzur Rahman v. Shamsun Nahar Begum*, 15 BLD (1995), *Muhammad Serajul Islam v. Musammat Helana Begum*, 48 DLR.

⁴⁶ Pereira, supra note 30.

⁴⁷ Id.

⁴⁸ Monsoor, supra note 3, p. 70.

In cases on maintenance, the courts did not previously provide for past maintenance unless stipulated in the kabinnama, nor would allow post-iddat period maintenance to divorced Muslim wives.⁴⁹ In Bangladesh, women had to rely on other techniques to secure some post-divorce maintenance.⁵⁰ One writer suggested a hopeful trend towards adoption and enforcement of clauses in the marriage contract or kabinnama which would clearly and in unambiguous terms provide for maintenance, as this offers protection against arbitrary and capricious subjugation.⁵¹ The development of the law of maintenance can be divided into the British Indian period, Pakistani period and the Bangladeshi period.⁵²

In case of maintenance, a woman has 3 legal rights: Firstly, she can go to the Arbitration Council under section 9 of the Muslim Family Laws Ordinance, 1961. Secondly, she can go to the Family Courts under section 5 of the Family Courts Ordinance, 1985. Thirdly, she could file a suit in the criminal court under section 488 of the Cr. P. C., 1898. It is necessary to point out here that the jurisdiction of the criminal court to entertain suits under section 488 of the Cr. P. C. was ousted in the case of *Pochon Rissi Das vs Khuku Rani Das*,⁵³ and by amendment of 2007, sections 488, 489 and 490 have been omitted from the Act. So in case of maintenance, a woman has now two options. She can go to the civil court under section 9 of the Muslim Family Laws Ordinance. or under section 5 of the Family Courts Ordinance. The differences between section 488 of the Cr. P. C. and section 9 of the MFLO are that section 488 had specifically prohibited of an order of past maintenance. There is a scope of past maintenance under section 9 of the MFLO. Secondly section 9 applies only to maintenance of wife. Section 488 applied both to wife and children. Also section 488 had applied to judicial processes and section 9, the MFLO to the extra judicial processes.

In our country Hanafi school of thought applies. For Hanafi women, the right to maintenance is particularly difficult to enforce.⁵⁴ The Hanafi's do not recognize any concept of alimony, payable for an indefinite period to the divorced wife.⁵⁵ This is the prevailing point of argument as to how 1961 Ordinance is based on Maliki law.⁵⁶ Let's go back in this regard to the history of the Muslim Family Law

⁴⁹ Monsoor, supra note 3, p. 65.

⁵⁰ Id.

⁵¹ 42 DLR (1990).39

⁵² Monsoor, supra note 34.

⁵³ 50 DLR 1998 (47)

⁵⁴ Monsoor, Taslima ; supra note 3, p. 66.

⁵⁵ Carroll, Lucy; Shah Bano and the Muslim Women Act, Bombay, 1998, pp. 35-45 at. 35.

⁵⁶ Hossain, supra note 36.

Ordinance of 1961. The 1956 Commission on Marriage and Family Law, while dealing with its task,⁵⁷ had been concerned with the question of post-divorce maintenance whether maintenance is obligatory or optional.⁵⁷ The view expressed in this respect by the members of the Commission as well as by hundreds of Muslims was that, "a large number of middle aged women who are being divorced without reason should not be thrown on the street without a roof over their heads and without any means of sustaining themselves and their children".⁵⁸ Therefore, the Commission recommended that Courts should have the jurisdiction to order a husband to pay maintenance to his divorced wife for her life or till she remarried. The Muslim Family Law Ordinance of 1961 dealt with the question and found in favor of women's claim.⁶⁰ But it only awarded maintenance for married women despite the recommendation from the 1956 Commission.⁶¹ A judicial development, however, invokes that it is permissible to follow a non-Hanafi school when Hanafi law does not provide relief.⁶² This principle was applied in *Gul Bibi v. Muhammad Saleem* In *Gul Bibi v. Muhammad Saleem*,⁶³ the Court held "According to Shiah and Shafi law the wife is entitled to maintenance notwithstanding the fact that she was allowed to get into arrears without having the amount fixed by the Court, or by agreement with the husband... In the instant case the parties admittedly follow Hanafi school of thought... However, as some thinkers of Islam do favour the positive view and such view is also consistent with reason, logic and common sense, its adoption as a rule in case of such sects which do not strictly follow that school of thought, would not be unjustified."

Therefore, the right of the wife can be enforced without intervention of the court or through the courts.⁶⁴ Section 9 of the MFLO lays down provisions for claiming maintenance extra-judicially but does not provide for a divorced wife to claim iddat maintenance.⁶⁵ Huq suggests that a clause be inserted in section 9 of the Ordinance by way of amendment entitling a woman to claim iddat maintenance before the Arbitration Council.⁶⁶

⁵⁷ Id.

⁵⁸ As stated in Gazette of Pakistan, Extraordinary, 20 June 1956, p.1215.

⁵⁹ Hossain, supra note 36.

⁶⁰ Id.

⁶¹ Id.

⁶² Id.

⁶³ ILR 5 Cal 558, 562 (1879).

⁶⁴ Huda, supra note 10.

⁶⁵ Huq, Naima, *Post Divorce Maintenance: Legal and Social Appraisal in Gender in Law*, Adtam Publishing House, Dhaka, 1998, pp. 62, 69.

⁶⁶ Ibid, p. 69.

A wife is entitled to maintenance during the continuance of marriage. There is no controversy that the husband is bound to maintain the wife during the 3 months of iddat period. It has been specifically provided in the holy Quran that the divorced woman shall wait for remarriage for 3 monthly periods and the woman in iddat live in the same style as the husband lives, according to his means. It also provides that for divorced women maintenance should be provided at a reasonable scale. In regard to maintenance two questions which arose were dealt with in 2 cases in Bangladesh. The first question is that -whether a woman is entitled to past arrears of maintenance? The courts did not previously provide for past maintenance unless stipulated in the Kabinama.⁶⁷ This question of past divorce maintenance was settled in the case of "Jamila Khatun vs Rustom Ali",⁶⁸ where it was decided that the wife is entitled to past divorce maintenance even in the absence of any specific agreement. Recognising the right to past maintenance, the Appellate Division handed down a progressive judgement by overruling an old text based judgement by the High Court Division of the Supreme Court in Rustom Ali vs. Jamila Khatun, to the effect that the claimant wife was not entitled to past maintenance.⁶⁹ In deciding the fate of Jamila Khatun the Appellate Division of the Supreme Court relied on the Pakistani leading case of Sardar Muhammad vs Nasima Bibi,⁷⁰ that positively settled the issue of past maintenance in Pakistan as early as in 1964.⁷¹ Supporting the deviation from the age old texts on the subject, the Appellate Division of the Supreme Court noted that the judicial Ijtihad in this area of law made by the Pakistani courts was in the right direction.⁷² Thus the Bangladeshi judges of the highest level of judiciary have only recently made the celebrated judgement in the case of Jamila Khatun vs Rustom Ali,⁷³ but how far this decision is being implemented in reality is yet to be analysed. The second question is that-whether a woman is entitled to post divorce maintenance beyond the period of iddat? This question was settled in the case of Hefzur Rahman vs Shamsun Nahar Begum.⁷⁴ In this case the High Court Division of the Supreme Court of

⁶⁷ Monsoor, supra note 34, p. 71.

⁶⁸ 16 BLD (AD) 61.

⁶⁹ 43 DLR (1991) 301.

⁷⁰ PLD 1966 (W. P.) Lahore 703.

⁷¹ The Sardar Muhammad was later approved in the case of Muhammad Nawaz, PLD 1972 SC 302 by the Supreme Court of Pakistan.

⁷² Monsoor, supra note 34, p.68.

⁷³ 16 BLD (AD) (1996) 61.

⁷⁴ 47 DLR (1995) 54

Bangladesh addressed themselves suo motu to the question as to whether the divorced wife would claim maintenance beyond the iddat period. After considering various verses of the Quran and precedent, the court held that the person after divorcing his wife is bound to maintain her on a reasonable scale beyond the period of iddat for an indefinite period, that is to say, till she loses the status of a divorce by remarrying another person.⁷⁵ The learned judges of the High Court Division of the Supreme Court of Bangladesh took this provision from Hedaya by Charles Hamilton,⁷⁶ the Digest of Mohamman Law (compiled and translated from authorities in the original Arabic) by Neil B E Baillie.⁷⁷

The Appellate Division of the Supreme Court overruled this decision in *Shamsun Nahar vs Hefzur Rahman* on the ground that in Muslim law there is no such obligation on the husband to maintain his divorced wife after the iddat period, and that the High court division of the Supreme Court's ruling was against the principles set by Muslim jurists of the last fourteen hundred years.⁷⁸ Thus in the latest case of *Md. Hefzur Rahman vs Shamsun Nahar Begum*,⁷⁹ it was held by the Appellate Division of the Supreme Court that whatever be the meaning of mataa it is certainly not maintenance as can be claimed within the meaning of maintenance under the Family Courts Ordinance (XVIII of 1985), section 5 (d). The court held that the word Mata'a in the Quranic verse II: 241, which modernists take for post divorce maintenance, means 'consolatory gift' and as such has never been enforceable.⁸⁰ Mustafa Kamal Justice explained the word Mataa as a parting gift to divorced women as a comfort and solace for the trauma they suffer from divorce.⁸¹ Besides it has never been judicially enforceable because it is a gift. A valid gift, once made, is judicially enforceable, but no one can compel another to make a gift through a process of law.

⁷⁵ For liberal interpretation, see: Rahman, Fayyazur, *Post-divorce maintenance for Muslim women in Pakistan and India*, Bangladesh Journal of Law, Vol. 2 No. 1, June 1998, pp. 26-52; Hoque, Ridwanul and Khaled, Mohiuddin, *Right to Post Divorce Maintenance in Muslim Law: The Shamsun Nahar Revisited*, Chittagong University Journal of Law, vol. 4, 1999, pp 1-32.

⁷⁶ Book IV, Chapter XV, Sec. 3, p.45.

⁷⁷ Part Second, Book II, Chapter VII Section Sixth, 1799-1883, pp 169-170.

⁷⁸ 51 DLR 1999 (AD)pp. 172.

⁷⁹ Id.

⁸⁰ Ibid, Per A.T.M Afzal, C.J., at para 49 and 56.

⁸¹ Supra note 78, Per Mustafa Kamal, J., at para 143.

Today we have the Family Courts Ordinance of 1985, which not only has a streamlined procedure but also under which women have to pay only their minimal fees.⁸² Now that the question of mataa - post divorce maintenance, has been raised before the Appellate Division of Bangladesh, we can be hope that the question has at last found an appropriate forum for decision.⁸³

The execution of the Family Court decrees is mentioned in the Family Courts Ordinance of 1985.⁸⁴ It is suggested here that where the decree is the payment of money the Family courts power should be likened to the criminal court.⁸⁵ This will ensure that the husbands pay maintenance.⁸⁶ It is also recommended that the sanctions of the Family Courts could be strengthened by providing them with acriminal court's power to attach the property of husbands to pay maintenance to their wives.⁸⁷

The real difficulty in availing the legal remedy for obtaining maintenance is the time factor involved in getting a decree for maintenance.⁸⁸ An author stated that maintenance for the wife is an immediate need and the delays in litigation often defeat the purpose.⁸⁹ It is suggested that reforms should be made in the Family Courts Ordinance, 1985 for providing interim orders not only for preventing persons from frustrating the suit as provided under section 16A of the Ordinance.⁹⁰ But providing for an interim order pending final disposal of the suit or for a deposit in the Family Court every month, an amount tentatively determined by such a court for payment for the maintenance of the wife and children.⁹¹ The powers of the Family Courts should be enhanced in this regard.⁹² By this method for an interim maintenance order it will give relief to the deserted and poor wives who do not have any other means of livelihood.⁹³

⁸² Pereira, supra note 30.

⁸³ Id.

⁸⁴ Sec. 16 of the Family Courts Ordinance, 1985.

⁸⁵ Monsoor, supra note 3, p. 85.

⁸⁶ Id.

⁸⁷ Monsoor, supra note 3, pp 85-86.

⁸⁸ Monsoor, supra note 34, p.72.

⁸⁹ Patel, Rashida; Women and Law in Pakistan, Karachi, 1979, p. 67.

⁹⁰ Monsoor, supra note 34, p.72.

⁹¹ Monsoor, supra note 34, pp.72-73.

⁹² Monsoor, supra note 3, p. 86.

⁹³ Monsoor, supra note 34, p.73.

The uniform family code (UFC) which is under consideration of the Government of Bangladesh,⁹⁴ proposed compulsory maintenance for divorced women for life or until their remarriage.⁹⁵ It also lays down the course of action that should be taken if maintenance is not paid.⁹⁶

3.2 Pakistan

In Pakistan a single family court system hears cases for all communities.⁹⁷ However, until the liberation war, Bangladesh was under the control of East Pakistan. That is why all provisions which were applicable in Bangladesh until 1971, will also be applicable here. Section 9 of the Muslim Family Laws Ordinance, 1961 says that 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).⁹⁸ So in Pakistan under section 9 of the Muslim Family Laws Ordinance of 1961, the husband is bound by the law to maintain his wife, and if he does not do so without legal cause, then the wife may sue him for her maintenance.⁹⁹ She may also apply for a court order as to payment of her maintenance under the Criminal Procedure Code of Pakistan.¹⁰⁰ The period for filing of a suit for maintenance is 6 years.¹⁰¹ It is necessary to mention here that the issue of post-divorce maintenance has once again been reviewed by the Law and Justice Commission of Pakistan.¹⁰² It has put forward a proposal for "Post-Divorce Mutat" for wives as ordained in the Quran by revisiting the half-century-old Muslim Family Law Ordinance 1961 and the West Pakistan Family Courts Act 1964 keeping in view the changing needs of the society.¹⁰³

⁹⁴ The uniform family code (UFC) has been prepared by Bangladesh Mahila Parishad (BMP) - an organization acting for the interests of women in Bangladesh.

⁹⁵ Hossain, *supra* note 36. p. 106.

⁹⁶ *Id.*

⁹⁷ Balchin, *supra* note 22.

⁹⁸ Shahid, *supra* note 20.

⁹⁹ Nasir, *supra* note 8, p. 106.

¹⁰⁰ *Id.*

¹⁰¹ Art. 120 of the Limitation Act, 1908.

¹⁰² *Id.*

¹⁰³ *Id.*

3.3 India:

Muslim community in India has lots of options concerning post divorce maintenance. An Indian couple can choose which system (customary, religious or general) they wish to be governed by.¹⁰⁴ Indian Muslim man as well as woman prefers their own personal law rather than the general law. Similarly with regard to post divorce maintenance Indian Muslim community likes to be governed by their own religious law.

However, post- divorce maintenance has recently been the subject of heated controversy in India.¹⁰⁵ Section 488 of the old Code of Criminal Procedure 1898 provides for criminal action by virtue of magistrate's orders for maintenance of wives which included Muslim wives.¹⁰⁶ Later sections 125-128 of the new Code of Criminal Procedure 1973 while retaining the old provisions also included payment of maintenance to the divorced wife.¹⁰⁷ She could now ask for maintenance from the former husband if she was unable to maintain herself.¹⁰⁸

Now let's examine the present sections one after another. In fact, section 125 of Cr.P.C. 1974 replaced section 488 of the Cr.P.C. Accordingly, if any person having sufficient means neglects or refuses to maintain his wife unable to maintain herself a Magistrate of the First class may, upon proof, order such person to make a monthly allowance for the maintenance of his wife at the rate of not exceeding 5 hundred rupees.¹⁰⁹

In order to compel or force an Indian husband to provide his divorced wife who is unable to maintain herself, an explanation was added which is section 125(b). According to section 125(b), wife includes a woman who has been divorced by or has obtained the divorce from her husband and has not been remarried.

Moreover, section 127 (3) (b) says that where an order has been made under section 125 in favour of a divorced wife, the court shall cancel such order if satisfied that she has received , whether before or after the divorce, the whole of the sum which is either under the personal or customary law applicable to the parties , was payable on such divorce.

¹⁰⁴ Balchin, supra note 22.

¹⁰⁵ Shahid, supra note 20.

¹⁰⁶ Id.

¹⁰⁷ Id.

¹⁰⁸ Id.

¹⁰⁹ Sec. 125 of the Indian Cr. P. C., 1974.

Muslims understood this to mean that they were exempted from the operation of section 125 once dower had been paid. The famous and explosive case is *M. Ahmed Khan vs Shah Banu Begum*.¹¹⁰ The fact of the case is-Ahmed Khan married Shah Banu in 1932. In 1975 he drove her out of the house. In 1978 Shah Banu filed a petition against him asking for maintenance under section 125 of the Cr.P.C.. In November of that year Ahmed Khan divorced her by giving irrevocable triple talaq. The lower court granted her maintenance at the rate of 25 tk. per month. The High Court raised this amount to 179.20 rupees. He went to the Supreme Court against the order given by the High Court on two grounds. One is-as a Muslim he has the liability to pay maintenance only up to the period of iddat.and secondly he has already paid the amount of dower, therefore, her application under section 125 was liable to be dismissed because of the provision of art. 127(3)(b).

The court held that the statutory right of a Muslim wife under section 125 to get maintenance from the former husband is not affected by the provisions of personal laws applicable to her.¹¹¹ As to this Act, the court further held that there is actually no contradiction between section 125 and Muslim personal law and they proceeded to base their interpretation or argument on Quaranic texts.¹¹² The outstanding feature of this decision is that a muslim husband is bound to maintain his wife who is unable to maintain herself. It created a great chaos and there was huge demonstration against the judgement by the muslims in India. The Muslim Personal Law Board opined that the Supreme Court was wrong in interpreting the Holy Quran as per a judicial stand taken whereby it was held that the court would not interpret religious scriptures or holy books.¹¹³ Therefore, despite the progressive decision of the Supreme Court, the decision could not be enforced, because of extreme pressure from the religious leaders.¹¹⁴ This led to the passage of Muslim Women (Protection of Rights on Divorce Act) 1986 by the Parliament to undo the effect of Shah Bano's judgement.¹¹⁵ Subsequently, the Rajiv Gandhi government brought the legislation to bar Muslim women from seeking relief under section 125 Cr. P. C. for maintenance.¹¹⁶

¹¹⁰ AIR 1985 SC 945

¹¹¹ 1988 SC 644 (5,6)

¹¹² 1988 SC 644 (5,6)

¹¹³ Shahid, supra note 20.

¹¹⁴ Rashida Manjoo, *The Recognition of Muslim Personal Laws in South Africa : Implications For Women's Human Rights*, Human Rights Program at Harvard Law School Working Paper, July 2007, Human Rights Program at Harvard Law School 1563 Massachusetts Avenue-Pound Hall 401 Cambridge, MA 02138.

¹¹⁵ Shahid, supra note20.

¹¹⁶ Lakdawala M. H., *Supreme Court Judgement on Maintenance*, the Mili Gazette, Mumbai.

This latest Act excluded divorced Muslim women from the purview of section 125 of the Cr. P. C.¹¹⁷ However, according to certain authors, the procedure under this law has been disarmed and substituted by another procedure offered to the woman.¹¹⁸ Although under section 3 (1) of the Act of 1986, ostensibly the entitlement of the divorcee seems limited,¹¹⁹ it contains loopholes which may be used to benefit Muslim women. In fact, Section 3(1) (a)¹²⁰ is modified unexpectedly by the immediate following subsections. Subsection 2 of section 3 allows an application to be made by the divorced woman to a Magistrate and the Magistrate, if he is satisfied under section 3(3), he will direct the husband to pay maintenance according to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband. Subsection 3 of section 3 of the Statute requires that the divorcee shall be paid a reasonable sum and fair provision to take care of her without having regard to any time limit fixed, that is, for the rest of her life. There are some judicial developments based on these sub-sections.

In *Ali vs Sufaira* 1988 (2) K. L. T. 94,¹²¹ it was held that under section 3(1)(a) of the Act of 1986 "a divorced Muslim woman is not only entitled to maintenance for the period of iddat from the former husband but also to a reasonable and fair provision for the future". It seems therefore that the divorcee may be entitled to be reasonably and fairly provided for without any time limit as to for how long such provision should benefit her, that is, either for the rest of her life, or at least until she can get married; although the sum itself must be paid during the period of iddat. Several High Courts of India upheld this interpretation of section 3 of the Act of 1986 (e.g., Kerala, Gujarat and Maharashtra), while others had not (such

¹¹⁷ Agnes, Flavia, *Law and Gender Inequality-The Politics of Women's Rights in India*, Oxford University Press, New Delhi, 1999, p. 102.

¹¹⁸ Latifi, Danial, *Women's Rights ---paper presented At THE INTERNATIONAL CONFERENCE OF LAWYERS ON CHANGING SCENARIO OF HUMAN RIGHTS*, New Delhi. February 20 and 21, 1993.

¹¹⁹ *Id.*

¹²⁰ Clause (a) of subsection 1 of section 3 states: Mahr or other properties of Muslim woman to be given to her at the time of divorce- (1) Notwithstanding anything contained in any other law for the time being in force, a divorced woman shall be entitled to- (a) a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband.

¹²¹ For a comprehensive discussion of *Ali vs Sufaira* 1988 (2) K. L. T. 94 see Pearl and Menski (1998), *Kerala Law Times*.

as Orissa). This inconsistency was laid to rest by a Full Bench of the Supreme Court in *Daniel Latifi vs Union of India*.¹²² This case approached a middle path wherein the judgment confirmed that the clause "reasonable and fair provision" meant lifelong post divorce maintenance to be paid by the husband within the iddat period.¹²³ But it does not confine itself to the iddat period only.¹²⁴ The *Daniyal Latifi* judgment argue that modern legislation is a step forward to protect financial rights for women under Islamic law and to expand them towards the goal of achieving social justice.

The Kerala High Court in November of 2004 in a judgement passed in the case of *Abdul Hammad vs Fousiya* has gone a step further to clarify that a former husband must pay maintenance from the date of divorce to the date of remarriage in case of her marrying again.¹²⁵

In fine it can be said that in India reforms were made to the muslim women's right to maintenance by the Act of 1986. Right to maintenance after divorce was extended by the Act of 1986 which was interpreted by the court provided for life long provision to be paid during iddat period. Also under this Act, a divorced woman who has not remarried and is unable to maintain herself after iddat period could claim maintenance from relatives in proportion to the properties, which they inherit on her death. If any of the relatives being unable to pay her maintenance allowance, a Magistrate may direct the State Waqf Board to pay such maintenance, the court said.¹²⁶ Moreover, the 1986 Act has met with severe criticisms from women's organizations, human rights groups and secular humanists since the time of its enactment.¹²⁷ One of them is with regard to constitutional validity. The insistence of conservative forces on precluding Muslim women from the purview of Section 125 violates Article 14 and 15 of the Constitution which prohibits discrimination by the State on grounds of religion, race, sex or place of birth were neither the issue for them, nor they were able to understand that with the passage of the Muslim women bill the

¹²² *Daniel Latifi vs Union of India* 7 SCC 740.

¹²³ Uma, Saumya , *Muslim Women's Right to Maintenance in India*, Law and our rights; The Daily Star, January 30, 2005.

¹²⁴ Shahid, supra note 20.

¹²⁵ Uma, supra note 123.

¹²⁶ Lakdawala, supra note 116.

¹²⁷ Uma, supra note 123.

government of India had indeed legislated on Muslim law; it had interfered in the Shariat.¹²⁸ As we all know, in Shariah there is no provision for maintaining divorced Muslim women through waqf or charitable organizations as were specified in the 1986 law.¹²⁹ On the other hand, among others the solicitor Gen supported the Act by stating that personal law was legitimate basis discrimination, and that therefore, it does not offend article 14 of the constitution.¹³⁰ The All India Muslim Personal Law Board, as an intervener, defended the 1986 Act and stated that Section 4 of the 1986 Act (maintenance from family, relatives & State Wakf Boards) was good enough to take care of avoiding vagrancy of a divorced woman, and that she need not be dependent on her husband.¹³¹ The Islamic Shariat Board defended the Act by arguing that the 1986 Act was enacted to nullify the erroneous judgement in Shah Bano's case and to bring it in line with Muslim personal law.¹³²

3.4 Syria

Under the Syrian Personal Status Law 1953 the husband is obliged to pay maintenance for iddat after talaq, judicial divorce or annulment, up to maximum period of nine months.¹³³ Divorced wife may be awarded compensation of up to three years, maintenance (in addition to maintenance during iddat) if judge finds husband's exercise of talaq to have been arbitrary.¹³⁴ If the husband does not comply with the law regarding maintenance, it is deemed a debt upon him, and under Article 54/3, such a maintenance debt takes priority over payment of the dower.¹³⁵ The debt upon him runs from the date of withholding maintenance payment, and only payment or discharge can settle the debt.¹³⁶

¹²⁸ Hussain, Sabiha, Reflections on Islamic Identity, Citizenship Rights and Women's Struggle For Gender Justice: Illustration from India, *Journal of International Women's Studies* Vol. 9 #1 November 2007, p. 72.

¹²⁹ Id.

¹³⁰ Uma, supra note 123.

¹³¹ Id.

¹³² Id.

¹³³ Shahid, supra note 20.

¹³⁴ Id.

¹³⁵ Nasir, supra note 8, p. 107.

¹³⁶ Id.

3.5 Jordan

Under Article 134 of the Jordanian Personal Law in case of divorce without legitimate cause, the judge grants compensation to the wife, not exceeding the equivalent of one year's maintenance.¹³⁷ Under this law, the man should be liable where necessary for the fees of the midwife and the doctor attending the birth of a child, as well as any medicines and other costs relating to the birth, according to custom and his means, whether the marriage is still binding or not (Arts.24/2, 66a, 71/1 & 78 respectively).¹³⁸ Therefore, while dealing with maintenance the Jordanian laws determine cases where divorce is by the unilateral will of the husband and not by mutual agreement,¹³⁹ stipulate mataa or mut'a, in addition to maintenance for a divorced women, after consummation.¹⁴⁰

3.6 Maghreb countries

Maghreb countries include Algeria, Morocco and Tunisia.

Let's start our discussion at first about Tunisia. There is a great diversity of legal positions on various issues in Tunisia, with the sources of law being religious and secular respectively.¹⁴¹ However, in Tunisia the Personal Status Code was enacted in 1956 and has been called by experts a measure piece of legislation which guarantees the rights of woman. This law applies to all Tunisian (uniform law). Majority of population is Sunni Maliki. But Hanafi school has influenced law making process. The principle of takkhayur, that is, borrowing from other schools is used for reforming law. In Tunisia law provides for equal cooperation in managing family affairs. Modern Tunisian law, whilst adhering to the general Shari'ah principles, rules that a wife who has means of her own is expected to contribute to the maintenance of the family (Art. 23).¹⁴² Under the Tunisian Family Code as amended in 1981, both men and women are entitled to compensation for the emotional and material damages inflicted on them by a divorce without grounds? or a divorce at their petition for injury.¹⁴³ This amendment further favours women who may opt to have the material part of the

¹³⁷ Shahid, supra note 20.

¹³⁸ Nasir, supra note 8, p. 106.

¹³⁹ Pereira, supra note 30.

¹⁴⁰ Id.

¹⁴¹ Balchin, supra note 22, p.211

¹⁴² Nasir, supra note 8, p. 106.

¹⁴³ Shahid, supra note 20.

damages paid not as lump sum but in monthly ongoing instalments.¹⁴⁴ The amount paid to a woman may be determined by the standard of living the wife was accustomed to. These instalments would continue until the woman's death or if her circumstances change such as if she is enabled to do without compensation or by way of a new marriage.¹⁴⁵ Welchman argues that the objectives of such legislation includes deterring the husband from arbitrary exercise of pronouncing unilateral divorce, compensating the wife for the injury she has sustained and to increase the financial obligations on the husband towards his divorcee wife beyond the payment of dower and maintenance during iddat.¹⁴⁶ Therefore, in Tunisia husband must provide maintenance during iddat period and if divorce wrongfully she may be awarded maintenance in the form of a lump sum to be determined by the women's standard of living.

Moroccan ruling is that the wife's lawful right to maintenance covers food, clothing, medical treatment and housing.¹⁴⁷ In Morocco a broad based coalition of women's groups overcame opposition from the religious right and led to reform of the Moudawana (Personal Status Code) in 2004.¹⁴⁸ Under this Moroccan Family code a husband is required to pay a consolation gift to the wife as a result of divorce, irrespective of who was at a fault.¹⁴⁹ A common approach in the 2004 Moroccan law and the Algerian amendments of 2005 is the replacing of the pre-existing lists of gender specific rights and duties pertaining to wife and husband with a single provision on 'mutual rights and duties of the spouses' which include jointly managing the affairs of house and children and, in uncommon reference, sharing decisions on family planning (Morocco) and the 'spacing of births'

(Algeria).¹⁵⁰ At the same time, the laws leave the wife's maintenance an obligation on the husband.¹⁵¹ Rather than employing the term 'disobedience', the

¹⁴⁴ Id.

¹⁴⁵ Id.

¹⁴⁶ Lynn , supra note 2, P 144.

¹⁴⁷ Nasir, supra note 8, p. 106.

¹⁴⁸ Balchin, supra note 22, p.211.

¹⁴⁹ Esposito, J. L and Delong-Bas, N (Chapter II verse 236, 237), p.98.

¹⁵⁰ Algerian law no. 05-02 2005 Art. 10 amending Art. 36 of the 1984 law; Moroccan Law no.70-03 of 2004 Art. 51.

¹⁵¹ Lynn , supra note 2, P 96.

Moroccan law allows for the lapse of the wife's right to maintenance where she refuses to comply with a court ruling requiring her to return to the marital home.¹⁵²

So the present Acts that are now in force in Tunisia, Algeria and Morocco make no mention of the wife's duty of obedience to her husband in discussing the duties of husband regarding maintenance.¹⁵³

3.7 Malaysia

Malaysia has a federal system in which the various states have jurisdiction in developing and applying family laws.¹⁵⁴ The Malaysian Islamic Family Law as regards post-divorce maintenance is established on the basis of Chapter II Verse 241.¹⁵⁵ The Islamic Family Law (Federal Territory) Act 1984 provides, in addition to the woman's right to maintenance, that a woman who has been divorced without just cause by her husband may apply to the Shari'a Court for Mutat and the court may, after hearing the parties and after being satisfied that the woman has been divorced without just cause, order the husband to pay such sum as may be fair according to the hukum Shari'a.¹⁵⁶ Moreover, the Shari'a courts in Malaysia have highlighted the distinction between the iddat maintenance and mutat or post-divorce maintenance.¹⁵⁷ Many scholars confuse iddah with divorce.¹⁵⁸ In fact, iddah is a continuation of the marriage, being a waiting period during which a divorce pronouncement may be revoked.¹⁵⁹ Thus during this time the husband and wife continue to be within a legally married state and therefore the question of mut'a at this stage does not arise.¹⁶⁰ The courts are of the view that during the iddat

¹⁵² Arts. 194 and 195. The provision in the 1984 Algerian law (Art. 37(1)) requiring the husband to maintain his wife and providing for its lapse (where the parallel French text of the law published by the Ministry of Justice translates nushuz as 'abandoning the conjugal dwelling') was removed by the 2005 amendments. A later provision however (Art. 74) also obliging the husband to maintain his wife was left intact.

¹⁵³ Lynn, supra note 2.

¹⁵⁴ Balchin, supra note 22, p.211.

¹⁵⁵ Shahid, supra note 20.

¹⁵⁶ Sec. 56 Islamic Family Law (Federal Territory) Act 1984.

¹⁵⁷ Shahid, supra note 20.

¹⁵⁸ Pereira, supra note 30.

¹⁵⁹ Id.

¹⁶⁰ Id.

the woman is entitled to maintenance as a wife.¹⁶¹ It is after the completion of the iddat period that the divorce becomes effective and thus the question of post-divorce maintenance arises especially in case where the divorce was arbitrarily brought by the husband.¹⁶²

3.8 Libya

In Libya whoever is at fault is liable to pay compensation to the other party at divorce.¹⁶³ The Libyan law disallows a woman with means from seeking divorce from an impoverished husband on grounds of his failure to maintain her, requiring her instead to maintain him and their children.¹⁶⁴ Rather Libya's 1984 law requires a wife with means to maintain her husband and their children at times when her husband is needy.¹⁶⁵ It makes no mention of obedience in its listing of the wife's and husband's rights, and declares the retrospective abrogation of all rulings of ta'a ('as if they did not happen').¹⁶⁶

3.9 Egypt

In Egypt Muslim couples are automatically governed by Muslim family laws.¹⁶⁷ Prior to codification, Egyptian personal law had been primarily based on the Hanafi School.¹⁶⁸ Judges found themselves being forced to apply manifestly unjust rulings in cases of maintenance and divorce.¹⁶⁹ Thus Egypt adopted some of the principles of Maliki and Shafi Schools in cases of maintenance and some other matters.¹⁷⁰ The Egyptian laws determine cases where divorce is by the unilateral will of the husband and not by mutual agreement.¹⁷¹ The laws stipulate mataa or mut'a, in addition to maintenance for divorced women, after consummation.¹⁷² Further, in that country arrears of maintenance are deemed a debt against husband from the date he fails to maintain until debt is paid or excused.¹⁷³ Besides, claims

¹⁶¹ Shahid, supra note 20.

¹⁶² Id.

¹⁶³ Esposito and Delong, supra note 149.

¹⁶⁴ Unless she did not know of his impoverishment before the marriage. Art. 40. The Omani code (Art. 109 c)) also disallows a wealthy wife to seek divorce from an impoverished husband.

¹⁶⁵ Lynn, supra note 2, P 95.

¹⁶⁶ Id.

¹⁶⁷ Balchin, supra note 22.

¹⁶⁸ Pereira, supra note 30.

¹⁶⁹ PLD 1978 Quetta, P. 55.

¹⁷⁰ Pereira, supra note 30.

¹⁷¹ Id

¹⁷² Id.

¹⁷³ ASK, amazon.com, access at 4.42 pm on 3rd January 2011.

for maintenance are not heard for past period exceeding one year from date of claim.¹⁷⁴ Besides that, wife's leaving the home for lawful work are not deemed disobedience so long as she does not abuse this right or it is not contrary to interests of her family, with proviso that husband has not asked her to refrain from exercising right to work.¹⁷⁵

3.10 Turkey

While the old Turkish Civil Code of 1926 was abolished, the Turkish Parliament accepted 1030 amendments to Turkey's Civil Code, signaling the victory of a protracted lobbying campaign by the country's women's movement.¹⁷⁶ Article 41 of the Constitution of Turkey (amended) now states that "The family is the foundation of Turkish society and is based on equality between spouses".¹⁷⁷ However, the spouse who is deserted without rightful reason is accepted as the injured party in a divorce case and can demand alimony and damages.¹⁷⁸ Therefore, the party who finds him or herself in a financially difficult position on account of divorce may, provided that he or she is not at greater fault, claim alimony from the other side to meet his or her living costs for an indefinite period of time.¹⁷⁹ The amount of the alimony has to be commensurate with the paying party's financial capacity.¹⁸⁰ Previously, there was a provision that for the husband to apply for alimony from the wife, the wife must have adequate financial means.¹⁸¹ This has been removed on the grounds of discrimination against men and by the inclusion of a new art.¹⁸² Thus both spouses are now equally liable to pay alimony.¹⁸³ Nevertheless, depending on the court, alimony may be paid in a single lump sum or periodically.¹⁸⁴ Periodical compensatory damages and alimony payments terminate automatically in the event of the

¹⁷⁴ Id.

¹⁷⁵ Id.

¹⁷⁶ Balchin, *supra* note 22, p. 216.

¹⁷⁷ The New Legal Status of Women in Turkey, Women for Women's Human Rights (WWHR)-NEW WAYS, April 2002, p. 3

¹⁷⁸ Ela Anıl, Canan Arın, Ayfle Berkay Hacımirtazoğlu, Mehvefl Bingöllü, Pınar Akkaracan, Liz Ercevik Amado; TURKISH CIVIL AND PENAL CODE REFORMS FROM A GENDER PERSPECTIVE: THE SUCCESS OF TWO NATIONWIDE CAMPAIGNS; Women for Women's Human Rights (WWHR) - NEW WAYS First edition Istanbul, February 2005, p. 40.

¹⁷⁹ *Supra* note 177, p. 36.

¹⁸⁰ Id.

¹⁸¹ Former art. 144, the Turkish Civil Code.

¹⁸² *Supra* note 177, p. 36.

¹⁸³ Art. 175, the Turkish Civil Code.

¹⁸⁴ *Supra* note 177, p. 36.

remarriage or death of one of the parties.¹⁸⁵ The same payments are cancelled by court decision if the receiving party lives with someone else as man and wife without a formal marriage, ceases to be poor or leads a dishonorable life (article 176 of the Civil Code).¹⁸⁶ There are also some of the arts. which are also related to it. The Code provides the parties with an opportunity to institute a case in the region of the domicile of the parties.¹⁸⁷ Besides it also mentions the limitation of filing a suit for claiming maintenance.¹⁸⁸

3.11 Iran

Iranian marriage law rules that maintenance includes residence, food, clothing and reasonable household goods.¹⁸⁹ However, under the Iranian law, the duties and rights of the husband and wife are not the same.¹⁹⁰ The husband is the head of the household,¹⁹¹ has the entire duty of maintaining his wife and children,¹⁹² and providing their domicile.¹⁹³ She has the duty of obedience, tamkin, and, if she obeys her husband, the right to be maintained, nafaqa.¹⁹⁴ Two articles of the Civil Code define maintenance.¹⁹⁵ The first, Article 1199, deal with the maintenance of children.¹⁹⁶ The second, Article 1206, allows a wife to claim all previous non-payments by lodging her complaint at a court; if the husband is bankrupt, then this is considered a prime debt which must be resolved before other settlements have been made.¹⁹⁷ Indeed, in the case of the husband's failure to provide maintenance, the wife can approach the court, which will direct the husband to pay the scale of maintenance which it considers appropriate, and if the court order cannot be executed, the wife may proceed to an application for the dissolution of the marriage.¹⁹⁸ If he enters into another such contract of marriage during the marriage, or if he leaves her, she continues to have the right

¹⁸⁵ Id

¹⁸⁶ Id

¹⁸⁷ Art. 177, the Turkish Civil Code.

¹⁸⁸ Art. 178, the Turkish Civil Code.

¹⁸⁹ Nasir, supra note 8.

¹⁹⁰ Halper, supra note 38, p. 94.

¹⁹¹ Civil Code art. 1105.

¹⁹² Civil Code, arts. 1106, 1199.

¹⁹³ Civil Code, art. 1107.

¹⁹⁴ Civil Code, arts. 1106-1108; Halper, Louise; Law and Women's Agency in Post-Revolutionary Iran, p. 95.

¹⁹⁵ Moghadam, supra note 42, p. 6-7.

¹⁹⁶ Ibid, p. 7.

¹⁹⁷ Id.

¹⁹⁸ Nasir, supra note 8, p. 106.

to support, and may even have the right to a higher level of maintenance, should he provide it to another wife.¹⁹⁹ The court will fix a sum and even order retroactive payments of maintenance to the wife.²⁰⁰ In temporary marriage,²⁰¹ a wife is entitled to maintenance only if the contract stipulates such. The exception to the wife's lawful right of maintenance regardless of personal means emanates from modern Tunisian law and the Zahiris, named after the Andalusian jurist, ibn Hazm al-Zahiri.²⁰³ It is held by al-Zahiri that should the husband be destitute but married to a wealthy wife, then it is her duty to maintain the household.²⁰⁴ Modern Tunisian law, whilst adhering to the general Shari'ah principles, rules that a wife who has means of her own is expected to contribute to the maintenance of the family (Art. 23).²⁰⁵ In fact, amendments in 1992 broke new ground in divorce provisions of the Shi'a school of law in Iran.²⁰⁶ They limit men's ability to act capriciously and protect women by providing them with some financial support, notably the right to claim compensation for household services rendered to the husband during marriage.²⁰⁷ This version of wages for housework, *ujrat ul-mithl*, is considered a major achievement by the advocates of women's rights in Iran.²⁰⁸

4. Conclusion

The effective implementation of maintenance rulings for wives and children where husbands are able but unwilling to meet their obligations in this regard is a major preoccupation for poor women, although their voices were not the first to be heard in the efforts to reform family law in the region.²⁰⁹ In the words of Justice Mustafa Kamal:

"If left destitute after divorce, the divorced women, under Islamic dispensation, are entitled as of the right to claim maintenance from their opulent prescribed relations. If not so available, the state is bound to maintain them. Those who do

¹⁹⁹ Halper, *supra* note 38, pp. 95-96.

²⁰⁰ Moghadam, *supra* note 42, p. 6.

²⁰¹ Iranian law permits temporary marriage, known as *sigheh*, but it must be for a fixed time period.

²⁰² Moghadam, *supra* note 42, p. 6.

²⁰³ Nasir, *supra* note 8, p. 106.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Moghadam, *supra* note 42, p. 8.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ Lynn, *supra* note 2.

not find solution to the problems of women after divorce within shariat may usefully explore a compulsory realization of Zakat by the state and will soon find that there will be a dearth of recipients of Zakat".²¹⁰ Thus, echoing with the learned judges we can also seek a change of attitude towards women by implementing the true Islamic law to provide Zakat to these destitute women and make them economically solvent and empowered.²¹¹ Moreover, demands for state intervention may propose the state advancing payments to the claimants and then seeking to recover them from the man (for example through deductions from his salary if he is a public employee).²¹² Iraq's revolutionary Command Council established a 'temporary maintenance fund' of this type from the general budget in 1980; Egypt's 2000 legislation instituted a system based on payments from the Nasser Social Bank, but serious problems arose in the early years of its implementation, and it was not until late 2004 that further legislation provided the resources needed to advance maintenance payments; in Palestine, a law establishing a 'maintenance fund' that had been the target of advocacy efforts by women's groups was approved before the legislature turned its attention to the substantive text of family law.²¹³ So it is an urgent need to implement maintenance rulings with a view of giving redress to the poor destitute divorced women.

²¹⁰ 51 DLR 1999 (AD), Per Mustafa Kamal, J., at para 146.

²¹¹ Monsoor, *supra* note 3, p. 73.

²¹² Lynn, *supra* note 2.

²¹³ Iraqi Revolutionary Command decisions 252 and 1239 of 1980. On Egypt, see Fawzy 2004 70 (and also on the debate as to the utility of imprisoning defaulting husbands). In Palestine the Maintenance Fund Law was approved by the legislature on 7 April 2005 and signed by President Mahmud Abbas on 26 April 2005. Tunisia established such a fund in a 1993 law: Chekir 2000 144.