

**“FOR DIVORCED WOMEN MAINTENANCE (SHOULD BE PROVIDED ON A REASONABLE (SCALE). THIS IS A DUTY ON THE RIGHTEOUS”.
- THE QURAN**

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The Quran and Sunnah obligate a Muslim husband to pay maintenance to his Muslim wife or divorced Muslim wife in principally four separate instances namely, (i) maintenance during the life and subsistence of the marriage (often claimed as ‘past maintenance’)¹, (ii) maintenance up till iddat period upon divorce² (iii) maintenance up till a two year period, upon divorce, if the woman is breast feeding a child born out of the wedlock, at the time of the divorce³ and (iv) maintenance after the divorce⁴. All these categories of maintenance are part of the Muslim Personal Law. The subject matter of this article is the said fourth category of maintenance i.e. post-divorce maintenance (Mata’a) for a Muslim woman and its recognition and acceptance, or lack thereof, in the Muslim family laws and legal system of Pakistan.

Under the Pakistani statutory regime, the substantive legal right of a Muslim wife to claim maintenance is stipulated in the Muslim Family Laws Ordinance 1961 (“**MFLO 1961**”), whereas, Family Courts Act 1964 (“**FCA 1964**”) deals with the procedure to be adopted by the Muslim wife (or divorced wife) before the family Court to claim such maintenance. Both the said statutes, arguably, codify the four types of maintenance. While the said statutes endorse the right of a Muslim wife to claim maintenance during the subsistence of her marriage, neither defines nor explains as to what ‘maintenance’ means or includes. More pertinently, both MFLO 1961 and FCA 1964, despite being based on the Muslim Personal Law, make no provision for post-divorce maintenance (*Mata’a*) for a Muslim woman.

Regardless of the ambiguity as to the meaning, description, characterisation or scope of ‘maintenance’ as codified in the MFLO 1961 and/or FCA 1964, maintenance is claimed by a Muslim wife or a divorced Muslim woman and consequently accepted or rejected by the Honourable Courts of Pakistan in view of Section 9 of the MFLO 1961⁵ read with Section 17A of the FCA 1964. As a consequence thereof, there is a rich legal literature in the form of case law catering to, and settling claims of maintenance, by Muslim wives or divorced Muslim women in Pakistan.

¹ Quran: Surah An-Nisa: Verse 34

² Quran: Surah At-Talaq: Verse 6

³ Quran: Surah Al-Baqarah: Verse 233

⁴ Quran: Surah Al-Baqarah: Verse 241

⁵ *Muhammad Najeeb v. Mst. Talat Shahnaz and others* reported at 1989 SCMR 119

Since the promulgation of the MFLO 1961 and/or FCA 1964, out of the afore-stated four categories of maintenance, the Honourable Courts of Pakistan have endorsed and effectively settled the law in the positive for a Muslim wife or divorced Muslim woman, whose case falls in any one or more of the first three categories thus allowing maintenance (based on the injunctions of Islam⁶⁶), despite that neither the MFLO 1961 nor FCA 1964 has any explicit legal provisions in this context. Further, the fourth category has also not yet been dilated upon by the Honourable Courts of Pakistan.⁷

The structure of society in Pakistan encourages women to restrict their role to care of the family, and in general, their activities are restricted to the confines of the house. Consequently, termination of financial support from the spouse upon breakdown of marriage leaves women from all strata of society extremely vulnerable. Financial protection for women in marriage and upon divorce is not alien to Islamic principles. Islamic doctrine of *Mata'a* refers to award of maintenance to the divorced Muslim woman for life or till she remarries, piecemeal or in a one-time transaction.⁸ The concept of *Mata'a* comes from Quran in Surah Al-Baqarah: Verse 241, where the Almighty ordains that:

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

In the context of the rights of Pakistani Muslim women, it is the responsibility of the State to take appropriate legislative action and measures for the protection and enforcement of such fundamental rights conferred by Chapter I of Part II of the Constitution of the Islamic Republic of Pakistan, 1973 (“**Constitution**”), namely in Articles 8, 9, 14, 24 & 25(3) (“**Fundamental Rights**”). The State is further obligated by the provisions of Articles 2-A, 31, 37, 38 & 227 of the Constitution.

‘MAINTENANCE’: DOCTRINE OF MATA’A

Marriage in Islamic law is a civil contract that gives rise to certain rights and obligations between husband and wife. In Islamic law, it partakes both the nature of ‘*Ibadat*’, or devotional acts, as well as ‘*Muamalaat*’, or dealings among men. As *Ibadat*, marriage is the fulfilment of a moral imperative for leading a good Muslim life, and as *Muamalaat*, it is the binding legal contractual nature of marriage that requires the fulfilment of certain obligations including ‘*Nafaqah*’, or maintenance, which the husband is bound to provide to his wife (and children).⁹

⁶⁶ *Sher Zaman v. Mst. Mahzari* etc. reported at 2018 YLR 128: payment of maintenance is governed by injunctions of Islam.

⁷ *Inamul Islam v. Hussain Bano* reported at PLD 1976 Lah 1466: In this case, the Honourable Court granted maintenance from date of separation till effectiveness of *talaq* plus 90 days and an observation was made that ‘*maintenance beyond the period of iddat is illegal and without lawful authority*’. However, no reasoning or discussion about it has been stated by the learned Judge. However see *Muhammad Aslam v. Muhammad Usman* etc. reported at 2004 CLC 473

⁸ Thematic Report on the Issue of Financial Protection Upon Divorce: Muslim Women’s Rights under Family Laws in Pakistan- Article 16 for Consideration by CEDAW Committee in its 75th session 15th-28th February 2020. Prepared and Submitted by Fauzia Viqar.

⁹ Ayesha Shahid, Post-Divorce Maintenance for Muslim Women in Pakistan and Bangladesh: A Comparative Perspective, *International Journal of Law, Policy and the Family* 27(2), (2013), 197–215

The provision of maintenance which a Muslim husband is bound to provide to his Muslim wife finds its mention in the MFLO 1961 and the FCA 1964. The relevant provisions of the said statutes are as follows:

MFLO 1961: Section 9(1)

“Maintenance.— (1) If any husband fails to maintain his wife adequately, or where there are more wives than one, fails to maintain them equitably, the wife, or all or any of the wives, may, in addition to seeking any other legal remedy available, apply to the Chairman who shall constitute an Arbitration Council to determine the matter, and the Arbitration Council may issue a certificate specifying the amount which shall be paid as maintenance by the husband.”

FCA 1964: Section 17A

“Suit for maintenance.— (1) In a suit for maintenance, the Family Court shall, on the date of the first appearance of the defendant, fix interim monthly maintenance for wife or a child and if the defendant fails to pay the maintenance by fourteen day of each month, the defence of the defendant shall stand struck off and the Family Court shall decree the suit for maintenance on the basis of averments in the plaint and other supporting documents on record of the case.

(2) In a decree for maintenance, the Family Court may:

(a) fix an amount of maintenance higher than the amount prayed for in the plaint due to afflux of time or any other relevant circumstances; and

(b) prescribe the annual increase in the maintenance.

(3) If the Family Court does not prescribe the annual increase in the maintenance, the maintenance fixed by the Court shall automatically stand increased at the rate of ten percent each year.

(4) For purposes of fixing the maintenance, the Family Court may summon the relevant documentary evidence from any organization, body or authority to determine the estate and resources of the defendant.”

By virtue of the afore-quoted provisions of the MFLO 1961 and FCA 1964 as well as multiple interpretations thereof by the Honourable Court of Pakistan through various judicial precedents, a divorced Muslim wife has been considered entitled for the maintenance under the following circumstances:

- a) Past maintenance (for the period during the subsistence of marriage when wife was not maintained);
- b) During the period of *iddat*;

- c) For the two year period when the divorced Muslim wife/mother breast feeds a new born baby from the wedlock¹⁰;

While all the afore-stated circumstances for award of maintenance are well entrenched in the juridical practice, the same do not find any explicit mention in the MFLO 1961 and/or the FCA 1964 or any other codified law in force in Pakistan. Further the MFLO 1961 and/or the FCA 1964 are also silent as to the provision of post-divorce maintenance (*Mata'a*) to the divorced Muslim women. The Honourable Courts of Pakistan have also not yet dilated upon this category of maintenance.¹¹

MUSLIM WIVES' RIGHT TO MAINTENANCE

The general, over encompassing right of women to maintenance is expressed in the Quran: Surah An-Nisa; Verse 34, which states that:

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

The Quran on the issue of maintenance further reminds the Muslim husbands, their duty towards their pregnant wives in Surah At-Talaq: Verse 6 as:

“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. And if they carry (life in their wombs), then spend (your substance) on them until they deliver their burden: and if they suckle your (off spring) give them their recompense....”

After establishing the general liability of men for the maintenance of women, the Quran, further, in Surah Al-Baqarah: Verse 233 lays down that:

“The mothers shall give suck to their offspring for two whole years, if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms....”

It is evident from the above quoted that concern is shown for wives not only at the time of their pregnancy but also at the nursing stage of the infant child. Thus, the Quran makes it very clear for the Muslim husbands to provide financial assistance to their wives when they carry life in their womb. Accordingly, the husband is made liable, according to his means, for the extra expenses and maintenance of his pregnant wife until such time she delivers the child and for an additional two years from the date of the birth of the child, if she suckles the child herself.

¹⁰ *Muhammad Aslam v. Muhammad Usman* etc reported at 2004 CLC 473

¹¹ *Inamul Islam v. Hussain Bano* reported at PLD 1976 Lah 1466: In this case, the Honourable Court granted maintenance from date of separation till effectiveness of *talaq* plus 90 days and an observation was made that ‘maintenance beyond the period of iddat is illegal and without lawful authority’. However, no reasoning or discussion about it has been stated by the learned Judge. See the more contemporary contra view in *Muhammad Aslam v. Muhammad Usman* etc. reported at 2004 CLC 473

DIVORCED MUSLIM WIFE'S RIGHT TO MAINTENANCE

The Quran¹² dictates that divorce is to be achieved in a regulated form that maintains dignity and morality. The Quran not only explains the procedure for divorce, but also shows concern for the divorced Muslim wife's condition instantly after the pronouncement of *talaq*. The divine obligation requires that a divorced Muslim woman should not be turned out of the house immediately. This saves the divorced Muslim woman from the danger of becoming destitute at once. Further, the Quran shows respect for the divorced Muslim woman and dictates that during the *iddat* period the woman shall be enabled to live in the same manner as before divorce. This certainly seeks to alleviate the harsh consequences of sudden and immediate termination of marital relations.

The Quran in Surah Al-Baqarah: Verses 236 & 237 also considers the position of the Muslim women who are divorced before consummation of marriage and therefore relate to a situation where there is no *iddat* period. The Verses 236 and 237, respectively, read as follows:

“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.”

“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.....”

It becomes obvious from the translation of the above Quranic Verses (Surah Al-Baqarah: Verses 236 & 237) that a Muslim man who divorces his Muslim wife before consummation should make a lump sum payment if no dower has been fixed as yet. The size of this payment 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 Muslim wife who is divorced after her dower was fixed, but where the marriage was not consummated, the Muslim husband should pay her half of the stipulated amount.

The Quran, in Surah Al-Baqarah: Verse 241 deals with the situation where a marriage has been consummated and advises maintenance provisions for such divorced Muslim women. Surah Al-Baqarah: Verse 241 reads as follows:

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

Below are given some of the most commonly used other translations of Surah Al-Baqarah: Verse 241 by translators belonging to various regions of the world, in chronological order:

¹² Surah At-Talaq: Verse 1 “O prophet, when your people divorce women, divorce them at a time when the period of 'Iddah may start. And count the period of 'Iddah, and fear Allah, your Lord. Do not expel them from their houses, nor should they go out, unless they come up with a clearly shameless act. These are the limits prescribed by Allah.....” - translation by Mufti Taqi Usmani.

“And for the divorced let there be a fair provision. This is a duty in those who fear God” - Rodwell. M., The Koran. London 1909. p. 364.

“And unto those who are divorced, a reasonable provision is also due; this is a duty incumbent on those who fear.” - Sale, G., The Koran. London 1923, p. 29.

“For divorced women a provision in kindness; a duty for those who ward off (evil).” - Pickthall, M., The meaning of the glorious Koran. London 1930, p. 56.

“For divorced women maintenance (should be provided on a reasonable (scale). This is a duty on the righteous”. - Ali, A. Y., The Holy Quran: Translation and Commentary. Lahore 1934, p. 96.

“Women who are divorced have a right to a reputable maintenance - a duty upon those who act piously.” - Azad, A.K., The Tarjumanal-Quran. Vol. 2, London 1967, p. 109.

“And for the divorced women, let there be a fair provision. This is an obligation on those who are mindful of God.” - Bell, R., The Quran. Vol. I, Edinburgh 1937, p. 34.

“For divorced women also there shall be provision according to what is fair. This is an obligation binding on the righteous”. - Khan, M.Z., The Quran. London 1971, p. 38.

“And for the divorced women, provision (must be made) in kindness. This is incumbent on those who have regard or duty.” - Ali, M., The Holy Quran. Sixth edition. Lahore 1973, p. 104.

“Reasonable provision should also be made for divorced women. That is incumbent on righteous men”. - Dawood, N.J., The Koran. London 1978, p. 358.

“And for the divorced women maintenance should be provided according to a fair usage, this is duty on the righteous ones”. - Jullundri, A.A.K., Translation of the glorious Holy Quran. Lahore 1978, p. 230.

“Divorced women should be given an allowance commensurate with their husbands' means. This is incumbent on all pious believers”. - Ahmad, M.M. The Koran. London 1979, p. 41.

“There shall be for divorced women provision honourable-an obligation on the god fearing.” - Arberry, A.J., The Koran interpreted. London 1980. p. 62

“For the divorced, equitable alimony shall be provided. This is an incumbent duty upon the righteous”. - Khalifa. R., Quran: The final scripture. Tucson 1981. p. 26.

“Making a fair provision for women who are divorced is the duty of those who are God fearing and pious.” - Ali. A. Al-Quran. Princeton, 1988. p. 42.

“Likewise, let there be a fair provision for the divorced women; this is an obligation on the God-fearing”. - Maududi. S.A.A. Towards understanding the Quran. Vol. I, English version of Tafim al-Quran., Leicester 1988. p. 185.

“And for the divorced women (too) (shall) be a provision in fairness; (this is) a duty on those who guard them-selves (against evil)”.- Ali, M.A., The Holy Quran. New York 1988, p. 167.

“And for the divorced women the provision according to rule-incumbent on the pious ones”. - Usmani, A.S.A., The Noble Quran, Tafseer-e-Usmani, NY., p. 137.

“And for the divorced women shall be a reputable present; a duty on the God-fearing.” - Daryabadi, M.A.M., The Holy Quran. (English translation by Mohammad Ashfaq Ahmed) N.Y, p. 38.

“Reasonable provisions must be made for divorced women—a duty on those mindful of Allah.”— Dr. Mustafa Khattab, the Clear Quran

“And for divorced women, maintenance (should be provided) on reasonable (scale). This is a duty on Al-Muttaqûn” — Muhammad Taqi-ud-Din al-Hilali & Muhammad Muhsin Khan

“The divorced women deserve a benefit according to the fair practice, being an obligation on the God-fearing.”— Mufti Taqi Usmani

“And for the divorced women (there shall be) (the necessary) enjoyment with beneficence, truly (binding) on the pious.”— Dr. Ghali

“Divorced women shall also have such maintenance as is considered fair: this is a duty for those who are mindful of God.”— Abdul Haleem

All the above translations¹³ of Verse 241 of Surah Al-Baqarah establish that Quran indicates that some maintenance should be given to the divorced Muslim woman. However, the Quran has left it for the Muslim husband himself to decide a fair quantum or type of such post-divorce maintenance.

OPINION OF HANAFI, SHAAFI, HANBALI & MALIKI SCHOOLS

There exist divergent opinions of Islamic jurists and scholars on post-divorce maintenance (*Mata'a*). *Hanafi* scholars have adopted a stricter approach, recognizing payment of post-divorce maintenance (*Mata'a*) as mandatory only in those marriages where dower (*Mahr*) is not fixed at the time of *Nikah* (marriage) and where a woman is divorced before the marriage is consummated. *Hanafi* scholars argue that post-divorce maintenance (*Mata'a*) is mandatory only in this situation because it is a substitute for a woman's right to fifty per cent of the dower (*Mahr*). The *Hanafi* scholars do not, however, consider Verse 241 which refers to giving reasonable maintenance to the wife. The *Hanbali* school also adopts a similar

¹³ Fayyaz-ur-Rehman, Islamic Law of Maintenance for Wives in Pakistan and Afghanistan Since 1960, Doctor of Philosophy, University of Peshawar, Peshawar, 2003.

position and refuses to recognize post-divorce maintenance (*Mata'a*) beyond *iddat*. Compared to *Hanafi* and *Hanbali* scholars, the *Shaaafi* school has adopted a more balanced view, considering that any divorced Muslim woman who is not responsible for the divorce is entitled to post-divorce maintenance (*Mata'a*). *Shaaafi* provided a list of those who are eligible for post-divorce maintenance (*Mata'a*). The position adopted by the *Shaaafi* and *Maliki* scholars is liberal and flexible compared to the strict approach followed by the other two schools of thought. In Pakistan, the *Hanafi* school is predominant and this may be the reason for the absence of debate on the subject.¹⁴

MIDDLE EASTERN PERSPECTIVE

Compared to South Asian Muslim scholars and jurists, scholars from the Middle East have interpreted Quranic Verses dealing with post-divorce maintenance (*Mata'a*) more liberally. More so, legislative reforms in view of Islamic law, post-divorce maintenance (*Mata'a*) has been included within the family laws of Muslim countries¹⁵ like Iran¹⁶, Iraq¹⁷, Qatar¹⁸, Egypt¹⁹, Tunisia,²⁰ Brunei-Darussalam,²¹ Turkey.²² Further, post-divorce maintenance (*Mata'a*) has been recognized and enhanced beyond *iddat* in many selective cases through legislation in Kuwait, Syria, Algeria, Morocco, Malaysia²³ and Jordan²⁴. The objective of

¹⁴ *Ibid* footnote 21

¹⁵ http://www.ljcp.gov.pk/Menu%20Items/Reports_of_LJCP/11/103.pdf

¹⁶ Concept of *Ujrat Ul Misl* is equivalent to post-divorce maintenance under which the husband is bound to pay to the wife compensation for three years if she is not at fault and not responsible for divorce (Article 1130–1133 of the Civil Code).

¹⁷ Section VIII of Law on Divorced Wife's Right to Residence 1983 provides that a suitable residence should be provided to divorced women by their husbands, subject to certain specified conditions. This law was enforced in Iraq on 8 August 1983 by a decree of the Revolutionary Command Council.

¹⁸ Post-divorce maintenance can be awarded to women for three years (Section 115 of the Family Reform Code 2005).

¹⁹ Under Article 18-A of the Law on Maintenance and Personal Statute 1920, a wife who after consummation of her valid marriage is divorced by the husband without her consent and without any fault on her part shall be entitled, in addition to maintenance, to *Mata'a*, equivalent to at least two years' maintenance, subject to consideration for financial status of the husband, 'circumstances of the divorce and duration of the marriage between the parties. The husband shall be entitled to pay such *Mata'a* in installments.

²⁰ Under Section 37(2) of Code of Personal Status 1956, it is stated that as regards the woman to be indemnified for material injury in terms of money, the same shall be paid to her after the expiry of *iddat* and may be in the form of retention of the matrimonial home. This indemnity will be subject to revision, increase or decrease in accordance with the changes in the circumstances of the divorced wife until she is alive or until she changes her marital status by remarriage.

²¹ Under Section 158(3) of the Religious Council State Custom and Kathis Courts Enactment 1955, a relevant provision says "A woman who has been divorced and who is not entitled to an order for maintenance under subsection (2) may apply to the court of the Kathi Land that court may, if satisfied that it is just and proper to do so in view of all the circumstances of the case, make an order against the former husband for the payment by him of such sums for such period as the court considers fit; provided that no such order shall require the former husband to pay to his former wife any amount in excess of one hundred dollars per month."

²² Under Section 133 of Turkish Civil Code of 1926, there is a provision for payment of compensation to the aggrieved spouse in the cases of divorce, if the facts and circumstances justify it.

²³ Md. Sadekur Rahman1, Hossain Mohammad Younus Sirazi, Post-Divorce Maintenance (MAA'TA) For Muslim Women in Bangladesh, Pakistan and India, IOSR Journal Of Humanities And Social Science (IOSR-JHSS) Volume 23, Issue 2, Ver. 3 (February. 2018) PP 01-10 e-ISSN: 2279-0837, p-ISSN: 2279-0845.

²⁴ Najma Moosa, & Shaheena Karbanee, University of the Western Cape, An exploration of mata'a maintenance in anticipation of the recognition of Muslim marriages in South Africa: (Re) opening a veritable Pandora's box?

such legislation on one hand is to deter the husband from arbitrarily pronouncing a unilateral divorce and on the other to compensate the wife for the injury she has sustained and increasing the financial obligations on the husband to his divorcee wife beyond the payment of dower and maintenance during *iddat*.²⁵

LAWS FOR MAINTENANCE FOR NON-MUSLIM WOMEN IN PAKISTAN

CHRISTIAN WOMEN

In Pakistan, the issue of maintenance for Christian women is dealt with under the Divorce Act, 1869. In any suit under this Act, whether it is instituted by a husband or a wife, the wife may present a petition for alimony pending the suit. Further, the Court, may on any decree declaring a marriage to be dissolved or on any decree of judicial separation obtained by the wife, order that the husband shall, to the satisfaction of the Court, secure to the wife such gross sum of money, or such annual sum of money for any term not exceeding her own life, as having regard to her fortune (if any), to the ability of the husband, and to the conduct of the parties, it thinks reasonable, and for that purpose may cause a proper instrument to be executed by all necessary parties.

PARSI WOMEN

The issue of maintenance for Parsi women is dealt with under the Parsi Marriage and Divorce Act, 1936; the Court may at the time of passing any decree under this Act, order that the husband shall secure to the wife such gross sum or such monthly or periodical payment of money for a term not exceeding her life as, having regard to her own property, if any, her husband's ability and the conduct of the parties, and for that purpose may require a proper instrument to be executed by all necessary parties and suspend the pronouncing of its decree until such instruments shall have been duly executed. The Court, if satisfied that the wife has remarried or has not remained chaste, shall vary or rescind the order.

HINDU WOMEN

There are several laws dealing with rights of Hindu women in Pakistan. Of the most recent is the Hindu Marriage Act, 2017, which states that if a wife is respondent in a petition for termination for the marriage by decree of termination, she may oppose the grant of decree on the ground that the termination of the marriage may result in grave financial hardship for her unless arrangements have been made to the satisfaction of the Court to eliminate such hardship. Further under the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, when allowing a claim for separate residence and maintenance, the Court shall determine the amount to be paid by the husband to the wife therefore, and in so doing shall have regard to the social standing of the parties and the extent of the husband's means.

²⁵ *Ibid* footnote 21

The laws of Pakistan, as stated in the preceding three paragraphs, pertaining to non-Muslim divorced women ensure financial protection which stretched beyond the divorce. The Christian and Parsi women are entitled to gross sum of money, or such annual sum of money or monthly or periodical payment of money for a term not exceeding life. The Hindu women's hardship may be eliminated by arrangements made to the satisfaction of the Court to eliminate such hardship.

PAKISTAN: THE COMMISSION ON MARRIAGE AND FAMILY LAWS, 1955

On 4th August, 1955, the Government of Pakistan announced the formation of a seven member Commission on Marriage and Family Laws ("**1955 Commission**"). The purpose of the 1955 Commission was to examine the then prevailing laws of marriage, divorce, maintenance and custody of children, and to examine the possibility of reforms or any modifications that could give women their due position in society according to the fundamentals of Islam.

The 1955 Commission submitted its reports on 20th June 1956. The concept of post-divorce maintenance (*Mata'a*) was discussed in the report and it was observed that "*a large number of middle aged women who are being divorced without rhyme or reason should not be thrown on the street without a roof over their heads and without any means of sustaining themselves and their children*". The 1955 Commission recommended that "*such discretion should be vested in the Matrimonial Court*"²⁶.

PAKISTAN: LEGAL DEVELOPMENTS AFTER 1960

Some of the reforms proposed by the 1955 Commission, as discussed above, were implemented in the shape of the MFLO 1961 which was a major legal development and in fact, the only reform made to the traditional Muslim family laws in Pakistan. The MFLO 1961 was promulgated, in the first instance, for the welfare of women. While there is little that the MFLO 1961 says about maintenance for divorced/widowed Muslim wives, section 9 of the MFLO 1961, provided a remedy for the neglected wife or wives to claim maintenance from the husband during the continuation of marriage. This resulted only in codification of at least one of the types of maintenance. MFLO 1961, however, is till date, silent on the issue of the maintenance for divorced/widowed wives during the *iddat* period and after the expiry of the *iddat* period. Further, MFLO 1961 also does not expressly cater to the issue of maintenance of a divorced Muslim woman who suckles an infant born out of the wedlock. After 1961, there was a further enactment in the field of family laws in Pakistan through the FCA 1964. The family Court has the power, under section 17A of the FCA 1964 apart from the MFLO 1961, to order maintenance for the neglected wife/ wives. However, the FCA 1964 also does not provide for any specific remedy or relief in respect of maintenance in the above stated three situations. In fact, FCA 1964 is, in essence, a procedural enactment and therefore no substantive legal rights (other than legal rights qua procedure) can be derived from the said statute.

²⁶ Gazette of Pakistan Extraordinary, published June 20, 1956, at p.1215

WOMEN'S RIGHTS COMMITTEE 1976

On 31st January 1976, the Pakistan Women's Rights Committee ("**1976 Committee**") was set up to devise law reforms, with the purpose of uplifting the social, legal and economic conditions of women in Pakistan. The 1976 Committee, apart from other suggestions, came up with a proposal of maintenance for divorced Muslim women and went further by indicating that a divorced Muslim woman should have a share in her husband's property. The 1976 Committee's suggestions did not achieve any higher pedestal in the shape of a binding statute.

PAKISTAN COMMISSION ON THE STATUS OF WOMEN 1983

On 9th July 1983, the Government of Pakistan established the Pakistan Commission on the Status of Women ("**1983 Commission**"). The 1983 Commission analysed the question of maintenance for divorced women as follows: *"The Holy Quran has also provided that the divorced women are entitled to a comely maintenance even after divorce has taken place. This command of the Quran has been almost completely disregarded in our country. Denial of the right of maintenance was one of the most common complaints of both the rural and urban women brought to the notice of the Commission. It is only that in a neighbouring country legislation on the basis of the above verse of Quran has been sought. It is not uncommon that a husband divorces his wife when she reaches mature years and loses the glamour of youth and sometime(s) the capacity to produce children also. At such an age and stage of life divorce can leave her absolutely without financial support or emotional satisfaction leaving her without any meaning in life. In such circumstances she is plainly entitled to support from one to whom she gave her youthful years of life"*. The 1983 Commission, in its recommendations for divorced Muslim women, came up with the proposal of *"Entitlement of alimony to the wife till she remarries, which as the Quran states, should be each according to his means"*. The recommendations of the 1983 Commission also did not attract any legislative backing.²⁷

The 1955 Committee, 1976 Committee and the 1983 Commission, were primarily formed to review the family laws of those times and to give recommendations for the uplift of women. Apart from the suggestions of the 1955 Commission, some of which were finally implemented in the shape of the MFLO 1961, no serious efforts were made by any successive government in Pakistan to enact laws based on the recommendations on the issue of post-divorce maintenance (*Mata'a*). In all three reports, the proposals were to the effect that there need to be laws for the post-divorce maintenance (*Mata'a*) of a Muslim woman even after the expiry of the *iddat* period. The reports are unanimous that the husband should be made responsible to provide post-divorce maintenance (*Mata'a*) for his divorced wife. Despite the above recommendations, no laws have been implemented that could benefit divorced Muslim women of Pakistan.

²⁷ Ibid footnote 26

LAW AND JUSTICE COMMISSION OF PAKISTAN

The Law and Justice Commission of Pakistan (“LJCP”) is a Federal Government institution created under the Law and Justice Commission of Pakistan Ordinance, 1979, and is, as per the Federal Rules of Business, 1973, a part of the Law & Justice Division. LJCP is headed by the Honourable Chief Justice of Pakistan and comprises other members including the Honourable Chief Justice of Federal Shariat Court, the Honourable Chief Justices of the High Courts, the learned Attorney General for Pakistan, the worthy Secretary, Ministry of Law, Justice and Human Rights and the esteemed Chairperson of National Commission on the Status of Women. LJCP comprises of four other members, one from each province, appointed by the Federal Government, on the recommendation of the Chairman, in consultation with the Honourable Chief Justice of concerned High Court from amongst the persons who are or have been holders of a judicial or administrative office, eminent lawyers or jurists, persons of repute and integrity from civil society, members of the Council of Islamic Ideology or teachers of law in a university or college.

The issue of post-divorce maintenance (*Mata’a*) was taken up by the LJCP in 1998. LJCP held that post-divorce maintenance (*Mata’a*) has been referred to as a parting gift, consolatory gift, or indemnity by various translators and scholars of Islamic law. LJCP also noted that the provisions of post-divorce maintenance (*Mata’a*) are in force in other Muslim countries where it is paid in addition to the payment of dower and maintenance during *iddat*. LJCP expressed the view that there is a need for reform.²⁸

In 2009, the LJCP again discussed in detail a Working Paper ‘Post-Divorce *Mata’a* for Wife’ (Law and Justice Commission, 2009: 5-20), which led to the LJCP submitting a draft Bill, ‘the Muslim Family Law (Amendment) Bill 2009’ to amend the MFLO 1961 by adding a specific clause on post-divorce maintenance (*Mata’a*). However, the said proposal did not see any further progress.

Between 1993 and 2009, the LJCP twice proposed draft laws to provide for post-divorce maintenance (*Mata’a*) by divorcing husbands beyond the period of *iddat*. However, despite the lapse of many years, no action by any of the successive governments (including the present one) of Pakistan has been taken on the recommendations of the LJCP which comprises of the top most legal minds of this country.

COUNCIL OF ISLAMIC IDEOLOGY

The Council of Islamic Ideology (“CII”) is a constitutional body, created by Article 228 of the Constitution, and is as per the Federal Rules of Business, 1973, a part of the Law & Justice Division. CII comprises of a minimum of eight and maximum twenty members (including the Chairman) representing various schools of thought, having knowledge of the principles and philosophy of Islam as enunciated in the Quran and Sunnah or having understanding of the economic, political, legal or administrative problems of Pakistan with at least two of the members to be sitting or retired judges of the Honourable Supreme Court/a

²⁸ *Ibid* footnote 21: Reference to Report No.77:1-13

High Court and one member to be a woman and with at least four members to be scholars who have been engaged in Islamic research/instruction for at least 15 years. In 2008, the CII also recommended enactment of a law on post-divorce maintenance (*Mata'a*). Even after the passage of more than a decade, no action has been taken by any of the successive governments (including the present one) of Pakistan on the said recommendations.

ARTICLES 8, 9, 14, 24 & 25(3) OF THE CONSTITUTION

The Constitution in its preamble states “.....it is the will of the people of Pakistan to establish an order:” “Wherein the principles of democracy, freedom, equality, tolerance and social justice, as enunciated by Islam, shall be fully observed;” and “Wherein the Muslims shall be enabled to order their lives in the individual and collective spheres in accordance with the teachings and requirements of Islam as set out in the Holy *Quran* and *Sunnah*;” “So that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the World and make their full contribution towards international peace and progress and happiness of humanity:” Despite the lapse of many decades, the essence of social justice as enunciated by Islam and as equally mandated by the Constitution is yet to be observed in the sphere of post-divorce maintenance (*Mata'a*).

The Constitution proceeds on the basis that Pakistan is an ideological State and that Islam is Pakistan’s ideology. And, it is a settled principle of interpretation that if there is any ambiguity in a provision of the Constitution or any law made under it, it must be so resolved as to be compatible with the injunctions of Islam.²⁹ Further, so long as existing statutes are not brought in conformity with injunctions of Islam, in respect of their interpretation, application and enforcement, wherein discretionary judicial elements are involved, only that course would be adopted which is in accord with the Islamic philosophy, its common law and jurisprudence.³⁰ The provisions of MFLO 1961 and/or FCA 1964 are not interpreted in a manner compatible with the injunctions of Islam as clearly stipulated in Surah Al-Baqarah, Verse 241.

ARTICLE 8

Despite the significance of the doctrine of post-divorce maintenance (*Mata'a*) as endorsed by various Committees, Commissions, the LJCP and the CII, the State of Pakistan has yet to fulfill its obligations as stipulated under Article 8(1) read with 8(4) of the Constitution as no legislative steps have been taken to bring section 9 of the MFLO or section 17A of the FCA 1964 in conformity with the rights conferred under Chapter I of the Constitution. In absence of such legislative reforms, the rights of divorced Muslim women to seek and obtain maintenance of any type remains devoid of its requisite protection and enforcement.

²⁹ *Hamida Begum v. Murad Begum* reported at PLD 1975 SC 624; *A.M. Qureshi v. USSR* reported at PLD 1981 SC 377; *Zaheeruddin v. State* reported at 1993 SCMR 1718

³⁰ *Haji Nizam Khan v. ADJ, Lyallpur* reported at PLD 1976 Lah 930; *Muhammad Bashir v. The State* reported at PLD 1982 SC 139; *Mian Aziz A. Sheikh v. Commissioner of Income Tax* reported at PLD 1989 SC 613

ARTICLE 9

The inaction by the State of Pakistan in the manner of not taking any requisite legislative steps to codify the doctrine of post-divorce maintenance (*Mata'a*) as part of the MFLO 1961 or through a new statute violates the dictates of Article 9 of the Constitution. The word “life” includes all such rights which are necessary and essential for leading a free, proper and comfortable life. The requirement of enjoying life and the freedoms as contemplated in the Constitution, the personal rights and their enjoyment are nothing but part of life. A Muslim woman is entitled to enjoy her personal rights. Any action or inaction which may create a hazard of life will be encroaching upon the personal rights of a citizen to enjoy the life according to law.

ARTICLE 14

The dignity, as envisaged by Article 14 of the Constitution is that valued and serene condition in a person's social and individual life which is to be guaranteed. The dignity of man is not subject to law but is an unqualified guarantee. By not providing the divorced Muslim women the legal right to seek or obtain post-divorce maintenance (*Mata'a*) under a specific and clear statute, the State has been unable to ensure inviolability of the dignity of such women.

ARTICLE 24

Islamic doctrine of post-divorce maintenance (*Mata'a*) is translated variously as “gratification”, “obligatory gift”, “alimony” and “suitable gift”³¹. It refers to award of maintenance to the divorced wife for life or till she remarries, piecemeal or in a one-time transaction. It is deemed to be a wife's right to receive property, in any form, from her husband at the time of divorce for period beyond *iddat*. The absence of a clear statutory framework ensuring this amounts to deprivation of the property and hence is a violation of Article 24 of the Constitution.

ARTICLE 25

The protection, in Article 25(3) of the Constitution, includes protection of rights, which further include property rights.³² The Constitution proceeds on the presumption that women (and children) need special protection. The underlying object is to treat the women (and children) as a disadvantaged class and to give them a preferential treatment so as to bring them up on a par with the advantaged, so that equality is meaningfully enjoyed. The successive governments (including the present one) in Pakistan have failed to comply with the dictates of the Constitution by not making any special provisions for the protection of the divorced Muslim women's property rights.

³¹ Muhammad Khalid Masud, *The award of mata'a in the early Muslim courts*, in “Dispensing Justice in Islam” Masud, Peters, Powers eds., Brill:2012 (pp. 349-381).

³² *Fazal Jan v. Roshan Din* reported at PLD 1990 SC 661

ARTICLES 2-A, 31, 37, 38 & 227 OF THE CONSTITUTION

ARTICLE 2-A

After the addition of Article 2-A in the Constitution, the Quran and Sunnah have become the supreme law of Pakistan and the Courts are obliged to enforce the existing laws with such adaptations as are necessary in the light of the Quran and Sunnah to uphold the provisions thereof. Similarly, every organ of the State is duty bound to act and implement the Islamic principles as enshrined in the Quran and Sunnah³³ which has become the real effective and positive law of Pakistan.³⁴ Provisions of Article 2-A of the Constitution have made the provisions and principles of law embodied in the Objective Resolution effective and operative. Therefore, every man must now conform to the injunctions of Islam as contained in the Quran and Sunnah. Even the Fundamental Rights must not violate the norms of Islamic injunctions.³⁵ Given the historical evolution of post-divorce maintenance (*Mata'a*) since 1950's in Pakistan, it is clear that the dictates of Article 2-A of the Constitution have not been complied with so far.

ARTICLE 31

Article 31 of the Constitution envisages the intent of the Constitution makers to provide facilities to the Muslims of Pakistan to enable them, individually and collectively, to order their lives in accordance with the injunctions and mandates of Islam in light of the injunctions of the Quran and Sunnah. The Preamble, Articles 2-A and 31, Chapter 3A of Part VII and Part IX of the Constitution make it incumbent upon the State to create conditions which enable the Muslims of Pakistan to order their lives in accordance with the fundamental principles and basic concept of Islam.³⁶ In the absence of a clear statutory framework upholding a divorced Muslim woman's right to seek and obtain post-divorce maintenance (*Mata'a*) the duty to enable them, individually or collectively to order their lives in accordance with the injunctions of Islam in light of Quran and Sunnah will remain unfulfilled.

ARTICLE 37 & 38

Articles 37 & 38 of the Constitution juxtapose to advance the cause of socio-economic principles and should be given a place of priority to mark the onward progress of rights of divorced Muslim women in Pakistan. These provisions become in an indirect sense enforceable by law and thus, bring about a phenomenal change in the idea of co-relation of Fundamental Rights and directive principles of State policy. If an egalitarian society is to be formed under the rule of law, then it has to be, necessarily, by legislative action, in which case it would be harmonious and fruitful to make an effort to implement the socio-economic

³³ *Haji Rana Muhammad Shabbir Ahmad Khan v. Federation of Pakistan* reported at PLD 2001 SC 18

³⁴ *Muhammad Sadiq etc. v. Mst. Ruqaya Khanum* reported at PLD 2001 Kar 60; *Mst. Sakina Bibi v. Federation of Pakistan* reported at PLD 1992 Lah 99

³⁵ *United Bank Limited v. M/s Gravure Packaging (Pvt) Ltd* reported at 2001 YLR 1549

³⁶ *Mian Abdul Razzaq Aamir etc v. Federal Government of Islamic Republic of Pakistan etc.* reported at PLD 2011 FSC 11

principles enunciated in the Principles of Policy, within the framework of the Fundamental Rights.

ARTICLE 227

Article 227 of the Constitution forbids, inter alia, the suspension of Fundamental Rights, as, such an act comes in direct conflict with Quran.³⁷ The State's inaction to provide for a clear law for providing the divorced Muslim women the legal right to seek post-divorce maintenance (*Mata'a*) amounts to suspension of the Fundamental Rights of divorced Muslim women in Pakistan.

CONCLUSION

It is about time that post-divorce maintenance (*Mata'a*) is recognized and legally declared as a category of maintenance under the injunctions of Islam; something that has already been affirmed by the Council of Islamic Ideology. Consequently, legal recognition should be given to the fact that divorced Muslim women of Pakistan are entitled to seek and obtain post-divorce maintenance (*Mata'a*) in addition to other categories of maintenance, as applicable, under Section 9 of MFLO 1961 read with Section 17A of FCA 1964;

The Government of Pakistan must initiate all appropriate administrative measures to transform the Muslim Family Law (Amendment) Bill 2009, as proposed and drafted by the Law and Justice Commission of Pakistan (or an appropriate alternative), into an Act of Parliament.

³⁷ *Darwesh M. Arbrey v. Federation of Pakistan* reported at PLD 1980 Lah 206