

## Post-Divorce Maintenance for Muslim Women: Which path to follow in Bangladesh?

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### Abstract

*To make the Muslim marriage more congruent and liberal for the followers, Islamic law permits divorce. Divorce might throw a woman towards endangered situation. Hence, the divorcee should be protected in such a way that this legal compliance cannot bring distress for any party to the marriage. This article examines the present legal position and the questions raised with regard to post-divorce maintenance of Muslim women under the Shariah and practice in Bangladesh. In doing so, it tries to examine what existing legal and practical shields are available in the Muslim world considering the societal ramifications.*

**Key Words:** Maintenance, Post-Divorce Maintenance, Mata, Nafaqae,

### Introduction

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

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<sup>1</sup> Rahman, T., A Code of Muslim Personal Law. vol 1, Karachi, 1979, at p.258.

<sup>2</sup> Ibid., at p.257.

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

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

clothes and shelter and can further depend upon the economic conditions of husband and wife.

A Muslim husband, thus, is responsible for maintaining his wife during the marriage. Under Muslim personal law maintenance of the wife is an obligatory duty of the husband. If he neglects or refuses to maintain her without any lawful cause, she has choices at her disposal starting with claiming maintenance to dissolving the marriage. The courts have held that under Muslim personal law maintenance of the wife is an obligatory duty of the husband. If the husband has neglected or refused to maintain her, she is entitled to maintenance from the time the husband neglected or refused to maintain her.<sup>5</sup>

A good number of Shariah scholars hold that (and it is the law and practice in Bangladesh ) following divorce maintenance is payable to the wife for the *iddat*<sup>6</sup> period of three months and not beyond. This rule has been the cause of heavy debates and criticism in volumes of contemporary writings. It is correct that if the rules stand as it is, it may and sure does cause hardship to divorced women without jobs or other means of support. The rule on maintenance may be also looked into in connection with the rules of divorce or right of divorce of the husband. It is generally believed that a husband also has the absolute power to dissolve the contract of marriage any time he wishes.<sup>7</sup> A Muslim male can terminate the marriage contract in any of the three different modes, that is, *talaq-i-ahsan*, *talaq-i-hassan* and *talaq-i-bidat*.<sup>8</sup> Some has argued that Muslim scholars themselves have apparently deviated from the express teachings of the *Sunnah*.<sup>9</sup> Some even favoured the *al-bida* form of divorce and, thus, allowed Muslim men to get rid of their unwanted wives instantly.<sup>10</sup> By patronising the *al-bida* form of divorce, the Muslim scholars have, on the one hand, made it easy for men to throw out their wives at their pleasure. On the other hand, they have left the divorced women indigent. This appears to be a violation of *Quranic* pronouncements.

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<sup>5</sup> *Jamila Khatun v. Rustam Ali*, 48 DLR (AD) (1996) 110.

<sup>6</sup> The period of three monthly cycle for the women to ascertain pregnancy.

<sup>7</sup> Ali, S.A., *Mahommedan Law*. Vol. II, Calcutta, 1929, at p.472.

<sup>8</sup> For further details see e.g. Fyzee, A.A.A., *Outlines of Muhammadan Law*, London 1949, at pp.129-132.

<sup>9</sup> According to the sayings of the Prophet Muhammad (PBUH), "In the eyes of Allah it (divorce) is the most hateful of the lawful things".

<sup>10</sup> The *al-bida* form of Muslim *talaq*, commonly known as triple divorce, is pronounced by the husband in one sitting. It terminates the marriage contract instantly and any chance for reconciliation is foregone.

## Post divorce maintenance

The non debated part of the Islamic law holds that in the event of divorce, the wife is entitled to maintenance for a limited period of approximately three months, i.e. the *iddat* period. Debates start after the end of this period. After the cessation of the *iddat* period, common interpretations of the Islamic law suggests that the man's obligation to maintain his divorced wife is over. There is a general consensus of opinion among the different schools and scholars in Islamic jurisprudence, that a divorced Muslim woman should not be granted maintenance beyond the *iddat* period. A divorced Muslim woman is free to remarry under Islamic law, after her *iddat* period has expired. This reflects the prevailing opinion in Islamic law that a divorced Muslim wife should remarry, and that a woman who needs maintenance should attach herself to a man who can provide her with food and protection. Some desperately impoverished women may need to do this very soon after divorce.

The purpose of the present paper is to understand the views on the possible rights of the divorced Muslim woman after the expiry of the *iddat* period. While there is no dispute among Islamic scholars regarding the provision of maintenance to the wife during her *Iddat*, there is no unanimity of opinion regarding this beyond the *Iddat* period. It is argued here that financial support may be and is available to a divorced women in the form of *Mata'a*.<sup>11</sup>

### *Mata'a*

The support in favour of post-divorce maintenance for a divorced wife after the expiry of *Iddat*, is based upon using the concept of *Mata'a* by some interpreters depending on the *Qur'anic* verses 236, 240, 241 in Chapter II and verse 49 in Chapter 33<sup>12</sup>.

Central to the debate on *Mata'a* is Verse 241 which states that '*For divorced women maintenance (should be provided) on a*

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<sup>11</sup> Moosa and Karbani, 2010

<sup>12</sup> Verse 236 refers to a suitable gift according to the means of the husband to the wife at the time of divorce. Verse 240 deals with the provision of maintenance for widows, and requires Muslim men to make a bequest for 1 year's maintenance and residence for the wife after their death. Verse 240 states that maintenance can be provided for up to 1 year, if the marriage has ended not because of any fault on part of the wife. Whereas verse 49 states that if a marriage ends before consummation, men should make provision for women and release them in an honourable manner.

*reasonable (scale). This is a duty on the righteous*'. The word used in the Arabic text *Mata'a* has been the source of debates. Not all scholars agree that the word means maintenance in the context as we understand when the marriage continues.

'The very Arabic term *mutah* (or *Mata'a* as used in this writing) linguistically connotes enjoyment, pleasure, delight, satisfaction, contentment, and happiness as opposed to gloominess, despair, depression, dejection, melancholy, misery, anguish and grief. Idiomatically it is used to denote the post-divorce financial support, or post-divorce payment, provided by a divorcer to divorcee, in an endeavour to fortify the divorcee's sense of confidence, self-esteem, to empower her with reasonable sustenance as well as to help her maintain social standing with poise and seamliness by toning down the effects of divorce negatively affecting her. John Penrice defined *Mata'a* as household stuff, goods, chattels, provision, and convenience. Dr. Balbaki endeavoured to define *mata'a* as effects, goods, wares; chattel(s). Hans Wehr defines *mata'a* as enjoyment, pleasure, delight, gratification; object of delight, necessities of life; chattel, possession of property; goods, wares, commodities, merchandise, furniture; implements, utensils, household effects; baggage, luggage, equipment, gear; useful article, article of everyday use; things, objects, stuff, odds and ends. Evidently it seems that he tried, in a very scholastic way, to decode the generic features involved in the term *mata'a*'.

*Mut'ah*, as one author scrupulously observes, is one of the three fixed rights billed to the women apart from her right of inheritance in the event of the death of her husband.<sup>13</sup>

Imam Abu Jafar Muhammad ibn Jarir al Tabari believes that *Mata'a* is a strict duty of the husband being ordained by Allah.<sup>14</sup> Similarly Mohammad Ibn Ahmad al-Ansari al-Qurtubi in line with Imam Tabari that *Mata'a* is a binding duty of the Muslims.<sup>15</sup> Imam Fakr al-Din al-Razi holds that the provision of *Mata'a* is mandatory.<sup>16</sup> Ibn-Kathir defines *Mata'a* as compensation to the wife resulting from the loss of divorce.<sup>17</sup>

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<sup>13</sup> Islam, Mohammad Azharul & Nahar, Azizun, Dhaka University Law Journal Vol.22, No 2, Dec 2011 at page101.

<sup>14</sup> Abu Ja'far al-Tabari, *Jami' al-Bayan fi Tafsir al-Qur'an* vol. 2, 81-100

<sup>15</sup> Sheikh, Mohammad Adam, 'Post-Divorce Financial Support from the Islamic Perspective' in Ayoub, Mahmoud (ed), *Contemporary Approaches to the Qur'an and Sunnah* (International Institute of Islamic Thought, 2012) 173.

<sup>16</sup> Ibid at p 177.

<sup>17</sup> Tafsir Ibn Kathir – <http://tafsir.com/default.asp> - accessed on 19 January, 2014

Sheikh Rashid Rida prescribed the rights of the divorcee to post-divorce financial support.<sup>18</sup> Sayyed Abul Ala Maududi in his *Tafsir al-Manar* defined *Mata'a* as a compensation to the wife for severing the marriage contract. Allama Tabtabai believes that *Mata'a* is obligatory in nature and a husband must make provision for the divorced women.<sup>19</sup> Sayyid Qutb in his *In the Shade of the Quran* advocates for *Mata'a* as compensation and distinguishes it with maintenance as prescribed during the marriage.<sup>20</sup> Muhammad Asad however, translated *Mata'a* as maintenance.<sup>21</sup> Dr. Sibayee, another scholar of the modern days, suggests that compensation in the form of *Mata'aa* needs to be paid to the divorced wife till she remarries and if she is not of marriageable age for the rest of her life to allow her to live an honourable life.<sup>22</sup> Rafiullah Sahab analysis historical events that when a wife was divorced servants were provided and even her servant was borne by the husband in addition to the wife getting compensation. Sahab thus argues that if a servant of the divorced wife was provided for, the wife must have been and requests the *Ulama* to study the issue in this light<sup>23</sup>. Khaliq Ishaque, another modern day scholar also urges for post divorce maintenance and equates *Mata'a* with such maintenance<sup>24</sup>.

Divergence of opinions of Islamic scholars on post-divorce maintenance have created divergent practice on the subject in the Muslim communities throughout the world. In addition to what have been described above, varying interpretations have

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<sup>18</sup> Sheikh, Mohammad Adam , 'Post-Divorce Financial Support from the Islamic Perspective' in Ayoub, Mahmoud (ed), *Contemporary Approaches to the Qur'an and Sunnah* (International Institute of Islamic Thought, 2012) 178.

<sup>19</sup> <http://shiasource.com/al-mizan> - accessed on 19 January, 2014

<sup>20</sup> *In the Shade of the Quran* (Adil Salahi and Ashur Shamis Trans, The Islamic Foundation, revised ed. 2003) vol 1, 372 [Trans of *Fi Zilal al-Quran*]

<sup>21</sup> *The Message of the Qur'an*, (Dar Al-Andalus, 1980) 54

<sup>22</sup> Mustafa As-sibayee, *Islam O Pashchatyo Samaje Nari* (Akram Farooque Trans, Bangladesh Islamic Center, 4<sup>th</sup> ed, 2007) (trans of: *Women in the Islam and the West*)

<sup>23</sup> Sahab, Rafiullah , 'A Pakistani view of Muslim Law' in Carroll, Lucy (ed), *Shah Bano and the Muslim Women Act a Decade on: The Right of the Divorced Muslim Women to Mataa* (Grabels, 1998) 54-5 cited in Sirajuddin, Alamgir Muhammad , *Muslim Family Law, Secular Courts and Muslim Women of South Asia A study in Judicial Activism* (Oxford University Press, 2011) 230-1

<sup>24</sup> Hafeez, Sabeeha, 'Metropolitan Women in Pakistan' (1981) xi; in Carroll, Lucy (ed), *Divorced Muslim women and Maintenance* (1986) 38 PLD Journal 1, cited in Sirajuddin, Alamgir Muhammad, *Muslim Shari'a Law and Society Tradition and Change in the Indian Subcontinent* (Oxford University Press, 2001) 316.

been given by scholars from the four schools of thought. Some Hanafi scholars have adopted a stricter approach, recognizing payment of *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.<sup>25</sup> These Hanafi scholars argue that post-divorce financial support is mandatory only in this situation because it is a substitute for a woman's right to fifty per cent of the dower (*Mahr*). These Hanafi scholars do not, however, consider verse 241 which refers to *Mata'a* (some arguing it to be 'giving reasonable maintenance to the wife'). The Hanbali school also adopted a similar position and refused to recognize post-divorce maintenance beyond *Iddat*. Compared to Hanafi and Hanbali scholars, the Shaafi school has adopted a more middle view, considering that any divorced woman who is not responsible for the divorce is entitled to post-divorce support. Shaafi provided a list of those who are eligible for post-divorce maintenance.<sup>26</sup> The position adopted by the Shaafi and Maliki scholars is liberal and flexible compared to the strict approach followed by the other two schools of thought. One possible reason for this could be that Islamic law was developed as a discourse and discussion between the founders of the schools. There were no hard and fast statutory rules and a case by case approach was taken by the early jurists to resolve disputes. The positions taken by the early scholars were to construct fair and just decisions. In Bangladesh, the Hanafi school is predominant and this may be the reason for adhering to the stricter interpretation of the verses. Some have gone as far as to suggest that such interpretation have overlooked the general or necessary verses of the holy Quran and accommodated patriarchal values and to support male interests. These

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<sup>25</sup> A sum payable by the husband to the wife at the time of marriage. It may either be prompt or deferred dower. It is a woman's unconditional and unrestricted right to receive *Mahr* from her husband and has been guaranteed in *Qur'anic* verses 33:50, 2:237, 4:4 and 4:20.

<sup>26</sup> The list included a woman divorced without any fault on her part; the divorce occurred before fixing her *Mahr* and before the consummation of marriage; divorce due to the husband's impotence, bad attitude, physical and mental cruelty and desertion; the husband's failure to secure the necessary maintenance for her and if divorced due to *'illa'h* (that is chronic sickness) or *ziha'r* (an ancient Arab custom, where the husband fore swears any marital relations with his wife, declaring her to be 'like the back of his mother').

scholars in the second and third centuries of the Islamic calendar were heavily influenced by the socio-economic, political, and indigenous tribal values of the prevailing times, and who ‘frequently adopted a male-centric approach’.<sup>27</sup> As a result, the original text which referred to providing ‘reasonable maintenance’ was ignored and reinterpreted under the patriarchal influences within different cultural and historical contexts, particularly during the Umayyad and Abbasid Caliphates.<sup>28</sup> It has even been suggested that to please the ruling elite, male jurists misread the verse that extended this inalienable right to women.

As a result, the egalitarianism or just society once associated with the *Qur’an* lost its revolutionary voice.<sup>29</sup> In the context of South Asia, *Al-Hidayah* (1152–1197) and *Fatawa-i- Alamgiri* (1890), the two authoritative texts based on the Hanafi school, state that maintenance to the wife should be determined only on the basis of the husband’s social and financial circumstances. The two texts do not allow the payment of maintenance after the *Iddat*.

Compared to South Asian Muslim scholars, scholars from the Middle East have challenged these narrow interpretations. They have interpreted verses dealing with post-divorce maintenance more liberally. Abu al Fidaa Ismail-ibn-Kathir is of the view that *Mata’a* should be paid in accordance with the husband’s means, so as to compensate the divorced woman for what she lost because of the divorce<sup>30</sup>. Imam al-Fakhr al-Razy, considered *Mata’a* to be mandatory. Fakhr al-Razy (1927) and Al Tabari (1987) strongly advocated a divorced woman’s right to post-divorce maintenance, as stated above. After carefully deliberating upon the views of various Islamic scholars, he drew the conclusion that payment of *Mata’a* to a divorced woman is an obligation on the husband by virtue of the *Qur’anic* verse 2: 241. He went as far as saying that the husband is liable to pay *Mata’a* just as he is liable to pay to the wife her due dower, and he will never be exonerated from such an obligation until he pays her or

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<sup>27</sup> Rehman, 2007

<sup>28</sup> Mernissi, 1991

<sup>29</sup> (Coulson, 1964)

<sup>30</sup> (Kathir, 2000)

her proxies or heirs. In his view *Mata'a* is like other debts that are due to the wife, and the husband is subject to incarceration and his property can be sold if he does not pay his divorced wife her post-divorce due or *Mata'a*<sup>31</sup>. Shaikh Rashid Rida (1981) also endorsed the eligibility and the right of divorced women to be paid post-divorce support as a mandatory duty on the divorcing husband. Later Fazlur Rahman (1983) emphasized that reform would be possible only if scholars could return to the moral guidelines given in the *Qur'an*. A number of early 20th century scholars like Al Tahir al Hadadd, Mahmud Shaltut, and Mohammad al-Ghazali have also advocated legal reform and stressed the importance of methodology that the independent jurist might employ to improve the status of women.<sup>32</sup> It may be however, noted that this is not relating to women's status rather this is linked to their rights.

Thus, some urges that Verse 241 does not set any time limit for maintenance to divorced women, nor does it lay a specific limit to the amount of *Mata'a*, mentioning 'reasonable maintenance' only. In other words, the *Qur'anic* legislation lays down a minimum requirement, and nowhere in the *Qur'an* is there a prohibition on providing more than the minimum. Thus it is argued that *Mata'a* is to be given to the wife with kindness and humility.

It is interesting to note that post-divorce maintenance has been included within the family law of countries like Iran, Qatar, Egypt, Malaysia, and Morocco. In Qatar, post-divorce maintenance can be awarded to women for 3 years (Section 115 of the Family Reform Code 2005). In Iran, the concept of *Ujrat Ul Misl* is equivalent to post-divorce maintenance under which the husband is bound to pay to the wife compensation for 3 years if she is not at fault and not responsible for divorce (Article 1130–1133 of the Civil Code). The objective of such legislation is on the one hand 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 *Idda*.<sup>33</sup>

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<sup>31</sup> (Al Tabari, 1987)

<sup>32</sup> (Tucker, 2008)

<sup>33</sup> Welchman, 2004

The following chart gives a generalized picture of the global practice on *Mata'a* or post-divorce maintenance beyond the *iddat* period:

Country	Practice or Legislation on <i>Mata'a</i>
Algeria	Allows compensation or damages to the wife if judge determines that the husband abused his right of divorce. (Article 52 of the Family Code 1984).
Egypt	Allows at least two years post divorce compensation depending on the husband's economic situation and the length of the marriage. The payment is allowed in installments and only after consummation of marriage. (Article 18 of the Law no. 100 of 1985).
Indonesia	<i>Mata'a</i> is compulsory when the divorce takes place before the consummation of the marriage and when dower was not fixed. In other cases <i>Mata'a</i> is fixed on the basis of <i>Sunnah</i> and the payment is ordered in accordance with the husband's ability to pay. ( <i>Kompilasi Islam di Indonesia – Sections 158 and 159</i> )
Iran	It is not very clear as to what is the position for post-divorce maintenance. However, the Civil Code with its amendment in 1992 allows a woman to claim for maintenance or damages for the household work during the marriage post-divorce. The intent of the legislation seems to be deterring the husband from acting capriciously.
Jordan	Allows a judge to order compensation if the husband divorced arbitrarily or unilaterally. However, the compensation is limited to her maximum one year of maintenance. (Article 134 of the Jordanian Family law of Personal Status).
Kuwait	<i>Mata'a</i> or post-divorce maintenance is provided as compensation for a period of one year after consummation of the marriage and if the divorce is without consent of the wife. The husband's financial situation is also taken into consideration. (Article 165 of the Kuwaiti Code of Personal status).
Libya	Libya allows post-divorce compensation for either party depending on the fault of the spouse.
Malaysia	In Malaysia, the law has used the <i>Mata'a</i> itself and has gone on to define it as consolatory gift. The Law allows a women to ask for this gift upon the judge being satisfied that the divorce was unjust and allows a payment of such sum as may be fair and just. [Section 56 of the Islamic Family Law (Federal Terries) Act 1984.]

Country	Practice or Legislation on <i>Mata'a</i>
Morocco	The <i>Mata'a</i> comes a consolation gift to the wife in Morocco. However, it does not matter if the divorce was unilateral or mutual. (Moroccan Family Code 2004)
Pakistan	No post divorce maintenance is allowed in Pakistan. However, the Law Commission have again recommended to apply ' <i>Mutah</i> '.
Syria	Allows <i>Mata'a</i> or post – divorce maintenance for a period of three years depending on the women's social status and depending on the degree of arbitrariness visa vis misery and hardship caused to the wife. (Article 117 of the Syrian Law of Personal Status 1975).
Tunisia	Tunisian Law of Personal Status 1956 (Article 31) provides for either the husband or the wife to pay compensation <sup>34</sup> . However, the compensation to the wife may co till her death or till she is able to earn on her own or till she remarries. A women's normal standard of living is taken into consideration as well.
Turkey	Turkey's Civil Code allows for either spouse to receive alimony and damages in a claim for injury upon divorce. The alimony can be allowed for an indefinite period of time or till the time either party remarries or live together with someone else.
Yemen	Article 71 of the Yemeni law of Personal Status allows compensation for one year taking into consideration the husband's circumstances.

It may be interesting to note from the above chart that *Mata'a* in most of the jurisdictions have been interrelated as compensation or consolatory gift. In the jurisdictions where equal payment or unlimited amount of alimony has been allowed, it has been more for civil reasons than Shariah reasons. In the light of the discussions above on the jurists and scholars views, it is clear that more work needs to be done in this area.

The application of post-divorce maintenance or *Mata'a*, has been restricted to the period of *Iddat* in Bangladesh based on certain interpretation of Islamic law. There has been an overall silence on the subject of extending this right beyond this. Hoever, considering the above examples, it is therefore argued that these examples show that *Mata'a* can also be given to women in Bangladesh

<sup>34</sup> The author is not in agreement that this law is in line with Islamic practice.

## Bangladesh

The Commission on Marriage and Family Laws appointed by the Pakistan government (as predecessor of Bangladesh) proposed as early as 1956 that courts should be vested with power to grant maintenance to an unjustly divorced wife for life or until her remarriage<sup>35</sup>.

The issue of giving *Mata'a* to the wife came under scrutiny in 1955, when the Commission on Marriage and Family Laws<sup>36</sup> in its Report on Marriage and Family Laws, made recommendations regarding the plight of women who are arbitrarily divorced and rendered destitute. The Commission recommended that the wife should have the right to sue her husband for maintenance and that the order of the court should be executable in a summary manner as arrears of land revenue. It also recommended that a wife could claim past maintenance for at least 3 years before the institution of the suit for maintenance. On the issue of post-divorce maintenance, the question put to the Commission was:

Should it be open to a Matrimonial and Family Laws Court, when approached to lay down that a husband shall pay maintenance to the divorced wife for life or till her remarriage? (Report of the Commission, 1956: 1219–20)

The Commission recommended that in such cases the Matrimonial Courts should have jurisdiction to order a husband to pay maintenance to his divorced wife for the rest of her life, or till she remarried. The Commission stated that '... a large number of middle aged women who are being divorced without rhyme and reason should not be thrown on the streets without a roof over their heads and without any means of sustaining themselves and their children' (Report of the Commission, 1956: 1215). The Commission emphasized the importance of reinterpreting Islamic law 'as no progressive legislation is possible if Muslim assemblies remain only interpreters and blind adherents of ancient schools of law' (Report of the Commission, 1956: 1231).

However, the recommendation of the Commission was opposed by one of its members who considered that payment

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<sup>35</sup> *Report of the Commission on Marriage and Family Laws* (The Gazette of Pakistan, Extraordinary, Karachi, 20 June 1956), 1215.

<sup>36</sup> *Gazette of Pakistan, Extraordinary*, 20 June 1956.

of post-divorce maintenance to the divorced wife was a deprivation of the existing or present wife's rights and her due share. He said: 'The grant of maintenance to the divorced wife would not only mean monetary injustice to the present wife but also lead to the moral degeneration of the beneficiary. The aid from a man who has lived as a husband for a long time would mean a standing threat to the chastity of the divorced woman... The members of the Commission look only to the monetary aid while Islam aims above all at safeguarding the chastity of the divorced woman. Moreover, the continued payment of maintenance to the divorced wife would keep the mind of the present wife constantly vexed with suspicion. The proposal thus is ill advised and harmful' (Report of the Commission, 1956:1235). Without any unanimity of the views and in fear of public uproar at the time, the recommendation of the Commission on post-divorce maintenance was not incorporated in the Muslim Family Law Ordinance 1961. The proposal has not made its way into the statute book of Bangladesh until now.

India solved the problem of destitute, divorced wives by enacting the Muslim Women (Protection of Rights on Divorce) Act, 1986 and by activist interpretation of its provisions by the Indian Supreme Court.<sup>37</sup>

Recently in Bangladesh a Division Bench of the High Court Division of the Supreme Court of Bangladesh in *Hefzur Rahman v. Shamsun Nahar Begum*, 47 DLR (1995) 74, attempted to hold former husbands liable for maintenance of wives until their remarriage. In a suit by a wife for her

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<sup>37</sup> *Daniel Latif v. Union of India*, AIR 2001 SC 3958. The court while upholding the validity of the Muslim Women (Protection of Rights on Divorce) Act, 1986 summed up its conclusions in the following manner:

1. A Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife, which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Act.
2. Liability of a Muslim husband to his divorced wife arising under Section 3(1)(a) of the Act to pay maintenance is not confined to the iddat period.
3. A divorced Muslim woman, who has not remarried and who is not able to maintain after the iddat period, can proceed as provided under section 4 of the Act against her relatives who are liable to maintain her in proportion to the properties which they inherit on her death, according to Muslim law, from such divorced woman including her children and parents. If any of the relatives is unable to pay maintenance, the Magistrate may direct the State Wakf Board to pay such maintenance.
4. The provisions of the Act do not offend Articles 14, 15 and 21 of the constitution of India.

*iddat* maintenance, the Court took up *suo moto* the legal query whether the divorced wife could have claimed maintenance beyond the *iddat* period. The Court held that a civil court has the jurisdiction to follow the law as contained in the Qur'an, disregarding any other law on the subject which is contrary to it, even though laid down by the jurists and commentators of great antiquity and authority and followed for a very long time. The Qur'anic Verse, which was applicable to their query, was Verse 241 of *sura Al Baqara*, translated by Abdullah Yusuf Ali, the celebrated modern commentator of the Qur'an, as "For divorced women maintenance (should be provided) on a reasonable (scale)." The Court accepted this as the correct translation of the Verse and observed:

Considering all the aspects we finally hold that a person after divorcing his wife is bound to maintain her on a reasonable scale beyond the period of *iddat* for an indefinite period, that is to say, till she loses the status of a divorcee by remarrying another person.

The HCD in interpreting *sura al Baqara* 2:241 took the help of the Dictionary and Glossary of the Koran of Jhon Penrice (for the meaning of the words *mootakallat*, *mataaon* and *maarroof*) and the translation of the Qur'an by Abdulla Yusuf Ali.

Some scholars of Muslim family law have maintained that the decision confirms that there is actually no real conflict between the Qur'anic foundations on the husband's obligations towards a divorced wife obliging husbands to look after the future welfare of their divorced wives.<sup>38</sup>

However, the decision was reversed by the Appellate Division (AD) of the Supreme Court of Bangladesh on the following grounds:

1. The HCD wrongly interpreted *mata* as maintenance since *Mataa'um-Bil-Ma'ruf* in its Arabic meaning in the Holy Qur'an cannot mean "maintenance on a reasonable scale". If amplified, it means compensation in the form of a presentation of some means of enjoyment which is an article of everyday use and which can take the shape of a dress, money, chattel, property or any other means of enjoyment according to prevalent practice.
2. The HCD disregarded the well established principle of interpretation of the Qur'an as it is not proper and advisable to interpret one verse in a disjointed manner and to ascertain the real meaning of one verse only without reference to other verses on the same subject.

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<sup>38</sup> Pearl and Menski, *Op. cit.*, 205.

3. There being no direction of payment of maintenance beyond the period of 'iddat' in the Holy Qur'an one is bound to follow the other sources of Islamic law for a guidance on the question of granting maintenance to a divorced women. The judgment is based on no sound reasoning and it is against the principles set up by Muslim jurists of the last fourteen hundred years.

In other words, the word *Mata'a* in the Qur'anic Verse II: 241 has never been understood as maintenance or provision in the sense of legal, formal and regular supply of necessities of life and livelihood to the wife. It is a "consolatory offering" or parting gift to a divorced woman as comfort and solace for the trauma she suffers from divorce. Being a gift, it has never been judicially enforceable. It was also said that statutory provisions may be made, binding the husband to maintain an unjustly treated and destitute divorced wife, as has been done in several Muslim countries. Such beneficial legislation, the Court held, will not be against Muslim personal law. On the contrary, it will be in consonance with the ideas of justice, tolerance and compassion that the Qur'an enjoins upon all righteous Muslims.<sup>39</sup> Mr. Justice Mustafa Kamal stated that "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 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".<sup>40</sup>

It is worthwhile to note that the debate encircling post-divorce maintenance is still continuing with the meaning and interpretation of the word *Mata'a*. While it seems that there is a consensus amongst jurists and scholars that *Mata'a* is a compensatory or consolatory relief which in practice can be translated as some form of financial support; the problem arises in legislating with regard to the ambit or tenure or form of this support. The question therefore is – is there a way to interpret *Mata'a* in a way that covers post divorce maintenance? Is there any prohibition in the Quran or *Sunnah* to interpret the verse of the holy Quran (2:241) to allow post divorce maintenance (specially to a destitute wife or someone who has crossed the age of marriage)? Few questions need to be answered for ensuring the appropriate enforcement of the Islamic verdicts or the enforcement of the Quranic pronouncements and interpretation thereof may include:

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<sup>39</sup> *Hefzur Rahman v. Shamsun Nahar Begum*, 4 MLR (AD) (1999) 41 at 87-88.

<sup>40</sup> 51 DLR 1999 (AD), Per Mustafa Kamal, J., at para 146.

- a. When the judges of the Supreme Court of Bangladesh sit on a hearing to interpret any Verse of the Quran, are they sufficiently qualified and/or equipped to do so?
- b. When there are several interpretations available on the same issue, how do they decide on which scholarship to follow?
- c. Would it be right to follow one interpretation or give preference to one interpretation when such interpretation affects the rights or liberties of any individual?
- d. When one school of thought recognizes one interpretation and it paves ways for ensuring rights of women (or any person) without violating the verdicts of the Quran; is it not more practical to follow that school?
- e. When it comes to giving interpretations on Verses of the Quran that relates to women, is women scholarship consulted at all or in other words – are women Shariah scholars' views taken into account, if any? That is to say – is there any gender sensitivity or is that needed?
- f. Do we need a special body or group of trained people to determine Shariah issues to be enforced by the Supreme Court or to aid the Supreme Court?
- g. Who will decide on these questions?

**The other way to ensure post divorce maintenance: Stipulation in the marriage contract.**

An Islamic marriage is a contract with religious overtone. Like any other contract it allows parties to stipulate conditions. However, one must be careful to understand that there may be norms or *Shariah* ordains that the parties may not be able to opt out from or the contract or any stipulations or conditions cannot go beyond the Islamic principles. There is consensus of the jurists and scholars that conditions within the *Shariah* limits can be inserted (although jurists differ in the kind of conditions<sup>41</sup>) and it can be

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<sup>41</sup> E.g. While the *Hanafi* school prohibits stipulating any prohibition on the husband's ability to marry second time during the existence of the first wife, the *Hanbali* school allows such condition. Amira Mashhour, 'Islamic Law and Gender Equality – Could there be a Common Ground?: a Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt' (2005) 27 *Human Rights Quarterly* 562, 576; with reference to Patricia Kelly, 'Finding Common Ground: Islamic Values and Gender Equity in Reformed Personal Status Law in Tunisia', in *Shifting Boundaries in Marriage and Divorce in Muslim Communities* (Special Dossier 1, Women Living Under Muslim Laws, 1996) 88.

demonstrated from earlier practices. As Mona suggests ‘One element introduced by Islamic law was the validation of individualized optional stipulations in the contract. Court archives in Egypt demonstrate that marriage contracts were concluded according to the principles of Shari’a during the Ottoman period, and that these contracts included additional substantive conditions. It was common for marriage contracts in towns and cities to include conditions restricting the husband’s right to take a second wife and providing for the wife’s right to compensation, divorce, or both in case of breach of this undertaking or mistreatment. Contracts included the husband’s commitment to support his wife’s children from a previous marriage and not to be absent or depart from his wife for longer than an agreed period of time. In case of breach by the husband, the wife could seek and obtain a divorce (*tatliq*, judicial divorce) from the Shari’a judge without forfeiting any of her financial rights and might also be entitled to damages if it were so provided in the marriage contract’.<sup>42</sup> Such practice is also found in practice of the companions of the Prophet (PBUH) as Munir<sup>43</sup> has cited:

Abd al-Rahman ibn Ghunaym narrates that a couple came to ‘Umar (the Second Caliph) in his presence, and woman complained that her husband, having agreed at the time of their *Nikah* to keep her in her paternal home, should now abide by it and not take her out of there. ‘Umar ultimately ruled in her favour [Abu Isa Muhammad ibn Isa al-Tirmidhi, *Sunan* (Maktabah Madniyah) Vol 1, 347].

Therefore, so long the stipulations are valid under *Shariah* as opposed to invalid or void any stipulation can be maintained in a marriage. This can work as a clear protection to a woman’s future especially in cases of post divorce maintenance. However, what needs to be addressed is the fact that the stipulations must be within the permissible level of Islam. And it needs to be considered that when we talk about post divorce maintenance and stipulations in a marriage contract, the question is; can a stipulation be enforced in law or *Shariah* when the marriage itself is not in place?

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<sup>42</sup> Zulficar, Mona, ‘The Islamic Marriage Contract in Egypt’ in Asifa Quraishi and Frank E Vogel (eds), *The Islamic Marriage Contract: Case Studies in Islamic in Islamic Family Law* (Islamic Legal Studies Program – Harvard Law School, 1<sup>st</sup> ed, 2008) 231, 233-4.

<sup>43</sup> Munir, Muhammad, ‘Stipulations in a Muslim Marriage Contract with special reference to talaq-al-tafwid provisions in Pakistan’ (2005-2006) 12 *Yearbook of Islamic and Middle Eastern Law* 239, cited in Haque, Muhammad Ekramul, ‘Utilities of Marriage Stipulations to remove Gender Inequalities and to Protect the Rights of Women’, *Dhaka University Law Journal*, Vol 22, No.2, Dec 2011, 44

There are few non exhaustive examples of present practice on marriage stipulations available to us:

Country	Marriage Stipulations
Algeria	Allows stipulations on the right of women to work.
Iran	A standard stipulation in a marriage contract is that wealth accumulated during marriage is divided into half between the spouses upon divorce.
Jordan	Allows restrictions on polygamous marriages; allows <i>talaq-al-tafwid</i> . Most importantly the Personal Law of 1976 allows stipulations so long they are valid and enforceable.
Mauritania	Stipulations are allowed to restrict the husband to remarry and allowing the wife to work and study. In case of breach the wife is allowed to sue for <i>Mata'a</i> . (Article 29 of the Mauritanian Law 2001)
Morocco	Allows prohibition on polygamy. What is important is that the Moroccan law allows a woman to reserve a right over the husband's property even if Divorce takes place. (Moroccan Family Code 2004)
Syria	The Syrian law of Personal Status (1975) states that no stipulation can be inserted to restrict the husband from conducting lawful personal affairs.
Turkey	Ottoman Law of Family Rights 1971 provides for restriction on polygamy in such a way that the marriage stands dissolved in case of a breach of the stipulation.

### **The case of Bangladesh**

In Bangladesh, we have no statutory stipulation in a direct way. In any standard Bangladesh marriage form i.e. the *Kabin-nama* there is a scope. In Column 17 of the standard form it states that – ‘Description of special conditions, if there is any’. Immediately after this in column 18, 19 and 20 stipulations with regard to (i) *talaq al-tafwid*, (ii) curtailment of husband's power to divorce, and (iii) poses question on arrangements of any deeds with regard to dower etc.

Column 17 is the place where special conditions may be inserted within the ambit of a valid Islamic marriage within the permissible limits of *Shariah*. The best way forward may be to have legislation on stipulations clarifying the limits and scope of stipulations. However, till that is done, awareness can be built to use *Mata'a* in column 17 of the *Kabin-nama*. Even if *Mata'a* in a clear form of post divorce maintenance is not available to start with; at least to have it in the form of some financial support would be of great benefit to destitute or helpless divorced women.

## **Conclusion**

Bangladesh, being one of the largest Muslim community, it is important that it carries on continuing research on the *Shariah* issues and creates a system to interpret them and enforce them in a way that improve living conditions for its people. *Shariah* being the only source of law for administration of personal law for Muslims in Bangladesh needs more attention of the jurists and scholars in a structured form. Taking some juristic opinion on cases when a case reached the Supreme Court of Bangladesh is not enough. There should be some regular studies of the Quran and *Sunnah* that clarifies the Islamic concepts and rulings on personal laws and issues and people are made aware of them. Judges should be trained as well to understand and know those principles and should require regular counsel from such studies. This is not to say that the present legal regime on Muslim personal law is not working. It is rather to say that knowledge base of the community is increasing globally and we need to continue to look into scopes to enhance the quality of life.

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