

Rethinking the Plights of Divorcee under Islamic Family Law

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Introduction

Family¹, the very basic foundation of the Islamic society, is treated as an abode of peace and tranquillity and it seems that in this institution the heavenly fragrance is felt by the spouses who are enjoined under *Shariah* to live with each other on a footing of mutual love and mercy, solace and repose, affection and compassion. Comprehending the innate traits of human psyche Islam espouses and fosters a pragmatic and compassionate view of human interaction and as a natural corollary of this, it appends grand magnitude to the eventual contentment of both the spouses.² Diametrically converse panorama of this blissful tie depicts a venomous conjugal life full of abhorrence and antipathy, and not less probably it may wreck the lives of the concerned partners or at least one of them.³ However, Islamic edict leaves no stone unturned to protect the sacred nuptial tie. But if the vital purpose of marriage is severely perturbed the recourse is made to dissolve the consecrated union. Once it is justifiably established that a marriage has proved a failure, canons of Islam do not scruple to allow the parties to separate from each other.⁴ Both the spouses are endowed with the options to sever the marital bond within the purview of *Shariah*. But before making recourse to this last resort certain formalities are needed to be fully observed. A meticulous appraisal of the Qur'anic and Sunnatic provisions and their apposite contextualization in the contemporary era highly convince the authors to advocate that if the marriage breaks down through the whimsical exercise of *talaq* by the husband, it is of course, within the legitimate authority of a state⁵ to make room for the

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¹ Family, in its truest sense, stems from the sacred bond of marriage. The very word '*Nikah*' literally means joining together. Technically, it implies marriage. *Nikah* in the Holy Qura'n (*Al-Nisa* 4: 24 & 25), has been designated as *hisn*, that is a fort, meaning the protection it affords social, physical and moral, to the couple joined together in a valid wedlock. See for details, Tanzil-ur Rahman, *A Code of Muslim Personal Law* (Hamdard Academy, 1980) vol 1, 17.

² K N Ahmad, *Muslim Law of Divorce* (Kitab Bhavan) 1.

³ Ibid.

⁴ Ibid.

⁵ Exercising this authority is possible through the proper appreciation of *Siyasah shariyyah*. Kamali ventured to translate it as *Shariah*-oriented policy. To him, this is generally regarded as a viable instrument of elasticity and expediency in *Shariah*, devised so as to serve and ensure the ultimate cause of justice and good government

compensation payable to the wife. However, though it is, to a certain extent, beyond the level of human efforts to patch up the psychological trauma of the spouses especially the divorced woman, Islamic Shariah, to relieve them with a soothing touch, gently makes provisions in the nature of *mut'ah*, a post divorce financial support, severely but spontaneously neglected, in spite of its firm root in the Qur'an, Sunnah as well as in the enriched juristic magnum opus, throughout the glorious history of Islamic Law. In this article, the authors venture to focus on these issues in the light of Qur'anic and Sunnatic injunctions, juristic writings, *maqasid al-shariah*⁶ comparative analysis of legislation as well as judicial decisions of the courts of different states.

Philosophy of Dissolution of Marriage in Islam

The dissolution of marriage is formally recognized in Islam on the very philosophy that instead of dragging on with an astringent and dejected existence in forced partnership, it would unquestionably be more conducive to the wellbeing of the parties to part with poise, elegance and benevolence.⁷ One renowned author rightly observes:

...Divorce, since it disintegrates the family unity, is, of course, a social evil in itself, but it is a necessary evil. It is better to wreck the unity of family than to wreck the future happiness of the parties by binding them to a companionship that has become odious. Membership of a family founded on antagonism can bring little profit even to the children...⁸

Islamic Family Law treats wedded bond as a sort of religiously sanctified social contract, and it is predisposed to be disbanded when it ceases to dole out its key purpose(s). This harsh reality does not necessarily proffer that marriage does not have any sanctity, solemnity or sombreness in Islam.⁹ One author has taken pain to recapitulate the philosophy of Islamic Law regarding marriage and divorce in the following way:

The analysis of marriage and divorce laws recognized by Islam clearly shows that the martial tie is to be respected and continued as far as possible. The mutual adjustment and tolerance are emphasized beyond proportions just for the sake of keeping intact the marital tie. The parties also lose some social respect on separation. The parties, their well-wishers and courts are required

especially when the canons of *Shariah* fall short of addressing certain situations or developments. See Mohammad Hashim Kamali, *Shariah Law An Introduction*, (Oneworld publications, 1st South Asian ed, 2009) 225.

⁶ *Maqasid al-Shariah*, is generally interpreted as goals or objectives of *Shariah*.

⁷ Firasat Ali and Furqan Ahmad, *Divorce in Mohammedan Law: The Law of Triple Divorce* (Deep & Deep Publications, 1983) 9.

⁸ G C Chesire, 'The International Validity of Divorces' (1945) 61 *Law Quarterly Review* 352, n 7.

⁹ See Ali and Ahmed, above n 7, 10.

not to leave any stone unturned for the subsistence of marital tie in case of dispute and disagreement between the parties. The dissolution is provided as a last resort in such circumstances. The marriage under such extreme circumstances may be dissolved by the parties or by the court.¹⁰

Islam maintains a moderate approach between the over-restriction and over-liberalization regarding the dissolution of marriage. One eminent author rightly points out:

...Islam has taken a position between categorical proscription and unqualified liberalization of divorce. It neither instituted the practice nor ignored its reality and occurrence. An outright prohibition would probably remain an "ideal" or merely a state of mind, but hardly a pattern of actual behavior, because absolute self-control is not always attainable. Such a prohibition, then, would seem incompatible with Islamic ideology which, as a matter of principle, prescribes only what is humanly attainable. On the other hand, any unregulated liberalization of divorce, is socially inconceivable and would almost certainly result in chaos, peril, and such traits that are destructive as well as intolerable.¹¹

Islamic Family Law is in favour of dissolving the marital tie as a final resort. Even divorce is treated as an awful and abominable practice in those cases which lack lawful excuse and used mere out of whims and caprices. Dr Jamal A Badawi has summed up this issue in the following manner:

Islam makes legal provision for divorce as a last and final resort, although it is a highly discouraged action according to the Qur'an and the sayings of the Prophet. The Prophet (SAWS) said, "The most detestable act that Allah has permitted is divorce"; this saying however, refers to divorce in situations where there is no good reason for it and the provision is simply being abused - divorce for a good reason would not be detestable and may even be commendable! In all cases however, divorce should be the last resort after all other avenues have been explored in trying to reconcile the couple.¹²

Steps Preceding to Dissolution of Marriage

Islamic Law of dissolution of marriage as it appears from the Qur'an, Sunnah of the Prophet (PBUH) and juristic decisions of the scholars is so well designed that it prescribes certain steps before effecting divorce as a last resort. Islamic injunction urges Muslims to marry after looking into

¹⁰ Ibid.

¹¹ Hammudah Abd al Ati, *The Family Structure in Islam* (American Trust Publications, 1977) 219.

¹² Jamal A Badawi, *Islamic Teaching Course: Social System of Islam*, vol 3, G-43 <http://www.witness-pioneer.org/vil/Books/JB/IslamicTeaching_Course-3.html#G-43> accessed 10 May 2012.

religious piety of man and woman.¹³ Firstly, after the completion of marriage both the spouses are enjoined to observe the teachings of Islam as reflected in the Qura'nic verses and the traditions of the Prophet (PBUH). In case of dissolution of marriage by the husband it is essential that he must be major and a person of sound mind. Husband must have reasoned scruples, must be cautious and free from unwarranted and excessive resentment. Pronouncement of divorce under the sway of intoxication and compulsion is void, though some jurists held these valid. Unequivocal intent to cease the nuptial tie on the part of the husband is a sine qua non of the divorce though some schools accept as valid the divorce pronouncements of a jesting and thoughtless or forgetful husband.¹⁴ Of course, the wife must be in a state of *tuhr* i.e. free from menstruation and the usual postnatal fluxes and she must not have had a consummation during this period of fresh purity.¹⁵ Pertinently mentionable that pronouncement of divorce during this period is both religiously outlawed and legally invalid according to the Shia and Zahiri schools of law while it is religiously proscribed but legally valid to other jurists.¹⁶

Modes of Dissolution of Marriage

Under the Islamic Law, marital bond can be dissolved during the life-time of the parties thereto: a) by the act of the parties (*talaq*); b) by mutual agreement (*khula* or *mubaraat*); and c) by a judicial order of separation in a suit by the husband or the wife (*tafrid*).¹⁷

To Jamal J. Nasir, these are the forms of dissolution of marriage that have been documented in the contemporary legislation on personal status.¹⁸ Apart from these, there are three more forms which are recognized by the classical jurists, but have diminutive practical efficacy and bearing in contemporary world. These are i) Injurious Assimilation (*Zihar*), ii) Vow of Continence (*Ila*) and iii) Imprecation (*Lian*).¹⁹ It is worth mentioning here that some people especially westerners, even some Muslim scholars and feminists seem to believe that the husband reserves the absolute,

¹³ This statement finds its recognition in a *hadith* of the Prophet (PBUH) narrated by Abu Huraira. He reported that the Prophet said, "A woman is married for four things, i.e., her wealth, her family status, her beauty and her religion. So you should marry the religious woman (otherwise) you will be a losers". *Sahih Bukhari*, vol. 7, Book 62, Wedlock, Marriage (Nikaah), Hadith no.27. Though this *hadith* focuses on the vital criteria of selecting a bride this necessarily carries insinuation regarding the choice of groom as well.

¹⁴ See al Ati, above n 11, 227.

¹⁵ See Ibid.

¹⁶ See Ibid, 227-8.

¹⁷ Jamal J Nasir, *The Islamic Law of Personal Status* (Graham & Trotman, 2nd ed, 1990) 112. See also Jamal J A Nasir, *The Status of Women Under Islamic Law and Modern Islamic Legislation* (Brill, 3rd ed, 2009) 117-19.

¹⁸ Ibid.

¹⁹ Ibid, 112-113.

unconditional and exclusive right to divorce. But, Islamic Law equally bestows upon both the spouse to dissolve the hallowed union if it is proved to be a staid failure.²⁰ As regards the nature of the modes of dissolution of marriage one author observes:

...the mechanisms or channels vary in kind and accessibility from case to case. Some channels are open to the man only; some to the woman only, with or without judicial intervention; and some to both, directly or through judicial process, with or without partner's consent.²¹

While *talaq* is usually initiated by man, the women's right to dissolve matrimonial tie either accrues as a result of a pre-nuptial accord, or is secured by a compromise with the husband, or can be exercised by filing proceedings of dissolution of marriage in the Court of Law.²²

One contemporary scholar opines that as marriage is a very sacred and solemn, and sanctified religious contract, a unilateral repudiation by the husband must be treated as a stern breach warranting fitting financial and social sanctions.²³

As per this article is concerned, the concept of *talaq* deserves to be defined properly.

Conceptualizing *Talaq*

The very word '*talaq*' has been derived from the root word '*talqun*' meaning freedom. It also comes from a root (*tallaqa*) which connotes "to release (an animal) from tether." Literally, it means to snap off or to separate.²⁴ Within the framework of Shariah, *talaq* means the termination of marital bond with explicit or implied words.²⁵ Divorce, as Tanzilur Rahman puts adroitly, is the snapping off the nuptial tie, with express or implied words, by the husband personally or through an agent or delegate making it effective immediately or consequentially.²⁶ *Talaq* may be classified from different perspectives namely, religious sanction, mode of expression and effects of divorce. From the viewpoint of religious sanction, *talaq* is divided into *talaq*-

²⁰ See al Ati, above n11, 242.

²¹ See Ibid. *Mutazila* School, however, believes that the reasons of divorce by the husband must be tested by an unbiased judge and consequently no divorce is permissible without the sanction of the court. See Syed Ameer Ali, *Mahommedan Law* (Law publishing House, 7th ed, 1979) vol 2, 432.

²² Justice Aftab Hussain, *Status of Women in Islam* (Law Publishing Company, 1987) 638.

²³ Fazlur Rahman, 'A Survey of Modernization of Muslim Family Law' (1980) 11 *International Journal of Middle East Studies* 451.

²⁴ Tanzil-ur Rahman, *A Code of Muslim Personal Law* (Hamdard Academy, 1980) vol 1, 309.

²⁵ Ibid.

²⁶ Ibid.

*us-sunnat*²⁷ and *talaq-ul-bidat*²⁸. *Talaq-us-sunnat* is further divided into *Talaq al-Ahsan* (most approved form of divorce) and *Talaq al-Hasan* (proper divorce).

Arbitrary and Oppressive Talaq

No water-tight definition of arbitrary or oppressive *talaq* is unsurprisingly feasible and enviable since proper contextualization of each and every case of *talaq* is inextricably allied with this definitional aspect. However, the *talaq* which is pronounced without any legal justification or which fails to protect the interest of the spouse(s) or tantamounts to injury to one of them or both of them or above all which is pronounced without following the dictates of the Qur'an and Sunnah is usually designated as whimsical, arbitrary and oppressive *talaq*.

To one renowned scholar, this oppressive type of *talaq* usually takes place in the following two circumstances²⁹. The first category embraces that type of divorce when the husband divorces wife during his death-bed illness in order to deprive the wife from inheritance. This type of *talaq* is abominable in the eyes of Allah (SWT) as well as an inhuman and barbarous act. Juristic opinions differ as to the entitlement of women's inheritance rights in this situation. To Imam Shafii, if the husband dies within the *iddat*³⁰ period the wife would not be entitled to inherit as *talaq-al- bain* puts an end to the marital relation. He also continues to say that his act certainly amounts to sin and for this he would be liable to suffer punishment in the hereafter world.³¹ It doesn't have any impact upon his worldly affairs.³² Other Imams namely Imam Abu Hanifa, Imam Malik and Imam Ahmad bin Hanbal opine that this person becomes eligible for punishment in accordance with the principles of Islamic Justice or *adl* as he pronounced *talaq* for causing injury to the wife.³³ According to Imam Malik the wife will be entitled to inheritance always irrespective of the death of the husband before or after the *iddat*. She is entitled to inheritance even if she embroiders another wedded thread with other person.³⁴ Imam Abu Hanifa opines that the wife is entitled to inheritance only if the husband dies within the *iddat* period.³⁵ Imam Ahmad

²⁷ Divorce pronounced in accordance with the dictates of the Qur'an and Sunnah of the Prophet (PBUH).

²⁸ Divorce pronounced in derogation of the principles of the Qur'an and Sunnah. It is also known as innovated and impious divorce.

²⁹ Mustafa As-Sibayee, *Islam O Pashchatyo Samaje Nari* (Akram Farooque trans, Bangladesh Islamic Centre, 4th ed, 2007) 98 [trans of: *Women in the Islam and the West*].

³⁰ It literally implies waiting period. *Iddat* has to be observed by the wife on the death of the husband or due to the dissolution of the marriage.

³¹ See As-Sibayee, above n 29, 98.

³² See *Ibid*.

³³ See *Ibid*.

³⁴ See *Ibid*.

³⁵ See *Ibid*.

bin Hanbal steers a middle course as he says that the wife is disentitled to inheritance if she enters into wedlock with other person after the observance of the *iddat* otherwise she will be entitled to the same irrespective of the death of the husband before or after the *iddat* period.³⁶ Dr Sibayee has accepted the opinion of Imam Ahmad.³⁷

The oppressive *talaq* also takes place when it is pronounced without any justification. The wife may be poor or she may reach extremely old age in which case remarriage is rarely possible or her reputation may be severely injured which makes her remarriage very difficult. This incident makes her life miserable and causes innumerable pains and sufferings to her. Undoubtedly, husband will be liable for such kind of offensive and sinful action to Allah (SWT). Islamic Law, in a straight line, does not provide compensation to the wife for being harmed in consequence of such arbitrary divorce. On the other hand, it is equally appropriate to say that Islam does not proscribe to provide compensation to the wife. However, the well-grounded principle of *adl* of Islam as firmly established through the Quranic verses and the *ahadith* of the Prophet (PBUH), the practices of the companions especially the Rightly Guided Caliphs and the juristic principles deduced from these and overall the *maqasid al sharia* dictate to make proper arrangements for payment of compensation to the wife.

Arbitrary Repudiation and Reliefs provided under Islamic Laws.

The underlying spirit of the laws of *talaq* as espoused in the Qur'an and Sunnah convince a group of jurists to opine that divorce is prohibited except in certain exceptional reasons.³⁸ A large and influential group of jurists allows *talaq* only in case of dire and extreme necessity namely the adultery of wife.³⁹ On the other hand, a body of jurists consisting mainly of the Mutazila scholars vehemently opposes *talaq* without the sanction of an impartial judge or court dealing and administering Islamic Law. They opine that any such cause as may justify separation and remove *talaq* from the category of being forbidden should be tested by an unbiased judge;⁴⁰ to support their opinion they mention the commandment of Allah (SWT) as espoused in Sura Al-Nisa 4:35 to appoint impartial arbitrators to settle family disputes arising between the spouses. They also refer the words of Prophet (PBUH) that of all the lawful acts the most detestable to Allah is divorce.

Under Islamic Law a husband is legally duty bound to provide maintenance to the wife. Upon divorce, he has to provide maintenance during the *iddat* period and in addition to that he has to make a reasonable and fair provision

³⁶ See Ibid.

³⁷ See Ibid.

³⁸ Syed Ameer Ali, *Mahommedan Law* (Law publishing House, 7th ed, 1979) vol 2, 432. Quoted from Radd-ul-Muhtar, vol 2, 682 .

³⁹ Ibid.

⁴⁰ Ibid, 433.

for the divorced wife. *Talaq* may take place before or after consummation. As regards *talaq* before consummation the Holy Qur'an focuses in the following verse:

You will incur no sin if you divorce women while you have not yet touched them nor settled a dower upon them; but [even in such a case] make provision for them - the affluent according to his means, and the straitened according to his means - a provision in an equitable manner: this is a duty upon all who would do good.⁴¹

Allah (SWT) reiterates this right of the divorcee and obligation of the husband in the following verse:

O YOU who have attained to faith! If you marry believing women and then divorce them ere you have touched them, you have no reason to expect, and to calculate, any waiting-period on their part: hence, make [at once] provision for them, and release them in a becoming manner.⁴²

It also ordains:

And if you divorce them before having touched them, but after having settled a dower upon them, then [give them] half of what you have settled - unless it be that they forgo their claim or he in whose hand is the marriage-tie forgoes his claim [to half of the dower]: and to forgo what is due to you is more in accord with God-consciousness. And forget not [that you are to act with] grace towards one another: verily, God sees all that you do.⁴³

The aforesaid verses established the rights of the wife repudiated by the husband before consummation of the marriage. However, if the marital bond is disbanded after consummation the rights of the wife naturally become stronger. As per the commandment of Allah (SWT) as revealed in Al-Ahzab 33:49 is concerned no question of *iddat* arises if marriage is annulled before sexual intercourse between the spouses. The question of *iddat* arises only when the marriage is consummated. *Iddat* can be regarded as the partial extension of the marital bond which is evident from the husband's strict obligation to provide maintenance to the wife during this period.⁴⁴ The Qura'nic injunction is very clear regarding this. It provides:

O PROPHET! When you [intend to divorce women, divorce them with a view to the waiting period appointed for them, and reckon the period [carefully], and be conscious of God, your Sustainer. Do not

⁴¹ Al-Baqarah 2: 236, Mohammad Asad, *The Message of the Qur'an*, <<http://www.geocities.com/masad>> accessed May 19, 2009. Translations of the different verses of the Qur'an as mentioned in different places of this article are taken from this source.

⁴² Al-Ahzab 33:49.

⁴³ Al-Baqarah 2: 237.

⁴⁴ Ali and Ahmed, above n 7, 246.

expel them from their homes; and neither shall they [be made to] leave unless they become openly guilty of immoral conduct. These, then, are the bounds set by God and he who transgresses the bounds set by God does indeed sin against himself: [for, O man, although] thou knowest it not, after that [first breach] God may well cause something new to come about.⁴⁵

The obligation of the husband to pay maintenance during this period specifically stems from the commandment of Allah (SWT) as espoused in the following verse:

[Hence,] let the women [who are undergoing a waiting-period] live in the same manner as you live yourselves, In accordance with your means; and do not harass them with a view to making their lives a misery. And if they happen to be with child, spend freely on them until they deliver their burden; and if they nurse your offspring [after the divorce has become final], give them their [due] recompense; and take counsel with one another in a fair manner [about the child's future]. And if both of you find it difficult [that the mother should nurse the child], let another woman nurse it on behalf of him [who has begotten it].⁴⁶

Apart from providing maintenance during *iddat* period the Qur'an speaks for endowing the divorced wife with *mutat*.⁴⁷

Meaning of Mata

The very Arabic term *mutah* linguistically connotes enjoyment, pleasure, delight, satisfaction, contentment, and happiness as opposed to gloominess, despair, depression, dejection, melancholy, misery, anguish and grief.⁴⁸ 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.⁴⁹ John Penrice defined Mata as household stuff, goods,

⁴⁵ At-Talaq 65: 2.

⁴⁶ At-Talaq 65: 6.

⁴⁷ See Al-Baqarah 2: 241. In this article the very term *mut'ah* is spelt variously namely *mata*, *mutat*, *motah* etc. This carries the same connotation.

⁴⁸ Mohammad Adam Sheikh, 'Post-Divorce Financial Support from the Islamic Perspective' in Mahmoud Ayoub (ed), *Contemporary Approaches to the Qur'an and Sunnah* (International Institute of Islamic Thought, 2012) 173.

⁴⁹ Ibid. To the author, though the chic of defining *mut'ah* in such fashion painstakingly focuses on the psychological aftermath of divorce it omits to construct an inclusive framework of rights pertaining to women and thereby it, not reluctantly, fails to concede that *mut'at al-talaq* is the primary right of the divorcee from the composite estate of the family unit whereof she was part and a full partner in ownership.

chattels, provision, convenience⁵⁰. Dr Balbaki endeavoured to define *mata'* as effects, goods, wares; chattel(s).⁵¹ Hans Wehr defines *mata'* 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.⁵² Evidently it seems that he tried, in a very scholastic way, to decode the generic features involved in the term *mata'*.

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.⁵³

Now we would proceed to interpret the verse with special reference on the word '*mutat*' in the light of renowned exegeses of the Qur'an.

To Ibn Abbas,⁵⁴ Allah (SWT) orders the husband to provide fair provisions for the wife in case of divorcing her before sexual intercourse. Undoubtedly, the arrangement of fair provision is dependent on the financial capacity of the husband. According to him, this is in surplus of the price given to the prostitute for her services (*mahr al-baghiy*) and the least amount of it consists of a chemise, a head covering and a wrap. Ibn Abbas believed that this order of Allah (SWT) imposes a bounden duty upon the husband for the very reason that it serves as a substitute for dower.

Ibn Abbas, being a respected companion of the Prophet (PBUH), a versatile genius as well as a highly acclaimed exegete of the Qur'an, properly articulated the nature and scope of the post-divorce financial support. He though, very contextually, mentioned the minimum amount of *mut'ah* ungrudgingly left to provide the maximum amount. Here lies the real wisdom of this unique scholar since determination of the amount of *mut'ah* corresponds to the time, society and most pertinently the financial capacity of the husband.

⁵⁰ John Penrice, *A Dictionary and Glossary of the Qur'an* (Other Press, revised ed, 2006) 210.

⁵¹ Rohi Balabaki, *Al-Mawrid: A Modern Arabic-English Dictionary* (Dar-El-Ilm Lilmalayin, 9th ed, 1997) 949.

⁵² Miton Cowan J (ed), *Hans Wehr's A Dictionary of Modern Written Arabic* (Lebanon Library, 3rd ed, 1980) 890.

⁵³ These three rights under the comprehensive framework of Shariah embraces dower (*mahr*) in the event of marriage, maintenance (*nafaqa*) during the subsistence of marital tie as well as *iddat* period, *mut'at al-talaq* after the happening of the irrevocable divorce. See Abdel Karim Shabun, *Sharh Mudawwanah al-Ahwal al-Shakhsyiyah al-Maghribiyah* (Maktabah al-Ma'arif, 1987) vol 1, quoted in above n 48.

⁵⁴ Abdullah Ibn Abbas, *Tafsir Ibn Abbas*, (Mokrane Guezzou trans, Royal Aal al-Bayt Institute for Islamic Thought,) [trans of: *Tafsir Ibn Abbas*] <<http://www.altafsir.com/Tafasir.asp?tMadhNo=0&tTafsirNo=74&tSoraNo=2&tAyahNo=236&tDisplay=yes&UserProfile=0&LanguageId>> accessed 27 August 2009.

One of the most ancient but illustrious exegetes of the Qur'an Imam Abū Ja'far Mohammad b. Jarīr al-ʿabarī, (d. 310 H.) in his fêted exegesis *Jāmi' al-bayān 'an ta'wīl āy al-Qur'an* candidly and boldly advocated the rights of women to the *mut'ah*.⁵⁵ His sound knowledge on different sources and aspects of Shariah led him to conclude that *mut'ah* was a strict obligation on the husband.⁵⁶ Moreover, he, after focusing on the different opinion of jurists on the said matter, vehemently asserted:

I believe what represents the truth among all of the above jurists' arguments is the argument of those who say that post-divorce *Mut'ah* is mandatory for all divorced women, because Allah has said: 'For all divorced women *Mut'ah* is a duty on the *muttaqīn*.⁵⁷

Being an authoritative and commanding jurist, instead of merely borrowing and reflecting on the opinions of other scholars he exploited the tool of *ijtihad* judiciously and after refuting the blemished arguments of scholars belonging to the adverse plinth assertively avows⁵⁸:

It is my conviction that post-divorce *Mut'ah* is an obligatory payment on the husband who divorced his wife, and he is liable to pay her *Mut'at-al-ʿalāq* just like he is liable to pay her due dowry, and he will never be exonerated from such obligation until he pays her or her proxies or heirs, and that *Mut'at-al-ʿalāq* is like other debts that are due to her, and the husband is subject to incarceration and his property can be sold for not paying his divorced wife her post-divorce due *Mut'ah*.⁵⁹

The aforesaid stance of Imam Tabari evidently goes to the extent of impudently claiming that husband's duty to pay *muta'h* is equivalent to the payment of dower and as a natural upshot of this his liability will not be dissolved until and unless he pays this debt like obligation to her or her heirs or legal representatives. Moreover, he bluntly opines that husband can be imprisoned as well as his property can be sold for the extreme failure to provide the wife with *due mut'ah*. This well-argued liberal interpretation of the Qur'an indubitably feels the psychosomatic poignant trauma of the divorcee and calls for refurbishing her right to *mutat-al-talaq* in order to relieve, as far as possible, her from such abysmal and appalling order.

Muhammad ibn Ahmad al-Ansari al-Qurtubi, eminent Maliki scholar, in his celebrated commentary of the Qur'an⁶⁰, departing from the widely held view

⁵⁵ See Sheikh, above n 48, 174.

⁵⁶ See Ibid.

⁵⁷ Muhammad ibn Jarir al Tabari, *Jami al-Bayan 'an Tawil ay al-Qur'an* (Resalah Foundation, 1994) vol 2, 81-100; see also al-Qurtubi, *al-Jami li Ahkam al-Qur'an*, (Dar Ihya al-Turath al-Arabi, 1985) vol 3, 196-208, 227-9. Quoted in n 48.

⁵⁸ See Sheikh, above n 48, 174-5.

⁵⁹ Muhammad ibn Jarir al Tabari, *Jami al-Bayan 'an Tawil ay al-Qur'an* (Mu'assasaat al-Risalah, 2000) vol 2, 80-2. Quoted in n 48.

⁶⁰ Muhammad ibn Ahmad al-Ansari Qurtubi, *Al-Jami' li Ahkam al-Qur'an* (Dar al-Kitab al-Arabi, 1967).

of the Maliki School spontaneously held, through the meticulous utilization of the tool of *ijtihad*, that the verse relating to the payment of *mut'at at-talaq* was revealed as a command and thus binding.⁶¹ Furthermore, in reply to the claim of one group of scholars that payment of *mut'at-al-talaq* was only binding on the *muhsinin* (righteous people) and the *muttaqin* (pious people of means) Qurtubi opined that this fact rather illustrates and strengthens the right of divorcee to post divorce *mut'ah* since each and every Muslim requires to be a *muhsin* and a *muttaqi*.⁶² Apart from this, he vehemently refuted the claim of those scholars who held that *mut'ah* was prescribed only for those women whose marriage had remain unconsummated and whose dower was not determined.⁶³

Ibn Kathir,⁶⁴ in explaining the verse, mentions that it is the commandment of Allah (SWT) towards the husband to compensate the wife for incurring loss resulting from the divorce before consummation. He expressed that this would be a gift of reasonable amount. To him, this meaning suited the very word '*mutat*'. Here the most decisive factor in determining the reasonableness of amount is the financial status of the husband. That is, the compensation paid by the opulent would vary from the pauper. In this connection he cited an illustration from the *hadith* of the Prophet (PBUH). The *hadith* is like as follows:

Narrated Sahl and Abu Usaid: The Prophet married Umaima bint Sharahil, and when she was brought to him, he stretched his hand towards her. It seemed that she disliked that, whereupon the Prophet ordered Abu Usaid to prepare her and to provide her with two white linen dresses.⁶⁵

Thus the Prophet (PBUH) ordered to provide provisions along with two garments. But it is not possible, from this tradition, to determine the cost of the dresses and the nature of provisions he provided. But it can, without difficulty, be presumed that the dresses supplied and the provisions provided by Him were reasonably sufficient in accordance with the status of the lady and the financial ability of the Prophet (PBUH).

Imam Fakhr al-Din al-Razi, a renowned exegete and scholar, in his voluminous and well-articulated commentary of the Qur'an, after dividing the divorced women into three different categories (Sura al-Baqarah 2:236), wisely argued that the very preposition letter '*ala*' in Arabic language implies that the issue in question is neither discretionary nor recommendable, but rather is fittingly mandatory.⁶⁶

⁶¹ See Sheikh, above n 48, 175.

⁶² See Sheikh, above n 48, 175-6.

⁶³ Muhammad ibn Ahmad al-Ansari Qurtubi, *Al-Jami' li Ahkam al-Qur'an* (Dar al-Kitab al-Arabi, 3rd ed, 1999) vol 3, 200-1, quoted in n 48, 176.

⁶⁴ See <<http://www.tafsir.com/default.asp>> accessed 28 August 2009.

⁶⁵ *Sahih al Bukhari* vol 7, Book 63, Divorce, Hadith no. 182. See also Hadith no 183.

⁶⁶ Fakhr al-Din al Razi, *Tafsir al Kabir*, (Dar al-Fikr, 1995) vol 5, 150-1 quoted in Sheikh, above n 48, 177.

According to tafsir al-Jalalayn⁶⁷, the very word *matā'an*, implies 'comforts'. Here Allah (SWT) obliges the husband to make provision of comforts for the divorced wife honourably, giving them what they can enjoy. Of course, the arrangements provided by the husband would vary according to the economic condition of the husband.

This commentary of the Qur'an, however, like many commentaries, fails to construct the essential framework to elucidate the concept of *mut'ah*. It, instead of explicating the real nature of comforts or provisions, merely depicts the skeleton.

Abul al-Qasim Mahmud ibn Umar al-Zamakhshari, one of the most eminent exegetes, in lieu of commending the opinions of scholars like Sa'id ibn Jubayr, Abu al-Aliyah and Al-Zuhri who regarded *muta'h* obligatory compensation for all divorcee he approved Imam Malik who held *mut'at-al-talaq* to be compulsory only for women divorced before the consummation of marriage, and only recommendable for other divorcees.⁶⁸

Shaykh Rashid Rida, a prominent scholar of relatively modern time, in his well-known commentary of the Qur'an *Tafsir al-Manar*, very beautifully, after weaving and embroidering the tapestry of his infrastructure of logic, advocated for the enforcement of the rights of the divorcee to post-divorce financial support. Endorsing the views of scholars who robustly defended the rights of divorcee to post-divorce support as obligatory responsibility, he enthusiastically regenerated this stream of thought in modern times.⁶⁹

As regards the verse 241 of Chapter 2 Sayyed Abul Ala Maududi in his renowned exegesis *Tafheem ul Qur'an*⁷⁰ comments that if the loss ensues to the woman in consequence of the severing the matrimonial contract the husband shall have to pay compensation for the loss according to his capacity. He elucidated that this is an order from Allah (SWT). Maududi translated the word '*mutat*' as something anyhow. In commentary, he marked it as compensation. Therefore, it can be aptly remarked that the husband must compensate the wife as Allah has commanded him to do so for his act causing detriment to the latter. Though Maududi is generally regarded as a rigid scholar, he even, endeavoured to unveil the divine intent which is undoubtedly not misogynist in nature. However, his understanding regarding the nature and breadth of *mutah* is vitiated by the influences of

⁶⁷ Tafsir al-Jalalayn, translated by Feras Hamza, published by Royal Aal al-Bayt Institute for Islamic Thought, Amman, Jordan retrieved from [http://www.altafsir.com/Tafasir.asp?tMadhNo=0&tTafsirNo=74&tSoraNo=2&tAyahNo=236&tDisplay=yes & UserProfile=0 & LanguageId=2](http://www.altafsir.com/Tafasir.asp?tMadhNo=0&tTafsirNo=74&tSoraNo=2&tAyahNo=236&tDisplay=yes&UserProfile=0&LanguageId=2) visited on August, 27, 2009.

⁶⁸ Abu al-Qasim Mahmud ibn Umar al Zamakhshari, *Al-Kashshaf an Haqiq al-Tanzil wa Uyun al-Aqawil fi Wujuh al-Tawil* (Dar al-Fikr) vol 1, 337 quoted in Sheikh, above n 48, 177.

⁶⁹ Rashid Rida, *Tafsir al Manar* (Dar al-Fikr, 1947) vol 2, 430-1, quoted in n 48, 178.

⁷⁰ See <<http://www.islamicstudies.info/tafheem.php?sura=2&verse=236&to=242>> accessed August 27, 2009.

classical orthodox scholars. Moreover, he spared to contextualize this divine intent in contemporary period as well as evaded to spend more ink to portray the utter significance of *muta'h* for the divorced wife.

Mufti Shafi⁷¹ commented that the verse 236 of chapter 2 deals with that circumstance where no dower is fixed and consummation has not taken place. He mentioned that in this circumstance, it is true that no dower is due but it becomes obligatory for the husband to render something to the wife who has been divorced before consummation. He interpreted the term '*mata*' as compensatory benefits. To him, the least amount of that would be a set of clothes. He commented that, though the Holy Qur'an does not specify the amount for this gift it indicates that the affluent should furnish in accordance with their capacity, which carries an element of persuasion for the wealthy who should not be miser in this act of grace. Citing from the *Qurtubi* he pointed out that Sayyidina Hasan, in a situation like this, gave a gift of twenty thousand *dirhams* to the divorced woman, and Qadi Shurayh, that of five hundred dirhams; and Sayyidna Ibn Abbas expressed that the lowest degree here is to give one set of clothes. Mufti Shafi, in keeping pace with the aforesaid explanation of the eminent classical scholars, commented that husband is under an unyielding legal obligation to provide such kind of provision.

So, Mufti Shafi, a prominent commentator of the Qur'an of the Indian sub-continent, palpably appreciated the weight of the commandment of Allah (SWT). Moreover, his citation of the illustrations of Sayyidina Hasan and Qadi Shurayh, repels the cloud of confusion regarding the fixation of amount of *mut'ah* as well as unfailing clarifies the 'variable' character of the *mut'ah*.

Allama Tabatabai⁷² interpreted the word "*al-Mut'ah*" and "*al-mata*" as what may be used, or enjoyed. In keeping pace with this line, he expressed that "*matti'uhunna*" means 'give them usable, enjoyable goods or wealth. Thus, Allah (SWT) ordered the husband to make provision or provide wealth to the wife for divorcing her before consummation of the marriage. To him, as doing of good to others is not incumbent, the order decreed by Allah (SWT) apparently seems in the nature of recommendation or a non-compulsory law. He continues, to say that patent traditions of *Ahlu'l-bayt* reveal that the order is undoubtedly compulsory and obligatory. He clarified this stance in the following manner:

Perhaps it may be inferred from this verse in this way: Allah has earlier said, "Divorce is twice; then keep (them) in fairness or let (them) go with kindness". There the Arabic word, for which we have used "Kindness", is *al-ihsan*, which in this verse has been translated as doing good to others. Anyhow, kindness and doing good is incumbent on those who let the women go, that is, those who give

⁷¹ <<http://www.islamibayanaat.com/MQ/English-MaarifulQuran-MuftiShafiUsmaniR A-Vol-1-Page-587-637.pdf>> accessed 2 February 2010.

⁷² <<http://www.shiasource.com/al-mizan>> accessed 27 August 2009.

divorce. Therefore, the divorcers are obliged to be doers of good. And this verse orders the doers of good to make provision for the divorced women. In other words, it obliges the divorcers to make such provision. (And Allah knows better).

Tabatabai, the renowned exegete, successfully appreciates the obligatory nature of *mut'ah* which a husband must pay for annulling the marital tie.

Sayyid Qutb observes that in such circumstances the husband is obliged to recompense her according to his means. He clarifies this by saying that the nature and size of the gift offered in such situation is left to the discretion and reasoned conscience of man but of course, within his financial capacity. He amazingly summed up the true intent of this gift in the following words:

Such a gesture would have an immense psychological impact on the woman, who would be devastated at having her marriage dissolved before it has even begun. It would go a long way towards dissipating any bitterness or acrimony left in her heart. The unfulfilled marriage would be understood as an unfortunate mistake rather than a reflection on her suitability or integrity. The aim would be to diffuse the tension and conduct the severance of the relationship amicably, in a spirit of fairness and with no hard feelings.⁷³

In explaining the verse 241 of Chapter 2 Sayyid Qutb vehemently opines that the 'provisions' referred to here are not identical to and same as maintenance.⁷⁴ Though few scholars hold the opinion that the right given to the divorcee in this verse was superseded by other verse he strongly argues that the context and the spirit of these Qur'anic passages suggest that such provisions are a right of all divorced women irrespective of whether the marriage was consummated or a dower agreed and settled.⁷⁵ Being a renowned exegete, he observes that these provisions are designed to alleviate the bitterness and acrimony associated with divorce, and to compensate or offset some of the grief, anguish, and distress that follow the severance of nuptial tie.⁷⁶

⁷³ Sayyid Qutb, *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-Qur'an*].

⁷⁴ Ibid, 375. Here he defies the opinion of different scholars as well as translators of the Qur'an who hold the view that *mut'ah* as embodied in this verse require to be construed as maintenance. Thus, he disagrees with the view of Muhammad Asad who translated the word *mut'ah* in the perspective of this verse as maintenance. See Muhammad Asad, *The Message of the Qur'an*, (Dar Al-Andalus, 1980) 54. In the same vein another scholar, after examining the connotation of the very term *mata'* as elucidated by different exegetes of the Qur'an, stringently insists that the translation of Abdullah Yusuf Ali is erroneous since no significant Arabic lexicons construe the aforesaid word as maintenance. See Syed Athar Hussain, *Muslim Personal Law: An Exposition* (All India Personal Law Board,) 121-6.

⁷⁵ Ibid, 375-6.

⁷⁶ Ibid, 376.

Though it is alleged that Sayyid Qutb belongs to the group of unbending scholar, the aforementioned vindication stunningly shuts up the mouth of the critics at least regarding this issue. He, with a rhythmic tone of progressiveness and liberalism, appraised the Qur'anic *Weltanschauung* or worldview exclusive of divorced women and furbished the path for them to be bestowed with the divinely ordained *mut'ah*. Being empathized he endeavoured to feel psychological trauma of the divorcee and after appraising the divine intent boldly expressed that *mut'ah* must be paid to all divorcee as outlined above. Though very simply put but very revolutionary while he manifestly maintained that, the claim of *mut'ah* stands in a quite distinct platform from maintenance or *nafaqa*.

Payment of Mutat: Obligatory or Merely Recommended.

Inevitable offshoot of Islamic legal pluralism also leaves its scar on the issue of *mut'ah*. Divergent approach towards the interpretation of the Qur'an and the Sunnah is the prime mover to contrive the scholastic division among the scholars. Undoubtedly each scholar, very logically as well as unsurprisingly, in this process was critically influenced by his own society and time and thereby it is not entirely illusory to claim that their understanding of Shariah, to assume its shape, borrows the stream of thought extant at that period.

Regarding the nature of *mut'ah* juristic opinions spawn two different brooks of thought.⁷⁷ While some scholars portray the post-divorce financial support as obligatory others venture to regard it merely recommendable.⁷⁸ Beyond this theological apparent dissection, as one author bewails, in terms of practicality, Muslim scholars generally treat *mut'ah* as merely recommended not fittingly mandatory and even the jurists who enthusiastically regard it obligatory miserably fail to sponsor this idea.⁷⁹

Hanafi School of jurisprudence, excepting in the following two cases, fervidly opposes to bestow divorcee with *mut'ah*.⁸⁰

The first case relates to *al-mufawadah*, referring to a woman entered into wedlock without determination of dower and divorced before consummation of the nuptials.⁸¹ Second case embraces the case of a divorcee whose dower though fixed but her matrimonial alliance was severed before the consummation of marriage.⁸²

This stance of Hanafi School, most ancient Sunni school of fiqh with huge number of devout followers, drive many Muslim scholars, judges and

⁷⁷ See Sheikh, above n 48, 179.

⁷⁸ See Ibid.

⁷⁹ See Ibid.

⁸⁰ See Ibid, 180.

⁸¹ See Ibid.

⁸² See Ibid.

masses to regard *mut'ah* merely recommendable.⁸³ This predominant view, very willingly overlooking the other cases of divorce excepting the aforesaid two, spontaneously provokes innumerable plights for the divorced women.

Imam Malik ibn Anas and most of the scholars of Maliki School of jurisprudence basing their logic on the interpretation of words *muhsinin* and *muttaqin*, opine that *mut'ah* is recommended for all divorcees except those with fixed dowers and whose marital tie was annulled before the consummation of the matrimony.⁸⁴

Imam Malik in *Al-Muwatta*, a noted *Hadith* Book, mentioned the following *ahadith* regarding compensation to the divorced wife under the heading titled 'Compensation in Divorce'. The first *Hadith* spelt out that compensation paid by Abd-ar-Rahman ibn Awf, a renowned companion of the Prophet (PBUH) to his divorced wife was a slave girl, an essential and precious gift during that period. The *Hadith* is as follows:

Yahya related to me from Malik that he had heard that Abd ar-Rahman ibn Awf divorced his wife, and gave her compensation in the form of a slave-girl.⁸⁵

Imam Malik opined that every divorced woman has compensation except the one who is divorced and is allocated dower but of course before consummation. The *hadith* reads as follows:

Yahya related to me from Malik from Nafi that Abdullah ibn Umar said, "Every divorced woman has compensation except for the one who is divorced and is allocated a bride-price and has not been touched. She has half of what was allocated to her."⁸⁶

The following *hadith* also emphatically affirms that each and every divorced woman has compensation.

Yahya related to me from Malik that Ibn Shihab said, "Every divorced woman has compensation." Malik said, "I have also heard the same as that from al-Qasim ibn Muhammad."⁸⁷

As regards the amount of compensation Imam Malik opined that there is no limit of compensation. The following statement as embodied in *Al-Muwatta* clarifies this.

Malik said, "There is no fixed limit among us as to how small or large the compensation is."⁸⁸

⁸³ See Ibid.

⁸⁴ See Ibid, 180-1.

⁸⁵ *Al-Muwatta* Book 29 Divorce, Section: Compensation in Divorce, *Hadith* no: 29:16:45.

⁸⁶ Ibid.

⁸⁷ Book: 29 Divorce, Section Compensation in Divorce *Hadith* no: 29:16: 46.

⁸⁸ Ibid.

Thus, the stance of Imam Malik becomes clear regarding *mut'ah*. His thought, regarding amount of post-divorce financial support, is revolutionary since he is quite aware of the *maqasid al-sharia* underlying the provisions of the *mut'ah*. He kept it open and made space for the upcoming scholars to determine the amount of *mut'ah* in their own time and society after taking into consideration the different factors regarding the said divorce, plights of divorcee as well as the financial capability of the husband.

Imam al-Shafii, very erudite scholar of Islamic jurisprudence, holds that a divorcee who is not divorced due to her own fault is entitled to *mut'ah*. This School held that there is no prohibition to pay *mutat* to the wife divorced before consummation. One eminent scholar of the Shafii School mentioned:

A woman repudiated before or after the consummation of marriage, to whom the law does not allow half dower, may demand a pecuniary indemnity called *motah*. This is also in the case of separation, at any rate when this separation is not the result of anything for which the woman is responsible. ...where the parties cannot agree as to the amount of the *motah*, the decision rests with the court, which should take into account the condition of both the litigants. Some authorities, however, maintain that the court should have regard to the husband's condition only; some only to that of the wife; others admit no legal minimum, provided that the *motah* consists of something that can form the basis of a legal obligation.⁸⁹

The position of scholars of Hanbali School of jurisprudence corresponds to those of the Hanafi and Shafii Schools.⁹⁰

All the divorced women are entitled to *mutat* though few scholars exclude the women who fall within the category as mentioned in Chapter 2: 237. On the other hand others in relation to the *mutat* as mentioned in Chapter 33: 49 unhesitatingly opine that this *mutat* is in addition to the half dower payable to the divorced wife by them under Chapter 2: 237. They further advance the argument by saying that if the dower had not yet been determined the *mutat* would in all its probability be larger, and it would certainly absorb the *mutat* prescribed in Chapter 2: 236.⁹¹

⁸⁹ Mahiudin Abu Zakaria Yaha Ibn Sharif En Nawawi, *Minha Et Talibin: A Manual of Muhammadan Law According to the School of Shafii* (E C Howard, Law Publishing Company, undated) 313.

⁹⁰ See Sheikh, above n 48, 183-4.

⁹¹ Abdullah Yusuf Ali, *The Holy Qur'an, Text, Translation and Commentary*, (Goodward Books, first published 1934, 2009 ed) 1121. He translated the word *mutat* here as present or gift. On the other hand, Muhammad Asad translated *mutat* as provision. See above n 41.

Views of Contemporary Scholars

Dr Sibayee⁹² vehemently supports the approach followed by the different modern states specially Syria, his native land. But he raised an objection regarding the legislation enacted by Syria. His objection is concentrated on the point of payment of compensation in addition to the maintenance for the waiting period as it specifies a time limit i.e. in an amount not exceeding three years' maintenance (*he mentioned the time limit as one year but it is now 3 years*). After raising this objection, he asserts that the arrangements should be made in such a way which would compel the oppressor husband to provide compensation to his wife until she remarries if she remains eligible for marriage (*of course, this is only possible if she expresses her desire to do so*) and if she is aged lady for which she is not in an eligible state of marriage she must be reimbursed in such a manner that she could lead her remaining life honourably i.e. she should be provided with secured abode and minimum standard provision for protecting her life and honour. He also opines that if the husband is not so financially well-off, the state shall have to bear the expenses after husband's arrangement's provided in accordance with his financial ability. He very beautifully sums up the philosophy of this when he articulates that Islamic *Shariah*, as it's intrinsic nature ensures justice, does not tolerate the whimsical conduct of the husband which expose the women in an inhuman situation i.e. she has spent the golden time of her life with that husband and in the last phase of her life she will be approaching the death without getting any reward from the family bondage that has been severed arbitrarily by the husband. It would be very much injustice for the husband not to provide any sustenance to the wife.

If a husband pronounces a *talaq* and it is apparent to the judge that the husband has acted arbitrarily and without reasonable cause, and that the wife will suffer misery and hardship, the judge may make an award against him for compensation to the wife according to his circumstances and the degree of arbitrariness in an amount not exceeding three years' maintenance for a woman of like social status. This shall be in addition to the maintenance for the waiting period. The judge may rule that this compensation be paid as a lump sum or in monthly instalments according to the circumstances.

Rafiallah Sahab, a pakistani scholar were succeeded in appreciating the true nature of Islamic Law in early periods regarding the issue of *mutat* and also urged the members of the contemporary community to understand the dynamics of Islamic Law in the context of modern complexities. After referring to a *hadith* and opinions of a group of scholars he asserts:

...good Muslims in the early period of realm always paid a handsome amount to their divorced wives so that someone may contract marriage with them for the sake of this money. Servants were provided to those divorced women who had passed the limit of

⁹² See As-Sibayee, above n 29, 99.

marriageable age. The expenses of this servant were always borne by the divorcing husband. If the husband is expected to pay the expenses of a servant, he can do so in respect of payment of maintenance allowance to her...In the light of these details, it is suggested that the ulema should study this issue in the light of the teaching of the Qur'an and Sunnah.⁹³

Fayyazur Rahman, another scholar of Pakistan agrees with this view.⁹⁴

Ashraf Ali Thanvi, a renowned scholar of the sub-continent opined that divorced may be effected only when all the efforts to keep intact the marital bond fails and husband should have to provide maintenance to the wife until her death or remarriage. He issued the following verdict while Maulana Abdul Majid sought his valuable opinion regarding his intention to divorce his disobedient wife:

I agree with you that you would arrange another husband for her. This is one alternative which you think suitable but this may have some defects. If at another place she is unable to maintain harmonious relationship and in case her marriage tie irretrievably breaks down then you would be responsible for that. You think over the matter again and again and if it is inevitable for you in the present circumstances and you have decided to divorce her you should do it with the condition that if she does not marry again, you will pay her an amount of Rs 5 per month for ever during her life time and if she remarries you will give her an amount of Rs 10 per month until her second marriage.⁹⁵

Another contemporary scholar Khaliq Ishaque severely criticized the stance of those early jurists who interpreted the provisions as found in Sura Al-Baqara 2: 241-2 from a misogynist point of view since they interpreted the injunction to pay *mutat* as a moral obligation instead of legally enforceable obligation. He laments:

Qur'an gives special status to women, but in the standard projections of Islam this point is overlooked: and in some cases even explained away. For instance, Qur'an says that provision be made for the maintenance of divorced women apart from that provided for

⁹³ Rafiullah Sahab, 'A Pakistani View of Muslim Law' in Lucy Carroll (ed), *Shah Bano and the Muslim Women Act a Decade On: The Right of the Divorced Muslim Woman To Mataa* (Grabels, 1998) 54-5 cited in Alamgir Muhammad Serajudddin, *Muslim Family Law, Secular Courts and Muslim Women of South Asia A study in Judicial Activism* (Oxford University Press, 2011) 230-1.

⁹⁴ See for details Fayyazur Rehaman, 'Post Divorce Maintenance for Muslim Women in Pakistan and India' (1998) 2(1) *Bangladesh Journal of Law* 26, 51.

⁹⁵ Furqan Ahmed, 'Role of Some Indian Muslim Jurists in Development and Reform of Muslim Personal Law in India' (1992) 34(4) *Journal of Indian Law Institute* 575, quoted in Alamgir Muhammad Serajudddin, *Muslim Family Law, Secular Courts and Muslim Women of South Asia A study in Judicial Activism* (Oxford University Press, 2011) 231.

the period of *iddat*. But the juristic view prevailing is that this provision only requires a pair of clothes and food for one to three days!⁹⁶

Modern Legislations designed to provide Reliefs to the Divorcee

It is noticeable that certain modern states have legislated in this regard.⁹⁷ Those states through their laws provide that if the husband arbitrarily divorces his wife or abuses his power of *talaq* recompense must be paid to the wife by the husband for the injury inflicted on her.

Art 52 of the Family Code 1984 of Algeria provides that if the judge considers that the husband has abused his right of *talaq* he shall award the wife the right to damages and benefits for the harm which she has suffered.

In Egypt Art. 18 of the Law no 25/1929 as amended by Law no. 100 Of 1985 provides that a woman with whom a valid marriage has been consummated, whose husband divorces her without her agreement and without any cause on her part shall in addition to the maintenance for her waiting period be entitled to compensation (*mut'a*) which shall be assessed as at least two years' maintenance, taking into consideration the circumstances of the divorcing husband in terms of wealth or poverty, the circumstances of the divorce and the length of marriage. The divorcing husband shall be permitted to pay the compensation in instalments.

Art. 134 of Jordanian Family Law of Personal Status says that if a husband pronounces *talaq* arbitrarily, that is if he divorces his wife without reasonable justification, and she makes a claim to the judge for compensation, he shall award her, against her divorcing husband, the compensation which he sees appropriate on condition that it shall not exceed the amount of her maintenance for one year. The husband shall pay this compensation in full or in instalments according to the requirements of the situation, and the circumstances of the husband in terms of wealth or hardship shall be taken into account. This shall not affect the other matrimonial rights of the divorced woman including maintenance for the waiting period.

Art. 165 of Kuwaiti Code of Personal Status provides that if a valid marriage is dissolved after consummation the wife shall be entitled, in addition to her maintenance, to compensation which shall be assessed at an amount not exceeding one year's maintenance, in accordance with circumstances of the husband, and which shall be given to her in monthly instalments following

⁹⁶ Sabeeha Hafeez, *Metropolitan Women in Pakistan* (1981) xi; see also Lucy Carroll, 'Divorced Muslim Women and Maintenance' (1986) 38 *PLD Journal* 1, quoted in Alamgir Muhammad Serajuddin, *Shari'a Law and Society Tradition and Change in the Indian Subcontinent* (Oxford University Press, 2nd ed, 2001) 316.

⁹⁷ For a critical analysis on this issue see Lynn Welchman, *Women and Muslim Family Laws in Arab States A Comparative Overview of Textual Development and Advocacy* (Amsterdam University Press, 2007) 125-31.

the completion of her waiting period, provided the parties have not agreed otherwise with regard to the amount or the manner of payment.

Exceptions to the preceding paragraph shall be:

- i. divorce for non-payment of maintenance due to hardship of the husband;
- ii. divorce on grounds of *dharar* if caused by the wife;
- iii. divorce by consent of the wife;
- iv. annulment of marriage at the request of the wife;
- v. death of one of the spouses.

Article 117 of Syrian Law of Personal Status (*Qanun al-Ahwal al-Shakhsiyya*), 1975 says that if a husband pronounces a *talaq* and it is apparent to the judge that the husband has acted arbitrarily and without reasonable cause, and that the wife will suffer misery and hardship, the judge may make an award against him for compensation to the wife according to his circumstances and the degree of arbitrariness in an amount not exceeding three years' maintenance for a woman of like social status. This shall be in addition to the maintenance for the waiting period. The judge may rule that this compensation be paid as a lump sum or in monthly instalments according to the circumstances.

Art. 31 of Tunisian Law of Personal Status, 1956 says that decree of divorce shall be made:

- a. on the basis of the request of the husband or the wife on the grounds specified in the articles of this law;
- b. by mutual agreement of the spouses;
- c. at the will of the husband if he wishes to divorce or at the request of the wife. In this instance the judge shall determine what financial compensation shall be due to the wife as reparation for harm caused to her, or what compensation she should pay to the husband.

Art. 71 of Yemeni Law of Personal Status provides that if the man divorces his wife and it becomes apparent to the judge that the husband has divorced her arbitrarily without any reasonable cause and that this will cause her distress and hardship the judge may rule in her favour in accordance with the husband's circumstances that he pay her compensation not exceeding the amount of one year's maintenance for a woman of her status in addition to the maintenance for the waiting period. The judge may make payment of this compensation a lump sum or monthly in accordance with the requirements of the situation.

Section 56 of Islamic Family Law (Federal Territories) Act 1984 wonderfully focuses on mutah or consolatory gift to woman divorced without just cause. It provides that in addition to her right to apply for maintenance, a woman who has been divorced without just cause by her husband may apply to the

Court for *mut'ah* or a consolatory gift, and the Court may, after hearing the parties and upon being satisfied that the woman has been divorced without just cause, order the husband to pay such sum as may be fair and just according to Hukum Syara.⁹⁸

Under the *Kompilasi Hukum Islam di Indonesia (KHI)*⁹⁹, *mutat* must be compulsorily paid if the wife is divorced before consummation and where no amount of dower is fixed and where divorce takes place at the will of the husband.¹⁰⁰ In other cases payment of *mutat* falls within the category of sunnah.¹⁰¹ Payment of *mutat* is dependent on the financial capacity of the husband.

The aforesaid discussion reveals that different states of Middle East, North Africa, and Southeast Asia legislated to provide compensation, *mut'ah* to the wife who has been divorced arbitrarily. Legislation of different states, though made references to maintenance, it was just because to measure the amount of compensation, not to treat the compensation as maintenance. Few states, however, clarified that this payment of compensation is in addition to the maintenance payable to the wife during *iddat* period. So, in no way, those provisions can be regarded as provisions made for maintenance of unjustly divorced wife.¹⁰² Equating and construing and above all terming compensation as maintenance will inevitably lead to erroneous conclusion.

Judicial Activism relieving the plights of Divorced Women

Regarding the interpretation of Sura Al-Baqara 2: 241 the Indian Supreme Court in *Mohd. Ahmed Khan v Shah Banu Begum*, AIR 1985 SC 945 held that the liability of the husband to provide maintenance to the divorced wife goes beyond the period of *iddat*. It also held that the explanation appended to section 125(1) of the Code of Criminal Procedure includes a divorced wife within the definition of wife and it contains no words to exclude Muslim women from its scope. Thus, a divorced Muslim woman would retain her status as a wife until her remarriage.¹⁰³ The court continued by saying that

⁹⁸ For a general discussion on the Law of Maintenance in Malaysia, see Taslima Monsoor and Raihanah Abdullah, 'Maintenance to Muslim Women in Bangladesh and Malaysia: Is the Judiciary Doing Enough?' (2010) 21(2) *Dhaka University Law Journal* 39, 51-7.

⁹⁹ This is a compilation of Islamic Law authored by officials from the Ministry of Religion. This is followed since the mid-1980s. See Abdullahi A An-Na'im (ed) *Islamic Family Law in a Changing World A Global Resource Book* (Zed Books, 2002) 264.

¹⁰⁰ See section 158(a) and (b) of the *Kompilasi Islam di Indonesia*.

¹⁰¹ Section 159 of the *Kompilasi Islam di Indonesia*.

¹⁰² Alamgir Muhammad Serajuddin termed compensation as maintenance. See Alamgir Muhammad Serajuddin, *Shariah Law and Society Tradition and Change in the Indian Subcontinent* (Oxford University Press, 2nd ed, 2001) 325-6; see also Alamgir Muhammad Serajuddin, *Muslim Family Law, Secular Courts and Muslim Women of South Asia A study in Judicial Activism* (Oxford University Press, 2011) 232.

¹⁰³ *Mohd Ahmed Khan v Shah Bano Begum* AIR 1985 SC 945, 948-9.

no conflict or contradiction exists between the provisions of section 125 and Muslim personal law regarding the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself.¹⁰⁴ It observed that though the Muslim personal law limits the husband's liability to provide maintenance up to the *iddat* period it fails to contemplate the situation envisaged by section 125 and hence it cannot be concluded that the Muslim husband is in no way liable to provide maintenance beyond the *iddat* period to his divorced wife who is quite helpless to maintain herself.¹⁰⁵

This decision stirred the whole country with agitation and ultimately led the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986 to specify the rights of a Muslim divorced woman at the time of divorce and to protect her interest.¹⁰⁶ Section 3(1) of the Act provides that a divorced woman shall be entitled to "a reasonable and fair provision and maintenance to be made and paid to her within the *iddat* period by her former husband."¹⁰⁷ Under section 3(1)(c) and (d) she is also entitled to "an amount of *mahr* or dower" due to her and all the properties given to her as marriage gifts. Failure to make a reasonable and fair provision and maintenance or the non-payment of dower or the non-delivery of property entitle the woman to file an application to a Magistrate for an order for payment of such provision, maintenance or dower of property. Section 4 provides that where a Magistrate is satisfied that a divorced woman is unable to maintain herself after the expiry of *iddat* period, he may order such of her relatives as would be entitled to inherit her property after death, to pay such reasonable and fair maintenance to her which deems proper an fit to him. In case of inability of any one of the relatives to pay her maintenance, the Magistrate can direct the State Wakf Board to pay her such maintenance as may be determined by him.¹⁰⁸

One renowned author commented that the Act begs the following questions:

- (i) Whether it takes away the rights which are conferred upon the divorced women under the personal law as interpreted by the Supreme Court in the Shah Bano Case.
- (ii) Whether the words 'provision' and 'maintenance' which occur in section 3(1)(a), mean the same obligation or two separate and distinct obligations.

¹⁰⁴ Ibid, 950-1.

¹⁰⁵ Alamgir Muhammad Serajudddin, *Muslim Family Law, Secular Courts and Muslim Women of South Asia A study in Judicial Activism* (Oxford University Press, 2011) 56.

¹⁰⁶ Ibid, 60.

¹⁰⁷ Ibid, 61.

¹⁰⁸ Ibid.

- (iii) Whether the liability to make a reasonable and fair provision and pay maintenance is only restricted to the *iddat* period or whether it extends beyond the *iddat* period.¹⁰⁹

After a number of conflicting decisions in different courts of different provinces of India the aforesaid issues were finally settled by the Supreme Court of India in the celebrated case of *Danial Latifi v Union of India*¹¹⁰. 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.¹¹¹

The aforesaid attitude of the Indian judiciary though endeavours to remedy the plights of divorcee but fails to unveil the true utility and vitality of the *mut'ah* as a post-divorce financial support. Moreover, to comply with the legislation it takes an apologetic feat and creates a burden on the shoulder of the husband to make fair and reasonable provision within the *iddat* period.

Neither the Parliament nor the Courts of Pakistan took any step to relieve the destitute wives from the distress inflicted upon them by their husband through arbitrary repudiation.¹¹²

¹⁰⁹ Ibid.

¹¹⁰ 2001 FLC 513, AIR 2001 SC 3958, (2001) 7 SCC 740.

¹¹¹ *Danial Latifi v Union of India*, 2001 FLC 513 at 529-30.

¹¹² To develop an overall idea on the Muslim Family Law in Pakistan, see above n 105, 104-87.

In Bangladesh a Division Bench of the High Court Division (HCD) of Supreme Court held that a divorced woman is entitled to maintenance on a reasonable scale from her former husband until remarriage. The court asserted:

Considering all aspects we finally held 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 husband.¹¹³

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 *maarooj*) and the translation of the Qur'an by Abdulla Yusuf Ali.

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

1. The HCD wrongly interpreted *mataa* 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.¹¹⁴
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.¹¹⁵
3. There being no direction of payment of maintenance during 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 woman. 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.¹¹⁶

Though the AD conceded that *mataa* is considered as recompense for the injury inflicted by the husband on his wife through his whimsical exercise of divorce by the different states of the world it willingly restrained itself to take any attempt to establish such sort of relief through judicial activism. Moreover, while HCD, to construe the very word '*mut'ah*', wrongly opined that it meant maintenance¹¹⁷ AD outright failed to appreciate the divine

¹¹³ *Hefzur Rahman v Shamsun Nahar Begum and another* (1995) 47 DLR, 57, para 23.

¹¹⁴ *Ibid*, para 142.

¹¹⁵ *Ibid*, para 168.

¹¹⁶ *Ibid*, para 172.

¹¹⁷ This type of erroneous interpretation also finds its place in a research article of Ayesha Shahid. See Post Divorce Maintenance for Muslim Women in Pakistan and

intent underlying the provision of *mut'ah* as ordained in the Qur'an, its basic meaning (since it very narrowly interpreted the term), nature, breadth as well as its true significance for the divorced women in different ages.¹¹⁸ The stance of different researchers also clouded the ground and failed pessimistically to construct a comprehensive framework for the alleviation of the plights of divorcee. One group of scholars emphatically and enthusiastically termed the decision of the HCD bold¹¹⁹, pure and simple judicial activism¹²⁰ but their stances despondently failed to go beyond the rim defined by western scholars. They always tended to consider the *mut'ah* as post-divorce maintenance¹²¹ instead of comprehending its generic character as post-divorce financial support. Even some scholars go to the extent of arguing that post-divorce maintenance could be regarded as compensation after taking into consideration the contractual nature of marriage. This vein of argument also lacks ingenuity since marriage under Islamic Law, as one scholar, appreciating its nature as sanctified religious contract having moral, social as well as spiritual nuances, reiterates, never resembles the contract entered into under the conventional law of contract and considering so will expose it to suffer the fate of so called judicial remedy namely restitution of conjugal rights introduced by the colonial power, on the basis of same understanding, in the Indian sub-continent.¹²² Moreover, payment of compensation is not always dependent upon the existence of an agreement rather compensation becomes always mandatorily payable due to the injury caused to anyone unjustifiably. Though the latter scholar very magnificently pointed out that one should not worry to find out the solution

Bangladesh: A Comparative Perspective, (2013) 27(2) *International Journal of Law, Policy and the Family* 197.

- ¹¹⁸ In this regard Shahdeen Malik very aptly criticizes the attitude of the apex court. See Shahdeen Malik, 'Laws of Bangladesh' in A M Chowdhury and Fakrul Alam (ed), *Bangladesh on the Threshold of the Twenty- First Century* (Asiatic Society of Bangladesh) 433, 461-2.
- ¹¹⁹ Ridwanul Hoque and Md Morshed Mahmud Khan, 'Judicial Activism and Islamic Family Law: A Socio-legal Evaluation of Recent Trends in Bangladesh' (2007) 14(2) *Islamic Law and Society* 204, 225. For a detailed discussion on this judgment See also Md Mohiuddin Khaled and Ridwanul Hoque, 'Right to Post-Divorce Maintenance in Muslim Law: The Shamsun Nahar Revisited' [1999] (4) *Chittagong University Journal of Law* 1.
- ¹²⁰ See above n 105, 226. See also Alamgir Muhammad Serajuddin, 'Judicial Activism and Family Law in Bangladesh' (2010) 55(1) *Journal of the Asiatic Society of Bangladesh (Humanities)* 47, 65.
- ¹²¹ One scholar, even unjustifiably ventures to treat the verses of the Qur'an on *mut'ah* as verses on post-divorce maintenance. See Rabia Bhuiyan, *Gender and Tradition in Marriage and Divorce: An Analysis of Personal Laws of Muslim and Hindu Women in Bangladesh* (United Nations Educational, Scientific and Cultural Organization, 2010) 231.
- ¹²² Anisur Rahman, 'Unlocking the Gate of Ijtihad Heffzur Rahman Revisited' [2011] (2) *Stamford Journal of Law* 155, 172. The last argument was borrowed by the author from other scholar. For this, see Shahdeen Malik, 'Muslim Family Courts Ordinance, and Relevant Reported Judgments' (Reader for the Students of the School of Law, BRAC University, 2005) 44.

beyond Islamic traditions¹²³, he abortively bungled to portray *mut'ah* as a post-divorce financial support. Another scholar, after emphasizing on the striking of right balance between the need of the divorced women and the affluence of the husband, asserts that the right of the divorcees to post-divorce maintenance¹²⁴ should be subject to duty to mitigate their own anguish and vulnerability and to effect this she urges them to be self-reliant as far as possible.¹²⁵ Furthermore, she believes that this will "have a positive impact upon the acceptability of the obligation to pay post-divorce maintenance on the part of the divorcing husband"¹²⁶.

We submit here that conforming to this view will, certainly put severe blow to the egalitarianism of Islamic faith since women cannot be burdened forcefully to earn their livelihood though they have absolute liberty to earn a lot if they wish. Secondly, this is not charity rather the right of the wife to be compensated by the divorcing husband for injuring her through arbitrary repudiation. Thirdly, this attitude will facilitate the husband to evade from his liability to support wife already divorced by him without justifiable rhyme or reason.

One scholar, though ventured to pose doubt regarding the implementation of decisions of the highest level of judiciary as to the maintenance in general, termed the judgment of the HCD on post divorce maintenance as celebrated one.¹²⁷ Since the HCD instead of appreciating the divine intent behind the verses on *mut'ah* travelled a complete different path its judgment eventually failed to ensure justice for the divorced women. Erroneous construction of *mut'ah* as maintenance debars us to dub it an illustrious judgment.

The leading British scholars after appreciating the modern social welfare rationale behind post divorce maintenance as reflected in the Indian decision of *Mohd Ahmed Khan v Shah Banu Begum*, AIR 1985 SC 945 and Islamic interpretation as advanced by the HCD of Bangladesh¹²⁸ in *Hefzur Rahman v Shamsun Nahar Begum and another* 15 BLD(1995) p. 34 opined that though the Qur'an obliged the husband to maintain divorced wife this beneficial legislation was ultimately narrowly interpreted by the jurists to

¹²³ Ibid.

¹²⁴ Beyond the *iddat* period the husband is responsible to provide post-divorce financial support not maintenance. This argument is already spelt out earlier in this write up.

¹²⁵ Naima Huq, 'Post-Divorce Maintenance: Legal and Social Appraisal' in Tahmina Ahmad and Md Maimul Ahsan Khan (ed) *Gender in Law* (Adtam Publishing House, 1998) 61, 82.

¹²⁶ Ibid.

¹²⁷ Taslima Monsoor, *From Patriarchy to Gender Equity, Family Law and Its Impact on Women in Bangladesh* (University Press Limited, 1999) 217.

¹²⁸ They mentioned it as Dacca High Court. This provides a wrong overview regarding the structure of apex Court of Bangladesh under its constitutional scheme. As per Article 94(1) of the Constitution of Bangladesh the highest court of Bangladesh is named as Supreme Court and it is divided into two separate divisions namely Appellate Division and High Court Division. However, the very word Dacca was replaced by Dhaka in 1983.

the effect that husband is liable to provide maintenance to the wife up to *iddat* period.¹²⁹ These scholars, we believe, did not provide due notice to the ever evolving dynamic and organic character of *mut'ah* or post divorce financial support. Moreover, they labelled the interpretation put by the HCD of Bangladesh as Islamic interpretation but the fact is that the interpretation placed by the same division is essentially flawed due to its piecemeal approach in defining *mut'ah*, deliberate negation to follow the different principles of interpretation of the Qur'an, disregard of authentic *Sunnah* of the Prophet (PBUH), negligently overlooking divergent juristic interpretations of different schools of thought and overall failure to comprehend the *maqasid al-Shariah* underlying the verses on *nafaqa* as well as *mut'ah*. The renowned scholars conceived of Qur'anic foundation but void of authentic *Sunnah* of the Prophet (PBUH).

Harta Sepencarian- A great Relief to Divorced Muslim Women

Harta Sepencarian, division of the matrimonial assets on death or divorce, serves a great relief to both the spouses. Both the spouses are entitled to claim *Harta Sepencarian* on the death of one of them or on case of dissolution. Division of matrimonial assets stems from the local *urf* of Malaysia. This is in vogue since colonial time and seems to be analogous to *mata' al-bayt* (home appliances) or *mal-al-zawjayn* as spelt out in different legal texts of different schools of jurisprudence. This custom has already secured its place in the Islamic Family Law (Federal Territories) Act, 1984.

Section 58(1) provides that the Court shall have power, when permitting the pronouncement of *talaq* or when making an order of divorce, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.

Section 58(2) says that in exercising its power of granting *harta sepencarian* the court shall take into consideration the following factors.

(a) the extent of the contributions made by each party in money, property, or labour towards acquiring of the assets;

(b) any debts owing by either party that were contracted for their joint benefit;

(c) the needs of the minor children, of the marriage, if any, and, subject to those considerations, the Court shall incline towards equality of division.

Section 58(3) further provides that the Court shall have power, when permitting the pronouncement of *talaq* or when making an order of divorce, to order the division between the parties of any assets acquired during the marriage by the sole effort of one party to the marriage or the sale of any such assets and the division between the parties of the proceeds of sale.

¹²⁹ David Pearl and Werner Menski, *Muslim Family Law* (Sweet and Maxwell, 3rd ed, 1998) 205.

However, the court requires to take into consideration the following matters while exercising its powers under section 58(3).

(a) the extent of the contributions made by the party who did not acquire the assets, to the welfare of the family by looking after the home or caring for the family;

(b) the needs of the minor children of the marriage, if any, and, subject to those considerations, the Court may divide the assets or the proceeds of sale in such proportions as the Court thinks reasonable, but in any case the party by whose efforts the assets were acquired shall receive a greater proportion.

Section 58(5) says that for the purposes of this section, references to assets acquired during a marriage include assets owned before the marriage by one party that have been substantially improved during the marriage by the other party or by their joint efforts.

The claim to *harta sepencarian* depends not on the circumstances of the dissolution of the marriage rather on the contributions of the spouses during their conjugal life.¹³⁰ The wife, whose housework might be said to have indirectly contributed to the husband's acquisition of property, is entitled to claim one-third of the property acquired during the marriage. She is entitled to claim half if it is shown that she contributed directly towards its acquisition. The claim can be made upon divorce or before the husband contracts a polygamous marriage.¹³¹

Under the *Kompilasi Hukum Islam di Indonesia (KHI)* if one of the spouse dies the living spouse is entitled to the half of the *harta bersama*¹³² and in case of talaq both are entitled to half in the absence of any stipulation in the marriage contract to the contrary.¹³³

1992 amendments to the Iranian Divorce Law allow "domestic wages" (calculated by placing monetary value on housework) for the work a wife has done during the marriage if the divorce is not initiated by her or caused by any fault of hers.¹³⁴ Domestic wages, as one noted author opines, is probably the conglomeration of *mutat* and *harta sepencarian*.¹³⁵ Though this reform is evidently revolutionary in nature one scholar asserts, the

¹³⁰ Nik Nooriani Nik Badli Shah, *Bibaho O Bichhed Islami Den Dharonar Alope Ainer Shansker* (Shajahan Faroque trans, Asia Foundation,) 103 [trans of: *Marriage and Divorce Law Reform within Islamic Framework*].

¹³¹ <<http://www.sistersinislam.org.my/BM/baraza/reforming.htm>> accessed 12 September 2012.

¹³² Section 96(1) of the *Kompilasi Hukum Islam di Indonesia*, 1991.

¹³³ Section 97 of the *Kompilasi Hukum Islam di Indonesia*, 1991.

¹³⁴ See Shah, above n 130.

¹³⁵ See Shah, above n, 130, 104.

measure is undoubtedly tough to apply in practice partly due to the intricacies involved in determining wages for housework¹³⁶.

Conclusion

In view of the above discussion, it appears that Qur'anic laws require to be interpreted from an emancipatory point of view instead of a misogynist point of view. Under Islamic Law the husband has to follow certain prerequisites as espoused in the Holy Qur'an before initiating talaq since disregard of those commandments of Allah (SWT) shall tantamount to outright violation of His Laws. However, if husband abuses his right of talaq he can be held liable for paying compensation to the divorced wife for such kind of injury inflicted on her. This is effectively possible through the enactment of a sound piece of legislation which falls within the purview of *Siyya al Shariah* of a state. Reforms of certain states bear this testimony. Those states draw the spirit of reform from the verses of the Qur'an regarding *mutat*. They treat *mutat* as a recompense for the injury inflicted on the wife by the husband arbitrarily. This fact also, to us, finds its recognition in the *hadith* of the Prophet Muhammad (PBUH) saying that "there should be neither harming (*darar*) nor reciprocating harm (*dirar*)"¹³⁷. In the context of Indian Sub-continent the reforms which took place in India is also appreciable but not like those of Arab, African countries, Iran, Malaysia and Indonesia. Since the Supreme Court of India failed to perceive the holistic, functional and organic nature of *Shariah* especially the Qur'anic and Sunnatic provisions regarding *nafaqa* as well as *mut'ah* the interpretations placed by it could not assume the feat like the aforesaid states. The interpretation of HCD of Bangladesh Supreme Court utterly failed to appreciate the real spirit and philosophy of Qur'anic Laws. On the other hand, AD of the Supreme Court though conceded the concept of recompense payable to the injured wife took no initiative to establish such right of the divorced Muslim women through judicial activism. Apart from these, the concepts of *harta sepencarian*, *harta bersama*, domestic wages (the proper term may be honorarium) as

¹³⁶ Abdullahi A An-Na'im (ed) *Islamic Family Law in a Changing World A Global Resource Book* (Zed Books 2002) 110.

¹³⁷ This *hadith* was related on the authority of Abu Sa'id Sa'd bin Malik bin Sinan al-Khudri. Ibn Maajah treats it as *hasan* (good) *hadith*; Ad-Daraqutnee and others regard it as *musnad* (supported) *hadith*. It is also related by Imam Malik in his *Muwatta* in *mursal* (hurried, broken chain) form from Amar bin Yahya, from his father, from the Prophet (PBUH) but dropping (the name of) Abu Sa'id from the chain. Other chains of transmission of this *hadith* strengthen one another (thus it may be regarded as of sound *isnad* or chain). Imam Nawawi mentions it in his manual of Forty Hadith. Hadith no 32. See <<http://www.bible-quran.com/islam-hadiths-hadiths-32-34-nawawi>> accessed 25 March 2014; see also <<http://www.40hadithnawawi.com/index.php/the-hadiths/hadith-32>> accessed 25 March 2014.

introduced in the laws of Malaysia, Indonesia and Iran respectively deserve critical appreciation and should, after apposite contextualization, be introduced in our country to alleviate the position and strengthen the financial status of the divorced Muslim women. Among the scholars the approach of Dr Mustafa As-Sibayee deserves high regard due to its radical, dynamic, beneficial as well as *Shariah* compliant stance. In fine, it can be concluded that since Qur'an is a living and dynamic book it can be diversely interpreted, of course in accordance with the dictates of Allah (SWT) and authentic *Suunnah* of the Prophet (PBUH), by the apt scholars of Islamic Law to resolve any problem confronting the *ummah* in a given society or a period of time. The non-biased, non-sexist, non-sectarian and overall an emancipatory reading of the Qur'an as well as the proper understanding of *Maqasid al-Shariah* can guide the *ummah* to appreciate the divine intent as far as possible.