ISLAMIC LAW OF MAINTENANCE
FOR WIVES
IN PAKISTAN AND AFGHANISTAN SINCE 1960

BY

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A THESIS

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Abstract

There appears to be a general consensus among the Muslim jurists that Muslim women are entitled to maintenance during the subsisting marriage. Though there is difference of opinion on the quantum of maintenance provisions among the schools of thought. Nevertheless, all the jurists agree that there is no concept of post-divorce maintenance beyond the iddat period for Muslim women in Islam. Whereas, for a widow the agreement is that she is not entitled to any maintenance once her husband dies. However, the Muslim jurists who developed Islamic law seem to have defined away the maintenance rights of a divorcee and a widow, which the Quran clearly established as a moral obligation.

As a result, Anglo-Muhammadan, modern Pakistani and Afghanistan law have accepted the Muslim wife's right to maintenance during the marriage, but yet have not fully protected women in case of divorce or death of the husband. Further, the Muslim women are being deprived even of their mahr and iddat entitlements sanctioned under the Islamic law. These excesses of patriarchal legal systems in modern India, have led to legal reforms through so-called secular legislation which has given rise to important case law and further legal regulations such as the Muslim Women (Protection of Rights on Divorce) Act of 1986.

In a welfare state, unable to pay for the consequences of marital breakdown, modern Indian jurisprudence has developed an understanding of the obligations of divorcing husbands that coincides with the moral guidelines of the Quran. Today,
in effect, divorced Indian Muslim wives are much better protected against destitution than Muslim women in Pakistan or Afghanistan.

Based on our finding that the revealed commands of Allah place a duty on husbands to be concerned about the welfare of women in a situation when they are divorced or they become widow.

In the light of the Indian evidence, the present thesis considers the potential strategies for modern Pakistan and Afghanistan in developing the rights of maintenance for divorced/widowed women. The comparison with Indian developments shows that, provided the state is willing to protect the legitimate interests of women, it is possible to introduce legal reforms which require Muslim husbands to be responsible for maintenance arrangements of their divorced/widowed wives. It is suggested that by following the secular Indian model, Pakistan and Afghanistan could introduce relevant reforms within the context of Islamisation to achieve the same result.
Acknowledgement

It would have not been possible to carry out this work without the guidance, help and advice of respected Professor Ahmed Ali Khan, my supervisor, I owe a great deal to him. His inspiring guidance, constant encouragement and continuous interest helped me to complete my work.

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<td>A P</td>
<td>Andhra Pradesh</td>
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<td>All</td>
<td>Allahabad</td>
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<td>Bom</td>
<td>Bombay</td>
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<td>Bom L R</td>
<td>Bombay Law Reporter</td>
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<td>B SOAS</td>
<td>Bulletin of the School of Oriental &amp; African Studies</td>
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<td>C J</td>
<td>Chief Justice</td>
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<td>C L J</td>
<td>Cambridge Law Journal</td>
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<td>Cr PC</td>
<td>Criminal Procedure Code</td>
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<td>F S C</td>
<td>Federal Shariat Court</td>
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<td>I A</td>
<td>Indian Appeals</td>
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<td>I C L Q</td>
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<td>Isl C L Q</td>
<td>Islamic &amp; Comparative Law Quarterly</td>
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<td>J</td>
<td>Judge</td>
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<td>I P C</td>
<td>Indian Penal Code</td>
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<td>I J M E S.</td>
<td>International Journal of Middle East Studies</td>
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<td>JILI</td>
<td>Journal of the Indian Law Institute</td>
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<td>KLT</td>
<td>Kerala Law Times</td>
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<td>MFLO</td>
<td>Muslim Family Laws Ordinance</td>
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<td>MLD</td>
<td>Monthly Law Digest</td>
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<td>MD</td>
<td>Madras</td>
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<td>Madhya Pradesh</td>
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<td>MW</td>
<td>Muslim World</td>
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<td>NLR</td>
<td>National Law Reporter</td>
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<td>NUC</td>
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<td>NY</td>
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<td>PLD</td>
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Chapter 1  
Introduction

The present thesis is based on the premise that the Quran establishes a clear duty for men to be concerned about their wives. Apart from maintenance provisions during the marriage, the Quran favours for provisions upon termination of marriage both through death of the husband and divorce. However, in case of death of the husband the liability of maintenance for a widow is fixed on the legal heirs of the deceased and in case of divorce upon the husband.

The husbands are very clearly directed by the Quran to provide maintenance on equitable terms to their wives. So that the wives could live in the same style as they live.\(^1\) The Prophet Muhammad (PBUH) even in his last sermon reminded his followers of the duty to look after their wives that include proper provisions of maintenance for them.

However, the maintenance right of wife became much conditional when the jurists belonging to various schools of thought in Islam started interpreting the Quran. These controversial interpretations of maintenance regulations, later on, in the Indian subcontinent and Afghanistan created problems for Muslim women and to a greater extent restricted their right of maintenance from their husbands.

The word Maintenance, according to the Concise Oxford Dictionary, is derived from the term ‘to maintain’, which means to support.\(^2\) The word maintenance itself

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1. The Holy Quran v. 65: 6
means "the process of maintaining or being maintained and the provision of the means to support life especially by work etc."³ According to the Encyclopedia Britannica maintenance means maintaining or assisting a party with money or otherwise.⁴ The Arabic term for the above defined word maintenance is nafaqa, which means ‘ikhraj’ or taking out. In general, terminology nafaqa means to make provisions for one’s necessities of life by another in consideration of his labour.⁵ Nafaqa usually includes provision of "food, raiment, and lodging".⁶ The highest obligation arises on marriage; the maintenance of the wife and children is a primary obligation. In traditional Islamic law, a Muslim wife’s right of maintenance towards her husband becomes due once she starts cohabiting.⁷ The husband’s duty to maintain commences when the wife attains puberty and not before; provided always that she is obedient and allows him free access at all lawful times.⁸ In addition to legal obligations to maintenance there may be stipulations in the marriage contract, which render the husband liable to make a special allowance to the wife.⁹

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³ Id.


⁵ Ibid. p. 257.


⁸ For details, see Id.

⁹ See for example Fyzee 1964, p. 203.
Marriage, under the provisions of Islam, is considered as a “solemn pact (mithaq-e-ghalid) between a man and a woman, soliciting each other’s life-companionship, which in law takes the form of a contract.” Once married the husband is bound to provide maintenance to wife. In fact in Islam the duty to provide maintenance is not only effected by the contract of marriage i.e. the husband to the wife, but also effected by consanguinity, i.e. the children upon their aged and destitute parents or relatives, so do the parents to maintain their suffering children. However, the duty of the husband to maintain his wife takes priority over the husband’s obligation to maintain his children and other relatives.

Some Muslim jurists agree that mere conclusion of a valid marriage does not entitle the wife to maintenance. The obligation of a husband to maintain his wife become affected once the wife places herself under the disposition of her husband, where he has free access to her at any lawful time. Furthermore, the wife must be physically mature for consummation irrespective of the fact that the husband is a minor or is not capable of having intercourse with her. However, there is considerable difference of opinion among the various schools regarding the

quantum of maintenance to which a Muslim wife is entitled and need to be discussed at length.

The husband will be discharged of his duty, of providing maintenance to his spouse, if she is disobedient (nashiza).\textsuperscript{15} Instances of such behaviour, on the part of the wife, include imprisonment, apostasy, and leaving the matrimonial home without the husband’s consent.\textsuperscript{16} However, the liability is restored when she becomes obedient. Nevertheless, a Muslim woman can be irrevocably eliminated from maintenance in Islam on two grounds, namely the death of the husband, and divorce between the spouses.

Marriage contract under the provisions of Islamic law, seems to be, heavily tilted in favour of the husband, especially, when and how to dissolve the marital contract. The well-known principle that a husband may use his power of \textit{talaq} (lit: divorce) any time. The implication of this on the maintenance provisions for the economically weaker spouse, which tends to be the wife, are often found to be dramatic. It is well known that the result of the \textit{al-bida}\textsuperscript{17} form of Muslim \textit{talaq}, has the effect of instant termination of the matrimonial bond and the support system falls instantly. This has led to many cases of homelessness and destitution for Muslim wives and children in many countries. It is apparent that the problem in

\begin{itemize}
\item \textsuperscript{15} Mst. Khatijan v. Abdullah AIR 1943 Sind 65. See also Mahmood 1982, p. 70.
\item \textsuperscript{16} Pearl, D. \textit{A textbook on Muslim personal law}. 2\textsuperscript{nd} edition, London 1987, p. 70.
\item \textsuperscript{17} The husband pronounces the \textit{al-bida} form of Muslim \textit{talaq}, commonly known as triple divorce, in one sitting. Thus, it terminates the marriage contract instantly and chance for reconciliation is gone. For further details on \textit{talaq}, see for example Ali, S. A., \textit{Mohammedan law}. Vol. 2, fifth edition, Calcutta 1929, pp. 471-506. Fyzee, A, A, A., \textit{Outlines of Muhammadan Law}. London 1949, p. 132, Pearl 1987, pp. 100-137.
\end{itemize}
Muslim societies exists, which demands a solution that respects the needs of the individuals within a wider socio-religious framework.

In case of death of the husband or divorce, the Islamic law has explored several mechanisms to provide women with maintenance and property. Apart from the succession laws, with which we are not concerned here, the institution of dower (mahr) and of iddat period are both relevant for our discussion.

In Islam, as understood in the Indian sub-continent, the amount of dower or mahr is often split into two portions, the so-called prompt dower, to which the wife is entitled on demand, generally on consummation of marriage, and the so-called deferred dower, which is normally due on the termination of the marriage contract. The termination of marriage could either be on death of the husband or divorce between the spouses. However, the opinion of the Maliki school of thought is that it is more appropriate to give the stipulated dower, to the wife, before the consummation of marriage. Therefore, from the Maliki point of view

18 The standard work on this is Coulson, N. J., Succession in the Muslim Family. Cambridge 1971.

19 Mahr or dower is any sum of money or property, given to the wife by the husband at the time of the marriage contract. For details see for example, Pearl 1987, pp. 60-68.

20 The iddat period, in Islamic law is described as the period during which it is incumbent upon a woman, whose marriage has been dissolved by divorce or death, to remain in seclusion and to abstain from marrying another husband. The husband, to avoid confusion of parentage, imposes the abstinence to ascertain whether she is pregnant. When the marriage is dissolved by divorce, the duration of the iddat, if the woman is subject to menstruation, is three monthly courses; if she is not, it is three lunar months. If a woman is pregnant at the time, the iddat period terminates upon delivery. For details see for example Rahim, A. The Principles of Muhammadan Jurisprudence. Madras 1911, p.341. See also Mulla, D.F. Principles of Mahomedan law. Bombay 1972, p. 252, Pearl 1987, p. 69.

21 Pearl 1987, pp. 65-68. See also Hodkinson 1984, p. 133.

22 For details see Ali 1929, p. 433.
the consummation entitles a wife to the dower and not the termination of marriage contract. Moreover, there is no provision in the Quran, which suggests the split in dower, rather the Quran asks the followers to be generous while giving dower to their wives at the time of the marriage contract. Therefore, here one can say that the Muslim jurists, seemingly, invented the so-called deferred dower for the protection of a widow/divorced wife on sudden termination of marriage. Yet, on the other hand, it can also be said that it was formulated to relieve men from financial burden but also deprive a woman of her Quranic right and made life difficult for her.

In the area of our research i.e. Indo-Pakistan and Afghanistan it has been found that once a dower payment is deferred, then in social reality it becomes extremely difficult for the woman to claim her unpaid dower. Thus, on the death of the husband, she has to claim dower from the legal heirs of her deceased husband, while in case of divorce, the defaulter is her former husband. In both situations, if the dower is not paid, the only remedy with the wife is to knock at the door of courts.

However, before we go further, it is indispensable to describe the geo-political complexion of the region. Apparently and particularly our region for this study consists of three sovereign political entities namely, Afghanistan, Pakistan and India. Hardly half a century earlier India and Pakistan were a single state. On

23 The Holy Quran vs. 4: 4
similar lines Afghanistan was declared a foreign territory in the 20th century. From the social and religious standpoint the entire region is fairly homogeneous especially Muslims, the onepondering majority of whom are the followers of the Hanafi sect of Islam. Therefore, understanding of the Islamic law provisions and especially, that of maintenance provisions for wives seems to be similar.

On the event of death of the husband or talaq, the wife has to observe the iddat period. This means, the wife cannot validly remarry during the period. However, in case of talaq, the husband is bound to provide maintenance to the wife until her iddat period expires. As the purpose of the iddat period is to ascertain pregnancy of the wife and if she is carrying a baby, the period lasts upon the delivery of the child. Therefore, in the above situation, the maintenance right of the wife could either be stretched or reduced. On the other hand, there is a common assumption that there is no provision in Islamic law of any permanent maintenance for a widow once her husband dies. 24 This may mean that a widow is not even entitled to any iddat period maintenance. 25 Whereas, if we look at the Quran, it clearly lays down that widows should be provided maintenance and lodging for one year. 26

The issue is discussed in some detail in Chapter two.

Owing to the tribal setup of the Arabian society, where normally, the head of the family or tribe takes care of his clan, it seems that the Prophet Muhammad never

26 The Holy Quran, Vs. 2: 240.
confronted with this problem of maintenance provisions. Later Muslim jurists belonging to various schools, probably influenced by the strong patriarchal notions of their respective societies, failed to implement man's liability to provide maintenance in the true spirit of the teachings of the Quran and Sunnah.

In some Muslim countries, legislation has been passed to safeguard the women. For example, in Syria for the divorced wife the provision is that where a wife was divorced without adequate cause or reason and could show that she would suffer damage and poverty as a result, the court might order limited compensation in her favour. Moreover, countries like Morocco, Tunisia and Malaysia have also adopted rules in this direction. This is indeed a thought provoking to countries like Pakistan and Afghanistan to come up with laws and especially, after the Indian experience, which could protect wives. Although in Pakistan, lip service to some family law reforms concerning divorce, polygamy, dower and inheritance has been paid in the shape of Muslim Family Laws Ordinance (hereafter MFLO) of 1961. Yet, the ordinance failed to implement the suggestions regarding maintenance for women, as proposed by the Report of the Commission on the Marriage and Family Laws 1956.

27 For further details see Coulson, N. J., Conflicts and tensions in Islamic Jurisprudence, Chicago 1969, p. 47.

28 For a detailed discussion on reforms in family laws in Muslim countries see for example Mahmood, T., Family Law Reform in the Muslim World, Bombay 1972.

29 For further details, see chapter 5 of the present study.

30 Gazette of the Government of Pakistan, Extraordinary, 20th June 1956, pp. 1197-1215. For details see chapter 4 below.
After independence in 1947, modern Pakistan simply continued the Anglo-
Muhammadan system of legal regulations. No efforts were made to codify the
family laws in general and the maintenance provisions in particular. There is a
social and legal problem but this matter has never been discussed. The present
thesis is a pioneering attempt to air the relevant issues and to search for a workable
solution in the Pakistani context. Similarly, the same could be said for Afghanistan
a Muslim majority country, but it seems that maintenance regulations for wives
remains the same i.e. wives are entitled to maintenance during marriage.
Thereafter, no effort has been made to implement laws that could protect woman
from becoming destitute.
Contrary to the above, modern India, after 1947, initially continued to apply the
position of the Anglo-Indian system on maintenance, the Criminal Procedure Code
(hereafter CrPC) of 1898. Since 1973, as a general law, the recast Indian CrPC in
1973, under section 125, contains a provision of maintenance for wives, which
extends to divorced wives. Before the introduction of the new law in 1973, under
section 488 of the 1898 Act, husbands were liable to pay maintenance to their
wives, but only as long as the marriage subsisted. The 1898 Code, which was
enacted during the British rule in the Indian subcontinent, encouraged deserted
wives to claim maintenance from their husband. However, many Muslim men,
instead of paying any maintenance, simply divorced their wives. This not only
relieved them from the payment to deserted wife but also terminated their liability
altogether.
India introduced modifications to the CrPC in 1973, which included divorced wives among the definition of 'wife' and therefore, gave, for the first time, a right to maintenance to divorced wives of any community. The Muslims objected to this reform in the CrPC 1973 and the government, in order to appease them, introduced special provisions in Section 127 of the CrPC, which seems to take account of the existing sharia by recognizing the amount of mahr as an amount payable on divorce to Muslim women.

However, by 1979, Indian case law under the 1973 code had established a new approach that was specifically derived at protecting divorced wives from destitution. The Indian Supreme Court began to establish a position whereby maintenance was given the status of a right and the adequacy of the amount became an issue. The major reason for this appears to be that the state does not want to pay for the divorced wives; it simply does not have the money. The modern Indian state thus, has not only become concerned to protect women but also to make sure that it does not have to pay the bill for broken marriages. Therefore, it is concerned to place responsibility on the families themselves. Unfortunately, Muslims have focused much of the debate on the Indian legal developments on anti-Muslim rhetoric and a consequently confrontational and defensive approach. The present thesis attempts to bridge such misconceptions and shows that there is a way forward for protecting women in Pakistan and Afghanistan, like their counterparts in India, legal reforms generated by the state but in line with Islamic concepts.
The view that one can just throw out divorced women without paying anything was challenged in India in the famous Shah Bano case,\(^{31}\) as discussed in detail in chapter 5 below. The politics of this judgment mixed up issues of concern for all women, the question of legal uniformity and the position of minorities within the secular framework of modern India. The ruling in the Shah Bano, by five honorable Hindu judges, appeared to lay down a new rule in Islamic law. For many Muslim jurists, the above judgment was shocking and was described as interference in their religion by non-Muslim Judges.\(^{32}\)

In the heat of the moment, basic teachings of the Holy Quran and the Prophet Muhammad (PBUH) were overlooked; they emphasized the uplift of the weaker class of society and of women.\(^{33}\) Moreover, the basic teachings of the Quran revolve around the uplift of moral and ethical behaviour of the society in general, and that of women in particular. In this regard, the Quran considers the status of women, as a mother, sister, daughter and wife, by giving them the right of inheritance. The position of women as wives has been thoroughly covered in the Quran. The Quran very clearly speaks for the rights of wives within the bond of marriage and further, in situations where they have been divorced or became


widow. In this regard, Rahman indicated the position of women according to the Quran;

"The most important legal enactment and general reform pronouncements of the Quran have been on the subjects of women and slavery. The Quran immensely improved the status of the woman in several directions but the most basic is the fact that the woman was given a fully-pledged personality."

The judgment in the Shah Bano case led to agitations from the Muslims and ultimately, so everyone thought, forced the Indian government to enact the Muslim Women (Protection of Rights on Divorce) Act, 1986 (hereafter 1986 Act). The 1986 Act provided a special exemption for divorced Muslim wives from the ambit of the provisions of the general law, i.e. S. 125 of the CrPC of 1973. Consequently, the constitutional validity of the 1986 Act has been in issue, and petitions are still pending in the Supreme Court of India seeking to strike down this legislation.

In the meantime, however, a large and growing number of reported cases decided under the 1986 Act shows that the actual effects of the 1986 Act are beneficial for the divorced Muslim wives in India. The 1986 Act, applying only to Muslims in India, has the same effect as the Shah Bano case, which it was supposed to nullify.

As a result, divorced Muslim wives in India today can easily and successfully


\[35\] See now Avaran Koya v. Mariyam 1993 (1) KLT 65.
claim maintenance beyond the iddat period from their ex-husbands, while their sisters in Pakistan and Afghanistan have no such remedy. This raises a number of questions, which are discussed in detail in the present thesis. Beyond offering and exploring the comparative study of the major South Asian jurisdictions we found that the thesis had to inquire afresh into legal position on the right of Muslim wives to maintenance within the framework of the Islamic law.

**The Purpose of the Present Study**

The present thesis contributes to the wider discussion of the role of the state in modern countries in which Islamic law has a prominent position, with particular reference to family law. Thus, in the main chapters of this thesis an effort is made to show, how the originally liberal and considerate approach of Islamic law on maintenance of wives found in the Quran, has been modified and in a sense taken away by the medieval scholars. This male-dominated force, it would appear, has joined hands with equally male-dominated social trends, which are obvious throughout the Muslim world.

In this context, chapter 2 examines in detail the issue of maintenance in traditional Islamic law. The issue is first discussed in the light of the relevant Quranic verses. An effort is made to demonstrate how the liberal but general Quranic verses were later reinterpreted to give way to the position that there is no maintenance for a divorced woman after the iddat period and a widow once her husband dies. It is
apparent that the issue we discuss here has been of significant importance, right from the early development of Islamic law. Therefore, after the Quranic verses, we first discuss the authority of the Prophet Muhammad (PBUH) to interpret the Quran and examine the role of the first four caliphs of the newly formed Muslim Empire after the Prophet’s death. In order to meet new problems they applied their judgments in the light of the Quran and the Prophet’s example. After the discussion on the authority of the companions to interpret the Quran, we move further to the crucial period, where the jurists, as it seems, gradually assumed the role of sole interpreters of the Quran. The verses of the Quran were interpreted in such a way that the result appears to have become an almost dogmatic notion to the effect that divorced Muslim wives are not entitled to any maintenance beyond the traditional iddat period. Whereas, the attitude of the jurists seems to be even worse for widows and their right to maintenance nevertheless during the iddat period has been successfully brushed aside. This chapter also examines in some detail how this Islamic axiom developed and to what extent it is maintainable today owing to the Islamic scholarship and in view of the needs of contemporary Muslim societies, especially in Pakistan and Afghanistan.

Chapter 3 focuses on the Indian subcontinent instead of Arabia. Here we seek to discover whether the evolving South Asian Muslim law, and later the Anglo-Muhammadan law have provided any maintenance rights for Muslim women up to 1947. During the Muslim rule in India, during the period 711 A.D. to 1857, there
seems to be no progress in implementing any regulations of maintenance for Muslim wives. Later, during the British-Indian period, the laws were codified and non-maintenance of wives became a punitive offence. However, such provisions only concerned maintenance of neglected wives and not of divorced wives or widows. The case law that developed ultimately shows that Muslim husbands simply pronouncing divorce under their personal law easily defeated maintenance claims. The judges during that period, however, awarded maintenance to divorced Muslim wives for the iddat period. By doing so, the divorced women were provided maintenance at least for a limited period. However, the amount awarded was often below the limit imposed by the CrPC 1898 and therefore, in some cases, it would have reduced the amount of maintenance due to a divorced wife under sharia which is not subject to any limit but to the earning capacity of the husband. This chapter, therefore, shows that no real progress was made during this period in protecting divorced Muslim wives.

Chapter 4 studies in detail issue of maintenance in the existing laws of Pakistan, where at present there is no law that could safeguard a woman, who has become a widow or has been divorced. The Pakistani courts, following the Hanafi doctrine, generally have simply stuck to the established restrictive juristic view that a woman who loses her husband either through death or divorce is not entitled to any maintenance from her former husband once the iddat period is over. Many Muslim husbands do not honour the dower arrangements and it seems that the situation on the ground is much worse than the official law assumes.
In chapter 5, the study concentrate on Afghanistan where like Pakistan we find that nothing has been done to safeguard women and particularly, the one whose marriage is broken down. All the constitutions that were promulgated there during the period 1923-1990 provide equal rights to women. Yet in social reality women are still not equal. In family matters such as marriage where woman’s consent is not a mandatory provision. Rather women are still sold in the name of marriage and the practice of walwar is very common in the society. The laws in Afghanistan do recognize the right of maintenance to women but during the marriage. Once the marital tie is broken it seems law is not concern about the fate of the women. However, due to the strong tribal setup it is presumed that the tribe or clan will look after the woman till she is again remarried. At present when Afghanistan is going through the process of rebuilding it seems measures will be taken to implement laws that could safeguard women.

In chapter 6, the study focuses on India, where sustained efforts have been made through the combination of and case law compel Muslim husbands, like any other Indian husbands, to provide maintenance to their divorced wives. In a line of cases, the Indian Supreme Court judiciary developed a basic rule about the liability of divorcing husbands towards their ex-wives, which does not exempt Muslim husbands from payment. It has been wrong to view this as directed against Muslim husbands. In fact, the modern state here has tried to avoid financial
liabilities for itself and has worked out a solution benefiting women of all the communities living in India. The result, already clearly shown in the Shah Bano case, has been that this basic requirement to provide for divorced wives and the Quranic law are not in fact in conflict. The chapter discusses all major cases, including the famous Shah Bano case. Thereafter a detailed analysis of the Muslim Women (Protection of Rights on Divorce) Act, 1986, and the case law under it, which has not yet been examined anywhere in detail, follow. The chapter thus shows that now in modern so-called secular India Muslim men will not be allowed to simply throw out their divorced wives, without taking care of their future needs, under the pretext of their personal law.

Chapter 7 contains the concluding analysis and recommendations. In the light of the findings of the thesis, we conclude with a set of recommendations made to the Pakistan and the Afghanistan authorities concerning protection of Muslim wives from becoming destitute. The recommendations can be easily implemented. Especially, under the cover of Islamisation and thus, contribute to a meaningful improvement for the position of Muslim wives there.
Chapter 2

The discussion of Maintenance provisions for wives under the traditional Islamic law

The purpose of the present chapter is to examine classical Islamic law, with reference to the right of maintenance of Muslim wives under three possible scenarios: That is, as a wife, as a widow and as a divorcee. Therefore, we need to look first at the relevant verses of the Quran, as it contains the roots of all law for all Muslims. This enable us to say that the Quran asserts right of maintenance for wives not only during the marriage but also on the event of dissolution of the conjugal tie. Nevertheless, this is done in very general terms, necessitating interpretation of the divine revelation. Thus, first we look at the authority of the Prophet to interpret the Quran and see how he explained the Quran through his action and deeds. After his death, the period of his companions, the Khualafa-i-Rashdin (lit. rightly guided), and later the role of Muslim jurists is examined, who played a vital role in developing the rules on maintenance. However, in their interpretations, it appears that they ignored the relevant general Quranic injunctions and came up with their own meanings that were nearer to the traditional setup.

2.1 Relevant Quranic provisions regarding maintenance

In Islamic jurisprudence, the Quran and the Sunnah (lit. Practices of the Prophet Muhammad PBUH) are considered to be the primary sources of the
Islamic law,\(^{36}\) and therefore are the starting point to any inquiry into it. For Muslims, the Quran is the “Book of Allah sent through the last of the Prophets, Muhammad” and it contains commands of Almighty Allah for the guidance of the believers.\(^{37}\) Whereas, the Sunnah is the Prophet’s interpretation and description of these commands of Allah.\(^{38}\) The other main but secondary sources of the Islamic law,\(^{39}\) are ijma (lit. consensus) and qiyas (lit. analogical reasoning).\(^{40}\)

The Quran cannot be confined to legal issues alone, it is also a book of religious and moral principles.\(^{41}\) In other words, law is seen as part of ethics and morality, which is the case in all-traditional societies.\(^{42}\) However, as the basic source of the Islamic law, the Quran not only deals explicitly with some of the civil, criminal, and family law matters,\(^{43}\) but also incorporates general

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36 Doi 1984, p. 64.
37 Ibid., p. 21.
38 Mahmood 1972, p. 10.
39 For details on secondary sources in Islamic law see Rahim 1911, pp. 69-192.
40 See Doi 1984, p. 64.
41 Rahman 1979, p. 37.
43 The Quran particularly deals with family matters, like marriage, dower, divorce, maintenance and inheritance, see, The Holy Quran, Vs. 2: 18-181, 221-223, 226-237, 240-241; Vs. 4: 1,3,4,7,9,11-12, 19-25, 34-35, 128-130; Vs. 65: 1-2, 4, 6-7. Some of the criminal offences like zina (illegal fornication) and sarriga (theft) are discussed in Vs. 4: 15-16; Vs 17: 32; Vs 24: -9; Vs. 2: 286; Vs. 5: 41-42. (civil issues, like riba, business, and trade are treated in Vs. 2: 275-276, 278-281; vs. 3: 130).
principles of social justice. Further, it has been argued that the Quran is mainly ethical in nature. This does not mean that it is not legal, but stresses the point that the Quran shows concern for the betterment of the "weaker members of the society, fairness, good faith in commercial dealings and incorruptibility in the administration of justice". At the same time, it has also been argued that the Quran contains some eighty verses, which deal unmistakably with legal topics. There is widespread agreement in the literature that the Quranic provisions react to the pre-Islamic phenomenon of treating women as mere chattels. In various verses of the Quran, the position of women as individuals has been described. The Quran speaks for the

44 For details see for example Rahman 1979, p.33.


46 For details see ibid., p. 11.

47 Ibid., p. 12.

48 Ali 1922, p. 228. On the issue that the Quran speaks for the betterment of women see also Coulson 1964, p. 14 and Rahman 1979, p. 38.

improved social status of women which otherwise in the society of Arabia was much degraded. ° Women were sold in the name of marriage and their parents or guardians used to take money from the person interested in the union. ° However, later the Prophet under the divine orders of Allah declared marriage as a contract. At the same time, it cannot be said that every woman in pre-Islamic Arabia was sold as the example of Hazrat Khadija is before us. Who was a trader and married the Prophet Muhammad at her own initiative. Yet, it could also not be said that every woman in the pre-Islamic era was a free agent regarding her contract of marriage and related issues. Thus, by giving independence to the women in her matrimonial affairs, the Quran puts an end to the traditional practice of sale of the women. In this regard, she is entitled to negotiate her dower, which may later become her property. This was apparently not the case in the Arab society. Furthermore, the Quran in its various verses emphasizes better relations between husband


52 Rahman 1979, p. 28.

53 Shams 1984, at p. 213.

54 Levy 1957, p. 137.
and wife. Yet, at the same time the divine law also permits that a couple may nullify their contract of marriage. However, here we are not going into the details of the Muslim laws on divorce. Instead we first look at the Quranic verses that deals with the provisions of maintenance to wives during marriage and later upon the termination of marriage i.e. either on the death of the husband or upon divorce between the couple.

2.1.1 Wives right to maintenance

The wife's right to maintenance during marriage is expressed in the verse 4:34 of the Holy Quran as:

"Men are the protectors and maintainers of women, Because God has given the one more (strength) Than the other, and because they support them From their means."

After establishing the general liability of men for the maintenance of women the Quran, further, in verse 2:233 lays down;

"The mothers shall give suck to their offspring for two whole years, if the father desires to complete the term. But he shall bear the cost of their food and clothing on equitable terms. No soul shall have a burden laid on it greater than it can bear. No mother shall be treated unfairly

55 The Holy Quran. See in particular Vs. 7: 189 and Vs. 30:21.
56 See ibid., Vs. 2: 229.
on account of her child. Nor father on account of his child, an heir shall be chargeable in the same way, if they both decide on weaning, by mutual consent, and after due consultation, there is no blame on them. If ye decide on a foster mother for your offspring, there is no blame on you, provided ye pay (the mother) what ye offered, on equitable terms. But fear God and know that God sees well what ye do”.

In the above verse of the Quran we find that husbands are asked to take care of their wives who are feeding their children. The Quran on the issue of maintenance further remind the husbands, their duty towards their pregnant wives in the verse 65:6 as;

“Let the women live (In iddat) in the same style as ye live According to your means: Annoy them not, so as To restrict them. And if they carry (life In their wombs), Then spend (your substance) on them until they Deliver their burden: and if they suckle your (off spring) Give them their recompense: And take mutual counsel Together, according to what is just and reasonable. And if ye find yourselves in difficulties, let another woman Suckle (the child) on the (father’s) behalf.”

The Quran further in verse 65:7 takes up the issue in the following manner;

“Let the man of means Spend according to
His means: and the man whose resources are restricted, let him spend according to what God has given him. God puts no burden on any person beyond what He has given him. After a difficulty, God will soon grant relief."

From the above Quranic verses, we can gather that there is no upper or lower limit of maintenance. Rather, the Quran ties the issue with the means of men. That is, if the person is well off he must maintain his wife according to his standard. At the same time, if the means of the husband are limited he is still not absolved of his responsibility of maintaining his wife. He has to provide maintenance to his wife but according to his means. Moreover, from the above Quranic verses, it is evident that the concern is shown for wives not only at the time of their pregnancy but also at the nursing stage of the baby. Thus, the Quran makes it very clear for the believers to provide financial assistance to their wives when they carry life in their womb. The above verse further instructs the believers to be kind with their wives upon delivery and to consult them if they wish to feed the baby. If the wife is not ready to take the responsibility of the child then make alternate arrangements for the feeding of the baby. Thus, husband is made liable, according to his means, for the extra expenses and maintenance of his pregnant wife until such time she delivers the child. This may include special nutritional food and services of a servant (if
required), medical and other expenses etc. In addition, the mother of the child is not bound for suckling the child. If she deliberately nurses the child, the husband has to recompense for it. If she refuses to do so, for whatever reason, then the father of the child will have to arrange an alternative for nursing the child. After making clear-cut orders both husband and wife are directed not to view their relationship in material terms only.  

However, in some translations to the verse 65:6 of the Quran the term 'during iddat' is added to the main text. If that standpoint is valid then the liabilities of husband, as discussed above, are extended to the divorced women as well. However, the issue is discussed at length in another section.

2.1.2 Widow’s right to maintenance

From the above verses of the Quran, we can gather that a Muslim husband is liable to provide maintenance to his wife. However, upon the death of the husband the Quran says in verse 2:240;

"Those of you Who die and leave widows
Should bequeath For their widows
A year’s maintenance And residence;
But if they leave (The residence),
There is no blame on you For what they do with
Themselves, Provided it is reasonable. And God

is Exalted in Power, Wise”.

In the above verse, it appears that the divine obligation is that Muslim men should make a bequest to ensure that their widows obtain a year’s maintenance and residence after their death. However, this verse does not talk about the amount to be paid, but focuses instead on the length of time for which the husband should make provisions. In this regard the time limit could be, on the one hand, to ensure that by that time a widow may get a new husband and her burden of maintenance shifts to the new man. On the other, it also seems that the divine obligation is to make sure that a widow is provided for if pregnant. Similarly, in case of divorce, a Muslim husband is under an obligation in sharia to support his pregnant divorced wife until she gives birth to the child. Nevertheless, later Muslim scholars have ignored this important factor, in case of pregnant widow. However, Muslim scholarship believes that the above verse is abrogated in favour of Vs 4:12 of the Holy Quran. We are going to discuss the issue later in this chapter. From here, we move to the Quranic provision that shows concern for the divorced Muslim women.

2.1.3 Divorced wife’s right to maintenance

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

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Vs. 65:1

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

Vs 65:2

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

Divorce, according to the above Quranic verses, is to be achieved in a
regulated form that maintains dignity and morality. The Qur.in, in the above
verses, not only explains the procedure for divorce, but also shows concern for
the divorced woman's condition instantly after the pronouncement of talaq. Therefore, in the above verses, the divine obligation is that a divorced woman should not be turned out of the house immediately. This, on the one hand, apparently saves the woman from the danger of becoming destitute at once. On the other hand, it also gives time to the married couple for reconciliation. 59 Furthermore, as indicated earlier the Quran in Vs.65:6 explains the status of a divorced woman during her iddat period, in the following manner:

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

Here one can gather that the Quran shows respect for divorced women and indicates that during the iddat period the woman shall be enabled to live in the same manner as before divorce. The Quran in vs. 65: 7 makes the above command more precise and clearly expects from the husband to spend according to his means on his divorced wife during her iddat period. Moreover, in this verse it seems that the Quran not only safeguards the position of the divorced wife but also takes care that the husband is not forced to spend more than his earning capacity. This is evidence of balanced equitable concern for both sexes.

The above verses could be seen as reflecting an increased concern about maintenance for divorced women. This certainly seeks to alleviate the harsh

consequences of sudden and immediate termination of marital relations. In this context, the Islamic institution of iddat is clearly very important. While it also serves to avoid confusion over legitimacy of any offspring and gives time to the husband and wife for reconciliation, the relevant consideration for our present debate is that it seems to save women from the immediate threat of destitution.

A Muslim male can terminate the marriage contract in any of the three different modes according to the Islamic law, that is, talaq-i-ahsan, talaq-i-hassan and talaq-i-bidat. However, it appears that Muslim scholars deviated from the express teachings of the Quran and the Sunnah. Some even favoured the al-bida form of divorce and, thus, allowed Muslim men to get rid of their unwanted wives instantly. By patronising the al-bida form of Muslim divorce, the Muslim scholars have on the one hand, made it easy for men to throw their wives at their pleasure. On the other hand, they have left the divorced women indigent. This appears to be a violation of the Quran.

60 See Coulson 1964, p. 15 and Pearl 1987, p. 3.

61 For details on Islamic law on divorce see e.g. Fyzee, A.A.A., Outlines of Muhammadan law. London 1949, pp. 129-132. See also Pearl 1987, pp. 100-102.

62 According to the sayings of the Prophet Muhammad (PBUH), "In the eyes of Allah it (divorce) is the most hateful of the lawful things". Reported by Maudoodi, S.A.A., The law of marriage and divorce in Islam. Translated by Fazl Amed. Safat (Kuwait) 1983, p. 29. See also Ali 1922, p. 244.

63 The al-bida form of Muslim talaq, commonly known as triple divorce, is pronounced by the husband in one sitting. Thus it terminates the marriage contract instantly and any chance for reconciliation is gone. For further details on talaq see Ali 1929, pp. 471-506. Fyzee 1949, p. 132. Pearl 1987, pp. 100-137.
A divorced Muslim woman is free to remarry under the sharia 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 that can provide her with food and protection. Some desperately impoverished woman may need to do this very soon after the dissolution of the marriage.

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

Vs. 2: 236

“There is no blame on you if ye divorce women
Before consummation Or the fixation of their dower;
But bestow on them(A suitable gift),
The wealthy According to his means,
And the poor According to his means;
A gift of a reasonable amount is due from
those who wish to do the right things”.

64 Pearl 1987, p. 54.
Vs. 2: 237

"And if ye divorce them Before consummation,
But after the fixation Of a dower for them,
Then the half of the dower (Is due to them),
unless They remit it Or (the man’s half) is remitted
By him in whose hands Is the marriage tie;
And the remission (Of the man’s half)
Is the nearest to righteous. And do not forget
Liberality between yourselves. For God sees well
All that ye do”.

It becomes obvious from the translation of the above Quranic verses that a man who divorces his wife before consummation should make a lump sum payment if no dower has been fixed as yet. The size of this payment, again, depends on the means of the husband, but there seems to be an indication that a reasonable amount should be given. In the case of a wife divorced after her dower was fixed, but where the marriage was not consummated, the husband should pay her half of the stipulated amount. Verse 237 also asks the husband to be liberal. These two Quranic verses clearly relate to a situation where the marriage is not yet consummated and where there is, therefore, no iddat period. The two present verses are therefore not primarily concerned about a particular length of time during which a husband has to maintain his wife after divorce, but are merely talking of a lump sum payment. There is no indication from the verse
itself that the size of the payment should be able to sustain the wife over a specific period of time. The only concern the verses indicate is that payment should be considerate and should be made in accordance with the man's means. If we compare the above translation of verses 236 and 237, we see that they also ask a man to remit the other half of the dower in favour of the divorced wife. It is indicated that this remission by the man is an act, which is nearer to righteousness. Here, we can conclude that the emphasis is on giving the full dower to the divorced wife, even if the marriage was not consummated. At any rate, there is no doubt that the husband has an obligation to provide for such a woman.

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

Vs. 2:241

“For divorced women maintenance (should be provided)

On a reasonable (scale). This is a duty On the righteous”.

If we compare the above verse with Vs.2: 240 we find that the Quran extend the principle of the husband's responsibility for the maintenance of the wife after his death to the situation where he has divorced her. Whereas, in Vs. 2: 240 a stipulated period of one year is evident, Vs. 2: 241 does not reveal any time limit and merely provides that reasonable maintenance should be provided
for the divorced woman. Prior to further analysis of Vs.2: 241, it is useful first to examine the Arabic text of the verse, which reads:

“Wa Lil-mutallaqaati mataa-un-bil-ma-ruuf.

Haqqan alal-Muttaqiin”.

Below we present various translations of the above verse and show how various translators give different meaning to the same verse.

In her word-to-word literal translation, Jamal-un-Nisa\textsuperscript{65} asserts the following:

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

The above translation shows that it is the duty imposed by Allah on the believers to provide maintenance to their divorced wives.

Below are given some of the most commonly used other translations of Vs.2: 241 by translators belonging to various regions of the world, in chronological order:

“And for the divorced let there be a fair provision. This is a duty in those who fear God”.\textsuperscript{66}

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

“For divorced women a provision in kindness; a duty for those who ward of (evil)”.  

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

“Women who are divorced have a right to a reputable maintenance – a duty upon those who act piously”.

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

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

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

"Reasonable provision should also be made for divorced women. That is incumbent on righteous men". 74

"And for the divorced women maintenance should be provided according to a fair usage, this is duty on the righteous ones". 75

"Divorced women should be given an allowance commensurate with their husbands' means. This is incumbent on all pious believers". 76

"There shall be for divorced women provision honourable-an obligation on the god fearing". 77

"For the divorced, equitable alimony shall be provided. This is an incumbent duty upon the righteous". 78

"Making a fair provision for women who are divorced is the duty of those who are God-fearing and pious". 79

"Likewise, let there be a fair provision for the divorced women; this is an obligation on the God-fearing". 80

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“And for the divorced women (too) (shall) be a provision in fairness; (this is) a
duty on those who guard them-selves (against evil)”.81

“And for the divorced women the provision according to rule-incumbent on the
pious ones”.82

“And for the divorced women shall be a reputable present; a duty on the God-
fearing”.83

If we go through some of the Urdu translations of Vs.2: 241, the expressions
“kharch dena” or “naan nafaqa” have been used.84 The term naan nafaqa means
maintenance allowance, whereas kharch dena means to advance money for
expenses or to give someone an allowance.85 One can easily say that both these
expressions mean maintenance.

All the above translations of Vs.2: 241 show that the Quran indicates generally
that something should be given to the divorced woman. In this regard the
Quran has used the word matta-un, which according to some translators means
‘maintenance’, while others have used the word ‘provision’. According to the

84 See, e.g. Qadir, S.A. (Ibn-I-Shah Wali Ullah), The Quran Delhi 1876, p. 35. Knan, A.Y. Taсeer-i-
1960, p. 63.
85 According to Atlantic’s Urdu – English Dictionary. (Revised edition). New Delhi 1989, p. 767, and
p. 328. See also Standard Twentieth Century Dictionary, Urdu to English. New Delhi 1980, p. 645, and
p. 285.
Oxford Advanced Learner's Dictionary of Current English, the word 'maintenance' means "maintaining or being maintained; (esp.) what is needed to support life". While 'provision' means "providing, preparation (esp.) for future needs".86

The long list of translations above confirms that the Quran asked the believers to give something to their divorced wives that could also take care of their future needs. However, it seems that the Quran has left it for the believers themselves to decide the quantum of maintenance. At the same time, it seems that the Quran has warned the believers by using the word, bilma-ruuf in Vs.2: 241, which signifies fairness or reasonableness in almost all the translations given above, or arrangements "in accordance with custom or usage".87 This could well mean that although the Quran has not fixed any amount or provision of maintenance in Vs.2: 241, it asks the followers to decide a fair amount according to their customs. This seems to say also that men should be liberal in deciding the magnitude of maintenance or provision. However, here one can doubt the generosity of the divorcing husband and could suggest that the issue could be well settled by official body for example, court of law. Nevertheless, our discussion establishes, in principle, a general right of Muslim women to post-divorce maintenance but it is not quantified.


87 See note 40 above.
Later developments regarding maintenance

The purpose of this section is to examine the literature and material on the development of Islamic law subsequent to the revelations, in order to enable us to understand how it was possible that the general but liberal Qur'anic injunctions about maintenance for women were later interpreted restrictively. Although there has been much discussion on the authority of certain individuals or institutions, it is almost impossible to find any specific statements on the position of Muslim wives in the post-Qur'anic period. However, there are indications of important changes subsequent to the divine revelations. A prominent example is that of inheritance, where express provisions of the Quran were overlooked to accommodate the norms of the Arab society. 88

The aim of the present section is, firstly, to show the increasing scope for interpretation of the liberal, but rather general verses of the Quran by those in positions of authority allowed to apply and interpret Islamic law. We shall then see how this discretion has after been used to the detriment of Muslim wives in socio-legal context that give prominence and overriding importance to patriarchal concepts and notions.

88 See especially the decision taken by Caliph Umar, in the al-Himariyya case. For further details see Coulson, N.J., Succession in the Muslim family, Cambridge 1971, p. 73.
2.2.1 The Prophet (PBUH) and the Companions regarding maintenance

In pre-Islamic Arabia the concept of maintenance for divorced wives or widows seems to have been unknown mainly because remarriage of such women was a common practice, and also because the society was clan-based. Therefore, it can be presumed that the clan would look after such women. Nevertheless, there also seems to be no reason for men to support their ex-wives. When they were their chattels, once rejected, they could simply be sent away, rather than being supported. However, Vs. 2: 241 of the Quran, as we saw above seeks to prevent that the divorced/widow are just thrown out of the house in the event of termination of the marriage.

The Prophet, in order to make the people understand the divine commands, had to interpret the Quranic verses. For example, in the case of inheritance, the customary practice in pre-Islamic Arabia was that only the nearest male agnate relatives of the prepositus were entitled to inherit the property. However, in Saasd’s case, the Prophet deviated from the customary practice and allowed the wife and the daughters of Sadd to inherit along with their uncle. The Prophet, by interpreting Vs. 4: 11-12 of the Quran on the issue of inheritance,

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89 See Abbot, N., *Aisha - the beloved of Mohammad*. Chicago 1942, p. 22. See also Ahmed 1992, p. 44.

90 Coulson 1974, p. 29.

91 For details see id.
not only allowed the right of inheritance for male agnates, but also showed his concern for maintenance of the widow and her children.

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

As a prophet of Allah, it was his duty to transmit the divine message to the other people, and in this regard the Quran says in Vs.16:44;

“(We sent them) with Clear Signs And Books of dark prophecies; And We have sent down Unto thee (also )the Message;

That thou mayest explain clearly To men what is sent For them,


and that they May give thought”.

The Prophet, when he started preaching the religion of Islam, argued against the practice of guardians selling off their daughters/wards in the name of marriage. Instead, the Quran introduce the concept of marriage as a contract in which the dower (mahr) is the property of the wife, thus raising the status of the woman from a mere chattel to that of a partner. Legally she could now negotiate her marriage contract. In social reality, the guardians tended to settle, as is evident from the opinion of different Muslim schools.94 However, the practices of the different schools of thought in Islam indicate the strong influence of local patriarchal concepts, which may have been opposed to the express rulings of the Quran.

We saw already that, at the time of the Prophet, remarriage of divorcees was a common practice. This is supported by the fact that the Prophet himself married a divorced woman.95 Although much colour has been added to this marriage of the Prophet,96 not much has been written on the Prophet’s marriage with Suda, who was a destitute widow and, was not very alluring.97 Here one can submit that on the one hand the Prophet himself set an example for his followers by marrying a divorcee and a destitute widow, while, at the same

94 Rahim 1911, p. 331. See also Coulson 1964, p. 94.

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

96 For details, see e.g. Mernissi 1975, p. 22.

time, polygamy also became an example for the followers. However, there is no evidence, which could suggest that the Prophet ever divorced any of his wives irrevocably,\textsuperscript{98} or denied them maintenance. Instead, he held \textit{talaq} to be the most detestable before God of all permitted things.\textsuperscript{99} Further, the Prophet on the matter of divorce said,

"The Angle of God advised me so many times about women that I became convinced that it is not lawful for a man to divorce his wife, except when she commits adultery".\textsuperscript{100}

If we assume that the Prophetic mission was to work for the weaker classes of society, he would not take away the rights of women; rather he would work for the enforcement of those rights. The Prophet even in last sermon reminded his followers of the rights of women. The Prophet said;

"O men, you have rights over your women and your Women have rights over you. Show piety to women, You have taken them in the trust of God and have had Them made lawful for you to enjoy by the word of God, And it is your duty to provide for them and clothe them

\textsuperscript{98} See Bell 1939, at p. 55. However once the Prophet offered divorce to all of his wives. For details see id. See also Abbott 1942, at p. 113.

\textsuperscript{99} See Ali 1922, p. 244; See also Westermak 1921, p. 311; Doi 1984, p. 169.

\textsuperscript{100} As quoted by Siddiqi, M. M., \textit{Women in Islam}, Lahore 1952, p. 66.
According to decent custom".101

Furthermore, he never claimed to supersede the Quranic verses. Rather he said, "When saying is reported and attributed to me, compare it with God’s whatever is in accordance with that book is for me, whether I really said it or no".102

The above saying of the Prophet, therefore, was concerned to show that he remained within the ambit of God’s revelation, but he also claimed the right and need to interpret. Also from the above we can say that the argument put forward by the Muslim jurists, as indicated above in section 2.1.2, that the Quranic verse on the maintenance right of a widow was abrogated seems to be invalid.

After the death of the Prophet, his most intimate companions, Hazrat Abu Bakr, Hazrat Umar, Hazrat Uthman and Hazrat Ali succeeded him, one after the other, as caliphs of the newly formed Muslim Empire.103

The immediate task before the caliphs was not only to guide the people politically but also to carry forward the sacred mission of the Prophet. However, with the death of the Prophet, the caliphs were left only with the text of the Quran and evidence of the sayings and practice of the Prophet.104 This


103 On details see Coulson 1964, p. 23.

means that further revelations were no longer available, and the caliphs had to depend on the teachings of the Quran and the Sunnah of the Prophet in their administration. However, at the same time, both these authorities, i.e. the Quran and Sunnah, were not compiled and they required further interpretation. Priority was given to the compilation of the Quran.¹⁰⁵

At the same time, the caliphs who followed the Prophet as heads of the Muslim state were confronted with new problems, especially when the Muslim Empire expanded beyond Arabia. In order to seek solutions they first referred to the Quran, then to the Sunnah of the Prophet, and in the absence of any clear injunctions, they had to give their own judgments on different reasoning.¹⁰⁶ In this regard, Nasir says that,

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

(i) Through the interpretation of texts, i.e. the Quranic verses and the Prophet’s practices and sayings known as the Sunna;
(ii) analogy (qiyas), that is deriving judgment similar cases ruled upon under the Quran, Sunna or previously established ruling by unanimity;
(iii) deduction from the spirit of the Divine Law in the absence of any text or analogy”.¹⁰⁷

¹⁰⁵ Hamidullah 1954, p. 18.
Thus, it means that the Companions of the Prophet used two different techniques in their approach to personal opinion in the process of deriving any rule of law. One group of Companions believed in the supremacy of the Quran and the Sunnah, and is branded as the School of Hadith (ahl al-hadith).\textsuperscript{108} The other group—preferred interpretation of the text in the light of human reasoning and are called the School of personal opinion ahl-al-ray.\textsuperscript{109}

Two examples can be given here, when the caliphs used their opinion when express provisions of the Quran and Sunnah were not available. The first example is famous as the Himariyya or Donkey case.\textsuperscript{110} In this case, her mother, husband, two full brothers and two uterine brothers survived a deceased woman. Hazrat Umar, following the Quran,\textsuperscript{111} allotted the shares as one-sixth to the mother, one-half to the husband and one-third to the uterine brothers. This result in de facto exclusion of the real brothers, because the Quranic sharers exhausted the estate. The full brothers, appealed to Hazrat Umar, taking the plea that had the same mother as the deceased, and submitted their plea to stand on equal footing with the uterine brothers. Hazrat Umar, by accepting the appeal, entitled the real brothers to inherit equally with the uterine brothers in their share of one-third. Here it becomes obvious that


\textsuperscript{109} Id.

\textsuperscript{110} See in detail Coulson 1971, p. 73.

\textsuperscript{111} The Holy Quran, Vs. 4: 11-12.
Hazrat Umar in this case not only applied the Quranic injunctions, but also at the same time accommodated customary practices. Therefore, Prof. Coulson has validly argued that it was a “compromise between the traditional heirs of the tribal law and the new heirs introduced by the Quran”.\textsuperscript{112}

The second example is of Hazrat Ali, the fourth caliph. The case is called Minbariyya (the Pulpit case)\textsuperscript{113} Here, Hazrat Ali confronted with a problem in which distribution of an estate according to the Quran resulted in exhaustion of the estate, before the shares distributed. In this case, the sharers were a wife, father, mother and two daughters of the praepositus. Hazrat Ali applied the principle of proportional abatement,\textsuperscript{114} thus the wife’s Quranic share of one-eighth was reduced to one-ninth. The shares of other relatives were similarly also abated in proportion. This modification of the Quranic provisions is not explicitly allowed in the Quran, so here the Companions acted by adding to the body of rules in the Quran, seeking to uphold its conceptual principles.

The above examples indicate the Companions/Caliphs used their opinion or ray, in dealing with the problems relating to inheritance, especially where the Quran and Sunnah of the Prophet were silent. In other word, it can be argued that the companions in the presence of express provisions of he Quran avoided

\textsuperscript{112} Coulson 1971, p. 75.

\textsuperscript{113} Ibid, p. 47.

\textsuperscript{114} Pearl 1987, p. 6.
to use their ray, while in the absence of express provision, they acted as a new source of guidance, thereby developing the rules of sharia.

There is no evidence that could suggest that the Companions/Caliphs denied any post-divorce maintenance to women. On the other hand, it seems that the Companions/Caliphs favoured maintenance for a divorced woman. This fact becomes evident on the ground that Hazrat Umar rejected a reported Hadith, which says: "Abu Salamah b. Abd al-Rahim reported on the authority of Fatimah daughter of Qais: Abu Amr b. Hafs divorced her (Fatimah daughter of Qais) absolutely when he was away from home, and his agent sent her some barley. She was displeased with it. He said: I swear by Allah, you have no claims on us. She then came to the Apostle of Allah (may peace be upon him) and mentioned that to him. He said to her: No maintenance is due to you from him." 115

Hazrat Umar, while rejecting the above Hadith, determined that he would not follow a woman, who may have forgotten, and instead he would prefer the Quran and the Sunnah. 116 This seems to mean that Hazrat Umar not only favoured maintenance for a divorced woman but also made efforts to reject a Hadith, which was contrary to the basic teachings of the Quran, as discussed in sub-chapter 2.1 above. However, the later jurists of different Muslim schools


appear to have become wedded to the idea that there is no maintenance for a widow or a divorced women in Islam. We will discuss the role of the jurists in the next-sub-chapter.

2.2.3 The Muslims jurists and the maintenance

After the death of Hazrat Ali, the fourth Caliph, the Muslim Empire turned into a kingdom. The Muslim rulers were now more interested in their empire building.\textsuperscript{117} During that time there was no authority left to carry on the task of the Prophet. The Prophet (PBUH), during his life, had acted as both political and religious head and had decided problems either on the basis of the Quranic revelations or his personal opinions.\textsuperscript{118} When he died, the Quran was there, but his personal guidance ceased for his followers. Although the early Caliphs, as discussed in section 2.2.2, inherited some of the Prophet’s authority, their position necessitated greater involvement in the business of the state. While this would involve the settlement of disputes, the ruler’s authority now derived more from his political status than proximity to the Prophet or his own learning. After the death of Hazrat Ali (661 A.D.), the Muslim Empire further expanded and Islam became the religion of societies different from the Arabian culture.\textsuperscript{119}

\textsuperscript{117} Schacht 1964, p. 23.

\textsuperscript{118} See Rahman 1979, p. 43. See also Nasir 1986, p. 6.

\textsuperscript{119} Coulson 1964, p. 21. See also Ahmed 1992, p. 67.
During the process of empire building, a need was felt by the Muslim rulers to develop the Islamic law, which otherwise as is obvious from the literature, was still in its rudimentary period.\textsuperscript{120} Meanwhile, with the expansion of the Muslim empire, numerous norms of local societies crept in, many quite different from the patriarchal Arabian society.\textsuperscript{121} To this effect, some writers suggest that patriarchal norms about the inferior position of woman also became part of the Muslim empire.\textsuperscript{122} This seems to mean that the position of women in Arabia was much better than in neighboring countries. However, this is a view contrary to the earlier one that a woman was a mere chattel in Arabia.\textsuperscript{123} Here we are not centrally concerned about the status of women in Islam on which there is clearly no uniformly agreed position. However, there is an agreement that the norms of various societies became part of the sharia.\textsuperscript{124} During the Umayyad period (661-750 A.D.), the Umayyad kings indulged in wine, women and music,\textsuperscript{125} some caliphs, even at the time of prayers, appeared drunk in public.\textsuperscript{126} The people started disliking such un-Islamic practices and secular attitudes of the Umayyad rulers. Such abuses gave further impetus to

\begin{thebibliography}{9}
\bibitem{120} Ibid., p. 89.
\bibitem{121} Coulson 1964, p. 27.
\bibitem{122} See e.g. Ahmed 1992, p. 67
\bibitem{124} For details see Schacht 1964 and Coulson 1964.
\bibitem{125} See Zikaria 1988, p. 69.
\bibitem{126} Id.
process of learning of the various aspects of Islam in different cities of the Kingdom. Later, such learned people, due to their knowledge of the Quran and traditions of the Prophet, became experts, and thus became jurists, theologians, interpreters and guardians of the Islamic law. In the meantime, these jurists became part of the administration and some of them were appointed as qadis for administering justice. In order to do so, and in the absence of codified law, the jurists interpreted the Quran according to their own knowledge; on this basis, they used to give their own opinion (ray). They gained their authority not only due to their wisdom but also due to the limited knowledge of the rulers. As the rulers wanted to strengthen their rule, they encouraged the inclusion of jurists in the administration for the interpretation of Islamic law.

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

128 Ibid., pp. 58-59.
129 Ibid. p. 58.
130 Coulson 1964, p. 28. See also Rahman 1979, p. 72.
131 Ibid., p. 30.
133 For details, see Esposito 1988, p. 76.
“Firstly, the basic feature of the qadi’s work was the application of the local law and this varied considerably throughout the territories of Islam. Society in Medina, for instance, remained faithful to the traditional concepts of Arabian tribal law under which the arranging of marriage alliance was the prerogative of the male members of the family. No woman, therefore, could contract a marriage on her own account but had to be given in marriage by her guardian. In Kufa, on the other hand, a town in Iraq which had started as a military encampment, the admixture of diverse ethnic groups in a predominantly Persian milieu produced a cosmopolitan atmosphere to which the standards of a closely knit tribal society were alien. Woman occupied a less inferior position and in particular had the right to conclude her own marriage contract without the intervention of her guardian.”

The second reason for the diversity of Umayyad legal practice was the free use of personal opinion (ray) by the qadis. There was no central authority to check this personal opinion. Therefore, the interpretation of the Quranic provisions became a matter of personal discretion of the qadi, who at times added his own opinion to the simple and basic rules of the Quran. Thus, we

135 Id.
136 Id.
137 Ibid., p. 31.
find many differences of opinion among the Muslim jurists on the same verse of the Quran.

On the issue of maintenance for wives during marriage, generally, there is an agreement among the various schools of thought in Islam that a wife under the provisions of Islam is entitled to maintenance. However, when it comes to the quantum of such maintenance during marriage there is a considerable difference of opinion.

In view of all the Muslim jurists if both the husband and wife’s background is homogeneous, the standard of maintenance shall be according to their mutual status. However, if there is a difference in the social status of spouses, Hanbali and Maliki schools go for moderate and average standard for payment of maintenance to wife. On the other hand, the Hanafi school considers the financial condition of the husband in cases were the wife is rich and the husband poor and where the husband is wealthy and the wife poor they consider the medium level of maintenance. Contrast to that the Shafi School considers only the financial conditions of the husband. According to the Shia jurists, the level of maintenance is tied up with the needs of the wife.

138 Pearl 1987, p.69.
139 Id.
140 For details see for example Rahman 1978, pp. 269-270.
141 See Hodkinson 1984, p. 147.
142 Id.
Hedaya and the Fatawa Alamgiri, two leading texts on Muslim law in the subcontinent, lay down that the amount of maintenance should be on the basis of rank, financial position and circumstances of both the parties. The above texts have further discussed the other necessary articles that are included in maintenance such as soap, oil, medicine etc. In other such text, it has been narrated that it is the duty of the husband to provide cooked food and stitched clothes to the wife. It further says that a wife cannot be compelled to cook food for her, much less for the husband; nor she is to be compelled to stitch her clothes. The husband is bound to provide her a separate house or a separate portion of a house that has an independent entrance and exit.

From the above juristic views on maintenance provisions for wives, we move to the discussion on maintenance provisions for a divorced wife. We have already seen that Vs.2: 241 of the Quran is phased in such vague terms that it is open to interpretation. Indeed, this verse has given rise to some debate in the context of interpretation, focusing on the legal implications of general moral injunctions of the Quran. According to Professor Coulson:

"Verses of the Quran (II:236, 241) urge husbands to make "a fair provision" for wives they have repudiated. Ibn-Hujayra, qadi of Egypt 688-702, considered such provision, which came to be called mut 'a, to be obligatory.

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143 See for example Fyzee 1949, 183-184.
144 As cited by Rahman 1978 p. 258.
145 Id.
He fixed the amount at three dinars and arranged for its recovery by ordering the pay-roll official to make necessary deduction from the husband's stipend. On the other hand, a later qadi, Tawba ibn-Namir, opined that the Quranic injunction was directed only to the husband's conscience.¹⁴⁶

It became noticeable that the qadis now started the task of interpretation of the Quran, the authority enjoyed by the Prophet or the early Muslim caliphs, as discussed above in section 2.2.1 and 2.2.2 Moreover, the qadis were appointed by the Governor of the area, therefore, the influence of the rulers over them cannot be ruled out.¹⁴⁷ To this effect, one can give the example of talaq-al-bida, which was preferred by the jurists to please the rulers. In this regard, Ali says, "The talak-ul-bidat, as its name signifies, is the heretical or irregular mode divorce, which was introduced in the second century of the Mahommedan era. It was then that the Omeyyade monarchs, finding that the Prophet on the facility of repudiation interfered with the indulgence of their caprice, endeavored to find an escape from the strictness of the law, and found in the pliability of the jurists a loophole to effect their purpose".¹⁴⁸

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

¹⁴⁶ Id.
¹⁴⁷ Pearl 1987, p. 8.
¹⁴⁸ Ali 1929, p. 475.
“In early Islamic society, the Muslims abided by their words of religious oaths, whatever the circumstances and whatever the consequences. Later on, however, during the reign of kings, a need was felt to apply sanctions against the breach of the oath. A contract, which was entered upon in the second century, read as follows:

If you make any change in the contract or act against what the Commander of the faithful had asked you to do, you will lose the protection of God, of His Prophet and of all the Muslims. The punishment for the defaulters among you will be that (1) all the wealth \ldots will be given away to the poor. (2) they will walk\ldots. As atonement, (3) the slaves \ldots set free. (iv) three divorces will stand automatically pronounced on their wives and there shall be no exception to it".149

Professor Shehab further says, in order to make the above contract feasible, “the people at the helm of affairs created such an atmosphere that three divorces in a single sitting began to be considered as the standard Islamic way of divorce”.150

This could then well mean that talaq-al- bida was promoted despite the clear Quranic injunctions and teachings of the Prophet.151 While its promotion, on the one hand, might have found appreciation with the rulers, it may also have

149 Shehab 1987, p. 84.
150 Id.
151 The Holy Quran. Vs. 65:1. See also Ali 1922, p. 244.
appealed to some Muslim husbands, who later found it an easy way to get rid of a wife immediately, and to be discharged from any further liability of maintenance towards their divorced wives. Further, it also resulted in divorced women leaving the husband's house immediately, without even waiting for the iddat period to be completed. It is argued that here is another parallel case with post-divorce maintenance in Islamic jurisprudence where the moral statements of the Quran are over-looked in favour of local traditions. Yet, it is further argued that divorce and maintenance are not the only cases where the express rulings of the Quran for the welfare of women bypassed by Muslim jurists. Rather, if we look at other pro-women Quranic verses, like those on mahr, iddat, and inheritance, and compare their interpretation by the Muslim jurists, we can clearly see that women have been systematically deprived of their rights established by the Quran.

After the downfall of the Umayyads, the Abbasids as the new rulers began to review the Islamic law, especially with view that the Umayyads had deviated from the Quranic injunctions. In particular, the Umayyads were criticised for their patronage of pre-Islamic customary practices and the personal opinions of


154 Schacht 1950, p.36.
the qadis in their era. However, the qadis of the Umayyad period, through their personal opinion (ray), had laid down further foundations of Islamic law.

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

We now concentrate on the commentaries to the Quranic verses 2: 240-241, as discussed in section 2.1 above, which suggest maintenance not only for a widow but also for a divorcee. This discussion shows that jurists were concerned to deprive women of maintenance rights. Although this discussion focuses largely on the right of widows, it may well be relevant for the position

155 See Watt, W.M., Islamic political thought, Edinburgh 1968, p. 65. See also Esposito 1988, p. 76
156 Schacht 1987, p. 10
157 Pearl 1987, p.10.
158 Esposito 1988, p. 77.
159 Ibid., 60
160 For details on different schools in Islamic jurisprudence see Coulson 1964, pp. 36-52.
of divorced women as well. Clearly, this discussion shows that the Muslim scholars are concerned to avoid liability of men to provide maintenance to women.

In commentaries to Vs.2: 240, the Muslim scholars first deny the right of maintenance to a widow. The point here is raised that if a widow inherited a share of 1/4 in case of an issueless marriage, or a share of 1/8 in the presence of children of the praepositus,\textsuperscript{161} should she then also be entitled to maintenance and residence?\textsuperscript{162} This seems to mean that the Muslim scholars consider that a widow loses her right to maintenance when she is entitled to inheritance. The technique of Muslim scholars to get around this was to argue that Vs. 2: 240 of the Quran is abrogated by Vs. 4: 12. However, Verse 4:12 reads as follows:

"In what your wives leaves,

Your share is half, If they leave no child;

But if they leave a child, Ye get a fourth;

after payment of legacies and debts.

In what ye leave, Their share is a fourth,

if ye leave no child; But if leave a child,

They get an eighth; after payment Of legacies and debts.

If the man or woman Whose inheritance is in question,

\textsuperscript{161} Coulson 1971, p. 41.

\textsuperscript{162} Daryabadi n.y. 38-A, note 611. See also Usmani n.y., p. 137, note 402.
Has left neither ascendants nor descendants,
But has left a brother Or a sister,
each one of the two Gets a sixth;
but if more than two, they share in a third;
After payment of legacies And debts;
so that no loss Is caused (to any one).
Thus is it ordained by God;
and God is all-knowing, most forbearing". 163

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

"Opinion differ whether the provision (of a year’s maintenance, with residence), for a widow is abrogated by the share which the widow gets (one-eighth or one-fourth) as an heir (Q.iv.12). I do not think it is. The bequest (where made) takes effect as a charge on the property, but the widow can leave

163 The Holy Quran, p. 182.
the house before the year is out, and presumably the maintenance then ceases”.\(^\text{164}\)

This seems to mean that the widow is entitled to maintenance and residence, but not to any other extra payment. This leads to the position that the widow is on the one hand, entitled to a share in the deceased husband's property and, on the other, to provision of maintenance for one year.\(^\text{165}\) As we saw above the Quran in Vs. 2: 240 further appears to envisage that a widow may leave her deceased husband's home during the one year period and seems to say that this is a matter of discretion for the widow. This could lead us to argue that a widow will lose her right of maintenance if she leaves the house of her deceased husband but she does not lose her Quranic right of inheritance.

Maulana Amrohi, who also advocated that Vs. 2: 240 was abrogated by Vs. 4: 12,\(^\text{166}\) argued that the one year of stay in the deceased husband's house was a pre-Islamic practice and it was the iddat period for the widow.\(^\text{167}\) He further writes in his commentary:

"In Arabia it was a tradition that on the death of the husband, the widow had to remain in iddat for one year. She used to wear old clothes and abandon makeup. If she resided in a city then the widow had to live in the same house.

\(^{164}\) Ali 1934, p. 96, note 273.


\(^{167}\) Id.
where her husband died. If the widow was a resident of a desert then in that case, a separate home was built for her and she was not allowed to come out of that house. The heirs of the deceased used to maintain her. However, if the widow went out of the house, the family’s liability of maintenance was then terminated".168

The Maulana adds that this divine obligation of one year’s maintenance prevailed in the early days of Islam. Later, when the revelation on the widow’s iddat of four months and ten days was revealed,169 this order of one year was abrogated.170 However, according to Ali:

"There is nothing to show that this verse (The Holy Quran, Vs.2: 240) is abrogated by any other verse of the Holy Quran. Neither Vs. 2: 234, nor 4:12, contains anything contradicting this verse. The former of these speaks of the period of waiting for a widow, but here we have nothing about the period of waiting; it simply speaks of a bequest on the part of the husband that the widow should be given an additional benefit, a year’s residence and maintenance. The later portion of the verse plainly says that if a widow of her own accord leaves the house...she is not entitled to any further concession, and there is no blame on the heirs of the deceased husband for what the widow does of lawful deeds

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168 Id.

169 See The Holy Quran, Vs. 2: 234, pp. 93-94.

i.e. if she remarries after her waiting period of four months and ten days is over”. 171

While going back to the arguments forwarded by the learned Maulana Amrohi, it becomes apparent that he is not clear himself whether Vs.2: 240 was abrogated by Vs.2: 234, or Vs. 4:12, as mentioned by some other scholars. 172 However, if Vs.2: 240 is abrogated by Vs. 2:234, then it seems to mean that the Quran has shortened the iddat period specifically to allow earlier remarriage, which could be for the benefit of the widow, but also to ease the burden on the family of the deceased. Otherwise, they both have to wait for one year, the widow to remarry and the family to get rid of her. Nonetheless, there is no indication in Vs.2: 240 that it demands form a widow to remain secluded for a year. The verse clearly leaves it to the discretion of a widow if she wants to leave the house of her deceased husband before the year-ends.

Whereas Vs.4: 12 enunciates the right of inheritance of the widow, 173 it seems that Vs.2: 234 and Vs.4: 12 focus on different subjects matters. While Vs.2: 240 proclaims the right of the widow to stay in the deceased husband’s house for one year, Vs. 2:234 describes the iddat period of the widow. In this particular verse, there is no mention that after the expiry of iddat, a woman should leave the house of her deceased husband. However, the Quran here

172 Daryabadi n.y., p. 38-A, note 611. See also Usmani n.y., p.137, note 402.
173 The Holy Quran. Vs. 4: 12. For details on the Muslim law of succession see Coulson 1974.
seems to exempt the other heirs of the deceased from any liability if the widow leaves. The only similarity which seems to be visible between verses 2: 234 and 2: 240 is that in both the Quran leaves it to the discretion of the widow whether to stay or leave the deceased husband's house, after her iddat is over. As far as Vs.4: 12 abrogating Vs.2: 240 is concerned, Vs.4: 12 explains the widow's right to inheritance in her deceased husband's property. Nevertheless, the Quran does not mention that a widow, after receiving her share, should leave the house. Rather after being entitled to a share, she becomes a full owner of her allotted share, which could be a house or other accommodation. However, it can be argued that by having a share in the deceased husband's property, a woman is in a better financial position than she were dependent on maintenance from the legal heirs of her husband.

Here we submit that the Muslim scholars have in fact forgotten to think about a widow who may not inherit any property, either due to non-existence of any property, or due to some customary practice of not giving any immovable property to the widow, as is in the case in classical Shi’a law.174

We conclude this debate by arguing that the Quran in Vs.2: 240 has asked the husbands to provide a year's residence and maintenance in favour of their wives, before they die. However, at the same time has given an option to the

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174 For details see Coulson 1971, p. 113.
widow either to stay in her deceased husband's house after her *iddat* period ends, or to leave it after that period expires.

In later case, she may lose her right of maintenance.\(^{175}\) This bequest is in addition to what a widow inherits.\(^{176}\) This could then well mean that a widow, on the bequest made by the husband, becomes not only entitled to a year's stay and maintenance in the house of her husband but also to her Quranic share in her deceased husband property.\(^{177}\) This Quranic share, in particular, would probably sustain the widow beyond the one-year limit. In a society where widows were expected to marry again, this might not be a big issue. In other words, pressure on widowed or divorced women to marry again would ease potential problems over women's rights to post-divorce maintenance, in particular.

We move from Vs.2:240, to some of the commentaries to Vs.2: 241. It seems that the Muslim scholars have taken a different view of their own translations, as discussed in section 2.1 above. The scholarly debate links *mah\(r* and maintenance. For example, Maulana Ashraf Ali Thaniv says that *mataa-un* here means that those divorced women whose marriage is consummated, and whose dower is fixed, are entitled to their full dower and this is their *mataa-un*.\(^{178}\)

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175 See Ali 1934, p. 96, note 273.
176 Id.
Whereas, in his translation to Vs. 2:241, he used the word ‘faida’ for mataa-un, which means ‘benefit’, ‘advantage’, ‘profit’ or ‘gain’. It can assumed that according to this commentary, a divorced woman whose dower is fixed is entitled to full dower and that is her matta-un and ‘benefit’ or ‘advantage’.

The Muslim scholars, as it seems, tried to give a new definition to dower (mahr) by connecting it with the provisions of maintenance. A wife, in Islamic law, is entitled to her full dower once her marriage is consummated. In section 2.1 above, we established that the Quran has not linked mahr and maintenance. Rather the Quran very clearly in Vs. 2: 237, as discussed above, says that those divorced women whose marriage is not consummated, but their dower was fixed, are entitled to half of the stipulated amount of dower. However, the Quran further asks men to be liberal and to give the full dower to their wives, even if the marriage was not consummated. Seen in this light, the practice of splitting the amount of dower (mahr) into the so-called prompt dower and so-called deferred dower seems to be an effort by the Muslim scholars to relieve men from financial burdens. On the other hand, this made life difficult for women, especially in the event of death of the husband or divorce. A woman, in order to claim her unpaid dower has to fight long legal battles.

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179 Id.

If we go through some of the other commentaries to Vs.2: 241, it seems that the Muslim scholars have gradually constructed a new argument. The reflection of arguments can be found in more recent writings in English and Urdu. For example, Maulana Amin Ahsan Islahi, in 1979, says that the Quran in this verse is again reminding the followers of what was said earlier in Vs.2: 236.  

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

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182 Ibid., p. 513.
184 Islahi 1979, p. 513.
divine obligation relates to the divorced woman whose marriage is consummated.

Maulana Maududi, in his commentary to Vs.2: 241, says some compensation is to be paid to the divorced wife,\textsuperscript{185} whereas Maulana Daryabadi is of the opinion that a divorced woman is entitled to a ‘reputable present’.\textsuperscript{186} However, Alama Usmani considers that only a pair of clothes may be given to the divorced woman. He further adds that it is only voluntary and not mandatory.\textsuperscript{187} This is contrary to his own translation to verse 2:241. From these recent above cited South Asian commentaries, it becomes obvious that Muslim scholars are not in favour of any maintenance for a divorced woman. Rather they have been successful in brushing the issue of post-divorce maintenance under the carpet of sharia. However, it is clear that it was not possible for them to run away from the express Quranic injunctions. Therefore it appears that they twisted their arguments in a way that their interpretation could give two different meanings to the same verse of the Quran by interpreting the word \textit{mataa-un} as gift or dower, rather than full-fledged maintenance. The present thesis cannot conclusively establish to what extent arguments about dower interfered with the discussion of maintenance rights, but there appears to be a

\textsuperscript{185} Maududi 1988, pp. 183-184, note 260.

\textsuperscript{186} Daryabadi, n.y., p. 38-A, note 617.

\textsuperscript{187} Usmani n.y., p. 137, note 404.
strong link, leading to the established position that divorced Muslim wives are entitled to their mahr, but no provisions beyond the iddat period. The Muslim scholars may have defined away maintenance to divorced women, yet we have the example of Hazrat Imam Hassan, son of Hazrat Ali (the fourth caliph). He gave twenty thousand dirhams or dinars, and a water-skin full of honey to his divorced wife.\textsuperscript{188} The purpose behind giving large sums as mattr-un was to enable the divorced woman to remarry.\textsuperscript{189} Moreover, those divorced women who had passed the age of marriage were also not left behind; they were often provided with a servant to look after them.\textsuperscript{190} The husband of the divorced wife till her death paid the salary of the servant.\textsuperscript{191} This seems to mean that there were people in the early Islamic period that, instead of throwing out their divorced wife, made efforts to prevent her from becoming destitute.

The preceding discussion shows very clearly that a number of issues relating to property and maintenance payments for widowed and divorced wives have been discussed over time by the Muslim jurists. The questions debated, related as we saw, to inheritance, mahr, and to the iddat period. But it seems nowhere is the issue of post-divorce maintenance debated in detail and on its own. This

\begin{footnotesize}
\begin{enumerate}
\item Shehab 1986, p. 221.
\item Id.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
confirms that there has been in fact, for a very long time juristic consensus on
the point that there is no entitlement to maintenance for divorced Muslim
wives beyond the iddat period. All the discussions are focused on the iddat
period, its duration, on mahr and its link with inheritance. These discussions
are based on the assumption that there is no further entitlement for a divorced
Muslim woman. At the same time, it remains a fact, as discussed in this
chapter, that the general Quranic stipulations, in favor of maintenance for
divorced wives, have been redefined and narrowly circumscribed.

Further developments in Islamic law, as the next chapter shall illustrates
simply proceed on the basis that traditional Islamic jurisprudence denies
divorced Muslim women any claims to maintenance beyond the iddat period.
Chapter 3

Maintenance laws for Muslim women in British India

The present chapter is primarily concerned with the development of maintenance laws for Muslim women during the period of British rule in the Indian subcontinent. However, before we go into details of the regulation of maintenance under British rule, it will be relevant to briefly discuss Muslim rule in India.

The Muslims rulers who laid the foundations of Islamic law in India, in the absence of any codified laws, mostly relied on the opinion of the jurists in the shape of legal fatawas, mainly based on the doctrines of the Hanafi school of law. However, during the time when Muslims conquered India Islamic law was not yet fully developed. The development of the principles of the Islamic sharia was a gradual process. Therefore, it can be assumed that the Muslims could at best know only the Quran and some saying of the Prophet. Further the Muslim rulers, at least in the beginning, were more interested in trade and commerce. Later, qazi courts were established, aided by jurisconsults (muftis), to decide disputes among the Muslims. Here we again see the reemergence of the court jurists, as during the early Islamic period of the Umayyad and later

192 Fatawa (singular) is the general technical term for authoritative legal opinions in Islamic law. For details see Coulson 1964, pp. 142-143. See also Rahman 1979, pp. 94, 204 and Fisch, J., Cheap lives and dear limbs. Wiesbaden 1983, pp. 44-47. Recently, Islamic law scholarship has begun to concentrate more on this topic. See now Hallaq, W.B., ‘From fatwas to furu: growth and change in Islamic substantive law’. In: Islamic Law and Society. (1994) Vol. 1, No. 1, pp. 29-65.

Abbasid dynasties respectively. Further, the non-Muslims or the natives had their own local councils, which used to decide legal issues according to the principles of their respective personal law.

The early Muslim rulers of India, as is apparent from the literature, were opposed to ecclesiastical interference in matters of law and religion, and more important, though, is the observation that the growing Muslim population of the sub-continent remained under the strong influence of local customary norms.

During the early Muslim period, Maulana Burhan-ud-din brought the Hedaya to India from Central Asia. It could not be said that it was a purely legal text based on Islamic laws and regulations. Rather it was a commentary, as is evident from its title, on Muslim laws in the light of the Hanafi School of thought. There is no evidence to suggest that during the period of early Muslim rule any Muslim woman went to the court of a qazi to claim maintenance from the husband or ex-husband. Rather it seems that people used to solve their family


197 Ikram, S.M., Muslim Civilization in India. London 1964, p. 102.
problems within the family, or they used to go to the local panchayats, that comprised of the elders of that area. Thus, the state continued to accept the power of families and clans to settle family disputes by themselves. Since such decisions were not reported, only detailed historical and anthropological research could unearth some evidence of dispute settlement at this level.

Later, in 1526, when the Mughal dynasty was formed there is no evidence to suggest that any effort were made to implement any family laws. However, during the reign of Aurangzeb, the Fatawa-i-Alamgiri was compiled with the help of Muslims scholars. The Fatawa-i-Alamgiri, apart from other provisions, also discusses provisions of maintenance for married women in Islam. Not surprisingly, in view of the position of Muslim jurists as discussed earlier, the fatawa denies any further maintenance to a divorced woman after her iddat period is expired. This is a view similar to the one taken in the Hedaya, which had discussed the issue of maintenance for a divorced woman in the following way:

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198 In India and in Pakistan, especially in the villages, some elder member of the community or village of the disputing parties normally decides disputes. For details see, for example, Banerjee, T. K., Background to Indian criminal law, Calcutta 1963, p. 268.

199 It mostly contains work on Islamic fiqh on the basis of the Hanafi School of thought. Like the Hedaya, it contains rulings of the ulama, i.e. on various issues like, criminal, civil, family and religious rituals. It is still considered to be the leading authority on Islamic law. The Hedaya and the Fatawa-i-Alamgiri, according to Hodkinson, contained a number of doctrines and legal practices not sanctioned in the classical law of the Middle East but accepted by Indian jurists; the British courts had to derive their knowledge of the law from these texts. See Hodkinson 1984, p. 12. Baillie translated some of its portions from Persian to English in 1875. I have consulted this translation of the Fatawa-i-Alamgiri.

200 For the discussion on maintenance see Baillie 1875, pp. 441-454.

201 Ibid., p. 454.

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"Where a man divorces his wife, her subsistence and lodging are incumbent upon him during the term of her Edit, whether the divorce be of the reversible or irreversible kind. Shafei says that no maintenance is due a woman repudiated by irreversible divorce, unless she be pregnant. The reason for maintenance being due to a woman under reversible divorce is that the marriage in such a case is still held to continue in force, especially according to our doctors, who on this principle maintain that it is lawful for a man to have carnal connexion with a wife so repudiated. With respect to a case of irreversible divorce, the arguments of Shafei are twofold; FIRST, Kattima Bint Kays has said, "My husband repudiated me by three divorces, and the Prophet did not appoint to me either a place of residence or a subsistence;" SECONDLY, the matrimonial propriety is thereby terminated, and the maintenance is held, by Shafei, to be a return for such propriety (whence it is that a woman’s right to maintenance drops upon the death of her husband, as the matrimonial propriety is dissolved by that event); but it would be otherwise if a woman repudiated by irreversible divorce be pregnant at the time of divorce, as in this case the obligation of maintenance appears, in the sacred writings, which expressly direct it to a woman under such circumstances. The argument of our doctors is that maintenance is a return for custody (as was before observed), and custody still continues, on account of that which is the chief end of marriage, namely, offspring (as the intent of Edit is to ascertain whether the woman be pregnant or not), wherefore is subsistence is due to her,
as well as lodging, which last is admitted by all to be her right; thus the case is the same as if she were actually pregnant; moreover, Omer has recorded a precept of the Prophet, to the effect that “maintenance is due to woman “divorced thrice during her Iddat.”” there are also a variety of traditions to the same purpose”.  

Thus, the *Hedaya* also sticks to the earlier juristic view that a divorced woman is only entitled to maintenance till her *iddat* period expires, as discussed earlier. However, from the above quote from the *Hedaya*, it becomes evident that the juristic debate revolves around the Hadith, as discussed above in chapter 2 which was rejected by the Caliph Hazrat Umer, but later found favour with jurists.

In the present brief discussion it becomes apparent that no efforts were made by the rulers to codify the Quranic injunctions on family matters and to re-open the questions of maintenance for women after the end of their marriage. Rather, the interests of women were left to the mercy of the jurists who made family matters their domain. This becomes evident from the late Indo Muslim interpretations of Quranic injunctions on the issues under discussion.

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3.1 **Application of Muslim law principles during the British period**

In this section, we examine the laws of maintenance during British rule in India. We focus our attention on the period when the laws on maintenance were enacted for the first time by the British government of India in 1861.

When the British took over the reigns of India, a need was felt for the gradual codification of laws. In this respect, action was taken especially in the early codification of criminal laws. This resulted in the enactment of the **Indian Penal Code, 1860**, and the **Code of Criminal Procedure, 1861**. In this context, for the first time non-payment of maintenance to wives and children was made a punitive offence. This also represents evidence of gradually growing state interference in this area of family law, significantly linking it with criminal law.

The British administration, however, also sought to interfere as little as possible in the personal laws of the populace. Therefore, by the 27th Article of Regulation II of 1772, 'all suits regarding inheritance, marriage, caste and other religious usages or institutions' were to be governed by the personal laws of the Hindus and Muslims respectively.²⁰³

When the British Crown finally took over administration of India in 1858, the system of law, as indicated by Jain, was confused and chaotic.²⁰⁴ There were

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²⁰³ Pearl 1987, p. 25.

no particular rules for litigation in most of the fields of law. The immediate need was to take action in the criminal law system. Inherited by the British from the Mughal Muslim rulers, it was based on Islamic principles. After considerable delay, the first India Penal Code, (hereafter IPC) in 1860 and a year later the CrPC were implemented. The IPC does not contain any provision for maintenance of wives, the CrPC in section 316, for the first time, incorporated laws for the maintenance of women.

The first Indian CrPC 1861, in chapter 21, had provisions for the maintenance of wives and children. The legislative intent behind the enactment was described by Sir James Fitz James Stephens as “a mode of preventing vagrancy, or at least of preventing its consequence”. Further, in this regard, Woodroffe says that, “the object of the law is to prevent the wife whom her husband is able to support from becoming a burden on other people”. This seems to mean that the state, instead of taking responsibility of destitute women, wanted men of means, to perform moral obligation of maintaining their families.


207 Woodroffe 1926, p. 553.
Reference to the origin of the chapter was made in an earlier case of the Bombay High Court decided by West, J in 1884. The judge by analysing the provisions of the poor laws in England, gave an outline of the development of the laws relating to the relief of the poor, he pointed out that the legislators definitely had in mind the state of law in England when they were going to make legislation regarding the chapter on maintenance of wives and children. Thus, he said, "the state of the law of England referred to in the foregoing observations must have been familiar to the Indian Legislature when the Code of Criminal Procedure was passed".

Meanwhile, due to the lack of knowledge of personal laws by the English courts, Maulvis and Pandits had been appointed, as experts, to instruct courts, in British India on their respective personal laws. This means that a conceptual thread was picked up form where it was left earlier. The policy of applying the personal law in accordance with the religious belief of the individual was not a new experiment performed by the British. It was rather a continuation of the policy of the Muslim rulers. The reliance on these so-called experts, not only indicates ignorance of the rulers on the subject matter; their

208 Re Shaik Fakruddin, ILR (1884) 9 Bom 40.
209 Ibid. p. 45.
appointment, also gave them authority to influence the society and supplant the Islamic law in the shape of their fatwas.\textsuperscript{212} It is also evident in various court decisions how the customary laws of the people were preferred over the specific teachings of Islam.\textsuperscript{213} Further, in the absence of any clear injunction in the texts, judges often decided cases according to “justice equity and good conscience”.\textsuperscript{214} This means the Islamic law in the subcontinent slowly intermingled with English law and took a new shape in the form of “Anglo-Muhammadan law”,\textsuperscript{215} which is still applied in India and to some extent in Pakistan.

During the period 1861 to 1898, some amendments were made to the criminal law but the provisions on maintenance remained the same. A new CrPC was enacted in 1898, divided into 46 chapters and 565 sections. In chapter XXXVI one finds the unaltered provisions of the 1861 Code relating to the law of maintenance and its procedure of enforcement. Section 488 of the CrPC 1898, regulates the maintenance of women and children. This section gives effect to the natural duty of a man to provide maintenance to his wife, children and the

\begin{itemize}
  \item \textsuperscript{212} See Coulson 1964, pp. 142-143.
  \item \textsuperscript{213} Hodkinson 1984, p. 12.
  \item \textsuperscript{215} Schacht 1964, p. 98.
\end{itemize}
nearest kin, if they are unable to support themselves. Section 488 of the Code provides:

Sec. 488  (1) “If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrates, a presidency Magistrate, a Sub-Divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding one hundred rupees in the whole,\(^{216}\) as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

(2) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintenance.

(3) If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner herein before provided or levying fines, and may sentence such person, for the whole or any part of each month’s allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if made sooner:

\(^{216}\) By section 92 of the Code of Criminal Procedure (amendment) Act, 1955, this figure was increased to a maximum of Rs. 500.00.
Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing. Provided, further, that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it become due.

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

(6) All evidence under this chapter shall be taken in the presence of the husband or father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed in the case of summons-cases:

Provided that if the Magistrate is satisfied that he is willfully avoiding service, or willfully neglects to attend the Court, the Magistrate may proceed to hear
and determine the case ex parte. Any orders so made may be set aside for good cause shown, on application made within three months from the date thereof.

(7) The Court in dealing with applications under this section shall have power to make such order as to costs as may be just.

(8) Proceedings under this section may be taken against any person in any district where he resides, or is, or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child."

As indicated earlier the legislative purpose behind the enactment of section 488 was to prevent vagrancy in the Indian sub-continent. This idea was endorsed in *Ebrahim Mahomed v Khursheed Bai,* where Beaumont C.J. noted that the object of section 488 was "to avoid vagrancy by providing that a Magistrate may up to a limited extent see that a wife and children are maintained by a husband or father able to maintain them". The same approach can be seen reiterated much later in *Jaigur Kaur v Jaswant Singh,* where Subba Rao J. said that the statutory provision intends to serve "a social purpose". This means that the judges were looking at the enactment as a reformative measure, in a sense, to achieve social justice.

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217 (1941) 43 Bom LR 515.
218 Id.
219 AIR 1963 S C 1521.
220 Ibid., at 1525.
Although Section 488 of the Cr.PC, in no way represents the first deviation from the basic principle of the Declaration on 1772, that matters of inheritance, marriage, caste and other religious usage should be governed by the personal laws of the parties, its enactment bears testament to the gravity of the problems of destitution and vagrancy facing the authorities in India. In a country where even minor changes in the personal laws could prove a costly exercise in weakening the stability of government, the British administrators had chosen to effect social change in an attempt to ameliorate the hardship of impoverished women deserted or abandoned by their husbands. However, this did not go as far as overriding established principles of Islamic law.

3.2 **Impact of the legislation**

The CrPC 1898, as a general law, was applicable to all the communities in India and thus had an overriding effect over personal laws. If we compare the provisions of maintenance for women in the CrPC 1898 with the ones specified in Islamic law, as discussed earlier, some similarities could be found between the legislation and the Islamic laws. Specifically, the treatment of disobedient wives, who will in Islamic law be disqualified from their right to be maintained unless their behaviour is justified, attracted some attention.

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No doubt, there is a similarity between the early legislation and the Islamic laws on the provision of maintenance; the difference is on termination of the right of maintenance. In Islamic law the wife’s right to maintenance exists as long as the marriage subsists. That is, on termination of the marriage contract, except for rules about mahr and iddat, the wife loses her right of maintenance under Islamic law; the general legislation is completely silent on the issue of maintenance to divorced wives or widows.

Until 1883, a husband ordered to pay a monthly sum for the maintenance of his wife was held not to be deprived of his right of unilateral repudiation, or talaq. This would, in consequence of its exercise terminate the efficacy of the order.222 Thus, a Muslim wife’s right to maintenance was held to last for the duration of her marriage and the iddat period only,223 a provision not found in section 488. In Shekhanmian Jehangirmian,224 Mirza J. correctly asserted that the statutory provision “has in no manner abrogated this part of the personal law of the parties”.225

Section 488 was enacted to make the husband responsible for providing maintenance to his neglected wife or wives. But the case-law, as discussed

222 Abdul Ali Ishmailji (1883) ILR 7 Bom 180. This case was heard under section 234 of the Act IV of 1877, a precursor to the 1898 Code.

223 See Din Muhammad (1882) ILR 5 All 226.

224 (1930) 32 Bom LR 582.

225 Ibid., p. 584.
below, shows that the Muslim men divorced their wives instead of paying maintenance. Therefore, it could be said that section 488 of the CrPC 1898, on the one hand, could not bring relief to every neglected wife. On the other hand, because of the absence of any remedy for a divorced/widow Muslim woman, the particular purpose of the law was not achieved rather it encouraged Muslim men to get rid of their unwanted wife through talaq. For the Muslim wife, after termination of her marriage either through death of the husband or divorce, there was no provision in her personal laws or the statutes on maintenance to seek permanent alimony.

Thus, here one can argue that by adopting the option of divorce, Muslim husbands found an easy way to defeat the state law. By pronouncing divorce, the Muslim husband not only blocked the purpose of the law but also succeeded in avoiding his responsibility to provide maintenance to his legally wedded wife. Here we conclude by submitting that, although the summary remedy of section 488 CrPC is worthwhile, it could only play a very limited role in the eradication of destitution and vagrancy, and it did not help divorced/widowed Muslim wives at all.

3.3 Development of case-law under section 488 of the CrPC

In this sub-chapter, we seek to examine the development of case law, especially under section 488 of the CrPC 1898. As the English judges were trained in common law, it became a new experience for them to decide cases on basis of personal laws. They were neither trained for this nor did they have
the knowledge of the language to had access to the primary sources. Therefore, as indicated earlier, Maulvis and Pandits were hired as so-called experts but were later (after 1864) discarded in favour of native Western-educated people. In the meantime, after the enactment of the CrPC, cases started coming to the courts in which neglected wives asked for maintenance under section 488.

In an earlier reported case of re-Kasam Pirbhai and his wife Hirbai, the magistrate had refused to cancel his previous order of maintenance in favour of the wife, on the ground that the husband had divorced her. In the view of the magistrate, the relevant Act did not mention this kind of situation, while under the Islamic law a husband was not bound to maintain his wife after the expiry of her iddat period. However, the High Court in the above case held, "An order made by a magistrate under Act XLVIII, of 1860 (Police Amendment Act), Section 10, directing a Muslim husband to pay a sum monthly for the maintenance of his wife, does not deprive such husband of his inherent right to divorce his wife, and after such divorce the magistrate order can no longer be enforced".227

In the above case, it was only decided that upon divorce a Muslim husband is not bound to maintain his wife. There was no reference to the maintenance of

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226 (1817) 8 Bombay High Court Reports 95.
227 Id.
the wife during her iddat period. In the petition of Din Muhammad,228 the Allahabad High Court decided a reference made by the Officiating Magistrate. The brief facts are that a wife had been awarded maintenance under the CrPC. One month after the order, the husband made an application that he had divorced his wife, therefore, the earlier order of maintenance should be set aside. The Assistant Magistrate, who had made the initial order of maintenance, rejected the application and “expressed doubt whether a divorce made with a view to getting rid of an order of maintenance would be valid.”229

It was further expressed in his opinion that “until a Musalman husband pays his wife’s dower, his liability to maintain her in accordance with marriage contract continues.”230 Later, the District Magistrate made a reference to the High Court. The court agreed with the findings in the case of re-Kasam Pirbhai,231 that a maintenance order ceases once the husband and wife no longer remain in the conjugal bond.232 The court further observed on the issue of maintenance to the divorced wife until the end of the iddat period:

“The rule of Muhammadan law in regard to maintenance of a divorced woman during her iddat is clearly stated in the Hedayat. “Where a man divorces

228 ILR 1882 All 226.
229 As reproduced in ibid., at 227.
230 Id.
231 (1871) 8 Bombay High Court Reports 95.
232 Din Muhammad ILR 1882 All 226, at pp. 230-231.
all to be her right”. Therefore, whilst I am of opinion that an order for maintenance of a wife passed under Chapter XLI becomes inoperative, in the case of a Muhammadan, by reason of his lawfully divorcing his wife and thus putting an end to the conjugal relation, I hold that that relation does not cease to exist so absolutely as to render the wife to marry again, or to look to any other means of support during her iddat. And this being so it would be putting an inequitable and unreasonable construction upon the law to hold that the Magistrate’s order for maintenance of the wife ceases to be operative before the expiration of the divorced wife’s iddat”.233

Therefore, in later cases on maintenance and a subsequent divorce, we notice that the judges are discussing maintenance provisions for the divorced wife during her iddat period, although no provisions are made for this under the Act. In Mt. Mariam v. Kadir Baksh,234 the wife had applied for maintenance under section 488 of the CrPC 1898. The husband, in order to avoid paying maintenance, divorced her in the court. In this case issue before the court was whether a wife is entitled to maintenance in such circumstances and if so, what should be the duration of the maintenance, and at what rate? It was held that the wife could obtain maintenance against the husband during the period of iddat and was entitled to it for three months. Although the judgment in the above case is not contrary to the principles of Islamic law regarding the

233 Ibid., at 232.

234 AIR 1929 Oudh 527.
divorced wife’s right to maintenance, fixing Rs.10 per month as maintenance seems objectionable. Firstly, it could be argued that after divorce the wife is not entitled to claim maintenance under the Act on the ground that the relation on the basis of which such demand is made no longer exists. As we saw earlier, it could also be argued that the purpose of the iddat period is not only to ascertain parentage but also to give time to the parties, at least the man, to reconsider the decision to divorce. However, in the present case, it seems the divorce pronounced before the court was in the al-bida form of Muslim divorce, which terminates the marriage instantly. Therefore, it is submitted that in fixing maintenance for the iddat period, other provisions should also have been considered, like whether the wife should live in the house of the husband during the period and in the same style as she used to. This means that after divorce, a Muslim wife does not fall under the provisions of maintenance prescribed by the Act, but her entitlements are to be decided on the basis of Islamic law, in which her previous style of living is one of the relevant considerations.

However, the earlier English judges in British India, as it seems, tried to avoid interpreting the written laws of the Muslims and Hindus, mainly due to the 1772 policy of non-interference in the personal laws of the two communities. Therefore, in Agha Mahomed v. Koolsom Bee Bee,²³⁵ the court avoided to

²³⁵ (1897) 24 IA 196.
consider that a Muslim widow is entitled to maintenance out of her husband’s property, apart from what she inherited as an heir, as expressed in Vs. 2:240 of the Quran. But at the same time, on the authority of the Hedaya, it was held in this case that the Muslim widow in not entitled to any maintenance once her husband dies.

During the British rule of India, there is no reported case, as far as we can see, in which the judges have ever decided to allow post-divorce maintenance to any divorced Muslim. Rather they have stuck to the concept that there is no maintenance for a divorced Muslim wife after her iddat period expires. Rather than question the approach taken by Islamic jurists, the judges thus seemed to endorse iddat period. Here one can question their ‘Justice, equity and good conscience’. The non-application of a more helpful position for divorced Muslim women indicates ignorance of the relevant Quranic provisions. It also shows that the judges did not want to annoy the traditionalists and the moulivs, whom they used as court officers. The more likely explanation for non-action is that the judges of this period felt bound by the existing statute and simply lacked the means to question the juristic consensus. Thus, despite lip service to the laws of the Quran, Anglo-Mohammadan law gave more weight to juristic opinion than the primary sources of Islamic law.

While in early British India the principle was laid down, through court decisions, that a divorced Muslim woman is not entitled to maintenance after her iddat period, a very interesting decision arose in Muhammad Muin-ud-din v. Jamal Fatima. In this case, the question for consideration was whether an agreement made between a Muslim woman and her prospective husband and father-in law, providing for the payment of a certain sum in the event of future disputes between herself and her prospective husband, was good in law and enforceable after her divorce or was opposed to public policy and void. It was held by the court:

"An ante-nuptial agreement made between a lady and her prospective husband and her prospective father-in law, providing for the payment of a certain maintenance in the event of future dissensions between her and her prospective husband, is good in law and enforceable after her divorce, where the agreement is obtained to secure the wife against ill-treatment and to ensure for her a suitable amount of maintenance in case such treatment is meted out to her".

The decision in the above case gives a clear indication that instead of going into debates on the issue of post-divorce maintenance and its legality in Islamic law, one could opt for contractual arrangements in the marriage deed. A similar

237 AIR 1921 All 152.

238 Ibid., pp. 152-153.
view was taken in the later case of Mt. Hamidan v. Muhammad Umar,\textsuperscript{239} where it was held,

"In Mahomedan law marriage is a mere civil contract and any ante-nuptial agreement between the wife and her husband, that the husband would be liable to pay for her maintenance by a specified monthly allowance if the relations between them became bad, is valid."\textsuperscript{240}

The above two decisions not only give food for thought to Muslims in the area of our discussion, and especially for Muslim women to secure such stipulation, as in the above cases, to ensure maintenance provisions in case of sudden termination of the marriage contract through divorce. They also indicate that there is nothing inherently wrong with making such stipulation, which could not be challenged as un-Islamic.

Our conclusion from the study of the legislation and cases in this period is that the judges may be concerned to protect women's rights to maintenance, but only within the \textit{iddat} period. In the process, the judges are getting into some conceptual difficulties about the interpretation of Islamic law. However, this is a matter of detail, which is not relevant for us here. The important aspects to note at this point are (a) that husbands could always absolve themselves from the liability of any further maintenance by divorcing their wives and (b) there

\textsuperscript{239} AIR 1932 Lahore 65.

\textsuperscript{240} \textit{I}d.
is no discussion about maintenance beyond the iddat period at this stage, although reference to pre-nuptial arrangements comes up in a few cases. The issue as such is not absent from people's minds, but it remains latently invisible because the dominant juristic position on the point remains unchallenged.
Chapter 4

Maintenance for wives under the laws of Pakistan from 1960

This chapter examines in detail the development of maintenance laws for wives in the broad prospect of family laws of Pakistan. We first study the issue of maintenance in the light of the Reports of various Commissions set up in Pakistan for the purpose of examining and recommending reforms in family laws. Then, we examine the constitutional framework of Pakistan and discuss the criminal law of Pakistan on maintenance for wives, as inherited on independence. The material can be discussed in several periods, 1947-1961 i.e. the background era when efforts were initiated for reforms. The crucial time of 1961, when the MFLO was introduced, and the subsequent period.

As Sunni Muslim majority country, Pakistan follows mainly the Hanafi school of juristic interpretations.241 In Pakistan, some reforms have been introduced in the traditional family laws including marriage, polygamy, divorce, maintenance and inheritance etc in 1961. Yet, the reforms, as it seems to be, are not enough to protect women rights.

Pakistan is a country that appeared on the world map in the name of Islam.242 Here two types of social behaviors emerged on the political scene i.e. Islamic–

241 An important exception, prior to independence, is the DMMA of 1939, whose rule system constitutes a blending of different school traditions.

liberalism v. conservatism or traditionalism.\textsuperscript{243} This hypothetical setup is evident in every legal and constitutional debate of Pakistan.

4.1 \textbf{The constitutional framework of Muslim family law in Pakistan}

In this sub-chapter, we briefly examine the constitutional provisions in Pakistan, which deal with the rights guaranteed to women. In the brief history of Pakistan, three constitutions were framed.\textsuperscript{244} The first was promulgated in 1956, the second in 1962 and the third in 1973. All three constitutions proclaim equal rights for women and men. We firstly start with the Constitution of 1956, which under the following Articles guarantees rights of equality between men and women:

Article 5(1) All citizens are equal before law and are entitled to equal Protection of law.

Article 14(1) In respect of access to places of public entertainment or resort, no intended for religious purposes only, there shall be no discrimination against any citizen on the ground only of race, religion, caste, sex, or place of birth.

Article 17 No citizen, otherwise qualified for appointment in the service of Pakistan, shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, sex, residence or place of birth:


\textsuperscript{244} On the constitutional law of Pakistan see in detail, Mahmood, S., \textit{The Constitutional foundation of Pakistan}. Lahore 1975.
Provided that for a period of fifteen years from the Constitution Day, posts may be reserved for persons belonging to any class or area to secure their adequate representation in the service of Pakistan:

Provided further that in the interest of the said service, specified posts or service may be reserved for members of either sex.

Article 29 provided for promotion of the social and economic well-being of the people of Pakistan and shows concern, especially in Art 29(d), about providing basic necessities of life, such as food, clothing, housing, education and medical relief for all citizens.

Article 44 provided for reserved seats for women in Parliament. It states in clause (2): In addition to the seats for the members mentioned in clause (1), there shall, for a period of ten years from the Constitution Day, be ten seats reserved for women members only, of whom five shall be elected by constituencies in East Pakistan, and five by constituencies in West Pakistan; and constituencies shall accordingly be delimited as women’s territorial constituencies for this purpose:

Provided that a woman who, under this clause, is a member of the Assembly at the time of expiration of the said period of ten years shall not cease to be a member until the Assembly is dissolved.

The above provisions of the constitution of 1956 show concern for the rights and prerogatives of women. Although the 1956 constitution took nearly nine
years to be promulgated, it lasted only for slightly more than two years.\textsuperscript{245} Therefore, its achievements for the welfare of women cannot be gauged. Still, the above clauses of the 1956 constitution show that the constitution considered women to be equal before the law and enunciated an equal opportunities policy for the. At the same time the constitution also showed concern for basic necessities of life for all the citizens, including women. Further, the constitution reserved ten seats for women in Parliament.

The second constitution was promulgated in 1962. Women remained "equal before law".\textsuperscript{246} But contrary to Article 14(1) of the 1956 constitution, in Article 16 of the 1962 constitution the following words were added:

"\ldots\ldots\ldots but nothing herein shall be deemed to prevent the making of any special provision for women".

Otherwise, women enjoyed the same status under the 1962 constitution as pledged under the provisions of the 1956 constitution.\textsuperscript{247}

In the second constitution, we must note that in the chapter 'Principles of Law Making' it is said in Article 6(2) (1) that "No law shall be repugnant to the teachings of Islam". Therefore, under Article 199 the constitution established Advisory Council of Islamic Ideology. The primary function of this Council

\textsuperscript{245} It was abrogated in 1958. Pakistan then had the first taste of military rule in the shape of martial law. For details see Choudhury, G. W., Constitutional developments in Pakistan. Second edition. London 1969, pp. 133-134.

\textsuperscript{246} For details on this, see Article 15 of the 1962 constitution.

\textsuperscript{247} For further details on the constitution of 1962 see, for example, Mahmood 1975.
was to make recommendations to the government by which the Muslims of Pakistan would be encouraged to lead their lives according to Islam. Further, the Council was to give its opinion on any legislation, if asked for, whereas in the earlier constitution of 1956 there was no concept of any advisory council on Islamic ideology. Rather, under Directive Principles of State Policy, it was desired by the state to promote Islamic principles in the country. This indicates that slowly the constitution has been giving directions for the Islamisation of laws. At the same time, we must note that by implementation of the above-mentioned articles, the state created a future and larger role for the ulema in the power politics of Pakistan.

In this regard, we see further developments after 1973, when the National Assembly of Pakistan ratified the third constitution. Before that, in 1969, the second constitution of 1962 was abrogated by the armed forces of Pakistan and the second martial law period in the country began. Most of the provisions relating to women, as discussed above, are also found in the third constitution of 1973. However, we find the following new provisions regarding women in the 1973 Constitution:

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248 Article 204 (1) (a) of the 1962 constitution of Pakistan.
249 Ibid., Article 204 (1) (b).
250 Article 25 of the 1956 Constitution of Pakistan.
251 For details see Choudhury 1969, p. 253.
Article 32  The State shall encourage local Government institutions composed of elected representatives of the areas concerned and in such institutions special representation will be given to peasants, workers and women.

Article 34  Steps shall be taken to ensure full participation of women in all spheres of national life.

Article 35  The State shall protect the marriage, the family, the mother and the child.

Thus, the three constitutions of Pakistan made some provisions, as briefly outlined above, for the betterment of the female citizens. For example, all the constitutions speak for the equal rights for women and the desirability of basic necessities of life. All the three constitutions of Pakistan provide broad guidelines for the government to make laws for the benefit of the weaker sections, i.e. women. Until now there is no law framed by the Parliament of Pakistan to protect divorced/widow women from becoming destitute. The constitutional provisions that speak for the betterment of women, by themselves, are too general to take care of actual situations in which women need help.

4.2  **Pakistan criminal law on maintenance of wives between 1947-1961**

This section returns to the CrPC 1898, which was inherited by Pakistan after independence. Until 1961, the CrPC was the only law, which came to the rescue of deserted wives by making provisions for maintenance.

In this section we examine the decisions of the Superior Courts of Pakistan, after 1947, on the issue of maintenance, especially under section 488 of the
CrPC until 1961. During this period we notice that the judges are confronted with two major issues as regards maintenance of Muslim wives. The first issue for the judges was the co-existence of the British-made laws, i.e. the CrPC and the Islamic law. The second controversial subject was maintenance for divorced wives during the iddat period. These controversies, as we saw earlier, were also a point of confusion for the judges during the British-India period, but the fact that the new discussions took place in a new country for Muslims does appear to make a difference.

Below we discuss cases on maintenance under section 488 of the CrPC 1898 which came up to the level of High Courts or the Supreme Court of Pakistan after 1947. There are only very few cases which have been reported. As indicated, the judges, as during the British Indian period, combined the issue of maintenance provisions under the CrPC 1898 with the Islamic law. By so, it seems, the judges in most of the cases deprived divorced Muslim women of their full entitlement to maintenance even during the iddat period. It is further submitted that the judges, by ordering iddat period maintenance, also deprived divorced women of their Quranic right of post-divorce maintenance. That is, the judges cemented the view that divorced Muslim women are not entitled to any maintenance after the iddat.
For example, the first reported case decided under section 488 of the CrPC after 1947 was that of Sh. Azmatullah v. Mst. Imtiaz Begum.\textsuperscript{252} The brief facts are that one Mst. Imtiaz Begum brought a suit of maintenance for herself and her minor son under section 488 of the CrPC. During the pendency of the case, her husband Azmatullah divorced her. The Magistrate held that the petitioner was only entitled to maintenance till her iddat period expired. In this regard the husband was ordered to pay maintenance to his divorced wife, but from the date of her application under section 488 of the CrPC. The husband filed a revision petition in the court of the Additional District and Sessions judge Lahore. Apart from some other grievances, arising out of the order of the Magistrate, with which we are not directly concerned here, the husband contended that the magistrate had failed to fix the period of maintenance. The District judge held that “the period of iddat is prescribed by law. It is not necessary for the Magistrate to specify it”.\textsuperscript{253} The husband appealed to the High Court. Now the contention was that after pronouncing divorce, especially the al-bida form of Muslim divorce, the husband is not bound to maintain his wife at all. Therefore the Magistrate had no jurisdiction to grant maintenance beyond the date of the divorce. The High Court rejected the above contention of the husband and approved the Magistrate’s order on maintenance, while it

\textsuperscript{252} PLD 1959 Lahore 167.

\textsuperscript{253} Ibid., p. 169.
relied on the judgments made during the British Indian period.\textsuperscript{254} It was held that “the divorced wife remains entitled to maintenance until the period of iddat has expired”.\textsuperscript{255}

It is submitted here, as before, that it is a wrong presumption to consider that a magistrate is empowered to grant maintenance for the period of iddat, especially when considering an application under section 488 of the CrPC, 1898. This is so mainly because the secular law of the 1898 Code in Pakistan provides maintenance to neglected wives subject to a maximum of Rs.400 per month.\textsuperscript{256} However, under the Islamic law, the divorced wife, as discussed earlier, is not only entitled to maintenance but also a place of residence. That is, the wife should stay in her husband’s house and should be allowed to live in the same style as before divorce. Therefore, it was wrong on the part of the judge to declare a meager sum of Rs. 90 as maintenance for the iddat period,\textsuperscript{257} and that too under the CrPC. It is however, submitted that once it is proved that a husband has divorced his wife during the pendency of the suit, the proceeding for maintenance under the CrPC should have been stopped. Thereafter, there are two separate issues. Firstly, arrears of maintenance for the neglected wife, until the date of divorce, to be decided under section 488 of the

\textsuperscript{254} For detail of these judgments see \textit{re Shekhanmian Jehangirmian} AIR 1930 Bom. 178; \textit{Mahomed Nagman v Zullekhan} AIR 1939 Sind 179; \textit{Shah Abu Ilyas v. Ulfat Bibi} ILR 19 All 50.


\textsuperscript{257} PLD 1959 Lahore 167, at p. 169.
The second issue is of maintenance after divorce and during the iddat period and is certainly not a subject matter of the CrPC. However, if the aim of the judge, in the above case, was to improve the welfare of the woman, then on the issue of maintenance for the iddat, due consideration should have been given to the previous standard of living of the wife and the husband.\(^{258}\) It is therefore submitted that, by not deciding the above issues separately, the learned judge on the one hand ignored the Quranic injunctions on the iddat maintenance for divorced women. On the other hand, the decision might have led to financial loss for the divorced woman, who was already being deprived of economic support by her husband in the shape of divorce.

Until 1961, we find a few more cases on maintenance coming to the High Courts or Supreme Court,\(^{259}\) but they deal with the maintenance of children. However, in 1961, in The State v. Muhammad Nabi Khan,\(^{260}\) a man divorced his wife in court, while the application before the Magistrate was for maintenance under section 488. The Magistrate, injudiciously, refused to give effect to the pronouncement of divorce in the court, and ordered maintenance at the rate of Rs.30 per month. The husband, aggrieved by the judgment, went in appeal to the District Judge. On the issue of divorce, not recognised by the Magistrate,

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\(^{258}\) There is no state law in Pakistan that makes provisions for iddat maintenance. However, in this respect we have a guideline from the Quran. For further details, see chapter 2 above.


\(^{260}\) PLD 1961 (WP) Karachi 12.
the Additional District and Sessions Judge observed that under Islamic Shariat law the learned Magistrate should have given effect to a divorce pronounced court. He further added that after divorce, “the wife is not at all entitled to maintenance except for the period of iddat”.

The High Court also agreed with the observations made by the Additional District and Sessions Judge, and ordered modification in the judgment of the magistrate. More precisely, it was held that the wife was entitled to maintenance form the date of application to the court for maintenance till the date when the divorce was pronounced in. However, in the above case, the two issues, as discussed above, have been separated the court, and then further to the expiry of the iddat period.

However, in the above case, the issues, as discussed above, have been separated into maintenance during the marriage and maintenance after divorce during the iddat period. But still we find that the learned Judge failed to decide the quantum of maintenance during the iddat period under the teachings of the Quran and instead followed the CrPC and thus justified Rs.30 per month as maintenance for the divorced woman. Instead, the court should have checked the financial condition of the husband to decide on the quantum of maintenance for the iddat period. Therefore, it is argued that a sum of Rs.30 per month, even in 1961, could in no way be termed as sufficient iddat

261 Ibid., p. 13.
262 Id.
263 Id.
maintenance. However, if the husband was poor, any amount is a relief for a poor divorced woman.

The above discussion on Pakistan's criminal law on maintenance for wives between 1947 to 1961 shows that there were only two reported cases under the CrPC in which the issue of maintenance for a divorced women till the end of her iddat period was discussed in any detail. The judges, during the above period, never tried to raise the issue of men’s liability to provide maintenance for a divorced wife beyond the iddat period. It is submitted that they could have opened the issue, especially after the 1956 Commission Report had aired it, but they were rather conservative in confirming that a divorced woman is only entitled to maintenance till her iddat period expires. There seems to be two major reasons for the judges to avoid going into the issue of post-divorce maintenance for Muslim women. Either the judges were reluctant to discuss this issue due to fear of possible protest from the ulema or, being men, they did not want to annoy their brothers by asking them to pay maintenance to their divorced wives once her iddat period expires. Surely, as judges they could not be unaware of the financial difficulties of divorced wives. Further, as Muslims they should be alert to the inequity of the situation of such women, especially in the light of the relevant Quranic statements.

4.3 The Commission on Marriage and Family Laws, 1956

Muslim women were fighting a battle for Pakistan side by side with men. After independence, however, they shifted their diligence and endeavors towards the rehabilitation of refugees and the women’s social uplift movement. Women were becoming more aware of their rights and measures that subjected or oppressed them. Particularly a wide concern was felt on the numerous alien practices and un-Islamic prejudices in the family laws. Moreover, the partition and the large-scale migration also induced great mischief and tragedy on the people specially the women folk, which ultimately resulted into increased polygamous marriages. Consequently, polygamy became a controversial issue and feminists expressed their concern upon the increase in its rate. On the contrary traditionalists always advocated it as a God given right to Muslim men and a norm of life. During the continuance of all this debate and controversy, the then Prime Minister married a second wife. An effective campaign was launched by the feminists against the Prime Minister that resulted into the establishment of a Commission on Family Laws in 1955.

265 For details, see for example Mumtaz, K. and F. Shaheed., Women of Pakistan. Lahore 1987, p. 56.
266 Ibid.
268 Ibid.
Apart from the internal pressure, the reason behind the efforts for reforms also seems to be the wave of reforms in other Muslim countries. In a broader perspective, however, the formation of the Commission can also be linked to the international gesture for the recognition of women and family rights.

4.3.1 Establishment of the Commission

On 4th August, 1955 the Government of Pakistan announced the formation of a seven member Commission on Marriage and Family Laws, consisting of the following persons:

1. Dr. Khalifa Shuja-ud-Din President
2. Dr. Khalifa Abdul Hakim Member-Secretary
3. Maulana Ehtishamul-Haq
4. Mr. Enayat-ur-Rehman
5. Begum Shah Nawaz
6. Begum Anwar G. Ahmad

The terms of reference of the Commission were to analyse whether the existing laws governing marriage, divorce, maintenance and other ancillary matters among Muslims needed any change? It aimed at giving women their proper


270 For different provisions of International Instruments relating to marriage and family laws see for example, Sieghard, F., The International Law of Human Rights, Oxford 1983.
place in the society according to the fundamentals of Islam. “The Commission was asked to report on the proper registration of marriages and divorces, the right to divorce exercisable by either partner through court or by judicial means, maintenance and establishment of Special Courts to deal expeditiously with cases affecting women’s rights”.271

After the first meeting of the Commission that took place on the 5th of October, 1955 its President Dr. Khalifa Shuja-ud-Din died of heart failure. Mian Abdul Rashid, former Chief Justice, was appointed the President of the Commission on 27th October, 1955.

One can conclude that the nature of the Commission’s report was already tentatively marked by giving weighty representation to the liberalists and feminists in comparison to only one member from the traditionalists, strongly voicing for the massive conservative community of Pakistan. Therefore, the traditionalists have deprecated the findings of the Commission even before it was made public.272

The Commission after having its new President worked on a questionnaire. The questionnaire was printed both in Urdu, English and Bengali and distributed among the people. It was also published in the press and the public was asked to assist the Commission with their knowledge and experience. Due


272 Pearl 1969, p. 171.
to the public demand and disappointing initial response final date for answers was extended to 15th February 1956 instead of 15th January 1956.

4.3.2 The Commission’s Report

The purpose of the Commission was to examine the prevailing laws of marriage, divorce, maintenance and custody of children, and to examine the possibility of reforms or any modifications that could give women their due position in society.273 The Commission, instead of following any particular school of thought of Islamic law, has based its endeavours in the name of Ijtehad and tried to sort out a liberal interpretation of the injunctions of the Quran and the Sunnah for the welfare of the humanity.274 They have expressly laid down that;

“The members of the Commission are of the firm conviction that the principles of law and specific injunctions of the Holy Quran, if rationally and liberally interpreted, are capable of establishing absolute justice between human beings and are conducive to healthy and happy family life.”275


275 Id.
The Commission submitted its reports on 20th June 1956. The Commission has very explicitly dealt with the woolly segments of family laws in social context without much consideration for its jurisprudential basis. In Coulson's view, it was in concurrence with the typical legislative approach of the subcontinent towards the Muslim personal law and it also best suited to the moods and aspirations of the people of Pakistan. Even though, the Commission, has also substantiated its report with responses of the public to the questionnaire issued for this purpose. However, the questionnaire that was circulated among the masses was in the written form. Thus, restricted it to the literate class only and that too was at that time not more than 20% of the total population.

The report of the Commission proposed changes to the following provisions of the Muslim family laws;

(1) Compulsory registration of marriages

(2) Presence of government official at the time of nikah to ensure free consent of the parties.

276 Id.


278 Id.

279 Ibid., p. 1198.

280 20% literacy rate is a rough estimate.
(3) In order to prevent child marriages age limit should be fixed for marriage.

(4) Parties to the marriage may be allowed to insert stipulations in the contract of marriage. Provided they are not repugnant to the basic teachings of Islam and morality.

(5) Sale of girls should be treated as a criminal offence.

(6) Divorce in shape of al-bida was condemned and involvement of court was suggested so that wife is paid entire amount of dower.

(7) The divorcing couple to be provided an opportunity to reconcile.

(8) Polygamy may be allowed through court.

(9) To establish the right of inheritance of the orphan grand child in the property of the grand father, legislation to this effect was recommended.

The Report of the Commission created a stir among the ulema. It was not only criticised by one of its own members, but was also strongly condemned by other ulema outside the Commission. The fury of the ulema was perhaps partly because of the fact that the Commission had ignored their proposals and had come up with propositions for reforms entirely different from the ulema’s point of view. Further, it also seems that the criticism was nurtured by


282 For a detailed discussion, especially from the viewpoint of the ulema, see for example Islahi 1958.

283 See in detail Ahmed 1959.
elimination of the ulema from their position of the sole authority to interpret Islamic law. 284 Evidently those, who enjoyed the privilege and authority to interpret the Islamic law from the days of the Umayyad’s rule, as discussed earlier, found the creation and findings of the Commission direct interference in their exclusive domain.

Therefore, the Commission and its report was altogether rejected by the traditionalist. The representative of the ulema, Maulana Ehtishamul Haq Thanvi issued a separate note of dissent objecting to every aspect of the Commission and its findings. 285 Starting with the members, he pointed out that they were not well qualified for the job i.e. they lacked the basic knowledge of how to interpret laws of Islam, 286 and thus, declared that the members, by assuming the role of a Mujtahid, have made mockery of the Islamic Jurisprudence. 287 He further criticised the distribution of Questionnaire and termed it as un-Islamic, due to the fact that the sharia do not allow such modus operandi to the general public or a layman. 288 The recommendations of the Commission were also berated on servility towards west and on attempt to


286 Ibid., pp. 1565-71.

287 Ibid., pp. 1562-1563.

288 Ibid., p. 1564.
distort the Quran and the Sunnah. However, the critical verdict of the maulana was particularly lacking in alternate recommendations.

If we go through some of the proposals made by the ulama outside the Commission, it is found that there are no elements of reforms. Rather the ulama, for example on the issue of the al-bida from Muslim divorce, stuck to traditional patriarchal interpretations. The Commission, for example, asked the following question:

“If a husband pronounces talaq three times at a single sitting, should it be recognised as a valid and final divorce or should three pronouncements during three Tuhrs, as enjoined by the Holy Quran, be made obligatory?”.

Maulana Maudoodi, one of the leading traditionalist of that era, came up with the following reply to the above question,

“The four Imams and majority of the jurists are of the opinion that if three divorces are pronounced at one and the same time they will be reckoned as three. To me this is the more correct view. As such I cannot suggest any alteration on this point”.

289 Id.


291 Id. See also Abbott, F., Islam and Pakistan. New York 1968, p. 199
Thus, it indicates the viewpoint of the traditionalists that the Muslim Family law does not require any reforms i.e. they accepted its present format. That could well mean that Anglo-Muhammadan form of Muslim law with the dressings of un-Islamic customs and practices was acceptable to them.

4.3.3 **Provisions of maintenance and the questionnaire.**

The Commission, as discussed earlier, was concerned with formulating proposals for reforms in the family laws also looked at the issue of maintenance to wives. Relating to maintenance of wives the following questions were asked by the Commission;

Question no: 1.

"Are you in favour of enacting that if the husband neglects or refuses to maintain his wife without any lawful cause, the wife shall be entitled to sue him for maintenance in a special Matrimonial and Family Laws Court?"

Question no: 2.

"Under section 488 of the Code of Criminal Procedure the wife can apply to a Criminal Court for maintenance. The Criminal Court can pass an order for maintenance not exceeding a monthly allowance of Rs. 100. Are you in favour of increasing the limit permissible under the Criminal Law?"

Question no: 3.

"Would you be in favour of the proposal that a wife should be allowed to claim past maintenance not exceeding three years?"

Question no: 4.
"Do you consider that if there is a stipulation in the Nikah-nama the wife shall be entitled to claim maintenance for the stipulated period and not only for the iddat period?"

Responding to the first question the Commission was of the view that;

“At present it is impossible for a neglected wife to get any adequate relief against her husband, as a suit for maintenance is governed by complicated Procedural Laws and cannot be finally decided in any reasonable length of time. After a decree has been passed against the husband for maintenance, he rushes to the appellate court and gets the execution of the decree stayed and pending hearing of the appeal. Thereafter he delays the final disposal of the appeal by various subterfuges, with the result that no final decision can be arrived at for about five years. Even if the wife gets a decree the number of objections that can be raised by an unscrupulous husband during the course of execution are so numerous that it is said that the real trouble of the wife begins when she starts to execute the decree. In order to avoid these most unfortunate consequences, it is essential that the wife should have the right to sue a husband for maintenance in a special Matrimonial court, and that the order of such court should be executable in a summary manner. For instance, the money payable by the husband as maintenance may be made realizable as arrears of land revenue".\footnote{Report of the Commission 1956, pp. 1219-1220.}
The second question was answered in the following manner;

"When a wife is very hard up she can, as the law at present stands, apply to a Criminal Court for maintenance. The Criminal Court can generally pass an order expeditiously for maintenance. Under section 488 of the Code of Criminal Procedure, however, the court cannot grant maintenance exceeding a monthly allowance of Rs. 100. The Commission is of the view that, in view of the enormous increase in the cost of living, the court should be allowed to grant maintenance to the wife up to a maximum of Rs. 300 per mensem. The right to claim maintenance through the Criminal Court should in the opinion of the Commission, be retained as maintenance sanctioned by a Criminal Court can be realized as it were a fine. This summary mode of realization is of the greatest assistance to a starving wife. It may be objected that when a civil suit for maintenance is likely to be decided expeditiously by a special Matrimonial and Family Laws Court, where is the necessity of providing a remedy to the wife in a Criminal Court. We consider it necessary that the wife should continue to enjoy the right because the amount of maintenance ordered by a Criminal Court can be realized as it were a fine under the Criminal Law. This method of realization is so prompt and so effective that the husband often deposits the amount of maintenance ordered by the Criminal Court even before the expiry of the month to which it related. Until we have a great deal of
experience of the working of the Matrimonial and Family Laws Courts, this valuable right which a wife at present possesses should not be taken away”. 293

Regarding the third question the Commission came up with following observations;

“At present if a wife is expelled by the husband and she goes to live with her parents, the husband generally stops paying maintenance to her. Even if she and her children are compelled to live with her parents or she maintains herself and her children by earning a little money in some profession she cannot claim any past maintenance. The husband therefore, resorts to subterfuges so that the wife may not sue him. He feels that the longer the suit for maintenance is delayed the less will be the amount of maintenance that he will be compelled to pay. We propose that a wife should be able to claim past maintenance at least for three years prior to the institution of the suit for maintenance”. 294

The fourth question was considered unnecessary by the Commission and was dropped. The Commission considered the other most important question that relates to a clause of contractual stipulation of maintenance provision in the nikah-nama unnecessary. However, if the above suggestion was recommended by the Commission and later on enacted by the Muslim Family

293 Ibid, p. 1220.

294 Id.
Law Ordinance, 1961 it would have solved the issue of maintenance for the divorced wives.

The suggestions to the third question were rejected by the traditionalists because of the Hanafi school's contention that there is no past maintenance for wife, who can only claim maintenance for future from the Qazi.295

Despite the fact that the Commission did not consider fourth question necessary, the dissenting note went further by specifying that:

“A divorced woman is not entitled to any maintenance after the period of iddat.”296

Whereas, on the issue of post-divorce maintenance, the following question was put forward by the Commission:

“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?”297

To the above quarry it was observed;

“The Commission was of the opinion that such a discretion should be vested in the Matrimonial Court, and that a large number of middle-aged women who are being divorced without rhyme or reason should not be thrown on the streets without a roof over their heads and without any means of sustaining

295 Thanvi 1956, p. 1214.
296 Ibid. p. 1601.
themselves and their children. Of course it would be open to a Matrimonial Court to refuse to sanction any maintenance if the woman is at fault.\textsuperscript{298}

However, to the above question, Maulana Maudoodi responded very sharply; “It seems quite unreasonable that a person who has divorced a woman and is no more entitled to have any rights over her should be compelled to bear the burden of her expenses for the whole of her life or till her re-marriage”\textsuperscript{299}

The above view of Maulana Maudoodi shows that he considered maintenance for a divorced wife a burden on the husband. Nevertheless, he accepted triple \textit{talaq}, as a valid form of divorce to get rid of the wife despite clear injunctions, as discussed earlier, of the Quran and teachings of the Prophet Muhammad (PBUH). However, elsewhere he considered an \textit{al-bida} divorce not only a sinful act, but also “it oversteps the limits of Allah”.\textsuperscript{300} This means he considered the opinion of the four Imams as superseding the commands of Allah. This shows how inconsistent Maulana Maudoodi’s argumentation was, and it is submitted that he picked whatever he liked or what response suited him at a given moment. On the issue of maintenance for divorced women Maulana Maudoodi states the following in his book, Huquq al-\textit{Zaujauyn}:

\begin{itemize}
\item[298] Id.
\item[299] See Ahmad 1959, p. 14.
\item[300] For details see Maudoodi 1983, p. 31.
\end{itemize}
"Giving the right of maintenance to divorced women is an absolute favoritism for women. When there is no relation left between a man and a women (after divorce), then, on the basis of the previous relation, compelling a man to provide maintenance to an unrelated women, while in return there is nothing for the man to achieve, is not only an incorrect and unbalanced approach, it is also against justice".301

The above citation clearly reflects the thinking of Maulana Maudoodi and his approach towards women. According to him, after divorce a man cannot take any benefit form that woman, therefore there is no justification to provide her any continuing maintenance. This is the same approach as when a cow stops giving milk she is sold to a butcher to be slaughtered, or if a horse cannot run, it is shot dead. Therefore, the opinion is in fact that a woman who has become useless to a man can just be thrown away without any further concern for her welfare.

4.4 Legal developments in Pakistani maintenance laws after 1960

In this section, we examine the issue of maintenance, under the current family laws of Pakistan i.e. from 1960 to the present. It also include the interpretation of the laws by the superior courts of the country. During the above period in Pakistan, there are some changes in the family laws. In particular, some of the

reforms proposed by the 1956 Commission, as discussed above, were implemented in the shape of the **MFLO 1961**.

### 4.4.1 The forum for maintenance suits

In 1961, when the **MFLO** was enforced, there existed confusion about whether a Muslim wife could sue her husband for maintenance under section 9 of the **MFLO 1961**, as discussed below, or under section 488 of the **CrPC** or both. Even in 1984, Hodkinson has wrongly assumed, “In Pakistan the wife may choose between the Muslim Family Laws Ordinance 1961, S.9; the Family Courts Act 1964; and the Code of Criminal Procedure 1898, S. 488”.[302]

It is submitted that now a wife can no longer sue her husband for maintenance under the **CrPC** 1898.[303] The Supreme Court of Pakistan in **Adnan Afzal v. Sher Afzal**[304] held, “A comparison of section 488 of the Criminal Procedure Code, 1898 and of the West Pakistan Family Courts Act, 1964 indicates that the provisions of the West Pakistan Family Courts Act are of a more beneficial nature which enlarge not only the scope

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302 Hodkinson 1984, p. 149.

303 For details see section 5 and 20 of the (West Pakistan) Family Courts Act, 1964. See also Farani 1992, p. 87-88.

of the enquiry but also vest the Court with powers of giving greater relief with a night of appeal either to the District Court or to the High Court. Furthermore, the combined effect of sections 5 and 20 of the Act is clearly to give exclusive jurisdiction to the Family Courts without, in any way, diminishing or curtailing the rights already possessed by a litigant with regard to the scheduled matters. Looking at the provisions as a whole it is therefore clear that all that the Family Courts Act has done is that it has changed the forum, altered the method of the trial and empowered the Court to grant better remedies. It has, thus, in every sense of the term, brought about only procedural changes and [has] not affected any substantive right. According to the general rule of interpretation, therefore, a procedural statute is to be given retroactive effect unless the law contains a contrary indication. There is no such contrary indication in the West Pakistan Family Courts Act. It could, therefore, rightly be held that the Act affected also pending proceedings and Magistrates have no longer any jurisdiction either to entertain, hear or adjudicate upon a matter relating to maintenance”.305

305 Ibid., p. 188.
Indeed, more recently chapter XXXVI of the CrPC 1898, pertaining to maintenance of wives and children, had been omitted from the statute books.  

4.4.2 **Maintenance and the MFLO, 1961**

The MFLO 1961 is a major legal development and in fact, the only reform made to the traditional Muslim family laws in Pakistan. However, for the ulema, the MFLO 1961 is a thorn in the flesh, and they have always refuted its provisions and considered it to be against the accepted principles of Islamic law. Despite objections by the ulema, the military government of that time went ahead with some of the recommendation made by the 1956 Commission. The ulema, at the time of promulgation of the MFLO, could not do much to have it struck down, because of the martial law in the country. Nevertheless, once martial law was lifted the ulema started their efforts to nullify the MFLO. In this regard, a bill was introduced in the National Assembly of Pakistan in 1963 to repeal the MFLO. On voting, the bill was defeated with a margin of 56-28. However, the government, through the Fundamental Rights Bill, the first amendment to the 1962 constitution, excluded the MFLO from review of

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306 This was done by the Federal Laws (Revision and Declaration) Ordinance, XXVII of 1981.


308 *Id.*

309 *Id.*
the courts. This protection of the MFLO still continues under Article 8(3) of the constitution of 1973.

The main purpose behind the enactment of the MFLO 1961 was, on the one hand, to safeguard and improve the rights of women. On the other hand, it served to make room for the new political set-up introduced by the government. Introducing arbitration as a means to settle family disputes was indeed a step in the direction of solving family controversies within the clan. Under the new statutory provisions, a married couple, for example in case of divorce, had not only time for cooling off, but at the same time their case was heard by elders of their own vicinity. According to Pearl:

"Realising the popular feeling that would be aroused against him if there were changes in the traditional way of life of the peasants and the town dwellers, Ayub linked his reforms of the family law to the twin concepts—both of them near to his heart—of local administration and arbitral conciliation. The ex-President had confidence in the ability of locally elected men to understand the problems of their immediate community, and he saw no reason why the local

310 Id.
311 For the detailed discussion, see Rahman, T., 'Family Laws Ordinance and the constitution'. In: PLD 1989 Journal, 22-28, at p. 23.
313 Pearl 1969, at p. 182.
leaders which he had created by the Basic Democracy Order, ought not be provided with judicial functions on issues of family discord".314

It seems that the intervention of elders in a dispute may at times help to patch up the differences. On the other hand, involving the state in the internal affairs of the household can also make the issue public. Moreover, discussing family disputes in open court may not only add fuel to the fire, but may also create hindrance in reaching an honourable settlement; this may further lead to never ending bitterness between the parties. Further, solving family problems within the clan or locality can also reduce the burden on the already overloaded civil courts.

The MFLO 1961 was promulgated, in the first instance, as indicated above, for the welfare of women. While there is little that the MFLO says about maintenance for divorced/widowed Muslim wives, its provisions illustrate that the reforms introduced did not radically depart from traditional Islamic law. Therefore, under section 5 every marriage solemnised under Muslim law required registration and non-registration of the marriage became a punitive offence. But non-registration of marriages remains common and such marriages remain valid. Even Maulana Maudoodi considered the registration of marriages as useful.315 Similarly, section 6 of the MFLO deals with polygamy. It provides that any person who wishes to take another wife has to take

314 Id.

permission of not only his existing wife or wives but also of the Arbitration Council. Though non-compliance with the provisions of section 6 may make the man subject to imprisonment of up to one year or fine up to five thousand rupees, or both, and the man may have to pay the entire unpaid dower of his wife or wives, the polygamous marriage itself will be valid.

Section 7 of the MFLQ 1961 too, does not constitute a radical reform, as we now know. The MFLQ 1961 to some extent tried to curb the al-bida form of Muslim divorce, as discussed above. The section provides that a man has to give notice of divorce, after the pronouncement of divorce, either oral or written, to the chairman of the Arbitration Council. The divorce is suspended till ninety days. During this period the chairman has to make efforts for the reconciliation and on failure the divorce becomes effective. However, the MFLQ 1961 is silent on the issue of validity of divorce in cases of absence of notice. The silence of the MFLQ 1961 on the above issue has created a basis for the judges to interpret section 7 according to the changing circumstances.316

In an earlier line of cases, led by Ali Nawaz Gardezi v. Mohammad Yusuf,317 the court held that notice of divorce is mandatory.318 However, in Mirza Qamar

316 By this I refer to the process of Islamisation in Pakistan, which is not of central relevance to this thesis. Briefly, the Presidential Order No. 14 of 1985 has made the Objectives Resolution with which we are not concerned here, a substantive part of the Constitution. For details see Article 2-A of the 1973 Constitution of Pakistan. For a detailed discussion on the Objectives Resolution see Munir, M., From Jinnah to Zia, Lahore 1979.

317 PLD 1963 SC 51.

318 Ibid., p. 74.
Raza v. Mst. Tahira Begum, the court found that section 7 of the MFLO 1961 is repugnant to the injunctions of Islam. In 1990, this led the Lahore High Court to decide in Allah Banda v. Khurshid Bibi that a divorce pronounced thrice in one sitting is valid and immediately effective. In Allah Dad v. Mukhtar and others, the Shariat Appellate Bench of the Supreme Court also held that notice of divorce to a chairman is not mandatory. In Mst. Kaneez Fatima v. Wali Muhammad and another, the Supreme Court held more recently that if the divorce is result of mutual consent between the parties, notice to the chairman is a mere formality and it could be sent any time. The above cases on section 7 of the MFLO indicate the reluctance of the judges in Pakistan to accept that the talaq al-bida is contrary to the teachings of the Quran and the Prophet Muhammad (PBUH). This means that notwithstanding Quranic injunctions about the need to be kind to the women in the event of divorce, modern Pakistani law follows the jurists' approval, which

320 Ibid., p. 220.
321 1990 CLC 1683.
322 Ibid., p. 1692.
323 Ibid., SCMR 1273.
324 Ibid., p. 1279.
325 PLD 1993 SC 901.
326 Ibid., p. 917.
is not helpful to women and makes a mockery of liberal rhetoric of the MFLO 1961.

Section 9 of the MFLO 1961 deals with provisions on maintenance as follows:

**Maintenance**

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

(2) A husband or wife may, in the prescribed manner, within the prescribed period, and on payment of the prescribed fee, prefer an application for revision of the certificate, in the case of West Pakistan, to the Collector, and in the case of East Pakistan, the Sub-Divisional Officer concerned and his decision shall be final and shall not be called in question in any Court.

Any amount payable under sub-section (1) or (2), if not paid in the due time, shall be recoverable as arrears of land revenue.

The maintenance laws in section 9 of the MFLO 1961, as cited above, provide an additional and simple remedy for the neglected wife or wives to claim

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327 The word East Pakistan and related provisions should by now been omitted form the textbooks after the creation of Bangladesh. But even the latest editions of the MFLO 1961 show the old wording. See for example, Farani 1992, p. 35.
maintenance form the husband during the continuation of marriage. However, the above provisions on maintenance give no new remedy on maintenance; rather they are a repetition of earlier provisions in the Islamic law and section 488 of the CrPC, 1898. Like the CrPC, the MFLO is also silent on the issue of maintenance for divorced/widowed wives during the iddat period and after the expiry of the iddat period. However, unlike the CrPC, the MFLO has not given any maximum amount for maintenance of neglected wives and has thus paved the way for the arbitration councils to decide the quantum of maintenance according to the financial status of the husband. As we have already argued, this would be fully in line with Islamic principles.

The absence of provisions on maintenance for divorced/widowed wives beyond the iddat period has been ignored by the judges of the superior courts of Pakistan. It seems that the judges have never even tried to take a glimpse of the deteriorating situation of the women whose marriage has been broken down because of divorce or death of the husband. This is evident from the fact that not a single judge, either under the CrPC or under the MFLO, has ever hinted at the desirability of an enactment of a better maintenance law for the benefit of such women.

After 1961, there was a further enactment in the field of family laws in Pakistan by the West Pakistan Family Courts Act, 1964. Section 3 of the Act

provides for a Family Court in every district. A person nominated to be a judge, under section 4, is a District Judge, Additional Judge or Civil Judge, empowered as Magistrate First Class, under section 20 of the Family Court. However, due to the absence of separate Family Courts, any of the above-mentioned judges in Pakistan has to perform multiple functions. Thus, a District Judge or Additional District Judge is also head of the civil appellate court in the district, and has to conduct trials of the criminal cases as a Sessions Judge. Further, the civil Judge’s court is the court of first instance for civil matters. Therefore it is always overburdened with pending cases due to the lengthy court procedure. Now in Pakistan, the Family Court has the power, under section 5 and 20 of the West Pakistan Family Courts Act, 1964 apart from the MFLO 1961, to order maintenance for the neglected wife/wives. But the Act of the 1964 also has no remedy for the maintenance of the divorced/widowed woman, once her iddat period has expired, because the 1964 Act is, in essence, a procedural enactment.

4.4.3 Case-law on maintenance after 1961

After 1961, in Pakistan, we find that a neglected wife can sue her husband for maintenance, either in a court of the family judge under the West Pakistan Family Courts Act, 1964 or she can apply to the chairman of the village union council or the district council. During the period between 1961 to the present, we find that many cases for maintenance have come up for hearing to the
courts. These cases can be divided into those appealed under section 9 of the MFLO and those appealing against the judgment of a Family judge.

Under section 9 of the MFLO, we found seventeen reported cases decided by the superior courts of Pakistan. In the first reported case, Sardar Muhammad, it was argued by the petitioner that, "a Muslim wife was not entitled to a decree for past maintenance." It was held by the court that a wife could justly claim maintenance from the date of accrual of cause of action and not necessarily from the date of first seeking redress. By allowing the arrears of maintenance, the court reinterpreted the traditional concept in Hanafi law. In Rashid Ahmad Khan, the Lahore High Court held the same. It had been argued by the petitioner that the Arbitration Council had no jurisdiction to

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award arrears of past maintenance. The Court answered, "there is nothing in section 9 of the Ordinance (MFLO) to confine its application only to grant future maintenance not covering the past." In 1972, a full bench of the Supreme Court of Pakistan, in Muhammad Nawaz, with a two third majority, also favoured the decisions taken in the above-mentioned cases. In this case, it was argued by the appellant that under the MFLO, past maintenance cannot be allowed. The Supreme Court held, "On the language of section 9 of the Muslim Family Laws Ordinance 1961, there is no prohibition for granting past maintenance. As opposed to this, under section 488 of the Criminal procedure Code the monthly allowance can be ordered to be paid only from the date of the application. The Legislature must have been conscious of the phraseology of section 488, Cr. P. C. In spite of that it did not place any restriction on the powers of the Arbitration Council to award maintenance. Under this provision of law, the Arbitration Council is competent to award maintenance for the past subject, of course, to the question of limitation".

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335 Ibid., p. 95.
336 Ibid., p. 93.
337 PLD 1972 SC 302.
338 Ibid., p. 303.
339 Ibid., p. 302.
However, in Ghulam Rasul v. Collector, Lahore. The court held that cohabitation between the husband and wife nullified the earlier order of maintenance by the Chairman, Union Council. The court held that, "Under this section 9 of the Muslim Family Laws Ordinance the wife is entitled to maintenance not only when she is not living with the husband but whenever it is proved that the husband fails to maintain her adequately or where there are more wives than one, fails to maintain the wife seeking maintenance, equitable".

In the above case the court very rightly defeated the plea that on reunion a husband should be absolved from paying the past maintenance order. Further, in Inamul Islam v. Mst. Hussain Bano, a case on validity of divorce under section 7 of the MFLO, with which we are not concerned here but for the issue of maintenance during the iddat period, the court observed that the MFLO has not disturb the Muslim law and held that a divorced wife is entitled to maintenance during the iddat period. In Mst. Gul Bibi v. Muhammad Saleem, the court granted past maintenance to the wife. Later, in 1985 we

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340 PLD 1974 Lahore 495.
341 Ibid., p. 496.
342 Ibid., p. 499.
343 PLD 1976 Lahore 1466.
344 Ibid., p. 1468.
345 PLD 1978 Quetta 117.
find that in Abdul Latif v. Mst. Bakht Bhari, the court held that under section 9 of the MFLO, the arbitration council is entitled to award maintenance according to the status of the husband.

In Major (Retd) Ala-ud-Din v. Collector, the husband first challenged the award of Rs.1500/- as maintenance by the arbitration council with the collector and succeeded in reducing the amount to Rs.750/-. But still not satisfied, the husband went to the High Court. The court, while rejecting the petition, observed that, "The Arbitration Council after assessing petitioner's financial position could award maintenance allowance to his wife in accordance with his income." Further in Mushtaq Ahmed v. the Collector Lahore, the arbitration council awarded Rs.9000/- as iddat period maintenance to the wife. The counsel for the husband contented that the chairman had ordered iddat maintenance after the divorce became effective and therefore, he was not competent to do so. The court agreed with the petitioner's point of view and set aside the award of the chairman. Although the court upheld the husband's plea in the above case, the award of Rs.9000/- to the divorced wife shows that,

346 1985 CLC 1184.
347 Ibid., p. 1185.
348 1985 CLC 2939.
349 Ibid., p. 2941.
350 1986 CLC 2312 (2)
351 Ibid., p. 2313.
352 Ibid., p. 2314.
if technically not defeated, a wife could have received a handsome amount for three months of iddat period. In Muhammad Abdur Rashid v. Mst. Shazia Parveen,353 the husband found a maintenance order of Rs.2000/- per month, decided by the arbitration council, too high. In an appeal to the collector, the amount was reduced to Rs.800/-.354 However, still not satisfied, the husband went to the High Court, with the plea, that his salary was less than Rs.800/-, asking for a further reduction in the amount of maintenance. The court not only rejected the petition but also advised the petitioner to work hard and discharge his liabilities.355 In Muhammad Najeeb v. Mst. Talat Shahnaz and others, 356 it was contended by the petitioner that section 9 of the MFLO speaks of a husband and wife. Once the husband had divorced his wife, therefore, the wife was not justified to claim maintenance as a wife. The court refused to accept the above plea of the husband and came up with a reformulation of ‘wife’ in this context:

"When an application is made by an ex-wife for maintenance regarding period when the wedlock was intact and also for the iddat period it would be made by

353 1987 MLD 766.
354 Id.
355 Ibid. , p. 767.
356 1989 SCMR 119.
the so-called divorced wife and would be covered by the word “wife” as contained in Section 9.\footnote{Ibid., p. 120.}

The above cases on maintenance under section 9 of the MFLO 1961 show, firstly, that neglected wives are now entitled to claim past maintenance from their husbands. Further, in case of divorce, they can be awarded a handsome amount as iddat period maintenance, provided the husband is wealthy. However, the husband, by way of divorce, can stop future maintenance. On this point, there is still no state law that could come to the rescue of the divorced wives. The issue has simply been marginalised, to the obvious detriment of women in Pakistan.

4.4 Recommendations of the recent Commissions/Committees

There have been reports of the Women’s Rights Committee 1976,\footnote{As reported by Khan, N.S., Women in Pakistan: a new era? Lahore 1988, p. 7.} and that of the Pakistan Commission on the Status of Women. 1983.\footnote{Report of the Pakistan Commission on the Status of Women, Islamabad 1985.} These reports, as discussed below, have also recommended maintenance for divorced Muslim women in Pakistan.

On 31st January 1976, the Pakistan Women’s Rights Committee was set up to devise law reforms, with the purpose of uplifting the social, legal and economic conditions of women in Pakistan.\footnote{Khan 1985, p.7.} The Committee, apart from...
other suggestions with which we are not directly concerned here, came up with a proposal of maintenance for divorced Muslim women and went further by indicating that a divorced Muslim woman should have a share in her husband’s property.\textsuperscript{361}

The government of Pakistan on 9 July 1983 established the Pakistan Commission on the Status of Women. The Commission’s brief was to look into the following matter:

"(i) To ascertain the rights and responsibilities of women in an Islamic Society and to make recommendations to the Federal Government for effective safeguards of women’s rights;

(ii) To advise the Federal Government on measures to provide education, health and employment opportunities for women;

(iii) To identify what service women can render in eradicating ignorance, social evils, poverty and disease in the country; and

(iv) To suggest measures to integrate women of minority communities in the national life".\textsuperscript{362}

The 1983 Commission analysed the question of maintenance for divorced women as follows:\textsuperscript{363}

\begin{flushright}
\textsuperscript{361} Id.
\textsuperscript{362} For details, see Report of the Pakistan Commission 1985, p. iii.
\textsuperscript{363} Ibid., p. 135.
\end{flushright}
"The Holy Quran has also provided that the divorced women are entitled to a comely maintenance even after divorce has taken place. This command of the Quran has been almost completely disregarded in our country. Denial of the right of maintenance was one of the most common complaints of both the rural and urban women brought to the notice of the Commission. It is only that in a neighbouring country legislation on the basis of the above verse of Quran has been sought.\textsuperscript{364} It is not uncommon that a husband divorces his wife when she reaches mature years and loses the glamour of youth and sometime(s) the capacity to produce children also. At such a age and stage of life divorce can leave her absolutely without financial support or emotional satisfaction leaving her without any meaning in life. In such circumstances she is plainly entitled to support from one to whom she gave her youthful years of life”.

The 1983 Commission, in its recommendations for divorced women, came up with the proposal of “Entitlement of alimony to the wife till she remarries, which as the Quran states, should be each according to his means”.\textsuperscript{365} The reference to the Quran shows that the Commission was well aware of the Quranic right of maintenance for divorced women as discussed earlier in chapter 2.

\textsuperscript{364} This shows that the Commission was aware of the Muslim Women (Protection of Rights on Divorce Act, 1986 in India.

Going through the above reports, we find that the Commission or the Committees were primarily formed to review the existing family laws and to give recommendations for the uplift of women. Apart, from the suggestions of the 1956 Commission, some of which were finally implemented in the shape of the MFLO 1961, there seems to be no serious effort by any government in Pakistan to enact laws based on the recommendations of the above Commission and Committees. The government that created the 1976 Committee was toppled in 1977. The 1983 Commission seems like an insult to the women of Pakistan. At that time, on the one hand, the government implemented a series of laws, which were heavily criticised as anti-women. Further, the state-owned media gave coverage to the views of those people who favoured keeping women behind the four walls of the house, and even proposed to nullify some of the sections of the MFLO 1961. It seems that the Government was paying lip service to women’s concerns by asking the Commission to recommend changes in the existing family laws for the benefit of women. It is obvious from the literature that both the Commissions of 1956 and of 1983, were basically created to ease the uprising of women against the

366 For details see Khan 1988, p. 8.


322 Dr. Israr Ahmed expressed this view, for example, in an interview with ‘Daily Jung’, as reported by Mumtaz 1987, p. 83.

various policies of the government that were prejudicial to the women of Pakistan.\footnote{For the former see Pearl 1969, at p. 171. See also Hussain 1984, p. 207. On the latter Commission see Khan 1988, p. 23.}

On the issue of post-divorce maintenance, we find that there has been concern for the predicament of divorced women right from the birth of Pakistan till more recently. In all three reports, the proposals are to the effect that there need to be laws for the maintenance of a divorced woman even after the expiry of the iddat period. The reports are unanimous that the husband should be made responsible to provide some maintenance for his divorced wife. It is therefore submitted that in Pakistan there is a clear-felt need for laws on maintenance for divorced women. However, the reports are silent on the issue of maintenance for a widow.

Despite the above recommendations, the government seems not to be serious about implementing laws that could benefit women. The purpose behind setting up commissions and committees to submit recommendations and to frame laws for the betterment of women remains unclear. Such bodies are considered just another organ of the government,\footnote{Khan 1988, p. 24.} and they have not been able to affect the status quo.
Chapter 5

Maintenance Provisions for Wives in Afghanistan since 1960

This chapter examines the issue of maintenance for wives in Afghanistan since 1960. Keeping in view, a rapid, change in political situation in Afghanistan that it affected not only the legal system but also the status of women. No study can be complete without going into the details of geo-political situation in Afghanistan.

Afghanistan is a crossroad of civilizations and religions; a land that has been invaded time and time again by conquerors, seeking glory in conquest of the land or those who aspired to the vast territories of the Indian subcontinent. Its strategic geographical position as a gateway to India has been a temptation to foreign invaders, and its high terrain and climate contrast to the lowlands of the subcontinent has lured many Afghan rulers themselves to attack India. Afghanistan comprises several distinct regions inhabited by different ethno-linguistic communities. The country’s physical geography on the one hand, and lack of adequate development projects in the rural areas, on the other, has contributed to the persistence of tribalism, regionalism, and conflict among various ethnic communities.

Afghanistan is spread over an area of 647,500 sq km and its population is approximately 27,755,755. Pashtuns are the dominant ethnic group, inhabiting the southern and southeastern regions of the country. Uzbeks and Turkmen reside for the most part in the northern part of the country. The Hazaras occupy
the central part of the country known as Hazarajat. The Tajiks live in the western part of the country. Despite their cultural and linguistic differences, the Afghans follow Islam as their religion and jurisprudentially follow the Hanafi School. Further, there are two significant Shi'a minorities: the Hazaras of central Afghanistan, who have historically been marginalised, both politically and economically, and the Ismailis of northeastern Afghanistan.

Culturally, the country is very mixed. The Pushtuns belt is tribal and highly traditional, with clearly defined codes of conduct governing relationships within the family and with outsiders to the tribe. The consensual system of decision-making characteristic of Afghanistan is particularly pronounced in the Pushtuns areas. The local structures, known as jirga, which are to be found in the Pushtuns belt, have played a major role in the maintenance of the social fabric.372

The Shi'a, Hazara population of central Afghanistan may also be described as conservative, but the codes of behavior are less rigid than that of the Pushtun south. The society is, in addition, quite hierarchical and individualistic. It is common for women to have to bring up children on their own within a system.

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372 For a detailed discussion see Zada, Dr. M., The role of Afghan Loya Jirga in law making. Unpublished Ph. D. thesis. Area Study Center (Central Asia, Russia and China), University of Peshawar.
where the nuclear rather than extended family is dominated. It is difficult to
determine whether Afghanistan belongs more appropriately in Central Asia, in
the Indian subcontinent or in the Middle East. The tribal culture of the
Pashtuns bears many similarities to that of the Arabian Peninsula, yet the
system of purdah (lit: veil) that is so characteristic of Muslim society in south
Asia is also evident.

Afghanistan’s history has been vitally affected by its geographic location and
its topographical elements. Lying between the plains of Central Asia and the
fertile lands of Iran and Pakistan Afghanistan provided routes for invasion and
conquest. Afghanistan’s fate was largely determined by its fringe of mountain
ranges the Hindu Kush, the Pamirs and the Himalayas that channeled the
passage of successive waves of invaders into northwest India, the Ganges
Plain, and other important areas. Some of these invaders stayed in Afghanistan
and settled the country.

5.1 Political changes in Afghanistan

In the present section we briefly analyse the political changes that took place
in Afghanistan especially, between 1923, when the country had their first
written constitution, to the present regime of President Hamid Karzai.

Ahmad Shah Durrani, a Pashtun tribal chief who was known to his countrymen
as Ahmad Shah Baba, or the father of modern Afghanistan in the year 1747,
founded Afghanistan as an independent state. During twenty-six years of
Ahmad Shah rule, the Durrani Pashtuns not only succeeded in establishing an independent state but also an empire extending beyond the borders of the present day Afghanistan. After the collapse of Ahmed Shah’s reign, another Pashtun tribe came into power in 1836 and the founder of this dynasty was Amir Dost Mohammad. The Amir assumed the title of Amiral-Muminin (lit: Commander of the faithful) mainly because “by this time, the growing awareness that close identity with a particular tribe had led to isolation and conflict, had gained ground” and “Islam offered the obvious alternative and a greater potential for national unity”.

Amir Abdur Rahman succeeded to the throne in 1880. By that time still there was no written constitution of the country. It was during the reign of Amir Abdur Rahman that the boundaries of present day Afghanistan were finally fixed and its various ethnic groups were brought under the direct control of a centralised government. Nevertheless, Amir Abdur Rahman who was called the ‘Iron Amir’ achieved all this using force, imprisonment and execution of the tribal elders. During his reign, Islam and tribalism emerged as the two major influences, which determined the social and cultural characteristics of

373 For details on Ahmad Shah’s rule see for example Singh, G., Ahmad Shah Durrani. Quetta 1979.


375 Id.
the Afghans.\textsuperscript{376} His son Amir Habibullah succeeded Amir Abdur Rehman in 1901 and after his death in 1919 his son Amanullah succeeded him.

It was during the reign of King Amanuallah that the first Constitution of Afghanistan was promulgated in 1923. He tried to liberalise the society, the religious leaders responded with hostility. The attempt to speed up the process of modernism the King faced rebellion from both tribal and religious leaders and resulted in his downfall and was followed by a revival of the orthodoxy. Amanullah’s reforms included female education, travel of female students for higher studies abroad, unveiling of women and compulsory wearing of European dress.

After Amanullah, there is very brief period, January –October 1929, in the Afghan history when Habibullah Khan, the Bachha-i-Saqao (lit: son of a water carrier), a brigand, ruled it. The rule of the Bachha-i-Saqao is termed as “a reign of terror, torture and extortion”.\textsuperscript{377}

General Nadir Shah became the King of Afghanistan.\textsuperscript{378} In the autumn of 1933, while distributing diploma prizes at a school King Nadir Shah was shot dead. Thus, came the end of the reign of King Nadir Shah who ranks amongst the greatest rulers of Afghanistan. He had rescued his country which was groaning

\textsuperscript{376} Ibid, pp. 3-5.

\textsuperscript{377} Ahmad, N. D., \textit{The survival of Afghanistan}. Lahore 1973, p. 19.

\textsuperscript{378} Khan, Muhammad Anwar, “The second constitution of Afghanistan”. In: \textit{Journal of Area Study Center}. Spring 1979, pp. 17-18.
under the tyranny of Bacha Saqao and had, therefore, saved it from the
darkness of anarchy that might well have lasted for a generation if not
murdered. It was also during the period of Nadir Shah that a new
Constitution was promulgated in 1931. The Constitutional provisions indicate
that it was enacted to please the conservative elements of the society who were
oppose to the liberal reforms of King Amanullah.

After the death of Nadir Shah his son Zahir Shah became the King of
Afghanistan in 1933. It was during the reign of Zahir Shah that another
Constitution was promulgated in 1964 and for the first time constitutional
monarchy was established in the country and women contested elections and
they became members of the parliament and even ministers. The history keeps
on marching through different calculated phases. Afghanistan remained a
kingdom throughout its recorded history. It took, however, a new turn when
Sardar Muhammad Daud, in a bloodless coup, came into power in 1973.
Sardar Muhammad Daud declared Afghanistan, for the first time, as an
independent Republic and conveyed to the masses that he will run the affairs of
the government in accordance with the tenets of Islam and with popular
support of the people. Sardar Daud took over power on July 7, 1973 as the first

379 Ahmad, Lahore 1990, pp. 253-254.
380 Khan 1979, p. 34.
president and as the Prime Minister of the country. On April 27, 1978, the 150 years of Muhammad-Zais domination met a bloody end in a Military Coup d'etat known as the “Great Saur Revolution”. The Coup succeeded in less than 24 hours and President Daud along with his numerous family members were killed in the process. It was during the period of Sardar Daud that another Constitution was enforced in 1977. Nur Muhammad Taraki of the Khalq faction of the Peoples Democratic Party of Afghanistan (hereafter PDPA) succeeded the Daoud regime. Nur Muhammad Taraki became the President of Afghanistan. As Taraki came to power with the help and supports of the Russians there was an uprising against him by the orthodox Islamists. Thus, in a short span of about six months in another coup, Taraki was assassinated in 1978. It was during Taraki rule that certain pro women decrees were issued but were later eliminated in 1992 by the Islamic fundamentalists. Hafizullah Amin, the then Deputy Prime Minister seized power. However, Hafizullah Amin also could not survive for long. He was killed in the year 1979. After Amin's death, Babrak Karmal took over as the Afghan President. He was pro-Soviet and by that time, USSR began a massive military airlift into Kabul. A number of theories have been advanced for the Soviet action. The civil war in Afghanistan that erupted was guerrilla warfare and a war of attrition between the Soviet troops and the mujahidin (lit: holy warriors). The war cost both sides a great deal. Many Afghans, perhaps as many as five million, or one quarter of the country’s population, fled to Pakistan and Iran.
where they organized into guerrilla groups to strike Soviet and government forces inside Afghanistan. On May 4, 1986, Karmal resigned as secretary general of the PDPA. Najibullah replaced him and later elected as the President in 1987. It was during the time of President Najibullah that the Constitution was enacted in 1987. He tried to diminish differences with the mujahidin and was prepared to allow Islam a greater role as well as legalise opposition groups, but the mujahidin rejected any moves he made toward concessions out of hand.

On April 14, 1988, an UN-mediated agreement was signed which provided for the withdrawal of Soviet troops from Afghanistan, the creation of a neutral Afghan state and the repatriation of millions of Afghan refugees. The USSR and US pledged to serve as guarantors of the agreement; however, the Afghan fighters rejected the pact and vowed to continue fighting while the Soviets remained in Afghanistan. On 15, February 1989 the Soviets completed their troops withdrawal as fighting between the Afghan rebels and government forces escalated for control of the government and thus, Afghanistan pushed from one civil war to another. By 1992, President Najibullah was ousted from power by the Afghan rebels.

On June 28, 1992 caretaker President Sibgatullah Mujaddedi surrendered power to Burhanuddin Rabbani who headed a 10 member Supreme Leadership Council of the guerrilla leaders. Still during the above period, we do not find end to the civil war in Afghanistan. This time the war escalated between rival
Shiite and Sunni Muslim fictions. The sectarian killings, which paved way for another extremist, group “taliban” (lit: students of Islam). On 27 September 1996, members of the fundamentalist’s taliban militia displaced President Rabbani and other ruling members of the Afghan government. The taliban eventually took control of 90% of the country, leaving only a small northern enclave in possession of opposition “Northern Alliance” forces. However, it was during the taliban reign that all pro women laws were abolished and it was desire on part of the government that women should stay home. If at all they have to come out they must be veiled.

On October 7, the United States commenced military operations against the taliban in retaliation for the September 11, 2001 terrorist attacks on the World Trade Center and Pentagon, which the US claimed had been masterminded by Osama bin Laden and his Al-Qaeda terrorist network, then operating from bases inside Afghanistan.

On December 7, 2001, the taliban regime collapsed entirely. Hamid Karzai, a Pashtun was named head of the Afghanistan interim government. In June 2002, 1500 delegate gathered for a Loya jirga and formally elected Karzai president. His term expires in 2004, when general election will be held. In the mean time, the country will be ruled under the constitution of 1962 with slight modification.
5.2 Constitutional developments and status of women in Afghanistan

The present section looks at the various constitutions that were promulgated in Afghanistan and their affect on the status of women.

While studying the constitutions of Afghanistan two trends are apparent. The constitutional processes seem to be operating in two opposite directions. On the one hand they initiate modern reform, and on the other try to preserve the religious and traditional values of the Afghan society. Afghanistan emerged as a modern state in 1747 but the country had no written constitution till 1923. During the reign of King Amanullah the first written constitution was enacted on April 9, 1923 and it marks the beginning of constitutionalism in Afghanistan.

5.2.1 The Constitution of 1923 and the provisions concerning women

The first constitution of Afghanistan promulgated in 1923 under King Amanullah, was formulated in a spirit of enthusiasm for modernization and reform. It was expressive of Amanullah's somewhat radical views which aimed at creating, in a tradition-bound society; a modern state governed by statutory law of dominantly secular nature. King Amanullah was much concerned about the political and economic state of the Muslims particularly about the Afghans and Afghanistan. Therefore, immediately after assuming as ruler of Afghanistan King Amanullah concentrated on framing of the first constitution.
The constitutionalism and constitutional development in Tunisia in 1861, Ottoman Turkey in 1876, Egypt in 1882 and Iran in 1886 had deep bearing on King Amanullah’s mind, which precipitated his endeavor to achieve his long cherished objective.\(^{381}\) The first Afghan constitution was derived much from the Turkish and Iranian models. For the preparation of the draft constitution and the laws pertaining to state affairs, the help of the Turkish constitutional and legal experts namely Badri Bey and Jamal Pasha was sought and obtained and thus lawmaking was given a concrete shape in Afghanistan. The King’s firm resolve was to have a stable political process based on universal democratic norms which rightly culminated in the framing of the first written constitution passed at the Jalalabad Loya Jirgah of 1923.\(^{382}\)

Some of the chapters of the constitution were called Qanoon Nama and Tali mat while the rest were known as Nizam Nama. The whole constitution was later named as “Qanoon-e-Assasi”, i.e., the fundamental law of the land or constitution.

The liberal and pro-women approach is visible in the 1923 constitution. Right of education was granted to all the citizens of the country. Article 14 of the constitution says,


\(^{382}\) For further details on role of Loya Jirga in Afghan law making, see Zada, Dr. M., The role of Afghan Loya Jirga in law making. Unpublished Ph. D. Area Study Center (Central Asia, Russia and China), University of Peshawar.
"Every subject has the right to an education at no cost...."

The above article of the constitution seems to mean all men and women have the right to free education. Whereas under Article 16 the constitution says,

"All subjects of Afghanistan have equal rights and duties...."

Further, under Article 17 of the constitution;

"All subjects of Afghanistan shall be eligible for employment in the civil service...."

By reading both the articles together of the 1923 constitution one can say that equal rights have been guaranteed to both men and women and at the same time equal job opportunities are provided for both the sexes. Thus, here one can safely say that the constitution recognized the role of women in the Afghan society. However, all such provisions look good in the official documents but in reality was the society at that time ready to except the role of women outside the house is always a debatable issue?

After the promulgation of the 1923 constitution, King Amanullah, embarked on a sweeping scheme of reforms. These included educational reforms social reforms, religious reforms, political reforms and military reforms. The reforms particularly incorporated introduction of female education and the travel of female students for higher education abroad, unveiling of women, wearing of European dress by the women, abolition of child marriage, restriction on polygamy, suspension of allowances to the ulema etc. Intrestingly, regarding
unveiling of women, the Queen Sorayya herself took the lead and in one of the gatherings she terred off her veil. These reforms though not ill conceived, however, led to the first popular rebellion at Khost in March 1924. The feudal (Khawanin) and Ulema rose against the Nizam Namah containing educational, social and religious reforms. The King was condemned for his reforms. That were not acceptable to the Khan-Mullah coalition and they challenge honesty of the King. The Khost rebellion continued for more than nine months. The Afghan army failed to quell the uprising. The rebellion with the help of tribal Lashkar that comprised men from Mohmands, Shinwaris, Waziris and Afridis was crushed. The rebels and contenders for power were arrested but it also weakened the foundations of Amanullah’s rule and in 1929, he hand over his crown to his elder brother Inayatullah and escaped out of the capital.

5.2.2 The constitution of 1931 and the provisions concerning women

After assuming the throne, King Nadir Shah issued ‘Khat-e-Mashi’ (lit: policy statement) in the middle of November 1929 with high Islamic zeal and fervor. The policy statement was an important document for running the Afghan state.


384 For details see Ibid, pp. 204-206.

It was identical with the principles of policy enumerated in the neighbouring countries of Turkey and Iran.

The statement declared as under:

1. Islamic Shariah was declared as the supreme law of the land. The Afghan Shura and the Ministry of Justice will be jointly responsible for the enforcement and execution of the Islamic law throughout Afghanistan. Equality before law was ensured. Purdah for women was made obligatory.

2. The department of 'Ihtisab' (accountability) to supervise the strict adherence of the Muslims to the moral codes of Islamic Shariah was established.

3. Sale of liquor, public or private, was prohibited.

4. Established 'conciliation and progress committees' in urban centers with the task to promote spirit of national conciliation and unity.

5. Measures were taken for the reorganization of the Afghan armed forces. The tribal councils or the chieftains were empowered to recruit soldiers from amongst the tribes.

6. Administrative machinery was geared up for the public welfare tasks.

7. Finance ministry was reorganized to bring about financial stability and to review friendly relations and re-establish the commercial ties with the outside world.
8. Plans were prepared for national reconstruction and acquisition of modern technology required for national development.\textsuperscript{386}

However, under the above policy statement on the one hand women were declared equal before law but on the other they were ordered to observe purdah. King Nadir Shah through the help of the Shura (lit: consultative council), whose members were drawn from the Loya Jirgah of 1930, gave the country the second constitution. This constitution was primarily drawn from the first constitution of Afghanistan of 1923 and French and Iranian sources. Louis Dupree, an American Universities Field Staff member, comments on the 1931 constitution in the following words:

"The 1931 constitution embodied a hodge podge of unworkable elements extracted from the Turkish, Iranian and French constitutions and 1923 constitution of Amanullah plus many aspects of the Hanafi Shariah of Sunni Islam and local customs".\textsuperscript{387}

The fundamental rights of the people of Afghanistan, laid down under Section III Article 9-26 and 109, of the constitution, were reduced much compared to Amanullah’s constitution. All persons according to Article 9, having Afghan citizenship were equal. Women were not specifically mentioned, so presumably they shared in all the rights mentioned in Section III of the

\textsuperscript{386} Id.

Constitution. Nevertheless, during the tenure of the 1931 constitution all persons were not meted out equal treatment before the law, and women held a decidedly inferior position in Afghan society.\footnote{388}

In contrast to Amanullah, Nadir's regime adopted a cautious and conservative policy right from the outset. This policy is reflected in the 1931 Constitution, which overruled the spirit of reform upheld by the Amanullah's Constitution. The 1931 Constitution, introduced in the wake of the anarchy that followed Amanullah's abdication is markedly conciliatory towards the religious establishment. The 1931 Constitution was in clear contrast with its predecessor in its emphasis on adherence to Islam in legislation and government affairs. As a result, over 60 \textit{Nizamnamas} that were introduced under Amanullah in various fields were abandoned altogether.\footnote{389}

Here we conclude that from a step taken for reforms and modernism in the earlier constitution of 1923 was reverted back to conservatism in 1931 constitution.

\footnote{388 Malik, A. K., 'An assessment of the 1931 Constitution of Afghanistan'. In: \textit{Central Asia}. No. 26, Summer 1990, pp. 31-42, at p. 34.}

\footnote{389 A list of these \textit{Nizamnamas} can be found in Poullada, L. B. \textit{Reform and Rebellion in Afghanistan 1919-1929}. Ithaca 1973.}
5.2.3 The constitution of 1964 and the provisions concerning women

After the accidental death of King Nadir Shah his son Zahir Shah was accented to the throne. On October 1, 1964, King Mohammad Zahir Shah signed the constitution, making it the fundamental law of the land. According to Kamali,

"The 1964 Constitution was long overdue mainly because of the lingering family loyalty on the part of King Nadir's successors, his son Mohammad Zahir, who respected his father's legacy by retaining 1931 Constitution rather than bringing about radical changes". 390

The Constitution provided for the gender equality as we found in the previous constitutions. The Constitution under Article 25 says;

"The people of Afghanistan, without any discrimination or preference, have equal rights and obligations before the law".

Further, under Article 34 the constitution speaks for education of Afghan citizens as follow;

"Education is the right of every Afghan and shall be provided free of charge..."

Under Article 37 work as a right for every Afghan has been established. The Article lays down the provision as;

"Work is the right and precept of every Afghan who has the capability to do it..."

From the above Articles we gather that the Constitution provide equality of sexes, equal rights to education and work. Thus, providing opportunities to the female population of the country to equip themselves with education and later join any service according to their qualifications. It is further added that it was the 1964 Constitution that provided for Constitutional monarchy, greater role to be played by the parliament in law making and women to be part of the new political setup.

Nevertheless, the 1964 constitution stands out among the constitutions of Afghanistan in its endeavor to redress the balance by giving recognition to both traditionalist and modernist opinions. This Constitution attempted to preserve the basic tenets of Islam while also responding to the need for social change and democratic reform. The 1964 constitution in other words, aimed at establishing a statutory legal order in which an attempt was made to reconcile Islamic and modern legal and constitutional principles. Thus, by favouring conciliatory approach in the constitution the Afghan legislators won acceptance of traditionalists and the more modern elements of the society.
5.2.4 The constitution of 1977 and the provisions concerning women

Sardar Daoud came into power on July 7, 1973 he proclaimed Afghanistan to be a republican state and denounced the 1964 constitution as "pseudo-democratic, but the alternative which he offered was outright undemocratic". Daoud disbanded both the parliament and the judiciary; no parliament was in existence between 1973 and 1977; the judiciary was put under direct executive rule and was merged with the ministry of justice. He ruled the country through the republican decrees until the promulgation of the 1977 constitution.

Regarding rights guaranteed to women under the 1977 constitution Article 27 says;

“All the people of Afghanistan, both women and men, without discrimination and privilege have equal rights and obligations before law”.

This is for the first time in constitutional history of Afghanistan word “women” has been used. Whereas, in the earlier constitutions either word “subjects” or “people” and “Afghans” is used and we took it as all citizens of Afghanistan both men and women.

The 1977 constitution was the turning point in the history of Afghanistan; whereby hundreds year old monarchy was abolished. It should also be noted

that Sardar Daoud was brought to power through Parcham Marxists fiction therefore, he committed himself to the socialist programme and pro Soviet postures of the Marxists. Therefore, women’s position as an individual, under the constitution, has been established. However, we must add here that though 1977 constitution incorporated socialist doctrines but at the same time retained Islamic and nationalistic characters. However, later the above compromise was missing and as a result there was a clash between the ideals of Marxism and Islam.

5.2.5 Decree No. 7 of 1978 and the provisions concerning women

The period after the death of Sardar Daoud till the departure of Babrak Karmal is more of a struggle to establish Soviet backed rule in Afghanistan. However, successive murders of the various heads of the state and war of resistance slowed down the process of developing laws for the uplift of women. The matters pertaining to run the machinery of government, in the absence of constitution, were run through the issuance of Decrees.

On October 17, 1978 the Revolutionary Council issued a decree entitled "Dower and Marriage Expenses" which prohibited walwar and other excessive marriage expenditure on pain of imprisonment for up to three years.

Under Article 1 the decree provided

"no one shall compel the bridegroom to pay money in the form of cash or commodities as a bride price
(toyana or walwar) at the time of marriage”.

Whereas, under Article 3 of the Decree dower amount was fixed at 300 Afghans and it also prohibited the girl and her guardian from accepting any amount that exceed the prescribed limit. The Decree further under Article 6 provides imprisonment from six month to three years for those who violate the law and the money/property involved was to be confiscated. However, the Decree was seriously resisted at the countryside and therefore owing to widespread popular protest, President Karmal rolled back these measures in 1980. However, the Islamic State of Afghanistan eliminated the Decree no 7 in the year 1992.

5.2.6 The constitution of 1987 and the provisions concerning women

During Dr. Najibullah’s rule 1987 constitution was enactment. The constitution for the first time under Article 15 recognises the role of family as a basic unit of the society. The Article lay down as follows;

“In the Republic of Afghanistan family constitutes the basic unit of the society. The state adopt necessary measures for ensuring the health of mother and child....”

Whereas, under Article 38 it has been laid down;

“Citizens of the Republic of Afghanistan, both men

392 Kamali 1985, pp. 104-105.

393 Ibid, 105.
and women have equal rights and are equal before law...”

Further, under Article 52 we find:

“Citizens of the Republic of Afghanistan have the right to work and are entitled to equal pay for equal work. The State, through enactment and application of just and progressive labor laws, shall provide necessary conditions for the citizens to enjoy this right”.

The above Articles of 1987 constitution very clearly establish the right of woman as a mother and provide her equal rights and give her the right to work. Article 52 also says that men and women are entitled to equal pay for the same amount of work. The above constitution of 1987 was amended in 1990 but as far as women are concerned nothing further was added to the constitution

Nevertheless, things changed and by 1996, when Taliban reached Kabul and assumed power all past legislations touching upon women and family were totally squashed. Like for example women were prohibited from work and school, and they were required to cover themselves in public.

Thus, from our constitutional discussion we conclude here that all most all the constitutions in Afghanistan speak for equal rights to women. However, in the history of Afghanistan, we find the period of the reign of King Aman ullah as the beginning of the opening of employment opportunities for women. It was after the constitution of 1964 that women began to figure more prominently into the structure of the Afghan government at various levels. Because special
care was taken to ensure that the constitution does not violate Islamic laws and norms, the entrance of women in the public sphere was not met with an overwhelming challenge from the conservative quarters. Consequently, in the 1960's women were elected as members of the parliament. The women members were Ruqiyyah Habib Abu Bakr, Ma'sumah 'Ismati Wardak and Dr. Anahita Ratibzad, and among the senators were Humaira Malikyar Saljuqi and Azizah Gardizi. Also, from the formation of 1965 cabinet of ministers onwards, women were included at top levels in the government. Throughout 1970's and 1980's the women participation is visible in the fields of judiciary, educational administrative and political fields. Decree No. 7 issued during the period provided equal rights of women with men; pledge to remove unjust patriarchal feudalistic relations between husband and wife for the consolidation of sincere family ties. The decree also forbade child marriage, forced marriages and exorbitant bride prices. Nevertheless, the above social reforms were viewed as a threat to cherished cultural values and intolerable intrusion into the closely-knit, family-based society and consequently met with early dissent. However, during the Taliban rule during late 90's women were sent back to the rearer seat.


395 In 1965 Kubra Nurza'i became Minister of Public Health and was re-appointed in the same post in 1967. In 1969 Safiqah Ziya'i was appointed minister without portfolio and was reappointed in 1971.
Now, that the Taliban rule is over in Afghanistan and Mr. Karzai, the new Afghan president, has announced the establishment of the constitutional commission. The commission is to draft a new constitution for a new Afghanistan that has emerged after the long years of war in that country. The task of the commission seems to be very difficult. That is mainly because on the one hand, the job is to provide for a free, democratic and prosperous Afghanistan. On the other hand, the commission is confronted with traditional and religious values of the society. Therefore, one can argue that the new constitution should guarantee to safeguard and insure women's rights, equal rights to men and women and all forms of discrimination must be shunned.

5.3 **Marriage and the related issues under the Laws of Afghanistan**

The study of matrimonial law and its related problems in Afghanistan is of especial interest as this field has received very little attention by writers in the past. Information on this subject is scarce in the national languages of Afghanistan and almost non-existence in English. A typical feature of the existing literature in the national languages is that it is largely a reiteration or a mere translation of the classical *Sharia* law of Hanafi School and, on the whole ignores the problems arising from the traditional interpretation of this law concerning marriage and related issues that contains maintenance provisions for wives as well.
5.3.1 Marriage

The tradition of arranged marriage is deeply rooted in Afghanistan. The reasons for these arrangements are usually political or economic in origin. For example, a marriage between two families can be arranged as a way to combine land holdings, or to gain influence in the community. Another reason for arranging a marriage is to reciprocate a favour received during a time of need. A man gives his daughter in marriage as a token of gratitude to the person who did him the favour, or to that person’s son. In Afghanistan, a man may acquire a wife in any one of the following four ways: he may inherit a widow, gain a bride in exchange marriage, gain a bride as compensation for a crime of which he or his relatives were the victim, or pay a bride price. Among Afghans, the “bride price” is commonly known as walwar or toyana. The amount is payable by the groom to the father/guardian of the bride. Though, the origin of walwar is not known, yet one can connect it to the same practice of the pre-Islamic Arabian society, where girls were sold in the name of marriage by their father/guardians.

Legislative measures to discourage the practice of walwar were taken in the Nizamnama of 1920’s. The Nizamnama of Marriage 1921 under Article 15 states; “walwar, toyana, qalin and shirbaha are forbidden”. Further, in the 1924 Nizamnama the same above wording has been repeated. It is evident that the

396 Kamali 1985, p. 84.
above marriage laws showed concern for the practice of bride price but at the same time did not apply any punitive measures to discourage it. The Marriage laws of 1934, 1949, 1960 and 1971 also showed concern but the basic weakness of all these enactments lies in the half-hearted legislative attitude, which is reflected by the absence of any specified sanction for violators.

In Afghanistan another manifestation of the concept of women as a property is the tradition of giving mahr. The money or property assigned, as mahr is neither given to the wife nor it is kept for her. Mahr is in fact the “bride price” and goes to her parental family. Whereas, under the provisions of Islam, mahr is the property of wife and we discussed the issue earlier in chapter one of the present thesis.

The Nizamnama of Marriage 1921 and that of 1924 under Article 15 and 11 respectively restricted the amount of dower to rupees thirty a sum, which was considered to be equivalent of Hanafi minimum for mahr. The Marriage Laws of 1934 and 1949 did not impose any restrictions on mahr and the 1971 Marriage Law adopted the same approach. Whereas, the Civil Law of 1977 is totally silent on walwar but it contains detailed provisions on the subject of mahr. Under Article 103 and 113 of the 1977 Marriage Laws, it is provided that dower is the property of the wife, and that her father may not interfere with it either by receiving the dower for his own benefit or by making a gift of it to a third person. Further, under Article 114 it has been stated that no one may compel the wife to dispose of her dower to the husband or anyone else.
However, an interesting question can be raised here that if the wife dies before receiving the whole of her dower; her legal heir would be entitled to demand it?

5.3.2 Divorce

Divorce in Afghanistan is looked down upon and dissolution of marriage either by men or by women is regarded as a social stigma. Prior to the introduction of the Civil Law 1977 divorce was pronounced under the accepted norms of the Hanafi law. The laws were either silent or were inadequate to provide any relief to a woman who wanted to get out of the burdensome relation. Under the Civil Laws of 1977, introduced during the rule of President Taraki, on the subject of divorce, from the Hanafi School a deviation was made towards the Malaki School that provides for judicial divorce on certain grounds. However, the above change was not the first attempt to depart from the ruling of one school to another. It was during the British rule in the Indian sub-continent that above mentioned approach was followed in the shape of the Dissolution of Muslim Marriages Act, 1939. The introduction of Malaki law in Afghanistan certainly represents a milestone of reform in the legal history of the country which has been shaped by the restrictive influence of the Hanafi law on the one hand and the conservative male-dominated tradition of the tribes on the other.

397 Kamali 1985, p. 158.

398 See for example legislation of 1920 and also the Marriage Laws of 1971.
In Afghanistan, unlike in Pakistan or even in India, people are supposed to register the divorce with the registration office. The office, however, register a single irrevocable *talaq*. Whereas, people in Afghanistan, prefer *talaq al bida* to the single pronouncement of *talaq*. It was the Marriage Law of 1971 that required registration of divorce at the office for the registration of documents but at the same time the registration is basically voluntary. The Civil Law of 1977, which consolidated the substantive law of divorce is, however, silent on the subject of registration. Registration of divorce has, therefore, remained an unresolved problem in Afghanistan. The divorce deed is known as *talaq khat*, however, it fails to address issues such as wife’s right to maintenance during the *iddat* period. The procedural law of divorce in Afghanistan is based on the following Articles 135-197 of the 1977 Civil Law of Afghanistan. It covers the following kinds of divorce and the grounds under which the marriage partners can obtain a decree for the dissolution of their marriage.

The Civil Law of 1977 in Afghanistan provides for four forms of divorce.399

(a) Faskh (Annulment) Articles 132-134.
(b) Talaq Articles 135-155.
(c) Khula Articles 156-175.
(d) Separation by judicial decree. Articles 178-197

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(a) **Faskh (Annulment) Arts 132-134**

It is the annulment or dissolution of marriage, through court due to the happening of certain defects, which become impossible for the parties to continue with the contract of marriage. The shortcoming may happen either at the time of marriage or afterwards i.e.

(i) Absence of such conditions, which are necessary for the valid marriage.

(ii) Marriage solemnized with a deficient dower that falls short of the proper dower.

(iii) The husband becomes insane or lunatic.

(iv) In case of lian when a husband charges his wife with adultery, the court after giving certain oaths to the wife and the husband, passes a decree, for dissolution of marriage. This process is called lian.

(v) A marriage contracted with a non-kitabia (lit: Person who belongs to the community who are without any religious book) wife, if she has refused to accept Islam after her husband has become a Muslim. The dissolution of marriage shall be confirmed through court.

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400 Ibid., Article 119-121.

401 Ibid., Article 123.

402 Ibid., 123-125.
Talaq

Articles 135-155 of the civil law of Afghanistan explain the procedure for the pronouncement, modes and completion of Talaq. It is necessary for the pronouncement of Talaq that the person must be competent to contract.\textsuperscript{403} The word must indicate an intention to dissolve the marriage tie. Sometime the language used is direct, sometimes, it is indirect.\textsuperscript{404} The husband may delegate the right of divorce to his wife. Once the wife accepts the delegated right then it cannot be withdrawn.\textsuperscript{405}

When a husband pronounces a revocable divorce, he has the right to retract it before the completion of (a) iddat period, (b) third pronouncement (c) before third Tuhr.

If he pronounces an irrevocable divorce, he has no such right. The following are irrevocable divorce:

a. When the third pronouncement is made.

b. Pronouncement is made before consummation

When an 'iwad' (compensation) is accepted for divorce on any other ground declared by this act as valid.

\textsuperscript{403} Ibid., Articles 126-129

\textsuperscript{404} Ibid., Article 130.

\textsuperscript{405} Hedaya, p. 140.
(c) **Khula**

Articles 156-175 deal with the essential conditions and legal effects of Khula. When in consideration of something paid in cash or kind or in consideration of a promise by wife to pay in cash or kind the husband divorces her, it is called divorce by Khula. Its literal meaning being putting off or laying down as the husband lays down his marital authority.\(^406\)

It is necessary for the validity of Khula that parties must be competent to contract. A Khula divorce is affected by an offer from the wife to compensate the husband if he releases her from marital obligation and acceptance by the husband of the offer makes the deal complete. Once the offer is accepted it operates as a single divorce.\(^407\)

The terms of bargain i.e. the amount of consideration and the modes of its payment depend upon the mutual agreement of the parties. The rights of the parties end if no consideration is specified and are separated without claim.\(^408\)

(d) **Separation by Judicial decree**

A married woman shall be entitled to obtain a decree for the dissolution of her marriage on the following grounds (i) Physical or mental diseases (Articles

\(^{406}\) Civil Law of Afghanistan 1977, Article 136

\(^{407}\) Ibid., Article 145.

\(^{408}\) Ibid., Article 143.
176-182) (ii) Injury darar (Articles 183-190) (iii) Failure to provide maintenance (Articles 191-193).

Under the civil law, the wife may ask for a divorce when the husband has suffered from an incurable disease, or a disease, which requires a long time to cure but which makes life injurious for the wife (Art. 176). (The explanatory memorandum of the Ministry of Justice stated that this provision adopted through the opinion of the majority of the Sharia jurists, which does not specify the disease but which qualifies the general attributes thereof). The next section provides that the wife may not demand a judicial divorce if she had knowledge of her husband's disability either before or at the time of the marriage contract. Similarly, if she consented to continue the marriage relationship after the disability developed, she may not have the right to judicial divorce.409

Whenever it is proved that a disease is incurable, the court is to order separation immediately, but if it is a disease, which requires time to cure, the court is to postpone the separation order for the period not exceeding one year (Art. 179). In establishing the nature of the disease, the court will refer it for the expert opinion. Divorce effected under these provisions is a final divorce which creates an immediate bar to inheritance between the parties but it does not create bar to a subsequent marriage between them.410

409 Ibid., Article 160, 177-179.

410 Ibid., Article 164.
If the wife alleges that cohabitation with her husband is injurious to her in such a way as to make it impossible for her to continue the marriage relationship, she may request the court for a divorce under Article 183. The subsequent Articles entitle the wife to a divorce in injurious circumstances both on the basis of proof that she may furnish as well as on the basis of mere insistence on her part. When the alleged injury is proved and reconciliation between the spouses seems impossible, the court is to order a divorce, to take effect as irrevocable single talaq (Art. 184). Whenever the wife's allegation of injurious treatment is not proved, but she still insists that this is the case, the court is to appoint two arbitrators to attempt conciliation between the spouses (S. 185). The arbitrators must be persons of virtuous character, one from among the husband’s relatives and one from the side of the wife. It is the duty of the arbitrators to discover the case of the discord and the ways in which reconciliation may be feasible, and to affect it (S. 187). The arbitrators will submit their decision to the court, which will then be adopted as the basis of the court decision. Article 188 provides for the final alternative: “When the arbitrators do not succeed to effect reconciliation, or when the case of discord is attributable to the husband or to both sides, or is not clearly ascertainable the court shall decree a divorce”. The second clause of Article 188 basically provides for Khula divorce in stating “when the discord originates on the

411 Ibid., Article 186.
412 Ibid., Article 187.
wife's side, the divorce decree is issued ordering the return by the wife of the part or the whole of the dower to the husband”.

While commenting on these provisions, the explanatory memorandum, as mentioned above, refers to the Quranic obligation of the husband “to retain them (the wives) with kindness or dismiss them in a becoming manner”, and points out: The husband is, accordingly not permitted to discipline his wife unless she ill-treats him and thereby embitters family life, in which case, he is entitled to punish her in “accordance with the provisions of Shariah”. The memorandum continues to say that this opinion is better suited to the welfare of the people, for even if the husband is punished by the court, tension is likely to arise between the spouses which would further undermine the tranquility of family life.

The husband's failure to maintain his wife, either by willful refusal or simply because of inability to do so, constitutes a ground for divorce as follows: The wife may apply to the court for a divorce when the husband has no property and is unable to support her.413 If the husband proves his inability, the court is to grant him a break not exceeding three months; if he is still unable to maintain her, the court is to order a divorce. A divorce effected for failure to maintain is a Talaq, which is revocable; the husband can, therefore, resume the

413 Ibid., Article 191.
marital relationship during the period of *iddat* provided that he proves his ability to support her (Art. 193).

Desertion of the husband for a period of three years entitles the wife to sue for a judicial divorce under Article 194. Divorce decree on grounds of desertion effects a revocable divorce under Article 195. Moreover, when the husband is imprisoned for ten years or more, the wife may apply for judicial divorce after the expiry of five years regardless of whether he is able to support her or not. 414

5.3.3 **Maintenance (Nafqah)**

The law of maintenance is explained in the 1977 Civil Laws under Articles 115-130. The husband is bound to maintain his wife so long as she is faithful to him and obeys his reasonable orders but she is not entitled to the maintenance if she refuses herself to him or is otherwise disobedient or leaves the husband’s house without his consent. The refusal or disobedience is justified by non-payment of prompt dower or she leaves her husband’s house because of his cruelty or any other valid reason. If her husband has been in imprisonment and is unable to provide her maintenance, she may borrow for her maintenance on the credit of her husband. When the wife has borrowed on the credit of her husband the creditor may recover the sum paid by him to the wife from the husband. 415

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414 Ibid., Arts. 194-196

415 Ibid., Arts. 105-111.
If the marriage is dissolved by divorce the wife is entitled to maintenance during her ḥiddat. According to Hanafi law the maintenance is due whether the divorce is revocable or irrevocable. If her husband has failed to provide for her maintenance then she can sue the husband for the payment of maintenance within one year and after the expiry of one year, the suit is time barred.

Interestingly, the law on maintenance simply follows the juristic approach i.e. maintenance is only permissible during the marriage. Further in case of divorce maintenance to the divorced wife is permissible till her ḥiddat period expires. Whereas, maintenance rights for a widow, even during her ḥiddat period have not been accomplished.⁴¹⁶ Therefore laws in Afghanistan are silent on any maintenance provisions for a widow.

5.3.4 **Inheritance**

In Afghanistan, as provided under the Islamic law, the ratio of inheritance of land and money is two to one in favour of males. In practice, women are often denied their rightful inheritance. Elder brothers hold the dowry of unmarried girls in escrow until they marry. However, there is a question mark if a girl remains unmarried. Normally, an unmarried girl remains in the paternal house and the elder brother is responsible to provide maintenance to them and in return the women never question the authority of the brother over her inherited property. In other words, the property of the unmarried women is merged with

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⁴¹⁶ For a detailed discussion see chapter 2 above.
the brother's property and it later evolves among his legal heirs. Thus, we conclude here that woman are deprived of their Quranic right of inheritance and are at the mercy of their husband or brothers and they have to live a life according to the wishes of their master who ever he is.

From the above discussion in Afghanistan we conclude that in between the period of 1960 to present the issue was considered but as in Pakistan, only during the marriage or in case of divorce till the iddat period. Further, the law is silent and it seems that either the law is no more concern with the welfare of the women or it is presumed that the tribe or clan will look after the women in need of maintenance. The other major ground that the issue of maintenance is not debated upon in the laws of Afghanistan is because of walwar. The issue of walwar is more significant and prominent and that is the reason that all the laws relating to marriage and the connected issues tried to deal with the social evil of bride sale. However, we conclude here that because of the practice of walwar the issue of maintenance for widows or divorcees, in Afghanistan, have been sidelined and the law seems to be concern about the practice of walwar.

Now with yet another change in the political arena of Afghanistan in shape of the new government of President Hamid Karzai, backed by the US, it seems that things will change and especially for the women who are now sharing the affairs of the government. Mr. Karzai has announced the establishment of the constitutional commission. The commission is to draft a new constitution for a new Afghanistan that has emerged after the long years of war in that country.
Keeping in view the situation in Afghanistan, the task is formidable. However, a new constitution must safeguard and insure women’s rights. The constitution must guarantee equal rights to men and women in all spheres of family, social, economic and public life.
CHAPTER 6

The issue of maintenance for Muslim women in India

After 1947, Modern India, unlike Pakistan, opted for secularism. This has affected the debate on personal laws generally, and on maintenance in particular, in that the modern state law, focusing on the concerns of women rather than religious politics, has sought to ensure post-divorce maintenance for women from any community. Clearly, the Indian laws on maintenance for deserted wives have not remained stagnant. The maintenance laws inherited from the British were not only reformed but efforts were also made to settle the centuries-old issue of post-divorce maintenance for Muslim women under the umbrella of the general law. This change in maintenance laws indicates that Pakistan continues to follow the Islamic and the colonial model of non-interference in the question of post-divorce maintenance for divorced Muslim women. The Indian state, however, has taken a different approach, which one can see as post-colonial, but in essence as a social welfare approach.

Modern India, after 1947, developed its own case law on the CrPC 1898 and, later, created a system of maintenance provisions explicitly for divorced wives from any community. This, it is argued here, is a useful model for the development of maintenance laws for women in Pakistan and Afghanistan.

The present chapter first examines the cases on maintenance decided under section 488 of the CrPC 1898, between the periods 1947-1973. Thereafter, the discussion focuses on the modified provisions of maintenance, and the reasons
for these reforms, under the new CrPC of 1973. Later, the debate analyses the subsequent cases of maintenance decided by the Indian superior courts, under the provisions of the CrPC 1973. In this context the famous Shah Bano case is discussed at length. This case soon led to the enactment of the Muslim Women (Protection of Rights on Divorce) Act, 1986. Therefore, from the CrPC 1973, we turn to focus on the 1986 Act, and the cases decided under it, until the present, by the various High Courts. The Indian Supreme Court is yet to decide any case under the 1986 Act, quite apart from pronouncing on the legality of that Act under the constitution of India. However, the new law on maintenance, especially for Muslim women in India, due to its closeness to the teachings of Islam, bears a lesson for Islamic Pakistan and Afghanistan with regard to future legislation on the issue of maintenance for divorced wives.

6.1 **The Indian case law under section 488 of the CrPC 1898**

In the present sub-chapter, we examine the Indian case law on maintenance for Muslim women under section 488 of the CrPC 1898 between the period 1947-1973. The case law shows that Muslim husbands defeated the law on maintenance for the neglected wives, as discussed earlier with reference to Pakistan, by simply pronouncing divorce. Thus, the Indian judges too would simply acknowledge a Muslim husband’s divorce and stop the proceedings on the issue of maintenance to a neglected wife. Nevertheless, the Indian judges following the footsteps of the British judges (see above, chapter 3) awarded maintenance to divorced Muslim women till the end of the iddat period.
After the division of India in 1947, the first reported case on maintenance decided by a superior court of India under section 488 of the 1898 CrPC was Re Mohamed Rahimullah. The Madras High Court held, “When a valid and irrevocable divorce has been given by a Mohamedan husband to his wife in conformity with the Mohamedan law and he has also paid the Iddat maintenance, he is not bound to continue to pay the maintenance awarded to his wife under S. 488 when marriage is not subsisting between them”. The court in the above case confirmed the general Muslim law approach that a divorced woman is not entitled to any maintenance beyond the iddat period. Thus, if a husband pays the maintenance amount for the iddat period at the time of divorce, according to the opinion of the court, his liability towards the wife is over.

Therefore, in Wahab Ali v. Qamro Bi, the court was of the opinion that “in law, a Muslim woman is entitled to maintenance during the iddat which is four months and ten days from the date of divorce”. The above opinion of the court can be challenged on two grounds. Firstly the application for maintenance was made by the wife under section 488 of the CrPC, a law which

417 AIR 1947 Madras 461.
418 Id.
419 AIR 1951 Hyderabad 117.
420 Ibid., p. 118.
shows concern for neglected wives and not divorced wives, therefore the law is silent on the issue of maintenance to divorced Muslim wives during their iddat period. Secondly, if by ‘law’ the court meant ‘Muslim law’, then the iddat period for the divorced woman, as discussed earlier, is of three lunar months or three menstrual courses. The period of four months and ten days is the iddat period for a widow.

Relying on the decision in Wahab Ali, the court in Abdul Shakoor v. Smt. Kulsum Babi held that,

"The husband had divorced his wife on the date when the written statement was filed and, therefore, the wife was entitled to maintenance only for the ‘iddat’ period, commencing from that date".

In 1955, we find a deviation from the above judgments. In Amad Giri v. Mst. Begha, a Division Bench came up with the analysis that under section 488, a wife divorced by talaq al-bida is not competent to claim maintenance, because she ceases to be wife. However, she can claim maintenance for her iddat period through a civil suit. Thus, in a unanimous decision the divorced wife was

421 Ibid., 117.
422 AIR 1955 NUC (All) 2706. For a detailed judgment see 1962(1) Cr.LJ247.
423 Id. See also Mohd. Shamsuddin v. Noor jahan AIR 1955 Hyderabad 144.
425 Ibid., p. 4.
disallowed any maintenance, even for her *iddat* period, under section 488.\textsuperscript{426} Nevertheless, in 1961 we find, in *Chandbi v. Badesha*,\textsuperscript{427} a court holding that despite divorce a wife is entitled to maintenance for “three lunar months”.\textsuperscript{428} Further in 1962, in *Shamshuddin v. Zamina Bibi*,\textsuperscript{429} the court awarded maintenance for the *iddat* period.\textsuperscript{430} However, the Kerala High Court in *Areekkal Abdurahiman Musaliyar v. Neliyaparambath Ayissu*,\textsuperscript{431} followed the judgment, as cited above, of *Amad Giri*.\textsuperscript{432} In 1964, the Kerala High Court in *Ayissu v. Ahammad*,\textsuperscript{433} held that “In law a divorced woman is entitled to maintenance during the period of *iddat* which is three lunar months”.\textsuperscript{434} In essence, all these cases are saying nothing new.

In 1966, we find a very interesting way out for Muslim husbands to absolve themselves from paying maintenance to their divorced wives, even for the period of *iddat*. In *Aboobaker v. Kadeesa*,\textsuperscript{435} we find that although the court

\textsuperscript{426} Ibid., p. 5.
\textsuperscript{427} AIR 1961 Bom 121, see also (1961) ILR Bom 191.
\textsuperscript{428} Ibid., p. 123.
\textsuperscript{429} 1962(2) Cr. LJ 124.
\textsuperscript{430} Ibid., p. 125.
\textsuperscript{431} AIR 1962 Kerala 234.
\textsuperscript{432} AIR 1955 Jammu & Kashmir 1.
\textsuperscript{433} 1964 KLT 472.
\textsuperscript{434} Ibid., p. 474.
\textsuperscript{435} 1966 KLT 857.
held that a divorced Hanafi Muslim woman is entitled to maintenance for her iddat period, the husband declared himself a follower of the Shafii School of thought.\textsuperscript{436} According to the Shafii School, an irrevocably divorced woman is not entitled to any maintenance for the iddat period unless she is pregnant.\textsuperscript{437} However, in 1971, the Kerala High Court in \textit{Habirullah v. Hammeda Beevi},\textsuperscript{438} followed the decision in \textit{Abdurahiman Musaliyar} \textsuperscript{439} and held that a divorced women is not competent to apply for her iddat maintenance under the \textit{CrPC}.\textsuperscript{440} But in 1972, a divorced Muslim woman's right of maintenance was accepted by Justice V. Khalid in \textit{Mohammed Haneefa v. Pathummal Beevi}.\textsuperscript{441} Moreover, on the plight of divorced Muslim women he observed, "Should Muslim wives suffer this tyranny for all times? Should their personal law remain so cruel towards these unfortunate wives? Can it not be amended suitably to alleviate their sufferings? My judicial conscience is disturbed at the monstrosity. The question is whether the conscience of the leaders of public opinion of the community will also be disturbed".\textsuperscript{442}

\textsuperscript{436} For details see \textit{ibid.}, p. 859.
\textsuperscript{437} See Hamilton 1870, p. 145.
\textsuperscript{438} 1971 KLT 533.
\textsuperscript{439} 1962 KLT 234.
\textsuperscript{440} 1971 KLT 533, at p. 534.
\textsuperscript{441} 1972 KLT 512.
\textsuperscript{442} \textit{Ibid.}, p. 514.
We see here the first signs of a new chain of arguments about maintenance rights for divorced Muslim wives. At the same time, still in 1973, before the enactment of the new CrPC, we find that in Sidhik Moula v. Nabeesa Beevi the court still observed that “since the first respondent was not a wife at the time of filing the petition, she is not entitled to maintenance under S. 488 of the Code”. While on the question of iddat maintenance, the court declared, “In a case where the divorce was before the filing of the petition, the question of maintenance for the period of iddat does not arise, since such a question can arise only in a civil court and not under S. 488 of the Code of Criminal Procedure”.

The above cases on maintenance for neglected wives, decided by the different High Courts of India, show how easily Muslim husbands defeated the purpose of law. As discussed earlier, the law on maintenance for neglected wives found its place in the statute books mainly to prevent vagrancy. But Muslim men not only subdued the man-made laws but also successfully ignored the commands of Allah and his Prophet Muhammad (PBUH) that ask the believers to take care that divorced wives should not be left indigent.

444 Ibid., p. 117.
445 Id.
446 For detailed discussion see chapter 2 above.
While the judges in modern India are seen visibly divided on the issue of maintenance to divorced Muslim wives, one section of the judges, as discussed above, favoured maintenance under section 488 of the CrPC 1898, for the iddat period of divorced Muslim women. Others were of the opinion that a divorced woman should claim her iddat period maintenance through the civil courts. However, it must be doubted whether the civil courts, in the absence of any contractual obligation on iddat maintenance, can provide meaningful remedy.

From the above, we find that some of the judges re-affirmed that section 488 of the CrPC 1898 refers to maintenance of wives and not of divorced wives. By doing so, the judges on the one hand deprived women of maintenance for the iddat period. On the other hand, it seems, they paved the way for future legislation on the issue of post-divorce maintenance for Muslim women.

6.2 Maintenance provisions for wives under theCr. PC, 1973

6.2.1 Reasons for reforms

Before we discuss the relevant provisions on maintenance under the CrPC, 1973 in India, we must briefly examine the reasons that led to the reforms of the maintenance provisions.

As we saw earlier, the reason for inclusion of maintenance provision in the CrPC 1898 was the desire to prevent vagrancy. Thus the purpose of maintenance laws in the statute book was not only to coerce a man to perform his economic obligations in respect of his wife and children, but also to seek to ensure that neglected wives and children are not left destitute.
However, as in Pakistan, the Muslims of India defeated the above social purpose behind the legislation simply by divorcing their neglected wives in response to a suit for maintenance. The shortcomings in the above law made some Indian judges begin to indicate the need for reforms in the existing laws.\textsuperscript{447} Parliamentary activity began to focus on finding a remedy. Realising the loophole in the laws of maintenance for neglected wives,

"The Joint Committee of the Parliament on the Code of Criminal Procedure Bill, 1970, considered the provision of section 488, and the hardship which it caused to Muslim women. The Joint Committee decided that the benefit of the provision should be extended to a woman who has been divorced by her husband and has not remarried after divorce".\textsuperscript{448}

Further, the 14\textsuperscript{th} and 41\textsuperscript{st} Report of the Indian Law Commission 1972, also recommended an extension of maintenance entitlements to divorced women in the old CrPC 1898.\textsuperscript{449} Justice Krishna lyer, who was a member of the Indian Law Commission, writes:

"I bestowed some thought on this problem and suggested, by a deeming provision, the inclusion of divorcee in the definition of ‘wife’".\textsuperscript{450}

\textsuperscript{447} See the observations made by Justice Khalid in \textit{Mohammed Hanes\textsuperscript{a} v. Pathummal Beevi} 1972 KLT 512.


The Indian Parliament paid attention to the above recommendations of the Law Commission. The issue of maintenance for divorced wives was first introduced in the Rajya Sabha, the Indian Upper house, and was later considered by the Lower House (Lok Sabha). In the Lok Sabha, two Muslim members, Ebrahim Sulaiman Sait and C. H. Mohammad Koya, objected to the explanation to the word "wife" in the proposed Code.\textsuperscript{451} It was contended by these members that the definition is opposed to Muslim personal law. Therefore, they demanded that the Explanation clause be deleted from the Bill, or the Muslims should be exempted from the Code. But Parliament passed the Bill with the Explanation clause. When the Code of Criminal Procedure bill came before the Lok Sabha again, the government proposed an amendment to it.\textsuperscript{452} The amendment denies maintenance to any divorced wife, where she received any sum under personal or customary law.\textsuperscript{453} The amendment appeared to relieve Muslim husbands from paying future maintenance to their divorced wives if they had paid any sum under their personal law to the divorced wife. Realising the politics of the ruling party, Jyotirmony Basu, a Member of Parliament, opposed the amendment and presented a petition on behalf of some 300 women from Delhi asking for withdrawal of the amendment.\textsuperscript{454} In order to justify his opposition to

\textsuperscript{451} See Carroll 1981, pp. 105-106.

\textsuperscript{452} Id.

\textsuperscript{453} Kusum., ‘Customary payments under S. 127(3)(b) Cr. P. C. as a substitute for maintenance: A need for reform’. In KLT 1979 J, pp. 75-77, at p. 75.

\textsuperscript{454} The text of the petition is reproduced by Latifi 1975, pp. 21-22.
the amendment, he further cited Vs. 2: 241 of the Quran, which according to the translation of Yusuf Ali, (see above, chapter 2) reads “For divorced women maintenance should be provided on a reasonable scale”\textsuperscript{455} However, the minister incharge refused to accept the above translation of the Quran put forward in favour of retaining provisions on maintenance in its original form.\textsuperscript{456} Subsequently the Indian Parliament accepted the amendment in the shape of section 127.\textsuperscript{457}

6.2.2 \textbf{The relevant provisions and responses to them}

The new \textit{CrPC} came into force on 1st April 1974, and replaced sections 488-490 of the 1898 \textit{CrPC} with section 125-128 under the 1973 Code. The relevant sections read:

Order for maintenance of wives, children and parents,-

(1) if any person having sufficient means neglects or refuses to maintain:

his wife, unable to maintain herself; or

his legitimate or illegitimate minor child, whether married or not, unable to maintain itself; or

\textsuperscript{455} The Holy Quran 1934, p. 96.

\textsuperscript{456} For the discussion in Parliament see \textit{Lok Sabha Debates}, dated 11 December 1973, Vol 34, No. 22, cols. 312 – 313.

\textsuperscript{457} Ibid., col. 318.
his legitimate or illegitimate child (not being a married daughter) who has attained majority, where such child is, by reason of any physical or mental abnormality or injury unable to maintain itself, or his father or mother, unable to maintain himself or herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate may from time to time direct: Provided that the Magistrate may order the father of a minor female child referred to in clause (b) to make such allowance, until she attains her majority, if the Magistrate is satisfied that the husband of such minor female child, if married, is not possessed of sufficient means. Explanation.-For the purposes of this chapter,-

"minor" means a person who, under the provisions of the Indian Majority Act, 1875, is deemed not to have attained his majority

"wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried.

(2) Such allowance shall be payable from the date of the order, or, if so ordered, from the date of the application for maintenance.

(3) If any person so ordered fails without sufficient cause to comply with order, payable from the date of the order, or, if so ordered, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in the
manner provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made: Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the court to levy such amount within a period of one year from the date on which it became due:

Provided that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the court to levy such amount within a period of one year from the date on which it became due: Provided further that if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing.

Explanation.-If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.
(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason, she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

126. Procedure.- (1) Proceedings under sec. 125 may be taken against any person in any district-
(a) where he is, or
(b) where her or his wife resides, or
(c) where he last resided with his wife, or as he case may be, with the mother of the illegitimate child.

(2) All evidence in such proceedings shall be taken in the presence of the person against whom an order for payment of maintenance is proposed to be made or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed or summons-cases:
Provided that if the Magistrate is satisfied that the person against whom an order for payment of maintenance is proposed to be made is willfully avoiding service, or willfully neglecting to attend the court, the Magistrate may proceed to hear and determine the ex parte and any order so made may be set aside for good cause shown on an application made within three months from the date thereof subject to such terms including terms as to payment of costs to the opposite party as the Magistrate may think just and proper.
(3) The court in dealing with applications under section 125 shall have power to make such order as to costs as may be just.

127. Alteration in allowance.—(1) On proof a change in the circumstances of any person, receiving, under section 125, a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife, child, father or mother, as the case may be, the Magistrate may make such alteration in the allowance as he thinks fit:

Provided that if he increases the allowance, the monthly rate of five hundred rupees in the whole shall not be exceeded.

(2) Where it appear to the Magistrate that, in consequence of any decision of a competent Civil Court, any order made under section 125 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

(3) Where any order has been made under section 125 in favour of a woman who has been divorced by, or has obtained a divorce form, her husband, the Magistrate shall, if he is satisfied that—

the woman has, after the date of such divorce, re-married, cancel such order as from the date of her remarriage:

the woman has been divorced by her husband and that she has received, whether before or after the date of the said order, the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce, cancel such order.
in the case where such sum was paid before such order, from the date on which such order was made;
in any other case, from the date of expiry of the period, if any, for which maintenance has been actually paid by the husband to the woman;
the woman has obtained a divorce from her husband and that she had voluntarily surrendered her rights to maintenance after her divorce, cancel the order from the date thereof.
At the time of making any decree for the recovery of any maintenance or dowry by any person to whom a monthly allowance has been ordered to be paid under section 125, the Civil Court shall take into account the sum which has been paid to, or recovered by, such person as monthly allowance in pursuance of the said order.
128 Enforcement of order of maintenance.-A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being, satisfied as to the identity of the parties and the non-payment of the allowance due.
Now if we compare the contents of section 488 of the 1898 CrPC with section 125-128 of the 1973 Code, as cited above, it is found that section 125(1)(a) ask husbands to provide maintenance to their wives unable to maintain themselves.
The 1898 Code, on the other hand, speaks for maintenance for neglected wives.
irrespective of their financial conditions. Therefore, the 1973 Code has reduced the scope of maintenance to only those wives who cannot maintain themselves. Thus the 1973 Code overlooked the Muslim wives’ absolute right of maintenance from their husbands during marriage, irrespective of their financial standing.\textsuperscript{458} In Islamic law the wife’s right of maintenance towards her husband becomes obligatory once she surrenders herself to him.\textsuperscript{459} Thereafter, the debate in Islamic jurisprudence is on the quantum of maintenance due to the wife, keeping in view the different financial conditions of the married couple.\textsuperscript{460} But the discussion on maintenance, for a married woman in Islamic law, nowhere seems to suggest that a husband is discharged to maintain his wife if she is a person of means. Rather if a husband refuses to maintain his wife, he could be imprisoned.\textsuperscript{461} Further, the wife has the right to move a petition in the court of the qadi for divorce.\textsuperscript{462} This means that a husband, under the provisions of Islamic law, cannot be absolved from paying maintenance even to his wealthy wife.

Obviously, it was not the primary purpose of the CrPC 1973 to uphold the rules of Islamic law. However, from here we turn to the maintenance rights of

\textsuperscript{458} See Rahman 1978, p. 258.

\textsuperscript{459} Id.

\textsuperscript{460} For the quantum of maintenance due to wives according to different schools in Islamic jurisprudence see for example Pearl 1987, p. 69.


\textsuperscript{462} Id.
divorced women under the new Code of 1973. The 1973 Code, for the first time, has extended the right of maintenance to divorced wives. This means that, as a general law, the CrPC 1973 made divorced Muslim wives eligible to claim maintenance from their former husbands, if they were unable to support themselves, and beyond the traditional iddat period maintenance.

Different scholars discussed the amendments to the old CrPC of 1898. Kusum argued:

"The Code of Criminal Procedure, 1973, is an endeavour to mitigate the suffering of destitute women by providing a uniform and expeditious provision enabling them to seek maintenance from husbands irrespective of their religion, caste or creed".463

Abdullah considered the provision as justified in the light of the Quran.464 But according to Haq,

"S. 125 of the new Cr. P. C. will not serve its purpose, and it is doubtful whether any self-respecting woman will go after her erstwhile husband claiming maintenance for her for the period after divorce has become absolute".465


464 For details see Abdullah, T. M., 'Ss. 125 to 127 of the new Criminal Procedure Code, How far applicable to Muslims?'. In: KLT 1974 J, pp. 54-55.

The above opinion, on the one hand, indicates that women who are not self-respecting will claim maintenance from their former husbands. On the other hand, it seems to recommend that it is better to be destitute than to claim maintenance.

Professor Tahir Mahmood, on maintenance provisions as found in the 1973 CrPC, says that “for the past about ten years a Shari’at vs. Cr. P. C. war is being fought in the judicial corridors of this country”.\textsuperscript{466} This rhetoric image signifies that asking a husband to pay an amount, which will not be more than Rs.500/- in any case, to his divorced wife under the 1973 CrPC amounts to a war against Islamic law- the law that speaks for the uplift of women. However, in an earlier article, Mahmood had criticised orthodox Muslim views on amendments to the 1973 Code and on maintenance to divorcée wives.\textsuperscript{467} He was of the opinion that “Islamic law only prescribed a minimum period during which a divorced wife was to be maintained; it did not prohibit extension of that period in suitable cases”.\textsuperscript{468} But in 1979, he shifted the responsibility for maintenance of divorced Muslim wives to their parental family and, interestingly, termed the divorced woman an unmarried girl.\textsuperscript{469} The opinions expressed by Professor Mahmood show that he has gradually changed his

\textsuperscript{466} Mahmood 1986 a. p. 82,

\textsuperscript{467} For details see Mahmood 1973, at p. 211.

\textsuperscript{468} Id

earlier views. Therefore, at one time he favoured maintenance for divorced Muslim wives beyond the iddat period, and went on to consider the unrest of the Muslims about the 1973 amendments as a "racket".\textsuperscript{470} He further suggested: "It is high time the national leaders gave priority to a well-planned programme of educating the masses over the issue of unification and secularisation of the now extremely divergent and theocratic family laws".\textsuperscript{471} The views of Mahmood also seem to indicate that he has changed his statements according to the demands of the time and situation.

For Ali, the enactment of a new CrPC in India was a step forward for a uniform civil code.\textsuperscript{472} Paras Diwan favoured inclusion of the divorced wife in the CrPC:

"Under the old code 'wife' did not include a divorced wife, and the result was that a divorced wife was not entitled to maintenance. This caused gross injustice in several cases. Wherever it was possible for a husband to divorce his wife he could evade his obligation to maintain her. This came into clear relief from cases relating to Muslim wives".\textsuperscript{473}

\textsuperscript{470} Mahmood 1973, at p. 211.

\textsuperscript{471} Id.

\textsuperscript{472} See Ali 1987, p. 144, The uniform civil code debate is of some relevance to the present topic. For details see Dhagamwar 1989.

Diwan has correctly analysed the situation, because the case law under section 488, as discussed earlier, clearly showed that Muslim husbands preferred to divorce their wives unilaterally, thus avoiding the responsibility of maintaining their spouses.

The above discussion on the 1973 amendments to the maintenance laws in India indicates that it was no doubt intended as a relief for the divorced Muslim wives, unable to support themselves. Nevertheless, for others, "the new law would be used to practically supersede the law of Islam". Therefore, a Muslim delegation met the Prime Minister and requested exemption for Muslims under the CrPC. The pressure from the orthodox Muslims, and the prevailing political situation in the country, forced the ruling party to bring an amendment. Thus, the efforts made to protect divorced Muslim wives under section 125 were somewhat half-heartedly taken away by inclusion of section 127(3)(b), as cited above. It seemed that "What was given with one hand was taken away with the other".

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474 Mahmood 1986 a, p. 83.


477 Id.

478 See Latifi 1975, at p. 18.
We should now briefly discuss the relationship of section 125 and 127 in the Code of 1973. As discussed above, section 125 of the Code of 1973 speaks for maintenance of a neglected ‘wife’ by a husband of sufficient means. In the Explanation clause, wife includes a divorced wife who has not remarried. Therefore under the Code of 1973, not only a wife but also a divorced wife unable to maintain herself and neglected by the husband can claim maintenance. Under section 127 of the Code, a Magistrate has the power to alter an allowance payable in case of a divorced wife where she has received any customary payments, payable on the event of divorce. This clearly refers to the Islamic law on mahr and iddat and would seem to suggest that a Muslim husband on paying any amount as mahr and iddat maintenance could be absolved from paying any further maintenance to his divorced wife. Insertion of section 127 in the Code of 1973 was considered to relieve Muslim husbands from maintaining their divorced wives under section 125 if they had paid any customary sum payable on divorce. However, the subject left much for the courts to interpret.

6.2.3 The case law under the Criminal Procedure Code 1973

In this sub-chapter we seek to examine the case law that developed as a result of decisions of the different High Court in the light of the enactment in 1973, to see how superior courts in India interpreted the law on maintenance for divorced Muslim wives. We have divided the material into cases decided by various High Courts and the Supreme Court. It is well documented that
attention shifted gradually to the Supreme Court decisions, until the high water mark of the *Shah Bano* case in 1985, which is discussed in the third sub-
chapter.

6.2.3.1 **High Court cases**

It did not take long for cases under the new Code to be reported. In *Khurshid Khan Amin Khan v. Husnabanu Mahimood Shaikh*, the Bombay High Court observed,

"Principles of Muslim law relating to Iddat are not relevant when considering the provisions of s. 125 of the Code of Criminal Procedure, 1973, enacted by the Parliament for all unprovided wives, irrespective of religion or caste".

It was further held by the court:

"There is nothing in Muslim law or culture to prevent Parliament from making a law conferring a right on the divorced Muslim wife to claim maintenance against her quondam husband, so long as she remained unmarried, even after the iddat period".

The above case indicates that the judges in India, after the enactment of the CrPC 1973, were no longer ready to accept that the Muslim husband’s liability to maintain his divorced wife is limited to the iddat period. In the above case, the court applied the new law and granted to a divorce Muslim woman...
maintenance. This was only possible after the promulgation of the 1973 Code. Before, the enactment in 1973, the judges of the British period and later during independent India, had found themselves helpless when the Muslim husband proclaimed that he had divorced his wife. Justice Khalid of the Kerala High Court, who earlier delivered a sympathetic judgment, welcomed the amendment in the 1973 Code in the case of Kunhi Moyin v. Pathumma:

"The most important change introduced in the new section is definition to the word 'wife'. The definition is contained in clause (b) to the Explanation in section 125(1). This departure from the earlier law, is a milestone in the social legislation conferring benefits to a particular group of women who is in need of help... In defining wives to include an ex-wife, this section imports a legal fiction and creates a relationship between a man and a woman only for the purpose of claiming maintenance".

A major issue in this case was whether section 125 could be retrospective in operation. The husband had divorced his wife, by way of talaq, before the enactment of the 1973 Code. It was observed by the court:

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482 See Mohammed Haneefa, above.
483 1976 KLT 87.
484 Ibid., p. 91.
“All that it intends, is to confer prospectively a benefit to wives who have been divorced, but who have remained unmarried. Therefore, the contention that the definition in section 125, cannot apply to wives divorced prior to the coming into force of the Act, cannot be accepted”. 485

The court further observed it:

“Looking at the scheme of the enactment as a whole, we cannot escape the conclusion that the definition intended or took in its sweep past actions also and therefore wives who have been divorced before the Act also can take advantage of this definition”. 486

Thus the court in the above case held that the definition of ‘wife’ in section 125 applies to a pre-Act ex-wife as well as to a post-Act ex-wife, and that the concept of retrospectivity would not render the section ineffective. 487

Although the above judgment had a social welfare purpose, it seems that it went too far in its interpretation of the law. Professor Derrett has severely criticised the decision and observed:

“The normal presumption that statutes will not be construed retroactively is strengthened here by the fact that the consideration bearing upon Muslim husbands’ minds, or the minds of Hindus entitled to divorce their wives at customary law, that their divorced wives will, if they do not remarry, be

485 Ibid., p. 94.

486 Id.

487 Ibid., p. 96.
entitled to claim what is virtually separate maintenance for the rest of their lives, can hardly with fairness be imputed to them retroactively. Applying their own minds to this consideration, the learned judges (at Para. 13-15) frankly apply sentimental considerations.... Moved by sentiment, however understandable, judges may lay their judicial discretion open to be impugned." 488

Writers like Mahmood and Haq also attacked the above judgment by the Kerala High Court, mainly on the ground of being against the personal laws of the Muslims. 489

In 1976, despite the earlier criticism, Justice Khalid made another progressive judgment in Muhammed v. Sainabi, 490 and observed “the claim for mahr is a valuable right available to the wife and this claim is a charge over the properties of the husband”. 491 However, this time the main contention was over section 127(3) and the court “rejected the argument that the amount payable in lieu of mahr and other household articles which belonged to her, would absolve the husband of further liability to maintain her”. 492 This means that the


490 1976 KLT 711.

491 Id.

492 See Kusum., ‘Customary payments under S. 127 (3) (b) CrPC. As a substitute for maintenance: A need for reform’. In: KLT 1979 J, pp. 75-77, at p. 76.
court, very rightly, considered dower and maintenance two separate issues and the husband was bound to pay both dower and maintenance to his divorced wife. In Mohammad Haneef v. Smt. Anisa Khatoon, the Allahabad High Court expressed a similar view as that taken by the Kerala high Court in the Kunhi Moyin case, and held that section 125 applies to every divorced woman, irrespective of the date of divorce. The same view was taken by some other High Courts. However, in Smt. Rukhsana Parvin v. Shaikh Mohammed Hussein, the Bombay High Court held that where a Muslim husband has paid to his divorced wife the mahr and maintenance for the iddat period, an application by his wife for maintenance is not maintainable. Justice Chandarkar gave full consideration to the meaning of sections 125 and 127, as discussed earlier, and concluded that they must be harmoniously construed. The intention on the part of the legislature, at least in a case where the parties were governed by Muslim law, was that the right to post-divorce maintenance “must be of a restricted nature”. The learned judge, while agreeing with the contention that “such an interpretation will take away the benefit which is in terms given under S. 125 as by way of a progressive and ameliorative measure

493 1976 Cr L.J. 520.
494 Ibid., p. 521.
496 1977, CrLJ 1041.
497 Ibid., p. 1048.
to create a right of maintenance in favour of a divorced woman".\textsuperscript{498} held that
"in view of the express provision in S. 127 (3)(b) it is not possible for us to
obviate this result".\textsuperscript{499} The above interpretation was later followed in S. Hamid
Khan v. Jamni Bai,\textsuperscript{500} and Qayyum Khan v. Noorunisa.\textsuperscript{501} In the later case,
the court went a step further by saying that it is enough if the husband simply
deposits the amount payable under section 127(3)(b) in the court. However, in
Smt. Zubedabi, v. Abdul Khader, \textsuperscript{502} the Karnataka High Court refused to
award maintenance to a neglected Muslim wife, the petitioner, who failed to
plead under section 125 that she was unable to maintain herself.\textsuperscript{503} Thus an
important aspect of Islamic law, which gives an absolute right of maintenance
to wives, was ignored in respect of the Code of 1973.

The above survey of different High Court cases shows a clear division in the
ranks of the various High Court judges on the issue of maintenance to a
divorced Muslim woman, under her personal law and under section 125 of the
CrPC of 1973. We find that the definition of mahr is not clear to the judges,
while they are opposing maintenance to a divorced Muslim woman under

\begin{itemize}
\item \textsuperscript{498} Ibid., p. 1047.
\item \textsuperscript{499} Id.
\item \textsuperscript{500} (1978) ILR (M.P) 595.
\item \textsuperscript{501} 1978 CrLJ 1476.
\item \textsuperscript{502} 1978 CrLJ 1555.
\item \textsuperscript{503} Ibid., 1557.
\end{itemize}
section 125. Therefore, we would argue that the amount of mahr has noting to do with divorce, because mahr is to be paid at the time of marriage and it is the right of the woman on becoming a wife and not of the divorcee. Therefore, it is not a customary payment under section 127, but an obligation on a husband who has not paid it at the time of marriage. Further, we find in most of the cases on maintenance that the Muslim husbands paid the iddat period maintenance and the amount of dower into the court, when asked to pay maintenance. Otherwise, the husbands would still throw out divorced women. Therefore, the new law was definitely beneficial to women. At the same time, a reading of section 125 clearly indicates that it does not amount to a life insurance to every woman living in India, since it says that only wives unable to maintain themselves would benefit. Under the provisions of the 1973 Code, it is therefore the duty of the courts to judge every case on its own merits, especially to consider the means of the husband and the needs of the wife.

6.2.3.2 Supreme Court cases

The various and conflicting interpretations of section 125 and 127(3)(b) by the different High Courts left the matter for the Supreme Court to settle the issue. Thus, in 1979, the Supreme made an attempt to resolve the controversy surrounding section 127(3)(b) and the matter was discussed at length in Bai Tahira v. Ali Hussain Fissalli Chothia.\textsuperscript{504} In this case, the husband, Ali

\textsuperscript{504} AIR 1979 SC 362; on the text see also Hodkinson 1984, pp. 199-204.
Hussain, divorced his wife Bai Tahira. The mahr and the iddat maintenance was settled, by way of compromise, among the parting couple. The wife was given Rs.5000/- as her mahr and Rs.180/- as the iddat maintenance. Further, the husband also transferred a flat in her name. But after some time, the wife filed an application under section 125 of the CrPC for a monthly allowance of maintenance for herself and her child. The magistrate awarded a monthly maintenance of Rs.300/- for the child and Rs.400/- for the mother. Both the Sessions judge and the Bombay High Court, on appeal, set aside the order of the magistrate. Thus, an appeal by special leave came before the Supreme Court. The court, in granting the wife’s appeal, held that, “every divorcee, otherwise eligible, is entitled to the benefit of maintenance allowance”.

In this important case, section 127 was for the first time interpreted in such a way that, seemingly, it fulfilled the purpose behind the maintenance provisions in the statute books. The earlier judgments had ignored to question the amount paid to a divorced wife under section 127(3)(b). Even a nominal amount was considered sufficient and, thus, absolved husbands from future liability of paying maintenance. However, in Bai Tahira, the court observed that section 127(3)(b) was incorporated because, “Parliament intended divorcees should not derive a double benefit”. On the other hand, it was observed that “The

505 AIR 1979 SC 362, at p. 264.
whole scheme of Section 127(3)(b) is manifestly to recognise the substitute maintenance arrangement by lump sum payment organised by the custom of the community or the personal law of the parties”. 508 Therefore, the amount of Rs. 5000/- as mahr in the above case was not considered enough, “unless she was ready to sell her body and give up her soul”. 509 Thus, the court held:

“No husband can claim under Section 127(3)(b) absolution from his obligation under S. 125 towards a divorced wife except on proof of payment of a sum stipulated by customary or personal law whose quantum is more or less sufficient to do duty for maintenance allowance”.

Various writers viewed the ruling in Bai Tahira’s case quite differently. For Kusum it was a “rational interpretation”. 511 Mahmood considered the judgment then as liberal and conforming to the spirit of Islam. 512 Iyer considered its effect positive as it, “negatived the plea that mehr, however, minuscule, if paid would silence the S. 125 guns”. 513 Diwan termed it as “progressive

508 Id.
509 Ibid. p. 365.
510 Ibid., p. 366.
511 For details, see Kusum 1980, at p. 411.
512 Mahmood 1984, p. 132. The above views were also reproduced by Krishna Iyer J in Fuzlunbi v. K.Khader Vali. AIR 1980 SC 1730, at p. 1735. However, Haq had some reservations about Mahmood’s views. For further details see Haq, F., ‘A comment on Supreme Court decision in Fuzlunbi’s case’. In: KLT 1981 J, pp. 15-17, at p. 17.
513 Iyer 1987, p. 1X.
interpretation. While for Latifi, the judgment was even the result of inspiration from the Quran. Pearl considered that the judgment failed to clarify the exact extent of section 127 (3)(b). Menski saw the judgment as a "powerful reminder to Muslim men that they had some responsibilities towards the women that they chose to divorce". Carroll observed, "The Supreme Court in India thus declared that the overriding social policy of the secular welfare state protected the "derelict divorcee", whatever her religious denomination and regardless of her personal law". However, there were others, mainly Muslim authors, who showed concern over correctness of the judgment. Further, to nullify the effect of the above judgment, politically, Mr. G. M. Banatwalla, seeking to restrict the maintenance rights of Muslim women, introduced a bill in Parliament.

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516 Pearl 1987, p. 72.


519 See for example, Haq 1981; Abdullah, T.M., 'Maintenance to Muslim divorcees'. In: KLT 1980 J, pp. 75-76. See also Abdulkhader, O.V., 'Supreme Court decisions on maintenance to Muslim divorcees-Bai Tahira and Fuzlunbi'. In: AIR 1982 J, pp. 115-118.

520 For further details, see Kusum 1980, at p. 412.
The criticism over Bai Tahira was not yet settled when in 1981 the Supreme Court decided another similar case on maintenance. The Supreme Court reiterated its earlier decision of Bai Tahira, and stressed the need for payment of a sufficient amount by the husband, in the event of divorce, to maintain an ex-wife and save her from destitution. Later in 1981, the Supreme Court in Zohara Khatoon v. Mohd Ibrahim, discussed the issue of maintenance for divorced women in a situation where the marriage had been dissolved at the instance of the wife, under the provisions of the Dissolution of Muslim Marriages Act, 1939. The court, after discussing various modes of Muslim divorce, came up with the conclusion that for the purpose of maintenance under section 125 CrPC, the divorced woman remains a wife, whatever the mode of divorce.

The discussion on the Islamic law of divorce, in the above case, was criticised by Mahmood, who went so far as to challenge the knowledge of the judge. Others also found faults in the judgment. However, it is submitted

522 Ibid., p. 1736.
524 Ibid., p. 1244.
525 Ibid., p. 1250.
526 Mahmood 1986 a, p. 82:
that by giving the right of maintenance to every divorced Muslim woman, irrespective of the mode of divorce, the court has not violated the equality provisions of the constitution. But it can be further argued that if a woman wants to break the marital tie, then why should the man be penalised for her act? Women against their husbands should in no case use section 125 as a blank cheque. Mahmood, in particular, has argued that if women can break the marriage and then get lifetime maintenance, this tilts the balance too far in their favour.528

The above decisions of the Supreme Court indicate that the court gave weight to the secular nature of maintenance provisions as found in the CrPC, 1973. Therefore, after these decisions, it seemed that the law on the issue of maintenance for divorced Muslim women was settled in India. Apart from some criticism, it seems that there was no large-scale protest by the Muslims, and they had accepted the law on maintenance under the 1973 Code.

However, after the decision in the famous Shah Bano case in 1985,529 the Muslim community came out on the streets in large numbers.530 The protests


528 Mahmood 1986 a, p. 129.


made by the Muslims jolted the whole country and forced the government to make changes in the law on maintenance. Before going into details on the current position on maintenance for divorced Muslim wives, it is necessary to discuss the Shah Bano case separately in detail below. This will enable us to see what went wrong in the judgment and seemed to force the Muslims to protest on such a large scale. But we are not going into the politics of the Shah Bano case,\(^5\) rather we restrict ourselves to the legal debate involved on the issue of post-divorce maintenance for Muslim women in India.

6.2.3.3 The Shah Bano Case

We first narrate the facts and the judgment of the Supreme Court. Thereafter, we discuss the judgment in the light of the bouquets and brickbats that it received subsequently.

The initial appeal in the Shah Bano case, against the judgement of the Madhya Pradesh High Court, came up before a two-member bench of the Supreme Court, consisting of Mr. Justice S. Murtaza Fazal Ali and Mr. Justice A. Varadarajan. The appellant, a lawyer, challenged the correctness of the earlier decisions on maintenance under the CrPC 1973. The two learned judges referred the case to a larger bench and observed:

"As this case involves substantial questions of law of far-reaching consequences, we feel that the decisions of this Court in Bai Tahira v. Ali

\(^5\) For a detailed discussion on the issue see ibid., pp. 11-19.
Hussain Fidaalli Chothia and Fuzlunbi v. K. Khader Vali require reconsideration because, in our opinion, they are not only in direct contravention of the plain and unambiguous language of S. 127(3)(b) of the Code of Criminal Procedure 1973 which far from overriding the Muslim Law on the subject protects and applies the same in case where a wife has been divorced by the husband and the dower specified has been paid and the period of iddat has been observed. The decision also appears to us to be against the fundamental concept of divorce by the husband and its consequences under the Muslim law which has been expressly protected by S. 2 of the Muslim Personal Law (Shariat) Application Act, 1937 – an Act which was not noticed by the aforesaid decisions. We, therefore, direct that the matter may be placed before the Hon'ble Chief Justice for being heard by a larger Bench consisting of more than three judges”.

The above opinion of the two learned judges, according to Mahmood, made the Chief Justice worried about “an eventual affirmation of the supremacy of Islamic law over the CrPC rules”. Therefore, in response to the above reference, the Chief Justice constituted a five-member bench of Hindu judges, but both Murtaza Fazal Ali J. and A. Vardarajan J. were kept out of the bench. The brief facts of the case are that Mohd Ahmad Khan, an advocate, married Shah Bano Begum at Indore, Madhya Pradesh, in 1932. The husband on the

533 Mahmood 1986 a, p. 89.
wife settled a mahr of Rs. 3000/-.

Five children were born of the union. In 1946, the husband, by exercising his right of polygamy under Islamic law, married a second wife. The husband apparently favoured the second wife, and neglected Shah Bano, who was denied even some necessities of life, like clothes and medicines. In 1975, the husband drove Shah Bano out of the house. In 1978, Shah Bano filed an application under section 125 of CrPC 1973, in the court of Judicial Magistrate Indore, asking for maintenance allowance from her husband at the rate of Rs.500/- per month, the maximum amount awardable under the Section. The husband was said to be earning more than Rs.60,000/- per annum from his legal practice. However, the husband, being himself a lawyer, knew the art of deceiving the law. He divorced his wife, then aged over seventy, by an irrevocable talaq. Thus, the husband contented, before the Magistrate, that he should be condoned from paying any future maintenance, as the petitioner had ceased to be his wife. However, he deposited the mahr amount of Rs.3000/- in the court and pleaded that he had been paying maintenance at the rate of Rs.200/- per month to the wife.

534 Latifi, the senior counsel in the Shah Bano case, has mentioned that the amount of mahr was Rs.30,000/- see, Latifi, D., ‘Muslim Law’. In: Annual Survey of Indian Law. (1985) Vol. XXI, pp. 385-387. The reported judgment in the Shah Bano case says that the husband, “deposited a sum of Rs. 3000/- in the court by way of dower”. See p. 947 in AIR 1985 SC 945. However, Latifi writing in Agarwala, B.R., (ed.) The Shah Bano case, New Delhi 1986, on p. 14 has said that, “A mahr of Rs. 3000/- was settled by the husband on the wife. This would, in real terms, be the equivalent of Rs. 30,000 today”. Khan narrates that the mahr of Shah Bano in 1932 was settled as 3,000/- kaldars or silver coins. It is further added by her, “Each silver coin weighed one tola, which is worth Rs. 40 at the current rates, and the total works out to Rs.120,000. All that Khan paid her was Rs.3000”. For details see Khan, M.R., Socio-legal status of Muslim women, New Delhi 1993, p. 76.

535 As discussed earlier, Muslim husbands in order to defeat the laws on maintenance, could simply pronounce divorce to their neglected wives in the form of talaq al bida.
The Magistrate in 1979, based on the rulings of the Supreme Court in 
Bai Tahira,\textsuperscript{536} and Fazlunbi,\textsuperscript{537} ordered the husband to pay what the Supreme Court later termed as the princely sum of Rs.25/- per month. The High Court, on appeal by Shah Bano, enhanced the amount of maintenance to Rs.179.20/- per month. It was against this order that, the husband, by special leave, went to the Supreme Court, challenging the correctness of the above-mentioned case.

The Indian Supreme Court, in disposing of Mohd Ahmed Khan’s appeal, addressed itself to the following main questions:

Does the Muslim Personal Law impose no obligation upon the husband to provide for the maintenance of his divorced wife?

(2) Is there any provision in the Muslim Personal Law under which a sum is payable to the wife on divorce?\textsuperscript{538}

In response to the first question, the Court observed that, “there is no greater authority on this question than the Quran”.\textsuperscript{539} It was further stated by the Court that, “Verses (Aiyats) 241 and 242 of the Quran, show that there is an obligation on Muslim husbands to provide for their divorced wives”.\textsuperscript{540} The Court went through various English translation of the Quran, place before the

\begin{footnotes}
\item[537] Fazlunbi v. K. Khader Vali AIR 1980 SC 1730.
\item[538] For details, see Mohd Ahmed Khan v. Shah Bano Begum AIR 1985 SC 945, at p. 947.
\item[539] Ibid., p. 951.
\item[540] Id.
\end{footnotes}
judges. The various translations also comprised that of Abdullah Yusuf Ali, the text that we have been using here. After discussing the various translations, it was concluded by the Court:

“These Aiyats leave no doubt that the Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. The contrary argument does less than justice to the teachings of the Quran”.

On the second question, the court considered the plea taken by the husband that after paying mahr, he should be absolved under 127(3)(b) from paying any further maintenance to his divorced wife. The bench considered various textbooks and judicial decisions on Muslim Law. However, the court ruled out the assumption that a Muslim husband, after paying the amount of mahr, is no more liable, under 127(3)(b) of the CrPC 1973. The court rather showed

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541 According to Mahmood, It was counsel Danial Latifi, senior advocate of Supreme Court, supporting Shah Bano before the court, who saw nothing wrong in inviting the Supreme Court to interpret a certain verse of the Quran. For further details see, Mahmood 1985, at p. 112. However, according to Latifi, “it was Taemur Jahan Begum and Amir Kalbey Ali (the two appeared before the Court as interveners on the woman’s side) who raised the issue”. For details see Latifi, D., 'The Shah Bano Case unprecedented controversy'. In: Agarwala, B.R. (ed.). The Shah Bano case. New Delhi 1986, p. 16. However, the literature shows that it was not for the first time in the Shah Bano case that the issue of maintenance for the divorced Muslim women has been discussed under the particular verse of the Quran. See for example, Abdullah 1974, at p. 55, also see his article of 1980, at p. 76. For contrary views see Haq 1974, pp. 58-59. The issue has also been discussed in the Indian Parliament by Shri Jyotirmoy Bisu on behalf of Taemur Jahan Begum, who according to Latifi, was instrumental in raising the issue at the Supreme Court. For details, see Latifi 1975, especially, pp. 19-25. Prior to the decision in the Shah Bano case, in Mohammed Yameen v. Smt. Shamin Bano 1984 Cr LJ 1297, the Allahabad High Court discussed the issue under the quran. Therefore, there was no need to blame the judges and their religion because the Muslims themselves wanted to discuss the issue under the Quran.

542 For details on various translations of the Quran considered by the Court in the Shah Bano case, see AIR 1985 SC 945, at 951-952.

543 Ibid., at 952.
concern about the presumption that mahr is payable on divorce and did not agree that a sum payable as a mark of respect, at the time of marriage, should be the one paid at the time of divorce.\footnote{544 \textit{Ibid.}, at 953.}

The court also considered the plea, by the appellant, that the intention of Parliament was to leave the provisions of the Muslim personal law untouched.\footnote{545 \textit{Id.}} The court agreed that the intention of the government was not to make changes in the Muslim personal law, by enacting section 125 and 127 of the 1973 Code. However, at same time, it was argued that, “The provision contained in section 127(3)(b) may have been introduced because of the misconception that dower is an amount payable “on divorce”. But that cannot convert an amount payable as a mark of respect for an amount payable on divorce”.\footnote{546 \textit{Ibid.}, at 954.}

Thus, the court, taking away mahr from the ambit of section 127(3)(b), partly overruled the earlier cases of Bai Tahira, and Fazlunbi.

After deciding the above main questions, the Supreme Court expressed deep regret that “Article 44 of our Constitution has remained a dead letter”.\footnote{547 \textit{Id.}} Therefore, it was urged upon the state to secure a uniform civil code for the
country. However, the Court dismissed the appeal by the husband, confirmed the earlier judgment of the High Court and further awarded a sum of Rs.10,000/- to the wife as costs of the appeal.

The above judgment in the Shah Bano case confirmed that the CrPC 1973, as a general law, overrides the Muslim personal law. According to Menski, "No court in India and no bench, however composed, could have held otherwise". The Court, to reach the above finding, had discussed the necessity of section 125:

"Section 125 was enacted in order to provide a quick and summary remedy to a class of persons who are unable to maintain themselves. What difference would it then make as to what is the religion professed by the neglected wife, child or parent? Neglect by a person of sufficient means to maintain these and the inability of these persons to maintain themselves are the objective criteria which determine the applicability of section 125".

The above interpretation of section 125 shows that by incorporating section 127(3)(b), Parliament, had unnecessarily played in the hands of people ignorant of their own personal law. Thus, it was left to the Supreme Court to

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548 Id.
549 Ibid., at 955.
550 Ibid., at 949. See also Menski 1990, at p. 286.
551 Id.
consider mahr as the customary payment made by the husband to his divorced 
wife under section 127(3) (b). Would this relieve the husband form paying 
future maintenance to his discarded wife, unable to maintain herself? In this 
regard, Latifi points out that 

"It was not Ahmed Khan’s case, as presented to the Supreme Court by his 
counsel, that Shah Bano being well off did not qualify for a maintenance order 
under section 125"553

Therefore, it could be submitted that if Shah Bano was a woman of sound 
financial background, as her own council indicated, then the Judicial 
Magistrate should have rejected her appeal in the first instance. Therefore, 
there was no reason for the lawyer husband, Ahmed Khan, to involve the 
personal law. Rather, the contention should have revolved around section 125 
and the pleading should have centered on the means of the wife and not around 
127(3)(b).

Coming back to the Supreme Court quoting the Quran in the Shah Bano case, 
Mahmood found the discussion of the issue of maintenance under the verses of 
the Quran amounted to interpretation of the Quran by the Hindu judges.554 It 
led Western scholars to say that the judges exercised neo-ijtihad.555 However, it 
is submitted that it was neither interpretation of the Quran, nor neo-ijtihad:

553 Latifi 1985, at p. 387.
554 For detailed discussion, see Mahmood 1985, at p. 112.
555 See Menski 1990, at p. 287.
Rather it seems, the judges consulted the relevant verses of the Quran.\textsuperscript{556} Moreover, it is submitted that the Court did not arrive at any new law, but it simply confirmed the clear position of the Quran (see above, chapter 2) that divorced women should be treated with kindness. Moreover, by excluding the amount of mahr from the ambit of section 127(3)(b), the Court has not violated the teachings of the Quran and of the Prophet Muhammad (PBUH). The Court has rightly pointed out that it is an amount paid at the time of marriage, and not at the time of divorce.

The custom during the period before Islam was to pay the sale price of the woman to her father or guardian and the woman was given a gift, before entering the marriage bed.\textsuperscript{557} However, under the teachings of Islam, the sale of women was prohibited and the sale price and the gift were given to the wife in a combined form as mahr.\textsuperscript{558} The only logic behind the so-called deferred mahr seems to be that the payment of mahr may be postponed to a future date, whenever demanded by the wife. Obviously, a wife brought up in a patriarchal society and with the ever-present fear of divorce seems unlikely to demand her right of mahr. Therefore, it is often, only after the termination of the marriage contract that the wife asks for her stipulated dower. Therefore, it is her

\textsuperscript{556} See Engineer 1987, p. 9. See also Khan 1993, p. 79.

\textsuperscript{557} For details, see Rafiq, ‘Right to maintenance under Muslim law- A legal view’. In: AIR 1986 J. 129-133.

goodwill that she keeps her dower amount pending till life becomes difficult for her after termination of her marriage. However, this does not mean that mahr should be linked with the events that lead to the termination of marriage, that is, death of the husband or divorce.\textsuperscript{559}

The judgement in the \textit{Shah Bano} case created a stir in India. Especially, the Muslims were made to believe that their religion is in danger.\textsuperscript{560} A successful publicity campaign was launched to nullify the effects of the decision in the \textit{Shah Bano} case. Much has been written for and against the judgment. For some, Shah Bano Begum became “the heroine of the day in whom they advised the Muslims of India to find their Florence Nightingale”.\textsuperscript{561} Those who opposed the judgement were called fundamentalists.\textsuperscript{562} Below, we briefly discuss the analysis of the judgement by various writers.

For Mahmood, there was no need for the Court, in the \textit{Shah Bano} case, to interpret the Quran.\textsuperscript{563} According to him, the responsibility for maintenance lies with the grown-up children of the mother;\textsuperscript{564} in the absence of children, or

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\textsuperscript{561} Mahmood 1986 a, p. 90.

\textsuperscript{562} \textit{Id}.

\textsuperscript{563} Mahmood 1985, at p. 112.

\textsuperscript{564} Mahmood 1986 a, p. 91.
\end{flushleft}
if they are minors, the responsibility shifts to the parents of the divorcee.\textsuperscript{565} For Mahmood it is very easy to write that the responsibility for a divorcée shifts to the parents or children. But this is not so easy under the social practices of the Indian society. In pre-Islamic Arabia, where the parents or guardians used to sell their daughter, and divorce was not considered to be a stigma, the divorce of a daughter was a chance for them to earn extra money by selling their divorced daughter again. But in South Asian societies, the daughter is considered to be a burden on the parents, especially due to dowry demands, with which we are not concerned here, by the family of the man. On divorce, if again they have to maintain their daughter, make efforts to find a suitable groom and arrange for a dowry, this is asking too much from the parents. Mahmood simply argues along patriarchal lines, without reference to social reality in South Asia.

Diwan has pointed out “the question of maintenance of divorced wife arises only when she is indigent”.\textsuperscript{566} Further, he puts forward a proposition that in case of a deferred dower, which is paid at the time of divorce, should a potentially handsome amount be taken into consideration?\textsuperscript{567} We submit that


\textsuperscript{567} Ibid, p. 242. See also Diwan 1985, at p. 316.
the husband, in any case, is bound to pay that amount and that it has nothing to
do with divorce.

On the communal politics of the judgement, Professor Ibrahim says:

“Section 125 of the Indian Criminal Procedure Code a secular law, there might
be no quarrel with it”. 568

For Orthofer, the decision was “provocative”. 569 However, Prof. Shehab is of
the view that the Indian ulema, instead of studying the issue in the light of the
Quran and Sunnah, issued hasty fatawas against the Shah Bano judgement. 570

For Menski, the decision of the Supreme Court in the Shah Bano case “makes
sound sense in modern Indian law, especially in the context of maintenance
laws generally”. 571

We conclude here that there was nothing wrong, in legal terms, with the
judgement in the Shah Bano case. In particular, it is not against the teachings
of the Quran and Sunnah, for a Muslim man is under moral obligations, as
discussed above in chapter 2, to provide maintenance to his divorced wife.
Therefore, the uproar against the judgement seems unnecessary and inflated.
That section 127 of the CrPC of 1973 was wrongly portrayed as absolving
Muslim men from paying maintenance under section 125 of the CrPC of

571 Menski 1990, p. 287.
1973 created confusion. However, in the judgement it is not clear what prompted the bench to speak for the uniform civil code in such strong terms, which seemed to be uncalled for.\footnote{572}

6.3 **The Muslim Women (Protection of Rights on Divorce) Act, 1986**

In this sub-chapter, we discuss the issue of maintenance for Muslim women in the light of the enactment that was passed, by the Indian government, to appease the tension mounting in the Muslim community after the judgement of the *Shah Bano* case.

Within a year of *Shah Bano*, the *Muslim Women (Protection of Rights on Divorce) Act, 1986* received Presidential assent on 19 May 1986 and became the law of the country. The new law, it was widely believed, relieved Muslim husbands from paying any maintenance to their divorced wives beyond the *iddat* period. The government, it appeared, by becoming a party, helped to nullify the effects of the *Shah Bano* case. By doing so, the government on the one hand deviated from the constitutional aim of achieving legal uniformity by enforcing special laws for Muslims. On the other hand, its claim of secularism seemed to have been shattered by the impression that the state gave in to Muslim demands.

The 1986 Act was promulgated according to the reasons of enactment as published in the Gazette of India extra-ordinary, part II, S. 2 dated 25-2-1986.

\footnote{572 Id.}
"This decision (Mohd. Ahmed Khan v. Shah Bano Begum and Others, (AIR 1985 SC 945) has led to some controversy as to the obligation of the Muslim husband to pay maintenance to the divorced wife. Opportunity has, therefore, been taken to specify the rights which a Muslim divorced woman is entitled to at the time of divorce and to protect her interest".\textsuperscript{573}

Thus under Sec. 3 (1) of the Act, a divorced Muslim woman is entitled to claim the following:

(a) a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband;

(b) where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of the birth of such children;

(c) an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law; and

(d) all the properties given to her before or at the time of marriage or after her marriage by her relatives or friends or the husband or any relatives of the husband or his friends.

Further, in sub-sections 3(2) the Act focuses on procedure. In cases where the husband has not acted according to any of the clauses of section 3(1), the wife

\textsuperscript{573} As reproduced in the judgment of Ali v. Sufina 1988 (2) KLT 94, at 97.
can make an application to the magistrate. Section 3(3) speaks about the enforcement order by the magistrate, if he is satisfied that a husband with sufficient means has neglected to act according to section 3(1). According to section 3(4), a magistrate can issue a warrant against a husband who fails to comply with the above order of the magistrate. The magistrate may pass orders for sentence of imprisonment for a term which may extend to one year.

The 1986 Act, after dealing with the husband’s liability to maintain his divorced wife, till the iddat period in section 3, comes to a situation in section 4, where an unmarried divorced wife is unable to maintain herself after the iddat period. This section reads as follows:

(4) Order for payment of maintenance.-

(1) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where a Magistrate is satisfied that a divorce woman has not remarried and is not able to maintain herself after the iddat period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in the proportions in which they would inherit her property and at such periods as he may specify in is order:
Provided that where such divorced woman has children the Magistrate shall order only such children to pay maintenance to her, and in the event of any such children being unable to pay such maintenance, the Magistrate shall order the parents of such divorced woman to pay maintenance to her:

Provided further that if any of the parents is unable to pay his or her share of the maintenance ordered by the Magistrate on the ground of his or her not having the means to pay the same, the Magistrate may, on proof of such inability being furnished to him order, that the share of such relatives in the maintenance ordered by him paid by such of the other relatives as may appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order.

(2) Where a divorced woman is unable to maintain herself and she has no relatives as mentioned in sub-section (1) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the proviso to sub-section (1), the Magistrate may, by order, direct the State Wakf Board established under Section 9 of the Wakf Act, 1954 (29 of 1954) or under any other law for the time being in force in a state, functioning in the area in which the woman resides, to pay such maintenance as determined by him under sub-section (1) or, as the case may be, to pay the
shares of such of the relatives who are unable to pay, at such periods as he may specify in his order”:

The 1986 Act in section 3(1)(a), as cited above, entitles every divorced Muslim woman to (i) a reasonable and fair provision and (ii) maintenance during the iddat period. The new Act, thus, does not depart from the position that the husband is responsible for his ex-wife’s maintenance. At first sight, this entitlement relates to the iddat period itself. In fact the 1986 Act, under section 3(1)(a), not only asks the divorcing Muslim husbands to provide maintenance to their wives during the iddat period, but also to make arrangements for their future needs as well within this waiting period. If the husband has not made such arrangements and the iddat period expires, the wife has a claim under the 1986 Act. Thus, the 1986 Act very clearly reminds Muslims men of their moral obligation towards their ex-wives, according to the teachings of the Quran, as discussed earlier in chapter 2. Further, under section 3(1)(a) a divorced Muslim wife is certainly in a good position as compared to section 125 of the CrPC 1973, where she was only entitled to an upper limit of Rs. 500/- as maintenance. However, the Act is silent on divorced women whose marriage is not consummated and thus there is no iddat period for them to observe.


According to section 3(1)(b) a divorced wife who has to look after children from the marriage can claim maintenance for them from her former husband.

Section 3(1)(c) concerns the dower or mahr of divorced woman. The section entitles a divorced wife to claim her unpaid dower. This means that the Act asks Muslim men to fulfill their stipulated obligation of paying the unpaid dower to their wives. The above section shows that the 1986 Act does not consider any unpaid dower to be an amount payable on divorce. Rather it seems to consider it as a debt, which a husband is liable to pay. The above section also seems to realise the difficulties faced by divorced women to claim their dower. As we saw in chapter 4 above, Muslim men prefer not to pay anything to their divorced wives and the 1986 Act takes particular account of that problem.

Section 3(1)(d) speaks about the properties given to the wife, at any time during the marriage, by the husband or parents or relatives or friends, and gives the divorced wife a claim over them. This means this section relates to what is commonly known as jahez (dowry).\textsuperscript{576} Mahmood has analysed the above section as "a pro-woman provision".\textsuperscript{577} This sub-section seems to mean that the wife will be entitled to have a claim on whatever she brought with her at the time of marriage and whatever she received from her husband or his family.

\textsuperscript{576} Ibid., at p. 173.

\textsuperscript{577} Ibid., p. 174.
One could argue that this is not particularly ‘pro-women’, it only reiterates the property rights that women already had.

The provisions of section 3(1) show that the Indian Parliament has certainly drafted an Act, which could protect divorced Muslim women from becoming destitute in the event of divorce.

Section 4 of the 1986 Act has shifted the responsibility of the divorced woman, unable to maintain herself, on her immediate relatives who might inherit her property on her death or in their absence on the Wakf Boards. Every one thought that divorced Muslim women would have to rely on their parental families, their children or the Wakf Boards, which promptly declared that they could not possibly bear such a burden. However, here one can argue that why a woman has to beg from her relatives if she has property, and if she is indigent, how can anyone inherit from a destitute? To ask a relative of the divorced woman to provide her maintenance is not only questionable but also objectionable. Iyer has strongly criticised the legislation and considered it a “clumsy draft, never found in any family laws of the world.” Moreover, if the relatives refuse to maintain the woman, there is nothing in the law to compel such relatives to abide by it. Thus, we see that 4(1) is not a workable and sound solution to the issue of maintenance for the divorced Muslim woman, after the expiry of her iddat period. However, it is added that perhaps

578 Ibid., at p. 173.

579 Ibid., p. 174.
section 4 was never intended to be a real remedy, it seems to be a political ploy to distract attention from section 3 of the Act, which is of course the first provision that a woman in need turns to.

The 1986 Act further, in the absence of any such relatives, gives the responsibility of maintaining such women to the Wakf Boards. But providing maintenance to needy divorced women is something beyond the scope of such institutions. A Wakf is created by a Muslim of his property for charitable purposes. Iyer in his criticism of section 4(2) of the 1986 Act describes a waqf:

"A waqf is a dedication of property in the way of God as it were, tying up the waqf as God's property. Mostly, the purpose to be fulfilled is of a religious nature and the Waki decides on the objects of the waqf". Iyer further questions the validity of the Act under section 4(2), in a situation, where a waqf is created for the maintenance of a mosque, for example. Can such resources be requisitioned by parliamentary decree into paying maintenance for a woman rendered destitute by some wicked husband's talaq?

According to Mahmood, "there is a difference between asking a particular waqf to direct its resources towards this purpose and putting the liability on the

580 For condition of Wakf Boards in India, see Khan 1993, p. 82.
581 Iyer 1987, p. 16.
582 For details see id.
State Waqf Boards. Wakfs are created by pious Muslims for a particular purpose. The Wakf Boards in secular India have been constituted under the Central and State Wakf Acts, and not under provision of the Shariat. Moreover, the purpose of the Wakf boards in India is to ensure that the wakfs are managed properly. Mahmood has argued that asking Wakf Boards to provide maintenance to divorced Muslim women, unable to maintain themselves, “cannot be regarded as an ‘un-Islamic’ provision”.

However, while the provision of maintenance to indigent divorcees by the Wakf Boards may not be “un-Islamic”, one can question their financial capabilities. Moreover, Khan in a recent study argues that often “nobody has even heard about the Wakf Board”. This could mean that shifting the responsibility towards Wakf Boards is not a viable solution to the issue of maintenance for divorced Muslim women.

Interestingly, under section 5 of the 1986 Act, a divorced woman and her former husband may declare by affidavit, either jointly or separately, that they would prefer to be governed by the provisions of section 125 to 128 of the CrPC 1973. The above provision has been described by Pearl as “an attempt to

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583 Mahmood 1986 b at 176.
584 Id.
585 See Khan 1993, p. 82.
586 Id.
protect the Act from allegations of unconstitutionality". Nevertheless, for Iyer, it was "the joke of the year". Mahmood, in defence of giving this joint option to husband and wife, submits that the choice of law to govern a particular marriage during its subsistence or after its dissolution can be made only by the mutual consent of the parties, and further considers it to be unobjectionable under the sharia. However, an unscrupulous husband who wishes to escape from his shariat obligations, which the 1986 Act enforces, may opt for the CrPC, whereas a divorced woman who wants to secure quick payment of her mahr and jahez under the 1986 Act might prefer to be governed by that Act. Nevertheless, it is interesting to find that the people, who opposed the decision in the Shah Bano case, are now prepared to accept this "sacrilegious provision." Section 5 of the 1986 Act seems to be an unnecessary inclusion, unless the option was only open for the wife. However, it may be useful for Muslim women in India to have such a clause in their marriage deed, to the effect that in case of divorce, the couple will follow

587 Pearl 1987, p. 74.
588 Iyer 1987, p. 16.
589 Mahmood 1986 b, at 177.
590 Id. See also Mahmood 1990, at p. 304.
591 Id.
592 Id.
593 Iyer 1987, p. 17.
the CrPC and not the 1986 Act. A prenuptial agreement in respect of post-divorce maintenance, as discussed earlier, is not against public policy.\textsuperscript{595}

In fact, as the subsequent case law (see the following section below) has shown, the crucial position in this Act is section 3. So far, there has been a lot of rhetoric about the 1986 Act and the scholarly writing has not yet incorporated the rather constructive interpretations found in the case law.\textsuperscript{596} As we turn to the cases now, it will become clearer that the 1986 Act does what its name promises, it protects the rights of divorced Muslim woman, and it does so quite well.

\textbf{6.4 Cases under the Muslim Women (Protection of Rights on Divorce) Act, 1986}

In this sub-chapter, the discussion is focused on the cases decided by the various High Courts, as the Supreme Court has yet to decide any case under the 1986 Act. The 1986 Act, as indicated above, after promulgation was left for the judiciary to interpret and enforce. A few years ago, the judges seemed not ready to concede defeat, despite the violent aftermath of the Shah Bano case.\textsuperscript{597} Today the 1986 Act, despite all the criticism and objections, is still a valid law of the country, although writ petitions challenging it legality are still pending

\textsuperscript{595} See already Muhammad Muin-ul-din v. Jamal Fatima AIR 1921 All 152, at 152-153. For a discussion on pre-nuptial contracts for maintenance provisions in case of divorce see also Malik, S., 'Saga of divorced women: Once again Shah Bano, maintenance, and the scope for marriage contracts.' In 42 Dhaka Law Reports (1990) Journal 34-40.

\textsuperscript{596} But see now Menski, W. F., 'Maintenance for divorced Muslim wives.' In 1994 KLT J, pp. 45-52.

\textsuperscript{597} Menski 1990, at p. 288.
in the Supreme Court. However, the court has so far refused to grant a stay against the operation of the 1986 Act.

The first published decision under the 1986 Act came from a woman magistrate of Lucknow. The magistrate interpreted the woman’s entitlement as (i) ‘reasonable and fair provision’, and (ii) maintenance of iddat. Thus, “The divorced wife was awarded a large sum of money. The magistrate held that the two reliefs are separate from each other, simultaneously available to all divorced women under the Act of 1986”.

Thereafter, many lower courts in different parts of India awarded huge amounts of money, as maintenance of iddat and reasonable and fair provision, as referred to by the 1986 Act. Frustrated husbands, who were

598 For details on this see Mahmood 1990, at 305, note 11 which lists the following pending petitions:

(i) Danial Latifi and Sona Khan v. The Union of India.
(ii) Tara Ali Beg and others v. Union of India.
(iii) Susheela Gopalan and others v. Union of India.
(iv) Islamic Sharia Board v. Union of India and All India Muslim Personal Law Board.
(v) National Federation of Indian Women v. Union of India.
(vi) Shahnaz Sheikh and others v. Union of India.
(vii) Rashidaben v. Union of India.

599 Id.

600 For detail, see Mahmood 1990, at 306.

601 Id.

earlier unwilling to maintain their discarded wives under section 125 CrPC, found these interpretations of the 1986 Act disagreeable and appeals started coming to the High Courts concerning the 1986 Act.

The Kerala High Court seems to have taken the lead here. In a remarkable line of progressive cases, primarily Ali, Aliyar, and Shamsudden, that High Court has elaborately discussed the provision of the 1986 Act. In Ali v. Sufaira, it was contented on behalf of the husband that under section 3 of the 1986 Act, he is only bound to pay maintenance for the iddat period, and no further payment is due as “reasonable and fair provision.” The court rejected such construction of section 3(1) of the 1986 Act and came to the view that, “u/s 3(1)(a) of the Act a divorced Muslim woman is not only entitled to maintenance for the period of iddat from the former husband but also a reasonable and fair provision for her future.” In a similar case, Aliyar v. Pathu, a Division Bench was confronted with the argument that fair

603 Menski 1994, at p. 47.
605 Aliyar v. Pathu 1988 (2) KLT 446.
607 1988 (2) KLT 94.
608 Ibid., p. 96.
609 Ibid., p. 101.
610 1988 (2) KLT 446.
provision and maintenance refers only to the iddat period maintenance. The court reaffirmed the interpretation of section 3(1)(a) in Ali, and reasoned:

If there is no difference between the two ideas and they mean the same thing, one of the expressions is redundant; there is no justification to take a view that the introduction of the words reasonable and fair provision by the parliament was intended to a different connotation.

However, keeping in view that the 1986 Act was promulgated as a result of the uproar by members of the Muslim community against the judgement in Shah Bano, the court tried to remain in the ambit of the 1986 Act and put forward the following argument:

"Parliament dissociated itself form the view expressed by the Supreme Court in Shah Bano's case that "provision" and "maintenance" mean the same thing and, therefore, divorced woman is entitled, according to the personal law, to maintenance even after expiration of Iddat period. Parliament intended to make it clear that the divorced woman is entitled to maintenance only for the Iddat period but is entitled to a distinct and reasonable provision for the post-Iddat period."

Thus, the court held that,

611 Ibid., p. 450.
613 Id.
614 Ibid., p. 458.
"S. 3 of the Act will not relive the former husband of all his responsibilities for the post-Iddat period. He has to make a reasonable and fair provision for the divorced wife for the post-Iddat period".615

In the third case, in Shamsuddeen v. Sabhiya,616 the court rejected the plea of a Muslim husband that the enforcement of the 1986 Act amounted to a change of circumstances in view of a previous order for maintenance made under section 125 of the Code of 1973. The court further added that under the 1986 Act maintenance is to be paid to the divorced wife only for the iddat period.617 The above three decisions by the Kerala High Court clearly show that the court refused to accept that after the enactment of the 1986 Act, Muslim husbands have been exempted from paying maintenance to their divorced wives beyond the iddat period.

The other most striking judgement came from the Gujarat High Court, in A. A. Abdulla v. A. B. Mohmuna Saiyadbhai.618 Here the court, in a lengthy judgement, first discussed the purpose of the Act and came up with the following observation:

"In simplest language the Parliament has stated that the Act is for protecting the rights of Muslim Women. It does not provide that it is enacted for taking

615 ld.
616 1988 (2) KLT 392.
617 ld.
618 AIR 1988 Gujarat 141."
away some rights which a Muslim Women was having either under the
Personal Law or under the general law i.e. Sc. 125 to 128 of the Cr. P. C". 619
The above initial observation made by the court shows that the court ruled out
any speculations that the 1986 Act in any way had taken away the rights of
divorced Muslim women. Rather the court considered that the 1986 Act was
framed to protect divorced Muslim women and therefore it was held that the
1986 Act did not nullify orders of maintenance under the CrPC. 620
However, there are some judgements that go against such interpretations. A
Full Bench of the Andhra Pradesh High Court in Usman Khan Bahamani v.
Fathimunisa Begum, 621 held that, "a divorced Muslim woman cannot claim
maintenance under S. 125 of the Code from her former husband after passing
of the Act of 1986". 622 The court, in its observations on the Shah Bano case,
considered that the decision, "overrides the well established principle of
Muslim law that the husband of the divorced Muslim wife is not liable to pay
maintenance under any circumstances beyond the period of Iddat". 623 The
above observation, is however, questionable on the ground that who has
established that fact that a divorced Muslim wife is not entitled to any

619 Ibid., p. 143.
620 Ibid., p. 158.
621 AIR 1990 AP 225.
622 Id.
623 Ibid., p. 229.
maintenance, under any circumstances, beyond the iddat period? We saw that there is no such prohibition in the Quran, quite on the contrary. However, interpreting 3(1)(a) of the 1986 Act, the court held that, "The fair and reasonable provision and maintenance under Section 3(1)(a) payable by the husband is restricted only for the period of Iddat and the liability of the husband to provide any provision or maintenance after the period of Iddat does not arise."\(^{624}\)

In the above judgement, the court absolved the Muslim husband from paying maintenance to his divorced wife beyond the iddat period. The court found that the 1986 Act only asked men to provide fair maintenance for the iddat period. Here we humbly submit, that the purpose of the 1986 Act is to protect the divorced Muslim woman and not the Muslim men. Therefore, the rulings by the Kerala and Gujarat High Courts, as discussed above, are more rational and have more logic than that of the Andhra Pradesh High Court.

In fact, the Kerala High Court in Ali, distinguishing clearly between 'provision' and 'maintenance', throws also some important light on our understanding of the reference to the iddat period. To repeat, section 3 (1)(a) reads 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". The decision in Ali is clearly to the effect that the

\(^{624}\) Ibid., p.242.
husband must arrange for both provision and maintenance within the iddat period. This does not exclude that the maintenance arrangements relate to the time after the iddat period. The crucial point is simply that the arrangements must be concluded, before the expiry of the iddat period, for section 3(1)(a) explicitly says that the provision and maintenance should be “made and paid to her” within that period. Concerned to protect women, the Indian legislature has not wasted any words but has provided a time-bound rule: any woman, for whom timely arrangements have not been made, has a case under the 1986 Act.

The Kerala High Court, in Ahammed v. Aysha,625 also found that the husband is bound to pay the iddat period maintenance and reasonable and fair provision. The court also observed that under the CrPC, the husband should have means to maintain his wife, while the wife should be unable to support herself. But under the 1986 Act, every divorced wife is entitled to a claim of maintenance for the iddat period and further, a reasonable and fair provision.626

In the more recent case of Mytheen v. Saphya,627 the court discussed the situation where a divorce was given through mutual agreement. Through a written deed, the wife confessed to receiving Rs.11,000/-, which was deemed to relieve the husband of any further liability for maintenance. But after the

625 1990 (1) KL T 172.

626 The same view has been taken in Alavi v. Sofin 1992 (1) KL T 649.

627 1993 (2) KL T 322.
enactment of the 1986 Act, the wife petitioned for more. The court refused the
wife the benefits of the 1986 Act and held that, section 3 does not transgress
into the terms of any agreement between the parties and the wife is not entitled
to any further provision as found in section 3.\textsuperscript{628} The court here seems to have
tilted its balance towards men and wanted the parties to honour their contract.
However, was the court satisfied that the divorced wife was sufficiently
protected, as the Act indicates, by receiving Rs. 11,000?\textsuperscript{628} The ruling, at the
same time, stresses the importance of individual contracts, which can be used
cleverly by the wife, by stipulating future maintenance, in case of divorce.
However, a husband can also manipulate the contract by asking the wife to
sign a declaration that could nullify her rights under the 1986 Act.\textsuperscript{629}
The above discussion on the 1986 Act and the cases decided under it indicates
that now in modern so-called secular India there seems to be a reasonably well­
settled law on post-divorce maintenance for Muslim women. In our view, the
Supreme Court in India will sooner or later accept the position taken by the
Kerala and Gujarat High Courts. Oddly enough, this secular law is closer to the
teachings of the Quran. The judges have also made sure that after the
enactment of the 1986 Act Muslim men should not have any excuse to get
away without fulfilling their duty of supporting their divorced wives and thus
awarded generous amounts as maintenance. The amounts ordered as

\textsuperscript{628} Id.

\textsuperscript{629} Menski 1994, at p. 49.
maintenance under the 1986 Act are based on case-by-case interpretation of the law by the judges. The case law shows that now in India Muslim men will have to provide a reasonable amount as maintenance for their divorced wives. Not surprisingly, it seems that men would now like to be protected against the sword of "reasonable and fair provision and maintenance".  

630 For details, see Mahmood 1990, pp. 317-320.
Concluding analysis and recommendations for the development of the law in Pakistan and Afghanistan

In the preceding chapters, we have reviewed the laws on maintenance of wives in the broad perspectives of Islamic law, British India period, Pakistan, India and Afghanistan. In Pakistan and Afghanistan, the general presumption is that a woman is entitled to maintenance only during the subsistence of marriage. Once the marital tie is broken by either death or divorce the general assumption is that a divorced Muslim woman is not entitled to any maintenance once her iddat period is over. Almost similar approach exists regarding a widow. However, a widow is more at disadvantage because the general belief is that there is no maintenance for a widow once she loses her husband.

While, modern India, has made provisions to save divorced Muslim women from the apparent danger of becoming destitute. Since Indian law explicitly relies on Quranic provisions to support divorced Muslim wives, the question arises whether Muslim women are actually better protected in modern so-called secular Indian law than Pakistan or Afghanistan, countries that purport to have embarked on a process of Islamisation. If our present analysis is correct, the question one needs to ask is whether Pakistan and even Afghanistan can learn from the Indian experience and can actually, within the
framework of Islamisation, take steps to improve the economic and legal position of divorced/widowed women in their respective countries.

In this concluding chapter, we first, summarise our discussions in the previous chapters before we discuss the implications of our findings. We then come to recommendations for legal development in Pakistan and Afghanistan in the light of our discussions on the issue.

In the second chapter, we briefly discussed male’s liability of providing maintenance to their wives under the Islamic law, and later, in case of divorce/death, to their former wives. We found that men in Islamic law are duty-bound by the Quran to provide maintenance to their wives during the subsistence of the marriage. However, after divorce, according to the juristic and common understandings, the liability is limited to approximately three months, the iddat period. Thereafter, the law is not concerned with the divorced woman. Therefore, the general assumption has become that a divorced woman should find another man for her support. This may be another husband, her father, brother or any male agnate. Whereas, for the maintenance of a widow the law seems to silent and the general assumption is that a widow is entitle to a share in the property of her deceased husband and this ground express commands of Allah have been ignored.

In order to investigate the claim in Islamic law that the divorced Muslim wife’s entitlement to maintenance is limited to the iddat period, we looked first at the relevant verses of the Quran. The Quran evidently indicates that a husband’s
liability to maintain his wife extends beyond the end of the marriage. Moreover, the verse in the Quran has not restricted maintenance, as the general belief is, to the iddat period of the divorced wife. The Quranic provision is open-ended, but quite clear in its basic message: the divorcing man is supposed to be considerate and to share his resources with the woman he divorces.

After the finding that the Quran morally exhorts men to provide maintenance to their divorced wives, we discussed the period of the Prophet and his close companions, who became caliphs of the new Muslim Empire. We found that post-divorce maintenance never emerged as a recorded problem during that era, presumably because remarriage of divorcees was not a problem. As a result, as far as one can see, there are no authoritative statements in the Hadith literature as well. After the death of the Prophet and his close companion caliphs, the Muslim jurists assumed the role of the main interpreters of the Quran. The Muslim jurists who developed the Islamic law did not prominently discuss the husband’s obligation towards his divorced wife, beyond the iddat period, in the light of the Quran. The debate among the Muslim scholars, however, is focused on maintenance for the divorced woman during the iddat period. In fact, there is a visible division among the different schools of Muslim law on the issue of maintenance for the divorced Muslim woman during her iddat period. In this context, the Muslim scholars also questioned maintenance provisions for women who were divorced irrevocably. By doing so, they not only encouraged men to adopt the al-bida form of Muslim divorce,
to get rid of their wives immediately, but they also relieved men from paying any maintenance to their ex-wives at all.

Thus, the variant views found in the traditional Muslim law on maintenance for divorced Muslim women indicate that Muslim scholars operated within the patriarchal concepts in society and showed more concern towards the betterment of their own gender rather than that of the opposite sex. Therefore, the express but vague statements in the Quran on the issue of post-divorce maintenance were re-interpreted in such a way that post-divorce maintenance for divorced women beyond the iddat period was more or less ruled out.

In order to discuss the laws maintenance of divorced Muslim women in Pakistan and India, chapter three concentrated on the sub-continent under British India. The period of Muslim rule in India reveals that the issue of maintenance to divorced Muslim women never really came up as a problem. In other words, the juristic statements to the effect that Muslim divorced wives had no claims beyond the iddat period were accepted without further discussion and were applied. However, when the British began to reform Indian laws, new provisions on maintenance for neglected wives were promulgated, for the first time in 1861, to prevent vagrancy. However, the Muslim husbands preferred to divorce their wives, rather than to maintain them under the coercive rule of the new law. Thus, by divorcing their wives often through the al-bida form, the Muslim husbands not only got rid of their wives quickly, but also saved themselves from paying any monetary benefits to their
divorced wives. It was through the intervention of judges that divorced women were awarded maintenance at least for the iddat period. However, by doing so, they created precedents, later followed in the independent states of Pakistan and India, but also settled the law into a pattern of debating only maintenance for the iddat period and of awarding lesser amounts than women might have been entitled to under sharia. Thus, following the reasons of the ulema, the judges did not bother to take notice of the worsening fate of divorced Muslim wives.

In chapter four on maintenance laws in Pakistan, we found that despite repeated recommendations by the various Commissions, the government has been keeping a deaf ear when it comes to legislating on post-divorce maintenance for women. The case law reveals that the judges are not interested to look beyond iddat period maintenance for the divorced woman. Pakistan here simply follows the colonial model, which could rescue a divorced woman from becoming destitute. Divorced women even have to fight long legal battles to claim their stipulated dower. While men, despite the provisions of the MFLO 1961, can still divorce their wives instantly by the al-bida form, most divorced women are deprived of their iddat maintenance and deferred dower as well. Only those divorced women who could withstand the pressure of prolonged court procedure might succeed in getting some dower and iddat money. Our brief section on case studies of women affected by this law
showed that even upper middle-class women face tremendous hardship in this respect.

In chapter 5 the discussion is focused on Afghanistan. In Afghanistan, as in Pakistan, the law on maintenance shows some concern for wives i.e during the marriage. However, once the marital tie is broken the law is silent. It is seems that in presence of the strong tribal system maintenance to divorced wives or a widow falls on the family or tribe.

In Afghanistan, all the Constitutions that were promulgated from 1923 to 1990 provide equal rights to men and women. But in practice the women do not enjoy equal status.

One can while seeking, commonalities can argue that across the Duran Line Pushtoons live and follow the Hanafi sect of Islamic jurisprudence. In Pakistan Pushtoons are highly tribal and conservative, have adapted to the civil laws and modern court structure. They have not shown any apathy to modernity even of their family relating issues. Though Afghanistan currently lacks any judicial set up one can hope that once the process of reconstruction /restructuring is complete the issues involving the family matters will definitely be the questions in need of solution. Pakistan and Indian model can easily be adopted and acted on though very cautiously.

In chapter six the discussion is focused on modern India. India at first continued with the colonial model as well and acquiesced in the deprivation of divorced Muslim wives. However, and important change to the criminal law on
maintenance in 1973 included divorced wives among the potential beneficiaries of the law. By 1979, several important Supreme Court cases had established that under the new CrPC of 1973, a divorced Muslim wife was entitled to maintenance even beyond her iddat period. This set modern Indian law on a course of collision with traditional Islamic jurisprudence and the juristic agreement that divorced wives are not entitled to maintenance once the iddat period expires. In a highly politicised case, Mohd. Ahmed Khan v. Shah Bano, the Indian Supreme Court re-opened the question of maintenance for divorced Muslim wives and reconciled the pro-women polices of modern India with the original Quranic statements about post-divorce maintenance. It may be reprehensible to Muslims that five Hindu judges should be seen to interpret Islamic law, but these judges created nothing new, they simply rediscovered and re-affirmed the original pro-women message of the Quran and utilised it for the betterment of Muslim women. The subsequent enactment of the 1986 Act and the case law that has now emerged under it confirm that modern Indian law, as a secular legal system, is seriously concerned about the protection of destitute divorced wives of any community. Thus, under an outwardly secular regime, divorced Muslim wives are better protected in India than under Islamic law in Pakistan.

This scenario raises a number of important questions for Islamic law generally and for Pakistani legal developments in particular. Should modern Islamic law, based on Quranic foundations, grant women specific maintenance rights, which extend beyond the iddat period? On the other hand, should the general moral injunction of the Quran be used as a basis for a more general provision, to be determined on a case-by-case basis?

In this regard our findings show very clearly that the Quran in its teachings emphasised the uplift of weaker sections in society, including women. The social status of women was much degraded in Arabia. Therefore, we find verses of the Quran that show concern for the betterment of women, not only in matrimonial life, but also as a mother, sister and a daughter. In this regard, the Quran gave women the right of inheritance. One could argue that modern Pakistani law today needs to make conscious efforts to improve the position of women generally and of divorced wives, in particular. The moral admonition of the Quran have, obviously, not become reflected in the Islamic law on the subject. As we saw, concerning post-divorce maintenance, the verses of the Quran which speak for an additional favour in respect of women were either considered to be abrogated or were connected with other verses to give them a different meaning.

Pakistan is one of the Muslim countries, which introduced reforms to the personal laws. These reforms in Pakistan are based on the assumption of ijtihad, and therefore a conflict between the so-called modernists and the so-
called traditionalists was inevitable. Reference to *ijtihad* also indicates a desire to legitimise legal reforms in an Islamic context. Pakistan is an Islamic Republic and most of its laws are considered to be in accordance with the principles of Islamic law. Yet, on family laws there is no settled opinion. The only major reform is the MFLO, 1961, but according to the traditionalists, it is un-Islamic, and according to the modernists, it is inadequate. Pakistan's law on maintenance for divorced wives has remained unreformed. The present thesis clearly shows that the existing law is neither truly Islamic (traditionalist) nor modern (reformist); it is in urgent need of reconsideration.

The comparison between Indian, Pakistan and Afghanistan in this field offered itself not only because of common roots, but also because the Indian legal reforms, although they allegedly appear anti-Islamic, are in fact immensely beneficial to divorced Muslim wives. The ease with which the Indian law makers avoided the pitfalls of the Shah Bano controversy and created a new rule system that assists divorced Muslim wives offers hope that Pakistan and Afghanistan could achieve similarly effective reform. To this effect, the following recommendations can be made for the development of Pakistani law:

The experience of the MFLO in Pakistan shows that most of the people there are still not aware of the reforms which are supposed to have taken place under the modern state law. Therefore, instead of going for immediate changes in the law, one can suggest that teaching about family laws should not be restricted to legal education alone. Rather, efforts should be made to teach the Islamic law,
keeping in view the provisions of the MFLO, on marriage, dower and divorce at the grass-root level. This, will in particular, allow more people to learn about the contractual concept of Islamic marriage, dower as the right of married women and the various modes of *talaq*, other than the *al-bida* form of Muslim divorce.

This knowledge could then be utilised for the benefit of women by introducing particular stipulations into marriage contracts. In this regard, the marriage contract, due to the absolute power of termination of marriage with Muslim men, should clearly discuss the possibility of divorce and further upon such an event the obligations of the husband. Therefore, it is suggested that the contract of marriage should clearly stipulate the amount of any sum of money or property or both to be paid or given to the wife in case of termination of the marriage. Further, it should stipulate the provisions on *iddat* period maintenance and about a place of residence for the divorced wife. This could be achieved by adding a clause in the marriage registration forms, as required under the MFLO. The clause should particularly ask for the amount to be paid or property to be given to the wife on the event of divorce. Obviously, this

632 The same has been suggested by Malik for Bangladesh. For details see Malik 1994, pp. 39-40.

633 For a sample of the registration form used in Pakistan for the purpose of marriage see Hodkinson 1984, pp. 105-106.
would only be effective if more people learn to use stipulations in marriage contracts creatively, but I see this as a realistic aim.

A further immediate step to safeguard the position of divorced Muslim women in Pakistan is to regularise the concept of the so-called prompt and the so-called deferred dower. The amount of mahr agreed between the husband and wife should preferably be paid to the wife at the time of the marriage. If the parties agree to defer some portion of the stipulated mahr, in that case, it should specify the exact time period during which it is going to be paid and it should not be tied up with any future incidents, like divorce or death of the husband. However, there seems to be no reason to have a deferred dower in a contract of marriage, if it is then often not paid or even remitted by the husbands from their wives. Therefore, instead of considering the deferred dower to be an amount payable on divorce, the emphasis should be on setting an amount or property to be paid to the wife in case of immediate and unprovoked divorce. On the other hand in Afghanistan mahr is again treated as the price to purchase a wife. That is, the amount of mahr goes to the father of the girl and thus, in Afghanistan the mahr money is not the property of the wife. Therefore, there is a need to adopt such laws that instead of fixing any minimum amount to be the dower money the women should be allowed to take that money or property.

In order to save divorced women, in Pakistan, from the immediate threat of destitution, an amendment should be brought in the MFLO 1961, probably in
section 7 of the Ordinance. The amendment should ask a divorcing husband to
deposit a sum, as deemed sufficient by the chairman, within the iddat period,
for maintenance of the iddat period of the divorced wife. The failure on the
part of the husband to provide such maintenance should be a ground for the
divorced wife to claim such amount in a family court.

In order to provide speedy judicial remedy to women, in case of their unpaid
dower and other family-related issues, every family court should only deal with
such matters and work independently of any load of other civil litigation as is
the case at present.

Apart from the above immediate steps that could be taken to provide some
kind of financial security to divorced women, the Islamic Republic of Pakistan
and Afghanistan, under their constitution, are bound to make laws that are not
contrary to the teachings of the Quran and Sunnah. Therefore, both the
governments has no option but to implement new rules, under the guidance of
the Quran, which could give divorced Muslim wives a fair deal and protect
them from destitution and accompanying dangers to health and morality.

While it appears unrealistic at the moment to demand, or to suggest as a
reform, that divorced Muslim wives in Pakistan and Afghanistan should be
given a legal right to maintenance till remarriage or death, the above
recommendations emphasise the Quranic right of Muslim wives to be treated
with kindness and consideration. In the particular context of Pakistan,
Islamisation of the maintenance provision necessitates a combination of state
involvement and private initiative to achieve the desired results. Therefore, the above suggestions about marital contracts are, in practice, going to be more fruitful than the option of dramatic law reforms that would require political will which is just not there in a patriarchal set-up.

However, securing maintenance rights for divorced wives is not just a matter of protecting women; it is also a technique to protect any family from the eventual burden of having to provide for a divorced daughter or sister. Thus, one could suggest that this particular angle of the maintenance problem should be stressed in debates to emphasise that securing maintenance for divorced wives is a matter for society as a whole, not just the women who happens to be victims of the male prerogative to divorce.
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