

MAINTENANCE OF THE DIVORCEE

A Critical Analysis

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In the name of God, most Gracious, most Merciful

Preface

While delivering its verdict in the Shah Bano case in 1985, the Supreme Court of India made it obligatory upon the ex-husband of a Muslim divorcee to provide her with alimony till her last breath or until the time she remarries. This verdict was absolutely against Islamic law. Hence, the Muslim Personal Law Board, which is a representative platform of Indian Muslims, raised the banner of protest against this verdict and condemned it as a blatant interference in Muslim personal law. All Muslim countrymen stood by the Board as they registered their protests in each and every corner of the nation. In response, the Government of India diluted the Supreme Court verdict by passing the 'Muslim Women (Protection of Rights of Divorcee) Act' in Parliament in 1986, thereby approving of the Islamic law regarding maintenance. However, this Act has certain loopholes. Taking undue advantage of these, our courts are still issuing verdicts necessitating the ex-husband to pay alimony to his divorced wife if she has no source of income, for as long as she lives or until she remarries. One more aspect of the Shah Bano case was that it brought to the forefront the debate surrounding a divorcee's financial issues. Even the Qur'an began to be quoted to prove the divorcee's right to lifelong alimony. At that time, I had tried to clarify the Islamic stand on this issue and to answer the questions related

to Islamic jurisprudence and law that arise in this regard in an article published in the quarterly magazine, Tehqeeqat-e-Islami, Aligrah in its Jul-Sep 1985 issue. The same has also been included in my book, '*Musalman Aurat Ke Huqooq 'Aur Un Par Aitrazat ka Jaiza*' (Rights of Muslim Women- A Critique of the Objections). Keeping in view its importance, it has also been published separately in the form of a booklet, which is entering its second edition after certain revisions.

The details regarding the Shah Bano case have been provided at the onset. I hope it would help the reader in understanding its background. I pray that God accepts these efforts.

1st January 2014 CE

Syed Jalaluddin Omari

Author's Note

In the present age, while Islam is the subject of discussion, the rights of women in Islam and whether Islam fulfils the requirements of justice and equality in this regard have been constantly under discussion. In my book, **“Musalman Aurat ke Huqooq aur un par Aitrazat ka Jaiza”**, I have presented with arguments the viewpoint of Islam thereon and critiqued the objections thereto. Thanks to God that the worth of this book was acknowledged. Its five editions have been brought out till date. Its English translation, **“The Rights of Muslim Women —A Critique of the Objections”** has been published.

Meanwhile, the need of publishing one of its chapters ‘Nafqua-e-Mutallaqua’ separately was felt. Hence it has been published in Urdu and now it is being published in English.

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Maintenance of the Divorcee

One of the objections against the Islamic Law of divorce is that merely pronouncing the word 'divorce' throws the woman out of his house, helpless and at the society's mercy. This objection is very old and carries little weight. However, people mention it repeatedly as a great challenge to the Islamic *Shari'ah*, which has nothing in its support. Islamic scholars repeatedly brought to focus its evident hollowness. Nevertheless, no explanation can satisfy those whose main objective is to criticize the opponent, without ever listening to them. They wish people to accept their objections and do away with the imaginary flaws in the *Shari'ah*, and thus set the law 'right.' They argue that the highest punishment for divorcing his wife is to compel him to continue paying her maintenance charges life-long. However, in cases of her second marriage, employment, or self-support she may release her husband from that imposition. One of the more recent verdicts of the Supreme Court, in a way, declared this objection justified and has given legal sanction to the proposed demand of lifelong maintenance for the divorcee, or until her second marriage. So we feel obliged to take up this problem in some detail.¹

¹ The case in which this decision was pronounced is in brief some thing like this: Muhammad Ahmad Khan wedded Shah Bano in 1932. After 43 years of (uneventful) married life in 1975, the husband turned his wife out of his house. In April 1978 Shah Bano Begam filed a suit against her husband in the court of the Judicial Magistrate, Indore (Madhya Pradesh) seeking redress under Article 125 of the I.P.C.,

Some Evils

1. If a person were to demands transfer of his economic responsibilities to an utter stranger, the world will either take it to be a joke, or that he has a cracked nut, because for such a transfer of one man's burden to another, there must be some basis. One finds no such basis between two utter strangers. According to Islam, one of the bases on which rests the responsibilities is *nikah*. After entering the tie of wedlock, the woman devotes her time to meet the wide-ranging demands of the conjugal life and applying her capabilities and energies to it. In return for this, man undertakes the responsibility of her maintenance. The responsibility lasts so long as they hold to this marriage tie. Divorce snaps this tie and the

claiming Rs. 500/- p.m. as her maintenance charges. On Nov. 6, 1978, Muhammad Ahmad Khan divorced Shah Bano Begam irrevocably. In his rejoinder to the complainant's demand for maintenance, the argument put forth by Muhammad Ahmad Khan was that after irrevocable divorce the complainant was no more his wife and hence no maintenance was due to her. In August 1979, the Judicial Magistrate in his decision directed Muhammad Ahmad Khan to pay Rs. 25/ p.m. as maintenance. On behalf of Muhammad Ahmad, request was made to the High Court, Madhya Pradesh, for review of the lower court's decision. The High Court not only maintained status quo but increased the maintenance charges from Rs. 25/ to Rs. 179.20. Against this decision of the high Court, Muhammad Ahmad filed a special appeal in the Supreme Court of India. A constitutional Bench comprising five judges, after prolonged hearing, corroborated the Madhya Pradesh High Court, dismissed the appeal and maintained its (lower court's) decision that divorced wife had a right to maintenance even after the period of iddat had elapsed. This decision came to the public notice in 1985. (Courtesy Urdu Weekly, Da'wat, Muslim Personal Law Number, June 16, 1985 issue , Introduction to the Shah Bano case).

Laudable indeed is the attitude of Shah Bano that when she learnt that the Supreme Court's decision, though in her favour, being in contravention of the Islamic Shari'ah, requested the court to take back its decision, thus establishing a glorious example. (Qaumi Awaz, Urdu Daily, Nov. 16, 1985)

man on his part gets release from this economic cooperation. A certain remoteness and alienation creeps in between the two. If the divorce is irrevocable, the alienation is so vehement that it becomes easier for the woman to wed another man and for the man to wed another woman than for, these two persons estranged by divorce to reunite. In case of their desire to unite once again, Islamic Shari'ah demands that the woman should wed another man and he divorces her or dies before she can marry her earlier husband. Without adopting this tedious course, they cannot revert to their former relationship of husband and wife. Where divorce generates such alienation and remoteness, taking them farther than utter strangers, who is to impose whose rights on whom and who is to undertake the responsibilities of whom?

2. It comes to divorce between husband and wife only when they are negligent in the matter of their responsibilities and do not recognize the rights on a mutual basis. When it comes to this, there is hardly any cooperation and partisanship in the domestic life. Non-cooperation and conflict come to stay. However, one usually talks of divorce as though it were an excess, a tyranny on the part of the husband, and the woman has nothing to do with it. Whereas one cannot rule out that, the woman might have created conditions, compelling man to divorce her. Despite all this, imposing the maintenance of woman on man for the lifetime is a grave injustice to him, which one cannot justify.

3. After divorce and separation, when the woman is not prepared to cooperate with the man, likewise man naturally is desirous of throwing away the burden of his responsibilities relating to her. If even after

divorce, the economic responsibility of the woman remains resting on him, abstaining from divorce would have been more useful to him. Instead of divorcing and yet remaining burdened with woman's responsibilities, he would have been prepared to keep her suspended without divorce, depriving her of all her due rights. Some people take it for granted that a suspended woman can also demand her maintenance through legal action. However, one must bear well in mind that it is not so easy to have one's rights relegated to him through legal procedure. The other consideration should be that man would like to escape from it and there are so many outlets for him. Thirdly, where does the wisdom lie in making divorce so difficult just by the imposition of maintenance of the divorcee that a person for fear of payment of the upkeep of the wife may abstain from divorce, keeping her suspended? To perpetuate one mistake, committing another is not at all reasonable.

4. After divorce, both man and woman are at liberty to choose another partner for them, thus filling this void created by divorce. However, if even after divorcing her he has to bear the burden of the divorcee, the husband can hardly venture on a second experiment in matrimony. Compared with the total expenditure of the divorced woman and the new wife, he would rather think of and decide on a life of celibacy. This is most likely to make him morally corrupt and inclined to a career of dissoluteness.

5. There is an equal chance of the woman taking to the disagreeable and prohibited paths. If there is assurance of a woman's maintenance on a regular basis, even after divorce, she may be inclined to play the role of the naughty girl by vexing the husband off

and on and prompting him to divorce her. That is why we find that one of the promptings to divorce on a large scale is the wife's surety about the regular receipt of her maintenance from the husband all her life. Islam regards the tendency to divorce wrongful. It cannot support any rule or regulation, which promotes a tendency in which one seeks to counter every minor unpleasantness through divorce.

6. There is another aspect to it too. Divorce alienates man and woman. Continuance of maintenance mitigates this estrangement; wounds caused by separation gradually heal, meetings become frequent with time, and display and declaration of familiarity and love increases. Since there is no bashfulness between them in the matter of sex relations, this recent familiarity and frequent meetings take a wrong direction. One can never condone maintaining a situation, which is likely to lead to moral turpitude.

One possible rejoinder to this effect is the prevention of direct contact between the two through proper arrangement of intermediation. However, in so far as they live in close neighbourhood this will be difficult to ensure. Many untoward consequences are on record. Therefore, they often start living together as husband and wife as of old. The society too is indulgent in this abominable affair. The demand of the temperament of the Islamic *Shari'ah* is to avoid creating such conditions for any one that help and promote their advances towards dissoluteness, and yet remain almost oblivious of their direction or approach.

These are some of those social evils and complications that spring from declaration of the compulsive payment of the divorced woman's

maintenance. It is not easy to overlook and carelessly brush them off as mere whims.

The Rights of the Divorcee

Some people earnestly desire that they could somehow trace the life-long maintenance of the divorcee to the Qur'an. However, their difficulty is that the Book of Allah does not at all allow them even to humour on this issue. In case of divorce, problems of woman's dower, maintenance and *iddat* or waiting present themselves. The Qur'an and the traditions of the Prophet have definite injunctions in this regard. The only thing missing here is the incessant maintenance of the divorced woman.

1. Mahr (Dower)

We have discussed mahar earlier in these pages. There are four different situations relating to payment of mahar. Mahar is fixed and consummation a certainty, full amount of dower falls due to woman. Mahar is not fixed but the husband has gone unto her, entitling the woman to a dower rife in her family. Mahar is fixed but no consummation occurs. The dower due is just half of that payable after consummation. Moreover, in a case where there is neither fixation of mahar nor copulation, the woman will get *mata'* or some sort of parting gift from the husband.¹

2. Iddat Specified

The following are some of the verses of the Qur'an, which specify Iddat.

¹ For details see my book, 'Rights of Muslim Women: A Critique of the objections' chapter Mahar and related ordainments.

"In case of divorce after consummation iddat is the term of three periods." -Al Qur'an II: 228

"It is only three months in all those cases where menses are absent either due to early age, pre-puberty, or advancing senility or menopause."-Al Qur'an LXV: 4

"And there is no iddat for a woman who has been divorced before consummation." - Al Qur'an XXXIII: 49

3. Maintenance for Iddat Only

Now taking up the problem of maintenance and lodging:

Divorce is of two types - revocable in which the husband has the right of revocation and irrevocable in which that the husband loses this right. The laws relating to both are in brief like this:

a. In case of revocable divorce, the jurists are unanimous on it that the woman is entitled to both her maintenance and lodging.

b. They are one here also on the issue that when the woman is pregnant, she gets both board and lodge regardless of the nature of divorce - revocable or irrevocable. The Qur'an says:

وَإِنْ كُنَّ أَوْلَاتٍ حَمْلٍ فَأَنْفِقُوا عَلَيْهِنَّ حَتَّىٰ يَضَعْنَ حَمْلَهُنَّ

"And if they are pregnant then spend (your substance) on them until they deliver their burden."

- Al Qur'an LXV: 6

c. If the woman is not pregnant and the divorce is irrevocable Imam Ahmad, Da'ood Zahiri, and Abu Thaur with some others are of the opinion that neither her maintenance nor lodging is due from the husband. They take their cue from the report about Fatimah bint Qais. She says: "My husband divorced me irrevocably.

The Prophet s.a.w. pronounced on it, 'you are not entitled to maintenance from your husband now'.¹

In another report the word 'lodging'² accompanies 'maintenance'.

Imam Malik, Imam Shafi'i and some others are of the opinion that since the Qur'an has mentioned 'lodging for her' she will get it but no maintenance. Ibn Rushd, a Malikiite, declares it (Maliki opinion) weak and vacillating.³ The Hanafite School appears to have a strong stand.

d. The Hanafite school and some other 'ulama think that irrespective of the nature of divorce the woman will get both the maintenance and lodging, their argument being that since the Qur'an had expressly mentioned lodging the maintenance naturally follows, being an accompaniment of (somebody's stay). The Qur'an has made it binding on the husband to provide lodging for the term of the iddat, her support too naturally falls due on him; lodging makes maintenance inevitable. The diction of the Qur'anic verse supports the arguments:

أَسْكِنُوهُنَّ مِمَّنْ حَيْثُ سَكَنْتُمْ مِنْ وُجْدِكُمْ وَلَا تَضْرِبُوا لَهُنَّ لِضْمَانًا عَلَيْهِنَّ

"Let the woman live (in iddat) in the same style as you live, according to your means: annoy them not so as to restrict them."

- Al Qur'an LXV:6

Jassas says that the words of the Qur'anic verse are general in nature covering both the revocable and the irrevocable. The words "according to your capacity"⁴ point to the fact that lodging in the property

¹ Muslim, Kitab-ut-Talaq, Babul Mutallaqatil Bain la Nafqata Laha

² Ibid

³ Bedayatul Mujtahid: 2/103

⁴ Zamakhshari, Alujdo, Al wuso Wat-Taqato, Al Kashshaf: 2/1497

of the husband is compulsory. This naturally demands the right of maintenance also (equally) compulsory, since lodging is a part of maintenance. In addition, the instruction that "she should not be annoyed to restrict her," means that annoyance and restriction are just as much applicable to maintenance as they have been said about the problem of lodging.¹

The report about Fatimah bint-e-Qais stands cancelled on the plea that 'Umar r.a.a., the second rightly guided Caliph, did not accept it. He records

لأنترك كتاب الله و سنة نبينا ﷺ لقول امرأة لأندرى لعلها حفظت او
نسيت لها السكنى والنفقة.

*"For the sake of a woman's statement we cannot abandon the Qur'an and the Sunnah of the Prophet s.a.w. Allah alone knows whether she remembers it (right) or has forgotten it. There is lodging as well as maintenance for the divorcee."*²

That means according to 'Umar r.a.a., the Book of Allah and the Sunnah of the Prophet both allow lodging and maintenance both to the divorced woman.³

It is now evident because of this authority that the maintenance and lodging of the divorcee is binding on the husband for the term of her iddat, but nothing after that.

Mata' for the Divorcee

Those who try to prove the maintenance for the divorcee by the Qur'an, present the following verse in their support:

¹ Jassas, Ahkamul Qur'an.: 3/565 .

² Muslim, Kitab-ut-Talaq, Babul Mutallaqatil-Baine, La Nafaqata Laha

³ For detailed discussion on this topic see: Bedayatul Mujtahid: 2/102,103 Jassas: Ahkamul Qur'an: 3/564-570. Ibn Qudamah, Al Moghni: 7/606-610

وَلِلْمُطَلَّقاتِ مَتاعٌ بِالْمَعْرُوفِ حَقًّا عَلَى الْمُتَّقِينَ ﴿٢٤١﴾

"For divorced women is a suitable gift. This is a duty on the righteous."
- Al Qur'an II: 241

One of the arguments derived from this verse is that it makes payment of mahar and mata' compulsory. After divorce so long as she lives, she should get this mata'to subsist. The Qur'an has mentioned mata' but not specified it, leaving it to popular usage. That means it is not definite and is according to the custom of any particular age. According to these advocates, fixation of this mata' in the form of maintenance for her life-term or until second marriage, it would be according to the dictates of the Qur'an and not in contravention of it. Its payment may be in a lump sum or in instalments (according to the convenience of the parties) but he must pay.

This quaint sense of mata' is neither supported by the Arabic lexicon nor the context of the Qur'an, nor the companions of the Prophet, their followers (tabi'een) and the jurists of the Muslim Ummah take it to mean maintenance. To understand fully the sense of usage of this word mata' or Muta'ah in the foregoing Qur'anic verse, the following questions we must deliberate on the following questions:

- i. What is mata'?
- ii. Is it moral or legal in nature?
- iii. If legal, is it so for every divorced woman in general or some particular ones?

The Literal Sense of Mata'

Literally mata' means petty personal effects and things serving some purpose only for a brief span of time. Zahri says:

المتاع في اللغة كل ما انتفع به فهو متاع.

*Mata' literally means something that can be utilised beneficially.*¹

Imam Raghīb says:

المتاع انتفاع ممتد لوقت.

*To derive benefit for a short time is mata'.*²

He further goes on to say:

كل ما ينتفع به على وجه ما فهو متاع و متعة.

*Every thing from which one can be derive benefit of any sort whatsoever is mata' or mata'ah.*³

Imam Razi says:

أصل المتعة والمتاع ما ينتفع به انتفاعاً غير باقٍ

*mata'ah and mata' is in fact something that serves and benefits but not for long (transient).*⁴

The Use of Mata' in the Qur'an

The Qur'an uses the word mata' to denote various utility articles - things of daily use in houses, for instance it directs the strangers to borrow the articles of daily use in the following manner:

وَإِذَا سَأَلْتُمُوهُنَّ مَتَاعًا فَسَأَلُوهُنَّ مِنْ وَرَاءِ حِجَابٍ

"And when ye ask (his ladies) for anything ye want, asks them from before a screen. -Al Qur'an XXXIII: 53

Metallic substances such as utensils and implements:

¹ Lisan-ul-Arab, (root 'M'-ta-'a)

² Al Mufradat fi Gharib-il-Qur'an (root m-ta-'a)

³ Ibid

⁴ Tafseer-e-Kabeer : 2/284

وَمِمَّا يُوقِدُونَ عَلَيْهِ فِي النَّارِ ابْتِغَاءَ حِلْيَةٍ أَوْ مَتَاعٍ زَبَدٌ مِثْلَهُ

"Even so from that (ore) which they heat in the fire to make ornaments or utensils therewith, there is a scum likewise."

- Al Qur'an XIII: 17

In Surah Yusuf (Q. XII: 79) it has been used for a bowl or a measure and at another place it has been used for the hunter's tackle and personal effects and in Surah Ma'idah (Q. V: 17) it has been used for water game.

Similarly, along with these things of meagre importance, all those useful articles and substances of supporting life have been termed mata'. The Qur'an says:

وَلَكُمْ فِي الْأَرْضِ مُسْتَقَرٌّ وَمَتَاعٌ إِلَىٰ حِينٍ ﴿٣٦﴾

"On earth your dwelling place and your means of livelihood for a time.

- Al Qur'an II: 36

The entire world with all its paraphernalia, including articles of luxury are referred to as mata'.

وَإِنْ كُلُّ ذَلِكَ لَمَّا مَتَاعٌ الْحَيَاةِ الدُّنْيَا وَالْآخِرَةُ عِنْدَ رَبِّكَ لِلْمُتَّقِينَ ﴿٣٧﴾

"... (and also adornments of gold). But all this was nothing but enjoyment of the present life: The Hereafter in the sight of thy Lord is for the Righteous.

- Al Qur'an XLIII: 35

Here, compared with the Hereafter life, the worldly existence had been termed as mata'. What is meant is that in keeping in view the life-eternal, Hereafter, and the bounties of the Benevolent Lord, this world and its riches and luxuries appear 'Mata'-e-Qaleel' (very very little or almost nothing).

وَمَا الْحَيَاةُ الدُّنْيَا فِي الْآخِرَةِ إِلَّا مَتَاعٌ ﴿٣٨﴾

"But the life of the world is but little comfort compared to the Hereafter." [53] - Quran XIII: 26

At another place, it says:

﴿فَمَا مَتَاعُ الْحَيَاةِ الدُّنْيَا فِي الْآخِرَةِ إِلَّا قَلِيلٌ﴾

"But little is the comfort, as compared with the Hereafter." - Al Qur'an IX: 38

Mata' in the Context of Divorce

Now let us see what the mata' of divorce means. The Qur'an ordains mata' of divorce is absolute without any conditions. It has not been specified what is meant by 'mata'. It is evident, that even considering it compulsory, anything of any value whatsoever given after divorce, fulfils this demand.

The scholars, who have laboriously investigated the true sense of the words used in the Qur'an and the traditions of the Prophet, do not for a moment take it to mean that maintenance is to be paid to the divorced wife life-long or she may be supported for a specified period even. According to them, it means that the husband should present her with some gift to please or console her in her grief.

Imam Raghīb, who is a linguist of high standing where Qur'anic terminology is concerned, says about mata'-e-Talaq:

... فالمتاع والمتعة ما يعطى المطلقة لتنتفع به مدة عدتها.

Whatever the husband confers on his divorced wife for her benefit is mata' or Muta'ah.¹

That means he regards the maintenance during the period of iddat mata' and does not consider her entitled

¹ Al Mufradat fi Gharib-il-Qur'an (root ma-ta-'a)

to any other mata'. (We present the opinions of the jurists a little later).

An expert lexicologist of the diction of Hadith; Allamah Ibn Atheer elucidates the term "mata'-e-Talaq" in these words:

ويستحب للمطلق ان يعطى امراته عند طلاقها شيئا يهبها اياه-

It is desirable for the person divorcing his wife that at the time of parting of ways he should give her some sort of gift.¹

Allamah Suyuti prepared an abridged edition of Ibn Atheer's book on the lexicon of the Hadith. In his book, he mentions:

متعة الطلاق اعطائها شيئا يجبر به كسرهما-

Mata'-at-Talaq simply refers to present to the woman something to console her in her grief.²

The Context in which the Qur'an has mentioned it also devotes the purpose behind it. It is said that

"The woman divorced before consummation shall be entitled to half her fixed dower, and the one with dower unfixed shall get only mata' or a gift."

- Al Qur'an II: 236-237

Now, if the dower does not mean life-long maintenance, how can a mata' come to mean life-long support of the divorcee?

Mata' Not to be Taken as Maintenance

The word mata' cannot mean maintenance for a life-term for two reasons:

a. The Qur'an has specified that after divorce, the maintenance and lodging of the woman shall be the

¹ An-Nihayah fi Gharibil Hadeeth : 4/76 (root ma-te-'a)

² Ad Durrin-Nasheer Ala Hamish-in-Nihayah (root ma-ta-'a)

liability of man for the term of the Iddat and there it ends. To make it binding on man after the expiry of the iddat for the lifetime of the divorcee or her second marriage would be an addition to the divine injunction, which is highly objectionable. The liability from which Allah declared him free in view of the many considerations to overburden him once again with the same would be a wilful disregard of those considerations.

b. We discussed earlier in detail that the responsibility of the wife's maintenance in return for her services to the household devoting her time and energy to run it efficiently. After the divorce, since she is relieved of that duty and the man has no more claim over them, on what basis can she claim further support and maintenance.

The Opinions of the Companions and Their Followers

Let us now try to find out what was the practice of the companions and their followers in this behalf. Abdullah Ibn Abbas r.a.a. says that the highest standard of the mata' is a slave for the divorcee. a level lower is a suit (three piece) and the least is some silver (money), which according to Abdullah Ibn 'Umar r.a.a. should at least be thirty dirhams.

Among the tabi'een, Qazi Shuraih has fixed mata' at five thousand dirhams. Imam Sha'bi has declared it to be the woman's dress used inside her house, a quilt and jilbab. Hasan Basri says that there is no fixed amount for mata'. Everyone will provide it according to his capacity. Ata ibn Abi Ribah has also said more or less the same thing.

There are also examples of benevolent elderly persons who went out of their way in cooperating with the divorcee'.

Abdullah bin Auf r.a.a. gifted a black slave girl when he divorced one of his wives, Tamadhar.

There has also been a report of Hasan r.a.a. that he gave ten thousand dirhams as mata' to one of his divorced wives.

These and many similar examples portray generosity and beneficence. However, it is not appropriate to generalize them as law.

Jurists' Viewpoint

The jurists have tried to pronounce upon it according to the circumstances extant then.

The Hanafite School recommends for the divorcee a change of clothes (usually a three pieces of cloth) but left to the prevailing trends of the times. The standard and quality of cloth will depend on the husband's life style and standard of living. Another group opines taking into consideration the standard of life of both the husband and wife. The Hanafites, besides, have consensus on it that mata' cannot exceed half the 'mahr-mithl' since it is in lieu of it, i.e. not less than five dirhams either,¹ (since according to the Hanafite school, the minimum of dower is ten dirhams). If one takes it to be half of the dower in vogue, it can be more than the cost of dress.

In Malikite jurisprudence, whatever a person gives, after divorce to his wife in keeping with his financial status in Muta'ah.²

¹ Raddul-Muhtar alad-Durril-Mukhtar : 2/462

² Al-Sharah-us-Sagheer: 1/616

Imam Shafi'i specified Muta'ah thus: For a man of substance a servant and for a person of the middle class a change of clothes. The minimum prescribed for it is thirty dirhams or something of that value. Moreover, the husband and the wife have the right to any agreement on more or less than that.¹

The Hanbalite School presents more or less the same point and pronounce that Muta'ah shall be that which man's status permits. The higher standard of it is a servant and the minimum is a dress that can suffice her for her prayer (a three-piece suit including a sheet). The husband can endow her with more than that at will and the woman can accept less than that if she is so pleased.²

The Jurists have tried to fix mata' according to the then existing conditions and adjustments can be made under changed conditions in a particular age. The Qur'an and the Hadith have left mahar and nafqah (maintenance) unfixed, so has Muta'ah remained unspecified, depending on the conditions through the ages. On the difference of opinions among the companions and the tabi'een, Allamah Abu Bakr Jassas has opined:

هذه المقادير كلها صدرت عن اجتهاد آرائهم ولم ينكر بعضهم على
 بعض ما صار اليه من مخالفته فيه فدل على انها عندهم موضوعة
 على ما يؤديه اليه اجتهاده.

"The stated quantum of Muta'ah is the ijtahadi opinions of our ancestors. None questioned the opinion of another since he himself held a different opinion of his own. That shows they were their own considered opinions (ijtihad)." (Ibn Qudamah : Al-mughni : 6/716)

¹ Baghavi, Ma'alim ut-Tanzeel: 1/204

² (Khateeb Sharbeeni : Al-Sirajul Muneer : 1/153)

According to some jurists, in fixing muta', one must consider the social and economic status of only the man and not the woman, since the Qur'an declared that:

"The moneyed shall endow Muta'ah according to their means and the poor according to their means."

- Al Qur'an II: 236

However, the more agreeable opinion is that in apportioning Muta'ah, the consideration should be for the status of both. Jassas says that "sticking to m'arroof (pious popular opinion) has been stressed concerning Muta'ah. Overlooking the status of woman is against m'arroof, and a lady of an affluent family be treated like a poor common woman in the endowment of Muta'ah"¹

The foregoing discussion makes it amply evident that Muta'ah refers to the items gifted according to status to a divorcee as a mark of sympathy and to console in her grief. Trying to enlarge its scope and stretching it to life-long maintenance is an excess that one cannot expect of any serious and reasonable person.

Obligation to pay Mata': Moral or Legal

Let us now take up the question whether mata' enjoys only a moral position or it is legal in nature. The point of view of Imam Malik on this issue is that it is agreeable to give the divorced woman something by way of gift. It is not a compulsory obligation. His argument rests on the Qur'anic words "This is a duty on the righteous," as the closing phrase of the verse. The preceding verse (II: 236) points out Muta'ah as piety and Ehsan in the closing words. We cannot

¹ For details see : Ahkamul Qur'an : 1/513-515

declare anything exemplifying taqwa and ehsan obligatory for all.¹

Among the tabi'een, Qazi Shuraih was also of the same opinion. One report records that a person divorced his wife after consummation. She filed a suit in the court of Qazi Shuraih claiming Muta'ah. The Qazi persuasively remarked during his talk to the husband that he should not deny himself the enviable position of joining the ranks of the righteous and the pious. However, he did not compel him for Muta'ah.²

According to Imam Malik, the woman divorced before consummation but with dower fixed, shall get half the fixed dower but shall not be entitled to Muta'ah.

One of the reported opinions of Imam Malik that Muta'ah considers muta' obligatory, but his well-known opinion is the one stated above.³

The majority of the jurists regard Muta'ah obligatory for the divorcee. They argue that the Qur'an uses the words "matt-i-'u-hunna" (give them mata'h - Q. II: 241). It obligatory except for there is contrary evidence. Quran says: "For the divorced women, there is mata'h," which also indicates obligation. Further, the phrase "For the divorced women" indicates that it will be their property, and therefore, they could demand it.

The words "*this is a duty on the righteous.*" (Q. II: 241) also suggest on its obligatory nature. It implies that Muta'ah is obligatory on the righteous. To further stress it, it has been said, "*is due from those who wish to do the right thing,*" (Q. II : 236).

¹ Ahmad Al Darweer, Al-Sharah-us-Sagheer : 217/218

² Baghawi : Ma'alim ut-Tanzeel. 'Ala Hamish il-Khazin : 1/204

³ Sharah-us-Sagheer : 2/617

Can it possibly mean that it is binding only on those who fear Allah and wish to do the right thing and not others? In response to this query, Allamah Abu Bakr Jassas has proved with precepts from the Qur'an itself that it does not at all mean to eliminate those who are not righteous. It is there just to stress on the command and that it may be further persuade people to this righteous deed, and thus elevating themselves to the ranks of the righteous and the pious.¹

Is Muta' Obligatory for Every Divorcee?

Now the question arises that if Muta'ah is obligatory in nature, is it so for every divorced woman or obligatory for some and not for others.

The Hanafite Fiqh opine that Muta'ah is the due of that woman whose dower was not fixed, and she got divorced before consummation. Because, it is she for whom the Qur'an has ordained it (Q. II: 236). Other divorced women get their mahar and maintenance for the entire iddat term, and therefore it is not approvable but obligatory.²

Imam Ahmad too is, of the same opinion.³

Imam Shafi'i says Muta'ah is obligatory for all the divorced women save those with fixed mahar and divorced before consummation. Qur'an is explicit about it that she will get half her fixed dower.⁴ (Q. II : 237) Among the companions Abdullah ibn 'Umar r.a.a. is reported to have the same opinion.⁵

¹ For the entire discussion in detail see : Jassas, Ahkam-ul Qur'an: 1/508-509

² Raddul-Muhtar 'Alad-Durril-Mukhtar: 2/461-462

³ For details see Ibn Qudamah; Al Mughni : 6/715

⁴ Bedayatul-Mujtahid : 2/205-106

⁵ Baghawi : Ma'alim-ut-Tanzeel 'ala Hamish il-Khazin : 1/204

Sa'eed bin Jubair, Abul 'Aliyah, Hasan Basri, and some others r.a., have said that every divorced woman must get Muta'ah as a matter of duty since (for the divorced woman is Muta'ah) is a Qur'anic injunction, which is general in nature, and there is no justification for any particularisation. The idea that only those divorced women without their dowers fixed will enjoy Muta'ah is also erroneous, since there was consummation as well as fixation of dower for the Prophet's s.a.w. consorts; but in case of divorce the Qur'an ordained payment of Muta'ah to them. It says:

يَا أَيُّهَا النَّبِيُّ قُلْ لَأُزَوِّجَنَّكُمْ إِنْ كُنْتُمْ تُرِيدُونَ الْحَيَاةَ الدُّنْيَا وَرِيثَتَهَا فَتَعَالَى
أَمْتَعْتُكُمْ وَأَسْرَّخْتُكُمْ سَرَاحًا جَمِيلًا ﴿٢٨﴾

*"O Prophet! Say to thy consorts that if it be that ye desire the life of this world and its glitter then come, I will provide for you enjoyment and set you free in a handsome manner."*¹

- Al Qur'an XXXIII : 28

This is the opinion on record of 'Ali r.a.a., Imam Zahri, Ibrahim Nakha'i, 'Ata bin Abi Ribah and Sufyan Thauri.²

As also of Zahirites. Ibn Hazam Zahiri opines compulsory entitlement of all divorced women to Muta'ah, whether the divorce is revocable or irrevocable, consummation or no consummation, *mahr* fixed or unfixed, since 'for the divorced woman there is Muta'ah according to the pious popular usage' is a general ordainment and it would be improper on our part to make it selective.³

All these opinions are similar. There could be some difference in their details. Those in favour of

¹ Ibn-e-Kaseer ; Tafseer : 1/288

² Ibn-Hazm : Al Muhalla : 10/247

³ Ibid., p. 245

making Muta'ah or parting gift to the divorced women obligatory may favour this (immediately foregoing) opinion, but there are several drawbacks to it.

Firstly, the woman divorced before consummation, with her dower fixed, shall get half of her fixed dower and Muta'ah, and in case of non-fixation of mahar, she shall get only Muta'ah, which appears to be sort of iniquity.

Secondly, declaring Muta'ah compulsory would mean that like mahar and maintenance, it is also an undeniable right, which she can claim legally. Undoubtedly, as stated above, the opinion of the Zahirites and some others is in support of it. The well-known commentator of the Qur'an, Ibn Jarir Tibri, too subscribes to it, and according to him Muta'ah like mahr is binding upon the divorcing husband and in case of non-payment, like mahr and other dues, the aggrieved party can sue for it in a court of Law.¹

This opinion appears to be unsound in view of the fact that the Islamic courts never pronounced such decisions. Imam Sha'bi says:

و الله ما رأيت احدا جس فيها (في المتعة) و الله لو كانت واجبة لحبس
فيها القضاة.

By Allah! I never saw any one imprisoned for non-payment of Muta'ah. By Allah! If it were obligatory, the Qazis would have put the defaulters behind the bars. (Tafseer Ibn-e-Katheer : 1/297)

In the foregoing pages, we discussed in detail the meaning of mata' and its legal position, and presented the opinions of various jurists in this behalf. It is amply manifest that one cannot prove on the authority of the

¹ For details see : Ibn Jarer Tabri : Jami'-ul-Bayan, fi Tafseer-il-Quran : 2/308-309

Qur'an and Hadith that there is any responsibility of supporting the divorced wife on the husband, nor from the antiquity to posterity has any one expressed his opinion in its favour. It is a baseless idea that finds support nowhere.

The Economic Problems of the Divorcee

Lastly, let us take up the question of the economic responsibility of the divorced woman. This question is hurled at the Muslim community in such a way that after divorce the Muslim woman finds herself in such a difficult fix to which solution has to be found anyway. Then they put forth all sorts of suggestions, delving into the Qur'an for the support of their new fangled ideas where the problems of nikah and divorce have been presenting themselves for the last fourteen hundred years. Divorce is nothing new. There have been cases from the early period of Islam and problems relating to both young and old divorcees have been dealt with. The reasonable course that should have been adopted was to find out whether Islam has presented any solution to this problem. Rather they should have expected that like so many other problems it must have provided guidance here also. And overlooking all the considerations to think rather make others believe that Islam has suggested no solution to this serious problem, the Muslim thinkers never cared to give a serious thought to it all this while, is an amazing example of sheer ignorance.

According to Islam, the relationship between the husband and wife gets snapped for good, and therefore, it has not at all associated the problem of the financial burden of the woman with the estranged husband but solved it in other ways.

1. It is a baseless proposition that if a divorced woman does not receive her maintenance from the husband, there will be no way of providing her subsistence and she is most likely to starve to death. There are probably some other motives behind this idea rather than any sympathy for the woman. Otherwise, it is a fact known even to an ordinary student of Islamic theology that under the Islamic Law there are various means financial resources for a woman, which include inheritance, mahar, legacy and others. Therefore, the possibility of her becoming financially well-off from either or all of the above mentioned sources, guaranteeing her subsistence satisfactorily cannot be overlooked.

2. Earlier, we have convincingly proved that though the woman is not under any compulsion to undertake any economic effort for her support, there is no bar on her taking to a permitted source of earning her subsistence. She can seek employment, undertake agriculture and trade, and partake in industry. In short, she has a perfect right to undertake any economic endeavour, of course within the Islamic limits. Success in this field will enable her not only to support herself away from external aid, but can even extend a helping hand to others in need.

3. Islam regards conjugal life for man essential. It has instructed the entire society to help the individuals in taking to conjugal life.

وَأَنْكِحُوا الْأَيَامَىٰ مِنْكُمْ وَالضَّالِّجِينَ مِنْ عِبَادِكُمْ وَإِمَائِكُمْ

"Marry those among you who are single and the virtuous ones among your slaves, male or female."

- Al Qur'an XXIV: 32

The word occurring in the Qur'anic verse above is 'Ayama', the plural form of Ayyum covering in its meaning both the unmarried man and woman. It also encompasses those who have not yet begun their marital life, besides those without a husband due to divorce or widowhood. There is no doubt that in the present age, the inclination of Muslims towards second marriage of the divorcee and the widow is at low ebb. But, Islam is in favour of giving it a fresh fillip and reasonably so. The Islamic teaching in this behalf is that if due to disharmony in temperament a husband and wife have parted ways or the death of one of them has closed the chapter of his or her conjugal life, a match should be found for their remarriage, since living alone permits corrupting influences on the morals and may blot characters. Acting on this teaching will itself solve the problem of the divorced and widowed women, since in conjugal life she becomes the liability of the husband. That is why, so long as they adhered to this teaching; never did any problem of the support of the widow and the divorced woman confront the Muslim society. This is the best solution of this problem and it must be promoted.

4. If the divorced woman and likewise the widow fail to find suitors and have no means of support of their own, Islam has imposed the responsibility of their support on their families.

In this connection what should be kept in view is the principle that under the Islamic law the woman is never under compulsion to endeavor in the economic field for her livelihood.¹ In the Islamic Fiqh, it has been said, *"To be a woman is enough for*

¹ For some details of this see, the writers book, 'Aurat aur Islam', pp. 29, 30

incapability,"¹ meaning thereby that for various reasons she lacks the capacity to earn her own bread. And that is why others have to shoulder that responsibility. The husband supports her under all circumstances. After divorce if she is not self-sufficient and her progeny is in a position to work and earn their bread, it becomes charged with her support. Here it would be in the fitness of things to make it evident that according to our jurists the maintenance of the parents includes all those facilities that have come for mention under the maintenance of wife.

ان جميع ما وجب للمرأة و جب للأب والام على الولد من طعام و شراب
و كسوة وسكنى حتى الخادم-

"The things included in the maintenance of wife, all those will also be included in the maintenance for the parents, namely food, clothing, board and lodging, and even a servant is also included." (Ibid. : 2/933)

If she does not get remarried after divorce and her children too are unable to undertake her support the burden of her maintenance shall be transferred to her father just like it was before her marriage. The expositor of the famous book of Hanafite Fiqh-Hidayah, Allamah Ibn-ul-Hammam writes:

فالاناث عليه نفقتهن الى ان يتزوجن اذا لم يكن لهن مال و ليس له ان
يواجرهن في عمل و لا خدمة و ان كان لهن قدرة و اذا طلقت و انقضت
عدتها عادت نفقتها على الأب-

"The maintenance and support of the daughters until such time as they get married, if they are lacking in substance, is the responsibility of the father. He cannot engage them in any work or service, even if they are able to undertake such jobs." If one of them gets

¹ Raddul-Muhtar 'Alad-Durril-Mukhtar : 2/925

divorced after the expiry of the term of iddat the responsibility of her maintenance will once again revert to the father." (Fathul-Qadeer : 3/344)

In the absence of father, whoever happens to be her closest mahram (eternally, prohibited to her), such as uncle, brother and others (maternal uncle, maternal and paternal grandfathers) shall be held responsible for her support. If none of these relatives are there or are incapable of shouldering this responsibility, the Islamic state steps in to undertake her support. In the absence of an Islamic state the Muslim society should come forward to take her charge. The society of Indian Muslims desirous of solving the problem of such women can easily do so.¹

Those who go on raising objections for their own sake, jumping from one to the next, it appears they are totally ignorant of the 'Islamic Law of Maintenance'. We have shown just a glimpse of it here. They should try to acquaint themselves with its details.

¹ This remark of ours is from the Islamic point of view. Our country, India, is a welfare State and as such it is also the responsibility that those who are helpless in the matter of their economic support should receive help and support from the state.