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Women's Right to Maintenance in Legal System of Pakistan with Special Reference to Judgments of Superior Courts

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ABSTRACT

In Islamic Law, provision of maintenance is the primarily duty of parents particularly the father; sons till the age of majority and daughters till marriage. After marriage, a husband is obliged to maintain his wife during marriage and if divorced till 'iddah. There are diverse opinions for provision of maintenance after 'iddah and Pakistani legal system is also silent in this regard. Although, some of the recommendations are under discussion for enacting law on provision of maintenance to a divorcee after 'iddah till remarriage or during her whole life. Maintenance signifies provision of basic necessities of life to wife that includes food, clothing, lodging and other essential expenses which a husband is liable to provide according to his financial capacity. In Islamic Law, maintenance is considered one of the fundamental rights of a woman and she can dissolve the marriage for provision of non-maintenance. Pakistani law is also providing this right to a wife under section 2, sub-section (ii) of Dissolution of Muslim Marriage Act 1939. The superior judiciary is also playing their role for provision of maintenance during marriage, during 'iddah period to a divorcee and past maintenance. The current paper discusses the concept of maintenance in Islamic Law and Pakistani law. It also signifies the legitimacy of quantum of maintenance in Islamic Law and legal system of Pakistan. The present paper denotes that in which circumstances wife is entitled for maintenance in Islamic Law by examining the decisions of superior courts. This paper focuses on the examination of judgments of Pakistani superior courts in provision of maintenance to a woman either during her marriage, 'iddah period or past maintenance and highlights the role of the superior judiciary in protection of woman's financial right.

Keywords: Maintenance, Woman, Islam, Financial Right, Shari'ah, Pakistan, Superior Courts.

Introduction

In Arabic language, the term for maintenance is used “*Nafaqah*” that includes food, clothing and other necessary expenses of life.¹ The orthodox Muslim jurists defined the term “*Nafaqah*” as “everything that is essential for sustenance of life that includes food, clothing, dwelling, accommodation and other essential necessities of life.”² Justice Dr. Tanzil-ur-Rahman states that maintenance includes proper food, clothing and accommodation.³ For provision of maintenance to a wife, Jamal Nasir, a contemporary Arab scholar states as

“It is the right of the wife to be provided at the husband's expense, and on a scale suitable to his means, with food, clothing, housing, toiler necessities, medicine, doctors' and surgeons' fees, baths and also the necessary servants where the wife is of a social position which does not permit her to dispense with such services, or when she is sick”.⁴

After coming into a marital relationship with a husband, a wife is entitled for maintenance and it is her right, cannot be denied by the husband but he is legally bound to provide to his wife food, drinking, clothing and accommodation according to his financial capacity during marriage, and till *'iddah* to a divorcee. A wife also can dissolve her marriage if she is not properly maintained by her husband in the provisions of Islamic law as well as the legal system of Pakistan.

Legitimacy of Maintenance in Islamic Law

Maintenance is recognized by a number of sources of Islamic Law including the Holy Qur'ān, Sunnah of the Holy Prophet (PBUH), the Consensus and Logical Reasoning. The Holy Qur'ān has denoted maintenance as a right of woman and children in the several verses as states

*“But he (the father) shall bear the cost of their food and clothing on equitable terms.”*⁵

There are some other verses of the Holy Qur'ān explicitly denote that that provision of maintenance is a financial right of a woman and the duty of the husband is to maintain her according to his financial capacity and affordability. Some of the verses are as under:

a) *“Let the women live (in 'iddah) 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 (offspring), 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."*⁶

b) *"Let the man of means spend according to his means: and the man whose resources are restricted, let him spend according to what Allah has given him."*⁷

c) *"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."*⁸

d) *"For divorced women maintenance should be provided on a reasonable scale and this is a duty on the righteous."*⁹

e) *"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."*¹⁰

It is evident by the above mentioned verses that a husband is legally liable to maintain the wife during marriage or a divorcee during 'iddah period. These verses also indicate that wife is to be provided maintenance in accordance with husband's financial capacity.

The Holy Prophet (PBUH) also has directed for paying maintenance to the wife in many aḥādīth as stated:

*"Give them food what you have for yourself, and clothe them by which you clothe yourself, and do not beat them, and do not revile them."*¹¹

Muhammad Abadi explained that this Hadith includes food, drinking, clothing, and accommodation according to the financial resources of husband as being rich or poor and he has to treat the wife fairly and nicely.¹²

In another Hadith Hind Bint 'Utba complained to the Holy Prophet (PBUH) that her husband is not maintaining her and children properly and she was permitted to get secretly from husband's property for essential necessities as stated:

*"Take what is sufficient for you and your children, and the amount should be just and reasonable."*¹³

The Holy Prophet (PBUH) has also encouraged taking care of the family and fulfilling needs by spending money for the sake of Allah Almighty as stated:

*"When a Muslim spends something on his family intending to receive Allah's reward it is regarded as Sadaqa for him."*¹⁴

In another hadith the Holy Prophet (PBUH) has signified the

importance of spending on the family and granting reward as said:

“The most virtuous of the dinar is the dinar spent by a man on his dependents, and the dinar spent by a man on his beast in the Cause of Allah, and the dinar spent by a man on his companions in the Cause of Allah.”¹⁵

It is apparent from all aḥādīth mentioned above that maintenance is to be provided by the husband to wife and children. It is considered the duty of the husband and financial right of a wife and children. Imām Ibn Hajar Al-‘Asqalani stated that family means his wife and then added the children as an instance where the general is added to the specific.¹⁶

Muslim Jurists have unanimously agreed that maintenance is a fundamental and financial right of a wife and no diverse opinion on it from the era of the Holy Prophet (PBUH) till today. In this regard Imām Ibn Qudāmah states:

*“Muslim Jurists had agreed that the responsibility of the husband is for provision of maintenance to his wife if they are both of the marriage legal age and she is not disobedient”.*¹⁷

Rationally and logically, when a woman is coming in a marriage contract, she becomes the member of husband's family and he has to maintain her otherwise, she couldn't survive but her life becomes miserable and she would be in deep trouble and her life would be ruined. An analogy has been made by the Muslim Jurists as status of the wife with that of the judge. The judges are maintained by the government or state because they work for the welfare and benefit of the government. If they were not given money from the state or the government, they could not survive in their lives, so, the same rule applies to the wife; she has to be maintained by her husband.¹⁸In this regard, Imām Ibn Hummām states:

*“The right of the wife is to get maintenance from her husband even if she were one of the people of the Book or Scriptures. If she gives herself in to him, then he has to provide for her living, clothing and housing”.*¹⁹

It is incumbent that it is a wife is to be maintained by the husband and it is considered a financial right of a woman and she becomes eligible in lieu of marriage contract.

Basis for Entitlement to Maintenance

Muslim jurists describe some conditions for the entitlement of maintenance to a wife. These are:

1. Validity of a marriage contract is a first requirement for maintenance.²⁰ A Hanafi Jurist, Imām Al-Khassaf stated that a woman who gets married but not fulfilling the requisites of a

marriage contract that is considered as invalid marriage and she does not deserve any maintenance.²¹

2. Surrendering herself to husband that means she lives with him and places herself under the control of husband as well as allows him free access.²² Wife must be in the legal age of marriage and she can bear the strain of consummation. In this regard Imām Ibn Qudāmah states that “If the woman gives herself in marriage to her husband in the way she is supposed to, she has the right to get everything that she needs in terms of food, drinking, clothing and accommodation.”²³ But if a wife resides at the house of her parents or somewhere else for valid and genuine reasons, her right to maintenance will be affected.²⁴

3. She must be physically mature for consummation irrespective of the husband being a minor or capable for marital relations.²⁵ In this regard Imām Ibn Qudāmah states:

*“If the woman was old enough for marriage and able to have sexual intercourse, and she gave herself in marriage to her husband or tried to, and if she did not hold herself from him nor did her guardians hold her from her husband, then the sexually immature husband, who is only a boy, is responsible for her maintenance”.*²⁶

4. She must live with her husband and do not refuse for consummation or marital relations or denying living with him without any reasonable or unacceptable reasons.²⁷ Imām Ibn Taymiyyah states as:

*“If the woman does not allow her husband to touch her or have intercourse with her, or if she leaves his house without his permission, she has no right to ask for nafaqah, or clothing because in this case she is taken to be a shrew or disobedient in things she is supposed to obey”.*²⁸

Legal Developments on Maintenance in Pakistani Law

In this section first we examine the legal provisions regarding maintenance and then having a look to few cases on maintenance. Generally, the superior judiciary has promoted and protected the marital rights of Muslim woman, who was depressed and considered helpless. The courts had made their possible positive efforts in provision of maintenance to miserable woman. There is no issue for maintenance to women in continuation of marriage and duration of *'iddah*. The verdicts of the courts are very clear but the superior courts are not favouring women regarding the provision of maintenance after *'iddah* period. The main reason for not providing maintenance to a woman is due to traditional views of the jurists.

The existing law is not supporting divorced women after the expiry of 'iddah as well as widow women. Most of the judgments of the superior courts are on the same way as well. However, the efforts have been made by providing maintenance to divorced women after 'iddah period. Here we have to highlight and examine all the efforts made by the government of Pakistan after independence regarding maintenance and later all the cases related to maintenance will be discussed by indicating legal flaws and gaps either in the procedure or decisions of the superior courts.

Legal Provisions Regarding Maintenance

After independence wives and children were claiming *nafaqah* under section 488 Code of Criminal Procedure, 1898. In fact, CrPC 1898, was inherited by Pakistan and was practiced and applied by the courts until 1961. The legal Provisions of CrPC 1898 were protecting rights of abandoned women. The provisions as reads under:

*“If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain himself, 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 four hundred rupees in the whole, as such Magistrate thinks fit and to pay the same to such person as the Magistrate from time to time directs”.*²⁹

This maintenance allowance will be payable from the date of the decision of the court or the application filed for maintenance as directed.³⁰ All such directions of the court will be properly enforced and all dues will be given to a wife.³¹ A wife is not entitled for maintenance under this section if she commits adultery, or lives not with husband without any adequate reasons.³²

In earlier years, the judges in most of the cases deprive women of their full entitlement to maintenance even during 'Iddah period. In fact the issue of maintenance was complicated in Pakistan even after independence between the provision of CrPC and Islamic Law. Details discussion will be made later in the following pages.

In Pakistan, woman's right to maintenance came under consideration first time when the marriage commission was established on August, 4th, 1955. The Commission was constituted by seven members³³ and some questionnaire were prepared and distributed among the people in different three languages, Urdu, Bangali and English.³⁴ The following questions were asked by the commission:

1. “Are you in favour of enacting the law in case of refusal from husband to provide maintenance to his wife or neglecting her without any justification and the wife shall be entitled to sue him for maintenance in a special Matrimonial and Family Laws court?”³⁵

2. “Under section 488 of the Code of Criminal Procedure, 1898, 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?”³⁶

3. “Would you be in favour of the proposal that a wife should be allowed to claim past-maintenance not exceeding three years?”³⁷

4. “Do you consider that if there is a stipulation in the Nikah nāma, the wife shall be entitled for maintenance claim for that period stipulated and not only ‘Iddat period?’”³⁸

In a result of Pakistan Commission report and countless efforts by the women activists³⁹, the reforms proposed by the commission in 1956 were inserted and implemented in the shape of Muslim Family Law Ordinance, 1961. Section 9 of MFLO reads as under:

“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”.⁴⁰ “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, [to the Collector] concerned and his decision shall be final and shall not be called in question in any Court”.⁴¹ “Any amount payable under Sub-section (1) or (2), if not paid in due time, shall be recoverable as arrears of land revenue”.⁴²

When the MFLO was enforced, the confusion existed in the mind that what could be the forum for maintenance suits. A Muslim wife could sue her husband for maintenance under section 488 of the CrPC, 1898 or Section 9 of MFLO, 1961, or both. This confusions is also found in the book of Keith Hodkinsons as she states

“In Pakistan, the wife may choose between the Muslim

Family law Ordinance 1961, s. 9; the Family Court Act 1964; and the Code of Criminal Procedure 1898, s. 488."⁴³

But the issue was solved and ambiguity was cleared after the amendments as made in Family Court Act 1964⁴⁴ that a woman cannot sue her husband any more under s. 488 of CrPC. By this amendment, the claim of maintenance would be made by her against her husband under section 9 of MFLO, 1961. A woman can sue her husband for maintenance within six years as prescribed in Article 120 of Limitation Act 1908. The commission also considered the dilemma of a woman and recommended that a wife should be able to claim maintenance at least three years prior to the institution of the suit. The commission further suggested that a divorcee must be provided maintenance by her ex-husband during her life or at least her second marriage. This important recommendation was not considered by the legislature when they enacted MFLO, 1961. But MFLO, 1961 has provided remedy to a neglected and depressed woman, who was not provided maintenance during her marital life.

The MFLO, 1961 is still silent on the issue of maintenance for divorced women during *'iddah* and after the expiry period of *'iddah*. However the maximum amount for maintenance of wives were decided by the arbitration councils according to the financial status of the husband and the quantum of maintenance must be fixed according to the financial capacity of the husband as per ruling of Qur'ān and Sunnah.

In recent years Family Courts in Pakistan have the powers as prescribed in s. 5 and s. 20 of the FCA, 1964, apart from the MFLO, 1961, to order maintenance for the deprived and neglected women. But the essence of the Act is a procedural enactment and it is also having no remedy for the divorced and widowed women after the expiry of *'iddah* period.

The concern for incorporation of provisions relating to post divorce maintenance is still there in Pakistan, although some efforts have been made in this regard by the women's activists, women's organizations. That's why there are a variety of reports that indicate the need for provision of *nafaqah* after *'iddah* period. Beside this marriage commission, there were some other committees such as women's rights committee, which was established on 31st January 1976 with the purpose of uplifting the socio-legal status of Pakistani woman.⁴⁵ The Committee further came up with a proposal of post-divorce maintenance and also suggested that a divorced woman should have a share in husband's property.⁴⁶ It was also suggested by the NCSW, Pakistan (National Commission on the Status of Women) that the divorcee must be entitled for maintenance from her

husband till her remarriage and it must be according to husband's means.⁴⁷ Another Pakistani Commission (Commission of Inquiry for Women, 1997) also suggested that a maintenance right is to be provided to divorced woman after *'iddah* period as well as other benefits and it must be according to the financial status of a woman.⁴⁸ The issue of maintenance after *'iddah* period is still under consideration in Pakistan, the later recommendation was made by the LJCP (Law and Justice Commission of Pakistan). The commission further suggested that enacting such law is the dire need of our Pakistani society because women are living after divorce a miserable lives and it could be helpful for their protection and prevention such depressed lives.⁴⁹

Ayesha Shahid states in this regard as:

"It has put forward a proposal for Post- Divorce maintenance for wives as ordained in the Qur'ān by revisiting the half century old Muslim Family Law Ordinance 1961 and the West Pakistan Family Courts Act 1964 by looking at the needs of the divorced women. It is a welcoming initiative but we still have to wait and see how, when and in what form such changes will take place".⁵⁰

The Government of Pakistan is having a serious concern regarding women's rights that's why it is asking by the commissions to recommend changes in the existing Family Law for the benefit and protection of women's rights.

It is incumbent from the efforts of the government by making commissions for the welfare and protection of divorced women's rights that there is a dire need of laws on maintenance for divorced women after *'iddah* period. However, there is silence regarding the issue of maintenance for widow. In spite of these recommendations by the commissions or committees, it has been seemed that the Govt. is not serious about implementing laws and judiciary has to play its role regarding post-divorce maintenance by observing the situation of a woman.

The Role of Superior Judiciary in Protecting Woman's Right to Maintenance

The established principle in maintenance cases decided by the superior judiciary is that woman can demand and claim maintenance and she has been entitled for that but it is provided during the continuation of marital life or after divorce till *'iddah* period. The case law of superior courts regarding maintenance falls under the two main categories. Firstly, where the marriage still exists and secondly, where the marriage has dissolved. The decisions of the courts are very clear, in respect of provision

maintenance in existing marriage and in the period of *'iddah*, where the divorce has taken place. But the superior courts as well as the lower courts are not favouring women at all by granting maintenance after termination of *'iddah* period. So, now we examine here the relevant case law by analyzing the reasons for non- provision of maintenance to women.

In *Iffat Kazmi vs. Shuja Akbhar Shah*,⁵¹ the brief facts of the case are that the couple (a man and a woman) contracted a marriage in accordance with the principles of Shia school of thought in 1996, then they left Pakistan, went UK (England) and started their marital life. Due to some unavoidable circumstances, the couple could not continue their marital life, husband divorced her after 19 months of their marriage and she left UK and came Pakistan. The notice of *Talāq* was received by the wife in writing. The wife filed a suit against her husband regarding maintenance. The amount of maintenance was specified Rs 25,000/- and High Court granted a relief to the husband by reducing its amount to Rs 15,000/- and then to Rs 10,000/-. The wife appealed to the Supreme Court and challenged the amount of maintenance as well as the legal validity of the divorce. In this case, there were two main issues, the SC have to examine firstly, the legal effect of a written *Talāq* in Shiah law and secondly, the quantum of maintenance according to the financial status of the husband.

On the first issue, the Court observed that according to Shiah law the proper procedure of a divorce is that it must be pronounced orally with the presence of two witnesses but in some extraordinary situations, *Talāq* in a written shape would also be considered and accepted. As in this case, it was deemed that the written *Talāq* is to be considered because it was not possible for the husband to pronounce it orally as well as in the presence of the two witnesses. With regard to the second issue, the Court observed and stated that the later reduction of the maintenance amount from Rs 15,000/- to Rs 10,000/- was not proper reasonable according to the financial means of the husband, Rs 15,000/- was a more appropriate amount, taking in to account the circumstances of the parties. The court held that the maintenance should be provided to the divorced wife till the completion of *'iddah* period.⁵²

In *Mrs. Farah Naz vs. Judge Family Court Sahiwal*,⁵³ the details of the case are that a couple married in Pakistan and stayed for a month. Later on, the husband moved to Paris and got married there with another woman. A wife, who was left in Pakistan, filed a suit of maintenance and the family courts granted her a relief as provision of past maintenance, per month Rs 10,000. The husband argued that my Pakistani wife was insane and already divorced by me and witnesses would be provided, if

demanded. This case was continued and reached at Supreme Court, the Court analysed the case and highlighted the errors of the lower courts with regard to maintenance.⁵⁴ Regarding past maintenance, the crucial question was in discussion before the Supreme Court of Pakistan that either the wife is entitled to past maintenance payments. The Court (Supreme Court) observed the issue and stated that the lower courts including High Court did not decide the case within the spirit of law as the High Court held that the maintenance of a woman is restricted and limited to three years but the court has to extend the period of past maintenance it in accordance with law from three years to six as was held by the Supreme Court.⁵⁵ The Supreme Court also argued that due to non-provision of enough evidences before the court for ending the marriage tie, it is the socio-moral and legal duty of the husband to provide proper maintenance according to his means as recommended by the rulings of Shariah.⁵⁶ But regarding the dower, the Supreme Court observed that fixation of dower amount by the lower courts was much less than had been found and as decided by the appellate court.⁵⁷ The wife also applied in the Family Courts for dowry articles. The court favoured woman and granted her a relief of partially Rs. 400, 000/ but she requested Rs. 955, 038/. The High Court restored the order of family Court in this regard because the wife neither rebutted nor contradicted and the value of articles shown in the list must be accepted on its face value. The assessment of the court was about the dowry article mentioned in the suit that's why, Rs. 400, 000/. On the basis of court assessment wife granted the prescribed amount as compensation of dowry articles.⁵⁸

In *Anar Mamana vs. Misal Gul*,⁵⁹ the facts of this case are that due to cruelty and misbehavior of husband, his wife and his daughter left home. The wife and the daughter claimed maintenance by filing a case in the family court. They demanded maintenance that they were not properly maintained in the past since last eight years without any legal justification; they are also presently not maintained as well as the demand from their side for future *nafaqah*. The court granted a relief to a wife and a daughter Rs 1000/- and Rs 500/- per month simultaneously but the wife's maintenance was restricted to the ending time of *'iddah* because she was divorced by him. The court also considered his request and claim for past maintenance and provided her maintenance for last six years. The plea of the husband regarding leaving the house without the permission and consent of the husband was rejected by the court. The court further observed that the cruelty and misbehavior of the husband was approved and in such situation, they have no option beside leaving the home of a husband and making residence at the home of her parents.⁶⁰

In *Sardar Muhammad vs. Nasima Bibi*,⁶¹ the summary of the facts

of the case is that a wife made an application in the court on 7 February 1962 by claiming her husband did not maintain her since 1958. The Arbitration Council granted her maintenance with effect from 15 July 1961. In write petition, the husband challenged this order among other things by arguing that she could be entitled for past maintenance in case of any agreement only otherwise she cannot claim. The lower court also stated that maintenance can only be paid to her from that day when decree was granted to her not from the day of application filed in the court and relied on the Hanafi school of thought. The Lahore High Court observed that the Hanafi Law is inconsistent with the true spirit of Shari'ah that the duty of the husband to maintain his wife from the very beginning of the marital life. There was a consensus among the Muslim Jurists that maintenance is a financial and marital right of a wife.⁶² The Court further commented that maintenance is an obligation in the manner of gratuity and other arrears of maintenance cannot be claimed as a right and cannot be accepted, relying upon Hanafi Law, while the three other schools, namely the Shafi'i, Hanbali and Maliki are unanimously of view that arrears of maintenance, being a just charge, could be realized from the husband.⁶³ The Court concluded that it is evident the depressed and helpless women do not come to the court for safeguard and marital rights even they avoid to pursue such things. The court further observed that maintenance is to be provided to a wife when the dispute started and she cannot be deprived from her financial right. The court also stated that the courts can interpret and understand the issue by observing the facts and circumstances of every case including limitation period accordingly.⁶⁴

In *Rashid Ahmad Khan vs. Nasim Ara*,⁶⁵ the facts in this case are that the couple (husband & wife) got married on 24th of May 1957. The court provided maintenance allowance Rs. 70/- to the wife as per month for the future and Rs. 718/- in lumpsum as arrears in maintenance from 15th of July 1961. The main issue in this case was whether the Arbitration Council had the jurisdiction to grant arrears of past maintenance. The court agreed with the decision of Sardar Muhammad⁶⁶ and considered that there was nothing in Section 9 of the MFLO, 1961 to confine its application only to the grant of future maintenance excluding the past. The court further observed: It would seem to be against the intention the intention of the law giver to hold that the Arbitration Councils can issue certificates under Section 9 only in regard to future maintenance, without having the powers to do the same in respect of the arrears of past maintenance. One can imagine a case where a wife may have hopefully waited for payment to her of her maintenance by the husband who may have been prevaricating to

meet the claim without expressly denying it and when the wife finally brings an action under the Ordinance before the Arbitration Council it would seem unfair to deny to the wife her claim for past maintenance on the ground that she had not promptly come to ask for it owing to the false promises held out by the husband. We are therefore, unable to find anything in Section 9 to draw a line for dividing the jurisdiction of the Arbitration Council for grant of the maintenance between past and future periods.⁶⁷

In *Muhammad Nawaz vs. Mst. Khurshid Begum*,⁶⁸, the Arbitration Council had ordered the husband on 7 December 1968 to pay maintenance @ Rs. 80 per month from 1 May 1962 to his wife who had been turned out of the conjugal home with two children. Relying on Sardar Muhammad the Lahore High Court upheld the order. On appeal, the Supreme Court also agreed with the decision of Lahore High Court and pointed out that whereas Section 9 of the MFLO, 1961 did not prohibit granting past maintenance. The CrPC, 1898 in s. 488 clearly denotes that maintenance is to be provide to the wife from the date of application in the court for claim or the date when the granted the decree. The authors of the MFLO, 1961 must have been conscious of the phraseology of Section 488; and in spite of this, they did not impose any restriction on the powers the Arbitration Council to award past maintenance. Therefore, under section 9, the Arbitration Council is competent to award past maintenance, subject to the law of limitation.⁶⁹

In earlier years the issue of maintenance for wife is prescribed as an obligation on the husband as a matter of gratuity.

In *Abdool Futteh Moulvie vs. Zabunnessa Khatun*,⁷⁰ the facts of this case are that the wife was segregated by the husband in January 1878, and the wife sued her husband in November 1878. There were two claims by the wife, firstly, past maintenance Rs. 100 per month since January 1878, and secondly, future maintenance at the same rate as long as the husband would not live with her. The lower court allowed her maintenance from March 1878 until June 1880 @ Rs. 50 per month and further observed that the husband should pay her maintenance at the same rate “during the term of her natural life” from 1 July 1880. Relying upon the Ḥanafī Law and quoting from *Hidāyah*, the High Court of Calcutta held (i) that maintenance should have been made payable by the husband from that date when the judgment of such case was passed by the court in favour of a wife; and (ii) that it was only payable during the continuance of the marriage.⁷¹

Alamgir Muhammad Serajuddin comments on the case as well as criticize the law of Pakistan that the injustice and inequity of the Ḥanafī

rule, which received the blessing of the colonial courts, did not escape the notice of the on marriage commission. They noted that the wife is expelled from the matrimonial home and forced to take shelter in parental home, if there is one, or in the streets, the husband takes recourse to various dubious devices to stop her from instituting a maintenance suit is delayed, the less will be the money he will have to pay to his neglected or deserted wife. However, their recommendation to allow past maintenance to the wife was not incorporated in the maintenance provision of the MFLO 1961, which simply signifies that a certificate for provision of maintenance to the depressed and neglected woman will be issued by any arbitrator.⁷²

He further states that:

*“The silence of the MFOL regarding past maintenance as opposed to section 488 of the Code of Criminal Procedure, 1898 which prohibited it,⁷³ the courts enabled to decide that where the husband neglects or refuses to maintain his wife without any lawful cause, the wife can justly claim maintenance from the date of the accrual of cause of action”.*⁷⁴

In *Gul Bibi vs. Muhammad Saleem*,⁷⁵ the wife filed a case against her husband on 23 March 1974 in Family Court for recovery of past maintenance from 1970 onwards. The main issue was the past maintenance of wife under the traditional Islamic law. The case was decided by the Family Court as claim was made by the wife. The husband appealed against the decision of the court and the District Court set aside the judgment of Family Court for past maintenance and allowed the wife maintenance from the Family Court order's date only. The wife appealed against her husband in the Quetta High Court, the Superior Court sustained the order of Family Court and held that marriage in Islam is a pure and simple contract. Provision of maintenance is considered the duty of the husband and right of the wife in the continuation of marriage as well as during *'iddah*. Once a legal obligation comes into existence, it is enforceable through the courts the moment it is violated and in a maintenance case the cause of action accrues to a neglected wife on the date the husband starts neglecting her.⁷⁶

The Court further observed that the Hanafi law does not allow the past maintenance to an isolated and neglected wife, the Shia and Shafi'i schools do. All the schools of thought including Shias agree that the marriage is a contract, there should have been complete unanimity regarding its incidents as well. The primary sources of Islamic law, the Holy Qur'an and Sunnah of the Holy Prophet (PBUH) are silent about past maintenance. The court further stated that adoption the opinion of Hanafi

school is not unjustified because they are various schools on the basis of Islamic principles not several religions. But the positive view of the other schools in this issue is that they are more “consistent with reason, logic and common sense”.⁷⁷ The court further concluded that one should keep in mind “the need of the times, pattern and structure of the society in which different jurists worked”.⁷⁸ Zakauallah Lodi, J., stated in this regard:

“We have great respect for all the Muslim Jurists but at the same time we feel that the opinions of such Jurists should find preference which are more akin to reason and precisely that is what we have tried to do while adopting the view of Shāfi‘ī and Shia schools of thought on this topic”.⁷⁹

Khalid M. Ishaque, a well-known Advocate, Supreme Court of Pakistan, proposed the recommendations regarding post divorced maintenance and quoted the Shah Bano case of India. He also suggested that provision of *Matā'* to the divorcee according to the teachings of Qur'ān and it was considered a duty of the Muttageen. He also stated the Qur'ān demands that husband has to provide maintenance and other living expenses for a year and not permissible for him to throw her out from the home. Recommendations also were proposed by the Pakistani recommendatory institutions such as LJCP and Marriage Commission. He further suggested that “any law that provides past divorce maintenance for a longer period must be enforced particularly when the divorcee is unable to take care of herself and husband is financially well established. He also stated that provision of past divorce maintenance to the divorcee for a longer time is very much in line with the moral thrust in Qur'ānic injunctions”.⁸⁰ Dr. Zeinab-al-Radhwan, a contemporary scholar from Egypt shared her views in an International Conference and stated that “Shāfi‘ī Jurists permitted and opined that post-divorce maintenance must be provided to a divorcee until she reached the age of sixty years”.⁸¹

In *Hajiran Bibi vs. Abdul Khaliq*,⁸² the same issue of maintenance as a contractual obligation of a husband was elaborated by the Lahore High Court. The Court relying upon *Gul Bibi vs. Muhammad Saleem* observed that it is a right of the wife to claim maintenance from the husband and it is an obligation on the husband to pay her. If the responsibility of maintenance was not fulfilled by the husband then it would be considered a debt on husband and he has to provide her even if he does not demand. In spite of being an obligation on him under the law to do so then the wife would be entitled not only to future maintenance but even to past maintenance for the period during which she has not been maintained.⁸³

In *Riffat Abrar vs. Mst. Sheila Sabri*,⁸⁴ the High Court held relying on the Supreme Court judgment in *Muhammad Najeeb vs. Mst Talat*

*Shahnaz*⁸⁵ that the spouses got married and continued their marital lives. The dispute regarding past maintenance arised among them, the wife can claim past maintenance when she was in existing marriage and the husband could not maintained her. The court held that provision of maintenance after marriage was an obligation on husband and he has to pay her and a divorcee can claim past maintenance in accordance with section 9 of Muslim Family Law Ordinance 1961.⁸⁶

In *Syed Mudassar Altaf vs. Deputy Commissioner Lahore*,⁸⁷ the court analysed the case and held if the marriage contract is validly concluded and husband has isolated her forcefully even in this situation, provision of maintenance is the duty of the husband and he cannot deny from this financial right of a woman.⁸⁸

In *Mr. Ahmed Riaz vs. Qisera Minhas*,⁸⁹ this case is also about past maintenance, the court concluded that a divorced woman can claim past maintenance about the duration when she was in a valid marriage contract and not maintained. Because in existing marriage, provision of maintenance becomes a duty on the husband and considered as debt, must be granted her even after divorce. The amount may be fixed by the court according to the means of the husband.⁹⁰

In *Muhammad Najeeb vs. Mst Talat Shahnaz*,⁹¹ the supreme court of Pakistan held that maintenance is to be provided by the husband to the wife if the marriage is existing and if divorced then till the completion of 'iddah period. The court also stated that a divorcee can claim her past maintenance from her ex-husband for that period of marriage when she was entitled for *nafaqah* and he was unable to provide or he ignored her properly regarding provision of maintenance.⁹²

Conclusion

Maintenance allowance includes food, clothing, accommodation and other essential necessities for subsistence of life. Provision of maintenance is a primary duty of a husband and a fundamental right of a woman. It is established by principles of Islamic law and recognized in the legal system of Pakistan. The quantum of maintenance is not specified or fixed neither in Islamic Law nor in legal provisions of Pakistani law but is is to be determined by the financial status of a husband. The Superior judiciary is also looking into the economic position of the husband and applied in their decisions. Muslim woman is entitled for maintenance after fulfillment of the conditions specified by the Muslim jurists. Pakistani law is evident with regard to the provision of maintenance during marital life or till 'iddah after divorce but after 'iddah period some efforts have been made and recommendations are around by Law and Justice Commission

of Pakistan. The general trend of the judiciary for determining the quantum of maintenance is according to the financial resources of the husband. It have become evident after examining the case law of superior courts that provision of maintenance is a financial right of the wife and obligation on husband after the consummation of marriage, either they are living together or separately or wife is living with her in laws when husband is abroad. This principle is established by the Courts that maintenance must be provided to a divorcee till the termination of 'iddah period but not afterward. Pakistani law is also silent on the issue of Post-divorce-maintenance but recommended by the Marriage Commission and LJCP. The government of Pakistan has to enact the law for dismal and helpless women for granting post-divorce maintenance till remarriage or whole life.

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<http://www.oecd.org/site/adboecdanticorruptioninitiative/39849781.pdf> (last accessed, 3-6-2016). This section was also omitted in 1981.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ The seven members were from different fields, i.e. Social Activists, Religious

Scholars, and Justices etc.

³⁴ The purpose of distribution of questionnaire among people to get suggestions from them and they have to assist commission by their knowledge and experience.

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⁵⁷ Ibid.

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⁷² Alamgir Serajuddin, *Muslim Family Law, Secular Courts and Muslim Women of South Asia: A study of Judicial Activism*, (Karachi: Oxford University Press, 2011), 137.

⁷³ Section 488 of the Code of Criminal Procedure, 1898, which is applicable to all citizens, irrespective of religion, provides that if any person having sufficient means neglects or refuses to maintain his wife, the Court may order such person to make a monthly allowance for her maintenance not exceeding to Rs. 400. This monthly allowance is payable only from the date of the order or the date of application.

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⁷⁶ Ibid.

⁷⁷ Ibid.

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⁸⁰ *The Impact of Family Laws in Pakistan*, 49.

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