

THE DEMAND OF WOMEN ACTIVISTS FOR ENACTMENT OF POST-DIVORCE MAINTENANCE IN THE MMDA OF SRI LANKA: AN ISLAMIC PERSPECTIVE

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Abstract: Islam explicitly emphasizes the post-divorce maintenance for divorced women. Nevertheless, the MMDA (Muslim Marriage and Divorce Act) does not have any provision to provide the post-divorce maintenance. Consequently, the *Qāḍīs* face difficulties in defining the period and quantity of divorced women's maintenance. Therefore, the women activists in Sri Lanka under the patronage of the MWRAF (Muslim Women Research and Action Forum) lobby for enacting the provision of post-divorce maintenance (*mut'ah*) in section 97 of the MMDA to be provided to the divorced wife whether the divorce is initiated by the husband or wife if there is no marital fault on the wife. Hence, this study aims to analyse the demand of the women activists in Sri Lanka drawing on the secondary data such as the *Qur'an*, the *Hadith*, the literatures of the prominent jurists and the books written by the women activists in Sri Lanka. The findings of this study reveal that the post-divorce maintenance is a marital right of women emphasized by the Holy texts. Accordingly, this study recommends the relevant authorities to enact the post-divorce maintenance in the MMDA. However, the women activists' demand "to pay the *mut'ah* to wives even though the divorce was initiated by wives" is intricate as it is unviable and contradictory to the opinions of the jurists.

Keywords: MMDA, post-divorce maintenance, Sri Lanka, women activists

INTRODUCTION

A man is accountable for maintenance of those under his care, such as his parents, wife, children, and animals. Hence the divorced woman has the right to the maintenance if the conjugal relation remains until the end of the *'iddah* period, as stressed in the *Qur'an*, "lodge them (the divorced women) where you dwell, according to your means, and do not harm them to straiten them (that they be obliged to leave your house). Moreover, if they are pregnant, then spend on them till they lay down their burden. Then if they give suck to the children for you, give them their due payment, and let each of you accept the advice of the other in a just way" (al-Ṭalāq:06).

Therefore, the MMDA insists that a husband should maintain his wife after the divorce in three circumstances: 1. Until the registration of divorce 2. Until the completion of the wife's *'iddah* 3. Until childbirth if the wife is pregnant.

The *Qur'an* stresses the vitality of maintenance of divorced women, "And for divorced women, maintenance (should be provided) on reasonable (scale). This is a duty on *al-Muttaqun*" (al-Baqarah:241). Hence, intensely acquiring this *Qur'anic* verse, most Muslim countries divide the maintenance into two categories, 1. Maintenance until the end of *'iddah* period 2. Providing a sum of money *mut'ah* as a source for livelihood (Hasanah, 2015, 65). However, the MWRAF criticizes that the MMDA does not have any Act to implement the *mut'ah*. Therefore, they demand the enactment of *mut'ah*, which the *Sharī'ah* legalizes.

Hence, this study aims to analyse the demand of the MWRAF for enacting the post-divorce maintenance drawing on the Islamic text and the opinions of the prominent jurists as well the Sri Lankan context.

MAINTENANCE UNTIL THE END OF 'IDDAH PERIOD

Though the MMDA prescribed the maintenance after the divorce until the end of 'iddah, the Sri Lankan Muslim women face tremendous challenges in obtaining the maintenance. When a woman applies for maintenance, the *Qāḍī* has been authorised to inquire about her husband's income and decide on the maintenance. Accordingly, the *Qāḍī* scrutinises the following circumstances.

| No | Measures to determine the quantum of the wife's maintenance | Mostly | Moderately | Rarely | Never |
|----|---|--------|------------|--------|-------|
| 1 | Income of the husband | 86.1% | 11.1% | 2.8% | 0.0% |
| 2 | Cost of living index | 46.2% | 34.6% | 15.4% | 3.8% |
| 3 | Financial condition of the wife | 55.6% | 25.9% | 18.5% | 0.0% |

Survey – 2014 (Jazeel, M.I.M. and Fowzul, M.B., 2021, 152)

However, most of the husbands' forge documents or provide false statements to prove that they are low-paid workers to escape from the maintenance or pay the lowest quantum of maintenance. In that case, the *Qāḍī* are unable to find the real income of the particular persons. There is no procedure in the law to verify the income. Hence, women are compelled to appeal for high pay, whereas the husbands demand diminishing it. Therefore, the reform proponents propose to adjudicate new procedures for measuring and defining a husband's income when he fails to mention the exact quantity.

Moreover, some husbands or fathers refuse to pay maintenance. In that case, women can recover it through the magistrate court. However, women are compelled to appear in the court where her ex-husband resides. section 64 (1). According to this Act, women spend more time and money than what they gain through the court if she resides a long way. Unfortunately, the court also remits the payment to the *Qāḍī*. Then women again must visit the *Qāḍī* court.

Consequently, women struggle for obtaining maintenance from the husband as well as from the courts. Therefore, women organizations criticise that these procedures do not favour to the affected women. Hence, they propose that the victim be privileged to file the case in her regional court, and the payment should be remitted directly to the affected women (Marsoof, 2001, 59).

MUT'AH (POST DIVORCE MAINTENANCE)

The consolatory compensation given to divorced women is named as *mut'ah*. The *mut'ah* is highly emphasised in the Qur'an as "for divorced women, the *mut'ah* (consolatory compliment must be provided) on an appropriate (scale)" (al-Baqarah:236). Furthermore, "bestow on them (a reasonable consolatory) compliment" (al-Baqarah:241).

The definitions of the jurists for *mut'ah* vary according to their disparate decisions. The Ḥanafī jurists divide the *mut'ah* into *wājib* and *mustahabb*. The *mut'ah* is obligatory if the divorce or separation occurred before copulation in a marriage where the *mahr* was not pronounced, as the Quranic verse explicitly enunciates that, "there is no sin on you, if you divorce women while yet you have not touched (had sexual relation with) them nor appointed unto them their *mahr*" (al-Baqarah:236). Meanwhile, it is *mustahabb* to provide the *mut'ah* for every divorcee if the divorce is pronounced after the coitus, whether the *mahr* was prescribed or not, and for the divorcee who is divorced before copulation but her *mahr* was already decided (Ibn al-Humām, 1977, 325).

Mālikī jurists suggest that:

The *mut'ah* is a marital benefit given by a husband to his wife only in the event of divorce. This definition encompasses all types of divorced women without differentiating them. However, if they did not have sexual intercourse with the mahr that was agreed upon, they would be given what they were promised, but not the *mut'ah* (Ibn Qudāmah, 1992, Vol.10, 142).

Shāfi'ī jurists enunciate that “the *mut'ah* is obliged funding for every divorcee if the separation was caused by husbands except the women who were not copulated with the declared *mahr*” (Ibn Rushd al-Qurṭubī, 1995, 14).

Moreover, even though the definitions of Ḥanbalī jurists vary with each other, they indicate that the *mut'ah* is an obligation of a husband for every divorcee, especially if they were divorced before coitus when the *mahr* was unpronounced (Ibn Qudāmah, 1992, Vol.10, 143).

Meanwhile, Ibn Hazm (n.d., 245) elaborates that ‘the *mut'ah* was impelled by almighty Allah according to the wealth and deficiency of a husband for the first term or second term or third term divorcee whether he copulated with her or not and the *mahr* was pronounced or not.

Though the jurists reached a consensus on the legality of the *mut'ah* for divorced women, they hold dissenting views on the degrees of legality and divorcees, who are entitled to claim the *mut'ah* (al-'Assāf, 2012, 135).

Ḥanafī jurists obligate the *mut'ah* for divorcee before coitus being the *mahr* pronounced or not without clarity drawing on the Qur'anic verses:

There is no blame on you if you divorce the woman while you have not yet copulated with them or while you have not imposed their mahr (at the marriage contract). Then, provide them with the mut'ah, the wealthy according to his capability and the indigent according to his capability as a beneficence of customary amount. It is a duty on well-doers” (al-Baqarah:236) and “O you who believe! When you marry believing women and then divorce them before you have sexual intercourse with them, no 'iddah [divorce prescribed period] have you to count in respect of them. So, give them a present, set them free (i.e. divorce), in a handsome manner” (al-Aḥzāb:49), and “as for divorced women, the mut'ah (should be provided) on a customary scale. It is obligatory on the pious (muttaqīn) (al-Baqarah:241).

Interpreting the above verses, Ḥanafī jurists stress the obligatory of *mut'ah*. Moreover, Ḥanafī jurists suggest that ‘the provision of *mut'ah* would be desirable or optional for all divorced woman after coitus whether the *mahr* was pronounced or not and when they are divorced before coitus if the *mahr* was clearly stated citing the following Qur'anic verses “as for divorced women, the *mut'ah* (should be provided) on a customary scale” (al-Baqarah:241). Furthermore, citing the Qur'anic verse, “O Prophet, tell your spouses ‘If you desire the worldly life and its adornment then come forward, I will provide you the *mut'ah* and release you in a beautiful manner” (al-Aḥzāb:28). Hence, al-Sarkhasī (n.d., 158) interprets that: “this verse denotes the optional grade of *mut'ah*”.

Contrary to the Ḥanafī jurists' opinion, Mālik, al-Layth and Ibn Abī Layla assert that the *mut'ah* should not be obligatory for any divorced women. Yet it is optional and desirable for all divorcees as can be understood from the Qur'anic verses ‘*ḥaqqan 'alā al-muttaqīn*' and ‘*ḥaqqan 'alā al-muḥsinīn*'. They assume that if it is obligatory, the almighty Allah might have imposed it on all believers regardless of *muttaqīn* and *muḥsinīn*. However, since it has been linked with *taqwā* (piety) and *iḥsān* (philanthropy), it is not obligatory (Ibn Qudāmah, 1992, Vol.10, 139).

Accordingly, Mālikī jurists categorise divorced women into three groups; 1. Divorced before coitus and before pronouncing the *mahr* – she obtains the *mut‘ah* while lacking the *mahr*. 2. Divorced before coitus, but after the pronouncement of *mahr* – she loses out on *mahr* provision. 3. Divorced after the coitus, whether it may be before or after the declaration of *mahr* (al-Zuhaylī, 2012, 307).

Nevertheless, Shāfi‘ī propounds that the provision of *mut‘ah* is obligatory on all divorced women. If husbands determined their separations except for the divorcee who was divorced before the coitus, the *mahr* was already pronounced. In this case, she obtains only half of the *mahr*. Concerning the statement of Abdullah ibn ‘Umar, Imam Shāfi‘ī stresses that their standpoints are derived from the Qur’anic verses:

“And if you divorce them before you have touched (had a sexual relation with) them, and you have appointed unto them the *mahr* (bridal money given by the husband to his wife at the time of marriage), then pay half of that (*mahr*), unless they (the women) agree to forego it, or he (the husband), in whose hands is the marriage tie, agrees to forego and give her full appointed *mahr*. And to forego and give (her the full *mahr*) is nearer to *al-taqwa* (piety, righteousness)” (al-Baqarah:237).

There are two opinions among the Ḥanbalī jurists. The first opinion asserts that ‘the *mut‘ah* should not be provided to the divorcee before the copulation and pronouncement of *mahr*. Because she is entitled to the half of the *mahr* as it is emphasised in this Qur’anic verse: “And if you divorce them before you have touched (had a sexual relation with) them, and you have appointed unto them the *mahr* (bridal money given by the husband to his wife at the time of marriage), then pay half of that (*mahr*)” (al-Baqarah:237).

Moreover, the second opinion of Aḥmad ibn Ḥanbal asserts that all divorcees are entitled to the *mut‘ah* according to the Qur’anic verse: “as for divorced women, the *mut‘ah* (should be provided) on a customary scale. It is obligatory on the pious (*muttaqīn*)” (al-Baqarah:241).

Nonetheless, Ibn Ḥazm (n.d., 246) opines that “the *mut‘ah* is imposed on every divorcee whether her divorce was first or second or third and whether she was copulated or not and whether the *mahr* was pronounced”.

Moreover, Ibn Qudāmah (1992, Vol.10, 143) elaborates that the jurists disagree on determining the situation for *mut‘ah* as follows:

1. The *mut‘ah* is determined according to the status of the husband. Because the divorce (*talāq*) is decided by the husband. Hence, the Qur’anic verse commands the husband to “provide them (divorced wives) with the *mut‘ah*”.
2. The *mut‘ah* is determined considering the status of both spouses as it is mentioned in the Qur’an: ‘for divorced women *mut‘ah* (should be provided) as per the custom’.
3. The *mut‘ah* is defined considering the wife’s situation because the *mahr* is also determined according to the lifestyle of a woman.

Furthermore, the jurists hold dissenting views on the quantity of *mut‘ah*. The Ḥanafī jurists stipulate that the *mut‘ah* should not be more than the half of the *mahr* and should not be below five *dirhams*, while Mālikī jurists suggest that the provision of *mut‘ah* depend on the autonomy of the husband. He can provide her with what he can afford without forcing rules (al-‘Assāf, 2012, 143).

Aḥmad ‘Īsā ‘Āshūr (2010, 237) maintains that “It is recommended that the *mut‘ah* should not be less than thirty *dirhams*. It is obligatory to give the quantity of what they agreed upon. If the parties involved dispute the amount, it is up to the judge to decide with his diligence (*ijtihād*). Additionally, it is permissible for the *mut‘ah* to be increased by more than half the dowry as mentioned in the Qur’an: But bestow on them (a suitable gift), the rich according to

his means, and the poor according to his means, a gift of reasonable amount is a duty on the doers of good” (al-Baqarah:236).

However, the Shāfi‘ī jurists hold three differing opinions in defining the quantity of the *mut‘ah* as follows (al-Sharbīnī, 1997, 318):

1. The *mut‘ah* should not be less than thirty Dirhams or the equivalent, if such an amount and the highest of the *mut‘ah* would be a maid while its moderate would-be clothing.
2. The *mut‘ah* should necessarily not be exceed half of the *mahr* if the spouses dispute on determining the *mut‘ah*. In contrast, if they concur, then the *mut‘ah* can be determined as they agree.
3. If the judge is authorised, he should determine the *mut‘ah* lower than the *mahr*.

Likewise, the Ḥanbalī jurists also have three opinions regarding the *mut‘ah* very similar to the Shāfi‘ī jurists.

In line with the command of the Qur’an, numerous Muslim countries have enacted compensation (*mut‘ah*) to divorced women. For instance, the Malaysian Islamic Family Law section 56 mentions that “it is fair and justice for a wife who was divorced without any reason to apply for the *mut‘ah* in addition to the *‘iddah* maintenance (Chulani, 1999, 105).

AN ANALYSIS ON THE DEMAND FOR ENACTMENT OF POST-DIVORCE MAINTENANCE IN MMDA

MWRAF criticises that the MMDA does not have any provision to implement the post-divorce maintenance which is expounded by the Quran. Therefore, they demand to include the *mut‘ah* in Section 97 of the Act to provide the divorced wife whether the divorce initiated either by husband or wife if there is no blame on the part of the wife for the termination of the marriage (Faizun and Chulani, 2014, 46).

Moreover, the Dr. Sahabdeen Committee proposed to adjudicate *mut‘ah*, but it was not implemented. Nevertheless, Marsoof (2011, 60) expresses that “if the *mut‘ah* is enforced in the Act, the divorce ratio would be diminished”.

In *Sharī‘ah*, it is obvious that though there are different views among the jurists regarding the *mut‘ah*, Abū Ḥanīfah, Mālik, al-Shāfi‘ī, Aḥmad and al-Zāhirī encourage the *mut‘ah* determining it as obligatory or favourable according to the situation of the marital breakdown. Meanwhile, majority of the jurists including al-Shāfi‘ī stipulate that: “the *mut‘ah* would be provided if the fault or reason of the divorce does not occur from the part of the wife” (Ibn Rushd al-Qurṭubī, n.d., Vol.3, 183). Accordingly, Raḥmān and Sirazi (2018, 6) highlight that: “the Shāfi‘ī school has adopted a more balanced view”. Therefore, the report for the reforms also suggests providing the *mut‘ah*, if the termination of marriage is without any fault attributable to the wife Marsoof, 2017, 19).

Nonetheless, if the provision of the *mut‘ah* is decided based on the nature of the divorce, it would be more complicated since most of the divorce cases in Sri Lanka are initiated by the women (Fowzul, 2014, 169). Hence, the MWRAF demands to explore the motive of the divorce, even though it was initiated by the women. Because most of the men persuade the women to apply for the divorce. Sometimes, some husbands torture their wives to apply for the divorce (Hyshyama and Hasanah, 2016, 13).

However, it is practically impossible for the *qāḍīs* to analyse the reason for the termination of the marriage if it is initiated by the women. Consequently, most of the woman would not be entitled for the *mut‘ah*. Nevertheless, since all the jurists encourage the *mut‘ah*, it should be included in the MMDA, at least based on the stipulation of al-Shāfi‘ī.

CONCLUSION

Islam explicitly obligate the post-divorce maintenance (*mut'ah*) for the divorced women. However, it was found that the MMDA does not have any provision regarding the *mut'ah*, even though it was emphasized by all the classical and modern jurists. Therefore, the MWRAF stresses to include the *mut'ah* payment in the MMDA. However, their demand 'to pay the *mut'ah* to the wives even though the divorce was initiated by the wives' is intricate as it is unviable and contradictory to the opinions of the jurists. Practically it is very tough to find the motive of the divorce whether it is originated from the husband or from the wife. Nevertheless, since all the jurists encourage the *mut'ah*, it should be included in the MMDA, at least based on the stipulation of al-Shāfi'ī.

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