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MAINTENANCE TO MUSLIM WIVES : THE LEGAL CONNOTATIONS☆

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Definition of Maintenance or Nafaqa

Maintenance is the lawful right of the wife to be provided at the husband's expense with food, clothing, accommodation and customarily extends to other necessaries of life.[1] It is incumbent on a husband to maintain his legally weded wife. The authorisation of the wife to maintenance derives from the injunctions of the Holy Quran, Prophet's Tradition and Consensus of the jurists. In the Holy Quran the husband is ordained to maintain the wife. The Quranic ruling states :

> Men are protectors and maintainers of women Because God has given them more strength then the other, And because they support them from their means.[2]

Once it is due the maintenance of the wife is deemed a debt on the husband from the date of withholding it. Only on payment, such debt is settled under the *sharia.*

The Prophet preached in his last sermon :

> Show piety to women, you have taken them in trust of God and have had them made lawful for you to enjoy by the word of God, and it is your duty to provide for them and clothe according to decent custom.

☆ This is a modified version of a part of the Ph.d Thesis of the author, titled "From Patiarchy to gender equity : Family Law and its impact of women in Bangladesh" from University of London in 1994.

1. Nasir, J. Jamal : *The status of women under Islamic Law.* London 1992, p.59; Hodkinson, Kieth : Muslim Family Law. London 1984, p.147.

2. *The Quran,* LV : 34.

Maintenance of a wife during the subsistence of the marriage is a legal obligation of the husband in Islam.[3] But the *sharia* provision of maintenance of the wife from her husband is conditional. The maintenance is only due to the wife, if she is under a valid marriage contract, if she allows her husband free access or *tamkeen* to herself at all lawful times and if she obeys his lawful commands in the duration of the marriage.[4] When the wife is working against the husband's wishes she becomes a rebellious or disobedient or *nashuza* and is not entitled to maintenance from her husband. A wife is *nashuza* as held in the case of Ahmed Ali v Sabha Khatun Bibi.[5] if without a valid excuse she disobeys his reasonable orders, refuses to cohabit in the house he has chosen, goes on hajj without his consent unless it is obligatory for her to go, takes employment outside the house without his consent, or is imprisoned so as to be inaccessible to him. However, she will not be a disobedient wife if her acts are in reply for her husband's inability to accommodate her in accordance to law or failure to pay prompt dower when demanded or when he has broken the stipulations in the *kabinnama* or has acted with cruelty.[6]

Islamic law grants a Muslim wife right to maintenance from her husband not only during the subsistence of the marriage but also reasonably after dissolution of the marriage.[7] There is no controversy that the husband is bound to maintain the wife during the three months of *iddat* period, but there is a considerable controversy whether the maintenance extends beyond the *iddat* period (see for details below). It has been specifically provided in the Holy Quran that the divorced women shall wait for remarriage for three monthly periods and the woman in *iddat* live in the same

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3. *The Quran,* ii : 29.
4. See for details, Nasir (1992) London, p. 60-65.
5. PLD 1952, Dacca 385.
6. See for details Hodkinon (1984) London, p. 147.
7. *The Quran,* 2 : 228 and 2 : 241.

style as you live, according to your means. It is also provided that for divorced women maintenance should be provided on a reasonable scale.[8]

In cases on maintenance, the courts did not previously provided for past maintenance unless stipulated in the *kabinnama,* nor would allow post-iddat period maintenance to divorced Muslim wives. In Bangladesh, women had to rely on other techniques to secure some post-divorce maintenance. One writer suggested a hopeful trend towards adoption and enforcement of clauses in the marriage contract or *kabinnama* which would clearly and in unambiguous terms provide for maintenance, as this offers protection against arbitrary and capricious subjugation.[9]

The Bangladeshi Judge of the highest level of judiciary have only very recently made celebrated judgment providing for past maintenance for Muslim women in Jamila Khatun Vs. Rustom Ali[10] but how far the decision is being implemented in reality are yet to be analysed. However, the judgment providing for post divorce maintenance in Hefzur Rahman vs. Shamsun Nahar Begum[11] has been recently overturned by the Appellate Division of the Supreme Court of Bangladesh.[12]

In this paper we are first of all concerned with the development of the law of maintenance during the British Indian, Pakistani period and finally the situation of the law in Bangladesh. We are more concerned with the legal connotations of the law than the social implications. However an emperical study of urban and village women will predicate the same picture of deprivation of

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8. *The Quran,* 2:228 and 2:241.
9. Malik, Shahbdeen : 'Saga of divorced women : Once again Shah Banu, maintenance and the scope for marriage contracts' In 42 DLR (1990), Journal, pp.35-40, at p.39.
10. 16 BLD (AD) (1996) 61
11. 47 DLR (1995) 54.
12. 51 DLR (AD) (1995) 172

maintenance. The enforcement of the law of maintenance is highlighted by the case studies not only from the highest tier of the judiciary but also from the lowest to project the attitude of the judges towards women in Bangladesh.

The Law of Maintenance under British India

There is no provision in the Hanafi Code of Muslim law enabling married Muslim women to obtain a decree from the courts dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or certain other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India. The Hanafi jurists, however, have clearly laid down that in cases in which the application of Hanafi Law causes hardship, it is permissible to apply the provisions of the Maliki, Shafi or Hanbali Law. This device to select and combine various elements of different schools of law is known as *takhayyur* or an eclectic choice between parallel rules of the various schools of Islamic Law.[13] This selective process of overcoming divergences was hardly followed. Even though the courts in British India were given powers before 1939 to apply the law of one of the schools of Muslim law in a case in which the parties were followers of different schools, on grounds of justice, equity and good conscience, the courts were reluctant to apply the more liberal rules of Maliki law to parties following other schools.[14] Acting on this principle on 17th March 1939 the Dissolution of Muslim Marriages Act, 1939 (Act VIII of 1939) came into being.

The new Act was an attempt to reinstate liberal Muslim provisions

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13. Layish, Aharon : 'Shariah, Custom and Statute Law in a Non-Muslim State'. In Cuomo, I.E. (ed.) : Law in Multi-Cultural Societies. Jerusalem 1985, p.102; Coulson, N.J. : A History of Islamic Law, Edinburgh 1964, p.185.

14. Hussain, Syed Jaffer : 'Legal Modernism in Islam : Polygamy and Repudiation'. In Journal of the Indian Law Institute. Vol.7, 1965, pp.384-398, at p.396.

which were not contrary to Muslim law. Under sec. 2 (ii) of the Act a wife is entitled to the dissolution of her marriage when her husband has failed to provide for her maintenance for a period of two years. The entitlement of the wife to maintenance depends on the principles of Muslim law. However, there are provisions of the Act which effect substantive changes and in some ways, as claimed by some scholars, contravene the principles of Muslim law. Tahir Mahmood has explicitly described the circumstances in which the husband might have withheld maintenance.[15] In particular, if the wife is nashuza (disobedient) or refractory, under Muslim law she is not entitled to maintenance and so her marriage cannot be dissolved on the ground of the husband's failure to provide maintenance for a period of two years.[16] Further on, it has been held by the courts that a wife who refuses to return to her husband without sufficient cause is not entitled to maintenance.[17] The rulings of the courts are mutually contradictory as they are based on the "fault" theory and contrarily the modern "breakdown' theory.[18] The view that judicial dissolution or *faskh* can be granted irrespective of the wife's faulty conduct has been criticised by some scholars as it is not in consonance with the principle of *Nushuza* under Islamic law.[19]

As we saw under the Hanafi law inability to maintain was not by itself considered as a ground for divorce,[20] whereas under the Act

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15. Mahmood, Tahir : *The Muslim law of India.* 1st ed. Allahabad 1980, pp.97-101, 2nd ed. 1982, 3rd ed. 1987.

16. Rahman, Tanzil-ur : *A code of Muslim personal law* Vol.I, Karachi 1978, p.288.

17. *Majida Khatoon* v *Paghalo Mohammad* PLD 1963 Dhaka 583; *Sardar Muhammad* v *Nasima Bibi* PLD 1966 Lahore 7.

18. Mahmood (1980), p.101.

19. Fyzee, Asaf A.A : *Outlines of Muhammadan Law.* 4th ed. New Delhi 1974, p.172.

20. *Asmat Bibi* v *Samiuddin,* 79 IC 1925 Cal 991 also Manchanda, S.C : *The law and practice of divorce.* Allahabad, 4th ed. 1973, p. 727.

failure to maintain, even on account of poverty, ill-health or imprisonment, is a good ground for the dissolution of the marriage.

The law of Maintenance in Pakistani period

The statutory law regarding the issue is found under section 9 of the Muslim Family Laws Ordinance of 1961 (this Ordinance will be regarded in the paper as MFLO). The Arbitration Council was also given powers by the MFLO in the areas of family law,i.e. a wife's claim of maintenance. It stated under section 9 (1) of the MFLO that if any husband fails to maintain his wife adequately, the wife may apply to the Arbitration Council, who shall specify the amount which shall be paid as maintenance by the husband. Appeal may be made to the Sub-divisional Officer under section 9 (2) of MFLO within 30 days (under section 16 of the Muslim Family Law Rules, 1961) and his decision will be regarded as final.[21]

The Arbitration Council could issue a certificate specifying the amount which the husband has to pay as maintenance. There are no specified rules by which the quantum of maintenance could be determined. The amount of maintenance to be paid is to be determined by the Arbitration Council. If not paid in due time, it could be recovered under section 9 (3) of the Muslim Family Laws Ordinance as arrears of land revenue. Thus, section 9 of the MFLO provides that the Chairman of the Arbitration Council may issue a certificate specifying the amount which should be paid as maintenance by the husband, only if the husband fails to maintain his wife "adequately". In Sardar Muhammed v Mst. Nasima Bibi,[22] it was held that the word "adequately" includes cases of total neglect or refusal. The judges seem to have extended the provisions of the Ordinance as they gave the Arbitration Council

21. In Bangladesh the right of the Subdivisional Officer for revision has been taken over by the Assistant Judge's Court, projecting the encroachment of the judiciary in the local administrative sphere.

22. 1967 19 DLR (WP) 50.

power to grant allowances for a period prior to the time of making of application.[23]

In Gul Newaz Khan v Maherunnessa Begum,[24] The High Court of Dhaka ruled that since willful non-payment of maintenance constitutes a ground for divorce, willful non-payment of dower due on demand entitles a wife to seek a judicial decree of divorce.

Overall, was can see that the courts in Pakistan were implementing the provisions of the MFLO and in some cases extending the meaning of certain provisions. However, the effects of this legislation on the society as a whole seem to have been minimal, as the concern to protect women was not so strong. The requirement of women in South Asia to have freedom from economic deprivation and violence were not focused on in the judicial decisions. Although some emphasis was given in the MFLO on giving maintenance and dower for wives, the courts were only alerted when there was total neglect and refusal. Moreover it has been argued that the legislation could only affect the elites of the society.[25] Thus, the patriarchal domination of Pakistani family law continued despite some well-sounding legislation and cases which paid lip-service to protecting the needs of women. The law as a whole would not come to the rescue of most women who found themselves confronted with violence and economic deprivation.

In summing up it can be critically commented that the Muslim Family Laws Ordinance of 1961 fell short of the needs and expectations of women's organisations and other social reformers who aspired for the better legal protection of women. The Ordinance

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23. *Id.*

24. 3 PLD 1965 Dacca 274-276.

25. See for details Carroll, Lucy : 'The reception of theMuslim family laws Ordinance, 1961, in a Bangladeshi village'. In *Contributions to Indian sociology*. Vol.12, No.2, 1978. pp.279-286; Pearl, David : 'The impact of the Muslim Family Laws Ordinance in Quetta (Baluchistan) 1966-68'. In *Journal of the Indian Law Institute*. Vol. 13, Oct-Dec. 1971, pp. 561-569.

did ignore some of the important issues crucial to women, such as khul divorce, custody of children and past maintenance for women, as had been recommended by the All Pakistan Women's Association.[26]

The Ordinance was within the ambit of modern versions of Islamic norms. But the Arbitration Councils could not ensure full justice to the aggrieved women in Pakistan. Matters referred to an Arbitration Council would usually be decided in accordance with social norms prevailing in the society.[27] In the patriarchal setting of Pakistan, this form of local dispute settlement could not effectively rescue Muslim women from economic deprivation and violence.

The law of Maintenance in Bangladesh

The law of maintenance in Bangladesh is a combination of codified law, local traditions and the traditional Muslim law. The quantum of maintenance is regulated under the schools of Muslim law by considering different circumstances. The Hanafi law determines the amount of maintenance by referring to the social position of both husband and wife, whereas the Shafi law only considers the position of the husband and the Shia law focuses on the requirements of the wife.[28] Bangladesh mainly follows Hanafi law but the cases do not reveal that the courts are taking into consideration the social position of both husband and wife while ascertaining the amount of maintenance.

There were two types of device available for redress in the cases of maintenance. First, a person could have instituted a criminal

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26. *Recommendation of Family Laws Ordinance 1961.* All Pakistan Women's Association (APWA), Lahore 1961.

27. For details see Pearl, (1971), pp. 561-569, at p. 561; Carroll (1978), pp.279-286.

28. Tyabji, Faiz Badruddin : *Muslim Law.* Bombay 1968, pp. 265-266; Ali, Ameer Syed : *Mohammedan law.* Vol.II, Calcutta 1917, p. 462; Anderson, Norman : *Law reform in the Muslim world.* London 1976, pp. 132-133.

suit in a criminal court under section 488 of the Criminal Procedure Code, 1898. Secondly, a civil suit might be instituted in the civil courts. In Meher Negar v Mojibur Rahman[29] the High Court Division of the Supreme Court held that it seems from the decision of Abdul Khaleque v Selina Begum,[30] that the jurisdiction of the Magistrates to entertain application under section 488 CrPC have been ousted and maintenance is a Family Court matter now. But considering the legal provisions, facts and circumstances the Court further held that the Family Courts Ordinance, 1985 have not taken away the power of the Magistrates to order for maintenance u/s 488 CrPC. Thus, in Banglaesh, both the Magistrate Courts and the Family Courts had concurrent jurisdiction in passing order for maintenance of wife and children untill the judgement passed in the case of Pochon Rikssi Das v Khukhu Rani Dasi and others.[31] In this case it was held that the criminal courts cannot entertain maintenance cases any longer and that by the Family Courts Ordinance, 1985 criminal courts jurisdiction has been ousted. Although this article is circumscribed to legal connotations and does not specifically deal with the social implications. It is undisputed that negligible portion of disputes actually comes up to the courts for the reasons of social stigmas and conventions attached to it in this patriarchal society.

The courts are institutions which could enforce newly created statutory rights into part and parcel of this society. An examination of the maintenance cases reported after 1971 illustrates this point.

In former East Pakistan the Subdivisional Officer or the local administrative sphere had the right of revision. The only procedural development that has been made in Bangladesh relating to the law of maintenance is that revision against the Arbitration Council is done by the Assistant Judge's Courts,i.e. the lowest tier of the

29. 47 DLR (1995), 18.

30. 42 DLR (1990), 450.

31. 50 DLR (1998), 47.

judiciary under the Muslim Family Laws (Amendment) Ordinance of 1985 (Ordinance xiv of 1985). This portrays that law is turning towards judiciary than the executive for it's implementation.

This brief discussion shows that the issue of maintenance is an amalgam of substantive Muslim law and statutory legislation. The query analysing the case law in Bangladesh will project whether the courts are giving more preference to the traditional Muslim law than the statutory legislation.

Application of the legislation relating to maintenance by the courts in Bangladesh

This part of the paper will focus on the application of this legislation as reflected through case-law. First of all, we are concentrating on the unreported decisions of the Family Courts then we will deal with the decisions of the higher tier of the judiciary to observe the attitude of the judges towards granting maintenance to women. Finally we will focus on the problems faced by women when they want to enforce the law.

Eleven unreported judgments on realisation of maintenance in the Family Courts of the capital city of Dhaka were gathered. The cases are usually brought for the realisation of dower and maintenance together. Because the rift between the parties had already started, a maintenance claim is the only weapon women have to restore their position or at best to have some relief from economic constraints. The cases on the issue of maintenance as a fundamental right of Muslim women appears that the Family Courts are showing that they are strictly applying the traditional Muslim law, infact they are not.

Other judgements are revolving in a similar trend where the doctrines of traditional Muslim law is forcefully applied even when it is not applicable. As for example the doctrine of *nashuza* or disobedience is applied to wives and it is regarded as their fault if they leave their matrimonial home even when their husbands live abroad and the mother-in-law ill-treats them. But in accordance to the Sharia law if there is sufficient cause for the wife to refuse

to live with the husband she is entitled to maintenance. According to Mahomed Ullah Ibn S. Jung :

> Maintenance is due to the wife even when she is in her fathers residence, unless she refuses to live in her husbands house.[32]

In Monawara Begum v Md. Hannan Hawladar,[33] the Family Court of the village Madhurchar in the Dohar upazila of the Dhaka district did not allow the wife maintenance on the ground that she was not present in her in-law's house while her husband was working abroad. This means that the judges are concerned for the presence of the wife in the matrimonial home, not only for the performance of the marital obligations. This is further evidence that judicial attitudes are influenced by stereotyped concerns about controlling women's movement. In the above case, what was the wife expected to do in the in-law's house? The parties were married under a registered *kabinnama* on 18.2.83 with a dower of 30,000 taka and the delegation of the right of divorce to the wife. The plaintiff pleaded that the hushand left the country in 1987 for a job in the Middle-East and she was treated cruelly by her mother-in law and was compelled to leave the matrimonial home. It had been held in a very old case[34] that the wife is not entitled of maintenance in such a situation, as quarrels and disagreement with her mother-in-law did not constitute a legal reason for her to leave her husband's house. This situation could be tackled if the right of separate residence and maintenance for such ill-treatment or differences had been stipulated in the *kabinnama*, as in a much older case.[35] The court may have based the judgment on the former case, although there is no reference to any case law. On the other hand, the court was relying on the wrong or fault of the plaintiff

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32. Jung, Mahomed Ullah Ibn S.: Dissertation on The Muslim Law Of Marriage-Compiled from the origial Arabic Authorities, Allahabad 1926, p.41.

33. Family Suit No. 15 of 1989 (unreported).

34. *Mohammad Ali Akbar* v *Fatima Begum*, AIR 1929 Lahore 660.

35. *Sabed Khan* v *Bilatunnissa Bibi*, AIR 1919 Calcutta 825.

and not the defendant's staying abroad. This might itself be the effect of the patriarchal notions influencing the attitude of the judge. The court ascertained that the wife had left her husband's residence without his permission, as she could not produce any letter showing that her husband had given approval for her to leave the residence. Thus, absence of documents in such situations could deprive the wife of her rights. The court decided that she was not entitled to maintenance during the subsistence of the marriage. Perhaps the traditional concept of disobedience or *nashuzah* was a basis of this judgment also, although it was not explicitly mentioned in the judgement. The court held that as the wife had divorced her husband by the power of delegated right of *talaq-e-tafweed*, she was only entitled to maintenance for the *iddat* period (1,200 taka for three months, i.e. 400 taka per month). The law of *talaq* and *talaq-e-tafweed* is same and in both the wives are entitled to maintenance within marriage and in *iddat*.

The courts are interpreting the fact that when a plaintiff is not living with her husband it tantamounts to refusal to perform marital obligations. In Ambia Khatoon v Md. Yasin Bepari,[36] the facts of the case were that the plaintiff and the defendant were married on 7.7.87 and their marriage was registered under a registered *kabinnama* which also mentioned dower of 50,000 taka and stipulated that the wife was entitled to maintenance in a respectable manner. The Family Court ascertained that the marriage subsisted and rejected the claim of the defendant that he had paid maintenance. The court decided that, as it was stipulated in the registered *kabinnama,* the plaintiff was also entitled to past maintenance when she was cohabiting with the defendant; i.e. from 7.7.87 to 6.4.88. However, the court did not allow maintenance for the time when the plaintiff was not living with the defendant.

In Mst. Hafeza Bibi v Md. Shafiqul Alam,[37] the plaintiff and

36. Family Suit No. 98 of 1990 (unreported).

37. Family Suit No. 28 of 1992 (unreported).

defendant were married under a registered *kabinnama* on 9.7.86 with the dower money fixed at 50,001 taka. The defendant gave *talaq* to the plaintiff on 18.11.91. The court did not grant maintenance to the wife during the subsistence of the marriage, as she was not obedient to her husband. One of the main criteria of her disobedience was that she was staying away from her husband. However, the court allowed maintenance for the *iddat* period.

In Mst. Razia Akhter v Abul Kalam Azad,[38] a suit for the realisation of dower and maintenance, the parties were married under Islamic *sharia* on 11.6.87 and a son had been born from the wedlock. The court ascertained that the defendant gave *talaq* on 5.1.89 when the plaintiff was not residing in the defendant's house. The son was born on 2.6.89. The court granted the woman maintenance for the *iddat* period, i.e. until the son was born five months after the *talaq*. This extension of the period of maintenance is in line with traditional Islamic law and the statutory enactment. Islamic law provides for this extension of *iddat* period of maintenance to ascertain the lagitimacy of the child. Under section 7(5) of the Muslim Family Laws Ordinance of 1961, if the wife is pregnant at the time of *talaq*, it is not effective unless the pregnancy ends. Thus, the judgment only gave extended maintenance to the woman till the baby was born but does not allow maintenance within the marriage when she was not residing in the defendants house.

Sometimes the Family Courts do not recognise the false allegations of the husband that the wife does not have any moral character and was married before but strangely allow the maintenance of the *iddat* period. In Mst. Shahida Begum v Md. Mahbub Hossain,[39] the plaintiff prayed for the realisation of maintenance only for the *iddat* period. The facts of the case state that the parties were married on 3.2.90 and the *kabinnama* was registered. After

38. Family Suit No. 193 of 1989 (unreported).

39. Family Suit No. 112 of 1991 (unreported).

leading a conjugal life for eight months, the defendant gave the plaintiff *talaq* on 21.10.90. The defendant alleged that the plaintiff had married him while her marriage was already subsisting with another man and she did not have a good moral character. The court rejected these defences as the defendant could not prove any of them sufficiently. The court held that as the defendant had given *talaq* to the plaintiff, she was entitled to maintenance for the period of *iddat.*

There is a strong sentiment of female seclusion of *lojja* and *sharam* working within women of Bangladesh, so that they do not like their private affairs to be opened in public. But these emotions might have changed their attitude in the legal battle. In Mst. Meherunnahar v Rahman Khondakar,[40] the Family Court squarely applied the classical Muslim law that when the marriage is not consummated, the wife is not entitled to any maintenance.[41] The facts of the case were that the parties were married under the Islamic *sharia* on 7.3.85 but after a few months, in September 1985, she was sent back to her father's house and on 25.5.87 the marriage was dissolved by *talaq*. The court rejected the allegation of the defendant that the wife had veneral disease but decided that *talaq* was effectively given. The court ascertained that the defendant had failed to provide maintenance to the plaintiff but did not allow maintenance to the wife as she herself had stated that there was no consummation of the maggiage. Although the facts and circumstances showed the opposite, the court ruled that admitted facts need not be proved. It was evident that the plaintiff (wife) lied in the court about not having intecourse with her husband. But why did she lie? Was the force of female seclusion (*lojja or sharam*) even stronger than her claim for maintenance? However, such attitudes of women are never considered in a court of law.

It is important to point out that it can not be gathered from the

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40. Family Suit No. 24 of 1987 (unreported).

41. See Ali, Ameer Syed : *Mohammedan law.* Vol. II, Calcutta 1917, p.463.

judgments whether the courts are following the traditional doctrine of taking into consideration the social position of the parties for ascertaining the quantum of maintenance. It could not also be assessed what principle they are following to ascertain the precise amount of maintenance. In the *kabinnama*, maintenance is usually regarded as to be given in a respectable manner (*bhodrochito hare*). But it is not expressed how much maintenance can be regarded as respectable.

In some cases, where the husband is residing abroad, the Family Courts are granting a higher scale of maintenance. In Margubater Rouf v A.T.M. Zahurul Haq Khan,[42] a suit for the realisation of dower and maintenance, the facts of the case disclose that the parties were married on 20.10.88 and the marriage was registered. In the *kabinnama* the dower was fixed to the extent of 300,000 taka, which might be for show of status or security for the wife. The plaintiff pleaded that the defendant left for abroad and did not provide any maintenance for her. The defendant alleged that the plaintiff was having an affair with another man and was unwilling to lead a conjugal life with him. The reasons behind this might be the migration dilemmas arising when husbands work abroad, as well as the social disapproval of the wife living without her husband. The husband gave *talaq* to the wife on 25.2.90. The court decided that, as *talaq* had been given effectively, in accordance with the Muslim Family Laws Ordinance 1961, no marriage subsisted and the wife was entitled to maintenance during the *iddat* period. The court reasoned that the wife was not entitled to any maintenance during the subsistence of the marriage as she was not willing to have conjugal relations with the husband. But it is interesting to note that the court ascertained 40,000 taka as the maintenance of the wife for three months,i.e. 13,000 taka per month, whereas in similar cases only 600 to 1,000 taka per month were given. It may be assumed that the court was here taking into

42. Family Suit No. 1 of 1992 and Family Suit No.3 of 1992 (analogous hearing) (unreported).

account the financial ability of the husband, who was working abroad. Alternatively, it was compensating the wife for the fact that matrimonial cohabitation ceased not due to her fault, but the husband's absence for being abroad. However, in Nasima Bilkis v Md. Abdus Samad,[43] the maintenance for the *iddat* period was ascertained as 2,500 taka per month when the husband was not working abroad. It cannot be gathered from the judgment why the court awarded such an high amount. The facts of the case are that the parties were married on 23.3.90 by a registered *kabinnama.* The plaintiff, alleging her husband's cruel behaviour, was living in her father's house from 19.7.90. The defendant persuaded the plaintiff to stay with him and the plaintiff stayed for seven days and then came back to her father's house again on 17.3.91 with the same allegation. The plaintiff divorced the defendant on the basis of her delegated power of divorce on 2.6.91 and registered the *talaqnama.* The Family Court decided on the evidence of a letter of the plaintiff's father that the relationship of the parties was not harmonious and so the plaintiff was not entitled to maintenance during the subsistence of the marriage not even for the seven days when she was staying with the defendant. But the Family Court decided that the plaintiff was entitled to maintenance for the *iddat* period.

There are some unreported cases in the Family Courts of Dhaka which portrays a positive picture where the courts not only allowed maintenance in the subsistence of marriage but also in *iddat.* In Mst. Roksana Begum v Md. Abul Khair,[44] the basic facts of the case were that the plaintiff and defendant were married under Islamic *sharia* on 10.2.88 with the dower money mentioned as 50,000 taka in the *kabinnama.* The defendant claimed that he had given *talaq* to the wife but he could not prove it in the court. The court therefore held that the *talaq* was not effective. The court

43. Family Suit No.12 of 1992 (unreported).

44. Family Suit No. 96 of 1991 (unreported).

decided that the defendant must pay within thirty days of the judgement maintenance of 1,000 taka per month to the plaintiff for the time when the proceedings were conducted, i.e. from the date of instituting the suit to the date of judgement (May 1991 to March 1993). The court also directed the husband to pay the monthly maintenance to the wife within the first 10 days of the month.

In Mst. Angari Begum v Md. Iqbal Rashid,[45] the parties were married on 6.11.89, fixing the dower money at 20,000 taka. The court found that the marriage subsisted and granted the wife maintenance not only for the time when the proceeding was going on (the suit was instituted on 6.4.91 and ended on 5.1.92) but long before that (from 1.8.90 to 5.1.92) and also ordered the defendant to pay further maintenance to the plaintiff within the first week of each month. The court fixed the monthly amount of maintenance at taka 800.

In Mst. Fatima Begum v Mohammed Golam Hossain,[46] the court held that the wife was entitled not only to maintenance for the present time but also past maintenance for the last seven months, as there was an agreement to pay maintenance in the negotiation or *shalish* in the Commissioner's office. This shows that the courts are also considering other contracts than the *kabinnama* to ascertain the maintenance and, in particular, that they are willing to build negotiated settlements into their decisions.

The reported cases of maintenance of the higher level of judiciary does not generally project a modernist trend of the law. Although, the latest decisions of the highest tier of the judiciary has suddenly made a substantial development in the law of maintenance.

In a fairly recent reported case on maintenance, the High Court shows itself to be static and does not deviate from the traditional concept of providing past maintenance unless the claim is based

45. Family Suit No. 52 of 1991 (unreported).

46. Family Suit No. 61 of 1991 (unreported).

on specific agreement or a decree of a court. In Rustom Ali v Jamila Khatun,[47] the High Court Division of the Supreme Court did not grant the past maintenance allowed by the lower Court as the wife was not staying with her husband. Thus the husband, with his sexual rights over the wife, controls residence in his marital home. Where the wife refuses to cohabit, she becomes a disobedient wife a or *nashuza*, which was in this case regarded as a prima facie cause for not allowing maintenance.[48] Muslim law only allows the wife maintenance if she is staying in her father's house, when the husband did not request her to come to his house, or it would involve danger or risk of her life or health to remove her from her father's house.[49] The court did not cosider the conditions which compelled the wife in Rustom Ali v Jamila Khatun,[50] to stay separate. This conveys an impression of unsympathetic attitude towards women and also exhibits a strong desire to control women's movement. The court only allowed maintenance from the date of institution of the suit till three months after the decree for dissolution of marriage,i.e. during the period of her *iddat.*

In Hosne Ara Begum v Md. Rezaul Karim,[51] the High Court Division of the Supreme Court ordered the husband to pay maintenance even when the wife left the husband's residence. The wife was living away from the matrimonial home on the ground of cruelty. Perhaps, the evidence of cruelty of the husband made the court considerate towards the wife. However, in Sirajul Islam vs. Helana Begum and others[52] the High Court Division of the Supreme Court decided that the Court has the jurisdiction to pass

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47. 43 DLR (1991) HCD 301.
48. For the law on this see Mahmood (1982), pp.76-79; Tyabji (1968), pp.263-267.
49. Ali (1917), p. 461.
50. 43 DLR (1991), HCD 301.
51. 43 DLR (1991) 543.
52. 48 DLR (1991) 48.

decree for past maintenance in an appropriate case and the decision of Rustam Ali v. Jamila Khatun[53] was held not to be applicable.

The latest position of Sunni Law in the Subcontinent regarding past maintenance of Muslim wife is held by the appellate Division of the Supreme Court in Jamila Khatun vs. Rustom Ali[54] is that the wife is entitled to past maintenance even in the absence of any specific agreement.

In South Asia the jurists had also argued that the husband should provide maintenance during subsistence of marriage and during the *iddat* period.[55] This was, perhaps, because in Islam after dissolution of marriage the parties are entitled to remarriage and the woman returns to her natal family.[56] It is just not fair to burden a man with the obligation of maintenance when he is no more her husband as marriage is a religious and social contract under Islamic law. Moreover, according to Islamic law, the deferred dower is seen as the safequard for divorced women. Nevertheless, women in Bangladesh are usually deprived of their deferred dower. But what happens to those women whose natal family can not provide for them? There is no state welfare system in South Asian countries as in the West. Islamic law states that if the natural family can not maintain the divorcee her maintenance will be a charge on collective resources of the Muslim Community as a whole. If there is a *Baitul Mal* or a community fund the divorcee could be provided from it or savings out of *waqf* property can also be used for such purpose.[57]

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53. 43 DLR (1991) 310.
54. 16 BLD (AD) (1996) 61
55. Fyzee (1974), p. 186; Diwan, Paras : *Muslim Law in modern India.* Allahabad 1985, p.130.
56. Mahmood, Tahir : *Personal laws in crisis.* New Delhi 1986, p. 87.
57. Shabbir, Mohd. : *Muslim Personal Law and Judiciary.* Allahabad, 1988, p. 288.

In India it has been argued that maintenance after divorce is an obligation of the ex-husband on the basis of the argument provided in the original sources.[58] The appellant stressed that the amount which was stated to be given after divorce is the deferred dower. Conclusively *Mata* is a gift to be given to divorcee or at the time of departure to console her or to conciliate her grief at the critical and delicate moment. But this argument did not satisfy the court and they decided that divorcee should be provided for maintenance till remarriage or death. This decision by the apex of the Judiciary in India exploded the Muslim community into a great controversy and debate. Majority of the Muslim community was of the opinion that the line of reasoning adopted by the Supreme court was contrary to the *sharia.* It was opined that it is neither desirable nor reasonable to bend the personal laws beyond their limit to unsettle the well-established rules of Muslim personal law.[59] This agitation in the Muslim circle led to the passing of the Muslim Women (Protection of Rights on Divorce) Act, 1986.[60]

From the women's viewpoint it is seen that the wife who has spend her whole life and labour for her husband's household, which was not rewarded, should not just be turned out of her house without any subsistence. In Bangladesh these problems are not articulated yet. The High Court Division of the Supreme Court had taken steps to provide for post-divorce maintenance. In Hefzur Rahman vs. Shamsun Nahar Begum[61] it was held that a person after divorcing his wife is bound to maintain her on a reasonable scale

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58. In the celebrated case of *Shah Bano* (Mohd. Ahmed Khan AIR 1985 SC 945) in India the court allowed post divorce maintenance. See for details, Naseem, Mohammad Farogh : *The Shah Bano case : X-rayed.* Karachi 1988; Ali, Asghar (ed.) . *The Shah Bano controversy.* Bombay 1989.

59. Shabbir, (1988), p. 285.

60. For the current development under the *Muslim Women (Protection of Rights on Divorce) Act* of 1986 see Menski, W.F.: 'Maintenance for divorced Muslim wives'. In *Kerala Law Times.* Journal 1994 (1), pp. 45-52.

61. 47 DLR (1995) 54.

beyond the period of *iddat* for an indefinite period till she loses the status of a divorcee by remarrying another person. The verse in the Holy Quran (2:241) translated by Abdullah Yusuf Ali was relied on :

> For divorced women maintenance (should be provided) on a reasonable scale. This is a duty on the righteous.[62]

The High Court Division considered only the literal meaning of the first part of the verse. The transliteration runs as : *"Wa lil-mootalla kate mataaoon* bil-maaroof".[63] However, the Appelate division of the Supreme Court held that the learned judges of the High Court Division did not give any attention to the real translation of the two arabic words *"Mataa"* and *"Nafaqa"* and wrongly held that a divorced woman is entitled to maintenance till she remarries.[64] *Mataa* has been translated as consolatury gift or compensation or indemnity. It is basically different from regular maintenance of the divorcee.[65]

Traditional Muslim juristic opinion is to the effect that the injunction of the Quran does not go beyond the iddat period. According to *Hedaya* translated by Charles Hamilton[66]

> Where a man divorces his wife, her subsistence and lodging are incumbent upon him during the term of her edit, whether the divorce be of reversible or irreversible kind.

Neil BE Baillie in his book also imitated the view from the *Hedaya* and stated that a *mooutuddah* or women who are divorced on account of repudiation for any cause other than her own, is entitled to maintenance and lodging during her *lddut*.[67] This has been

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62. Ali, Abdulla Yusuf : *The Holy Quran,* Delhi 1979.
63. Ibid.
64. 51 DLR (AD) (1999) 172.
65. Ibid, 173.
66. Book iv, chapter xv, section 3, p.145
67. *The Digest of Moohummudan law,* London 1865, p.450.

recently upheld by the Appellate Division of the Supreme Court of Bangladesh in Hefzur Rahman vs. Shamsum Nahar Begum.[68] The Quranic verse 65:6 which is considered in this regard directs the husband's to pay maintenance to their divorced wives during *iddat*, it says :

> "Let the women live (In *iddat*) in the same style as ye live, According to your means : Annoy them not, so as to restrict them. And if they carry (life in their wombs), then spend (your subsistence) 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 women suckle (the child) on the (father's) behalf."[69]

Consequently, the Appellate Division ruled that the judgement of the High Court Division is based on no sound reasonings and it is against the principles set up by Muslim jurists of the last fourteen hundred years. The judgement was perhaps a reflection from earlier decisions. In Aga Mahomed Jaffer Bindamen vs Koolsoom Beebee and others as early as in 1870 it was held by the Privy Council that it would be wrong for the court on a point of this kind to attempt to put their own construction on the Koran in opposition to the express ruling of commentators of such great antiquity and high authority.[70]

In the above case[71] it was also held by chief justice ATM Afzal that the Quranic verses can not be understood in total isolation and not only on its literal construction but with the help of the prophet's (peace be upon him) teachings and practices and subsequently by the enunciations of Islamic jurists and scholars. Justice Mustafa Kamal in his decision stated that if *mataa* means maintenance it will run counter to *ayats* 233, 236 and 237 of *Sura Al-Baqarah* and

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68. 51 DLR (AD) (1999) 172.
69. Ali (1979), p. 1565.
70. 25 ILR (1870) Cal 9.
71. *Hefzur Rahman* vs. *Shamsun Nahar Begum* 51 DLR (AD) (1999) 173.

Ayats 6 and 7 of *Sura Al-Talaq*. If *mataa* does not mean maintenance it means consolatury gift or compensation or indemnity which should be provided to the divorced women in accordance to the Holy Quran.

There are problems which continually crop up in all maintenance cases. Firstly, there is the question of determining the amount of maintenance, i.e. how do the law and the Family Court arrive at an just and adequate sum? It has been shown in the discussion of the cases that there is no firm policy, although sometimes the husband's income is taken into consideration. Secondly, the problem is more acute, as husbands evade to pay maintenance in the majority of the cases. The only sanction left to the wife is to execute the decree, which is also not difficult for the husband to escape as the law is hardly implemented. Moreover, men in the patriarchal society of Bangladesh have the advantage to use social harassment, family slander and, in the extreme, physical threat so as not to implement the law. This is another element of the patriarchal arbitrariness which is the result of male authority in society. However, it is true that the enforcement of Maintenance decree is very difficult where the husband is unwilling to pay, but the statutory provisions are there. The need of the hour is enforcement of the law.

The execution of Family Court decrees in accordance to the Family Courts Ordinance, of 1985 is dealt in section 3 which states that if the decree is the payment of money and the decretal amount is not paid within the time specified by the court, the Family Court will act as the Civil Court. But if it is for the order for payment of fine the Family Court will act as the Criminal Court and may issue a warrant, pass an order for imprisonment if the decretal amount is not paid. The execution of maintenance decrees is similar to the the decree of the payment of money. It is suggested here that where the decree is the payment of money the Family Courts power should be as the Criminal Court. This will ensure that the husbands pay maintenance. It is also recommended that the sanctions of the Family Courts could be strengthened by providing them with a criminal court's power to attach the property

of the husbands to pay maintenance to the wife.

The real difficulty in availing the legal remedy for obtaining maintenance is the time factor involved in getting a decree for maintenance. It has been rightly pointed out by an author that maintenance for the wife is an immediate need and the delays in litigation often defeat the purpose.[72] It is suggested that reforms should be made in the Family Courts Ordinance, 1985 for providing interim orders not only for preventing persons from frustrating the suit as provided under section 16A of the Ordinance. But providing for an interim order pending final disposal of the suit, for a deposit in the Family Court every month, an amount tentatively determined by such court for payment as maintenance of wife and children. The powers of the Family Courts should be enhanced in this regard. By this method for an interim maintenance order it will give relief to the deserted and poor wives who does not have any other means of livelihood.

The present paper has shown in various ways that wives in Bangladesh are denied of their Islamic right of maintenance. It is suggested that reforms should be made in the Family Courts Ordinance, 1985 to make this statutory right more effectively enforced.

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72. Patel, Rashida : *Women and law in Pakistan.* Karachi, 1979, p.67.