

Maintenance to Muslim Women in Bangladesh and Malaysia: Is the Judiciary Doing Enough?

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Introduction:

Islamic family law system has been successfully in practice by the Muslim community since the early centuries of Islam until the present day. In the beginning of the nineteenth century, an attempt was made to reform the traditional Islamic family law. The idea in reforming the law began when the classical doctrine of Islamic Law was felt by the authorities of certain Muslim country to be unsuitable to cope with several problems faced by the Muslim community. Several Muslim countries have started to promulgate their family law in a codified form. Not every aspect of family law was subject to reform. Polygamy, *Talaq*, minimum age of marriage was among the matters of concerned to the reformers. Other areas such as maintenance seemed to remain untouched by the reformers and thus were left to be governed by the classical law.

Women's rights of property through maintenance are already granted in the *Sharia* law and under official law. However, after several decades of implementation of the legal provisions at the courts, several problems have been encountered by Muslim women especially in their ways to get justice and their rights. As those rights are not being implemented women are actually deprived of those rights which can empower them and bring about the economic empowerment. With the growth of women's studies, more and more authors have identified labour, power and sexuality as the main structural elements shaping the relationship between gender and power.¹The economic position of women in society is reflected according to an eminent author as ability to own, or inherit and control, income earning assets; ability to participate in economic activities; control over their husband's income and right and ability to control property.²

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¹ See for example Connell, R.W. 1986. *Gender and Power*. London, p.104.

² Ahmad, Alia. 1991. *Women and Fertility in Bangladesh*. New Delhi, Newbury Park and London, p.31.

Women in Bangladesh are, marginalised within an intensely hierarchical system of gender relations which continually challenge to deny women not only access to social power and control over their own lives but also granted rights to which they are entitled.³ Female employment in Bangladesh did not provide women control over main production, landownership or income earned.⁴ However, Muslim women in Malaysia seem to have a better position than Bangladesh. The Government of Malaysia through the National Policy of Women in 1989 has underlined strategies for women's advancement. Women were given equal opportunities to higher education, better access to health-care and encouraged women to participate in workforce not only on the insignificant occupations but also in professional and managerial positions.⁵ The government developed several programs to improve the legal and socio-economic status by providing greater opportunities in education, employment and monitoring programs for integration of women in development. Despite of industrialization and modernization, Muslim women in Malaysia did not abandon their religion, culture and tradition in order to improve their status.⁶

The practice of Muslim majority countries is shared like Malaysia and Bangladesh to lead to a reduction in improper application of *Sharia* law, particularly affecting women. The difference of social attitude towards women in Bangladesh and Malaysia is the main reason for comparison of this analysis. Therefore, this article will enhance access to the legal justice system by reviewing the relevant judicial system and mechanism in the legal framework and processes for the enforcement of Laws on women. The article aims to evaluate the potentiality of *Sharia* law for better protection of women in relation to her rights of maintenance. The impact of legal practice is exposed by the court cases, from which the views of the judiciary about the application of the laws for the empowerment of women of Bangladesh and Malaysia can be analysed. In view of our premises, we shall need to focus particularly on the question whether judges protect women from abuse and exploitation.

³ Kabeer, Naila. 1988. "Subordination and Struggle: Women in Bangladesh". *New Left Review*. No.168, pp. 95-121, at p.101.

⁴ Khan, Zarina Rahman. 1992. *Women, Work and Values: Contradictions in the Prevailing Notions and the Realities of Women's Lives in Rural Bangladesh*. Dhaka, p.198.

⁵ Omar, Roziah. 2003, "Negotiating Their Visibility: The Lives of Educated and Married Malay Women", *Women in Malaysia: Breaking Boundaries*. Kuala Lumpur, p. 124.

⁶ *Ibid*.

The Law of Maintenance in Bangladesh

The laws which are in force in Bangladesh comprise the general law and the family law. The family law in Bangladesh is based on religion. Women's rights to property are already granted in the *Sharia Law*⁷ and under official law but such rights are not enforced. There are misconceptions that as women are maintained they are not to be provided of their landed entitlements granted under Islamic and official law. Thus, the patriarchal argument that women are subordinated by religion is not completely true, as even the rights which are granted in the religious law are often not enforced in a male-dominated patriarchal society.⁸ An innovative study showed that women are being deprived economically by the customs and conventions of the society that put an embargo to secure their inheritable entitlements.⁹

In cases of maintenance, the courts did not previously provide for past maintenance unless stipulated in the *Kabinnama* (Contract of Marriage), nor would it allow post-*Iddat* period (waiting period to remarry) 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 impulsive subjugation.¹⁰

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 scale of maintenance by referring to the social position of both husband and wife. Whereas, the *Shafie* law only considers the position of the husband

⁷ Lateef, Shaheeda. 1973. "In a Community". Paper presented in the seminar on the status of women, held in Dhaka, pp.29-34; Serajuddin, Alamgir Muhammad. 1987. "Muslim Family Law and the Legal Rights of Muslim Women in South Asia". *Journal of Asiatic Society of Bangladesh* (Hum). Vol. xxxii, No.2, Dec. pp.128-147, at p. 128.

⁸ Monsoor, Taslima. 2005. *Judiciary & Gender on Trial*. Published by British Council and Foreign and Commonwealth Office, Dhaka; Monsoor, Taslima. 2008. *Gender Equity and Economic Empowerment: Family Law and Women in Bangladesh*. Published by British Council under EWLR (Empowerment of women in the legal regime) a Higher Education Link programme of Law Dept Dhaka University and Law Dept SOAS (School of Oriental and African Studies University of London), Dhaka.

⁹ See for details Monsoor, Taslima. 1998. "In Search for Security and Poverty Alleviation: Women's Inheritable Entitlements to Land, the Untapped Resources". *BILIA'S Journal of International Affairs*, Vol. 4, No. 2, July-Dec, pp. 42-57.

¹⁰ Malik, Shahdeen. 1990, "Saga of Divorced Women: Once again Shah Banu, Maintenance and the Scope for Marriage Contracts". 42 DLR (Journal), pp. 35-40, at p. 39.

and the *Shia* law focuses on the requirements of the wife.¹¹ Bangladesh mainly follows *Hanafi* law but the cases do not reveal that the courts take into consideration the social position of both husband and wife while ascertaining the amount of maintenance. The query analysing the case law in Bangladesh will project whether the courts give more preference to the Muslim women in Bangladesh to realise their rights of maintenance.

Application of the Legislation Relating to Maintenance by the Courts in Bangladesh

It may be expected that the effects of a male-dominated patriarchal society have an impact on the courts. But some judicial decisions are remarkably enlightened and can be seen as a departure from the patriarchal mould. These decisions signify concern of the higher courts not only about giving general emphasis on women's rights but also about the need to protect women from cruel treatment and deliberate economic deprivation. There are also many judgments, however, in which the courts interpreted the legislation only on the basis of orthodox concepts and fail to give effect to the underlying social purpose of the *Sharia* law or legislation.

The views of the judiciary about the application of the laws for the empowerment of women in Bangladesh was analysed by reported and unreported cases. In view of this premises, we shall need to focus particularly on the question whether judges protect women from economic abuse and exploitation. To analyse how far judicial decisions are enforced to protect or safeguard women's interest, or whether they are merely rhetoric, we have to go into details of the family law judgments.

Thus, 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 decisions of the higher tier of the judiciary to observe the attitude of the judges towards granting maintenance to women then we will deal with the unreported decisions of the family courts. Finally we will focus on the problems faced by women when they want to enforce the law.

The reported cases of maintenance of the higher level of judiciary do 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.

¹¹ Tyabji, Faiz Badruddin. 1968. *Muslim Law*. Bombay, pp. 265-266; Ali, Syed Ameer. 1917. *Mohammedan Law*. Vol.II, Calcutta, p. 462; Anderson, Norman. 1976. *Law Reform in the Muslim World*. London, pp. 132-133.

In a 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 on specific agreement or a decree of a court. In *Rustom Ali v Jamila Khatun*¹², the High Court Division of the Supreme Court did not grant 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 or *Nashuza*, which was in this case regarded as a *prima facie* cause for not allowing maintenance.¹³ 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 to her life or health to remove her from her father's house.¹⁴ The court did not consider the conditions which compelled the wife in *Rustom Ali v Jamila Khatun*¹⁵ to stay separate. This conveys an impression of insensitive 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*¹⁶, 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 v Helana Begum and others*¹⁷ the High Court Division of the Supreme Court decided that the court has the jurisdiction to pass decree for past maintenance in an appropriate case and the decision of *Rustam Ali v Jamila Khatun*¹⁸ 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 v Rustom Ali*¹⁹ is that the wife is entitled to past maintenance even in the absence of any specific agreement.

¹² 43 DLR 1991, HCD 301.

¹³ For the law on this see Mahmood, Tahir. 1986. *Personal Laws in Crisis*. New Delhi, pp. 76-79; Tyabji, above note 11, pp. 263-267.

¹⁴ Ali, above note 11, p.461.

¹⁵ 43 DLR (1991) HCD 301.

¹⁶ 43 DLR (1991) 543.

¹⁷ 48 DLR (1996) 48.

¹⁸ 43 DLR (1991) 310.

¹⁹ 16 BLD (AD)(1996) 61.

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 has 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 apparently show that the family courts strictly apply the traditional Muslim law, in fact they are not. Other judgments revolve in a similar trend where the doctrines of traditional Muslim law are 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 lives 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 father's residence, unless she refuses to live in her husband's house.²⁰

In *Monawara Begum v Md. Hannan Hawladar*²¹, the family court of village Madhurchar in Dohar *upazila* (unit of administration) 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-laws' house? It had been held in a very old case²² that the wife is not entitled to 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.²³ 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 and not the defendant's staying abroad.

²⁰ Jung, Mahomed Ullah Ibn S. 1926. *A Dissertation on the Muslim Law of Marriage-Compiled from the Original Arabic Authorities*, Allahabad, p. 41.

²¹ Family Suit No.15 of 1989 (unreported).

²² *Mohammad Ali Akbar v Fatima Begum*, AIR 1929 Lahore, 660.

²³ *Sabed Khan v Bilatunnissa Bibi*, AIR 1919 Calcutta, 825.

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 has given approval for her to leave the residence.

The courts interpret the fact that when a plaintiff is not living with her husband it is equivalent to refusal to perform marital obligations (See for details *Ambia Khatoon v Md. Yasin Bepar*²⁴, *Mst. Hafeza Bibi v Md. Shafiqul Alam*²⁵, *Mst. Razia Akhter v Abul Kalam Azad*).²⁶

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. Mahub Hossain*²⁷, the plaintiff prayed for the realisation of maintenance only for the *Iddat* period. 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* (one form of dissolution of marriage) to the plaintiff, she was entitled to maintenance for the period of *Iddat*.

In *Mst. Meherunnahar v Rahman Khondakar*²⁸, the family court squarely applied the classical Muslim law that when the marriage is not consummated, the wife is not entitled to any maintenance.²⁹ The court rejected the allegation of the defendant that the wife had venereal 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 marriage. 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 intercourse with her husband. But why did she lie? Was the force of female seclusion (Shame or *Lojja* or *Sharam*) even stronger than her claim for maintenance? However, such attitudes of women are never considered in a court of law. There is a strong sentiment of female seclusion of *Lojja* and *Sharam* working within women

²⁴ Family Suit No.98 of 1990 (unreported).

²⁵ Family Suit No.28 of 1992 (unreported).

²⁶ Family Suit No.193 of 1989 (unreported).

²⁷ Family Suit No.112 of 1991 (unreported).

²⁸ Family Suit No.24 of 1987 (unreported).

²⁹ See Ali, Ameer Syed. 1917. *Mohammedan Law*. Vol. II, Calcutta, p.463.

of Bangladesh, so that they do not like their private affairs to be opened in public. These emotions might have changed their attitude in the legal battle.

It is important to point out that it can not be gathered from the judgments whether the courts follow 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 follow 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 resides abroad, the family courts grant a higher scale of maintenance. In *Margubater Rouf v A.T.M. Zahurul Haq Khan*³⁰, 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* has 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 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*³¹, the maintenance for the *Iddat* period was ascertained at as 2,500 taka per month when the husband was not working abroad. It cannot be gathered from the

³⁰ Family Suit No.1 of 1992 and Family Suit No.3 of 1992 (analogous hearing) (unreported).

³¹ Family Suit No.12 of 1992 (unreported).

judgment why the court awarded such a high amount. 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*³², the defendant claimed that he has 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 decided that the defendant must pay within thirty days of the judgment 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 judgment (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. The same situation arose in *Mst. Angari Begum v Md. Iqbal Rashid*³³. In *Mst. Fatima Begum v Mohammed Golam Hossain*³⁴, 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.

In South Asia the jurists had also argued that the husband should provide maintenance during subsistence of marriage and during the *Iddat* period.³⁵ This is because in Islam after dissolution of marriage the parties are entitled to remarriage and the woman returns to her natal family.³⁶ 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

³² Family Suit No.96 of 1991 (unreported).

³³ Family Suit No.52 of 1991 (unreported).

³⁴ Family Suit No.61 of 1991 (unreported).

³⁵ Fyzee, A. A. A. 1974. *Outlines of Mohammedan Law*. Delhi, p.186; Diwan, Paras.1985. *Muslim Law in Modern India*. Allahabad, p. 130.

³⁶ Mahmood, above note 13, p.87.

law, the deferred dower is seen as the safeguard for divorced women. Nevertheless, women in Bangladesh are usually deprived of their deferred dower. But what happens to those women whose natal family cannot 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 cannot maintain the divorcee her maintenance will be charged 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 from savings out of *Waqf* property can also be used for such purpose.³⁷

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.³⁸ The appellant stressed that the amount which was stated to be given after divorce is the deferred dower. Conclusively *Mataa* (consolatory gift) 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 judiciary in India exploded the Muslim community into 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.³⁹ This agitation in the Muslim circle led to the passing of the *Muslim Women (Protection of Rights on Divorce) Act, 1986*.⁴⁰

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 v Shamsun Nahar Begum*⁴¹ it was held that a person after divorcing his wife is bound to maintain her on a reasonable scale beyond the period of *Iddat* for an indefinite period till she loses the status of a divorcee by remarrying another

³⁷ Shabbir, Mohd. 1988. *Muslim Personal Law and Judiciary*. Allahabad, p. 288.

³⁸ In the celebrated case of *Shah Bano v Mohd. Ahmed Khan* (AIR 1985 SC 945) in India the court allowed post divorce maintenance. See for details, Naseem, Mohammad Farogh. 1988. *The Shah Bano case: X-rayed*. Karachi, Ali, Asghar (ed.). 1989. *The Shah Bano controversy*. Bombay.

³⁹ Shabbir, above note 37, p. 285.

⁴⁰ For the current developments under the Muslim Women (Protection of Rights on Divorce) Act of 1986 see Menski, W.F. 1994. "Maintenance for Divorced Muslim Wives." *Kerala Law Times*. Vol. (1), pp.45-52.

⁴¹ 47 DLR (1995) 54.

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.⁴² This is a duty on the righteous.'⁴³

The High Court Division considered only the literal meaning of the first part of the verse. The transliteration runs as: "*Wa lil-mootalla Kate Mataaon bil-maarof*".⁴⁴ However, the Appellate 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*" (consolatory gift) and "*Nafaqa*" (maintenance) and wrongly held that a divorced woman is entitled to maintenance till she remarries.⁴⁵ *Mataa* has been translated as consolatory gift or compensation or indemnity. It is basically different from regular maintenance of the divorcee.⁴⁶

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 (Book IV, 145), 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 *Iddat*.⁴⁷ This has been recently upheld by the Appellate Division of the Supreme Court of Bangladesh in *Hefzur Rahman v Shamsun Nahar Begum*.⁴⁸ 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.

Consequently, the Appellate Division ruled that the judgment of the High Court Division is based on no sound reasoning's and it is against the principles set up by Muslim jurists of the last fourteen hundred years.

⁴² The Quran, 2:228 and 2:241.

⁴³ Ali, Abdulla Yusuf. 1979. *The Holy Quran*, Delhi.

⁴⁴ *Ibid*.

⁴⁵ 51 DLR (AD) (1999) 172.

⁴⁶ *Ibid*, 173.

⁴⁷ Baillie, Neil B.E. 1875. *A Digest of Moohummudan Law*. 2nd ed. London, p. 450.

⁴⁸ 51 DLR (AD) (1999) 172.

The judgment was perhaps a reflection from earlier decisions. In⁴⁹an old case 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 Quran in opposition to the express ruling of commentators of such great antiquity and high authority.⁵⁰

In the above case of *Hefzur Rahman v Shamsun Nahar Begum*⁵¹ 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 *Ayats* 6 and 7 of *Sura Al-Talaq*. If *Mataa* does not mean maintenance it means consolatory gift or compensation or indemnity which should be provided to the divorced women in accordance with the Holy Quran. Recently authors are echoing in the same direction that this remedy is treated as a compensation for an arbitrary *Talaq* and is not an automatic, general entitlement, which has been ignored in South Asia.⁵²

The execution of family court decrees in accordance with 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 decree of the payment of money. It is suggested here that also 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 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.⁵³ It

⁴⁹ *Aga Mahomed Jaffer Bindamen v Koolsoom Beebee and others.*

⁵⁰ 25 ILR(1870) Cal 9.

⁵¹ 51 DLR (AD) (1999) 173.

⁵² Pearl, David and Menski, Werner. 1998. *Muslim Family Law*. Lahore.

⁵³ Patel, Rashida. 1979. *Women and Law in Pakistan*. Karachi.

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 do not have any other means of livelihood. 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 to the courts for the reasons of social stigmas and customs attached to it in this patriarchal society.

The Law of Maintenance in Malaysia

The provisions on maintenance are provided in Part VI which includes maintenance of a wife, children and others.⁵⁴ These provisions are largely based upon the Islamic classical law, mainly *Shafie* law. There has not been any reform on matters pertaining to a wife's right to maintenance. The law provides that the wife is entitled to maintenance. In exercising the provision of the *Islamic Family Law (Federal Territories) Act, 1984*, the court may order a husband to pay maintenance to his wife or his former wife up to the period of *Iddat*.⁵⁵ Failure to provide maintenance, entitles a wife to approach the *Sharia* court. The court, then, will order a husband to pay maintenance.⁵⁶ In determining the amount of the maintenance claims by the wife, the court will base its assessment primarily on the means and needs of the parties, regardless of the proportion the maintenance bears to the income of the person against whom the order is made (for example wife). In *Ismail v Norsiah*⁵⁷ the parties were married in 1961. The husband failed to provide maintenance and the wife claims maintenance for 5 years, 1 month and 17 days on the ratio of RM 1 per day in which the total was RM 1,847. The trial Judge ordered the husband to pay the amount and the husband appealed to the higher court. The appeal court then, ordered the husband to pay the maintenance and reduced the amount to RM 955 based on the husband's financial background.

⁵⁴ Section 59 to 80 of the *Islamic Family Law (Federal Territories) Act 1984*.

⁵⁵ Section 59 (1) and section 65 (1), *Ibid*.

⁵⁶ Section 60, *Id*.

⁵⁷ 1970 JH 111.

If the husband violates the court order, he is then punishable under the law.⁵⁸ In fact, a wife is entitled to obtain an order from the court to terminate her marriage by *Faskh* (judicial recession), if the husband has failed or neglected to provide maintenance for a period of three months.⁵⁹

The *Islamic Family Law* in Malaysia grants a right to the wife to claim for maintenance while in marriage or upon being divorced. If the husband defaults the order, he may be penalised. In issuing an order to the husband or ex-husband to provide maintenance, the Court will take into consideration the background of the husband's financial standing in ascertaining the amount to be paid to the wife or ex-wife. In fact, the wife is given the right by the law to dissolve the marriage by way of *Faskh* or *Talaq* in the event that the husband refuses to pay maintenance within a period of three or four months. As in the case of *Sakdiah v Ahmad*,⁶⁰ the *Sharia Court of Appeal* in Kedah decided according to the *Hukum Syarak* (order of the *Sharia Court*) based on the book by *Sunan al-Matalib bi Syarhi Rawd al-Matalib* giving an option to the wife whether:

To be patient until the husband secures a job that will enable him to earn in order to pay maintenance for which he is liable; or

Demand for *Faskh* of the marriage to the relevant party if the wife refuses to be patient.

Sections 59 and 65 of the *Federal Territories Act* 1984 guarantee the rights of a wife who is being divorced to obtain maintenance during the period of *Iddat*. However, this provision does not clarify whether the wife was divorced by way of *Talaq raj'i* or *Talaq ba'in* (or even *al-Mabtutah*).

Section 71 of the *Islamic Family Law* (Federal Territories) Act, 1984 also provides a right to accommodation for the wife who is divorced during the period of *Iddat*. This means that the divorced woman is entitled to both, namely maintenance for herself and a place of accommodation (*Sukna*) based on the view of *Hanafi School*. However, both these forms of maintenance are subject to supplementary conditions, namely that the said wife does not commit adultery within the said period.

In the case of *Mashitah v Hussain*⁶¹, the husband failed to provide maintenance for a certain number of years. The court held that, the wife was entitled to terminate her marriage by *Faskh*. The 1984 Act furthermore provides, that a disobedient (*Nashuza*) wife is not entitled to

⁵⁸ Section 132 of the *Islamic Family Law* (Federal Territories) Act 1984.

⁵⁹ Section 52 (1) (b), *Ibid*.

⁶⁰ 1981 J H 2, p. 101.

⁶¹ 1972 J H 2, p. 153.

maintenance. The Act provides various conditions to consider a wife as a *Nashuza*.⁶²

The category of divorced woman is not provided for under this Act. Thus, the court will have to follow the rules found in the classical *Shafie* legal manuals. A wife's right to maintenance will therefore be affected on account of her being *Nashuza*.⁶³ Any arrears of maintenance however are recoverable at any time⁶⁴ (Section 69 of the 1984 Act).

On the question of rights of a divorced woman to financial assistance after the completion of her *Iddat* period the Act provides in various sections, that she may have rights such as *Mataa* and *Mahr* but there is no specific provision for *Nafaqa*.

In Malaysia, any type of dissolution of marriages is required to be registered under section 55 of the Register of Divorce⁶⁵ *Islamic Family Law* (Federal Territories) Act of 1984. Before any registration is made, the Act provides a significant provision for the *Sharia* courts to make an order for a divorced wife. This will include custody and maintenance of the dependent children, for the maintenance and accommodation of the divorced wife, and for the payment of *Mataa* to her.⁶⁶ Therefore, it could be said that, the *Sharia* court in Malaysia guarantees financial aid to a divorced wife before any attempt of divorce registration is made.

In addition to the above provision for a divorced wife, the *Islamic Family Law* (Federal Territories) Act 1984 provides for interim maintenance in order to assist them. Where the court is satisfied that there are grounds for the payment of maintenance, it may make an order against the husband for payment of interim maintenance to take effect at once and to be in force until an order of the Court is made on the application for maintenance. The interim maintenance received by the wife is to be sufficient for her basic needs.

In a situation where a husband divorces his wife without just cause, the *Islamic Family Law* (Federal Territories) Act 1984 provides that a divorced wife may claim for the payment of a *Mataa* (consolatory gift). This provision is clearly based upon the Quranic injunction which is from the word *Mata'*⁶⁷. The 1984 Act however does not provide any amount of *Mataa* that should be paid. Therefore, in deciding the payment, the court

⁶² Section 59 (2) of the Islamic Family Law (Federal Territories) Act 1984.

⁶³ *Ibid.*

⁶⁴ Section 69, *Ibid.*

⁶⁵ *Ibid.*

⁶⁶ *Id.*

⁶⁷ Al-Quran 2: 241.

will order the husband to pay such sum as may be fair and just according to *Hukum Shar'i*.

In the case of *Rahaniah v Haji Ujang*,⁶⁸ the divorced wife claimed *Mataa* in addition to *Nafaqa Iddat*. She claimed RM 10 000 as a *Mataa* but the husband offered to pay only RM 1 000. In this case there was a dispute in ascertaining the amount of *Mataa* and the court referred to the *Mughni al-Muhtaj* and the *Qur'an*.⁶⁹ The court held that the husband had to pay RM 2000 as a *Mataa*.

In another case *Tengku Anun Zaharah v Dato Dr Hussein*,⁷⁰ the divorced wife claimed *Mataa* of RM 25000 in addition to other payments. The court held that the wife is entitled to RM 25000 as a *Mataa* and the husband had to make the payment in three months time. This amount was considered the highest amount paid as a *Mataa* under the Family Law Act in Malaysia at that time.

From the above cases it is clear that the payment of *Mataa* is obligatory upon a husband on divorce. The *Sharia* court in Malaysia will order a husband to provide *Mataa* irrespective of a divorced wife's circumstances. This differs from the payment of maintenance during *'Iddat* period where a *Nashuza* (Disobedient wife) (Malaysia refers them as *Nashiza*) wife is disentitled from claiming her maintenance. In a case outside the Federal Territory, *Piah v Che Lah*,⁷¹ the wife was shown to be a *Nashuza* women. The *Sharia* court in Penang held that, the wife was entitled to *Mataa* but not *Nafaqa in 'Iddat*. Hence, being a *Nashiza* woman did not affect the right of a divorced woman to the payment of *Mataa* or consolatory gift.

In another case, *Rokiah v Mohd Idris*.⁷² The Qadi or the judge calculated the amount of *Mataa* based on the daily rate of RM 1 for 35 years, 3 months, and 5 days of the marriage. The total amount of *Mataa* for the divorced wife was RM 12,695. The husband appealed and the Kuala Lumpur *Sharia* Appeal Committee allowed the appeal only on matters in relation to the amount of *Mataa*. The Committee argued that there were no juristic basis on the assessment rate for *Mataa* and this is against the principle of *Mataa* which is to solve the tribulations of the wife being divorced. Therefore the Appeal Committee decided to award *Mataa* of RM 6,500 to the divorced wife.

⁶⁸ 1983, 4 JH, p. 270.

⁶⁹ Ibrahim, Ahmad 1987. 'Ancillary Orders on Divorce in the Shariah Courts of Malaysia'. *Journal of Islamic Comparative Law Quarterly*, Vol. vii, No. 3.

⁷⁰ 1983, 3 JH, p.125.

⁷¹ 1983, 3 JH, 220.

⁷² 1989, 2 MLJ.

Similarly in *Siti Aishah v Abdul Majid*,⁷³ in the state of Negeri Sembilan, *Sharia* Court of Appeal, dismissed the wife's claims of *Mataa* based on the daily rate of RM 10 for 4 years amounting to RM 14,000. The Appeal court referred to previous *Rokiah v Mohd Idris*⁷⁴ case and held that the RM 320 as *Mataa* to the divorced wife is reasonable considering the socio-economic position of the parties. The Appeal Court held that *Mataa* should not be calculated based on the duration of the marriage, but should be determined based on the parties' financial and social background.

Those ancillary orders provided for under the 1984 Act are based upon provisions in classical *Shafie* law. In Malaysia, the *Islamic Family Law* has guaranteed the right of a divorced wife to *Mataa*. The only debatable question is on the issue of a reasonable amount that can be regarded as a *Mataa*. So far in Malaysia, although the divorced wife has the right to claim for *Mataa*, the amount however is not substantial. The possible reason for the relatively low amount of *Mataa* is due the existence of *Harta Sepencarian* or jointly acquired property.⁷⁵ The 1984 Act also provides for another assistance which is basically customary. The provision is called jointly acquired property or *Harta Sepencarian*. Under the 1984 Act the right to the jointly acquired property is defined as a division between the parties at any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale. The claim of jointly acquired property can be made either through the High court or the *Sharia* court. An early case, *Roberts vs. Umi Kalthum*,⁷⁶ the court has decided and confirmed that jointly acquired property was a matter of Malay custom.⁷⁷

Application of the Legislation Relating to Maintenance by the Courts in Malaysia

The reforms of the *Sharia* have been in place now for more than 20 years and appear to be well established with fairly deep roots. A survey of the academic literature shows that the legislation is widely accepted and hardly questioned. The main public concern remains its implementation, which has created confusion and resentment towards the *Sharia* Court.⁷⁸

⁷³ 1995, 10 JH 27.

⁷⁴ 1989, 2 MLJ.

⁷⁵ Nik Noriani Nik, Badlishah. 1998. *Marriage and Divorce under Islamic Law*. Kuala Lumpur.

⁷⁶ 1966, 1 MLJ 163.

⁷⁷ Ibrahim, Ahmad. 1984. *Family Law in Malaysia and Singapore*. 2nd edition, Singapore.

⁷⁸ Abdullah, Raihanah and Soraya Khairuddin. 2009. "The Malaysian *Sharia* Courts: Polygamy, Divorce and the Administration of Justice". Vol. 25 (1): 32 *Asian Women*.

Even though the wife is entitled under the law to receive maintenance, however several problems arose due to the claims for maintenance in the court whether the claim is for her or for the children. These problems arose as in most cases; the person responsible breached his duty of paying the maintenance whether to the wife or the children. This occurs when the husband encounters problem such as leaving the house, not having a job, involved in drug abuse and also have another wife in a polygamous marriage. In such situations, even though the wife is entitled to maintenance, either for her or for the children and an order has been issued, but the husband or father still persists in not performing his responsibility. The wife or ex-wife does not submit any claim to the court as sometimes the amount fixed is not equivalent to the cost that the wife had to bear when she brings the case to the court.

Studies conducted on *Sharia* Court cases for the year 1973-1977 in the district of Petaling in the state of Selangor, shows that the amount of maintenance is less than RM 50 per month.⁷⁹ This rate indicates that the parties involved in divorce consist of the lower income group.

This section apparently provides matters that arise during divorce by way of *Talaq*. However, if Sections 49, 50 and 52 of the *Federal Territory Act* of 1984 is carefully studied, there are no provisions pertaining to matters that arise from divorce that may be claimed all at once when the divorce order is made. This means that, as for wives who are divorced by way of *Talaq*, *Faskh* and *Khul*, they have to submit separate claims for *Iddat* maintenance or even child maintenance. It is most certain that when a separate claim is submitted, the wife or wives will have to go through a new process.

This occurs as the wife have no knowledge or information pertaining to her rights or due to her placing divorce as the main matter compared to making efforts to obtain maintenance. In addition, the wife had to undergo a long process to obtain divorce. When the husband agrees to a divorce, the husband will make an offer that the wife withdraws all her rights if she wants a divorce in a short period of time. A matter such as this is an injustice towards the wife. However, if the wife agrees to withdraw her rights for maintenance voluntarily, hence in this situation, the question of injustice does not occur. For example, divorce occurs due to the failure on the part of the husband to provide maintenance for the wife. In this situation, application for *Iddat* maintenance will be deemed negative or useless since during their marriage term, the husband failed and neglected to provide maintenance.

⁷⁹ Kassim, Azizah. 1984. "Women and Divorce among the Urban Malays". *Hing Ai Yun, Nik Safiah Karim and Rokiah Talib* (eds). Selangor, p. 102.

Agreement on the part of the wife to drop matters arising from the divorce such as, *Mataa* maintenance during the *Iddat* period and jointly acquired properties should actually not involve child maintenance and also *Hadanah* (custody).

This means that, even though an agreement with the consent of both parties has been made during the occurrence of divorce involving *Hadanah* (custody) and child maintenance, the law seemed to provide surety to the said child to vary the order duly made for the purpose of ensuring the welfare of the said child. This is because the life of a husband and wife in matters pertaining to the provision of maintenance has no receipt. Hence, when the wife makes a divorce claim by way of *Talaq* or even *Faskh* on the grounds that the husband did not provide maintenance, she will need to provide sufficient proof such as the presence of a witness who is aware and saw such negligence on the part of the husband or had left the matrimonial home within the period stipulated.

Even though the court had issued an order of maintenance to the wife and children; however it is seen as ineffective if the said order is not observed. The husband/father is negligent or refused to observe the said order and avoid fulfilling his duties. This is prejudicial to the wife who is divorced and the children due to the non-fulfillment of their basic needs such as the need for education, health and their daily living requirements. As such, the government through the Department of *Sharia* Judiciary Malaysia has established the Family Support Division on 24 October 2008. This division is intended to assist in the performance of the execution order and enforcement of the judgment pertaining to maintenance by the *Sharia* Court. It is also to ensure that judgment debtors observe the order of the *Sharia* Court. This division received the financial co-operation from *Baitul Mal* as well as from the government in particular on the provision of monthly finance to the wife and children. Currently this division is only applicable to Muslims.

Presently, it is too early to comment on the effectiveness of this division. As trial, early operations has been done at the *Sharia* Court, Federal Territories. The officer in charge interviews the wife who has been divorced and their children. The officers found that many husbands refused and are negligent in paying maintenance even though a court order has been issued. Tracing the husband who is self-employed or does not have employer is rather difficult. This is because in the case where the husband has an employer, normally salary deduction will be done based on the maintenance enforcement laws.

Conclusion:

It is clear from the above discussion that *Shariah* has provided comprehensive provisions on maintenance for wife and divorced wife during their period of *Iddat*. However, in practice this does not mean

that the wives particularly divorced women, are protected and secured by the so-called Islamic society in which they live. Law enforcement has to be strengthened to ensure that such protection which was guaranteed by the religious law is honoured by the society. By looking to the practice of family law in the majority Muslim countries like Bangladesh and Malaysia, this phenomenon could be seen clearly.

The family courts of Bangladesh have now become the main repository of family law issues as very few cases come up to the higher courts. It was projected from the reported and unreported cases whether modern Bangladeshi family law has benefited from judicial activism by protecting the interests of women and whether there is a need for more systematic activation of the judiciary and better sensitization of all judicial personnel for the needs of women.

The present paper has shown in various ways that women in Bangladesh are denied 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.

Court activity and the involvement of sensitized judges may help to establish that institutions like the family courts as the right platform to protect women from economic deprivation and that a better sensitized judiciary could empower and protect women by providing an effective support mechanism by the enlightened judicial pronouncements.

While the *Islamic Family Law* Enactments in Malaysia on the law of maintenance follows directly the *Shafie* doctrines. The law has imposed an obligation upon a husband to provide maintenance to a wife. Not only that, husband who failed to comply with a maintenance order is punishable under the law. The *Sharia* court has to ensure that any order of maintenance, custody of a dependent children, maintenance and accommodation during the period of *Iddat* the deferred *Mahr*, the payment of *Mataa* or consolatory gift and the division of jointly acquired property are all made before any attempt of divorce registration. All these ancillary orders are beneficial to a divorced woman to continue their lives after divorce especially to those who are destitute or discarded. Recent development that will benefit the economic need of divorced women can be seen when the Government has introduced the Family Support Division. The purpose of this Division is to solve the legal enforcement issues. By having this Family Support Division in the Islamic Judiciary system in Malaysia, is by no means assisting divorced Muslim women to continue their lives without economic deprivation.