

Submission date: 19 June 2020

Acceptance date: 2 May 2021

Publication date: 31 Dec. 2021

PROTECTION OF WIFE'S RIGHT TO MAINTENANCE IN BANGLADESH: AN OVERVIEW

Nahid Ferdousi

School of Social Sciences, Humanities and Languages, Bangladesh Open University, Bangladesh

E-mail: ferdousi329@gmail.com

DOI: <https://doi.org/10.33102/mjssl.vol9no2.246>

ABSTRACT

Muslim wife has a legal right of maintenance which devolves upon her husband. This rights exclusively created by the marriage and wife is entitled to maintenance during the subsistence of the marriage and after divorce for *iddat* period under the Islamic Shariah and Muslim personal law in Bangladesh. Usually, the Muslim women enforces the claim for her maintenance while obtaining divorce. Divorce brings distress in her life and it also creates jeopardized situation in the society. In doing so, the controversy arises regarding the post-divorce maintenance beyond *iddat* period of Muslim women under Islamic Shariah. Though the judiciary of many countries are trying to reform on the post-divorce maintenance, but judicial activism of the country has not much advancement in this issue. Hence, the divorced Muslim women are not entitled post-divorce maintenance beyond *iddat* period in the country. In addition, often women are not getting access to family justice rather they suffered adversely for difficulties of legal procedure, male oriented society and non-implementation of Islamic values. Therefore, majority divorced woman faces many challenges of social justice and not being protected in the present legal system. The objective of the study is how and to what extent Muslim wives are being protected through maintenance under the Islamic Shariah as well as the Muslim personal law in Bangladesh. So, qualitative research method is used in this study and the primary information is collected from the Holy Quran, Sunnah and as well as different journal articles, books, reported cases and websites. It is designed based on Islamic Shariah and Muslim personal laws relating to wife's maintenance rights in Bangladesh.

Keywords: Protection, wife's right, maintenance, Islamic Shariah, Muslim personal law.

Introduction

Maintenance is a lawful right of a Muslim wife which protected by the Islamic *Shariah* as well as the Muslim personal law in Bangladesh. In accordance with Islamic *Shariah*, a husband is bound to provide maintenance to his wife during the continuation of marriage and in the event of divorce, he is also responsible to provide maintenance to his wife only up to the expiration of *iddat* period (90 days to ascertain pregnancy) (Fyzee, 1974). Islamic *Shariah* describes the provision of maintenance and also dower to guarantee the financially protestation of women in their respective arena. The traditionally established women rights of maintenance after dissolution of marriage, during *iddat*, are enforceable under the statutory laws of various Muslim countries.

In Bangladesh, the Muslim personal laws based on the principles of Islamic *Shariah* and women are entitled to claim maintenance under these laws. The Muslim Family Law Ordinance 1961 tried to evolve a procedure which the wife can easily have her remedy of maintenance, but it has not appreciable improvement yet. Therefore, the Family Courts Ordinance 1985 has been promulgated to deal with divorce and related matters for disposing the cases within the shortest time. These Muslim personal laws are providing maintenance of women till the expiry of the period of *iddat* and not providing the post-divorce maintenance (*Maa'ta*) beyond *iddat* period to protect the divorced wife. Additionally, there is no judicial rule regarding post-divorce maintenance beyond *iddat* in the country. This is because after divorce it is considered unfair to burden a man with the obligation of post-divorce maintenance beyond *iddat* period rather differed dower is seen as a safeguard for divorced women (Shahid, 2013).

However, all types of personal rights of women, which are ensured by the Islamic *Shariah* are not included in the sphere of statutory laws in the country (Alam and Islam, 2015). For that, most of the divorced woman cannot claim post-divorce maintenance because it is not included in statutory Family laws and judicial consideration (Rehman, 1998). In practice, most of the women want to protect their family prestige and they are usually hesitant to avail of their rights and privileges for difficulties of male oriented society, cumbersome court procedure and existing non implementation of Islamic *Shariah*. Accordingly, it affects the women life as well as children and other members of the family (Ahmed and Choudhury, 1979). The study presents the rights of maintenance of Muslim wife under the Islamic *Shariah* as well as the Muslim personal law and its actual practice in Bangladeshi society.

Status of Wife's Maintenance under the Islamic *Shariah*

As per the rule of Islamic *Shariah*, marriage is a civil contract that gives rise to certain rights and the fulfilment of certain obligations including maintenance, which the husband is bound to provide to his wife (Shahid, 2013). However, the basis of the husband's liability to maintain his wife can be found in various verses of the Holy Quran and Sunnah of the Prophet Muhammad (PBUH).

Under Islamic *Shariah*, the established principle that the male is the 'provider' is largely drawn from the explanation in Surah Al-Nisa. The Holy Quran says,

'Men are the protectors and maintainers of women, because Allah has given the one more (strength) than other, and because they (men) support them (women) from their means' (Al Quran, Sura 4: Verse 34).

It is the established rule of Islamic *Shariah* that a Muslim wife is entitled to get maintenance during the subsistence of marriage. In case of divorce wife, it has been stated in the Holy Quran that

'There is no blame on you if you divorce women before consummation or the fixation of their dower, but bestow on them (a suitable gift) the wealthy according to his means, and the poor according to his means, - a gift of a reasonable amount is due from those who wish to do the right things' (Al Quran, Sura 2: Verse 236).

But there has been an inevitable debate on how long after divorce, the divorced wife is entitled to maintenance Thus, additionally, the Holy Quran says,

'Let the women live (in *iddat*) in the same style as you live, according to your means; annoy them not, so as to restrict them. And if they carry (life in their wombs), then spend (your substance) on them until they deliver their burden: and if they suckle your (offspring), give them their recompense; and take mutual counsel together, according to what is just and reasonable. And if you find yourselves in difficulties, let another woman suckle (the child) on the (father's) behalf' (Al Quran, Sura 65: Verse 6).

This verse considered in this context and directed man to pay financial support to their divorced wives during post-divorce waiting period (3 months of *iddat*). Similarly, it has been declared in the Holy Quran that,

'For divorce women maintenance should be provided on a reasonable scale, this is a duty on the righteous' (Al Quran, Sura 2: Verse 241).

That means the Holy Quran imposes an obligation on the Muslim husband to make provision for or to provide maintenance to the divorced wife. Accordingly, based on these verses, it is the duty of a husband to provide all the basic needs for his wife. If he fails to do so, he disobeys Allah.

As to the Sunnah of the Prophet Muhammad (BPUH), Jabir (r.a.) said that the Prophet Muhammad (BPUH)said:

'Fear Allah concerning women! Verily you have taken them on the security of Allah and intercourse with them has been made lawful to you by words of Allah. You too have right over them, and that they should not allow anyone to sit on your bed whom you do not like. But if they do that, you can chastise them but not severely. Their rights upon you are that you should provide them with food and clothing in a fitting manner' (Imam Muslim, Sahih Muslim, 'Abdl al Hamid Siddiki, kitab al-Haj, Vo II, p. 615-615).

Similarly, there is a Hadith narrated Mu'awiyah al-Qushayri: I asked Prophet Muhammad (BPUH): 'What is right of a wife over her husband?' He replied: Give them food what you have for yourself, and clothe them by which you clothe yourself, and do not beat them, and do not revile them (Abu Dawud 2144, Book 12, Hadith 99).

There is another Hadith narrated from Aishah that Hindun binti 'Utbah said:

"O Prophet Muhammad (BPUH), Abu Sufyan is a miser and does not give me what is sufficient for me and my children, can I take of his property without his knowledge?" The Prophet Muhammad (BPUH)said, "Take what is sufficient for you and your children, and the amount should be just and reasonable"

(Al-Bukhari, Shahih al-Bukhari (tr.) Muhammad Muhsin Khan, Chapter *al- Nafaqa*, Vol, VII, 6th edition, Kazi Publication, Lahore, 1983, p.212).

According to Al-Zuhayli, the above hadith shows the obligation to provide sufficient maintenance to the wife. Therefore, if the husband did not provide sufficient maintenance while he is able to do so, the wife can even take the husband's property in secret but in a kind manner, in order to fulfill her need (Al-Zuhayli Vol. 7, p. 787).

Hence, the Prophet Muhammad (BPUH) required his followers to accord their wives the best possible treatment. He impressed upon the men the rights of women regarding the food, clothing and lodging. Even in his famous Fate well Address at Arafat, the Apostle of Allah did not forget to exhort the believers to fulfil their obligations regarding the proper maintenance of their wife's (Khan, 1998). Thus, the maintenance rights derive from the authority of the Holy Quran, from the Prophet's traditions and from consensus. (Nasir, 2009).

On the contrary, in Islamic *Shariah* the wife has no legal obligation to maintain her husband in any circumstance if he is poor (Mahmood, 2013). Rather the first duty of a Muslim wife is to submit herself to her husband and remain with him under his roof and protection. So, maintenance of the wife is the prior duty of a husband and the entire burden of maintenance is on the husband even though she is capable of earnings (Ali, 1985).

Wife's Rights of Maintenance under the Muslim Personal Law

There are eight statutes regarding Muslim personal rights in Bangladesh, such as the Muslim Personal Law (*Shariaht*) Application Act 1937, the Dissolution of Muslim Marriage Act 1939, the Muslim Family Law Ordinance 1961, the Muslim Family Laws Rules 1961, the Muslim Marriage and Divorces (Registration) Act 1974, the Muslim Marriages and Divorces Registration Rules 1975, the Family Courts Ordinance 1985 and the Family Courts Amendment Act 1989.

The reforms and developments of the Muslim personal laws were made during the British and Pakistan period and were applicable for the Muslim of Indian sub-continent and Muslim Family Law Ordinance 1961 for Muslim of whole Pakistan. But after the independence of Bangladesh in 1971, the same law has become accepted through the promulgation of the Laws Continuance Enforcement Order 1972 and thereafter a numbers of Family laws were passed and enumerable reforms were also done. But all these Family laws were not enacted to ameliorate the condition and empower the women. The Ordinance 1985 only has a streamlined procedure and women can get access to family court with minimal fees.

Under Muslim family law the wife's right to be maintained by her husband is absolute. Therefore, the wife are entitled to recover maintenance from her husband as per the Muslim personal law (Huda, 2004). The Dissolution of Muslim Marriage Act 1939 discussed regarding maintenance whether a wife, who is at fault, is entitled to dissolution under the law (section 2ii of the Act 1939). For protection the rights of married women, the Muslim Family Law Ordinance 1961 provided the procedure of maintenance though it is complicated.

According to the Muslim Family Law Ordinance 1961, 'If any husband fails to maintain his wife adequately, or where there are more wives than one, fails to maintain them equitably, the wife, or all or any of the wives, may, in addition to seeking any other legal remedy available, apply to the Chairman who shall constitute an Arbitration Council to determine the matter and the Arbitration Council may issue a certificate specifying the amount which shall be paid as maintenance by the husband (section 9 of the Ordinance 1961).

Thus, *in case of husband fails to maintain his wife during marriage, wife can bring a claim in a Family Court under the Family Court Ordinance 1985 for up to six years of past maintenance.* Under the Family Courts Ordinance 1985, a wife can sue in the Family Court for maintenance and other personal issues. Indeed, the Ordinance 1985 deals major personal issues of women which are dower, divorce, maintenance, guardianship and restitution of conjugal rights (section 5 of the Ordinance).

Muslim law attaches a condition of obedience on the part of the wife as a condition precedent for claiming maintenance from the husband (Monsoor, 1998). Accordingly, the wife has certain duties to be followed before claiming maintenance. The wife is under a duty to obey all the just and reasonable commands of the husband (Ali, 1985). But if she does not act upon her husband lawful wishes or live apart from him, she becomes a refractory and is not entitled to be maintained by her husband (Rahman and Moniruzzaman, 2017).

In this perspective, the relevant case was *Ahmed Ali Khan vs. Sabha Khatun Bibi* (Pakistan Law Digest (PLD) 1952 Dacca, 385), the court adjudged that when the wife works against the husband's wishes she becomes a rebellion or disobedient and is not entitled to maintenance from her husband. As per the judgment, a wife is considered to be disobedient to his husband in the following circumstances: (i) if

without a valid excuse she disobeys his reasonable orders; (ii) if she refuses to perform marital obligations without valid reasons; (iii) refuses to cohabit in the house he has chosen; (iii) goes on *Hajj* without his consent unless it is obligatory for her to go; (iv) takes employment outside the house without his consent.

Besides this, the Family Court may also disallow the wife's maintenance on the ground that she was not present in her father-in-laws house while her husband was working abroad (case of *Monwara Begum vs. Md Hannan Hawladar* Family Suit no. 15 of 1989, unreported). But mere refusal by the wife to live with her in-law in the absence of her husband is not a ground to disentitle her from maintenance. Thus, in *Hosna Ara Begume vs. Md Rejaul Karim* (43 Dhaka Law Report 1991 HCD) the court ordered the husband to pay maintenance when the wife left the husbands residence on the ground of cruelty. It may be observed that negligence or refusal to maintain by husband may be express or implied. It may also be inferred from the conduct of the person.

Nevertheless, the controversy starts from the moment of a separation and arguably a divorcee women is entitled to three months of maintenance. In this context, as per the principles of *Shariah*, the question is how long after divorce, the divorced wife is entitled to maintenance by her husband. There are differences of opinion among the Islamic Scholars in different countries as to allowing post-divorce maintenance (*Maa'ta*) beyond *iddat* period under Islamic *Shariah*. The Muslim jurists have differently interpreted the divorced woman's right of maintenance deviating from Islamic teaching. Thereafter, the different interpretations have created complicated situation for Muslim women in the country.

In *Mst Razia Akhter vs. Abul Kalam Azad* (Family Suit no. 193 of 1989, unreported) the court granted to woman maintenance for the *iddat* period, *i.e.* until the son was born five months after the divorce. Under section 7(5) of the Muslim Family Law Ordinance of 1961, if the wife is pregnant at the time of divorce, it is not effective unless the pregnancy ends. But section 9 of this Ordinance is silent on the issue of post-divorce maintenance (Huq, 2002). In the absence of such legal provision, a divorced woman suffers from lack of financial support as during the post-divorce period.

However, the issue of post-divorce maintenance was first raised significantly in the case of *Shamsun Nahar vs Hefzur Rahman* (47 Dhaka Law Reports 1995 54) in Bangladesh. The High Court Division held that financial security could be provided to divorced women in impecunious circumstances by making their former husbands liable for their maintenance until their remarriage (Serajuddin, 2011). This significant attempt of the High Court Division to uphold the divorced women's right to the post-divorce maintenance in this case. The verdict held that the person is bound to maintain his wife on a reasonable scale beyond the period of *iddat*, that is to say, till wife losses the status of a divorce by remarrying another person (Rahman, 1998).

Meanwhile, the Appellate Division of the Supreme Court overturned this decision in *Shamsun Nahar vs Hefzur Rahman* (59 Dhaka Law Reports 1999 Appellate Division 172) on the ground that there is no such obligation in Muslim family law to maintain his divorced wife after the *iddat* period. However, at first the Appellate Division observed that it is naturally followed from the Quranic Verse 2: 241 that *Maa'ta* is a something to which a divorced woman is entitled and which a former husband is under legal obligation to. According to the judgment, *Maa'ta* is considered as consolatory gift, compensation or indemnity, basically different from regular maintenance of divorcee. It is incumbent on the righteous as enjoined by Allah in the Holy Quran.

The Court held that the word *Maa'ta* as used in the Quranic verse was never understood as maintenance or provision in the sense of legal, formal and regular supply of necessities of life and livelihood to the wife. It is a consolatory offering or parting gift to a divorced woman as a comfort and solace for the trauma she suffers from divorce. Eventually the learned Court held: "But the right to *Maa'ta* loosely used as maintenance beyond the period of *iddat* may be statutorily provided for the poorer women who are destitute and suffering in the hand of unjust and cruel husbands".

Thus, the verdicts made by the supreme judiciary, have the status of law and binding force. The Constitution of the People's Republic of Bangladesh in this regard under Article 111 states that the law

declared by the Appellate Division shall be binding on the High Court Division and the law declared by either division of the Supreme Court shall be binding on all courts subordinate to it. Bangladesh being a common law country, precedent is a source of law. In addition, the adversarial natures of legal system in the country and the judges have limited scope to interpret of the existing Muslim personal law regarding maintenance of rights of the women (Ali, 2000).

In this backdrop, after the separation the divorced wife's deprives from the right to maintenance and granting post-divorce maintenance only for a shorter period and not beyond the *iddat* period (Aktar, 2012). They cannot get beneficial support under the Muslim personal law. In fact, post-divorce maintenance or support may also work as a valuable, alternative and effective tool for the divorced women (Alam & Islam, 2015).

Challenges faced by Muslim Women to get Maintenance

As per the Muslim law, the wife has been conferred with an absolute right to be maintained and the husband is under an obligation to maintain her regardless of the fact whether she's able or not. However, the woman's right to claim maintenance and husband's obligation to maintain her wife exists only if the wife remains faithful to her husband and obeys all his reasonable orders. In practice, the patriarchal society of Bangladesh, women are not expected to apply their maintenance rights easily and even they cannot deny male authority. The prevailing social belief in that if a wife claims maintenance it would hurtful for the conjugal life as well as family harmony (Islam, 2003). Hence, most of the women are not pay attention to maintenance rights and they are facing economic vulnerability due to fixed legal provisions and dominant patriarchal system. Some major challenges are mentioned below:

No fixed rules for maintenance

There is no clear guideline regarding maintenance amounts which is problematic for Muslim women in Bangladesh. Even there is no scale or standard has been fixed for maintenance by the Muslim personal law. Rather about the scale of maintenance, there has always been difference of opinion among the jurists which is main obstacles for fair justice. As per rule 9 of the Muslim Marriages and Divorce (Registration) Rules 1975 allows a wife to stipulate maintenance amounts and terms in the marriage contract but this is rarely if ever done in practice. In addition, Family Courts generally consider the husband's 'capacity to pay' while deciding on maintenance amounts, but it is unclear how they assess amount factors (Aktar, 2012).

Less marriage registration

According to the Muslim personal law men and women are required to register their marriages. The marriage must be registered with a marriage registrar in accordance with section 3 of the Muslim Marriage and Divorce (Registration) Act 1974. But due to lack of awareness about marriage registration it is not possible to maintain properly in Bangladesh. Most of the rural people do not have knowledge about the legal consequences of registration of marriage. In Bangladesh, registered marriage is lawful as well as both husband and wife can get any legal remedies if they claim. During the period of claiming maintenance, it is needed proof of marriage such as a copy of the marriage registration certificate as per the Muslim personal law. Women who are unable to prove their marriage by the registered certificate, apparently, they deprived from maintenance. Consequently, she is not entitled to enforce her maintenance claim as well. If this is not available, oral evidence or an affidavit (from any person who solemnized or witnessed the wedding) is enough. Many women are not able to collect copies from another district, given mobility restrictions, and the fact that there is no computerized database of marriage registrations.

Abuse of process and delays

Women who make maintenance claims often face frivolous counterclaims by their husbands. These include claims for restitution of conjugal rights (as per section 5b of the Family Courts Ordinance 1985) or prosecution for theft. Furthermore, for backlogs of the pending cases in the Family Courts lead to

huge delays to provide remedy on time. Every year many maintenance cases in the Family courts are pending for 2 years or more.

Absence of interim maintenance

When women seek to secure her maintenance in the courts, usually through legal aid, she may struggle to maintain herself and daily living expenses. As per the Muslim personal law the Family court does not grant interim maintenance orders. Thus, women often have to face months and years pursuing this minor claims. Consequently, she is essentially depended on her parents, sibling and other relatives. For this reason, her condition in most cases is miserable.

Conclusion

The right to maintenance both in marriage and after divorce is an important for protection of a Muslim wife. Bangladesh, being a Muslim country, it is needed formulate helpful provision which provides security to a divorced woman either for such definite period. In order to secure the rights of the women, many countries have already enacted legislations and clarified the ways, methods and scope of maintenance. Additionally, in a suit of maintenance, where the plaintiff aims to secure a maintenance order, the court cannot award an interim order, as this would amount to a final judgment. Hence, maintenance under the section 9 of the Muslim Family Law Ordinance 1961 should include some clear criteria for consideration by Family Court judges when determining maintenance amounts. In this context, the duration of the relationship; the impact of childcare and household responsibilities, the dependent spouse's capacity to support herself; the health and age of the spouses; the dependent spouse's other means of support should be incorporated. In addition, interim maintenance order should be granted by the Family Court for providing financial support of divorced women. In that way, judiciary can play a proactive role to provide legal protection to divorced Muslim women and restore the socio-economic conditions of the women in Bangladesh. Thereafter, it is needed to change existing social attitude and the spread of the proper teachings of Islamic *Shariah* rules regarding women personal rights and thereby it can play a proactive role to provide legal protection to divorced Muslim women in the future.

References

- Aktar, Sharmin. (2012). Protecting Divorced Muslim Women's Right through Maintenance: A Comparative analysis based on the Present Legislative Reforms among the Muslim Community, *The Northern University Journal of Law, Volume III*.
- Alam, Md. Jobair and Islam, Toufiqul. (2015). Rethinking Post-Divorce Maintenance: An Alternative For The Empowerment of Muslim Women In Bangladesh, *Bangladesh Journal of Law*, 15 (2), 81-83.
- Ali, Saheen S. (2000). Gender and Human Rights in Islamic and International law. The Hague, London and Boston: Kluwer Law International.
- Chaudhry, Muhammad Sharif. (1991). Women's Rights in Islam. Sh. Muhammad Ashraf publishers, Lahore, Pakistan.
- Farouk, Sharmeen A. (2005). Violence against Women: A Statistical Overview, Challenges and Recommendations. Dhaka: Bangladesh National Women Lawyers Association (BNWLA).
- Fyzee, A. (1974). Outlines of Muhammadan Law. Delhi: Oxford University Press.
- Hoque, Redwanul (2011). "Judicial Activism in Bangladesh: A golden mean approach" Cambridge scholar publishing.
- Huq, Naima. (2002). Post Divorce Maintenance: Legal and Social Appraisal, *Gender in Law Journal*, Dhaka, 68-69.
- Huq, Naima. (1998). *Past and post-Divorce Maintenance: legal and social Appraisal*. A seminar paper, 6.

- Islam, M Baharul. (2003). *Lecture synopsis on Muslim personal law* in Bangladesh Bar Council Course, 6.
- Kazi, Mazharul. (1998). *Family life and Social obligations in Islam*. New Delhi: The Islamic Centre.
- Khan, Maulana Wahiduddin "Women in Islamic Sharia" The Islamic Centre, New Delhi.
- Khaled M. and Hoque. (1999). Right to post-divorce maintenance in Muslim Law, *Chittagong University Journal of Law, Vol. IV, 23*.
- Mahmood, T. and Mahmood, S. (2013). *Introduction to Muslim Law*, Universal Law Publishing Co, Dhaka.
- Monsoor, Taslima. (1998). Maintenance to Muslim Wives: The Legal Connotations, *The Dhaka University Studies, IX (1)*, 63-85.
- Monsoor, Taslima. (1999). *From Patriarchy to Gender Equity: Family law and its Impact on women in Bangladesh*. Dhaka: The University Press Limited.
- Muthhari, M. (1981). *The rights of Women in Islam*. Tehran: The World Organization for Islamic Services. pp. 113-123.
- Nasir, Jamal J. Ahmad. (2009). *the Status of Women under Islamic Law and Modern Islamic Legislation*, Volume 1, 3rd ed., Boston: Brill, Leiden.
- Rahman Md. Sadekur. (2018). "Post-Divorce Maintenance (Maa'ta) For Muslim Women in Bangladesh, Pakistan and India' *IOSR Journal of Humanities and Social Science (IOSR-JHSS)*. 23 (2), pp. 01-10.
- Rahman, F. (1998). "Post-divorce maintenance for Muslim women in Pakistan and India". *Bangladesh Journal of Law*. 2 (1), 26-52.
- Rahman, M. S. and Moniruzzaman. (2017). Trends and Issues of Judicial Protection of Womens Right to Maintenance under Muslim Law in Bangladesh, *Barisal University Journal 2 (1)*, 111-120.
- Serajuddin, Alamgir Muhammad. (2011). *Muslim Family Law, Secular Courts and Muslim Women of South Asia: A Study in Judicial Activism*, Oxford University Press, Karachi.
- Shahid, A. (2013). Post-divorce Maintenance for Muslim Women in Pakistan and Bangladesh: A Comparative Perspective, *International Journal of Law, Policy and the Family*, 27(2), 197–215.