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ARTICLES

Dower in history and its significance in Islamic law

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পঞ্চম জাতীয় সংসদে গঠিত কতিপয় গুরুত্বপূর্ণ কমিটি: একটি পর্যালোচনা

বাংলাদেশের শিকস্তি ও পয়স্তি আইন : একটি পর্যালোচনা

ইসলামে মোহরানার অধিকার ও বাংলাদেশের আর্থসামাজিক প্রেক্ষাপট : একটি পর্যালোচনা

সাইবার ক্রাইম : আইন প্রয়োগ, সমস্যা ও উত্তরণের উপায় অনুসন্ধান

শিশু নির্যাতন এবং শিশু অধিকার : প্রেক্ষিত বাংলাদেশ

বাংলাদেশে টিপাইমুখ বাঁধ এর প্রভাব : একটি আইনী পর্যালোচনা

Abstract on the Project Legal Rights of the Child: Policy and Enforcement in Bangladesh, 1995

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The Law of Maintenance and its Implementation in Bangladesh: A Comparative Study

Md. Delower Hossain*

1. Introduction:

Islam imposes a great importance upon the relationship among the relatives and, especially between the husband and the wife. The basis of the relationship rests upon blood connection, marriage contract and affinity. Thus Islam recognises mutual rights and obligations among the relatives. Though Muslim law enjoins the obligations for maintenance of the children, the parents and the other relatives, the right to maintenance of the wife gets priority over them in the eye of law. However, the relationship between the husband and the wife starts with marriage contract and it gets strengthened not only for their respective love and compassion but also for their mutual rights and obligations. In this regard, the Holy *Quran* states:

"Women have similar rights over men as men have over women."¹ "And among His signs is this that He has created mates from among yourselves that you may live in comfort with them, and He has put love and compassion among you (husband and wife). Surely in that are signs for those who think."² "It is his solemn duty to Allah to treat his wife with kindness, honour and patience, to keep her honorably, free her from marital bond honorably, and to cause her no harm or grief."³

Prophet Mohammad (sm) also emphasizes the spousal relationship:

"Among you he who treats his wife best, is specially honoured and among you he whom his wife says good, is good."⁴

According to the above verses and tradition, the legal status of Muslim wife is not only upgraded with rights but also adorned with honours. However, the legal status of Muslim women in Bangladesh is defined by the principles of *Sharia* through Muslim personal Law along with the [ordinary] laws, which are non-religious and secular in character. The Muslim personal law covers the field of marriage, divorce, *maintenance*, guardianship of children and inheritance whereas the [ordinary] law covers the rights in the constitution, penal code, the civil and criminal procedure codes, and the law of evidence etc.⁵ Bangladesh, through some of its progressive judicial decisions has come into the limelight of

* Lecturer, Department of Law, Northern University, Rajshahi.

¹ *Al-Quran*: 2:228, [Abdullah Ali Yusuf translates Quranic verses into English].

² *Al-Quran*: 30:21.

³ *Al-Quran*: 2:229-32; 4:19.

⁴ Waliuddin Mohammad bin Abdullah al Khatib, *Miskatul Masabih*, pp118&128 as cited in Muhammad Faiz-ud-Din, 'Muslim Bibah o Bidhibadha Ain' (*Muslim Marriage and Statutory Laws*), Bangladesh, September, 1998 p 52. The author from Bangla version has translated the tradition cited.

⁵ Sultana Kamal, 'Law for Muslim Women in Bangladesh', Women living under Muslim law (WLUML), Dossier 4 August /September 1988 p 1(website).

the discourse on Islam and women's human rights. In the judicial arena, matter of crucial importance today for Muslim women around the world and in Bangladesh is the question of Muslim women's entitlement to maintenance from their husbands after their divorce.⁶

If we look into the matter of the right to maintenance for Muslim women and its application in the light of *Sharia* and existing laws of Bangladesh, we observe that the wife is entitled to maintenance from the beginning of the conjugal life through marriage contract to the end of marriage through death or divorce; Even the wife has the right to maintenance for a limited period called *Iddat*⁷ after the divorce. But when the *Iddat* period comes to an end, she loses the right. The debatable matter is whether this right is extendable after the *Iddat* or not. It is the bone of contention between the two groups: the classical Islamic jurists and the modern commentators of Islamic Law. The first group says that it is not extendable; other group says that it is extendable.

It is, therefore, necessary to examine the laws and their applications regarding the right to maintenance, especially right to post divorce maintenance for Muslim wife in Bangladesh.

2. Maintenance under Muslim Law:

Islam being a complete code of life covers all the aspects of human life either directly or substantially. *Sharia* law of maintenance can be set as an instance for it. Because an in-depth study of *Sharia* law along with juristic writings and commentaries appears that it encompasses all the angles of rights and obligations regarding maintenance of different relations, e.g., relation by marriage, blood and affinity.

2.1. Maintenance Defined:

"In the language of Arabs, '*nafakah*', literally means what a man spends over his family [and] it signifies food, clothing and lodgment [shelter for residence]."⁸ In other words, maintenance "comprehends food, raiment [clothing] and lodging [shelter for residence], though in common parlance, it is limited to the first (food)."⁹ Moreover, *nafqah* or maintenance signifies all those things, which are

⁶ Dr. Foustina Pereira, '*Post Divorce Maintenance for Muslim Women and the Islamist Discourse*', Women living under Muslim law (WLUML), Dossier 22 November 1999 p1 (website).

⁷ *Iddat* is a period or term that the wife whose marriage has been dissolved either by divorce or death of her husband is to undergo, depending on situation, either for three menstrual courses or three lunar months or four months ten days, in case of wife's pregnancy till delivery.

⁸ Syed Amir Ali, '*Mohammedan Law*' vol. II, 1928, 5th edn., p364.

⁹ Baillie, I, 441 as quoted in Fyzee, '*Outlines of Mohammedan Law*', India, 1971, 4th edn., p 211.

necessary to the support of life, such as food, cloths, lodging, toilet-requisites.¹⁰ So, *nafqah* or maintenance has main three aspects, e.g., food, clothing and residence¹¹ but additionally toilet-requisites.¹² In a word, it includes food, lodging, clothing, nourishing, care and well-being.

2.2. Nature of Muslim Marriage and Maintenance Obligation of the Husband:

Muslim marriage is a civil contract.¹³ It is the institution whereby men and women are joined in a special kind of social and legal relationship for the purpose of having a family. It originates a legal relation, a partnership in life, securing harmony, happiness, and peace of mind, good fellowship and connubial relation between the couple. It is recognised as the basis of human society.¹⁴ As a result, the rights and obligations of the spouse spring from the status of marriage validly contracted. But the husband's obligations are independent of any express contract.¹⁵ According to *Hanafi* School, the theory of Muslim Law as to maintenance is that it is due to the wife from the husband as a recompense for the matrimonial restraint, and it is one of the necessary and inherent conditions of marriage contract.¹⁶ So, the parties have to comply with the basic conditions of contract.¹⁷ But Muslim marriage is not merely a civil contract, because unlike other civil contracts, it cannot be made contingent on a future event.¹⁸ Besides, the contract of marriage differs from other forms of contract substantially. The former runs from, rests upon and aims at humanism, the basis of civilization, on the other hand, the latter runs from, rests upon and aims at financial interest. Though the contract of marriage has financial involvement, it is besmeared with divine love and compassion in the nature of *ibadat* (devotional acts ordained by Allah the Almighty) and *muamlat* (dealings with men).¹⁹ So, the

¹⁰ Hedaya, 140 as quoted in Aziz Ahmed, 'Islamic Law in theory and Practice', Pakistan, 1956, p 293.

¹¹ It is incumbent upon the husband to provide separate apartment for his wife's habitation solely and exclusively for her use and the apartment will be self-contained with a kitchen, bathroom and latrine and other members of the husband's family may enter the apartment with her permission and desires.

¹² Maintenance does not include luxuries like hair-dry, kohal (a black power, used, especially in eastern countries, around the eyes to make them more attractive) lipstick etc. The extent of and access to toilet-requisites should be within the means and status of the husband. See n 10.

¹³ *Abdul Kadir v Selima* ILR 1886 as quoted in Faiz-ud-Din, above, n 4, p 51.

¹⁴ Sarkar Ali Akkas, 'Marriage of Minor in Bangladesh: A study of Muslim Law and Statutory Provisions', Law Journal, Faculty of Law, University of Rajshahi, 1998 p 61.

¹⁵ Amir, above, n 8, p 364.

¹⁶ Hedaya, 140 as quoted in Aziz, above, n 10, p 294.

¹⁷ The Contract Act 1872 s 2(g).

¹⁸ Dr. M. Maimul Ahsan Khar, 'Muslim Personal Law: Clash and Reconciliation', Law Journal, Faculty of Law, University of Rajshahi, 1998 p 110.

¹⁹ Ibid, p 111.

interpretation of the marriage contract should be based both on material and spiritual aspects of life. Muslim marriage has a large number of purposes and duties: apart from biological aspects it has many social financial, religious, moral and spiritual aspects and [it also originates] a lot of duties to other family members, neighbours, society and even to the state.²⁰ According to Islamic philosophy, family is the base-unit of state and the husband is the head of the family and thus he is under obligations to maintain the family.

According to the *Darr-ul-Mukhtar*, the wife is the *asl* (root) and the child is the *far* (branch). So, her priority is established. According to the ordinary sequence of natural events, the wife comes first.²¹ However, the husband's duty to maintain commences when the wife attains puberty and before not.²² In other words, when a woman surrenders herself into the custody of her husband, it is incumbent upon him henceforth to maintain her.²³ So, it can be said that the rights of the wife to property of the husband, maintenance, dower etc are established after the contract of marriage is made and the rights exist till the continuance of the marriage contract. Under the *Hanafi* Law, in adjusting the obligation of *nafqah* or maintenance of wife regard is to be had to the rank, status and condition both of wife and husband but in *Shafi* Law the same is to be considered of the husband alone.²⁴

2.3. Maintenance for the Normal Continuance of Marriage:

There are three causes for which it is incumbent on one person to maintain another: marriage, relationship and property. The highest obligation arises on Marriage resulting in the maintenance of the wife as a primary obligation.²⁵

During the normal continuance of marriage, the husband is legally bound to maintain his wife by providing food, clothing and residence and additionally toilet-requisites. The wife has absolute right to maintenance though the husband is poor and has no means to support her, while she herself is rich and can support herself.²⁶ According to *Hanafi* law, if the wife is minor with whom sexual intercourse is not possible, she is not entitled to maintenance, though she is in the custody of the husband. But she is entitled to maintenance under *Shafi* law.²⁷ On the other hand, if the husband is minor and the wife is adult, she is entitled to her maintenance at his expense, because the obstacle to the matrimonial enjoyment exists on the part of the husband alone.²⁸ In Islam, the husband not father of the wife, is under obligation to maintain his wife after marriage.

²⁰ Ibid.

²¹ Fyze, above, n 9, p 211.

²² Ibid, p 212.

²³ Aziz, above, p, n 10, 294.

²⁴ Ibid, Hedaya, 140.

²⁵ Fyze, above, n 9, p 211.

²⁶ Baillie, 441as cited in Aziz, above, n 10, p 294.

²⁷ Ibid, Hadaya, 141.

²⁸ Ibid.

Actually, he is the legal guardian of all the affairs of his wife. Broadly speaking, he should maintain her in a manner so that her basic essentials are not barred. He should also maintain the matter of moral and natural development of her human faculties, if necessary.²⁹ But the wife may lose her right to maintenance when she becomes *nashizah*.³⁰

2.4. Maintenance for the Period of *Iddat*:

After divorce, the wife is entitled to maintenance during the period of *Iddat*. The husband's duty to maintenance of his wife starts with his wife's attainment of puberty and having her access to him and not before. This obligation subsists till the continuance of the marriage contract even till *Iddat*. It is settled that a divorced wife is entitled to maintenance during the period of *Iddat*.³¹ But a widow is not entitled to maintenance during the period of *Iddat* consequent upon her husband's death.³²

3. Maintenance Jurisdiction of the Family Court:

The matter of maintenance has been assigned to the exclusive jurisdiction of the Family Court under section 5³³ of the Family Courts Ordinance 1985. Thus the section 488 of the Code of Criminal Procedure has lost its application³⁴ virtually in case of maintenance jurisdiction. Under section 5 of the Ordinance, both the wife

²⁹ If the wife falls ill she is entitled to maintenance though she is incapable of admitting her husband to the conjugal embrace. But it is not legal duty of the husband to supply her with medicines or pay fee of her doctor. She must herself meet the doctor's bill out of her own property. In *Shafi Law*, in case of wife's illness the husband is bound to supply medicines and pay the surgeon's or doctor's fee see Aziz, above, p 297. The word 'maintenance' does not include education at higher levels and *infinitum*, *Ala Din vs. Mst Parveen Akhter* 22 DLR 192.

³⁰ If she deserts her husband, disobeys lawful orders of her husband, disallows her husband free access to her at all lawful times, hates her husband or shows attraction, in terms of conjugal relation, to another person other than her husband, she is called *nashizah*. But a single instance of adultery does not deprive a wife of her maintenance right. *Mahbub Akhtar vs. Md. motaleb Biswas* 19 DLR 628.

³¹ Hadaya, 145 Baillie, 450, *Mahbub Akhtar vs. motaleb Biswas* 19 DLR 628.

³² *Aga Mahammed Jaffer vs. Koolsom Beebee* (1897) 25 Cal.9. cited in Mulla, *Principles of Mohammedan Law*, p 237.

³³ Section 5 of the Family Courts Ordinance 1985 deals with the jurisdiction of the Family Court as to Divorce, Restitution of conjugal rights, Dower, Maintenance and Guardianship of children.

³⁴ Provisions made in the Family Courts Ordinance have ousted the jurisdiction of the Magistrates to entertain application for maintenance. *Abdul Khaleque vs. Selina Begum*, 42 DLR 450. The provisions of the Family Courts Ordinance 1985 have not taken away the power of a Magistrate to order for maintenance of wife and children under section 488 of the Cr. P. *C. Maher Nigar vs. Mojibur Rahman*, 47 DLR, P 467. However, the illegitimate children from any religion may get the benefit of the section 488 Cr.P.C.

and her children can file a suit in a Family Court for their maintenance.³⁵ Now question may arise whether the Family Court can grant past maintenance of the wife and her minor children living with her. In this regard, the AD of the Supreme Court of Bangladesh maintains:

Although the traditional views on the *Hanafi* law ... envisage that a Muslim wife is not entitled to a decree for past maintenance unless the claim is based on a specific agreement, the latest position of *Sunni* Law prevalent in the sub-continent is that the wife is entitled to past maintenance even in the absence of any specific agreement. This view, which is an advance by *ijtihad*, has been made in right direction with strong reasons within the bounds of *Sunni* Law. Thus it is now well-settled that a Muslim wife is entitled to past maintenance not only for herself but also for her minor children living with her.³⁶

The Court further maintains:

The Limitation Act does not specifically provide for any particular period of limitation for filing suits by a Muslim wife for arrears of maintenance...the residuary Article 120 of the First Schedule, providing for a period of limitation of 6 years from the time when the right to sue accrued in respect of a suit for which no period of limitation is provided elsewhere in the First Schedule, will be applicable to a suit for maintenance by a Muslim wife under the Family Courts Ordinance, 1985.³⁷

3.1. Maintenance for the Parents and the other Relatives:

It is incumbent upon a person to provide maintenance for his father, mother, grandfather and high so ever and grandmother high so ever if they should happen to be in necessitous position. Maintenance to parents is incumbent if they are in poverty, though they should be able to subsist by their own industry.³⁸ According to *Shia* law, if the father has the capacity to earn, it exonerates his children from maintaining him.³⁹ In this connection, the AD of the Bangladesh Supreme Court observes:

Children in easy circumstances under Mohammadan law are bound to maintain their poor parents, although the latter may be able to earn something for themselves. These poor parents may also file suits in the Family Court for their maintenance from their opulent children. Similarly, poor or disabled relatives, even servants of the wife, can maintain a suit for maintenance under the Ordinance under circumstances enjoined by Mohammadan Law.⁴⁰

Actually, Islam imposes obligation upon the children (both son and daughter) to maintain their parents. But in the society, most of the people, who have no firm faith in the teachings of Islam and basic values of human being, do not take care of the whereabouts of the old and destitute parents let alone the other relatives.

³⁵ *Jamila Khatin vs. Rustom Ali* 16 BLD (AD) (1996) p 61.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ Hadaya, 147, 148. Baillie 465 as quoted in Aziz, above, n 10, p 306.

³⁹ *Ibid.*, Tyabji, 332.

⁴⁰ *Jamila Khatin vs. Rustom Ali*, above, n 35, p 61 as per Justice Mustafa Kamal.

As the obligation appears to be moral, there is no legal sanction to enforce the obligation for maintenance of the parents.

3.2. Maintenance for the Non-Muslim Citizens:

Though the Family Courts Ordinance 1985 does not deal clearly with its applicability to the non-Muslim citizens of the land, the matter has been clarified in the decision of the highest court:

"The provisions of the Family Courts Ordinance 1985 are applicable not only to the Muslim but also to the other community which constitutes the populace of Bangladesh."⁴¹

So, any citizen, either Hindu or from other religions, can get remedy for maintenance in the Family Courts. It is noteworthy that a Hindu wife can file a suit for the declaration of right to maintenance and past maintenance within 12 years respectively.⁴²

3.3. Execution of the Decree /Order for Maintenance:

Section 488(3) of the Cr.P.C reads:

"If any person ordered [by Magistrate] fails to comply with the order without sufficient cause [,] [such Magistrate] may, for every breach of the order, issue warrant for levying the [order money], for levying fines, and may sentence such person, for the whole or any part of such [monthly] allowance remaining unpaid after the execution of the warrant, or imprison for a term which may extend to one month or until payment if sooner made..."

Here question may arise whether the Family Courts have sufficient powers to enforce its decree given for maintenance. In this connection, the following decision given by the apex court of Bangladesh is noteworthy:

"In view of the provisions of section 16(3) of the Family Courts Ordinance 1985, the executing court may direct for civil imprisonment once again for failure to pay money of the subsequent instalments and this power can also be exercised as a Magistrate while dealing with cases under section 488(1)(3) Cr.P.C."⁴³

So, it is said that the scope of jurisdiction of the Family Courts is wide enough and it is equipped with sufficient powers to enforce its decree given for maintenance, among others.

4. Post Divorce Maintenance:

The question of post divorce maintenance still remains an unresolved issue of law.⁴⁴ However, the phrase 'post-divorce maintenance' may justifiably be used to

⁴¹ *Maher Nigar vs. Mojibur Rahman*, 47 DLR p18.

⁴² The Limitation Act 1908, sch. I, arts. 128-129.

⁴³ *Abdul Khaleque vs. Selina Begum*, 42 DLR p 450.

⁴⁴ Md. Khelad Mohiuddin and Ridwanul Hoque, 'Right to Post Divorce Maintenance in Muslim Law: The Shamsun Nahar Revisited', Chittagong University Journal of Law, vol. IV, 1999 p 2.

mean maintenance beyond the period of *Iddat*.⁴⁵ But whether a wife is entitled to maintenance after the divorce has become effective has been extensively debated...both academically and juridically.⁴⁶ Consequently, the issue has resulted in severe debate, which has culminated in conflicting judicial decisions...⁴⁷

4.1. The Position of Post Divorce Maintenance in Some Muslim Countries Including India:

The commentators who try to mean '*Mataa*' as maintenance give examples of the application of '*Mataa*' in some Muslim countries, namely Malaysia, Egypt, Jordan, Syria, Morocco, Lebanon, Algeria, Kuwait, Tunisia, Turkey and North Yemen.⁴⁸ Let us discuss the matter of the post divorce maintenance with reference to the term '*Mataa*' in some of those Muslim countries including India.

4.1.1. Malaysia:

The Malaysian Islamic Family Law as regards post divorce maintenance is established on the *Sura II Verse 241*.⁴⁹ *The Islamic Family Law (Federal Territory) Act 1984* provides, in addition to the woman's right to maintenance, that a woman who has been divorced without *just cause* by her husband may apply to the *Sharia* Court for '*Mataa*' and the Court may, after hearing the parties and after being satisfied that the woman has been divorced without *just cause*, order the husband to pay such sum as may be fair...which is based on [the] *Sura II Verse 241* of the [Holy] *Quran*.⁵⁰ The *Sharia* Courts in Malaysia have rightly highlighted the distinction between the *Iddat* and maintenance and '*Mataa*' or post divorce maintenance.⁵¹

4.1.2 Egypt and Jordan:

Egypt adopted some of the principles of *Maliki* and *Shafi* Schools in cases of maintenance and some other matters.⁵² Jordanian Courts consider compensation for divorce a financial right of the divorced wife, which is not forfeit in the case of death of the husband.⁵³ The Egyptian and Jordanian laws determine cases where divorce is by the unilateral will of the husband and not by mutual agreement.⁵⁴ Both laws stipulate '*Mataa*' or in addition to maintenance for

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ Abdul Mannan Talib, ed., *Islami Ain o Bicher Acti Gobesonadharmi songcolon (Islamic Law and Judiciary-A research based Compilation)*, Islamic Law Research centre and Legal Aid Bangladesh, (1999) p 49.

⁴⁹ Ibid, pp 55-56.

⁵⁰ Dr. Foustina Pereira, above, n 6, p 4.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Ibid.

⁵⁴ Ibid.

divorced women after consummation.⁵⁵ And if the husband divorces whimsically, the husband has been made bound to provide maintenance for one year in Jordan, two year in Egypt and three year in Syria.⁵⁶ The payment may be at a time or on installments as the case may be on the basis of economic condition of the husband.⁵⁷

4.1.3 Tunisia and Turkey:

If either husband or wife, whoever may be, divorces his/ her spouse against his/her consent, without his/ her guilt on insistence, either husband or wife is bound to pay proper compensation to the aggrieved party.⁵⁸ So, the wife can also be liable for the violation of the due process of divorce in this sense.

4.1.4 Iran:

Here the financial rights of the divorced wife have been extended from the maintenance during *Iddat* and deferred dower to the right to claim compensation for household services rendered to husband during marriage.⁵⁹

4.1.5 Pakistan:

Pakistani law recognises post divorce maintenance if a provision is written into the *Nikahnama* or any agreement is made in this regard. And the compensation for maintenance will be in the form of a lump sum payment or monthly payment.⁶⁰

4.1.6. India:

According to section 125 of the Indian Code of Criminal Procedure 1973, the relevant part as to post divorce maintenance reads as follows:

"[If] any person having sufficient means neglects or refuses to maintain-
(a) his wife, unable to maintain herself, ...a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife ...[and] "wife" includes a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried."⁶¹

But the Muslim Women (Protection of Rights on Divorce) Act, 1986 has excluded the application of the above provision to the Muslim wives for mitigating the religious agitation caused by the landmark Shah Bano case.⁶²

⁵⁵ Ibid.

⁵⁶ Ibid.

⁵⁷ Abdul Mannan, ed., above, n 48, p 56.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ *Post Divorce Maintenance/ Financial Arrangement* 1992, <http://www.law.emory.edu/IFL/legal/iran.htm>. Accessed on 20 October 2006.

⁶¹ Section 125 also deals with order for maintenance of wives before divorce, legitimate or illegitimate children and parents.

⁶² *Md. Ahmed Khan vs. Shah Bano*, AIR, SC 945 (1985).

According to the stated objects of the Act, where a Muslim divorced woman is unable to maintain herself after the period of *Iddat*, the Magistrate is empowered to make an order for the payment of maintenance by her relatives who would be entitled to inherit her property on her death according to Muslim Law...But where a divorced woman has no relatives or such relatives..has not enough means to pay the maintenance the magistrate would order the State Waqf Board to pay the maintenance. The 'liability' of husband to pay the maintenance was thus restricted to the period of the *iddat* only.⁶³

4.1.7. Bangladesh:

With regard to post divorce maintenance, there is no parliamentary enactment in Bangladesh. But the Supreme Court observed the matter in the leading *Shamsun Nahar* case.⁶⁴ In this case, the HCD *suo motu* raised question whether the divorced wife could have claimed maintenance from her ex- husband for a period beyond *Iddat*. Particularly, after interpreting the verse 2:241,⁶⁵ the Division Bench held:

'... a person after divorcing his wife is bound to maintain her on a reasonable scale beyond the period of *Iddat*, that is to say, till she loses the status of a divorcee by remarrying another person...'⁶⁶

But the Appellate Division overturned the High Court Division ruling on post divorce maintenance with an observation that the judgment was based on no sound reasoning and against the principles set up by the Muslim Jurists of the last fourteen hundreds years.

Actually, the matter of post divorce maintenance has posed legal problems of many aspects but a common point at which the Muslim Scholars and Jurists hold variant views is whether the term '*Mataa*' means maintenance or not.

In this regard, the AD of the Supreme Court of Bangladesh maintains:

"The Prophet (sm), the *Shahabas* of the Prophet, the *Tabeyis*, the *Imams* of all four schools of thought in Islam, and recognized commentators from the 3rd century *Hijri* up to the 15 century *Hijri* have never deviated from the following provisions with regard to '*Mataa*':

- (1) '*Mataa*' is a parting gift to a divorced woman as a comfort and solace for the trauma they suffer from the divorce,
- (2) Since '*mataa*' is a presentation, her post divorce financial position has not been made a subject matter of consideration while giving '*Mataa*',
- (3) '*Mataa*' is a temporary one -off gift and is not a matter to be given repeatedly and at intervals and

⁶³ Section 4 of the Indian Muslim Women (Protection of Rights on Divorce) Act, 1986.

⁶⁴ *Hefzur Rahman vs. Shamsun Nahar*, 47 DLR (HCD) p 54, 1995, 51 DLR (AD) p 172, 1999.

⁶⁵ Abdullah Ali Yusuf translates Quranic verses into English "For divorced woman maintenance (should be provided) on a reasonable scale. This is a duty on the righteous." Later he edited "For divorced women/Is a suitable gift/This is a duty on the righteous."

⁶⁶ 47 DLR, above, n 47, p 55, paragraph 23 as per Justice Golam Rabbanni.

(4) '*Mataa*' has never been judicially enforceable because it is a gift.⁶⁷

So, the word '*Mataa*' does not mean maintenance. It is 'gratification' or a 'gift', which is awarded upon divorcing the wife. In this connection, Chief Justice A.T.M. Afzal observes:

"'*Mataa*' can not be equated with the maintenance as the HCD did. Whatever be the meaning of '*Mataa*' it is certainly not maintenance".⁶⁸

The study of the position of post divorce maintenance and '*Mataa*' in those Muslim countries including India implies a common feature of the Law of maintenance that they have enacted laws on '*Mataa*'. But the noticeable matter is that the provisions of '*Mataa*' are subject to some conditions.⁶⁹ As for example, the divorce has been given 'unilaterally' by the husband or without any 'justifiable reason' etc.⁷⁰ Another common feature is that '*Mataa*' has not been meant maintenance.⁷¹ But the matter that can be taken into consideration is that the husband who is liable for post divorce maintenance till remarriage or death of his ex-wife is so liable not for '*Mataa*' but for his personal guilt or doing injustice in the exercise of his divorce power.⁷² So, if the divorce is the result of the 'violation' or 'abuse' of the due process of divorce⁷³ enshrined in the Holy *Quran* and opposed to basic human values, then this type of 'violation' or 'abuse' can logically be termed as a distinct 'offence'. As no wrong should go unpunished, the wrongdoer husband cannot but account for his liability. For the ends of justice, such liable husband should be brought to justice through punishing him with a lump sum payment to the victim divorcee on the basis of the merits of the case of the divorce in dispute. Similarly, the wife may also be held liable for the same offence as in case of the husband.

5. Concluding Remarks:

In conclusion, it can be said that the wife is entitled to maintenance for the period of the normal continuance of marriage and for the period of *Iddat* if the divorce is made according to *Sharia*, but she is not entitled to the same beyond the period of *Iddat*, that is post divorce maintenance. But if divorce is the result of unjust, whimsical, capricious, unreasonable, and unilateral intention and conduct of the husband, and if the divorced wife is absolutely destitute, without any means or job to live on or very old or physically paralysed or sick or shelterless, then very relevant question may arise whether such husband can be

⁶⁷ 51 DLR, above, n 47, p 250, paragraph 172.

⁶⁸ Abdul Mannan, ed., above, n 48, p 49.

⁶⁹ Ibid, pp 55-56.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid.

⁷³ For the protection of the women in terms of divorce, *Iddat* and maintenance, the holy *Quran* enunciates clear provisions in the verses 2:229-233; 2:236-237; 2:240-242; 65:1-3 and 65:6-7.

held liable for such type of inhuman divorce. On the contrary, it is plainly inhuman, unjust, inequitable and unfair to impose on a man the burden of maintaining a divorced woman whom either he has not even touched or from whom receives no consideration after divorce⁷⁴ or by whom he (husband) has been divorced unjustifiably. Relevantly, here also question remains why such innocent husband will be forced to bear unreasonable burden.

However, a close look at some Muslim countries appears that a strong basis has already been founded on the opinions and views of the commentators, and on the reformatory legislations adopted by those countries about the matter of maintenance, especially the post divorce maintenance based on major schools of Islamic Law. So, it will not be violation of the Quranic provisions if necessary legislative measures are taken in Bangladesh with a view to consolidating the law of maintenance, especially the law of maintenance for rescuing the destitute and helpless women from the clutch of the unjust and capricious husband, and more especially the law of maintenance for the old and destitute parents. Actually, this is a great question of human rights. As Islam puts emphasis on human rights very substantially, any positive step for protecting such divorced women and uncared poor parents is necessary for the protection and promotion of human rights. But the state authorities should be practical in enacting any law regarding any matter of religion.

Because [it] is common belief that the modern principles of law are in sharp contrast with the Islamic principles of Family law.⁷⁵ Very often it appears that the religious forces fail to understand the rationales of secular interpretations of personal law and reject them from philosophical, religious and moral grounds, while secular forces rarely can appreciate the emotion, sentiment and psychology of the religious peoples.⁷⁶ Many codified or enacted laws adopted by the state authorities remained ineffective because of the absence of stronger popular, religious and moral support of the masses. By imposing legal principles and norms on religious masses hardly we can bring any lasting good result in the matters of personal law.⁷⁷ [So we should] honour the viewpoints of our religious masses and [should] ensure their support for legal reforms demanded by the present socio-economic conditions of the society.⁷⁸

The government is, therefore, suggested to enact law in this regard in the light of the Holy *Quran* and *Sunnah* as well as legislative steps taken in the Muslim countries, and in the Indian sub-continent to avoid juristic confusions and conflict of judicial decisions.

⁷⁴ 51 DLR, above, n 47, p172, paragraph 150.

⁷⁵ Dr. Maimul, above, n 18, p111.

⁷⁶ Ibid, p 112.

⁷⁷ Ibid.

⁷⁸ Ibid.