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Financial support for women under Islamic family law in Bangladesh and Malaysia

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This article looks at the application of Islamic Family Law through decisions of the courts on matters of financial support for Muslim women after divorce in Bangladesh and Malaysia. The selection of the two countries was deliberate in that both are former British colonies with Muslim majority populations. In addition, both have ratified the United Nation’s Convention on the Elimination of All Forms of Discrimination on Women (CEDAW), with reservations. Comparative generalization is made, wherein selected cases of alimony in both countries are analysed. Although Bangladesh and Malaysia are both Muslim countries, there are differences and similarities in how the courts in both countries construe legal provisions in making rulings. The differences, as reflected in their decisions, are influenced by various factors, most notably relating to socio-cultural aspects.

Keywords: post-divorce financial support; Shariah; legal provisions; Muslim women; divorce; Bangladesh; Malaysia

Introduction

One observes that most Muslim communities are meticulous in perpetuating various aspects of an Islamic legal system over the centuries to the present day. Evidence of such continuity reflects a commitment to ensure the application of various aspects of classical Islamic family law, despite secular legal systems, as in the case of Bangladesh and Malaysia. The constant challenge has always been the reconciliation of ‘classical’ Islamic Law, with emerging problems in contemporary, ‘modern’ Muslim societies. Rules relating to the institution of the family, as discussed in classical Islamic Law, are deemed to be adequate for Muslims to live by in accordance with Islamic principles. It was considered necessary to maintain such principles regarding the family in their original state and any amendments were seen as going against Islam (Dennerlein, 1999; Buang, 1997; Anderson, 1976).

In the early nineteenth century, attempts were made to reform traditional Islamic Family Law. The idea of law reform began when the classical doctrine of Islamic Law was seen by the authorities of certain Muslim communities to
be no longer suitable to cope with emerging ‘modern’ problems faced by the Muslim community. Muslim reformers, such as Muhammad Abduh and Jamaluddin al-Afghani, formulated concepts for reform. During this period, several Muslim countries, for example, Egypt, Jordan, Turkey and Morocco, began to codify Islamic Family Law in their own contexts. The focal point of legal reform in family matters was to strengthen the position of Muslim women, long considered the inferior gender in the West, to be empowered, especially regarding financial matters pertaining to the family (Moghadam, 1993; White, 1978). Women faced many familial problems when their husbands failed to carry out their responsibilities as enjoined in the Qur’an. The earlier judicial structures provided little opportunity for women to seek recourse. With legal reform, women could now turn to the court to exercise their rights to divorce, custody and claims after divorce (Coulson & Hinchcliffe, 1978; Moors, 1999). However, not every aspect of Islamic Family law was subjected to reform. Matters regarding polygamy, *talaq* (divorce), registration of marriage and divorce, and the minimum age for marriage were among the issues reformers were concerned about. Other areas such as post-divorce financial provisions remained largely untouched.

As such, many researchers have argued that in practice women do not really benefit from legal reforms (Moors, 1999; Mir Hosseini, 1993). They have criticized these as certain aspects of family law have proved to be disadvantageous to women. Also, they have given examples of legal reform concerning financial support that have not benefited women during marriage, after divorce, or regarding custody and other claims after divorce (Abdullah & Khairuddin, 2009; Fawzy, 2004; Mir Hosseini, 1993; Pearl & Menski, 1998). In addition, its implementation has also been criticized, for instance, Moors has pointed out that this was stalled because of the attitude of the judiciary (Abdullah, 2007; Abdullah, 2001; Moors, 1999). Socio-economic factors have also been considered to contribute to the ineffectiveness of legal reform, in particular for women.

With the growth of women’s studies in the social science literature, an increasing number of authors have identified labor, power and sexuality as the main structural elements shaping the relationship between gender and power (Broadbridge & Hearn, 2006; Cortis & Cassar, 2005; Connell, 1987). The economic position of women in society is reflected by their ability to own, inherit and control income earning assets; participate in economic activities; have control over their husband’s incomes; and the right and ability to control property (Abdullah, Mohd Radzi, Johari, & Dastagir, 2014; Ahmad, 1991). In many Muslim communities, women’s rights to property via post-divorce financial provisions, are readily guaranteed in Shariah law and later under national (civil) law. However, Muslim women still face problems in securing their rights even after several decades of battling for justice. As such rights have not been provided and women are deprived of power and economic autonomy.

This article specifically touches on financial support made for women during marriage and after divorce, as given under the Shariah. In Islam, it is the duty of
the husband to provide physical and psychological sustenance to the wife through the duration of their marriage. Upon its dissolution, women are entitled to claim certain prescribed amounts from their husbands as means to begin new lives on their own. The problem now is that contemporary socioeconomic challenges and struggles that divorced Muslim women face, may not be recognized or embodied by the law and therefore may cause considerable hardship to them. Women then turn to the Islamic Courts in the hope of finding solutions to their problems.

This article discusses two Muslim communities—Bangladesh and Malaysia—because both countries have Muslim majority populations. In these countries, the erstwhile British colonizers have left their legacy in the way of systems of economy and education that have effectively replaced or at best marginalized local systems. In addition, legal systems of both countries are modeled on the British Legal System, another legacy of their colonial past. As such, it is significant to reflect on the extent of the impact of the national law over the Shariah Law with regard to post-divorce financial support given to Muslim women. For the record, Bangladesh gained independence from Great Britain in 1947 as East Pakistan, following the partition of India and became an independent country in 1971. Malaysia gained independence from Great Britain as the Federation of Malaya in 1957. Bangladesh and Malaysia were also parties to the Convention on the Elimination of Discrimination against Women (CEDAW), which was ratified by the two countries in 1985 and 1995, respectively.

Methodology

The main objective of this article is to evaluate the implementation of the established Shariah Law on post-divorce financial support and appraise the discrepancies in its implementation and how they affect women. To this end, an analysis of court rulings in cases of financial support before and after divorce in both jurisdictions was done in order to identify relevant issues. We use a comparative analysis to look into the differences and similarities between two countries. Although comparative analysis will undoubtedly raise criticism and conflict, the rationale behind the methodology is essentially to learn about ourselves, through an understanding of others (Sugden & Tomlinson, 1999). In this case, understanding of laws affecting financial support for Muslim women after divorce in Bangladesh would be able to illustrate issues affecting Muslim women with more clarity in Malaysia and vice versa. This in turn will throw light on laws on divorced women in both countries.

The law on financial support after divorce in Bangladesh and Malaysia

As mentioned earlier, Bangladesh is a Muslim majority country with an essentially secular legal system. Its personal laws, including family law, are founded on the principles of Shariah Law. Women’s rights of property are guaranteed under this and under general law (Serajuddin, 1987). Such rights, however, are not fully enforceable. According to Subramaniam (1998), women in Bangladesh are

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entitled to own property similar to what is owned by men according to both the
general and Shariah Law. However, there are several misconceptions in the
society that as long as women are maintained by their husbands or kin, they
need not have land entitlements granted under Islamic and official law. Thus,
the patriarchal argument that women are subordinated by religion does not hold
up. One explanation would be the nature of the male-dominated society
(Monsoor, 2008; Monsoor, 2005). This is also the finding of a ground-breaking
study that shows how women are economically deprived by the customs and con-
ventions of their society, which places an embargo on their inheritable entitlements
(Monsoor, 1998).

The law on financial support during marriage and after divorce in Bangladesh
is a combination of codified law, local traditions and Shariah Law. Bangladesh
follows the Hanafi School of Islamic Law and Malaysia follows the Shafi‘i
School of Islamic Law. To explain their difference, the Hanafi School of Law
determines the scale of financial support after divorce based on the social position
of both the husband and wife; the Shafi‘i law implemented in the Malaysian
Shariah Courts, however, considers only the position of the husband (Anderson,

In cases of financial support during marriage, earlier precedents show that
courts did not provide for claims of arrears in financial support unless stipulated
in the Kabinnama (marriage contract certificate), nor would courts allow post-
Iddat financial support to divorced Muslim women. In Bangladesh, women
had to rely on other mechanisms to secure such financial support. Malik (1990:
39) suggests that there is an optimistic tendency towards adoption and enforce-
ment of clauses in the Kabinnama which would clearly provide for financial
support, as this offers protection against “arbitrary and capricious subjugation.”
It would appear that without any specific provision for financial support in the
Kabinnama, the courts would not generally allow any financial provision to be
paid and this would definitely be a burden for Bangladeshi women.

Malaysia has a different situation. The Shariah law on divorced women is
based on the following Qur‘anic interpretation (Ali, trans. 1979):

“…for divorced women financial support should be provided on a reasonable
(scale). This is a duty on the righteous”. (Qur‘an 2: 241)

According to Pereira, the Malaysian Islamic Family Law regarding financial
support after divorce is established in the Qur‘an: Surah 2 Verse 241 as stated
above (Pereira, 1999). Although compared to Bangladesh in this instance, Malay-
sia appears to have a better position theoretically; the real test is to see how this is
being meted out in the courts.

In Malaysia, disputes over personal law, including family law, for Muslims are
not tried at the civil courts. Rather, all Muslim personal law cases are heard in the
Shariah Courts under a specific jurisdiction that is outside the ambit of the civil
courts. In addition, specific statutes that deal with family and other personal
laws in Islam are also promulgated by each of the fourteen states of the country (Shuib, 2012). Although the basic principles remain the same, there are variations in statutes on the implementation of the Shariah Law. Shuaib (2012: 96) comments that:

Generally, the states in Malaysia have chosen to exercise legislative and judicial power to the maximum extent permitted by the Constitution. Each state has enacted an Islamic family law enactment or act, a Syariah offense enactment or act, a Syariah criminal procedure enactment or act, a Syariah court civil procedure enactment or act, a Syariah evidence enactment or act, and an administration of Islamic law enactment or act.

On this matter, Abdullah (2007: 523) is of the opinion that:

Most researchers and writers do appear to believe that whatever the problem that may result from the implementation, Islamic family law is certainly uniform. Only its application is not uniform, and in a small country such as Malaysia, this can cause problems. In 2000, several states addressed this issue, and the Islamic Family Law Enactment was amended to become uniform in application throughout Malaysia.

As mentioned earlier, Malaysian Muslims follow the Shafi’i School of Law, which makes the financial support award according to the economic status of the husband. Although in theory this appears to be ideal, in practice it causes hardship for women as cases discussed later will illustrate. On the one hand, husbands claim that they are unable to pay for financial support during the marriage, giving rise to a number of unresolved cases that have dragged on, sometimes for over five years. The wives in these cases, on the other hand, are shown to have extremely high levels of tolerance even when financial support awards do not essentially compensate their real needs.

The Islamic Family Law in Malaysia grants the right to divorced wives to claim support from their former husbands. If the man defaults he may be penalized. In issuing an order to the man to provide financial support during the marriage and after divorce, the Court will take into consideration his financial standing in order to ascertain the amount to be paid to his wife or ex-wife. In fact, the wife is given the right by law to dissolve the marriage through taaliq, faskh (judicial divorce) or talaq, especially in the event that the husband refuses to provide financial support within a period of three to four successive months of their marriage. This provision shows that a more systematic form of Shariah Law is applicable in Malaysia.

Now, for example, if one looks at Part VI of the Islamic Family Law (Federal Territories,) Act 1984 (Amendment 2006), one finds that there are no less than twenty provisions regarding financial support, which includes those for a wife, children and others. These provisions are largely based upon the Islamic classical law, mainly Shafi’i law. No reform has been undertaken on matters pertaining to a wife’s right to financial support. In other words, the Islamic law on financial
support during the marriage and after divorce in Malaysia does not depart from classical Shafi’i law. That being said, there is no clear definition of ‘financial support’ in the Islamic Family Law in Malaysia. As such, the case of *Abdul Hanif vs Rabiah* (1997) may be said to provide an acceptable definition of this in Malaysia. In this case, the Honourable Judge elaborated on the meaning of dwelling place from the perspective of providing financial support, which the husband must provide for the wife upon divorce. The presiding judge also included sustenance and clothing to be provided to the wife based on the financial capacity of the husband in his definition.

Sections 59 and 65 of the Islamic Family Law (Federal Territories) Act, 1984 (Amendment 2006) guarantee the rights of a divorced wife to obtain post-divorce financial provisions during the period of *iddat* (Ibrahim, 1984). However, this provision does not clarify whether the wife was divorced by way of *talaq raj’i* (Revocable Divorce Proclamation) or *talaq ba’in* (irrevocable divorce proclamation) or even *al-Mabtutah* (irrevocably divorced wife). The wordings of the sections are not clear and precise, which could cause confusion in the future. Section 71 of the 1984 Act 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 financial support for herself and a place of accommodation (*sukna*), based on the view of the Hanafi School. However, both these forms of provisions for financial support are subject to supplementary conditions, for example, the wife must not commit adultery within the said period. Other than support for the divorced wife, the Islamic Family Law of Malaysia also provides rights to the children by the father after their parents’ divorce.

The 1984 Act further provides that a disobedient (*nashuza*) wife is not entitled to financial support during the marriage. The Act provides various conditions to consider a wife as a *nashuza* (Section 59 (2) of the 1984 Act). As the category of divorced woman is not provided for under this Act, the court will have to follow the rules found in the classical Shafi’i legal manuals. A wife’s right to financial support will therefore be affected if she is deemed to be *nashuza* (Section 59 (2) of the 1984 Act). Any arrears, however, of financial support are recoverable at any time (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 *mut’a* (consolation gift), *mahr* (dower), *nafaqa* (financial support) as well as *harta sepencarian* (jointly acquired property) (Abdullah, Martinez, & Mohd Radzi, 2010; Ibrahim, 1987). This is also another potential area for problems for women in the Muslim community. Divorce often causes hardships in different ways, emotional and financial. Provisions for financial support after divorce are mentioned in the classical Islamic legal sources as financial assistance to women undergoing divorce to ease their burden and suffering to continue with their lives, especially when children are involved. Even in marriage, the sole responsibility of providing for the family rests with husband. When women work outside the home, their earnings are not considered to be for the
family but for themselves. There is a prevalent misconception that women who are working do not need any financial provision as they can take care of themselves and this goes on to hold for when they divorce. Another point is when a woman does not work outside of her home; her contribution to the family is not measured in economic terms. If divorced she has no means of earning or financial support, therefore, she is placed in great difficulty indeed.

In Malaysia, any sort of dissolution of marriage is required to be registered under Section 55 of the 1984 Act. Before this is made, the Act provides a significant provision for the Shariah courts to make an order for a divorced wife. This includes custody and provision of financial support for dependent children, a home for the divorced wife, and payment of *mut'a* (consolation gift) to her (Section 55 of the 1984 Act). Therefore, it could be said that the Shariah court in Malaysia guarantees financial aid to a divorced wife even before the divorce registration is made (Abdul Latif, 2013). In addition to such provision for a divorced wife, the 1984 Act provides for interim financial support in order to assist her. Where the court is satisfied regarding grounds for payment of support, it may make an order against the man to pay interim amounts as financial support after divorce, which has to take effect immediately and remain until a court order is made for financial provisions. The interim support received by the woman is supposed to be sufficient for her basic needs.

Analysis of court cases

What follows is a discussion on several selected legal cases that would shed light on the issue of financial support, both for wives and divorced Bangladeshi and Malaysian women, by the Civil Courts as well as the Shariah Courts in the two countries. The cases comprise an important source of information and documentation, which clarifies the function of the judiciary in empowering women through reinstatement of their rights to financial support after divorce. The question at this point is whether the judiciary is indeed protecting women from economic abuse and exploitation. The reported cases regarding such support at the higher levels of the judiciary do not generally project a new interpretation of the law. These did, however, substantially augment the local development of laws pertaining to the support.

Financial support and the issue of *nusyuz* (disobedient wife)

**Bangladeshi cases**

In the case of *Rustom Ali v Jamila Khatun* (43 DLR 1991, HCD 301), the High Court Division of the Supreme Court revised the original rulings of the lower court and did not grant financial support during the marriage to the respondent as she was not staying with her husband in their marital home. The wife refused to cohabit and thus became a disobedient wife or *nusyuz*. The High Court did not deviate from the traditional concept of providing arrears of financial
support unless the claim was based on a specific agreement or decree by a court. This was regardless of the fact that the husband exerted his sexual rights over the wife and controlled residence in the marital home. In this case, the wife refused to cohabit with her husband and thus became a disobedient wife or *nusyuz*, which was in this case regarded as a *prima facie* cause for not allowing financial support (Tahir, 1986; Tyabji, 1968).

In cases of estranged or volatile relationships the claim for financial support is usually the only weapon that women have to obtain some relief from economic hardship. For example, the doctrine of *nusyuz* or disobedience is by default applied to wives if they leave their matrimonial homes even if their husbands are living abroad and their mothers-in-law ill-treat them. However, in accordance to the Shariah law, if there is sufficient cause for a wife to refuse to live with her husband, she is entitled to financial support during her marriage. According to Mahomed Ullah Ibn S. Jung (1900), such provision is due to the wife even while she is in her father’s residence, unless she refuses to live in her husband’s house. It is interesting to note that, although the cases on the issue only solidify this as a fundamental right of Muslim women and the Family Courts try to show that they are strictly applying the traditional Muslim law when in fact they do not do so. This is a serious point that needs to be considered as the impact of the court rulings that are not rooted in reality make a mockery of the Shariah. It would seem pointless to have a legal system when it cannot be relied upon. This may explain the lack of consistency or, rather, of actual implementation of the law in decisions made by the Family Courts. In several cases, husbands give reasons/excuses for not giving financial support for their wives and children, which are inconsistent with the teachings of Islam. More studies are needed to understand the reasons behind such behavior.

At times, a wife may be considered disobedient by the Court merely because of her absence from her in-law’s residence, for instance, in the case of *Monawara Begum* vs Md. Hannan Hawladar (Family Suit No. 15 of 1989, unreported), the Family Court of the village Madhurchar in Doharupazila, a sub-district of Dhaka district did not allow financial support to a woman on grounds that she was not present in her in-law’s house while her husband was working abroad. This means that the judges were concerned about the presence of wives in their matrimonial homes and not just for performing their marital obligations. This goes to show that judicial attitudes are influenced by stereotypical concerns about controlling women’s movements.

It is socially accepted in Bangladesh that on marriage the woman will live with her husband in his family home and must do so for the length of their marital relationship. It had been earlier held in the case of *Mohammad Ali Akbar vs Fatima Begum*, (AIR 1929, Lahore 660) that the wife was not entitled to financial support during her marriage in such a situation, because quarrels and disagreement with her mother-in-law were not legal reasons for her to leave her husband’s house. This situation may have been conveniently avoided if the right to separate residence and financial support arising out of such ill-treatment or differences had
been stipulated in the Kabinnama, as in an earlier case of Sabed Khan vs Bilatunnissa Bibi (AIR 1919 Calcutta 825). In the case of Mohammad Ali Akbar vs Fatima Begum, the court relied on the fault of the plaintiff, but not on the defendant’s abandonment of the marital home as he worked abroad. Nor did the court base its judgement on the earlier case of Sabed Khan vs Bilatunnissa Bibi. This reflects the patriarchal attitudes of the judiciary, as the court merely ascertained that the wife had left her husband’s residence without his permission because she could not produce any letter to show that her husband had approved her departure.

Another type of disobedient act by a wife is refusal to consummate marital relations. In Mst. Meherunnahar vs Rahman Khondakar (Family Suit No. 24 of 1987 unreported), the Family Court bluntly applied the classical Shariah law, that is, if the marriage is not consummated, the wife is not entitled to any financial support during her marriage (Ali, 1917). The court rejected the allegation of the defendant that the wife had venereal disease but decided that talaq (revocable divorce) was effectively pronounced. The court ascertained that the defendant had failed to provide financial support to his wife (the plaintiff), but did not grant this to her as she herself had stated that their marriage had not been consummated. Although the facts of the case 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. From a socio-cultural standpoint, the bigger question was what motivated her to lie. Was the impact of shame or embarrassment (Lojja or Sharam) stronger than her need for financial support? However, such attitudes of women are never considered in a court of law. Owing to female seclusion, feelings of shame—Lojja and Sharam—are very strong among women in Bangladesh and so they do not like to discuss their private affairs in public. Thus the woman may have been embarrassed to speak about sexual intercourse in an open court where other people were present. It is important to point out that the court’s decision shows that the judiciary was conservative in its outlook regarding financial support. However, women here do not want their private affairs discussed in a public arena, but the courts are not sensitive about this.

It would also be difficult to ascertain the exact principles they were referring to for determining the precise amount of financial support. In Bangladesh, the Kabinnama (marriage registration certificate) is a very important legal document, which stipulates that financial support during the marriage should be given in a respectable manner (Bhodrochito hare), although there is no indication about how much is regarded as respectable. Thus, the wording of the Kabinnama must be made clear and precise for the court to inspect and decide upon. In addition, circumstantial evidence must go beyond socio-cultural norms so that the court delivers justice to all parties concerned.
**Malaysian cases**

The husband did not provide financial support to his wife as he was of the view that he had no obligation to do so as she had disobeyed him when she left their matrimonial home to pursue higher studies in the US without his consent. This is the gist of the case of *Fakhariah Lokman vs Johari Zakaria*. The Shariah Lower Court dismissed the application of the wife for declaration of divorce by way of *Ta`aliq* (Divorce by the Breaking of Condition) on the grounds that the husband failed to give financial support to her during their marriage. The court said the wife was not entitled to such support as she left the matrimonial home without her husband’s permission and without need, as provided under the Islamic Law. The wife later appealed on the matter.

The Shariah Court of Appeal in Selangor later allowed the appeal and permitted the declaration of divorce by way of *Ta`aliq* as applied for by the wife. This case points to the fact that even though the wife was outside of the matrimonial home, she could apply to the court that her absence was a valid ground for divorce via *Ta`aliq*. The court’s decision was in favor of the wife although she was not in her matrimonial home and rejected the husband’s refusal to maintain her as he had not sought to have the court declare that the wife was in fact disobedient.

What constitutes disobedience must be determined by the court. In the case of *Khatijah vs Ismail* (1989), the wife applied for declaration of divorce by way of *Ta`aliq* on grounds that the husband had left her for more than six months and failed to provide financial support after divorce. The husband made the counter-claim that his wife had disobeyed him by refusing to move in with him to a small room with rudimentary amenities close to his workplace. His claim that her wife was disobedient was considered by the court as a ploy to avoid providing financial support after divorce and *mut`ah* (consolation gift). The court of appeal rejected the claims of the husband and was of the opinion that he was capable and must therefore provide a reasonably equipped dwelling place suitable for his former wife to live in. As such, she could not be declared disobedient or *nusyuz*.

As there is no clear provision on *nusyuz* matters in the Islamic Family Law Act (Federal Territories) Act 1984 (Amendment 2006) the decision of the court was based on the interpretation, both direct and indirect, regarding the tacit provision of Section 59(2) dealing with matters on financial support during the marriage and after divorce. The absence of a direct provision on *nusyuz* opens the way for various interpretations as there are no specific guidelines on the matter. The Circulars issued by the Shariah Court, Practices Number 11, 2001 function in the way of general principles and may even contribute to an array of additional interpretations that could result in multiple interpretations and actions. Section 59(2) of the 1984 Act outlines three actions that may disqualify the wife from her rights to receive financial support after divorce because of her *nusyuz* status. It is, therefore, time that a specific provision on *nusyuz* be promulgated to avoid further misperception in the future.
The value of legal provisions for financial support after divorce

**Bangladeshi cases**

In some cases, if the husband resides abroad, the Family Courts may grant a larger amount after divorce. In *Margubater Rouf vs A.T.M. Zahurul Haq Khan* (Family Suit No. 1 of 1992 and Family Suit No. 3 of 1992), a suit for the claim of dower and support, the plaintiff pleaded that the defendant had left to work abroad and did not provide anything 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 husband pronounced *talaq* (Revocable Divorce) to the wife on 25 February 1990. The court decided that, as *talaq* had been given in accordance with the Muslim Family Laws Ordinance 1961, no marriage subsisted and the wife was entitled to financial support after divorce during the *iddat* period. The court reasoned that the wife was not entitled to financial support while she was married because she was disobedient. However, it is interesting to note that the court still ordered 40,000 taka as financial support to be given to her for a period of three months after the divorce, that is, 13,000 taka per month, whereas in similar cases decided earlier, only 600 to 1,000 taka per month were granted. It may be presumed that this was so because the court was taking into account the financial standing of the husband, who was working abroad. Alternatively, it may have been compensating the woman because the failure of the marriage was not her fault, but that of the husband who was absent as he was abroad. However, in the case of *Nasima Bilkis vs Md. Abdus Samad* (Family Suit No. 12 of 1992 unreported), the post-divorce financial support for the *iddat* period was fixed at 2,500 taka per month, although the husband was not working abroad. It is not clear from the judgment why such a high amount was awarded. Evidently the Bangladeshi Court in this instance was not consistent in its rulings on acceptable amounts as post-divorce financial support.

**Malaysian cases**

In Malaysia, if a husband violates the court order, he is punishable under the Law (Section 132 of the Islamic Family Law, Federal Territories, 1984 Act, Amendment 20016). In fact, a wife is entitled to obtain an order from the court to terminate her marriage by *faskh* (Judicial Repudiation), if the husband during the marriage has failed or neglected to provide support for a period of three months (Section 52 (1) (b) of the 1984 Act). In *Ismail vs Norsiah* (1970 JH 111) the parties were married in 1961. The husband failed to provide financial support during their marriage and the wife claimed support for five years, one month and 17 days on the ratio of RM 1 per day, amounting to a total of |RM 1,847. The trial Judge ordered the man to pay this amount and he appealed to the higher court, which then ordered him to pay, but reduced it to RM 955 based on his financial means.

Studies of Shariah Court cases for the year 1973–1977 in the district of Petaling in the state of Selangor shows that the amounts of support given during the
subsistence of the marriages were less than RM 50 per month (Kassim, 1984). This rate indicates that the divorcing parties’ claims for support were from lower income groups. However, studies conducted at the Shariah Court, pertaining to cases of financial support for children in the year 1984, also show that the amounts ordered by the Shariah Court to be paid by fathers were mostly around RM 50 (Nik Badlishah, 1998). Similarly, based on studies done by the Shariah Court in Perlis in the year 1999, particularly in cases of financial support to children following divorce, the amount men were asked to provide for their children was between RM 50 and 100 (Abdullah, 2001). However, there were cases of fathers who were able to provide much larger sums, for instance, sums of RM 300 per month per child if they so wanted. However, this amount is still very small, but the court should order claims for post-divorce support, especially for children, when a divorce order is issued. The said divorce could be one by way of talaq (by the breaking of a condition), faskh (Judicial Repudiation) or even khul’ (at the request of the wife who pays a compensation). This is because it is compulsory under Shariah for the father to provide for his children after divorce, without being bound to any condition, even if his former wife was considered musyuz.

**Failure to provide financial support during the marriage as grounds for divorce**

In Bangladesh, a woman married under Muslim law shall be entitled to obtain a decree for divorce for the dissolution of her marriage on any one or more grounds (out of a total of eight grounds) as provided under Section 2 of the Dissolution of Muslim Marriages Act of 1939. One of the most commonly cited grounds for the dissolution of marriage is neglect, for example, for a husband who has neglected or has failed to provide for his wife for a period of two years, he would be legally obliged to maintain his wife financially. So, if he fails to do so, the wife may seek divorce on this ground. A husband may not maintain his wife either because he neglects her or because he has no means to provide for her. In both cases the result would be the same. The husband’s obligation to maintain his wife is subject to the wife’s own performance of matrimonial obligations. Therefore, if the wife lives separately without any reasonable excuse, she is not entitled to get a judicial divorce on grounds of her husband’s failure to maintain her, as her own conduct has not been exemplary. Therefore, she would not be entitled to post-divorce financial support under Muslim law.

In Malaysia, the case of **Sakdiah vs Ahmad** (1981 JH 2: 101) saw the Shariah Court of Appeal in Kedah, a northern state in Peninsula Malaysia, deciding with reference to the works of Syeikh Zakariyya Al-Ansariy, a prominent Shafie scholar in *Sunan al-Matalib bi Syarhi Rawd al-Matalib*. The Judge proceeded to provide an option to the wife: to be patient until the husband secured a job that would enable him to earn in order to pay financial support for which he is liable; or if she refuses to wait, demand for faskh (judicial repudiation) of the marriage.
Post-divorce financial support after the dissolution of marriage

Muslim jurists have also argued that the husband should provide financial support during the subsistence of marriage and the *iddat* period (Paras, 1985; Fyzee, 1974). This is because in Islam, after the dissolution of marriage, the parties are entitled to remarry and the woman returns to her natal family (Tahir, 1986). It is considered unfair to burden a man with the obligation of post-divorce support when he is no longer her husband as marriage is a religious and social contract under Islamic law. Moreover, according to Shariah Law, the deferred dower is seen as a safeguard for divorced women. Nevertheless, women in Bangladesh are usually deprived of their deferred dower for socioeconomic reasons. The question at this point is what happens to those women whose natural families cannot provide for them after dissolution of marriage? There is no state welfare system in Bangladesh as there is in the West. Shariah Law states that if the natal family cannot maintain the divorcee, support from her former husband will be charged on the collective resources of the Muslim community as a whole. If there is a Baitul Mal (Financial Institutions that administers taxes and other finances in Muslim countries) or a community fund the divorcee can be provided from this or from the savings of the *Waqf* (Islamic Endowment) property (Shabbir, 1988).

From the women’s viewpoint, if a wife has spent her life laboring in her husband’s household, but has not been rewarded, she should not be turned out without maintenance. In Bangladesh these problems have not been articulated yet. The High Court Division of the Supreme Court had taken steps to provide for post-divorce support. In *Hefzur Rahman vs Shamsun Nahar Begum* (47 DLR 1995 54), it was held that, after divorcing his wife, a person is bound to maintain her at a reasonable scale for an indefinite period until she remarries. The verse in the Holy Quran (2:241), translated by Abdullah Yusuf Ali, was cited in view of this. The High Court Division, however, considered the literal meaning of the first part of the verse. The transliteration runs as: “Wa al-Mutallaqat Mataa” (the righteous persons should give a consolation gift after divorce). 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” (consolation gift) and “nafaqah” (financial support) and wrongly held that a divorced woman is entitled to post-divorce support till she remarries (51 DLR AD1999 172). *Mataa* has been translated as consolation gift, compensation or indemnity and is basically different from regular financial support for the divorcee.

Traditional Muslim juristic opinion is that the injunction of the Quran does not go beyond the *iddat* period. It is clearly stated in the Hedaya that a woman who is divorced on account of repudiation for any cause other than her own, is entitled to post-divorce financial provisions and lodging during her *iddat* (Hamilton, 1982; Baille, 1875). This has been recently upheld by the Appellate Division of the Supreme Court of Bangladesh in the case of *Hefzur Rahman vs. Shamsun Nahar Begum* (51 DLR AD 1999 172). The Quranic verse 65:6, considered in this context, directed men to pay financial support to their divorced wives.
during *iddat*. It is clear that while the provisions of the primary sources of the Shariah are clear about the status of post-divorce support, the socio-cultural aspects of the community definitely influences its actual implementation.

**Arrears of financial support provisions**

The latest position of Sunni Law in Bangladesh regarding arrears of financial support for a Muslim woman was illustrated in the Appellate Division of the Supreme Court in *Jamila Khatun vs Rustom Ali* (16 BLD AD 1996 61). According to this, the woman was entitled to support even in the absence of any specific agreement. In Malaysia, in the case of *Seri Utama Dewi Kasman vs Abu Bakar bin Abdullah* (2010 JH 30(1): 111), the Shariah High Court ordered the respondent to pay arrears to the appellant and her child, starting from April 2005 as the Court felt that the respondent’s claim that the appellant was *nusyuz* was unfounded. In these cases, clearly the Courts in both jurisdictions awarded support payments to women with retrospective effect, even though their divorces had taken place earlier and in the case of Jamila Khatun (Bangladesh) no earlier agreements had been made between the parties.

**Financial support and the *sulh* (mediation) process**

In the middle of the 1990s, the Malaysian Shariah courts were greatly criticized in the media for their backlog of adjourned cases and the delays in their management. Many of the divorces and resulting claim cases were adjourned. This resulted in long settlement processes that greatly inconvenienced the parties, especially the divorced wives who lived in financial insecurity. The time and money spent by the women in going to the courts caused hardship to them and were deemed unreasonable. This backlog of cases only highlighted the inefficiency of the Shariah Court System and most critically pointed to the disadvantages and inadequate implementation of the law.

The plight of these women took center-stage in the media and in turn generated a lot of interest and research. The Department of Shariah Judiciary, Malaysia, a government agency that deals with Islamic matters, took note of the media reports and research findings to rectify the matter. This department has subsequently initiated mechanisms to shorten the process of divorce settlements by taking several positive steps, such as appointment of more judges, including women judges, tightening administrative and case management systems of the courts, increasing legal awareness among women and introducing the *sulh* (mediation) process as an alternative to settle cases. This was introduced by the Selangor Shariah Judiciary Department on 1 May 2002. The process is based on the authority of Section 254 of *Mal (Property) Procedures Enactment of the Selangor Shari* (medication) process as an alternative to settle cases. This was introduced by the Selangor Shariah Judiciary Department on 1 May 2002. The process is based on the authority of Section 254 of *Mal (Property) Procedures Enactment of the Selangor Shariah Courts*, promulgated on 1 October 2001 and came into force on 1 May 2002. The delay in enforcing the process was due to completion of several management issues, including administrative matters and appointment of officers. The objective of the *sulh* process is to address the backlog of cases and the overall administration of justice in the courts. In this process, matters
are to be expedited as both parties attend the mediation sessions, wherein issues are discussed outside the formal confines of the courtrooms. The results of the mediation are then forwarded to the Courts for endorsement and orders.

In Directive Practice No. 3, 2002, the application of the sulh process has been further augmented by the provision that the cases referred must be registered within 21 days for the Chair to conduct mediation sessions. All resolutions are recorded and read in front of the parties and forwarded to the presiding judge and recorded for a Mutual Agreement Order. Based on Directive Practice No. 1, 2010, any claims regarding post-divorce financial support—for wives, iddat, children or others—must be referred to the sulh Council before the matter is heard in open court. How successful this measure is in clearing the backlog of cases is still being studied, but it is indeed a very innovative approach undertaken by the Malaysian Department of the Shariah Judiciary.

Discussion and analysis

Based on the analysis of the conditions of both jurisdictions, the major similarities and dissimilarities are presented in Table 1.

Table 1. Comparison between Malaysia and Bangladesh.

<table>
<thead>
<tr>
<th>Source</th>
<th>Malaysia</th>
<th>Bangladesh</th>
</tr>
</thead>
<tbody>
<tr>
<td>Islamic Primary and Secondary</td>
<td>Sources Codified Shariah Law</td>
<td>Islamic Primary and Secondary</td>
</tr>
<tr>
<td>Schools of thought (Madzhab)</td>
<td>Shafi’i</td>
<td>Hanafi</td>
</tr>
<tr>
<td>Amount</td>
<td>The Shafi’i law followed by the</td>
<td>Determines the scale of post-</td>
</tr>
<tr>
<td></td>
<td>Malaysian Shariah Courts which</td>
<td>divorce financial support with</td>
</tr>
<tr>
<td></td>
<td>considers only the position of</td>
<td>reference to the social position</td>
</tr>
<tr>
<td></td>
<td>the husband</td>
<td>of both husband and wife</td>
</tr>
<tr>
<td>History</td>
<td>Former British colony</td>
<td>Former British colony</td>
</tr>
<tr>
<td>UN Convention on women</td>
<td>CEDAW</td>
<td>CEDAW</td>
</tr>
<tr>
<td>Court system</td>
<td>Shariah court separate from</td>
<td>Shariah court within civil</td>
</tr>
<tr>
<td></td>
<td>civil court based on common law</td>
<td>court based on Common law Single</td>
</tr>
<tr>
<td></td>
<td>Dual Court System</td>
<td>court system</td>
</tr>
<tr>
<td>Law of financial support</td>
<td>Combination of codified law,</td>
<td>Combination of codified law,</td>
</tr>
<tr>
<td></td>
<td>local traditions and Shariah</td>
<td>local traditions and Shariah</td>
</tr>
<tr>
<td></td>
<td>Law</td>
<td>Law</td>
</tr>
<tr>
<td>Economy</td>
<td>Labor Force Participation:</td>
<td>Labor Force Participation:</td>
</tr>
<tr>
<td></td>
<td>66.2% Female : 51.1%</td>
<td>43% Female: 27%</td>
</tr>
<tr>
<td>Literacy</td>
<td>95%</td>
<td>58%</td>
</tr>
<tr>
<td>Population</td>
<td>30.1 million</td>
<td>134 million</td>
</tr>
<tr>
<td>Socio-cultural dimension</td>
<td>Industrialized and modern vs.</td>
<td>Patriarchal/ masculine vs</td>
</tr>
<tr>
<td></td>
<td>traditional</td>
<td>feminism</td>
</tr>
</tbody>
</table>

The analysis of the cases did not point to the effectiveness or otherwise of the Shariah Law in addressing the issue of financial support for women. Rather, the decisions are made on a case-by-case basis, wherein the current social conditions of the parties involved are taken into consideration. This observation resonates with the practice of the Hanafi School of Law in Bangladesh, although in effect, there are decisions that are not reflective of the said Law; for example, the quantum of post-divorce financial support, which tends to be higher even if husbands are not working abroad as in the case of Nasima Bilkis. It is not immediately clear why the decisions of the court tend to be inconsistent, but clearly the strong patriarchal nature of Bangladeshi society was reflected in some of the court rulings presented in this article. These may present difficulty for Muslim women in the future if this trend continues without any intervention by the legal fraternity.

In Malaysia, even though the court had issued an order for post-divorce financial support to wives and children, it is seen as ineffective if not implemented. In the event that the husband/father is considered negligent or refuses to observe the order and neglects his duties, the divorced woman and children suffer. Their basic needs for education, health and daily living would not be fulfilled. These issues have caused hardship to Malaysian Muslim women, which case has prompted many NGOs to advocate on the matter with the Malaysian government.

Through its Department of Shariah Judiciary, the Malaysian government established the Family Support Division on 24 October 2008 and started operations in April 2009. This division has sought to assist in executing the order and enforcing judgments pertaining to post-divorce financial support by the Shariah Court. This was also done to ensure that the order of the Shariah Court be observed. It has received financial and other co-operation from the Baitul Mal and the government, particularly for providing monthly allowances to divorced women and their children. Currently, this rule is only applicable to Muslims. The officer in charge interviews such women and children and have found that many men have refused and neglect to make the post-divorce support payments despite the court orders. If the men have employers, a deduction is normally made from their salaries based on the Married Women and Children (Enforcement of Maintenance) Act 1968, but demanding from men who are self-employed or completely unemployed is difficult.

Even though a woman is entitled under the law to receive post-divorce financial support, several problems have arisen regarding their claims in the court, for example, whether these were for her or for the children. In most cases, problems result from men’s inability or intentional neglect to pay, especially if they have to leave their homes, do not have jobs, are involved in drug abuse, or have other wives in polygamous marriages. Considering these situations, some women decide not to make any such claims, as the amounts fixed may not be commensurate with costs they would incur if they were to go to court.

The reforms of the Shariah have been in place now for over 20 years and appear to be well established. A survey of the literature shows that the legislation is widely accepted and hardly questioned. The main public concern that remains is on its implementation, which has created confusion and resentment towards the Shariah Court [65].
Conclusion

Based on a comparison of the two Muslim communities, it may be possible to say that the implementation of the Islamic Family Law, especially on matters of financial support for women, is influenced by external factors that affect the outcomes of cases. While financial support cases can be heard in the official courts in Bangladesh, in Malaysia such cases can only be tried at the Shariah courts, which is a judicial system totally separate from the civil courts. It also appears that socio-cultural and economic factors play an important part in how judges decide such cases in Bangladesh, but these are not so evident in Malaysia. This is illustrated for example, when a judge in a financial support case considers the social and economic positions of both parties.

Judges in Bangladesh follow the legal tradition of the Hanafi School of Law, while the Malaysian Shariah court follows the legal tradition of the Shafi’i School of Law that considers the position of the husband in deciding on post-divorce support matters. Economic factors are not seen to be very significant in the Malaysian cases, although there are socio-cultural factors that also affect the outcomes of court decisions. Malaysia has a complex landscape that is shaped by developmentalism, women’s education, and labor participation (Lunn, 2006). As such, Malaysian women and their voices are said to play a part in the judicial process. The law has imposed an obligation on all men to provide financial support to women whom they may divorce. Those who fail to comply are punishable under the law.

The Shariah court has to ensure that any order for providing such support, custody of dependent children, and accommodation during the period of iddat, the deferred dower or mahr, the payment of mut’a or consolation gift and the division of jointly acquired property are made before any attempt at divorce registration. All these ancillary orders are beneficial to a divorced woman for her livelihood after divorce, especially if she is destitute. Recent developments that will benefit the economic needs of divorced women include the government’s introduction of the Family Support Division. The purpose of this is to resolve legal enforcement issues and especially to assist women going through divorce to start new lives. It is, however, too early to say whether or not the Division is indeed effective as it has been established recently.

Based on our analysis, it is clear that court activities and the involvement of sensitive judges in both communities would help institutions like the Family Courts to become the right platforms to protect women from economic deprivation. A more sensitized judiciary can empower and protect women by providing effective support mechanisms through enlightened judicial pronouncements.

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Notes

1. *Iddat* is the four-month long (or completion of three menstrual cycles) period of waiting observed by a divorced woman before commencing a new contract of marriage with a view to ensure that she is not pregnant following her previous marriage.

2. *Taaliq* is a stipulation of a vow expressed by the husband after the solemnization of the marriage. The breach of that vow renders the marriage void.

3. *Fasakh* is a dissolution of marriage applied for by either husband or wife and granted by the Shariah Court judges, because of reasons justified by Islamic law.

4. *Talaq* is divorce by mutual consent, with the permission of the Shariah court, after a spouse makes an application to the Court by filing a specific form and both parties agree to divorce.
References


**Abstract in Bahasa Malaysia**

Artikel ini meninjau aplikasi Undang-undang Keluarga Islam melalui analisis keputusan mahkamah di dalam perkara berkenaan nafkah untuk wanita Islam selepas perceraian di Bangladesh dan Malaysia. Pemilihan dua negara ini adalah khusus memandangkan keduanya adalah negara bekas jajahan British dengan populasi yang majoritinya adalah orang Islam. Tambahan pula, kedua negara ini juga telah menandatangani perjanjian *United

**Keywords:** bantuan kewangan selepas perceraian; Shariah; peruntukan Undang-undang; wanita Islam; perceraian; Bangladesh; Malaysia