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Recent Trends of Judicial Activism for the Advancement of Muslim Family Laws in Bangladesh: A Critical Appraisal

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Abstract: *The aim of this paper is to analyse the trends of judiciary towards the development of Muslim family law in Bangladesh particularly in the areas of restitution of conjugal rights and maintenance. While analysing the trends, the paper underscores the role and significance of judicial activism in developing new principles considering the changes in the society. The paper highlights the progressive interpretations and approaches of the judiciary that not only uphold the constitutional principle of equality and non-discrimination but also contribute to uplift the position of women in the society. The paper also indicates a static and conservative approach of the judiciary in few cases which could have been dealt with more positively. The paper suggests to develop a consistent and coherent pattern of judicial activism in order to make the Muslim family law pragmatic and effective.*

Keywords: Judicial activism, Family law, Progressive interpretation, Women's rights, Gender equality*, Ijtihad.*

1. Introduction

The static and immutable doctrines of Muslim family law are facing constant challenges to keep the pace with society.[1] The changing circumstances and social needs in relation to family matters interfered with the inevitable sacred laws. Therefore, harmonizing the traditional Islamic principles with the needs of progressive society became crucial.[2] Here comes the tool of judicial activism, which contributes significantly to introducing new principles on different issues of

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[1] Alamgir Muhammad Serajuddin, 'Judicial Activism and Family Law in Bangladesh' Professor Mahfuza Khanam and Barrister Shafique Ahmed Trust Fund Lecture delivered at the Asiatic Society of Bangladesh, 2009, Dhaka, Bangladesh.

[2] Alamgir Muhammad Serajuddin, *Shari'a Law and Society: Tradition and Changes in South Asia,* Oxford University Press (reprinted), 2001, First published by Asiatic Society of Bangladesh (1999). 12 & 338.

Muslim family law, taking into account the related social developments.[3] It is to be noted that in order to understand the teachings of Muslim family law in a particular region, the historical and geographical along with political dimensions need to be taken into account[4] that can largely be maintained by judicial activism. In this regard, this paper aims to critically analyze the trends in changing judicial discourse towards the development of Muslim family law, particularly in the context of Bangladesh. It is worth mentioning that the classical Sharia law on family relations while carrying the legacy of patriarchal cultural contexts, leads to legal and social discrimination. Bangladesh is not an exception. However, the judiciary often came forward with its bold decisions to remove inequity and injustice, particularly against the women, and contributed to developing the new discourse of Muslim family law with a more liberal interpretation of *Sharia*.[5] Though judicial activism also has not escaped criticism, this paper submits that the role of the activist judiciary cannot be ignored rather it needs to be flourished. It is to be noted that while analyzing the trends of the judiciary, two significant issues, among others, of family relations, namely Restitution of Conjugal Rights and Maintenance, are analyzed in this paper.

2. Significance of Judicial Activism

Judicial activism is considered as an active tool for engineering social change.[6] A court, while examining a case, encompasses inherent authority to unveil the changing social and economic conditions to expand the horizon of the individual's rights.[7] The question might arise, why social and economic conditions are matters of concern in relation to the judiciary? The answer is that the court can translate and interpret the meaning of law considering its social and economic dimensions that lead to settling the disputes and ensuring justice.[8] Not only that, the judiciary, while taking an activist approach, is also turning into a source of new principles or policies meeting the aspirations of the people.[9] In this regard, Krishna Iyer, J. (1980), one of the eminent exponents of Judicial Activism, remarked that:

"every new decision on every new situation is a development on the law. Law does not stand still. It moves continually. Once this is recognized, then the task of the Judge is put on a higher plane. He must consciously seek *to mould the law so as to*

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[3] Serajuddin (n1).

[4] Abdullahi Ahmed An-Naim, *Islamic Family Law in a Changing World: A Global Resource Book* (London Zed Books Limited 2002) 20.

[5] ibid.

[6] T. Anant and Jaivir Singh, 'An Economic Analysis of Judicial Activism' (2002) Vol. 37(43) *Economic and Political Weekly* 4433-4439.

[7] ibid 4433.

[8] Serajuddin (n1).

[9] R. Shunmugasundara, 'Judicial activism and overreach In India' <http://core.ac.uk/download/pdf/112282.pdf.> accessed 29 April, 2022.

serve the needs of the time. He must not be a mere mechanic, a mere working mason, laying brick on brick, without thought to the overall design. He must be an architect-thinking of the structure as a whole-building for society, a system of law which is strong, durable and just. It is on his work that civilized society itself depends"[10].

> Another important aspect of judicial activism is that it works as an empowering tool to raise the voice of unheard people and mobilize the disadvantaged sections of the society in terms of fighting against their grievances.[11] From the above discussion, it can be deduced that judicial activism, on the one hand, contributes to developing new principles or modifying the age-old principles taking into account the vast changes in society and on the other hand, it is working as an empowering tool for the downtrodden segments of the society.[12]

3. Judicial Activism in Muslim Family Law

It is undeniable in the context of today's Muslim world that women are the worst victims of discrimination that occurs mostly within the family.[13] Injustice and discrimination within the family are critically significant because of the fact that the centrality of the family dictated by male dominion causes an adverse impact on the lives of women.[14] To address this concern, the classical *sharia* law on family relations, while carrying patriarchal dogmas, has led to legal and social discrimination, which was supposed to maintain gender equality and social justice.[15]

The history of gender inequality and the subjugation of women can be traced back to the ninth and tenth centuries, where Muslim jurists mostly relied on orthodox authoritative texts without considering the context.[16] Before the independence of the Indian subcontinent in 1947, the application of the English doctrine of precedent and the Sharia doctrine of taqlid made the Sharia law and society stagnant, which failed to respond to changing social values and attitudes.[17] In this backdrop, it was questioned that was family law immutable from that which God, the Qur'an, Muhammed, and Islamic jurisprudential scholars had written, or

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[10] *Fuzlunbi* v *K. Khader Vali and Anr,* AIR 1980 SC 1730. (A case concerning the maintenance rights of divorced Muslim wife). (Emphasis added). Cited in Serajuddin (n1). Also in http://indiankanoon.org/doc/1719467/ (Paragraph 4). accessed 29 April 2022.

[11] In the landmark case of *Bihar Legal Support Society* v *The Chief Justice Of India & Anr* 1987 AIR 38, 1987 SCR (1) 295, the court considered it as an obligation to assist the deprived and vulnerable sections of society in the process of realizing their economic and social entitlements. Cited in Serajuddin, Judicial Activism and Family Law in Bangladesh (n1).See also <http://indiankanoon.org/doc/1041403/ > accessed 29 April 2022.

[12] Serajuddin (n1).

[13] Zainah Anwar and Jana S. Rumminger, 'Justice and Equality in Muslim Family Laws: Challenges, Possibilities, and Strategies for Reform' (2007) 64 *Wash. & Lee Law Review* 1529.

[14] ibid 1531.

[15] Serajuddin (n1).

[16] Anwar and Rumminger (n 7) 1537.

[17] Serajuddin (n 2) 16.

was it flexible to modern needs?[18] Here it can be submitted that since the teachings of Islamic law possess inherent plurality having different views on a particular legal problem, so it is suitable for the primary objective of judicial activism that seeks for a wider dimension of justice.[19] It is noted that the judicial interpretation of Muslim Family Law is primarily based on the text of quran and the teachings of prophet. However, the diversity of schools of muslim law offer different views on a particular legal problem while allowing the scope of consensus (*ijma*) or juristic disagreement (*ikhtilaf*) in a given context.[20] Such interpretative diversity facilitates the modern judges to exercise *ijtihad* or judicial activism in order to to formulate a situation-specific decisive rule.[21]

In this regard, two significant steps contributed to bring some progressive changes in the area of Sharia law in the then subcontinent.[22] These were, namely, the introduction of the English principle of equity and, most notably, a flexible and liberal interpretation to eradicate the hardship caused by the strict application of laws.[23] With these developments, judges started to underscore the wider social context of the litigating parties while resolving conflicts.[24] While settling marital disputes, the *qadis* (the then judges) attempted with utmost commitment to prevent the breakdown of relationships so as to maintain social reality and continue to live together amicably.[25] The above discussion leads us to believe that judicial activism signifies a progressive effort to remove discriminations and disabilities by employing creative interpretation of laws and policies.[26]

4. Trends of Judicial Activism in Bangladesh

Coming to the context of Bangladesh, it has been found that judicial activism has contributed to the amelioration of the position of women going beyond the traditional construction of Sharia.[27] After the independence of Bangladesh in 1971, the judiciary, while following the developments of earlier years, attempted to interpret traditional principles of Islamic law liberally in order to meet social realities.[28] In addition, it

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[18] Nadya Haider, 'Islamic Legal Reform: The Case of Pakistan and Family Law' (2000) 12 *Yale Journal of Law and Feminism* 288.

[19] Ridwanul Haque and Md. Morshed Mahmud Khan, 'Judicial Activism and Islamic Family Law: A Socio-legal evaluation of recent trends in Bangladesh' (2007) 14 *Islamic law and society* 206.

[20] ibid 206.

[21] ibid, 207.

[22] Serajuddin (n 2) 16.

[23] ibid 16.

[24] Wael B. Hallaq, *Introduction to Islamic Law* (Cambridge University Press 2009) 12.

[25] ibid 12.

[26] Serajuddin (n1).

[27] ibid 204.

[28] ibid 213.

has been observed in a number of family law cases that the judges of Bangladesh expressed deep concern while addressing the plight of women and children.[29] The contribution of the judiciary towards the development of new principles on different issues of Muslim family law is remarkable. It is also argued that the judiciary, over the years, has taken the role of the social and legal institution while dealing with family issues over the years.[30] The following part of this paper will address two areas of family law while addressing the trends of the judiciary in Bangladesh.

4.1 Restitution of Conjugal Rights

Under a marital relationship, the spouses are entitled to each other's companionship as of right, and this companionship includes the unity of their lives and fortunes.[31] The concept of restitution of conjugal rights comes as a remedy which allows both husband and wife to institute a suit for restitution who is deprived of companionship from the other without any proper reason.[32] Though this principle is apparently considered a remedial tool to prevent the breakdown of relationships, in reality, the practice of this right resulted in discrimination against wives because this right was primarily perceived as the right of the husband.[33] The principle of restitution of conjugal rights is also significant on the ground that this is the first English principle which had been infiltrated into the domain of personal law in British India.[34] The reasoning behind this infiltration was articulated by Syed Ameer Ali, a leading Indian jurist of Sharia Law, who pointed out that since the English judges were ignorant about sharia law and its language, they were reluctant to give effect to the rules of Muslim law rather they invoked English law and sometimes even Hindu law[35] "either to cut down or to explain away the meaning of Mahommedan law".[36] It is also apparent from the decision of the Calcutta High court in the case of *Moonshee Buzloor Ruheem* v. *Shumsoonnissa Begum,*[37] where the court refused to follow the sharia law on restitution of conjugal rights and decided the

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[29] ibid 217.

[30] Anisur Rahman, 'Development of Muslim Family Law in Bangladesh: Empowerment or streamlining of women?' 2 <http://ssrn.com/abstract=2171810>. accessed 05 May 2022.

[31] Shahnaz Huda, 'The Confusing Conundrum of the Law of Restitution of Conjugal Rights Under Muslim Law in Bangladesh' (2014) 10(2) *Journal of Islamic State Practices in International Law* 116.

[32] ibid 116.

[33] ibid 116.

[34] Faustina Pereira, *The Fractured Scales: The Search for a Uniform Personal Code* (First Published STREE, Calcutta 2002) 208. <https://www.google.co.uk/search?tbo=p&tbm=bks&q=isbn:8185604517>. accessed 06 May, 2022.

[35] Serajuddin (n 2) 13.

[36] Syed Ameer Ali, *Mahommedan Law*, Vol I (4th edn, London 1912; reprint New Delhi, (1985).

[37] (1867) 11 Moores Indian Appeals, Published in Fyzee, Cases 281 -302.

issue on the basis of English law.[38] This sort of imposed infiltration threatened the essence of sharia law, which had an adverse impact on the practical operation of Muslim law.

Coming to the practical implications of this principle, it has been found that the practice of restitution of conjugal rights led to the suffering of wives, making them vulnerable in the hands of their husbands.[39] It has also been argued that the idea of compelling a wife to join her husband is a Christian idea which was treated as an ecclesiastical remedy, but in undivided India, this remedy was being used mainly by the husband. [40] In addition, it has been observed that since the husband possesses the unilateral authority of divorce, this right of restitution of conjugal rights would always be used against the wife, even though this right is supposed to be exercised by both.[41]

However, the judiciary in Bangladesh took positive steps to prevent the misuse of this principle by taking spirit from the principles of social welfare, equality before the law and equal protection of the law.[42] In this regard, the landmark case is *Nelly Zaman* v *Gias Uddin Khan*[43] where the court, while recognizing the social change that has been taken place in the last couple of decades, observed that the forcible application of restitution of conjugal rights against the wife who is unwilling to live with her husband has become outmoded and disregards the principles of equality before the law and equal protection law guaranteed by the constitution of Bangladesh[44] for both men and women.[45] It is worthy to mention that the court while considering the practical position of women, underscored that since the constitution of Bangladesh has guaranteed equal rights to all men and women in all spheres of state and public life[46], the husband's unfettered right in relation to the exercising restitution of conjugal rights would be violative to the constitution.[47] In this regard, it is submitted that the approach of the judiciary is remarkable because, firstly, it came forward to address a principle of Islamic law, that is, restitution of conjugal rights, by unveiling its weakness in terms of its application or in other words it can be explained that though this principle urges for the equal footing of both husband and wife, but in reality, it is found to be impractical influenced by the dominated social position of men, that has been observed in the above case and

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38 Serajuddin (n 2) 14.

39 Rahman (n 30) 24.

40 Pereira (n 34) 208.

41 Rahman (n 30) 24.

42 ibid 24.

43 34 DLR, HCD, 221. Cited in Rahman (n 30).

44 The Constitution of the People's Republic of Bangladesh, art 27 and 31.

45 Rahman (n 30) 25.

46 Constitution of Bangladesh (n 44) art 28(2).

47 Rahman (n 30) 25.

Secondly while dealing with a case of Muslim personal law the court referred the constitutional principles which not only showed the linkage between Muslim law and constitutional values but also guaranteed the constitutional rights of equality and non-discrimination[48] considering the practical position of women in relation to both personal and public sphere. This submission is also supported on the ground that the constitution, by its nature, generally deals with the public sphere, and its reference to personal issues is found to be rare, but in the above case, the judges took a bold step to use constitutional principle in relation to personal matters for the sake of protection of women rights.[49] The judiciary in this regard has contributed to advance 'social welfare' arguments towards women.[50] In a later case of *Hosne Ara Begum* v *Alhaj Md Rezaul Karim*[51] the court recognized the cruelty of conduct of a husband as valid ground for his wife to nullify the exercise of restitution of conjugal rights claimed by husband.[52] Here the court offered a wider interpretation of the term 'cruelty' indicating that 'cruelty' does not mean only physical torture; in a well to do family compelling the wife to-do any domestic work is also can be treated as cruelty.[53] However, despite all these progressive judgements, the matrimonial rights of women still remain in a fragile state.

The story does not end here because we find the reverse position of the judiciary in other cases. In the cases of *Md. Chan Mia* v *Rupanahar*[54] and *Hosna Jahan (Munna)* v *Md. Shajahan (Shaju)*[55], the High Court pointed out that restitution of conjugal rights are reciprocal and therefore not in violation of any of the provision of the constitution.[56] In this regard, it can be said that the position in relation to the status of restitution of conjugal rights is not clear yet rather seems to be confusing with the presence of conflicting decisions of the Courts.[57] In the case of *Mrs Sherin v Alhaj Md Ismail* [58] wife pronounced divorced in the exercise of *talak-i- tawfiz,* and thereafter husband filed suit for restitution of conjugal rights. The family court decreed in favour of the husband, and thereby wife moved ultimately to High Court Division (HCD). The HCD held that where

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[48] Constitution of Bangladesh (n 44) Art 27 and 28.

[49] Tahrat Naushaba Shahid, 'Islam and Women in the Constitution of Bangladesh: The impact of Family Laws for Women' 2013, Policy brief published by The Foundation for Law, Justice and Society, 6. http://www.fljs.org/files/publications/Tahrat.pdf. Accessed 08 May 2022.

[50] Jamila A Chowdhury, 'Pro-women Metamorphosis in Legal Discourses on Matrimonial Rights: Is Family Mediation a speedway to reap its fruits?' (2012) 23(2) Dhaka University Studies Part F 144.

[51] (1991) 43 DLR 543 (HCD).

[52] Chowdhury (n50) 144.

[53] Rahman (n 30) 17.

[54] 1998, 6 BLT, HCD P. 92. Cited in Rahman (n 30).

[55] 1998, 18 BLD, HCD, P. 321. Cited in Rahman (n 30).

[56] Shahid, (n 50) 6. Also in Rahman (n 30) 26.

[57] Huda (n 31) 119.

[58] 51 DLR 1999(HCD) 512

the divorce is valid, the decree of restitution of conjugal rights should not be ordered by the court as it may amount to a forceful bond which is contrary to the principles enshrined in Articles 27 and 31 of the constitution of Bangladesh.[59]

It is mention-worthy to describe cases from India in relation to the restitution of conjugal rights since they represented a similar approach to the judiciary. In the case of *T. Sareetha v. T. Venkata Subbaiah*[60], Judge Choudary of the Andhra Pradesh High Court observed that the remedy of "restitution of conjugal rights provided in the *Hindu Marriages Act of 1955* was a savage and barbarous remedy violating the right to privacy and human dignity guaranteed by and contained in Article 21 of our Constitution."[61] The judge went on to opine that this measure "deprives a woman of control over her choice as to when and by whom the various parts of her body should be allowed to be sensed" and "makes the unwilling victim's body a soulless and a joyless vehicle for bringing to existence another human being"[62]. In this case, the practicality of subordinated position of women was underscored, and the remedy of restitution of conjugal rights was considered an oppressive tool operated by the husband.[63] However, quite frustratingly, the Supreme Court reversed the decision of the High Court, praising the remedy of restitution since *it "serves a social purpose as an aid to the prevention of breakup of marriage",* and the court, in this regard, referred the religious duty of Hindu wife to surrender to her husband and to live in the matrimonial home.[64]

On the other hand, in *Itwary v* Asgari[65] the court held that cruelty on the part of the husband disentitles him to get a decree for restitution of conjugal rights. It opines that an abusive husband's second marriage may be considered as cruelty to the first wife. Therefore, the Indian Supreme Court rejected such a husband's prayer for a decree of restitution of conjugal rights.[66] In the case of *Sushila Bai* v. *Prem Narain Rai*[67]*,* the court observed that while a husband left his wife in her father's home without maintaining any connection with her, it would be considered as withdrawing from her society and the decree of restitution shall be passed. In *R. Natarjan* v. *Sujatha Vasudevan* case, the court opined that 'if a wife is asking to live separately from husband's aged parents, it does not amount to a reasonable excuse of withdrawal and the wife can be granted a decree for restitution of conjugal rights'.

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[59] ibid.

[60] 1983, A.I.R. (A.P.) 356. Cited in Martha C. Nussbaum, *Sex and Social Justice* (Oxford University Press 1999) 4.

[61] Martha C. Nussbaum, *Sex and Social Justice* (Oxford University Press 1999) 4.

[62] ibid 4.

[63] ibid 4.

[64] AIR (SC) 92 152 (1984) Cited in Nussbaum (n 62) 92.

[65] AIR 1960 ALL 684

[66] ibid.

[67] AIR 1985.

In this backdrop, it is submitted that though the cases mentioned above were decided by principles of Islamic law and Hindu law in Bangladesh and India, the final outcomes of both situations carry the same legacy. In both contexts, the position of the judiciary regarding the application of the principle of restitution of conjugal rights is found to be diverse that varies from case to case.

4.2 Maintenance

Maintenance is the lawful right of the wife where the husband is legally obliged to provide food, clothing, accommodation and other necessities of life- based on context. The rights and obligations of maintenance of women by husbands derived from the quranic texts. The most relevant quranic verse stipulates that 'Men are the protectors and maintainers of women, because Allah has given the one more (strength) than the other, and because they support them from their means.[68] The Prophet (PBUH) preached in his last sermon that 'Show piety to women, you have taken them in trust of God and have had them made lawful for you to enjoy by the word of god and it is your duty to provide for them and clothe them according to decent custom'.[69] The issue of maintenance of wives in the discourse of Muslim family law carries special significance since it imposes responsibility on the husbands to maintain their wives who are not able to earn their own living on account of social taboo.[70] It is also important because maintenance is a parameter by which the attitude of husbands towards their wives can be assessed on the one hand, and the social and economic position of the women, on the other hand, can be scrutinized in a given society.

Unfortunately, the legal and judicial response relating to maintenance in the context of Bangladesh fails to reflect a concrete mark of development rather it shows a confusing scenario of ups and downs, particularly from the viewpoints of the judiciary.[71] The legal aspect of maintenance in the context of Bangladesh is a combination of various sources, including codified law, local traditions and traditional Muslim law.[72] In fact, the issue of maintenance, being part of Muslim personal law in the South Asian context, is influenced by formal and informal plural normative orders that include secular, religious, customary and patriarchal norms.[73] It is worthy to mention that in the context of Bangladesh, women being marginalized by an intensely hierarchal system of gender relations are often left without maintenance rights.[74]

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[68] Al Quran 4:34, Translated by Yusuf Ali.

[69] Jamal J. Nasir, *The Islamic Law of Personal Status* (Brill 2009) 107.

[70] Serajuddin (n 2) 276.

[71] Haque and Khan (n 19) 234.

[72] Taslima Monsoor, 'Maintenance to Muslim Wives: The Legal connotations' (1998) 9(1) *The Dhaka Universities Studies*, Part F 63-86.

[73] Ayesha Shahid, 'Post-Divorce Maintenance for Muslim Women In Pakistan and Bangladesh: A Comparative Perspective' 2013, *International Journal or Law, Policy and the Family,* 27(2), 197-213.

[74] Taslima Monsoor and Raihanah Abdullah, 'Muslim Women in Bangladesh and Malaysia' (2010)

The rights of maintenance of Muslim wives can be divided into two segments (i) Past Maintenance and (ii) Post Divorce Maintenance.[75] The difficulty in the case of past maintenance lies on the ground that a decree awarding maintenance to her is enforceable only from the date of the decree, not from the day cause of action arose that causes serious hardship to the needy wife who has been expelled from the matrimonial house without sufficient cause.[76] The trend of the court in the case of past maintenance was objectionable on the ground that it did not allow past arrears of maintenance unless the claim was based on a specific agreement like *Kabinama* or a decree of the court.[77] In the case of *Rustam Ali v. Jamila Khatun*[78], the High Court Division of the Supreme Court refused to grant past maintenance to the wife, which was allowed earlier by the lower court as the wife was not staying with her husband.[79] The reasoning in this regard went on to assert that the wife, while refusing to cohabit with the husband, became *nashuza* or disobedient, which was considered as a *prima facie* ground for refusing maintenance.[80] In this case, the court failed to underscore the background circumstances that propelled the wife to stay away from the husband, and at the same time, this decision represented a strong desire to control the movements of wives.[81] In a subsequent case,[82] the attitude of the court was changed, though minimally, and allowed the maintenance based on an '*appropriate case'*.[83]

However, the issue of past maintenance was finally settled in the landmark case of *Jamila Khatun v. Rustom Ali,*[84] where the Appellate Division of the Supreme Court of Bangladesh came up with a progressive mind by recognizing the right to past maintenance to the wife and overturned the orthodox ruling of High Court Division in the *Rustom Ali v. Jamila Khatun* Case.[85] While coming to this forward-looking and positive decision, the Appellate Division took reliance on a leading case of Pakistan that was *Sardar Muhammad v. Nasima Bibi*[86] which

21(2) *The Dhaka University Studies*, Part F 40.

[75] Sharmin Akhter, 'Protecting Divorced Muslim Women's Rights through Maintenance: A Comparative analysis based on the present legislative reforms among the Muslim Community' (2012) 3 *The Northern University Journal of Law* 31 <www.banglajol.info/index.php/NUJL/article/download/18393/12903.> accessed 06 May 2022.

[76] Serajuddin (n 2) 294.

[77] Monsoor (n 74) 80 see also, in Akhter (n 75) 32.

[78] 43 DLR, 1991, HCD 301. Cited in Monsoor (n 74) 80. Akhter (n 75) 32.

[79] Monsoor (n 74) 80, Also Akhter (n 75) 32. And Serajuddin (n 2) 304.

[80] Monsoor (n 74) 80.

[81] ibid 80.

[82] *Sirajul Islam* v. *Helena Begum* 48 DLR 1991 HCD 48. Cited in Monsoor (n 74) 80.

[83] Monsoor (n 73) 80. Emphasis added.

[84] *Jamila Khatun* V. *Rustom Ali,* 48 DLR (AD) 1996, 110. Cited in *Serajuddin, Shari'a Law and Society* (n 2) 305.

[85] Haque and Khan (n 19) 222. Also Serajuddin (n 2) 305 And Monsoor (n 74) 81.

[86] PLD 1996 (WP) Lahore 703. Cited in Haque and Khan (n 20) 222.

also granted past maintenance in favour of the wife.[87] The decision of *Jamila Khatun* was well appreciated and celebrated on the ground that it introduced a policy of disapproving the unhealthy tendency of consulting ancient texts going beyond the reference of modern situations, and the decision also welcomed the

judicial activism by way of neo-*ijtihad.*[88] In this regard, it is worthy to add that the Appellate Division (1996) in the *Jamila Khatun* case, while supporting the deviation from the age-old texts, noted that:

> Although the view taken in Sardar Muhammad's Case does not literally embrace the exposition of Hanafi Law in Baillie's *Digest* and Hamilton's translation of *Hedaya*, and advances closer to the Shafi school of thought, we find that the advance by way of *ijtihad*[89] has been made in the right direction with strong reasons so far undisputed and of course within the bounds of Sunni Law.[90]

So, the latest position of the judiciary regarding past maintenance indicated its progressive and developmental trends with a view to advancing the rights of women in accordance with the needs of time and society.[91]

The second issue regarding maintenance is the post-divorce maintenance for Muslim divorcees, which is another significant and debated area where trends in the judiciary deserve to be critically analyzed. While it was settled that the husband is obliged to provide maintenance during the subsistence of marriage and during the *iddat*[92] period, there was no concrete norms as to whether the husband is bound to provide maintenance beyond the period of *iddat*.[93]

In this regard, the landmark case in the context of Bangladesh is *Hefzur Rahman v. Shamsun Nahar Begum*[94] , where the High Court Division took legal interest on its own to scrutinize the issue of whether the divorced wife could have claimed maintenance beyond the *iddat* period.[95] While addressing this issue, the court felt to decide first whether it had jurisdiction to interpret the relevant Quranic verses and accordingly, it assumed the jurisdiction on the ground that the Quran itself allowed the construction of its verses considering the given context.[96]

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87 Haque and Khan (n 19) 222.

88 ibid 223.

89 '*Ijtihad'* literally means endeavour or "seli-exertion . In legal usage, it means formulation of new rules on the basis of evidence.

90 *Jamila Khatun* V. *Rustom Ali*, 48 DLR (AD) 1996, 110 at 115. Cited in Serajuddin (n 2) 305. see also Haque and Khan (n.19) 223.

91 Haque and Khan (n 19) 223.

92 *Iddat* denotes the period that a divorced wife must wait three months before she can lawfully another man. discussed in Haque and Khan (n 19) 225.

93 Monsoor (n 74) 81.

94 47 DLR (1995) 54. Cited in Serajuddin (n 2) 320.

95 Serajuddin (n 2) 305.

96 ibid 320.

The court also referred in this regard to the famous observations of Muammad Shafi, J, in *Mst. Rashida Begum v. Shahab Din* 1960[97]:

> …Reading and Understanding the Quran implies the interpretation of it …which must be in the light of existing circumstances and the changing needs of the world…[98]

After that, the court, while considering the literal meaning of Quranic Verse II: 241: "for divorced women maintenance (should be provided) on a reasonable (scale)"[99] opined that the Muslim husband is bound to provide maintenance to his divorced wife beyond the period of *iddat* until her remarriage or death.[100] This enlightening judgment was considered as a glaring example of judicial activism that made it possible to bring new developments in the discourse of Muslim family law.[101]

However, the Appellate Division (AD), overruled the decision of the High Court Division (HCD) on the ground that under sharia law husband is not bound to provide maintenance after the *iddat* period, and the ruling of HCD violates the principles observed by Muslim jurists for 1400 years.[102] Here, the AD, while referring to the Quranic verse 2: 241, held that the word *mataa* used in this verse was understood as a consolatory gift or compensation, not as maintenance and being a gift; it has never been judicially enforceable.[103]

In addition, in order to justify the nullity of the HCD ruling, the AD referred to an old case of *Aga Mahomed v. Koolsom Bee Bee* (1897) 24 I. A. 196, where the Privy Council did not approve the construction of the Quran that opposed the express rulings of commentators of great antiquity and high authority.[104] In this regard, the position of the Privy Council can be scrutinized on two points firstly, the Privy Council, by another observation, allowed the interpretation of sharia law, though exceptionally, if it was expedient to confirm substantial justice and secondly, the Judges of Privy Council being non-Muslims were anxious and reluctant to decide legal issues taking viewpoints of Muslim Jurists.[105]

Here, this paper submits that the AD in Bangladesh could have taken into account the aforesaid exceptional view of the Privy Council (on the ground of confirming substantial justice) while interpreting a present-day case of Muslim family law disregarding the unjustified stand of the then-British Judges. But it is

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97 PLD 1960 Lahore, 1142 at 1153.

98 Serajuddin (n 2) 322.

99 This is the version of Abdullah Yusuf Ali. Cited in Serajuddin (n 2) 322.

100 Haque and Khan (n 19) 225.

101 Shahid (n 73) 210.

102 Haque and Khan (n 19) 225. see also Shahid (n 73) 210.

103 Serajuddin (n 2) 323.

104 ibid 321.

105 ibid 15.

unfortunate that the decision of AD based on orthodox legal texts frustrated the earlier developments by HCD, ignoring progressive interpretations and taking the advancement of Islamic law one step back.[106] Though the comment of AD in relation to making statutory provisions of *mataa* for mitigating the sufferings of destitute wives was considered a positive approach of the court[107], in reality, this suggestive comment has not been appreciated to date by many scholars in Bangladesh.[108]

The position of India regarding the issue of post-divorce maintenance is very much commendable, from which Bangladesh could have learned in order to protect the rights of women relating to maintenance. In the famous case of *M. Ahmed Khan v. Shah Banu Begum*[109] , the judges, while applying the secular interpretation of Islamic texts, granted the right of post-divorce maintenance to the divorced wife beyond the *iddat* period till remarriage.[110] This progressive judgement was considered a virtual death warrant on sharia law and created an unprecedented debate and controversy among the majority of the Muslim Community.[111] Consequently, the legislature stepped in to pass the *Muslim Women (Protection of Rights on Divorce) Act, (1986)* which inserted provisions for the maintenance of divorced Muslim women during and after the period of *iddat*.[112] This Act placed the liability of maintaining a divorced woman who is unable to maintain herself on her children, parents and other relatives entitled to inherit her property on her death and failing them on the State *Wakf* Boards. While it was argued that this Act weakened the judgement of *Shah Banu* and denied the right of Muslim divorcees to maintenance from their former husbands[113], another landmark case in this regard came up with progressive judgments. Here, the historic judgment in the case of *Daniel Latifi* v. *Union of India*[114] was considered as a glaring example of judicial activism in statuary Muslim family law, which not only displaced the belief mentioned above that the Act fails to protect the right of post-divorce maintenance but also confirmed the right to receive such maintenance from their former husbands under the very Act.[115] In a recent case of *Jubair Ahmad v* Ishrat Bano*[116]* the Supreme Court held that 'A Muslim husband is

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[106] Haque and Khan (n 19) 225.

[107] Serajuddin (n 2) 323.

[108] Haque and Khan (n 19) 226.

[109] AIR 1985 SC 945. Cited in Serajuddin, Shari'a Law and Society (n 2) 317 see also Prof. Ashok Wadje, 'Maintenance Right of Muslim Wife: Perspective, Issues and Need for Reformation' 7 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1266018> accessed 06 May 2022.

[110] Wadje (n 109) 13. see aslo Monsoor (n 74) 82.

[111] Serajuddin (n 2) 319.

[112] Serajuddin (n 2) 319. see also Wadje (n 109) 13.

[113] Wadje (n.109) 13.

[114] 2001, 7 SCC740. Cited in Haque and Khan (n 19) 227.

[115] Haque and Khan (n 19) 227.

[116] 2019, Criminal Revision No. – 2509 of 2014 < https://indiankanoon.org/doc/139688509/> accessed 03 August 2022.

liable to make a reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well. Such a reasonable and fair provision extending beyond the iddat period must be made by the husband within the iddat period in terms of Section 3(1)(a) of the Muslim Women (Protection of Rights on Divorce) Act,1986.'

It is evident that judgments in India contributed significantly by liberally interpreting 'a reasonable and fair' provision that may extend the consideration for a wife beyond the iddat period. Such progressive interpretation can extend the right of post divorced maintenance to the destitute wives without violating the spirit of Muslim personal law.[117] However, what is reasonable and fair need to be defined further. It is also apparent that while the Indian judiciary is aiming for continuous development of personal laws, the judiciary in Bangladesh remains a bit static, at least in a few issues which could have been dealt with more positively.

5. Conclusion

The majority of decisions discussed above concerning restitution of conjugal rights and maintenance portrayed the pivotal role of judicial activism both in developing the discourse of Muslim family law as well as safeguarding the rights of women from patriarchal dominations. While the decisions relating to restitution of conjugal rights prompted for ensuring equality and non-discrimination, in case of maintenance, they underscored the economic value of legal rights for women. These judgements cumulatively fostered the social and economic position of women in the context of Bangladesh.

In addition, these decisions also about the pluralistic aspects of sharia law that help to interpret religious texts considering the needs of present day context.[118] It is worthy to mention that the judges of Bangladesh, while dealing with the rights of women, have developed a gender-sensitive approach that reflects their justice consciousness with respect to rights under sharia law.[119] However, a closer scrutinization of a few of the cases discussed above revealed that the judiciary has yet to develop a consistent and coherent pattern of judicial activism rather, there exists still conservative and traditional trends alongside the activist and progressive movements.[120] Sometimes the judiciary was found reluctant to reconstruct the sharia law considering social realities which could have been dealt with justice-promoting interpretations.[121] Despite the criticism the judiciary is encountering in a few cases, it is submitted that the responsibility still lies on the active judiciary to deal with the plurality of judicial discourses with a view to making the Muslim Family law more pragmatic and timely.

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[117] Shahid, 'Post-Divorce Maintenance for Muslim Women In Pakistan and Bangladesh' (n 74) 212.

[118] Serajuddin (n 2) 338.

[119] Haque and Khan (n 19) 223.

[120] ibid 234.

[121] ibid 224.