



POLICY BRIEF

Access to Justice for Women

Women's Economic Rights After Separation or Divorce

Bangladesh Legal Aid and Services Trust (BLAST)

*'My husband did not give me any money. How would I survive with my kids? He gave me no assistance. How could he divorce me?'*¹

Context

Women have a right to claim maintenance while married or after a marriage ends. However their rights differ depending on which personal law applies to them and this varies depending on religion, ethnicity and location. Across Bangladesh, women married under Muslim, Hindu or Christian law have different rights under their respective customary laws.²

Women married under Muslim laws may claim maintenance while married, for the 90-day post-divorce waiting period (*iddat*), or through the period of pregnancy if the wife is pregnant at the time of divorce.³ If a husband fails to maintain his wife during marriage, she can bring a claim in a Family Court for up to six years of 'past maintenance'.⁴

Hindu women may claim maintenance during marriage or separation (there is still no right to divorce under Hindu law in Bangladesh).⁵ Christian women may seek maintenance during marriage or separation, after divorce, and during the course of divorce proceedings.⁶ Women in civil marriages may claim maintenance on the same basis. In all such cases, payment of maintenance is tied to a wife's chastity and 'dutiful' behaviour.⁷

Problems

1. Amount and duration of maintenance

The absence of clear criteria to guide judicial discretion while deciding on maintenance amounts is problematic for women from all religious communities:

- **Muslim law** only requires a husband to maintain his wife "adequately".⁸ Although it also allows a wife to stipulate maintenance amounts and terms in

1 This report was drafted by Dr Zahidul Islam Biswas, Mahbuba Akhter, Kiran Barhey and Mohsina Hossain, and edited by Sara Hossain. Thanks are due to Dr Faustina Pereira for comments.

See the documentary by Catherine Masud, 'Waiting for Justice' (October 2014), available at: https://www.youtube.com/watch?v=xz4OcLG_1_8, accessed 23 February 2015.

2 Customary laws governing rights in the family and specific to each of the Adibashi communities in the Chittagong Hill Tracts are not discussed here due to lack of space, and will be addressed in a separate policy brief.

3 According to classical Muslim law, a woman may claim post divorce maintenance only for the *iddat* period of three months. The Commission on Marriage and Family Laws in 1956 proposed that courts should be vested with powers to grant maintenance to an unjustly divorced wife for life or until her remarriage (Report of the Commission on Marriage and Family Laws (The Gazette of Pakistan, Extraordinary, Karachi, 20 June 1956), 1215). The High Court Division of the Supreme Court of Bangladesh in *Hefzur Rahman v. Shamsun Nahar Begum*, 47 DLR (1995) 74, held that financial security could be provided to divorced women in impecunious circumstances by making their former husbands liable for their maintenance until their remarriage, but the Appellate Division of the Supreme Court overturned this decision (*Hefzur Rahman v. Shamsun Nahar Begum*, 4 MLR (AD) (1999) 41).

4 *Jamila Khatun vs. Rustom Ali* 16 BLD (AD) (1996) 61; 43 DLR (1991) (HCD) 301.

5 According to uncodified Hindu personal law, as applicable in Bangladesh, and under the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946.

6 See the Christian Marriage Act, 1872 and the Divorce Act, 1869. Marriages under the Special Marriage Act, 1872 may be dissolved under the Divorce Act.

7 Human Rights Watch, 'Will I Get My Dues, Before I Die?', 2012, p. 31.

8 According to uncodified Muslim Personal Laws. Also, see section 9 of the Muslim Family Laws Ordinance, 1961.

the marriage contract, this is rarely if ever done in practice.⁹ Further, under Muslim law women are not entitled to post-divorce maintenance.¹⁰ If they seek maintenance during marriage or separation, they may, and all too often do, face the prospect of arbitrary divorce by husbands attempting to cut off their entitlement to maintenance.

- Under **Hindu law**, a court directing a husband to pay maintenance must “*have regard to the social standing of the parties and the extent of the husband’s means.*”¹¹
- For **Christians and those in civil marriages**, a court granting “*alimony*” may consider the wife’s “*fortune,*” the husband’s ability to pay, and the conduct of the parties.¹²

According to practicing lawyers, Family Courts generally consider the husband’s ‘*capacity to pay*’ and the ‘*wife’s needs*’ while deciding on maintenance amounts, but it is unclear how they assess these factors.¹³

2. Proof of marriage

Maintenance claims require proof of marriage. Women who are unable to prove their marriage have been denied maintenance. In some cases, where a woman has cohabited, believing herself to be married, but cannot provide proof of the marriage, she has not been able to enforce her maintenance claim.¹⁴

In general, proof can be established with documents, such as a copy of the marriage registration certificate. If this is not available, oral evidence or an affidavit (from any person who solemnized or witnessed the wedding) is enough. Practice in trial courts appears uneven in this regard.¹⁵

Obtaining marriage certificates can be difficult:

- **Muslims** are required to register their marriages¹⁶ but, in reality, poverty and lack

9 Muslim Marriages and Divorce (Registration) Rules. 1975, rule 9, clause 20. However in many cases, women are unaware of this right. See Human Rights Watch, ‘*Will I get My Dues.... Before I Die?*’ (2012) p39.

10 Overturning a decision of the High Court Division, the Appellate Division of the Bangladesh Supreme Court held that the Hanafi school of Islamic law does not give Muslim women the right to post-divorce maintenance beyond the *iddat* period (see above, *Hefzur Rahman v. Shamsun Nahar Begum* 4 MLR (AD) (1999) 41).

11 Hindu Married Women’s Right to Separate Residence and Maintenance Act. 1946, section 3.

12 Divorce Act, 1869, section 37.

13 Based on comments by lawyers participating in three Divisional Workshops arranged by BLAST in 2013 (on file).

14 However, in the case of *Momtaz Begum vs. Anwar Hossain* 2011 CLC (AD) 40, the Appellate Division established that if a Muslim man and woman live together as husband and wife for a considerable time but there is no registered kabin-nama, if the marriage is consummated it may be treated as a valid marriage.

15 The Family Courts Ordinance 1985 provides special provisions for recording evidence. It clearly mentions that the Evidence Act 1872 shall not apply to proceedings before Family Courts. Section 12(3) provides that witnesses shall give evidence in their own words and may be cross-examined and re-examined. Section 12(6) says, ‘*the Court may permit the evidence of any witness to be given by means of affidavit.*’ Despite this, lawyers in Family Courts say that in cases requiring proof of marriage, the courts do not always allow oral or affidavit evidence.

16 A Muslim marriage is formalized through a written contract, known as a *kabin-nama* or *nikahnama*. The marriage must be registered with a marriage registrar or *Kazi* in accordance with the Muslim Marriage and Divorce (Registration) Act, 1974, Section 3, and the related Rules.

of awareness means many fail to complete the formalities.¹⁷ *Kazis* reportedly often do not give women copies of their marriage registration certificates unless they or their family members expressly request this at the wedding. Women may face difficulties in obtaining a copy later, when seeking maintenance or dower. *First*, many women are not able to collect copies from another district, given mobility restrictions, and the fact that there is no computerized database of marriage registrations. *Secondly*, they find it too expensive, given the costs of obtaining a duplicate certificate coupled with demands for unauthorized fees.¹⁸ Finally, some face reported tampering with entries in marriage registers at the instigation of husbands seeking to avoid paying dower or maintenance.¹⁹

- **Christians** are also required to register marriages.²⁰ Again, there are no digitized records and individuals do not always comply with registration requirements.
- **Hindus** may now opt to register a marriage, but this is not compulsory, and official documents are rarely available.²¹

In general, any party who wishes to prove a marriage will need to rely on oral evidence from witnesses, and bear their travel and accommodation costs. For poor women, this is a prohibitively expensive process.²²

3. Abuse of process and delays

Women who make maintenance claims often face frivolous counter-claims by their husbands. These include claims for restitution of conjugal rights²³ or prosecution for theft.

Further, backlogs in the Family Courts lead to huge delays. A former judge has stated that he dealt with a backlog of 700 Family Court cases in one district alone.²⁴ One legal aid organisation stated that between the years 1998 – 2012 they had over 3,408 maintenance cases which had been pending for 2 years or longer.²⁵

4. Economic vulnerability

When a poor woman seeks to secure her dower or maintenance through the courts, usually through legal aid, she may struggle to maintain herself and to cover her day-to-day living expenses. Her only source of support is likely to be her own parents or siblings, given the absence of significant state support. Many are not aware of existing social safety nets.²⁶ The Court does not grant interim maintenance orders. Women thus often have to face months and years pursuing minor claims.²⁷

17 Human Rights Watch, 'Will I Get My Dues.... Before I Die?' (2012) p 32.

18 Human Rights Watch, 'Will I Get My Dues.... Before I Die?' (2012) p 74.

19 Ibid, p. 75; discussions with lawyers in consultation workshops arranged by BLAST (on file).

20 The Christian Marriage Act, 1872, section 27; The Special Marriage Act, 1872, section 13.

21 The option of registration is available since the passing of the Hindu Marriage Registration Act, 2012.

22 Human Rights Watch, 'Will I Get My Dues.... Before I Die?' (2012) p 75.

23 The Divorce Act, 1869, sections 32-33; Family Courts Ordinance, 1985, section 5(b).

24 Human Rights Watch, 'Will I Get My Dues.... Before I Die?' (2012) p 63.

25 Ibid, Annex II.

26 For example the Vulnerable Group Development Fund or Allowances for Widows, Deserted and Destitute Women. A full list is available in Hossain Zillur Rahman, Liaquat Ali Chowdhury and Khondoker Shakhawat Ali, 'Social Safety Nets in Bangladesh: Volume I' (2011), Power and Participation Research Centre and United Nations Development Programme, Annexes.

27 Section 16A of the Family Courts Ordinance says: 'Where at any stage of a suit, the Family Court is satisfied by affidavit or otherwise, that immediate action should be taken for preventing any party from

One woman interviewed by BLAST took her husband to court to claim maintenance and child support. However, the financial burden of pursuing the case was overwhelming.

*'It was so hard for me to attend hearings with my two children. Sometimes I had money, sometimes I didn't. We often went without food whilst attending court.'*²⁸

5. Inflation

Muslim women have a right to claim dower in addition to maintenance.²⁹ This can be calculated in terms of money or valuable property. Common practice in Bangladesh is to fix the dower in terms of money. Inflation and rising living costs mean that, over time, fixed monetary amounts of dower lose value, and therefore provide little or no economic security. If dower were specified in terms of gold or land, this problem could be averted.

Women of all religions who negotiate fixed maintenance claims may find that, due to inflation, they are no longer able to live off the small amounts involved. They could perhaps seek to renegotiate maintenance amounts to account for inflation, in light of the requirement for husbands to maintain their wives 'adequately'.

What Can be Done?

We propose the following recommendations to ensure that women can claim their dower and maintenance rights through Family Courts:

To Government

- 1) **Amend laws to provide criteria for maintenance**³⁰ to include clear criteria for consideration by Family Court judges when determining maintenance amounts. The criteria should include:
 - a. the duration of the relationship;
 - b. the impact of childcare and household responsibilities on the education and earning capacity of the dependent spouse;
 - c. current and likely future income of each spouse;
 - d. the dependent spouse's capacity to support herself;
 - e. the health and age of the spouses;
 - f. the dependent spouse's needs and standard of living;
 - g. the dependent spouse's other means of support;
 - h. contributions made by the dependent spouse to realize the other's career potential.

frustrating the purpose of the suit, it may make such interim order as it deems fit.' Some lawyers consulted were of the view that the Family Court may invoke this provision to award an interim maintenance order. Others advised that in a suit of maintenance, where the plaintiff aims to secure a maintenance order, the court cannot award an interim order, as this would amount to a final judgment. .

28 Catherine Masud (Dir), 'Waiting for Justice' (October 2014), available at: https://www.youtube.com/watch?v=xz4OclG_1_8, accessed 23 February 2015.

29 Under Muslim law, it is a condition of marriage that a husband promises to pay his wife, on demand or on dissolution of marriage, a certain amount of money or other property, known as *mahr* or dower.

30 Specifically section 9 of the Muslim Family Laws Ordinance, 1961; section 3 of the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946 and section 37 of the Divorce Act, 1869.

- 2) **Amend laws on restitution of conjugal rights**³¹ in line with decisions of the High Court Division of the Supreme Court of Bangladesh.³²
- 3) **Amend laws to require compulsory registration of marriage**, specifically the Hindu Marriage Registration Act, 2012 to make marriage registration compulsory for all.
- 4) **Digitise marriage related records** for all.
- 5) **Create public awareness about penalties for tampering with marriage records, through** disseminating information in simple language and accessible formats, including online.
- 6) **Create greater awareness among women about** rights during and after marriage **by** disseminating information through press, electronic and social media and in accessible formats . Ensure women and girls married under Muslim law learn about the different clauses of the kabin-nama, and how women can negotiate these at the time of marriage.
- 7) **Create public awareness** in simple language and accessible formats on social safety nets and benefits for women facing separation or divorce.

To the Hon'ble Supreme Court

- 1) Consider issuing guidance to Family Court judges to use their powers to issue interim orders under the Family Courts Ordinance, 1985 to provide interim maintenance, pending final determination of women's maintenance claims.
- 2) Consider developing a Practice Direction for Family Court Judges to address these criteria when determining maintenance amounts:
 - a. the duration of the relationship;
 - b. the impact of childcare and household responsibilities on the education and earning capacity of the dependent spouse;
 - c. current and likely future income of each spouse;
 - d. the dependent spouse's capacity to support herself;
 - e. the health and age of the spouses;
 - f. the dependent spouse's needs and standard of living;
 - g. the dependent spouse's other means of support;
 - h. contributions made by the dependent spouse to realize the other's career potential.

³¹ The Divorce Act, 1869, sections 32-33; Family Courts Ordinance 1985, section 5(b).

³² The High Court declared in the following five decisions that the law of restitution of conjugal rights violated the provisions of the Constitution: *Nelly Zaman v Giasuddin Khan* 43 DLR (1991) 543; *Hosne Ara Begum v Alhaj Md. Rezaul Karim & others*, 43 DLR (1991) 543; *Sharmin Hossain alias Rupa v Mizanur Rahman* 2 BLC (1997) 509; *Khodeja Begum and other v Md. Sadeq Sarker*, 50 DLR (1991) 181; and *Sherin Akther v Md Ismail* 51 DLR (1999) 512. However, in two decisions, *Chan Mia (Md.) v. Rupnaha* 51 DLR (1999) 292 and *Hosna Jahan (Munna) v Md. Shajahan (Shaju) and Other* 51 DLR (1999) 295, the High Court declared that the law of restitution of conjugal rights is neither discriminatory nor violative of any provision of the Constitution.

To Civil Society:

1. Develop proposals for reform of maintenance laws,³³ including consideration of criteria for determining maintenance, based on:
 - a. the duration of the relationship;
 - b. the impact of childcare and household responsibilities on the education and earning capacity of the dependent spouse;
 - c. current and likely future income of each spouse;
 - d. the dependent spouse's capacity to support herself;
 - e. the health and age of the spouses;
 - f. the dependent spouse's needs and standard of living;
 - g. the dependent spouse's other means of support;
 - h. contributions made by the dependent spouse to realize the other's career potential.
2. Develop proposals for reform of the law on restitution of conjugal rights.³⁴
3. Develop proposals for ensuring compulsory registration of marriages.
4. Develop proposals for digitization of the marriage registration process.
5. Provide more organized assistance for women needing access to marriage certificates.
6. Produce communications in accessible formats in a range of media to improve women's and girl's awareness of their rights during and after marriage. Ensure women and girls married under Muslim law learn about the different clauses of the kabin-nama, and how women can negotiate these at the time of marriage.
7. Produce information in simple language and accessible formats to raise public awareness about the scope and forum for making complaints against any person who tampers with or falsifies marriage records.
8. Produce information in simple language and accessible formats on social safety nets and benefits for women facing separation or divorce.

33 Specifically section 9 of the Muslim Family Laws Ordinance, 1961; section 3 of the Hindu Married Women's Right to Separate Residence and Maintenance Act 1946 and section 37 of the Divorce Act, 1869.

34 The Divorce Act, 1869, sections 32-33; Family Courts Ordinance, 1985, section 5(b).