

The wife's right to maintenance: *Shahab Saqib v Sadaf Rasheed*

2021 IHC 7

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Introduction

The recent judgment of the Islamabad High Court (“IHC”) in *Shahab Saqib v. Sadaf Rasheed*¹ marks a landmark development for women's rights in the jurisprudence of Muslim Personal Law in Pakistan. The judgment entirely departed from the established legal position of considering the wife's right to maintenance as contingent upon various preconditions and made significant progress in re-understanding marriage as an equitable relationship for both husband and wife. By upholding the sovereignty of the legislature as well as the primacy of statutory laws, the judgment responded to the historical need of fully realising the objectives of state-led legislation for the benefit of women and helped discard the archaic colonial understanding of their rights in the sub-continent. Furthermore, it rejected the preconditions associated with the wife's right to maintenance, shed light on the actual intent of the legislature behind Section 9 of the Muslim Family Laws Ordinance 1961² (“MFLO”), and emphasised upon the role of the judiciary in relation to personal matters of faith. This case note lays down the facts and rulings of the judgment, provides a brief historical account of case laws development related to the wife's right to maintenance, and analyses the reasoning as well as the impact of this judgment for future jurisprudence.

Facts and Ruling

The case initially started with the family suit filed by the petitioner's wife before the Judge Family Court (“JFC”). The Family Court passed an *ex-parte* decree in favor of the petitioner's wife. The petitioner then filed an appeal against the decree before the Additional District Judge (“ADJ”). The ADJ allowed the appeal, and after a few months, passed the impugned judgment. The said petition came against that impugned judgment before the IHC. The petitioner pleaded before the IHC to render the judgment void due to the ADJ's inability to not remand the case to the JFC on grounds of breach of mandatory procedure of due process prescribed under the West Pakistan Family Court Act 1964. The petitioner filed a writ petition against the order of the ADJ. The ADJ in the order had upheld the *ex-parte* judgment given by the JFC and ordered the petitioner to pay monthly maintenance to his daughter, respondent No. 2., and the amount of dower to his former wife, respondent No. 1. In response to the ADJ's order, the petitioner pleaded that his wife should be disentitled from maintenance as they were separated. He also pleaded that the agreement to give his wife the amount of dower be considered a waiver of his obligation to pay maintenance. However, the respondent argued that the petitioner did not attend the proceedings deliberately; that an appeal could be considered a continuation of trial for giving a new decree; that the petitioner was liable to pay the first half of the dower on demand and the other half was immediately payable; and that the petitioner's questionable conduct did not deserve him an equitable relief.

To deal with these issues, the Court framed the following four questions:

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¹ *Shahab Saqib v. Sadaf Rasheed* 2021 IHC 7.

² Muslim Family Laws Ordinance 1961, s 9.

- i- Did the impugned judgment suffer from any illegality as the ADJ did not remand the case to the JFC, and if it did, did it violate the petitioner's right to a fair trial and due process?
- ii- Is the wife entitled to maintenance if she is working and not living with her husband?
- iii- Did the ADJ wrongly hold that half of the dower was payable on demand?
- iv- Is the petitioner entitled to discretionary equitable relief?

To answer the first issue, the Court held that an appeal can now be considered an extension of the trial, as far as the possibility of revelation of new facts or evidence exists.³ It ruled that remanding the case should now be preferred in exceptional circumstances, especially when there is a possibility of "delayed justice" on one side and a threat to due process rights of the opposing party under Article 10A of the Constitution⁴ on the other. The Court ruled that they cannot give the petitioner the protection of his right to due process as he deliberately remained absent from the proceedings, and the right to due process being relative cannot be repeatedly ensured to one party at the expense of the other.⁵ Moreover, the Court held that the petitioner could seek relief either through bringing a cross-appeal before the learned ADJ or by showing any new factual ground to make the remand of the case necessary.⁶ However, since the petitioner did not take either of these steps, the judgment passed by the ADJ did not suffer from any illegality, nor were his rights to a fair trial and due process violated under 10A.

The second issue constitutes a central part of the judgment which the Court comprehensively adjudicated upon in light of the historical evolution of Muslim personal law, relevant case laws, jurisprudence, and modes of statutory interpretation. First, in light of the various case laws and Quranic verses, the IHC clarified that the wife's maintenance is an obligation of the husband, which he cannot easily forego.⁷ Second, according to the "unequivocal" language of Section 9 of the MFLO, the Court held that the wife is entitled to maintenance from the husband without fulfilling any preconditions previously required of her to meet⁸. The Court held that Section 9 simply provides, "if any husband fails to maintain his wife adequately," she can file an application for maintenance while in the bond of marriage. This means that in absence of any ambiguity in the language of Section 9, principles of Islamic Law and personal understanding of the Quran and Sunnah cannot be "imported" to decipher its meaning.⁹ As stated in Justice Benjamin N. Cardozo's principles of interpretation, "the rule that fits the case may be supplied by the Constitution or by statute. If that is so, the judge looks no further... In this sense, judge-made law is secondary and subordinate to the law that is made by legislators."¹⁰

³ *Shahab Saqib* (n 1).

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid* [9].

⁷ *Ibid* [14].

⁸ *Ibid* [35].

⁹ *Ibid* [34], [35].

¹⁰ *Ibid* [23].

Moreover, the Court held that Section 2 of the West Pakistan Muslim Personal Law (Shariat) Application Act 1962,¹¹ which makes the rules of Muslim Personal Law applicable to various familial affairs, cannot be applied in maintenance cases. The reason for this stance was that the fact that Section 2 addresses marital issues, the word “maintenance” was not explicitly mentioned in it. According to precedent on maintenance law, the term “family relations” could not be broadly interpreted to include maintenance.¹² Hence, the IHC formed its decision based on the intent of the legislature by looking at the historical evolution of the law from enactment of Section 488 of the Criminal Procedure Code 1898, Section 2 of the Muslim Personal Law (Shariat) Application Act 1937, Section 9 of the MFLO to the final revocation of Section 488 of the CrPC. The Court, thereby, ruled that the omission of the term “maintenance” from Section 2 of the Act 1962 was intentional, which made it unnecessary to apply principles of Islamic law in interpreting the wife’s entitlement to maintenance under Section 9 of the MFLO. On these grounds, it is held that, “the respondent was entitled to maintenance for the entire period that she remained married to the petitioner unconditionally.” There was no need to look at any preconditions before claiming the maintenance.¹³

Regarding the third issue, the IHC ruled that the ADJ rightly decreed the grant of nondeferrable dower to respondent No.1, as dower is a separate obligation on the husband, which he cannot bargain for the amount of maintenance he owes to his wife.¹⁴ Therefore, it ruled that the petitioner was also obliged to pay maintenance alongside the payment of dower.¹⁵

In line with this reasoning, the IHC further held on the fourth issue that the petitioner was not entitled to equitable relief given his unconscionable conduct of not giving anything in maintenance to his wife and daughter for the last thirteen years since the initial filing of the suit.¹⁶ On these grounds, the Court eventually dismissed the petition.

Prior Case Law

Prior case law on maintenance under Section 9 of the MFLO portrays an entirely different picture. The wife’s right to maintenance has been construed as conditional on various factors such as her faithfulness and obedience to the husband. Codified provisions such as Section 9 of the MFLO and Section 2 of the Act of 1962 have been continuously interpreted in light of uncodified principles of Islamic law by the Courts, keeping the wife’s right to maintenance relative rather than absolute. The following few case laws give a brief account of the evolution of preconditions that the wife had to fulfill before becoming eligible for maintenance.

Muhammad Ali v. Mst. Ghulam Fatima, reported in AIR 1935 Lahore 902, is one of the seminal judgments dating back to the pre-partition era. The Court, in this case, held that the wife’s right to maintenance was dependent on the conditions articulated under paragraph 277 of the Muhammadan Laws.¹⁷ Paragraph 277 obliges husbands to pay maintenance to their wife if the

¹¹ West Pakistan Muslim Personal Law (Shariat) Application Act 1962, s 2.

¹² Ibid [16].

¹³ Ibid [38].

¹⁴ Ibid [39].

¹⁵ Ibid.

¹⁶ Ibid [40].

¹⁷ *Kashif Akram v. Mst. Naila* 2011 MLD 571, [14].

wife meets two conditions: a) faithfulness in the marriage; and b) obedience to the husband.¹⁸ These conditions could only be waived if their defiance is due to the husband's non-payment of dower or cruelty.¹⁹ Otherwise, wife had to fulfill these two conditions to seek maintenance before the court.

Afterwards, another condition of being “*nashizah*” or “rebellious” was gradually added to the two conditions mentioned above. In this regard, *Majida Khatun Bibi v. Paghalu Muhammad* provides critical insight. In this case, the Court ruled that the *nashiza* woman is the one who leaves her husband's house and that in deserting her husband's house she is not entitled to maintenance.²⁰ In addition to faithfulness and obedience, another condition related to a woman's character was constructed, and her obedience was linked with her living in her husband's house. Similarly, in another case, *Mukhtarul Hassan Siddique v. Judge Family Court*, the Court defined a disobedient woman as one who is living away from her husband and the *nashizah* as one who is not only living away from her husband but also disallowing him to enter her house.²¹ Hence, as the subjective interpretive project - comprising of both “uncodified personal law and constituted sources of law”²² - continued, the scope as well as meaning of the preconditions associated with the maintenance kept evolving.

Then, in *Kashif Akram v. Mst. Naila*, the condition of faithfulness was defined in more refined and restrictive terminologies such as “the willingness to perform conjugal rights and other marital obligations”.²³ Thus, the Court held that a woman is not entitled to maintenance unless she wants to perform her conjugal rights and other marital obligations, and the husband does not leave her without any lawful excuse.²⁴ Before the IHC judgment in *Shahab Saqib*, the jurisprudence regarding preconditions to maintenance had become significantly complex, comprising of the wife's faithfulness, obedience, and condition of living with her husband to the nature of the husband's excuse for not providing maintenance. One of the recent judgments from the High Court of Azad Jammu and Kashmir in *Majid Hussain v. Farah Naz* encapsulates this fact. In the judgment, the Court ruled that the wife deserves maintenance only until she is faithful to her husband, lives with him, does not leave his house without lawful excuse, and is willing to perform her marital obligations²⁵.

Analysis

This judgment has made significant developments in various aspects regarding the subject matter, interpretation, and the purpose of pro-women legislation in Muslim Personal Law in Pakistan. First, this judgment is significant as it lends itself to a feminist interpretation of family laws and suggests reforming the historically male-favored rules of judicial ruling.²⁶ In this regard, the

¹⁸ Sir Dinshah Fardunji Mulla, *Principles of Muhammadan Law* (Haryana, LexisNexis 2013) 351.

¹⁹ *Ibid.*

²⁰ *Majida Khatun Bibi v. Paghalu Muhammad* PLD 1963 Dacca 583, [18].

²¹ *Mukhtarul Hassan Siddique v. Judge Family Court* 1994 CLC 1216, [8].

²² *Shahab Saqib* (n 1) [30-32].

²³ *Kashif Akram* (n 17) [17].

²⁴ *Ibid.*

²⁵ *Majid Hussain v. Farah Naz* 2019 MLD 1999, [10].

²⁶ Ziba Mir-Hosseini, ‘Muslim Legal Tradition and the Challenge of Gender Equality’ in *Men in Charge: Rethinking Authority in Muslim Legal Tradition*, (Simon and Schuster, 2014) 43-44.

judgment took a bold step forward in what has been described as the Women Protection Principle (“WPP”) by Abbasi and Cheema.²⁷ Under this principle, courts intend to protect the interests of women whenever confusion arises around the interpretation of legal principles. This judgment made the wife’s right to maintenance absolute, removing the possibility of the court passing judgments against the interests of women. Making the principle of maintenance absolute means that the only condition for the wife to get maintenance is that she should be in the marriage bond. Once proven, she can claim maintenance for the period she remained within the marriage bond. Moreover, following the same premise, it might also potentially block the usage of common legal lacuna by the husbands of getting a decree for restitution of conjugal rights to avoid providing maintenance, especially when a claim for past maintenance is made. The right is now absolute and a claim can now successfully be filed before the court, regardless of whether conjugal rights are restituted afterwards.

Second, the literal-cum-purposive interpretation of Section 9 of the MFLO by the IHC established the objective standard for interpreting Muslim Personal Laws in the future. The Court not only interpreted the language of Section 9 literally, but also highlighted the legislative intent behind it by giving an account of the historical evolution of statutory laws regarding preconditions of maintenance. Such articulation of the ruling gave credence to the literal interpretation by justifying it with legislative intent. It also showed a credible alternative to tone down the highly contested influence of uncodified Islamic law in the country’s jurisprudence. The close-to-objective standard given by the court as a precedent is also instrumental to checking the dominance of any one school of Islamic thought in governing the legal interpretive regime and advocating for much-needed fairness for all communities based merely on the merits of the case.

Third, the ruling rightly responded to historically unmet objectives of the state-led legislation behind the promulgation of the MFLO and establishment of the Family Court. The Pakistan Law Commission, which was formed in 1956 for making recommendations for the MFLO, had initially opined to give complete discretion to the court to decide upon matters of maintenance – irrespective of what any particular school of thought says.²⁸ Similarly, the purpose of promulgating MFLO and establishing a family court was to simplify the complex legal processes to provide speedy justice to the wife’s claim to maintenance.²⁹ This judgment seems to certainly meet that historical need of interpreting the wife’s right to maintenance without being influenced by any one school of Islamic thought and simplifying the wife’s access to maintenance by making the existence of marriage the only pre-condition. These grounds make it a landmark judgment in reenergising the lost historical imperative made on the national level to protect and advance women’s rights in family law in Pakistan.

However, despite these encouraging developments, the judgment has left a few critical issues unaddressed. The first challenge arises around the understanding of marriage as a civil contract in Islam. Marriage becomes complete when an offer is accepted by one of the parties. It

²⁷ Muhammad Zubair Abbasi and Shahbaz Ahmed Cheema, *Family Laws in Pakistan* (first addition, OUP 2018) 516.

²⁸ Barkat Ali and Muhammad Hassan, ‘Law of wife’s maintenance in Pakistan: Exploring the Missing Islamic Script’ 22 *Research Journal Ulum-e-Islamia* 22 <<https://iri.aiou.edu.pk/indexing/wp-content/uploads/2018/04/3.Dr-Barkat-Sab-Law-college.pdf>> accessed 15 May 2021.

²⁹ Lucy Carroll, ‘Maintenance Claim and The Family Courts: The Pakistan Experience (1991) 33(3) *Indian Law Institute* 333 <<https://www.jstor.org/stable/43951371>> accessed 15 May 2021.

thereby creates mutual rights and obligations between the parties like a civil contract.³⁰ As is understood under contract law, such a reciprocal relationship potentially demands the performance of obligations by both parties. Under this conceptual framework, giving women the absolute right to maintenance without any requirement from them to perform their part of the marital obligations becomes challenged. The judgment does not address this fundamental aspect. Second, it becomes pertinent to mention that maintenance is only one of the many marital affairs upon which the intent of the legislature is clear, and for which this judgment gave an objective standard of interpretation. The imperative challenge to strip Muslim Personal Laws of subjective religious influences still exists in various other areas such as divorce, inheritance of widows, the status of surrogates etc., where clear intent of the legislature still needs to be found.

Conclusion

Shahab Saqib case makes a commendable development on the issue of maintenance under Muslim Personal Law. It removes various preconditions associated with the wife's right to maintenance by making this right absolute in nature. It introduces an objective standard of interpreting Muslim law and presents a viable alternative to subjective interpretive modes of Islamic schools. In addition to maintenance, it also provides a good precedent for adjudication in other family matters. Moreover, it rightly gives credence to legal initiatives taken by the state to expedite the wife's access to maintenance. This case note attempts to briefly discuss the developments mentioned above in light of the historical development of law and its future implications. It helps to develop a basic understanding of the issue, which is quite instrumental to generating a meaningful discussion in the future and suggesting viable reforms to protect women's rights under family law in Pakistan.

³⁰ Muhammad Zubair Abbasi and Shahbaz Ahmed Cheema, 'Marriage', *Family Laws in Pakistan*, (1st edn , OUP 2018) 37.