

CHAPTER 11

MAINTENANCE OF WIFE, CHILDREN AND RELATIVES

11.1 *Categories of maintenance*

The causes of maintenance are three: marriage, *nasab* (kinship) and ownership. Accordingly, maintenance has four categories: (1) maintenance of wife; (2) maintenance of close relatives (*aqārib*); (3) maintenance of slaves; and (4) maintenance of animals and property. The third category does not exist today.

11.2 *Maintenance of Wife During Marriage*

11.2.1 **Maintenance of a wife is obligatory, but lack of continued maintenance is not a basis for seeking divorce**

Maintenance of a wife who is not living away from the husband of her own accord is obligatory upon the husband.

The husband's continued ability to maintain his wife is not sufficient cause for seeking divorce. For the position taken by state law on the issue, see discussion above.

11.2.2 **Meaning of maintenance and amount to be paid to wife**

Maintenance includes residence (*suknā*), clothing and daily expenses for the wife and for a servant (salary and funds for running the mistress's household).

There is no fixed amount (although jurists have suggested amounts according to their own times), and the amount will depend upon the financial status of the husband and the needs of the woman according to what is customary and reasonable.

If the husband is well off and enjoying financial ease, he is to pay an amount for daily expenses, clothing, household expenses and the expenses of a servant to an extent that is reasonable for such households. If the husband is a person of ordinary means, he is required to pay an amount that is reasonable for such households to cover expenses and clothing, but he is not required to maintain a servant for his wife.

Clothing has to be provided to her for different seasons on a regular basis, even if she refuses to use some of the clothing provided. The wife is entitled to maintenance of a certain month even if she has saved part or all of the amounts of the previous months.

11.2.3 Wife is entitled to maintenance as long as she lives with her husband

A wife is entitled to maintenance as long as she continues to live with her husband. If she stays away from the husband, of her own accord, and against the wishes of the husband, she is not entitled to maintenance during the time she stays away provided that her husband has paid her dower or the dower is deferred.

If the husband does not keep the wife with him, when she is willing to do so, she is entitled to maintenance.⁵⁷

The wife staying with the husband is entitled to her maintenance even if she is ill and cannot perform her marital duties. The wife staying with the husband is entitled to her maintenance even if she denies physical access to her for purposes of intercourse.

11.2.4 Fixing of expenses by the court and recovery of past expenses

A wife is not entitled to recover past unpaid expenses unless the court had fixed the amount to be paid prior to the withholding of expenses by the husband.

The court may fix the expenses to be paid to the wife in case of dispute (as in a suit for the restitution of conjugal rights). The court will keep the position of the husband in view while fixing the amount.

If the husband discontinues the payment of expenses after they had been fixed by court, his wife can raise a loan to meet her expenses and recover the amount later from her husband. The expenses determined by the court become a debt liability that is to be paid by the husband for which he may be imprisoned by the judge until he pays.

Where a wife enters into an agreement with her husband to accept maintenance that is less than what is sufficient for her, she may later go back on the agreement and demand what is sufficient for her, because entitlement to maintenance is renewed with time.

57. In *Muhammad Tauqeer v. Additional District Judge*, 2001 MLD 1650, it was held that the mere refusal by the wife to live with her in-laws in the absence of her husband was no ground to disentitle her from maintenance. The wife, in the circumstances, could not be considered to be disobedient as she was under no obligation to live with her in-laws.

Where a man has more than one wife, the court is to fix equal amounts for them irrespective of one wife being of a different religion. Where the husband claims that he is poor and the wife claims that he is not, the statement of the husband is to be accepted. The burden of proving that he is not poor will be on the wife. Liability for a debt established by the decree of the judge is terminated when it is either paid off, is waived by the woman, or when one of the spouses dies.

11.2.5 There is no maintenance in an irregular contract of marriage, whether the contract is an ordinary irregular contract or one arising out of *shubhah*

There is no maintenance after an irregular contract irrespective of the irregularity being based on the usual circumstance of *fasād* or on *shubhah*.

As there is no contract, the woman is prevented from performing marital duties, which becomes a hurdle in the way of maintenance.

11.3 Maintenance of Wife During Waiting Period ('*Iddah*)

11.3.1 Maintenance for divorced women during waiting period ('*iddah*)

Every woman who is divorced after a valid contract of marriage, whether through three repudiations or a single repudiation, is entitled to residence and maintenance as long as she is in the waiting period.

The following divorced women are entitled to residence and maintenance during their waiting periods:—

- (a) A woman divorced thrice through three repudiations pronounced at once.
- (b) A woman divorced through a single repudiation, whether revocable or irrevocable. The woman divorced through a revocable repudiation is still the man's wife in all respects.
- (c) A divorced woman who is pregnant, and her waiting period extends up to the delivery of the child.
- (d) A woman undergoing '*iddah* after *khul*'. If she surrendered her right to maintenance, she is still entitled to residence, which is a requirement that cannot be bargained away. She may, however, voluntarily agree to remain in her own house or bear the burden of residence herself.

(e) A woman undergoing 'iddah as a result of *ilā'*.

(f) A woman undergoing 'iddah as a result of *li'ān*.

(g) A woman undergoing 'iddah as a result of *riddah* (apostasy) of her husband.

11.3.2 Maintenance not claimed during waiting period lapses

If the husband is not paying maintenance expenses during the waiting period the woman must claim them while still in her waiting period.

Maintenance expenses not claimed, till after the waiting period is over, cannot be recovered later and are deemed to have lapsed, except in cases where such expenses have been fixed by the court at the time of divorce.

11.3.3 Right to maintenance remains even if waiting period is prolonged

Where the waiting period is prolonged as a result of lengthening menstrual periods, the right to residence and maintenance continues.

Where a disagreement arises about the termination of the waiting period, it is the statement of the woman along with her oath that is to be given precedence, unless the husband can lead evidence about her acknowledgement of such termination.

11.3.4 There is no right of maintenance during waiting period for a woman whose husband has died

There is no maintenance during the waiting period of a woman whose husband has died. A claim for maintenance does not lie against the heirs.

She is entitled to residence and is permitted to go out of the house during the day to meet her needs.

11.3.5 Effect of lewdness or apostasy on the part of the woman during her waiting period

If a woman commits an act of lewdness (sufficient for an accusation of *zinā*), she is still entitled to her maintenance, unlike during the continuance of marriage where it is to be stopped.

Where a woman commits apostasy her maintenance comes to an end, not because of her act, but because she is imprisoned. If she repents and returns to the house, her maintenance is restored.

11.3.6 Maintenance after exercise of option of puberty where marriage was consummated

Where marriage of a minor was consummated, but she exercises the option of puberty, she is entitled to maintenance as long as she is in her waiting period.

11.3.7 Where the husband acknowledges after consummation of marriage that his wife was prohibited for him

Where a man acknowledges after consummation of marriage that his wife was actually prohibited for him, the woman will be entitled to residence and maintenance during the waiting period.

11.3.8 Maintenance in waiting period resulting from an irregular contract

There is no maintenance during the waiting period that follows an irregular contract.

11.4 *Should There be Maintenance for the Divorced Wife After the Waiting Period ('Iddah)?*

In recent times, a debate has ensued whether a divorced wife should be paid maintenance, under Islamic law, even after her 'iddat. The famous *Shah Bano* case in India fuelled this debate. The Supreme Court in India decided that payment should be made, but on resistance from Muslims the Congress passed a law that diluted this judgement. It is well known that "alimony" is paid under US law and in other countries in the West, although payment can also be made to the husband under such laws. Islamic law does not acknowledge such payment.

11.4.1 Why should payment be made to the wife?

Islamic law maintains that after divorce there is no relationship between the husband and wife, either physical or otherwise, therefore, there is no legal basis for justifying such payment. This issue should not be confused with the maintenance of children, because Islamic law does impose a duty on the husband for children. The issue should not be confused with the division of household assets either for which provision is also made in Islamic law.

There are different theories in the West for justifying the payment of alimony. The first theory is the compensation theory, which considers payment to the wife as justified for having been tied-up in the bond of marriage for some period. This theory lacks a moral basis as it re-

duces the sacredness of the marriage contract into one of the employer-employee relationship in which a pension is justified after retirement or parting of ways. This theory reduces the contract of marriage into a commercial contract that is akin to prostitution.

The rehabilitation theory believes that the woman needs some time to adjust in society, and till such time that she does the husband must contribute to her financial security. Islamic law imposes the duty of providing maintenance and residence to the divorced wife during her waiting period, and in the case of the death of the husband she receives a share from the husband's estate.

11.4.2 There is no compelling legal basis for maintenance after the waiting period

Whatever is said for the justification of alimony in the West is not sufficient for providing a legal or moral basis for such payments; there is no legal basis for the payment of alimony. The *Shah Bano* case was about an aged woman (62) who was divorced and left destitute; it had emotional undertones. The sympathy for the woman is justified, but there is no sympathy for a system that does not apply the provisions of Islamic law in toto, where there is the provision of *zakāt*, the system of *wilāyah* that imposes a duty on relatives for providing maintenance (see below) and finally that places a duty on the *bayt al-māl* to provide funds.

11.5 Each wife entitled to maintenance is entitled to residence

Every wife who is entitled to maintenance is entitled to residence essential to meet the purposes of the marriage contract.

If the husband keeps the wife with his relatives—like his mother, sister and others—in a manner that violates the privacy of the woman necessary for purposes of marriage thus hindering physical access of the husband to the wife, the wife has a right to complain to the court and the court will compel the husband to provide proper residence for her.⁵⁸ If the wife is provided a private room in a house when other relatives are also resident in the house, but her privacy is not violated, the wife does not have a right to claim separate residence.

58. In *Muhammad Siddique v. Shahida Parveen*, 1991 CLC 227, the High Court observed that it is not necessary for the wife to live with her in-laws in case her husband was serving abroad and she was entitled to maintenance and would only be disentitled to maintenance when she failed to live with her husband.

Where a wife is provided independent residence with no one else residing with her and she complains to the court that her husband beats her or physically torments her, the court is to make enquiries from the neighbours about the veracity of the statement. If the court thinks that the complaint is probably true, it is to order the husband to treat her decently, and if he persists the court may discipline the husband with means considered appropriate. Thus, wife-battering may become an offence.

If the husband has provided residence to the wife in a neighbourhood with people of bad repute, the court on complaint by the wife can compel the husband to move the wife to a better neighbourhood.

1.6 Maintenance of Relatives

11.6.1 Maintenance of a child is primarily the duty of the father

The father is responsible for the maintenance and residence of the child in accordance with what is customarily good. The father is also responsible for the breastfeeding expenses of the child where the mother is not breastfeeding the child.⁵⁹

The maintenance of the child is obligatory till the age of majority of the child and even after that where the child is economically or physically handicapped or chronically ill. In the case of a female child, maintenance is obligatory even after the age of majority (puberty).⁶⁰

Where the father is unable to maintain his child and the mother has the means to do so, she is to spend on the child but is given the right to recover from the father when he enjoys financial ease. If the husband is prevented from earning due to a handicap, she cannot recover from him.

11.6.2 The mother of the child cannot be compelled to breastfeed the infant

Where the mother of the child refuses to breastfeed the child, the father is to make alternative arrangements for breastfeeding till the age

^{59.} In *Abdul Rauf v. Shireen Hassan*, PLD 2001 SC 31, the Supreme Court held that parents are under an obligation to provide maintenance and it is a moral obligation of the parents to provide the means to support the life of their children. In a number of cases, the courts have also held that regardless of the mother's income or poverty and the father's preferential right to custody, the father is obliged to maintain his minor children and daughters till they get married.

^{60.} In *Arbab Mir Muhammad v. Irum Altamas*, PLJ 2005 SC 742, the Supreme Court observed that the father who was a well to do person was under an obligation to provide maintenance to the son, although the son had become an adult and was still getting an education.

of weaning of the child. Nevertheless, the *fatwā* is that she should feed the child to prevent injury to it.

Where the mother breastfeeds the child, while she is still married to the child's father, she is not entitled to additional expenses for breastfeeding besides her normal expenses of maintenance, clothing and residence.

If the mother, who has been divorced, continues to breastfeed the child in her custody, she is to be paid expenses for such breastfeeding. This does not apply to the case of the revocable (*raj'ī*) divorce. In all these cases, and even after the waiting period, the husband retains the right to hire another woman for wet-nursing.

11.6.3 Maintenance of relatives within the prohibited degree of marriage is obligatory

It is obligatory upon a person to maintain and support his relatives, who fall within the prohibited degree for marriage, when they are in need. This duty grants an enforceable right to the relatives and they can approach the court for their maintenance, residence and clothing expenses.

The duty relates to the provision of expenses, residence and clothing as needed. The duty for expenses and clothing remains even if such relatives own a house and employ a servant; they are not to be compelled to sell their house. Past claims not recovered do not become a debt in this case.

The following relatives can acquire this right:—

- (a) *Parents and grandparents.*—The children are duty bound to support their parents. If there is one child the entire burden falls upon that child. If there are more than one, the burden is distributed among the sons, and if one is not able to pay the others will pay on their behalf and will have recourse to him when he enjoys financial ease. Where there are no sons, or the sons are unable to support the parents, the duty falls upon the daughter or daughters as the case may be. The same rules apply to paternal grandparents and maternal grandparents when they do not have male children or their children to support them.
- (b) *Brothers and sisters; nephews and nieces.*—It is the duty of a person to support his or her brothers and sisters if they are in need. The duty moves on to the nephews and nieces if there is no one else to support them.

(c) *Uncles and aunts whether maternal or paternal.*—It is the duty of a person to support his or her uncles and aunts, whether maternal or paternal, when they are in need and do not have their own children or their children cannot support them due to financial hardship.

The general rule is that the duty first falls upon persons closer for purposes of inheritance. If they cannot pay due to financial hardship, the duty devolves upon those next in line but they can recover from those prior if and when they regain financial ease.

11.7 *There is no duty to provide maintenance for relatives who are not within the prohibited degree of marriage*

There is no duty on a person to provide maintenance for a person who is not within the prohibited degree of marriage. This rule will include first cousins, whether paternal or maternal, and those more remote.

11.8 *Maintenance of Animals and Property*

11.8.1 **Maintenance of domestic pets and animals**

A person is required to provide for the maintenance of his pets and other domesticated animals. According to Abū Yūsuf, the owner can be compelled by the court to provide such maintenance.

11.8.2 **It is recommended that property be maintained to avoid loss**

A person cannot be compelled to maintain his property like houses and real estate. It is considered *makrūh* (disapproved) not to maintain such property when there is chance of a loss.