CHAPTER IV

ECONOMIC STATUS OF WOMEN UNDER SHARI’AH
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4.1. Introduction

Economic independence of its members is considered as the basic requirement for an over development of any society. But before the advent of Islam, women had no economic rights and they were considered as a burden in the society. They had to depend on men for even their basic needs and could not hold property on their own. Even if some communities granted them the right to inheritance, they were not the absolute owners of their property and it was the father or the husband of a woman who was the manager of her property. She was not entitled to inheritance and in fact, she herself was considered as a property that could be inherited by the heirs of the deceased as a part of his estate. Some exceptions were there, but that was a rarity.

At that time, when the whole world was drowned in ignorance, Islamic Law granted woman economic rights with the purpose of upgrading her status in the society. Islam, no more, considered her a burden and provided her financial security of being maintained by her near relations who could inherit from her upon her death. She has also been granted specified shares in the property of her deceased relations in different capacities i.e., as a mother, sister, wife or daughter. Her maintenance has been made a duty incumbent upon her relations irrespective of her financial status. Unlike, before the advent of Islam, dower has been made her personal property upon which no one has any claim. Not only this, but she has been made the absolute owner of the property held by her and thus, she has the right to dispose it off the way she wants during her life time. Islam also granted woman the right to employment and declared that only she had the right over what she earns and her income or property cannot be taken by anyone else, be it her father, brother or husband.

Hence, unlike other religions where woman is considered as a burden, Islam has provided for her financial security at every stage of her life. May it be childhood, maidenhood, young or old-age, she gets maintenance and other financial securities in different forms like dower, gifts, estate, inheritance, etc. However, the fact that men are the maintainers of women does not automatically make them superior to women but this is only meant to create a balance
between the duties of both of them. This chapter analyses in detail the various economic rights of woman granted to her under Islamic Law.

### 4.2. Guarantee of Financial Security

Islam has not burdened woman with any kind of financial responsibility of maintaining herself or any other family member except her parents and that too in case when she has no brother(s) or he (brother) is not able to maintain them due to his poor economic condition. On the other hand, Islam has put the responsibility of maintenance of women upon men. The Holy Quran lays in this regard:

> “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…”¹

Islam has given the women the security of being maintained by their father, brother, husband or son, whatever the case may be. Islam makes it obligatory upon a father to maintain his daughters and to provide for their education and for their marriage too. The Holy Prophet (PBUH) is reported to have said in this regard:

> “Whoever maintains two girls till they attain maturity, he and I will come on the Resurrection Day like this;” and he joined his fingers.²

Further, the Holy Qur’an provides regarding the father’s duty to bear the expenses of the suckling mother of the child in the following words:

> “The mothers shall give suck to their offspring for two whole years, if the father desires, to complete the term. But he shall bear the cost of their food and clothing on equitable terms.”³

Thus, the verse mentioned above makes it clear that even a mother can claim the cost of breast-feeding her own child from the father of the child if the father wants her to breast-feed his child up-to two years. The cost here would be the food and clothing of the woman on equitable terms. This provision generally applies in cases of divorced women and if a man wants her former wife to breast-feed his child then he will have to maintain her as a cost of the same because it is the responsibility of the father to provide for the child and not that of the mother. So, the father will have to bear the expenses of the same and no responsibility lies

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¹ *Holy Qur’an*, IV:34.
² Reported in *Sahih Muslim*.
³ *Holy Qur’an*, II:233.
on the mother. Hence, a woman, who bears a child in marriage, is entitled to child support from the child’s father and in case, the father of the child is dead, it is obligatory upon the heirs of the deceased to provide for the maintenance of nursing mother, as the Holy Qur’an says:

“And on the (father’s) heir is incumbent the like of that (which was incumbent on the father).”

Islam also provides for a woman’s maintenance upon her father in case she has been divorced by her husband. One of the Traditions of the Holy Prophet (PBUH) lays:

“Shall I not teach you the best form of charity?—(maintaining) your daughter who has been returned to you, who has got no earning member except you.”

Islam puts the responsibility of a woman upon her husband after her marriage and unlike other religions like Hinduism, she has no responsibility to maintain herself or her children or her husband. She is free from any such responsibility and in fact, her husband is obliged to provide for her. Thus, the woman gets the guarantee of financial security of being maintained after her marriage too. The maintenance to which a wife is entitled under Islamic Law shall be according to the standard of the wife but Islam does not burden a man beyond his capacity. In this regard, the Holy Qur’an lays down:

“Let the man of means spend according to his means: and the man whose resources are restricted, let him spend according to what Allah has given him. Allah puts no burden on any person beyond what he has given him. After a difficulty, Allah will soon grant relief.”

As a mother also, a woman is entitled to claim maintenance from her children. Islam has made it obligatory upon every man and woman to maintain his/her parents in their old age and regards it as a great act of piety. Not only this, but Islam has also declared for men to pay dower to their wives and has made it a condition necessary for marriage. Allah says:

“And give to the women (whom you marry) their mahr (obligatory bridal money given by the husband to his wife at the time of marriage) with a good heart, but if they, of their own good pleasure remit a part of it to you, take it, and enjoy it without fear of any harm (as Allah has made it lawful).”

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5 Reported in *Ibn Majah*.
Apart from this, a woman is fully entitled to get a share in the property of her deceased father, brother, husband as well as in the property of her pre-deceased son. This provision was also laid down to make her financially secure so that she must be able to provide for herself and should not be left at other’s mercy. Regarding the share of women in the property of their deceased family members, the Holy Qur’an says:

“There is a share for men and a share for women from what is left by parents and those nearest related, whether the property be small or large- a legal share...”

Woman, under Islamic Law, has no monetary obligations towards any member of her family and she is not obliged to make any kind of financial contributions in the family except that of being bound to help the poor relatives. In fact, on the other hand, she is totally relieved from the burden of earning a livelihood. It does not matter that how poor her husband may be, he cannot force her to work for a livelihood. In fact, it is his sole responsibility to maintain her. According to Islamic Law, if there is no male relative who is financially capable of maintaining her then, in that case, the obligation of her livelihood solemnly lies upon the treasury of the State. Thus, the guarantee of being financially secure is provided to a woman in all stages of her life i.e., as a daughter, sister, wife or mother. All this is due to the fact that Islamic Law wants to create a balance in the society and does not at all want any sort of chaos to exist within the family as well as the society. That’s why Islam has guaranteed the financial security to women in different forms like maintenance, dower and inheritance so that they may not be over-burdened with the responsibilities. If women had to shoulder both the responsibilities i.e., looking-after the household as well as making money, then it would be unjust to her by putting extra burden upon her shoulders and she would not be able to perform either of them in a proper manner. That is the reason behind the division of labour among both the sexes under Islamic Law by providing financial security to women.

4.3. Absolute Ownership of Property

It has become more clear now by going through the study made in previous chapters that Arabs and non-Arabs used to deprive their women of their right in taking possession of property and in some exceptional cases, where some women of the noble families or tribes

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8 Holy Qur’an, IV:7.
11 Maulana Wahiduddin Khan, Woman between Islam and Western Society 175-176 (Goodword books, New Delhi, 2010).
got this right they, in fact, limited the scope of their free hand over their own properties. It was the husband who could have a free hand over the property of his wife. Islam cancelled this practice and provided her with full right to take her property into her actual possession or to have a free hand over the same. Rules of Islamic Law recognise full right of a woman over her property to manage all sorts of ownership, sign all/any financial contracts and she is not required to have any ward-ship upon her for this purpose, provided she is conscious, sensible and legally major. In this concern, woman has been treated the same way like that of a man. So a woman, under Islamic Law, has a full hand over her property in all forms and practices like buying, selling, lending, borrowing, mortgaging, speculating, renting, donating, letting, sponsoring, trading, crop-sharing, giving in charity, making a will or \textit{waqf} and so on. This shows that a woman, in Islam, can enter into any lawful trade or do any lawful job to earn a living. She can be a guarantor as well as can be guaranteed; can transfer by will in favour of those who don’t get any share in her property as sharer after her death. Islamic Law gives her full right to sue anyone in order to resort what belongs to her, or to avoid being wronged. All these rights are hers and hers only without any intervention on the part of her husband or patron and if he tries to wrong her in any way, she has got the right to sue him for the same.\textsuperscript{12}

Before the advent of Islam, a woman had no share in the family property. Rather, even her own earnings were not left to her and whatever she got through her own efforts was regarded as the property of the father, husband, sons or other members of family. Islam declared this practice as the clear-cut violation of her right under the law and recognised the right of woman to absolute ownership of property and any meddling with it by anyone was declared wrongful and unlawful. According to this, just as a man has a right to honestly earned wealth, so has a woman the right to own and use her lawful earnings.\textsuperscript{13} The Holy \textit{Qur’an} declared in this regard:

\begin{quote}
\textit{“...To men is allotted what they earn and to women what they earn...”}\textsuperscript{14}
\end{quote}

The above-mentioned verse of the Holy \textit{Qur’an} makes it clear that under Islamic Law, whatever a woman gets from her parents, husband and the offspring(s) or whatever she earns through her own economic efforts, she is the rightful owner of it all, and is fully entitled to spend it the way she likes. She has free will whether to spend it on her own person, her

\textsuperscript{12} Kawther M. Al-Minawi, \textit{A Segment of Woman rights in Islam} (Translated by Saifuddin H. Shaheen) 55-56 (Dar Ashibil Publishers and Printers, Saudi Arabia, 1993).

\textsuperscript{13} Dr. Muniruddin Qureshi, \textit{Status of Woman in Islam} 179 (Reference Press, New Delhi, 2003).

\textsuperscript{14} \textit{Holy Qur’an}, IV:32.
husband and children, parents and other members of family. She can also invest it in other ways, as have already been mentioned above, like charitable acts, sale and purchase of property, forming trusts, gifting it to others or bequeathing it at her own discretion and nobody can interfere in these matters.\textsuperscript{15}

It is worth mentioning here that of the great faiths, Islam has been foremost in assigning to woman a position of economic independence. In other religions and even in the major civilizations of the world, which claimed to be the most advanced and liberal ones, women had no right to dispose-off their properties on their own discretion and it were mostly their husbands or other male members of their family who could do so. For example, in the United Kingdom, till as late as 1882, when the first \textit{Married Women’s Property Act} was passed by the Parliament, a married woman had no right to hold any property on her own, independently of her husband and any property that a femme sole (unmarried woman) held in her own right vested automatically in her husband upon her marriage.\textsuperscript{16} Even the women of India had to wait until 1956 for a right which Muslim women have always taken for granted. Hence, Islam gave women the right of absolute ownership over their properties at a time when the whole world didn’t even have the concept of it.\textsuperscript{17}

Economic independence of married women and her right to absolute ownership over her property is a well-established feature of Islamic Law.\textsuperscript{18} Concerning the right to one’s earnings, the Holy \textit{Qur’an} says:

\begin{quote}
\textit{“And wish not for the things in which Allah has made some of you excel the others. To men is allotted what they earn and to women what they earn, and ask Allah of His Bounty. Surely, Allah is Ever All-Knower of everything.”}\textsuperscript{19}
\end{quote}

The above verse clearly warns human beings not to desire or claim the things which belong to others or are others’ earnings and declares that everything belongs to him/her who has earned it. For this reason, Muslim women may keep (and in fact they have traditionally kept) their maiden names after marriage, an indication of their independent property rights as legal entities. Marriage of a Muslim girl has no effect, whatsoever, on her right to hold property in full ownership. Any property that a woman might acquire by her own effort, or might inherit

\textsuperscript{15} Supra Note 13 at 179.
\textsuperscript{17} Syed Hamid Mohsin, \textit{Islam- Facts vs. Fictions; Treading the Veils of Misconceptions} 13-14 (Salam Centre, Bangalore, 2014).
\textsuperscript{18} Tahir Mahmood and Saif Mahmood, \textit{Muslim Law in India and Abroad} 253 (Universal Law Publishing Co., New Delhi, 2012).
\textsuperscript{19} \textit{Holy Qur’an}, IV:32.
as an heir or receive as a legacy or gift, belongs to her independently of her husband. She may ask her husband to manage it, but if she chooses to manage or administer it herself, he cannot interfere in the management or administration of it.\textsuperscript{20} It is important to mention here that there is not even a single verse in the Holy Qur’an which gives a husband the right to possess his wife’s property automatically without asking her permission.\textsuperscript{21}

There are authentic reports that during the rise of Islam (7\textsuperscript{th} Century to 15\textsuperscript{th} Century A.D.), Muslim women inherited property and held them independently and were active patrons and sponsors of public works. Rich women supported many public fountains, gardens, hospitals, and inns through their own assets and property.\textsuperscript{22}

\section*{4.4. Right to Employment}

Islam has granted woman the freedom of economic pursuits in the form of business, profession and work (any of the public services). She is permitted to undertake trade, agriculture, financing, industry, service, teaching jobs, journalism and writing and compilation of books- in fact all permitted trades. For this purpose, she has been allowed to go out of her house (if necessary).\textsuperscript{23} Generally, a Muslim woman is guaranteed support in all stages of her life, as a daughter, wife and mother or sister. Circumstances may, however, occur where a woman will need to work and earn a living.\textsuperscript{24} In such circumstances, a woman is allowed to work and earn a living through any legitimate means, so long as she does not compromise her honour and moral integrity.\textsuperscript{25} The Holy Qur’an affirms this when it provides that:

\begin{quote}
Men shall have a benefit from what they earn, and women shall have a benefit from what they earn.
\end{quote}

\textsuperscript{26} This verse, apart from giving women the right to earn, supports the economic theory of ‘equal pay for equal work’. The core of this theory is that women and men should be

\begin{itemize}
\item \textsuperscript{20} \textit{Supra} Note 16 at 23-24.
\item \textsuperscript{21} Gunawan Adnan, \textit{Women and the Glorious Qur’an: An Analytical Study of Women-Related Verses of Sura An-Nisa} 170 (Universitatsverlag Gottingen, Germany, 2004).
\item \textsuperscript{22} Dr. M. I. H. Farooqi, \textit{Muslim Societies- Rise and fall: Wake Up Call and Revival Efforts} 141 (Sidrah Publishers, Lucknow, 2010).
\item \textsuperscript{23} \textit{Supra} Note 13 at 178.
\item \textsuperscript{24} R.W. Maqsood, \textit{Living Islam: Treading the Path of the Idea} 132 (Goodword Books, New Delhi, 2006).
\item \textsuperscript{25} Ibrahim N. Sada, “Shari’ah and the Rights of Muslim Women in Northern Nigeria” 44 A Report prepared for \textit{Special Programme on Women in the North under the Access to Justice Programme}, Department of International Development (DFID) (July 2004).
\item \textsuperscript{26} \textit{Holy Qur’an}, IV:32.
\end{itemize}
compensated for the work they perform regardless of their gender. The Holy Qur’an addresses this issue by referring to both genders and stating that each should be compensated for his/her work. If it was intended that women receive less than men, it would have been explicit. Thus, Islamic Law does not restrict women from using their talent in any field of human endeavour. This, in essence, can be construed to mean that a woman can engage in any lawful employment, business, profession or vocation to earn and to contribute to family income, though only in cases of need\textsuperscript{27} and where the society requires benefiting from her talent. For example, a Muslim woman is free to go to farm and work\textsuperscript{28} and is equally allowed to participate in industrial activities.\textsuperscript{29} This shows that women in Islam possess equal right with men to be gainfully employed or carry out certain trades if they stay within the purview of Islamic Law. They are free to venture into any profession that fits their nature best or where the society needs them the most. There are many incidents in early phase of Islam which show that women were not confined indoors. They certainly went out in order to attend to many necessary outdoor duties. Following verses of the Holy Qur’an are ordinarily quoted to support woman’s participation in this field:

\begin{quote}
“And in no wise covet those things in which Allah hath bestowed His gifts more freely on some of you than on others: to men is allotted what they earn, and to women what they earn: But ask Allah of His bounty: For Allah hath full knowledge of all things.”\textsuperscript{30}
\end{quote}

\begin{quote}
“And when he arrived at the watering (place) in Madyan. He found there a group of men watering (their flocks), and besides them he found two women who were keeping back (their flocks): He said: “What is the matter with you?” they said: “We cannot water (our flocks) until the shepherds take back (their flocks): And our father is a very old man.”\textsuperscript{31}
\end{quote}

Encyclopaedia of Islam says regarding the woman’s right to take part in economic activities:

\begin{quote}
“Islam does not restrict the economic activity of women; what it restricts are those factors which might encourage or incite the spread of obscenity in society. If women take proper care of these things and observe Shari’ah instructions, they are not barred from engaging in any lawful activity outside their houses which is necessary for their livelihood, for Allah’s Messenger explicitly permitted this in these words:”\textsuperscript{32}
\end{quote}

\textsuperscript{27} S.C. Muhammad, \textit{Women in Islam} 3 (Adam Publisher, New Delhi, 1997).
\textsuperscript{28} N.M. Shaikh, \textit{Women in Islamic Society} 40-41 (Kitab Bhavan, New Delhi, 1991).
\textsuperscript{29} Abdul Ghaffar Hasan, \textit{The Rights and Duties of Women in Islam} 15 (Maktaba Dar-us-Salam, Riyadh, 2003
\textsuperscript{30} Holy Qur’an, IV:32.
\textsuperscript{31} Holy Qur’an, XXVIII:23.
“O women! You have been allowed by Allah to go out for your needs.”

Further, Dr. Hamidullah writes in this regard:

“In every epoch of Islamic history, including the time of the Holy Prophet (PBUH), one sees Muslim women engaged in every profession that suited them. They worked as nurses, teachers, and even as combatants by the side of men when necessary, in addition to being singers, hair-dressers, etc. Caliph Umar employed a lady, Shifa’ bint Abdallah, as inspector in the market at the capital (Madina) as Ibn Hajar (Isabah) records and the same lady had taught Hafsah, wife of the Holy Prophet (PBUH), how to write and read. The jurists admit the possibility of women being appointed as judges of tribunals, and there are several examples of the kind. In brief, far from becoming a parasite, a woman could collaborate with men, in Muslim society, to earn her livelihood and to develop her talents.”

Also, Justice Aftab Hussain, in his book “Status of the women in Islam” writes:

“Careerism among women is not hobby. The object of some in choosing a career is to make themselves useful to the society. For them, money is a secondary consideration. For others, there are economic compulsions. The uneducated widows or deserted wives generally earn money by sewing and needle work but literate women avail of their talents in finding many vocations for living honourably. During this age of inflations and unpredictable rise in the costs of living many an educated women assist their husbands, parents, brothers and sisters by putting to use their talents for earning honest money, to make the two ends meet. And then the question is why they should not turn out to be useful members of the Ummah or society. One thing which is common among those ladies is that with few exceptions, in fact much fewer than males, they entertain considerable love and reverence for Islam, the Holy Prophet (PBUH) and the saints. They are generally chaste and guard their modesty. No scandal is attached to them. They marry, have children but persevere in their careers.”

Therefore, from the expressed views of the above-mentioned writers and scholars of Islamic Law, it becomes very much clear that although earning of sustenance for family is basically the duty of man, yet Islam does not prohibit a woman from engaging in any employment, business, profession or vocation, to earn or contribute in the income of family in case of need.

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33 Reported in Sahih Bukhari.
34 Dr. Muhammad Hamidullah, Introduction to Islam 206 (al-Falah Publications, Faridabad, 1997).
4.5. Economic Rights of Woman under Shari’ah

4.5.1. Right to Dower

Islam has tried to create a balance in the marital relationship by declaring the rights of the wife on the husband and vice versa. Among the rights of wife on the husband, the right to dower is one such right which obliges the husband to give to wife the same as a symbol of his desire in marrying her and of wanting her. Allah does not want to make wife a mere puppet in the hands of her husband and hence, He declared in the Holy Qur’an:

“And give to the women (whom you marry) their mahr (obligatory bridal money given by the husband to his wife at the time of marriage) with a good heart, but if they, of their own good pleasure remit a part of it to you, take it, and enjoy it without fear of any harm (as Allah has made it lawful).”

The expression ‘with a good heart’ in the above-mentioned verse signifies that Islam considers dower as a gift from the husband to his wife and not as a price in return for the pleasure that he gets from her (as is commonly misinterpreted or misunderstood by many). The amount of mahr is not a consideration for conjugal rights and in fact, it is a token of a husband’s love and respect for his wife. Islam symbolises this, in material form, as a responsibility of a man which he is obliged to fulfil in regard to his wife till the end of his life. It is a proof of a man’s sincerity towards his wife throughout his whole life. The Holy Qur’an has used the words ‘sadaqat’ and ‘sidaqah’ and ‘sadaq’ for dower which interprets its true spirit. The words ‘sadaqah’ and ‘sadaq’ have been derived from the Arabic word ‘sidq’ which has a very wide sense including sincerity, love, friendship, sticking to one’s word, to come up to the expectations of people, to prove one’s mettle in trial, etc. Allamah Savi has explained its meaning by describing that ‘sadaqah’ is a derivative of ‘sidq’ which is the antonym of ‘kizb’. It (sadaqah) has been used for mahr since its existence between the husband and wife is proof of the fact that they are at heart bound by Shari’ah.

Hence, it is clear from the use of the word ‘sadaqah’ that Allah has made the payment of dower to wife by the husband a token of his love and sincerity for her. So, to declare it a price for the bride is an insult to that sincerity which a man holds towards the woman whom he chooses to be his partner for the rest of his life (as intended by him). Through the payment of

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36 Holy Qur’an, IV:4.
37 Maulana Wahiduddin Khan, Women in Islamic Shari’ah 83 (The Islamic Centre, New Delhi, 2010).
mahr, the husband tries to prove that he will come up to the wife’s expectations of her good faith in him and shall not deceive her any time throughout their marriage.  

Under Islamic Law, the payment of mahr is an obligation on the husband and he cannot refuse to pay the same and in case, the husband dies then the amount shall be paid from the property of the deceased that he leaves behind. Islam has ordained that if a man is marrying a woman then he must pay her dower. However, the non-payment of dower does not affect the validity of marriage although dower is an important part of marriage under Islamic Law. Mahr is the property of a woman and is given to her by her husband and her father or other relations have no right over this property. It is her right under Islamic Law to demand, fix, and receive dower at the time of her marriage and mahr becomes her own personal property to keep, spend, invest or dispose it off in any manner that she likes.

Discussing the nature of dower, Justice Mahmood has regarded dower as a consideration for marriage contract by comparing it with the contract of sale. In Abdul Kadir v. Salima, he observed:

“Dower may be regarded as consideration for connubial intercourse by way of analogy to the contract for sale. The right to resist her husband so long as the dower remains unpaid is analogous to the lien of a vendor upon the sold goods while they remain in his possession and so long as the price or any part of it is unpaid and her surrender to husband resembles the delivery of the goods to the vendee…”

But Ameer Ali has opposed this view of Justice Mahmood in his book ‘Mohammadan Law’. Later on, in the cases of Anis Begum v. Mohd. ‘Istifa and Wajid Ali Khan v. Shaukat Ali Khan, this reasoning based on the analogy of sale was strongly criticised by Sir Shah Sulaiman. He observed:

“It is quite obvious that the analogy of sale cannot be carried too far. The marriage cannot be regarded as purely a sale of the person by the wife in consideration for payment of dower.”

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40 Supra Note 17 at 162.
41 ILR. (1886) 8 All 149 at 157.
42 Abdul Kadir v. Salima, ILR. (1886) 8 All 149.
44 ILR 1933 All 743.
45 (1912) 15 Oudh Cases 127.
Further, Abdur Rahim while describing the true nature of dower has correctly observed that it is not a consideration that proceeds from the husband for the contract of marriage, but it is an obligation which Islamic Law has imposed on the husband as a mark of his love and respect for his wife which is evident from the fact that the mere non-specification of dower at the time of marriage does not affect the validity of marriage.\(^{47}\)

Therefore, it comes to light that although dower is an essential part of Muslim marriage but its absence does not affect the validity of marriage itself in any way. In case, there is an agreement as to the non-payment of dower then the condition by itself would be void but the marriage would be a valid one. According to \textit{Hedaya}:

\begin{quote}
“Marriage is valid although no dower has been mentioned because \textit{nikah} signifies a contract of union which is fully accomplished by the performance of the marital rites. Dower is obligatory as a mark of respect for the marriage but its mention is not essential to the validity of marriage. For the like reason, a marriage is valid although the man agrees to the marriage on the special condition that there should be no dower. In such a case, the condition would be void but the marriage would be valid.”\(^{48}\)
\end{quote}

\textit{Fatawa-e-Qazi Khan} says with regard to dower:

\begin{quote}
“Dower is so essential to marriage that even if it was not mentioned at the time of the marriage or marriage contract, the law will presume by the virtue of contract itself.”\(^{49}\)
\end{quote}

Thus, from the above statement as cited from the \textit{Fatawa-e-Qazi Khan}, it becomes clear that dower is so fundamental feature of Islamic Law of marriage that even if the woman agrees to forego all her right to dower before marriage or agrees to marry without any dower, such agreement would be invalid, but the marriage would be valid.

Wife’s unrestricted and unconditional right to receive dower (\textit{mahr}) from her husband has been guaranteed by the following verses of the Holy \textit{Qur’an}:

\begin{quote}
\textit{There is no blame on you if ye divorce women before consummation or the fixation of their dower; but bestow on them (a suitable gift) the wealthy according to his means, and the poor according to his means- a gift of a reasonable amount is due from those who wish to do the right things.}\(^{50}\)
\end{quote}


\(^{49}\) \textit{Ibid}.

\(^{50}\) \textit{Holy Qur’an}, II:236.
“And if ye divorce them before consummation, but after the fixation of a dower for them, then the half of the dower (is due to them), unless they remit it. Or (the man’s half) is remitted by him in whose hands is the marriage tie; and the remission (of the man’s half) is the nearest to righteousness, and do not forget liberality between yourselves, for Allah sees well all that ye do.”

“But if ye decide to take one wife in place of another, even if ye had given the latter a whole treasure for dower, take not the least bit of it back: Would ye take it by slander and a manifest wrong?”

“Also (prohibited are) women already married, except those whom your right hands possess. Thus hath Allah ordained (Prohibitions) against you: Except for these, all others are lawful, provided ye seek (them in marriage) with gifts from your property- desiring chastity, not lust. Seeing that ye derive benefit from them, give them their dowers (at least) as prescribed; but if, after a dower is prescribed, ye agree mutually (to vary it), there is no blame on you. And Allah is All-Knowing, All-Wise.”

“O Prophet! We have made lawful to thee thy wives to whom thou hast paid their dowers…”

“… And there will be no blame on you if ye marry them on payment of their dower to them…”

**Definition of Dower**

Dower has been defined in different ways by different people. Some of the definitions of dower given by some well-known scholars of their times are as under:

Baillie defines dower as:

“… the property which is incumbent on the husband, either by reason of its being named in the contract of marriage, or by virtue of the contract itself… dower is not the exchange or consideration given by the man to the woman for entering into the contract; but an effect to the contract imposed by law on the husband as a token of respect for its subject, the woman.”

According to *Hedaya*, the term ‘dower’ stands for:

“A sum of money or other property which the wife is entitled to receive from the husband…”

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51 Holy Qur’an, II:237.
52 Holy Qur’an, IV:20.
54 Holy Qur’an, XXXIII:50.
55 Holy Qur’an, LX:10.
Abdur Rahim defines dower in the following words:

“It is that sum of money or other form of property which the wife is entitled to get from her husband on marriage as a token of his respect towards herself.”

Dower has been defined by Tyabji as:

“A sum that becomes payable by the husband to the wife on marriage, either by agreement between the parties, or by operation of law.”

Justice Ameer Ali considers dower as:

“A consideration for wife’s sole and exclusive use and benefit.”

Mulla defines dower as:

“A sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage.”

**Objects of Dower**

Dr. Muhammad Sharif Chaudhry, in his book *Women’s Rights in Islam* states the three-fold objects of dower which, according to him, are:

- Firstly, it would be a check on the arbitrary exercise of the power of divorce by the husband;
- Secondly, it would restrain the husband to indulge in polygamy;

The *Dictionary of Islam* has provided in this regard:

“The custom of fixing heavy dowers, generally beyond the husband’s means, especially in India, seems to be based upon the intention of checking the husband from ill-treating his wife, and above all, from his marrying another woman, as also from wrongfully or causelessly divorcing the former. For in the case of divorce, the woman can demand the full payment of the dower.”

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58 Supra Note 47 at 334.
60 Supra Note 43 at 452.
Thirdly, it would work as an obligation imposed upon the husband as a mark of his respect for his wife.

Another object of *mahr* which needs to be mentioned here is to provide for subsistence of wife in the event she is divorced by the husband. Therefore, if one analyses properly, then it will be found that it is actually intended to be a reasonable restriction on husband’s unlimited power to dissolve marriage at any time even without the knowledge and consent of the wife. Dower, hence, is actually a security for the wife under Islamic Law and a check on the capricious exercise of husband’s unlimited power of dissolution of marriage which the Law-Giver- The Almighty Allah intended to restrain by rendering the rules as to the payment of dower stringent upon the husband.

**Kinds of Dower:**

Islamic Law classifies dower into two broad categories i.e., (i) specified, and (ii) unspecified dower.

(i) **Specified Dower:** When the amount of dower, which the husband has to pay to his wife, is settled by the parties to marriage by themselves at the time of marriage or afterwards, the dower is known as ‘specified dower’. If the bridegroom is minor at the time of marriage, then in that case, his father may settle the amount of dower to be paid to the bride. Where the father specifies the amount of dower then, according to *Hanafi* law, the father shall not be personally liable to pay the same in case his son fails to fulfil his obligation, but *Shia* law makes the father personally liable if his son fails to pay the amount of dower. Under Islamic Law, the husband is bound to pay the whole amount of specified dower, however excessive or beyond the paying capacity it may be. That is why, Islam guides man to fix an amount of dower which is not frivolous and is within the paying capacity of the husband. Specified dower has been further divided into (a) Prompt; and (b) Deferred Dower.

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(a) **Prompt Dower:** It is also known as *mahr-e- mu’ajjal*. The word ‘mu’ajjal’ has been derived from the word ‘ajilah’ which means ‘without delay’.

Under Islamic Law, the prompt dower becomes payable immediately upon the marriage. Hence, prompt dower may be paid whenever demanded by the wife. She may claim her dower from her husband at any time before or after the consummation of marriage. Concerning the prompt dower, the Islamic Law rules as under:

- The wife has a right to refuse cohabitation with the husband until she is paid her prompt dower.
- If the wife is minor, her guardian can refuse to allow the wife to be sent to the husband until prompt dower is paid.
- Only after the payment of the prompt dower, the husband is able to enforce the conjugal rights.
- However, if the marriage is consummated, the wife cannot refuse cohabitation after that.
- Prompt dower does not become deferred after consummation and the wife has the right to demand and sue for it any time.
- The period of limitation starts after demand and refusal and it is of three years.

On the point that which part is prompt and which one is deferred, there is a difference of opinion among the *Shia* and *Sunni* law. *Sunni* law holds that only a part of dower is prompt and the rest amount is deferred. The part which is prompt, under *Sunni* law, is to be fixed with reference to:

i) custom;
ii) the status of the parties to the marriage; and
iii) the amount of settled dower.

*Shia* law, on the other hand, holds that the whole amount is prompt.

(b) **Deferred Dower:** It is also known as *mahr-e-mu’wajjal*. Under Islamic Law, deferred dower becomes payable upon the dissolution of marriage (either by

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67 *Supra* Note 37 at 130.
68 *Supra* Note 66 at 91.
divorce or by the death of the husband). After the death of the husband, a wife has the right to recover her dower and it will be charged on the estate of her deceased husband. The rules of Islamic Law regarding the deferred dower are as under:

- Even though it is deferred, an agreement to pay before is valid and binding.
- A wife does not have a right to claim dower but a husband can treat it as prompt and transfer property as payment.
- A widow can relinquish her claim to dower at the time of the funeral of her deceased husband by reciting a formula, but her relinquishment must be a voluntary act.
- The interest of wife in deferred dower is a vested one and her heirs can claim it after her death.

(ii) **Unspecified Dower:** When the amount is not fixed, the wife is entitled to ‘proper’ or ‘customary’ dower (*mahr-e-misl*), which is determined by keeping in regard the amount of dower settled upon other females of her father’s family and her own personal qualifications. According to *Hedaya*, the wife’s age, beauty, intellect and virtue will also be considered while determining her dower. Thus, the following factors should be taken into account when determining the proper dower of a woman:

i) age, beauty, fortune, understanding and virtue of wife;

ii) social position of her father;

iii) dower given to her female paternal relations;

iv) economic condition of the husband; and

v) the circumstances of the time.

Under the *Ithna Ashari* School of Islamic Law, an adult wife can waive the requirement of dower. While under all the other Schools of Islamic Law, even where the wife stipulates that she will not demand any dower, she remains entitled to it and the rule of estoppel will not apply to her.\(^69\)

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\(^69\) *Id.* at 92.
Subject-matter of Dower

It has already been mention earlier that *mahr* is the property which a husband pays to his wife as a token of his love and respect for her and a mark of his responsibility of her maintenance throughout the subsistence of their marriage. The Holy Prophet (PBUH) had insisted that there must be dower which, for the woman, would be a token of her husband’s love and respect for her, and for the man its payment would mean the realisation that he is not marrying a mere nobody. The word ‘property’ here does not mean that it should be necessarily in the form of cash only. It can be in the form of any valuable property or even in the form of personal services too. e.g., in case, a man does not possess any money, he can pay the dower in some other form such as, emancipating the slave-girl he is marrying. Here, in such a case, her freedom would be her dower. It has been mentioned in the books of Islamic history on many occasions that the Holy Prophet (PBUH) had arranged the marriage of one of his companions on the condition that he would teach his wife the verses of the Holy *Qur’an* and this instruction was regarded as her dower.70

Thus, the fitting subject-matter of dower is not only confined to a sum of money or property, it may also include personal services and other things. Apart from the personal services of the husband, any profits arising from land or business, debts due to the husband, insurance policies, the sale proceeds of something, may constitute a valid dower.

Dower is a debt and the widow is entitled along with other creditors of her deceased husband, to have it satisfied out of his estate. However, this debt is an unsecured debt and ranks after secured creditors. But it has priority over legacies and rights of heirs.

Maximum and Minimum Limit of Dower

It is evident now that the dower is considered such an essential in Muslim marriage so that, in case it is not fixed, even then the wife is entitled to its payment according to the standards in the family. Wife has the right to remit her dower or to accept the reduced amount or to postpone her demand for its payment. According to Islamic Law, the amount of dower may be fixed either before or at the time of marriage or after marriage and can be increased at any time by mutual consent. Concept of dower existed in pre-Islamic Arabia also but it was of a different nature from what it is today. In that system of dower, women used to be exploited

by men in different ways so that they might escape from paying dower to women. Islam put an end to the unjust practice of ‘shighar’ which was prevalent in pre-Islamic Arabia. Islam declared dower to be the exclusive property of the woman and removed all the false and unjust claims on it one by one. It openly declared:

“And give them, the women, (on marriage) their dower as an obligation.”

However, Shari’ah has not prescribed any limit for the amount of dower to be paid to the bride and it can be increased and decreased according to the financial status of the persons entering into the marriage contract. But, it certainly is its (Shari’ah’s) inclination that it should be an amount that the man can easily pay and it should not be a fabulous amount which the husband could never pay (as is found as a custom in many families today). Concerning the same, the Holy Prophet (PBUH) is reported to have said:

“If a man marries a woman and fixes a dower which he really does not intend to pay, then he is committing adultery. It is like a man who is borrowing money and has no intention to repay it: he is, in fact, a thief.”

Thus, to ensure the payment of dower, the best method is to fix an amount which would be convenient for the husband to pay. The importance of actual payment of dower is apparent from the fact that although the Holy Prophet (PBUH) had married A’isha before he migrated to Medina, he had not brought her home. After he reached Medina, Abu Bakr requested the Holy Prophet (PBUH) to take A’isha home but the Holy Prophet (PBUH) replied that he could not do so as he did not possess the necessary money to pay the amount of dower. Abu Bakr then offered a loan to the Holy Prophet (PBUH) which he accepted and brought A’isha home after paying her mahr. This, in no way, means that the bride cannot be taken home or marriage cannot be consummated without the payment of dower. This only means that the actual payment of dower is necessary under Shari’ah.

On the issue of fixation of the minimum amount of dower, the opinions of jurists differ. Those belonging to the Hanafite School of Islamic Jurisprudence put it at ten dirhams and not less than that. The Maliki School in this regard gives the minimum limit of three dirhams but the Shafi’i and Ithana Ashari School do not provide any minimum limit of dower that

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71 ‘Shighar’ was a custom prevalent in pre-Islamic Arabia in which daughters were exchange in marriage without paying any dower.
72 Holy Quran, IV:4.
73 As cited by Supra Note 70 at 63.
74 Ibid.
75 Supra Note 13 at 177.
should be paid by the husband to his wife. Fayzee, in his book ‘Outlines of Mohammadan Law’ observed that the minimum amount fixed by law can hardly be judged as an adequate amount for the wife.\footnote{Asaf A.A. Fayzee, Outline of Mohammadan Law 134 (Oxford University Press, London, 1974).}

Hence, Islamic Law does not fix any minimum amount of mahr to be paid and left it on the will of the parties. The only condition is that it should be within the paying capacity of the husband. According to the well reported Traditions of the Holy Prophet (PBUH) even a handful of barley or dates\footnote{Reported in Sunan Abu Dawud.} or even an iron ring may be sufficient provided the bride agrees to accept it. The Messenger of Allah (PBUH) himself married Hazrat Safiyyah and her emancipation was her dower.\footnote{Reported in Bukhari and Muslim.} Umme Sulaim agreed to marry Abu Talha on the condition that he should accept Islam. Abu Talha fulfilled the condition and his acceptance of Islam was declared to be mahr of Umme Sulaim.\footnote{Reported in Nisai.} In another case (mentioned above), the teaching of one or two verses of the Holy Qur’an by the husband to the wife was declared to be an adequate mahr for the bride.\footnote{Reported in Sunan Abu Dawud.}

On the other hand, no maximum or upper limit of mahr or dower, which should be paid by a husband to his wife, has been fixed by Islamic Law either. The Holy Qur’an says:

“But if ye decide to take one wife in place of another, even if ye had given the latter a whole treasure for dower, take not the least bit of it back.”\footnote{Holy Qur’an, IV:20.}

From the above-mentioned verse of the Holy Qur’an, the jurists of Islam have deduced that the right of a woman to demand any amount of dower as a condition of her agreeing to marriage is not restricted to any upper limit by Islamic Law. Hazrat Umar, the second Caliph of Islam, once thought of fixing the upper limit of dower on the complaint of men that women were demanding fantastic amounts; but he was dissuaded by a woman who drew his attention to the verse of the Holy Qur’an quoted above.\footnote{Supra Note 62 at 155.}

Thus, it is very much clear now from the reference of the verses of the Holy Qur’an and the Traditions of the Holy Prophet (PBUH) that Shari‘ah has not fixed any minimum or maximum amount of dower. It should be fixed according to the means of the husband, at the
pleasure of the contracting parties and in view of socio-economic conditions and precedents and customs in the family.

**Modes of Enforcement of Dower**

As dower is an enforceable right of the wife against her husband, Islamic Law confers the following three rights upon her to compel the payment of the same:

1. **Refusal from Cohabitation**

Under Islamic Law, a wife is fully entitled to receive full portion of her prompt dower at the time of entering into marriage contract and in case of refusal of payment by her husband, she can refuse to submit her person to him for marital conjugation. She may even refuse to follow him to his house until the full portion of her prompt dower is paid to her. Further, she may even be free to leave the house of her husband without his permission and by doing so she will not be thereby rendered rebellious and will also not lose her right to claim maintenance. Where the wife is minor or is insane, her guardian has full right to refuse to send her to her husband’s house until the payment of her prompt dower and during such a stay of her at her guardian’s house, the husband will be liable to maintain her. But this right of refusal of cohabitation is lost once the marriage gets consummated between the parties. In this regard, the Calcutta High Court has held:

“The absolute right of the wife to insist on payment of prompt dower, before giving him the access to her, is lost after the consummation of marriage.”

In the case of *Rabia Khatoon v. Mukhtar Ahmad*, it was held that after the consummation of marriage but before the payment of prompt dower, if the husband files a suit for the restitution of conjugal rights upon her refusal to cohabitation, then he can secure only a decree conditional upon the payment of prompt dower.

2. **Right to Dower as a Debt**

The dower of a Muslim wife, under Islamic Law, is an unsecured debt against her husband or his heirs. It is like any other ordinary debt and therefore, she has the right to have it satisfied

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85 *Hamidanissa Bibi v. Zaheer-Sheikh*, (1886) 8 ALL. 149.
86 AIR 1966 All 548.
along with the other creditors. Her right is, however, not in any way superior to other creditors’ rights and therefore, she cannot claim any priority over other creditors of the husband. It may be recovered by her from her husband when he is alive or it may be recovered from his estate after his death. For the recovery of her dower, she can sue the legal heirs of her deceased husband but they will not be personally liable to pay the dower debt. Their liability will arise only up to the extent of the proportion of their share in deceased’s estate.

Right to dower is a transferable right under Islamic Law and thus, in case the wife dies before the recovery of her dower then her heirs can recover the same by stepping into her shoes. Although dower, per se, is not a charge on the husband’s estate but one may be created by an agreement between the parties or by a decree of court. Thus, it is clear that a court can create a charge on husband’s estate in wife’s favour for the recovery of dower and such a charge will be fully enforceable by law. Mulla and Ameer Ali, both, are of the view that the court should not create a charge in wife’s favour against her husband’s property, since it will give priority to the claim of the wife against the claim of other creditors of the deceased. But sometimes, it is the only way to protect the interest of the wife by securing it on the deceased husband’s estate and if this is the case, the court has full power to do so.

3. Right to Retain the Property of her Deceased Husband

Right to retention is a Muslim wife’s right whose dower has not been paid. Under this right, she can retain the possession of the husband’s property until the full satisfaction of her dower debt. As stated earlier that a widow’s claim is no greater than the claim of any other unsecured creditor of her husband. The only exception in her case is that if she is in possession of the property of her husband, then she can retain the same until her dower debt is paid. But if she is not in possession of any kind of property of her husband, then she cannot claim its possession as a matter of right. This applies only if she is already in possession of the estate and possession was obtained by her in a peaceful manner without any

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88 Imtiaz Begum v. Abdul Karim Khan, AIR 1930 All 881.
89 Ameer-oonnsa v. Mooradoon, (1855) 6 MIA 211.
90 Qasim v. Habibur Rahman, ILR (1929) 56 IA 250.
91 Supra Note 61 at 284.
92 Supra Note 43 at 450.
93 Kulsum Bibi v. Shiam Sunder Lal, AIR 1936 All 600.
94 Hamira Bibi v. Zubaida Bibi, ILR (1916) 38 All 581.
fraud or use of force. It is by way of compulsion to obtain her unsecured debt. But this is
applicable only after the dissolution of marriage either by death of the husband or by divorce
and in no case this right will arise during the subsistence of marriage.

In the right to retain the possession of property in lieu of her dower, the wife can satisfy her
claim only from the rents and profits that accrue from the property against which such a right
lies. The right to retention of property does not give her any title over the same. Title is in the
heirs of the deceased and in the widow off course. Therefore, during such retention, she
cannot alienate the property by sale or by mortgage in order to satisfy her dower and any
kind of alienation shall be unlawful except up to the extent of her own share in the property
and not of the shares of the other heirs of her deceased husband. The most outstanding feature
of the wife’s right to retention of property in lieu of dower is that once she comes into
possession of the property, she cannot be dispossessed by anyone until the full satisfaction of
her dower debt and if any one dispossesses her, then she can claim and recover the possession
back.

Possession here means the actual possession and where she has not obtained the actual
possession of her deceased husband’s estate in lieu of her dower, then she cannot exclude the
other heirs from possession. They are jointly entitled to the possession of the property of the
decedent along with her. If a widow obtains the possession of her husband’s estate without
his or his heir’s consent, she cannot get lien of her dower in such a case. It was held in the
case of Syed Yousaf Akbar Hussain v. Syed Murtaza Akbar Hussain that the limitation
period of three years from the death of the husband does not operate in the case of retention
of property by the wife in lieu of her dower provided the possession was obtained by other
than fraud or force.

Possession of estate by the widow in lieu of her dower is in no way a bar to suit for dower
and she can simultaneously bring a suit for the recovery of her dower against the concerned
parties. But where she chooses to file a suit for the recovery of her dower in the court of law,
she must offer, in such a suit, to give-up the possession of the property. While Patna High Court forms the opposite view in the case of Mohitan v. Zubera in this regard. Further, it was held in Kaniz Fatima v. Ram Nandan case that if she sues for the recovery of only a part of dower debt then she will not be entitled to claim the balance of such debt afterwards. Since, the widow’s retention of property in lieu of dower is a mere retention right therefore, she will be liable to render accounts also.

**Relinquishment of Dower**

Although the wife cannot claim at the time of marriage as a matter of right not to receive any dower but after marriage takes place, she has the right to remit the whole or a part of her dower in the favour of her husband or his heirs. It is obvious that such remission must be with her free consent and must not be forceful in any way. In the case of Hasnumiya v. Halimnussa, it was held that the consent given in great mental distress, such as when her husband is on the death bed or has died, cannot amount to free consent and hence, it is not binding upon her. Further, in the case of Muhammad Mashhud Hassan Khan v. Muhammad Anwar Husain Khan, it was held:

“Where a Muslim wife relinquished her dower by a written deed of release in favour of her husband, and died five days after, there was cogent evidence that at the date of the relinquishment and four weeks prior to her death, she was suffering mortal sickness and was under apprehension of death, it was held that as it was highly improbable that she would have relinquished her dower if she had not been apprehensive that death was imminent, the deed of release was inoperative.”

As dower is the personal right of the wife against her husband so, only she has the right to relinquish and her guardian has no power to do the same on her behalf. While relinquishing her right to claim dower in her husband or his heirs’ favour, the wife must be sane and must have reached the age of puberty otherwise the relinquishment will be null and void.
Relinquishment of dower by the wife is a unilateral act and hence, the acceptance of the remission by the husband or his heirs is not at all necessary. But where the husband refuses, it returns back to the wife. Relinquishment of dower by the wife in favour of her husband or his heirs may be conditional also. e.g., where the wife relinquishes her dower in her husband’s favour on the condition of the payment of an annuity to the wife by the husband as a consideration for such relinquishment, it will be a valid condition. The wife has also the right to reduce the amount of dower voluntarily. Baillie writes in his book that under Hanafi law, a wife is entitled to claim dower even if she has contracted expressly not to claim it.

4.5.2. Right to Maintenance

Islamic Law provides financial support to a woman at every stage of her life, like in her childhood, a daughter is the responsibility of her father, in her youth, this responsibility shifts upon the shoulders of her husband and he has to maintain her and in her old age, her children are bound to maintain their old-aged mother if she lacks the means to maintain herself. In case of maintenance of parents, the law does not make any distinction between a son and a daughter. The reason behind this is simply clear and is that both of them inherit property from them on their death. Therefore, Islamic Law does not leave a woman to be a destitute on the basis of her weaker sex. One thing is to be noted here that the responsibility of maintenance of children and parents arises only when they don’t have any means to support themselves but in case of wife, a husband is bound to maintain her even if she has the means to support her own maintenance. Even if the wife is richer than the husband, then also the husband’s responsibility arises for her maintenance and he cannot claim the lack of resources for the same.

The economic conditions of the parties play a dominant position for the claim of maintenance under Islamic Law and it gives due consideration to the economic conditions of both- the one who has the obligation to maintain as well as the one who has to be maintained, before

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114 Ghulam Md. v. Ghulam Husain, ILR (1931) 59 IA 74.
116 Supra Note 56 at 91.
117 Supra Note 9 at 204.
118 Supra Note 39 at 227.
putting any responsibility of maintenance upon the shoulders of the obligor with the sole exception of wife’s maintenance where no such consideration is taken into account.\textsuperscript{119}

According to \textit{Radd Al-Muhtar}, maintenance is that which a man spends over his family (children, wife, parents or other indigent blood relations) which, in law, means food, clothing and lodging.\textsuperscript{120} \textit{Hedaya} lays down that maintenance comprehends all things which are necessary for the sustenance of a person’s life and includes in its ambit the food, clothes and lodging, etc.\textsuperscript{121} In this regard, \textit{Fatawa-i-Alamgiri} lays down that maintenance involves food, raiment and lodging, though in common parlance its limit is up to the food only.\textsuperscript{122}

The principles of maintenance are determined by the strength of claims and affections and duties of persons on whom such obligation has been cast. Islamic jurists did not keep distinct moral and legal obligations. Under Islamic Law, the moral and legal duties, in case of maintenance, are connected with each other and it considers the right of maintenance a moral obligation also, apart from being a legal obligation. The Bombay High Court has tried to distinguish between the moral and the legal duty in the case of \textit{Mohd. Jusab v. Haji Adam}\textsuperscript{123}:

“It has been contended that the Muhammadan Law as to maintenance is a law of imperfect obligation imposing a moral and not a legal obligation. This distinction between the laws of perfect and imperfect obligation has been discussed in detail by Adbur Rahim at page 62 of his Principles of Mohammadan Jurisprudence, where he has described the laws as to domestic relations to be laws of perfect and not imperfect obligation. Later on at page 343, Abdur Rahim has referred to maintenance of children being a right against their father. So also Wilson in Chapter VI of his Anglo-Muhammadan Law has treated the rights of maintenance as rights enforceable under Anglo-Muhammadan Law, and in para 142 has asserted the right of minor sons to maintenance from their father on the authority of page 456 of Baillie’s Digest so that there would appear to be no reason to doubt that the rights of maintenance are enforceable under Anglo-Muhammadan Law.”\textsuperscript{124}

Thus, it is clear from the language of above-mentioned excerpt from the judgment of the Bombay High Court that, under Islamic Law, the maintenance is a legal obligation too and not only a mere moral obligation. Islamic Law of maintenance of women and children is based on justice and is related to two factors:

\begin{itemize}
  \item \textsuperscript{119} \textit{Supra} Note 66 at 181.
  \item Jesse Russell and Ronald Cohn (Eds.), \textit{Radd Al-Muhtar Ala Ad-Dur Al-Mukhtar} 316 (Book on Demand, New Delhi, 2012)
  \item Charles Hamilton, \textit{The Hedaya- Commentary on the Islamic Laws} 140 (Kitab Bhavan, New Delhi, 1994).
  \item \textit{Fatawa-e-Alamgiri}, Vol. I at 271.
  \item ILR (1911) 37 Bom 71.
  \item As cited by \textit{Supra} Note 66 at 179.
\end{itemize}
(i) Islamic Law makes maintenance incumbent upon a person towards another person according to the former’s proportion of inheritance in the latter’s estate; and

(ii) It is a binding obligation upon the nearest affluent relative to provide sustenance for his poor relatives.

Definition of Maintenance

The word ‘maintenance’ is actually the translation of the Arabic word ‘nafaqah’ which has been defined as under in the works of various authors:

Hedaya defines maintenance in the following words:

“It includes all those things which are necessary for a person for the sustenance of life such as food, clothes and lodging whereas many thinkers confine this to food only.”

Radd Al-Muhtar defines maintenance as under:

“Literally, it means that which a man spends over his children (as dependents); in law, it means food, clothing and lodging, in common use it signifies food.”

In Fatawa-i-Alamgiri, maintenance has been defined as under:

“Maintenance comprehends food, raiment and lodging, though in common parlance, it is limited to food only.”

Syed Khalid Rashid, in his book ‘Muslim Law’, has enumerated the following principles of maintenance:

(i) A person, who has no property of his own to survive upon, is entitled to maintenance under Islamic Law.

(ii) Those who are related to the obligor in the prohibited degrees of relationship are also entitled to maintenance from him/her.

(iii) A person is also entitled to maintenance from the obligor if he/she is related to him as his wife or child.

(iv) The obligor is liable to maintain his relations, only if he has sufficient means to support them.

125 Supra Note 121 at 140.
126 Supra Note 120 at 316.
127 Supra Note 122 at 271.
128 Supra Note 66 at 181.
Further, he writes that though, a person is under a greater liability to maintain his wife, minor sons, unmarried daughters, mother, father, paternal grandfather and paternal grandmother, but this responsibility on his part is also hedged by the factor of their economic condition.\textsuperscript{129} Thus, Islam gives due consideration to the economic conditions of both- the one who has the obligation to maintain as well as the one who has to be maintained- before putting any responsibility of maintenance upon the shoulders of the obligor. Therefore, the economic conditions of the parties play a dominant position for the claim of maintenance under Islamic Law. The only exception to this rule is the wife as she is entitled to maintenance from her husband even if she has the means to maintain herself or even though she may be richer than him.\textsuperscript{130}

Islamic Law of maintenance comprises one of its vast areas of the \textit{Shari’ah} rulings but here, the researcher has not dealt with the whole law of maintenance. Instead, she has kept her research confined to the maintenance of women only i.e., maintenance she is entitled to in her different capacities like as a daughter, as a wife and as a mother.

\textbf{i) Right to Maintenance as a Daughter}

Islamic Law makes the upbringing of a daughter and her maintenance, a responsibility of the father that has been laid down upon him. Islam provides that there should be no partiality in the upbringing of a daughter and a son. Till her marriage, the upkeep of a daughter is an obligation of her father.\textsuperscript{131} Islamic Law of maintenance does not make any discrimination on the basis of sex and both (son or daughter) are equally entitled to maintenance from their father.\textsuperscript{132}

Islamic Law makes parents duty-bound to support and show kindness and justice to their daughters. Father is bound to maintain his daughter until she is married. He is also responsible for the upkeep of his widowed or divorced daughter(s). The Holy Prophet (PBUH) said:

\begin{itemize}
  \item \textsuperscript{129} \textit{Ibid.}
  \item \textsuperscript{130} \textit{Supra} Note 39 at 227.
  \item \textsuperscript{131} \textit{Ibid.}
  \item \textsuperscript{132} Badre Alam Khan, \textit{Economic Rights of Women under Islamic Law and Hindu Law- A Comparative Study} 35 (Adam Publishers and Distributors, New Delhi, 1999).
\end{itemize}
“Should I not tell you what is the best charity that you should show kindness to that daughter who (becoming a widow or having been divorced) has been returned to you, and who has no other maintainer or supporter.”133

Thus, Islamic Law gave the girl child not only the right to life by condemning the ill-practice of female infanticide but also the right to be maintained by her father on an equal footing along with her brother(s). According to one hadith, once a man kissed his son and placed him on his lap in the presence of the Holy Prophet (PBUH) but did not do the same to his daughter. The Holy Prophet (PBUH) immediately objected and said, “You are unjust. You should have even kissed your daughter and placed her on the other lap”. The Holy Prophet (PBUH) did not only speak about justice, but he practised it too.134 Apart from the maintenance of daughter, Islam also condemned the killing of daughters. The Holy Qur’an forbids the practice of female infanticide in the following verses:

“...And that ye slay not your children because of poverty...”135

“And when the female (infant) buried alive is questioned for what crime she was killed.”136

The Holy Prophet (PBUH) is also reported to have prevented the female infanticide in the following words:

“One who is checked through the female born and he treats her well; would be saved from hell (by that female child).”137

Further, regarding the father’s liability of maintenance of children (son or daughter), the Holy Qur’an rules out:

“The mothers shall give suck to their offspring for two whole years, if the father desires, to complete the term. But he shall bear the cost of their food and clothing on equitable terms...”138

The above-mentioned verse of the Holy Qur’an clearly states that it is a father’s responsibility to maintain his children and this responsibility is up to such an extent that even the mother of the child can claim maintenance for suckling him/her. Further, the Holy Prophet (PBUH) declared:

133 Ibne-e-Majah, Abwahul Adab.
134 Reported in Sahih Muslim.
135 Holy Qur’an, VI:151.
137 Dr. Zakir Naik, Rights of Women in Islam- Modern or Outdated? 16 (Adam Publishers and Distributers, New Delhi, 2010).
138 Holy Qur’an, II:233.
“Whoever nourishes three daughters, educates and trains them, gets them married (and afterwards) offers a gentle behaviour to them has his place reserved in heaven.”\textsuperscript{139}

This hadith of the Holy Prophet (PBUH) makes it clear that Islamic Law makes incumbent upon the father to provide for the education and marriage also of the daughter(s) and maintenance has not been confined just to the basic necessities of life only like food, clothing, shelter and medicine, etc.

\textbf{ii) Right to Maintenance as a Mother}

As a mother, a woman is accorded a special place of honour in Islam. The Holy Qur’an discusses the immense honour and respect due to both the parents, and especially to the mother:

\begin{quote}
“And We have enjoined on man (to be dutiful and good) to his parents. His mother bore him in weakness and hardship upon weakness and hardship, and his weaning is in two years - give thanks to Me and to your parents—unto Me is the (final) destination.”\textsuperscript{140}
\end{quote}

The projection of woman as the most honourable human being in the form of a mother makes it clear that what sort of a society Islam wants to create. It is incumbent on a man to provide maintenance for his parents if they happen to be in necessitous circumstances. This obligation of maintaining parents does not end by the mere fact that they are able to earn something for themselves. The children’s obligation to maintain their poor parents is irrespective of sex and wealth. Any son or daughter in easy circumstances may be forced to pay the whole amount of maintenance that may be required.\textsuperscript{141}

\textbf{iii) Right to Maintenance as a Wife}

Under Islamic law, every person’s maintenance should be given from his own property whether he is a minor or a major. As a general rule, the right of maintenance is available only to the necessitous persons who are poor and cannot earn their maintenance. But it may be noted that the wife is the only one who is entitled to maintenance even if she has got the means of maintaining herself, and the husband is without any means. A wife can claim maintenance from her husband in the following two situations:

\textsuperscript{139} Reported in \textit{Sahih Bukhari}.
\textsuperscript{140} \textit{Holy Qur’an}, XXXI:14
\textsuperscript{141} N.M. Shaikh, \textit{Women in Islamic Society} 217 (Kitab Bhavan, New Delhi, 1991).
A. Maintenance During the Subsistence of Marriage

Under Islamic Law, as soon as the marriage is contracted validly, the rights and duties of the parties come into existence on the basis of establishment of the marriage tie. The husband becomes bound to provide maintenance to his wife but this is subject to the condition of wife being not rebellious or too young for the consummation of marriage. Thus, according to Shari‘ah, maintenance of wife is compulsorily the responsibility of the husband without any consideration of his financial status and he cannot escape from this responsibility except under the provisions of Shari‘ah. The Hanafi School of Islamic Law says that if the husband and wife are both wealthy, the maintenance of wife shall be according to her status in life; In case the wife being at a financially lower level, her maintenance shall be the mean between the rich and the poor; but if the reverse is the case, he shall spend on her according to his means and any deficiency shall become a liability as credit due from him to be paid to her at his convenience. If a wife is rich, a servant shall be provided to her; if the wife does not want to live with the husband’s relations, she can demand a separate house (or an apartment in the same house but affording her privacy). It is her legal right and the husband has to meet it. It is worth mentioning here that under Shari‘ah, a wife is not obliged to serve her husband and do the household chores. If she undertakes it, it is courtesy from her and the urge of her moral virtue but she cannot be compelled to do the same.142

The husband, under Shari‘ah, is required to provide his wife with food, clothes, a place to live and medical treatment according to his environment, conditions and income. The wealthy have their own measure, whereas the poor have theirs. The Holy Prophet (PBUH) said in this regard:

“You are obliged to provide them with food and clothes honourably.”143

The following verses of the Holy Qur’an provide injunctions for the maintenance of wife:

“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…”144

“Let the man of means spend according to his means: and the man whose resources are restricted, let him spend according to what Allah has given

142 Supra Note 13 at 178.
143 Reported in Sahih BuKhari.
144 Holy Qur’an, IV:34.
him. Allah puts no burden on any person beyond what he has given him. After a difficulty, Allah will soon grant relief.”

“Lodge them where ye dwell, according to your wealth, and harass’ them not so as to straighten life for them...”

According to some well-known Traditions, reported in authentic books of hadith, the Holy Prophet (PBUH) required his followers to accord their wives the best possible treatment. He impressed upon men the rights of women regarding the food, clothing and lodging. Even in his famous farewell address at Arafat, the Apostle of Allah (PBUH) did not forget to exhort the believers to fulfil their obligations regarding the proper maintenance of their women. The Holy Prophet (PBUH) said:

“Fear Allah regarding women. Verily you have married them with trust of Allah and made their private parts lawful with the word of Allah... They have got rights over you in respect of their food and clothing according to means.”

Therefore, it is clear now that the husband is bound to maintain his wife. Her right to receive maintenance is absolute even if she is very rich and owns a lot of property. The husband is bound to maintain his wife so long as she is faithful to him and obeys his reasonable orders. But he is not bound to maintain a wife who refuses herself to him or is otherwise disobedient, unless the refusal or disobedience is justified by non-payment of prompt dower or she leaves the husband’s house on account of his cruelty. If the husband is poor and the wife supports the family, she is entitled to recover the amount expended by her from the husband when he is in easy circumstances. Further, the notion of maintenance goes so far in Islam that, according to the law, a wife is not obliged even to give her breast to her suckling child; it is the duty of the father of the child to procure for it a foster mother at his own expense, if the mother does not want to suckle the child.

**Conditions of Maintenance**

The wife’s right to maintenance is subject to the fulfilment of the following conditions:

(i) The first condition is the age of the wife which lays down that the wife must have attained an age at which she can render conjugal rights to the husband and if the

147 Reported in *Sahih Bukhari* and *Sahih Muslim*.
148 *Supra* Note 34 at 236.
wife is minor i.e., she has not attained the age of maturity, then she will not be entitled to maintenance. In this regard, Hanafi law and Shia law both propose the same but according to the Shafi‘i law, it makes no difference whether the wife is minor or not. Thus, if the wife is too minor for the consummation of marriage then she is not entitled to claim maintenance. But if the wife refuses to cohabit with her husband on account of non-payment of her prompt dower by the husband, her right to maintain still subsists.\(^{149}\)

(ii) Second condition which is required to be fulfilled by the wife for the claim of maintenance from her husband is that except for some reasonable cause, she should be accessible for conjugal intercourse. If the husband is unable to have sexual intercourse with his wife because of any act or conduct of the wife, then the husband is not liable to maintain her. In case, where the wife is residing at a place other than her husband’s home and which is preventing the husband from having sexual intercourse with her, then the husband is not liable to maintain her and in case, where she makes unjustified refusal to stay with her husband, then also she is not entitled to maintenance.\(^{150}\) But where the wife is an adult and the husband is a child or if the husband is sick or impotent, she would be entitled to maintenance.

(iii) The third and the last condition for the claim of maintenance is that except for some reasonable cause, she should reside with the husband and obey all his reasonable commands. The wife is under a duty to obey the reasonable commands of the husband. If the wife leaves the husband’s place without his permission she will lose her right of maintenance. But where the husband treats her with cruelty, then she has a valid ground to live separately from him and she will be entitled to maintenance in such a case.\(^{151}\) In Hedaya, it has been provided that where, after the consummation of marriage, wife falls sick (at her husband’s or father’s house) which renders her unfit for the sexual intercourse, then also she will be fully entitled to maintenance from her husband. Further, it is also provided that in case where the wife falls sick in her husband’s house and moves or gets herself moved to her father’s house, she has the right to be maintained by her husband even when he claims her back so long as it is found impossible to remove her from there. But if her removal is possible and still she refuses to return back to her husband, then


\(^{150}\) Ali Akbar v. Fatima Begum, AIR 1929 Lah 902.

\(^{151}\) Amir Mohd. v. Mt. Boshra, AIR. 1956 Rajasthan 103.
in such a situation, she loses her right to maintenance on account of such refusal. Where the husband has married a second wife or keeps a mistress, then the wife may refuse to live with him but her right to claim maintenance shall not be affected in such a situation.

Thus, a husband, under Islamic Law, is obliged to maintain his wife even though he is poor, sick or too young for the cohabitation or impotent. This obligation arises irrespective of the fact whether she is Muslim or non-Muslim, rich or poor, old or young, so long as she is able to fulfil the primary object of the marriage. Such a maintenance is due upon the husband even if his wife resides in her parent’s house unless she has moved there without any valid reason and on his demand to accompany him to reside with him in his house, she refuses the same. Therefore, the minority of the husband is no bar to maintenance of wife and where the husband is minor (not able to consummate marriage on account of his minority) the wife is still entitled to maintenance. If the husband has no source of income to maintain his wife, then his guardians shall be made liable to pay the same.

It can be said thus, that under Islamic Law, a wife is entitled to be maintained by her husband so long as she is faithful to him and obeys all his reasonable orders. It is immaterial that she has the means to maintain herself and the husband is without any means to provide maintenance for her. For the claim of maintenance, the marriage must be regular but the marriage which is considered irregular solely on the account of absence of witnesses is deemed as regular marriage for the purpose of maintenance. It, therefore, becomes evidently clear that the wife’s claim to maintenance rests on the fulfilment of the following conditions:

(a) She has attained the age of puberty, i.e., an age at which she can render herself to her husband for conjugal rights; and
(b) She places and offers to place herself in his power so as to allow free access to herself at all the lawful times and obeys all his lawful commands.

Maintenance by Agreement

In addition to the legal obligation of maintenance of wife by her husband, there may be stipulations in the marriage contract which may render a husband liable to make special

\[152\] Supra Note 121 at 701-703.
\[153\] Badruddin v. Aisha Begum, 1957 All LJ 300.
\[155\] Mt. Khatrija v. Abdulla, AIR (30) 1943 Sind 65.
allowances to the wife. Thus, under Islamic Law, a husband and wife or their guardians may validly enter into an agreement that upon the happening of a certain specific event, the husband shall provide maintenance to his wife. Such event may include the ill-treatment of the wife by the husband, disagreement between them, or second marriage of the husband, etc. But such an agreement should not be in conflict with the provisions of Shari’ah or opposed to public policy, e.g., an agreement that wife shall not be entitled to claim maintenance is null and void as it is in conflict with Shari’ah rulings and is also against the public policy. On the other hand, the agreements like providing of betel allowance (kharch-e-pandan)\textsuperscript{156} for the wife by her husband or an allowance for dry fruits (mewa khori) were held to be valid and binding even though they had been entered into by the guardians of the minors on their behalf.\textsuperscript{157}

Similarly, in the case of \textit{Mansur v. Azizul},\textsuperscript{158} it was held by the court that where the husband and wife enter into an agreement after his marriage with the second wife that the husband will provide a certain amount of maintenance to the wife if, in future, she fails to adjust with the second wife, such an agreement is valid not being against the public policy and the husband was made liable to pay maintenance.

\section*{B. Maintenance of a Divorced Woman}

Duty of providing maintenance to women is so important that the Holy \textit{Qur’an} makes even the divorced wife entitled to it during the period of \textit{Iddah} when the husband would provide her food, clothing and lodging and he cannot expel her from his house. The Holy \textit{Qur’an} makes it a duty for the pious and God-fearing persons to make some provision even for those women who have been divorced by them. The Holy \textit{Qur’an} lays down in this regard:

\begin{quote}
“\textit{There is no blame on you if ye divorce women before consummation or the fixation of their dower; but bestow on them (a suitable gift) the wealthy according to his means, and the poor according to his means- a gift of a reasonable amount is due from those who wish to do the right things.}”\textsuperscript{159}

“For divorced women maintenance (should be provided) on a reasonable (scale). This is a duty on the righteous."\textsuperscript{160}
\end{quote}

\textsuperscript{156} Khawaja Mohammad Khan v. Nawab Hussain Begum (1910) 37 IA 152.
\textsuperscript{157} Mohd. Ali Akbar v. Fatima Begum, ILR (1929) 11 Lah 85.
\textsuperscript{158} AIR 1928 Oudh 303; ILR (1928) 3 Luck 603.
\textsuperscript{159} \textit{Holy Qur’an}, II:236.
\textsuperscript{160} \textit{Holy Qur’an}, II:241.
“O Prophet! When you divorce women, divorce them at their prescribed periods, and count (accurately) their prescribed periods: And fear Allah your Lord: and turn them not out of their houses, nor shall they (themselves) leave, except in case they are guilty of some open lewdness. Those are limits set by Allah; and any who transgresses the limits of Allah, does verily wrong his (own) soul: Thou knowest not if perchance Allah will bring about thereafter some new situation.”\(^{161}\)

“Let the women live (in ‘Iddat,) in the same style as ye live, according to your means; annoy them not, so as to restrict them. And if they carry (life in their wombs), then spend (your substance) on them until they deliver their burden: and if they suckle your (offspring), give them their recompense; and take mutual counsel together, according to what is just and reasonable. And if ye find yourselves in difficulties, let another woman suckle (the child) on the (father’s) behalf.”\(^{162}\)

Thus, it is clear that Islamic Law does not only provide for the maintenance of wife during the continuance of marriage but also supports for her maintenance in different ways even after the dissolution of marriage but until the expiry of \textit{iddah}. Further, Islamic Law lays down that if the wife is pregnant at the time of divorce, then the husband is bound to maintain her till the delivery of the child and in case she suckles the child, she would be entitled to receive the due payment for this service. Again the Holy Qur’an says:

“\textit{The duty of feeding and clothing nursing mothers in seemly manner is upon the father of the child.}”\(^{163}\)

In case the father of the child is dead, the obligation of providing maintenance to the nursing mother would be on the heir of the deceased, as the Holy Qur’an says:

“\textit{And on the (father’s) heir is incumbent the like of that (which was incumbent on the father).}”\(^{164}\)

Until recently, according to Muslim Personal Law in India, the liability of the husband to maintain his wife ceased on the expiry of \textit{iddah} period once the marriage was dissolved by divorce. Therefore, a wife was entitled to maintenance only till the period of \textit{iddah}. Fyzee explains the principle regarding the maintenance of divorced wife in the following words:

“\textit{The wife’s right to maintenance commences on divorce, or when she comes to know of the divorce, and ceases on the death of her husband, for her right of inheritance supervenes. The widow is, therefore, not entitled to}”

\(^{161}\) \textit{Holy Qur’an,} LXV:1.

\(^{162}\) \textit{Holy Qur’an,} LXV:6.

\(^{163}\) \textit{Holy Qur’an,} II:223.

\(^{164}\) \textit{Holy Qur’an,} II:223.
maintenance during the *iddah* of death. It is otherwise in the case of divorce, where she is entitled to maintenance during *iddah*.”

This principle was also followed in the cases of *Md. Shamsuddin v. Noor Johan* and *Chandbi v. Badesha*. But Ameer Ali is of the view that if the separation is caused due to wife’s misconduct, then she loses her claim of maintenance.

On this point, Tyabji has expounded the law lucidly in his book by stating that under Hanafi law, a woman shall be entitled to maintenance during the period of *iddah* irrespective of the fact that whether it takes place in the form of revocable or irrevocable divorce, be it single or triple, and whether she is pregnant or not but if the marriage has been dissolved for some cause of criminal nature which originated from the woman, then she will not be entitled for the claim of maintenance. Further, he has laid down that under the Shiite and Shafi‘i law, only on the happening of revocable divorce, the wife will be entitled to maintenance and no such right exists if the divorce takes place irrevocably, unless the divorce has been pronounced during the wife’s pregnancy in which maintenance will be provided by the husband until delivery. But, he expounded further, the wife’s right to maintenance shall cease on the expiry of *iddah* period.

According to *Fatawa-i-Alamgiri*, a woman who is undergoing *iddah* on account of divorce is entitled to maintenance and lodging, whether the divorce is revocable or irrevocable, and be she pregnant or not. No maintenance was sanctioned in favour of an apostate or a criminal wife under the old law. In case of dissolution of marriage by the death of the husband, the widow’s right to maintenance was ruled out even during the *iddah* also.

But now the trend has changed and divorcée can claim maintenance from her former husband even after the dissolution of their marriage, if she has no means to support her sustenance. The controversy that arose after the famous Shah Bano’s case led to the enactment of *Muslim Women (Protection of Rights on Divorce) Act, 1986*. In the case of *Mohd. Ahmed Khan v. Shah Bano Begum*, Supreme Court held that although the husband’s liability to provide maintenance to his divorced wife is limited to the period of *iddah* only but it does not

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165 Supra Note 76 at 209.
166 AIR 1955 Hyderabad 144.
168 Supra Note 59 at 461.
169 Supra Note 122 at 276.
171 1985 SCR (3) 844.
contemplate or countenance the situation envisaged by Section 125 of the *Cr.P.C.*, 1973. The Court held further that it would be unjust in cases of those women who are unable to maintain themselves after the period of *iddah*. Therefore, the Court came to the conclusion that where the wife has the means to support herself financially, then the husband’s liability of maintenance shall cease after the expiry of *iddah* period. But if the wife is unable to maintain herself after *iddah* period, in such cases, she will be entitled to have recourse to the provisions of *Cr.P.C.* under Section 125.172

The decision of Supreme Court in the case of Shah Bano was considered by many as going against the principles of Islamic Law. But the legislature took the opportunity arising out of the decision of Supreme Court in the same case to specify the rights a Muslim divorced woman which she would be entitled to at the time of divorce and to protect her interests. Prior to that, a Muslim woman had two options for the claim of maintenance; she could get it under her personal law (i.e., Islamic Law) and also she could claim maintenance under the *Criminal Procedure Code* (*Cr.P.C.*).

**Maintenance of Wife under *Criminal Procedure Code* (*Cr.P.C.*)**

Under the old Section 488 of *Cr.P.C.*, a wife was entitled to claim maintenance allowance from her husband irrespective of the provisions of the traditional personal law. The right to maintenance of Muslim woman under section 488 of *Cr.P.C.* was independent right and hence, she was not barred from claiming maintenance under Islamic Law if she had claimed the same under the said section of *Cr.P.C.* In *Badruddin v. Aisha Begum*,173 the Allahabad High Court held that the *Muslim Personal Law (Shariat) Application Act, 1937* has no effect on Section 488 of *Cr.P.C.* Under this section, the magistrate could compel the husband to pay a monthly allowance not exceeding rupees 500 to his wife as maintenance. But the claim of maintenance by the wife under Section 488 of *Cr.P.C.* did not include in its scope the divorcees and hence, maintenance could be claimed during the continuance of marriage only.174 But where the divorce was not communicated to her even up to *iddah*’s expiry, the wife could get maintenance until the communication of the divorce be it after the expiry of the period of *iddah*.175

173 1957 All LJ 300; See also *Sarwari v. Shaft Mohd.*, (1957) I All 255.
175 *Supra* Note 66 at 187.
To mitigate this evil, the old Section 488 of *Cr.P.C.* was replaced by the new Section 125(1) Explanation (b) in 1973 which defined the term ‘wife’ as to include the woman who was divorced by or had obtained divorce from her husband and had not remarried. Therefore, now under Section 125 of *Cr.P.C.*, a husband could not frustrate the wife’s claim to maintenance by divorcing her. This section applies to all the communities and therefore, has the characteristic of a common civil code. But Section 127(3)(b) ordains that the magistrate shall cancel his order passed under Section 125 if it is proved that the divorcee has received the whole of the sum from her husband which under customary or personal law was payable on such divorce. The Supreme Court envisaged the ‘*mahr*’ in the ‘customary sum’ of Section 127 in *Bai Tahira v. Ali Hussain.* But the watershed line on this point was drawn by the Supreme Court in the case of *Mohd. Ahmed Khan v. Shah Bano Begum* by overruling its earlier ruling that the payment of *mahr* money as a customary discharge was within the cognizance of the provision of Section 127(3)(b). The judgment in the case of *Shabana Bano v. Imran Khan* lays down that to find out the personal law of Muslims with regard to divorced women’s rights, the starting point should be Shah Bano’s case and not the original texts or any other material. By referring to the judgments in the cases of Danial Latifi and Iqbal Bano, it further held that even a divorced Muslim woman would be entitled to claim maintenance from her divorced husband, as long as she does not remarry. This being a beneficial piece of legislation, the benefit thereof must accrue to the divorced Muslim women. It was held that even if a Muslim woman has been divorced, she would be entitled to claim maintenance from her husband under Section 125 of *Cr.P.C.* after the expiry of period of *iddah* also, as long as she does not remarry.

**Maintenance under the Muslim Women (Protection of Rights on Divorce) Act, 1986**

As stated earlier that a great controversy arose in India after the Shah Bano case’s judgment, the Parliament had to intervene and it enacted *Muslim Women (Protection of Rights on Divorce) Act, 1986*. The Act aims to protect the rights of Muslim women who have been divorced. Sec. 3 of the said Act provides for giving the *mahr* or other properties of Muslim

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176 (1979) 2 SCC 316; AIR 1979 SC 362.
177 1985 SCR (3) 844.
178 AIR 2010 SC 305.
181 Shabana Bano v. Imran Khan, AIR 2010 SC 305
woman to her at the time of divorce. Sub-section (1) of the same section lays down as
under:  

3(1) Notwithstanding anything contained in any other law for the time being in force, a divorced
woman shall be entitled to-

(a) a reasonable and fair provision and maintenance to be made and paid to her within
the iddat period her former husband;
(b) where she herself maintains the children born to her before or after her divorce, a
reasonable and fair provision and maintenance to be made and paid by her former husband
for a period of two years from the respective dates of birth of such children;
(c) an amount equal to the sum of mahr or dower agreed to be paid to her at her time of
her marriage or at any time thereafter according to Muslim law; and
(d) all the properties given to her before or at the time of marriage or after the marriage
by her relatives or friends or the husband or any relatives of the husband or his friends.

Further, Section 4 of the Muslim Women (Protection of Rights on Divorce) Act, 1986
provides that notwithstanding anything contained in Section 3, a divorced woman is entitled
to file an application for maintenance from her relatives or Wakf Board, if she is not in a
position to maintain herself and if she has not been able to obtain fair and reasonable
maintenance from her husband. For the application of Section 4, following two requirements
should be satisfied:

(a) She is not able to maintain herself after the iddah period; and
(b) She had not remarried.

On the plain reading of clause (a) of Section 3, sub-section (1) of the Muslim Women
(Protection of Rights on Divorce) Act, 1986, apparently it seems that liability of the husband
to maintain his wife is up to the period of iddah only. The question on this point arose for the
first time in the case of Arab A. Abdullah v. Arab Bail Mohmuna Saiyadbhai before the
Gujarat High Court. In this case, the husband contended that under the said section, his
liability ceased after the expiration of iddah period as the maintenance was payable during
iddah period only and not beyond that. Rejecting the contention of the husband, the court
held that nowhere in the Act has been specified the period for which a divorced wife shall be
entitled to maintenance and nor did the Act provides that it was the said period only. Another
argument put forward by the petitioner was that under Section 4 of the Act, if a woman is
unable to maintain herself after the period of iddah then her relatives and failing them, the
Wakf Board shall provide for her maintenance. Rejecting this contention too, the court held

182 Section 3 of the Muslim Women (Protection of Rights on Divorce) Act, 1986.
183 AIR 1988 Guj 141.
further that this provision was intended to make additional arrangement for the wife where
the maintenance provided and the provision settled by the previous husband fell short of her
needs on account of some unforeseen circumstances.

On the same question that was raised before the Gujrat High Court in the above-mentioned
case, it was also held by a Full Bench of the Punjab and Haryana High Court in Kaka v.
Hassan Bano and Anr., 184 that under Section 3(1)(a) of the Act, a divorced Muslim woman
can claim maintenance which is not restricted to iddah period. The husband will have to show
that within the iddah period, he has provided, made and paid reasonable and fair provision
and maintenance to the wife which is an adequate provision for her life or till she remarrys.

In K. Zunaideen v. Ameena Begum and Anr., 185 the Division Bench of Madras High Court
held that Section 3 of the Muslim Women Act has to be given a broader interpretation
considering the object of the Act. Maintenance is not limited to iddah period and future
livelihood of the women has to be taken into consideration.

Further, in Danial Latifi’s 186 case also, the validity of the Muslim Women (Protection of
Rights on Divorce) Act, 1986 was upheld. A constitutional bench of Supreme Court in Danial
Latifi v. Union of India, 187 while upholding the validity of the Muslim Women (Protection of
Rights on Divorce) Act, 1986, concluded as under, the relevant para 36 of which reads:

“While upholding the validity of the Act, we may sum up our conclusions:
(1) A Muslim husband is liable to make 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 iddah
period must be made by the husband within the iddah period in terms of
Section 3(i)(a) of the Act.
(2) Liability of the Muslim husband to his divorced wife arising under
Section 3(i)(a) of the Act to pay maintenance is not confined to the iddah
period.
(3) A divorced Muslim woman who is not remarried and who is not able to
maintain herself after the iddah period can proceed as provided under
Section 4 of the Act against her relative who are liable to maintain her in
proportion to the properties which they inherit on her death according to
Muslim law for such divorced woman including her children and parents. If
any of her relative being unable to pay maintenance, the Magistrate may
direct the State Waqf Board established under the Act to pay maintenance.
(4) The provisions of the Act do not offend Articles 14, 15 and 21 of the
Indian Constitution.”

185 1998(II) D.M.C. 468.
Effect of *Muslim Women (Protection of Rights on Divorce) Act of 1986* on Wife’s Right to Maintenance under Section 125 of *Cr.P.C.*

On this point, it was held in the case of *Mahboob Khan v. Parvin Banoo and Anr.*,\(^\text{188}\) that after coming into force of the *Muslim Women (Protection of Rights on Divorce) Act, 1986*, the provisions of Sections 125 and 127 of *Cr.P.C.* stand repealed. The inevitable consequence was that not only right under Section 125(1) but also remedy under Section 125(3) are lost. Section 7 envisages complete effacement of the right and remedy under Section 125 of the Code and therefore, there can be no question of enforcing the same under sub-Section (3) of Section 125 of the Code.

*Rizwana Begum v. Motiullah*,\(^\text{189}\) also affirmed the principle that Section 125 of the Code will have no application to the case of a divorced Muslim woman who is governed by the provisions of the *Muslim Women (Protection of Rights on Divorce) Act, 1986*.

In *Hazran v. Abdul Rehman*,\(^\text{190}\) also a similar view was taken and the court held that read with Section 4, the intention of the Legislature is patently clear that the operation of Sections 125 to 128 of *Cr.P.C.* have been impliedly repealed by the *Muslim Women (Protection of Rights on Divorce) Act, 1986*.

Further, a full bench of Punjab and Haryana High Court held, in *Kaka v. Hassan Bano and Anr.*,\(^\text{191}\) that a divorced Muslim woman cannot have recourse to the provisions of Sections 125 to 128 of the Code after the commencement of the Muslim Women Act. However, recourse to the said provisions is permissible if parties agree as provided under Section 5\(^\text{192}\) of the *Muslim Women (Protection of Rights on Divorce) Act, 1986*.

Also in *Bibi Shahzaz v. State of Bihar and Anr.*,\(^\text{193}\) the Patna High Court held that after the enactment of the *Muslim Women (Protection of Rights on Divorce) Act, 1986*, divorced

\(^{188}\) 1988 Mh.L.J. 781.

\(^{189}\) 1989 Crl. LJ. 155.

\(^{190}\) 1989 Crl. L.J. 1519.

\(^{191}\) 1998(II) D.M.C. 85(F.B.)

\(^{192}\) Section 5- Option to be governed by the provisions of section 125 to 128 of Cr.P.C.- If, on the date of the first hearing of the application under sub-section (2) of section 3, a divorced woman and her former husband declare, by affidavit or any other declaration in writing in such form as may be prescribed, either jointly or separately, that they would prefer to be governed by the provisions of sections 125 to 128 of the Code of Criminal Procedure, 1973 (2 of 1974); and file such affidavit or declaration in the court hearing the application, the Magistrate shall dispose of such application accordingly.

\(^{193}\) 1999(11) D.M.C. 589.
women is not entitled to bring action under Section 125 of the Code. She can only claim maintenance under the provisions of the said Act.

Again, in the case of *Mst. Bilkis Begum v. Majid Ali Gazi and Anr.*,\(^ {194}\) it was held that so far as the claim of maintenance for the divorced wife is concerned, the proceeding’s under Section 125 cannot be proceeded with. She is entitled to receive her dues according to the provisions of the *Muslim Women (Protection of Rights on Divorce) Act, 1986*.

As to whether a magistrate is entitled to invoke his jurisdiction under Section 125 of *Cr.P.C.* to grant maintenance in favour of divorced Muslim women, it was held that subsequent to the enactment of the *Muslim Women (Protection of Rights on Divorce) Act, 1986*, the jurisdiction of the magistrate under Section 125 *Cr.P.C.* can be invoked only when the condition precedent mentioned in Section 5 of the Act is complied with.\(^ {195}\) A combined and harmonious reading of the provisions of Sections 3 to 7 of the Act of 1986 would clearly demonstrate that the general object of the legislation is to bring the law of maintenance payable to the wife in consonance with the principles of Islamic Law. Therefore, the provisions of Sections 125 to 128 of the Code will have no application to the Act of 1986 except in case of option exercised by the parties under Section 5 of the Act to any such claim of maintenance made by the wife under Section 125 of the Code.

Finally, in *Shamim Bano v. Asraf Khan*,\(^ {196}\) the Supreme Court made the law clear by answering the question that whether a divorced Muslim woman can claim maintenance under Section 125 of *Cr.P.C.* from her former husband even after passing of the *Muslim Women (Protection of Rights on Divorce) Act of 1986*. In this case, Supreme Court held that the Magistrate still retains the power of granting maintenance under Section 125 of the Code to a divorced Muslim woman only if the proceeding was continuing without any objection and the ultimate result would be the same.

**Fixation of the Amount of Maintenance**

Islamic Law provides that while fixing the amount of maintenance, due consideration must be given to the respective financial conditions of both, the husband and the wife. Where both are rich, the amount of maintenance should be fixed on a generous scale in favour of the wife.

\(^{194}\) *JT 2002 Suppl 1 SC 115.*


\(^{196}\) *2014 (12) SCC 636.*
Usually, the maintenance amount is fixed by taking into account the status and needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband, but where the husband is poor and the wife is higher to him in status, then he must furnish as much as he is able out of the maintenance agreed upon, the balance constituting debt to the wife which will be payable when the financial position of the husband improves. Maintenance may be fixed in kind or in money, according to the variation in the price of commodities in the locality.

In *Jasbir Kaur Sehgal v. District Judge Dehradun*, regarding the fixation of the amount of maintenance of wife, the Supreme Court held that the court, while fixing the amount of maintenance in favour of a wife has to consider the status of the parties, their respective needs, the capacity of the husband to pay having regard to his reasonable expenses for his own maintenance and of those he is obliged under the law and statutory but involuntary payments or deductions. The amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband and also that she does not feel handicapped in the prosecution of her case. At the same time, the amount so fixed cannot be excessive or extortionate.

In *Shamima Farooqui v. Shahid Khan*, the reduction in the amount of maintenance by 50 per cent (i.e., from Rs. 4000 per month to Rs. 2000 per month) was held to be invalid and it was also held that the basis of fixation of the maintenance amount should be the earning capacity of the husband and not his actual income.

**Past Maintenance**

Fyzee, in his book *Outlines of Muhammadan Law*, on the question of a wife’s right to the past maintenance, observes as follows:

“Except under the *Shiite* and *Shafii* law, the wife is not entitled to past maintenance.”

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198 *Supra* Note 84 at 179.
201 *Supra* Note 76 at 213.
On the same question, the views of Tyabji are as under:202

“Under *Shiite* and *Shafi’i* law, the wife is entitled to maintenance notwithstanding that she has allowed it to get into arrears without having had the amount fixed by the Court, or by agreement with the husband. While, on the other hand, under *Hanafi* law, arrears of maintenance are not recoverable unless fixed by the Court or by agreement between the husband and wife; nor even after they have been so fixed, in case of divorce or death of either party; provided that arrears may be recovered if the Court has decreed maintenance, but not fixed its amount.”203

Thus, a Muslim wife is entitled to the arrears of past maintenance only if she belongs to the *Shiite* or *Shafi’i* School of Islamic Jurisprudence. A *Hanafi* wife can get the arrears of her past maintenance only if the court decrees the same in her favour or if the husband agrees to pay the same under an agreement and not otherwise.

### 4.5.3. Right to Inheritance of Property

Inheritance is the transfer of legal possession of deceased persons onto their descendants. It is really a very tough job to determine the justified quantity or ratio of assets to be distributed among the dependants and relatives. Thus, the law of inheritance forms the most important part of Islamic Law. The Holy Prophet (PBUH) is reported to have said:

> “Learn the laws of inheritance, and teach them to the people; for they are one half of useful knowledge.”204

The Islamic Law of inheritance is based on the combination of the *Qur’anic* rules relating to the inheritance of property and some of the pre-Islamic customs in the same regard. The Holy *Qur’an* did not sweep away the existing pre-Islamic customs of succession, but made a great number of amendments in the same. Right to inheritance of property under Islamic Law solely rests upon two principals i.e., grounds of marriage and blood relationship with the deceased.205 Inheritance, under Islamic Law, is opened only after a person is dead. Islamic Law does not recognise the birth right in inheritance and therefore, during his life time, a Muslim is the sole owner of his property and no one can interfere with his right to enjoyment of property. Thus, there is no surety that if an heir survives the ancestor, he would definitely inherit his property.206 After the death, the first charge on the estate of the deceased Muslim is

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202 Supra Note 59 at 271.
204 Reported in *Sunan Ibn Majah*.
206 *Abdool v. Goolam* (1905) 30 Bom 301.
his funeral charges, which include washing, shrouding and interring of the body together with the ceremonies connected therewith including the *chehlum* (i.e., the religious rites performed on the 40th day of the death of a Muslim). After the payment of the funeral charges of the deceased, his debts including the wages earned by and due to the servants are to be satisfied. After that, any bequest (made by the deceased Muslim) of not more than one-third of his property, shall be satisfied from the property of the deceased which is left after the payment of the funeral charges and the debts. After making all these arrangements, the inheritance of property by the heirs of the deceased opens up and the property gets devolved upon them in accordance to their share under the Islamic Law of inheritance.

Islam gave women the right to inheritance of property of their relatives back in the seventh century which was considered as a revolutionary step then. In contrast with other religions, Islam has guaranteed a fair right of inheritance to women. Before the advent of Islam, women across the globe were being deprived of their right to inherit property of their relatives. In fact they, by themselves, were considered as a part of the property which could be inherited by men along with the other properties. At that time, Islam came to their rescue and raised its voice against this grave injustice to the weaker sex, proclaiming aloud that woman has as much right to her share in the inheritance as the man. Islam banned the practice of inheriting women and declared them as an individual who have got similar rights of inheritance like that of men. Whether she is a daughter, wife, sister or mother, she has a share in the property of her deceased relative which has been fixed by Allah. The Holy Qur’an says regarding the right of women in the inheritance of property from their deceased relations:

“There is a share for men and a share for women from what is left by parents and those nearest related, whether the property be small or large- a legal share...”

Islam has not made any difference whether the deceased was a male or a female, and the same scheme of inheritance applies to their property. Under Islamic Law of inheritance, the female sex is no bar to inheritance of property of the deceased relative. But the share of inheritance depends upon the degree of relationship with the deceased and the number of

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207 *Supra* Note 43 at 38.
209 *Hayat-un-Nissa v. Muhammad* (1890) 12 All 290.
210 *Supra* Note 13 at 182.
211 *Supra* Note 137 at 13.
212 *Holy Quran*, IV:7.
heirs left behind. System of inheritance is perhaps the most detailed part of Islamic Law, but this study is confined to the rights of Muslim women only under the same system.

Therefore, it becomes crystal clear now that the principle of sameness and equality is fully applicable in the case of inheritance also under Islamic Law. The individual’s sex, age, or order of birth or marital status does not constitute a barrier to inheritance. Both men and women are entitled to inherit the property of their deceased relations but the share that they get may vary in each case.

**General Principles of Islamic Law of Inheritance:**

Following are the general principles upon which the Islamic Law of inheritance is based:

(i) **No Distinction of property**-

**Movable and Immovable Property:**

Under Islamic Law, there is no distinction between a movable and an immovable property. Every property, whether movable or immovable, is subject to distribution equally among the heirs of the deceased Muslim. The only exception is that Shia law does not entitle a childless widow to have a share in the husband’s immovable property such as agricultural lands, but she is fully entitled to have a share in the value of buildings or standing trees as these do not form the part of immovable property.

**Ancestral and Self-Acquired Property:**

There is no concept of joint family property or self-acquired property under the law of inheritance in Islam. Just because a person is the member of the family does mean that he is heir also and vice versa. It was held in the case of *Mohd. Abdul Rahim v. Mohd. Abdul Hakim* that where any of the family member holds assets or carries on business on behalf of other family members (as is common in the State of Andhra Pradesh), such a case will be an instance of partnership (express or implied) only, and the person holding such assets or business will stand in a fiduciary relationship with the other family members.

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215 AIR 1931 Mad 553.
(ii) **No Limited Interest**-

Under Islamic Law, the distinction between corpus (*ayn*) and usufruct (*manafi*) has been recognised for the purpose of inheritance. Islamic Law recognises absolute dominion only over the corpus which is heritable and unrestricted in point of time. Therefore, no limited interest can be created in corpus but it may be created in the usufruct.

(iii) **Rule of Primogeniture not Recognised**-

The rule of primogeniture is not recognised under the *Sunni* law of inheritance. But *Shia* law recognises this rule up to a certain extent i.e., the eldest son is entitled to his deceased father’s sword, wearing apparels, ring and the Holy *Qur’an*.\(^{216}\)

(iv) **No Birth Right**-

The principles of *nemo est heirs viventis* (a living person has no heir) is applicable in case of Muslims. It means that the right of inheritance devolves upon the heirs of a person only on his death and not during his lifetime. The heir’s right to inheritance is nothing more than a mere *spes successionis* i.e., a mere chance of succession which cannot pass by succession to his heir, nor can it pass by bequest or will.\(^{217}\) Therefore, his right may be defeated in a number of ways like the owner of the property may transfer it in his lifetime and an heir apparent cannot make any claim for the same.

(v) **Vesting of inheritance**-

Immediately after the death of a Muslim, his heirs are vested with the right of inheritance in his property and become entitled to their allotted shares under the Islamic Law of inheritance. This right of the heir cannot be lost if by chance his death takes place before the actual distribution of the deceased’s property among the heirs. Therefore, in case, where the death of an heir takes place, his own heirs will be entitled to a claim in his share. However, an heir who has predeceased the owner cannot have the right of inheritance.\(^{218}\)

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216 Supra Note 154 at 418.

217 *Abdul Wahid Khan v. Nuran Bibi* (1885) II Cal 597.

218 *NazirKhan Mohammed v. Damodhar M. Patre*, 2003 AIHC 3297 (Bom).
(vi) Devolution of Separate Shares-

As already mentioned above that the concept of joint family property is foreign to Islamic Law therefore, each heir gets his separate share on the devolution of inheritance in the deceased relative’s property.\textsuperscript{219} The share may vary in case of each heir (as allotted under Islamic Law) according to his degree of nearness to the deceased. The heirs are entitled to hold the property as tenant-in-commons, each having a definite share in the property.

(vii) Position of Missing Propositus-

The devolution of property upon the heirs of a missing person would arise only on the date of his presumed death and not on the date on which he disappeared. The earlier law in this regard was that a person was presumed to live up to ninety years from his date of birth but now the position has changed as Section 108 of the Indian Evidence Act, 1872 is applicable in cases of missing persons.\textsuperscript{220} If meanwhile, the missing person reappears then his property will be returned to him. According to Section 108 of the \textit{Indian Evidence Act, 1872}:

108- Burden of proving that person is alive who has not been heard of for seven years:-

“When the question is whether a man is alive or dead, and it is proved that he has not been heard of for seven years by those who would naturally have heard of him if he had been alive, the burden of proving that he is alive is shifted to the person who affirms it.”\textsuperscript{221}

(viii) Position of Missing Heir-

Where an heir is missing at the time of death of the ancestor, his share will be reserved for him and the other heirs will be given their shares. If he reappears, his share will be given to him; but in case where he is declared dead, his reserved share will devolve upon his heirs. The presumption of his death is also governed by the Section 108 of the \textit{Indian Evidence Act, 1872}.

(ix) Position of Illegitimate Person-

An illegitimate person is entitled to inherit from the property of his mother under \textit{Sunni} law but not from the property of the father. But under \textit{Shia} law, such a person is not entitled to inherit any property, either from his mother or from the father.

\textsuperscript{220} \textit{Rakhi Bibi v. Rahat Bibi}, 7NWP 191.
\textsuperscript{221} Section 108, \textit{Indian Evidence Act, 1872} (Act no. 1 of 1872).
(x) Position of the Child of a Woman Divorced by Lian-

The son or daughter of a woman who has been divorced by her husband by the method of lian is treated on the same footing as an illegitimate child for the purpose of inheritance. Therefore, the same rule will be applicable in such a case. In this regard, Shia law recognises the exception of allowing such a child to inherit from the property of the mother and vice versa.

(xi) Position of the Child in the Womb-

For the purpose of inheritance, a child is deemed to be born on the date of his conception and therefore, treated as a living person at the time of death of the propositus. The property will be distributed among the other heirs only after reserving the share of the unborn child i.e., the share of a son or a daughter, whichever is greater (according to the accepted view of Abu Yusuf). According to Shia law, the share of two sons should be reserved as a measure of precaution.

(xii) Position in Case of Death in Common calamity-

Where two or more persons die in a common calamity like an earthquake, or a plane crash, or a car accident, etc. and it is impossible to prove that who died first, then their properties shall devolve upon their respective heirs without any mutual rights of inheritance between all the deceased. In such a case, the distribution of property shall take place in such a way among the surviving heirs as if the intermediate heirs who had died along with the original proprietor had never existed.

Classification of Heirs

According to Fyzee, the heirs have been classified into seven classes (three principle and four subsidiary classes) by the Hanafi jurists.222 It may be noted here that out of the twelve sharers, eight are women, under Sunni law of inheritance.

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222 Supra Note 76 at 401.
Principal Classes:

These include the following:

a) *Qur’anic Heirs (Dhawul-furud)*- Also known as ‘sharers’, are those relations whose shares have been specifically fixed in the Holy Qur’an. These include- husband, wife, daughter, son’s daughter, father, mother, true grandfather, true grandmother, full sister, consanguine sister, uterine brother and sister.

b) *Agnatic Heirs (Asabat)*- Also known as ‘residuaries’, are those who have no fixed shares but who succeed to the residue of the estate after the sharers are given their fixed shares.

c) *Uterine Heirs (Dhawul-arham)*- Also known as ‘distant kindred’, are all those heirs who are related to the deceased by blood and are not included in the above two classes. These inherit only when there are no residuaries.

Subsidiary Classes:

These include the following:

d) **The Successor by Contract**- It is a person whose right of inheritance is based on a contract with the deceased in consideration of an undertaking given by him to pay any fine or ransom.

e) **The Acknowledged Kinsman**- It is a person who is of unknown descent but the deceased makes an acknowledgement of kinship in his favour, not through him but through another, e.g., as his brother or uncle, but not his son.

f) **The Sole Legatee**- Where a person has no heir left behind from among the above-mentioned categories of the heirs i.e., principal and the subsidiary classes, then the proprietor can bequeath whole of his property in favour of any person who is called the ‘sole or universal legatee’.

g) **The State, by Escheat**- In the absence of any heir from the principal or the subsidiary classes of heirs, or a will, the whole estate of the deceased will escheat to the Government.

*Shias*, on the other hand, divide heirs in two categories only i.e., sharers and residuaries and there is no heir of the class corresponding to ‘distant kindred’ of *Sunni* law. The heirs, under *Shia* law of inheritance, have been divided into two classes:
(i) **Heirs by Consanguinity** (i.e., heirs by blood relationship)-

These are further sub-divided into the following three groups:

**Group (I):**  
a) Parents.  
(b) Children and other lineal descendants (how lowsoever).

**Group (II):**  
(a) Grandparents (how highsoever)- true or false.  
(b) Brothers and sisters and their descendants (how lowsoever).

**Group (III):**  
(a) Paternal Uncles and Aunts (how highsoever).  
(b) Maternal Uncles and Aunts (how highsoever).

(ii) **Heirs by Special Cause** (i.e., heirs by marriage).

There are nine sharers under *Shia* law of inheritance, out of which six are women. These include- husband, wife, father, mother, daughter, uterine brother and sister, full sister, consanguine sister.

**Difference between Sunni and Shia Law of Inheritance**

Given below are the main points of difference between *Sunni* and *Shia* law of inheritance as provided by Aqil Ahmed in his book ‘*Mohammedan Law*’:

1) Sunni law does not recognise the rule of primogeniture while, on the other hand, *Shia* law recognises it up to the extent of eldest son’s right to the entitlement of his father’s sword, wearing apparel, ring and Holy *Qur’an*.

2) Principle of consanguinity is not recognised under the *Sunni* law of inheritance and agnates are preferred over cognates but *Shias* recognise the principle of consanguinity and prefer the nearest kinsman whether they are agnates or cognates.

3) *Sunnis* classify heirs into sharers, residuaries and distant kindred while there is no category of heirs corresponding to distant kindred in the *Shia* law of inheritance and they classify heirs into sharers and residuaries only.

4) *Sunni* law does not recognise the doctrine of representation while it is the keynote of the *Shia* law of inheritance.

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223 Supra Note 154 at 418-419.
5) Distant kindred are postponed to sharers and residuaries under Sunni law of inheritance but under Shia law, they inherit along with the sharers and residuaries.

6) Sunni law extends the doctrine of increase to all the sharers alike. On the other hand, under Shia law, the doctrine of increase applies only against the daughter and sister.

7) No distinction is made between the movable and the immovable property under Sunni law but Shia law makes such a distinction in case of a childless widow.

8) Under Sunni law, all the sharers, except the husband and the wife, share in return and even the husband or wife gets the residue on the total failure of all the other heirs. While under Shia law, in certain cases, the mother and uterine brother or uterine sister also do not share in the return besides the husband and the wife.

9) If the deceased leaves behind the father and a single daughter, the residue goes to the father under Sunni law but under Shia law, the residue will be divided amongst the sharers by return in such a case.

10) Sunni law of inheritance entitles an illegitimate child to inherit property from her mother but not from the father, but Shia law does not entitle him to inherit either from mother or the father.

**Shares of Women under Islamic Law of Inheritance:**

Under Islamic Law, a woman’s share in inheritance varies depending on her relation to the deceased person. Right of inheritance rests upon two principal grounds of marriage and blood relationship with the deceased. In some cases, a female inherits a less share than a male; in some cases, a female might inherit as much share as a male gets; and in other cases, she might inherit more than a male’s share. The following is the list of female sharers along with their portion of share in the inheritance of deceased relation’s property under the Sunni and Shia law of inheritance:

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224 ‘Representation’ is a term used in probate law to describe how the property of a person who dies without a will is to be divided when the descendant who would take the intestate share of the estate is also deceased. The surviving descendants take by “representation”.

A. Position under the Sunni Law of Inheritance

Under Sunni law, the women sharers have been allotted the following shares in the scheme of inheritance:

1. Share of the Wife

When there is a child or child of a son (h.l.s) of the deceased left behind, wife is entitled to 1/8th share in the property of her deceased husband. When there is no child or child of a son living, then she will be entitled to take 1/4th of the deceased husband’s property. It is noteworthy that share of the wife under Islamic Law is a collective one and if there are more than one wife of the deceased person, then they will inherit a share depending on the presence or absence of child or son’s child and will share the same equally among themselves. The ruling of the Holy Qur’an regarding the share of the wife of the deceased is as under:

“…In that which you leave, their (your wives) share is a fourth if you leave no child; but if you leave a child, they get an eighth of what you leave…”

2. Share of the Mother

A mother is entitled to 1/6th share, if there is left behind a child or child of a son (h.l.s) of the deceased and also if there are left behind two brothers or sisters, or one brother and one sister (whether full, consanguine or uterine). Her share will be 1/3rd if there is no child or child of the son (h.l.s) of the deceased living and also when there is only one brother or sister (if any). But if there is also wife or husband and the father, then she will be entitled to inherit only 1/3rd of what remains after the deduction of the wife or husband’s share. The Holy Qur’an says in this regard:

“For parents, a sixth share of the inheritance to each, if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased left brothers (or sisters), the mother has a sixth.”

3. Share of the True Grandmother

The share of the true grandmother is 1/6th in the property of the deceased Muslim. But a maternal true grandmother is excluded from inheriting property if there is a mother or nearer true grandmother (paternal or maternal) present. A paternal true grandmother is excluded.

226 Holy Quran, IV:12.
227 Holy Quran, IV:11.
from inheriting by the presence of father or nearer true grandmother (paternal or maternal) and intermediate true grandmother.

4. Share of the Daughter

Islamic Law does not make any difference between a married and an unmarried daughter and both are equally entitled to inherit the property of their deceased father and they are absolute owners of their respective shares. A daughter is entitled to $\frac{1}{2}$ when there is only one daughter of the deceased and there is no son living. In the presence of son, she becomes a residuary. When there are more than one daughter (two or more) they take $\frac{2}{3}$ collectively. The verse dealing with the share of daughter is as under:

“Allah commands you as regards your children’s (inheritance; to the male a portion equal to that of two females; if (there are) only daughters, two or more, their share is two-thirds of the inheritance; if only one, her share is a half…”]

5. Share of the Son’s Daughter (h.l.s.)

The son’s daughter (h.l.s.) inherits $\frac{1}{2}$, when there is one and if they are more than one in number, then they will collectively inherit $\frac{2}{3}$ of the deceased’s property. A son’s daughter gets excluded by the presence of: (a) son, or (b) daughter, or (c) higher son’s son, or (d) higher son’s daughter, or (e) equal son’s son. When there is only one daughter or higher son’s daughter but no (a) son, or (b) higher son’s son, or (c) equal son’s son, the daughter or higher son’s daughter will take $\frac{1}{2}$ and son’s daughter (h.l.s.) (whether one or more) will take $\frac{1}{6}$ (i.e., $2/3-1/2$). In the presence of an equal son’s son, she is converted into a residuary.

6. Share of the Uterine Sister

The share of uterine sister is $\frac{1}{6}$ when there is only one such sister and there is no (a) child, or (b) child of a son (h.l.s.), or (c) father, or (d) true grandfather of the deceased left behind. If there are more than one uterine sisters living, then they will be entitled to inherit $\frac{1}{3}$ of the deceased’s property collectively. The Holy Qur’an says in this regard:

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228 Holy Quran, IV:11.
“...If the man or woman whose inheritance is in question, has left neither ascendants nor descendants, but has left a brother or a sister (uterine), each one of the two gets a sixth; but if more than two, they share in a third...”

7. Share of the Full Sister

A full sister of the deceased Muslim, in the absence of his/her (a) child or (b) child of a son (h.l.s.), or (c) father, or (d) true grandfather, or (e) full brother, is entitled to inherit 1/2 share in his/her (deceased) property. When there are more than one full sisters living, they take 2/3rd collectively and will share among themselves. In the presence of the full brother, full sister becomes a residuary. Holy Qur’an declares in this regard:

“...Say: Allah directs (thus) about those who leave no descendants or ascendants as heirs. If it is a man that dies, leaving a sister but no child, she shall have half the inheritance: If (such a deceased was) a woman who left no child, her brother takes her inheritance: If there are two sisters they shall have two thirds of the inheritance (between them). If there are brothers and sisters, (they share) the male having twice the share of the females...”

8. Share of the Consanguine Sister

When there is a consanguine sister of the deceased present, her share in the inheritance will be 1/2 in the absence of the (a) child, or (b) child of a son (h.l.s.), or (c) father, or (d) true grandfather, or (e) full brother, or (f) full sister, or (g) consanguine brother of the deceased. If there are more than one consanguine sisters, there share in the inheritance will be 2/3rd which they will take collectively. With the consanguine brother, she becomes a residuary. But if there is only one full sister and she succeeds as a sharer, the consanguine sister (whether one or more) will take 1/6th provided she is not otherwise excluded from inheritance. The Holy Qur’an lays down in this regard:

“...Say: Allah directs (thus) about those who leave no descendants or ascendants as heirs. If it is a man that dies, leaving a sister but no child, she shall have half the inheritance: If (such a deceased was) a woman who left no child, her brother takes her inheritance: If there are two sisters they shall have two thirds of the inheritance (between them). If there are brothers and sisters, (they share) the male having twice the share of the females...”

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229 Holy Quran, IV:12.
230 Holy Quran, IV:176.
231 Holy Quran, IV:176.
B. Position under the Shia Law of Inheritance

Under Shia law of inheritance, the descendants (h.l.s.) of the sharers are also sharers. The shares of women, in the scheme of inheritance under Shia law, are given below: 232

1. Share of the Wife

A wife (one or more) under Shia law is entitled to 1/8th share in her deceased husband’s property in the presence of a lineal descendent. If the deceased is not survived by any lineal descendant, then her share will be 1/4th of the property.

2. Share of the Mother

Mother’s share, in the inheritance, is 1/6th when there is a (a) lineal descendant, or (b) two or more full or consanguine brothers or one such brother and two such sisters, or four such sisters, with the father. But in their absence, her share will be 1/3rd in every other case.

3. Share of the Daughter

If there is only one daughter of the deceased left behind, she will be entitled to 1/2 share in her deceased parent’s property but if their number is more than one, they will collectively inherit 2/3rd of the property in the absence of a son. If the deceased leaves behind a son, then she will inherit only as a residuary and not as a sharer.

4. Share of the Uterine Sister

The share of uterine sister is 1/6th if only one in number and 1/3rd if they are more than one in number, in the property of the deceased Muslim. A consanguine sister inherits only in the absence of a parent or any lineal descendant of the deceased person.

5. Share of the Full Sister

The full sister’s share is 1/2 if there is only one such sister living and there is no (a) parent, or (b) lineal descendant, or (c) full brother or (d) father’s father left behind by the deceased person. Two or more full sisters take 2/3rd share in the deceased’s property and share equally.

232 Supra Note 154 at 409.
among themselves. In the presence of full brother or father’s father of the deceased, the full sister is converted into a residuary.

6. Share of the Consanguine Sister

A consanguine sister takes $1/2$ (if one) and $2/3^{rd}$ (collectively- if more than one) in the property of the deceased person. She is entitled to inherit only in the absence of (a) parent, or (b) any lineal descendant, or (c) full brother or sister, or (d) consanguine brother, or (e) father’s father. Where there is a consanguine brother or father’s father living, the consanguine takes as a residuary only, and not as a sharer.

It is noticeably evident here that generally the share of a male is the double of the share of a female in almost every category and it is the most criticised principle of inheritance under Islamic Law. Many Western scholars object to the Qur’anic principles granting males double the share of females and consider it as a grave injustice and discrimination made towards its women by Islamic Law. Therefore, it becomes necessary here to present some details of this law and the wisdom of the Law-Giver behind it and for this reason the explanation of this inequality becomes extremely necessary at this point. If one goes into the depth of the wisdom that has formed the basis of Islamic law of inheritance, then he/she will find that women, in fact, have been favoured much more than men under this system of inheritance. It should be kept in mind that the financial responsibility of maintaining family rests entirely upon the husband which is a sort of special position. Husbands cannot ask their wives to contribute towards the expenses of the home. Whatever wives earn or possess, is their own property over which husbands have no control. As it is the husband’s responsibility to provide all the needs for his wife and home, it is not unfair that his share of inheritance should be double. The Holy Qur’an has tried to compensate her in other ways like mahr and maintenance.233

Thus, an in-depth and genuine examination of Islamic law of inheritance shows that women have not been discriminated under the same and they have been given full rights over the property they inherit.234 On this basis, woman is the recipient of greater benefits under Islamic law of inheritance which forms an unparalleled equilibrium between the closeness of relationships and financial responsibilities. And this exemplary balance is that outstanding

234 Supra Note 132 at 49.
feature of Islamic Law which bestows on it a unique characteristic not enjoyed by any other religion or ideology.\textsuperscript{235} Even, many modern writers like Sir William Jones, Rumsey, Fitzgerald, Macnaghten, Tyabji, Anderson, etc. have also admired the Islamic law of inheritance for its excellence.\textsuperscript{236}

4.6. Conclusion

An examination of the economic rights of women under Islamic shows that how Islam has protected women from being exploited in the hands of men by granting her economic independence. Islam granted a good number of economic rights to women and provided her economic security at all stages of her life. Islam decreed a right of which woman was deprived both before Islam and after it (even as late as this century), the right of independent ownership. According to Islamic Law, woman’s right to her money, real estate, or other properties is fully acknowledged. This right undergoes no change whether she is single or married. She retains her full rights to buy, sell, mortgage or lease any or all her properties. It is nowhere suggested in Islamic Law that a woman is inferior simply because she is a female. It is also noteworthy that such right applies to her properties before marriage as well as to whatever she acquires thereafter.

Further, there is no decree in Islam which forbids woman from seeking employment whenever there is a necessity for it, especially in positions which fit her nature and in which society needs her the most. Moreover, Islam puts no restriction on benefiting from woman’s exceptional talent in any field. Even for the position of a judge, where there may be a tendency to doubt the woman’s fitness for the post due to her more emotional nature, one finds early Muslim scholars such as Abu-Hanifa and At-Tabari holding the view that there is nothing wrong with it.

Further, a man in Islam is fully responsible for the maintenance of his wife, his children, and in some cases of his needy relatives, especially the females. This responsibility is neither waived nor reduced because of his wife’s wealth or because of her access to any personal income gained from work, rent, profit, or any other legal means. Woman, on the other hand, is far more secure financially and is far less burdened with any claims on her possessions. Her possessions do not transfer to her husband on marriage and she even keeps her maiden name. She has no obligation to spend on her family out of such properties or out of her

\textsuperscript{235} Supra Note 39 at 238.

\textsuperscript{236} Supra Note 66 at 362-363.
income after marriage. She is entitled to *mahr* which she takes from her husband at the time of marriage. If she is divorced, she may get alimony from her former husband and is also entitled to maintenance from him till her death or remarriage if she has no means to maintain herself.

In addition, Islam restored to woman the right of inheritance at a time when she herself was an object of inheritance in some cultures. Her share is completely hers and no one can make any claim on it, including her father and her husband. Her share in most cases is one-half the man’s share, with no implication that she is worth half a man. It would seem grossly inconsistent after the overwhelming evidence of woman’s equitable treatment in Islam, which was discussed in the preceding pages, to make such an inference. This variation in inheritance rights is only consistent with the variations in financial responsibilities of man and woman according to Islamic Law. Thus, an examination of inheritance law within the overall framework of Islamic Law reveals not only justice but also an abundance of compassion for woman.