CHAPTER 5

CONSEQUENCES OF DISSOLUTION OF MARRIAGE IN
IRAN AND INDIA

5.1 Legal Consequences of Divorce

Whatever be the mode, a divorce operates as a complete severance of the matrimonial relationship between husband and wife. After completion of every form of divorce, the marriage is dissolved and the parties cease to be husband and wife. Effects or the legal consequences of a divorce are given below:

(i) Cohabitation becomes Illegal

Cohabitation between the husband and wife becomes unlawful after completion of the divorce.

(ii) Iddat

The wife is required to observe an Iddat of three lunar months after the divorce or, if pregnant, till the delivery of the child. However, if the divorce takes place before consummation, the wife need not observe Iddat.

(iii) Maintenance during Iddat

During the period of Iddat, the divorced wife is entitled to be maintained by her former husband. Maintenance of divorce wife is now governed by Muslim woman (Protection of Right on Divorce) Act, 1986. Under this Act too the former husband is liable to maintain the divorced wife only up to the period of Iddat.
(iv) **Right to contract marriage**

Both the parties are free to contract another marriage with other persons. Thus, husband can marry another woman immediately after the divorce. But a divorced wife cannot marry another husband before the expiry of the period of *Iddat*. If their marriage has dissolved before the consummation, the wife is also free to contract another marriage immediately after the divorce.

However, if the husband has four wives at a time and one of them has been divorce, the husband too cannot contract another marriage during the *Iddat* of the divorced wife.

(v) **Dower**

The unpaid dower becomes immediately payable to the divorced wife. Whether the dower is prompt or Deferred, the divorced wife is entitled to it immediately after the divorce.

If the marriage was consummated, she is entitled to the full amount of her specified Dower; if the divorce takes place before consummation then she is entitled to only half of the specified Dower. Where dower was not specified, she is entitled to proper Dower; but if divorce takes place before consummation, she is entitled to get only some presents.

It is to be noted that Section 5 of the Dissolution of Muslim Marriage Act, 1939, provides that the Act does not affect, in any manner, the right to dower which a married woman may have under Muslim law on the dissolution of her marriage. Therefore, where a wife seeks a judicial divorce under this Act her right to claim dower is not lost; she is entitled to dower in accordance with the rules of Muslim personal law.
(vi) Remarriage between the divorced couple

After completion of divorce, the parties cease to be husband and wife. There is no restriction in their re-marriage with other persons. But, there is some restriction in the re-marriage of the divorced couple. Muslim law prescribes certain special rules for the re-marriage between divorced husband and wife. These special rules [in Indian Muslim laws] are given below:

(a) The re-marriage of the divorced couple must a fresh contract of marriage with all the essential formalities including fresh dower. If the divorced couple resumes cohabitation without contracting a fresh marriage, their union would be unlawful.

(b) The divorced couple cannot remarry even by a fresh contract without adopting the following special procedure:

(i) After completion of divorce the wife observes the required Iddat. When Iddat is completed, the divorced wife contracts a valid marriage with another person. This marriage with the other person should not be merely a formality. It must be consummated.

(ii) The marriage with such other person dissolves. The husband either voluntarily divorces the wife or is himself dead and the wife observes Iddat.

(iii) Now, after the expiry of this Iddat, the wife may lawfully remarry the former husband.¹

¹ This difficult and long procedure before the remarriage of divorce couple has been incorporated in Muslim law with the object of checking the evil
But in Iranian Muslim (Shi’a) law, above condition are (only) concerning third divorce (third divorce=irrevocable divorce) not revocable divorce. When divorce be Kind of revocable divorce, the re-marriage of the divorced couple no need a fresh contract of marriage “. . . A third divorce, performed after three consecutive marriages (of the same parties) whether by mere renouncement by the husband of his desire to divorce the wife or by a new marriage between the two parties”.  

Thus, we find [in Indian Muslim law], that for a lawful remarriage between the divorced couples, two conditions are necessary: First, there must be a fresh contract of marriage between them and secondly the prescribed ‘special procedure’ must be followed. If there is fresh contract but special procedure has not been followed, the marriage is irregular. But, if there is no fresh contract, the marriage is void. That is to say, if there is mere resumption of cohabitation there is no re-marriage and the union is void. 

5.2 Waiting period (Iddat, Iddeh)

Definition of Waiting Period (Iddat, Iddeh)

*Iddat* is an Arabic word and its literal meaning is ‘counting’. ‘Counting’ here means counting the days of possible conception to practice of the per-Islamic Arab who used to divorce and remarry several times so that their wives could never be free to marry another person. (R.K. Sinha, *Muslim Law*, (2006), 16th Ed, pp1. 08-109.

2 I discussed in chapter II (third divorce in Iranian laws).

3 The triple divorce in one meeting like Indian Sunni Muslim law has no place under Iranian Shi’s law. In the other word, we can say there is no provision in Shi’a Law which approves triple divorce in one session as prevailed in India. That is to say a Shia husband cannot say to his wife that “you are divorce, divorce, divorce” or “you are divorce irrevocably”. But triple divorce in one meeting should not be limited to only, above examples.


ascertain whether a woman is pregnant or not. Under Muslim law, it is that period during which a woman is prohibited from re-marrying after the dissolution of her marriage. During this period the widow or a divorced wife is required to live a pure and simple life and she cannot marry again.  

_Hedaya_ defines it as follows:

“The term of probation (or waiting) incumbent upon a woman in consequence of the dissolution of marriage after carnal connection”. It has been further said in _Hedaya_ that “the most approved definition of _Iddat_ is, the term by the completion of which a new marriage is rendered lawful”.

_Iddat_ is the period for which a woman must wait before marrying again whether in the event of divorce or death.

**Waiting period (Iddat) in the Holy Quran**

The Holy Quran regarding _Iddat_ says:

“O Prophet! When any of you divorce your wives, divorce them during their period of purity and calculate the period carefully: be mindful of God, you Lord. Do not drive them out of their homes—nor should they themselves leave—unless they become openly guilty of immoral conduct...”.

“Divorce women should wait for three menstrual cycles; it is unlawful for them, if they believe in God and the Last Day, to hide what God has created in their wombs. Their husbands have the right

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6 Supra note at 55.
8 Tyabji, at 137.
9 Holy Quran, 65: 1, (Surah- Al-Talaq).
to take them back within that time, if they desire to be reconciled...".10

"In the case of those of your wives who have passed the age of menstruation, if you have any doubt, know that their waiting period is three months; and that will apply likewise to those who have not yet menstruated; the waiting period of those who are pregnant will be until they deliver their burden [give birth]. God makes things easy for those who are mindful of Him".11

"Let the women [who are undergoing a waiting period] live in the same manner as you live yourselves, in accordance with your means; and do not harass them in order to make their lives difficult. If they are pregnant maintain them until they give birth...".12

"Believers, if you marry believing women, and divorce them before the marriage is consummated, you are not required to observe a waiting period: make provision for them and release them in an honorable way".13

Object of Iddat

The object of Iddat is to ascertain the paternity of a possible conception by her former husband. After divorce or death of the husband, if the woman re-marries immediately and a child is born within normal course, then there is every likelihood that the conception could be by the former husband and not by the present. It would be difficult, therefore, to establish as to who may be regarded as the father of such a child. To overcome this difficult,

10 Holy Quran, 2: 228 (Surah -Al-Baqarah).
11 Holy Quran, 65: 4 (Surah – Al- Talaq).
12 Holy Quran, 65: 6 (Surah-Al-Talaq).
13 Holy Quran, 33: 49 (Surah -Al-Ahzab).
Muslim law provides that where a marriage is dissolved (by divorce or death of the husband), the woman cannot re-marry before the expiry of a specified period called Iddat. After this period, the possible conception by the former husband would naturally become apparent and visible.

Marriage with a woman who is observing Iddat is irregular under Sunni law. Under Shia law the marriage contract with woman observing Iddat is void. 14

(i) Periods of Iddat in Indian Muslim Laws

Different periods of Iddat, which a woman is legally required to undergo, are given below:15

<table>
<thead>
<tr>
<th>Cause of Dissolution</th>
<th>Marriage whether consummated or not</th>
<th>Period of Iddat</th>
</tr>
</thead>
<tbody>
<tr>
<td>Divorce</td>
<td>Consummated</td>
<td>3 courses or, if pregnant, till delivery.</td>
</tr>
<tr>
<td>Divorce</td>
<td>Not consummated</td>
<td>No Iddat</td>
</tr>
<tr>
<td>Death</td>
<td>Doesn’t matter</td>
<td>4 months and 10 days or, if pregnant, till delivery whichever period is longer</td>
</tr>
</tbody>
</table>

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14 Sinha, at p. 55.
Dissolution of Marriage by Divorce

(i) When a valid marriage is dissolved by divorce and consummation has taken place, the duration of Iddat is three monthly courses. Divorce may take place by *Talaq, Ila, Zihar, Khula, Mubarat* or other Dissolution of Muslim Marriage Act, 1939. If the woman is not subject to menstruation, this period is three lunar months.

(ii) If the marriage has not been consummated, the woman is not required to observe the *Iddat*.

(iii) If the woman is pregnant at the time of divorce then duration of *Iddat* extends till delivery of the child or abortion.

Dissolution of Marriage by Death of Husband

(i) Where a valid marriage dissolves by the death of the husband, the duration of *Iddat* is four months and ten days. If she is pregnant at the time of husband’s death, it continues till the delivery of the child, or four months ten days whichever is longer.

(ii) After the death of the husband, an *Iddat* of four months ten days must be observed by the widow even if the marriage was not consummated.

Death of Husband during ‘Divorce Iddat’

The period of *Iddat* after divorce is three months. If the divorced woman is observing *divorce-Iddat* of three months and her former husband dies before completion of three months, she has to start a fresh *Iddat* of four months and ten days from the date of husband’s death. For example, where after completion of two
months of divorce-Iddat the former husband dies the divorced woman has to observe a fresh Iddat of four months ten days. Thus, the period of Iddat in such case shall be five months ten days.

**Commencement of Iddat**

The period of Iddat begins from the date of the divorce or death of the husband and not from the date on which the woman gets the information of her divorce or of the death of her husband. If she gets information after the expiry of the specified term, she need not observe the required Iddat.16

(ii) The Waiting Period (iddah) in Iranian Laws

**Iddat of Divorce**

The waiting period, during which the ex-wife may not remarry, is three consecutive menstruations, or three full lunar months for a woman of childbearing age who does not menstruate.17 The period begins at the time the divorce formula is recited, whether or not the wife knows that the formula has been recited.18 This applies also where a woman has had sexual relations “by mistake”, that is, outside of a valid marriage but where there were

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16 Sinha, *Supra* note at 55-6.
17 Articles 1150 and 1151, Article 1150 of (Iranian Civil Code - I.C.C.), “Iddah consists of a period during which a woman whose matrimonial bond has been dissolved cannot marry”. And Article 1151 - The period of Iddah for a divorce or for the dissolution of a marriage consists of three consecutive monthly periods of a woman unless the woman concerned though of child bearing age has no monthly period, in which case the period of Iddah will be three months. (Khomeini, Clarification 2512, 2513. )
reasons that might have led her to suppose that there was a valid marriage.19

**Iddat of Temporary Marriage**

The waiting period following a temporary marriage is two menstruations, but for a woman of childbearing age who does not menstruate it is 45 days.20

**Iddat of Widow**

The waiting period for a widow extends for four months and ten days from the time she learns of her husband’s death.21 even if the woman is in menopause, she was pregnant and gives birth within this period, the marriage was not consummated, or it was a temporary marriage.22

**Iddat of Pregnant Woman**

If the woman is pregnant at the time of divorce or dissolution of the marriage the waiting period extends until she has given birth and performed the ablutions following childbirth, even if this is time is less than three months.23

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19 Article 1157 of I.C.C., “A woman who has had matrimonial relations by way of mistake with someone must observe the uddah laid down in cases of divorce”.

20 Article 1152 of I.C.C., The period of Iddah for divorce or dissolution of marriage or waiver of the remaining period or its expiry in the case of temporary marriage for a non-pregnant woman is the expiry of two monthly periods unless contrary to the nature of her age, she no such periods, in which case the period will be 45 days". And (Khomeini; Clarification of Question, 2515).

21 Khomeini, Clarification of Question, p. 2520.

22 Khomeini, Clarification of Question, p. 2517.

23 Article 1153 of I.C.C., The period of Iddah for divorce or dissolution of marriage act or waiver or expiry of the period of marriage in the case of a woman who is pregnant will be until she given birth to a child", Khomeini, Clarification of Question, pp. 2514, 2518.
Iddat Before Consummated

There is no waiting period for a woman who has been divorced before the marriage was consummated, or who is past the menopause (the divorce in both cases being irrevocable).\textsuperscript{24}

Inheritance Right in Iddat

During the waiting period following a revocable divorce, the husband and wife retain their inheritance rights from one another.\textsuperscript{25} There is no separate right to alimony, but the wife’s right to maintenance by her husband continues during the waiting period\textsuperscript{26} except where:

- the divorce arises because of the wife’s disobedience,
  or
- the marriage has been annulled or
- in those cases mentioned above, in which a repudiation constitutes an irrevocable divorce.

Except in these cases, the husband is required to pay maintenance to his wife during the divorce proceedings and, in advance, for three months after the divorce is registered. Failure to pay is punished by the same court.\textsuperscript{27}

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\textsuperscript{24} Khomeini; Clarification of Question, p. 2511.
\textsuperscript{25} Article 943 of I. C. C., Article 943 - If the husband has divorced his wife in such a way that the divorce is revocable, either one of them who dies before the expiry of the “Iddah” period will inherit from the other; but if the death of one of them takes place after the expiry of the “Iddah” period, or if the divorce was irrevocable, they will not inherit from one another.
\textsuperscript{26} Khomeini, Clarification of Question, p. 2523.
\textsuperscript{27} According to Article 642 of Islamic Punishment laws.
\end{flushright}
If the wife is pregnant by her husband, she is entitled to receive maintenance until the child is born, even in the three exceptional cases just mentioned.\textsuperscript{28}

5.3 Parentage and Legitimacy of children in Indian Laws

In the Muslim law, as in other systems of law, parentage involves certain right and obligations. The relation between a father and his child is called paternity; the relation between a mother and her child is called maternity.\textsuperscript{29}

Maternity

Maternity is commonly recognised by law as the natural relationship between the mother and the child. The woman who gives birth to the child is its mother. Sunni Law (like other legal system) recognises this status, irrespective of the fact whether she is married or unmarried, and even if the child is the outcome of Zina. So the child can inherit from its mother. But under the Shia Law mere birth is not enough to establish maternity. A child born of adultery, incest or fornication is an illegitimate child and is devoid of maternity in the woman who gave birth to it; so he cannot inherit from her. Thus, there is a legal status to maternity and is a legal relationship.\textsuperscript{30}

Paternity

Paternity is the legal relationship between child and its begetter. It is based in turn, on the legal relationship between the

\textsuperscript{28} Article 1109 of I.C.C., Cost of maintenance of a divorced wife during the period of “Iddeh” is to be borne by the husband, unless the divorce has taken place because of disobedience. But if the Iddeh arises from the cancellation of the marriage or a final divorce, the wife is not entitled to cost of maintenance, unless she is with child from her husband in which case she 1 be entitled to cost of maintenance till her child is born”.

\textsuperscript{29} R. K. Wilson, Anglo-Muhammadan Law, p. 79 (1930).

\textsuperscript{30} Syed Khalid Rashid, Muslim Law, p. 146 (2009).
woman who gave him birth and the man who begot him—there must be a tie of marriage between the woman and the man; he must be the husband of the child’s mother. The marriage must be valid, may be even irregular, but no void or *batil*; neither Sunni law nor Shia law gives any credence to paternity if the marriage was *batil*. The fact of marriage is proved by either direct proof or by presumption.  

**Parentage**

Parentage is the relationship of parents to their child or children. The mother and the father of a child are called the parents of the child. Importance of this legal relation lies in guardianship and inheritance.

**Islamic Concept of Legitimacy**

The concept of legitimacy of children is the direct outcome of the concept of marriage. Society that recognises the institution of marriage also recognises the legitimacy of children born within lawful wedlock; and vice versa, those born outside the wedlock are illegitimate. The father of a child born in wedlock is presumed to be the husband of the woman giving it birth, and a child which is born after six months of marriage and during its continuance is said to be born in wedlock. The legal effect of marriage on fixing the paternity of a child continues, according to *Hanafis*, for two years, and according to the *Malikis* and the *Shafiis* for four years after the separation by divorce or death.

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31 *Supra* note.
34 Syed Khalid Rashid’s, *Muslim Law*, p. 145.
Legitimacy

Legitimacy is a status which directly results from the fact of paternity of child. When the paternity of a child is established, its legitimacy is also established. Basis of legitimacy is paternity which depends upon the existence of a marriage. Therefore, under Muslim law the legitimacy of a child is established by a direct or indirect proof of marriage between the father and mother of the child. In cases where no direct proof of marriage is available, the existence of a lawful marriage may be presumed by:

(i) a prolonged cohabitation of man and woman (not prostitute), or

(ii) by the fact that a man acknowledges a woman as his wife, or

(iii) by the fact that man acknowledges himself as father of a child.

Thus, we find that the basis of legitimacy under Muslim law is the existence of marriage and the marriage itself may be presumed when a man acknowledges paternity to a child born to a woman (wife).

5.4 Presumption of Legitimacy under Indian Muslim Law

This topic has now become outdate because Islamic Law of the presumption of legitimacy is not applicable in India. In India, the conclusive proof of the legitimacy of a child (whether Muslim or non-Muslim) is established under the provisions of the Indian Evidence Act, 1872. However, a brief description of Islamic Law on this point cannot be ignored because of its academic value. Under

35 Mulla, Supra note at 355.
36 R.K. Sinha, Mulim Law, p. 112.
the Muslim law, rules regarding the presumption of legitimacy are as under:

1. A child born within six months of the marriage is illegitimate unless the father acknowledges it.

2. A child born after six months of the marriage is legitimate unless the father disclaims it by accusing his wife for adultery.

3. A child born after the dissolution of the marriage is legitimate if born-
   (i) Within 10 [lunar] months of the dissolution (Shia law)
   (ii) Within 2 [lunar] years of the dissolution (Hanafi law)
   (iii) Within 4 [lunar] years of the dissolution (Shafie & Maliki law).  

The above mentioned rules of presumption of legitimacy, at least the different periods given in rules (ii) and (iii) may not be believable, but two reasons may be attributed to such rules. Firstly, in the absence of any advanced medical science, the jurists of those days had no perfect knowledge of the normal period of delivery of a child after its conception. Secondly, there was a very severe punishment for illicit intercourse under the classical Muslim law. Therefore, if an illegitimate child was born to a woman, not only the child was socially boycotted but its mother was also punished for Zina.  

Humane considerations must have persuaded

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37 Supra note. Also see. Tyabji, supra at 219.
38 Zina in Islam is the generic name for illicit intercourse the chief forms whereof are adultery and fornication. (A.A.A. Fyzee, Outlines of Muhammadan Law, p. 157 (2008) edited and revised by Tahir Mahmood.)
those jurists to avoid this situation created by the misuse of law of divorce and disclaim of children by the husbands of those days. Citing Bailie, Ameer Ali,\textsuperscript{39} observes.

"... ancient sunni doctors in laying down such long periods, had in view those abnormal conditions which sometimes perplex the most skillful of the medical faculty in Europe. D'Ohssan and Autarya, on the contrary, are of opinion that the old jurist consults of the Sunni school were actuated by sentiments of humanity, and not by any indifference to the laws of nature, their chief desire being to prevent an abuse of the provisions of the law regarding divorce and disavowal of children".

On the authority of Sharifiyah, Bailie observes:

"The shortest period of gestation in the human species is six months,... and the longest is two years, according to Abu Hanifa, who assigned this as the maximum on the authority of Ayeshah, who is reported to have said, as having received it from the Prophet himself, that the child remains no longer than two years in the womb of its mother, even so much as the turn of a wheel".\textsuperscript{40}

The present rule on the subject is to be found in the conclusive presumption raised in Section 112 of the Indian Evidence Act.\textsuperscript{41} The rule may be shortly stated as follows: A child born during the continuance of a valid marriage, or within 280 days after its dissolution the mother remaining unmarried, is conclusively presumed to be legitimate unless there was no access when he could have been begotten. The question whether Section 112 of the Evidence Act supersedes the rule of Muslim law was left open in

\begin{footnotes}
\textsuperscript{39} Ameer Ali, Muhommedan Law, Vol. II, p. 213.
\textsuperscript{40} R.K. Wilson, Anglo-Muhammadan Law, p. 169 (1930).
\textsuperscript{41} Indian Evidence Act, 1872.
\end{footnotes}
the leading case of *Muhammad Allahdad v. Muhammad Ismail* by Mahmood J., but since that time the trend of modern decision is to regard this as purely a question of the law of evidence governed by Section 112 of the Indian Evidence Act even with regard to Muslims. If, however, the marriage is held to be irregular difficult questions may arise.

**Deference Between Present Law and Indian Muslim Law**

When we compare this provision of the Evidence Act with the rules of legitimacy under Muslim law, we find following points of difference:

1. Under Muslim law, a legitimate child should not only be born but also be conceived during a valid marriage whereas under the Evidence Act a child born even after a day of marriage may be legitimate.

2. Under Muslim law a child born within two years (or even longer periods under Shafie and Maliki schools) of the dissolution of marriage may be legitimate, but under the Evidence Act a child born after two hundred and eighty days of the dissolution of marriage can never be treated as legitimate.

**Acknowledgement of Paternity (Iqrae-e-Nasab)**

Acknowledgement (Iqrar) of paternity takes place in Islam as follows:

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42 (1888) 10 All 289; the leading judgment is that of Mahmood J., pp. 324-43. The opinion of Straight J. (pp. 300-21) is also important as it contains texts. (A.A.A. Fyzee *Supra* note at 157).
43 Mulla, *Supra* note at 340.
44 Fyzee, *Supra* note at 153-4.
(a) Where the paternity of child is not know or established beyond a doubt; (b) it is not proved that the claimant is the offspring of Zina (illicit intercourse); and (c) the circumstances are such that they do not rebut the presumption of paternity, an acknowledgement of paternity by the father is possible and effective. We shall now discuss each of these three incidents.

Unknown Paternity

The rule to acknowledgment of legitimacy arises only if the paternity of the child is not certain. To use the terminology of the Indian Evidence Act, the paternity of the child must neither be 'proved' nor 'disproved', but it should be 'not proved'.

Must not be Illegitimate

An illegitimate son cannot be acknowledged as legitimate for there is no such thing as legitimation in Islam. Mahmood J. points out that the legitimation of an illegitimate son is possible in Roman and Scots law, but:

No analogy exists between the principles upon which those rules proceed and those upon which the Muhammadan rule of the acknowledgement of parentage is founded. Putting the matter shortly, the former two systems proceed upon the principle of legitimating children whose illegitimacy is proved and proceeds, whilst the Muhammadan law relates only to cases of uncertainty and proceeds upon the assumption that the acknowledgment child is not only the offspring of the acknowledger by blood but also the issue

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46 'Paternity dose not admit of positive proof, because the connection of a child with its father is secret. But it may be established by the word of the father himself", Ameer Ali, II, p. 190-1 citing Fatawa Alamgiri.

47 Fyzee, Supra note at 154.
of a lawful union between the acknowledger and the mother of the child.\footnote{Tyabji, \textit{Supra} note at 225.}

\textbf{Nothing to Rebut Presumption}

First, the ages of the parties must be such as to be in consonance with the presumption of paternity. Secondly, marriage must be possible between the father and mother. Thirdly, the person acknowledged must not be the offspring of \textit{zina} (illicit intercourse); and fourthly, there must not have been a disclaimer or repudiation on the part of the person acknowledged.\footnote{Fyzee, \textit{Supra} note at 155; Tyabji at 225.}

\textbf{Effects of acknowledgement}

The acknowledgment of the children has the legal effect of the acknowledgement of the wife as well; for the acknowledgment of a man is valid with regard to five persons- his father, mother, child, wife, and \textit{mawla} (a freed slave).\footnote{Fyzee, \textit{p.} 156.}

A valid acknowledgment gives rights of inheritance to the children, parents and wife. An acknowledgment once made is not revocable.\footnote{Mulla, \textit{Supra} note at 346. Tyabji at 223.}

\section{5.5 Paternity (Nasab) and Legitimacy in Iranian Muslim Laws}

Paternity, or legal filiations, is recognized only in the context of a valid marriage, whether permanent or temporary. A child born outside a valid marriage is the issue of \textit{zina} (fornication) and cannot be legitimated, as stated in Article 1167 of the Iranian Civil Code: “A child who is the issue of \textit{zina} is not attached to the \textit{zani
(fornicator)”. The abortion of illegitimate children is not permitted.52

**Paternity of Erroneous Assumption Child**

Where the man made an erroneous assumption (*shubha*) that there was a valid marriage, the child may be legally filiated to him, but if the man knew there was no valid marriage, and the woman thought there was, there is no paternity. 53

### 5.6 Legitimacy of child

A child born during the term of a marriage is assumed to belong to the husband, providing that the birth occurs between 6 and 10 months after an act of sexual intercourse between them.54

There is no belief in the 'sleeping foetus', as in Sunni law, (as above mentioned), which in some cases allows paternity to be imputed to a man as much as two years (in Hanafi law55) and four years (in Safei and Maliki law) after he has died or divorced the mother concerned. In Iranian law a child born more than 10 months after a divorce or the end of a temporary marriage will be assumed to be the issue of zina.

A child born within 10 months after the dissolution of a marriage belongs to the ex-husband, providing the mother has not remarried in the interval.56 We have seen that a woman who is

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52 Khomeini, Clarification of Question, p. 2453.
53 Article 1165 of (I.C.C.) states: “A child born after such mistaken sexual intercourse will belong to the party who made a mistake and if both parties were in error, child belongs to both them.
54 Article 1158 of the (I.C.C.) states: “Any child born during married life belongs to the husband provided that the interval between intercourse and the birth of the child is not less than 6 months and not more than 10 months.
55 But under the Evidence Act, 1872( of India) a child born after two hundred and eighty days of the dissolution of marriage can never be treated as legitimate.
56 Article 1159 (I.C.C.) states: “Any child born after the dissolution of marriage belongs to the husband provided that the mother has not yet married again
pregnant at the time of divorce or dissolution of marriage cannot remarry until after the birth of the child,\textsuperscript{57} so this provision would apply only where the pregnancy was not known at the end of the waiting period following a divorce or dissolution, and has remarried within a few months. If she remarried immediately at the end of the three months waiting period and gave birth six months after the second marriage, paternity could be attributed to both husbands. In such a case, “the child belongs to the second husband unless definite indications otherwise.\textsuperscript{58}” This seems to be the only instance in which paternity can be determined by objective criteria.

**Acknowledgement of Paternity (Iqrar-e-Nasab)**

According to Article 1161\textsuperscript{59} of the Iranian Civil Code, “that a husband’s explicit or implicit acknowledged of paternity, cannot later be withdrawn. The following Article allows a man to repudiate fatherhood within two months of learning of its birth, or (Article 1163) within two months of learning its correct date of birth. From the reference to the exact date of birth, it would appear that these Articles only in the ambiguous case just mentioned. There does not seem to be a general right to deny fatherhood based on objective evidence.

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\textsuperscript{57} Article 1153 of (I.C.C.) States: “The period of Iddah for divorce or dissolution of marriage act or waiver or expiry of the period of marriage in the case of a woman who is pregnant will be until she given birth to a child”.

\textsuperscript{58} Article 1160 of (I.C.C.) States: “If the marriage is dissolved after matrimonial intercourse and the wife has married again and a child is born to be, the child belongs to the husband who can be identified as the child’s father according to the foregoing Articles (1158-1159). If the child could be attributed to both husbands according to the foregoing Articles, the child belongs to the second husband unless definite indications show otherwise”.

\textsuperscript{59} Article 1161 of (I.C.C.), “In the cases coming under the foregoing Articles, if the husband has explicitly or implicitly admitted that he is the father, his subsequent denial of this will be of no validity”.

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There is a general rule that a child born of fornication does not belong to the fornicator (Article 1167): the rights of parentage are seen as a benefit which should not be obtained by wrong-doing. This could mean that a child is technically parentless. However Article 1164 to 1166 deal with the possibility that one or both of the parents may have thought there was a valid marriage, or may have been mistaken about the identity of the other. In both cases, the party or parties who had sexual relations under the mistaken belief that these were legitimate, acquires the rights of parenthood. It is also possible for a man who is himself illegitimate by birth to marry a pregnant woman and also legitimate her child.

This child’s family name is that of the father. Each child is given an identity certificate which remains with the child throughout life, and is used to record major event. The first page gives the birth details including the name of the parents. All birth and abortions occurring after the 6th month of pregnancy have to be registered.

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60 Article 1164 of (I.C.C.), “The provisions of the foregoing Articles will also be applicable in the case of a child born from sexual intercourse when one party was in error as to the other’s identity, although the mother may not have made any mistake”.

61 Article 1166 of (I.C.C.), “If marriage between the parents of a child is illegitimate owing to the existence of any legal impediment, the relation of the child to that one of the parents who was ignorant of the existence of the impediment is legitimate, and its relation to the other party is illegitimate. If both parents were ignorant of the impediment, the relationship of both of them to the child is legitimate”.

62 Khomeini, Clarification of Question, p. 2461.


64 Article 993 of (I.C.C.) states, “The following events must be notified to the Census Office during the proper period and in the way stipulated by special laws and regulations
1. All births and all abortions which may occur after the 6th month from the date of conception.
2. Marriages, whether permanent or temporary.
3. Divorces, whether permanent or revocable or divorce by way of waiving the remainder of the period of a temporary marriage.
5.7 Dower

In old pre-Islamic, Arabia, when the institution of marriage as we know it today was not developed many forms of sex relationships between man and woman were in vogue. Some were temporary and hardly better than prostitution. Men, after despoiling their wives, often turned them out, absolutely helpless and without any means, the ancient custom to settle certain sums for subsistence of the wife in the event she was turned out was often disregarded, as there was no organized system of law.65

Sometime the guardian of the bride used to take the dower himself; but it is not certain whether it was a mere violation of the usage that the bride should take the dower, or whether it shows that dower was originally the price paid for the bride to her parents.66

A device was in vogue under the name of SHIGHAR marriage in which a man would give his daughter or sister in marriage to another in consideration of the latter giving his daughter or sister in marriage to the former. Thus neither of the wives could get a dower. False accusations of unchastity were frequently used to deprive the wife of her dower.67

In the so called Beena marriage, where the husband visited the wife but did not bring her home, the wife was called Sadiqa or female friend, and a gift given to wife on marriage was called, Sadaq. In Islam Sadaq simply means a dower and is synonymous with Mahr (sale price). But originally the two words (Sadaq and Mahr) were quite distinct. Sadaq was a gift to the wife in the Beena

4. The death of any individual”.
66 Syed Khalid Rashid, Muslim law, p. 88 (2009), revised by Prof. V. P. Bharatiya.
form of marriage and mahr was gift or compensation to the parents of the wife in the baal form of marriage. Mahr belongs to the marriage of domination, which is known as the baal marriage, where the wife’s parents (guardian) part with her and have to be compensated. Promulgation of Islam gave a new form of nikah to marriage, abolished this ancient custom and forbade unjust acts towards the fair sex, as is evident from the Quran. If you separate yourself from your wives, send them away with generosity: it is not permitted to you to appropriate the goods you have once given to them. Thus the custom originated in ancient times with the payment which husbands often made to their wives as means of support in their old age or when turned out by them. Mahr in the baal form of marriage was also recognized by the Prophet to ameliorate the position of wife in Islam, and it was combined with Sadaq, so that it became a settlement or a provision for the wife.

In Islamic law Mahr belongs absolutely to the wife, although historically speaking it is more akin to bride’s price than gift or anything else.

**Mahr Definition**

*Mahr* or dower is a sum that becomes payable by the husband to the wife on marriage, either by agreement between the parties or by operation of law. It may either be prompt (*Mu’ ajjal*), or deferred (*Mu wajjal*).

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70 *Supra* note.
71 Fyzee, *Supra* note at 126.
Concept of Dower (Mahr)

The concept of *mahr* in Islam has unfortunately been much misunderstood and is sometime misinterpreted since it is either understood as a consideration made by the man to the women as bride-price or dower, but in reality, is none of these. A close definition has been forwarded by the *Kifayah* and *Hedayah* in the *Fatawa-i- Alamgiri* as not the exchange or consideration given by the man to the women, but an effect of the contract imposed by law on the husband as a taken of respect for its subject, the women. 73

The Privy Council describes it as an essential incident to the status of marriage. 74 Farther the *in ayah* defines it as the property which is incumbent on a husband, either by reason of its being named in the contract of marriage or by virtue of the contract itself and it is known by several names such as *muhr, sudak,*75 *nuhlah* and *akr.*76

According to Bailie, “... the property which incumbent on a 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 the law on the husband as a token of respect for its subject, the woman.”77

According to Wilson, “Dower” is a consideration for the surrender of person by the wife. It is the technical Anglo-Mohammedan term for its equivalent ‘*Mahr*’ in Arabic.

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74 Supra note at 155.
75 Sadaq is Arabic word ad its pronunciation is sadaq.
According to Ameer Ali, “Dower” is a consideration which belongs absolutely to the wife.

According to Mulla “Dower” is a sum of money or other property which the wife is entitled to receive from the husband in consideration of the marriage. The word ‘consideration’ is not used in the sense in which the word is used in the Indian Contract Act. It is not obligation imposed upon the husband as a mark or respect to the wife.

Dr. Jung defines “Dower” as the property or its equivalent, incumbent on the husband either by reason of being agreed in the contract of marriage or by virtue of a separate contract, as special consideration of Buza, the right of enjoyment itself.

Hon’ble Justice Mahmood has said in Abdul Kadir v. Salima, that ‘Dower under the Muslim law is a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of marriage, and even where no dower is expressly fixed or mentioned at the marriage ceremony, the law confers the right of dower upon the wife’.

In Saburannessa v. Sabdu Sheikh, Calcutta High Court has observed that Muslim marriage is like a contract of sale in which the wife is the property and dower is the price.

The above opinions are based on the argument that marriage is a civil contract and dower is a consideration for the contract. But it is submitted that the above opinions are erroneous, because even in those cases where no dower is specified at the time of marriage,

78 Mulla, 17th Ed, p. 277.
79 Aqil Ahmad, Supra note at 150.
80 ILR (1886) 8 All 149 at 157.
81 Supra note at p. 150.
82 AIR 1934 Cal 603.
marriage is not void on that account, but the law requires that some dower (proper dower) should be paid to the wife. **Abdur Rahim** correctly observes, “It is not a consideration proceeding from the husband for the contract of marriage, but it is an obligation imposed by the law on the husband as mark of respect for the wife as is evident from the fact that the non-specification of dower at the time of marriage does not affect the validity of marriage”.83

**Nature of Dower**

Dower in the present from was introduced by the Prophet Mohammad and made obligatory by him in the case of every marriage. Dower in Muslim law is somewhat similar to the *danatio propter nuptias* in Roman law. The important difference, however, is that while under the Roman law it was voluntary, and under the Muslim Law it is absolutely obligatory.84

Islam insists that dower should be paid to the wife herself. It sought to make dower into a real settlement in favour of the wife, a provision for the rainy day and socially, a check on the capricious exercise by the husband of this almost unlimited power of divorce.85

The following points may be noted with respect to the nature of Dower:

1. Analogy is often drawn between a contract for dower and one for sale. The wife is considered, to be the property and the dower her price.

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84 Aqil Ahmad, *Mohammedan Law*, p. 150.
85 Syed Khalid Rashid, *Supra* note at 90.
Mahmood, J., in *Abdul Kadir v. Salima*, gives the best description of the nature of dower. He observes:

“Dower, under the Muhammadan Law, is a sum of money or other property promised by the husband to be paid or delivered to the wife in consideration of the marriage, and even where no dower is expressly fixed or mentioned at the marriage ceremony effect of marriage. To use the language of the *Hedaya*, the payment of dower is enjoined by the law merely as a token of respect for its object (the woman), wherefore the mention of it is not absolutely essential to the validity of a marriage; and, for the same reason, a marriage is also valid, although a man were to engage in the contract on the special condition that there should be no dower”.

“Even after the marriage the amount of dower may be increased by the husband during covertures”.

2. It is regarded by some eminent authorities as a consideration for conjugal intercourse. In a case, *Smt. Nasra Begum v. Rizwan Ali*, Allahabad High Court expressed the view that the right to claim prompts dower proceeds cohabitation.

3. Dower is an essential incident and fundamental feature of marriage with the result that even if no dower is fixed the wife is entitled to some dower from the

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86 ILR (1886) 8 All 149.
88 Baillie’s Digest; Supra note at 111.
89 AIR 1980 All 119.
husband. The marriage is valid even though no mention of dower made by the contracting party.\textsuperscript{90}

The amount fixed for\textit{ Mahr} is usually a mutually agreed between the parties and if the parties are competent to marry, they may fix their own\textit{ Mahr} at the time of contracting their marriage contract. At any event it is enforceable in law.\textsuperscript{91}

**Importance of Dower**

\textit{Fatwai-i-Quazi Khan} says, “\textit{Mahr} is so necessary to marriage that if it were not mentioned at the time of the marriage, or in the contract, the law will presume it by virtue of the contract itself”.\textsuperscript{92}

It is essentially an incident of the Muslim law of Marriage that even if there is stipulation on the part of the woman before marriage to forego all her right to dower, or even if she agrees to marry without any dower, the stipulation or agreement will be invalid.\textsuperscript{92}

The reason of its importance lies in the protection that it imparts to the wife against the arbitrary exercise of the power of divorce by the husband. In Muslim Law, the husband can divorce his wife at his whim and so the object of dower is to check upon the capricious exercise of the husband of his power to terminate the marriage at will. It not only protects from his unbridled power to divorce but also from his extravagance in having more than one wife. A stipulation to charge a huge dower on the occasion of his another marriage is enough to deter him from enjoying the luxury of

\begin{footnotes}
\item[90] Aqil Ahmad,\textit{ Supra} note 151.
\end{footnotes}
having two, three or four wives. In Abdul Kadir v. Salima,\textsuperscript{93} Mahmood, J., has observed:

The marriage contract is easily dissoluble, and the freedom of divorce and the rule of polygamy place the power in the hands of the husband which the law-giver intended to restrain by rendering the rules as to payment of dower stringent on the husband. That is why the right of the wife to her dower is a fundamental feature of the marriage contract; it has a pivotal place in the scheme of the domestic relation affecting the mutual rights of the spouses at more than one point.

The question with regard to dower does not arise in case of marriages solemnized under the Special Marriage Act, 1954. But the right to \textit{Mahr} fixed in a marriage first contracted under Muslim Law will not be forfeited merely by the fact of registration of the marriage under the Special Marriage Act, 1954.\textsuperscript{94}

\textbf{Legislature’s Right to Make A Legislation in Respect of Reasonable Dower}

According to Muslim Law, on the dissolution of marriage, the wife can claim her dower money. It is possible that the amount of dower may be very high or it may be very low. There were cases where the husband was having sufficient source of income but the amount of dower was so meagre, that it is not possible for the wife to maintain herself without that and therefore the legislature was given full power to make law providing that the Court will not be bound to award the amount of dower according to marriage deed. Section 5 of the Oudh Laws Act, 1876, provided that the Court is not to award the amount of dower stipulated in the contract of

\textsuperscript{93} ILR (1886) 8 All 149.

\textsuperscript{94} Aqil Ahmad, supra note at 152.
marriage, but only such sum as shall be reasonable with reference to the means of the husband and the Iddat of the wife. 95

The Object of Dower

The object of dower is three-fold:

(i) to impose an obligation on the husband as a mark of respect of the wife;

(ii) to place a check on the capricious use of divorce on the part of husband; and

(iii) to provide for her subsistence after the dissolution of her marriage, so that she may not become helpless after the death of the husband or termination of marriage by divorce.96

Fixation of Mahr in Indian laws

The Indian Ulama recommended in a seminar that Mahr (dower) should be fixed in terms of gold or silver so that the rights of women are fully protected in the event of fall in the values of currencies.97

Since Mahr is an integral part of Muslim marriage, it may be fixed by an agreement between the parties; in case it is not done, it will be determined by operation of law.98

With the exception of the Hanafis and the Malikis, among whom a minimum amount (though not maximum) of dower is laid down, Muslim law givers do not fix any minimum or maximum amount of Malikis at three dirhams. In India, the value of ten

95 Abdul Rahaman v. Inayati Bibi, (1931) AC 631.
96 Aqil Ahmad, supra note at 153.
98 Paras Diwan, Muslim Law in India, p. 70 (2008).
dirhams is between Rs. 3-4. Thus, the minimum of mahr in both schools is nominal. The peculiar feature of Muslim law of mahr is that no maximum amount of mahr is prescribed, and, therefore, a husband is free to fix any amount of mahr, even though it is beyond his means or ability to pay or earn. 99 Whenever a claim is made to enforce the payment of the amount of the dower, the Court ordinarily awards the entire amount stipulated in the contract. Sometimes, with a view to preventing the husband from divorcing his wife, the amount of mahr is deliberately fixed very high. 100 The husband cannot plead in equity and say by way of his defence, that the amount is too excessive and beyond his means. 101 In only two states, Oudh (now part of the Uttar Pradesh) and Jammu and Kashmir, it has been laid down statutorily that the Court may not award the amount of dower as stipulated in the contract if it finds it too excessive, and may award an amount which it considers to be reasonable with reference to the means of the husband and the status of the wife at the time of payment of mahr. 102 It is surprising that under either statute, the Court has no power of raising the amount of mahr if it finds it to be too low, considering the means of the husband and the status of the wife. 103

Fazee states; “The amount of mahr may either be fixed or not; if is fixed it cannot be a sum less than minimum laid down by the law as follows: 104

(a) Hanafi law : 10 dirhams

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100 Zakeri v. Zakina, (1909) 32 All 167.
101 Mahomed Sultan v. Sarajuddin, 1936 Lah 183.
102 Oudh Laws Act, 1876, Section 5: Jammu and Kashmir State Muslim Dower Act, 1920, Section 2.
103 Paras Diwan, Muslim Law in Modern India, p. 70 (2008).
Under *Ithna Ashari* and *Imamia Ismaili* laws there is no legal minimum of *mahr*. However, under the Fatimid *Shiah* law it should not be less than ten *dirhams,*" the regular *mahr* among the *Sulaymani Bohras* is Rs. 40 at present. The *Daudi Bohras* have no fixed amount, but the usual *mahr* is Rs. 51 Rs. 110 or more".105

The amount of *mahr* may exceed the legal minimum, but all schools of law strongly recommend moderation, and some are of the opinion that *mahr* should not exceed the amount which the Prophet bestowed on his wives known as *mahr ul-Sunnah*. However, where the husband has the capacity he may stipulate as much as he can afford according to *Al-Nahr* "so much of gold as an ox hide can contain".106 Thus, "there seems to be no legal limit for dower; and dowers of very large amounts have been sustained by courts of justice in India".107

*Mahr* need not be a sum of money; any type of property can be conferred by way of *mahr*. Anything, which falls within the meaning of *mal*, and has value, may, according to the *Hanafi* law, form the subject of dower.108 Even instructions in the Koran may be the subject matter of *Mahr*.109 It may, on the other hand, be immovable property, land or house. If immovable property of the value of Rs. 100 or more is given by way of dower, and the wife is put into possession, she cannot be dispossessed even if there is no

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106 Muhammadan Law, p. 264.
registered deed, Section 54A, Transfer of Property Act, 1872, will apply.110

Usually a written deed of *mahr* known as *mahr nama* is executed; but no deed is necessary.

It has been earlier stated that when dower is fixed by a contract between parties, it is known as specified dower; when dower arises by operation of law, it is known as proper dower.

**Increase or Decrease of Dower**

The husband may at any time after marriage increase the dower. Likewise, the wife may remit the dower wholly or partially. A Muslim girl who has attained puberty is competent to relinquish her *Mahr* although she may not have attained majority (18 years within the Indian Majority Act). The remission made by the wife, should be with free consent. The remission of the *Mahr* by a wife is called *Hibe-e-Mahr*.

In a case where the wife was subject to mental distress, on account of her husband's death the remission of dower, was considered as against her consent and not binding on her.111

**(i) Kinds of Dower in Indian Laws**

We have seen that dower is payable whether the sum has been fixed or not. Ali said: “There can be no marriage without *maher*”.112

Thus, dower may, first of all, be either specified or not specified. In the latter case it is called *Mahr al-mithl*, proper dower, or to be strictly literal ‘the dower of the like’. If the dower has been

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specified, then the question may be whether it is prompt *(mu‘ajjal)* or deferred *(Muwajjal).*

Thus we have two kinds of dower in Islam—

(a) Specified dower *(al-mahr al musamma)*, and
(b) Unspecified dower or proper dower *(mahr al-mithl)*.

Specified dower may again be divided into

(c) prompt *(mu‘ajjal)* and (d) deferred *(muwajjal).* In (a) and (b) the question before the court is the amount payable; in (c) and (d) the question is the time when payable has to be made. 113

Regarded as a consideration for the marriage, it is, in theory payable before consummation but the law allows its division into two parts, one of which is called ‘prompt’ payable before the wife can be called upon to enter the conjugal domicile or demanded by the wife the other ‘deferred’, payable on the dissolution of the contract by the death of either of the parties or by divorce. But the dower ranks as a debt and the widow is entitled along with other creditors of her deceased husband, to have it satisfied on his death out of his estate”. If the property of her deceased husband is in her possession, she is entitled (as against other heirs of her husband and as against other creditors or recover that property after they have paid up her debt. Dower-debt is not a charge and widow cannot prevent another creditor or of her husband from recovering his debt from his estate. Dower-debt is an unsecured debt ranking equally with other debts. 114

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114 Aqil Ahmad, *Supra* note at 151.
In the other word, “Prompt dower is payable on demand, and deferred dower is payable on the dissolution of marriage by death or divorce. The prompt portion of the dower may be realized by the wife at any time before or after consummation, but the deferred dower could not be so demanded.\textsuperscript{115}

The Ithna Ashari Shias divide mahr into three categories: one, \textit{Mahr i- Sunnat} or the amounts of mahr the Prophet paid his wives, said to be 500 dirhams; \textit{Maher- i-Mithl}, or customary dower; and \textit{Maher-i-Musama} or the specified dower.\textsuperscript{116} Under Shiah Ithna Ashari law as practiced in India when no \textit{mahr} has been stipulated at the time of marriage, and is to fixed by the operation of the law, the amount is \textit{Maher- i- Sunnat} or 500 dirhams mahr, in the absence of specification, in not to exceed this amount, Ismailli law follows a similar rule.\textsuperscript{117} There also exists an exceptional clause in the Shiah Ithna Ashari law in India that a woman “who is adult (baligh) and not of a weak or facile disposition can, at the time of marriage, agree that there will be no Maher. An Ithna Ashari may also, at the time of marriage, reserve (with the consent of the wife) an option to cancel the maher.\textsuperscript{118} Under Fatimid Shiah law a woman may under certain circumstance give up her \textit{maher}, according to all other Schools \textit{mahr} forms an inseparable ingredient of the marriage contract and never be cancelled by the virtue of law.\textsuperscript{119}

So, the dower may be classified in Sunni Schools into:

(a) Specified Dower (\textit{Mahr-i-Mussamma})

(1) Prompt dower; and

\textsuperscript{118} \textit{Supra} note at 45.
\textsuperscript{119} \textit{Ibid} at 45.
Deferred dower.

(b) Unspecified (Proper) dower (Mahr-i-Misl)

(a) Specified Dower

Usually the maher is fixed at the time of marriage and the qazi performing the ceremony enters the amount in the register; or else there may be a regular contract called kabin-nama with numerous conditions. The sum may be fixed either at the time of marriage or latter, and a father's contract on behalf of a minor son is binding on the minor.

If the amount of dower is stated in the marriage contract, it is called the specified dower. Dower may be settled by the parties to the marriage either before the marriage or at the time of the marriage or even after the marriage. If a marriage of a minor or lunatic boy is contracted by a guardian, such guardian can fix the amount of dower. Dower fixed by the guardian is binding on the minor boy and he cannot on attaining the age of puberty take the plea that he was not party to it. Even after the marriage of such minor or lunatic boy, the guardian can settle the amount of dower, provided that at the time of settlement of dower, the boy is still minor or lunatic.

The husband may settle any amount he likes by way of dower upon the wife, though it may leave nothing to his heirs after payment of the amount. But he cannot in any case settle less than ten dirhams (the money value of 10 dirhams is between Rs. 3 and 4).

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121 *Syed Sabir Husain v. Farzand Hasan*, (1937) 65 IA 119.
according to Hanafi law and 3 dirhams according to Muslim law. Shia law does not fix any minimum amount for dower.\textsuperscript{123}

For those Muslim husbands who are very poor and not in a position to pay even 10 dirhams to the wife as dower, the Prophet has directed them to teach Quran to the wife in lieu of dower. At present there is no limit to the maximum amount of dower. The minimum has now become obsolete.\textsuperscript{124}

As already stated, specified dower is again subdivided into:

\begin{enumerate}
\item Prompt Dower (\textit{muajjal mahr})
\item Deferred Dower (\textit{muwajjal mahr}).
\end{enumerate}

(1) **Prompt Dower**

It is payable immediately after marriage on demand. According to \textit{Ameer Ali} a wife can refuse to enter into conjugal domicile of husband until the payment of the prompt dower.

The following point must be noted regarding prompt dower:

1. Prompt dower is payable immediately on the marriage taking place and it must be paid on demand, unless delay is stipulated for agreed. It can be realized any time before or after the marriage. The wife may refuse herself to her husband, until the Prompt Dower is paid. If the wife is minor, her guardian may refuse to allow her to be sent to the husband’s house till the payment of Prompt Dower. In such circumstances, the husband is

\textsuperscript{123} Aqil Ahmad, \textit{Mohommadan Law}, p. 154 (2006).
\textsuperscript{124} \textit{Supra} note.
bound to maintain the wife, although she is residing apart from him. 25

2. Prompt dower does not become deferred after consummation of marriage, and a wife has absolute right to sue for recovery of prompt dower even after consummation. After consummation, she cannot resist the conjugal rights of the husband if the prompt dower has not been paid by him. Instead of refusing the decree the suit for restitution of conjugal rights to which the husband is entitled, if marriage is consummated, the Court may pass a decree conditional on payment of dower.

3. It is only on the payment of prompt dower that the husband becomes entitled to enforce the conjugal rights unless the marriage is already consummated. The right of restitution arises only after the dower has been paid.

4. As the prompt dower is payable on demand, limitation begins to run on demand and refusal. The period of limitation for this purpose is three years. If during the continuance of marriage, the wife does not make any demand, the limitation begins to run only from the date of the dissolution of marriage by death or divorce. 126

Although prompt dower, according to Muslim law, is payable immediately on demand, yet, in a large majority of cases it is rarely demanded and is rarely paid; in practice Muslim husband generally gives little thought to the question of paying dower to his wife save when there is domestic disagreement, or when the wife presses for

125 Ibid at 154.
126 Ibid.

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payment upon the husband’s embarking upon a course of extravagance and indebtedness without making any provision for her. Lapse of time since marriage raises no presumption in favour of the payment of dower.\footnote{AIR 1941 Oudh (Now UP) 457.}

(2) Deferred Dower

It is payable on dissolution of marriage either by death or divorce.

According to \textit{Ameer Ali} generally in India dower is a penal sum with the object to the compel husband to fulfill marriage contract in its entirety.

The following points must be noted regarding deferred dower:

1. Deferred dower is payable on dissolution of marriage by death or divorce. But if there is any agreement as to the payment of deferred dower earlier than the dissolution of marriage such an agreement would be valid and binding.

2. The wife is not entitled to demand payment of deferred dower (unless otherwise stipulated) but the husband can treat it as prompt and pay or transfer the property in lieu of it. Such a transfer will not be void as a fraudulent preference unless actual insolvency is involved.

3. The widow may relinquish her dower at the time of her husband’s funeral by the recital of a formula. Such a relinquishment must be a voluntary act of the widow.

\footnote{AIR 1941 Oudh (Now UP) 457.}
4. The interest of the wife in the deferred dower is a vested and not a contingent one. It is not liable to be displaced by the happening of any event, not even on her own death and as such her heirs can claim the money if she dies.128

Presumption regarding Prompt and Deferred Dower

The amount of dower is split into two parts: (1) one is called ‘prompt’ which is payable on demand and (2) other is called ‘deferred’, which is payable on dissolution of marriage by death or divorce. The prompt portions of the dower may be realized by the wife at any time before or after consummation.129 Dower which is not paid at once may for that reason be described as deferred dower but if it is postponed until demanded by wife, it is in law prompt dower.130 But deferred dower does not become prompt merely because the wife demands it.131

If the Kabin nama, the marriage contract deed, fixes the amount of dower but fails to show what portion of it will be prompt and what deferred dower, according to Allahabad and Bombay High Courts the proportion between the two should be fixed on the basis of (i) position of wife; (ii) custom of locality, (iii) total amount of dower, (iv) status of husband.

It has been held in Rehana Khatun’s case,132 that the proportion of prompt dower is regulated by custom, and in absence

128 Aqil Ahmad, Mohommaden Law, p. 155.
129 Rehana Khatun v. Iqtidar-Uddin, (943) All LJ 98.
132 Rehana Khatun v. Iqtidar-Uddin, (943) All LJ 98.
of custom, the total amount of dower is to be settled on the basis of the status of the parties. 133

Shia Law

Under *Ithna Ashari Shia* law if the *kabin nama* fixes the total amount of dower but does not specify as to what portion of it will be prompt and what deferred, the whole of the dower is regarded as prompt. In the Madras Presidency, unless otherwise stipulated the entire dower is prompt no matter the parties are *Shia* or *Sunni*.134

Sunni Law

According to Sunni Law, in the absence of any family usage and statement in *Kabin nama*, half of the total amount is regarded as prompt and half as deferred.135

Difference between Shia and Sunni in prompt dower

In *Ithna ashari* law the presumption is that the whole of the dower is prompt,136 but in *Hanafi* law the position is different. The whole of the dower maybe promptly awarded,137 but a Full Bench decision lays down that where the *kabin-nama* is silent on the question the usage of the wife’s family is the main consideration, in the absence of proof of custom the presumption is that one-half is prompt and the other half deferred, and the proportion may be changed to suit particular cases.138

133 Aqil Ahmad, p. 159.
134 Supra note.
135 Ibid.
137 Per Mahmood J. in *Abdul Kadir v. Salima*, (1886) 8 All 149; Tyabji, p. 123.
(b) **Proper (Customary/Unspecified) Dower**

When the amount of dower is not fixed in the marriage contract or even if the marriage has been contracted on the condition that she should not claim any dower, the wife is entitled to proper dower. Proper dower is to be determined by taking into consideration the amount of dower settled upon other female members of the father's family such as her father's sisters.\(^{139}\)

**Determination of Proper Dower**

The proper dower (\textit{mahr-i-misl}) is regulated with reference to the following factors:\(^{140}\)

(a) Personal qualifications of wife; her, age, beauty, fortune, understanding and virtue.

(b) Social position of her father's family.

(c) Dower given to her female paternal relations.

(d) Economic condition of her husband.

(e) Circumstances of time.

There is no limit to the maximum amount of proper dower under the Sunni Law, but under the Shia law the proper should not exceed the 500 \textit{Dirhams}. 500 \textit{Dirhams} was the amount of dower which was fixed in the marriage of Fatima, the Prophet's daughter. In the Shia Muslims it is, therefore, considered a point of honour not to stipulate for a sum higher than the sum of dower fixed by the Prophet for his daughter, Fatima.\(^{141}\)

\(^{139}\) Aqil Ahmad, p. 156.

\(^{140}\) \textit{Abdul Rehman v. Mst. Inayator}, AIR 1931 Oudh 63.

\(^{141}\) Aqil Ahmad, p. 156.
Wife's Rights and Remedies on Non-Payment of Dower

Muslim Law confers upon a wife (or widow) the following three rights to compel payment of her dower:

(a) Refusal to cohabit;
(b) Right to dower as a debt; and
(c) Right to retain her deceased husband’s property.\textsuperscript{142}

Refusal to Cohabit

If the marriage has not been consummated, the wife has a right to refuse to cohabit with her husband so long as the prompt dower is not paid. In the case of a wife who is a minor or an insane, her guardian has right to refuse to send her to her husband’s house till payment of prompt dower. During her such a stay in her guardian’s house the husband is bound to maintain her.\textsuperscript{143}

Right to Dower as a Debt

Their Lordships of the Privy Council held that “the dower ranks as a debt and widow is entitled along with other creditors to have it satisfied on the death of the husband, out of his estate”. If the husband is alive, the wife can recover the dower debt by instituting a suit against him. After the death of the husband, dower debt remaining unpaid, the widow can enforce her claim for the dower debt by filing a suit against his heirs. The heirs of the deceased husband are however, not personally liable for the dower debt. They are liable to the extent to which and in the proportion in which they inherit the property of the deceased husband. If the widow is in procession of her husband’s property under a claim for her dower, the other heirs of her husband are severally entitled to

\textsuperscript{142} Supra note.
\textsuperscript{143} Aqil Ahmad, p. 156-157.
recover their respective share upon payment of a quota of the dower debt proportionate to those shares.\textsuperscript{144}

A Mohammdan dies leaving a widow, a son and two daughters. The widow is entitled to a dower debt of Rs. 3200; the widow’s share is the estate is 1/8 and she is liable to contribute 1/8 of Rs. 3200 = Rs. 400. The son’s share is 7/16 and he is liable to 7/16 of Rs. 3200 = Rs. 1400. The share of each daughter is 7/32 and she is liable to pay 7/32 of Rs. 3200 = Rs. 700 and if the window is in possession to recover her share on payment of Rs. 700. She is not, however, entitled to any charge on her husband’s property, though such a charge may be created by agreement.\textsuperscript{145} Even a father’s contract on behalf of his minor son is binding upon the minor and upon the father if the minor fails to pay.\textsuperscript{146}

**Right to Retain Possession in lieu of unpaid Dower**

Dower ranks as a debt, and the wife is entitled, along with the other creditors, to have it satisfied on the death of the husband out of his estate. Her right, however, is no greater than that of any other unsecured creditor except that if she lawfully obtains possession of the whole or part of his estate, to satisfy her claim with the rents and issues accruing there from she is entitled to retain such possession until it is satisfied.\textsuperscript{147} If the widow has lawfully and without force or fraud obtained in lieu of her dower actual possession of the property of the deceased husband, she is entitled to retain that possession of her property of the deceased husband, she is entitled to retain that possession as against other heirs and as

\textsuperscript{144} Hamira Bibi v. Zubaida Bibi, ILR (1916) 38 All 581.
\textsuperscript{145} Ibid.
\textsuperscript{146} Aqil Ahmad, Mohammadan Law, 22\textsuperscript{nd} Ed, p. 158.
\textsuperscript{147} Hamira Bibi v. Zubaida Bibi, ILR (1916) 38 All 581.
against other creditors of her husband, until her dower is paid. This right of retention does not give her any title to the property; therefore she cannot alienate the property. The right to retain possession of husband's estate till payment of dower also arises after divorce. In no case it arises during the continuance of marriage.148

A widow's right to retain possession of her husband's estate in lieu of her dower, is for a special purpose. It is by way of compulsion to obtain speedy payment of the dower which is an unsecured debt. Where she is not in possession or has lost possession, she cannot claim to obtain it. Because her right to retain is not in the nature of a charge on the property like mortgage but a personal right against the heirs and creditors of her deceased husband.149

The following features of right to retain possession must be noted:

**No right of retention during continuance of marriage**

The right comes into existence only after the death of her husband, or if the marriage is dissolved by divorce, immediately on such divorce, but not before.

Thus, if a creditor of the husband obtains a decree against him and the husband's property is sold in execution in his lifetime, the wife has no right of retention against a purchaser in execution of the decree and she must deliver possession to him.150

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148 Aqil Ahmad, p. 158-9.
149 *Supra* note.
150 *Ibid* at 159.
**Actual Possession**

The right of retention means the right to continue in the possession of the husband’s property after termination of marriage (either by divorce or death) until the satisfaction of dower debt. It is, therefore, necessary for the exercise of the right that the wife or widow must be in actual possession of the property at the time of the termination of marriage. If she was not in actual possession of the property at this time, she cannot afterwards acquire possession of the husband’s property in lieu of this right. The right of retention is the right to retain possession of the property which was acquired by her during the subsistence of marriage. It is, therefore, not a right to obtain possession.

It is also necessary that the wife should have obtained possession of the property lawfully and without force or fraud.\(^{151}\)

**The right of retention not analogous to a mortgage**

The woman has no interest in the property, as mortgage has under an ordinary mortgage. There is no true analogy between her right of retention and mortgage. In the case of a mortgage, the mortgage retains possession under an agreement between him and the mortgagor, while her right or retention does not arise from any such agreement but is conferred on her by law.\(^{152}\)

**Not a Charge**

Ordinarily, the right does not constitute a charge on the property and as such she is not a secured creditor. If the property, which is being held by her in lieu of dower under her right of retention, has been mortgaged by her deceased husband, the

\(^{151}\) Supra note at 159.

\(^{152}\) Ibid.
mortgage can sell it free of her right and can oust her from possession.\textsuperscript{153}

**A possessory lieu on property is no title**

(a) She is to satisfy her claim for dower with the rents and profits accruing from the property.

(b) The right of retention does not give her any title to the property. The title to the property is in the heirs, including, of course, the widow.

(c) She cannot alienate the property by sale or mortgage to satisfy her dower. If she alienates the property, it is valid to the extent of her own share and not of the shares of other heirs of her husband.

If she delivers possession thereof to the alienee, the other heirs become entitled to recover immediate possession of their shares unconditionally, that is, without payment of their proportionate share of the dower-debt. The widow is not entitled on the alienation being set aside, to be restored back possessions. By giving up possession of the property, she loses her right to hold possession thereof and whether she loses her right to the dower. However, if the widow is dispossessed by the heirs of the husband or their transferees, she can recover possession only by instituting a suit under Section 9 of the Specific Relief Act, that too within 6 months of dispossession, failing which she would lost her right to recover possession. In case she is dispossessed by a trespasser, she can sue with 12 years under Article 12 of the Indian Limitation Act.\textsuperscript{154}

\textsuperscript{153} Ibid at 160.

\textsuperscript{154} Ibid at 160.
Widow in Possession liable to amount

A widow in possession of her husband’s estate is bound to account the other heirs of her husband for the rents and profits received by her out of the estate while she is herself entitled to charge interest on the dower due to her and to set it off against the net profits. It was held in Shaikh Salima’s case, that “widow on possession of her husband’s property in lieu of dower debt is liable to account to other sharers of income from such property, in her possession”.\textsuperscript{155}

Can sue heirs

The widow is not disentitled to sue her husband’s heirs for the property of her dower out of his assets on the ground that she is retaining the property.

The Right of retention whether heritable or transferable

There is a conflict of judicial opinions whether the widow’s right to hold possession is transferable and heritable.\textsuperscript{156}

1. One view is that the right is personal right and not a lien and it cannot therefore be transferred by sale, gift or otherwise, nor can it pass to her heirs on her death.\textsuperscript{157}

2. The other view of the Mysore High Court that the right to hold possession is the right both heritable and transferable.\textsuperscript{158} Such right to retain possession can also be exercised by her heirs after her death.\textsuperscript{159} It has been

\textsuperscript{155} Shaikh Salma v. Mohammad Abdul Kadar, AIR 1961 AP 428.
\textsuperscript{156} Zubair Ahmed v. Jainadan Prasad, AIR 1960 Pat 147.
\textsuperscript{157} Hadi Ali v. Akbar Ali, (1898) 22 All 262.
\textsuperscript{158} Hussain v. Rahim Khan, AIR 1951 Mys. 4.
\textsuperscript{159} Haliman v. Mohammad Moin, AIR 1971 Pat 385.

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held in a case that it is heritable without expressing any opinion whether it is also transferable.\(^{160}\)

3. In another case of the Allahabad High Court it has been held that it is both transferable and heritable.

**If it is transferable, can it be transferred without transferring also the dower debt**

Here again there is a conflict of judicial decisions. In some cases it has been held that the right to hold possession cannot be served from the dower debt and transferred as a separate interest as in *Maina Bibi’s* case.\(^{161}\) In other cases it has been held that it can be so transferred.\(^{162}\)

But a transfer merely of the dower debt does not pass to the transferee the right to hold possession and the Privy Council expressed doubt, whether a widow can transfer either the dower debt and the right to hold possession.\(^{163}\)

All that can now be said with certainty, is that the right to hold possession is heritable. Though it cannot be said with certainty, whether it is transferable but the balance of authority in India is in favour of the view that it is also transferable.\(^{164}\)

Following Illustrations may make the position clear.

A Muslim dies leaving a widow and a brother. The widow is in lawful possession of her husband’s property in lieu of her dower. The brother cannot claim his share until he pays his proportionate share of the dower debt. The dower debt remains unsatisfied, and

\(^{160}\) *Azizullah v. Ahmad*, (1885) 7 All 353.

\(^{161}\) *Zaibunnissa v. Nazim Hassan*, AIR 1962 All 197.


\(^{163}\) *Abdul v. Shamsul Haq*, (1921) All 262.

\(^{164}\) *Maina Bibi v. Chaudhary Vakil Ahmad*, (1925) 52 IA, 145.
the widow sells the whole property to satisfy the debt, and delivers possession thereof to the purchaser. Now the question is – what is the effects of the sale? The sale passes to the purchaser only the widow’s share and the right to the possession of that share. Now what will be the effect of the delivery of possession of the purchaser? The effect will be that the brother, who was not entitled, before delivery of possession, to possession of his share until he paid his share of the dower debt, becomes entitled to immediate possession of his share without paying his share of debt. The purchaser is not entitled to retain possession of the brother’s share until the brother pays his share of dower debt. The reason is that the deed does not purport to transfer to him either the dower or the right to hold possession. Nor is the widow entitled to have the possession restored back to her, for by giving up possession, she lost her right to hold possession.\footnote{165}

\textbf{Difference Between Sunni and Shia Laws Relating to Dower}

<table>
<thead>
<tr>
<th>Sunni Law</th>
<th>Shia Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>A minimum limit of 10 dirhams is prescribed for specified dower.</td>
<td>No minimum limit is prescribed.</td>
</tr>
<tr>
<td>There is no limit to proper dower.</td>
<td>Proper dower cannot exceed 500 dirhams.</td>
</tr>
<tr>
<td>There is no maximum limit for specific dower.</td>
<td>Fixing of dower exceeding 500 dirhams is considered abominable though not illegal.</td>
</tr>
</tbody>
</table>

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<thead>
<tr>
<th>Sunni Law</th>
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<tbody>
<tr>
<td>If the marriage is dissolved by death and dower has not been specified, or it is agreed that no dower shall be payable, proper dower would be due whether the marriage was consummated or not.</td>
<td>In such case no dower would be due if the marriage was not consummated.</td>
</tr>
<tr>
<td>An agreement that no dower shall be due is void.</td>
<td>Such agreement by sane and adult wife is valid.</td>
</tr>
<tr>
<td>In the absence of an agreement only a reasonable part of the dower is presumed to be prompt.</td>
<td>The whole dower is presumed to be prompt.</td>
</tr>
</tbody>
</table>

**Amount of Dower and Condition of Payment**

1. If the marriage is consummated, and is dissolved by death:

   In case of regular marriage
   
   \[ (a) \quad \text{Whole of the specified dower; or} \]
   \[ (b) \quad \text{Proper dower if unspecified,} \]
   \[ (c) \quad \text{Specified or proper dower, whichever is less, in the case of irregular marriage.} \]

2. If the marriage is not consummated, and is dissolved by the act of party:

   (i) When divorced by husband –

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In case of regular marriage

\[
\begin{align*}
(a) & \quad \text{half of the specified dower, or In case of regular} \\
(b) & \quad \text{a present of three Articles, if unspecified} \\
\end{align*}
\]

No Dower

\[
\begin{align*}
(ii) & \quad \text{When divorced by the wife: No dower} \\
(iii) & \quad \text{If the marriage is irregular in the cases:} \\
& \quad \text{Case (i) and (ii) above.}^{167}
\end{align*}
\]

(ii) **Dower in Iranian Laws**

**Definition and Condition of Dower**

The dower (mahr, or sadaq) is a sum which the husband pays or obliges himself to pay to the wife (not to her family). The Shia rules are essentially the same as those of the Sunni Schools.

Although the Dower may appear to be the price in a contract of sale—literally a bride-price—it differs in many ways from the consideration involved in a sale. It may or may not be economically significant, but it is always legally and symbolically significant. The best way to understand it would appear to be not as a price, but as an act of consummation, constitutes part of the performance which creates a marriage relationship.

The dower should preferably be stipulated in a valid marriage contract, but where it is not stipulated, or where the contract is not valid; a dower must nevertheless be paid. In the latter case the amount is proportionate to the social rank and personal qualities of the wife (mahr al-mithal), and these are also the usual criterion for a dower which is stipulated (mahr al-musamma).

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\(^{167}\) Syed Khalid Rashid’s, *Muslim Law*, p. 94 (2009).
The dower is fixed by agreement and stipulated in the marriage formula, “I marry myself to you for [a certain sum]”, or “I marry my principle to you for [a certain sum]”. Where no sum is stipulated, the contract is still valid, and the amount is fixed by agreement or by law. Most jurists reject a dower agreement which is conditional, for example one fixing a low dower so long as the wife is not required to leave her place of birth, but a higher dower is she is in future required to move to another city.

The dower may be any licit Article, service, or legal act of value which could be sold or rented, having a general (market) use and value in the eyes of reasonable people. An Article having value only under occasional circumstances, such as an herb used to cure an illness rarely encountered, cannot constitute a dower, according to traditional fiqh. A poodle serving no purpose cannot be a dower, but a guard dog may. The Civil Code’s provision (Article 1078) is more restrictive, specifying “anything which can be called property and which can be owned and possessed”. This seems to exclude services, and also to exclude a promise to do something, such as to free a slave, or not to do something, such as not to take a second wife. The provision in the traditional fiqh which allows services as the dower rests on Muhammad’s example in allowing the teaching of the Qur’án to serve as a dower. Muhammad likewise married a

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168 According to Article 1078 of Iranian Civil Code: Anything which can be called property and which can be owned and possessed can be designated as a marriage dower.


171 On this point Shia law differs from Sunni law. Abu Hanifa says that as a slave is an economic property, the services of a slave can constitute the mahr, but as a free person is not an economic property his services (the example given is to perform a pilgrimage on behalf of another) cannot constitute a dower. (Hassan Emami, L’institution juridique du mahr, pp. 24-24.).
slave (Saffiyah) and gave her her freedom as dower. The opinion that a promise not to remarry can serve as a dower rests on the general fiqih rules that "the dower is anything to which the man consents." It seems unlikely that a court would over-rule such strong precedents simply because of the wording of Article 1078. In fact, the reference in the Civil Code is probably intended not to exclude promises and services, but to exclude physical properties which cannot be owned, such as a public work. According to the Civil Code, where the agreed dower is something that by its nature cannot be owned, the wife is entitled to the 'reasonable dower'.

Another instance in which the dower is invalid is a marriage contract specifying a dower, and also specifying a higher dower should the husband require his wife to leave her home town. In this case the dower, being conditional, is usually regarded as unspecified and invalid, although some authorities have disagreed.

Where the quality of the Articles is not specified, the husband is obliged to provide those of average quality. The quantity or value must be specified. Where a specific item, such as 'my black horse' is agreed, the parties must have seen it. If an item is

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172 In this respect, shia law differs from Sunni law. The latter considers Muhammad's (P. B. U. H & H.F) act as a particular privilege of the Prophet, which does not establish a legal precedent. (Hassan, Emami, L'institution juridique du mahr, pp. 20-24).
174 Supra note.
175 According to Article 1100 of I.C.C., "If the specified marriage portion (dower) is unknown or if it is not of such a nature that it can be owned or if it belongs to reasonable marriage portion and in the third case to the equivalent of the value of the property which proved to be that of a third party, unless the latter authorizes the transfer".
176 Hassan Emami, L'institution juridique du mahr, pp. 40-42.
177 Supra note, pp 25-26.
178 Ibid at 31.
specified as the dower, and this proves to belong to someone else, the husband is required to provide its equivalent in value.\textsuperscript{179}

**Kinds of Dower in Iranian Laws**

The dower may be classified in Shia Schools into:

(a) Specified Dower (\textit{Mahr-i-Mussamma})

(i) Prompt dower (\textit{mu‘ajjal}); and

(ii) Deferred dower (\textit{muwajjal}).

(b) Customary /Proper/ suitable dower or average bridal gift\textsuperscript{180} (\textit{Mahr-i-Misl})

(c) Reasonable marriage portion (\textit{mahr al-muta} or \textit{mahr al-Sunnat})\textsuperscript{181}

**Amount of Dower (Mahr) in Iranian Laws**

There is no maximum or minimum amount,\textsuperscript{182} although some traditional jurists have recognized a legal maximum of 500 \textit{dirhams}, citing traditions from the sixth Imam to support this.\textsuperscript{183} Others say that the limit of 500 \textit{dirhams} is recommended, not obligatory. It is regarded as reprehensible to set a dower worth less than six \textit{dirhams}, again on the basis of a tradition from the sixth Imam.\textsuperscript{184} Sunni law does not recognize any maximum.

\textsuperscript{179} Article 1100 of (I.C.C.).

\textsuperscript{180} Which is determined according to the wealth, family and qualities of the bride. (\textit{Law Dictionary, The Vice Presidency for Legal & Parliamentary Affairs}, p. 389 (2008)).

\textsuperscript{181} The amounts of mahr the Prophet paid his wives, said to be 500 dirhams.

\textsuperscript{182} Article 1080 of I.C.C., Fixing of the amount of marriage portion depends upon the mutual consent of the marrying parties.

\textsuperscript{183} Hassan Emami, L’institution juridique du mahr, p. 34.

\textsuperscript{184} Supra note at 35.
Condition of dower in Iranian Law

If the dower is not legally valid, this does not make the marriage contract itself invalid.\textsuperscript{185} The primary intention of the couple is to marry, bear and raise children, and the dower is a secondary matter. For the same reason, the marriage is valid if no dower has been set. If the dower agreed is not valid, but the marriage has been consummated, the woman is entitled to receive the ‘proper dower’ [\textit{mahr al-methl}] a proper dower to that which is customary for a woman of her status and qualities. If the marriage has not been consummated, and is dissolved by divorce, annulment or the death of either party, no dower is payable.\textsuperscript{186} If the agreed object proves to be non-existent (the house has burnt down, for instance) or to have a different value than the parties thought, the dower is the monetary equivalent of the value it was thought to have.

Article 1079 of the Iranian Civil Code says that the dower “must be known to the marriage parties to the extent their ignorance is removed”. However Article 1087 allows for the possibility that the dower may not be mentioned in the contract, and even that the contract may specify that there is to be no dower. In both cases, the parties can decide on the dower by mutual consent after the marriage, but before consummation. If they do not do so, and the marriage is consummated, the wife is entitled to the ‘proper dower’

\textsuperscript{185} \textit{Ibid} at 16, 35-36.

\textsuperscript{186} According to Article 1087 (I.C.C.), “If a marriage dower (portion) is not mentioned, or if the absence of marriage portion is stipulated in a permanent marriage, that marriage will be authentic and the parties to it can fix the marriage portion subsequently by mutual consent. If previous to this mutual consent matrimonial intercourse takes place between them, the wife will be entitled to the marriage portion ordinarily due”. And according Article 1088 - In the case of the foregoing Article, if one of the marrying parties dies before the fixing of the marriage portion and before the consummation of marriage, the wife will not be entitled to any marriage dower (portion).
(mahr al-methl) according to Article 1093, or the ‘reasonable dower’ according to Article 1100. Khomeini says the proper dower.\textsuperscript{187} If they do not fix a dower, and the marriage ends in divorce without being consummated, she is entitled to the ‘reasonable dower’.\textsuperscript{188}

Where a father arranges the marriage of his minor child, the father is obliged to pay the dower (to which some authorities add: ‘If the child cannot’).\textsuperscript{189} If the father dies before the dower is paid, it is a first charge on his estate.

Where a man engages an intermediary to arrange a marriage, or it is arranged by someone having a power of attorney, and the man later refuses to recognise the marriage contract, some authors say it is the intermediary, not the principle, who is obliged to pay the jilted woman the dower, or some say, half of the agreed dower, while others say there is neither marriage nor dower.\textsuperscript{190} The authority to determine the amount of the dower may be delegated to a third party (such as an agent arranging the marriage), or the contract may specify that the husband has a unilateral right to determine the dower\textsuperscript{191} decide on an amount exceeding the ‘reasonable’ dower (Article 1090). Article 1091 specifies that the proper dower is to be determined in the light of the status of the wife, with respect to her family’s rank and other circumstances and

\textsuperscript{188} Hassan Emami, L’institution juridique du mahr, p. 43-44.
\textsuperscript{189} Supra note at 51.
\textsuperscript{190} Emamy, L’institution juridique du mahr, pp. 50-52.
\textsuperscript{191} Article 1089 of I.C.C., Authority for fixing the marriage portion can be entrusted to the husband or a third party, in which case both of them can fix it at any amount they may wish.”.
peculiarities concerning her in comparison with her equals and relatives, and also in the light of the customs of the locality.\textsuperscript{192}

Article 1094 adds to this, that the wealth of the man is to be considered in fixing the reasonable dower (reasonable marriage portion). This differentiates it from the ‘proper dower’.\textsuperscript{193} Where a man and woman have illicit sexual relations believing themselves to be legally married, or under some other form of ‘mistake’, the traditional fiqh says that the man is obliged to pay the woman the ‘proper dower’.\textsuperscript{194}

**Payment and ownership**

The dower is paid to the wife. Even where she is a child living with her father or grandfather, the latter is not permitted to use it for his own purposes. No clause that benefits any third party can be attached to the dower agreement. It is legally the wife’s property from the moment of marriage, and she has the right to dispose of it.\textsuperscript{195} Nevertheless, the husband is responsible for the dower until it is handed over: if an agreed Article is lost through no fault of his own, he is nevertheless obliged to provide an equivalent.\textsuperscript{196} Likewise, if a material fault is found in an agreed Article, the wife is entitled to demand an equivalent.

\textsuperscript{192} Article 1091 of I.C.C., “In fixing of the proper dower the status of the wife in respect of her family’s station and other circumstances and peculiarities concerning her in comparison with her equals and relatives and also the customs of the locality, etcetera, must be considered”.

\textsuperscript{193} Article 1094 of I.C.C., The status of the man in respect of wealth or poverty will be considered in fixing the reasonable marriage portion.

\textsuperscript{194} Emamy, L’institution Juridique, p. 13.

\textsuperscript{195} Emamy, L’institution juridique du mahr, p. 60-63; Article 1082 of I.C.C., Immediately after the performance of the marriage ceremony the wife becomes the owner of the marriage portion and can dispose of it in any way and manner that she may like.

\textsuperscript{196} Emamy, L’Institution juridique du mahr, p. 60-63; Article 1084, If the marriage portion consists of a designated property and it is found out that before the celebration of the marriage, that property was defective or that
Although the wife becomes the owner of the dower immediately after the performance of the marriage ceremony, one half of her ownership is unconditional, and the other half is subject to the consummation of the marriage. If the marriage ends in divorce without being consummated, she is entitled to only half of the dower and may have to repay any additional amount she has received.\textsuperscript{198}

If a temporary or permanent marriage proves to be void (for instance because of an impediment), and has not been consummated, the wife is not entitled to any dower. Where it has been consummated, and the wife did not know that the marriage was not valid, she is entitled to the proper dower.\textsuperscript{199}

A wife has the right to refuse consummation and other matrimonial duties until the dower, is paid. However she has this right only if the dower is specified as being paid in one amount and not in installments, and she has only one opportunity to use this provision to enforce payment: if she has freely consummated the marriage she cannot later withdraw consent pending payment of the

\textsuperscript{197} Article 1082, I.C.C.

\textsuperscript{198} Article 1092 of I.C.C., If the husband divorces his wife before the consummation of marriage, the wife be entitled to half of the marriage portion and if the husband has already paid more than half of the marriage portion he has the right to demand the return of the surplus, in original, in the equivalent, or in value.

\textsuperscript{199} Articles (1098 and 1099) Article 1098 of I.C.C., “If the marriage, whether temporary or permanent, was void, and there has not been any matrimonial relations, the wife will not be entitled to any marriage portion and the husband can demand the refund of the marriage portion if it has been settled”.

Article 1099 – “If the wife was ignorant of the fact that the marriage was unauthentic, and if in such case matrimonial relations have occurred, the wife will be entitled to a reasonable marriage portion”.

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A clause specifying at the marriage will be cancelled if the dower is not paid by a certain time would be an invalid clause, but the marriage contract and the agreed dower would still be valid.201

She cannot claim the dower from a bankrupt husband, although her right is only suspended.202

Delayed Payment

It is common practice to divide the dower into a portion to be paid immediately (prompt dower), a portion to be paid over time (deferred dower), and a portion which is payable when the marriage ends by death or divorce. The last of these is commonly much the larger amount, and serves as a discouragement to divorce and a source of security for the wife in the event of divorce.

The Civil Code allows the dower to be divided into installments and paid over time. If the contract does not specify the amounts and times, immediate payment is assumed, since Imam Khomeini says the wife may refuse to have intercourse until she receives the dower.203

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200 Articles 1085-86 of I.C.C., “Article 1085 - So long as the marriage portion is not delivered to her, the wife can refuse to fulfill the duties which she has to her husband provided, that the marriage portion is payable at once. This refusal does not debar her form right of maintenance expenses”.

201 Article 1081 of I.C.C., “If a condition is laid in the marriage act that if the marriage portion is not paid within a fixed period that marriage will be cancelled, the marriage and the marriage portion will remain binding and authentic but thee condition will be null and void”.

202 Emamy, L’institution juridique du mahr, p. 60.

203 Article 1083 of I.C.C., A duration of time or installments can be fixed for the payment of the marriage portion, as a whole or in parts.
5.8 Maintenance

(i) Maintenance in Indian Muslim Laws

"The law of maintenance suffers in point of definiteness", says Tyabji, "as the Muslim text had no object in keeping legal rights distinct from obligations of a moral nature. The power of a kazi\(^\text{204}\) are different from those of court of law in India, that rules sufficient to guide the Muslim courts can at times hardly be stated in a concrete form, without violence to some necessary but merely implied, reservation or qualification. The whole of law cannot, however, be said to be of merely imperfect obligation".\(^\text{205}\)

The first difficulty we encounter in this, as in some other branches of the law, is that the ancient lawyers do not observe the modern distinction between a legal and moral obligation. Therefore it is not always easy to say what is legally enforceable and what merely an ethical recommendation is.\(^\text{206}\)

The distinction between legal and moral duty to maintain has been well brought out by the Bombay High Court in *Mohd. Jusab v. Haji Adam*.\(^\text{207}\)

"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. The distinction between the laws of perfect and imperfect obligation has been discussed in detail by Abdur 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 on at page 343,

\(^{204}\) In some Indian textbook it has been written as "Kazi" but this is Arabic word and the correct pronunciation is "Qazi".


\(^{206}\) Tyabji, p. 287.

\(^{207}\) ILR (1911)37 Bom 71.
Abdur Rahim has referred to the 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 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. That being so, the right to enforce them in civil courts under Section 9 of CPC, is unaffected by the fact that there is a concurrent provision for their enforcement in criminal courts under Section 488 of the Criminal Procedure Code as pointed out in Ghana Kanta Mohanta v. Gereli”.

It must be appreciated that whereas Muslim jurists left legal and moral obligation to maintain overlapping each other, they remedied this “deficiency” by giving extended powers to the Kazi (Qazi). However, since the present day law courts do not possess such vested powers, the difficulty remains. Thus, though it may be conceded that Muslim Law of maintenance imposes a legal obligation, “but the details in the texts about the quantum of maintenance, the rules for determining when a person must be considered necessitous, and for fixing the standard of means, the possession of which imposes the obligation to provide maintenance, are hardly applicable to our times and conditions”.

After accepting the view that “to maintain” is a legal duty, let us examine in which order obligation to maintain various class of persons, can be placed.

208 ILR (1904) 32 Cal 479.
209 Tyabji, p. 254.
The first obligation arises on marriage. It is obligatory to maintain the wife and children. Then come those obligation that arise out of blood relationship.210

The result is that Muslim law of maintenance which is enforceable in India, is based on the Muslim personal law laid down by the courts and the incorporated in the enactments such as the Indian Majority Act, 1875, the Criminal Procedure Code, 1973 (Chapter IX), and the Muslim Women (protection of Rights on divorce) Act, 1986. In the language of Muslim law, maintenance is called ‘Nafkah’.211

Definitions of Maintenance (Nafaq)

Literally, maintenance is defined as “disbursement or cost”. It means the amount a person spends to maintain his family.212

It means a person should provide maintenance according to his means, and the word maintenance includes food, cloth and other necessities of life.213

“All those things which are necessary to the support of life, such as food, clothes and lodging; many confine it solely to food.”214

“Nafaqa literally means that which a man spends over his children; in law it means feeding, clothing and lodging; in common use it signifies food”.215
The, *Nfaqa* (maintenance) means all those things which are necessary for the support of life such as food, cloth and lodging. When a woman surrenders herself to her husband, it is incumbent upon him to support her and provide food, cloth and shelter, whether she be a Muslim or an infidel, because such is approved by the Holy Quran and tradition.\(^{216}\)

**Definition of Kharch-e-Pandan, Guzara, Mewa khorı**

In addition to the legal obligation to maintain there may be stipulations in the marriage contract which may render the husband liable to make a special allowance to the wife. Such allowances are called *kharch-e-pandan, guzara, mewa khorı*, etc.\(^{217}\) For example, a husband may have a lawful agreement with the first wife that on his marrying a second wife the first wife may reside with her parents and obtain a regular allowance; or similarly, an agreement with a second wife to allow her to reside in her parents' house and to pay her maintenance.\(^{218}\) An agreement for future separation, however, and for the payment of maintenance in such an event is void as against public policy.\(^{219}\)

**Religious Authority**

"Let the women [who are undergoing a waiting period] live in the same manner as you live yourselves, in accordance with your means; and do not harass them in order to make their lives difficult. If they are pregnant, maintain them until they give birth; if they suckle your infants, pay them for it; discuss things among

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\(^{216}\) *Hedaya*, p. 140.

\(^{217}\) *Tyabji, Supra note*, p. 298.

\(^{218}\) *Mulla, Supra note*, p. 280.

yourselves in all decency—if you cannot bear with each other, let another woman suckle for you".220

"And the [divorced] mothers should nurse their children for two whole years, if they wish to complete the period of nursing; and during period the father of the child shall be responsible for the maintenance of the mother in a reasonable manner. No soul is charged with more than it can bear. No mothers should be made to suffer on account of her child, and no father should be made to suffer on account of his child. The same duties devolve upon the father's heir [in case of the death, of the father]. But if, after consultation, they choose by mutual agreement to wean the child, there shall be no blame on them. Nor shall it be any offence for you if you desire to engage a wet-nurse for your children, provided you hand over what you have agreed to pay, in a reasonable manner. Have fear of God and know that God is observant of all your actions".221

The Prophet (peace be upon him) emphasized in this sermon at the time of his last pilgrimage the maintenance of wives said: “The customary maintenance of your wives is incumbent on you”.222

Object of Maintenance

There is different view among Muslim jurists as to objects of the maintenance. Some believe that they are three things i.e., food, clothing and lodging.223
But some others confine it only to food; “Maintenance comprehends food, raiment and lodging, though in common parlance it is limited to the first”. 224

According to last view, in this regard, maintenance is as stated before, not confined to only food, clothing and lodging but it includes other necessities of the woman. 225

Persons Entitled to Maintenance

Under Muslim law, a person may have to right to be maintained by the other on the basis of: (a) the marriage, and (b) the blood-relationship. Wife is entitled to be maintained by her husband because of marriage and her right is absolute; the husband is bound to maintain the wife whether she is necessitous or not. The second category of persons entitled to maintenance, are the blood-relationships which include young children and necessitous parents and other relations within the prohibited degree. In this manner, under Muslim law the following persons are entitled to maintenance:

- Wife,
- Young children
- the necessitous parents; and
- Other necessitous relations within prohibited degrees. 226

Maintenance of the Wife

According to the ordinary sequence of natural events the wife comes first. The wife is entitled to maintenance from her husband

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225 Hedaya, supra note at 392.
although she may have the means to maintain herself and although her husband may be without means.\textsuperscript{227} The \textit{Durr-al-Mukhtar} lays down that the wife is the \textit{asl} (root) and the child is the ‘\textit{far}’ (branch), wherefore her priority is established.\textsuperscript{228}

The husband’s duty to maintain commences when the wife attains puberty and not before; provided always that she is obedient and allows him free access at all lawful times.\textsuperscript{229} If a wife deserts her husband she loses her right to maintenance.\textsuperscript{230}

**Condition for the Wife’s Right of Maintenance**

The wife’s right to maintenance is subject to following condition:

1. Under Muslim law, the wife is entitled to maintenance from her husband only where the marriage is valid (\textit{sahih}). If the marriage is void (\textit{batil}) or irregular (\textit{fasid}), the husband is under no obligation to maintain the wife.\textsuperscript{231} However, according to Tyabji, where the marriage is irregular merely because of the absence of witnesses, the wife is entitled to claim maintenance.\textsuperscript{232}

2. The husband’s duty to maintenance only from the date when the wife attains puberty (fifteen years) and not before that where a wife is too young for sexual intercourse and lives with her parents, she has no right to claim maintenance.

\textsuperscript{227} Tyabji, p. 289.
\textsuperscript{228} Supra note, p. 312.
\textsuperscript{229} Mulla, Principes of Mohammadan Law, p. 277.
\textsuperscript{231} R.K. Sinha, \textit{Muslim Law}, p. 135.
\textsuperscript{232} Tyabji, \textit{Muslim Law}, p. 263.
3. Although a Muslim wife's right to maintenance by her husband is an absolute right yet, she must be faithful and obedient to him in respect of all the [lawful] matrimonial affairs. In other words, the right to be maintained by husband is subject to wife’s corresponding obligation to be faithful and obedient to her husband. Section 125 (4) of the Criminal Procedure Code, 1973 provides that no wife shall be entitled to receive any maintenance from her husband if she is living in adultery. If the wife herself does not discharge her own matrimonial duties, she has no right to claim maintenance from her husband. For example, if she does not allow her society to the husband and refuses cohabitation without any excuse, she is not entitled to maintenance. Similarly, if she refuses to obey the reasonable orders of the husband or lives separately without any reasonable justification, her right of maintenance against the husband is lost.

4. If the wife’s conduct is justified in the eyes of law, the husband is bound to maintain her, although for some reasons, he himself may not be able to exercise his matrimonial rights over his wife. In such circumstances; the wife would not lose her right of maintenance. According to Tyabji, a wife would not lose her right to maintenance in the following cases:

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233 These sentences seem wrong, because perhaps, some husband’s sue for matrimonial affairs is unlawful so it is right when I tell 'Lawful matrimonial affairs.


235 Ibid.
(a) Where she refuses access to her husband on some lawful ground, or

(b) Where the marriage cannot consummated owing to (i) the husband’s minority; or (ii) due to her absence from him with his permission, or (iii) because of her illness, or (iv) due to malformation (defect) in wife’s organs.\(^{236}\)

The wife is not entitled to sue her husband for past maintenance, unless the claim is based on a specific agreement, as held in *Abdool Futteh v. Zabunnessa*.\(^{237}\) The Court cited with approval a passage from *Baillie’s Digest* (p. 433): “When a woman uses her husband for maintenance for a time antecedent to any order of the judge or mutual agreement of the parties, the judge is not to decree maintenance for the past”. And the same thing has been laid down in much the same term in *Hedaya*. Thus, the decree of the lower court, which awarded “Rs. 1400 for arrears of maintenance, from March 1878 until the end of June 1880, at the rate of Rs. 50 a month” was reversed.\(^{238}\)

**Maintenance of the Divorce Women**

Under Muslim personal law as applied in India, a divorced wife claim maintenance from the former husband only for that period during which she is observing her *Iddat*. The duration of *Iddat* on divorce is three menstruation periods or, if pregnant, till delivery of the child. The former husband’s liability extends only up to the period of *Iddat*; not beyond that. For the claim of


\(^{237}\) (1881) 6 Cal 631.

maintenance under Muslim personal law the wife has to file a civil suit against her former husband.

Muslim law does not prescribe any maximum or minimum amount to be given during *Iddat* of the divorced wife. The court is competent to fix any amount keeping in view the socio-economic status of the husband and wife.\(^{239}\)

It is significant to note that maintenance of a divorce Muslim woman is now governed by the *Muslim Women (Protection of Right on Divorce) Act, 1986*. The provision of this Act are being discussed in the following lines separately. Besides other provision, this Act lays down that divorced Muslim woman is entitled to claim maintenance from her former husband only up to the period of *Iddat*. Thus, the law relating to divorced Muslim woman’s claim of maintenance from her former husband under pure Muslim law has now become a statutory Muslim law, and is subject to the provisions of the above mentioned enactment on this point. Detailed account of divorced Muslim Woman’s claim of maintenance under this Act has been discussed in the following lines under separate head.\(^{240}\)

**Maintenance under Section 125 of Criminal Procedure Code, 1973**

Under Section 125 of the Criminal Procedure Code, 1973 (Section 488 of the old code) a wife, whether Muslim or non-Muslim, is entitled to claim maintenance against the husband on the ground of the husband’s neglect or refusal to maintain her. That provision lays down: If any person having sufficient means neglects or refuses to maintain his wife unable to maintain herself, of his legitimate or illegitimate minor child, Whether married or

\(^{239}\) Sinha, *supra* note at 139.

\(^{240}\) *Supra* note at p. 140.
unmarried unable to maintain itself, or his legitimate or illegitimate child, not being a marred daughter, (a married minor daughter may be given maintenance allowance by the Magistrate, until she attains majority, If the Magistrate is satisfied that the husband of the child is not possessed of sufficient means) who has attained majority, where such child is by reason of any physical or mental abnormality, or injury unable to maintain itself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to pay a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding five hundred rupees in the whole, as such Magistrate think fit, and to lay the same to such person as the Magistrate from time to time directs.

Under the Criminal Procedure Code, the monthly allowance of maintenance cannot exceed Rs. 500.\textsuperscript{241}

Second proviso to Section 125(3), Criminal Procedure Code lays down that if the husband offers to maintain his wife on condition of her living with him, and she refuses to live with him, then the Magistrate may consider any ground of refusal stated by her, and may make an order for maintenance notwithstanding such offer, if he is satisfied that there is just ground for so doing. The Section also lays down that if a husband has contracted marriage with another woman or keeps a concubine, then it is a just ground for the wife’s refusal to live with him. It would amount to mental and legal cruelty if it is found that husband is impotent and is unable to discharge his marital obligations. It would amount to just cause.\textsuperscript{242}

\textsuperscript{241} Paras Diwan, Muslim Law, p. 153 (2004).
Sub-Section (4) of Section 125 lays down that no wife is entitled to receive an allowance from her husband, if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent. If a wife who has been allowed maintenance allowance Section 125, is found living in adultery, or living separately from her husband without sufficient reason or by mutual consent, then the Magistrate will cancel the order.243

The Muslim husband could always defeat wife’s claim of maintenance under Section 488 of the old CrPC by pronouncing divorce on her.244 If this happened, she could claim maintenance under the order of the Magistrate only till the expiry of the period of Idda but not beyond. Now Section 125 of the new Code defines “wife” as including a woman who has been divorced by, or has obtained a divorce from, her husband and has not remarried. In Bai Tahir v. Ali Hussain,245 Krishna lyer, J., in most unequivocal terms observed eligible, was entitled to the benefit of maintenance allowance and the dissolution of the marriage under personal law makes no difference to this right. Again in Fuzlunbi v. K. Khader Vali,246 Supreme Court reiterated Bai Tahir, and Krishna lyer, J., said that whatever the facts of a particular case, the Code by enacting Sections 125 to 127 changes the court with the humane obligation of enforcing maintenance or its just equivalent to illused wives and cast away ex-wives only if the woman has received voluntarily a sum, at the time of divorce, sufficient to keep her going according to the circumstances of the parties. He added,

243 Paras Diwan, p. 154.
244 Shah Abu v. Ulfat, (1896) 19 All 50; Ahmed Kasim v. Khatun Bibi, (1932) 59 Cal 833.
“Neither personal law nor other salvationary plea will hold against the policy of public law pervading Section 127 (3) (d) as much as it does Section 125. So a farthing is no substitute for a fortune nor naive consent equivalent to intelligent acceptance”. In Zohara Khatoon v. Md. Ibrahim, the Supreme Court said that “wife” in Section 125 and Section 127 includes a wife divorced by *talaq* as well as a wife who obtains divorce under the dissolution of Muslim Marriage Act, 1939.

**Maintenance under the Muslim women (Protection of Right on Divorce), Act, 1986**

*The Muslim woman (protection of Right on Divorce) Act, 1986* is the outcome of the controversy that usurped the attention of the Muslim community all over India after the *Shah Bano Befum’s* case. Besides other provisions, this Act was enacted to negative the law laid down *Shah Bano’s* case, in so far as divorced Muslim woman’s claim of maintenance beyond *Iddat*, is concerned. The Act extends to the whole of India and makes provisions for the maintenance of a divorced Muslim woman during and after the period of *Iddat* and also for enforcing her claim to unpaid dower and other exclusive properties.

The Act is applicable to every such divorce woman who was married according to Muslim law and has been divorced by, or has obtained divorce from her husband under the provisions of Muslim law. Thus, the Act is applicable to a woman who had contracted marriage according to the provisions of Muslim personal law and her marriage dissolves through any of the kinds of judicial or extra-judicial divorce recognized under Muslim law such as, *Talaq, Ila,*

248 Paras Diwan, Supra note at 154.
Zihar, Khula or Mubarat and also under Dissolution of Muslim Marriage Act, 1939. 249

Relevant Provision of the Muslim Woman Act, 1986

(i) Maintenance during the Iddat

The divorced woman is entitled to a reasonable and fair amount of maintenance for herself during the Iddat period from her former husband. 250

Where the divorced woman herself maintains the children born to her before or after the divorce, she is entitled to get a reasonable and fair amount from her former husband also for the maintenance of the children till such children attain the age of two years. 251

But, a divorce woman’s right to claim maintenance also for her children (under two years) does not affect the right of these children to claim maintenance from father. In Siraj Sahebji Mujawar v. Roshan Siraj Mujawar, 252 the Bombay High Court has held that children’s right of maintenance from father is separate and independent of the divorced wife’s (i.e. their mother’s) right to claim maintenance.

What amount is to be given to her as maintenance shall be determined by the Magistrate before whom the divorced woman makes application. The Magistrate shall fix the amount having regard to the needs of the divorced woman, the standard of life

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249 Ibid.
250 Section 3 (1)(a).
251 Section 3 (i)(b).
252 AIR 1990 Bom 334.
enjoyed by her during her marriage and the means of her former husband.\textsuperscript{253}

(ii) Maintenance After the Iddat

The divorced woman who remains unmarried after the \textit{Iddat}, and is unable to maintain herself, is entitled to get maintenance from her such relatives who would inherit her properties upon her death. In the absence of any of such relatives or, where they have no sufficient means, then, ultimately the liability to maintain her cast upon the \textit{Waqf Board} of the State in which she resides.

Section 4 (1) of the Act provides that where the Magistrate is satisfied that a divorced woman has not remarried and is not able to maintain herself after the \textit{Iddat} period, he may an order directing such of her relatives as would be entitled to inherit property on her death according to Muslim law, to pay a reasonable amount to her.

Section 4 (2) provides that where a divorced woman who is unable to maintain herself, has no relatives as mentioned above or, where such relatives ( or any one of them) have no enough means to pay maintenance, the Magistrate may, by order, direct the State \textit{Waqf Bord} (established under the \textit{Waqf} Act, 1954 or under any law for the time being in force in the State) to pay such maintenance as determined by him or, as the case may be, to pay the shares of such relatives who are unable to pay at such period as he may specify in his order.

(iii) Dower and other Exclusive Properties of Wife

The divorced woman is entitled to get her unpaid dower. Besides dower she is also entitled to all such properties which were

\textsuperscript{253} R.K. Sinha, p. 143.
given to her before or after the marriage by husband, his relatives, friends or her relatives or friends. It may be noted that dower and other properties given to a Muslim wife as presentation (gift) is her exclusive property and, she continues to be its absolute owner even after divorce. She was entitled to her dower and other exclusive properties under the uncodified Muslim law even before the commencement of this Act. But the wife had to file a civil suit and could get her properties only after going through the lengthy procedure under Civil Procedure Code as followed by these courts. It was an inconvenient dilatory process. Now under Section 3(2), (3) and (4) of the Muslim Women Act, 1986 the procedure followed by the Court is a ‘Criminal Procedure’ which is speedy and gives faster relief to aggrieved Muslim Woman. The Act has made the enforcement of these claims more effective.

It is significant to note that now the period of limitation for filing a suit for the claim of dower or maintenance under Section 3(2) and (4) shall not be determined under Muslim law. In Shahnaz Bano alias Shanaz Khan v. Parvez Ahmad Khan, 254 it was pleaded that suit for the claim of dower and maintenance should be dismissed as being time-barred because it was filed after the expiry of three years from the date of dissolution of marriage. But, the Patiala High Court held that since 3 (2) of the Muslim Women Act does not prescribe any time-limit for filing of a suit, it may be said that there is no limitation for filing such suit. Accordingly, the suit for the claim of dower and maintenance was held not time-barred and the court accepted it for the relief. 255

254 AIR 2000 Pat. 326.
255 Sinha, Muslim Law, p. 145.
(iv) **Option of Section 125 Cr.P.C.**

This Act does not totally bar the application of Sections 125 to 128 of the Criminal Procedure Code, 1973. The Muslim women Act, 1986 has now made the operation of Sections 125-128 of the Criminal Procedure Code optional in respect of the Muslim women. Section 5 of the Act provides that, on the date of the first hearing of the application if the divorced woman and her former husband declare by affidavit or any other declaration in such form as may be prescribe, either jointly or separately, that they would prefer to be governed by the provisions of Section 125 to 128 of the Code of Criminal Procedure, 1973, and file such affidavit or declaration in the Court hearing the application, the Magistrate shall dispose of such application accordingly. 256

(v) **Case Pending Under the Criminal Procedure Code**

Section 7 of this Act lays down that every application by the divorced woman under Section 125 or 127 of the Code of Criminal Procedure, 1973, pending before a Magistrate on the commencement of this Act, shall be disposed of by such Magistrate in accordance with the provisions of this Act, provided the parties have not opted, under Section 5 of this Act, that they want their case to be decided under the Criminal Procedure Code. 257

However, in *Usman Khan Bahmani v. Fatimunissa Begum*,258 the *Andhra Pradesh high Court* has held that operation of provisions of Section 125 or 127 of Criminal Procedure Code are excluded on the commencement of Muslim Women Act, 1986. The court observed that the applications filed under Sections 125 or 127

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256 AIR 1990 AP 225.
257 Sinha, *Supra* note at 145.
258 AIR 1990 AP 225.
CrPC) Pending the Magistrate shall be disposed of in accordance with the provisions of the Act of 1986. Explaining the meaning of 'pending applications' in *Hafiza Bi SulemanMoh. Darwajkar*, the *Bombay High Court* has held that pending applications include also such 'revisional applications' which were pending before the Magistrate on the Commencement of the Act (i.e. on 15-9-1986). Application for revision are deemed to be continuance of proceedings and such applications would also disposed off under Muslim Women Act.260

(vi) **Other Already Passed Under CrPC**

The orders already passed for maintenance under Section 125 of the Cr. P. C. are not affected. The Muslim Women Act, 1986 is not retrospective. Thus, the maintenance allowance granted to a divorced Muslim woman under Section 125 Cr. P. C. before commencement of the Muslim Women Act, shall continue even beyond the period of *Iddat*. In *A. A. Abdulla v. A. B. Mahmuna Saiyad Bhai* the Gujarat High Court held that maintenance is given to a divorced woman under Section 125 Cr. P. C. after contemplating her future needs and the maintenance is not limited only upto Iddat period. Therefore, the orders already passed by Magistrate under Section 125 Cri. P. C. are not to be nullified on coming into force of the Muslim Women Act, 1986.

It may be concluded therefore, that it is a well know judicial opinion that the Muslim Women Act, 1986 is not applicable to orders of maintenance already passed under the Criminal Procedure Code.262

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259 AIR 1990 Bom. 79.
261 AIR 1988 Guj. 143.
262 Sinha, supra note at 146.
(vii) Revision or Modification of Orders Already Passed

As regards revision or modification in the already passed orders of maintenance, the opinion of the courts is divided. According to Kerala High court, after the commencement of Muslim Women Act, 1986, there cannot be any modification in maintenance order. In Abdul Ghafoor v. A. U Pathumma Beevi, the court held that after coming into force of the Muslim Women Act, 1986, a Muslim divorcee, who had obtained a maintenance order under the Criminal Procedure Code could not invoke Section 127 Cr. P. C. so as to seek enhancement of the amount of maintenance. But, according to Allahabad High Court such orders may be revised or otherwise modified subsequently. In Shafaat Ahmad v, Fahmida Sadar, the Allahabad High Court held that the Muslim Women Act, 1986 does not exclude the application of the Criminal Procedure Code. Therefore, Cr.P.C. has to be given effect and any order passed by Magistrate (even) under Section 3 of the Muslim Women Act becomes revisable in view of the provisions of Section of Cr.P.C. This means to suggest that according to Allahabad High Court the provisions of Section 125 to 128 of the Criminal Procedure Code were still alive in so far as the maintenance of divorced Muslim woman is concerned.

Maintenance of the Widow

The wife’s right to claim maintenance from husband ceases as soon as her husband dies. After the husband’s death the widow is not entitled to maintenance even during her period of Iddat. Husband’s liability to maintain his wife is his personal liability which comes to an end upon his death. She is neither entitled to be

263 (1989) CrLJ 1224 (Ker).
264 AIR 1990 All 182.
265 Sinha, supra note at 146.
maintained by relatives of her husband, nor out of her husband’s properties. Section 125, does not include ‘widow’ in the term ‘wife’ therefore, a widow has no right to claim maintenance also under the Criminal Procedure Code, 1973. In *Agh Mohammad Jaffer v. Koolsoom Bibi* the privy Council observed that under Muslim personal law, a widow is not entitled to get maintenance out of the properties of her deceased husband even during her *Iddat.*

**Maintenance of Children and Descendants**

A father is bound to maintain his sons until they attain puberty, and his daughters until they are married. He is also responsible for the upkeep of his widowed or divorced daughter. The father is not bound to provide separate maintenance for a minor son who refuses to live with him without reasonable cause; nor is an unmarried daughter entitled to separate maintenance unless the circumstance for are such as to justify her in staying away. But the father’s obligation is not lessened by the child being in the *hidanat* (custody) of the mother. An adult son need not be maintained unless he is infirm.

If the father is poor, the mother is bound to maintain the children. And, failing her, it is the duty of the paternal grandfather. Thus grandchildren and other lineal descendants also possess rights of maintenance.

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266 (1897) 24 I.A. 196.
267 Sinha, *supra* note at 149.
268 Wilson was of the opinion that a father was bound to maintain his sons till the age of 18. Mulla took a contrary view and said that his obligation ceases when the son completes the age of 15. This question has so far not been settled by judicial authority. Wilson, pp. 140-42; Mulla, p. 370.
269 The correct pronunciation is ‘Hizanat’.
271 Tyabji, p. 315.
272 Fyzee, p. 175.
Maintenance of Illegitimate Children

A father is not bound to maintain an illegitimacy child; but in the Hanafi School the mother is bound to support her natural son or daughter.273

The Code of Criminal Procedure, Section 488 provides that the putative father of an illegitimate child can be ordered to pay a sum not exceeding Rs 500 per month by way of maintenance.274

Maintenance of Daughter-in-law

A father – in-law is under no obligation to maintain his widow daughter-in-law.275 (i.e. Son’s wife).

Maintenance of the Parents

Under Muslim law, the children are bound to maintain their necessitous parents and grand-parents. The Islamic principle is that as the children have right to be maintained by their parents, they have also a corresponding duty to provide maintenance to their parents, IF need be so.276

Maintenance of Grand-Parents

The children are bound to provide maintenance to their paternal or maternal grand-parents if the grand-parents are poor and need support for their livelihood. But the grand-parents are entitled to maintenance from their grand-children only in the absence of their own children. Thus, grand-parents are not entitled to maintenance from grand-children if they have their own children.277

273 Fyzee, Supra note.
274 Tyanji, p. 289.
275 Mohomed Abdul Aziz v. Khairunnissa Abdul Gani, (1948) 52 BLR 133.
277 Supra note at 152.
(ii) Maintenance (Nafaqah) in Iranian Laws

‘Nafaqah’ literally means to go, to perish, to spend. It is verbal noun and it’s infinitive is ‘Nofooq’ and it’s plural from are ‘Nafaqat’ and ‘Nefaq’. 278

According to Article 1107 of Iranian Civil Code: “Cost of maintenance includes lodging, clothing, food, furniture in proportion to the situation of the wife, on a reasonable basis, and provision of a servant if the wife is accustomed to have servants or if she needs one because of illness or defects.

Persons Entitled to Maintenance in Iranian Laws

Under Iranian law (like Indian Muslim Law) the following persons are entitled to maintenance:

1. Wife,
2. Children and Descendants
3. Parents and Ascendants
4. Other necessitous relations within prohibited degrees

Wife’s Priority to Maintenance

The wife has overriding priority in receiving maintenance over some others who are also entitled to such as parents, Children etc. But a person should, first, maintenance himself if and the wife’s right to maintenance comes to picture afterwards. 279

Article 1203 of (I.C.C.) states: “If there are a wife and one or more relatives who are to be supported, the claim to support of the wife precedes that of others.

Wife's Maintenance

The wife has a right to be maintained (nafaqah) by her husband.

According Article 1106 of Iranian Civil Code (I.C.C): “The cost of maintenance of the wife is at the charge of the husband in permanent marriages”.

It remains in effect even if the husband is poverty-stricken and the wife has independent wealth, and it is not reciprocal at all. A woman who has earnings or inherited wealth is not obliged to contribute anything to the household.

According Article 1118 of I.C.C., the wife can independently do what she likes with her own property.

The maintenance right comes into effect when the marriage is consummated, and continues so long as she is not in a state of disobedience (nushuz).

Article 1108 of (I.C.C.) states: “If the wife refuses to fulfil duties of a wife without legitimate excuse, she will not be entitled to the cost of maintenance”.

Essentials of Wife's Maintenance

(i) The marriage must be valid and be permanent. So, in the case of temporary marriage the wife is not entitled to the cost of maintenance, unless provision has been specially made for this, or the marriage has been arranged on this condition.\(^{280}\)

(ii) The wife must be obedient unless there a lawful excuse.

\(^{280}\) Article 1113 of (I.C.C.).
Other Condition of wife’s Maintenance

According to Article 1114 of I.C.C, “The wife must stay in the lodging that the husband allots for her unless such a right is reserved to the wife”.

Article 1115 of I.C.C. states, “if the existence of the wife and husband in the same house involves the risk of bodily or financial injury or that to the dignity of the wife, she can choose a separate lodging: and if the alleged risk is proved the court will not order her to return to the house of the husband and, so long as she is authorized not to return to the house, her cost of maintenance will be on the charge of her husband”.

Article 1116 - In the case of the foregoing Article, so long as litigation is not concluded between the married couple, the lodging of the wife will be fixed by mutual consent of both parties and failing such consent, the court will fix the lodging after duly obtaining the views of near relatives, and in the absence of relatives the court itself will fix a suitable lodging.

Maintenance of divorcee

According to Article 1109 of (I.C.C), “Cost of maintenance of a divorced wife during the period of “Iddeh” (revocable divorce) is to be borne by the husband, unless the divorce has taken place because of disobedience. But if the Iddeh arises from the cancellation of the marriage or a final divorce, the wife is not entitled to cost of maintenance, unless she is with child from her husband in which case she be entitled to cost of maintenance till her child is born.
Wife's Maintenance in death period (Iddah)

According to Article 1110 (I.C.C.), “During Iddah Period that has happened due to the death of the husband, the living expenses are supplied from the relative’s property by woman’s asking, if they do not pay; The relatives who are responsible for alimony.

Husband’s Refusal of Maintenance's Payment

Article 1111 of the (I.C.C.) states, “The wife can refer to the Court if her husband refuses to provide for her maintenance. In such a case the court will fix the amount and will compel the husband to pay it.

Article 1112 of the (I.C.C.) states, “If the enforcement of the provisions of the foregoing Article is impossible, the provisions of Article 1129 must be followed.

Article 642 of Islamic Punishment Law States, “If one refuses to pay his wife’s maintenance, although she complies with him, or the maintenance of the other persons who are compulsory for him, the court sentences him from 3 months and one day to 5 months jail.

Claim for wife’s Past Maintenance

Article 1206 - A wife can always and in any case prefer a claim for her past expenses, and her right to these expenses is preferential. In the event of bankruptcy or insolvency of the husband her dues must be paid before any liquidation payment is made.

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281 Article 1129 - If the husband refuses to pay the cost of maintenance of his wife, and if it is impossible to enforce a judgment of the court and to induce him to pay the expenses, the wife can refer to the judge applying for divorce and the judge will compel the husband to divorce her. Also when the husband is insolvent and not able to maintain the wife.
arranged. Relatives, however, entitled to provision of maintenance expenses can claim only their expenses for a future period.

**Maintenance of Child and relative**

Article 1196 of (I.C.C.) states, “Only relatives by blood in a direct line ascending or descending are under reciprocal obligation to provide maintenance for each other”.

Article 1197 of (I.C.C.) states: “A person is entitled to maintenance expenses if he or she is poor and cannot earn a living by adopting an occupation”.

Article 1198 of (I.C.C.) states: “A man is only obliged to maintain another if he is in a position to do so, that is to say he can provide such maintenance without thereby causing himself distress. To determine whether a man can maintain another his obligations and his manner of life must be taken into consideration”.

**Maintenance of child**

Article 1199 of the (I.C.C.) states: “Maintenance of children is the duty of the father on his death or his incapacity for maintenance, this duty devolves on the paternal grandfathers, the nearer of his kin coming before the father. In the absence of a father or paternal grandfathers or in the event of their incapacity, the duty of maintenance devolves on the mother.

If the mother is dead also or is unable to maintain the child, the duty will devolve on maternal grandfathers and the grandmothers and paternal grandmother who are sufficiently wealthy to provide maintenance, giving preference to the nearer of
kin over the father. If a number of the grandparents are similar in degree of kinship, the maintenance expenses must be paid by them in equal shares.

72. Maintenance of parents

According to Article 1200 Of (I.C.C.): “Maintenance expenses of parents must be paid by the nearest related child or grandchild in the order of kinship”.

Maintenance of relatives

According to Article 1204 of (I.C.C.): “Maintenance of relatives consists of providing dwelling, clothing, food and furniture to the extent of bare necessities and subject to the means of the person who provides the maintenance”.

Refusal to payment of maintenance

Article 1111 empowers a court to determine the amount of maintenance and to compel the husband to pay it. Where payment is impossible, the wife may apply to the court for a judicial divorce.282 Khomeini stipulates that a wife who is entitled to maintenance may take the required amount from her husband’s assets without his permission. If she is obliged to work to support herself, her obligation to give obedience is suspended.283 The right to maintenance normally continues in the 3-month ‘iddah period following a divorce (discussed in the Section on divorce), but there is no right to maintenance during the ‘iddah period following the husband’s death, no right to maintenance during the ‘iddah period following the husband’s death.

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282 Article 1129.
283 Khomeini, Clarification of Question, 2416.
Obedience for the woman entails not leaving the house without her husband’s permission, surrendering to any pleasure he desires, and not refusing sexual intercourse without a religious excuse.\textsuperscript{284}

\textsuperscript{284} Khomeini, Clarification of Question, 2412.