

Interpretation of Muslim Law for Mahr, Dower and Maintenance

BY: Dr.Pankaj Dwivedi(Associate Professor), HOD, School of Law and Legal Affairs, Noida International University and Annu Bahl (Research Scholar), Noida International University

Introduction to Mahr, 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.¹

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.²

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.³

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 form of marriage and mahr was gift or compensation to the parents of the wife in the baal form of marriage.⁴ 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

¹ Aqil Ahmad, Text Book of Mohammedan Law, p. 149 (2006)

² Syed Khalid Rashid, Muslim law, p. 88 (2009), revised by Prof. V. P. Bharatiya

³ Aqil Ahmad, Mohammedan Law, p. 149 (2006).

⁴ Ameer Ali,

Mohammedan Law, Vol. II p. 432-4, Vols. I-II, Calcutta 1912, 1929, new addition by Tahir Mahmood (1985).

compensated.⁵ 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.⁶ 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).

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.

The Privy Council describes it as an essential incident to the status of marriage. 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 *muh*, *sudak*, *nulah* and *akr*.⁷

⁵ A.A.A. Fyzee, *Outlines of Muhammadan Law*, p. 105 (2008) edited and revised by Tahir Mahmood.

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.⁸

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.

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

⁸ N.B.E. Baillie, *Digest of Moohummudan Law*, Vol. I, p. 195 (1980).

time of marriage, 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”.

Nature of Dower

Dower in the present form 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.

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.

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.

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”.⁹

⁹ ILR (1886) 8 All 149.

“Even after the marriage the amount of dower may be increased by the husband during covertures”.¹⁰

2. It is regarded by some eminent authorities as a consideration for conjugal intercourse. In a case, *Smt. Nasra Begum v. Rizwan Ali*,⁸⁹ 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 husband. The marriage is valid even though no mention of dower made by the contracting party.

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

Importance of Dower

Fatwai-i-Quazi Khan says, “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”.

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. 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 having two, three or four wives.

In *Abdul Kadir v. Salima*,¹¹ *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

¹⁰Syed Khalid Rashid, *Muslim Law*, p. 89 (2009).

¹¹ILR (1886) 8 All 149

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 *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.

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.¹²

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.¹³

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.

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 *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. 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.

¹²Aqil Ahmad, *supra* note at 153

¹³Social Issues Decision of Indian Ulam, p. 14.

Sometimes, with a view to preventing the husband from divorcing his wife, the amount of *mahr* is deliberately fixed very high. The husband cannot plead in equity and say by way of his defence, that the amount is too excessive and beyond his means. 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*. 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.¹⁴Fazee 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:¹⁵

- (a) *Hanafi law* : 10 dirhams
- (b) *Maliki law* : 3 dirhams
- (c) *Shafèi law* : no fixed minimum
- (d) *Shia law* : no fixed minimum

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”.

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”. 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”.

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. Even instructions in the Koran may be the subject matter of *Mahr*. It may, on the other hand, be immovable property, land or house. If immovable property of the value of Rs. 100 or more is

¹⁴Paras Diwan, *Muslim Law in Modern India*, p. 70 (2008).

¹⁵A. A. A. Fyzee, *Outlines of Muhammadan Law*, p. 107 (2008).

given by way of dower, and the wife is put into possession, she cannot be dispossessed even if there is no registered deed, Section 54A, Transfer of Property Act, 1872, will apply.

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.

(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 *mahr*".

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 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.

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.

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.

The *Ithna Ashari Shias* divide mahr into three categories:

one, *Mahr i- Sunnat* or the amounts of mahr the Prophet paid his wives,

said to be 500 dirhams; *Maher- i- Mithl*, or customary dower; and *Maher- i- Musama* or the specified dower. Under Shiah Ithna Ashari law as practiced in India when no *mahr* has been stipulated at the time of marriage, and is to fixed by the operation of the law, the amount is *Maher- i- Sunnat* or 500 *dirhams mahr*, in the absence of specification, in not to exceed this amount, *Ismailli* law follows a similar rule. 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 mahr.

Under Fatimid Shiah law a woman may under certain circumstance give up her *mahr*, according to all other Schools *mahr* forms an inseparable ingredient of the marriage contract and never be cancelled by the virtue of law.

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

(a) Specified Dower (*Mahr-i- Mussamma*)

(1) Prompt dower; and

(2) Deferred dower.

(b) Unspecified (Proper) dower (*Mahr-i-Mish*)

(a) Specified Dower

Usually the *maker* 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) according to Hanafi law and 3 *dirhams* according to Muslim law.

Shia law does not fix any minimum amount for dower. 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.

As already stated, specified dower is again subdivided into:

(a) Prompt Dower (*muajjal mahr*)

(b) Deferred Dower (*muwajjal mahr*).

(1) Prompt Dower

It is payable immediately after marriage on demand.

According to *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 bound to maintain the wife, although she is residing apart from him.

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. 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 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.

(2) Deferred Dower

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

According to *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. 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.
2. 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.
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.

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.

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.

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 possession of her husband's property

under a claim for her dower, the other heirs of her husband are severally entitled to recover their respective share upon payment of a quota of the dower debt proportionate to those shares.

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 in the estate is $\frac{1}{8}$ and she is liable to contribute $\frac{1}{8}$ of Rs. 3200 = Rs. 400. The son's share is $\frac{7}{16}$ and he is liable to $\frac{7}{16}$ of Rs. 3200 = Rs. 1400. The share of each daughter is $\frac{7}{32}$ and she is liable to pay $\frac{7}{32}$ of Rs. 3200 = Rs. 700 and if the widow 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.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.

Difference Between Sunni and Shia Laws Relating to Dower

| Sunni Law | Shia Law |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------|
| A minimum limit of 10 dirhams is prescribed for specified dower. | No minimum limit is prescribed. |
| There is no limit to proper dower. | Proper dower cannot exceed 500 dirhams. |
| There is no maximum limit for specific dower. | Fixing of dower exceeding 500 dirhams is considered abominable though not illegal. |
| 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. | In such case no dower would be due if the marriage was not consummated. |
| An agreement that no dower shall be due is void. | Such agreement by sane and adult wife is valid. |
| In the absence of an agreement only a reasonable part of the dower is presumed to be prompt. | The whole dower is presumed to be prompt. |

The Muslim Women (Protection of Rights on Divorce) Act, 1986, has provision on Mahr as follows.

Section 3. Mahr or other

properties of Muslim

woman to be given to her at the time of divorce.—

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

(a) a reasonable and fair provision and maintenance to be made and paid to her within the iddat period by her former husband;

(b) where she herself maintains the children born to her before or after her divorce, a reasonable and fair provision and maintenance to be made and paid by her former husband for a period of two years from the respective dates of birth of such children;

(c) an amount equal to the sum of mahr or dower agreed to be paid to her at the time of her marriage or at any time thereafter according to Muslim law; and

(d) all the properties given to her before or at the time of marriage or after the

marriage by her relatives or friends or the husband or any relatives of the

husband or his friends.

(2) Where a reasonable and fair provision and maintenance or the amount of mahr or dower due has not been made or paid or the properties referred to in clause (d) of sub-section (1) have not been delivered to a divorced woman on her divorce, she or any one duly authorised by her may, on her behalf, make an application to a Magistrate for an order for payment of such provision and maintenance, mahr or dower or the delivery of properties, as the case may be.

(3) Where an application has been made under sub-section (2) by a divorced woman, the Magistrate may, if he is satisfied that—

(a) her husband having sufficient means, has failed or neglected to make or pay her within the iddat period

a reasonable and fair provision and maintenance for her and the children; or

(b) the amount equal to the sum of mahr or dower has not been paid or that the properties referred to in clause (d) of sub-section (1) have not been delivered to her. make an order, within one month of the date of the filing of the application, directing her former husband to pay such reasonable and fair provision and maintenance to the divorced woman as he may determine as fit and proper having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of her former husband or, as the case may be, for the payment of such mahr or dower or the delivery of such properties referred to in clause (d) of sub-section (1) to the divorced woman: Provided that if the Magistrate finds it impracticable to dispose

of the application within the said period, he may, for reasons to be recorded by him, dispose of the application after the said period.

(4) If any person against whom an order has been made under sub-section (3) fails without sufficient cause to comply with the order, the Magistrate may issue a warrant for levying the amount of maintenance or mahr or dower due in the manner provided for levying fines under the Code of Criminal Procedure, 1973 (2 of 1974) and may sentence such person, for the whole or part of any amount remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one year or until payment if sooner made, subject to such person being heard in defence and the said sentence being imposed according to the provisions of the said Code.

The Muslim Women (Protection of Rights on Divorce) Act, 1986, has provision on maintenance as follows.

4. Order for payment of maintenance.—

(1) Notwithstanding anything contained in the foregoing provisions of this Act or in any other law for the time being in force, where the Magistrate is satisfied that a divorced woman has not re-married and is not able to maintain herself after the iddat period, he may make an order directing such of her relatives as would be entitled to inherit her property on her death according to Muslim law to pay such reasonable and fair maintenance to her as he may determine fit and proper, having regard to the needs of the divorced woman, the standard of life enjoyed by her during her marriage and the means of such relatives and such maintenance shall be payable by such relatives in

the proportions in which they would inherit her property and at such periods as he may specify in his order:

Provided that where such divorced woman has children, the Magistrate shall order only such children to pay maintenance to her, and in the event of any such children being unable to pay such maintenance, the Magistrate shall order the parents of such divorced woman to pay maintenance to her: Provided further that if any of the parents is unable to pay his or her share of the maintenance ordered by the Magistrate on the ground of his or her not having the means to pay the same, the Magistrate may, on proof of such inability being furnished to him, order that the share of such relatives in the maintenance ordered by him be paid by such of the other relatives as may

appear to the Magistrate to have the means of paying the same in such proportions as the Magistrate may think fit to order.

- (2) Where a divorced woman is unable to maintain herself and she has no relative as mentioned in sub-section (1) or such relatives or any one of them have not enough means to pay the maintenance ordered by the Magistrate or the other relatives have not the means to pay the shares of those relatives whose shares have been ordered by the Magistrate to be paid by such other relatives under the second proviso to sub-section (1), the Magistrate may, by order direct the State Wakf Board established under section 9 of the Wakf Act, 1954 (29 of 1954), or under any other law for the time being in force in a State, functioning in the area in which the woman resides,

to pay such maintenance as determined by him under sub-section (1) or, as the case may be, to pay the shares of such of the relatives who are unable to pay, at such periods as he may specify in his order.

Concept of Maintenance and General Meaning of the Term:-

The term maintenance includes all necessities for subsistence of life. The general meaning of the term can be well understood by referring to the definition given under Hindu law, since muslim law doesn't per se define the term, and hence, this reference shall be useful.¹⁶ The term as defined in Hindu Law means:-

¹⁶ Aioshwarya Anand, "Maintenance for Muslim Women in India" International Journal of Advanced Research (2016), Volume 4, Issue 5, 1503-1510

"in all cases, provisions for food, clothing, residence, education and medical attendance and treatment; in the case of an unmarried daughter, also the reasonable expenses of and incident to her marriage."¹⁷

As indicated by Halsburys law of England, maintenance is "the name

given to the week by week or regularly scheduled installments which may be requested on a declaration of separation, or nullity to be made for the upkeep and backing of the wife amid the joint lives of the life partners. Hence, it is a comparative procurement for their profit, which may be made in processes of judicial separation, nullity, divorce and restitution of conjugal rights”

Meaning of the Term under Muslim Law:-

Under traditional Sharia law, the law regarding maintenance was a little unclear, since there was no demarcation between a legal obligation or a moral or ethical duty under Muslim law, hence making it difficult to ascertain as to what is a person legally bound to do and what is a mere moral duty. Under Quranic Law, a husband is obliged to provide maintenance to his wife and family, and the term signifies the amount he is liable to pay for the same.¹⁸

The term used for maintenance under Muslim Law is called *naḥāqā* and it comprehends food, raiment and lodging, though in common parlance it is limited to the first.¹⁹

The wife is entitled to maintenance from husband, despite the

fact that she has means to maintain herself. In addition to this, the marriage contract may stipulate payment of special allowances by the husband, and in presence of these, it becomes the obligation of the husband to pay these to the wife. Such allowances are called *kharch-e-pandan, guzara, mewa khore,* etc.

This can be claimed as a right. However, this is subject to a few exceptions. These are:-

1. A wife cannot claim maintenance if she is disobedient.
2. A wife cannot claim maintenance if she does not allow free access to husband unconditionally
3. A wife who deserts her husband is not entitled to maintenance.

¹⁷Section 3 (c) Hindu Adoption & Maintenance Act, 1986

¹⁸Khan Ephroz, “ Women and Law : Muslim Personal Law Perspective”(Rawat Publications , 2003) 302

¹⁹Prof. Ashok Wadje, “ Maintenance Right of Muslim Wife: Perspective, Issues & Need for Reformation” National Law University, Jodhpur Law Journal

The husband's obligation to maintain his wife is a personal liability, thus after his death, the wife is not entitled to be maintained by his relatives nor out of his property.

We have established that maintenance is the right of the wife.

The following circumstance give rise to such a right. These are:-

1. Marriage.
2. Divorce.
3. Pre Nuptial Agreement.

We may now move a step further to list the sources from which these rights emanate. There are three major sources. These are :-

1. Muslim Personal Law.
2. Section 125, CrPC.
3. The Muslim Women (Protection of Rights on Divorce) Act, 1986.

The present work shall focus on Maintenance of Muslim Women Post Divorce. The major research area is the conflict between CrPC and Muslim Personal law, and the position as settled by the famous Shah Bano Case.

Maintenance of Divorcees under Muslim Law: Maintenance under, CrPC- Before and After 1973:-

Initially, it was provided in the CrPC(earlier under section 488) that only a wife is entitled to maintenance by husband. It was claimed by the husbands that once dissolution takes place, a woman ceases to be a wife and hence is not longer entitled to maintenance. However, in Muslim law, taking a divorce is relatively easier and hence, it led to situations

where the same was being misused by the husbands.

Looking at this loophole, an amendment was made in 1973, wherein under section 125, a divorcee was entitled to maintenance till the time she remarries. Being secular in nature, this provision applies to all women, including Muslim women.

Conflict of Muslim Personal Law with section 125 of CrPC:-

Under Muslim Personal Law, a woman is entitled to maintenance only till the end of the Iddat period. Iddat is the period when co-habitation of the parties end, on the expiry of iddat the spouses will stand divorced. The period of iddat consists of three menstrual cycles or three lunar months , in case of pregnant women , the iddat period would extend up to the time of delivery.²⁰

²⁰ Khan Ephroz , “ Women and Law : Muslim Personal Law Perspective” Rawat Publications , 2003

Hence, we can see a direct conflict, since CrPC does not recognize iddat period and maintenance goes beyond the same. Secondly, in Muslim Law, polygamy is permitted, and under section 125, marriage to another woman becomes a ground for claiming maintenance. In *Mohammed Haneefa v. Mariam Bi*,²¹ the Court stated that in case of a clash between personal law and CrPC, the former shall prevail. This position was seconded by the Supreme Court in *SairaBano v A.M Abdul Gafoor*.²²

This caused a lot of dilemma in the legislature. To resolve this dilemma, Section 127(3) was added under which that if a divorced woman receives an amount due to customary or personal laws of the community, the magistrate can cancel any order for maintenance in her favour.

Judicial Decisions interpreting the Scope of Section 127:-

However, since the judiciary favoured the right of women to claim maintenance, the conflict continued. It was held in *Bai Tahira vs Ali Hussain Fissalli Chothia*²³ that payment of "illusory sums" focused around the Muslim personal laws ought to be considered to diminish the measure of maintenance payable by the spouse, however that does not acquit the

spouse from the commitment in light of the fact that each lady independent of her religion is entitled to maintenance. The divorced wife has this right except from when the aggregate payment stipulated by custom is pretty much sufficient to substitute the maintenance. Thus the spirit behind Section 127(3)(b) is that a wife can't profit from both, unless the whole sum paid under the customary law is deficient. An extra requirement was included by the Apex court in *Fuzlunbi v. K Khader Vali*.²⁴

The instalment of the sum focused around Muslim law must be pretty much identical to the month by month maintenance to the divorcee, required till her remarriage or demise, with a specific end goal to substitute the maintenance recompense commitment. The Supreme Court expressed in *Zohara Khatoon vs Mohd. Ibrahim*²⁵ that the expression "wife" in S.125 and S.127 of CrPC incorporates Muslim ladies who get separated by method for Talaq or under the Dissolution of Muslim Marriage Act, 1939.

²¹ AIR 1969 Mad 414

²² AIR 1987 SC 1103

²³ 1979 AIR SC 362

²⁴ AIR 1980 SC 1730

²⁵ 1981 AIR SC 1243

It was in this context of growing conflict and dissatisfaction that the famous Shah Bano Case surfaced and went on to become the most landmark judgment in this subject matter.

Mohd Ahmad Khan v. Shah Bano Begum or the Shah Bano Case:-²⁶
Facts of the Case briefly stated:-

Shah Bano Begum married Mohammad Ahmed Khan in 1932. They produced three sons and two daughters. Mr. Khan took another wife, legally according to Islamic law, with whom he produced additional children. The entire extended family shared a home, from which Mr. Khan expelled Shah Bano in 1975, forcing her to take refuge with one of her adult sons. Shah Bano received maintenance from her husband for two years, after which he claimed he had fulfilled his obligations under Islamic law because according to the fundamentalist interpretation of the Shariat, “the Muslim husband enjoys the privilege of being able to discard his wife whenever he chooses to do so.”

In the present case, a 62 year old woman was divorced and subsequently denied maintenance. She had not remarried. On moving the court of the Judicial Magistrate at

Indore under section 125 of the CrPC, and claiming maintenance of Rs 500 per month, she was awarded a maintenance of Rs 25 per month from the husband.

Aggrieved by the low amount, she filed a revision petition before

the Madhya Pradesh High Court, which entitled her to a maintenance of Rs 179.20 per month. The husband appealed against this order before the Supreme Court, his main contention being that since the dissolution had taken place, she ceased to be his wife and under Muslim law, he was not obliged to pay her maintenance. Also, since he had paid the dower amount during the Iddat period, the wife was not entitled to any maintenance. Muslim bodies like All India Muslim Personal Law Board and Jamiat Ulema-e-Hind joined the case as interveners.

The case was decided by a five judge bench composed of chief justice Chandrachud, Jangnath Misra, D A Desai, O. Chinnappa Reddy, and E S Venkataramiah.

²⁶ AIR 1985 SC 945

Judgment of the Court:-

The Supreme Court dismissed the appeal and upheld the decision of the High Court. The Supreme Court held that if the wife is equipped to maintain herself then the spouse's commitments would stop post iddat. However in the event that she can't do so, a recourse under section 125 is available and, hence, the appellant had to pay. The Supreme Court stated that if the Holy Quran is correctly interpreted, then it can be inferred that there is not conflict between section 125 of the CrPC and Muslim Personal Law at all, since even under Islamic Law, the husband is obliged to pay maintenance to the divorced wife. The Supreme Court explained this judgment by saying that, even if there is a conflict, section 125 of CrPC is a secular law, and hence, applies to all women, irrespective of their religion. It further stated that CrPC shall prevail over Muslim Personal Law in case of a conflict. The court held:-

“It would be incorrect & unjust to extend the rule of maintenance under Muslim Law to the cases in which the divorced wife is unable to maintain herself, so if the

divorced wife is able to maintain herself, the husband's liability ceases with the expiration of the period of Iddat, but if she is unable to maintain herself after the period of Iddat, she is entitled to have recourse to Section 125 of Cr. P.C.”

Hence, the Supreme Court settled the position of law that in case a Muslim woman is divorced, incapable of maintaining herself and has not remarried, then she shall be entitled to maintenance under section 125 of the CrPC.

Reaction to the Judgment:-

The judgment had a lot of political repercussions and had to face a lot of criticism from the orthodox Muslim Community. Different Civil Code altogether for Muslims was demanded and caused a lot of controversy and heated debates.

The main protestors were Obaidullah Khan Azmi and Syed kazi. They had formed an organization in 1973 known as the All India Muslim Personal Law Board devoted to upholding what they saw as Muslim Personal Law, and through this organization, they voiced their opinions against the judgment.

Developments Post Shah Bano Case:-

The Rajeev Gandhi government, coming under pressure from Islamist groups decided to nullify the judgment, and in a effort to do the same, it passed The Muslim Women (Protection Of Rights On Divorce) Act, 1986.

This act became one of the most controversial legislations enacted. The relevant provisions of this act are sections 3(1)(a) and 4(1), which stated that the former husband must provide “a reasonable and fair provision” and maintenance within the period of iddat and, that in case she is unable to maintain herself after the period of iddat, she can claim maintenance from her relatives and if they cannot pay, then she can claim from the Wakf Board as per S.4(2), respectively. It doesn't characterize a maximum limit to the maintenance. It expresses that women may look for fair and reasonable remuneration amid the iddat, and that any kids borne of the marriage are eligible for a further maintenance.

Reaction to the Act and Controversies surrounding the same:-

The Act was seen as oppressive as it denied divorce Muslim ladies the right to fundamental support which

ladies of different beliefs had recourse to under CrPC. Minority Rights Group International, an NGO based in the U.K., denounced the law, commenting that it “highlighted the disjunction between constitutional law premised on the principle of sexual equality and religious

laws which discriminate on the basis of this very category.”

The Constitutional validity of the Act was challenged on the ground of being violative of Article 14, 15 and 21. The basic question raised by right activists was the necessity of enacting an Act, which completely segregates a portion of the population by having a special enactment despite a secular remedy being available.

The Act was also criticised for being arbitrary for two main reasons.

“Firstly, the use of the word within implied that there was no provision in the Act which could entitle a woman to maintenance post iddat period. Secondly, the Act diminished the scope of Section 125 of the CrPC, since, by virtue of this Act, the Muslim men were at the option of making the said section of CrPC inapplicable to them.”

A state of confusion was prevalent among the judiciary, since on the face of it, the Act seemed to be in

in favour of Muslim women, because of the use of words like fair, reasonable, provision etc. However, the act didn't provide for any circumstance in which the maintenance could exceed the iddat period. The controversy was on its peak between Gujarat and Andhra High Courts in the cases of Arab Bail and Fathimunnissa Begum .

Hence, a situation of ambiguity prevailed, and the court started interpreting the Act, as shall be discussed in the next section.

Position Post Enactment of The Muslim Women (Protection Of Rights On Divorce) Act, 1986- Daniel Latifi v. Union of India²⁷:-

As noted in the previous section, the Act had created a lot of ambiguity, and the judiciary started interpreting the Act. The Andhra Pradesh High Court took a strict view saying that the use of the word with signifies that in no case can the maintenance exceed the iddat period. On interpreting this, the Gujarat High Court, relying on the words fair and reasonable, awarded a lump sum payment to the divorced wife as maintenance. The position was finally settled by another landmark judgment in 2001, called Daniel Latifi v. Union of India.

Daniel Latifi v Union of India:-

In this case, a writ was filed under Article 32 challenging the constitutional validity of the Act. The case was heard by a bench consisting of Mr. G.B. Pattanaik, Mr. S. Rajendra Babu, Mr. D.P. Mohapatra, Mr. Doraiswamy Raju and Mr. Shivaraj V. Patil. In this case the constitutional validity of the Act was upheld and an interpretation of the provisions of the Act was provided. The Court looked into the Preamble, Statement of Objectives and Reasons of the Act. Huge reliance was placed on the judgment in the Shah Bano case as well. The court concluded that, one, the Act does not violate Articles 14, 15 and 21 and hence, is not ultra vires. The court stated that "the legislature does not want to enact unconstitutional laws."

The court went on to interpret the Act, and the Supreme Court stated "that a construction that results in making an Act ultra vires has to be discarded and one that upholds the validity of the Act preferred"

The court made the following interpretations.

Firstly, interpreting the meaning of the term "within" used under section 3(1)(a) of the Act read with the terms

terms fair and reasonable, the court arrived at the conclusion that the maintenance, being fair and reasonable, should exceed the iddat period but must be made within the iddat period. Such maintenance made during iddat period should be for her entire future, that is the time after the expiration of iddat period well. The liability of the husband, therefore, is not limited to the iddat period. Therefore, this Act is not in contravention of section 125 of CrPC. The court stated the following which comprehensively explains the position:-

“the word 'provision' indicates that something is provided in advance for meeting some needs. In other words, at the time of divorce the Muslim husband is required to contemplate the future needs and make preparatory arrangements in advance for meeting those needs. Reasonable and fair provision may include provision for her residence, her food, her cloths, and other articles. The expression "within" should be read as "during" or "for" and this cannot be done because words cannot be construed contrary to their meaning as the word "within" would mean "on or before", "not beyond" and, therefore, it was held that the Act would mean that

on or before the expiration of the iddat period, the husband is bound to make and pay a maintenance to the wife and if he fails to do so then the wife is entitled to recover it by filing an application before the Magistrate as provided in Section 3(3) but nowhere the Parliament has provided that reasonable and fair provision and maintenance is limited only for the iddat period and not beyond it. It would extend to the whole life of the divorced wife unless she gets married for a second time.”

The above clarifies the position of law as settled by the case, quite comprehensively.

It further stated that if a woman doesn't remarry she has the recourse under section 4 of the Act against her relatives in proportion of the properties they shall inherit after her death. If the relatives are not in a position to the, the judicial body can order the WAKF Board to pay for the maintenance of the woman.

Effects of Daniel Latifi Judgment:-

Daniel Latifi judgment basically revived the principles settled in Shah Bano case that, the husband's liability to maintain his wife doesn't end with the iddat period.

However, it explained this principle, not as contravening the Act which was enacted as a result of the Shah Bano case, as a commentary on that Act. Also, the Act is consistent with section 125 of the CrPC and hence, there is no scope for conflict. Hence, the position of law is that, the provisions of the Act basically emanate from principles set forth in the Shah Bano case. The same has not been changed till now, and continues to govern matters related to maintenance of Muslim women after dissolution of marriage. The principle has been seconded by the Supreme Court once again in Iqbal Bano V/s. State of U.P.²⁸. In the case the court reiterated the position that divorced women are entitled for maintenance beyond the Iddat period and stated that provisions of the Act do not contravene Article 14, 15 & 21 of the Indian Constitution. The court further observed that “right under Section 125 of Cr. P.C. extinguishes only when she receives “fair or reasonable” settlement u/Sec. 3 of the Muslim Women Act. The wife will be entitled to receive maintenance u/Sec. 125 of Cr.P.C. until the husband fulfills his obligation u/Sec. 3 of Muslim Women (Protection of Rights on

Divorce) Act, 1986. This was once again reiterated in the recent judgement in Shabana Bano v. Imran Khan²⁹ that after the expiry of iddat, a divorced Muslim woman can seek maintenance under S.125CrPc as long as she doesn’t remarry. Hence, the position as laid down in the Daniel Latifi case is the settled position and has not undergone any change.

Conclusion:-

When communal identity is defined by religious traditions, social transformation that affects religion is seen as a threat to that identity, and thus evokes an emotional response. Rather than remaining a question of Shah Bano’s demand for maintenance, the case became a battle to protect the Muslim identity from what fundamentalists considered “the Hindu’s homogenizing influence.” In addition to the broader argument between right-wing Hindus and Muslim fundamentalists, the Shah Bano case wrought divisions within the Muslim community. Women’s groups like the NIWF (National Indian Women’s Federation) and AIDWA (All India Democratic Women’s Association) spoke out in favor of the

judgment as a progressive step toward equality for Muslim women.

Shah Bano was not the first woman to go to the courts and demand maintenance based upon the CrPC. Religion became a weapon both exploitative and divisive used to dismantle India's democracy.

It could be seen that under Muslim law, maintenance post-divorce has been a controversial subject matter. Initially, there were two sources from which the rights to maintenance of a divorced Muslim woman emanate. These were section 125 of CrPC and the Muslim Personal Law. There was a conflict between the two since, under CrPC, the right of a woman to claim maintenance was beyond the iddat period and under Muslim Personal Law, the husband was obliged to pay maintenance only during iddat period. To resolve this, section 127 was inserted in CrPC, but this was unsuccessful in resolving the conflict and being a substitute for maintenance. In this context, the famous Shah Bano Case was decided, which settled the position of law. The case gave precedence to CrPC over Muslim

Personal Law, and stated that if the divorced woman does not have the means to maintain herself, then it is the obligation of the husband to maintain her for her entire lifetime, and hence, well beyond the iddat period. The judgment caused a lot of unrest among traditional Islamic groups, which saw this as an attack on their personal law. Coming under pressure, the Rajeev Gandhi led government enacted the Muslim Women (Protection of Rights on Divorce) Act, 1986. This act stated that the husband is obliged to provide fair and reasonable maintenance within the iddat period. This led to a lot of ambiguity and a sense of confusion prevailed over the interpretation of the terms. This confusion was finally resolved by another landmark judgment, Daniel Latifi v. Union of India. In this case, the Supreme Court upheld the constitutional validity of the Act and stated that the same does not contravene Article 15, 15 and 21 of the Indian Constitution. Interpreting the terms, the Court said that the husband is obliged to provide for maintenance of the divorced woman even beyond iddat period, since the term fair and reasonable provision implied this. The term within was construed to mean that

such a maintenance should be made within the iddat period. However, the obligation does not end with the Iddat period. Therefore, the case is credited for serving dual purpose of maintaining the constitutional validity

of the Act and reiterating the position which was settled in the Shah Bano Case. The position has been seconded by Court in various instances and stands unchanged.