

Regarding Payment of Dower in the Marriages under Muslim Personal Law

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Abstract

Marriage generally involves some financial settlements under every legal system, secular or religious. However, Muslim personal law requires the payment of dower also, apart from maintenance, to be made by the husband to the wife. This is in fact a strict financial obligation set by the *sharia* that has to be performed by every husband in consequence of a marriage. The Holy Qur'an directs that 'Give women their dowries as a free gift'(4:4). Dower is a financial gain of the wife, which is her personal right. This is an extra amount that is payable to her that incurs even no financial liabilities and the wife, if likes, may keep it in the form of fixed deposit or may spend it according to her sweet will without any restriction from her husband. Thus, the wife is the absolute owner of the property obtained by way of dower. This is also one of the distinguishing features of Islamic Law of marriage. 'the payment of dower on the part of the husband is an admission of the independence of the wife, for she becomes the owner of property immediately on her marriage though before it she may not have owned anything.¹ This is absolutely her own property over which husband has no legal right.² There are many verses of the Holy Qur'an that indicate that this is her absolute right and 'so it is not lawful for her father or any other one to take any part' of this property³

Dower: General Principles

Dower: Source of Obligation: Sharia, not contract.

Though marriage under Islamic Law is generally treated as a contract, the agreement of the parties is not only the source of rights and duties to arise in consequence of such contracts, there are many unilateral obligations that arise in consequence of marriage. They are not settled by the parties themselves but are imposed by the *sharia*. Dower is one of the those unilateral obligations on the husband, which has been imposed by the *sharia* irrespective of the agreement

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1- Fitzgerald, Seymour Vesey, *Muhammadan Law: An Abridgment*, Oxford University Press, London: Humphrey Milford, 1931; pp.62-3

2- Charles Hamilton, tr. *The Hedaya: commentary on the Islamic Laws*; London, vol. 1, 1985, Reprint. P.122

3- 2:236.

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made by the parties. Dower is payable even no mention of Dower is made in the deed of marriage or not even orally agreed at the time of entering into marriage. If there is any stipulation regarding non-payment of dower still the dower is payable. Thus, this is absolute liability fixed by the sharia. It also reflects the sharia or spiritual aspect of the contract of marriage, that a contract of a marriage is not a pure civil contract, rather it has some spiritual dimensions also which is evident from the fact that rights and obligations are not solely dependant here on the agreement of the parties. There are some sharia obligations, which can not be avoided even by bilateral consent unlike a pure civil contract. Of course, the parties here are able to fix the amount of dower though cannot avoid paying it. Dower is inalienable in the sense that 'it is implied in every marriage', and this is an 'imprescriptible right' 'in the sense that the wife's right cannot be barred by mere lapse of time alone'.⁴

act cannot take place. But a marriage takes place even if the parties agreed before marriage that no dower will be payable, and dower will be a consequential obligation. Thus, a consequence has to be distinguished from an element. It is jurisprudentially wrong to identify dower as an element or condition of a marriage, rather it should be termed as a consequence of a Muslim marriage. As Hedaya also says that 'a marriage is valid, although no mention be made of the dower by the contracting parties, because the term *Nikkah*, in its literal sense, signifies a contract of union, which is fully accomplished by the junction of a man and woman; moreover, the payment of dower is enjoined by the law, merely as 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 the man were to engage in the contract on the special condition that there should be no dower'.⁵

Minimum and Maximum Amount of Dower

The Holy Qur'an does not make any specific mention regarding the actual amount of dower, because the Qur'an is in fact not the embodiment of all the laws strictly to be termed as the code of law, rather it formulates the fundamental polices. The Holy Qur'an says that 'the wealthy according to his means and the straited according to his means'.⁶ Thus, opinions of varying degree are found on this point. According to Hanafi opinion the minimum amount of dower is ten *dirhams* or 'pieces of silver weighing seven *miskals*, coned or unconed'.⁷ So, according to

4- Rahman,Abdur AFM.; Institute of Mussalman Law: *A Treatise on Personal Law According to the Hanafi School*, 1907, Thacker Spink and Co., Calcutta; p.40.

5- Verma, B.R.; *Muslim Marriage and Dissolution*, 1975Law Book Co., Allahabad, p.147; Baillie, Neil B.E.; *Digest of Mochummudan Law*; Compiled and translated from authorities in the original Arabic, 1958, Premier Book House, Lahore.vol. 2 . p.68.

6- Pearl, David; *A textbook on Muslim Personal Law*, Croom Helm, USA. 2nd ed., 1987; p.61.

7- For details see Wilson, R.K.; *Anglo Muhammadan law*, 5th edition, 1921, Thacker, Spink & Co., London; pp.115-6.

Hanafi view, in case of any amount settled by the parties lower than the above minimum amount, still the husband will be obliged to pay the above mentioned minimum amount of dowry. According to Shia and Shafi views, there is minimum amount of dowry, and even 'a grain of wheat' may be a good dowry.⁸ According to Malik is the minimum amount is 3 *dirhams*. These Maliki and Hanafi opinions regarding minimum amount of dowry have been developed 'by the use of analogy with the minimum value of stolen goods which rendered a thief liable to one of the *hudud* penalties; namely amputation of the hand.'⁹ Such an analogy can validly be criticized on the ground that it paves the way to translate dowry into 'consideration' for loss of virginity of the bride, which is not true as the dowry is in fact an obligation set by the sharia which sometimes is payable even without consummation. However, there are in fact many practical difficulties to determine the actual value of 10 *dirhams* or 3 *dirhams*.¹⁰ In those days of Muhammad (Sm) a *dirham* was 'a silver coin 2.97 grammes in weight'.¹¹ It should vary from time to time as well. How can it be convincing for a reasonable person to accept the calculation that says 10 *dirhams* (One *Dirham* is equal to 23 Pak Rupees and Bangladeshi Takas 22.50) at the rate of present currency? Whereas the objectives of dowry are token of respect and economic security. It is also popularly on each of his wives is said to have been five hundred *dirhams*, with one exception, that of Omm Habibah¹³ where 'the dowry was fixed at 4000 *dirhams*'.¹⁴ The actual proprietary value of 10 *dirhams* or 500 *dirhams* of 1500 years before should properly be valued at the present currency. A new *ijtihad* may be createdⁱⁱⁱ regarding the minimum amount of dowry considering all relevant factors. Hedaya formulates the policy of fixation of dowry that is 'respectable'. What is not reasonable in the given circumstances cannot be respectable. Tahir Mahmood gives the following statement about the value of ten *dirhams*:¹⁵

In old days *dirham* was a silver coin of Arabia and the plural word *diraham* in Arabic usage often signified money or cash without referring to coins of any particular number—while the figure ten was a symbolic figure standing for a respectable amount. Ten *dirhams* therefore did not mean an exact amount with any arithmetical accuracy; it in fact stood for

8- Mahmood, Shaikat; *Principles and Digest of Muslim Law*, 1960, Ilmi Kitab Khana, Lahore, p.51.

9- Pearl, David; *A textbook on Muslim Personal Law*, Croom Helm, USA. 2nd ed., 1987; p.61.

10- For details see Wilson, R.K.; *Anglo Muhammadan law*, 5th edition, 1921, Thacker, Spink & Co., London; pp.115-6.

11- Mahmood, Shaikat; *Principles and Digest of Muslim Law*, 1960, Ilmi Kitab Khana, Lahore, p.51.

12- Siddiqui, Muhammad Iqbal, *The Family Laws of Islam, 2005*, Adam Publishers, New Delhi, p.145.

13- Supra note 10, p.116.

14- Ibid

15- Mahmood, Tahir; *The Muslim law of India*, 3rd ed., 2002, LexisNexis Butterworths, New Delhi,; p.68.

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what we now call a reasonable amount. Notably, dirham now forms part of the currencies of several Arab countries, e.g, Morocco and UAE, and in each such country it has a different value.

Tahir Mahmood has rightly commented that 'It is in fact wrong to try to ascertain the present value of ten dirhams of Arabia over a thousand year ago and regard it as the scale for minimum *mahr* in our time.'¹⁶

Though it has been supported by Hadith that a service to be rendered by the husband to his wife may constitute a good dower, but Hanafis rejected it as they think that 'a stipulation to perform services' is not a valid dower payment and if such a dower were to be agreed the wife would be entitled to proper dower.'¹⁷ Hanafi seems to be more sound as one of the objectives of dower is the economic guarantee that is better ensured through property in direct instead of any service though that may have the economic value. Imam Shafi opined rightly that 'the dower is the right of the woman, and consequently it must depend upon herself to determine the amount of it.'¹⁸

However, 'those things which have no value in themselves or cannot be lawfully possessed by Muslims, cannot validly be settled as dower, and if unlawful things are settled as dower, the settlement is void, but the contract nonetheless remains valid.'¹⁹ In such a case, the wife is entitled to get proper dower.²⁰ As Hedaya says that 'because what is named is not property with Mussalmans; and on this principle it is that a proper dower becomes due'.²¹

Proper dower is settled at a reasonable amount based on the dowers settled in cases of their paternal relatives, her social status and qualifications. However, in every dower there may be two portions in terms of time of payment, prompt and deferred. It is not mandatory that the dower has to have these portions, but usually it has such or is presumed to have such two portions. Whole dower even may be mentioned as prompt deferred only by their mutual consent. Prompt is that portion which is payable on demand made by the wife at any time. Thus, she can claim prompt dower at any time at her sweet will. Husband is bound legally to pay the prompt portion whenever he is asked for it. But, deferred portion is payable on dissolution of marriage or on the happening of any specified event. However, if there is no mention regarding these two parts then Ameer Ali

16- Ibid. p.68

17- Hodgkinson, Keith; *Muslim Family Law: A sourcebook*, 1984, Croom, Helm, London and Cariberra; p.132.

18- Supra note 5, p. 122.

19- Supra note 7, p.42.

20- Ibid., p.53.

21- Supra note 17, p.133.

advocates half as prompt and another half as deferred²² whereas David Pearl mentions the whole as prompt.²³ According to section 10 of the Muslim Family Laws Ordinance, 1961, in Bangladesh and Pakistan in such a case the whole amount will be deemed to be prompt. 'Imam Malik recommended to his followers the payment of the entire dower prior to the consumption of marriage, and the rule prescribed by him is practically followed in all those countries where his doctrines are in force²⁴ e.g., Saudi Arabian people sued to pay the whole amount at once at the time of marriage.

Minhaj Et Talibin, a treatise according to Shafi school, prescribes the following two criteria nicely to determine the amount of proper dower:²⁵

It is estimated according to the genealogy of the person in question, i.e., according to the dowers granted to the women who are the nearest agnates of the man from who she derives her origin, such as her whole sister, her sister on father's side, the daughters of her whole brother or brother on the father's side, her father's sister, and so on. If there are no agnates who are women, or if they have not yet been given in marriage, or if their dowers are unknown, their relatives on the mother's side, such as mother's mother or sisters, are taken into consideration.

According to the wife's age, mental faculties, wealth, virginity, or otherwise, and in general all qualities usually appreciated in a spouse.

It is worth mentioning here that the above are the generally agreed criteria also by all schools.

Stipulation regarding non-payment of dower: valid or void?

Any stipulation in the contract regarding non-payment of dower is void but nevertheless the marriage will be valid. But, only in Ithna Ashari Law, a woman who is adult and not of 'weak or facile disposition' can, at the time of marriage, agree that there will be no *mahr* and such an agreement has to be proved by clear evidence²⁶ 'An Ithna Ashari There are some specific rules regarding which portion of dower will actually be payable under different circumstances. The law relaxes the full payment under certain situations and sometimes even no dower becomes payable. These rules will be discussed here under the following sub-headings:

22- Supra note 17, p. 133.

23- Pearl, David, Supra note 9, p.64.

24- Qureshi, M.A., *Muslim Law of Marriage, Divorce and Maintenance*, Deep and Deep Publications, Delhi, 1995; p.96.

25- En Nawawi, Mahiuddin Abu Zakaria Yahya Ibn Sharif, *Translated into English from the French edition of Berg*, Van Den L. W. C. by Howard E.C., Minhaji El Talibin: *A Manual of Muhammadan law According to the School of Shafi*, Thacker & Co. London 1914; p.310.

26- Supra Note 15.

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When is the woman entitled to FULL DOWER?

Full dower, fixed or proper, as the case may be, is payable, if consummation or true seclusion takes place or either of them dies in whatever condition in a valid marriage. More specifically speaking, following are the situations where the wife is entitled to full dower:

1. *On consummation of marriage*

If the sexual intercourse takes place full dower becomes payable irrespective of the mode or time of consummation. Thus, full dower is payable even if the consummation takes place during the time when consummation is prohibited. The Holy Qur'an says that 'But if you want to replace one wife with another and you have given one of them a great amount (qintaar), do not take any of it back.'²⁸

2. *If true seclusion takes place*

If the spouses remain together in a private place for some time where there is no legal, moral or physical impediments to have the actual consummation then according to the majority of scholars full dower will be payable, whether actual consummation takes place or not. A minority of the jurists thinks that full dower is not payable on mere seclusion without actual consummation.

3. *The^{vi} death of either spouse after a valid marriage whether consummated or not:*

Dower was fixed and death of either of the parties:

If either of them dies even before consummation but after a valid marriage between them, and the dower was fixed, then full fixed dower is payable. This opinion has been established by 'ijma of the Companions', highest grade of ijma. The basic jurisprudential argument put forward is that by such death contract is not annulled rather that merely comes to an end.

No dower was fixed and death of either of the parties

However, according to the majority of jurists, if death occurs and no dower was fixed, still she is entitled to receive the full proper dower. Maliki jurist think that under such a circumstance no dower is payable. The majority view here seems to be sounder. Dr. Saalih cites the following Hadith:²⁹

27- Supra Note 15.

28- *The Holy Qur'an*, Sura an-Nisa, Verse 20.

29- Saalih Ibn Ghaanim al-Sadlaan, Jamaal Zarabozo, Jamaal al-Din M. tr., *The Fiqh of Marriage in the Light of the Qur'an and Sunnah*, 1999. Al Basheer Company, USA.

Abdullah Ibn Masud judged concerning a woman whose husband died and had him) made the same judgment you just made concerning Barwa Bint Washing.”

4. *Staying one year in the house of the husband*

According to Imam Malik, if the wife stays at her husband's house for one year, then full dower will be payable irrespective of the fact of actual consummation or true seclusion. However, other three Imams do not agree with this view.³⁰

5. *A divorce said on one's deathbed, before consummation of the marriage. In order to keep the wife from inheriting:*

According to the Hanbalis, if a woman is divorced while her husband is on his deathbed, is entitled to her full dower even without consummation if he dies after pronouncing the divorce in order to keep her from inheriting.³¹

6. *Physically enjoying one's wife in a manner less than sexual intercourse, such as kissing and so forth, while not in complete privacy?*

Dr. Saalih cites such a situation and determines the amount of dower payable in the following words:

“Ahmad explicitly stated that in such a case, the woman is entitled to her complete dower. In al-‘Mughani it states: “If he is with her and touches her or hugs her, without being I private with her, she is entitled to her complete dower as he has done wⁱith her what is not permissible for others to do”. The following hadith and Quranic verse are placed as evidence in favor of this opinion: Prophet (Sm) says: “Whoever uncovers the head covering of a woman and looks at her must pay the dower, whether he consummated with her or not.” Qur’an says: “If you divorce them before ‘touching them’ and you have determined their dowers, then they shall receive half of the dowers...”. However, these two proofs are objected to. First the Hadith contains Ibn Laheeah who is weak and whose narrations cannot be used as evidence. Even if one were to assume that it is authentic, it would be understood to mean that such took place when the two were in private as there is a consensus that if something of that nature takes place in front of others, the dower does not become obligatory. As for the verse, it is not a clear text concerning this issue because the apparent meaning of the word ‘touch’ in the verse is actual sexual intercourse. However, even that action is not required because there is a

30- Supra Note 29.

31- Ibid. p.64.

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consensus among the Companions that if the person is completely alone with the woman he must pay the complete dower. As for cases other than being in private with her, the generality of the verse is left as it is (in other words, it applies to sexual intercourse only). This is the opinion of the majority of the jurists.'

If dower was fixed and then divorce takes place before consummation or true seclusion the wife is entitled to half of the fixed dower. As the Holy Qur'an says, "if you divorce them before touching them and you have determined their dowers, then they shall receive half of the dowers...". But, if no dower was fixed and divorce takes place subsequently then no dower is payable. Thus, here fixation of dower has great significance, as the wife cannot get under such a situation half of the proper dower. However, this provision of half dower is applied in a restricted manner only to cover above case of regular marriage, which does not have any application evening cases of irregular marriages.

There is another situation where half dower is payable according to some jurists, if the parties are separated due to apostasy of the husband or act of any third party, e.g., it is discovered after the marriage that they were breastfed by the same./omem, stronger view is that she is deserving half of her dower.³²

When is the Woman Entitled to NO DOWER?

1. In case of regular marriage, if no dower was fixed, and divorce takes place before consummation^{viii} or true seclusion, the wife is entitled to no dower. However, the husband requires paying her *motah* in such case that usually consists of three articles³³ or as has been prescribed by Imam Shafi that it must not be less than 30 dirhams, and there are others who admit no legal minimum.³⁴
2. If an irregular marriage is dissolved before consummation, either by death or divorce, whether dower was fixed or not, wife is entitled to no dower.
3. If the marriage is dissolved by *Khul'* divorce where the wife deliberately waives her dower as the compensation to her husband, then the wife will not be entitled to any dower after the divorce takes place. This is not for *Khul'* rather for her agreement in that behalf. There are some countries that consider such waiver as oppose to public policy.³⁵

32- Ibid., p.49

33- Supra note 11, p.57.

34- Supra note 25, p. 313.

35- Eisenman, Robert H.; *Islamic Law in Palestine and Israil*, 1978, Leiden, E.J. Brill, The Netherlands; p.89.

Mere True Seclusion: Full dower or Half dower?

Jurists are divided into two opinions on this question.³⁶

1. The first opinion is that the private seclusion has no effect on the dower, meaning that divorce or annulment before it or after it will still require only half of the dower to be paid [as long as no consummation took place]. This is the opinion of Imam Malik according to one of his two statements, Shafi in his new opinion, and Ahmad Bin Hanbal in what is narrated by Yaqoob Ibn Bakbtann. It is also narrated from Ibn Abbas and Ibn Masud.
2. The second opinion is that the private seclusion is the same as consummation with respect to establishing the obligation of paying the entire dower. This is the opinion of the Hanafis, Imam Malik in a second statement from him, Shafi according to his old opinion and Ahmad according to the strongest narration from him. This has been narrated from the Caliphs Abu Bakr, Umar, Uthman and Ali (R) as well as from other Companions.

Following arguments for both the opinions have been summarized neatly by Dr. Saalih Ibn Ghaanirn al-Sadlaan.³⁷

Those who say that being in seclusion with the bride has no effect in establishing the payment of the entire dower cite the following as evidence:

First Allah says in the Qur'an: "if you divorce them before touching them and you have determined their dowers, then they shall receive half of the dowers." The verse clearly states that the^{ix} one who is divorced before being touched receives half of what was determined as her dower. The divorced woman before consummation, although after private seclusion, has not been touched because touch is a figurative expression for sexual intercourse. Hence, the verse is directly including the case of the woman with whom the man has been alone but with whom he has not had sexual intercourse.

This argument has been responded to by saying that the text is not definitive in its indication as it could be a case where Allah is indirectly mentioning the causative factor instead of the cause itself, which is being in seclusion with the woman. This interpretation is given a stronger weight because it is consistent with the consensus of the Companions who agreed that private seclusion has the same ruling as consummation with respect to entitling the woman to her complete dower. It has been narrated that Ibn Abbas held an opposing view to that consensus but such narration are not authentic.

36- Supra note. 29, pp.48-53.

37- Ibid., p.53.

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Those who say she is entitled to half dower also quote Allah's saying in the Qur'an: "And how could you take it (the dower back) while you have gone into each other". The argument here is that 'gone into each other' means having sexual intercourse. This indicates that the dower is not obligatory except after consummation. This makes it clear that the earlier verse is explaining the case of divorce after consummation. Obviously, there is no intermediate case. Therefore, being in private does not entitle the woman to her entire dower if there was no consummation.

This argument is responded to by saying that the 'gone into each other' does not necessarily imply sexual intercourse. It is narrated that al-Farra (Arabic language) said, 'gone into each other means complete privacy, whether the marriage was consummated or not'.

Those who say that being in complete privacy with the bride entitles her to her entire dower cite the following also as evidence.

First is what is recorded by Abdur Razzaq in his Musannaf on the authority of Abu Huraira who said that Umar said, "If the curtains are drawn or the doors are locked, the complete dower becomes obligatory".

Second, when the impediments to sexual intercourse are removed, she, in essence, has been given over to him and therefore she is deserving of her right in exchange for that.

Third, the obligation of paying the entire dower is not conditional upon fulfillment with woman but it is simply conditional upon her being given over to him in the proper way, as in other similar contracts, such as selling or leasing. As for Allah's saying, "before consummating the marriage", it may be interpreted as a kind of metaphor in which the result is mentioned to refer to the stimuli (saying with a woman in seclusion) rather than the action.

Thus, it appears that the second view that equalizes true seclusion with actual consummation for the purpose of determining the amount of dower payable by the husband is sounder. As this opinion also have been established by many Companions who realized the meaning of the Qur'anic verses in amore clear manner. However, according to Shia law only consummation confirms the dower and true seclusion is not sufficient unlike Sunni law.³⁸

Dower in Irregular Marriage

If no consummation takes place, no dower will be payable, in case of irregular marriage. Thus, in case of irregular marriage there is no provision for half dower. Only criterion to get dower in an irregular marriage is actual consummation or true seclusion. No other cause even death of either of them is ground of getting

38- Bailhic, Neil B.E., digest of Moohammudan Law: *Compiled and translated from authorities in the original Arabic*, 1958, Premier Book House, Lahore, Vol, ii, p.78.

have any impact on the payment of *mahr* unlike in a regular marriage. Thus, the wife, in an irregular marriage, is entitled to any dower only if the actual consummation takes place. As Hedaya says that 'no dower is due after *khalwat saheeh*, or complete retirement, because, on account of the invalidity of the marriage, the law does not consider retirement as indicating the commission of the carnal act, and consequently it does not stand as such.³⁹

But, next question arises: which dower will the wife get—full, fixed or proper dower? In case of a regular marriage, wife always gets fixed dower if there is any fixed dower and if no such fixed dower is proved then she gets the proper dower. But, this is different in case of irregular marriage. In no irregular marriage, if no dower is fixed and she is entitled to full dower legally, then the wife gets full proper dower. But, if there is nay fixed dower under such circumstance then also there is no certainty that the wife will get that fixed dower unlike in a regular marriage. If the dower was fixed, then it will be compared with the proper dower; if no dower would be fixed, then the wife will get whichever is less in between these two. Here lies also a significant difference between regular and irregular marriage, as has been classified by the Sunnis.

Dower can it be waived?

Since dower is also like a debt so a valid remission of dower after marriage obviously will discharge the husband's liability to pay the same. But it must be ensured that it has been remitted voluntarily and spontaneously without being under coercion, fraud, undue influence or any thing like this. Any sort of involuntary remission will be of no legal effect. 'Umar, the second caliph of Islam, and Qadi Shuraih have decreed that if a wife remits the whole of her *mahr* or a part of it but later on demands it, the husband shall be compelled to pay it because the very fact that she demands it is a clear proof that she did not remit it of her free will'.^{40xi} This opinion seems to be absolutely reasonable, logical and correct 'A remission made by the wife when she is in great mental distress on account of the death of her husband is not valid' and 'when a wife remitted her dower thinking that was the only way to win or retain the affection of the husband it was held that she was no acting as a free agent' and so the remission is invalid.⁴¹

Consequences of Non-payment of Prompt Dower : Rights of the Wife

1. The wife may refuse to reside with her husband at his house.

39- Supra note. P. 146.

40- Doi Abdur Rahman; Shariah: *The Islamic Law*, 1997, Ta Ha Publishers, London, UK. : p. 159.

41- Mahmood, Shaikat (supra note 11) with reference to the cases Nurunnesa v. Khaje Mahomed, 1920, 47 Cal, 537, 56 I C. 8 and Shah Bano Begum v. Ifikhar Muhammad Khan, PLD 1956, Karachi, 363.

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2. She also may refuse consummation and the husband cannot compel her for consummation till payment of her prompt dower. Though some jurists think that the first consummation destroys further right to refuse consummation, but Hanafi opinion is that such right to refuse consummation does not come to an end by any consummation rather that right lasts till non-payment of that portion irrespective of any earlier consummation between them.⁴²
3. If the wife resides separately on the ground of non-payment of prompt dower, still the husband will be bound to pay maintenance.

Widow's Remedy to Recover Dower

If the husband dies keeping dower unpaid, then the Islamic Law grants her a unique right of lien to realize her dower which is popularly known as 'widow's right of lien'. If the widow remains in possession of her deceased husband's property while dower is unpaid, then she can lien that property to the exclusion of other claimants till realization of her dower. Her right to hold this possession is a prior and special right that is given top priority over every other claim.

II. Dower Its Nature: Consideration or not?

There are many jurist who defined 'dower' as consideration though it is not clear whether they meant by it consideration in its technical legal sense or have used it as a mere terminology to mean that it is payable in consequence of marriage. As Mulla defines dower as 'a sum of money or other property which the wife is entitled to received from the husband in consideration of the marriage.' This approach to define dower also has been criticized rightly by many other jurists. As Shaukat Mamood with reference to Abdul Rabim, Hedaya and Bailee that 'it is not a consideration proceeding from the husband for the contract of marriage, but is an obligation imposed by ^{xiii}law upon the husband as a mark of respect to the wife.⁴³ He also argued that dower 'is not the bride price of the wife because otherwise a marriage contracted with the express provision that no dower would be paid would be void for lack of consideration although according to Muslim Law such a contract is held valid.⁴⁴

Thus, two opposite views are found regarding the nature of dower, whether this is consideration or not. In fact, the idea that generally treats marriage as a contract led to the concept of equalizing dower with consideration. There are many jurists including both traditionalists and modernists who believe dower to be consideration in the contract of marriage. The most popular belief among them is

42- See for reference Wilson, Supra note 10, p.120. I.

43- Supra note 11, p.50.

44- Ibid., p.50.

that dower is given in lieu of the sexual pleasure to be enjoyed by the husband. But there is another stronger view that denies dower to be consideration. They think that dower is an obligation set by the *sharia* as a token of respect to his wife and it is never the price of the sexual pleasure.

In fact, in pre Islamic era, in the then Arab society, marriage was considered as a sale, where the dower was paid to the guardian of the bride as the sale price or consideration. But, Islam changed the situation radically and now that contract of sale has been turned into a solemn covenant between two parties, husband and wife, and the wife herself is receiving the dower instead of her guardian as it is no more a sale of a girl of sexual pleasure. Thus, Islam considers dower as a *sharia* obligation imposed upon the husband. This is one of the distinguishing points between marriage and a pure civil contract that unlike civil contract the parties do not settle all obligations. There are some strict obligations, which are imposed strictly by the *sharia* irrespective of the consent of the parties, and the payment of dower is one such obligation that cannot be avoided by the parties even incorporating a stipulation in the deed of marriage to the contrary. Accordingly, dower takes place though there is a stipulation regarding non-payment of dower.

Justice Aftab Hussain⁴⁵ has gone to the root and tried to present a literal analysis of the issue whether dower is consideration or not, explaining the meaning of the different terminologies used in the Holy Qur'an in relation to dower. He has sorted out that the Holy Qur'an at different verses used at least five terms to mean dower, *atiyya*, *farida*, *sadaqa*, *nehla* and *ujur*, the plural of *ajr*, to connote the same thing. *Atiyyai* means gift, which is not a consideration for anything. *Farida* means something obligatory or appointed portion. The term *sadaqa* comes from *sadiq* that means friend and so the term *sadaqa* 'carries the sense of sincerity, friendship and companionship'. Again, the word *nehla* means that which is given as a gift and is not consideration for anything. The word *ujur* means 'wages as well as reward'^{xiii}. 'Reward also does not carry any sense of consideration'. 'Keeping in view the sense of the three words *sadaqa*, *nehla* and *ata* or *atiyya* the word *ajr* cannot mean wage in verse 4:24 and it must mean something given as a gift and not for a consideration.'⁴⁶ This literal explanation ultimately negatives the idea that dower is consideration.

The definition of marriage given by some traditional authorities are problematic. As Hedaya and Kanz-ul-Daqaiq defines marriage in terms of contract where husband purchases a unilateral right to enjoy his wife sexually. Such a definition of marriage leads to the idea that dower is the price for that sexual pleasure whereas the fact is that husband can never purchase such sexual right at least for

45- Hussain Aftab J., *Status of Women in Islam*, Law Publishing Company, Lahore, 1967; pp.460-1..

46- Justice Aftab has given above all interpretations with reference to *Lughat al Qur'an* by Parvez, Lataif al Lughat, Taj and Ibn Fars, *Lughat al Qur'an. The Dictionary and Glossary of the Koran* by John Penrice.

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the basic reason that sexual right is not a unilateral right as has been wrongly understood by many authorities rather this is a clearly mutual right and the question of purchasing it from the wife does not arise at all. Though some jurists including both traditionalists and modernist identified it as the right of the husband that arises in consequence of marriage, there is another group of jurists who think it rather as a mutual right.

Though the wife is bound to admit the husband to consummation at any time with due regard to consideration of health, decency and other relevant matters, it does not necessarily lead to idea that the rights and duties of sexual intercourse are the exclusive and unilateral privilege of the husband. Rather conjugal intercourse is a mutual right of both husband and wife. Verma cites two things, 'a vow to abstain from sexual intercourse by the husband for the period of not less than 4 months or for an unspecified period (*ila*) has the effect of divorce after the expiry of period of 4 months' and 'the wife is entitled to obtain a divorce if the husband fails to perform his marital obligations without reasonable cause for a certain long period.'⁴⁷ These two instances clearly prove that the wife also has the right to sexual intercourse and thus it may be concluded confidently that conjugal intercourse is a mutual right and not a unilateral right to have been purchased by the husband from the wife in lieu of the dower in the form of consideration.

Marriage may take place between two persons who are totally beyond the age of enjoyment or sexual ability and the advocates to term dower as consideration fail to substantiate their arguments in such a case. Again, dower becomes payable even without physical enjoyment, as it is payable if the marriage is dissolved by death or divorce even before actual consummation or valid retirement.

David Pearl and Werner Menski referred the definition of dower given by Abu Zahra where *mahr* has been translated as bride-price, but then they summarized the position in the following words concluding that dower is in fact not a consideration:⁴⁸

In view of the use of the term 'bride-price' above, it needs to be emphasized at once that *mahr* is not a consideration for the contracting of the marriage. The dower must be clearly seen as an effect of the contract of marriage rather than the price paid by the husband for acquiring the various rights which accrue to him on marriage. *Mahr* is often discussed also in term of a sum paid to the wife as a mark of respect to her. Doi emphasizes its character as a "free gift by the husband to the wife, at the time of contracting the marriage". Nasir suggests in the words of a Hanafi jurist that "dower has been ordered to underline the prestige of the marriage contract and to stress its importance".

47- Verma (supra note 8), p.87.

48- Pearl, David and Menski Werner; *Muslim Family Law*, 1998, Brite books, Pakistan; p.179.

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Mahmood, J., in *Abdul Kadir v. Salima* (1886, an Indian case) seems to give a wonderful description of the nature of dower. He observes:⁴⁹

Dower, under the Muhammad 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, the law confers the right of dower upon the wife as a necessary effect of marriage.

...and indeed in this, as in some other respects, the dower of the Muhammadan law bears a strong resemblance to the donation proper nuptias of the Romans which have subsisted in the English law under the name of marriage settlement. In this sense and in no other can dower under the Muhammadan law be regarded as the consideration for the connubial intercourse, and if the authors of the Arabic text books of Muhammadan law have compared it to price in the contract of sale, it is simply because marriage is a civil contract under the law. And sale is the typical contract which Muhammadan jurists are accustomed to refer to in illustrating the incidents of other contracts by analogy.

He further clarifies:

Dower can be regarded as the consideration for connubial intercourse by way of analogy to price under the contract of sale. It is not the exchange or consideration as understood in the technical sense in the contract Act, of the contract imposed^{xv} by the law on the husband as a token of respect for its subject, the woman. If dower were the bride price a postnuptial agreement to pay would be void for want of consideration, but such an agreement is valid and enforceable.⁵⁰

The line of reasoning based on the analogy of sale was criticized also by Ameer Ali. Sir Shah Sulaiman observed:⁵¹

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

It was observed in this case, unlike marriage under Islamic law, a contract of sale of goods can be cancelled for partly unpaid consideration or goods may be returned even under circumstances. 'Moreover, the question -- whether the dower is the consideration for the first consummation of marriage only or whether it is the consideration for the society of the wife during the married life? -- could not be

49- ILR 8 All. 149.

50- ILR 8 All. 149.

51- *Anees Begum V Mohd Istefa*, ILR 1933 All 743.

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answered by applying the analogy of sale to dower money and marriage'.⁵² Islam insists that dower should be paid to the wife herself and it sought to make dower into a real settlement in favor of the wife, a provision for the rainy day and socially, a check on the capricious exercise by he husband of his almost unlimited power of divorce'.⁵³

Khalid Rashid, an Indian writer, mentions the following:

There is classic example given by someone which must be mentioned. A person purchases a horse. To whom he must pay the price? Not to the horse itself certainly. But to the owner, thus, if dower be regarded as sale-price, it must be paid to the father or the guardian of the wife. Since it is paid to the wife herself, it cannot be the price. It is a token of respect.⁵⁴

Bailee says:⁵⁵

Dower is not the exchange or consideration given by the name to the woman for entering into the contact but an effect to the contract imposed by the law on the husband as a token of respect for its subject, the woman.

There is another convincing argument made by the jurists who think that dower is consideration that it is given by the husband in exchange of accruing some superior rights to be exercised over the wife, e.g., controlling wife's behavior. In fact, the jurists who termed Muslim marriage as purely a civil contract they ultimately argued dowe^{xvi}r to be consideration.

Dr. Tahir Mahmud also negated the claim that dower is consideration as he observes:

The Islamic concept of *mahr* has been widely misunderstood. Those who are obsessed with the contractual element in the Muslim concept of marriage regard it as consideration. Those who are more familiar with 'dowry' confuse it with the same. The fact is that *mahr* is neither 'consideration' nor 'dowry'; it has a unique position of its own.⁵⁶

III. Dower: Modern Statues and Practice

In the Middle East region, 'women are entitled to claim the deferred *mahr* in cases where the husband repudiates the wife or where the wife has a valid reason to ask the court to dissolve the marriage.'⁵⁷ Thus, it is a good provision that does

52- Rashid, Khalid; *Muslim Law*; 2nd ed., Eastern Law House, Delhi; p.79.

53- Ibid. P.79

54- Rashid, Khalid; *Muslim Law*; 2nd ed., Eastern Law House, Delhi; p.79.

55- Supra note 38, p.75.

56- Supra note 15, p.66.

57- An-Naim, Abdullah A.; *Islamic Family Law in a Changing World: A Global Resource Book*, 2002, London & New York; p.99.

not discharge the husband always from the payment of dower even though the divorce is taken at the instance of the wife.

Iran has made a wonderful legislation to calculate the actual value of the *mahr* that is payable to the wife. Suppose, a certain amount is fixed a *mahr*, question arises will the same amount be payable after 30 or 40 years even if goes devaluation occurs? Or the actual value at that time of the said *mahr* should be payable? Iran made the legislative provision so as to accept the second possibility where 'in 1997, a law was passed requiring courts to calculate the *mahr* payments husbands must pay divorced wives according to an index updated for inflation.⁵⁸ Obviously, it seems to be a logical piece of legislation. Due to the possibility of inflation now the authorities in Iran 'try to encourage women and the families to record the *mahr* as a gold or real estate in order to preserve its value'⁵⁹ that seems to be a principle of high practical utility.

In Sri Lanka, according to the Muslim Marriage and Divorce Act, 1951 during the conciliation process after making application for divorce, 'it is the qadi's duty, where conciliation proceedings have failed, to recover any unpaid *mahr* from the husband, whether or not the wife has claimed her outstanding dower debt.'⁶⁰ Such an amount thus

realized is deposited with the court in the name of the wife and the wife is notified about this deposit in her name. Realization of full *mahr* before granting divorce finally is an excellent statutory provision that ensures wife's right to dower in a more secured manner.

In Tunisia, the 1956 Personal Status Code reaffirms the obligation to pay the dower and it also makes the explicit provision 'that husbands have no legal claim over any part of the^{xvii} *mahr* either before or after marriage. Thus, this provision reflects the independent and absolute ownership of *mahr* recognized by the *sharia* that belongs solely to the wife.

Surprising, 'under the South Africa Bill of Rights, both the Islamic tradition of *mahr* and the local African practice of *lobola* were prohibited'.⁶¹ 'However, enforcement of this law is rare, and both practices continue virtually undisturbed.'⁶²

58- Ibid. p.100

59- Knowing Our Rights: *Women, family, laws and customs in the Muslim*, World, 2003, Women living under Muslim Laws, London, UK, p.185.

60- Supra note 56, p.240.

61- Supra note 56, p.195.

62- Ibid, p.955.

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West African practice is quite shocking as the family of the bride receives the dower instead of the bride herself. Professor Naim summarized this position in the following words:⁶³

The payment of bride wealth is an essential part of marriage in most West African communities, Islamic or not. The payment usually follows indigenous rules rather than the classical Islamic tradition of *mahr*. In Niger, for example, the negotiation leading to marriage are marked by a series of gifts. In practice, the bride's family often spends as much as the groom's on these exchanges. Nevertheless, the marriage is not valid until the payment of bride wealth and the announcement of the amount. Among most West African, the bride's family receives the payment rather than the bride herself.

One good side of above West African practice is that till payment of *mahr* marriage does not become valid that protects the wives from evil practice of not giving the dower money actually to them by their husbands.

Though the Tunisian law does not recognize symbolic *mahr* as recitation of a Qur'anic ayat, Sudan's code of personal law recognized it as a valid *mahr*.⁶⁴

Regarding exorbitant *mahr*, Socialist South Yemen restricted *mahr* to 100YD 'to remove the class control over marriage that resulted from costly *mahr* and to make *khul'* easier for women and making it more likely that they would be able to repay the *mahr* themselves'⁶⁵. Senegal also fixes it at 3,000 in their currency and also makes non-^{xviii} payment of prompt portion a ground for divorce.⁶⁶ In India, the province of Oudh formulates a rule regarding excessive dower by section 4 of the Oudh Laws Act, 1876 that says—

Where the amount of dower stipulated for in any contract of marriage by a Muhammadan is excessive with reference to the means of the husband, the entire sum provided in the contract shall not be awarded in any suit by decree in favor of the plaintiff, or by allowing it by way of set off, lien, or otherwise to the defendant but the amount of dower to be allowed by the Court shall be reasonable with reference to the means of the husband and the status of the wife. This rule shall be applicable whether the suit to enforce the contract be brought in the husband's lifetime or after his death.

63- Ibid, p.288.

64- Supra note 58, p.180.

65- Ibid. p.183.

66- Ibid, p.183.

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Nigerian law considers *mahr* as compulsory and 'the minimum amount is determined according to the equivalent of ¼ Dinar, depending on the current exchange rate'.⁶⁷ This minimum amount fixed by the Nigerian law seems to be unreasonable and grossly inadequate. Gambian law also fixes such an inadequate amount as the minimum, which is equivalent to US\$8.40.⁶⁸ In Saudi Arabia, '*mahr* is always prompt and paid in full.'⁶⁹ If no dowry is fixed then the court determines the amount based on the social status in Philippines.⁷⁰

Along with other provisions, the Moroccan law reaffirms the *sharia* position explicitly that the *mahr* is the absolute property of the wife and 'the husband has no right to demand that the wife should provide household goods, furniture, or clothing in return for the *mhar*.'⁷¹

Malaysia, *inter alia* makes the statutory provision regarding mode and time of payment of dowry. 'Under 5.21 of the IFLA, *mahr (mas kahwin)* shall ordinarily be paid by the man or his representative to the woman or her representative in the presence of the person solemnizing the marriage and at least two other witnesses and the registrar shall ascertain and record the value and other particulars of the *mass kahwin*, as well as their terms of payment, including the promised date of payment and the particulars of any security given for the payment.'

In case of any dispute about the amount of *mahr* Egyptian law requires the wife under A.19 of the LMPS (as amended in 1985) to provide proof of the original agreement. If she fails to present so, husband's oath is considered as valid but 'where he s^{xix}wears to an amount not in keeping with *mahr ul mithi*, the courts will determine *mahr* according to *mahr ul mithl*.⁷² Algerian law settles such dispute in favor of the wife if I arises before consummation and it is settled in favor of the husband if that arises after consummation.⁷³

Conclusion

Interestingly, according to the customary laws in Nigeria, 'among the Hausa it may be counted as part of *kayan sadauki* (marriage gifts), some of which goes to the bride, but some of which goes to the other relatives' and 'in some parts of *Yorubaland*, the groom's father may pay the *mahr* instead of the groom—on the grounds that he groom should not think that he has bought his bride.'⁷⁴ Philippines

67- Supra note 58, p.182.

68- Ibid, p.183.

69- Ibid, p.183.

70- Ibid, p.182.

71- Ibid. p.182.

72- Ibid ,p.182.

73- Ibid, p.185.

74- Ibid. p.185

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also adopt the evil practice of giving it to the bride's family instead of the bride herself⁷⁵. According to the customary practices in Senegal a marriage becomes valid on making the following payments: 'a) the *tian* (by the groom to the bride at the time of celebration of the marriage); b) the *lekku undeye* (a portion of the dower to be given to the mother to share with her relatives and friends); c) the *beyu bay* (a portion of the dower to be given to the father or guardian); and d) the *nient ak transu* (amount of money given by the husband at the time of the marriage celebration to seal the contract).⁷⁶

This is really an unhappy real scenario of many Muslim societies that dower is not paid actually. Thus, a device that could be used to facilitate the economic status of the wives has been frustrated by malpractice in the society. This is one of the examples, where the women are deprived of their rights in a patriarchal society. Strict legislation may be made to ensure the payment of dower. Legislation may be made making provision for payment of at least the prompt portion at the marriage ceremony as obligatory. Another malpractice that is usually seen in Pakistani and Bangladeshi society is that people avoid paying actual amount of dower in the guise of the gifts made at the marriage ceremony. Thus, gifts have to be distinguished from dower, and the payment has to be calculated strictly, properties should not be overvalued. Again, suppose, if Rupees 10 lacs and Takas is fixed as dower, can the ornaments or other such materials be treated as the payment of that dower without taking consent of the wife in this regard? The answer is 'no'. It is also argued that if the dower becomes high and deferred portion consists of substantial portion then it may act as a check against arbitrary talaq by husband. At the same time it does not become a constraint to marry, because of exorbitant dower that does not become payable immediately after the marriage. Evasion of dower may be made punishable or fine may be imposed. The trend that inspires dower to equate with consideration is not logical and sound opinion at all. Finally, legal awareness has to be increased so as to make it the habit of the people to perform their legal duties.

75- Supra note 58, p.185.

76- Ibid, p.185.