

Dower in Muslim Marriage: In Search for Its *Raison D'être*

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Abstract: Dower is one of the legal consequences of Muslim marriage. But why is dower payable by the husband to the wife? In the backdrop of this question, the paper aims to search for the *raison d'être* of dower. In this author's view, the previous explanations of dower, such as consideration of marriage, condition for validity of marriage, dower as a gift, dower as a token of respect to the wife, etc., are neither accurate nor adequate. The holy Qur'an is silent regarding the exact reasoning behind the concept of dower. As a consequence of Qur'anic silence, the real reason for the provision of dower remains somewhat obscure. However, as opposed to the above-mentioned traditional explanations, this paper advocates for a financial approach to dower. The financial aspects of dower have not been adequately addressed so far. The paper aims to fill this vacuum. Viewed from a financial perspective, the criteria to determine the amount of dower, the extent to which a husband's financial means should be taken into consideration in fixing the amount of dower, and whether excessive dower may be fixed to secure wives' financial interest, are some of the significant issues that are addressed in this paper. It may be of help for the courts to deal more efficiently with any dower dispute between the parties. Furthermore, any Muslim male or female reader can be more cautious and conscious to decide on dower at the time of entering into his/her marriage contract.

Keywords: Muslim marriage, incidents of Muslim marriage, dower, financial security of Muslim wives, Islamic law.

1. Introduction

Marriage among Muslims is commonly viewed not as a sacrament but as a civil contract.¹ However, the parties to a marriage contract themselves do not enjoy absolute freedom to determine the terms and conditions of marriage. Some incidents of marriage, including dower, are predetermined by *sharia* itself. The paper aims to explore the true *raison d'être* (reason) of dower. It argues that the hitherto existing explanations of dower, such as consideration of marriage, condition for validity of marriage, dower payable as a gift or token of respect to the wife, etc., are neither accurate nor adequate.

The holy Qur'an is the most basic, primary, and fundamental source of Islamic law. But the Qur'an is silent regarding the exact reason for the payment of dower by the husband to the wife. In this author's view, in the face of Qur'anic silence, the real reason for the requirement to pay dower remains obscure. However, whatever may be the reason for the Qur'anic

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¹ See generally below, section 2.

prescription of dower, this paper argues that the provision of dower may be viewed as a form of financial security for Muslim wives.

The financial security aspect is crucial when dissolution of marriage takes place, particularly when the husband divorces his wife unilaterally by exercising the power of Talaq. The question of the amount of dower and its determining criteria becomes significant when dower is looked at from this financial security perspective. For example, what should be the criteria to determine the minimum and maximum amount of dower? Should the husband's financial strength or means be taken into consideration in fixing the amount of the dower? Whether fixing excessive dower is allowed or desirable?

The latter question is relevant since excessive dowers may have the effect of discouraging males from contracting marriages and force them to enter into different forms of extra-marital relationships. If the unwanted occurs, it would go against the philosophy of Muslim marriage itself since Islam encourages marriage and severely condemns any sort of extra-marital relationship or fornication (*zina*). There is thus a necessity to balance between Muslim wives' financial security through dower and the higher interest of Muslim society to keep it free from any kind of foulness and unchastity.

The financial security aspect of dower, together with the above-identified associated questions, has so far not been adequately addressed in legal literature. The paper attempts to fill this vacuum. This may help and guide courts to deal more effectively/efficiently with any dower-related dispute between the parties. Moreover, any Muslim can be more cautious and conscious to decide on dower at the time of entering into his/her marriage contract.

With the above aim in view, the paper comprises *six* sections. The present section introduces the reader to the background, objective, and necessity of the paper. Section 2 reflects on the nature of Muslim marriage itself. It highlights all three aspects of a Muslim marriage: legal, social, and religious. Section 3 distinguishes dower as a legal consequence from essential elements to constitute marriage. Section 4 shows the inadequacies of hitherto given explanations as to the *raison d'être* of dower. Section 5 explores and stresses mainly the financial aspects of dower and the relevant concerns about it. Section 6 summarises the arguments of the paper and concludes.

2. The Nature of a Muslim Marriage

Since dower is an incident of Muslim marriage, it is pertinent to begin with elucidating the nature of Muslim marriage itself. The Arabic term for the

English word marriage is ‘*nikah*’, which literally means ‘joining together’. The expression ‘joining together’ connotes the idea of a lawful wedlock since it legalises the living together of a male and a female as husband and wife.

So far as the nature of a Muslim marriage is specifically concerned, Mahmood J in *Abdul Kadir v Salima Begum* observed that “marriage among Muhammadans is not a sacrament, but purely a civil contract.”² In *Anwar Hossain v Momtaz Begum*, the High Court Division of the Supreme Court of Bangladesh also emphasised the contractual nature of Muslim marriage when it said: “It is recognised on all hands that a marriage between a Muslim male and a Muslim female is not a sacramental marriage but a civil contract.”³

Mahmood J’s use of the expression “purely” with respect to “civil contract” confuses whether Muslim marriage is a civil contract for all intents/purposes, devoid of any social and religious significance. It is submitted that a Muslim marriage is not purely a civil contract, though it has some similarities with it. For example, the formation of both civil contract and Muslim marriage is simple and non-ceremonial. Generally, a civil contract may be concluded without rituals. Likewise, so far as the law is concerned, there are no religious rituals or irksome formalities to contract a Muslim marriage. An ordinary civil contract may be terminated. Similarly, in the case of a Muslim marriage, it may also be dissolved. Again, an ordinary civil contract gives rise to mutual rights and obligations between the parties. Similarly, by contracting a marriage, both the husband and wife become subject to matrimonial conditions (rights and obligations).

True, due to the similarities of the abovementioned kinds, a Muslim marriage resembles a civil contract. But it would be too much to consider a Muslim marriage *purely* a civil contract for this reason alone. A Muslim marriage should not be viewed as a purely civil contract for two different reasons at least: *first*, there are also dissimilarities between an ordinary civil contract and a Muslim marriage; *second*, a Muslim marriage, besides legal aspects, has also social and religious aspects and significance.

Let us first see the dissimilarities between an ordinary civil contract and a marriage contracted under Islamic law:

² *Abdul Kadir v Salima Begum* (1886) ILR 8 All 149 (hereafter *Abdul Kadir*).

³ *Anwar Hossain v Momtaz Begum* (1999) 18 CLC (HCD) 7376 [8].

First (witness), a civil contract does not require the presence of witnesses, but the presence of a witness is essential to constitute a valid Muslim marriage.⁴

Second (consideration), an agreement (contract) without consideration is treated as void, but there is no such thing as consideration in the marriage contract.⁵

Third (parties), a civil contract can be formed between natural persons, artificial persons, and between natural and artificial persons, and between the same sexes, but a Muslim marriage can be contracted only between two natural persons of opposite sexes.

Fourth (legal impediments), a civil contract can be concluded between any person; there are no such thing as legal impediments based on prohibited degrees of relationship or other grounds. But marriage cannot take place when there is any legal impediment. Some examples of legal impediments (prohibited degrees of relationship/other grounds) include consanguinity, affinity, fosterage, unlawful conjunction, bar of religion, *idda*, triply divorced wife, etc. So, for example, a Muslim male can conclude an ordinary civil contract with his paternal/maternal aunts but not a marriage.

Fifth (rights and obligations), parties to ordinary civil contracts have more freedom to determine their contractual rights and obligations. On the contrary, matrimonial rights and obligations in a marriage contract are mostly predetermined by *sharia*. Parties to a marriage can fix the terms and conditions of marriage only to the extent that they do not contravene any *sharia* injunction.

Sixth (termination), an ordinary civil contract may be terminated subject to payment of compensation. But dissolution of a Muslim marriage is regulated by predetermined rules of *sharia*. For example, a complex procedure is to be followed to effect divorce by *talaq*; the wife is required to observe the probation period (*idda*), etc.

Seventh (contingency), an ordinary civil contract may be contingent. But the same is not true for a marriage contract.

⁴ This is typically the view of Hanafi school. According to Maliki School, presence of witnesses is required to complete the marriage in all respects. So, a marriage without the presence of witnesses is valid provided it is duly publicised. Shia law, however, holds that the presence of witnesses is not essential to constitute a valid marriage: For details see Tanzil-ur-Rahman, *A Code of Muslim Personal Law, Vol I* (1st edn, CUP: Karachi 1978) 76–83.

⁵ Some regard dower as consideration of Muslim marriage. But this author holds this view to be inaccurate: See generally below, section 4.1.

Eighth (duration), an ordinary civil contract may be formed for a fixed period of time. But marriage for a fixed duration is void.⁶

The above dissimilarities are only illustrative and not exhaustive. But they may be considered sufficient as to why Muslim marriage should not be viewed purely as a civil contract. Besides this, an ordinary civil contract should not be equated with a marriage contract since marriage also has important social and religious aspects. Let us now briefly reflect on these aspects of Muslim marriage.

The holy Qur'an uses the term '*hisn*' to mean marriage (*nikah*).⁷ The term '*hisn*' literally means 'fort'. The term '*hisn*' has perhaps been used because marriage protects an individual from foulness and unchastity. Thus, as Haque observes, a marriage fulfils both individual wants and serves a social purpose to build up a protected society.⁸ Indeed, marriage is the only approved form of sexual relationship recognised by society. Only issues born out of marriage are considered legitimate by society. Marriage is a means for the continuance of the human race. Additionally, marriage brings peace, harmony, comfort, solace, and social dignity and status for a male and female wedded together.

To speak of religious aspects, it is generally believed that Islam does not support celibacy. So, marriage has religious overtones in Islam. The holy Qur'an, for example, describes marriage as *mithaq-e-ghalid* (sacred covenant).⁹ It furthermore says that "your spouses are a clothing for you and you are clothing for them."¹⁰ Allah also says that He has created for men wives so that they may find comfort in them, and He [Allah] has placed between them compassion and mercy.¹¹

Our Prophet (sm) is reported to have said that "He who marries completes half of his religion; it now rests with him to complete the other half by leading a virtuous life in constant fear of God."¹² Another narration of Prophet (sm) says that "There are three persons whom Almighty himself has undertaken to help – first, he who seeks to buy his freedom; second, he who marries with a view to secure his chastity; and third, he who fights in

⁶ This is the unanimous view of all four Sunni Schools (Hanafi, Maliki, Shafi and Hanbali). However, the Shia school (only Ithna Ashari, not Zaidis and Ismailis) recognises temporary marriage (*mut'a*) as valid: For details, see Rahman (n 4) 169–74.

⁷ *The Qur'an* 4:24.

⁸ Muhammad Ekramul Haque, *Muslim Family Law, Sharia and Modern World* (2nd edn, London College of Legal Studies (South): Dhaka 2024) 12.

⁹ *The Qur'an* 4:21.

¹⁰ *The Qur'an* 2:187.

¹¹ *The Qur'an* 30:21.

¹² Syed Khalid Rashid, *Muslim Law* (3rd edn, Eastern Book Company: Lucknow 1996) 54.

the cause of God.”¹³ Our Prophet (sm) also says that “. . . whoever marries a woman so that he may retain his eyes – God putteth a blessedness in her for him, and in him for her.”¹⁴

Imam al-Ghazali, the famous Islamic philosopher, regards marriage as a means “of attaining nearness to God.”¹⁵

The above verses of the holy Qur'an, narrations of the Prophet (sm), and the view of Imam Ghazali clearly indicate that marriage is a devotional act in Islam. The social and religious aspects of marriage are also evident in the definition of some modern authors. For example, Syed Ameer Ali's definition reflects both individual and social aspects when he says that marriage is “an institution ordained for the protection of the society, and so that human beings may guard themselves from foulness and unchastity.”¹⁶ Baillie, in his Digest, echoes the same: “Marriage is a contract which has for its desire or object the right of enjoyment and the procreation of children. But it was also instituted for the solace of life and is one of the prime or original necessities of man.”¹⁷

Some authors, while acknowledging marriage as a worldly affair, expressly take note of its religious aspects. Fyzee, for example, observes that while considering the social and legal aspects, the aspect of religion is often neglected or misunderstood . . . marriage partakes of the nature both of *ibadat* (worship) and *mamala* (worldly affairs).¹⁸ Mahmood considers it a solemn pact (*mithaq-e-ghalid*) which, in law, takes the form of a contract (*aqd*).¹⁹ Rahim observes that “the Muhammadan jurists regard the institution of marriage as partaking both of the nature of *ibadat* or devotional acts and *muamlat* or dealings among men.”²⁰ Rahman, in the same vein, describes it as a “religious legal contract that regularises the sexual relationship between man and woman, establishes the lineage of their progeny, and creates civil rights and obligations between them.”²¹ Hodgkinson beautifully depicts Muslim marriage, highlighting its religious aspect:

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ *ibid.*

¹⁶ *ibid.*

¹⁷ *ibid.* 53.

¹⁸ Asaf AA Fyzee, *Outlines of Muhammadan Law* (4th edn, OUP 1974) 89 – 90.

¹⁹ Tahir Mahmood, *The Muslim Law of India* (2nd edn, Law Book Company: Allahabad 1982) 45.

²⁰ Quoted in Rashid (n 12) 52.

²¹ Rahman (n 4) 17.

In substance, a Muslim marriage contract is a sanctified religious contract. The rights and obligations arising [out of a marriage under Islamic law] are a cohesive whole based on the biddings of God and traditions of the Prophet. Hence, Muslim jurists regard Nikah to be both temporal and religious at the same time.²²

Indeed, the religious aspects of Muslim marriage were acknowledged in later judicial decisions after *Abdul Kadir*.²³ In *Anis Begum v Muhammad Istafa Wali Khan*, Sir Shah Sulaiman CJ observed that “marriage in Islam is not recognised as a mere civil contract, but a *religious sacrament* (too).”²⁴ In the Pakistani case of *Muhammad Yasin v Khushnuma Khatun*, Justice Qadir al-Din Ahmad observed that

If religious ritual is not an essential part of the transaction, it does not mean that it has no sacred and no higher religious purpose, enjoying the sanctity of religion and the pleasure of God. There is a sanctity attached to it from the beginning to the end by conceptions of rights and obligations which, if treated without the holiness which they possess in their nature, would be profane and cease to be Islamic in character.²⁵

The above view of Justice Ahmad regards Islamic marriage not merely as a civil contract but attaches to it a religious sanctity. Rahman, therefore, aptly remarks that “Nikah to Muslims does not only bring legal and social advantages; it also confers on them innumerable religious and spiritual benefits.”²⁶

In *Khurshid Bibi v Md. Amin*, SA Rahman J of the Pakistan Supreme Court observed that a “marriage among Muslims is not a sacrament but is like a civil contract. Such a contract undoubtedly has spiritual and moral overtones and undertones, but legally, in essence, it remains a contract between the parties.”²⁷ The learned Judge does not say that a Muslim marriage is purely a civil contract, or, for that matter, a civil contract. He

²² Quoted in Haque (n 8) 17.

²³ *Abdul Kadir* (n 2).

²⁴ *Anis Begum v Muhammad Istafa Wali Khan* (1933) 55 Allahabad 743 (hereafter *Anis Begum*) (as quoted in Rashid (n 12) 54).

²⁵ *Muhammad Yasin v Khushnuma Khatun* (1960) 2 Karachi Weekly Law Reporter 65 (as quoted in Rahman (n 4) 18).

²⁶ Rahman (n 4) 19.

²⁷ *Khurshid Bibi v Md Amin* [1967] PLD (SC) 97 (hereafter *Khurshid Bibi*) (as quoted in Rahman (n 4) 18).

merely regards it as a civil contract. This description correctly presents the nature of an Islamic marriage.

In light of the above judicial and juristic views, it may be concluded that a Muslim marriage, though like a civil contract, is a sanctified religious contract. It is both *muamlat* (worldly affairs or dealings among men) and *ibadat* (devotional act); simply speaking, it is both a temporal and religious act.²⁸

So, a question may crop up in one's mind: why did a reputed Judge like Justice Mahmood hold it to be a purely civil contract?²⁹ One reason may be that the learned Judge was anxious to differentiate Muslim marriage from Christian and Hindu marriages, where it is regarded only as a religious sacrament (*sanskara*).

3. Dower: A Constituent Element or Legal Consequence?

This section draws on the distinction between essential elements and legal consequences of marriage. The former are components to form the institution of marriage itself, whereas the latter are incidents when the institution of marriage is formed. So, one can speak of the latter only when the former is constituted by its forming parts. Sometimes confusion arises as to whether dower is a constituent element or a consequence of a valid marriage. The reason for the confusion will be stated later.³⁰ Let us first briefly reflect on the constituents and consequences of a valid marriage.

3.1 Constituent Elements of a Valid Marriage

The constituent elements of a valid marriage may broadly be grouped under three headings: (a) essential elements as to capacity; (b) essential elements as to the absence of legal impediments; (c) essential elements as to form.

Elements as to capacity mean that the parties should be people of sound mind and of the age of majority. In the preceding section, it has been seen that a Muslim marriage is like a civil contract. And, in the eyes of the law, only people of sound mind are capable of giving their consent to form a contract. So, in a marriage, parties must be of sound mind to contract it. Likewise, only majors are capable of giving consent. So, a valid marriage

²⁸ Analysing the juristic and judicial definitions, Haque summarises these characteristics of a Muslim marriage—it is an agreement of contractual nature; it is the only form of approved sexual relationship; it legalizes the procreation of children; it ensures the excellence of individual character keeping one within the approved form of sexual relationships; it acts like a fort that affords protection to society from unchastity and as such it serves a social purpose: Haque (n 8) 14.

²⁹ See (n 2) above and accompanying text.

³⁰ See below, section 3.3.

may be contracted only between a male and a female who have attained majority.³¹

However, in Islam, the majority is not a matter to presume at any specific age. It is rather attained naturally when a male or female reaches puberty. Puberty is a natural physical event by which a person achieves sexual ability. A girl attains puberty when she begins *menstruating*, and a boy attains puberty when he starts getting *night pollution*.³² Generally, the minimum and maximum ages for a girl to reach puberty are considered to be 9 and 15 years, respectively. For boys, in the absence of clear proof, they are considered to have reached puberty at 15 years. Thus, the age of puberty may not be the same for all; it may rather vary for different boys and girls.³³

Coming to the second element, legal impediments between the parties may be for prohibited degrees of relationship or other grounds. These grounds include, *inter alia*, consanguinity, affinity, fosterage, unlawful conjunction, number of wives, difference of religion, *idda*, triply divorced wife, etc. For a valid marriage to be constituted, there must not be any legal impediment between the parties.

The third element is about how a marriage is actually formed. Suppose the parties are people of sound mind and major between whom there are no legal impediments. Then, some acts need to be performed for a marriage to actually happen. These are regarded as essential elements for the form of marriage. So far as the Hanafi law is concerned, there are five such elements: *first*, one party must give the offer of marriage (*ijab*) to the other party; *second*, the offer should be accepted (*qabul*) by the other party; *third*, the offer and acceptance both should be in unambiguous language; *fourth*, the offer and acceptance should be exchanged in the same sitting/meeting; *fifth*, the act of offer and acceptance should be witnessed by at least two competent witnesses.³⁴

³¹ By this, it is only meant that minors cannot contract their own marriage. But, so far as the classical Muslim law is concerned, they may be given in marriage by their guardians. However, such a marriage may either be confirmed or repudiated by the minor after attaining majority. This is known as 'option of puberty' (*khiyar al-bulugh*).

³² For details, see Haque (n 8) 19.

³³ In this context, it should be mentioned that the Child Marriage Restraint Act, 2017, has only declared a child marriage to be a punishable act. Males below 21 and females below 18 years of age are considered underage/child for the Act. Thus, the Child Marriage Restraint Act, 2017, does not prescribe the age of majority for marriage. It is still governed by the classical *sharia* law. The Muslim Personal Law (Shariat) Application Act, 1937, clearly states that the *sharia* will be the governing law for a Muslim marriage.

³⁴ It is clearly evident from the rules that the formation of an Islamic marriage is very simple. If parties are competent (sound mind and major) with no legal impediment, there is no further irksome formality or ritual and ceremony to constitute marriage between them. This aligns with the philosophy of Islamic marriage. Islam severely condemns any

3.2 Legal Consequences of a Valid Marriage

Once a marriage is formed following the rules of the preceding sub-section, it produces some legal consequences. These legal consequences are broadly of three types: (a) mutual rights and obligations; (b) rights of the wife and duties of the husband; (c) rights of the husband and duties of the wife.

Some of the important mutual rights and obligations are as these: *first*, sexual relationship becomes lawful between the parties; *second*, children born of the union are legitimate; *third*, mutual rights of inheritance between the parties; *fourth*, rights of inheritance between parents and children; *fifth*, legal impediment of affinity; *sixth*, dissolution of marriage; *seventh*, wife to observe *idda* after dissolution of marriage either by death or divorce; *eighth*, restitution of conjugal rights; *ninth*, any valid stipulation or matrimonial condition agreed upon by the parties.³⁵

Some rights are unilaterally in favour of the wife. For example: *first*, the wife is entitled to, and the husband is bound to pay dower; *second*, the wife is entitled to, and the husband is bound to provide maintenance; *third*, the wife has the right to visit her parents at reasonable intervals. Some rights are unilaterally in favour of the husband. For example, *first*, the wife must be obedient to the husband; otherwise, she will forfeit her right of maintenance; *second*, the husband has the right to control the wife's movement reasonably. In either case, any valid stipulation or matrimonial condition agreed upon by the parties.³⁶

3.3 Dower: Constituent or Consequence?

It is quite clear from the foregoing sub-sections that dower is one of the legal consequences and not a constituent element of marriage. But dower as a legal consequence is somewhat different from the other legal consequences. The parties don't need to say anything about the consequences fixed by *sharia* at the time of marriage or in the marriage deed since those will automatically ensue once the institution of marriage

form of extramarital relationship. Hence, it encourages marriage. And it is quite natural that the rules for the formation of an institution (marriage) would be simple, which has been encouraged. However, it should be noted that some rituals and ceremonies are in fact observed in a Muslim marriage. For example, the presence of relatives of both sides, recitation from the verses of the holy Qur'an, offering blessings to the couple etc. are common events of a Muslim marriage. But these are only social and customary observances; in no sense legal essentials.

³⁵ The limited space of the paper does not cover to deal in detail these mutual rights and obligations of the parties. For a detailed discussion of them, see Haque (n 8) 57–60.

³⁶ The limited space of the paper does not cover to deal in detail these unilateral rights of the parties. For a detailed discussion of them, see Haque (n 8) 60–62.

is validly constituted. This is true for all consequences, whether mutual for both parties or unilateral in favour of either husband or wife.

But what do we usually see in practice? We see that the dower is settled at the time of the marriage contract itself, though dower is to be payable by the husband even if it is not settled at the time of marriage. If dower is not settled, proper or customary dower is to be payable by the husband to his wife.³⁷ A question, therefore, arises: if dower is to be payable (as a legal consequence) even if it is not fixed, why is it invariably seen to be fixed at the time of marriage? One reason may lie in the question of fixing the amount of dower. If not fixed, then proper dower will be payable. But if it is fixed at the time of marriage, both parties are then able to settle the amount very cautiously and consciously.

But this settling of dower at the time of marriage has the chance of creating confusion between the *constituents* and the *consequences* of marriage. We have seen that when parties are competent with no legal impediments, they can constitute a marriage following some simple rules as to *form*: offer; acceptance; unequivocal language; same sitting; and presence of witnesses. But when dower comes into the forefront of discussion at the time of marriage, in addition to these rules of *form*, there is then a chance of a misconception that dower is perhaps an essential element to constitute a valid marriage. That is to say, there is no marriage where there is no dower. But, as already understood, a valid marriage may be constituted without any mention of dower at the time of marriage. But, once a valid marriage is constituted, dower will automatically ensue as a legal incident of such marriage. Thus, dower in Muslim marriage is not a *constituent* but a *consequence*.

The above analysis only clarifies that dower is a legal consequence and not a constituent of valid marriage, but it is no answer to the question: why does dower ensue as a legal consequence of marriage, or, put simply, why is dower payable by the husband to the wife? What, in fact, is its *raison d'être*? The following section investigates some of the traditional misconceived views of the question.

4. The *Raison D'être* of Dower: Misconceived Views

Dower no doubt constitutes a salient feature of the Muslim matrimonial law. But, unfortunately, the concept of dower has been widely misunderstood. The paper identifies four misconceived views of dower: (a) dower is bride-price or consideration; (b) dower is for sexual pleasure or

³⁷ Dower is considered proper/customary/unspecified when it is not fixed at the time of marriage or in the marriage deed. Usually, the dower given to the bride's sisters and paternal aunts are taken into consideration for fixing the amount of proper dower.

propriatorship; (c) dower is payable as a gift; (d) dower is payable as a token of respect to the wife. The inadequacies of these views are explained below.

4.1 Dower as Bride-Price or Consideration

The first misunderstood view is that dower is the bride-price or consideration of marriage. Mulla, for example, defines dower as "a sum of money or other property which the wife is entitled to receive from the husband *in consideration of the marriage*."³⁸ Pearl and Menski refer to Abu Zahra's definition of dower, where it has been translated as bride-price.³⁹ Haque, however, observes that it is not clear whether these authors mean consideration [or bride price] in its technical legal sense or use it as a mere terminology to mean that it is payable in consequence of marriage.⁴⁰

In this respect, Mahmood J's observation in *Abdul Kadir*,⁴¹ is noteworthy. The learned Judge was of the view that the Arabic textbooks used the term consideration or compared marriage with a contract of sale, not in the technical sense as in the Contract Act, but as an effect of marriage. To quote him:

Dower, under the Muhammedan 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 Muhammedan law bears a strong resemblance to the *donatio 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 Muhammedan law be regarded as the consideration for the connubial intercourse, and if the authors of the Arabic textbooks of Muhammedan law have compared it to price in the contract of sale, it is simply because marriage is a civil contract under that law. And sale is the typical contract which Muhammedan jurists are accustomed to

³⁸ Mulla, *Principles of Mahomedan Law* (19th edn, NM Tripathi Private Ltd: Bombay 1990) 245 (emphasis added).

³⁹ David Pearl and Werner Menski, *Muslim Family Law* (3rd edn, Brite Books: Pakistan 1998) 179.

⁴⁰ Haque (n 8) 117.

⁴¹ *Abdul Kadir* (n 2).

referring to in illustrating the incidents of other contracts by analogy.⁴²

He further observed:

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, given by the man to the woman for entering into the contract, but an effect of the contract imposed 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.⁴³

It is interesting to note that Mahmood J sought to clarify that the Arabic textbooks used the term consideration or bride-price not in the technical sense in the Contract Act but himself used the term ‘consideration’ to describe dower when said, “[d]ower, under the Muhammedan 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*.”⁴⁴

The above kind of descriptions of dower in Arabic texts, similar definitions of some authors as Mulla or Abu Zahra, are the reason for the misconception that dower is a consideration or bride-price of Muslim marriage. Mahmood J sought to clarify, but his exposition itself used similar terminology.⁴⁵

However, the line of reasoning based on the analogy of a contract of sale has been criticised. In *Anis Begum*, Sir Shah Sulaiman J, for example, observed:

It is quite obvious that the analogy of sale[s] cannot be carried too far. [Marriage] cannot be regarded as purely a sale of the person by the wife in consideration for the payment of dower.⁴⁶

⁴² *ibid* (emphasis added).

⁴³ *ibid* (emphasis added).

⁴⁴ See text accompanying (n 42) above (emphasis added).

⁴⁵ *Ibid*; Haque observes that in fact the jurists who term Muslim marriage as purely a civil contract are the ones who ultimately argue dower to be consideration: see Haque (n 8) 124.

⁴⁶ *Anis Begum* (n 24): The learned Judge observed further why a contract of sale should not be equated with marriage. For example, a contract of sale of goods can be cancelled for partly unpaid consideration, or goods may be returned under certain circumstances

Many modern authors have criticised the approach of describing dower as bride-price or consideration. Bailee says that "dower is not the exchange or consideration given by the man to the woman for entering into the contract; but an effect to the contract imposed by the law on the husband as a token of respect for its subject, the woman."⁴⁷ Referring to Rahim, Hedaya and Bailee, Shaukat Mahmood says that dower "is not a consideration proceeding from the husband for the contract of marriage but is an obligation imposed by law upon the husband as a mark of respect to the wife."⁴⁸ Tahir Mahmood also rules out the possibility that dower is a consideration of marriage:

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.⁴⁹

Pearl and Menski are also of the view that dower is in fact not a consideration. Negating Abu Zahra's definition of dower as bride-price, they observe as stated below:

In view of the use of the term 'bride-price' above, it needs to be emphasized at once that *mahr* [dower] 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.⁵⁰

Justice Aftab Hussain sorts out the different terminologies used by the holy Qur'an for the term dower. He identifies five terms to mean dower in the

which it would be absurd to think of in case of marriage which has been consummated, and the dower is unpaid or partly paid only. Again, whether dower is consideration for the first consummation only or whether it is consideration for the society of the wife during married life could not be answered by applying the analogy of sale to dower money and marriage; See Rashid (n 12) 84.

⁴⁷ Neil BE Baillie, *Digest of Moohummudan Law: Compiled and Translated from Authorities in the Original Arabic, Vol ii* (Premier Book House: Lahore 1958) 75. Quoted in Haque (n 8) 124.

⁴⁸ Shaukat Mahmood, *Principles and Digest of Muslim Law* (Ilmi Kitab Khana: Lahore 1960) 50.

⁴⁹ Tahir Mahmood, *The Muslim law of India* (3rd edn, LexisNexis Butterworths: New Delhi 2002) 66.

⁵⁰ Pearl and Menski (n 39).

Qur'an: *atiyya*, *farida*, *sadaqa*, *nehla*, and *ujur*, the plural of *ajr*, to connote the same thing. After a perusal, he holds that none of these expressions carries the sense of consideration; it rather means something given as a gift and not as consideration.⁵¹

Agreeing to the above modern critiques, the paper advances two additional arguments against the view that dower is bride-price or consideration. *First*, if dower is regarded as bride-price or consideration, it goes against natural justice. In pre-Islamic Arabia, a bride was a saleable object when given in marriage by her guardian. But, under Islamic law, she is a contracting party endowed with legal competence. Now, if dower is regarded as bride-price or consideration, then she becomes both subject and object of marriage, which goes against natural justice to sell her personality. Since, under Islamic law, dower is paid not to her guardian but to herself, it cannot be viewed as bride-price.⁵²

Second, dower should not be viewed as consideration for yet another reason. An agreement without consideration is treated as void. But a valid marriage may be contracted, remaining wholly silent as to dower or without fixing it. In such a case, the husband shall still be liable to pay proper or customary dower.⁵³ Indeed, under Islamic law, a marriage even with the stipulation that the husband shall not pay dower is valid. In such a case, the stipulation itself will be rendered void, but marriage will remain valid, and the husband shall still be liable to pay proper or customary dower.⁵⁴

The above is really the law of dower, because dower is an effect of a valid marriage, a strict *sharia* obligation imposed upon the husband, irrespective of the consent of the parties to marriage. Hence, in *Hamira Bibi v Zubaida Bibi*, it was rightly held that “maher is an essential incident to the status of marriage.”⁵⁵ The law of dower was also rightly construed by the High Court Division of the Supreme Court of Bangladesh in *Md. Saidul Haque Bhuiyan v Shahina Akhter and Others*:

Dower is payable even if no 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-

⁵¹ Justice Aftab Hussain, *Status of Women in Islam* (Law Publishing Company: Lahore 1987) 460–61; For details of Justice Aftab’s view, see Haque (n 8) 119–20.

⁵² Rashid (n 12) 84: Rashid has a similar understanding when he says, “There is a 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.”

⁵³ Regarding proper or customary dower, see (n 37).

⁵⁴ *ibid.*

⁵⁵ *Hamira Bibi v Zubaida Bibi* [1916] AIR (PC) 46.

payment of dower, still the dower is payable, though it is not the condition precedent of the marriage. Thus, this is an absolute liability fixed by the Sharia.⁵⁶

Dower is thus neither the consideration nor a condition of the validity of Muslim marriage. This view also finds support from the holy Qur'an when it says:

There is no blame if you *divorce* a woman before the marriage is consummated or the *dower is settled*. But give them a 'suitable' compensation – the rich according to their means and the poor according to his. Reasonable compensation is an obligation to the good-doers.⁵⁷

Divorce is a legal consequence of marriage because one cannot speak of the dissolution of marriage when marriage itself is not constituted. Since divorce follows only after a valid marriage, the above verse is in support of the effectiveness of marriage without any mention of dower at the time of marriage or in the marriage deed.⁵⁸

In light of the above analysis, it may be concluded that the view that dower is bride-price or consideration is neither accurate nor adequate as an explanation of the *raison d'être* of dower.

4.2 Dower as Payment for Sexual Pleasure or Proprietorship

Can dower be viewed as a financial amount given instead of the sexual pleasure to be enjoyed by the husband? This question may come into one's mind due to the definition of marriage given in some classical authorities. Famous Hanafi books, such as Hedaya, Kanz al-Daqaiq, Fatawa e-Alamgiri, etc., describe marriage as a contract where the husband gets the beneficial right to enjoy her wife sexually.⁵⁹ Kanz al-Daqaiq, for example, defines marriage as "a contract that is entered into by a man with a woman for the enjoyment of the beneficiary rights over her (i.e., the enjoyment of the proprietary sex rights) as an owner."⁶⁰

The above definitions give the wrong impression that sexual rights are a unilateral right of the husband. But sexual rights are indeed mutual rights

⁵⁶ *Md Saidul Haque Bhuiyan v Shahina Akhter and Others* (LEX/BDHC/0151/2022, HCD, 2022).

⁵⁷ *The Qur'an* 2:236 (emphasis added).

⁵⁸ For the same view, see, Charles Hamilton (trs), *The Hedaya: Commentary on the Islamic Laws, vol 1* (Reprint edn, London 1985) 122; Jamal JA Nasir, *The Status of Women under Islamic Law and Modern Islamic Legislation* (Leiden: Boston 2009) 88; See also Haque (n 8) 98.

⁵⁹ See Rahman (n 4) 17.

⁶⁰ *ibid.*

of both the husband and wife. Haque rightly points out the problem of these definitions:

The definitions of marriage given by some traditional authorities are problematic. As Hedaya and Kanz-ul-Daqaiq defined marriage in terms of a contract where the husband gets the right to enjoy his wife sexually. Such a definition of marriage may lead to the idea that dower is the price for sexual pleasure, whereas the fact is that sexual right is not a unilateral right, but a mutual right of both husband and wife.⁶¹

That sexual right is a mutual right of both the husband and wife may be proved from some forms of dissolution of marriage also. The first form of dissolution of marriage that may be cited in this respect is *ila* (vow of continence). *Ila* is a vow to abstain from sexual intercourse by the husband for a period of 4 months or more. *Ila* has the effect of irrevocable divorce after the expiry of the said period unless the husband, before the expiry of the period, resorts to the wife by words and, if possessing power, by acts. The Qur'anic provision of *ila* is to be found in Surah al-Baqarah:

Those who swear not to have intercourse with their wives must wait for four months. If they change their mind, then Allah is certainly All-Forgiving, Most Merciful.⁶²

But if they settle on divorce, then Allah is indeed All-Hearing, All-Knowing.⁶³

The second form of dissolution is *faskh* (judicial rescission). Under this form, a wife may seek a decree for judicial dissolution of marriage on certain grounds. In this regard, the Hanafi law is very restrictive. It recognises only one ground, that is, impotence of the husband to consummate the marriage. Maliki law, however, is very liberal and acknowledges additional grounds in this respect. For example, under Maliki law, besides impotence of the husband, a wife may seek judicial dissolution when the whereabouts of the husband have not been known or when the husband has been sentenced to imprisonment or when the husband has failed to perform, without reasonable cause, his marital obligations or when the husband has been insane or is suffering from leprosy or a virulent venereal disease (in all cases) for a considerable period of time.

⁶¹ Haque (n 8) 120.

⁶² *The Qur'an* 2:226.

⁶³ *The Qur'an* 2:227.

The above forms of dissolution of marriage on account of *ila* (vow of continence) or *faskh* (judicial rescission) clearly prove that the wife also has the equal right to sexual intercourse in matrimonial life. So, the right to sexual intercourse is not the exclusive and unilateral privilege of the husband. It is rather a mutual right of both the husband and wife. The necessary implication of this is that the dower cannot be viewed as a payment instead of the sexual pleasure of the husband.

Haque cites a curious example that a marriage may take place between two people who are beyond the age of enjoyment or sexual ability.⁶⁴ But the husband will be liable to pay dower in this case also. This also shows why dower cannot be viewed as consideration in lieu of the sexual pleasure of the husband.

That dower cannot be viewed as a payment in lieu of sexual pleasure can also be proved from a direct Qur'anic provision. A verse of Surah al-Baqarah clearly indicates that dower may become payable even when there was no physical enjoyment, meaning either actual consummation or valid retirement. To cite the verse:

And if you divorce them before consummating the marriage but after deciding on a dower, pay half of the dower, unless the wife graciously waives it or the husband graciously pays in full. Graciousness is closer to righteousness. And do not forget kindness among yourselves. Surely Allah is All-Seeing of what you do.⁶⁵

This verse shows that the husband is liable to pay half dower when he divorces the wife before consummation but after fixation of dower. The only concession is that he is required to pay half instead of full, but nonetheless, he is required to pay the dower.

Under Hanafi law, the husband is required to pay the whole fixed or proper dower when either of the couple dies before consummation.⁶⁶ There is no physical enjoyment in this case, but the husband is still not relieved from his liability to pay dower.

The above analysis clearly shows that dower cannot be viewed as payment in lieu of the sexual pleasure of the husband, a false conception that may

⁶⁴ Haque (n 8) 121.

⁶⁵ *The Qur'an* 2:237.

⁶⁶ However, under Shafi law, no dower is to be payable when the dower is not fixed and either of the couple dies before consummation. For details, see Rahman (n 4) 223–26.

be caused by the misconceived definitions of marriage given in classical authorities like Hedaya, Kanz al-Daqaiq, and Fatawa e-Alamgiri.⁶⁷

4.3 Dower as Free Gift

Dower is also explained to be payable by the husband as a gift. It is so explained because the holy Qur'an enjoins the husband to pay dower as a gift. The relevant verses of the Qur'an are as follows:

And give the women (on marriage) their dower as a free gift.⁶⁸

Except for these, all others are lawful, provided you seek them in marriage) with gifts from your property.⁶⁹

These verses imply that dower is neither consideration nor payment in lieu of sexual pleasure of the husband, but an effect of marriage to be payable by the husband as a gift. But this merely states the fact that dower is to be payable as a gift, but does not address the philosophical thrust of the matter: why is it to be payable by the husband as a gift (to use the Qur'an's terminology)?

In the case of a gift, the donor receives no consideration or return from the donee. Likewise, in the case of dower, the husband receives nothing in lieu of dower. So, both juristically and from the point of view of transfer of property law, dower should have been compared with a gift, and the Qur'an exactly did this. So, from the Quran's description of dower as a gift, one can understand only that dower should be payable by the husband gratuitously, expecting nothing in return from the wife, but it is no answer to the question: why is dower payable by the husband gratuitously to his wife?

In fact, describing dower as a gift is no more gain than describing dower as a legal consequence. When we say that dower is an effect of marriage, from this, we only get a conceptual clarity that dower is not a constituent element or condition of validity, but a consequence of marriage. But we still do not know the reason why dower is an effect of marriage. Likewise, when we say that dower is a gift to the wife (as the Qur'an says), we find only that it is payable by the husband, gratuitously expecting no return from the wife. But we still do not get the answer or know the reason why dower is to be payable by the husband gratuitously as a gift.

⁶⁷ See text accompanying (n 59) and (n 60) above.

⁶⁸ *The Qur'an* 4:4.

⁶⁹ *The Qur'an* 4:24.

To explain further, let us know the distinction between a fact and the reason or philosophy behind the fact. For example, the Sun rising in the East is an observable fact of nature. But the philosophical thrust as to why the Sun rises in the East (instead of the West or the North, for example) is an inquiry into the reasoning behind the fact. Similarly, when we say that dower is to be payable as a gift, it only states the fact but does not explain the philosophical reasoning behind the fact. But the paper, as stated in the Introduction, is a philosophical inquiry to know the *raison d'être* of dower.

It, therefore, can be said that the Qur'anic description of dower as a gift only states the fact that it is to be paid gratuitously by the husband but not the *raison d'être* behind the fact of gratuitous payment.

4.4 Dower as Token of Respect to the Wife

Another explanation of dower is that it is payable to the wife as a token of respect. Hedaya, for example, states:

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 men were to engage in the contract on the special condition that there should be no dower.⁷⁰

The narration of dower as a token of respect to the wife has been followed both by Judges and authors. For example, in *Abdul Kadir*, Mahmood J held that "maher is not the exchange or consideration given by the man to the woman, but an effect of the contract imposed by law on the husband *as a token of respect for its subject, the woman*."⁷¹ Likewise, Rashid, in the same vein, observes: "... 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*."⁷²

Shaukat Mahmood says that dower "is not a consideration proceeding from the husband for the contract of marriage but is an obligation imposed by

⁷⁰ Hedaya (n 58) (emphasis added).

⁷¹ *Abdul Kadir* (n 2) (emphasis added).

⁷² Rashid (n 12) 84 (emphasis added).

law upon the husband *as a mark of respect to the wife*.”⁷³ Tahir Mahmood does not expressly explain dower as a token of respect to the wife but says that “it has a unique position of its own.”⁷⁴ Baillie describes dower similarly as a token of respect for its subject, the woman.⁷⁵

It should be noticed that the Judges or authors who explain dower as a token of respect to the wife negate the “bride-price” or “consideration” thesis as the *raison d’être* of dower. They replace “bride-price” or “consideration” with “token of respect” thesis. But, in this author’s view, this explanation is also not sufficient since dower is indeed a financial gain of the wife. What do we usually see given as dowers in marriage? In most cases, the amount of money is fixed as dower. And, since women wear ornaments, sometimes ornaments, particularly gold, are given as dower.⁷⁶

So, dower is invariably something of financial value. Now, if dower is to be regarded as a token of respect to the wife, why does the husband need to show this respect by giving money or articles of financial value only? Can he give a bunch of flowers as dower to show this love and respect? Perhaps not. And no bride or, for that matter, guardians of the bride, will perhaps agree to such an arrangement.

So, dower in terms of a token of respect to the wife is also inadequate as its *raison d’être*.⁷⁷ In this author’s view, analysis in terms of the financial aspect may come nearest to its true *raison d’être*. The following section, therefore, explores dower mainly from financial perspectives.

5. Financial Approach to Dower

To explore the financial perspectives, the paper first traces the historical origin of the law of dower and relates it to the financial security aspect of Muslim women. It then enquires into some significant questions associated with the financial aspect of dower, such as the minimum and maximum amount of dower and whether the husband’s financial strength and means

⁷³ See (n 48) (emphasis added).

⁷⁴ See (n 49).

⁷⁵ See (n 47).

⁷⁶ This is not to mean that no other thing except money and gold can be given as dower in marriage.

⁷⁷ Apart from the four traditional explanations of the *raison d’être* made in the paper, there may be other arguments. For example, some jurists think that dower is consideration that is given by the husband in exchange of accruing some superior rights to be exercised over the wife, e.g. controlling wife’s behavior. Haque considers it a convincing argument: Haque (n 8) 124; This author, however, does not agree with Haque’s view. The husband is bound to provide maintenance to his wife provided that the wife remains obedient to the husband. And obedience covers controlling wife’s behavior albeit reasonably. So, obedience and its appertained aspects cannot be treated as the true *raison d’être* of dower.

should be taken into consideration in determining the amount of dower. It finally investigates the question of whether fixation of excessive dower should be desirable to secure the financial interest of Muslim wives.

5.1 Historical Origin of the Law of Dower

To know the real reason for the Islamic law of dower, it may be useful first of all to trace its historical origin. To accomplish this purpose, it may be further useful to reflect, albeit in brief, on the pre-Islamic Arabian customary family law or the law regulating the relationship between Arab males and females. If we compare the pre-Islamic Arabian customary family law with Muslim family law after the advent of Islam, it will become apparent that Islam did not intend to give a completely novel structure of family law. Instead, it merely reformed the pre-Islamic Arabian customary law. Some familiar examples of Muslim family law may be cited below to show this.

First (number of wives), in pre-Islamic Arabia, an Arab could marry as many women at a time as he liked.⁷⁸ Islam did not abolish the practice altogether; it merely restricted the number to four. Thus, Islam, like the pre-Islamic Arabian customary law, allowed polygamy, though in a restricted form.⁷⁹

Second (divorce), before Islam, an Arab husband had unrestricted rights to divorce his wife whenever he liked.⁸⁰ Here again, Islam did not curtail the husband's unfettered and unilateral power of talaq. It only laid down the procedure of pronouncement and the effect of talaq in ahsan and hasan forms.⁸¹

Third (right to inheritance), females had no right of inheritance before the advent of Islam. After the death of an Arab, his wife, mother, sister, daughter, etc. had no share in his properties.⁸² The pre-Islamic law mainly recognised the male agnatic relatives as heirs of the deceased. Islam did not substitute it with a completely new structure of inheritance law. The Qur'an

⁷⁸ RK Sinha, *The Muslim Law* (3rd edn, Central Law Agency: Allahabad 1995) 11.

⁷⁹ *The Qur'an* 4:3 prescribes the rule and condition of polygamy: "If you fear you might fail to give orphan women their 'due' rights 'if you were to marry them', then marry other women of your choice – two, three, or four. But if you are afraid you will fail to maintain justice, then 'content yourselves with' one or those 'bondwomen' in your possession. This way you are less likely to commit injustice."; It is to be noted that polygamy is a debatable issue in Islam. The scope of the paper, however, does not cover to address the debate.

⁸⁰ Sinha (n 78) 11.

⁸¹ Ahsan and Hasan forms are known as Talaq as-Sunnah (approved forms of talaq). Other forms, may be in vogue, are Talaq al-Bida (disapproved forms of talaq).

⁸² Sinha (n 78) 11.

specifically recognised some female heirs, and male agnatic relatives just became the second-class residuary (*asaba*) heirs.⁸³

Fourth (marriage and dower), before Islam, a girl could be married to anyone by her guardian without her consent. Marriage was considered a sale where a price was paid to the guardian as bride-price. Islam converted the situation from a contract of sale to a sacred covenant. Interestingly, Islam did not abolish the requirement to pay the amount since it is no longer a sale now. Rather, Islam allowed the wife herself to receive the amount as dower instead of her guardian.

The above examples are enough to show that the Qur'an did not intend to provide a novel structure of family law. Islamic family law, as contained in the Qur'an, is mostly a reformed version of pre-Islamic Arabian customary law.⁸⁴ And, as shown above, this is true for the Islamic law of dower as well. In a contract of sale, the consideration or price is something of financial value usually. The Qur'an did not alter this character in the case of marriage. It only changed the person who will receive the financial benefit. In the pre-Islamic era, the bride's guardian received it, but under Islamic law, the bride herself receives it. But even if it is a kind of financial benefit, it is neither a consideration/bride-price nor a payment in lieu of sexual pleasure of the husband, for reasons explained earlier.⁸⁵ However, if not consideration, it cannot be viewed merely as a token of respect to the wife either.⁸⁶ Instead, viewed from a historical perspective, it is linked more with financial reasons.

The Arab males enjoyed unfettered power of divorce before the advent of Islam. The Qur'an kept the husband's unilateral and unfettered power of talaq intact, subject to procedural rules as to pronouncement and effect. Similarly, it kept the provision of financial gain intact in marriage but gave it to the bride herself instead of her guardian. These two may now be balanced against each other. Dower may work as a check on the capricious exercise by the husband of his almost unfettered power of divorce.⁸⁷

⁸³ Under Sunni law of inheritance, heirs are of three types: Qur'anic heirs/Sharers (Class I); Residuary heirs (Class II); and, Distant kindred (Class III). Women mentioned as heirs in Qur'an are Class I Qur'anic heirs/Sharers.

⁸⁴ This is not to mean that Islam never abolished any pre-Islamic custom. Pre-Islamic customary law recognised the practice of adopting a son. Such a child was treated as a natural born son of the adopter. Islam completely abolished this pre-Islamic customary law of adoption: See, *The Qur'an* 33:4.

⁸⁵ See generally above, sections 4.1 and 4.2.

⁸⁶ See generally above, section 4.4.

⁸⁷ Rashid (n 12) 84.

Moreover, it may be a provision for rainy days of wife if divorced by her husband.⁸⁸

Again, if the dower is deferred, a husband will think twice before he divorces his wife because the entire deferred dower will become instantly payable on divorce.⁸⁹ However, a contrary situation may be contemplated as well. When a wife asks for a divorce from her husband (this form of divorce is known as *khul*), the wife is required to surrender the dower received from her husband. Thus, the question of dower becomes crucial at the time of dissolution of marriage at the instance of both husband and wife.

The foregoing discussion indicates that the financial perspectives are a more probable explanation of the *raison d'être* of dower. If it is true, then determining the amount of dower, husband's financial ability, the question of excessive dower, etc., are some of the significant pertinent financial aspects of dower. The paper turns to analyse them briefly in the following sub-sections.

5.2 Amount of Dower

Three financial aspects about dower are considered in this sub-section: (a) minimum amount of dower; (b) maximum amount of dower; and (c) husband's financial strength or means to determine the amount of dower.

5.2.1 Minimum Amount of Dower

Is there any minimum amount below which a dower may not be fixed? The holy Qur'an does not specifically mention the actual amount of dower. In view of the Qur'anic silence, there are varying degrees of opinion among the Islamic jurists. According to the Hanafi opinion, the minimum amount of dower is 10 dirhams or "pieces of silver weighing seven miskals, coined or uncoined."⁹⁰ According to Maliki law, the minimum amount is 3 dirhams.⁹¹ So, according to Hanafi and Maliki law, in case of any amount settled by the parties lower than the above minimum, the husband will still be obliged to pay the above-mentioned minimum amount of dower.⁹² However, according to Shafi law, there is no minimum amount of dower,

⁸⁸ *ibid.*

⁸⁹ From the point of view of mode of payment, dower is of two types: prompt and deferred. Prompt dower is that which is promptly paid at the time of marriage contract or is payable promptly on demand by the wife. Deferred dower is that where the time of payment of dower depends on the will of the husband. Deferred dower, if not paid during the continuance of marriage, will become instantly payable on dissolution of marriage either by death or divorce.

⁹⁰ See Haque (n 8) 99.

⁹¹ *ibid.*

⁹² *ibid.*

and even ‘a grain of wheat’ may be a good dower.⁹³ The Shia school holds the same view as that of the Shafi law.⁹⁴

Pearl observes that the Maliki and Hanafi opinions regarding the minimum amount of dower 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.”⁹⁵ Haque rightly observes that such an analogy may be validly criticised on the ground that “it paves the way to translate dower into ‘consideration’ for loss of virginity of the bride, which is not true as the dower is in fact an obligation set by the sharia, which sometimes is payable even without consummation.”⁹⁶

However, apart from the above-stated objectionable analogy, there are also practical difficulties in ascertaining the value of 10 dirhams in Hanafi law or 3 dirhams in Maliki law. In the days of the Prophet (sm), a dirham was a silver coin 2.97 grammes in weight.⁹⁷ It was perhaps the same or varied at the time of Imam Abu Hanifa or Imam Malik. Literally speaking, 10 dirhams may be equal to 16 rupees or 24 takas approximately at the present currency rate. This calculation cannot be convincing for any reasonable person to accept as the minimum amount of dower. So, what is necessary is to ascertain what proprietary value 10/3 dirhams of 1300-1500 years ago may have in today’s world, in the present currency. Tahir Mahmood explains the value of 10 dirhams in the following words:

In old days, [the] dirham was a silver coin of Arabia; and the plural word dirahim 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 what we now call a *reasonable amount*. Notably, dirham now forms part of the currencies of several Arab countries, e.g., Morocco and the UAE, and in each such country it has a different value.⁹⁸

The author manifestly states that the figure 10 dirham did not mean an exact amount with any arithmetical accuracy; it rather meant a *respectable/reasonable* amount. Hedaya formulates the same policy that

⁹³ ibid.

⁹⁴ ibid.

⁹⁵ David Pearl, *A Text Book on Muslim Personal Law* (2nd edn, Croom Helm: USA 1987) 61.

⁹⁶ Haque (n 8) 99.

⁹⁷ Mahmood (n 48) 51.

⁹⁸ Mahmood (n 49) 68 (emphasis added).

the dower fixed should be a 'respectable' amount.⁹⁹ And what is not reasonable in the given circumstances cannot be said to be respectable.¹⁰⁰ The Tunisian law follows the same principle. Article 12 of the Tunisian law states that "Dower shall not be insignificant."¹⁰¹ Quite obvious, insignificant dower cannot be said to be 'reasonable' and hence 'respectable' as well.

We should recall that the objective (*raison d'être*) of dower lies in economic reasons.¹⁰² It has been observed that dower acts as a check against the arbitrary and capricious exercise of the husband's power of talaq.¹⁰³ It is a provision for the rainy days of a wife divorced by her husband.¹⁰⁴ If these objectives or *raison d'être* are true, then can a small and insignificant dower serve these purposes? Certainly, not. So, to serve the purposes well, the minimum amount of dower should be respectable.¹⁰⁵

If dower is to be a respectable amount, then a question naturally arises: should the Shafi and Shia view that "there is no minimum amount of dower, and even 'a grain of wheat' may be a good dower"¹⁰⁶ be regarded as correct? Juristically speaking, this view cannot be said to be incorrect. Marriage essentially is a contract, and the bride, as a contracting party endowed with full legal competence, has every right to determine the amount of dower. Imam Shafi rightly said that "the dower is the right of the woman, and consequently it must depend upon herself to determine the amount of it."¹⁰⁷ So, there is no fault if she agrees to 'a grain of wheat' provided her consent was fully free in the absence of fraud, misrepresentation, undue influence, etc. In other cases, the general principle should be that the minimum amount of dower should be a 'respectable' amount.

⁹⁹ Haque (n 8) 100.

¹⁰⁰ *ibid.*

¹⁰¹ Nasir (n 58) 91 (as quoted in Haque (n 8) 102).

¹⁰² See generally above, section 5.1.

¹⁰³ *ibid.*; See, particularly text accompanying (n 87) above.

¹⁰⁴ See text accompanying (n 88) above.

¹⁰⁵ However, there cannot be any fixed formula applicable for all as to what should be the minimum respectable amount of dower. It depends on various factors, such as, education, status, age, beauty, understanding etc. of the bride as well as the financial strength or means of husband. Haque (n 8) 100: Haque observes that a new *ijtihad* can be created regarding the minimum amount of dower considering all relevant factors.

¹⁰⁶ See text accompanying (n 93) above.

¹⁰⁷ Seymour Vesey Fitzgerald, *Muhammadan Law: An Abridgment* (OUP 1931) 122 (as quoted in Haque (n 8) 102).

5.2.2 Maximum Amount of Dower

Should there be any maximum ceiling on the amount of dower? According to Sunni law, there is no maximum limit of dower. But under Shia law, dower cannot exceed 500 dirhams, fixed in the Prophet's (sm) daughter Fatima's (ra) marriage. In this author's view, the Shia law does not seem to be sound. Three-fold arguments may be given to show that there is indeed no maximum limit of dower.

First, as already understood, marriage in Islam is in the nature of a civil contract between the husband and wife. Although the Qur'an speaks of dower as an effect of marriage, it does not fix any upper or lower limit as to its amount. So, the husband, as a contracting party and acting as a free agent, can fix any amount, however high it is. There is no reason why the law should put any restriction on his free will and ability.

Second, the practice of Prophet (sm) itself shows that there is no maximum limit of dower. In those days of the Prophet (sm), he paid 500 dirhams or 20 camels to Khadiza (ra) as dower, and Ayisha (ra) was also paid the same amount.¹⁰⁸ Pearl says that Prophet (sm) settled for each of his wives 500 dirhams dower with one exception, that of Omm Habibah, where it was fixed at 4000 dirhams.¹⁰⁹ 500 dirhams, 4000 dirhams, or 20 camels about 1500 years ago was certainly a huge amount. So, the Sunnah of the Prophet (sm) itself shows that there is no maximum limit of dower.

Third, that there cannot be any maximum limit of dower can be proved from the Qur'anic provision itself. The relevant verse of the Qur'an is as follows:

If you desire to replace a wife with another and you have given the former even a *stack of gold* as dower, do not take any of it back. Would you still take it unjustly and very sinfully?¹¹⁰

The above verse enjoins upon the husband not to take back the dower from their divorced wives. What is, however, relevant in our context is the amount of dower it speaks of. It forbids us to take it back even if the dower was a *stack of gold*. Stack usually connotes 'a huge' or 'a great deal' of amounts. So, the use of the expression 'stack of gold', though not directly relevant to the question of the amount of dower, it indirectly implies that there is indeed no maximum limit of dower.

¹⁰⁸ Muhammad Iqbal Siddiqui, *The Family Laws of Islam* (Adam Publishers: New Delhi 2005) 145; See, Haque (n 8) 100.

¹⁰⁹ Pearl (n 95) 116; See, Haque (n 8) 100.

¹¹⁰ *The Qur'an* 4:20 (emphasis added).

In light of the above analysis, it can be said that under the Sunni law, the belief that there is no maximum limit of dower is a sound one as opposed to the Shia law, which restricts the maximum amount up to 500 dirhams.

5.2.3 Husband's Financial Means

Classically, the bride's age, beauty, fortune, understanding, learning, status, etc., are considered as factors to be considered in determining the amount of dower. But, as already discussed above, the present paper explains dower from financial perspectives as opposed to merely as a token of respect to the wife.¹¹¹ Islam imposes all financial obligations upon the husband in the matrimonial life. Dower is one such financial obligation strictly imposed by the *sharia* upon the husband. Hence, while acknowledging the classical factors as such, the paper seeks to inquire specifically into the extent to which a husband's financial strength or means may also be a relevant factor in determining the amount of dower.

The general rule may be as follows. If both the husband and wife are wealthy and of equal status, then dower should be fixed in an opulent manner. If both parties are poor, dower should be fixed accordingly (perhaps stringently). If the husband is rich and the wife is poor, a moderate dower, such as below the former's and above the latter's means and status, may be fixed. In this case, instead of moderate dower, it may also be fixed in an opulent manner since the husband is a man of means and the Qur'an says, "Let the man of wealth provide according to his means."¹¹²

The above three types of cases do not present too many difficulties. The fourth type of case, where the wife is rich but the husband is poor, may pose a difficult situation. What should be the scale to fix the amount of dower in such a case? In this author's view, three plausible answers may be contemplated. They are stated below.

First, an average/moderate dower, such as above the husband's and below the wife's means and status, should be fixed. This is based on the simple logic that since the parties' positions differ, the dower is to be determined based on their average position.

Second, dower is to be determined based on the husband's financial means and strength, regardless of the wife's status and position. A verse of Surah al-Talaq may be referred to in support of this view:

Let the man of wealth provide according to his means. As for the one with limited resources, let him provide according to whatever Allah has given him. Allah does not

¹¹¹ See generally above, sections 4 and 5.1.

¹¹² *The Qur'an* 65:7.

require any soul beyond what He has given it. After hardship, Allah will bring about ease.¹¹³

Yet another Qur'anic verse may be cited in support of this view:

There is no blame if you divorce a woman before the marriage is consummated or the dower is settled. But give them a 'suitable' compensation – *the rich according to their] means and the poor according to his*. A reasonable compensation is an obligation to the good-doers.¹¹⁴

This verse is not directly on dower. It encourages the righteous to give a 'fair provision' or 'reasonable compensation' to their wives on divorce (in Arabic, this is known as *mutat* and not *nafaqa* or maintenance). Qur'an enjoins the husband to give *mutat* according to their means when it says, "the rich according to his means and the poor according to his." Extending the rule of *mutat* in dower, it may be said that the husbands are required to settle dower according to their means only.

Third, dower is to be determined based on the wife's status and position. Dower determined in Prophet's (sm) daughter Fatima's (ra) marriage may be cited in support of this view. It is widely known that Ali (ra) though rich in knowledge and wisdom, was poor in terms of wealth. But having regard to the high status and position of Fatima (ra) as the Prophet's daughter, dower was fixed at 500 dirhams.

Now the crucial question is which of the above three views represents the correct statement of law. In this author's view, the second one is a relatively more accurate exposition of the law in this regard. To explain the reason, let us begin with the third one. The example of Fatima's (ra) marriage is an extraordinary one. On the one hand, Fatima (ra) herself is said to be the leader of all women in heaven. So, no other woman after her is comparable to her. On the other hand, she was the daughter of the Prophet (sm). So, her marriage is truly an exceptional one and should not ordinarily be cited as an example to fix the amount of dower when the husband is a man of poor financial means. Then comes the first one, which suggests an average or moderate dower. As to this one, it may be said that when someone is not a man of wealthy means even a moderate dower may cause hardship for him. Moreover, the bride is willingly marrying a man of poor financial means. So, having decided on it willingly, she cannot now insist even on a moderate or average dower.

¹¹³ *ibid* (emphasis added).

¹¹⁴ *The Qur'an* 2:236 (emphasis added).

Due to the above-stated reasons, the second opinion supported by Qur'an, in this author's view, should be the governing principle to determine the amount of dower when the husband is poor, but the wife is rich.

5.3 Excessive Dower

The paper first envisages two usual kinds of excessive dower. *First*, suppose taka 2 lacs were good enough or a reasonable dower under the circumstances of both parties, including the husband's financial means. Now, suppose again, parties fixed taka 10 lacs dower with the free consent of the husband. This is one kind of excessive dower, but though excessive, it must be paid by the husband since he freely and knowingly agreed to this, unless the wife voluntarily remits the whole or any part of it.

Second, suppose taka 5 lacs could have been a reasonable amount of dower under the circumstances of both parties, including the husband's financial means. Now, suppose again, parties fixed taka 25 lacs dower, but this was only for show before the eyes of society, or to show that the parties belong to a high social status. This kind of excessive dower should be considered reprehensible and is a kind of mockery of the solemnity of both dower and the institution of Islamic marriage. And, so far as the law is concerned, only proper dower and not the excessive dower fixed shall become payable by the husband.

The above two types of excessive dowers are not the concern of the paper. It rather envisages a third type of dower. The paper, as already understood, explains dower in financial terms. It can check the husband's arbitrary exercise of talaq and can be a support in her rainy days. Because of this, any reader may ponder whether fixation of excessive dower should be desirable to secure the financial interest of wives. In this author's view, dower should not be determined excessively by keeping in view only the financial aspects involved.

To understand the reasons for the above statement, one must know the philosophy of the Islamic law of marriage and divorce. Islam encourages marriage, and for this reason, the rules of marriage formation are very simple.¹¹⁵ This is due to the reason that any form of extra-marital relationship is severely condemned and absolutely prohibited in Islam. Allah says, "Do not go near adultery. It is truly a shameful deed and an evil way."¹¹⁶ Now, if excessive dower is fixed just to secure the financial interest of wives, there may be chances that Muslim males become disinterested in marriage and take refuge in various forms of extra-marital

¹¹⁵ See generally above, section 3.1.

¹¹⁶ *The Qur'an* 17:32.

relationships. This will go directly against the philosophy of Muslim marriage itself, that is, to protect Muslims from unchastity and immorality.

The same can also be shown from the philosophy of the law of divorce. Islam discourages divorce, and for this reason, the rules and procedures to effect divorce are very complicated. To perceive, let us consider talaq as an example. To make divorce effective in *ahsan* form, one single revocable talaq is to be pronounced by the husband who has consummated the marriage during the unconsummated purity of the wife and followed by abstinence from sexual intercourse (or revocation otherwise) for the period of *idda*. To make it effective in *hasan* form, three single revocable talaq is to be pronounced by the husband who has consummated the marriage in three unconsummated purities, whether consecutively or not.

Thus, the rules to effect divorce are not as simple as those related to the formation of marriage. The fact that Islam discourages divorce may be proved from other matrimonial laws also. For example, on divorce, the entire deferred dower becomes immediately payable by the husband. Again, the husband cannot take back any amount given as dower from his divorced wife. Even when the marriage has been consummated, and the wife seeks divorce from her husband (*khul*), she is bound to give her husband something for her freedom – usually relinquishment of the amount of dower. The Qur'an says:

It is not lawful for you (men) to take back anything who divorce them (wives). It is, however, different when both of the parties fear that they would be unable to keep the limits ordained by Allah. If ye do indeed fear that they would be unable to keep the limits ordained by Allah, there is no blame on either of them *if she gives something for her freedom*. These are the limits ordained by Allah. So, don't transgress them.¹¹⁷

So, the Qur'an discourages divorce at the instance of both husband and wife. Besides this, the Qur'an speaks of reconciliation when the parties anticipate dissolution:

If you anticipate a split between them, appoint a *mediator* from his family and another from hers. If they desire *reconciliation*, Allah will restore harmony between them. Surely Allah is All-Knowing, All-Aware.¹¹⁸

Now, a question naturally arises: why does Islam allow divorce when it discourages divorce so much? The reason lies in its philosophy. The first

¹¹⁷ *The Qur'an* 2:229 (emphasis added).

¹¹⁸ *The Qur'an* 4:35 (emphasis added).

principle of Islamic family law, as already said, is to protect Muslims from sexual immorality. Hence, the institution of marriage. The second principle is to keep the married couple with love, affection, harmony, happiness, co-operation, etc. But when there is no chance that the parties may live in harmony and good fellowship, the law should not insist on their coexistence. Hence, the institution of divorce. Moreover, forcing unwilling or unhappy unions to stay together may lead to various forms of extramarital relations. So, divorce, in its ultimate analysis, like the institution of marriage itself, serves the higher purpose of keeping the Muslim society away from foulness and unchastity. For this reason, divorce, though discouraged, has been allowed by Islamic law as a last resort.

The above philosophy of the institution of divorce may be defeated if excessive dower is fixed just to protect wives' financial interests. If dower is excessive, there are chances that it will not be paid promptly or at the time of marriage and will mostly remain unpaid as deferred dower. Now, if marital relationships break down for whatever reason, maybe a husband wishes dissolution but cannot effect it due to the economic hurdle of excessive dower, they will just be forced to live as an unwilling and unhappy union, which may cause them to form extra-marital relations.

If the above unwanted event occurs, it will go against the solemnity and underlying philosophy of Islamic marriage. Hence, due to these reasons, fixing excessive dower cannot be said to be desirable just because it secures wives' financial interest in matrimonial life. It is, however, desirable that at least a reasonable amount of dower, considering all relevant factors, including the husband's financial means, should be fixed. The reasonable dower should not be excessive but should at least be such an amount, depending on the parties' social status and position, that it can act as a check against the husband's arbitrary divorce, as well as be a means of economic support for the wife on rainy days.

6. Conclusion

Marriage in Islam is a solemn covenant, and dower is an essential incident of the institution of marriage.¹¹⁹ The Qur'an enjoins upon the husbands to give their wives dower but does not expressly say the reason behind dower. However, the judicial and juristic approaches identify four plausible explanations of dower: dower is bride-price or consideration of marriage; dower is payment in lieu of sexual pleasure of the husband; dower is

¹¹⁹ See above, sections 2 and 3: Section 2 argues that Marriage in Islam is in the nature of a civil contract but not purely a civil contract. Besides legal aspects, it has social aspects and religious and moral overtones. Section 3 distinguishes dower as a legal consequence of marriage from the constituent elements of marriage.

payable as a gift; and dower is payable as a token of respect to the wife.¹²⁰ The paper shows that all these approaches are inadequate to explain the true reason for dower.¹²¹ The paper adopts and advocates a financial approach to dower. The main reason for dower is financial, as shown by tracing its historical origin and comparing the pre-Islamic Arabian customary law of marriage with the reformed law after Islam.¹²²

Dower involves important financial aspects. For example, what should be the minimum and maximum amount of dower, and to what extent the husband's financial means may be taken into consideration to determine the amount of dower? The paper holds the view that dower should at least be a 'reasonable' or 'respectable' amount, and contrary to the view of Shia law, argues that there is no maximum limit of dower.¹²³ As far as the husband's financial means are concerned, it envisages four possible situations and holds its distinctive views for each of the four situations.¹²⁴

It finally addresses a curious question: should fixing excessive dower be desirable to secure wives' financial security and interests? Dower may be viewed as a balance against the husband's unilateral and unfettered power of talaq. Nonetheless, keeping in view the philosophy of both marriage and divorce, the paper concludes that it should not be desirable to fix excessive dower just because it can act as a check against arbitrary talaq and secure wives' financial interest.¹²⁵

¹²⁰ See generally above, section 4.

¹²¹ *ibid.*

¹²² *ibid* section 5.1.

¹²³ *ibid* sections 5.2.1 and 5.2.2.

¹²⁴ *ibid* section 5.2.3.

¹²⁵ *ibid* section 5.3.