

# **The Construction of Dower as Consideration for Islamic Marriage**

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## Abstract

*The institution of marriage is a cornerstone of the family unit on which Islam bases its teachings directing the personal life of a Muslim. The Islamic concept of marriage has long been criticized for being an antiquated concept dictating the lives of Muslim females, divorced from their basic human rights. One of the elements aiding towards the contribution of such criticism is that of Dower. This mandatory requirement, without which the Islamic concept of marriage cannot be constructed, has been described as consideration, if the Islamic marriage is constructed as a civil contract. If Dower is so successfully construed, its implications negatively reflect on the concept of Islamic marriage, especially with regards to the human rights consideration of the respective bride. This paper will not only compare Dower and Consideration as parallel concepts but also evaluate to see the extent of which the two differ from each other, so as to create an individual identity for the concept of Dower. Certain relevant human rights implication which have been the source of much criticism for the Islamic concept of marriage will also be considered and clarified in this regard.*

## Introduction

The most sacred of relationships not created at birth, in the eyes of the law in Pakistan, is undeniably that forged by marriage. This is true not only for Pakistan as many countries in the world accord special privileges to married couples. This may be in the form of a tax relief,<sup>1</sup> or inheritance property transfer benefits<sup>2</sup> or even, immunity from incriminating testimony by one spouse against the other,<sup>3</sup> before a court of law. Even in cases of criminal misconduct, such as assault or battery, officers of the law are only too willing to look the other way or let the perpetrator off with a proverbial slap on the wrist if the victim is the spouse. This is particularly true for Pakistan where the law and its officers are in kind, seen to be hesitant to involve themselves in matters pertinent to the family unit, especially those between the two spouses.

This is due to the sacred position marriage is allowed to hold in Pakistan which may be largely attributed to the theory that marriage is instrumental in creating the family unit, the basic building block of any society. Religious preferences favour cohabitation of consenting adults through the institution of marriage which is in large part responsible for the legal favours accorded to married couples. This is

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<sup>1</sup> Reductions in tax filing allowed in the United Kingdom to married couples which may reduce a couple's tax bill by between £345 and £891.50 a year. 'Married Couple's Allowance' (*Gov.UK*) <<https://www.gov.uk/married-couples-allowance>> accessed 10 April 2019.

<sup>2</sup> No capital gains tax must be paid on the transfer of property to a spouse in the United Kingdom. 'Capital Gains Tax' (*Gov.UK*) <<https://www.gov.uk/capital-gains-tax/gifts>> accessed 10 April 2019.

<sup>3</sup> Known as spousal immunity where, pursuant to the Federal Rules of Evidence of the United States of America, in a criminal case the prosecution cannot compel the defendant's spouse to testify against him and this privilege is applicable to married couples only. 'Spousal immunity' (*Legal Information Institute, Cornell Law School*) <[https://www.law.cornell.edu/wex/spousal\\_immunity](https://www.law.cornell.edu/wex/spousal_immunity)> accessed 10 April 2019.

true for Islam as well, the religion adhered to by the majority in Pakistan.

### **A. The Institution of Marriage in Islam**

The institution of marriage is given a lot of importance in Islam. It is not only seen as a sacrament but spiritually, marriage is seen as a form of worship in Islam as Muslim family life represents one of the greatest expressions of religious identity in Islam.<sup>4</sup> Celibacy and monasticism, which are although treated as a means of moral salvation in other religions, are not thought of to be any benefit with regards to Islam.

This view is evident from the following verse of the Quran:

*‘And among His signs is this: that He created mates for you from yourselves that you may find rest and peace of mind in them, and He ordained between you love and mercy. Certainly, herein indeed are signs for people who reflect.’<sup>5</sup>*

The main objectives of the institution of marriage according to Islamic injunctions are to protect the progeny, refrain people from engaging in sexual relations outside the bond of marriage, which is forbidden in Islam and for the continuation of human race. These objectives provide for the institution to occupy a place of great

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<sup>4</sup> Islam Uddin, ‘Nikah-only Marriages: Causes, Motivations, and Their Impact on Dispute Resolution and Islamic Divorce Proceedings in England and Wales’ (2018) 7(3) Oxford Journal of Law and Religion <<https://academic.oup.com/ojlr/article/7/3/401/5181380>> accessed 10 April 2019.

<sup>5</sup> *The Holy Quran*, 30:21.

importance within Islam. The importance of marriage in Islam with reference to these objectives is emphasised in another verse, which states;

*'they are apparel for you, and you are apparel for them'.<sup>6</sup>*

The ones who are referred to in this verse are the men and women who enter into the bond of marriage. Emphasis on the importance of the institution of marriage in Islam can also be seen from the Hadith of the Prophet, the second most important source of religious guidance in Islam, which narrates as

*'Marriage is my sunnah. Whosoever keeps away from it is not from me'<sup>7</sup>*

and

*'He who marries completes half of his religion'.<sup>8</sup>*

Islam is seen to encourage those in their youth to marry young as it protects Muslims from straying from religious boundaries. In one narration, the Holy Prophet said,

*'O group of youngsters, whoever amongst you has the means should get married, because it keeps the gaze down the best and it is the most protecting for the private parts. Whoever does not have the means should fast, because that breaks the temptation.'<sup>9</sup>*

Therefore, it may be conclusively stated that Islam attributes an immense amount of importance to the institution of marriage due to which, Muslims attach religious value to marriage itself as well.

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<sup>6</sup> *The Holy Quran*, Al-Baqara, 2:187.

<sup>7</sup> *Sahih Bukhari, Book of Marriage (62)*, Volume 7, 1.

<sup>8</sup> *Sahih Bukhari (n 7)*.

<sup>9</sup> *Sahih Bukhari, Book of Marriage (62)*, Volume 7, 4.

## **B. The Concept of Marriage in Islam and in Law**

Through different times and in different places, the laws and customs that regulate a family unit, through marriage, and give this domestic relation the privileged position it holds have varied. However, those rules that regulate this institution in Islam have remained the same.

In the case of Islam some of the concepts that are relevant to marriage have been considered controversial and have been subject to serious scrutiny and criticism. This is because they are not perceived to have escaped the trappings of an idea steeped in history, which was conceived before the world recognised human rights and civil liberties on the scale that it does right now, especially with respect to the individuals married to each other. Islamic ideas of marriage are therefore thought to have remained confined to antiquated notions of rights and obligations, with regards to both, the husband and the wife, with the wife always seen in an increasingly disadvantaged position, owing an unequal share of obligations to her husband, many of which may trample on her basic human rights.

In addition to this, while some countries have evolved the prevalent religious concept of marriage in congruence with the evolution of the legal concept of marriage as defined by their respective legal systems, their Pakistani counterpart has not experienced much in the way of evolution. This has only served to add to the controversy surrounding marriage in Islam and its associated rights and obligations, as parameters of the religious concept of marriage have not been defined with regards to the medium of law which eventually has to deal with the appropriation of said rights and responsibilities. Pakistan being a Muslim majority country, with its laws tailored to respect the religious sentiment of the Muslim population, any and all legal acts of the country are incorrectly seen to represent the Islamic injunctions on the matter. This is particularly true for the treatment of women, especially with regards to the laws regulating marriage.

Some legal systems treat marriage purely as a sacrament whereas others refer to it as a civil contract. In the Quran the nature of marriage is described as '*mithaq ghalizah*' which means a firm or sacred covenant.<sup>10</sup> This allows for the Islamic marriage to be called a civil contract. This may be so, owing to the fact that covenants also carry terms and conditions which are one of the fundamental elements within a contract. Consequently, Pakistani courts have sometimes in their judgments referred to Muslim marriage as a civil contract. Such was held in a case that:

*'it is a settled proposition of law that marriage under the Christian Marriage Act 1872 is a sacrament unlike Muslim marriages which are purely civil contracts between the spouses'*.<sup>11</sup>

In another case it was stated that:

*'Marriage among the Muhammadans is not a sacrament, but purely a civil contract'*.<sup>12</sup>

It is however quite rare for a judge to give such statement as, mirroring the Pakistani approach to marriage, judicial decisions have time and again reminded us all that marriage is a sacred covenant, more than it is a civil contract. This may be stated in the following words:

*'marriage [in Islam] is not regarded as a mere civil contract, but a religious sacrament'*.<sup>13</sup>

Again, in a case, damages were claimed on the basis of the idea that

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<sup>10</sup> *The Holy Quran*, Al-Nissa, 4:21.

<sup>11</sup> *Muhammad Aslam v Mst. Suraya* (2000) PLD Lahore 355 at 4; Mrs Fakahr-un-Nisa J. in *Rafaqat Masih v Maqssod Bibi* (2003) YLR 400.

<sup>12</sup> Mahmood J. in *Abdul Kadar v Salima* (1886) 8 All 149 (FB).

<sup>13</sup> Suleman C.J. in *Anis Begum v Mohammad Istefa* (1993) 55 All 743.

‘marriage is a civil contract’.<sup>14</sup> But overlooking the moral aspect of the Islamic marriage reduces this argument to the end that marriage is either a religious bond or a civil contract and that it may not be a concept which exists as a form of both, processed by laws which reflect the religious importance of the idea and the contractual nature of the relationship.

### C. Dower and Islam

One of the most important pillars on which the institution of Muslim marriage stands is *mahr*,<sup>15</sup> henceforth referred to as Dower.<sup>16</sup> Dower is considered to be a gift from a groom to the bride, at the time of the religious marriage ceremony (*Nikah*) upon which the bride must agree. Dower may consist of anything that is of a monetary value, however, property, gold or cash are the most popular forms of Dower in Pakistan. In regards to the obligation to give Dower the Quran states that:

*‘and give the women (on marriage) their dower as a free gift, but if they, of their own good pleasure, remit any part of it for you, take it and enjoy it with cheer.’*<sup>17</sup>

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<sup>14</sup> *Shahida Parveen v Samiullah Malik* (2006) PLJ Lahore 1215.

<sup>15</sup> *Mahr* is the Arabic word for Dower.

<sup>16</sup> This must not be confused with the idea of ‘Dowry’ which is a cultural practice where the bride’s family is required, by local custom, to compensate the groom or his family, at the time of the wedding, by furnishing them with expensive wedding presents. The motivations for doing so may vary but they do not find any relevance or support within Islamic injunctions.

<sup>17</sup> *The Holy Quran*, 4:4.



At another place in the Quran it is stated that:

*'wed them with their leave, and give them their dowers according to what is reasonable.'*<sup>18</sup>

The different terms and expressions used for dower are '*sadaq*', '*ajar*' and '*fariza*'. '*Sadaq*' can be interpreted as a free gift, '*ajar*' as the reward whereas '*fariza*' as an obligation. When these terms are examined thoroughly it gives an impression that dower is a gift and reward for the wife along with being an obligation for the husband to pay. In the various Islamic schools like the Hanafi school of thought the practice of giving Dower is regarded as an effect of marriage and according to the Maliki school of thought it is a constitutive element of the marriage contract.

Dower is categorised into *Mahr Moajjal*<sup>19</sup> and *Mahr Mo'wajjal*<sup>20</sup>. *Mahr Moajjal* is to be paid at the time of marriage whereas *Mahr Mo'wajjal* is the one that becomes payable to the bride at some future time or event which may not be necessarily divorce or the death of the husband.

#### **D. Dower as Consideration for the Civil Contract of Islamic Marriage**

The aforementioned Islamic schools of thought and judicial decisions may allow for the construction of Islamic marriage in Pakistan as a civil contract provided that the religious dimension of the agreement

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<sup>18</sup> *The Holy Quran*, 4:25.

<sup>19</sup> Arabic term for prompt dower

<sup>20</sup> Arabic term for deferred dower

is eschewed in such a construction. This would then require that the essential requirements of a contract be fulfilled in order for there to be a valid marriage contract. The three main requirements of contract are offer, acceptance and consideration. If we reflect on the scope of these three requirements onto a marriage contract, the element which fits the requirement of consideration may be argued to be Dower.

According to English law of contracts, consideration is regarded as an essential requirement which provides the contract the '*badge of enforceability*'<sup>21</sup>. Consideration can be defined as

*'a valuable consideration, in the sense of law, may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss of responsibility given, suffered or undertaken by the other'*.<sup>22</sup>

In other words, one must give something of value in order to gain some service, benefit or something of value in return and the thing of value which is to be so exchanged forms the consideration of the contract. It is a common conception that Dower is in fact the consideration for marriage contract. Since without consideration there is no contract and likewise no marriage without Dower, hence Dower is very often assimilated as consideration of the contract.

Some have incorrectly interpreted this to fall under the concept of 'bride price' instead of what the idea is intended to be, a gift for the bride. This misconception has allowed for serious criticism to be levied against the Islamic institution of marriage which is not only referred to a commercial transaction where the bride price is paid to buy the bride from her family or to pay the bride in exchange for her consent to have sexual relations, but has also likened the idea to that

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<sup>21</sup> Ewan McKendrick, Professor of English Private Law at the University of Oxford.

<sup>22</sup> Traditional definition provided by *Currie v Misa* LR 10 Ex 153.

of legalizing prostitution.

This may be attributed entirely to the misunderstanding of the concept of Dower in Islam and the motivations behind the religiously stipulated, mandatory exchange of items of financial value, without which the religious ceremony of marriage is deemed incomplete in Islam.

Islam does not recognise the cohabitation of intimate sexual partners with the exception of one male and one female, who have entered into the covenant of marriage. The religious idea has addressed the Pakistani understanding of sexual etiquette. Therefore, marriage in Pakistan is the sole socially acceptable and legal way of cohabitation.

Dower is introduced as a means of financial insurance for the wife, which the groom must provide in order to complete the religious ceremony which amounts to marriage. Some schools of thought also describe Dower as a gift from the groom to the bride and support for this is found in the aforementioned Quranic verses.<sup>23</sup> But nowhere do they liken it to a counterpart to the concept of consideration, mandatory for the existence of civil contracts.

The misconception also arises due to the superimposing of the concept of Muslim marriage on that of a civil contract. The civil contract is a contract entered into voluntarily, with terms and conditions and mandates the provision of consideration. Thus, far, the idea seems to have no obvious discrepancies with that of the Muslim marriage. Where the two ideas separate is the representation they have in terms of religion which has inevitably influenced the legal representation of the covenant in Pakistan. While Islam accords great precedence to all contracts, it separates the contract of marriage to not only have greater moral implications but, unlike other contracts, it

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<sup>23</sup> *The Holy Quran*, 4:4.

also binds both parties to the marriage contract to greater rights and responsibilities, with higher moral penalties. The bride is given rights and, unlike being sold for a price (i.e. the Bride Price), she is given extra financial insurance, which sets the tone for the financial responsibility in the course of the relationship being assumed, on the groom. Therefore, it is difficult to argue that the concept of Dower and consideration bear substantial resemblance to the extent that one would serve as the religious counterpart to the other.

### **E. Dower *versus* Consideration: The Differences**

There are some grounds that explain the difference between dower and consideration. Dower is an obligation upon a Muslim male entering into a marriage and whether it is stipulated in the marriage contract or not does not matter as the husband is still liable to pay it at the time of the marriage or even after. Regardless of the time of payment, it must be paid. Even if the husband stipulates in the marriage contract that there will be no dower, he still remains liable to pay and unlike like the usual rules of contract a husband cannot contract out of his obligation to pay dower.

Also, there is a popular misconception by drawing an analogy with buying something, the price of which depends upon its specifications so likewise the dower ought to be dependent upon the beauty, education and wealth of the bride. This argument however is not accurate as a bride who is considered to be of outstanding beauty and status may agree on a very nominal amount of dower and a bride who is not so considered may not agree to enter a marriage for a nominal amount of dower. Since it is not a price but a gift, the amount to be

paid has been left to the agreement of the parties.

The rules governing dissolution of marriage also give reasons to distinguish dower from the consideration. Certain rules can be seen in the verse of Quran that states:

*'If ye divorce them before ye have touched them and ye have appointed unto them a portion, then (pay the) half of that which ye appointed, unless they (the women) agree to forgo it, or he agreeth to forgo it in whose hand is the marriage tie. To forgo is nearer to piety. Forget not kindness among yourselves.'*<sup>24</sup>

This draws a clear distinction between dower and consideration. If dower is the consideration for it then there is no point in placing an obligation upon men to pay half of the fixed amount of dower in case of non-consummation. This obligation does not fit in the definition of consideration as the wife has not fulfilled her part of the contract. This obligation which is still there after the dissolution of marriage and even when there was no cohabitation clearly shows that dower is not the bride price thus distinguishing it from the concept of consideration. Except for the amount to be given there is no further element as to freedom to contract with regards to dower.

Thus, whereas the fact that dower is an essential part of Muslim marriage, makes this marriage appear to be a civil contract, yet there are at least seven other dimensions which distinguish Muslim marriage from a mere civil contract. These dimensions are as under:

1. One essential objective of Muslim marriage is the propagation of progeny whereas civil contracts are not directed to any such specific aim.
2. Another essential aim of this marriage mentioned is the protection of people from falling into religiously and legally illicit

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<sup>24</sup> *The Holy Quran*, 2: 237.

sexual relations. A civil contract again has nothing to do with such legal or moral aims.

3. Dower in Islam is regarded as a token of respect for the wife rather than the bride price and is an initiation of the financial responsibility which is religiously delegated to the groom in the course of the marriage. Consideration has no implications with regards to respect or responsibilities in the future, of either party.

4. Dower is also regarded a sort of financial security for the women rather than her price, which consideration does not as it sums up the financial exchange which the parties to the contract have agreed to assume.

5. Dower also arguably limits the exercise of husband's arbitrary power of divorce as there are implication with regards to Dower and its payment in the event of divorce, which the concept of consideration would be unable to support.

6. Last of all, the Quranic injunctions to the husband to pay half the dower if divorce occurs before consummation, makes dower different from consideration and thus marriage different from civil contract.

## Conclusion

Hence, it may be concluded that with respects to a Muslim marriage the statement of Suleman C.J. is more accurate, in which he states that

*'in Islam marriage is not regarded as a mere civil contract but a religious sacrament'*.<sup>25</sup>

Consequently, Dower is not a consideration for a contract as a

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<sup>25</sup> Suleman C.J. (n 13).

marriage in Islam is not a mere civil contract, a distinction which divides the concepts of consideration and Dower, to the core.

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