

As for the verse, it is not a clear text concerning this issue because the apparent meaning of the word “touch” in the verse is actually sexual intercourse. In other words, it means that the complete dower is not required if no sexual intercourse took place. However, even that action is not required because there is a consensus among the Companions that if the person is completely alone with the woman he must pay the complete dower. As for cases other than being in private with her, the generality of the verse is left as it is [in other words, it applies to sexual intercourse only]. This is the opinion of the majority of the jurists.<sup>1</sup> Allah knows best.

## Paying Half of the Dower

Jurists are agreed<sup>2</sup> that the wife has a right to only half of her agreed upon dower that was part of a sound marriage contract, if the husband divorces her before consummating the marriage or before being in complete privacy with her. This is based on the verse,

وَإِنْ طَلَّقْتُمُوهُنَّ مِنْ قَبْلِ أَنْ تَمْسُوهُنَّ وَقَدْ فَرَضْتُمْ لَهُنَّ فَرِيضَةً  
فَنَصْفُ مَا فَرَضْتُمْ

“If you divorce them before ‘touching them’ and you have determined their dowers, then they shall receive half of the dowers...” (*al-Baqara* 237).

However, the scholars differ concerning what the woman is entitled to if they are separated but not divorced, due to an act by the husband, such as apostasy, or the act of a third person, such as they discover that they have been breastfed by the same woman. [Hence, the separation was not due to any fault of the woman.] The first opinion is that in such a case, the woman is to receive half of her dower. This

<sup>1</sup> *Al-Mughni*, vol. 10, p. 158.

<sup>2</sup> *Badaai al-Sanaai*, vol. 2, p. 296; *al-Sharh al-Sagheer*, vol. 2, p. 454; *Bidaayah al-Mujtahid*, vol. 2, p. 23; *al-Muhadhib*, vol. 2, p. 59; *Kishaaf al-Qimaa*, vol. 5, pp. 165, 171 and 176.

opinion is based on an analogy with divorce [without sexual intercourse] and because the separation was not caused by her. This is the view of the majority of jurists.<sup>1</sup>

The second opinion is that the woman is not entitled to anything of the dower. This is the opinion of the Dhaahiris (Literalists).<sup>2</sup> They adhere to the strict literal meaning of the verse, although it is regarding one who is divorced before consummation and not one whose marriage is dissolved.

The stronger view is that she is deserving of half of her dower. This will lessen her pain and suffering. Furthermore, preventing her from that dower will cause her undue harm for something that was not her fault.

The following question now arises: Does divorce or annulment before consummation but after complete seclusion require half of the dower to be paid or does it take on the same consequences as consummation with respect to requiring the entire dower to be paid? We have already stated that the strongest opinion is that a complete seclusion with the wife requires that all of the dower be paid to her. In order to make this issue clear, it is appropriate for us to quote the statements of jurists on this issue followed by a discussion demonstrating the strongest view.

Jurists are divided into two opinions on this question. The first opinion is that the private seclusion has no effect on the dower, meaning that divorce or annulment before it or after it will still require only half of the dower to be paid [as long as no consummation took place]. This is the opinion of Imam Malik according to one of his two statements,<sup>3</sup> al-Shafi'ee in his new opinion,<sup>4</sup> and Ahmad ibn Hanbal in what is narrated

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<sup>1</sup> *Bidaayah al-Mujtabid wa Nihaayah al-Muqtasid* by ibn Rushd, vol. 2, p. 20.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Abkaam al-Quran* by ibn al-Arabi, vol. 1, p. 218; *al-Mudawwanah al-Kubra*, vol. 2, p. 222.

<sup>4</sup> *Haashiyah Qalyoobi wa Umairah ala Sharh al-Minbaaj*, vol. 3, p. 278.

by Yaqoob ibn Bakhtaan.<sup>1</sup> It is also narrated from ibn Abbaas and ibn Masood.<sup>2</sup>

The second opinion is that the private seclusion is the same as consummation with respect to establishing the obligation of paying the entire dower. This is the opinion of the Hanafis,<sup>3</sup> Imam Malik in a second statement from him,<sup>4</sup> al-Shafi'ee according to his old opinion and Ahmad according to the strongest narration from him.<sup>5</sup> This has also been narrated from the rightly-guided caliphs (Abu Bakr, Umar, Uthmaan and Ali) as well as from other Companions.

## The Evidence

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

First, Allah says in the Quran,

وَإِنْ طَلَّقْتُمُوهُنَّ مِنْ قَبْلِ أَنْ تَمْسُوهُنَّ وَقَدْ فَرَضْتُمْ لَهُنَّ فَرِيضَةً  
فَنِصْفُ مَا فَرَضْتُمْ

“If you divorce them before ‘touching them’ and you have determined their dowers, then they shall receive half of the dowers...” (*al-Baqara* 237). The verse clearly states that the one who is divorced before being “touched” receives half of what was determined as her dower. The divorced woman before consummation, although after private seclusion, has not been “touched” because “touch” is a figurative expression for sexual intercourse. Hence, the verse is directly including the case of the woman with whom the man has been alone but with whom he has not had sexual intercourse.<sup>6</sup>

<sup>1</sup> *Al-Mughni*, vol. 10, p. 153; *al-Insaaf*, vol. 8, p. 283.

<sup>2</sup> *Al-Sunan al-Kubra* by al-Baihaqi, vol. 7, pp. 254-255, Chapter on a man who is alone with his wife and then divorces her before touching her.

<sup>3</sup> *Al-Mabsoot*, vol. 5, pp. 64-65.

<sup>4</sup> *Al-Sharh al-Sagheer* by al-Dardeer, vol. 2, p. 238.

<sup>5</sup> *Al-Insaaf*, vol. 8, pp. 283-285.

<sup>6</sup> *Abkaam al-Quran* by ibn al-Arabi, vol. 1, pp. 218-219.

This argument has been responded to by saying that the text is not definitive in its indication as it could be a case where Allah is indirectly mentioning the causative factor instead of the cause itself, which is being in seclusion with the woman. This interpretation is given a stronger weight because it is consistent with the consensus of the Companions who agreed that private seclusion has the same ruling as consummation with respect to entitling the woman to her complete dower. Imam Ahmad and al-Athram related through their chain of authorities from Ziraadah ibn Abu Aufa who said, "The rightly-guided caliphs ruled that if someone closes the door or pulls the curtain [putting him and his bride in privacy], the dower and waiting period [in case of divorce or death] become obligatory." The Hanafis also relate the same from Umar and Ali. It is related from Saeed ibn al-Musayyab and Zaid ibn Thaabit that they said, in such cases, that she must observe the waiting period [in case of divorce or death] and she is entitled to her entire dower. Ibn al-Mundhir has also recorded this same opinion from Abdullah ibn Umar, Jaabir and Muadh ibn Jaabir.

This was a well-known question at that time and no one differed with that opinion. Therefore, it was a consensus. It has been narrated that ibn Abbaas held an opposing view to that consensus but such narrations are not authentic. Imam Ahmad stated that such [an opinion from ibn Abbaas] was narrated from Laith and he was not a strong narrator. Handhalah narrated the opposite of what Laith narrated and Handhalah is stronger in narration than Laith. Also, as for what has been narrated from ibn Masood stating that he also differed from the consensus, such narrations have broken chains to them [and are therefore not considered authentic or proofs].<sup>1</sup>

[Those who say she is entitled to half of her dower also quote] Allah's saying in the Quran,

وَكَيْفَ تَأْخُذُونَهُ وَقَدْ أَفْضَىٰ بَعْضُكُمْ إِلَىٰ بَعْضٍ

"And how could you take it [the dower back] while you have gone into each other" (*al-Nisaa* 21). The argument here is that "gone into each

<sup>1</sup> *Al-Mughni*, vol. 10, p. 154.

other” means having sexual intercourse.<sup>1</sup> This indicates that the dower is not obligatory except after consummation. This makes it clear that the earlier verse is explaining the case of divorce before consummation while this is explaining the case of divorce after consummation. Obviously, there is no intermediate case. Therefore, being in private does not entitle the woman to her entire dower if there was no consummation.

This argument is responded to by saying that “gone into each other” does not necessarily imply sexual intercourse. It is narrated that al-Farraa [the Arabic language expert] said, “Gone into each other means complete privacy, whether the marriage was consummated or not. This is the correct opinion because the word used in the verse is derived from the word implying ‘an open space’ or a deserted land. In other words, it is as if Allah had said, ‘And you have been alone with each other.’”<sup>2</sup>

Third, being alone with the wife after the marriage contract could not imply that she is entitled to her entire dower as being alone with a woman outside of marriage does not entitle her to such.<sup>3</sup> One may respond to this argument by saying: Being alone after the sound marriage agreement makes the matter of greater importance and it takes on the same ruling as consummation, as opposed to being alone with a woman outside of marriage which has no legal effect.<sup>4</sup>

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

First is what is recorded by Abdul Razzaaq in his *Musannaf* on the authority of Abu Huraira who said that Umar said, “If the curtains are drawn or the doors are locked, the [complete] dower becomes obligatory.”<sup>5</sup>

<sup>1</sup> *Bidaayab al-Mujtabid*, vol. 2, p. 19.

<sup>2</sup> *Al-Mughni*, vol. 10, p. 154.

<sup>3</sup> *Fath al-Qadeer*, vol. 2, p. 446.

<sup>4</sup> *Atbaar Aqd al-Zawaaj fi al-Shareeah al-Isaamiyyah*, p. 143.

<sup>5</sup> *Al-Sunan al-Kubra* by al-Baihaqi, vol. 7, pp. 255-256; Malik also recorded it in his *Muwatta* (vol. 2, p. 528) from Saeed ibn al-Musayyab on the authority of Umar with a *sahib* chain.

Second, when the impediments [to sexual intercourse] are removed, she, in essence, has been given over to him and therefore she is deserving of her right in exchange for that.<sup>1</sup>

Third, the obligation of paying the entire dower is not conditional upon fulfillment with the woman but it is simply conditional upon her being given over to him in the proper way, as in other similar contracts, such as selling or leasing.<sup>2</sup>

## The Strongest Opinion

Looking at what both sides have presented as evidence as well as the rebuttals of the evidence for the first opinion, the second opinion is considered the stronger and choice opinion. That is, a true private seclusion with the bride entitles her to her entire dower as long as it was truly private and the result of a sound marriage contract. This is considered the stronger view also due to the fact that the Companions, those who lived at the time of the revelation and who understood its real essence, made such a decree. Furthermore, being in private with the bride is a factor leading to sexual intercourse and the factor itself takes on the same ruling as the act it leads to.<sup>3</sup>

However, if the act of being in private with the bride is not, in reality, a completed act that could lead to sexual intercourse due to some impediment, whether it be a *shareeah*, physical or natural impediment, the woman is then entitled only to half of her dower. This is because the dower is a matter related to wealth and such matters are not established on the basis of doubts or conjectures.<sup>4</sup> The exception to this is if the woman claims that she had been “touched” by him even though the impediments were present. In this case, she will be entitled to her entire dower if she makes an oath stating that her claim is true. Allah knows best.

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<sup>1</sup> *Fath al-Qadeer*, vol. 2, pp. 445-446.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Al-Mugni*, vol. 10, p. 154.

<sup>4</sup> *Al-Insaaf*, vol. 8, p. 282, 286.

## **The Question of Being Alone with One's Fiancee before the Actual Contracting of the Marriage**

This practice of the man being alone with his betrothed, so that they may experience and know each other as a means leading to love between them, is an evil practice and a terrible phenomenon that exists in many Muslim lands.

This distasteful custom has slowly crept over Muslim societies and has now become a blind custom that people follow and that is supported by the evildoers and ignorant people in the name of "civilization"—the deceitful civilization that is fighting us in our religion, morals and ways. We have become such prisoners to this way that the betrothed mix with one another in a most shameful and disgusting way, without anything watching over them, neither a chaperone, conscience, family or religion.

The engaged man and woman get together before the marriage has taken place and go out together [on dates] to clubs and places of forbidden enjoyment based on the argument that they are going to be husband and wife. They remain alone together and both his and her family know about that but they put up no objection whatsoever. After the viper [the man] has exhausted what he can from her and becomes bored with the woman, he will flee from her due to any flimsy excuse and, due to him, she will have to face disgrace and dishonor. Due to such practices, a great deal of evil spreads, such as illicit sexual relations, and the woman is then not able to find a husband in the future.

In the newspapers and media we hear of things that are very embarrassing and shameful that exist in the Muslim world as the result of this evil practice. In fact, in some of those lands it has become commonplace for the woman to lose her virginity before marriage and for the people's honor to be lost. We ask Allah only for safety and well-being.

In their ignorance of the laws of Islam, they claim, and they are completely wrong, that when the two are engaged and on the road to getting married, then the things that are permissible under marriage

become permissible for them. That is why they allow the two to be in complete privacy with one another. They claim that in this way they will get to know one another and begin to love one another. However, they are completely and dangerously mistaken. The nature of engagement is completely different from the state of being married. Nothing of what becomes legal due to the marriage contract becomes legal simply due to an engagement. Furthermore, no matter how much the man is in the company of his fiancée, he will never actually discover her true nature [from such experiences]. In the same way, she will not discover his true nature by such meetings. This is because in such meetings, they both present themselves in ways that are different from how they customarily are. They try their best to show their good side and hide anything evil they may possess.

If one really wants to know about the other's character, nature and manners, the best and safest way to do so is by asking [those people who know that man or woman well]. May Allah guide all to what is beloved and pleasing to Him and provide us all with understanding of the laws of the religion and the ability to act according to the *shareeah* of Islam.

Yes, it is true that Islam allows the man, if his intention is strong and he has taken the normal, proper path to marriage, to look at the potential bride but it must be according to certain conditions and in a specific way as spelled out in detail in their proper place [in the books of fiqh]. However, if the matter reaches a point where the people are doing what Allah has forbidden, then its result will be loss and harm.

We will not prosper unless the young ladies return to their protected status and customs that keep them from being treated like cheap commodities that may be used and abused. She should be protected in her proper attire and manners and in that way the wolves among men will not be able to reach her. In that way, she will be sought after in the right manner with all due respect and proper treatment.



## Cases Wherein the Man is Not Obligated to Pay Any Portion of the Dower

The obligation of giving the dower is completely dropped in the following four cases:<sup>1</sup>

### **(1) Separation other than Divorce and before Consummation or before Complete Privacy with the Wife**

Any type of separation, other than divorce, before consummation or complete privacy means that the man does not have to pay any portion of the dower. This is the case whether the separation was from the wife's side or from the husband's side. For example, if the woman apostatizes from Islam or if the man refuses to become Muslim while the wife embraces Islam, the man does not have to pay any portion of the dower. Other examples include the wife choosing to dissolve the marriage due to a defect in the husband or the guardian of the wife dissolving the marriage because the husband is not qualified. In these cases, in which the marriage is completely annulled and there is no consummation, the obligation of the dower is completely dropped. This is because separation other than divorce annuls the contract. Annulling the contract before consummation necessitates that the entire dower also be annulled. In other words, annulling the contract makes it as though the contract never occurred in the first place.

The Malikis say that if the husband annuls the marriage or returns the wife due to some defect or problem with her before consummation, then he is not obliged to pay any portion of the dower. Furthermore, she is not entitled to anything in the case of a marriage by proxy if the husband dies or if he divorces her before consummation.<sup>2</sup>

The Shafi'ees<sup>3</sup> and the Hanbalis<sup>1</sup> distinguish between the case where the separation is due to a cause from the wife and when it is due

<sup>1</sup> *Badaai al-Sanaai fi Tarteeb al-Sharaai*, vol. 2, p. 295.

<sup>2</sup> *Al-Qawaaneen al-Fiqhiyyah*, p. 203; *al-Sharh al-Sagheer*, vol. 2, p. 437.

<sup>3</sup> *Mughni al-Mubtaaj*, vol. 3, p. 234.

not to any fault or cause of her own. If the separation takes place before consummation and due to the wife, then she is not entitled to any of the dower, regardless of the nature of the dower. This would include the following cases: she becomes Muslim [and not her husband]; one of her parents becomes Muslim [and she is still underage]; the husband annuls the marriage due to a defect or problem with her; she apostatizes; or if she had been breastfed by one of her husband's wives while she was small.

When the separation takes place before consummation and is not caused by the wife, she is entitled to half of her dower. This would include divorce or *khula*,<sup>2</sup> even if it were by her own choice, such as when she is empowered with the right of divorce and she gets herself divorced or if the husband makes a conditional divorce conditioned by an act that she performs. It also includes the cases where the husband becomes Muslim<sup>3</sup>, apostatizes, separates from her due to accusing her of illegal sexual intercourse, or in the case where she was breastfed by his mother or he was breastfed by her mother when he was small. In the case of divorce, though, the previously mentioned verse, "If you divorce them before 'touching' them..." takes effect.

## **(2) In the Case of *Khula*<sup>4</sup>, Either before or after Consummation, Wherein the Wife Agrees to Return Her Dower**

If the two are separated through *khula* wherein they agree that the woman will return her entire dower, then the obligation to pay the dower is dropped. If the dower was one that the woman had not previously taken possession of, then the husband is freed from any

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<sup>1</sup> *Kishaaf al-Qinaa*, vol. 5, pp. 157, 163, 167; *al-Insaaf*, vol. 8, pp. 277-280.

<sup>2</sup> [*Khula* is considered different from divorce by many scholars while others treat it as a type of divorce. In *khula*, the wife agrees to pay something to the husband in order to be released from the marriage.—JZ]

<sup>3</sup> [This would be true only if the wife were neither a Christian or a Jew.—JZ]

<sup>4</sup> [*Khula* is considered different from divorce by many scholars while others treat it as a type of divorce. In *khula*, the wife agrees to pay something to the husband in order to be released from the marriage.—JZ]