

The Study on the Comments Regarding Bisection of the Marriage Portion in Iranian Civil Code and Shiite Jurisprudence

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Received: January 12, 2015

Accepted: March 25, 2015

ABSTRACT

The subject of marriage portion (مهریه) is deemed as one of the important and controversial topics in Islamic jurisprudence (فقه). Regarding this religious and legitimate right, one could look for some rules in Islamic jurisprudence, which might have converted the basis of marriage portion as a determinate and mandatory issue into a doubtful one. As a result, there are some cases, which may be assumed both as dividing marriage portion and supposing it a total portion. It is intended in this article to extract these cases out of Shiite jurisprudence and Civil Code of Islamic Republic of Iran and to explore the commonalities and differences among them.

KEYWORDS: Marriage Portion, Division of Marriage Portion, Civil Code, Shiite Jurisprudence

INTRODUCTION

Definition of marriage portion

The marriage portion (مهر or مهریه) denotes the righteous intention for concluding marriage contract (Ibn Manzoor, vol. 5: 184). Marriage portion (مهر) is an Arabic term that is also called (صداق) namely denoting woman's real inclination for marriage. Similarly, some other words are also used as other synonymous lexicons for marriage including (free gift) نحله (obligatory wage), علائق (interests), (property) عقر, and (friendship donation) حبا in Arabic (Ibn Ghodameh, vol. 6: 697).

Also in terminology, marriage portion/ dowry (مهریه) includes the property or something reliant on property, which is based on conventional norm, is granted by the husband to his wife upon marriage and/ or she is undertaken to pay in favor of his spouse (Jafari Langeroodi, 1994: 702). In Article 1081 of IRI Civil Code it has and been referred to definition of marriage portion in which it is a property that shall be granted by the husband to wife because of marriage, as follows: "If a condition is laid in the marriage act that if the marriage portion is not paid within a fixed period that marriage will be cancelled, the marriage and the marriage portion will remain binding and authentic but the condition will be null and void." (Article 1081: Civil Code)

Marriage portion is not deemed as one of the innovations in Islamic Law and it has existed before Islam among various nations as well and Islam has also accepted it with some amendments (Sheikh Mofid, book of *فیه المهر*: 4).

Type of marriage portion

Although from the very beginning there was marriage portion among several nations and culture and its trace may be observed in Babylonian Culture (Hammurabi's Code), Arabs in Age of Ignorance, and Rome etc, one can assume the establishment and declaration of the given rules in Islam and granting legal and legitimate right to the woman since Islam has emphasized on role of indicating the true and real intention for marriage among two spouses (صداق) as well as the spiritual aspect of this issue as well so it gave both material and spiritual dimensions to this issue.

It has been explained about four types of marriage portion in Islamic jurisprudence: 1- Specified marriage portion (مهر المسمى); 2- Average bridal gift (مهر المثل); 3- Traditional dowry (مهر السنه); and 4- Reasonable marriage portion (مهر المتعنه)

1- **Specified marriage portion (مهر المسمى)**: It is a marriage portion that has been determined upon marriage and or its determination has been assigned to third party (Jafari Langeroodi; 1997: 702). Term of *مهر المسمى* has been derived from Islamic jurisprudence and it has been mentioned in Article 1100 of IRI Civil Code but it has not been defined in Law. With respect to various articles from Civil Code and also according to Islamic jurisprudence this term may be defined as follows: The specified marriage portion (مهر المسمى) is a determined property that is specified as dowry with mutual agreement of both spouses or the person who is elected by both of them in order to determine it (Safayee; 2007: 148).

This property may be the ascertained object such as house, land, garden, automobile, and otherwise or it may be the benefit of something as they may determine residence or rental of a house as marriage for certain period and also it may be an activity (business) with economic benefit.

2- **Average bridal gift (مهر المثل)**: It comprises of dowry that is given to the wife in marriage after intercourse and before mutual agreement over specified marriage portion based on repute and circumstances of her. According to Article 1091 of Civil Code: "In fixing of the reasonable marriage portion the status of the wife in respect of her family's station

and other circumstances and peculiarities concerning her in comparison with her equals and relatives and also the customs of the locality, etcetera, must be considered.”

So in this article, the term ‘customs of locality’ mean that granting such dower should not be only as habit for her relatives in that city or the near town to that place and also there should not be any difference among the customs of that location from the customs.

According to Civil Code, the average bridal gift (مهر المثل) is appertained to the wife in the following cases:

1- When the marriage portion has not been specified and the intercourse has occurred among the spouses before mutual consent over specified dower (Article 1087);

2- If the absence of marriage portion is stipulated in a permanent marriage and the intercourse has occurred among the spouses before mutual consent over specified dower (Article 1087);

3- If mutual consent of both parties about specified marriage portion is null and void in whatsoever for instance the specified property is unknown or if it has not such nature (Article 1100)

4- When the marriage is not authentic and the wife is ignorant of this fact and at the same time intercourse has occurred. According to Article 1099 of Civil Code in this regard: “The wife was ignorant of the fact that the marriage was unauthentic, and if in such case matrimonial relations have occurred, the wife will be entitled to a reasonable marriage portion.”

3- **Traditional dower** (مهر السنه): This portion is a dower that has been specified by Holy Prophet (PBUH) as marriage portion for his spouses. According to statement from jurist book of Lomeh (لمعه) this dower was 500 dirham and these 500 dirham is today equal to 50 golden dinars or 50 Mithqal (250gr) of pure gold.

4- **Reasonable marriage portion** (مهر المتعه): It has been implied in Article 1093 of Civil Code that: “If no marriage portion is mentioned in the act of marriage and the husband divorces his wife before the consummation of marriage and the fixing of the marriage portion, the wife is entitled to a reasonable marriage portion, and if she is divorced after the consummation of marriage, she will be entitled to the equivalent of marriage portion.”

In fact, reasonable marriage portion is a property that the husband gives to his wife as her reassurance and to grant her this benefit; therefore, as it assumed this type of marriage portion is on husband’s onus to pay if divorce occurs and before his intercourse with his wife and it is specified to separation via divorce (Pooladi; 2004: 65-66).

Creation cause of marriage portion

As we implied, the marriage portion is not innovated by Islam and it has existed among various nation of yore. It is also explicitly mentioned by Holy Quran and verified by Sunna from Holy Prophet (PBUH) in Islam as well. It has been referred to marriage portion in Holy Quran in some verses like Nesa Sura (4: 4, 24, and 25) and it has been determined the obligatory nature of women’s dower.

Several statements have been proposed about this matter that why marriage portion belongs to women and what the philosophy of existence (raison d’être) whether in Islam and or before Islam including Safayee introduces the creation reasons for marriage portion as follows:

Regarding the philosophy of existence for marriage portion, some lawyers have expressed that the marriage portion, which is granted by the husband to the wife may compensate relatively the shortage of woman’s share of inheritance in law. Furthermore, customarily the marriage portion is sign of value and respect that is attached by husband for the wife and it is a symbol of husband’s commitment to provide living for wife. Sometimes, marriage portion, which is asked usually after dissolution of marriage, may prevent from tearing matrimonial link and it is assumed as a guarantee for duration of marriage. Also in the case of occurrence of divorce, the property which the woman receives as marriage portion is very efficient in her life and it avoids from her frustration and embarrassment (Safayee; 1995: 193-194). In addition to these cases, other group assumes the marriage portion as a gift given by the man to attract her consent (Sanei, journal of women’s message, vol. 51: 6-11). Also Ayatollah Motahari (martyr) looks at subject of marriage portion as a pleasant and proud contract for the woman and he argues that the woman has found with intuitive inspiration not to put herself for free at man’s disposal and so-called to sell it pleasantly (Motahari; 1996: 185).

There is no definite and obvious statement about this point that what the main and ultimate philosophy of concluding marriage portion and each of its creation factors and the same time each of these cases may be denied with pondering so as the case is in whatsoever, marriage portion is a property including material or intellectual one that the husband will be obliged to give it to the wife (Safayee; 1995: 166).

But despite the fact that the man shall be undertaken for payment of dower to the woman under some conditions the man may not be obliged any right and undertaking for payment of marriage portion and/ or he is entitled to pay only a half of the specified dower as marriage portion. But, what factors give the man this right not to pay marriage portion?

Non- delivery of marriage portion

As it implied, the marriage portion is one of husband’s requirements so the man is not only obliged to pay it but according to Article 1084 of Civil Code, he is responsible for its defect or loss as well. It holds: “If the marriage portion consists of a designated property and it is found out that before the celebration of the marriage, that property was defective, or that after the marriage celebration and before the delivery of the property it becomes defective or it was destroyed.” So, the man will be responsible for the compensation.

According to Shiite jurists’ attitude of course, if this property has been defective during period of ownership of woman the husband is entitled to retake a half of the price of sound property or a half of the ascertained object without spread among the sound and defective prices after divorce and before intercourse. Some of experts also argue that the

husband is entitled only to request for half of total price while the others believe that only the half of price plus the spread among sound and defective cases belong to the husband. It seems more likely reasonable in the latter solution since defect in marriage portion is assumed as loss of the part of it so the woman is obliged for it so as the half of this portion should be given to the husband in the case of destruction of dower as a result if it is defective the price of half portion should be also paid in addition to half of the specified object so the spread of the property in sound and defective conditions should be disbursed (Safayee; 2007: 176-177).

According to Article 1082 of Civil Code: "Immediately after the performance of the marriage ceremony the wife becomes the owner of the marriage portion and can dispose of it in any way and manner that she may like" while some Islamic scientists like Sheikh Toosi and Allameh Helli argue that any suspiciously intercourse is also led to appertaining of marriage portion to the wife and the Shafei clergymen (Sunnite) have taken a step beyond of this point and they have stipulated marriage portion for the woman, who has been compelled to fornication (Sheikh Toosi; vol. 5: 303). But by virtue of Article 1098 of Civil Code: "If the marriage, whether temporary or permanent, was void, and there has not been any matrimonial relations, the wife will not be entitled to any marriage portion and the husband can demand the refund of the marriage portion if it has been settled"

Division of marriage portion

In addition to the conditions for non- delivery of marriage portion we implied, sometimes the law stipulates to divide the marriage portion to half price under some conditions. It is noteworthy that the marriage portion is fixed in total price in four cases:

1- In the case of sexual intercourse whether the wife is inseminated or not (The wife owns the marriage portion exclusively by concluding marriage and her ownership is fixed totally by sexual intercourse.¹) (Imam Khomeini; 1973: vol. 2: 300)

2- Natural waiver of spouse: (The marriage portion is not payable if the woman asks for divorce and it is payable in half if it was asked by the man and it is discounted before occurrence any intercourse by divorce with dividing the price of marriage portion into halves; otherwise, it is payable equally whether specified marriage portion or the average bridal gift.²) (Najafi; vol. 30:48)

3- Death of husband

4- Death of wife

The cases we may witness the order of division of marriage portion into halves are seven items and we refer to them in the following.

1- The price of woman's marriage portion may be specified both by mutual consent of parties and through assignment to other party. The woman, who gets married by assignment of price of marriage portion, is called مفوضة المهر (dower-assigned). Now, if some circumstances occur and thereby the woman personally specifies her own marriage portion, according to Article 1090 of Civil Code, she is not entitled to determine it more than average bridal gift (مهر المثل) since it is assumed that granting power to her to specify the amount of marriage portion is accompanied with her personal benefit and the law protects from the husband in this case and it prevents from possible risks and personal abuses by the woman. In this case, Shiite denomination restricts the limit of power for the woman. As a result, according to opinion of jurists in this denomination, if the option of dower stipulation is given to the woman she may determine it for herself higher than traditional dower (مهر السنة) while IRI Civil Code has stipulated average bridal gift and it assumed the surplus as ineffective and accordingly the husband is entitled to pay the rest of the order for average bridal gift.

2- If the husband divorces the wife before stipulation of marriage portion by arbiter (third party) two cases may occur. In one case, the arbiter may determine amount of marriage portion. But if arbiter rejects to stipulate value of dower the court will be competent to determine the rate of marriage portion. Shiite jurists believe in that if the arbiter dies after intercourse of spouses, the wife is entitled to receive average bridal gift while in this regard it has been mentioned in Civil Code that when the intercourse occurs before mutual consent of both spouses over marriage portion, the woman will be entitled to receive reasonable marriage portion and "the status of the man in respect of wealth or poverty will be considered in fixing the reasonable marriage portion" (Article 1094).

3- Of other cases in which the order of division of marriage portion in halves is waived it is related to Holy Quran in Baghareh Sura (2:237). In this Quranic verse, God addresses the Muslim as follows:

"And if you divorce them before you have touched them and you have appointed for them a portion, then (pay to them) half of what you have appointed..."³

Also by virtue of this Quranic verse, it has been stipulated in Article 1092 of Civil Code based on which "If the husband divorces his wife before the consummation of marriage, the wife be entitled to half of the marriage portion and if the husband has already paid more than half of the marriage portion he has the right to demand the return of the surplus, in original, in the equivalent, or in value". This article is based on the social viewpoint from Shiite jurists while the subject of intercourse is the same as what was mentioned by the jurists where this consummation is done in anus (دبر) or genitals (قبل) of spouses.

4- Of other cases of splitting amount of marriage portion into halves, which have been highly discussed over this subject, is the order of bisection or non- bisection of marriage portion upon death of husband. Several viewpoints have been mentioned about this issue since the past time and these comments may be divided into groups of pros and cons.

¹- تملك المرأة الصداق بنفس العقد و نستقر ملكه تمامه بالدخول.

²- يسقط ان كان من المرأة و نصفه ان كان من الرجل تنزيلا للفسخ بارتداده منزله طلاقه المتصرف للمنهر قبل الدخول سواء كان المسمس او المهر المثل.

³- و ان طلقتموهن من قبل ان تمسوهن و قد فرضتم لهن فريضة فنصف ما فرضتم ... (بقره 2: 237)

According to comment from some jurists like Ibn Hamzeh, Sheikh Mofid, and Sheikh Toosi, even the husband dies before intercourse; the wife is entitled to receive her specified marriage portion totally. Ibn Hamzeh considers husband's death similar to intercourse as the causes for fixing the marriage portion and he implies that the specified marriage portion is mandatory with occurrence of marriage contract and it is established with either of three causes including husband's intercourse, death, and waiver/ heresy (Ibn Hamzeh; 237: 1408).

Also Sheikh Mofid expresses: If husband determines the specified marriage portion for his wife but he does not pay it to her until his death, after his death she will be entitled to receive the specified marriage portion whether the wife receives the blood money or not and this dower will be taken from the bequest and before division of inheritance (Sheikh Mofid: 49).

Similarly, Sheikh Toosi has mentioned in this regard that if the husband dies before intercourse with his wife, the heirs are obliged to pay marriage portion to her totally. Of course, it is permissible for the wife to return a half of marriage portion to his heirs and if she does not so she is entitled to receive dower totally (Mohaghegh Helli; 2008: vol. 2:232).

According to view from Shiite jurists, death of husband causes establishment marriage portion totally (Karaki; 1987; vol. 13: 364). Also, IR Civil Code agrees with the viewpoint of Shiite jurists and according to Article 1092, it has mentioned only about returning of marriage portion in case of divorce before intercourse not death of husband before consummation.

The abstract paradigm of pros regarding payment of marriage portion is summarized in these cases in which they believe that the God- believer is committed to his promise and covenant therefore he should pay what he has been pledged to grant as the specified marriage portion. The other point is that in Holy Quran (Baghareh Sura 2: 237) God has stipulated to pay a half of marriage portion only when the consummation has not occurred and the spouses are separated but not if husband dies. The other hint is that this group of pros on total payment of marriage portion argues that God expressed in Holy Quran (Sura Nesa 4:4) that "And give women their dowries as a free gift..."⁴ so in fact this Quranic verse ordains whole payment of marriage portion and non- implication of splitting dower into halves by this Quranic verse also includes total payment of marriage portion upon husband's death as well. Writer of book (جواهر الكلام) also believes the same and expresses that this verse denotes the proved ownership of all of women toward whole dower (writer of book of جواهر الكلام; vol. 3: 327).

According to order from some of Islamic jurists like Sheikh Koleini in book of Kafi (2009, 118/6- Chap 47), Sheikh Sadoogh in book of من لا يحضره الفقيه (vol. 3/ 267), Bahrani (24/550), the amount of marriage portion and sexual restraint for divorced woman (عده), whose husband has died without any consummation is determined as a half of the specified marriage portion. In this regard, Sheikh Koleini implies 11 Islamic narratives during which all the narratives were emphasized on splitting marriage portion into halves and they did not refer to receiving total amount of dower. Also Molla Mohsen Feiz Kashani in book of وافي (22/511) and Mohammad Ibn Hassan Horr Ameli in book الوسائل (15/739) tended to this statement. Inter alia, with proposing several narratives, which both referred to whole payment of marriage portion and splitting it into halves, they acknowledge their own final comment in tendency to splitting the marriage portion into halves.

Mohammad Ibn Moslem has narrated this tradition from one of Imam Mohammad Bagher and Imam Sadegh (PBUH) that about a husband who dies without consummation with his wife and Imam implied that the given wife is entitled to receive half of marriage portion and taking her total right from the inheritance and she should observe sexual restraint period (عده) after his death (Koleini, 2009; 6/1189).

Sahiheh or Hassaneh Halabi has also narrated from Imam Sadegh (PBUH) that if the husband had no consummation with his wife before his death and he stipulated some marriage portion for her the wife will be entitled to receive inheritance and half of marriage portion while she should observe sexual restraint period after his death (ibid: 118).

It has been also mentioned in a narrative of Obeid Ibn Zoradeh from Imam Sadegh that regarding a woman whose husband died while he had no consummation with her that this woman is assumed like a divorced one that her husband had no consummation with her so if in marriage contract some marriage portion has been stipulated for her she is entitled to receive half of that dower (ibid: vol. 9; 6/119).

In addition to these cases, Sheikh Toosi in book of التهذيب narrated from Imam Sadegh (PBUH) that even the subject of non- payment of marriage portion has been mentioned in it as well and that is as follows:

Ibn Abi Yafoor narrated from Imam Sadegh (PBUH) that I asked him about a woman whose husband dies before consummation with her and what her marriage portion is and how her inheritance share is calculated. He replied if a creation marriage portion has been specified for her half of this portion should be given to her and the wife inherited from the husband and if no dower was determined for her that woman is not entitled to receive any marriage portion. Imam has also explained about a man who dies before consummation with his wife that if no dower has been determined for her the wife will not be entitled for the marriage portion (Sheikh Toosi; 2011; 8/147, H 109).

It has been implied in IRI Civil Code that death of husband has no effect on the specified marriage portion and if it has not been granted during lifetime of the husband, the wife may ask for it wholly since she has been entitled to receive the specified marriage portion by marriage and nothing causes waiver of her right wholly or partially.

In general, some of Islamic jurisprudents have assumed bisection of marriage portion regarding husband's death before his consummation but the well-known viewpoint from Shiite jurists contradicts to it and Civil Code has followed

⁴ واتوا النساء صدقاتهن نحلة... (سوره نساء 4: 4)

the given Shiite comment and it has mentioned about only payment of the half of marriage portion about divorce before consummation in Article 1092 (Safayee; 2007: 172-173).

The other group of jurists believes in details for this purpose and they assume difference among death of wife and husband in such a way that if husband dies his wife is entitled to receive the marriage portion wholly while if the wife dies she has right to receive a half of this amount (Sheikh Toosi, vol. 2: 471).

5- Of other cases, which are led to bisection of marriage portion is the revocation of marriage contract before consummation. Concerning to this subject, Article 1101 of Civil Code holds: "If the marriage is cancelled before matrimonial relations for any reason or after it, the wife is not entitled to any marriage portion. If the reason of cancellation is impotency, the wife will be entitled to half the marriage portion notwithstanding the cancellation of the marriage." (Shabrang Moridani, 1996: 218) According to this article, despite of revocation of marriage, the impotent husband may keep a half of marriage portion for the wife unless no marriage portion belongs to the wife.

6- If before consummation, the husband divorces the wife based on her request against granting the marriage portion to her husband according to viewpoint of Shiite jurists, granting marriage portion to husband versus divorce is assumed as donation or indemnification of the marriage portion for him. Therefore, the husband will be entitled for average bridal gift or half of dower price. Of course, some experts like writer of book of (جواهر الكلام) and Dr. Emami maintain that indemnification and donation of marriage portion to the husband differs from granting dower to him versus divorce by wife's request whether the wife has possessed the marriage portion with donation and indemnification before the divorce and/ or transferred or revoked it and it is in such a way that the marriage portion is realized with it. Hence in the cases like donation and indemnification, the husband could not be assumed as competent for half of average bridal gift or by price (Emami; 2001; vol. 4: 409; Najafi, 1988; vol. 31: 90-91).

Likewise, in contribution to marriage portion that is similar to donation of dower to the husband, the property should be conveyed to husband and then the husband stipulated it as marriage portion. Therefore, if divorce occurs, a half of marriage portion is returned to the husband not the other person, who has stipulated one's property as marriage portion. Article 1092 of Civil Code implies this issue.

7- Of other relevant subjects to bisection of marriage portion is the issue of overages (نمائنات). Overages (نمائنات) are derived from root 'over' or 'surplus' and in legal terminology it refers to physical or intellectual increase and growth in property. The overages include two types: Continuous overages and discrete overages. For example, if tree grows or gives fruit or an animal gives milk or bears child or the horse obtains further value and price due training these overages may be continuous therefore they are called continuous overages such as growth of tree and obesity of animal or livestock and they may be discrete like fruit of tree (Safayee; 2007: 175).

Whenever a half of marriage portion is returned to husband due to divorce, the overages, which have resulted within interval among marriage and divorce by ownership of wife, will belong to the wife or a half of these overages should be given to that husband. There are various beliefs in this regard in Shiite jurisprudence. Civil Code has not referred to this subject and it has remained silent; nonetheless, with respect to criterion of Article 287 of Civil Code that is concerned with rescission (mutual cancellation), some solutions may be proposed for it. It can be implied according to the statement of Shiite jurists that regarding the continuous overages whether they are caused by woman's activity (e.g. painting of cloth) or not (e.g. rear up animal), these overages belong to the wife and she has right to give a half of the original object or a half of price of marriage to the husband without calculation of overages and husband may not compel her for giving a half of original property (writer of book جواهر الكلام; vol. 31:85). In addition to this well-known statement, Katoozian argues that the husband has right to possess a half of marriage portion and to pay a half of value-added due to continuous overages to the wife (Katoozian; 2006: 171-172).

Conclusion

Marriage portion is assumed as a legal right for wife and in some cases- in which usually no consensus is seen- it is stipulated to bisect marriage portion. In this investigation, seven cases in Islamic jurisprudent in which bisection of marriage portion may be observed have been mentioned:

1- When the option for determination of marriage portion is assigned to the wife she will not be entitled to stipulate it higher than average bridal gift and more than this amount will be deemed as ineffective and according which the husband may reject the rest amount of average bridal gift.

2- Regarding a man, who assigns determination of marriage portion to third party but arbiter rejects from determination of marriage portion amount under this condition the court, is competent to stipulate marriage portion per se. Hence, according to viewpoint from Shiite jurists, if arbiter dies after consummation of spouses the wife is entitled to receive average bridal gift.

3- When husband divorces from his wife before consummation with wife, there are several views but according to viewpoint from pros group, the wife whose husband has died without her consummation is similar to the divorced woman with whom the husband had no intercourse. Thus, if upon marriage contract certain marriage portion was stipulated, a half of this portion belongs to her.

5- If marriage contract is revoked before consummation in whatsoever except this cancellation was due to impotency (male's sexual sterility) therefore despite of revocation of marriage the woman is entitled to a half of marriage portion and it does not differ such defect occurs before the marriage or after it.

6- According to viewpoint from Shiite jurists, when the husband divorces from his wife by her request versus granting her portion before consummation with her, donation of marriage portion to husband against divorce is similar to donation or indemnification of dower for him. Hence, the husband is entitled for average bridal gift or half of marriage portion.

7- Whenever a half of marriage portion is returned to husband due to divorce, the overages (surplus benefits), which have resulted during the interval period among marriage and divorce due to ownership of wife, will belong to the wife or a half of these overages should be also given to that husband. The husband can possess a half of marriage portion and to pay a half of value-added resulting from the continuous overages to the wife.

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