ÇEYİZ

Çeyiz Ariyetmidir?

İbn Abidin, c III. s. 156, 585

ÇEYİZ

Şelebi, Ahkamü'l Usra, 410

ÇEYİZ

FIQH

İbn Âbidin, III, 585

ÇEYİZ

Fıkhu's-Sünne, II, 145

THE FAMILY LAWS

OF

ISLAM

By

MUHAMMAD IQBAL SIDDIQI

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upon him) and took from him a dower of 4,000 dirhams. Then he sent her to the Messenger of Allah (peace and blessings of Allah be upon him) with Shurahbil bin Hasana. (*Abu Dawud, Nasa'i*)

Prompt and Deferred Dower: The latter jurists divided dower into two portions: One is called *Mahr Mua'jjal* (مہر معجل) that is, immediately exigible or prompt and the other *Mahr Muajjal* (مہر مؤجل) that is deferred. Whether a dower should be entirely or in part exigible or deferred depends on the contract of the parties and in the absence of any contract, on the custom of the country. Even during the subsistence of the marriage the wife is entitled to demand so much of her dower as is exigible, but she is not entitled during the continuance of the marriage to demand the deferred portion of the dower. It becomes due on the death of either party, or on the dissolution of marriage.

Dowry : Dowry is the property which a woman brings to her husband at marriage. It is quite different from dower which is a payment made by the bridegroom to her bride in terms of the contract of marriage. Dower has a legal sanction. It is enjoined in the Holy Qur'an to pay it:

> "And give the women (on marriage) their dower as a free gift. . . . ." (4:4)

Dowry is the free gift given by the parents to their daughter at the time of her marriage. Dowry may be given in the form of cash, utensils, furniture, ornaments or clothes. The idea behind dowry is to help the newly formed family to set up a home of their own.

Dowry has no legal requirements in Islam. There is no injunction in the Holy Qur'an about it. It depends upon the sweet will as well as the capability of the parents of the girl to give dowry or not.

Today the problem of giving dowry has become very serious because people have started thinking about it differently. The would-be bridegroom demands it as a matter of right. Mostly such demands are too excessive. The parents of the girl might not afford to meet them. The result, sometime, is that marriage of their girl does not take place. There are many girls in our society who have passed the blooming years of their life at their parents' home waiting idly for their rightful consort.

Some parents, for fear of their daughter being neglected by her prospective husband, try to meet his demands despite their meagre resources. They are burdened in debt on this account. For that reason dowry has become a curse today. There are others who bestow dowry lavishly to display in public eye their wealth and status.

Evil Practice : There is in vogue an evil practice among the feudal class of Muslims that they give heavy dowry to their daughter at the time of her marriage and in consequence deprive her of the share of inheritance from their property. This is against the injunction of the Holy Qur'an which says :

> "From what is left by parents and those nearest related, there is a share for men and a share for women, whether the property be small or large, – a determinate share." (4:7)

Again the Holy Qur'an says :

> "Allah (thus) directs you as regards your children's (Inheritance): to the male, a portion equal to that of two females: if only daughters, two or more, their share is two-thirds of the inheritance; if only one, her share is half. . . . These are settled portions ordained by Allah: and Allah is All-Knowing, All-Wise." (4:11)

Dowry is not a religious obligation. People seem to have given it sanctity because the Holy Prophet Muhammad (peace

Muslim Women in Transition—

a social profile

H. Y. SIDDIQUI

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Practice and Attitude towards dowry

The dowry practice in India has probably adversly affected the status of women more than anything else. The recent escalation in dowry deaths is a reflection of the kind of miseries it generates. The birth of a female child therefore, is generally regarded as a tragedy, even by the parents.

Muslim women in the areas under study were comparatively better off since though the dowry was given, it did not give rise to tensions and miseries as it does among the Hindus. This is because it is voluntarily given by the parents and is not demanded by the boy's family. The study revealed that in the majority of cases (99% rural and 96% urban) the dowry was voluntarily given (Table 5.29). The majority of the respondents (76% rural and 81% urban) reported that they did not face any problems either financial or inter-personal on account of dowry (Table 5.30). A sizable number of rural respondents (31%) approve of dowry practice, the same attitude being exhibited by rural heads (31%). The urban respondents and the male heads in comparison, in the majority of cases disapproved of the dowry practice (Table 7.04). Education did not appear to have made any impact on the attitude of the respondents either in the rural or urban areas as there were no significant differences in the responses of the respondents education-wise. A possible explanation one could offer for the urban respondents' rejection of dowry could possibly be the recent highlighting of the problems concerning the dowry system in the urban areas, particularly by the mass media.

Practice of Dower

Among the Muslims there is also a practice of 'Mehr' whereby the husband promises to give some amount in cash (dower) to the bride after the marriage. Dower is generally divided into two kinds, prompt and deferred. Although it is payable, and is sometimes paid at the time the marriage contract is entered into, it has been the general practice in India to leave it unpaid, and so like an on-demand obligation, it remains due at all times—the wife's right to the same not being extinguished by lapse of time. The wife's (or her guardian's) object in leaving the dower unrealised seems to be that there may always exist a valid guarantee for the good treatment of her by her husband. The custom of fixing heavy dowers in India, generally beyond' husband means, seems to be based upon the intention of checking the husband from ill-teating his wife and above all, from his marrying another women or wrongfully or needlessly divorcing the former. For in the case of divorce, the women can demand the full payment of the dower. In the event of the death of the husband, the payment of the dower has the first claim on the estate after funeral expenses; the law regarding it as a full-debt.

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Legislation

ANTI-DOWRY LEGISLATION IN PAKISTAN AND BANGLADESH

LUCY CARROLL*

[I]

In 1961 India led the way in enacting national anti-dowry legislation when the Dowry Prohibition Act of that year was passed. The then government of West Pakistan in 1967[1] and the government of the North-West Frontier Province in 1972[2] also placed on the statute books legislation dealing with the subject of dowry; and in 1976, largely at the urging of women's organizations, the government of Pakistan passed the Dowry and Bridal Gifts (Restriction) Act.

The Pakistan Act of 1976 was reproduced and commented upon by Pradyumna Arora in a previous issue of this journal.[3] The text of the Pakistan Act in that note, however, failed to take account of the amendments effected in that Act by the Dowry and Bridal Gifts (Restriction) (Amendment) Ordinance, 1980.[4] The text of this Ordinance is set out below:

Text of the Pakistan Amendment Ordinance

An Ordinance to Amend the Dowry and Bridal Gifts (Restriction) Act, 1976

Whereas it is expedient to amend the Dowry and Bridal Gifts (Restriction) Act, 1976 (XLIII of 1976), for the purposes hereinafter appearing;

...

...the President is pleased to make and promulgate the following Ordinance:—

* Centre for South Asian Studies, University of Cambridge, England. The study and research upon which this essay is based were made possible by a fellowship awarded by the American Association of University Women (Aldaline Gilstrap/Rocky Mountain Region Endowed Fellowship), Washington, D.C. This support is most gratefully acknowledged. Responsibility for facts, opinions, and interpretations rests, of course, with the author alone.

[1] West Pakistan Dowry (Prohibition on Display) Act, 1967.
[2] North-West Frontier Province Dowry Act, 1972.
[3] II *Islamic* CLQ 70-78 (1982).
[4] Ordinance 36 of 1980, PLD 1981, Central Statutes 3 (cited as *Gazette of Pakistan, Extraordinary*, Part I, 10th July 1980).

Hediye

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ATATÜRKÜMÜZ ÖLMEDİ

Can evimizde yaşıyor
Atatürkümüz ölmedi
Türklüğe ışık saçıyor
Atatürkümüz ölmedi.

İçimizde bayrak bayrak
Her an dalgalanıyor bak
Hep nabzımda atacak
Atatürkümüz ölmedi.

Haftalara aya sığmaz
Bütün yıl ansak yine az
Türkoğlu nasıl haykırmaz
Atatürkümüz ölmedi.

Denizde karada o var,
Edirne'de Kars'ta o var,
Güzel Ankara'da o var,
Atatürkümüz ölmedi.

Tüm mazlumların dilinde
Yaşıyor nasıl da zinde
Bak yüz milyonlar izinde
Atatürkümüz ölmedi.

Türk gençliği uygar, asil
Fikri vicdanı hür nesil
Her genç Mustafa Kemâl bil
Atatürkümüz ölmedi.

Her genç yasalara uyar
Ulu kişileri sayar
Mustafa Kemâl'i duyar
Atatürkümüz ölmedi.

TÜRKLERDE KALIN ÂDETİ

A. Rıza GÖNÜLLÜ

Türk evlenme hukukunun, önemli motiflerinden birisi de "kalın"dır. Kalını, geçen yüzyılda Türk illerinde araştırma yapmış olan İzasstrov, Groclekav ve Dingelstedt gibi folklorcu ve hukukçular şu şekilde tanımlamışlardır. "Kalın, babanın sağ iken, oğullarının evlenebilmeleri için verdiği paydır"(1). Bunun içine ise at, deve, altın, para v.s. girmektedir. Yalnız Prof. Dr. Bahaeddin Ögel'in de belirttiği gibi(2) bu payda, ailenin müşterek hissesi vardır.

Malum olduğu üzere, "kalın"; "kal" fiil köküne, fiilden isim yapan eklerden "n" getirilerek yapılmış (kal-ı-n) bir kelimedir. Ve bütün Türk Lehçelerinde de ortaktır. Meselâ : Kırgız Türk Lehçesi (Kalıng) (3) ve Türkiye Türk Lehçesi (kalın-kalıng), (Kocaköy-Keban(4), Malatya-Karaman(5).

Moğol dilinde de kalım diye bir kelime vardır(6).

G. J. Ramstedt'e göre, kalın kelimesine ilk defa, Suci kitabesinde rastlanmaktadır. Bir Çin kaynağında ise V-VI. asır Uygurlarının kalın malını nasıl ödedikleri ve bu münasebetle yaptıkları merasim tasvir edilmiştir. Bu belgeye göre, kalın malını kızın akrabası alıyordu(7).

(1) Prof. Dr. Bahaeddin Ögel, Türk Kültürünün Gelişme Çağları, S. 177-178, II. baskı, Ankara 1979.
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(3) Prof. K.K. Yudahin, Kırgız Sözlüğü (Kalıng maddesi), C. II, İst. 1948.
(4) Doç. Dr. Tuncer Gülensoy, Doğu Anadolu Osmanlıcası, S. 250, Ankara 1986, T.K.A.E. yayınları.
(5) İhsan Hinçer, Türklerde Başlık ve Mehir, S. 392, I. Uluslararası Türk Folklor Semineri Bildirileri, Ankara 1974.
(6) B.Y. Vledimirtsov, Moğolların İçtimai Teşkilatı, S. 338, dipnot 75, Çev. Abdülkadir İnan, Ankara 1944.
(7) Abdülkadir İnan, Türk Düğünlerinde Exogamie İzleri, S. 348, Makaleler ve İncelemeler, Ankara, 1968, Karşılaştır : H.N. Orkun, Eski Türk Yazıtları C. I, S. 156, Ankara 1987.

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ERNST HOLTHÖFER

Translated from the German by Johanna M. Baboukis

DOUBTFUL CASES. "Doubtful Cases" (*yi zui*) is the title of the last article, number 502, of the Tang code (*Tanglü shuyi*) of 653 C.E. The general concept is an old one in Chinese law. The *Book of Documents* (*shujing*), a canonical text dating from the first millennium B.C.E., refers to offenders whose crimes are in some way doubtful being allowed to make payment, whether in copper, silk, or other valuable goods, instead of receiving physical punishment. That this practice continued is shown by mentions of it in the dynastic histories previous to the Tang dynasty (619–906 C.E.). In particular, from at least the Han dynasty (206 B.C.E.–221 C.E.), a special procedure was established under which doubtful cases were submitted to the highest judicial authorities for review.

What actually causes a crime to be described as a doubtful offense is fully developed for the first time in the Tang code. In Article 502, two distinct situations, with markedly different outcomes, are referred to as doubtful offenses. The first is a situation in which doubt arises during a trial as to whether the accused actually committed the crime. In the second situation, called a doubtful case, the guilt of the accused has already been established, but doubt exists as to which law is relevant in assigning punishment. In this latter case, there must be some important substantive conflict between the laws, since generally in cases where two laws are both applicable to an offense, whichever provides the heavier punishment must be used in sentencing.

The basis for doubt involves several circumstances, all of which are described in the official subcommentary to the law. In one instance, a crime can be considered a doubtful offense if the testimony of the witnesses is equally for and against the accused. Doubt may also arise when the facts of the case speak against the accused, but where there are no witnesses to the offense. If there are witnesses, but the facts do not seem very certain, the case is also considered doubtful. Under any of these situations, the accused is allowed to redeem the crime by payment of copper instead of receiving corporal punishment. The first five articles of the General Principles Section (*ming-li*) of the code provide equivalents for punishments in terms of amounts of copper, ranging from one and one-half pounds in the case of forty blows with the light stick to 120 pounds for either of the two death penalties.

The seriousness of a doubtful case is indicated by the fact that it could not be decided at the county level. Rather, it had to be sent up for decision by progressively higher legal authorities. When a majority of the five officials in any of these offices agreed about the law, the case was decided. The Song code simply repeats the provisions of the Tang code. However, neither the Ming or the Qing codes had articles covering doubtful cases. Rather, Article 44 of the Qing code states only that such cases are decided by analogy and then referred to the emperor.

[*See also* Appeal, *subentry on* Review in Chinese Law; *and* Chinese Law, History of.]

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WALLACE S. JOHNSON

DOWER IN ENGLISH COMMON LAW. In England, dower differed from dowry, which was called *maritagium* and, later, marriage portion. Dower was a widow's share of her deceased husband's lands, customarily one-third.

Dower and Maritagium. The common law began to protect dower shortly after 1176, when, as a consequence of the Assize of Northampton, writs of dower were first made available. At that time dower was a grant of land made by a groom at a publicly celebrated marriage. The law of dower never departed very far from its original conception as a grant to the bride at her marriage. Although a public ceremony was not requisite for a valid marriage, it was necessary for the recovery of dower at common law.

Maritagium was a grant of land made by the bride's father to her husband with her in marriage. Although the grant was formally made to the groom, it was well understood that the land was his wife's *maritagium* and was inheritable by their issue. The husband was caretaker of the land during marriage but had no power of alienation. The limitation of inheritance to the couple's issue was designed to cut off claims by the husband's other heirs. If the couple had a child, the husband could remain on the land after his wife's death even if the child had died before

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عنایت‌الله فاتحی‌نژاد

جَهیر، بَنی، نک: ابن جهیر، خاندان.

جَهیزیّه، یا جَهاز، داراییهای معینی که دختران با خود به هنگام ازدواج از داراییهای خانواده یا گروه دودمانی خود به خانهٔ شوهر و خانواده و گروه دودمانی او می‌برند.

در جامعه‌هایی که فرزندان از سوی پدر و مادر هر دو ارث می‌برند، دریافت سهمی از داراییهای منقول و غیرمنقولِ (زمین، دام، کالا و اسباب‌خانه) والدین به هنگام ازدواج برای پسران و دختران معمول بوده است. سهم دختر را در ادبیات مردم‌شناختی اصطلاحاً «dowry» (مئر، 69) و در فرهنگ جوامع اسلامی و ایران «جهیزیه» و «جهاز» نامیده‌اند.

جهاز را نوعی شیربهای واژگونه[1] (نک: ه د، شیربها) نیز دانسته‌اند، به این معنا که در جایی که زنان کمیاب‌اند، شوهران چیزی به نام شیربها به خانوادهٔ دختر می‌پردازند، و در جایی که مردان نادرند، پدر زن چیزی به نام جهاز می‌پردازد. به هر روی، جهاز یکی از هزینه‌های ازدواج است و در جامعه‌هایی که رواج داشته باشد، شوهران از آن احتمالاً چشم نمی‌پوشند (همانجا).

در جامعه‌هایی که شمار جمعیت زنان بیش از مردان، و در آن تک‌زنی[2] نوع ازدواج غالب است، بر دادن جهیزیه بیش از پرداخت شیربها تأکید می‌شود و زنان بی‌جهاز معمولاً برای ازدواج چندان مطلوب نیستند («فرهنگ ...[3]»، 60).

واژهٔ جهاز و ترکیبات آن: در فرهنگ و زبان عربی واژهٔ «جهاز» (از مادهٔ جهز) و در زبان فارسی و فرهنگ ایران واژه‌های «جهیز» یا «جهیزیه» و «جهاز» به معنای رخت و اسباب‌خانه و ملکی که عروس به خانهٔ داماد می‌بَرَد، آمده است (*المنجد*، ذیل جَهَزَ؛ *غیاث* ...، نیز *لغت‌نامه* ...، ذیل جهاز و جهیز؛ صفی‌پوری، ۱/ ۲۰۸؛ شرتونی، ۱۴۶).

در فرهنگ مردم و زبان عامهٔ مردم ایران واژه‌های جهیز و جهیزیه کمتر، و واژهٔ جهاز بیشتر و عمدتاً به صورت جاهاز و جاهازیه و با ترکیبهایی مانند «جاهازگیری» یا «جاهازگیران»، «جاهازگیری کردن»، «جاهاز دادن»، «جاهاز بُردن» یا «جاهاز بَران» به کار می‌روند.

جهازگیری کردن و جهاز دادن به دختران در جامعهٔ ایران رسم و سنتی کهن، و از دیرباز معمول بوده است. در *تاریخ* بیهقی، تألیفی از سدهٔ ۵ ق/۱۱م، به جهاز دخترِ باکالیجار، والی گرگان و طبرستان، اشاره شده و چنین آمده است: «با دختر باکالیجار چندان چیز آورده بودند از جهیز معین که آن را حد و اندازه نبود» (ص ۵۰۹-۵۱۰). نظامی عروضی در *چهار مقاله*، تألیفی از سدهٔ ۶ ق/۱۲م در شرح جهازی که فردوسی می‌خواست برای دخترش فراهم کند، می‌نویسد: «همهٔ امید او آن بود که از صلهٔ آن کتاب [*شاهنامه*]، جهاز آن دختر بسازد» (ص ۷۵).

جهازگیری: فراهم کردن جهاز برای عروس از مشغله‌های مهم خانواده‌های دختران بوده است. جهاز از مقولاتی است که در هنگام گفت‌وگوهای ازدواج میان دو خانوادهٔ دختر و پسر، دربارهٔ آن، و بیش و کم یا سنگین و سبک بودنش سخن به میان نمی‌آید. خانوادهٔ دختر اسباب جهاز را عمدتاً بنابر توانایی مالی و شأن و پایگاه اجتماعی خود و میزان اعتبار و حیثیتی که انتظار دارند در میان خانواده و طایفهٔ داماد و آشنایان و همسایگان به دست آورند، فراهم می‌کنند. در برخی پاره ـ فرهنگها سنگین و سبک بودن جهاز دختران را بر مبنای زیاد و کم بودن مهر آنان و در برخی پاره ـ فرهنگهای دیگر براساس مقدار شیربهایی که از خانوادهٔ داماد می‌گیرند، تعیین می‌کنند (شریعت‌زاده، ۲۶۳). به‌طورکلی در هر دو فرهنگ تصمیم‌گیری در سنگین و سبک گرفتن جهاز با خانوادهٔ عروس است و خانوادهٔ داماد دخالتی ندارد.

در بسیاری از جامعه‌ها تمام یا بخشی از پول شیربها را در جهازگیری دختر هزینه می‌کردند (مثلاً نک: مؤید محسنی، ۸۲؛ پاینده، *آیینها* ...، ۵۳). در قبایل عرب خوزستانی تمام شیربها، و در ایل باصری فارس بخشی از شیربها را که به پدر عروس می‌دادند، خرج خرید اسباب جهاز می‌کردند (نوذرپور، ۱۵۶؛ بارث، 19).

بنابر قوانین شرعی در اسلام، دختر نصف پسر از دارایی والدین خود ارث می‌برد (نک: نساء/۴/۱۱)، از این‌رو، با اعطای سهمی از دارایی خانواده به صورت جهاز به دختر، کم و بیش بخشی از سهم الارث آیندهٔ پسر یا پسران خانواده را پیشاپیش به دختر یا دختران می‌دهند. در جامعه‌هایی هم که ثروت به طور عادلانه تقسیم و توزیع نمی‌شود، دادن جهاز به زنان تغییر چشمگیری درآیندهٔ ازدواج آنان پدید می‌آورد (مئر، 50).

1. reversed bride-price 2. monogamy 3. *A Dictionary* ...

IS DOWRY OBLIGATORY?

In 1976 the Parliament of Pakistan passed an Act for regulating and rationalising the custom of dowry *(jahēz),* which is one of the social evils from which the Muslim society is now suffering. After the establishment of Pakistan, as the economic conditions of the people improved and prosperity was ushered in this custom, which the Muslims of the Indo-Pakistan sub-continent adopted and borrowed from the Hindus where it forms an essential part of the nuptial ceremonies and without which a Hindu marriage cannot be considered as complete, assumed serious and in many cases menacing proportions. People began to resort to hard bargaining and the sacred contract of marriage was reduced to a mere formality revolving round and based in the lengthy inventory of the dower, "the property which a woman brings to her husband at marriage."

Jahēz is an Arabic word which means, according to authoritative lexicographers, making preprations or providing one with essential goods and necessities. It is why equipping an army, providing travel-kit to a person proceeding on a journey, managing and conducting a funeral, and lastly providing a bride with the *basic* necessities of life (like utensils, bed-steads, bedding clothes etc.) is semantically known as *Jahāz* or *Jahēz.* However, the use of the word *Jahēz* is now restricted to only those goods and property, chattel-personal which the parents of a bride provide to her on her marriage.

In pre-Islamic Arabia we do not come across any reference to the custom of dowry either in the poetry of the *Jāhiliyya* or ancient inscriptions which have so far been discovered and deciphered. As against this the common practice among the tribal Arabs was that even the amount of *mahr (ṣadaq)* which a girl received on her marriage from her husband was misappropriated by the guardians of the girl who did not like the idea of sharing it with their former ward. The Qur'ān, by way of reformation repeatedly asks the Arabs of those days to give to the women their dower or jointure to which they were fully entitled. The Qur'ān further declares that the dower *(mahr)* is wholly and solely the personal property of the woman and neither her husband, her father nor her other close relatives have any right or entitlement to any part thereof without the express consent of the woman. Dr. Jawād 'Alī, the noted Arab historian, whose voluminous work *" The History of the Arabs in pre-Islamic Times"* has earned him wide-spread fame also says that in the *Jahiliyya* majority of the guardians used to themselves devour the dower of the girls given away in marriage (see his *al-'Arab Qabl al-Islām,* vol. 5 pp. 268-9). It was due to the prevalence of this custom among the *Jāhiliyya* Arabs that they used to congratulate the father of the new-born girl that he would come to enjoy her dower when she came of age. The pernicious custom of burying alive their new-born daughters which the Qur'ān condemns roundly, was in fact confined to a few members of the Arabian tribes of Banū Asad and Banū Tamīm. Many Arab authors and lexicographers, among them Ibn Manẓūr and Muḥammad Tal'at Harb *(Duwal al-'Arab qabl al-Islām,, p. 76)* pointedly refer to jubilations and

S T 96 - 98 (1979 PAKISTAN)

or it was the product of their own thinking and *ijtihād*. If we differ from them, as is the trend in our present-day society, that clearly means that the interpretation offered by our forefathers, jurists and legists was wrong. Centuries ago either they were right or now we are right - both cannot be wrong. It is very easy to make a public pronouncement on matters with which we are the least competent to deal but in fact very difficult to prove our stand logically and in the light of the conduct of the *Ṣaḥāba* and the succeeding generations.

The pronouncements of the present interim Government and the various measures taken by them are indeed very encouraging and clearly show a bias towards Islamism in our half-westernised and the so-called emancipated society.

Genl 2.

A. S. BAZMEE ANSARI

DOWRY IN ISLAM Geniz

A lot of misunderstanding exists about the correct position of dowry (*Jahāz or Jahēz*) in Islam. Usually a lavish dowry is termed as un-Islamic while an ordinary one is considered a legitimate part of an Islamic marriage. Actually this custom is totally foreign to Islam, inasmuch as there is no word for it in the Arabic language. That is why its details are not available in the religious literature of Islam. The Urdu word ' *Jahēz* ' used for this custom in Indo-Pakistan has a different meaning in the Arabic language. It means a light-footed horse, or quick death *(jahīz)*. However, due to the affluence of the present-day Arab States, this custom has also found its way into the modern Arab society and for this purpose they have coined a new word ' *Bā'ana*' (باءنة) for it. This new word means the money or property which the bride brings to the house of the bridegroom at the time of her marriage.

In Islam the responsibility for bearing all the expenses of marriage rests on the shoulders of the bridegroom. If he is in a position to meet this expenditure, well and good, otherwise he should refrain from marrying till he is able to arrange the dower-money *(mahr)* required for meeting the expenses of the marriage. In the meantime, he is asked to control his passions by fasting. The Qur'ān ordains:

> ' And let those who cannot afford marriage, observe continence until Allāh provides them with such means! (XXIV:33).