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Flavia Agnes

The law of marriage in its essence is a law regulating economic transactions and woman's access to and control over it. The Islamic provisions of 'mehr' and marriage agreements, and right of property management have stood Muslim women in good stead during litigation in the last century. However, gradual infiltration of Hindu notion of sacramental marriage and English principles of morality and public policy have curtailed Muslim women's rights granted under Islamic jurisprudence. Muslim leadership needs to give up its attitude of negating women's rights if it aspires for support of secular and human rights forum in the period of aggressive Hindu communal propaganda for uniform civil code.

THE law governing marriage and family relationships in its essence is a law of property settlement rather than a law governing sexual morality. Hence, any proposal for reform would have to necessarily redefine property rights of women within the family. This consciousness has led both conservative as well as progressive forums now engaged in drafting alternate codes to focus more upon the economic rights of women rather than confine the debate to issues of monogamy and sexual control.

In this context, even the Hindu fundamentalist political parties like the BJP have been forced to acknowledge that the Hindu law of succession does not grant rights to women and hence while enforcing a uniform code, the concept of Hindu joint family property may have to be abolished.

Most legal scholars concede that the Muslim law of inheritance protects women's rights better than the Hindu law based on male coparcenary. But in the realm of matrimonial law, it is presumed that the Hindu law (which is a reflection of the archaic British law) will be more favourable to women than the Muslim law which permits polygamy and triple talaq. In fact, the rationale for a uniform code is based on this premise, i e, liberation of Muslim women.

The present Hindu law of marriage and divorce is a curious mixture of Victorian morality, Hindu notion of women's servility and the modern concept of a contract between equals, which collectively work towards the subordination of women. Since it has nothing to offer in the realm of economic rights, we need to take recourse either to the Continental system which is based on equitable distribution of matrimonial property or to the Islamic concept of mehr.

Unfortunately, due to the communal undertones which usually accompany the demand for a uniform civil code, the contribution of Islamic legal principles to the modern matrimonial jurisprudence has not received due recognition. For instance, the Islamic principle of marriage as a dissoluble contract was borrowed first by the Continental and later by the British matrimonial jurisprudence, to set off the Christian notion of marriage as an eternal and indissoluble sacrament, while ushering in modernity. This concept was incorporated into the Hindu law in 1955.

In the British legal system, divorce, in its origin, was confined to faults, where one spouse had to prove a matrimonial offence against the other. And if women were the 'guilty' spouse, they would be deprived of the meagre maintenance dole and additionally their property could be settled in their husbands' favour as compensation for the loss of proprietary rights.

In contrast, the Islamic law provided for more civilised modes of dissolving marriages, either by consent or by providing for irretrievable breakdown of marriage. Only in the later half of 20th century the British matrimonial jurisprudence accepted the concept of divorce by mutual consent. This was incorporated into the Hindu law in 1976. The Indian Divorce Act which governs Christian marriages has not recognised this concept to date and the only option open to consenting spouses under Christian law is collusion and perjury. The notion of 'no fault divorce' (or irretrievable breakdown of marriage) has not yet been accepted by the Hindu law.

Under Islamic law, while the husband is granted an unlimited right of divorce, the wife is also granted a limited right of *khula*. To equalise the status of spouses within marriage, the neighbouring Pakistan and Bangladesh have, at one level curbed the husband's right of oral talaq by stipulating mandatory arbitration procedures, and at the other level, secured the woman's right to *khula* through standardised marriage contracts, *nikah-nama*. The contract includes a routine clause through which the husband is bound to grant the right of *khula* to the wife at the time of contracting the marriage. The Supreme Court of Pakistan in the landmark decision in Khurshid Bibi's case[1] while interpreting this provision held that hatred or aversion towards the husband is sufficient for obtaining *khula* and ruled that the consent of the husband is not a necessary precondition.

The provisions of arbitration and speedy settlement of matrimonial dispute are also important principles of Islamic matrimonial jurisprudence. If arbitration procedures fail, the matrimonial bond should be severed with ease, *ahsan*. Several judgments of high courts in Pakistan have relied on this principle and have held that marriage should be dissolved through a simple deed and anyone who makes it complicated will stand ostracised.[2] This concept has gained statutory recognition in India, through the family courts act which provides for arbitration and speedy settlements rather than prolonged adversarial litigation of the British system, where one spouse is required to prove the matrimonial offence against the other, which causes great hardships and humiliation to women in court rooms.

Since Islamic law provided the modern matrimonial jurisprudence with important legal principles, perhaps it would be worth our while also to examine the Quranic right of mehr which was meant to provide a safeguard against arbitrary oral divorce. This right of providing for the future security of the woman at the time of marriage, finds no parallel in any other legal system.

All provisions of dissolving a marriage become detrimental to women if they are not simultaneously linked to protection of economic rights. It is this court room reality which makes it imperative to examine the rights of mehr and pre-marriage agreement bestowed upon women under the Islamic law.

Superior Position of Women in Islam

Mehr is a Quranic right. A specific mention of this right is made in all subsequent legal texts. Chapter IV verse 3 of the Holy Quran stipulates: "And give women their dower freely and if they are good enough to remit any of it of their own free will, then enjoy it with a good conscience". There is also a mention that the Prophet settled 500 dhirams on each of his wives with the exception of Omm Babeebah (from Abysinia) on whom he settled 4000 dhirams.

According to the Maliki school of Islamic law, a marriage without the stipulation of

mehr is invalid. According to the Hanafi school the marriage is valid but if no mehr is stipulated or if the amount stipulated is very low, the woman is entitled to a proper mehr, mehr-el-misl. The proper mehr would have to be determined depending upon the means of the husband and the family status of the wife.

While a minimum of 10 dhirams is mandatory, the legal texts routinely mention amounts of 1,000 and 2,000 dhirams by way of examples which indicate that the amounts settled were meant to be far above the lowest stipulated. Additions to the amount stipulated at the time of marriage can be made at any time during the marriage. Mehr is a mark of respect to the wife and is meant to set off the disability suffered by women under the law of inheritance. Hence, the amount stipulated has to be substantial. A token amount is injustice and wrong as per Islamic principles.

If the mehr is prompt it is payable on demand. If it is deferred, it must be paid subsequently and in any event upon dissolution of marriage either by death or divorce. If at the time of dissolution of marriage the mehr dues are unpaid, the woman is entitled to retain possession of her deceased husband's property. Usually this right is discussed in legal texts as a 'widow's right' but the same principle would apply if the marriage is dissolved by divorce.

A woman has the right to impose conditions regarding her mehr. For instance she can stipulate that if the husband resides in the same city as her parents then the mehr amount would be 1,000 dhirams, but if he shifts to another city then the amount should be doubled. In such a case if the husband does shift to another city then the wife is entitled to claim 2,000 dhirams.

Mehr need not be stipulated only in cash. Gold ornaments, valuables and other movable and immovable property can also be settled as mehr. Mehr is the sole right of the wife and the husband cannot have any claim over it once the marriage is consummated.

The husband can settle his share of family property or a particular house as mehr. The woman would then be entitled to this property or its monetary value. If the woman claims that the matrimonial residence has been given to her in lieu of her mehr debt, it is for the husband to rebut the presumption. If the husband refuses to pay the prompt mehr upon marriage, the woman can refuse to fulfil her marital obligations including cohabitation. She is not bound to obey any of his commands. The wife is entitled to live separately and claim maintenance from her husband during this period. Even if the husband has paid nine dhirams and one dhiram is due, the wife has a right to refuse cohabitation and the husband is not entitled to reclaim the nine dhirams already paid.

If a man agrees to pay a certain amount of mehr upon the condition that the wife is a virgin and subsequently discovers that she is not, he cannot retract from his commitment and the woman is entitled to the full amount. Once settled, the husband cannot be absolved of his duty to pay the dues, even when there is a subsequent separation which is caused by the wife's action. Even when a Muslim marries a non-Muslim he is bound to pay her the mehr.

The superior position of women under Islamic law can be ascertained only when we compare it with the status of women under other contemporary legal systems. Under Roman and British legal systems of this period, women lost their rights to acquire, hold and manage separate property upon marriage. The Roman law of marriage which derived its roots from the Judaic law was based on the notion of a patriarchal family consisting of wives, sons and slaves. The head of the family acquired total control over the person, property and labour powers of all the members of his household. The wife was treated as the ward and she had no independent identity.

Under the British system, upon marriage, the woman lost her legal existence. Marriage meant a legal death. All her property belonged to her husband and he could not only use it but even alienate it without her consent. The husband's right to his wife's property was held in such high esteem that even after betrothal, if the woman alienated her property without the consent of the groom, he could sue her for fraud.

Only in the year 1870 a married woman who was legally separated from her husband was granted the right to hold separate property. A married woman did not have the right to enter into a contract either with her husband or with a third party till the year 1935.

The Quranic right of mehr is distinct from the customary right of bride price and the English concept of dower. Many tribes and communities in Africa and Asia followed a custom of bride price where the groom was bound to pay a certain sum to the bride's father to compensate him for the loss of his daughter's labour power. The Prophet changed the concept of bride price to mehr, a sum to be settled upon the woman herself, as a mark of respect and future security to her. The amount settled belonged to the woman exclusively and not to her relatives.

The British jurists used the word mehr and dower interchangeably. But the right of mehr is distinct from the right of dower. Dower, under English law, is a widow's right to be maintained from her deceased husband's property. This right is very distinct from the Islamic right of mehr, which is a right upon marriage and not a right arising upon widowhood.

The personal laws of the post-colonial period are no longer applicable in their pristine form. The rights are based on English translations of the original texts, the legal precedents of the British jurists and the local customs and practices. In order to ascertain the contemporary status, a scrutiny of these sources would be necessary.

While examining the case law concerning women's economic rights within marriage one can discern a curious trend. While judicial decisions throttled the Hindu woman's economic rights by constraining the scope of stridhana, the Muslim woman's economic rights could not be similarly throttled. The legal precedents also indicate that the rights of mehr and pre-marriage agreements were not just illusory rights but were viable economic safeguards.

Several judgments upheld the woman's right to impose conditions upon their husbands through private agreements. As per the Christian doctrine of eternal and indissoluble marriage, pre-nuptial agreements stipulating conditions of a future divorce were deemed to be against public policy. But since divorce was not considered as against public good under Islamic law, Islamic jurisprudence held such contracts as valid.

While adjudicating over matrimonial disputes, if the British jurists relied upon Islamic principles, the agreements were held to be valid. But if they relied upon British notions of morality and public policy, the agreements were invalidated. Some important legal decisions in this direction are discussed below.

In Badarannissa Bibi's case decided by the Calcutta High Court in 1871,[3] the husband had entered into a pre-marriage agreement (*kabin-nama*) with his wife, authorising her to divorce him if he remarried without her consent. Subsequently, the husband did remarry and the wife approached the court for redress. The court dismissed the wife's plea on the ground that the Mohammedan law does not permit a wife to divorce herself upon a private agreement.

In appeal, an Islamic jurist, Moulvi Mahamat Hossein, appeared for the wife and pointed out the relevant sections from the legal texts which specifically mention the delegated power of the wife to divorce husband and pleaded that such a provision is not repugnant to the Mohammedan law. The court concurred with this view and ruled in the woman's favour.

Under the English law of contracts a person who is not a party to a contract cannot enforce it even when s/he is a beneficiary. Hence the following judgment, *Khwaja Mohammed v Husseini Begum*[4] discussed in detail, becomes an important milestone in the law of contract in India. The privy council

laid down a new precedent by upholding a minor girl's right to enforce a contract against her father-in-law, even while she was not a party to it.

In the year 1877, on the occasion of the marriage of his son, the father-in-law executed an agreement that he would pay the daughter-in-law Rs 500 per month as *kharch-i-pandan* in perpetuity. After seven years, the wife was compelled to leave the husband's home. Thirteen years later, in 1896, the couple was separated. In 1901, the wife filed a suit to recover arrears. The trial court refused to enforce the agreement on the following grounds:

1 It is unreasonable to suppose that wife can enforce her contract against her father-in-law even when she refuses to live with her husband. To hold so would be repulsive to conscience and common sense.
2 The unchastity of the woman has not been proved, but her character is not beyond suspicion.
3 If she refuses to live with her husband, the father-in-law has no duty to pay *kharch-i-pandan*.
4 The husband entertaining prostitutes at home and incurring debts are not reasonable justifications for wife's refusal to live with him.

In appeal the Allahabad High Court decreed in the wife's favour as follows:

1 No condition had been attached to the payment of the annuity.
2 Nothing is said in the agreement about the chastity of wife,
3 No provision is stated under which father-in-law ceases to be liable if wife stops living with her husband or due to any other acts of the wife.

In an Appeal against this decree to the privy council by the husband, it was held:

1 Although she was not a party to the agreement, the wife was entitled to enforce it as she was the only beneficiary of the agreement. In India and among Muslim communities, marriage is contracted by parents/guardians on behalf of minors. Hence serious injustice will be caused if the common law doctrine (read English law doctrine) is applied to agreements entered into in connection with such contracts.
2 The wife had not forfeited her right to the allowance on her refusal to reside with her husband. By the agreement, the father-in-law binds himself unreservedly to pay to the wife the fixed allowance. There is no condition in the agreement that it should be paid only while she is living in the husband's house.

The court admonished the subordinate judge for his remark that the woman's character was not 'free from suspicion' and held that if the allegation of unchastity was not proved, it was incorrect to make such derogatory comments in the judgment. The court also drew a distinction between kharch-i-pandan and the English concept of 'pin money' which could only be spent with the consent of the husband. In contrast, the Muslim woman could exercise her sole control over her kharch-i-pandan. Explaining this concept the court ruled, "Kharch-i-pandan, which literally means 'betel box expenses', is a personal allowance to the wife customary among Mohammedan families of rank, especially in upper India, fixed either before or after the marriage. When they are minors, as is frequently the case, the arrangement is made between the respective parents and guardians."

In a case decided by the Allahabad High Court in the 1921,[5] the husband had married twice and had treated both wives with cruelty. The father of the third wife entered into an agreement with the husband and his father prior to the marriage, binding the husband to pay a sum of Rs 15 per month for life, in addition to the dower debt, in case of divorce.

The wife was subsequently divorced and she approached the court for the enforcement of her contract. The court held that the agreement was enforceable as it was meant to secure the wife against ill-treatment. The court countered the plea that pre-marriage agreements are against public policy and held that agreements protecting a woman's future rights are valid under Islamic law.

Public Policy: Treacherous Ground

While upholding the right of a Muslim wife to enter into agreement in respect of future maintenance, the Lahore High Court made an interesting comment regarding the notion of public policy: "There is nothing in the husband's promise to pay a certain sum of money for the personal expenses of his wife, which can be regarded as opposed to public policy". The court further cautioned: "Public policy is unsafe and treacherous ground for legal decisions. It must therefore be kept within reasonable restraint."[6]

It must be noted that notions such as morality and public policy were English principles which were surreptitiously introduced into the Indian family law to the detriment of women's rights. Based on this premise, women's customary and textual rights to divorce, to adopt children or to inherit property were constantly curtailed. The following case reported in 1853 is a classic example of how the notion of public policy could be used against women's economic interests.

The case concerns the Muslim trading communities of Gujarat – Khojas and Memons. These communities followed the local custom of holding the family property jointly. The male-headed coparcenaries denied women their right to a stipulated share in the property, which they were entitled to under the Shariat. A woman from the trading family challenged this practice.

On her behalf it was argued that the Hindu custom of disinheriting daughters which has been adopted by Mohammedans is most unreasonable and that public policy would dictate the adoption of the wiser rule laid down by the Quran by which daughters are allowed a defined share in the succession. A contrast was drawn between the relative position which females hold in Hindu and Muslim systems. It was pointed out that since the Muslim system was more beneficial to women, it was the duty of the court to give it effect when the two come in collusion.

The comments of the concerned judge, Lord Erskine Perry, while disallowing the woman's claim are interesting to note: "A custom for females to take no share in the inheritance is not unreasonable or against public policy in the eyes of the English law. It accords in great part with the universal custom as to real estates where there are any male issue and with some local customs mentioned in Blackstone by which in certain manors females are excluded in all cases."[7]

While the high courts of Calcutta, Allahabad and Lahore upheld a Muslim woman's right to enter into agreements, the Bombay High Court relying upon the English doctrine of public morality, invalidated them.

In *Mehrally v Sakerkhanoobhai*[8] the couple was married in 1901. After a few months, due to marital conflict the wife left the matrimonial home. Thereafter, in an attempt to reconcile, the husband executed an agreement stipulating the following:

1 He will rent a house and live separately with his wife, away from her family and relatives. If they cannot live together, he will pay her Rs 20 per month as maintenance;
2 The wife's ornaments (20 tolas of bangles, five tolas of chain) belong to her exclusively and he would not claim any right over it;
3 He would not obstruct her from meeting her friends and relatives.

The reconciliation following this agreement lasted only for one year and thereafter, the wife returned to her parents' house. Husband filed for restitution of conjugal rights. The wife relied upon the agreement in her defence. Rejecting the wife's plea, the court held: "The principle upon which the law looks askance at agreements contemplating the future separation of husband and wife, is a principle which is thoroughly fixed, having its foundations in the welfare of society. Hence an agreement which provides for a subsequent separation, is bad under English law."

The court then applied this principle to an agreement regarding maintenance in *Bai Fatima's* case.[9] While contracting a second marriage, the husband executed an agreement in favour of the first wife that in case of disagreement he would pay her Rs 8 per month as maintenance. After separation, the first wife sued for recovering arrears of maintenance. Relying upon the preceding judgment, the court ruled that since the separation did not take place until some weeks after the execution of the agreement, the post-nuptial agreement encouraged future separation and hence it was against public policy.

As can be observed, Muslim women were on a firm footing if the courts applied Islamic principles. The decision of the Oudh high court in *Mansur v Azizul*[10] is yet another example of this trend. In this case the court laid down an important principle regarding the Muslim woman's right to shelter or, as formulated in the present context, the right to matrimonial home.

At the time of the second marriage, the husband entered into an agreement granting the first wife option to live separately and claim maintenance of Rs 5 per month in the event of disagreement between the two wives. Subsequently, the first wife sued for arrears of maintenance amounting to Rs 58-7-0.

Upholding her right of separate residence and maintenance, the court observed: "If a Muslim marries two wives and if the wives are not able to get along, and if the husband is not able to provide separate apartments, agreement in favour of one wife granting her maintenance (*guzara*) is not against public policy". The court differed from the view expressed by the Bombay high court that such agreements encourage separation. The judgment relied upon two important authorities on Muslim law regarding the Muslim woman's right of separate residence.

1 A passage from the *Hedaya*: "It is incumbent upon a husband to provide a separate apartment for his wife's habitation to be solely and exclusively appropriated to her use, so that none of the husband's family or others may enter without her permission and desire, because this is essentially necessary to her and is therefore, her due the same as maintenance and the word of God appoints her a dwelling house as a subsistence and as it is incumbent upon the husband to provide a habitation for his wife, so he is not at liberty to admit any person to a share in it as this would be injurious to her; neither is the husband at liberty to intrude upon his wife, his child by another woman. If the husband appoints his wife an apartment within his own house giving her the lock and key it is sufficient as the end is, by this means, fully obtained".

2 A passage from Ameer Ali's *Mohammedan Law*: "Under the Mohammedan law, the maintenance (*nafkah*) of a wife includes everything connected with her support and comfort such as food, raiment, lodging, etc, and must be provided in accordance with the social position of the parties. The wife is not entitled merely to maintenance in the English sense of the word but has a right to claim a habitation for her own exclusive use in accordance with the husband's means. It is incumbent on the husband to provide a separate apartment for his wife's habitation to be solely and exclusively appropriated by her, because this is essentially necessary to her and is therefore her due, the same as her maintenance and the word of God appoints her a dwelling house as well as a subsistence".

Keystone of Islamic Law of Marriage

The judgments discussed above indicate that a Muslim woman's right upon marriage were superior to the English woman's rights. But recent research on Muslim societies indicate that these rights have been corroded. Mehr is reduced to a mere token and in its place, dowry, a custom practiced by the upper caste Hindu society is gaining acceptance. This development is disturbing. Due to the ritualistic manner in which mehr settlements are contracted, there is a fear among women's rights activists that this right is not an adequate safeguard against destitution. But the reported judgments of a bygone era bear testimony to a different reality.

In Sungra Bibi's a case decided in 1880,[11] the unpaid mehr dues at the time of husband's death were Rs 51,000 and the assets left behind by the husband were insufficient to pay the dues. The full bench of Allahabad high court held that the wife was entitled to the whole amount stipulated, irrespective of the fact that the husband's assets were not sufficient to pay the dower debt.

In *Kamar-un-nissa Bibi*'s case of the same period,[12] the husband had made an oral gift of the property to his wife, in the presence of seven witnesses. Later, he executed a document, *mukhtar-nama* to give effect to the gift, which was made in lieu of the unpaid dower of Rs 51,000. However, it was proved that the dower stipulated at the time of marriage was a mere Rs 100. Decreeing in the woman's favour, the privy council held that it was not necessary to prove that Rs 51,000 was agreed upon at the time of marriage. Under Mohammedan law, mehr may be fixed even after marriage.

The *Sultan Begam* case of 1936 (AIR 1936 Lah 183) is yet another milestone in this direction. The widow claimed Rs 50,000 out of the stipulated amount of Rs 1,50,000 since the assets of her deceased husband were not sufficient to satisfy the entire amount. The husband's relatives alleged that the dower publicly announced was not intended to be paid and only a smaller amount settled in private was payable. But the privy council validated the *Kabin-nama* of 1877 where a sum of Rs 1,25,000 was stipulated. The document was signed by the husband and attested and witnessed by 25 persons. The court held that the fact that the husband did not have the means or expectations to pay the amount was no reason to decree a smaller sum.

This judgment is significant for its observations regarding the right of mehr. The privy council commented: "Mehr has important uses which affect the domestic life of Mohammedans. The law-giver of Islam was anxious to safeguard the wife against the arbitrary exercise of the right of divorce by the husband. He accordingly devised the institution of mehr to control that right. Mehr is a weapon in the hands of the wife to protect her from possible ill-treatment by the husband. If she survived her husband and his other heirs ill-treated her, she would not be thrown out into the streets but would be able, apart from her legal share, to enforce against them her claim which must be paid out of the assets of the husband before they are distributed among his heirs. This is the keystone of the Mohammedan law of mehr in its purity".

Protecting the woman's interest further, the courts have also ruled that mehr cannot be absolved in distress. Since the woman has a right to enter into a contract regarding her mehr the Islamic law grants her the right also to opt out of the contract. This is called the right of remittance. This provision is misused by elders in the family and the woman is coerced into remitting the mehr during the husband's illness or on his death bed. Recognising the disability women face during these moments, the courts have ruled that a consent obtained in a moment of distress does not constitute valid consent and the woman does not forfeit her rights by this action.

The courts have also granted due recognition to a woman's inability to claim her dues during the subsistence of her marriage. In 1855, the privy council held: It is important to consider how inconvenient it would be if a married woman was obliged to bring an action against her husband. It would be full of danger to the happiness of married life.[14]

In a series of judgment the courts have ruled that, if at the time of the husband's death the widow's mehr dues are unpaid, and she is already in possession of the property, she has the power to retain possession. In economic terms this is a

substantial safeguard against destitution. The husband's relatives do not have the right to dispossess the widow until her claim is satisfied. Several courts have also held that this right is heritable and transferable.

The high amounts demanded by women as mehr resulted in the enactment of statutes in the states of Oudh (in 1876) and Jammu and Kashmir (in 1920) to protect husbands from the exorbitant amounts claimed by the wives. The statutes empowered the courts to reduce the amount if deemed to be too high and beyond the husband's means.

The amounts mentioned in the judgments cited above need to be viewed in the context of the living standards of this period. Only then will it be possible for us to grasp the security which the high amounts stipulated as mehr provided for women. The salaries for clerical posts in government jobs during this period ranged from Rs 40 to Rs 100. A sum of Rs 10 to Rs 20 was deemed an adequate amount as maintenance.

Although it is possible to argue that the cases discussed above concern women of affluent families, the decisions are a reflection of the prevalent social norms and hence it can reasonably be assumed that mehr was a right which provided the Muslim woman substantial economic protection. The case law also provides concrete evidence that even lower class women did enter into agreements with their husbands to protect their economic rights as the low amounts of settled as maintenance indicate.

Contemporary Trends

It is in the context of the above legal status that the present situation of Muslim women need to be examined. Despite progressive legal provisions, it is the customs and practices prevalent in the community which determine the status of women in any society.

While the community practices are not homogeneous, nor is the shariat followed in its letter or spirit, recent studies indicate that mehr continues to be an integral part of a marriage contract among most Muslim communities. But the right is corroded beyond recognition. The amounts stipulated are as low as Rs 101 to Rs 501 and only among a minuscule section the amounts excceed Rs 10,000. The communities also practice the dowry system and the amount of dower paid to the groom is always higher than the mehr which is settled upon the woman.[15]

There is a pressure within the community to stipulate a low amount in a ritualistic manner. The practice of pre-marriage agreement is almost non-existent. Although marriage among Muslims is a contract, the Hindu notion of a sacramental marriage seems to have permeated into community practices and high amounts of mehr are disapproved due to its analogy to a contract of sale. The absence of economic safeguards has upset the delicate balance upon which the Islamic law of marriage had rested and tilted it in husband's favour. The arbitrary oral divorce which cause destitution of women perhaps is a direct corollary to the deterioration of the economic safeguards. Unfortunately, there are no sociological studies which shed light on the social processes which were instrumental to this deterioration.

Partition and the transfer of population which followed it, have resulted in the general lowering of economic and social status of Indian Muslim community. The communal holocausts in the intervening years and the communalisation of political processes in the country have kept ablaze the insecurities experienced by Muslims at the time of Partition. This insecurity has resulted in a narrowing down the visions and aspirations of the community in the post-independent period. In this mileu the rights of women are deliberately allowed to corrode. While the community leadership has been vigilant in opposing state interventions in the realm of personal laws for fear of subversion of its identity, the subversion of women's rights through the process of Hinduisation seems to have caused no concern for the leadership. The insidious co-relationship between dowry and mehr is a case in point.

Another example of this trend is a recent judgment by Justice Tilhari which invalidated the practice of triple talaq. The community leadership opposed the judgment as intervention into the personal laws of the community. But the basic issue which the judgment was meant to address was of land rights. Under state enactments, the woman's individual property was deemed as the property of the husband as head of household. This principle is un-Islamic, but this violation of the Islamic principle seems to have caused no concern for the Muslim leadership.[16]

The neglect of women's concerns can also be ascertained through the events following the controversial judgment in the Shahbano case. The adverse remarks of the judiciary regarding Islam and the Prophet aroused the wrath of the Muslim leadership which led to enactment of the Married Women's (Protection of Rights upon Divorce) Act, 1986, which the religious and politcal leaders felt would be more in keeping with the Islamic precepts. The preamble of the act emphasises this.

The act disentitled divorced Muslim women from claiming maintenance under a secular provision of the Criminal Procedure Code (Cr PC). But instead of a monthly maintenance dole of Rs 500 (provided by section 125 Cr PC), the act granted Muslim women the right to a fair and reasonable provision and maintenance, which the Muslim leadership felt were more in keeping with the Quranic principles.

While the act met with a lot of criticism from progressive and women's rights forums, several courts interpreted the provision in women's favour by granting them lump sum settlements. In one of the earliest cases after the statute came into effect, the judicial magistrate at Lucknow's Diwani Kacheri awarded the divorced Muslim wife a sum of Rs 85,000 as fair and reasonable settlement.[17]

The Gujarat high court[18] while interpreting the clause, reasonable and fair provision and maintenance to be made and paid to her, held that the word 'provision' indicates that something is provided in advance for meeting future needs. At the time of divorce the

Muslim husband is required to visualise or contemplate the extent of the future requirements and make preparatory arrangements in advance for meeting the same. This interpretation seems to be in confirmation with the cases discussed above. The Kerala high court reiterated this view and held that even a millionaire wife who lives in luxury and affluence is entitled to claim under the act and the requirement of 'not being able to maintain herself' is no longer applicable to Muslim women under the act.[19]

It is in this context that the commitment of the Muslim leadership towards its women becomes questionable. Instead of welcoming the pro-women judgments as concurring with the Islamic principle of providing future security to women, the Muslim Personal Law Board filed appeals to the supreme court challenging the Constitutional validity of these judgments. In 1992, Syed Shahabuddin introduced a private members bill in the Lok Sabha to plug the loopholes through which the courts granted women lump sum settlements.[20]

But confronted with the aggressive Hindu communal propaganda in the post-Ayodhya phase and its demand for a uniform civil code, the Muslim leadership is today compelled to focus attention to the problems faced by women. It is evident that in the name of protecting its cultural identity, if it pursues its ostrich like attitude of negating women's rights, it will lose the support of secular and human rights forums, who had stood by the community in its hour of tribulation following the demolition of Babri Masjid. This political reality has led to some stirrings within the Muslim leadership.

At the biannual meeting of the All India Muslim Personal Law Board held in Ahmedabad in October, 1995, a group of Muslim women were invited to present their views. This group has been working on a format of standard *nikahnama* which could adequately protect women's rights within the Islamic framework. Some of the suggestions formulated by this group are: – mehr should be stipulated in gold, silver or other valuables so that over the years its value is not depreciated; the *nikahnama* should provide the woman the right of *khoola* and *talaq-e-tawfeez*; a man should bind himself to divorce through an arbitration forum, the husband should not contract bigamous marriage without the consent of the first wife and in the event that he does, the wife can pronounce *khoola* and release herself of the marriage bond and claim her mehr dues. There is also a suggestion that in the event of arbitrary oral talaq, the man should be compelled to pay penalty mehr, double or triple the stipulated sum. All the suggestions are within the Islamic precepts and subscribe to the theory of 'reform from within' rather than a uniform civil code.

Although these suggestions have not yet been accepted, the Fiqah Academy which is the apex body of Muslim jurisprudence in India, in its recently concluded international conference has addressed this issue. Maulana Mujahidul Islam Qasmi, a leading Muslim theologian, made a plea for structural reforms which would reflect the social realities of Muslim women in India.[21]

While this is one area of law reform, another area which the women's organisations are pursuing is small specific legislations which would not arouse the controversy of the uniform code and at the same time protect women's rights. Bills like Domestic Violence Act and the Right to Matrimonial Home and Property are already on the anvil. The specific statutes are meant to fill the lacunae within the existing Indian matrimonial laws. The bills have been debated in public forums and in the Parliament. It will indeed be tragic and ironic if in today's vitiated atmosphere, the Muslim leadership pleads for exemption from their application on the pretext of state intervention, when in fact the statutes would be giving legal effect to Islamic principles of woman's security, in a similar manner the principle of marriage as a dissoluble contract was extended to other jurisprudence in the last century.

Predicaments of Women and Manipulations by Husbands

While not denying that the provisions of shariat are patriarchal and reflect a male bias particularly in the realm of penal law and succession rights, at least in its origin, the law of marriage was tilted in women's favour, by securing their economic rights. Hence, Islamic principles could be effectively applied to safeguard the women from their husband's manipulations to deprive them of these rights. The following three cases are discussed to draw a parallel between the predicaments of women of the last century and the women of today.

In the first case, *Moonshee Buzul-ul-Raheem v Luteefutoon-Nissa*[22] Rs 10,000 and Rs 1,000 gold *mohurs* were settled as *dyn-mohur* (mehr) in 1842. In 1847 the husband remarried. The second wife laid down a condition that the husband should divorce the first wife. But if he divorced her he could be compelled to pay the mehr dues. So he treated her with cruelty and denied her food and clothing in order to induce her to ask for divorce, *khoola*, in which case she would be compelled to forfeit her right to dower.

The mehr deed was in the possession of her mother and the wife informed her of ill treatment and requested the mother to hand over the deed to her husband. The mother filed several complaints against the ill treatment of her daughter in the *Fauzdari* court and finally obtained permission to visit the daughter. At this meeting the husband informed the wife's mother: "I have divorced her. You give up the paper and take away your daughter". But the mother refused to give up the settlement deed. But in 1850 since the daughter's condition was becoming unbearable, upon her desperate plea, the mother sent over the document and the wife handed it over to her husband. Thereafter, the husband forced the wife to sign a *Khoolanama* relinquishing the mehr dues.

Subsequently the wife filed a suit for the recovery of her mehr dues valued at Rs 26,000 (the 1,000 gold *mohurs* valued at Rs 16,000) in the district court. The case was submitted to the 'moulvie' for his 'Futwa' who proclaimed that as per the Mohammedan law, a *Khoolanama* cannot be proved without the wife's admission. But since the husband has the power to give *talaq* the divorce cannot be disputed. Hence the husband is liable to pay the whole *dynmohur*, and *iddit* allowance. In an appeal filed by the husband, the 'Sadar Dewanny Adawlut' upheld the trial court's decision.

The husband filed an appeal the privy council which confirmed the lower court order on the following ground: "Muslim law recognises two forms of divorce, *talaq* and *khoola*. *Talaq* is the arbitrary act of the husband, who may repudiate his wife at his own pleasure, with or without cause. But if he adopts that course he is liable to repay her dower. A divorce by *khoola* is a divorce with the consent and at the instance of the wife. In such a case the terms of settlement are a matter of arrangement between the spouses and the wife may, as a consideration, relinquish her mehr and other rights. But since the wife has not admitted to the *khoola*, it does not constitute a divorce. The divorce was effected through the husband's repudiation of the wife. Hence he was bound to pay his mehr dues".

In the second case a Muslim widow with five children, *Shamsoonnisa Begam*,[23] inherited a large share of her father's property in November, 1847. A few months prior to this, in May 1847 she married Moonshee Buzloor Ruheem. Due to ill treatment, in December, 1855 she left her husband. But the husband retained the government securities which she had inherited from her father. So in April, 1856 she filed for recovery of her property. In retaliation, the husband filed for restitution of conjugal rights.

The husband's suit for restitution was dismissed by the trial court and the high court. The wife obtained a decree in her favour regarding the property detained by her husband valued at Rs 2,34,800. The

husband appealed against both the orders to the privy council.

During litigation, the husband claimed that he had purchased the securities from the wife and she had spent the amount for the marriages of her children from previous marriage. But the husband was already in debt and a decree was passed against him for a sum of Rs 2,48,000. The documents concerning the securities were traced in the hands of the husband's creditors.

The privy council while upholding the wife's claim of property held as follows: "The wife came to her husband's house as a wealthy woman and left as a destitute. As a Muslim woman of rank, she was in Zenanah and had passed the securities to her husband who was supposed to have managed them for her for the purpose of collecting interest. Instead he had transferred them to his creditors. Her communication to the outside world was from behind the Purdah. Due to her state of seclusion (i e, *Purdah-nusheen*) her husband, who managed her affairs for her, was in a position to use undue influence on her".

Regarding the right of Muslim women upon marriage the privy council commented: "Distinction must be drawn between the rights of a Mahmmodan and a Hindu woman and in all that concerns her power over her property, the former is, by law, far more independent, in fact even more independent than an English woman. There is no doubt that a Mussulman woman when married retains her dominion over her own property and is free from the control of her husband in its disposition. The Mohammedan law is more favourable than the Hindu law to women and their rights and does not insist on their dependence upon and subject to the stronger sex".

The third case concerns a marriage agreement. At the time of the marriage *Poonoo Bibi*'s[24] husband entered into the following agreement with his wife: "That I shall never give you trouble in feeding and clothing you; that I shall make over to you and nobody else besides you whatever I shall draw from employment; that I shall never exercise any violence on you; that I shall not take you anywhere else away from your home; I shall not marry or make nikah without your permission; that I shall do nothing without your permission; and if I do anything without your permission you will be at liberty to divorce me and realise from me the amount of dynmohur forthwith and this nikah will then be null and void".

After desertion, the wife filed for the enforcement of the agreement regarding the husband's savings. The husband was employed in a clerical post and was drawing a salary of Rs 40 and had savings of around Rs 568. The husband's advocate argued that the agreement is against public policy as it amounts to reducing the husband to a slave. During litigation a compromise was arrived at and the wife agreed to a monthly maintenance of Rs 10. Although, the court commented, "Some part of the agreement may be void", it did not strike down the agreement as invalid or against public policy.

The law of marriage is not a law concerning sexuality or morality. The law of marriage in its essence, like all civil laws, is a law regulating economic transactions, and more specifically, women's access to and control over it. The Islamic provisions of mehr and marriage agreements, and right of property management have stood Muslim women in good stead during litigation in the last century. Hence, the decline from *Luteefutoon-Nissa* and *Shamsoonnisa Begam* in 1860 to *Shahbano Begam* in 1985, is not a reflection of the Islamic law of marriage, but a sad comment on the politicisation of women's rights within a communally vitiated and patriarchally tilted social structure.

Notes

1 *Khurshid Bibi v Mohammad Amin* PLD 1967 SC 97.
2 See *Dr Qamar Murtaza Bokhari v Mst Zainab Bashir* PLD 1995 Lah 187 and *Shah Begam v District Judge, Sialkot and Ors* PLD 1995 Lah 19.
3 *Badarannissa Bibi v Mafiattala* (1871) 7 BLR 442.
4 (1910) 37 IA 152.
5 *Muhammad Muin-ud-din v Jamal Fatima* AIR 1921 All 152.
6 *Muhammad Ali v Mst Fatima* (1929) ILR 11 Lah 85.
7 *Kutchi Memon's Case* Perry's Oriental Cases 110-129 (cited by A A A Fyzee (1965) in *Cases of Muhammadan Law of India and Pakistan*, Oxford University Press, London, pg xxix.
8 (1905) 7 Bom LR 602.
9 *Bai Fatima v Ali Mahomed Aiyab* (1913) ILR 37 Bom 280.
10 AIR 1928 Oudh 303.
11 *Sungra Bibi v Masuma Bibi* (1878-80) 2 All 573 (FB).
12 *Kamar-un-nissa Bibi v Hussaini Bibi* (1881) 3 All 266 (PC).
13 *Sultan Begam v Sarajuddin* AIR 1936 Lah 183.
14 *Ameer-un-nissa v Muradunnisa* (1855) 6 MIA 211.
15 See Newsletter of Women's Research and Action Group, Bombay Vol I/2 September, 1994, Vol II/1 February, 1995, Vol II/2 and 3 August 1995 and Vol II/4 October, 1995.
16 Flavia Agnes: *Triple Talaq Judgment - Do Women really Benefit? Economic and Political Weekly*, 29-20 May 14, 1994, p 1169.
17 Flavia Agnes: State, Gender and the Rhetoric of Law Reform, SNDT Univeristy, Bombay, 1995 p 240.
18 *A A Abdulla v A B Mohmuna Saiyedbhai*, AIR 1988 Guj 141.
19 *Ahmed v Aysha* II (1990) DMC 110 Ker.
20 Bill No 155 of 1992.
21 Islamic Conference Proposes Amendments on Marriage Laws, *The Times of India*, (Bombay edition), October 27, 1995.
22 (1861) 8 MIA 379.
23 *Moonshee Buzloor Ruheem v Shamsoonnisa Begum* (1867) 11 MIA 551.
24 *Poonoo Bibi v Puex Puksh* (1875) 15 BLR App 5.