# TO BELLOW LIKE A COW

## Women, Ethnicity and the Discourse of Rights

**Part II**

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### Whose Equality?

Before we move onto a discussion of the law as a strategy for the attainment of women's rights through human rights, perhaps it is important to consider for a moment the discourse of equality. Often at the same conference, the word equality is used with diametrically opposite constructions placed upon it. Even international documents vary. For CEDAW, equality is non-discrimination, i.e. a constant measure of men against women. In other contexts, equality is non-discrimination, i.e. a constant measure of men against women. In other contexts, equality is access to empowerment as individuals, not as a measurement of the final end which men vs women actually reach. In some cultures, equality retains notions of separate spheres, the public and private separate but equal doctrine prevails, justified by the uniqueness of the maternal function.

In socialist societies, equality carries with it the responsibility for the State to socialise maternity and maternal functions so as to allow the woman to work and fulfill her public life. To many others equality is an ideological disposition, rooted in attitudes and psychological make-up which can only be removed through strategies drawn from psychology and post-structuralism. For many others equality of women is completely dependent on their class, caste or ethnic group—if these attain equality then women in those groups will also achieve equality. For feminists, of course, equality is the other side of patriarchy, since every aspect of life seems to be infected by the gender bias and classification, equality will only be achieved if it is linked to social transformation of a very radical sort.

Given these diverse conceptions of equality, the law in many of these societies as well as at the international level has taken the easy way out. It is only in areas where discriminination can be factually ascertained through empirical data and actual case studies, is that law is relevant to the question of female equality. It is therefore not unusual that non-discrimination remains the model legislation in all parts of the world when it comes to the equality of women. Women's rights couched in this limited human rights discourse is also confined to conceptions of equality which are linked to the structure of the law and its relationship with the state in any particular society. In addition, in our part of the world, there is very little autonomy that law enjoys vis a vis the state and politics. Human Rights is then confined to this post-colonial sector of law, legislation, the state, the bureaucracy, and political party mobilisation. This is the clue to its success as well as its future.

### Opportunities and Innovations

This is not to say that interesting innovations cannot take place which take women's rights beyond non-discrimination in certain constitutional contexts. Since the Indian constitution recognises the right to life and dignity, in a series of cases the Indian courts dealt with the situations which were clearly not issues of measuring men against women but rooted in life and dignity—The Agra Remand case where women in remand were living in such dismal circumstances was one such case and there have been others dealing with women under trial, prisoners, women construction workers etc ... In this context, the principles contained in the Indian constitution permitted a move away from simple non-discrimination—or the redistribution of poverty as it is sometimes called in third world societies, to a more empowering stance focusing on the clauses relating to human dignity. Unfortunately many countries do not have these provisions or judges willing to interpret it in a holistic light.

### Barriers: Family and Personal Law

This paper is not about opportunities but about barriers. The issues of women, ethnicity and rights discourse eventually come to a head in the area of family law or personal law, and other forms of economic labour legislation have a certain similar standard, modelled on ILO recommendations and directing themselves to the urban labour force. In this context the vast amount of women (87% of the Sri Lankan woman worker)[10] work in the agricultural sector and are protected by the law. The barriers relating to their rights are in the urban labour bias of labour legislation. The criminal law is of course the security safety net of any society and though there

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are many issues to raise with regard to women and violence—issues that are not raised in CEDAW, the provisions are generally similar and have a certain uniform structure.

The family law, however, is where completely different and plural standards and constructions exist of how we must conduct our personal and social life. It is infact the litmus test in any given society with regard to legal norms and the status of women. It is also where the law, ethnicity and ideology with regard to the rights of women merge to become a powerful ideological force. Before we come to any conclusions with regard to the barriers that exist with regard to women in this area, let us look at these four case studies.

## Roop

On September 4th 1987, in Deorala, Rajasthan, Roop Kanwar, the widow, was burnt alive on her husband's funeral pyre. She was a university student eighteen years old and her husband was an unemployed university graduate who died of a terminal illness. Her shrine became a place of pilgrimage and many believed that she was a Goddess and that offerings to her shrine would cure them of cancer, the illness that took the life of her husband. There are conflicting versions of her state of mind. Some commentators have argued that she was willing to die, others that she was coerced, and the third that she was unsure but in the end succumbed to family pressure.[11]

The newspapers carrying the story a week later stirred a huge controversy. Urban centered women groups as well as groups of women from all over India were horrified and organised a march in Rajasthan. The Rajasthanis retaliated and filled the streets with thousands of their own ethnic group—the right to commit Sati they claimed was part of their ethnic culture. After months of waiting the police finally arrested Roop Kanwar's father-in-law and five other members of the family for abetment to suicide. Three months later, the Indian parliament passed a tough law banning Sati, even though an old law already existed, as a sign of central government intolerance of these ethnic practices which Rajiv Gandhi pronounced as "utterly reprehensible and barbaric".

Though the feminist movement had scored some type of legal victory, the case pointed to the terrible gulf between human rights and women rights activists, on the one hand and those who see the status of women as an integral part of their ethnic identity. A leading Hindi journal pointed an accusing finger at secular, western educated intellectuals arguing that only godless people who did not believe in reincarnation would denigrate Roop's brave act.[12]

The debate over Sati and Roop raged for weeks in the newspapers. There were those who argued that if it was voluntary it was alright, suicide is a time honoured Rajasthani practice and should be accepted. It was cultural discrimination to prevent Sati for those who really wished to commit Sati. There were others, such as Nandy, who argued that Sati was a terrible affair but it is no business of the state, the onus must lie with the people and communities of Rajasthan, they might be the ones to outlaw the practice and not the central government. There were women's groups that felt that Sati was so offensive like in the case of Indian penal provisions on custodial rape; if a woman dies of burns in a public place, the burden of proof should shift to the family to prove that the incident of Sati did not take place. Human rights activists, called for the imposition of the death penalty on those who aid and abet Sati. The international struggle against the death penalty was forgotten in the heat of the moment.

Roop Kanwar's case sent the human rights community of India into deep crisis. Firstly, Rajput defiance and Hindi language newspapers pointed to how human rights consciousness was not a given norm and was increasingly being allocated to the "urban, western intelligentsia". This marginalisation is purposeful but given the fact that many of the leading activists are Delhi based, it carries a measure of credibility and the counter belief that these human rights people are out to denigrate national culture. Spectators in Rajasthan during those days, saw the people as joyous, celebrating a great event and a courageous act—they did not see anything wrong. This realisation alone was terrifying to most feminists working in the twentieth century. Ironically, the State came down strongly on the side of the women activists and yet there was a sense that the battle was lost and there were echoes of Nandy's initial analysis. What is the point of all these laws if the people do not believe that putting an eighteen-year-old on a funeral pyre and denying her life is not a violation of the most basic fundamental right- the right to life? What is the point of all the Constitutional protection if "ethnic identity" is an acceptable justification for reducing the status of women according to diverse cultural practice? As one activist said in conversation, "something died in the Indian women's movement with Roop Kanwar, the innocence of believing that what shocks your conscience will also shock the world."[13]

## Safia

The second case in point is the celebrated Pakistani case of Safia Bibi. Safia Bibi was a blind girl who alleged that she was raped. She was still a minor so her father filed a complaint of rape two days before she delivered the child, supposedly born of this union. Her parents claimed that Safia had told them of the rape

incident but they did not want to disclose it for fear and humiliation. The alleged rapist retorted that the blind girl was of loose virtue.

Under the newly promulgated Hudood Ordinance, under the Offenses of Zina Ordinance,[14] Safia and victims of rape faced a major dilemma. If Safia alleged rape and failed to prove it, (as rape conviction requires four non-female witnesses), then she could be sent to jail for "adultery" if she was married, and "fornication" if she was unmarried. This is precisely what happened. The Sessions Court convicted her for Zina and sentenced the blind girl to three years rigorous imprisonment. There was a national and international outcry and the Federal Shariat Court set aside the judgement on technical grounds. However, the alleged rapist did not spend a day in court because of insufficient evidence.

Safia Bibi's case was another crisis for the women's movement in South Asia. It is without doubt the mobilisation of women's groups in Pakistan along with their international network which brought enough pressure to bear on the judges in the revision of the judgement. Safia Bibi raises a whole different set of issues than Roop Kanwar. In the former case, practices in civil society which were against women suddenly re-emerged in the context of new power and class struggles. In the case of Safia Bibi, civil society had become accustomed to certain colonial norms with regard to criminal and civil procedure. The state in its infinite wisdom and under martial law introduced laws which had not been in operation in Pakistan for centuries based on its own interpretation of the Koran. This act of State took place after Pakistan had joined the United Nations and was thereby bound by the Universal declaration of Human rights. The spirit of the Hudood Ordinance in the section on Zina and even with regard to criminal procedure in certain types of moral offenses were clearly contrary to the Universal Declaration. In this case, the state flouted international norms so as to articulate religious fundamentalist ideals even when there was no pressure from below for its promulgation. This manipulative use of religion and religious codes to defy international norms is a new manifestation of the post-colonial nation-state—a trend that may increase in the near future. The only option against this type of activity cannot be the legal system which has become perverted by political will. It has to come from political mobilisation within and international support from without. The Safia Bibi case is an indication that such international efforts may succeed in some instances.

## No Fault Divorce

Last year a Committee, set up to look into reform with regard to the divorce laws of Sri Lanka, came up with the following recommendations:

i. The establishment of family courts.

ii. non-adversarial approach to marriage break-up by adopting the theory of marital breakdown.

iii. a move away from fault based divorce to consensual divorce after two years judicial separation and/or five years separation being evidence of marital breakdown.

iv. introducing standards with regard to the best interest of the child as the grounds for custody rather than the concept of a natural guardian—in Sri Lanka under Roman Dutch inheritance such a guardian is the father.

The Committee's recommendations were far-reaching in terms of Sri Lankan law which was still fault based and adversarial with concepts of natural guardian but the recommendations were well within the trend of divorce reforms sweeping most of the legal world—except in Islamic countries. The reaction to the reforms was vociferously negative even from an organisation such as the Sri Lanka Women Lawyer's Association. They argued vehemently for maintaining the old system with a few minor changes—their argument being that the present divorce reforms as suggested by the Committee threatened the family unit and therefore went against the interests of women.

The consensus was so openly against the proposed law reforms that they were not adopted. The main furor against the reforms was that no-fault divorce went against the interest of the family and especially the wife. Women were in the forefront in challenging the Committee which compromised of leading women academics and professionals.

This crisis among women and their perceptions about family and divorce raises some extremely interesting questions. CEDAW to which Sri Lanka is a signatory clearly privileges and independent free woman, but in the case of Sri Lanka the ideology of the family remains supreme. It is the belief that the protection of woman lies in the protection of the family. Ironically, however, the data shows an increasing number of female headed households and female as the primary earner, whether in plantations, the free trade zone or as migrant workers. This gap between myth and reality is the ideological construction—the barrier toward formulating laws which will protect women and children at the margins which are increasingly becoming the mainstream.

While the Indian and Pakistani cases show us the dilemma of the tension between civil society and the law, in this case all the struggle has been within the framework of the law—the preference for standards which were set in the late nineteenth century over modern day formulations. These divorce laws of course do not affect the personal laws of the minorities but only of the general population. Rights discourse with its notion of the

empowered individual comes up against communitarian notions of the family-an ideological force far stronger than rights discourse and perhaps the most formidable obstacle women's rights activists face. In fact it is only recently that Sri Lankan scholars could even talk about domestic violence without being considered family wreckers. So, even in a context, where colonial legal norms prevail and have been indigenised, where rights discourse would be the natural outgrowth of these systems, the ideological barrier of the sanctity of the family unit will not allow for reforms in these areas even if, in the long run, they would empower women and give them an equal stake as individuals.

## Shah Bano

The final case study is the celebrated Indian case of Shah Bano. In 1975, Shahbanu's husband made her leave his home after over forty years of marriage. Initially he paid her a small maintenance but then stopped. In 1978, Shahbano filed under section 125 of the Criminal Procedure Code — a prevention of destitution provision, for maintenance of Rs. 500 a month from her husband who was a lawyer with a five figure income. While the application was pending her husband pronounced Talak on her and divorced her, gave back the mehr, or the money she brought as dowry, Rs. 3,000 and then refused to pay maintenance. The magistrate under the criminal code ordered him to pay Rs. 25. The High Court raised it to Rs. 179. Her husband appealed to the Supreme Court. His argument was simple, saying he was Muslim, that his marriage is governed by the Muslim Personal Law and under that law there is no duty of maintenance, only the duty of returning the mehr, and that the personal law is superior to the Criminal Procedure Code in this respect.

Ten years from the year the case began, the Supreme Court dismissed the husband's appeal saying that the provision against destitution is not in conflict with Muslim rules of maintenance. If the wife cannot maintain herself within the three month period of IDDAT —i.e. initial separation before divorce, then she has recourse to the criminal procedure.

The case was the most controversial one of the decade and points to the enormous problems and dilemmas that South Asian nations face when they promote women's rights as human rights. In this case it would be Article 16 of CEDAW which would be relevant, the article on which India made reservations and therefore is not internationally bound.

The forces lining up with regard to this confrontation were

i. For Shahban—Women's groups, Hindu fundamentalists who wish to get India rid of Muslim law in their country and a very few moderate Muslims.

ii. Against Shah Bano—the Muslim community and in the end The Indian State when Rajiv Gandhi moved to appease the minority community be passing legislation to override the Supreme Court judgement. Today destitute Muslim women do not have the right to go to court under the penal law.

The problem of Shah Bano was compounded by the fact that she was a minority woman in a country with a hostile majority, where communal prejudices run deep, are volatile and explosive. Her community considered her a traitor. She was also in a country which like most others in South Asia, accepted a formal framework of law which stated in effect, "all men are equal, but women are bound by the position relegated to them by the different systems of personal law, laws which govern the most important area of their lives, the family." In 1984, Rajiv Gandhi made it clear that personal law was superior to any provision in the Criminal Code — it is privileged over all other legal provisions which may have some bearing on the provisions of personal law.

In Shah Bano's case the state stepped in to protect the rights of the minority community at the expense of women; a state, which in other contexts, may not think it wrong to fan the flames of communalism when it comes to other issues, especially in Kashmir. So as Hensman puts it, the triple oppression of Shah Bano is clearly demonstrated — she suffers as a woman, she suffers as a muslim woman who wants to assert a different voice to her community. She is indeed the subaltern voice which had suddenly found itself in a court of law.

Initially, Shah Bano received a great deal of support, least of which was from the Supreme Court of the land.

However, some of the Court's interpretation of the Koran angered many Muslims as wrong and insensitive. The support she got from Hindu fundamentalists was also a terrifying fact. The leader of one of the Hindu movements said in anger, "One country must have one law" meaning 'laws acceptable to the majority Hindus.'

Women's groups supported Shah Bano vociferously but their discourse of rights and equality was drowned by the voices of communalism on both sides. They were trapped in between and especially when riots ensued their voice was naturally weakened. When a delegation went to see the Prime Minister at that time, Mr. Rajiv Gandhi, he sympathised but added, "how many women can you get on the streets to defend the Supreme Court judgement and stop the rioting?" It was in the end a question of numbers, violence, fear and terror — the very factors which are least conducive to a rights regime. In the end Shah Bano had no rights, she became a metaphor in the

political discourse of communalism which has shaped the violent history of post-colonial South Asia.

Shah Bano's case and the ones before it point to many problems which relate to barriers for implementing women's rights in the South Asian region:

i. Rights discourse is a weak discourse, secondary to other legal discourses, especially when it comes to women and family relations.

ii. The value of rights discourse as it relates to women are not part of the popular consciousness and in fact in some contexts, the reverse may persist in practices of civil society.

iii. The post-colonial South Asian has played a very arbitrary and adhoc role depending on its composition and priorities, siding with different parties, different discourses, depending on the political exigencies and the numbers game. While it may intervene to stop Sati, it will refrain to give a muslim woman maintenance. While it encourages modern commerce, usury and banking, it will bring in laws which impose extreme penalties with regard to issues of rape, adultery and fornication. It has mastered the art of cultivated hypocrisy with regard to women.

In the late nineteenth century a renowned North Indian male poet charged a female poetess of bellowing like a cow, denying decorum and invading male public space. Ironically, with regard to the law at least, the public spaces, often governed by recent thinking in the law, grants equal access to women in most South Asian societies. In Sri Lanka, the most progressive in these aspects, women are 50% of the medical faculty, 50% of the law faculty, more than 50% of the arts faculty etc... and they are increasingly joining the labour force. Laws are also being drafted to assist women in the rural areas who for centuries have worked in the field without protection.

But it is the private sphere, a distinction which came to us with a colonial inheritance of personal laws, that is most impervious to change with regard to women's rights. Here women are divided by community and among themselves about whether a rights discourse is relevant or necessary. Unless we begin to examine law's approach to the family and to private space in greater detail and understand the dynamics more fully with regard to ideological constructions which resist legal change, we will not be able to bring rights home to the family. The task is daunting but necessary. Without equity in the family, it is argued, there will not be equity in society. Without mutual respect in the family, we can be sure that there will be no respect for the rights of others in society. Without mutual respect in the family, we can be sure that there will be no respect for the rights of others in society. As has been often repeated, the family should not be defined in a formalistic, nuclear construction as a husband, wife and children. The family is the place where individuals learn to care, and nurture each other. The law should protect and privilege that kind of family and not any other.

**Notes:**

10. Sri Lanka Department of Labour, *Employment Survey*, 1981
11. See for journalistic account including firsthand scene of the crowds, Bumiller, p.62
12. Bumiller p.72
13. Kamala Bhasin in conversation, August 1990
14. The Hudood Laws, promulgated in 1979 and enforced in 1980 see also A. Jahangir, and H Jilani, *The Hudood Ordinances: A Divine Sanction?*

# COMMUNICATION

## On TULF After '83

I refer to a passage on page 8 of your issue of May/June 1993, wherein Mr. N. Shanmugaratnam writes that "the Government amended the Constitution to ban the demand for a separate Tamil State and unseat the TULF MPSs from Parliament".

I do not know whether this is a correct statement of facts. I do not think the Sixth Amendment unseated the TULF MPs from Parliament. The Sixth Amendment was passed sometime towards the middle of August 1993. But on the 23rd of July 1983 at their Mannar Convention the TULF decided not to go to Parliament after the 22nd of July 1983. This was consistent with their position at the 1982 December Referendum where they took a stand to oppose the extension of Parliament.

The Sixth Amendment was conceived much after this momentous decision of the TULF. So how can it be said that the Sixth Amendment unseated the TULF MPs from Parliament?

We Tamils have a natural propensity to distort facts. I have come across many such instances coming down for the last fifty years. My Party has also been a victim of such false propaganda.

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