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The Acts and Facts of Women's Autonomy in India

Paula Banerjee

Any discussion of women's autonomy in India has to begin with the 19th century because it was at this time, by a conjuncture of events, that questions of women's rights assumed centre stage in debates on social reforms both in England and India. Although it was recognized by social reformers that something needed to be done to improve the condition of women in India, their actions were often not driven by any notion of gender justice or equality. That story has been much repeated, but what needs to be remembered is that these debates led to changes in the situation of women both in England and in India. More importantly, however, these debates led to the specific social construction of 'woman' as more a member of a community than an individual. This ensured that questions of women's autonomy were to be historically subsumed within religious and personal law, and were hardly ever treated as a matter of either individual right or justice. Even to this day women's autonomy remains hostage to personal and customary law.

This paper addresses questions of women's autonomy in India and analyse its location within the legal discourse. The women's movement has primarily tried to analyse questions of women's autonomy through exploring women's position in law. Women's position in society is often analysed through marriage, divorce and property acts, among other indicators. This paper analyses the evolution of these acts and critiques whether that has led to women's autonomy or whether it has merely subsumed questions of autonomy resulting in further marginalization of women in the polity. The paper begins with the assumption that locations matter and that laws affect different women differently, particularly in the context of India where civil law is constantly pitted against personal and customary law. Therefore, to understand the situation of women in India an understanding of the evolution of laws seems necessary, because laws are considered as primary markers of autonomy.

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I

Discourses on women's autonomy have usually been associated with other discourses, such as that on rights and representations, because Indian society even until the recent past did not treat women as autonomous subjects. Therefore, legal provisions on women's rights and representations are some of the markers that help us to understand women's position in Indian society. The official discourse on Indian women in the post-colonial period is often shaped by the colonial discourse on Indian women, and 'the way it entered into the nationalist discourse in the pre-independence period'.[1] To understand the colonial discourse we need to analyse some of the 'pro-women' enactment undertaken in the 19th century by social reformers, who were largely men. In the 19th century gender was far from marginal to the new world and was constantly being rearticulated through social reforms, beginning with abolition of Sati in 1829 and not running its course until the *Age of Consent Bill* in 1892.

Though it all started with the 1829 abolition of Sati, that event affected only Hindu women. Around the same time a division emerged between public and personal law. It was said that 'public law was designed to encourage and safeguard the freedom of the individual in the marketplace, and was established by statutes; personal law was intended to *limit* the extent of freedom'.[2] Where women's issues were concerned even Statutory Acts were considered to be part of the personal realm. This is clearly revealed by the passage of the *Indian Marriages Act*. In 1864 the Act was enacted but it scrupulously avoided any modification of the Hindu and Muslim personal laws, thereby creating procedures only for Christian marriages. Other acts, such as the *Hindu Widows Remarriage Act* and the *Age of Consent Act*, did affect notions of marriage, at least among the Hindus, but it made no effort to put issues of marriage within the realm of the civil. The *Indian Succession Act* of 1865 was one of the first efforts to systematize civil law in India. It declared that no person 'shall by marriage acquire any interest in the property of the person that he or she marries', thereby challenging the husband's rights over a wife's property, but not stipulating any maintenance for the wives, which would later lead to destitution for many women. Even this act was not applicable to the Hindus, the Muslims or even the Parsis, who had separate legislation for their own community.

In the 1850s the first divorce acts came into legal usage in England. Although the 1857 bill was introduced because of pressure from women's groups, it treated men and women differently; women could obtain a divorce only on grounds of aggravated adultery, while men needed to prove just simple adultery. The first *Indian Divorce Act* came into effect in 1869. The underlying reason for the enactment of this act was not to ensure equality of the sexes, but to make provisions so that marriages legalized in England could be dissolved in India if needed. It must be said that notions of equality of the sexes had already appeared in political and legal discourses of the time. For example, Sir Henry Maine, one of the chief architects of these acts, was said to have commented sarcastically on the Parsis' partial civil code that allowed their daughters to inherit only one-fourth of what they allowed their sons to inherit. However, no effort was made to translate these sentiments into legal provisions for any communities in India. Even the *Age of Consent Bill* that raised the

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marriage age for women from 10 to 12 was severely criticized by Hindu leaders who considered it a severe encroachment into their 'personal' domain, thereby relegating questions of women's autonomy to the domain of the personal that later came to be defined as group rights.

Debates in the *Legislative Assembly* during the first half of the 20th century were also concerned with discussions over the position of women. Both during the 1920s and 1930s there were heated assembly debates concerning the situation of Hindu women. In 1939 two crucial bills in this regard were introduced. One of these was the *Hindu Women's Right to Divorce Bill* and the other was the resolution to set up a committee to investigate the position of women under existing laws. Discussions over both these resolutions portrayed how questions of women's autonomy were addressed. G. V. Deshmukh, who introduced both resolutions, was often at pains to explain that he had consulted the orthodox religious opinion. No one challenged the concept that for any legislation on women's position in society, the orthodox religious opinion needed to be not just addressed but consulted as well. Others belonging to orthodox opinion, such as M. Ananthasayanam Ayyangar, were totally against encouraging change in the lives of women. He opposed wives receiving maintenance in the case of divorce because that meant they would be provided for even when they lived away from their husbands. In fact, he said that if wives lived away from their husbands even when their husbands meted out 'ill-treatment' he saw no reason for their being allowed to claim maintenance. He loudly complained that:

> So far as the wife is concerned, when does her right of maintenance accrue? It is only when she wants to live away from her husband that the question of maintenance comes in. Is there any Member of this House including the Leader of the House who is unconditionally prepared to allow any woman to live separately from her husband even though there may have been ill-treatment? . . . Therefore, all this is moonshine and let no ladies be tempted by it.[3]

There were even some members of the Congress party, such as Bhulabhai Desai, who showed concern that if the position of women changed to any great extent it would result in the same chaos among the Parsi community: 'recently, my friends, the Parsis have gone just as far as they could and some 300-odd Parsi ladies, who were waiting for it, got themselves divorced as soon as the Bill was passed'.[4] Most of the members were against any large-scale changes that might have substantive effects on the lives of women as individuals. Herein was the crux of the problem. Women were to be treated as part of their family or community, but not as individuals. Hence the *Hindu Women's Right to Property Act* of 1937 recognized the right of the widow, but not of the daughter, because a daughter's community remained undecided as women largely belonged to the community they married into. Even this concession was considered extremely radical.

Therefore, debates over the resolution for the appointment of a commission that was meant to investigate the position of women soon changed the terms of reference and became a debate on the formation of a commission that would investigate only the legal position of women. Also, it was only Hindu women who were to be the focus of their investigation. These debates portrayed any change in the situation of

women as becoming possible only through legal means. That there could be other ways of addressing questions of women's position in society was never even considered. Further, such changes were never considered relevant to women's rights. Finally, the right to discuss changes in women's position hardly ever included women's own voices; it was, however, considered to be a matter for community leaders to debate. Thus women's autonomy was hardly ever discussed in the official discourse, but was subsumed within questions of legal change. Such changes were to be contemplated only after the sanctity of marriage, integrity of religion and what was perceived of as the stability of society were supposedly left intact.

II

The *Constituent Assembly Debates* addressed women's autonomy by taking up questions regarding women's rights. Even while the Constitution was being formulated women's questions were being subsumed within the group question. Women's issues were never seen independently of issues of the community. The *Hindu Code Bill* envisaged major changes in the situation of Hindu women. When the bill was introduced in the Constituent Assembly it was done so ostensibly to 'amend and codify certain branches of Hindu Law'.[5] The bill dealt with questions of succession, maintenance, marriage, divorce, adoption and guardianship among Hindus, also aspects of personal rights. The bill for the first time suggested that married daughters should get half of what the sons were getting. According to B. R. Ambedkar, who proposed the bill, the change 'which the Bill makes so far as the female heirs are concerned is that the number of female heirs recognized now is much larger than under either the *Mitakshara* or the *Dayabhaga*'.[6] Further, both the *Mitakshara* and the *Dayabhaga* discriminated against women on the basis of whether they were rich or poor, married or unmarried, which the present bill was meant to do away with.

The bill converted women's limited rights over her estate into her absolute possession. Until then the practice was that a woman could enjoy the profits of her estate in her lifetime but after her death it reverted to her husband's family. But this bill recognized that she had the same rights over an estate as other men, and she could keep it or dispose of it. The bill abolished 'the right of reversioners to claim the property after the death of the widow'.[7] The bill also abolished caste as the basis of marriage and adoption. Most importantly it recognized the principle of monogamy. It also made it possible for concubines to claim maintenance. Over the question of maintenance it again raised the contentious issue of a woman's right to maintenance even if she lived away from her husband. While explaining this provision Ambedkar said:

> Generally, under the provisions of the Hindu law, a wife is not entitled to claim maintenance from her husband if she does not live with him in his house. The Bill, however, recognizes that there are undoubtedly circumstances where if the wife has lived away from the husband, it must be for causes beyond her control and it would be wrong not to recognize the causes and not to give her separate maintenance.[8]

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Consequently the bill established that women were entitled to claim separate maintenance if their husband suffered from a 'loathsome disease', if he kept a concubine, if he was guilty of cruelty, if he had abandoned her for over two years, if he converted to another religion and 'any other cause justifying her living separately'. This was perhaps the most far-reaching of all the measures suggested. As had been pointed out even a decade before, a wife's claim to maintenance, especially if she lived away from her husband, raised virulent protests from many of the legislative assembly members. But this bill was bold enough to not just take up the same question; it also went forward to claim that if a wife could justify her decision to live away from her husband she had a right to do so and could claim maintenance. The bill also recognized women's right to divorce on multiple grounds including cruelty. As was pointed out by Pattabhi Sitaramayya, the bill was 'a progressive measure of reform, comprehensive in outlook, far-reaching in its result, radical in its nature . . . [as it] embraces the rights of women in regard to inheritance, in regard to marriage, in regard to property, in regard to divorce, in regard to personal freedom'.[9]

The women members of the constituent assembly were jubilant. Hansa Mehta encapsulated their opinion in her speech by saying that she congratulated Ambedkar for bringing forward this bill. She said that although the Code abolished sex discrimination with regard to inheritance it only gave the daughter half the share of the son. 'This violates the principle of equality on which we have again and again said that our new Constitution is going to be based.'[10] On the question of marriage she claimed to be gratified that the principle of monogamy was recognized: 'and if the Code comes into being then the principle of monogamy will be established.'[11] The women members of the assembly, who were most affected by the bill, clearly supported it, but that was not reason enough to accept it.

Protest came first from the orthodox quarters and it raised a storm. Naziruddin Ahmad, who said he was speaking on behalf of some of his friends, was among the first people to start a virulent critique. It is interesting to note that Ahmad was not part of the Hindu community. He said he was opposed to the bill as the bill was opposed by the entire Hindu community and later qualified that what he meant was 'the orthodox section of the community'. He clarified that his opposition to the bill was because the Hindu community was against it and he did not wish to 'spoil the cause of orthodox Hinduism'. The Hindus opposed women's right to inherit land because it would lead to fragmentation of the land. It should be mentioned here that, in any event, agricultural land was outside the purview of this bill. He ended his recriminations by saying that unlike the authors' aims of creating public opinion in favour of women's rights, legislation should rather follow public opinion, not create it. He said that only 'some of the ultra-modern sections are behind it, but the masses, most of whom are ignorant, are indifferent to it'.[12] It has to be stressed that voices such as Naziruddin Ahmad's were not the exception but the norm. Not surprisingly, then, the bill was first sent to a select committee. On 31 August 1948 there was a motion to postpone considering the bill in the then current session. The bill was finally shelved when it was placed within the Directive Principles. According to Aparna Mahanta the 'failure of the Indian state to provide a uniform civil code, consistent with its democratic, secular and socialist declarations, further illustrates the modern state's accommodation of the traditional interests of a patriarchal society'.[13]

Even while fundamental rights were being discussed it was claimed that discussing discrimination on the basis of sex was not necessary as women were presumed discriminated against only as members of a certain community and not because of their gender. For the Congress party, equality rights was one of its long-established platforms. The leadership had adopted a resolution, during the Karachi Congress in March 1931, that there should be rights to equality and non-discrimination for all. But during the *Constituent Assembly Debates* the same leadership consistently refused equality to women. This was nothing new. Even Gandhi, while promising equality to minority communities during the second session of the Indian Round Table Conference in October 1931, completely overlooked the situation of minority women by saying that the personal laws of all these communities would be allowed to continue unchanged.[14] In the *Constituent Assembly Debates*, therefore, even while discussing fundamental rights, men argued that no mention should be made of 'sex'. It was the women members who insisted that where fundamental rights were concerned the term 'man' could not stand for both male and female. Hence, discrimination on the basis of 'sex' was barred by the Constitution. However, even this debate could not liberate the women's question from questions of community. Since the Constitution was recognized as the point of origin for post-colonial legal discourse, the women's question remained hostage to questions of community.

Discussion of the status of women appeared in unprecedented forms during the *Constituent Assembly Debates* and for a while it centred on Article 31, which focused on the question of people's right to livelihood. Article 31, clause (i) as proposed read: 'the citizens, men and women equally (should), have an adequate means of livelihood'. The first amendment suggested was that 'men and women equally are unnecessary and redundant'. When the member proposing this amendment was questioned as to why he thought the clause was unnecessary he replied: 'the masculine, as it is well known, embraces the feminine.' He went on to explain that 'if we are to make it clear that any law shall apply to men and women equally and if we are forced to declare it everywhere, then this expression has got to be used unnecessarily in many places'.[15] In answer to such declarations even well-known leaders such as Mahavir Tyagi said that what the amendment proposed was merely an 'improvement in language or change in words'.[16] Although Ambedkar opposed the amendment Tyagi asserted that it was actually about semantics, thus disregarding the political implications of such rhetoric. Such a disregard for issues central to women often cut across religious and ethnic lines. This became clear during the debate on the Hindu Code when it was placed in the list of Directive Principles, ensuring that it would probably never see the light of the day even though, as pointed out earlier, Rajkumari Amrit Kaur and Hansa Mehta supported it vociferously. The *Constituent Assembly Debates* have thus maintained the tradition of ignoring women's voices when women's issues are being discussed.

The Indian State's attitude to women was further revealed over the question of abducted women. Partition of the Indian subcontinent in 1947 witnessed probably the largest refugee movement in modern history. About 8 million Hindus and Sikhs left Pakistan to resettle in India while between 6–7 million Muslims relocated to Pakistan. Such a transfer of population was accompanied by horrific violence. Some

50,000 Muslim women in India and 33,000 non-Muslim women in Pakistan were abducted, abandoned or separated from their families.[17] Women's experiences of migration, abduction and destitution during partition, and the State's responses to them, is a marker of the relationship between women's position as marginal participants in state politics and gender subordination as perpetrated by the State. In this context the experiences of abducted women and their often forcible repatriation by the State assumes enormous importance today.

Both India and Pakistan embarked on a massive Central Recovery Project during which some 30,000 women were recovered by their respective states. Some incidents relating to these abducted women exemplify the politics of gender during partition. Even when the two countries decided on little else they agreed that the abducted women must be restored to their families. Problems arose over the process and progress of recovery. An *Abducted Persons (Recovery and Restoration) Bill* was brought to the Indian Parliament. Boys below the age of 16 and women of all ages were brought under the jurisdiction of this bill that gave unlimited power to police officers regarding abducted persons. If a police officer detained any woman under this bill the officer could not be questioned in any court of law. Such a situation meant that the women themselves lost agency over their own person. Their voices were often not heard, and even when heard were not taken into cognizance. Although numerous amendments were proposed in the House, the bill passed unchanged on 19 December 1949.[18]

According to Rameshwari Nehru, adviser to the Government of India's Ministry of Rehabilitation, many abducted women showed extreme unwillingness to leave their 'captors'.[19] Ritu Menon and Kamla Bhasin observe that women were:

> abducted as Hindus, converted and married as Muslims, recovered as Hindus but required to relinquish their children because they were born of Muslim fathers, and disowned as 'unpure' and ineligible for marriage within their erstwhile family and community, their identities were in a continuous state of construction and reconstruction, making of them . . . 'permanent refugees'.[20]

Among the many explanations given for this forcible repatriation of women, Menon and Bhasin point out how national honour was bound to women's bodies. Even Jan Jindy Pettman reconfirms the crucial issue of how repatriation was made a nationalist project because women's bodies became markers of male honour. As in any other nationalisms, women's bodies became 'part of other people's agendas'.[21] India made claims of moral superiority over Pakistan or the *other* and this claim was based on the State's ability to protect/control female bodies. This control was essential for the self-definition of the male identity that was in a state of crisis. Recent feminist research has demonstrated how 'citizen' is a gendered category by examining how women are treated unequally by most states, especially post-colonial states, even though most of these states give constitutional guarantees of women's equality.[22]

Abducted women were not considered as legal entities with political and constitutional rights. All choices were denied to them and while the State patronized them verbally by portraying their 'need' for protection, it also infantilized them by giving decision-making power to their guardians who were defined in the act by the male

pronoun 'he'. By insisting that the abducted women could not represent themselves and had to be represented, the State marginalized them from the decision-making process and made them non-participants. For the abducted, it was their sexuality that threatened their security and the honour of the nation. Thus, their vulnerability was perceived to be rooted in their bodies. Their bodies made all women susceptible to such threats and so they had to be protected/controlled. By denying agency to the abducted women the State made it conceivable to deny agency to all women under the guise of protecting them. This act, therefore, challenged head on the notions of women's autonomy. It has to be remembered that the act was passed in 1949 by which time the need to design correctives for women's vulnerability to abduction had all but disappeared. This act therefore was more a mechanism to control women than to protect them. In fact, the families of these women often refused to accept forcibly repatriated women, but the women had to be brought back nevertheless, because what needed to be stressed was that women belonged to their family, their kin and the nation but never to themselves. In the context of increasing women's militancy and activism in Tebhaga and Telengana and their further assertions of personhood in the *Constituent Assembly Debates*, this act was necessary to symbolize their subject position and not just challenge but summarily deny their growing expectations of autonomy.

III

The *Abducted Persons Act* remained in operation until 1956. The State's initial reactions against any recognition of women as equal partners in state formation, and then granting these women some legal correctives, seem to have contained women's activism for a long time. The militancy that was visible in the working women's movement and the Tebhaga and Telengana movements remained a thing of the past and the legal correctives reiterated women's social positioning as wives and mothers. These legal correctives or measures did not go beyond what one analyst terms the 'typecasting of women as wombs to bring forth babies, lips to utter sweet nothings, and laps to cuddle infants'.[23] The *Hindu Law Code* contained in it the *Hindu Succession Act* which came into force in 1954–6. This act stated that the 'property of the intestate shall be divided among the heirs . . . The intestate's widow, or if there are more than one, all the widows together, shall take one share. The surviving sons and daughters and the mother of the intestate shall each take one share'.[24] For the first time the act recognized the daughter's right to inherit parental property.

Soon, however, motions were afoot to curtail women's right to inherit agricultural land, particularly in Punjab, the agricultural heartland of India. Many women leaders met the Chief Minister of Punjab to press their views against such a measure. Likewise the *Hindu Marriage Act*, 1955 gave women and men equal rights to divorce on such grounds, as adultery, but the implementation of this act remained skewed. Also, not all Indian women were beneficiaries of this act, and women from other communities remained under their own personal law. For example, Muslim women continued to be guided by Shariat laws of 1939 that decreed that women cannot inherit agricultural land. Even legal correctives could not change women's marginal

position in society and there was rampant social discrimination. For example, in the *Special Marriage Act*, 1956 both husbands and wives were given equal rights to divorce on grounds of cruelty, but in its implementation the courts did nothing to revise the patriarchal paradigm of a 'good wife'. According to one observer:

> The recognition of cruelty as grounds for divorce was significant as it expanded the grounds on which women and men could exit from a difficult marriage. However, the courts have interpreted this ground against the norm of familial ideology. When applied to women, this amounts to a moral evaluation of her conduct, and whether it conforms to the norm of a good mother and wife. A wife who fails to perform her marital obligations, which are primarily concerned with caring for and obliging her husband, is vulnerable to a charge of cruelty.[25]

Women also could not effectively challenge the paradigm created by the state of a *good woman* until much later. That the *Hindu Law Code* did not in any way challenge that paradigm is evident from the new educational policy set up by the Government of India under a national committee on women's education in 1959. This committee argued that the courses likely to interest women were home science, music, drawing, painting and nursing, and so on. As such, these were no different from the courses stressed in the 1930s when the main role for women was seen by the colonialists to be that of makers of good homes, and by the nationalists as helpmates to their husbands. The new laws in no way gave women equity. Their biased implementation also demonstrated that as long as women's rights remained hostage to community rights they could easily be subverted.

The *Citizenship Act* of 1955 dramatically reiterated the male centrism of the Indian project of state formation. As its title suggests, the act dealt with modes of acquisition, renunciation, termination and deprivation of citizenship. Although the act was meant to give rise to the category of universal citizen, in actuality it did not. It perpetuated the gender dichotomy evolved by the colonial state. The section on citizenship by registration stated that 'women who are, or have been, married to citizens of India' were to be given citizenship if they applied for it. No such stipulations were made for men marrying women who were Indian citizens. Thus citizenship by registration was largely transferred through the male line. In the section on the termination of citizenship it was stated that where a male person 'ceases to be a citizen of India under sub-section (1), every minor child of that person shall thereupon cease to be a citizen of India'.[26] This reiterated that citizenship was transferable largely through the male line giving women a second-class citizenship status. Although in later acts women could transfer citizenship rights to their spouse and to their children this did not alter the maleness of the Indian State as conceived in its formative years. In addition this act entrenched women's location within essentially patriarchal sites such as the family or the community, while the State consistently refused to consider a Uniform Civil Code that could have challenged this. Demands for women's autonomy were thereby successfully contained by the State until the 1970s when these demands resurfaced. The context was both internal and international.

The United Nations declared 1975–85 to be the decade for women, and Indian women activists took the opportunity to explore the actual situation of women in

India. They soon confronted the fact that despite legal victories over the years, political, economic and social disparities between men and women continued. There was extensive evidence of increasing violence against women despite such measures as the amended *Factory and Mines Act* of 1953 and *The Dowry Prohibition Act*, 1961 and its amendment in 1964. These gaps between women's formal legal rights and their substantive inequality in practice could no longer be ignored. Dowry deaths continued unabated and there was no evidence that violence against women had in any way diminished. The *Towards Equality Report* of 1975 dramatically brought women's marginalization in society to popular attention. It was made clear that women's political and socio-economic inequalities persisted in the face of a broad range of legislation intended to improve women's status. As a result of these developments the *Equal Remuneration Act*, 1976 was passed. But even these legislative changes proved that women's lives could be improved only up to a point. That legislation might also be a double-edged sword was further illustrated by events following the Shah Bano case.

Shah Bano, a 73-year-old Muslim woman, divorced by her husband after 40 years of marriage, brought a petition for maintenance against her husband under section 125 of the *Criminal Procedure Code* of 1973. In April 1985 the Supreme Court held that she was entitled to maintenance of Rs.179.20 per month. This judgment created a furore in the country, but for Shah Bano victory came after 10 long years of struggle. She was not the first Muslim woman to apply for and be granted maintenance under the 1973 Criminal Code, but the repercussions of this judgment surpassed any other, perhaps because the Supreme Court called for the enactment of a Uniform Civil Code. When some by-elections took place in December 1985 a sizeable Muslim vote that traditionally voted in support of Congress-I turned against it. From Kishengunj constituency the opposition Muslim candidate Syed Shahbuddin came to power. Soon an independent Muslim Member of Parliament introduced a bill to 'save Muslim personal law'.[27] Congress-I, which was the ruling party, issued a whip to ensure the passage of the bill. The women's movement and some Muslim organizations vigorously campaigned against the bill. The Hindu right also campaigned against it. 'The government, initially supportive of the Supreme Court decision, reversed its position, and supported the enactment of the *Muslim Women's (Protection of Rights on Divorce) Act* in May 1986, which provides that section 125 of the *Criminal Procedure Code* does not apply to divorced Muslim women.'[28]

The Shah Bano case strongly revived the question of the sanctity of personal law. A member of Parliament in the Lok Sabha (the lower chamber) during the initial debate argued that since this issue pertained to the Muslim religion, 'only a Muslim judge should decide such cases because in such cases only a Muslim got the right to do iztihad, i.e. the right to give an opinion where there is a conflict between the order of the law and that of the Prophet'.[29] Such claims asserted that the right of the cultural/religious community was greater than the political community. Meanwhile, in a dramatic turn-around, even Shah Bano dissociated herself from this judgment. She proclaimed 'I, Shah Bano, being a Muslim reject it [the SC judgment] and dissociate myself from every judgment which is contrary to the Islamic shariat'.[30] Her rejection of the Supreme Court judgment symbolized women's capitulation to the cultural community when arrayed against patriarchal forces that work across cultural and

political communities. In a recent interview Sona Khan, who acted as Shah Bano's lawyer, commented that 'one cannot make a Shah Bano of a rich woman. It is only the poor and uneducated that get taken in by what religious fundamentalists say. Also, it is not fair to criticize the discriminatory personal laws of one community while discriminatory laws of other communities are not paid attention to.'[31] Women's apprehensions that the new law was retrogressive proved correct the next year. The Minister for Social Welfare, Rajendra Kumari Bajpai, reported in March 1987 that the Wakf Board did not grant maintenance to a single woman in India in 1986.[32] But yet the controversy helped women to organize themselves into a movement as never before. The motion that was started by the *Towards Equality* report gathered momentum because of the Shah Bano case. This can be gleaned from debates led by women Members of the Parliament at exactly the same time as the Shah Bano case was going through the courts.

It started with the *Lok Sabha Debates* on the 'Progress of Indian Women in Social, Educational, Political and Economic Fields in the International Women's Decade'. This debate created an occasion for women MPs to put the situation of women in India before the topmost law-making body of the State. It was revealed that the number of illiterate women in India had increased from 215.3 million in 1971 to 241.6 million in 1981.[33] The number of women cultivators was in decline and women agricultural labourers on the increase, proving that land was progressively being taken out of the hands of women. In India, although 'more boys are born than girls . . . more girls die than boys and the expectation of life is lower for girls. The death rates of females particularly in the age group of 0 to 4 is much higher',[34] and more girls suffer from malnutrition than boys. Members also pointed out that the 'number of women workers is decreasing every year', even in traditionally female-dominated industries such as cashew, tobacco, bidi, matches, tea, etc.[35] In the jute and textile industries 30–60 percent of women workers were displaced.[36] In India it was said that 43.5 percent of all marriages were marriages of girl children. Also, members reported the link between the 'commercialization of agriculture and the nutritional deprivation of females'.[37] This was perhaps the first time there had been an effort to make a holistic audit of women's position in society in the Indian Parliament. Even the legal status of women came under fire. Women activists felt that within the Indian context the 'main problem is that there [are] many laws but women are dominated not by secular laws, not by uniform civil laws but by religious laws'.[38] Thus even before the controversy over the *Muslim Women's (Protection of Rights on Divorce) Act*, 1986 women had identified personal laws as a problem for women's empowerment.

But with the Shah Bano case another insidious trend became noticeable, one that entrenched women within their own communities. While the debate over Muslim personal law was continuing there were calls from women candidates such as Abida Ahmed, who argued that the 'Government should frame a law which should prohibit interference with Personal Law time and again and may end the disturbed atmosphere that has been created in various quarters as a result of the Shah Bano case'.[39] Leaders such as Jaffar Sharief even argued that 'today, in the Shah Bano case, I am finding that many people are more sympathetic towards Muslim women than *their own women*. This is very very strange.'[40] The whole question of women's rights

was subsumed within the question of group rights. It became a question of 'our women' versus 'their women'. Once again the State failed to protect women's rights and capitulated to the patriarchal definition of women as part of their communities.

In fact the State played a partisan role in this controversy. While debating the *Muslim Women's (Protection of Rights on Divorce) Act*, 1986 in the Lok Sabha the Congress government clearly took the side of Muslim orthodoxy against women's rights. Instead of advocating neutrality in matters of religion the law minister, in one of the debates, dwelt at length on the equality of all religions in the political lives of citizens. He said: 'Tolerance of diversity and differences should be the hallmark of governance in a multi-cultural society. Secularism demands that everybody should not be tarred with the same brush.'[41] The upshot of all this was that women's rights were to be guided by personal law that often reflected the views of the orthodoxy. Zoya Hasan contends that 'Women's status was a very secondary consideration in government policy'.[42] Government rather wanted to appease the Muslim leadership who were largely against the Supreme Court verdict. In the process they once again portrayed women's lives as something to be guided by their own communities. Hence the position of the government echoed that of the All India Muslim Personal Law Board. The politicization of the question led to a realignment of politics. The left and the Hindu right were aligned against the Congress and the Muslim conservatives. No one paid heed to what the women's movement was saying. Maintenance became a matter of compensation and not of women's rights. Gender justice and equal rights for women once again fell victim to the rights of communities, which was where the State chose to place the women's question. The new political alignments reflected how patriarchal forces cut across party politics to consistently marginalize women's self-definition. Movements for women's autonomy once again centred on parliamentary reforms, which due to much new legislation had become one of the most contested sites on the issue of women's rights.

Demands for reservation of seats for women began in the early 1970s and culminated in the 1980s. According to one observer 'Ramkrishna Hegde's government in Karnataka started the process in 1983 before Central legislation mandating representation for women was passed. It provided for 25 percent reservation for women at village panchayat levels. This was before any powerful women's lobby emerged in Karnataka to press for this move.'[43] After the Shah Bano case women within political parties gave up on the issue of representation as the only way to change the situation of women. A backlash against the women's movement seemed imminent.

That this backlash was indeed imminent could be seen through legislation on the Family Courts. The *Family Courts Act*, passed in 1984, was a procedural statute that carved out separate and innovative adjudications for family disputes. The act shifted matrimonial litigations from the district courts and maintenance litigation from magistrates' courts to family courts. Ironically, however, the principle of gender justice, which was the primary motivation of the women's rights movement's demand for special courts for family matters, was not clearly spelt out in the enactment. Instead the act emphasized preservation of the family as its primary aim and intent. In a study of the workings of the Family Courts in West Bengal, noted women's rights activist and lawyer Flavia Agnes commented: 'The primary concern of the campaigns seems to have been lost at the official level, in the process of

transforming the demand from a campaign into an enactment. An impression seemed to have been conveyed to all official functionaries that "preservation of the family" is synonymous with "protection of women's rights". But the legislative history of matrimonial law is counter to this premise.'[44] The workings of the family courts portray the lack of state priority given to such instruments, which are meant to improve women's access to justice.

However, one of the first legislative instruments for the protection of women's rights in the early 1990s was indeed progressive. This was the 73rd amendment of 1992 that reserved 33 percent of seats for women at Panchayat level. This led to the introduction of the September 1996 bill that called for reservation of one-third of the seats in Parliament for women. Debates over this issue continue until today. Women's demand for equitable representation started with the *Towards Equality* report. The Nairobi declarations in 1985 also called for increased representation for women. Therefore the 73rd amendment responded to women's long-standing demands for representation. Questions of representation became one of the important demands for the women's movement too. Once the 73rd amendment was passed, however, the women's movement felt a severe backlash that had been on the horizon from the 1980s onwards. The ostensible reason was the view that only the female relatives of political leaders benefited by reservations made in the 73rd amendment. Hence, few states embraced this amendment. States such as Meghalaya, where there are overwhelming numbers of matrilineal tribes, have not embraced this amendment as yet. In other states it took years to take action on this amendment. In a recent Action Aid project that presents the case of Assam, one researcher comments: 'although the 73rd and 74th amendment ensures a political voice for women, autonomy [for women] or independent decision making is still far off.'

Even on other issues regarding women's rights the backlash was increasingly being felt, and the family court system became a victim of this backlash. A recent report portrays that even in a 'progressive state' such as West Bengal there are only two such family courts today and the budget allocation for them is the paltry sum of Rs.1,488,000. In 2003 there were 6390 cases of matrimonial litigation, of which family courts handled only 270.[45] The capacity of these courts to give speedy redress to women is now being questioned.

However, the backlash against activism for women's rights caused the majoritarian women's movement, which was substantially weakened by legislative reversals due to the controversy generated by the Uniform Civil Code, to all but dissipate. Women's resistance to patriarchal systems in India did not end with this; instead they found newer avenues, but the law was no longer the most important of these.

IV

This paper set out to discuss how the Indian State has on the one hand legislated for an enhancement of women's autonomy, yet on the other has whittled it away, because of the State's reliance on religious dictums and, paradoxically, dictums of modernization that continued to locate women within patriarchal groupings. In the process women's autonomy, though often sanctioned by law, remained a distant and

an ambivalent dream. By exploring how a process that had its origin in colonial times continued to be sanctioned by the Constitution, that is women's location within the personal realm and not within the civic, I show that even though there are 'acts' there are far stronger 'facts' of citizenship. This paper has attempted to reflect the light and the darkness around the notion of citizenship – a term which at once connotes a reality and a reminder of the fact that equality for women, though promised, remains unfulfilled. Many groups of women remain on the periphery of citizenship. To cite but one example, despite the 73rd amendment it is clear that even in the 1990s the situation of scheduled caste and schedule tribes women remains extremely precarious. Dowry deaths among landless women continue unabated. Among the tribal people who are giving up *jhum* cultivation women are the poorest of the lot. Pauperization of a community always means further impoverishment of the women of that community. Neither legal rights nor representation have brought women their desired autonomy. The majoritarian women's movements seem, even if willing, still unable to liberate women from their own patriarchal legal systems epitomized by the personal and customary laws that often discriminate against them. According to Ritu Menon and Kamala Bhasin: 'Family, community and state emerge as the three mediating and interlocking forces determining women's individual and collective destinies'.[46] Among these three denominators the State in India has had a complicitous relationship with family and community where women's rights are concerned.

This paper does not intend to convey the impression that women have given up their efforts to be recognized as autonomous subjects. Women activists now realize that legal activism is neither the only course of action nor the only solution. Since the 1980s, women have no longer restricted themselves to the majoritarian women's movement, but have started a number of autonomous movements. They have recognized that women's rights are always posited against community rights and then subverted. These autonomous movements have consequently started coalitions with other civil society groups within their own communities, thereby making a stronger claim for recognizing women's rights as human rights. From recent developments in North-East India it seems that these women's groups have found a way forward, but discussion of this development must wait for another occasion. The legal system maintains its ambivalence towards recognizing women as citizens. Through its provisions the newly drafted Constitution in 1950 made women permanent exceptions by locating them not within the Constitution but within community laws. The legal system in India is yet to get out of this bind created by the makers of the Constitution. Notwithstanding certain progressive pieces of legislation that different governments undertook, often as a response to the demands made by the women's movement, the basic dichotomy between questions of women's autonomy and their location within their communities' personal and customary laws persists.

Paula Banerjee
Department of South and Southeast Asian Studies,
University of Calcutta and Calcutta Research Group

Notes

1. Mahanta (1994: 88).
2. Tharu and Lalita (1991: 157), original emphasis.
3. Ayyangar (1939: 3674).
4. Desai (1939: 3662).
5. 'Hindu Code' (1948: 3628).
6. The Mitakshara and the Dayabhaga are the two schools of Indian legal thought (Ambedkar, 1948: 3630).
7. Ambedkar (1948: 3630).
8. Ambedkar (1948: 3631).
9. Sitaramayya (1948: 3635).
10. Mehta (1948: 3643).
11. Mehta (1948: 3643).
12. Ahmad (1948a: 3640–2).
13. Mahanta (1994: 95).
14. Ansari (1999: 114).
15. Ahmad (1948b).
16. Tyagi (1948).
17. For a scholarly account of gender in the politics of partition refer to Menon and Bhasin (1998) and Bhutalia (1998).
18. Banerjee (1998: 8–9).
19. *Rameshwari Nehru Papers*, Speeches and Writings, Sub. File no. 25, Nehru Memorial Museum and Library (NMML), Delhi.
20. Menon and Bhasin (1993: 13).
21. Pettman (1996: 194).
22. Yuval-Davis and Anthias (1989: 6).
23. Mahanta (1994: 94).
24. *The Hindu Succession Act, 1956* (Act No. 30 of 1956) [as on 1 June 1982] Section 10, Rules 1 and 2, p. 5, GOI, New Delhi.
25. Kapur and Cossman (1996: 110–11).
26. S. C. Consul (1962: 179–85).
27. This phrase was used by a number of scholars writing on the Shah Bano case including Pathak and Rajan (1992: 257).
28. Kapur and Cossman (1996: 63).
29. Owaisi (1985: 399).
30. Shah Bano's open letter of 2 November 1985, quoted in Jayal (1999: 120).
31. Interview of Sona Khan with Deepti Mahajan, 6 July 2004, New Delhi.
32. Jayal (1999: 135).
33. Mukherjee (1985: 288).
34. Patnaik (1985: 307).
35. Mollah (1985: 312).
36. Mollah (1985: 312).
37. Sinha (1985: 318).
38. Mollah (1985: 314).
39. Ahmed (1984: 333).
40. Sharief (1985: 7), emphasis added.
41. *Lok Sabha Debates* (1986: 313).
42. Hasan (2001: 75).
43. Kishwar (1999: 135).
44. Agnes (2004: 2–3).
45. Agnes (2004: 6–7).
46. Menon and Bhasin (1998: 255).

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