

TO BELLOW LIKE A COW

Women, Ethnicity and the Discourse of Rights

Part 1

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"Why have you appeared before this gathering?
Why do you bellow like a cow in labor?
Your time must be near.
Shameless women with no sense of decorum
Bellow in gatherings of respectable men"

(Bhola Moira on Poetess Jogeswari and her female troupe. 19c.)

Introduction

In his book *The Politics of Rights*, Stuart Scheingold writes:

The appeals made by the myth of rights for the support of Americans are rooted in traditional values and closely associated with venerable institutions." The symbolic voice of the myth of rights, can, moreover, be easily understood and readily adapted to political discourse. But just how compelling is it? How pervasive and widespread and uniform a grip do legal values have on the minds of Americans?

Implicit in this argument is that for human rights to be effective, they have to go beyond the normative, textual essence and become part of the legal culture of a given society. They must strike a responsive chord in the general public consciousness with regard to political and civil issues. This resonance is therefore the clue to whether "the myth of rights" works in a given society to ensure the political and civil rights of all persons.

In the area of women's rights as human rights there is the least amount of resonance, especially in the countries of South Asia and this lack of resonance has prevented the effective implementation of rights.

The barriers to the implementation of human rights are two-fold. Firstly, there is an obstacle of the lack of a proper implementation machinery to make rights real in the lives of women, as well as a lack of the awareness of the rights machinery on the part of women, so as to empower them. The second and more formidable barrier is the refusal to accept the values in and of themselves, i.e. an ideological resistance to human rights for women.

(I do not want to get in what is called the Orientalist trap.)
It is easy to divide the world into bipolar categories, the

West is progressive on women's rights and the East is barbaric and backward. The reverse of this argument from the Eastern point of view is to accept the distinction, but to say that the East is superior, more communal and less self-centered with no place for this "adversarial" concept of rights. I would argue that in South Asia both traditions exist. There are examples of personal laws and women's rights which came to issues such as no fault divorce and the best interest of the child, centuries before the West. The Kandyan laws of the Kandyan Sinhalese is one such example.²

Privileged Female Personality

To analyse the barriers posed by culture, custom and personal laws with regard to women's rights as human rights, it is important to analyse the underlying assumption about the female personality which accompanies any discourse of women's rights especially in documents such as the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). The personality which is privileged in such documents is the free, independent woman as an individual endowed with rights and rational agency. It is in fact the culmination of the enlightenment project, the "rights of man" now being enjoyed by women. This is perhaps exemplified in the most controversial and therefore the most important provision of the Convention, Article 16.

Article 16 requires that State parties on a basis of equality of men and women, ensure that women have the same right freely to choose a spouse and to enter into marriage with their free and full consent. It also requires the state to ensure the same personal rights for husband and wife, including the right to choose a family name, a profession and an occupation.

Though the convention's emphasis is on the principle of non-discrimination, and not on the principle of empowerment (Article 1 of CEDAW), there is the assumption that it privileges the free, independent and empowered woman. The only female difference accepted by the convention relates to woman's condition of maternity in the section on labor law (Articles 11 and 12) and with regard to special rights relating to the redressing of historical grievances (Article 4). The highlighting of these differences



is only to ensure that the state take necessary measures to ensure that the woman is given the opportunity to develop her individual identity, rooted in an enlightenment view of the human personality, a personality without fetters or community context.

I am in agreement with the enlightenment view of the human personality. But it would be wrong to assume that the values contained in the Universal Declaration of Human Rights are truly Universal. Such an assumption would make more than half the world the subject of ridicule. However, to work toward this enlightenment ideal, it is important to expose the ideologies of power which sustain counter ideologies, which recognise women as inferior. It is also important to learn from non-western societies of other issues, rooted in Asian example, which may in fact further the rights of women even beyond those contained in International Conventions — those rights which must necessarily be attached to woman in context, i.e. her class, caste, her ethnic group.

Duality in Modern Law

For the greater part of the non-western world, the approach to women is couched in ambiguity. The Sri Lankan Constitution inspired by liberal, socialist norms is one such example. It states's general non-discrimination clause (Article 12:4) which includes sex:

Nothing in this Article shall prevent special provision being made by law, subordinate legislation or executive action for the advancement of women, children and disabled persons.

On the other hand, the drafters argue that this formulation is to allow room for affirmative action on behalf of women, but the juxtaposition of women, children and the mentally retarded is an extremely interesting feature.

It is especially so if we compare it to article 4 of CEDAW:

Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discriminatory.

The first formulation as expressed in the Sri Lankan Constitution does not accept responsibility for historical wrong while the second implicitly. The reason for this lies also in the fact that Sri Lanka is a Buddhist society and that many of the leading scholars feel that there was no traditional discrimination against women and that discrimination is a colonial legacy. This line of thinking is a dominant school-i.e. discrimination originated with colonialism.³

Secondly, the Sri Lankan Constitution, in juxtaposing women with children and the disabled persons accentuates the duality that is present in all the laws with regard to women. On the one hand, there is the belief that she is vulnerable and needs protection. In this

paternalistic project, women along with children and the mentally disabled are denied agency, i.e. the right to protect themselves, with certain inputs from the State.

The special protection provision on behalf of women is also defended on the ground that the reality of working conditions in a developing country is such that a worker's health is often at risk. with proposition one cannot disagree. But, the argument of non-discrimination requires that men are also protected from the terrible working conditions which may impair health. Equality in this world view is only present to help women, it is not reciprocal. The line of thinking is similar to the cases on social security which came before the US Courts in the early 70's where men as widowers, husbands and dependents claimed social security benefits which they felt they were entitled to.⁴

Anthropological Reality: Ideological Barriers

The Sri Lankan Constitution is a modern document drawn from liberal and socialist inspiration. In some sense the issues it raises are easily identifiable and are within the framework of discourse which characterise legal thinking with regard to women's rights as fundamental rights. The barriers though real are thought out and solutions of various inclinations have been put forward. It is a modern problem in the realm of world history and rights discourse. While the so-called modern Constitution reflects this duality between freedom and vulnerability, the situation becomes even more complicated if one deals with what is often termed the anthropological reality.

The "extra-legal" factors which are barriers to the enjoyment of women's rights as human rights in South Asia are rooted in ideological aspects especially as they relate to the tension between the Law and civil society as well as within the legal system itself. Let us begin with the former.

Law and Civil Society

Asish Nandy in India analyses the roots of the modern Indian crisis in the disjuncture between the traditions of Indian civil society and the colonial inheritance of a modern nation-state run on Weberian lines with bureaucracy and the market being the central organisational features. The law is the central instrument in this colonial process which aims at erasing tradition, plurality and restructuring civil society along modern lines. The law and the state are the special targets of hatred and the rights discourse is seen as a manifestation of this impersonal, homogenizing, activist State. Judicial activism is anathema to scholars such as Nandy.

Nandy is one of the most influential scholars in South Asia. His challenge of rights discourse is the best articulated response to modern statehood which through the



use of law attempts to ensure equality. It is important to deconstruct his argument to recognise the type of ideological barriers that we face in South Asia when we talk about women's rights as human rights. The speeches and pamphlets of religious and ethnic dignitaries are self-evident in their rejection of the West including rights in what may be termed the Orientalist encounter. But, Nandy is the most sophisticated and perhaps a more enticing articulator of the rejection of the concept of an activist state intervening to impose a model of equality based on the values of the Universal Declaration of Human Rights.

In an article entitled "The Making and Unmaking of Political Culture"⁵ he argues that India has a measure of cultural autonomy from western values and institutions and that this autonomy persists despite the best efforts of the government. He argues that in the world view of traditional Indian culture, politics was considered the Machiavellian art of the possible. It occupied only a very limited sphere — ie that of providing security to the population. Civil society was the centre for struggle and conflict in traditional India and it was ruled by precepts of dharma and ethics. Tolerance, he claims was an aspect of everyday life. In the hierarchy of power, the power over self was valued over state power which was the least respected and the most brutal. Nandy's argument is supported by the two volume work on the Hindu Equilibrium.⁶

In this view of the dichotomy between civil society and the State, the root of all evil is located at the colonial encounter, where the Weberian concept of state was transferred to Indian soil. The competition among political parties, the struggle for state resources and the supremacy of state power is what Nandy points to as the main reasons for what Kohli calls "the crisis of governability."⁷

The implications of this scheme of analysis for human rights is not very clear. On the one hand Nandy is not opposed to the substance of human rights which he feels is at the root of popular culture and the humanistic face of civil society.

However, he is totally opposed to the mechanism employed for its enforcement—the law and the paternalistic state. He argues instead for strengthening human rights values in civil society.

Nandy's point of view has been criticised as a romanticised view of the Indian past and of Indian popular culture. The rigours of the caste system or sex-based oppression cannot all be laid at the doorstep of colonial India. Many practices in Indian civil society shock the conscience and cannot be willed away as an aberration. And yet there is a voice there that should be heard.

If one looks at CEDAW and other international documents of human rights, every article begins with the word "State

Parties" and then goes on to unfold the obligation imposed by the State. As States are the foundation of the international order, this is inescapable. However if the State is entrusted with the responsibility of ensuring women's rights; if the state is always viewed as active and paternalistic in a benign manner, then this does pose serious questions. The nation-state in the third world does not carry this "Scandinavian aura". In addition there is a major problem of implementation in what Kohli calls the redistribution of poverty. Nandy is correct in one sense, that unless these human rights values take root in civil society and unless civil institutions and NGO's take up the cause, then women's rights as human rights will have no resonance in the social institutions concerned.

There are situations of course, where state action or inaction with regard to a particular community galvanises an awareness of human rights as part of the struggle of elements within society. The Chipko movement in India is one such example with regard to women and the environment where women protected their livelihood by wrapping themselves around trees when the bulldozers, which were part of a larger development project, came into their areas. In Sri Lanka, ethnic and civil violence has galvanised groups into action from all strata of society and has in itself instilled values of the right to life and freedom from arbitrary arrest. It is therefore lived experience which is the best fermenting ground for human rights awareness and action, including the rights of women. In that sense Nandy is correct. The future of human rights in the South Asian region does not lie with "State parties" but with the movements in civil society.

Where Nandy is wrong is that the law is not only an empty shell but a galvanising point for mobilisation. Even if the future lies in civil society, there have to be standards by which one can hold individuals and states accountable. In addition in some rare instances, the Courts are also galvanised into action. In such a context, this artificial separation into civil society where the popular will resides, and the state where the legal and bureaucratic will reside may create more problems in the realisation of women's rights. It is only a combination of the two, coming together at a particular historical moment which results in change, creativity and social action. The first is only limited to mobilisation and awareness, the second to articulation and implementation. Of course after enactment, forces in civil society have to act as watch dogs to ensure that the rights guaranteed are protected. So Nandy's point is well taken — civil society is necessary for creating the conditions for law to be relevant, it is also useful in ensuring that law is enforced. But at the same time it has to be recognised that without law, any human rights activist will only be fighting windmills of the mind.

While discussing issues of civil society, it may be important to reiterate here that the essentialist view that western civil society and law empowers women while the eastern only subordinates them is not strictly correct.



There are instances where the traditional laws have been more progressive than modern legislation and the colonial encounter actually robbed women of pre-existing rights. A case study in point is the Kandyan law of the Sinhalese, where standards such as no fault divorce and best interest of the child and even polyandry were recognised in the Kandyan areas of Sri Lanka and still have some legitimacy under the modern system of law though of course the practice of polyandry faded with the importation of western values.

In addition the colonial encounter forced reinterpretation of law according to legal norms prevalent in the West. The Thesawalamai of the Sri Lankan Tamils had notions of community property akin to that of the Roman Dutch law but Dutch draftsmen interpreted the notion of community property according to their law before the nineteenth century reforms with regard to Married Women's property. They imposed on Tamil women the denial of the right of alienation of property without their husband's consent with no reciprocal duty. Today, married Dutch women can freely acquire and alienate property acquired in their name, but married Tamil women, subject to this archaic law and its medieval interpretation, cannot do so and do not enjoy the rights given by the Married Women's Property Ordinance of the nineteenth century. And since Sri Lankan Tamil women are a minority, they have no access to change the law which for all purposes may govern them till the end of time, regardless of the change in circumstances or the practices of the community.

Law and Other Ideologies of Empowerment

Since rights are in the final analysis about empowerment, what many South Asians argue is that the traditional roots of empowerment in South Asian societies is denied in rights discourse. The legal strategies which accompany rights discourse, aim at an adversarial contest in the courts between the victim and the state. However it is argued that women's empowerment in these traditional societies has manifested itself not through rights ideology but by family ideology. There has been in South Asia recently a spate of writings about "Mother-Community and Mother-Politics".⁸

South Asia has the greatest concentration of women heads of State. India, Pakistan, Sri Lanka and Bangladesh have all experienced rule by women heads of state. There is ideological acceptance of women in the realm of the public sphere but this is because they have appropriated the discourse of motherhood. Anthropologists have also noted a major rise in mother-goddess worship. Of course the glorification of woman as mother means the denigration of unmarried women, widows, childless women, and divorced women. And yet this ideology is so powerful that the present Tamil Nadu chief minister Jayalalitha, who enjoyed a non-formal relationship with the hallowed hero,

film star turned politician, has appropriated motherhood as a symbol, even though she is neither married nor has children. She is called the "Avenging Mother" in a certain context, a protector of the poor and the underprivileged.

What women activists argue is that legal strategies do not allow women to touch base with their traditional sources of empowerment. In Sri Lanka the ideology of motherhood has been appropriated for political action with regard to the widows and mothers who have lost their husbands and children in the recent violence. The Mothers for Peace or the Mothers of the Disappeared, precisely because of their appropriation of the mother ideology have found a great deal of political space which even politicians caught within the same ideological construct are hard pressed to overcome.⁹

There has been a lot of criticism about this type of strategy which uses indigenous symbols because of the other side of the same process. If one accepts mother ideology how do we privilege the voice of the unmarried, the widows etc.. The strategy appears to divide the female community with no real concrete political goal save that of agitation. But what is significant to realise is that rights discourse, because of its construction and its style of implementation, is not plugging into many of the dynamic social movements taking place in South Asia. Perhaps, one should accept that one is the realm of politics and the other the realm of law. Either way, it is important to recognise that there is an important disjuncture in the sphere of social action.

References

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