WOMEN AND COMMUNITY: AN ASSERTION OF INDIVIDUAL RIGHTS BY SYRIAN CHRISTIAN WOMEN IN INDIA

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JULIE THEKKUDAN

CENTRE FOR POLITICAL STUDIES
SCHOOL OF SOCIAL SCIENCES
JAWAHARLAL NEHRU UNIVERSITY
NEW DELHI – 110067
INDIA

2000

Dated: 28·7·00

Centre for Political Studies
Jawaharlal Nehru University
New Delhi – 110067

CERTIFICATE

This is to Certify that the dissertation entitled **WOMEN AND COMMUNITY: AN ASSERTION OF INDIVIDUAL RIGHTS BY SYRIAN CHRISTIAN WOMEN IN INDIA** submitted in partial fulfillment for the M.Phil degree of this university has not been previously submitted for any other university and is my original work.

JULIE THEKKUDAN

We recommend that the dissertation may be placed before the examiners for evaluation.

Prof. IMTIAZ AHMED
(Supervisor)

Prof. KULDEEP MATHUR
(Chairperson)
CHAIRPERSON
Centre for Poltical Studies
School of Social Sciencei-II
Jawaharlal Nehru University
New Delhi-110067

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INTRODUCTION

In recent debates about communities and their rights vis-à-vis other communities and the state the basic issue has been cultural autonomy and preservation of different cultures. The need to promote cultural pluralism and empower minority cultural groups becomes the essential requirements for a viable and sustainable democracy. Minority communities are often a numerically smaller group in society with certain attributes which its members consider to be unique and vital to their existence as a group. The attempt therefore is to protect and sometimes even promote these unique attributes within the larger society. The leverage that a minority community acquires for itself depends upon its relative standing to the other groups in society.

Communities are never insular in that they are constantly affected by the way the other communities in society perceive themselves and the community in question. Most demands from minority communities are, consequently, an attempt to incorporate these differences within the mainstream as legitimate ones. The roles that the state plays in promoting cultural pluralism in the public sphere becomes significant. The state as an all encompassing institution can favour one community over others. In such situations the minority communities get relegated to a subordinated position. Demands for minority rights significantly shift the focus from the individual to the collective. Multiculturalism claims that the imperatives of justice demand that state policies be sensitive to issue of collective rights. The multiculturalists regard this to be a shortcoming of the liberal theory.

This demand for more community based theories of rights is not unproblematic. This demand for community based rights can sometimes conflict with individual rights. There may be a denial of certain liberties to its individual members which may then restrict an individual's choices in life. Carried to an extreme it can even become tyrannical in its attempt to project a unified image to the larger society. Their continued existence may depend on this unified image that they project. For instance, feminists pressing for greater gender equality within these community based theory of rights perceive most communities as patriarchal or male dominated. Women are seen as the markers and symbols of the community. For the formation and strengthening of the community identity it may become imperative that gender identities be subsumed within the community identity. This leads to a conflict between the demands for cultural autonomy and the notion of gender equality. Hence, demands for inter group equality would become meaningless if unaccompanied by intra-group equality.

India is one of those countries where plurality of various kinds have been a reality within the brand of democracy that India promotes. This plurality is visible in the laws and state as well. The Indian state has granted certain fundamental rights to minority cultural groups to ensure that these groups have the power to preserve and promote what they consider important. The concerns of cultural autonomy and gender equality frequently converge in the domain of personal laws. Personal laws refers to the matter which define gender relations - matters such as marriage, divorce, adoption and inheritance. In India, personal laws have been justified by the differences perceived by minority communities. But, they have frequently been

challenged as a violation of the ideals of individual liberties. Therefore, a study of the personal laws is useful in understanding the conflict between demands for cultural pluralism and the quest for gender justice and the ways to resolve these conflicts without endangering the ideals of cultural autonomy or undermining the notion of gender equality.

In India, minority groups are primarily religious communities, Muslims, Christian and Parsis. The Christian community, comprising 2.32 percent of the Indian population, is the second largest minority group, though its political clout, may not be comparable to that of the Muslims due to the latters' numerical strength. The Christians occupy a unique place within Indian politics. This position changed from that of the political masters during the colonial period to an insignificant minority in Independent India. Many of its fundamental ideas have come under attack in the recent years from different quarters. Driven to project a united front for its continued existence, the need for protecting their community identity becomes more significant. Differences from within could only lead to the further weakening of particular community identity. As a minority, Christians have thus, not been the focus of literature on minority groups in India. The task of collecting data about this community has proved to be rather challenging.

Among the Christians, the Syrian Christian community is one of the oldest groups, tracing its history to the coming of St. Thomas in A.D.56. Belonging to the landed upper caste within Kerala society (although the notion of caste within Christianity is not recognised), the Syrian Christians believe in maintaining status quo

and are unwilling to give into changes which may alter the social and economic relations within the community.

Many of the recent challenges to the Christian personal laws have come from within the Syrian Christian community. Being a member of this community, I was keen on understanding the circumstances that have initiated the demands for reforms within the Christian personal laws, the community reaction of these changes and state action in dealing with and facilitating reforms initiated by the Christian community. This research has been a voyage of discovery for me about the socio-economic, political and judicial relations within the community and within the Indian state. This study is restricted to issues of inheritance and divorce within the Christian personal law.

The first chapter of this study involves the notion of community and cultural identity as essential requirements in the formation of individual identities. Cultures give meaning to the choices made in an individual's life and provides the individual with a world view (Kymlicka, 1995). Shifting the focus in liberal thinking from individual autonomy to this celebration of differences and the preservation of cultures has been the aim of the multiculturalists. This aim has had a different trajectory within Indian politics. The need for territorial integrity required a greater emphasis on minority communities rather than individual liberties.

The interface between religious communities and gender is a complex one. The second chapter deals with the relationship between patriarchy and community and its effect on the assertion of gender identities within the community. The effects are intensified when the community involved is a minority. The struggle for the

maintenance of community identities and the accompanying assertion of gender identities would involve the state. The state's willingness to implement reforms within personal laws would depend on whether the initiative came from the community itself (like the Parsis) or the community on its own provided that initiative despite opposition from the community (like the Hindus).

Since the courts have been a source of legal change, the last chapter discusses certain cases which have challenged discriminatory issues within the Christian personal law; the initiative for reform from the community and the reactions of the Indian state. The last section deals with the outcomes in this contest between the community women and the state.

LITERATURE SURVEY

Multiculturalists, attempting to make liberal theory more sensitive to communities, have put forward a group based theory of rights. Will Kymlicka stressed the meaning that culture provides to individuals across the full range of human activities encompassing both public and private spheres. According to him, multiculturalism opens the space for members of communities to fight for their rights and to fight against the misguided social pressures and discriminations they often face (Kymlicka, 1995).

Charles Taylor advocates a politics of difference, particularly in the public sphere. Different cultures should be acknowledge for their worth and this recognition is incomplete unless it is legitimised in the public sphere. Politics of differences is

distinguished from the politics of equal dignity which encouraged non-discrimination that were blind to the ways in which individuals differ from each other. A politics of difference, on the other hand, understands non-discrimination as making distinctions the grounds for differential treatment (Taylor, 1994). A problem may arise in this emphasis on difference. There may be some differences which may not allow other differences to exist. The multiculturalists are critical of the internal restrictions that cultural communities may impose on their individual members. But certain issues of individual autonomy may have been sidelined in this emphasis on communities.

This concern for cultural autonomy as well as individual liberties has had different effects within the Indian context. Gurpreet Mahajan, pointing to the differences in the Western trajectory and the Indian requirements, has highlighted that in India religious communities have been considered as the guarantor of cultural autonomy. Collective religious and cultural rights were granted by the Indian constitution to safeguard against the possibility of unequal treatment and the imposition of majority culture by the State. Hence, minority communities, though dependent on the State for its survival, appeal to State neutrality to seek special facilities from it (Mahajan, 1998).

An emphasis on the community-based thinking has, according to Kumkum Sangari, led to a treatment of religious communities in India as single monolithic structures which have swept within its parameters many differences. Claiming communities to be dominated by its male members, the perceived economic and social dependence of women on men have only perpetrated gender inequalities. The

state may have helped in the maintenance of status quo when personal laws of the communities are challenged.

There can be two approaches to the issue of gender justice, the formal equality approach and the substantive approach. The legal discourse in India have resorted to the formal approach whereby all subjects are treated the same. Within this formal approach, the attitude is a protectionist one which regard women to be weaker than men and in need of protection. Brenda Cossman and Ratna Kapur points out the inadequacy of the formal approach and stress that the more relevant approach in India would be a substantive approach which is aimed at eliminating individual, institutional and systematic discrimination of disadvantaged groups (Cossman and Kapur, 1996).

Zoya Hasan highlights the centrality accorded to religious identities in minority politics in India. Along with this, the articulation of traditional community discourses keeps women bound to the traditions of religious communities. This has affected the enhancement of the secular rights and demands of women. The role of the State in adhering to the conservative opinions within the community has often reinforced this problem (Hasan, 1994).

Stressing the point that women's rights is not a primary concern, Flavia Agnes claims that this issue is often used as a rhetoric which can be brought into the public arena to support other hidden objectives. She has traced the developments in the Christian personal laws and the efforts to initiate reform within it. She advocates that these efforts of family law reform would become feasible only if there is a disassociation of gender concerns from the context of identity politics (Agnes, 1999).

This study attempts to incorporate these concerns in cultural autonomy and gender justice in its application to the Christian community. The Syrian Christians are indicative of the conservative nature of the community. The struggle for the assertion of individual rights by women have to contend with this conservatism and the reluctance of the State in bringing about changes within the community.

CHAPTER ONE

IDENTITY, CULTURE AND COMMUNITY

Multicultural debates almost always include within their realm a discussion on the notion of identity, its formations and its importance to the individual as a member of a culturally constituted group. Identity has been construed, by multiculturalists, as a notion of what it entails to be a particular human being in a particular context. It has also been regarded as the framework within which one tries to determine from case to case what is good or valuable; what ought to be done, what he or she endorses or opposes. In other words, it is the horizon within which a person is capable of taking a stand (Bhargava,1999). It is logical that this process of self-realisation cannot occur in isolation from others because it is in the interaction with others that one's potentiality can be discovered to its fullest. Charles Taylor calls these others as 'significant others'. A crucial feature of human nature is its inherent dialogical character. It is through a dialogue with the significant others that our identities are reinforced, sometimes in struggles against the things our significant others want to see in us. Our conversation with these 'significant others' may outlive our dialogue with them, for instance our parents. Thus, our dialogues with these many significant others forms the key loci of self-realisation and self-affirmation (Taylor, 1994:79). A human being, thus, becomes aware of his identity in socially defined terms, that is, defined not first by his own behaviour but by an interaction of the behaviour of several persons at the same time which can constitute a social practice. Thus, many of our

identity constituting beliefs and desires exist directly embedded in such social practices (Bhargava, 1999).

Community and Cultural Identity

Situating an individual within a cultural context has significant implications for the individual. Culture provides the individual with a sense of identity and belonging that one calls upon in confronting questions about personal values. It gives meaning to how we live our lives; it supplies the context that makes sense of what we do. We decide how to lead our lives by situating ourselves in these cultural contexts (Kymlicka, 1994:96). The emphasis then is on cultures, for it is only through a secure cultural structure that people find a meaning to their lives. It is this stable and secure cultural structure that throws open to the people the various options available to them and also enables them to examine and assess for themselves the inability of those very options in their own lives. People cannot be separated from their ends, in fact, it is these very interests and ends that constitute people's identities (Spinner, 1994).

But the notion that the individual acquires meaning within a cultural context has led to a rethinking of some of the basic ideas within liberalism itself. It is the collective,that is, the community which gives meaning to the individual. Community can then be defined as a network of social practices in which identity-constituting beliefs and practices are deeply embedded. It may not always be explicit nor is it fully present in the person's consciousness, yet it is of deep consequence to the identity of a person. People become aware of themselves, of who they really are only through

contact with and by confirmation and endorsement by others. Self knowledge is mediated by others and therefore, involves not only cognition but also recognition. This model of formation and continual reinforcement of identities holds true for the wider social universe as well as for the narrower public sphere within it. And it is in this wider social universe that there is a demand for the politics of recognition. People want their identities and significant attributes of their community to be not only socially acknowledged but also publicly endorsed and respected (Taylor quoted in Bhargava, 1999).

Multiculturalism within Liberalism

Liberalism has often been characterised by a certain kind of individualism, that is, the individual is regarded as the ultimate unit of moral worth in. In fact, liberal theory has been insensitive to the notion of collectives and the principle of cultural differences. Liberal theorists have been unsympathetic to the idea that the public realm should reflect diverse cultural values and ways of life. Liberals assumed that cultural heterogeneity would follow logically from the liberty granted to individuals to pursue their own way of life. Liberalism worked on the assumption that individual liberty would nourish and translate itself into diversity of every kind. Consequently, liberals paid little attention to cultural differences in the public arena. In fact, cultural diversity is effaced from the public domain and the effect of state policies on different cultural communities still remains insignificant (Mahajan, 1998:4).

In the last two decades of the twentieth century the idea of multiculturalism has gained much momentum. Multiculturalism has within its ambit a set of inter-related themes --- the need to have a stable identity; the contribution of cultural communities to the fulfillment of this need; the link between identities and recognition; the importance of cultural belonging and the legitimacy or the desire to maintain cultural differences (Bhargava, 1999). It also refers to a desired end-state as a way of referring to a society in which different cultures are respected; the reproduction of culturally defined groups is protected and social diversity is celebrated (Joseph, 1999). Multiculturalism challenges the reality of a single culture or its supposed worth. In fact, it must be viewed in the context of twentieth century domination of monoculturalism (Goldberg, 1994:10).

The discourse of recognition is aimed at two levels. Firstly, it is aimed at the intimate sphere where the formation of identities takes place in a continuing dialogue with the 'significant others'. Secondly, it takes place in the public sphere where a politics of equal recognition has come to stay and to play a more important role. Multiculturalism is an effort to redefine the public values constitutive of the political state in which we live, to make those values more open to incorporative formation. It embodies a politics of collective goals as well as a politics of difference. This is sometimes believed to necessitate the politicisation of group identities and the abandonment or at least a modification of the ideal of equal treatment under common laws (Taylor quoted in Goldberg,1994:82).

In most strands of multiculturalism, culture is understood as a body of practices, beliefs and especially visible symbols that characterise a community and

provide its members with their social identity and way of being in the world. Each culturally cnstituted group has its own unique culture which must be valued in and of itself, on the basis of which the community asserts its right to exist according to its own beliefs and customs, even within a social context or nation-state dominated by another ethnic group. This understanding of social difference reflects a substantialised idea of culture as a thing which can be possessed, deformed (as by external forces like that of the market) destroyed or lost, and which is crucial to the integrity, identity and survival of the possessor. With identity politics having embraced this notion of culture, culture becomes objectified in terms of particular practices, symbols or other markers which then become the foci of struggles for equality or recognition (the turban, the veil etc.) These objectified symbols of culture also becomes central to the social identification of individual who in a multicultural context most often belong to one group or another. Collectivities do form their own cultures with greater or lesser degrees of self consciousness but multiculturalism itself creates rather than simply reflect identities and culture that already exist. Thus, culture refers primarily to collective social identities engaged in struggles for social equality. Therefore, culture for them is not an end in itself but more a means to an end (Upadhyaya,1999).

Concept of Equality in Multiculturalism

Social culture is that which provides its members with meaningful ways of life across the entire range of human activities including social, educational religious,

recreational and economic life encompassing both public and private spheres. Aside from values and memories these cultures have common institutions and practices. This shared vocabulary becomes the vocabulary of everyday life, the social life, embedded in practices that cover most of human activity. For this to happen in a modern environment it would mean that a culture has to be institutionally embodied in schools, media, economy and government. These societal cultures are generally linked to the process of modernisation. Modernisation would involve a diffusion through a society of common culture including a standardised language embodied in common political, economic and educational institutions. For a culture to survive and develop in a modern world, given the pressures towards the creation of a single common culture in each country, it must become institutionally embodied, given the enormous significance of social institutions in our lives and in determining our options (Kymlicka, 1995:80).

Membership in a particular community, therefore, is important but equally important is the relationship of equality among the different cultural communities. In many nations cultural identity may be seen as a connection between people, a bond upon which subsequent bonds can be forged. It may be a way for some to make a large anonymous world a little more intimate. Attempts to take away these bonds will take away some source of meaning to many people. To destroy these identities in the name of some larger national identity may make people more alienated from each other than they currently are. Charles Taylor's thesis would then become valid in the sense that our identity is partly shaped by recognition or its absence, often by mis-recognition of others, real distortion, if the people around them reflect a confining or

demeaning or contemptible picture of themselves. Non-recognition or mis-recognition can be equally harmful and can be construed as a form of oppression, imprisoning someone in a false, distorted and reduced mode of being. It is in this sense that some of the feminists argue that in a patriarchal society women have been reduced to adopt a deprecatory image of themselves(Taylor quoted in Goldberg, 1994:76)

There can be two trajectories of equal recognition. The first is made of the shift from 'honour to dignity' from which arises a 'politics of universalism' emphasising equal dignity of all citizens and the context of this politics has been the equalisation of rights and entitlement. The second emerges from a 'development of the modern notion of identity' giving rise to a politics of difference. It means that everyone should be recognised for his or her unique identity. The first fought against discrimination. The second wanted distinctions to be recognised in policies. Where the politics of universal dignity fought for forms of non discrimination that were quite 'blind' to the ways in which citizens differ, the politics of difference often redefines non discrimination as requiring that we make these distinctions the basis of differential treatment (Taylor quoted in Goldberg, 1994:83)

Politics of recognition in contemporary societies can, therefore, take the form of guaranteeing equal rights and citizenship to all members or the form of politics of difference. Both the forms can be accommodated within the framework of liberal theory though they represent two different perspectives within it. Both include the provisions of basic human rights to all citizens and decry discrimination. However, Taylor associates the politics of equal rights with procedural liberalism which allows

individual autonomy to pursue its own version of good life within the framework of state laws. Equal dignity would be interpreted as giving importance to the similarities between individual and promoting equal citizenship. Only a limited recognition of difference could be accommodated in this form. On the other hand, the politics of difference is based on the belief that each person has a unique nature and potential to which he/she should be true and this should get public recognition. To deny recognition to a person's self dignity or to impose a demeaning identity on them would be to cause them harm. For Taylor, a politics of recognition would not only give public recognition to different groups but should also try to ensure the conditions in which people could be true to their nature (Taylor quoted in Goldberg, 1994:83).

In multicultural nations individuals are not incorporated into the nation universally (that is, each individual citizen stands in the same direct relationship to the state), but rather in a consociational manner, that is, through the membership in one or other of the cultural communities. Under this mode of incorporation, the rights of the people and the opportunities they have would depend to a large extent according to the particular cultural community into which they are incorporated and the justification for these measures focuses on their role in allowing minority cultures to develop their distinct cultural life which is insufficiently protected by the former universal mode of incorporation (Kymlicka, 1995:135).

This universal mode of incorporation, as enshrined in liberalism, is inhospitable to the notion of difference because (a) it insists on uniform application of the rules defining these rights without exception and (b) it is suspicious of collective

goals. It is in no ways an attempt to abolish cultural differences. It only means that it is inhospitable to difference because it cannot accommodate what the members of these culturally constituted groups aspire to, which is, survival. This (b) is a collective goal which (a) inevitably call for some variations in the kinds of law that is deemed permissible from one cultural context to another (Taylor quoted in Goldberg, 1994:94).

With the politics of equal dignity what is established is meant to be universally the same, an identical basket of rights and communities. On the other hand, what the politics of difference seeks to achieve is a recognition of the unique identity of this individual or group, their distinctiveness from everyone else, what should be highlighted is this very distinctness that has been ignored, glossed over, assimilated to a dominant or majority identity. It is this assimilation which is the cardinal sin against the ideal of authenticity. The politics of difference often redefines non discrimination as requiring that we make these distinctions the basis of differential treatment. The politics of equality or equal recognition realises the universal human potential a capacity that is shared by all human beings whereas, in the politics of difference, there is an alternative universal potential as its basis, the potential for forming and defining one's own identity as an individual and also a culture (Taylor quoted in Goldberg, 1994:94).

The problem with the supposedly neutral set of difference-blind principles of the politics of equal dignity is in fact a reflection of a hegemonic culture. This being the case, minority or suppressed cultures are being forced to assume forms alien to theirs. Consequently, the supposedly fair and difference-blind society is not only

inhuman because it suppresses identity formation, but is also highly discriminatory in a subtle and unconscious way. Thus, liberalism defines equality. It is comparative. To know if you are equal you have to be equal to somebody who sets the standard you compare yourself with. Liberal equality would then mean that women must think and act like men to be equal, ethnics must think and act like members of the dominant culture to achieve equality (Mackinson quoted in Spinner, 1994:91).

Any culture which has existed for a length of time and won acceptance from a group has something of value to all human beings. In this strong sense, the politics of equal respect would imply assigning equal value not only to the potential of all human beings, but also of what has been made of their potential. This may be termed as 'fusion of horizons' which would involve examining our own culture and other cultures side by side, thus opening up both to critical evaluation (Taylor, 1994).

On the subject of collective rights, two kinds of claims of collective rights made by a culturally constituted group can be noted. The first involves the claim of a group against its own members and the second would be a claim of a group against the larger society. Both can be viewed as measures for protecting the stability of the culturally constituted groups but they respond to instability stemming from different sources. The first kind is intended to protect the group from the destabilising impact of internal dissent, for example, the decisions of individual members not to follow traditional practices or customs; whereas the second is intended to protect the group from the impact of external decisions, for example, the economic or political discussions of the larger society. The first kind can be viewed as internal restrictions and the second kind as external protection (Kymlicka, 1995:35).

External protection involves inter-group relations, that is, the culturally constituted group may seek to protect its distinct existence or identity by limiting the impact of the decisions of the larger society. This raises the danger of unfairness between groups. One group may be marginalised or segregated in the name of preserving another group's distinctiveness. Kymlicka claims that liberal societies can and should endorse certain external protection where they promote fairness between groups. In fact, most communitarians concern themselves with this aspect of collective rights and most demands for cultural communities are generally based on this (Kymlicka, 1995:35).

The problem arises when there is an undue emphasis on internal restrictions. Internal restrictions involve intra-group relations whereby the culturally constituted group may seek to use the state power to restrict the liberty of its own members in the name of group solidarity. This raises the danger of individual oppression. Critics of collective rights point our that very often this becomes an example of what can happen when the alleged rights of the collectivity are given precedence over the rights of the individual which can be seen in patriarchal societies and religious groups where women are oppressed in the name of the group solidarity (Kymlicka, 1995:35).

Culture is something which is constructed continuously by the members of a cultural community by exercising free choice within the matrix of their community. Freedom would not merely be making choices, but would also include revising one's choices even if the existing choices seems to produce good results. Kymlicka sets two preconditions for the fulfillment of our essential interest in leading a life that is good:

a) We lead our lives from inside in accordance with our beliefs about what gives value to life and,

b) we are free to question those beliefs, to examine them in the light of whatever information and examples and arguments our culture can provide. Freedom is also when a person can revise his opinions about how to lead his life constantly (Kymlicka, 1995:36).

But in the case of internal restrictions this freedom of revising one's choices contrary to those held valuable by the majority of the community may become contentious. In culturally constituted groups where such freedom does not exist, the options open to the members become no options at all. Choices, then, become forced choices. The identity which is so cherished by the communitarians then becomes a bondage, a tie that may hold someone in. Thus, identity can also have another aspect associated with it. It can be viewed as exclusionary, it can forcibly include those people who do not want to be in. And this is done by insisting on an essential character or simply by requiring community solidarity (Goldberg, 1994:12).

Difference, then, can be used as a boundary to limit in organization, in interaction, in memory those included as members of the group, of the same kind in virtue of their heritage. This (self) imposed distinction may be cast as a mark of elevation or moral superiority by the community leaders as being necessary to group survival or self-determination or as a burden worth bearing no matter one's desire or effort (Goldberg, 1994:12). Hence, the options for revising one's choices in life become further limited.

Liberals value the ability of the individual to adopt a critical distance from social and cultural practices, and if need be to change them, by generating forces within civil society outside the arena of the state and without the help of state power. Critical distance enables individuals to perceive possible oppression within cultural practices where it exists and to ensure that existing social practices are not used to license any abuse, injustice and cruelty that may be present within that culture of a community. Communitarians, on the other hand, believe that critical distance is at best one value among several others and cultural belonging matters even when it undermines critical reasoning. When taken to extremes this leads to communitarianism, or so the liberals fear, to turn a blind eye to oppressive cultural practices and to ignore injustice even cruelty within cultures -a conflict between liberals and communitarians- a conflict between autonomy and cultural belonging which has been subsumed under individual versus group debate. Thus, it is often feared that multi-culturalism supports aggregative community power over individual freedom and by according equal rights to oppressive cultures, it corrodes the values of liberal democracy (Bhargava,1999).

The desire to protect cultural practices from internal dissent exists to some extent in every culture, even homogeneous nation states. On the other hand, external protection can only arise in multi-national or poly-ethnic states since they protect a particular ethnic or culturally constituted group from the destabilising effects of decisions of the larger society. Communitarians do not accept the idea that it is legitimate for a group to oppress its own members on the pretext of group solidarity, religious orthodoxy or cultural purity. Indeed, for them what distinguishes a liberal

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theory of minority rights is precisely that it accepts some external protection for culturally constituted groups and national minorities but it is very sceptical of the internal restrictions. The liberal conception of minority rights will not justify (except under extreme conditions) 'internal restrictions' (Kymlicka, 1995:7). Communitarians are thus committed to supporting the right of individuals to decide for themselves which aspects of their cultural heritage are worth passing on. Liberalism is committed to, perhaps even defined by the view that individuals should have freedom and capacity to question and possibly revise the traditional practices of their community should they see them as no longer worthy of their allegiance (Kymlicka, 1995:153). Since multicultural heterogeneity multiplies in number and quality the available nature and range of knowledge and practical wisdom and given that heterogeneity applies equally within and between groups, it sets a limit on intra-group tyranny just as it delimits inter-group tyranny (Goldberg, 1994:13).

This theme within multiculturalism has not been unproblematic. Many questions arise in one's mind as to what constitutes the 'extreme conditions' under which an abrogation of individual rights and liberties by a community is justified? Who should decide where the line should be drawn between an 'extreme condition' and an abuse of the powers of the community for it is but a thin line between an exception and an abuse? What would be the course open to an individual who feels the necessity to hold opinions different from that of the community? Is he forced to exit from the community and at what cost is this to happen to the individual's identity formation and self-realisation? It is here that the state has an important role to play. Not all demands from the cultural groups should be entertained by the state when

constituting policies for the whole nation. Some of the demands may be detrimental to the stablity of the state and, therefore, should not be allowed to grow out of proportion whereas, on the other hand, there may be some that could be accomodated within the state policies.

The Indian Context

In India, the liberal project has followed a different trajectory for cultural autonomy and minority rights from that in the West. The distancing of religion from state policies in the West can be accredited to the historical context in which this ideology evolved in Europe. Confronted with a situation in which religious differences became the source of conflicts between states and the religious convictions of the sovereign a cause of persecutions of dissenters, liberal theorists associated religious differences in the public realm with discrimination. In other words, the liberal theorists linked the existing religious conflicts with the fact that state policies expressed the value system of a particular community. They suggested that the state should not embody any particular conception of good life. To strengthen this the liberal theorists advocated the procedural republic where the state, they felt, should not be a moral community engaged in the pursuit of a common substantive purpose. The absence of common ends in the public realm was favoured by liberals because it allowed individuals the freedom to pursue their diverse ambitions and

goals. Therefore, agreeing on procedures rather than common pursuits or values ensured the autonomy of the individuals. It gave to each subject the freedom to live in accordance with his own beliefs and norms (Mahajan, 1998:2).

The case in the Indian context was much different. The circumstances at the time of Independence necessitated the subordination of individual rights in favour of community rights. The primary emphasis was on ensuring the stablity of the newly independent country. The Indian Constitution, by focusing on the cultural policies of the state and devising ways by which cultural communities received equal consideration in the public realm, deviated from the liberal framework as followed in the West. While it accepted and endorsed the twin ideals of autonomy and non discrimination it acted on the assumption that equal treatment to all religious and cultural communities could not be ensured by providing equal political or civil liberties to individuals. Consequently, the Indian Constitution devised a two fold policy. On the one hand, it tried to ensure that no community was outrightly excluded or systematically disadvantaged in the public arena; and, on the other, it provided autonomy to each religious community to pursue its own way of life. Liberalism in the West, therefore, operated on the belief that protecting the autonomy of the individual would be the best way of preserving diversity and doing away with the structures of discrimination. That is the reason why there was a stronger emphasis on citizenship rights. The Indian Constitution, on the other hand, by comparison regarded autonomy for religious communities to be the best guarantor of equal treatment. Thus, even though the ideals of autonomy and equality still remained the

central concern of the debate the liberal priorities were significantly changed to incorporate the unique circumstances of the Indian state (Mahajan, 1998:4).

The notion of cultural autonomy has been incorporated in the public realm differently in the West and in India. In the West, collective community rights have been placed on the agenda after a uniform structure of social and civil laws has been established in society. The existence of uniforms laws is important because it has set the boundaries within which certain cultural differences are permissible. That is, aspects of the liberal ethics have been incorporated into community practices and, as a consequence, in these liberal societies community rights have not frequently conflicted with the principle of gender equality. In India, as far as gender equality is concerned, cultural rights demanded by communities have tended to perpetuate the continued subordination of women as a group since minority rights in cultural matters were conceded before gender inequality had been dealt with, preserving cultural autonomy tended to perpetuate group discrimination (Mahajan, 1998:7). Thus, the liberal project has yielded different results in the West and in India. In the West, the minorities challenged the cultural homogeneity and have attempted to rectify the disadvantages that they faced due to it. However, in India it has held back the process of democratisation by the continuation of prevailing community laws that place women in a subordinate position in all matters relating to the family. Community rights have therefore, resulted in the denial of equal rights of citizenship to women (Mahajan, 1998:7).

In India, cultural community rights were supposed to enhance cultural heterogeneity by providing autonomy to different religious communities. In recent

times the attempt to build a national identity around that of the Hindu majority has only justified the need for such cultural autonomy. However, the unique conditions of the Indian state leading to the prioritising and granting of cultural autonomy to the religious communities of India has led to several problems. In addition to hindering the realisation of gender equality, community rights have completely ignored the issue of intra-group equality. To some extent, the principle of non-discrimination itself raised the issue of group equality; minority rights have reaffirmed this priority. What was ignored as a consequence, was the question of equality within the group. (Mahajan, 1998:8).

Thus, the individual in India was marginalised both by the priority accorded to cultural and religious communities as well as the concern for territorial integrity of the Indian state. On the one hand, community practices were protected even when they were in conflict with the rights of the individuals as citizens; on the other hand, the liberties of the individual citizen were curtailed in the interest of national security and unity. On both counts, the Indian constitution severely reduced the space for the expression of individual autonomy. (Mahajan, 1998:8).

Since cultural practices of communities were given protection within the Indian state even before equal rights of citizenship were ensured for all categories of people within the communities, the priority accorded to the cultural practices of religious communities only served to reinforce the authority that was given to the religious leaders. Where the hegemony of the religious sphere has not been displaced

from the social sphere the sanctity given to the religious and cultural community practices reaffirmed the special status of religious leaders within the community and the rest of the society. It was the religious leaders who decided for the community thereby restricting the individual's capacity of assessing and reconsidering ongoing community practices (Mahajan, 1998:9).

In the Indian context, three sets of theories dealing with culture and religious diversity and its relationship to the state have been put forward--theories of national identities; theories of liberal individualism and communitarian theories. The first two look at diversity with mistrust and pessimism. According to the theories of national identity, the Indian state has failed in the project of the construction of a homogeneous national community. According to liberal individualism, the Indian state compromised the basic principle of liberalism by allowing cultural communities to co-exist with citizenship rights. Consequently, cultural/religious diversity sets limits to the stability of the nation state. By contrast, communitanian theories with its 'politics of cultural recognition' presume an optimistic reading of the Indian experience. The state is tolerant of multiculturalism and this should serve as a model of nation building for other democratic states. However, both sets of theories are problematic. The former cannot account for the stability and integrity of the state despite the proliferation of diversities and the latter cannot account for the persistence of substantial inequalities despite half a century of bureaucracy and political labours to enhance equality (Hasan,1999).

The communitarian approach in India while analysing the nature of democracy have put forward three arguments (a) an individualist ethic is not a

necessary condition for the functions of democracy, in fact, as a form of government, democracy can and, indeed does, exist in societies where community identities dominate over all the others (b) the existence of community identities is not an impediment to the function of a democracy (c) the central concept of liberalism-namely individualism, secularism, the distinction between the private and public-are either unnecessary or inappropriate (Mahajan,1998 : 26).

The community based perspective fails to take into account the plural and changing nature of a person's identity. It assumes that a community is a natural and pre-given unit and it is an unproblematic way of differentiating between categories of people. This perspective ignores the fact that people have multiple identities. Membership of a particular community is only an aspect of the person's self and certainly does not embrace the whole. This view also fails to accept that there are no uncontested ways of constructing typologies. Thus, when one uses a particular identity for categorising people there is a deliberate privileging of that identity over the others, for instance, when there is primacy given to religious identities the gender-based identities may be forced to take a backseat. What needs to be emphasised as far as a community based perspective is concerned is that the existence of multiple identities may sometimes necessitates the use of political strategies that take the individual and not the community as the subject of political discourse (Mahajan, 1998:27). Hence, inter-group equality would become meaningful only if it is supplemented, if not preceded, by intra-group equality.

What is peculiar to the Indian situation is that in India political institutions were incorporated without the accompanying process of secularising civil society. In

India, where religious freedom is guaranteed by the Constitution, political intervention by the state seems to become unnecessary. However, while the withdrawal of the state may be desirable, it is questionable whether religious communities can generate resources that can sustain democratic equality both within the community and outside. Further, in India, where religious leaders play such an important role, the possibility of such initiatives coming from the community itself is limited (Mahajan, 1998:79).

To supplement the autonomy of religious communities, the Indian Constitution provided collective group rights to minority communities. While freedom of religious worship and practice restricted state interventions in religious matters, collective rights allowed minorities to protect and preserve their cultural identities. In fact, minority rights placed certain obligations on the state in this regard. Although the state has not recognised these commitments, nevertheless, the envisaged system of minority rights limited the possibility of cultural assimilation and homogenisation by the nation state. Collective cultural rights that were granted by the state were supposed to safeguard against the possibility of unequal treatment. Together with religious autonomy these rights were to prevent the state from imposing the culture of the majority (Mahajan, 1998:74). But the Indian State does not allow all identities to proliferate. The identities that are recognised by the state are firmly linked to statist notions of multiculturalism. The Indian State extends recognition to four specific categories of 'valid' groups -religion, language, region and caste. The Indian State does not consider gender or class differences. Within this framework there can be seen a further subtle classification which privileged certain

identities over the others. The state has developed over the years a set of written rules which defines certain identities as being legitimate and which can be accommodated and those identities which are deemed as illegitimate and which might be a cause of threat to the state. One such rule is that regional demands must stop short of secession. The second rule is that demands based on language and culture will be accommodated but demands which are explicitly based on religious differences will not be accepted. Therefore, there are two features that stand out within the Indian context. The first is the predominance of the collective over the individual identity and secondly, the unequal placement of individuals and groups in society. While the state recognises the existence of different communities and inequalities, its egalitarian impulse centres on caste (Hasan, 1999).

There can be two ways in which a democracy can deal with assertive, politically active and competing religious identities. It can grant political rights to all citizens but use the religion of the majority to build the nation and give it the distinction of cultural identities, or it can provide equality for the 'other' both in the political as well as in the cultural realm. The difference between the two perspective is that while political rights are granted to citizens in both, the former asserts the cultural hegemony of the majority religious community. In fact, it considers this hegemony to be an essential condition for the harmonious and peaceful co-existence of 'self' and 'other'. In the second alternative, no such overriding advantage is given to the majority religious community. Indeed, the cultural policy of the state is sensitive to religious sentiments of the majority and the religious minority within the nation state. India has chosen the second option (Mahajan,1998 : 85).

Minorities and the State

In India, the minorities perceive the state in a dual light. On the one hand, it is perceived as an instrument of cultural homogenisation and on the other, they view it as a potential ally. Considering themselves as vulnerable sections of the society these communities feel compelled at times to be dependent upon the state for survival. Hence, they appeal to its neutrality and seek special facilities from it. But the contention is that minority rights in India have, at least indirectly, obstructed the pursuit of gender equality. In India, each community is, in matters of family inheritance, adoption, marriage and divorce governed by the personal laws of that particular community. Although, protection of the personal laws was never considered as a fundamental right of the communities or its members, yet the right to culture granted to the communities has been used by these communities to advocate non interference of the state in the personal laws of these communities (Mahajan, 1998:103). The interface between religion and the state is centred around administration and law. Though the state initiated certain legal reforms like the introduction of the right to divorce, abolishing child marriages and legally recognising inter-caste marriages, the major criticism is that state legislation has been used to bring about reform in the religions of the majority thus creating an aberration in the very notion of equal citizenship. The basic problem was rather evident that if it was accepted that the state could intervene to protect the rights of one community

then what was the ground for not doing the same for other religious communities. The reasons for this was essentially pragmatic but the political leadership believed it was perhaps more important to respect the sensitivity of religious communities and accordingly the State sponsored reforms would be initiated only when the religious communities were ready to accept them. Thus there are legal asymmetries between different communities related to their personal laws (Mahajan, 1998:103).

The principle of group equality gave a specific shift to the notion of equality. While non discrimination defined equality negatively and stipulated the minimum necessary conditions for the existence of social equality, group equality had within its ambit a strategy for continuing discrimination and enhancing non discrimination. In other words, it gave a positive connotation to the notion of equality. Instead of ignoring social identities, it now related them to the social patterns of discrimination and maintained that promoting equality between groups and communities was the only reliable way of ending existing forms of discrimination in the society. Within the idea of inter group equality each denomination was treated as a homogenous entity and differences between the communities were ignored. Therefore, what gained greater validity was the opinion of the religious leaders of the community who were mostly orthodox male clerics, as the moderate opinion was regarded as a threat to the community identity. As women are rarely in the forefront of religion it is these male clerics who define the politics of the religious community (Mahajan, 1998 : 152).

The emphasis on groups and communities is not merely an expression of community-centred social existence. To a considerable extent it is a result of the primacy given to the principle of social equality or social non discrimination in the

Indian Constitution. What needs to be hightighted is that groups and communities enter into the discourse of democracy through the concern for social equality. In fact, the principle of non discrimination itself contains a group reference. Even the assertion that no one must be discriminated or disadvantaged on accord of his/ her social identity draws attention to the collective community identity and group membership. More importantly, the principle of non discrimination is a criterion by which discriminatory groups or community practices can be identified and challenged. It makes a distinction between communities whose practices are discriminatory and others who became the victims of such practices. Thus, a group reference is implicit even in the principle of non discrimination. The quest for social equality thus makes the community / group an important entity for democratic theory. In fact, reference to community identities in political arrangement where social equality is a primary concern. Both the principles of non discrimination as well as the concern for equality of opportunities implicate the group and the community. While the former is critical of discriminatory group practices and declares social identities to be insignificant within a democracy, the latter accords primacy social affiliation and devises policies which compensates disadvantages to stemming from social circumstances and community membership. Equality of opportunities also seeks to promote the ideal of non discrimination by dissociating community identities from life opportunities, the only significant difference is that it consciously uses the category of group and community membership to take care of the special needs of some. Either way, the general commitment to the idea of social equality makes democracy sensitive to group practices and social identities (Mahajan, 1998:167).

In the political sphere, the issue of individual liberty and self determination has been continuously ignored in India. Thus, political conflict has been manifested as contestations between two distinctive types of communities, religious/cultural community and political community or the nation state. In this contestation the abstract egalitarianism of citizenship retains its emancipatory potential vis à vis practices of religious community. It offers equal status to all groups and it is for this reason that it remains a platform for the weaker and vulnerable sections of society such as women to come together. Even though privileging the category of citizen grants a special status to the nation state and in that respect it often constraints individual liberty yet in the conflict with religious community it is cast in a different light. As far as the religious community citizenship furthers the process of democratisation by treating all groups and people a equals members with equals rights. What is significant then is not that the discourse of democracy in India is group centered but that this feature imbues political category with dual, and often contradictory meanings, just as it combines the emancipatory and statist perspective of citizenship, it makes religious / cultural communities both symbols of desirable heterogeneity as well as conservative patriarchy and discrimination (Mahajan, 1998:164). Minority rights in India present three kinds of problem for a multi-cultural polity like ours. Firstly, minority rights which privilege community rights over the principle of equal rights do often reinforce existing hierarchies; secondly, such rights have exacerbated gender inequalities within the group and restricted individual choice in the name of cultural integrity and lastly and most importantly, it underestimates the potential for culture and communities to change and yet survive.

Moreover, a culture encompasses a lot of things such as how one should live, related to one's fellow human beings and find meaning in one's life. It would therefore,be erroneous to link culture solely or judge it even primarily in terms of one aspect, in this case the personal laws of the different communities (Hasan,1999).

Therefore, a problem that exists within multiculturalism is that it ignores other forms of discriminationsin society,for instance, discrimination arising due to patriarchy. Demands for gender justice is a consequence of this source of discriminaton and should entail more than just a community-based perspective to the liberal project in a community.

CHAPTER TWO

COMMUNITY, WOMEN AND STATE

Social change has never been easy with diversity as varied as ours, particularly when attempts are made to alleviate the status of women. During the last seven or eight decades, there has been a triangular contest between representatives of religious communities, women's groups and the state regarding the status of women within the changed socio-political milieu that is now India. The central focus on the overlapping of religious community identities and gender identities in India and the interactions of the two with the state and state response to the demands of change from both kinds of identities. The social, political and religious construction of the identity of women has become a major impediment in the legal empowerment of women. The attempt is to ensure gender justice in laws by efforts to change the construction of such identities of women.

Multiculturalism and Religious Community

The demarcation of religious boundaries in civil society is a complex process. The conception of community that forms the basic core of all discussions of gender and personal law can be termed as rigid. In this conception, the community is seen as static, fixed and primordial (Sangari, 1995 :3289). In India, community notions are primarily based on religious communities, namely, the Hindu, the Muslim, the

Christian and the Parsi communities. Religious ties are privileged over all ties of kinship, caste, language or region. This is accompanied by a complementary conception of religion as inert, self-standing, and isolated from social process and from all other religions. This conception rests on a simple conflation of faith and community (Sangari, 1995:3289). Unfortunately, the primacy given to religious communities has been at the cost of many different identities; leading thereby to a gradual erosion of the pluralities within a particular religious community: denominations, sects, orders and movements. This erosion of pluralities, thus, included an ignoring of belief systems that could not be designated as communities. As a result, one can observe the incorporation of many diverse sects and practices into the legal definitions of `Hinduism' or `Islam' and it is this image of a unified religious community that these communities project their interaction with other religions communities and with the state. In fact, this perceived monolithic structure of the religious community undermines the notions of religious plurality or cultural diversity in India (Sangari, 1995:3290). Consequently, ideologies of cultural diversity that rest on an assumption of discrete homogeneous communities are rejected. The notions of community is criticised as bureaucratic, reductive, static and essentialist defeating their declared objective of maintaining social pluralism. Religion should not be regarded as the sole determinant or axis of cultural diversity. Since the notion of communities is constructed, in India the idea of mulitculturalism is also constructed. The actual cultural diversity in the country exists in a politically unarticulated and politically unselfconscious real; and it is this, rather than four personal laws, a product

of political articulation by the state and community spokesmen, that constitutes genuine plurality (Sangari, 1995:3302).

Community, Patriarchy and Religious Identity

The broad ideological conception of religious communities within India can have uncomfortable implications, since it can be undemocratic, particularly towards women. Community identities can be as much primitive as protective for women and that too, protective on patriarchal and proprietorily assumptions. Communities were meant to legally govern, reform and adjudicate themselves. It was for the communities to decide whether they should be the sole instruments for change or the protectors of status quo. In effect, they become self-legislating patriarchies, hand over maintenance of community identities to the more conservative sections within the community (Sangari, 1995:3293).

The financial and social dependence of women on men subordinates their position within any community, both in status and in choice of action. This is, in fact, a general social feature, which has strengthened the assumptions of the weakness of women and the overriding need for protection by their male counterparts within the community. The religious and community identity of women and their role in maintaining, it only leads to a reinforcement of their passive nature. Thus, women's consent to religious identification may go beyond questions of individual faith and reflect the ways in which religions and patriarchies are merged together (Sangari, 1995:3293).

Some feminists writers seek to provide a more comprehensive analysis of women's oppression based on the concept of patriarchy. They view gender inequalities as the result of an autonomous system of patriarchy which cuts across all religious communities. All religions are implicated and enter into the broad process of social legitimisation of patriarchies. A challenge to the existing patriarchal norms as envisaged by the women's movements within the country is thus, seen to constitute a threat to specific forms of religious legitimisation (Cossman and Kapur, 1996:29).

Community, Religion and Law

Law can be used as an instrument of change in bringing about an enhancement of the rights of women, sometimes contrary to the community's notion of familial ideology. Familial ideology refers to the dominant conceptions of the family through which ideas about what the family is and what roles people play within it are universalised and naturalised. This familial ideology often allocates to women the roles of wives and mothers. This identity has become naturalised through a broad range of social, cultural and religious discourses. This identity has become so universalised that they are now regarded as natural. It becomes important in that it constitutes women as `different' from men. Women are different because they are wives and mothers and, conversely, women are wives and mothers because they are naturally different. This assignment of difference in and through familial ideology thus operates to both construct and reinforce this difference. The main area where the influence of familial ideology is most apparent is the area of personal laws which

defines gender relations within a community. Laws pertaining to women become contentious since they are given more to contain women within the patriarchal framework of the family, thereby curtailing her rights as an individual (Cossman and Kapur, 1996:42). Thus, the legal discourse in India, constructing women as gendered subjects, has contributed in perpetuating the subordination of them. But at the same time, it is within these boundaries of law that identities so constructed are challenged by women's movements, in an attempt to displace the previously held dominant notions of women's roles and identities so as to evolve a more equal participation of women as citizens. Hence, it is this discourse of law that needs to be reconceptualised as a site of discursive struggle where competing visions of the world and women's place therein, have been and continue to be negotiated (Cossman and Kapur, 1996:59).

In India, feminist movements began by basing themselves firmly on the principle of equality. The discourse of equality has focused primarily on patriarchal social relations, and to laws that explicitly discriminate against women in particular. The difference between men and women was held largely (and by implication `merely') to be a biological one, which should not affect women's right to equality with men either in the public or private spheres. As far as constitutional law and the concept of equality is considered, there are two approaches which can be clearly identified in the political and legal discourse, that is, a formal approach and a substantive approach. In the formal approach, equality is seen as equal treatment, that is, all those who are the same must be treated the same. On the other hand, the substantive approach goes beyond the same treatment of law to the actual impact of

law on disadvantaged groups. Substantive equality is, thus, directed at eliminating individual, institutional and systematic discrimination against them, which effectively undermines their full and equal social, economic, political and cultural participation in society as citizens. This shift from formal equality to substantive equality has larger implications for the concept of equality. Differences no longer become a reason to preclude an entitlement of equality but rather are embraced within the concept of equality. Thus, differential treatment may be required not to perpetuate the existing inequalities but to achieve and maintain a real state of effective equality (Cossman and Kapur, 1996:16).

Within the legal discourse, the question of gender difference has resulted in three kinds of attitude. The first , the protectionist attitude, works on the underlying assumption that women are weaker than men and are therefore in need for protection. Any differentiated treatment of women is thus, considered as being protective and with an intention of benefiting them. In this approach, the existence of gender difference is seen as natural and inevitable thereby essentialising difference. In the name of protecting women, this attitude leads to a further reinforcement of the subordinate status of women, for example, laws that deny women the right to own properly may be justified on the basis of this approach (Cossman and Kapur, 1996:26).

The second attitude is that of equal treatment, whereby men and women are viewed as equal before law and should be treated likewise. This primarily strikes down provisions that treat women and men differently. Any recognition of gender difference in the past has been perceived as a tool for justifying discrimination against

women. `Special treatment' then becomes a contentious issue in the sense, that under the guise of protection it has been used to discriminate against women (Cossman and Kapur, 1996:26).

In the patriarchal attitude, laws are based on male norms, male experience and male domination. Women have been seen as a historically disadvantaged group and are therefore in need of compensatory or corrective treatment. Gender differences are often viewed as relevant and as requiring recognition in law. A failure to take differences into account would only serve to reinforce and perpetuate the underlying inequalities. Rules and practices that treat women differently from men can be upheld if they are aimed at improving the position of women. This attitude attempts to show how the ostensibly gender neutral rules of the formal equality approach are not in reality gender neutral but rather based on male standards and values. And it is only if women can confirm to these standards and values of men that gender differences should be taken into account to produce substantive equality for women (Cossman and Kapur, 1996:26).

Feminists claim that, as far as the legal discourse in India is concerned the judicial approach to sex discrimination is overwhelmingly influenced by a formal approach to equality and within this a protectionist attitude to gender differences which has only operated to preclude any entitlement to equality (Cossman and Kapur, 1996:34). After independence, women achieved formal political and economic equality within the public sphere but it did not have an impact on the private sphere. In other words, women could be `equal' in the public sphere without being the same as men in the private sphere. The end result was that though the discourse of equality

could gain hold in the public sphere, it could not fundamentally challenge or displace the hold of familial ideology in the private sphere (Cossman and Kapur, 1996:59).

A violation of women's rights to equality for the feminists entails a discursive struggle to transform the way in which people gives meaning to the world around them. The attempt is to denaturalise the way in which women are treated by providing a different lens through which women are perceived. It is a contest over the meaning of equality, gender and gender difference, an effort to destabilise dominant meanings and supplant these meanings with alternative visions about how we ought to live in the world (Cossman and Kapur, 1996:42).

Feminist scholars have attempted to distance themselves from the sameness/difference debate within the women's movements. When the two are paired dichotomously, then the choice between them becomes quite impossible because if one chooses equality then one is forced to admit that the notion of difference is contrary to it and one opts for difference them equality becomes unattainable (Cossman and Kapur, 1996:42).

Recognising that difference becomes meaningful within a complex web of social relationships, within certain reference points (in this case men), differences as being relational is therefore, more of a social construct than a natural aspect of the whole debate. Difference, therefore, must become part of the analysis rather than a mere justification for not pursuing the equality analysis. Thus, substantive equality redirects our attention to disadvantages and to the critical interrogation in which difference has been socially constructed, to the ways in which difference has very real material implications in an individual's life and to the ways in which the judicial

approach cannot simply proclaim on the relevance on irrelevance of difference but must begin to deconstruct the assumptions that are deeply embedded in the way we see the world (Cossman and Kapur, 1996:221).

Legal discourse constitutes subjects as legal citizens, as individuals with certain rights and responsibilities vis-à-vis other citizens and the state. This discourse is both universalising and naturalising – all legal citizens are the same in the sense that they are equal before the law. Law is, therefore, seen to protect the rights of the individual who exists prior to their constitutions in and through legal discourse. But feminist scholars have attempted to disclose the heterogeneity within the discourse of law. It does not constitute all citizens in the same manner. Rather, it constitutes individuals as gendered subjects. It imparts to the women a particular meaning and explains and rationalises these meanings by an appeal to the `natural ' differences that exist between the sexes, differences that these rules themselves have assisted in creating and maintaining. The feminist scholars feel that gender differences within the family are seen as natural and therefore legitimate grounds for men and women to be treated differently. The biological fact that women are child bearers is conflated with the social fact that women are wives and mothers. It is for this reason that there is so rarely an interrogation of substantive inequalities. Moreover, the legal discourse does not constitute all women in the same way. Rather even this gendered discourse of law is not always homogeneous. It is instrumental in partially constituting women's ethnic, racial, religious and sexual identity. Sometimes these differences can be explicitly described in law, as is the case with the personal laws. At other times, these differences are obscured in law as legal discourse assumes a

homogeneity of all women and attempts to universalize a common gendered identity.(Agnes, 1999:42).

There is an implicit identification of religion with personal laws. The term `personal laws' generally refers to the religious textual laws but on other occasions, it seems to be used to embrace all laws that are applicable to a person because of his religion on ethnicity. The rationale behind a system of personal laws is to help an individual to affirm the distinct identity of his own religious and ethnic groups. It may contribute to the well being of the individual in the sense of having meaning in their lives (Mansfield in Baird, 1993:158). But sometimes, the individual's well being may not be enhanced by the existence of personal laws but rather diminished by the membership in a particular religions or ethnic community. It has often been perceived as a way of maintaining those identities which constrain the individual, particularly women. This legal purview of religion, which is confined to personal laws, that is, to matters related to family, marriage and inheritance, works to the detriment of women. Thus, all issues concerning `personal' matters were deemed `religious' rather than customary and over a period of time `religious laws' and `personal laws' began to be used as synonymous (Agnes, 1999:61) .

The influence of religion on laws relating to family, marriage and inheritance has created a division between the public and private. The understanding of family as private and beyond state intervention has operated to both immunise the oppression of women within this domestic sphere, as well as to obscure the extent to which this private sphere is created and protected by state regulations. Feminist scholars have revalued the important role of familial ideology in the continuing rationalisation of

this idea of privacy (Cossman and Kapur, 1996:90). The division between public and private is both uneasy and unreal. Unreal, because in practices the areas in which personal laws operate are interdependent with and related to all the other areas, in laws and in women's lives; women are governed not by family laws alone but other laws of inheritance which may encompass both the public and the private domain in different regional and legal combinations. Moreover, this legal division of public and private, of work and family life is illusionary women's family life and work capacities most often are completely intertwined and mutually determining. The division between public and private is uneasy because this division simultaneously ensconces religion as a means for the public regulation of `private' family affairs, on the one hand and on the other, effectively puts religion into the domain of the `private' in the sense that its legal purview in restricted to family matters (Sangari, 1995:3297).

The location of religion in the `private' domain also leads to a number of problems. It serves to transpose the liberal rationale of the family as a private sanctuary ideally beyond state intervention (which has proved to be detrimental for women) onto the religious community and its personal laws. It also shifts the onus of maintaining community identity onto women in marriage and women in familial relations. Finally, this notion of religion assists in the repetition of a classic logic, honed by colonial administrators and middle class Indians in the early nineteenth century, in which patriarchies had to be preserved and reformed but this time on the ground of personal laws (Sangari, 1995:3297).

Communities were categorised on the basis of their religion, customs and laws which the English administrators had created were in turn deemed to be religious.

This created a legal fiction that the laws of Hindus and Muslims are rooted in their respective scriptures and further that Hindus and Muslims are homogeneous following uniform laws. There was also a presumption that the dividing line between the communities is their religion, overriding other factors such as caste, sect, occupation, language or regionality. This legal fiction provided no space for validating the role of customary law which has no scriptural basis and is evolved at the local level transgressing boundaries of religious identities (Agnes, 1999:43).

There was a presumption that by incorporating the concepts of modernity into the native jurisprudence, the status of women in India would be alleviated. However, this premise has been questioned by recent scholarship (Agnes, 1999:43). As far as customary laws were concerned, the scope of women's rights was constrained beyond recognition through a series of judicial decision. For instance, the Mitakshara has expanded the scope of *stridhana* to include property acquired by women through every source, including inheritance and partition. But the judicial decisions changed this concept and held that inherited property is not *stridhana*. A new legal principle was gradually introduced through court decisions that whether the property is inherited by a woman through her male relatives (father, son, husband) or through female relations (mother, mother's mother, daughter) it is not her *stridhana* and that it would devolve on heirs of her husband or father. Women, thus, lost the right to will or gift away their *stridhana* and it acquired the character of a limited estate. Any transaction by a widow in respect of the property inherited by her had to be justified on two grounds, legal necessity or religious on charitable purpose. Upon the widow's death, the property reverted to the husband's male relatives. The introduction of this

concept of `reversionary' which is a legal principle under the English law bestowed upon the male relatives the right to challenge all property dealings by Hindu widows (Agnes, 1999:47).

The period of ninety year, 1857-1947, which mark the nation's struggle for Independence, are also the years that witnessed the creation of personal laws. Hence, the edifice has within its boundaries the political undercurrents of the period. The struggle for women's rights within the realm of family law is entrenched within these undercurrents and has become an integral and inseparable part of this discourse. The process was initiated with the codification of laws after the administration of India was transferred from the British East India Company to the British Crown. At this time, a distinction was made between the laws of the `personal' and `public' spheres. The personal laws to a large extent, were left unmodified to be governed by native jurisprudence (Agnes, 1999:58).

Reforms Within Personal Laws Initiated By The State :

Hindu Code Bill

Communities are not insular entities being affected by the larger political forces at work. On the contrary, their identities are often moulded by the way the other communities perceive themselves in relation to the others. These community identities may be weakened or intensified by the assertion of identities of other communities in society. Likewise the gender identities of women are also affected by an articulation of these identities by women of other communitites. With changes in

this articulation there may be strengthening of gender identities of other communities. This may particularly hold true for the minority communities in India. Thus, changes initiated either by the state or by the community may lead to an attempt to do the same in the other communitites. It is in this sense that a study of the initiatives for reforms by the state in the majority community, the Hindus and within the minority communities become important for the assertion of gender identities.

In the first decades of India's independence the codification and reform of the Hindu personal law was hailed as the symbol of the new government's supposed commitment to the principle of gender equality and non-discrimination enshrined in the constitution. During the colonial period the British, attempted to bring under scrutiny many aspects governing the lives of the various communities constituting the British empire. The court was influenced in its judgements by the translations of the shastras creating a myth that the Hindus were governed by them. It were these rigid Anglo-Hindu laws that were converted into the Hindu Code Bill in independent India (Kishwar, 1994:2145).

The Hindu Code Bill began to be drafted in the 1940s. After a long history with many efforts to scuttle it, a Hindu Code Bill was presented to the legislature in 1947. The Bill faced stiff opposition due to which the government decided to split it into four acts and pass it piecemeal. In this process, the legislation underwent a metamorphosis and by the time the last of the four acts were passed in the mid-50s they were very different from the code as it had been intended (Kishwar, 1994:2145).

The state meant to improve the position of women as a component of its plan of modernisation but it did not intend to upset or alter in any substantial manner, the

power structure of the family. The intentions of the reformers may have been to unify and modernise the law rather than liberate the Hindu woman. By making a uniform law applicable to the members of the Hindu (the majority) community, the state could facilitate the goal of national integration. The state, is this case may have used the process of law to primarily to further its own political goals. In the case of the Hindu Code Bill, the reforms were not a demand by the public but rather the state assumed the authority to decide whether and when it would take the support of public opinion (Parashar, 1992:72).

Another contention has been that the British homogenised personal laws through codification and further codified customs through the accumulation of case law, scarcely incorporated the enormous diversity or variations of belief, sect and practice in different regions and classes that existed even within the rubric of the major denominations. Subsequent reforms of personal law have shown neither respect nor commitment to this substantive diversity. The reformers of each personal law first directly confronted then sought to erase the diversity of customs in order to homogenise the various Hindu and Muslim communities across the subcontinent (Sangari, 1999:29).

Under the double pressure of colonial definitions of Hinduism and a `Hindu' mainstream, and the intent to bring as many people as possible into the provenance of a Hindu Code Bill that was partly envisaged as the first stage towards a more progressive, and possibly uniform, civil code, the reform of Hindu Personal law after independence produced a tendentious legal description of a `Hindu'. It purposively included the Buddhist, Jain and Sikh despite many protests. The plea of Sikhs and

some Buddhist to be governed by their own personal laws was turned down. The Jains, too were turned down on the ground that their difference from the Hinduism was not fundamental. Among the broad category of Hindus was included anyone who was not a Muslim, Christian, Parsi or Jew. The Hindu Code was applicable to any Hindu, Buddhist, Jain or Sikh, who has merely deviated from the orthodox practices of his religion but had not embraced the Muslim, Christian Zoroastrian or Jewish religion. Moreover, it was extended to cover even those who did not `profess' Hinduism and were not `active followers', Finally, it was reluctant to either continue or make new regional exemptions. The Bill thus attacked most principles of religions plurality and choice; it first recognised the existence and claims of in between and unclassifiable areas, discrete belief systems, overlapping religions, non-believers, regional specificity and then proceeded to deny them. The negative description of a Hindu was so tightly bound to his/her birth that even non-belief could not provide an exit. Even though the Constitution had provided for the right of non-belief or atheism, the reformed Hindu personal law `legally' took away the freedom of self-definition from individuals born in `Hindu' families in the sense that he/she could not renounce Hinduism without converting. Moreover this description of Hinduism solely on relation to four excluded religions inevitably meant that these four excluded religions because the legal `others' of Hinduism (Sangari, 1999:30).

Feminists argue that if the government was genuinely desirous of setting up norms of equality and gender justice, it would have done better to frame a thorough-going egalitarian civil code rather than undertaking the shoddy piecemeal alteration of Hindu law in the name of reform (Kishwar, 1994:2157). It gave the Hindus the false

notion that Hindu women now had legal rights which is far from the case. It created the myth that reformed Hindu law is `secular' not `religious' or `personal' whereas Muslim personal law is `religious', therefore backward and can be secularised only by reforming it on the lines of the Hindu Code Bill (Kishwar, 1994:2159). The Hindu Code Bill purged out of existence a number of functioning, local and regional legal systems, several of which provided better rights to women in certain respects without setting up a functional alternative machinery to inform people of their rights under the new laws (Kishwar, 1994:2157).

Though the codification has bought some gains to Hindu women by granting a right to absolute ownership of properly, monogamy and the right of divorce, these rights are termed by the feminists as more conceptual rather than actual. While resolving same issues, the codification has foreground others which have yet to find a satisfactory solution (Agnes, 1999:89).

Muslim Personal Law

The personal laws of the minority communities were a different case altogether. They have been virtually left untouched, ostensibly because the leaders of these communities claim that their religious laws are inviolate and also because there is said to be no demand for changes from within their communities. When the Hindu Code Bill was passed, there were claims from some parts that a secular state should not legislate only for one religious community. It was also felt that if the Hindu

personal law discriminated against women and was changed then the Islamic personal law should also be reformed for the same reason (Parashar, 1992:80).

The politics of religious self-assertion, which claim to speak for both the majority and minority rights, seeks to negate and suppress divergent interests and rights of individuals and social groups. In general, the social, cultural and political concerns of movements for religious revivalism play a key part in legitimising gender differences embodied in traditional attitudes and perspectives of family and gender relations. Many of the movements following from this phenomenon impinge not just on the areas of marriage, divorce, inheritance, sexuality and reproductive rights but also define the place of women and assign them a certain status within the community (Hasan, 1993:5).

If a particular community, which is in a minority, when caught up in the process of change then despite its internal differences, it tends to develop a sharp sense of identity vis-à-vis the majority community which it feels threatens its very existence. This illustrates the special difficulties faced by the women of minorities. Challenging the role and status of women within minority communities became a challenge to the very identity of those communities. Redefining tradition has proven to be even more difficult within the minority communities. Gender could not be singled out and redefined without threatening the very integrity of the community to define its own cultural traditions. Due to the particular situation of the minority, women cannot easily make demands for their individual rights as this may be easily characterised by the community as being anti-community or can be viewed as a weakening of the community solidarity. The onus would then be upon the minority

leaders to further the interests of these women and in case they do not they are left in an irresolvable bond.(Parashar, 1992 : 189).

The religious ideology and leadership legitimise patriarchal practices in that they play an important role in the creation and maintenance of a `Muslim identity', understood as a codifiable phenomenon with specific doctrinal commitments of personal law that distinguish Muslims from others. This community identity constitutes a specific legal and political commitment to the `unity of Islam' and is designed to homogenise the Muslim community through a set of common religions symbols. As far as women are concerned the problem lies in the constant emphasis on the unity of community defined in terms of family codes that restrict the articulation of gender interests. Therefore, feminists claim, that opposing changes in personal law and the obsession of safeguarding the sanctity of the Shariat becomes not only a symbol of representing Muslim identity but also the basis for claims to establish a status for the community commensurate with its substantial minority position (Parashar, 1992:6). Thus, Muslim personal law becomes a symbol that may be used by Muslim political elite to bargain with the state (Hasan, 1993:8). The current Muslim leadership's somewhat stultified vision of the community's future may be attributed to political uncertainty and to the disinterest of political leadership in India in addressing, much less solving, the problems ordinary Muslims face (Lateef, 1996:27).

Community identity has come to be seen exclusively in terms of regulation of family matters. In failing to define identity in more positive ways, the leadership of the minority communities who are comprising largely of men, has succeeded in

appropriating one arena epitomising the essence of that particular community- the personal laws. Any challenge to the personal laws is seen as a threat to the community's right to self-determination. Women, thus become trapped in a contestation over the larger issue of the relationship between the community rights and the state. Although equality between communities should have, in principle, helped in the elimination of gender-based inequalities but the treatment of a community as a homogeneous unit and the importance given to the right to culture has, in practice, sanctioned gender inequalities within it. Moreover in countries like India, the processes associated with liberal democratic government, particularly the concern for achieving electoral majority have only aided the subordination of the claims of women to the right of equality (Hasan, 1998:86).

The decision to reform the religious personal law is linked to the minority status of these communities rather than to considerations about the position of women. In a democracy like India, the state is unlikely to be able to disregard the claims of the minorities communities for special protection. As these communities are unlikely to cease being minorities, the women belonging to such communities face the prospect of continuing legal inequalities (Parashar, 1992:145).

The difficulties of achieving equality and justice for women within the Muslims were highlighted by the Shah Bano controversy. In April 1985, Shah Bano was granted the right of maintenance by the Supreme Court. Shah Bano had sued her ex-husband for maintenance under the Criminal Procedure Code. Hence, a Muslim woman who, unable to maintain herself, was entitled to take recourse in Section 125

of the Criminal Procedure Code, which requires husbands having sufficient means to pay maintenance to wives or ex-wives who were enable to support themselves. The Supreme Court's judgement was based on the understanding that Muslim personal law, which limits the husband's liability to provide maintenance to the period of iddat, does not deal with a situation of destitution, the prime concern of the provisions of the Criminal Procedure Code (Hasan, 1993:10).

The Supreme Court verdict was met with an angry outburst from the Muslim community and its leadership which held that the verdict impinged on Muslim personal law and the judgement attacked the minority identity of the Muslims. The agitation over the Shah Bano judgement changed the terms of discourse by raising misgivings regarding minority status and minority identity in a secular society. The discourse moved out of the law courts into the public arena where the larger issue of minority identity became a platform for unifying the Muslims. In fact, many Muslim women sought to assert their faith in religions laws. They rejected the Shah Bano verdict as they felt it had the backing of Hindu right-wing organisations (Hasan, 1993:10).

In response to the Shah Bano controversy, the Rajiv Gandhi government introduced the Muslim Women's (Protection of Rights in Divorce) Bill, and it was passed by Parliament in 1986. This bill relegated Muslim women to the status of second class citizens by denying them the option of redress under Section 125 of the Criminal Procedure Code.

State, Personal Laws and Women

The State's approach to personal laws and its reform has been varied. While laying the foundation of a new nation, the state found it imperative to relocate the scheme of national integration and it is for this reason that reforms for women's liberty became subservient to it in all later developments both legislative and judicial. The issue of personal laws was debated primarily in the Constituent Assembly in the context of the rights of minorities within the new nation. The trauma of partition had brought in its wake an insecure and defensive Muslim minority which had to be reassured of its right to religious and cultural freedom within the new democracy to be governed by majority concerns (Agnes, 1999:72). It has been claimed that the constitution makers were aware of the tensions to freedom of conscience and efforts to improve the position of disadvantaged sections of society, women and so on. However, this conflict unresolved and the exact power of the state to reform religious personal laws was left undefined in order to make the minority, especially the Muslims, less apprehensive (Parashar, 1992:227).

Since the state had clearly assumed the authority to reform Hindu personal law, it could hardly have claimed the lack of authority in the case of the minority religions personal laws. This hesitant attitude of the state to modify the religion personal laws of any other community except that of the Hindu community exemplifies the conflict between the rights of the minorities and the rights of women of these minority communities. By choosing to protect the religions rights of minority communities, the legislature, the judiciary and the executive branches of the

state have ignored the fact that women are thereby especially disadvantaged. As members of a minority community, women have one set of rights, that relating to religious freedom, protected by the state, but, simultaneously a demand for rights to equality is lost simply due to the fact that they are women with fewer rights in comparison to men of these religious minority communities. Moreover, in view of the judicial interpretation of the scope of the article on religious freedom that the state cannot reform a religion out of existence means that it may now be the male members of religious communities instead of the legislature who will decide whether any aspect of religions personal law can be modified to give equality to women (Parashar, 1992:267).

The debate about religious personal laws has until now concentrated on their religious nature and on the capacity of a secular state to change them. This is partly due to the fact that the state has neither rejected nor totally accepted the claims about the inviolable character of personal laws. The Constitution is ambiguous about these personal laws is seen from the fact that there are provisions to reform them but at the same time, arguments against them are based on the constitutional right to freedom of conscience guaranteed as a fundamental right under Article 25-28 which encompasses the right to be governed by religious personal laws. The Constitution does not resolve the difficult question as to whether the religious nature of these laws prevent a secular state from interfering in them or whether the personal nature of these laws as distinct from territorial laws makes them immune to State control. Such ambiguity in the Constitution permits contradictory claims and allows for discrepancy

with regard to permits the state to essentially similar claims of different communities (Parashar, 1992:267).

The decision to treat minority personal laws as the exclusive concern of the respective minority communities may have the political prudent choice in the post-partition period. But in the following years it seems to have assumed the shape of a permanent principle in the political practice. The state's decision to treat religio-political leaders as the sole spokesmen of the community and to give religious personal law a status higher than that of non-religions civil laws may prove to be significant. The state may have to accede to similar demands by other communities at the risk of appearing inconsistent (Parashar, 1992:189).

Though over the years several discriminatory aspects of the personal laws came up for judicial scrutiny under the constitutional mandate of equality and non-discrimination the courts, in most cases, have stopped short of declaring the discriminatory aspects as unconstitutional. The courts have held that the discrimination under the personal laws of various communities is based on reasonable classification. This has thrown further stumbling blocks in the path of gender equality (Agnes, 1999:77).

The most glaring example of the defeat of the principle of gender justice for Indian women as well as the defeat of secular principle within the Indian polity has been the reaction against the Supreme Court's verdict in the Shah Bano case and the resulting Muslim Women's Act. For the women's movement, the Shah Bano judgement and the Muslim Women's Act was a watershed. From this point onwards the gender equality could no larger be placed as two mutually exclusive and hostile

terrains. While gender equality continued to be the desired goal, the demand had to be reformulated within the context of cultural diversity and rights of the marginalized sections (Agnes, 1999:106). The compromise the government made in surrendering women's rights can be seen as part of a rightward shift in India's politics and economy in the 1980s resulting in a marked decline in the state's commitment to secularism, equal opportunities, and social welfare benefits for the underprivileged and disadvantaged (Hasan, 1993:14). The Muslim Women's Bill reflected the government's effort to pacify ruffled Muslim sentiments over the reopening of the disputed Babri Masjid site and to quell objections of conservatives to the Supreme Court verdict (Hasan, 1993:14). The Congress Party insisted that the government was constrained to introduce the bill because Muslims perceived Section 125 of the Criminal Procedure Code as interference in their personal law. Though the issue was one of women's rights, the state only acknowledged a nongendered identity for Muslim women (Hasan, 1993:14).

The question that remains pertinent to the whole debate is whether the reforms in the personal laws of the communities should come from `within' the community or be imposed from above? Is patriarchal control and /or reform to be exercised by the state and its institutions or by the community ? Will community control act in tandem with the state or independently of it, as in the recent demand for separate Shariat courts? Significantly, the experience of reform of personal law from within, has in the case of the Christians met only with procrastination from the state, while for Muslims it has been one of entrenchment of religious elites and a `community' complicit with the state. The reform of Hindu personal law from above by the state

did challenge religious elites but culminated in the promulgation of patriarchal laws by the state instead. The legitimacy of the state is dubious whether in supporting reforms from within or in reforming from above. In both, reform of personal laws is a bargaining issue for the state whereby it retains the power to decide whether or not to reform the personal law of any community (Sangari, 1995:3296).

The issue of women's rights and family law reform has, therefore, become entangled with the polemic of identity politics and minority rights. At one level, there is a tendency among social activists to project the demand for an all encompassing uniform civil code which like the proverbial magic wand, would do away with the woes of Indian women in general and the minority in particular. At the other level, within a communally vitiated political climate, the demand carries on the agenda of `national integration' and `communal harmony'. The demand is also laden with a moral undertone of abolishing polygamy and other `barbaric' customs of the minority and extending to them the egalitarian code of the `enlightened majority' (Agnes, 1999:1). Any reform within the personal laws of any community will come up against both the state and patriarchal arrangements in the community. Any challenge to the traditional roles, identities and status of women within the family will continue to be met with protests of dangers to religion and the family. In such a situation, the onus of bringing about changes in the personal laws of any religions community would fall on a small number of persons to take up the cause and also upon when and to what extent the community leadership is willing to grant women rights.

CHAPTER THREE

SYRIAN CHRISTIAN WOMEN'S QUEST FOR JUSTICE

The issue of women's rights and family law reform has over the years become entangled within the controversy between identity politics and minority rights. It has become increasingly difficult to disentangle women's identity as a subject or a citizen imbued with rights from that of their multi-faceted identities as daughter, sister, wife or widow and as the symbols of the community (Mukhopadhyay, 1998). However, the struggle for equality and freedom becomes elusive when it is a struggle of women belonging to culturally distinctive communities. Their struggle for equal rights is a sensitive and volatile issue as it is enmeshed with the community identity. For the formation and strengthening of these culturally distinctive communities, it becomes essential that all other identities that exist within it be subsumed for the interests of the community. In such a situation, constant tension prevails between the multiple identities that women are invested with, and in times of crisis it is their gender identity that is more forcefully pushed to the background in the ineterest of the community.Women who then come forward to take up this struggle for equality and

freedom that questions the parameters imposed by the community, become the sole crusaders of reform within their communities.

This chapter attempts to focus on the Syrian Christian community, one of the oldest Christian communities in the world, and the quest of the Syrian Christian women for equality within the Christian personal laws. It focuses on the discriminatory aspects of succession laws and the divorce laws which deny justice to women. It deals with a few landmark cases, which have brought to the fore the need for change within personal laws and the subsequent tussle between the women in their attempt to do so and the community in their bid to maintain the status quo. Thus, Christian women face difficulty in asserting their gender identity since they are restrained by their Christianness. In this context, an understanding of their gender identity is dependent upon their understanding of the culture that has come to be seen as given (Chandy, 1995:4).

Background of the Syrian Christian Community

The Syrian Christian community can be traced back to the first century when it is believed that St. Thomas, one of the twelve Apostles of Jesus Christ, came to India is A.D. 56. He converted many Namboodri or high caste Hindus along the Malabar coasts. The Syrians Christians are mostly found in the erstwhile states of Cochin and Travancore. Over the next few centuries the nascent church was further strengthened

by Syrian immigrants, about four hundred in number, who came with Thomas of Cana from Armenia in A.D. 345. The name Syrian Christian is a bit of a misnomer as it signifies no blood relation with Syria. It is derived from their earlier practice of using the Syrian language in their religious services in Kerala. Syriac is a dialect of Armenia, the language of Jesus Christ and His Apostles, which was the language of the mother church in Persia. Hence, the name is not an ethnological or geographic designation but is a purely ecclesiastical one. Their social customs, physiognomy, build and so on indicate that they are essentially children of the soil like their Hindu brethren. They are generally referred to as *Nazaren Mopillas* (the followers of Jesus of Nazareth). The term '*Mopilla*' is a compound Malayalam word *maha* (great) and *pilla* (son) signifying 'prince' on 'royal' son, which was the honorary title granted to Kanaya Thomas (Thomas Cana) and his followers by Cherumala Perumal, the old renowned Emperor of Kerala. The other synonyms associated with the Syrian Christians are Marthoma Christian (St. Thomas Christians, as they claim Christian tradition from St.Thomas) and *Vadakkumbhaggar* (northerns) as referred to the Kanaya Christians.

With the coming of the Portuguese, there was a reduction in the powers of the early church. The Portuguese went about the task of purging the indigenous Syrian Christian church of 'heathenism' through a series of decrees and in the process imposed a number of Catholic traditions and customs. These changes were strongly resisted by a section of the Syrians Christians who rebelled against the loss of independence of the parish yogams which were partially decentralised structures

around which the community was organised. These parish yogams gave the people the opportunity to decide on church and community matters. The rebels took an oath to retain their identity at the *Coonen Cross* in 1653. This led to a split within the Syrian church leading to the emergence of the Romos Syrians, the Jacobite Syrians and also laid ground for future splits leading in the church.

The position today is that the old Syrian church is now divided into many churches. The first is the original orthodox Syrian church which owes allegiance both to the Patriarch of Antioch and the Catholics of the East; the Reformed or Mar Thoma Church; the Romo Syrians under different bishops but owing allegiance to the Pope of Rome; the Nestorians or Chaldeans whose religious head is the Nestorian Patriarch of Babylon; the Independent See of Thozhiyoor and belonging to the dioceses of the Church of South India, formerly known as the Church Missionary Society.

The challenges to their "Syrianness" over centuries, while resulting in both major and minor splits had a two way effect. On the one hand, the assimilation of the challenges led to a Christianisation of Syrian rituals without diluting their essential 'Syrianness'. On the other hand, the onslaught of Catholicism brought in a move towards centralization and hierarchisation of the church organisation (Chandy, 1995:13).

The social life gravitated round the parish or family church, and derives its sustenance and strength from the importance attached to the church and its festivals and the allegiance and attendance the church demanded for the observance of

ceremonies connected with the domestic occurrences of birth, marriage and death. These events are the occasions for social intercourse and gatherings not only of members of the family but also members of the community who lived in the same locality and worshipped in the same church. This feeling of oneness and common interests had one the years welded each village group into one homogeneous body bound together either by the ties of kinship or the parochial ties of religious affinity. Such a social pattern bred an innate conservatism that fostered the observance of old customs which remained unaltered until the first two decades of this century.

During the colonial period, the middle-class Syrian Christians were strong advocates for introducing reforms within the community. Reforms were urged so as to resolve matters such as the Church disputes, to purge extravagant marriage rituals and expenses, giving of and the vulgar display of jewellery and dowry, child marriage, and the education of women. The last was considered to be an important aspect of the social life of the Syrian Christian middle class. It was a vital aspect of the institutions of family and community which had come to be the mainstay of the Syrian Christian patriliny. However, education for women was never for themselves or for their own use. The specific knowledge they received was meant to be used to maintain and perserve the family and the community, that is, as men took on the family, women used their education to further the interests of a patrilineal family system.

This tendency to essentialise women of the middle class as mother and wives through a feminine curriculum had its byproducts. The skills learned from these

institutions and the emergence of women's organisation propelled them into the male public sphere. Christian women by the early twentieth century, were active participants in the social life though organisations such as Mother's Union (1909), as nuns operating schools and working in charitable concerns. There was also a women's workforce, which emerged as a consequence of their being employed as teachers, doctors, health workers, school inspectoresses and so on. Though it was argued that these professions only complemented their motherly and uxorial roles in the public sphere, the opportunities of employment and economic independence, nevertheless, invested Christian women with an identity of their own, distinct from their family (Chandy, 1995:18). Within colonial Travancore, however, there arose within the Syrian Christian community a dominant section of property owners. There was a conscious attempt to posit the interests of this dominant section as that of the entire community. This was challenged by different sections of people from within the community and also from outside. Communists and liberation theologists highlighted the exploitative class aspect of certain sections within the church and the upper classes within the community. There were others who questioned the community's denial of individual rights, particularly the denial of women's property rights. These challenges were stalled by the dominant sections within the community by raising slogans of infringement of minority rights and the community in peril.

It is interesting to note that from 1870s onwards there were litigations which raised the issue of women's rights to her *stridhanam* (dowry), parental and marital property. *Stridhanam* was considered a substitute for the daughters share in

patrimony. Since she had already been given a share, further equal property rights would mean a further split of the property between sons and daughter leading to the break up of the family,. These litigations, therefore, can be seen as a consequence of the new found identity of women based on economic independence and the educations imparted to them. To a certain extent, it reflected their lack of faith in the family and community institutions from which justice could have been expected. The voices of dissent made clear the awareness of the patriarchal thinking within the family system denied them their rightful and just share in parental property (Chandy, 1995:31).

The voices of discontentment were better expressed in postcolonial India when political forces questioned the community's authority over various aspects of individual life. Following the merger of Travancore and Cochin with the Indian Union in 1949, these regions came to constitute what was termed as Part B States in 1951. This meant that certain Acts that were in existence in the rest of India were now applicable to Travancore and Cochin. One such Act was the Indian Succession Act of 1925 (ISA), an amended version of the ISA, 1865, which should have logically repealed the Travancore Christian Succession Act, 1916 (TCSA). However, judgements on some cases relating to Christian property rights that came up after April 1951 in the Tranancore–Cochin and Madras High Courts upheld the TCSA as the law valid among the Christians of Kerala (Kurian Augusty v. Devassy Aley, AIR 1957). It was only in 1983, more than two and a half decades later, that TCSA was challenged in the Supreme Court by Mary Roy, a Syrian Christian from Travancore and the

daughter of wealthy parents on the ground that it violated the constitutional guarantee of equal rights for both sexes. (Mary Roy and other v. State of Kerala and others (1986) 2 S.C.C.209 = AIR 1986 SC 1011).

Mary Roy and Others v. State of Kerala and Others

Mary Roy, at the death of her father, had been offered her share in her father's estate worth a crore rupees, a mere five thousand which she refused. At the age of thirty, Mary Roy left her husband to start afresh with her two children. She stayed at a house owned by he father at Udhagamandalam (Ooty) and worked as a school teacher on a monthly salary of Rs.300. Harassed by her brother to vacate the house it was only in 1983 that she was in a position to challenge the Travancore Christian Succession Act, 1916,. which she claimed had in the name of upholding the community's interest sacrificed the rights of Christian women.With no Christian lawyer willing to accept her brief, it was in Delhi that a lawyer filed a public interest litigation in the Supreme Court on her behalf. The TCSA was challenged on the grounds of a violation of a woman's constitutional right to equality under Articles 14 and 15 of the Constitution.

Aleykutty, her four sisters and their mother were turned out of their ancestral house after the death of their father, by their only brother. He refused to share the fifteen acre land with his mother and sisters. In 1983, Aleykutty impleaded herself in Mary Roy's petition in the Supreme Court. Mariakutty Thomman, unmarried and well into her eighties was a primary school teacher earning a monthly salary of Rs.150. It

was after her mother's death in 1973, nearly sixteen years after her father's death, when she realised that she did not have the right of a tenant in her father's estate. In 1982, her brother decided her that her share was only Rs.5000. A year later, hearing about Mary Roy, she went to Kottayam and became a co-petitioner in the case filed.

THE CASE AND ITS REASONING

The question for consideration before the Supreme Court, was whether the provisions of the Travncore Christian Succession Act were ultra vires the Constitution. Another related question that was raised before the court was to examine the impact of the Part B States (Laws) Act, 1951, on the Travancore Act. The verdict of court was that the Part B States (Laws) Act excluded the operation of the Travancore Act and thereby obviated the need for examining the first question on the constutionality of the Act. It was of the view that by virtue of Section 6[1] of the Part B States (Laws) Act, 1951 and the inclusion of the Indian Succession Act, 1925 in the schedule to that Act, the Travancore Christian Succession Act stood repealed from the appointed day under the Part B States (Laws) Act, that is, 1st April, 1951. Hence, it reasoned, the law applicable to interstate succession among Travavancore Christians of Kerala is the Indian Succession Act, 1925, from 1st April, 1951. Following this decision, the High Court of Kerala ruled that the Cochin Christian

[1] Seciton 6 lays down: "Repeals and savings - if immediately before the appointed day, there is in force in any Part B States any law corresponding to any of the Acts or Ordinances now extended to that State, that law shall, save as otherwise expressly provided in the Act, stand repealed."

Succession Act, 1921 (CCSA) also stood repealed by Part B States (Laws) Act, 1951.[2] Though these courts did not expressly give retrospective effect to the judgements, the mere declaration that the Travancore and Cochin Acts stood repealed on 1st April, 1951 gave these judgements retrospective effect overturning the then existing law and practice among the Travancore–Cochin Christians (Champapilly, 1994:13).

PROBLEMS ARISING OUT OF THE RETROSPECTIVE EFFECT

The Christians of Travancore and Cochin conducted their property transactions on the basis of the provisions of the Acts of 1916 and 1921, respectively. The Travancore-Cochin High Court in 1951 [3] and the Madras High Court in 1978[4] reaffirmed that the Travancore Act still remained in force inspite of the Part B States (Laws) Act, 1951. When the Supreme Court repealed the TCSA in 1986 the property transactions of Christians in both testamentary and intestate became illegal.

These decisions have had another impact. Under the Travancore Cochin Acts probating of wills was not mandatorily applicable to the Travancore- Cochin Christians. Under the ISA, it was mandatory for the Christian to get their wills probated. Therefore, as a consequence of the decision, family settlement deeds based

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[2] V.M. Mathew v. Elisa (1988) KLT 310 (D.B.). Also Joseph v. Mary (1988) KLT 27 (DB)
[3] Kurien Augusty v. Devassy Aley AIR 1957 T.C.I=1956 KLT 559
[4] D.Chelliah v. G. Lalitha Bai AIR 1978 Mad. 66

on wills that were not probated had suddenly become invalid as a result of this provision with effect from 1st April, 1951. In the case of intestate succession, partitions on family settlements made in accordance with the provisions of the Travancore Act also became defective. Such documents now, cannot be used as securities for financial transactions. Daughters and sisters who were excluded from the share under the provisions of the Travancore or Cochin Acts can now re-open the matter both for genuine and malafide reasons.

In short, many title deeds in the hands of Christians remain defective and this would adversely affect the stability and progress of the community, as all the 'settled' property relations may now have to be resettled (Champapilly, 1994:13)

MARY ROY AND THE SUPREME COURT

It would be interesting to examine the constitutional and jurisdictional issues involved in this case. The proceedings before the Supreme Court were instituted under Art. 32 of the Constitution of India. Art. 32 is a fundamental right to enforce a fundamental right or to avert a threat to a fundamental right. That being so, Art. 32 cannot be pressed into service for determining the validility of an enactment unless that enactment infringes the fundamental rights. This has been the consistent view of the Supreme Court. A petition under Art. 32 is thus admissible only if it causes restriction on the enjoyment of fundamental rights. If a right is not a fundamental right conferred by Part III of the Constitution, it is outside the purview of Art. 32 for enforcement. In such cases, the petitioner cannot invoke Art. 32. It is open to the

petitioner to approach the High Court under Art. 226 of the Constitution. Therefore, the mere declaratory judgement of the Supreme Court in Mary Roy case was passed ignoring the procedural and jurisdictional limitations of the court. This was contrary to the practice of the court. The only course open to the court was to examine the validity of the Travancore Act within the framework of the Constitution (Champapilly, 1994:18). The Supreme Court had not looked into the constitutional provisions relating to existing law and its continued applicability after its commencement. Art. 372 (1) declares that:

"all the law in force in the territory of India immediately before the commencement of the constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority." the President of India has been given the power to make such adaptations or modifications of the law in force so as to being them in conformity with the provisions of the Constitution. This could be done before 1st November, 1957 as is provided under Art. 372-A of the Constitution. Further, Art. 13(1) provides that all laws in force in the territory of India immediately before the commencement of the constitution, shall be considered void if found inconsistent with the provisions of Part III of the Constitution.

These provisions relating to the law in force have been enacted to make the law in tune with the principles of International Law and Public Law. For example, according to the principles of state succession under International Law, though the people change their allegiance and their relations to their ancient sovereign is dissolved, their relations to each other and their right of property remain undisturbed. Moreover, a general rule of public law is that whenever political jurisdiction and

legislative power over any territory are transferred from one nation or sovereign to another, the municipal laws of the country continue in force untilabrogated or changed by the new sovereign. The Constitution of India has provided for meeting such a contingency by Art. 372 and Art.13. The failure of the Supreme Court to consider these constitutional provisions in deciding the case on hand was unfortunate (Champappilly, 1994:18).

INTERPRETATIVE DILEMMA

Laws with regard to sensitive issues like succession should reflect custom and practices of the community for its acceptance and sustenance. In this sense, the Travancore Act was a well balanced legislation inasmuch as certain provisions were explicitly made inapplicable to certain sections of Christians living in certain Taluks. Indeed, the Indian Succession Act, 1925 also contains a safety value to make it relevant in the society.

By the judgement in the Mary Roy case, the Indian Succession Act, 1925 is made applicable in toto to the Travancore area on the ground that it is expressly mentioned in the schedule to Part B States (Laws) Act,1951. While doing so, the court repudiated the strong argument that if the Indian Succession Act is wholly applicable, then its Section 29(2) saving the existing laws (including the Travancore Act) should also be applicable. Going by the precedents created by the Supreme Court itself, Section 29(2) should have been held applicable, thereby saving the Travancore Christian Succession Act, 1916. It could be argued that, what the supreme Court did

was not interpretation in the true sense of the word, but a policy choice, which is the realm of the Legislature or the Executive. In short, the reasoning and the decision of the court cannot be sustained on any ground. Had the court examined the issue in the constitutional context, retrospective operation of the decision would have been avoided, On the other hand, if Section 29(2) was given effect the Travancore Act would have been saved. In both cases, the present difficulties would have been avoided (Champapilly, 1994:19).

EFFECT OF THE COURT RULING ON THE LITIGANTS

The Supreme Court with its verdict laid down the general law to be followed in the case of intestate succession. The Supreme Court verdict neither entered into the question of the infringement of women's rights within a minority group, nor raised the issue of the violations of women's rights under Article 14 and 15 of the Constitution (the grounds on which the TCSA was challenged).

After the Supreme Court verdict in 1989, Mary Roy filed a case in the Kottayam District Court claiming her share, that is, a one-sixth of her father's estate property. The court ruled against her and declared that she had no right in this property for two reason:

(a) no partition could be valid while the mother's life estate existed; that partition would be in order only after her death and,

(b) she had been gifted a house in Udhagamandalam (Ooty) by her mother, her two brothers and her sister. The court held that this was in lies of her one-sixth share in her father's property. The court considered this in lieu of her share in her father's property. The court did not take into account that the house was merely a gift and not her share as viewed by the court. Moreover, at the time gift was made the TCSA was in force. It did not visualize a share in a family property for any women. The judge violated his own ruling in (a) by pronouncing a verdict on her share (see (b) above) (Roy, 1999:212). Mary Roy has appealed against this judgements in the Kerala High Court. It has been five years since her appeals were filed.Even after five year the case is not yet ready for hearing because of a simple technical error, that is, her sister living in Madras (one of the parties to the case) had not signed the receipt of the summons.

The intestate property of Mary Roy's father, P.V. Issac was estimated at one crore rupees in 1984 in the petition presented to the Supreme Court. A Syrian Christian officer in the Wealth Tax department used this valuation to claim a tax of Rs.7,00,000 on her one-sixth share in the interstate property, which they claimed was in her possession since the date of the Supreme Court judgement, that is, since 1986. She was asked to pay Rs.3,50,000 immediately andthe remainding Rs.3,50,000 as penalty for default. This was stayed only with the intervention of the then Finance Minister, Man Mohan Singh and the Secretary Central Board of Direct Taxation. The same property was valued as worth Rs.1,500 by her mother at the time of the death of her father in order to evade death duties. The District Court used the Rs.1,500

valuation of the same property to declare that she had received a cottage in Ooty valued at Rs.15,000 as a gift which was ten times the total value of the intestate property. Therefore, Mary Roy had already received more than her rightful share in her father's estate. These two distinct valuation were used by the courts and the government taxation department to suit their purpose (Roy, 1994:213).

The 1986 Supreme Court verdict did not hold any promises for Aleykuetty and her sisters. Her brother produced a will which he claimed was written by their father. The court rejected his claim. He has appealed against this judgement in the Kerala High Court. Mariakutty Thomman, the second co-petitioner in the Mary Roy case, is also yet to see justice. An attempt to reach a mutual agreement was made in the presence of a retired judge. After an assessment the judge ordered a sum of Rs.1.5 lakhs as her share. Mariakutty Thomman refused the amount and has filed a case in the Eruakulam High Court.

THE COMMUNITY REACTION

By giving Christian women equal inheritance rights in intestate property the Supreme Court verdict had questioned the exclusivity of the culture which the Christians laid claim to. The verdict also challenged the dominance of certain section on issues within the community. The church, the community and the state legislature were quick to react against this verdict. Amongst the first was a review petition from the Union Government, followed by an appeal from the State Government in 1986, to

reverse the retrospective appeal of the judgement. The State government's appeal centered around the claims of administrative complications that the retrospective judgment would create. This was due to the earlier land transactions which included land distributed to the landless during the land reforms which wrested property from Christian owners as well. This attitude of the State Government was influenced by the Kerala Congress, a coalition, dominated by conservative Christians and sections of the church. The community and church leaders pointed out that the affluent Syrian Christian community would face economic distress. All transactions involving Syrian Christians, like the sale of property and bank security would because invalid. It was also feared that an estimated 30,000 nuns who were not given dowry and therefore been wedded to Church would now demand their share in their father's property.

P.J. Kurien, the then Member of Parliament, attempted to introduce a Private Members Bill 'The Travancore Christian Succession Act Validation Bill' to revalidate the old law for the period 1951-1986 which was refused a hearing. Another Member of Parliment, Thampan Thomas, attempted to introduce a Bill to amend the Dowry Prohibition Act, so that Syrian Christians would be allowed to continue with the practice of stridhanam (Gandhi and Shah, 1991:247).

The reaction of the Church was more severe. Priests belonging to the Roman Catholic, Jacobite, Church of south India (CSI) and the Kanaya Churches began to make pulpit pronouncements critical of the Supreme Court verdict. The Synod of Churches which had began a pulpit campaign in support of the Private Members Bill,

arranged for free legal counsel for drafting wills that would deny women their share in paternal property. Churchmen, through pamphlets and meetings, began to mobilise the Christian male opinion against the verdict. The CSI priests assured the Christian youth of status quo. At a convention held in 1986 at Muvattapuzha, the Syrian Faith Movement of the Jacobite Church demanded a new personal law for Christians. This was echoed by Bishop Abraham Mar Clemis of the Kanaya Church who warned, at a meeting at Tiruvalla, that the verdict would destroy the community (Chandy, 1995:42).

The influential and wealthy minority within the community formed theJoint Christian Action Council of Kerala. In a memorandum submitted before the Government of Kerala on 25th March, 1991, they put forward the following demands which were :

(a) the conservation of the distinct culture of Christians under Art. 29 (1) of the Constitution of India;

(b) to exempt the Christians who were governed by the TCSA and CCSA from the retrospective effect that became operational with the enforcement of the ISA; (c) validate the TCSA and CCSA and include in them provisions for unmarried daughters for a share equal to that of the sons from 1st April, 1951 to 24th February, 1986 through an ordinance and later by a suitable legislation. (Chandy, 1995: 44)

Following this the United Democratic Front in Kerala attempted to introduce a bill, Bill-105 (Travancore and Cochin Christian Succession Revival and Validation Bill,

1994) to remove the resulting uncertainties by restricting the retrospective operation of the judgement with the introduction of a Validation Act to legalise all transactions of immovable properties among Christians during the relevant thirty-five years.(Deccan Herald, 1994, 14th September). Amongst those who were strong votaries for the restructuring of the Supreme Court verdict were Kerala Law Minister K.M.Mani and P.J.Kurien Member of Parliament. They claimed that the effect of the judgement had created genuine difficulties to the community. Between 1951 and 1986, titles to properties were governed by the TCSA. The titles covered transfers of inheritance which had been sold, pledged or hypothecated to Christians of both sexes, members of other communities and institutions during the stipulated period. The argument was that the Supreme Court verdict had made all such titles to property under the earlier Act defective. Without clear transferable rights to property, the Christian economy in Kerala would be affected apart from causing individual problems.They justified their stance by claiming that the women in the Syrian Christian community enjoyed a respectable status andhad little cause to challenge the existing Act. For Mary Roy the Supreme Court verdict provides them with the means to fight for their fair share. However, by reducing the argument to bare economics the Supreme Court had sidestepped the larger issue of gender justice (Chandy, 1995:44).

Even after eight years of the landmark verdict, only twenty-nine cases have been filed by Christian women in various Kerala courts seeking a redressal of unjust property division. Hence, the state legislature's introduction of Bill-105 is an attempt

to invalidate merely 29 cases. In fact, the government fearing defeat of the Bill on the floor of the House tried to pass it in the form of an ordinance. In Kerala, it is popularly believed that the Bill was being pummelled due to the pressure from rich landowners and those with vested interests determined to safeguard their property (The Telegraph 1994, 7th September). The proposed bill had met with stiff opposition from constitutional experts as well as from a sizeable section of the enligtened Christian clergy who signed a memorandum demanding its withdrawal. Changes in the State Government has stalled the bill.

REACTIONS OF THE CHRISTIAN WOMEN

At a meeting jointly organized by the Kerala Christians Council and YMCA on 25th September, 1993 at Kottayam, the Forum of Christian Women for Women's Rights was formed. They unanimously adopted resolution expressing their protest to the state and central governments regarding the move to bring Bill-105 in the Kerala Assembly. On 24th-25th November, 1993, the Forum held a meeting of women's organisations of all the dominations of the Syrian Christians, at Thiruvanthanapuram. The Forum also had representatives from various secular women's organizations, political parties, human rights activists educationalists and writers. They strongly protested against any attempt by the the Church and the government to taken away the equal rights given to the Christian women of Kerala. This was the first time Christian women had organised themselves under a common banner to challenge the authority

of the community and the Church to decide on matters relating to women. The Forum was able to isolate the conservative opinions within the Church and the community from the liberal and the progressive (Chandy, 1995:45). The main focus of the alternate opinionwas the violation of human rights. There were efforts at conciliation and discussion within the sections of the community. In a signed statement Dr. M.M.Thomas (the former governor of Nagaland and the ex-President of the World Council of Churches), Advocate Ninan Koshi and Bishop Paulos Mar Paulos of the Orthodox Church, asked the church heads to clarify their stance. They called for an objective study of the existing reality and for talks between the government, the Church and the women's organizations resolve problems arising from the Supreme Court verdict of 1986 (Indian Express, 2 July ,1994).

Independent India saw the emergence of alternate identities within the Christian community. Significantly, these alternate identities located themselves within the community and asked for changes that would provide a space for issues concerning Christian women within it. However, there was no questioning of the foundations of the community (Chandy, 1995:47). The Mary Roy verdict, irrespective of or rather in spite of its opposition, served to protect the equal rights of women where the government or the parliament failed to do so on narrow political considerations. To assume that the judiciary can fill the void created by the legislature is to overlook the limitations of the judicial process, that is, it adopts a case by case approach, which is time consuming and expensive. The judiciary also has to await an opportunity to decide and lay down a new proposition or correct an error of a

subordinate court. A remedy of the discriminatory personal laws cannot be brought about in a short time. The Government of India instituted a committee towards ensuring gender justice relating to the rights and status of women in India, the committee on the Status of Women. On the question of the personal laws of Christians, in the former princely states of Travancore and Cochin, the Committee recommended immediate legislative measures were necessary to bring Christian women of Kerala under the ISA as a first step to unify the law. An Empowered Committee examining the recommendation stated that this is not immediately acceptable. Move for change had to come from the community itself. The post independent governments following the colonial government stated ad nauseam that no reform in the personal laws of Muslims or other minorities would be contemplated without the community's demand or without the community's consent (Sivaramayya, 1999: 398).

DIVORCE LAWS : HISTORICAL BACKGROUND

The Indian Divorce Act, 1869 retains its originality as a piece of antiquity. At one hand,l the Christians were governed by the pioneering statutes which revolutionized the scheme of personal laws in colonial India and set the parameters of reform for all communities. At the other hand, these statues have remained static for well over a century, while the other communities have adapted with the changing trends. This dichotomy is enmeshed within the political events which reduced

Christianity from its favoured position as the religion of the colonial masters to the religion of a minority in the post-colonial phase (Agnes,1999:142). Two other factors of historical significance have also contributed to the complexity of the Christian personal laws. These laws are shaped by two distinct colonial influences, the Anglo-Saxon jurisprudence introduced by the British (who were Protestants) and the Continental system introduced by the French and the Portuguese (who were Catholics) within their respective territories. Any attempts at reforms have been marked by a conflict between the conservative Roman Catholic doctrine and the reformist Protestant theology. The concept of marriage as a permanent bound has gone through a full cycle with the early churches of Orthodox traditions permeting customary forms of marriage and divorce; the medieval church of Latin rites evolving the doctrine of sacramental indissolubility with the medieval European church moving to regulate marriages through canon law and ecclesiastical courts and the reformist protestant traditions reformulating marriage as civil and dissoluble contracts to be regulated by state enactments (Agnes, 1999:142).

The laws governing the Christian community have three distinct sources, that is, the statutes enacted by the British in the nineteenth century, the Civil Code introduced by the Portuguese and the French within then colonies and the local customary laws. Moreover, the Roman Catholics are governed by a dual system of civil law and canon law. As the Roman Catholic Church does not believe in the concept of divorce, to deal with the practical aspect of the breakdown of marriages it provides for liberal grounds of annulment under a legal fiction that marriages which

are annulled were not valid in the first place. This legal fiction enables the Church to hold on to its dogma of indissolubility vis-a-vis the protestant doctrine and at the same time provide for broken marriages. On the other hand for the Protestants a civil dissolution of the constitutional marriage is valid as they have no doctrine of sacramental indissolubility. The Indian Divorce Act, 1869 (IDA) was modeled on the British matrinomial statute, the Matrimonial Causes Act of 1857 and provided for adultery as the sole matrinomial offences which for the wife had to be coupled with either cruelty, desertion, incest or bestiality. Subsequently, British enactments liberalized divorce and by 1937 adultery, cruelty, desertion and insanity because grounds for divorce in England and attempts were made to incorporated these into the Parsi, Muslim and Hindu personal laws. Ironically, during the period 1935-37 when the three religious communities went through a process of remoulding their laws along the Anglo-Saxon matrimonial principles, there was no attempt to modernise the Christian laws. This could be attributed to the fact that the nationalist leaders were of the opinion that the Christian religion and laws being that of the colonial masters could not be reformed through nationalist efforts. Moreover, the absence of an Indian indigenous Christian political leader of repute within the nationalist movement, perhaps, resulted in the instability of issues concerning indigenous Christians. The other factor that may have been responsible for it is that the IDA of 1869 (modelled on English Statute of 1857) was so structured as to automatically incorporate the developments in the English matrimonial statutes within its scheme. The necessity of statutory reform may not have arisen (Agnes, 1999:145).

A significant development in post-independent India was that with the end of colonial rule, the domination of the Protestant ideology (that of the colonial masters) was replaced by that of the Roman Catholic Church, which became one of the powerful denomination of Christians in India. The Roman Catholic Church with its strict notions of marriage as a sacrament and its indissolubility became an ardent supporter of the IDA of 1869 and restricted any attempts to reform it (Agnes, 1995:145).

DISCRIMINATORY ASPECTS OF INDIAN DIVORCE ACT, 1869

Section 10 of the Indian Divorce Act which governs Christian marriages clearly shows the discrimination between husband and wife. Any husband may petition for a dissolution to the District Court or to the High Court on the ground that his wife has since the solemnisation of the marriage been guilty of adultery. On the other hand, a wife may petition for dissolution on the ground that since the solemnisation of the marriage her husband has exchanged his profession of Christianity for the profession of some other religion; or gone through a form of marriage with another woman; or has been guilty of incestuous adultery or of bigamy with adultery; or of marriage with another woman with adultery; or of rape, sodomy or bestiality; or of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa thoro* or the adultery coupled with desertion without reasonable excuse for two years

or upwards. Since adultery is extremely difficult to prove, and not all husbands who treat their wives with cruelty or desert them also commit adultery, Christian women face great hardships and are discriminated against both vis à vis Christian men and vis à vis women governed by other matrimonial statutes. Due to the rigidity of the laws many men exploited Section 19 of the IDA which states that a Christian marriage can be nullified if the husband is impotent at the time of marriage and at the time of filing a divorce petition. The Act contains certain anachronisms in its procedures too. Proceedings under the Act can be initiated in a District Court or a High Court. This peculiar procedure existed because the British wanted a confirmation of the judgements done by Christian judges during the colonial period. But it continues to remain in the statute even today (except in U.P. which has omitted this procedure). Thus, even when there is no appeal, a party has to want for a very long time for confirmation in order that the judgement of the trial becomes complete and binding. This only results in an extraordinary delay as a full bench sits for confirming such decrees only once or twice a year.

In a landmark judgement on 24th February, 1995 a full bench of the Kerala High Court amended the controversial Section 10 of the IDA 1869 (Mary Sonia v Union of India, 1995 (1) KCrLT 644). The verdict claimed that Section 10 was a violation of Articles 14,15,19 and 21 of the Constitution. It was arbitrary, authoritarian and discriminatory on the grounds of sex and religious against Christian women as cruelty and desertion are independent legal grounds for divorce under every other personal law governing other religious communities. The Kerala High Court

directed the Union of India to take a decision regarding amendments to the Act within six months. Observing that the statute was primitive Justice Thomas stated that after Independence, the Indian Parliament had brought about radical changes in the marriage law applicable to Hindus, Parsis, even to foreigners living in India by incorporating progressive and realistic grounds for divorce in such enactments. The Calcutta High Court has in a judgement observed, "We are inclined to think our parliament or the state legislative should very seriously consider the question of introducing similar amendments in the Divorce Act of 1869 to bring it in harmonious conformity with other analogous enactments on the subject governing the other communities of India". (Swapna Ghosh vs Sadananda Ghosh and others, AIR 1989 Cal. 1)

The court in the Mary Roy case held that, "The legal effects of the provision of section 10 is to compel the wife who is deserted or cruelly treated to continue a life as the wife a man she hates. Such a life will be a sub-human life without dignity and personal liberty. It will be humiliating and oppressive without the freedom to remarry and enjoy life in the normal course. Such a life can legitimately be treated only as a life imposed by a tyrannical or authoritarian law on a helpless, deserted or cruelly treated Christian wife quite against her will and will be a life without dignity and liberty as ensured by the constitution. Hence the provision which require the christian wives to prove adultery along with desertion and cruelty are violative of Article 21 of the Constitution of India." (Mary Sonia v. Union of India, op.cit.)

LAW COMMISSION RECOMMENDATIONS AND COMMUNITY BASED INITIATIVES

Efforts to update Christian marriage and divorce laws date back to 1958-59 when Private Bills were introduced in the Parliament. This resulted in the Government refering the matter to the Law Commission. A draft bill titled, Christian Marriage and Matrimonial Causes Bill, 1960 was circulated by the Law Commission to religious leaders and community organizations.

The representatives of the Catholic Church raised the plea that in adherence to the canonical doctrine, the Catholic community should be exempted from its application. The Law Commission overruled these objections on the basis that the provisions of divorce existed since 1869 and the Church had not raised any objection to this relief. The proposed bill was merely widening the scope of the existing provision and was not providing for any new reliefs. After taking into account the views of the representatives of the community, a comprehensive report (Fifteenth Report) was prepared and submitted to the Ministry of Law by the LC on 19 August, 1960. Due to the resentment by the Catholic church hierarchy to the proposed Bill, the government returned the Bill with a request to further elicit public opinion. Some of the clauses of the Bill were re-examined and the Twenty-Second Report was submitted to the Law Ministry in December, 1961 Following the recommendations of

the LC, the government introduced the Christian Marriage and Matrinomial Causes Bill (Bill LXII B of 1962) in the Lok Sabha. But the Bill was not debated and lapsed in 1971.

In 1983, in response to the letters received from Christian Women under the leadership of Justice K.K. Matthew, the Law Commission again took up the question of the grounds of divorce under Section 10 of the Indian Divorce Act and submitted the Ninetieth Report. After considering various options, the Law Commission made a strong recommendation for amending the discriminately provision by stating, "If the Parliament does not remove the discrimination, the courts in exercise of their jurisdiction to remedy violations of fundamental rights, are bound some day, to declare the section as void...." (Nineteenth Report) Despite these recommendations given by the Law Commission, the government did not introduce the amendments in parliament. This set in motion a claim reaction within the community which culminated in the Marriage Bill of 1994. Jyotsha Chatterjee, Director of joint Women's Programme (JWP), mobilised community support and a memorandum signed by about ten thousand people, was sent to the Union Law Minister demanding changes in the personal laws (Agnes, 1999:157).

In February, 1986, members of various Women's Fellowships of the Churches in Delhi, representing the opinion of a wide cross-section of the Christian community, presented a memorandum to the Prime Minister of India. With the help of P.M. Bakshi, the then member of the Law Commission, the JWP and the Church of North India had drafted a comprehensive marriage bill (an amendment to the Indian

Succession Act and a new Christian Adoption and Maintenance Bill, since at present there is no legal provisions for Indian Christians to adopt children) when presented with the bills the then Prime Minister, Rajiv Gandhi, had said that if the laws were discriminatory, they would be changed in accordance with the consensus opinion of all churches in India. It took another ten years to evolve a consensus among the different churches including the Catholic Church. The Catholic Church supported the recommendation to repeal the Indian Divorce Act, the provision of automatic recognition of church annulments by civil courts as in Goa but instead of a new Bill providing for divorce, suggested a via media that provisions of the Special Marriage Act, 1954 should apply to all marriages solemnized under Indian Christian Marriages Act. This was a tactical move which would save the Church from embarrassment that may be caused by even by a tacit acquiescence to a Bill liberalising divorce. This rigid stand of the Catholic Church did draw much critcism from the Catholic laity. Due to pressure from many Christian organization supporting the bill the Catholic Church finally relented from its orthodox stand and withdraw its opposition to the bill. Following this, a broad forum titled, 'Ecumenical Committee for Changes in Christian Personal Laws' was formed, consisting of representatives of the Catholic Bishops Conference of India (CBCI), the All India Catholic Union (representatives of the laity), Satyashodak (its women's wing), the National Council of Churches of India (representatives of Protestants) and the breakaway Pentecostal Church supported the draft, Christian Marriage and Matrimonial Causes, Bill, 1994. Despite these sustained efforts, the government did not introduce the Bills. When a question regarding the

status of these Bills was raised in Parliament, the government evaded the issue saying that the Joint Women's Programme, a women's organization had submitted certain draft legislation relating to marriage, divorce, adoption, maintenance and succession. Moreover, since it was the policy of the government not to interfere with the personal laws of the minority communities, unless the necessary initiative came from the concerned community, it would not be possible to bring in reforms. The government also assured the House that the matter was being referred to the Minorities Commission. These comments have only undermined the decade-long efforts initiated by the community leaders and women's organizations to arrive at a consensus about matters concerning marriage and divorce thereby providing a united effort to the government. With this statement, the onus was again on the religious hierarchy to reaffirm its commitment to law reform. Women's concerns were once again made subject to the vagaries of the religious dogmas. This was a cause for concern for the community as the response of the religious clergy to this new challenge was unpredictable (Agnes, 1999:152).

The bills endorsed by NCCI and CBCI were submitted to the government through the Minority Commission on 27th, October, 1997. But while the community was eagerly awaiting the presentation of the Bills to the Parliament, the government lost its majority and mid-term polls were declared. During the last round of deliberations, for reasons best known to the leaders, the consolidated Bill for marriage and divorce has been shelved and two separate Bills titled, The Christian Marriage Bill and The Indian Divorce Bill have been submitted along the lines of the current

statutes. The Law Commission in its One Hundred Sixty Fourth Report on the Indian Divorce Act (IV of 1869) in November 1998 suggested, " Section 10 of the Act also needs to be amended suitably so that the female spouses are not discriminated vis à vis male spouses in obtaining divorce. Indeed, the offending portions have already been struck down by Kerala and Andhra Pradesh High Courts and there is not a murmur against the said discussions by any member of the Christian Community. The Law Commission recommends that at least these amendments be made without any delay" (One Hundred Sixty Four Report,1998).

The Law Minister, Ram Jethmalani, put forward before the Christian community in April, 2000 a bill to amend and modify the law relating to marriage and matrimonial causes among Christians. The Bill titled, Christian Marriage Bill, 2000 has done away with the discriminatory Section 10 of the Indian Divorce Act, 1869 and has made the provisions of matrimonial remedies on par with the special Marriages Act, 1954.

The thwarted efforts of Christian reforms, in comparison to the successive efforts of the Parsi reforms reveal that in this political game, there may be more to reform than a mere initiative from within the community as is publically propagated. Perhaps there may be other considerations which may have led to the government's reluctance in introducing reforms initiated by the community, something which can only be hinted at:

(a) Except in pockets like Kerala, Goa and North East India, the community has neither the numerical weigthage of the Muslims or the economic strength of the

Parsis. Hence, issues concerning women from this insignificant minority do not warrant serious political debate and can safely be rendered invisible.

(b) The Christian reforms were not initiatives that came from the Church hierarchy of male leaders. Most of the initiatives came from women which were deeply resented by the male conservative church leadership. Since the women's groups which supported the initiative were mainly of an autonomous nature, they could not generate the required political pressure to bring in legislative reforms. The government did not take a serious note of the initiatives by women as compared to the Parsi reforms initiated by the liberal male community leadership within the community.

(c) The differences within the various denominations of the Christian Community was an obstacle in the process of reforms. The community could not present a unified view to the government, as was the case of the parsi reforms. The government did not want to antagonise the conservative and politically powerful Catholic Church (Agnes, 1999:153).

It would be possible to gauge the present government's willingness to bring about reforms within the Christian minority community by the way it handles the proposed Bill, Christian Marriage Bill, 2000, an initiative which has come from the government itself. To unravel the legal maze within which the Christian personal laws have become entangled would require a whole range of legal reforms. Unfortunately, even though the community is ready and willing, the political will to legislate for it is sadly lacking.

CONCLUSION

Rights can exist on a dual level, at the level of the community and also at the level of the individual. The debate on rights has in recent years, been centred around the individual versus the community. The liberal project has demanded the creation of space for the articulation of collective rights. The underlying reason is that identities are situated in cultural contexts. Cultures provide the lenses with which the individual views the world, providing him with meaning in negotiating choices in life. Experiences of the individual within this cultural context enables him to evaluate the worth of these choices. It provides him with his moorings which may in its absence render him defenseless or lost in the world.

The liberal project had only considered the individual as the ultimate unit of moral worth. Each individual has as equal moral worth and was to be treated in a like manner. There was no room for the collective within this moral ontology. The community was important for what it contributed to the life of the individual. Ethnic or national identities were considered as a transient phase in human history. These narrow, parochial identities were meant to fade a away in a world increasingly integrated economically and politically. But this integration, to the contrary, created more room for the articulation and maintenance of these pluralities. It questioned the homogeneity that the state endeavoured to project and instead, promoted cultural pluralism not only in the private sphere but even in the public sphere (Kymlicka, 1995).

The emphasis in Western liberal theory was, therefore, on the creation of space for cultural pluralism. The Indian context had generated a different outcome. A complex and comprehensive pluralistic society, harbouring a multitude of races, tribes, religious communities and languages, in India, cultural pluralism was an accepted feature of democracy. The main aim was that the preservation of these different cultures within this pluralism. Cultural minorities converted themselves into political minorities in order to seek recognition and protection of their distinctive identities. With the onslaught of economic globalisation, there has been a marginalisation of certain sections of the society. Those who are marginalised on account of being outside the pale of the market, have resorted to a consolidation of these primordial identities as a defense mechanism to combat this marginalisation.

India has witnessed a resurgence of these identities in the recent past culminating in greater demands for minority rights. Thus, the primacy accorded to minority rights were adopted historically for pragmatic reasons, the reassurance of the minorities within the newly independent country. The contemporary political moment demands a shift in the argument for the grant and protection of minority rights. This shift can be due to the rise and consolidation of the majoritarian mood, a subtle hint at legitimisation and routinisation of the idea that the nation be defined by the majority (Chandoke, 2000).

The idea of group rights is seen to compliment the individual rights. But, they may often lead to conflicts between the two. Groups can truncate the rights of their members to freedom or equality in the guise of group identity. This may even be a part of the process whereby groups seek to represent themselves as cohesive for the

purposes of acquiring rights. This cam hold true particularly for women within minority cultures which are often viewed as patriarchal, essentially male in their orientation and policy. Equality between communities should have, in principle, aided in the elimination of gender based inequalities. However, the treatment of a community as a homogeneous entity and the primacy accorded to their right to culture, in practice, subsumed the gender identities of women to that of the community and in ways sanctioned gender inequalities. Moreover, the concern for achieving electoral majority have often led to a collusion of the democratic government with the subordination of the claims of women (Mahajan, 1996).
Attempts to challenge the discriminatory aspects of personal laws have resulted in protests of interference by the state within minority community rights.

The debate about individual and community rights may be one that can continue, since the core idea is that there is a constant revision of the choices, which may sometimes even be desirable since the current ends are not always worthy of allegiance. Thus, group rights can be conceptualised as conditional rights for individual rights (Chandoke, 2000). Individual rights and community rights derive their worth from two separate human needs. Community rights address the need to belong, the quest for situated-ness. They situate the individuals; individual rights allow the individual to question this setting. Collective rights are asserted against the wider society if and when the rights of that group are violated. Individual rights are asserted both against community *diktats* and state regulations. The rights of the community cannot be a substitute for individual rights since they should be regarded as preconditions for individual rights (Chandoke, 2000).

Extending these arguments of the individual versus community debate to the Christian community, one can examine the tensions between the preservation of a cohesive and homogenous community identity and the assertion of individual rights. The Syrian Christian community, a conservative denomination, is influenced by the larger quest for the articulation and preservation of the community identity. The Christians are governed by personal laws introduced by the British on the basis of the statutes that were prevalent within England during those times. Being antiquated these laws are in urgent need of reforms. Reforms in post-independent India, have been often results of cases that have brought to the courts as violation of the individual rights conferred by the Constitution to its citizens. Mary Roy, challenging the discriminatory inheritance laws for the Christian women, was successful in initiating this process of reform. Subsequent cases have also questioned other aspects of Christian personal laws, in particular the divorce laws(Mary Sonia Zachariah v. Union of India, 1995). The question of divorce has become entangled with the difference between the Roman Catholic Church which believe in sacramental indissolubility and the Protestants for whom a marriage is a dissoluble contract. Though a consensus between the two Churches were arrived at by the Joint Women's Programme after a decade long struggle, the reluctance of the State to ensure its introduction has brought its efforts to naught. After the inaction of the democratic government on the proposed reform for six years, the present government has now initiated a comprehensive Christian marriage bill, including the provisions of divorce. This bill has been presented to the community for their opinions. The community leadership, which include representatives of the laity, has communicated its views on

the proposed reforms. Although the reforms is more in tune with gender justice, one can only wait for the government to ensure its passage in the Parliament. This may again, depend upon the processes of electoral politics. With the recent attacks on the Christians even this piecemeal efforts may be in jeopardy as the focus has once again shifted to the maintenance of the community identity in the face of these threats.

There are other areas, however, which have been overlooked by the state initiated reforms. The Christian personal law does not have the scope for adoption laws. Along with the Christian Marriage and Matrimonial Bill, 1988 the Joint Women's Programme had also drafted two more bills, Indian Adoption Bill, 1988 and Indian Succession Bill, 1988. Adoption still has to become an area for reform by the state although community initiatives have come forth. One can therefore, question the government's tardiness and piecemeal efforts at reforming the Christian personal laws.

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