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Judging Community: Religious Minorities & Law in India

Legal pluralism has existed in India from pre-colonial times and has been thought to be the best solution for India's incredible diversity of peoples and religions. In post-independence India however, the country's particular version of secular is continually pushing up against assumed universal categories of equality under the law. Female citizens are more and more often questioning their subject position vis a vis their community law and their rights as citizens. This paper will use specific legal cases with emphasis on the Parsi community to show how women must first be recognized as belonging to a religious community before they may claim certain rights from the state.

Within the now global debates on secularism and democracy, India or the Indian Constitution to be more specific, is often heralded as a model for a form of secular federal government that represents an extremely diverse religious and ethnic citizenry (Bhargava 1998). Although some modern legal statutes are direct descendents of their past colonial counterparts, the Constitution itself is specific about its protection of minority groups and has limited the government's reach into the private sphere of the individual at least in terms of religious and cultural matters (Smith 1963; Parashar 1992). While there is a universal criminal code for all Indians, civil and family law are almost entirely under the purview of religious or tribal laws, that is communal laws. Most claim that this is a vestigial legal remnant of British colonial policy which was hesitant about proclaiming overarching civil law either due to lack of knowledge of customs and traditions, or due to their unwillingness to incite agitation (Cohn 1996). The framers of the modern constitution remained with plural civil law due to probable fears that minorities would otherwise feel threatened by the possible monopoly of civil law by Hindu-based statutes. One can see how such a stance was very necessary especially after the atrocities during Partition, but this form of legal pluralism in the domain of civil law as well as its concomitant tendency to relegate civil law to communal authorities has very deep and sometimes dramatic implications for Indian women and their rights as citizens (Das 1995).

Veena Das in *Critical Events* (1995) analyzes several contemporary cases that captured the Indian national stage and pushed the limits of accepted notions about what it means to live in a professed secular state. As Das claims, after independence, "the rationality of the state and the rationality of the family crisscrossed each other to create a unique configuration of events" (Das

7).

But what does it mean to be a community under the law? Das does specify that this specific idea of community can be characterized by its right to define a collective past, a right that often implies a homogenizing or privileging of preferred histories; a consubstantiality between acts of moral authority and acts of violence; and most importantly for the purposes of this paper, the right to regulate the body and sexuality by codification of custom (Das 15). Das reminds us that “the community, in contemporary contexts, is defined as much by the structures of modernity, including bureaucratic law, as by a customary innate order,” avoiding the misleading dichotomy of community/tradition v. modernity/law (Das 51). In certain circumstances the community bifurcates the space between the individual and the state, the private and the public. For her, “the community also colonizes the life-world of the individual in the same way as the state colonizes the life-world of the community” (Das 16).

Following the argument, a community’s claim over the rights to their culture can involve several aspects of social life both public and private, while the federal state must hover beyond the private unless there is a transgression of criminal law. Das holds that such legal pluralism can become a threat to the state as a community once “vested with legal personality might have very different ideas of modes of life that might threaten ideals of state” (Das 14). Increasingly in contemporary times, women especially have been pushing at this legal boundary to claim their rights within and without their communal identities.

In 1985 the Shah Bano controversy exposed this dual personality of minority cultural rights when a Muslim woman actually appealed to the criminal code while bypassing her own community law. The case involved a divorced woman who filed for maintenance under the Code of Criminal Procedure. The Supreme Court had to then decide whether Section 125 of the Code did indeed apply to Muslims. Although the court ruled that it did apply, the head judge opened the Pandora’s box further by writing more generally in his ruling about religious law and the desirability of a uniform civil code. The case became “the occasion for an attack on the conflicting ideologies of family and marriage among different communities in India” (Das 99). The case thus leaked out of the judicial sphere and pushed for further questioning of more universal rights for women outside of their communal categories and led to immediate legislation with the Muslim Women

(Protection on Rights on Divorce) Bill, 1986. The outrage expressed by many Muslim authorities especially can be seen as an example of a community's attempts to maintain authority over its "private life" (Das 101). As this paper will show, this protection of the private life of the community has indeed been one of the main achievements of the Parsi community in relation to the law.

But where exactly does the private life of the community reside? As Basu (1999) has shown one of the key sites is in domestic property and inheritance rights that "define women in terms of dependent and circumscribed roles within the family" (Basu 9). Basu notes that no exposition on women and property is complete without contending with Virginia Woolfs' (1929) notion of "a room of one's own" that "simultaneously reveals the enormous power and limitation of the very concept of property" (Basu 6). But she claims, Woolfs' assumptions about the emancipatory aspects of property ownership ignore very certain realities of the situation of subaltern women (Basu 7). With the lack of a uniform civil code, gendered property rights vary by religion in India, and are covered by various Marriage and Succession acts.

She gives the example of *K. Devabalan vs. M. Vijayakumari*, a case in which the rights to property belonged to a Hindu or converted Christian man, and debated whether the status to property was changed since a Hindu man had married a Christian woman and whether this constituted a conversion, allowing his daughter to access property through a different Succession act. It became the burden of the defendant to exhibit "proof" of religious identity "not from specific faith-related icons or choice of deity but from extraneous signifiers associated with religion [such as] the alleged religiosity of names" signifying Christian or Hindu (Basu 212). Basu's analysis points out further that these appeals to the law first must produce a single verifiable religious affiliation that has little do with observance but with other observable markers of identity, and that that membership reveals the correct judicial reckoning of property rights.

If citizens are then granted their rights primarily through their membership in a religious or ethnic community, the law, like custom, can never be a "stable ally" especially if clear religious membership itself is occluded by practices such as intermarriage, conversion, or adoption. For the Parsis of India along with Christians, Jews, and those married under the Special Marriage Act of 1955, inheritance is governed by the Indian Succession Act of 1925 that makes no distinction

between the shares of sons and daughters unlike other Succession Acts. Although following an amendment in 1991, Parsis do have equal gender rights to inheritance, Basu notes that tenancy and ceiling exemptions do apply (Basu 10). Again, as the following section will show, these laws are further complicated in cases of intermarriage or adoption where a woman's membership in the Parsi community may be threatened. This essay will proceed to give a brief overview of important cases that solidified certain customary practices through appeals to the law.

The Bombay Parsi Panchayat (BPP) endowed with religious authority over Parsis by the colonial government since 1787, continues this role in independent India. As early as 1906 however a dispute arose as to the voting rights of women who had married out of the community, as the Panchayat held that they could no longer vote in community elections. The Bombay High Court decided that since among Parsis descent passed through the father, offspring of males could be initiated into the community, but not offspring of a Parsi female who had married out, as she was assumed to have acquired her husband's religion and consequently renounced her rights as a Parsi (Hinnells 2005, 73).

One case that set very important legal precedent was the case of JRD Tata, a famous and wealthy Parsi industrialist, who had married a French woman named Suzanne Briere in 1903. She had a *navjote* (Zoroastrian initiation ceremony) performed and it was claimed that she was thereby granted access to the privileges of being a Parsi, including access to fire temples and placement in the Towers of Silence (the practice known as *dokhmenashini*) upon her death. Due to the unprecedented nature of such a conversion and the high profile of Tata himself, a very intense debate ensued along with the forming of a committee to discuss *juddin* (non-Zoroastrian) initiations. The BPP and its secretary Dr. Jivanji Modi sought legal council, which came to no resolution, and the case was brought to court in 1906 as Parsi Panchayat Case, Suit no. 689.

The plaintiffs were members of the Tata family and also included other Parsis of note and held that initiated persons should be recognized as Zoroastrians and therefore entitled to Trust benefits, and also pointed to an electoral discrepancy that would nullify the authority of the current standing BPP trusteeship. The BPP was represented by Sir Jamsetji Jijibhoy. In former debates about the acceptance of converts, the argument against stood on the fear that it would attract the poor of society who would only convert to gain access to trust properties, but clearly in

the case of the Tata marriage, this would not hold, and the issue became mostly about access to religious spaces such as fire temples and the Towers of Silence.

As Mitra Sharafi (2007) outlines, the High Court judge to preside was himself an Orthodox Parsi, Justice Davar, and asked that he would be joined by Mr. Justice Beaman to provide fairness. Beaman was an interesting choice as he himself had written about the positives of the Indian caste system and was outspoken about his support for religious orthodoxy (Sharafi 2007, 162). The main point of contention in the case became the legality of the conversion through *navjote* itself and not the specifics of the Tata claim. Justice Davar noted in his commentary:

while I find that although the conversion of *juddins* is permissible amongst Zoroastrians, I also find that such conversions are entirely unknown to the Zoroastrian communities of India...the Zoroastrians communities of India have never attempted, encouraged, or permitted the conversion of *juddins* to Zoroastrianism...
(Davar in Case 689, pp. 81, 86 in Hinnells 2005, 120)

It is commonly held belief that Parsis have never encouraged conversion as part of their conditions of arrival in India. Justice Davar's commentary not only exhibits the common Orthodox view on conversion but perhaps was also a comment on the then ongoing community struggles with Christian missionaries who were partially successful in converting Zoroastrians in the early twentieth century.

Justice Beaman concluded that Parsis had become a caste and that as such, people could not convert in Indian society to another caste. He found that the funds and institutions of the Parsi community had been:

founded and endowed only for members of the Parsi community, and that the Parsi community consists of Parsis who are descended from the original Persian emigrants, and who were born of Zoroastrian parents, and who profess the Zoroastrian religion, who came to India, either temporarily or permanently, and the children of Parsi fathers by alien mothers who have been duly and properly admitted into the religion.
(Beaman in Suit 689,p.117, in Hinnells 2005, 120)

The conclusions by Justices Davar and Beaman were *obiter dicta*, that is, noted as not legally binding (Hinnells 2005, 121). But Hinnells notes that the Tata case did become precedent setting and was referred to in another case of disputed initiation known as Bella's case (Hinnells 2005,

121; Sharafi 2006).

Sharafi in her 2006 work expounds on the intricacies of Bella's case, also of 1906, that revolved around the initiation in Rangoon of a child named Bella, of non-Parsi father and Parsi mother. After her father's death Bella was adopted by a Parsi trustee of the Rangoon temple and then given a *navjote* in 1915, and was taken to court by community officials when she first attempted to enter a Parsi temple. Ignoring the conclusion about caste that did not translate to Burmese society, the Rangoon court did cite the existence of conversion in Zoroastrianism from Suit 689 (Hinnells 2005, 121). But the plaintiffs took the case to the Privy Council in London, which overturned the ruling saying that the temple's Trust Deed did specify use exclusively by Parsi Zoroastrians.

Although Suit 689 and the commentary were decided and emphasized as non-legally binding, and the Privy Council's decision also only pertained to that specific temple in Burma, the respective court decisions are still referred to in current debates. It is interesting to note on both accounts that religious authority was not actively sought through the knowledge of sacred texts or priests, but was unquestionably held by the Bombay Parsi Panchayat and customary law.

What this paper has shown is a continuing intense engagement of minority religious communities with the law as both a protector and an interloper. The Parsi case is further complicated because of the lack of a single clear authority. Priests do have much moral authority over the community, but lack the material means to punish or exclude. The Bombay Parsi Panchayat is endowed with the material wealth and power of the community, but itself is split between the priests and the needs of the lay community, as well as its own subject position under the law. Parsi laity, especially women seem to be the ones who more often push against the established boundaries between religious law, custom, and their rights as citizens of India. The overlaps between communal and national law, private and public spheres, create varied constellations in which women and minorities find themselves in, and through which they must negotiate to claim their rights. Instead of coming to claim her rights, perhaps minority women must first *become*, to claim their rights. They must first perform their minority identity in order to claim rights based on this status.

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