patriarchal subjugation of women within wider ideologies of permanence and change. What is sought to be preserved is what is seen to be changing: monogamous fidelity, the woman inside the domestic role the woman as the preserve of 'truth' and 'tradition', the arena on which to defend personal religion against the law. The universalizing definition of the pativrata is not mechanically tied to a caste or class, but to what *may* be a class consciousness shared by those who do not physically belong to it. The pativrata woman is being defined against women who work (in the Shekhawati area, women in agricultural labour), non-Hindu women (only Hindu women can be 'sati'), the popular caricature of the westernized woman (the model that urban banias have to contend with), women in marriage arrangements other than monogamy (most likely to belong to lower caste groups), widows who may seek remarriage, divorced and unmarried women, educated women who may seek employment, urban feminists, and any women who challenge their given role. It is to these women and the complex, changing forces which they appear to embody that the consent to widow immolation, together with attendant ideologies and beliefs, is addressed. Clearly this address goes beyond any single social group or class though it may originate in them. The domestic jurisdiction of pativrata dharma enlarges into a powerful patriarchal discourse which performs a range of functions in the public domain which are not restricted to either women or widow immolation. It is a discourse that marks within itself both contestation and the changes to which it is addressed. As far as women are concerned it is a discourse which challenges the notion of the woman as a citizen, i.e. in the consciousness of democratic rights and individual abilities, in the right to choice, and in the right to an identity not governed by religious denomination.

The internalization of ideologies and beliefs produced by the event is thus related to a wider social process and not confined to the narrower stakes in the practice of widow immolation or to the patriarchies of the specific groups involved. However, once internalized, these ideologies and beliefs become a part of the objective forces and structures which can produce further widow immolations or carry over into other forms of violence against women. For these reasons we need to explore the wide range of relationships between patriarchies, the systemic violence which inheres in them, the consent they need to generate and contemporary processes of social change.

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12

Communities as Political Actors: The Question of Cultural Rights

Veena Das

At the time of Partition, over the question of recovery of abducted women and unwanted children, the nation state was invested with a new agency—it was addressed by the people as the agency for setting right grievous wrongs suffered by family and community. The two cases which I examine in this essay relate to a transformation of this relationship between people and the state. Here, what we witness is not a tactical alliance between state and community but a contest over the issue of cultural rights, especially the right to regulate the spheres of law and memory.

One of the symbols used by the community to mobilize political support in modern India in recent years is couched within the phrase 'cultural rights'. Despite the apparent similarity of phrasing, however, I believe that cultural rights cannot be thought of as parallel to, or analogous to, political rights, for the term 'cultural rights' includes a variety of situations with very different moral implications. Further, cultural rights cannot be understood exclusively within a framework of a theory of interests, for they refer primarily to political passions. Before I explore this relationship between cultural rights and political passions further, let us see the political and juridical contexts in which the problem of cultural rights has been formulated.[1]

[1] I am grateful to Upendra Baxi for intensive and extensive discussions on the subject of cultural rights, and for many ideas most generously shared.

The Subjects of Cultural Rights

The question of cultural rights has been formulated in national and international forums primarily in the context of the rights of minorities. The Indian Constitution grants minorities the right to preserve and develop their culture as well as make institutional arrangements for this, for instance by establishing educational institutions. As formulated in the Constitution, this right is in the nature of a restriction on the powers of the state.

A similar concern with the preservation of minority culture is evident in the formulations of various provisions of international law concerning the rights of persons belonging to minorities.[2] The Commission on Human Rights, established in 1946 by the United Nations assembly, appointed a Subcommission on Prevention of Discrimination and Protection of Minorities. Between 1947 and 1954 this Subcommission attempted to define the concept of a minority. Although most members agreed that the definition must include an objective and a subjective element, it failed to arrive at an agreed definition of this crucial concept. This was partly a reflection of the dualistic character of international law in relation to human rights—for which the state and the individual form the two poles around which legal personalities are organized. In international law it is states which mutually recognize each other. In certain cases groups of individuals have the right of petition, but there has been great hesitation in granting legal personality to groups. In part, this approach is a result of the specific historical circumstances under which the international community recognized that the most gross violations of individual rights can occur within lawfully constituted states, for example the attempt to exterminate Jews in Nazi Germany. Thus the first formal recognition of the crime of genocide (*crimen lesae humanitus*) was made in Nuremberg in 1945. This concrete context, within which the concern with human rights came to be articulated in international opinion, naturally emphasized the rights of individuals against the overwhelming power of the state.

According to Sacerdoti (1983), these rights fall into the following five clusters:

[2] On the question of rights of minorities in international law, see Copotorti, 1985 and Sacerdoti, 1983.

1. Rights of individuals, peoples, groups, and minorities to existence and protection from physical suppression. At the individual level this is expressed as the right to life, of which an individual may only be deprived through due process of law. At the collective level this is recognized through the Convention on Genocide which makes the physical suppression of a group punishable.[3]
2. Rights of individuals not to be discriminated against on grounds of membership of a minority group.
3. Rights of persons belonging to racial or ethnic groups not to be the objects of hate or hostile propaganda.
4. Prohibitions against actions meant to destroy or endanger the existing character, traditions and culture of such groups.
5. Rights of persons belonging to ethnic, linguistic, or religious minorities to preserve their culture and language, and rights of persons belonging to religious minorities to practise and profess their religion.

It is quite clear that the subjects of all these rights are individuals. Especially important in this context is the right of an individual not to be discriminated against on grounds of membership of a group, or not to be made the object of hatred or hostile propaganda. Yet it is also evident that the subjects of these rights cannot be treated as isolated, atomized individuals, because, in order for them to preserve and enjoy their culture, the collective survival of traditions becomes an important condition. To understand the complexity of the issues involved, let us pay close attention to Article

[3] It has been noted that the Convention on Genocide made physical killing and forcible control of biological reproduction punishable, but could not reach any agreement on cultural genocide. Further, the provisions of the Convention were not applicable to groups whose members were recruited on the criterion of choice, such as political groups on homosexuals [cf. Lodor-Lederus, 1983]. On major examples of genocide in the twentieth century, see Baccianini, 1987. Crawford 1988 has noted that 'peoples' or 'groups' protected by the rules on prevention and punishment of genocide include groups which could not be classed as beneficiaries of the right to self-determination. He also notes that the Genocide Convention is directed at offenders rather than victims, emphasizing the *duties* of legal persons, whether these be rulers, public officials or private individuals. But to the extent that the Convention has as its object the preservation of groups, it is meaningful to talk of their rights. As we shall see later, it is precisely on the question of the preservation of a group as a cultural entity that serious conflicts may come about between the rights of groups and those of individuals.

27 of the International Covenant on Civil and Political Rights:

> In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their groups to enjoy their own culture, to profess and practise their own religion, or to use their own language.

It should be noted that the subjects of these rights in Article 27 are persons; yet we have to ask whether the rights promised to minorities can all be derived from the fundamental human rights of individuals, or whether it becomes necessary to evoke additional criteria of a collective nature for the protection of minorities. The crucial phrase in this article is *in community with other members of their groups*. It would seem from this phrase that a collective dimension of rights is being recognized only in the form of associational rights, so that individuals can, in community with other individuals with similar characteristics, enjoy these rights. Yet how can this community of individuals be preserved if the cultural traditions or language or religion of the group is allowed to disappear? Can one define a group as a mere aggregate of individuals? Would a Chinese, an Indian and a Bantu when aggregated make up a group with a culture, and can each such individual be said to be enjoying their culture in community with other members of their group?[4]

The discussions which took place among members of the Subcommission on Protection of Minorities, it seems, reflected some of the difficulties mentioned here. For instance, it was recognized that the definition of minority cannot be arrived at by enumerating objective criteria. It was stated that the members of a minority group must show a subjective will to preserve the traditions of their group; also that if a group became numerically depleted it might not be able to show the will to preserve and live by these traditions. It was repeatedly stated in different contexts that the issue was not only of biological survival, nor only of ensuring that minorities did not suffer discrimination, but also that, in order for individuals to be able to enjoy their culture, it must be preserved in the conscience collective.[5]

[4] On the difference between an aggregative notion of totality and a distributive one as applied to human societies, see Das, 1989a.

[5] In its attempts to define minorities, the UN Subcommission on Prevention of Discrimination and Protection of Minorities discussed, in 1950, the following text:

> (1) The term minority includes only those non-dominant groups in a population which wish to preserve stable ethnic religious, or linguistic traditions or characteristics markedly different from those of the rest of the population.
>
> (2) Such minorities should properly include a number of persons sufficient in themselves to preserve such traditions.
>
> (3) Such minorities should be loyal to the states of which they are nationals.

The suggested definition came up for sharp criticisms. Bruegel commented that all obligations against any positive steps have been collected in a resolution which is supposed to define desirable positive steps. Similarly, the representative of a Jewish organization commented that no minority of any kind could get any rights under these provisions. See Sacerdoti, 1983.

The following theoretical issues, then, seem to me crucial in developing a conceptual framework within which we may think about cultural rights. First, if we divide rights according to their adjectival qualities into (a) individual rights, and (b) collective rights, then we need to ask what relation this distinction has with the one between the individual and the collective as morphological categories as well as subjects of rights. Second, in granting individuals the right to enjoy their culture, what obligations does the state have towards ensuring the survival of that culture? Is the state simply required to abstain from interference, or does it have positive obligations towards these groups?[6] Is the dualistic structure of human rights—which is organized around the state and the individual as the two poles with legal personalities—adequate in the context of cultural rights? In other words, is the state the only possible organization of human collectivities that can be bestowed with legal personality in the matter of rights, or is it possible for groups and communities to be recognized as legitimate expressions of man and woman's collective existence? Finally, if we consider it necessary that the rights of collectivities, as distinct from the collective rights of individuals, be recognized, then how would relations between different collectivities on the one hand,

[6] Capotorti, 1985 favours the interpretation that the state has positive obligations to protect the culture of minorities. To quote him, 'If real equality of treatment is to be assured—only tolerance pure and simple will not achieve it.' He goes on to say that Article 27 would be superfluous if it only granted rights that could be basically deduced from human rights. 'With particular reference to the cultural field, it should be recalled that the obligations imposed on states by Articles 13 and 15 of the Covenant on Economic, Social, and Cultural Rights (concerning every individual's rights to education and to take part in cultural life) have the features of positive obligations to be implemented through appropriate measures.'

and the collectivity and the individual on the other, be governed? A strong fear has been expressed by many scholars to the effect that since there is no legally acceptable definition of 'people', the recognition of such entities as legal beings may lead to a gross violation of human rights enjoyed by individuals in the interest of an abstraction such as the nation, the community, the masses, the economy or even the state.[7]

Given these questions, I would suggest that just as the experience of the Second World War was of crucial importance for European and American societies to arrive at a conception of human rights—which has its foundation in natural law theories and which essentially tries to empower the individual against oppressive state structures—so the experience of contemporary Asian societies with struggles over culture is crucial to develop legal structures within which the collective dimension of human existence takes clearer shape. This collective dimension is recognized in the Universal Declaration of Human Rights, when reference is made to the 'community in which alone the free and full development of personality (of everyone) is possible.' It seems important, therefore, to apply our intellectual resources towards developing our concepts of culture and community.

What is Culture?

Definitions of 'culture' are contested. In anthropological usage the word refers to a system of shared meanings through which collective existence becomes possible. However, as many recent critiques of this position point out, this sense of culture gives no place to the idea of judgement, and hence to the relations of power by which the dominance of ideas and tastes is established. As Said says about Matthew Arnold's view of culture:

> what is at stake in society is not merely the cultivation of individuals, or the development of a class of finely tuned sensibilities, or the renaissance of interests in the classics, but rather the assertively achieved and *won* hegemony of an identifiable set of ideas, which Arnold honorifically calls, culture, over all other ideas in society (1983, 10).

The implications of Arnold's view of culture are profound; they lead us towards a position in which culture must be seen in terms

[7] See Sieghart, 1988 and Crawford, 1988.

of that which it eliminates as much as that which it establishes. Said argues that when culture is consecrated by the state, it becomes a system of discriminations and evaluations through which a series of exclusions can be legislated from above. By the enactment of such legislation the state comes to be the primary giver of values. Anarchy, disorder, irrationality, inferiority, bad taste and immorality are, in this way, defined and then located outside culture and civilization by the state and its institutions. This exclusion of alterity is an important device by which the hegemony of the state is established; either certain 'others' are defined as being outside culture, as are 'mad' people; or they are domesticated, as with penal servitude—Foucault's monumental studies on the asylum and the prison demonstrate this.

It is this context which we must understand in order to fully appreciate the challenge posed by the community to the hegemony of the state, especially to the notion that the state is the sole giver of values. At the same time, the danger is that we may in the process be tempted to valorize the community as somehow representing a more organic mode and therefore a more authentic method of organizing culture. Many scholars feel that culture is more organically related to the traditions of groups, whereas traditions are falsely invented by the hands of state.[8] The issues are by no means as simple, for culture and tradition are not instituted in society once and forever, but are subject to the constant change and flux which are an essential feature of every society. Indeed, the very attempt to freeze and fix cultural traditions may be inimical to their survival. Finally, in the contests between state, communities and collectivities of different kinds on the one hand and the individual on the other, we can see the double life of culture: its potential to give radical recognition to the humanity of its subjects as well as its potential to keep the individual within such tightly defined bounds that the capacity to experiment with selfhood—

[8] This, for example, appears to be the case in Unger's conception of 'community', as he acknowledges in a postscript to *Knowledge and Politics*. 'But the vision of empowerment in the classical doctrines of emancipation is clouded by unjustifiably restrictive assumptions about the possible forms of social life and in particular about the possible institutional definitions of market and democracies. *In place of the theory of organic groups, I would put a programme that extends the ideal of empowerment*, and relates it to ideals that it seems to exclude, by freeing it from unnecessarily confining premises', Unger 1984a, 339–40, emphasis supplied.

which is also a mark of humanity—may be jeopardized.

So, we arrive at this double definition of culture. By this I mean that the word culture refers to both a system of shared meanings which defines the individual's collective life, as well as a system for the formulation of judgements which are used to exclude alterities, and which thus keep the individual strictly within the bounds defined by society. It is in view of this that the question of cultural rights seems to me to be placed squarely within the question of passions rather than interests. It is time now to define passion.

After the classical work of Hirschman on political passions, it was usual to think of passions as obstructions in the path of reason. Passions had to be overcome for enlightened interest to emerge. This view of passions is extremely limited. Indeed, certain kinds of revelations, including the recognition of oneself as human, become possible only through passion.[9] If the self is constituted only through the Other—so that desire, cognition, memory and imagination become possible through the play of passion—then the revelatory role of passion must be acknowledged not only in the life of the individual but also in the life of the collective. Passion then must play a role in politics. It is my argument that it is precisely through the life of the passions that culture and community have become entangled in the shaping of public culture within modern India.

As we have seen, the demand for cultural rights at this historical moment is in a context where cultural symbols have been appropriated by the state, which tries to establish a monopoly over ethical pronouncements. The state is thus experienced as a threat by smaller units, who feel that their ways of life are penetrated, if not engulfed, by this larger unit. The situation is quite the opposite of the relation between the part and the whole in hierarchical systems, a relation seen as the characteristic mark of traditional polities in South Asia.[10] In a hierarchical system, *differences* between constituent units were essential for the 'whole' to be constituted.

[9] This view of passion has been developed in recent years primarily by Unger, 1984b, although the history of the concept is complex.

[10] A systematic elaboration of this view may be found in Dumont (1971). Dumont's view has been criticized for its idealist orientation, and recent studies of kingship point to various complexities both within the ideology of hierarchy as well as in the categories of the polity. See especially Shulman, 1985; Kulke, 1978; Dirks, 1987 and Stein, 1984.

In other words, small units came to be defined by being bearers of special marks in a hierarchical entity. And although by definition they could not be equal in such a system, the very logic of hierarchy assured that they could not be simply engulfed into the higher totality. This was both a source of their oppression as well as a guarantee of their acceptance (though not a radical acceptance) of their place in the world. My argument is not an appeal for a return to hierarchy as a principle of organization. Rather, it is an effort to locate the special nature of the threat which smaller groups feel in relation to the modern Indian state.

Community and State

In order to understand contests between the community and the state in India, and thus to clarify key concepts, I focus upon two different events which are taken as exemplars.

The first of the two events is popularly known as the Shah Bano case. This case, as is well known within India, raised the entire question of the relationship between on the one hand secular law, as formulated and implemented by institutions of state, and on the other the rights of minorities as well as rights of women. The second event concerns the occurrence of sati in 1987, in a small town of Rajasthan. This has come to be called the Roop Kanwar case after the eighteen-year-old girl who was consigned to the flames upon the death of her husband. Her sati led to a severe contest between women's groups and some Hindu organizations on the nature of her death, which threw up questions about violence against women on the one hand, and the rights of a community over its religious customs on the other.

In both cases the state intervened and passed new legislation, though the direction of the legislative provisions was quite different in each case. A comparison between the two cases will help us see the kinds of questions which arise in India's political culture, specially as regards issues of cultural rights. The contradictions and conflicts between different kinds of community on the one hand, and the state and community on the other, appear starkly in such events.

The Shah Bano Case

The Shah Bano case refers to events which followed from a criminal appeal by an appellant, Mohd. Ahmad Khan, against respondents

Shah Bano Begum and others, in the Supreme Court in 1985.[11] The appeal arose out of an application filed by the divorced Muslim woman, Shah Bano, for maintenance under Section 125 of the Code of Criminal Procedure. The appellant, an advocate, was married to the respondent in 1932; there were three sons and two daughters born of their marriage. According to the respondent, she was driven out of her matrimonial home in 1975. In April 1978 she filed an application against her husband under Section 125, in the court of the judicial magistrate, Indore, asking for maintenance at the rate of Rs 500 p.m. On 6 November 1978 the appellant divorced the respondent by an irrevocable *talaq* (divorce) permitted under the personal law of Muslims. His defence of Shah Bano's petition for maintenance was that she had ceased to be his wife after the divorce, that he had paid a maintenance allowance of two years and deposited a sum of Rs 3000 by way of dower during the period of *iddat* (which normally is three menstrual cycles, or the passage of three lunar months for post-menopausal women). The pre-history of the case does not concern us; what is important is that the husband was in the Supreme Court by special leave, and the court had to give its ruling on the question of whether the provisions of Section 125 of the Code of Criminal Procedures were applicable to Muslims.

The judgement, given on 25 April 1985, has a heterogeneous structure. The court decided that the provisions of the Code of Criminal Procedure were indeed applicable to Muslims, and therefore upheld the High Court decision on the provision of maintenance to Shah Bano. In the course of giving the judgement, however, Chief Justice Chandrachud also commented upon several other issues. These included the injustice done to women in all religions, the desirability of evolving a common civil code as envisaged by the Constitution, and provisions in the Shariat regarding the obligations of a husband to provide maintenance to a divorced wife. In a way, it was this very heterogeneity which allowed the judgement to become a signifier of issues which touched upon several dimensions, including the nature of secularism, the rights of minorities, and the use of law as an instrument of securing justice for the oppressed.

I do not wish to suggest that the judgement by itself created

[11] A voluminous literature exists on the Shah Bano case, only some of which has been directly referred here. A very useful compilation of this literature is available in Engineer, 1987.

these issues; in fact the Muslim community was in the midst of debating these issues itself. (The fact that an eminent lawyer, Yunus Saleem, had appeared as counsel on behalf of the Muslim Personal Law Board and not as counsel for the defendant attests to this interpretation.) The issue had become contentious at both the legislative and adjudicatory level. Baxi (1986) summarized this well:

> What has caused this insecurity [among the Muslims]? Surely not the affirmation by the Supreme Court of India of an order raising the maintenance of Shah Bano from about Rs 70 to Rs 130 from a husband whose earnings as a lawyer were very substantial indeed? Ahmad Khan did not resort to the Supreme Court because maintenance amounts caused great financial hardship to him. The real meaning of the Shah Bano litigation was an attempt to secure reversal of two earlier decisions of the Court allowing maintenance to divorced Muslim wives under Section 125 of the Criminal Procedure Code. The litigation was devised to reinstate the Shariat. And it succeeded in the first round when Justice Fazal Ali explicitly referred to a five-bench judge the question whether the earlier decisions were in consonance with the Shariat Act, 1937, which laid down that in all matters of family, including divorce and maintenance, courts will decide the questions in the light of the Shariat.

Thus it was not the judgement which created the issues, but certain complications were introduced as a result of the lack of restraint in judicial prose.

Following this judgement there was great agitation within the Muslim community, heated debates between 'progressive' and 'fundamentalist' Muslims, arguments between women's groups and Muslim leaders, and argumentation on the floor of parliament. The political debates, pressures and counterpressures finally led to the passing of the Muslim Women (Protection of Rights on Divorce) Bill, 1986. This bill was hailed as a victory for fundamentalists by some and as a triumph for democracy by others; it was alternatively seen as a betrayal of women's rights and as a document which had vindicated the position of women in Islam—which, it was alleged, had stood questioned in the Supreme Court judgement. Although in 1985–6 it was perhaps not possible to delineate the complexity of the issues, so that the debate was seen in terms of a confrontation between secularists and communalists, it should now be possible to break out of this battle of shadows to see the varied and complex nature of the question.

The first matter to address is the nature of the judgement itself.

On legal issues the judgement was quite clear. The judges stated quite categorically that earlier decisions of the Supreme Court had referred to whether Muslims were exempt from the application of Section 125 of the Criminal Procedures Act. They said that Section 125 referred to all cases in which a person of sufficient means refused to maintain a wife, including a divorced wife who was unable to maintain herself. Incidentally, the provisions of the act also applied to aged parents, children and handicapped adult children. The purpose of the act was to see that, where relatives could maintain a destitute relative of these categories, they fulfilled this duty, preventing the destitute person from turning vagrant.

The judges quoted from the speech of Sir James Fitzjames Stephen, who had piloted the Code of Criminal Procedure, 1872, as Legal Member of the Viceroy's Council. They did this to establish the purport of the relevant sections of the code within which Section 125 occurred: Stephen had described this particular section as a 'mode of preventing vagrancy or at least of preventing its consequences.' Supporting this interpretation, the judgement stated that 'the liability imposed by Section 125 to maintain close relatives who are indigent is founded upon the individual's obligation to society to prevent vagrancy and destitution. That is the moral edict of the law and morality cannot be clubbed with religion.'

One may differ on some counts with the seal of approval given to this piece of colonial legislation, for the precise concern in Stephen's pronouncement was not with individual rights but rather with 'prevention of vagrancy' as a threat to public order. The creation of a legal category of vagrants, as well as the criminalization of 'close relatives' who could be held responsible for supporting indigent relatives, reflected the basic opposition of colonial rulers to the maintenance of unproductive populations.[12] That the judges should have invested this clause with such moral fervour without considering at any point the state's responsibility towards the maintenance of the indigent is another story.

[12] Responsibility for maintenance of pauper lunatics and pauper lepers was similarly placed upon the family in the Lepers Act and the Lunatic Act. It is interesting to observe that in the metropolitan countries the problem of indigent populations was sought to be resolved by institutional solutions. For a masterly account of poor laws, the category of vagrants and its relation to the growth of capitalist market systems in England and Wales, see Scull, 1977.

To return to the strictly legal issues, the judgement did not raise questions which could have become symbols of the contests that were to follow. The judges baldly stated that Section 125 was part of the Code of Criminal Procedures and not of civil law. They further stated that they were not concerned with the broad and general question of whether a Muslim husband was liable to maintain his wife, including a divorced wife, under all conditions. The correct subject matter of Section 125 related to a wife who was unable to maintain herself, and their ruling was limited to such a case. Clearly, given the fact that there is a uniform criminal code to which all Indian citizens are subject, the court could not take into account the religion of the persons involved. Had the judgement stopped at this point, the issue would only have been restricted to whether the criminal and penal codes applied to all citizens of India, regardless of religion.

But the judgement went beyond this issue. It considered questions relating to interpretations of the Quran and Islamic law on the issue of maintenance of divorced wives. The judges also made several comments on the desirability of evolving a common civil code as a means of achieving national integration and gender justice.

The opening paragraph of the judgement said that the appeal did not involve questions of constitutional importance; however, it did raise issues of another kind that were important: 'Some questions which arise under the ordinary civil and criminal law are of a far reaching significance to large segments of society which have been traditionally subjected to unjust treatment. Women are one such segment.' The judges then quoted from Manu—the famous line which acts like a signature for all discourses on Manu—namely *na stri swatantryam arhati*, i.e. a woman does not deserve autonomy. Having shown their critical capacity in relation to Hindus, they then criticized Islam, taking for their authority a statement by Sir William Lane, made in 1843, to the effect that the fatal point in Islam is its degradation of woman.

The semiotic function of this framing paragraph in the judgement was to establish the secular and learned credentials of the judges for, by a time honoured tradition in our political culture, secular credentials are signalled by handing out in an even manner criticisms of the majority community and minority communities.[13] The second purpose was to show a concern for gender justice:

[13] I have noted the function of this rhetoric elsewhere. See Das and Nandy, 1986.

This appeal . . . raises a straightforward issue which is of common interest not only to Muslim women, not only to women generally, but to all those who, aspiring to create an equal society of men and women, lure themselves into the belief that mankind has achieved a remarkable degree of progress in that direction.

Thus, we have two moral ends posited in the judgement: first, the creation of a society of equals between men and women; and second, the moral duty of the individual to support destitute relatives in order that society does not bear the consequences of vagrancy. The two ends, however, do not belong to the same moral plane.

The third relevant set of observations are on the importance of evolving a common civil code. 'It is a matter of regret', state the judges, that 'Article 44 of our constitution has remained a dead letter.' They deplore the absence of any official activity for framing a common civil code. 'A common civil code will help the cause of national integration by removing disparate loyalties to laws which have conflicting ideologies.' The case of Shah Bano becomes in this way the occasion for an attack on conflicting ideologies of family and marriage among the different communities in India. There is no attempt in the judgement to explain why different ideologies in the sphere of personal life are seen as intrinsically threatening to national integration. This is taken to be 'self-evident'. To an anthropologist this appears puzzling, for the self-evidence of one culture is often the puzzle of another. One must recall that personal law concerns not only Hindus and Muslims but also tribal communities whose family affairs are regulated by their own customary laws, and on which intellectual discourse in India, with a few honorable exceptions, remains silent.[14]

At one level then, the judgement is about Shah Bano and the applicability of the provisions of the Code of Criminal Procedure

[14] For one instance of this silence, see the paper by Krishna, 1986, in which the debate on personal law is constructed primarily as a problem concerning the Muslim community. Krishna argues that according to Islamic political theory the relation between Muslims and a non-Muslim state is contractual, devoid of any moral obligation on the part of the former towards the latter. He singles out Muslims as 'the one community' that felt threatened by the integrative process initiated by the Constitution. Krishna's paper is remarkable for lack of analysis of the ideology of integration, or the processes through which the state may establish a hegemony over smaller communities. But it must be said, in all fairness, that Krishna is not alone among social scientists in his unquestioned support to nation-state ideologies.

to all citizens, regardless of religion. It is not about civil law or national integration. At other levels, however, it is about the unquestioned allegiance to legally created semiotic objects, such as the category of 'vagrants', who are defined by the danger that they supposedly pose to public order. Second, there is a complete rejection of legal pluralism in the judgement, for it is taken as self-evident that conflicting laws create conflicting ideologies which are inimical to national integration. Finally, there is the question of the rights of women. This is raised but then totally eclipsed by the allegiance to abstractions like public order and national integration.[15]

From the perspective of secular and progressive opinion, the opposition to the judgement of the Supreme Court was led by 'fundamentalists' and 'communalists', and their rise to power indicated 'regressive' threats to Indian society—a somewhat simplistic characterization of the complex issues that were raised.

The Response of the 'Community'

The first such complex issue was the relation between community and state. I do not think that a claim was ever made, on behalf of any section of the community, that Muslims should be ruled in accordance with Islamic laws in matters pertaining to crime and punishment. It was, however, aggressively asserted that in civil matters pertaining to family and marriage the Muslim community recognized only the authority of the shariat.[16]

From some of the responses given by Muslim leaders it seems clear that laws pertaining to crime and punishment were seen as

[15] The allegiance to the idea of public order is a little surprising, given that there is widespread recognition among many jurists that hypothesizing about a danger to public order rather than showing its existence in concrete terms is often a pretext for the state to use its police functions illegitimately. See also Barham, 1984.

[16] See, for example, the comments of Syed Shahabuddin in Engineer, 1987. He had criticized the competence of the judges to interpret the shariat which, he said, was an exclusive right of the ullama. When questioned if he would advocate the Islamic punishment for theft, i.e. amputating the arm of the thief, he replied that such punishments could only be given by an Islamic state and under Islamic rules of evidence which were not applicable in the Indian case. Unfortunately, most such statements were made in a highly adversarial context, whereas what is needed is one or several comprehensive position-pictures on the varieties of relationship possible between the shariat, non-state customary law and state law in matters pertaining to both criminal and civil law.

coming under the jurisdiction of the state; laws pertaining to family and marriage were seen as coming under the jurisdiction of the 'religion' or 'culture' of the community. One way to interpret this claim of the community over its civil matters is to see it as part of a worldwide pattern, a pattern connected with the decline of the idea of the nation state which pretends full ideological and political loyalty to its own value. In challenging the state as the only giver of values, the community may be seen from one point of view as claiming authority over its private life. Nevertheless, the all-pervasive presence of the state was acknowledged in the very act of the new legislation and the widespread support it received from 'fundamentalist' sections of community. In giving their support to the new bill, such sections were paradoxically reiterating the authority of the state to legislate and the courts to interpret the shariat,[17] while simultaneously asserting their own obligation to give direction to state law. The bill postulated that a divorced woman was to be supported by those relatives, such as sons or brothers, who were in the category of heirs, and that if such relatives were unable to support a divorced and indigent woman, then it was the responsibility of the community to support them through its *waqf* boards. In other words, though the category of relatives who were to support an indigent woman was altered, the right of a woman to have these provisions endorsed by courts of law in a

[17] It should be recalled that codification of the shariat for purposes of adminstration of personal law by British courts, through the Shariat Act of 1937, was a piece of colonial legislation that took away the customary rights of Muslims and created an area of 'tradition' suited to the British. The élitist assumptions behind such legislation are obvious, as also the attempt to create a homogeneous community that which could be administered with greater ease.

In the case of the Muslim Women (Protection of Rights) Bill 1986, also, varying interpretations of the shariat were manifest within the Muslim community which were homogenized through an act of state. For example, the Islamic Shariat Board of Kerala stated in a memorandum to the Prime Minister, dated 1 February 1986: 'views expressed by the commentators of the Quran and eminent theologians recognized by the Islamic world corroborate the verdict of the Supreme Court.' For this and other dissenting views, see Engineer, 1987.

It is not surprising that there should have been differences in interpretation within the Islamic community itself on the interpretation of the shariat, for this is at the heart of the hermeneutic enterprise to which all revelation is necessarily subject. Even among these different voices, however, folk interpretations of theology are given no voice among contemporary Islamic theologians. On the conflict between élite and folk interpretations, see Das, 1985.

modern state were not challenged. One could say that the forms of legal mediation instituted by the modern state were endorsed, even as the contents were being directed via mobilizations of the Muslim community in a particular direction. The community, then, can be seen not as claiming sovereignty in competition with the state, but informing the state on the direction of laws in the field of marriage and the family.

The second question which arose from the judgement was whether it was legitimate and proper for personal laws to reflect the differences between different communities on the nature of conjugality. It was argued by some Muslim scholars that a Hindu woman, upon marriage, lost her rights in her natal family and became fully incorporated in the family of her husband: this is reflected in several institutional practices, including the fact that divorce is not recognized in the Dharmasastras.[18] Under such conditions, it was argued, even when the laws were developed and provisions for divorce introduced, the liability of the husband to maintain his abandoned or divorced wife was of a piece with the concept of marriage and conjugality. In contrast, marriage under Islamic law was a contract, and a woman was never fully incorporated in the husband's group. She continued, for instance, to exercise rights of property in her natal family. It was therefore considered proper that a woman should be maintained by those relatives, namely sons and brothers who expected an inheritance from her share. This argument had also been put forward in the court and been rejected as contrary to 'law' and 'life'. When codified in the new law on the Rights of Muslim Divorced Women, it was criticized by several women's group as equivalent to taking away the rights of maintenance from women, for it was felt that a woman would never drag members of her natal family or her children to a court of law.

There were several implicit assumptions about law and life in the judgement, as well as in some of the responses of women activists. These are presented as being self-evident, which again appears puzzling seen from the eyes of another culture. Certainly, the central place given to conjugality in the life of a woman, and

[18] Divorce was recognized in the customary regulations of many castes, but it is part of the same élitist discourse, referred to earlier, for jurists and scholars of Islam who wrote on this issue to have equated Hindu law with rules in the Dharmasastras.

her primary definition as a wife rather than a daughter or a sister, is not a principle one can derive from 'life' if we mean by this that it derives from nature. Seen in the cross-cultural context, in many societies where marriages are hypogamous a woman may be seen by her natal family as simply 'lent' to the husband's family (cf. Leach, 1968).[19] She is never incorporated in the conjugal family and continues to exercise all her rights in her natal family. Yet there is no evidence that her status is lower than that of women in societies which practise hypergamous marriages, and in which the rights of the husband override any claims by her natal kin. One must not assume that the concepts of marriage and sexuality enshrined in 'secular' laws are somehow derived from principles of life. In fact, it would be interesting to enquire the extent to which some 'secular' laws relating to marriage, conjugality, sexuality and family bear the stamp of ecclesiastical laws and reflect a Christian understanding of marriage and family, rather than being unmediated reflections of the 'law' of 'nature'.

As to the question that women are reluctant to take their natal family and children to a court of law, I think this reflects the unspoken assumption in our society, among both Hindus and Muslims, that conjugality may become a site of conflict but that conflicts between a woman and her natal kin should be covered by a shroud of silence.[20] In fact violence against a woman by her natal family, including attempts to deprive her of her property rights, are by no means uncommon. In the Muslim case, many studies show that although women have a theoretical right over property in their natal families, they rarely get to exercise this right, exchanging it for the right to visit and receive gifts.[21] Thus, if women's rights are to be strengthened against those of the family, there is no reason to exclude rights as a daughter or sister from this arena of conflict. The very emphasis on the woman as wife reflects the preoccupation with her role as wife, to the exclusion of her other roles.

[19] This unfortunate vocabulary has to be applied here because women are invariably seen as 'exchanged' between men at the level of ideology although they subvert this ideology, in many ways, in the practices of their everyday life. For a masterly account of both—forms of laws of exchange and their limits—Levi Strauss, 1969 is still unequalled.

[20] This silence does not apply to conflicts between brothers over property.

[21] See Eglar, 1967 and Das, 1973.

It should be evident that I believe the real issue in this case is not secularism versus communalism or national integration versus national disruption.[22] It is rather a question of whether powers of the state should be extended to encroach into the sphere of the family. In the colonial period, this encroachment was justified on the grounds that the state was engaged in the creation not only of a civil society but also a 'good' society (Spivak, 1985). This is why although many interventions by the colonial state concerned the rights of women, these were so enmeshed in a network of other concerns that women themselves seemed almost peripheral to the issue. This is why if the state is to intervene in order to correct injustices against women in institutional structures such as the family, the focus of its legislative and adjudicatory labour has to be women themselves. The conflict between the rights of subordinate groups, such as women, to break the power of traditions which subordinate them to men on the one hand, and the radical recognition of the right of minorities to exist as cultural entities on the other, are not capable of being resolved through easy solutions. But minimally, it is necessary that these issues are addressed on their own terms, and that they do not become a contest between the passions of the state (national integration, patriotism) and the passions of the community (its cultural survival in the form given to it by the dominant male culture).

In the context of the debate in the Shah Bano case, several women activists pointed out that the issue was not whether women enjoyed a high status in Islam at the level of ideas. The question was whether women were able to obtain reasonable security for themselves under existing institutional structures. The large number of petitions for maintenance from women (including Muslim women) which came up every year under Section 125 of the Criminal Code were clear indication that the family or the community were not protective institutions, as scriptural quotations from religious traditions would have us believe.

We know the family to be a site of conflict. So, when a community claims that the right to its own culture includes the right to legally govern its members in the sphere of the family, where do women or children who may be oppressed by the

[22] I hope it is clear from the form of my argument that I am not implying there are no real battles on the issues of secularism and communalism, but rather that it is a mistake to frame the Shah Bano case in terms of these polarities.

pathologies of the family and the community go for redress? Can the right of a community to preserve and develop its culture exclude the right of individuals to move out of the community, or critique and even reject its norms through an exercise of other options? Clearly not. Meanwhile, one must note that the appropriation of the issue of justice to women under the master symbols of state and community almost made them disappear from view, except in the title of the new legislation.

This eclipse is best seen if we pay attention for the moment to Shah Bano. The facts of her personal case were as follows: married to her first cousin, she was the mother of three adult sons, the eldest being fifty-four. Her husband had taken as his second wife another first cousin. It seems likely that her sons had asked this seventy-six-year-old woman to sue her husband for maintenance as a move in their ongoing dispute with their father (and another of his sons, by his second marriage) over property. After the Supreme Court decision, Shah Bano was persuaded by 'leaders' of the community to reject the court's decision. Her letter speaks most eloquently of the way in which a woman may simply become the means by which various contests between men are conducted: contests between father and son; between adherents of different schools of interpretation of Islamic law; between state and community. A passage from her letter says:

> Maulana Mohammad Habib Yar Khan, Haji Abdul Gaffar Saheb and other respectable gentlemen of Indore came to me and explained to me the commands concerning *nikah*, divorce, dower and maintenance in the light of the Quran and hadith...since women were getting maintenance through law courts, I also filed a suit for the same in the court of law and was successful...till then I had no idea about the shariat's view in this regard.

She then goes on to say that after the provisions of the shariat had been explained to her, she rejected the judgement of the Supreme Court which upheld her plea for maintenance from her divorced husband. Thus, from the lowest to the highest levels of male society, she became nothing more than a pawn through whom men played their various games of honour and shame.

As ought to be evident from this discussion, the Supreme Court judgement raised several conceptual issues regarding culture and community. These may be summarized as follows:

1. Does the constitutional right given to minorities to preserve and enjoy their culture, as well as the rights of minorities enshrined in the international instruments of the UN (such as the Covenant on Human Rights), include their right to live according to their own civil laws of family and marriage? Does the existence of conflicting ideologies of marriage and family in itself pose a danger to the sovereignty of the state?

2. If legal pluralism in civil matters is considered acceptable or even desirable, so that the norms of particular communities are given not only the status of custom but of law—what Baxi (1985) calls non-state law[23]—then what are the limits to the control that such communities may exercise over their individual members? In other words, how does one take into account heterogeneity *within* a community for the purpose of recognizing 'non-state law'?

3. How would one resolve conflicts posed by the desire to preserve culture by a filiative community (such as an ethnic or religious minority) and a similar but affiliative community (such as the community of women) which wishes to reinterpret that culture according to a different set of principles?

4. We have seen how the human rights movements empowered the individual against the power of the state. If a commitment to cultural rights leads us similarly to empower the community against the state, how can one ensure that the individual is not totally engulfed by the community?

The Question of Sati

I turn now to the second incident, which involved the wilful ritual consignment to flames of an eighteen-year-old girl. This incident took place in Deorala, a small town of Rajasthan, on 4 September 1987, when Roop Kanwar ascended or was forced to ascend the funeral pyre of her husband. The continuance of sati which had stigmatized India's identity in the eyes of the British, and the fact that it happened at a time when women's groups had been engaged in combating violence against women in the family (especially the violence against young brides in their conjugal families on account

[23] The expression 'non-state law' hardly commends itself on grounds of elegance but has the great advantage of steering debates away from normally sterile discussions on the difference between law and norms, or law and custom. It also disputes the claim of the state as the only legitimate maker of law.

of inadequate dowry) made Roop Kanwar a very volatile issue. It would be a mistake, though, to suppose that the opposing political formations which emerged around this issue could be summarized as 'tradition' versus 'modernity' or 'men' versus 'women'. For one thing, Hindu religious leaders were themselves sharply divided on the issue of the place of sati in Hinduism. Thus, the Shankaracharya of Puri appeared as a strong supporter of the custom, whereas reform groups such as the Arya Samaj, led by Swami Agnivesh, challenged both the Shankaracharya's authority as well as his understanding of Hinduism. Similarly, in the so-called modern sector, there were those who saw sati as a pathology of Hinduism and those who saw it as a pathology of colonialism.[24]

It is not possible to discuss all the complex issues in the various public discourses and their implications for the political culture of India today. I only wish to point out here that there is a long tradition of two hundred years in which sati came to be regarded as the symbol by which the whole of Indian society could be characterized as either a land of miracles or of savagery (cf. Prinz, 1988). My attempt is to disengage from this debate in order to pose the problem of cultural rights in the contemporary context. The question of the history of the institution of sati is important, but as we shall see it stands transformed here into the issue of how popular memory is organized.

Some of the problems raised by Roop Kanwar on the relationship between cultural rights and law were similar to those raised by Shah Bano; therefore I shall concentrate on those issues which raised new problems on the question of cultural rights. The object of my analysis is the text of the Commission of Sati (Prevention) Act, 1987, which the government enacted in order both to prevent incidents of sati and to devise adequate instruments for the punishment of those responsible for inducing the commission of sati. Although this act was designed to punish those responsible for the death of a widow, it paradoxically defined the woman herself as also punishable.[25]

An important feature of the act was to make criminal the 'glorification' of sati. It defined 'glorification' as any of the following:

[24] It is not possible to refer to the large and complex literature that grew out of this event. But see Das, 1986b; Nandy, 1975; Ray, 1985; Mani, 1986, 1989, Weinberger-Thomas, 1989; and the Special issue of *Seminar*, 1988.

[25] See Dhagamvar, 1988.

(a) the observance of any ceremony or the taking out of a procession in connection with the commission of sati

(b) the supporting, justifying or propagating the practice of sati in any manner; or

(c) the arranging of any function to eulogize the person who has committed sati

(d) the creation of a trust or the collection of funds, or the construction of a temple or other structure or the performance of any form of worship or of any ceremony with a view to perpetuate the honour of or to preserve the memory of any person who has committed sati.

It is this aspect which raises questions different from those raised by the Shah Bano case.

As in Shah Bano, it was the semiotic excess of the judgement as well as the manner in which orthodox reactions were characterized by 'progressive' opinion that converted the issue of women's rights into secularism versus communalism. In Roop Kanwar, as in Shah Bano, the language of criticism reveals much more than people's attitudes to women's rights.

In terms of the political unconscious, I believe that one of the confrontations was over the nature of time-consciousness in the discourses of the state and the community. This may seem at the outset a very abstract issue, and one unlikely to raise strong passions on either side. I hope to show, however, that the ideologies of modern states do try to control the time-consciousness of communities, and impose upon them a single, monolithic view of time. This then gets translated into issues of how to control and organize one's own history, as well as how far a community is willing to submerge its biography in the biography of the nation state.

From the viewpoint of the state which enacted this legislation, time is valued as a scarce resource for a future-oriented mastering of problems left over from the past. In this time-consciousness, there are no exemplary models from the past. Modernity does not borrow standards from the past—it draws its normativity from itself. In many of the speeches made in parliament, as well as in the way in which this particular episode was inscribed, frequent references were made to the fear of returning to a barbaric age. Indeed, the bill itself made this observation:

The recent incident of the commission of sati in the village of Deorala in Rajasthan, its subsequent glorification and the various attempts made by

the protagonists of this practice to justify its continuance on religious grounds had aroused apprehension all over the country that this evil social practice, eradicated long back, will be revived. A general feeling had also grown in the country that the efforts put in by social reformers like Raja Rammohun Roy and others in the last century would be nullified by this single act in Rajasthan.

As this statement about the objectives of the bill shows, an act of sati comes to signify an anxiety about time which is typical of modernity, namely the return to a regressive past which would cancel all progress made by the modern state on behalf of society. This past has to be rigorously controlled and eliminated. The new legislation not only sought to control and punish future incidents of sati and abetment to commit sati, it also tried to control the past—i.e. its resurgence in the present.

Criminalizing the glorification of sati obviously belongs to an order of events different from the actual commission of sati. This is because in all modern forms of governance the state establishes an absolute right over the death of its citizens. Within modern state structures it is only through due process of law that a person may be deprived of her life. In ordinary cases, no death is legitimate unless certified by agencies of the state, and as far as heroic deaths are concerned it is the nation which has a monopoly over what constitutes sacrifice. The glorification of a particular social or religious practice, however, is open to a greater range of freedoms and merges with the right to practise one's religion. Interference with this custom raises the question of whether the state has a right to control the future or whether it can also redefine, and in this sense control, the past. Given these difficult questions, it was only to be expected that bringing the glorification of sati within the purview of legislative acts would not go uncontested.

The contest I will now examine is the litigation between the trustees of the Rani Sati Mandir and the Indian government over this very question. The Rani Sati temple is located in Jhunjhunu, about 190 km from Jaipur. It is owned by the Rani Sati Mandir Trust with its head office in Calcutta. According to oral tradition, the temple is dedicated to the memory of Narayani Devi, the wife of a merchant of Jhunjhunu who, during his travels with his young wife, was attacked by Muslims and died. His wife, according to legend, fought with the Muslims, defeated them, and then having constructed a funeral pyre consigned herself to the flames alongside her dead husband.

As this legend shows, the sati myth has been appropriated here by merchant castes as a challenge to Rajput legends which asserted that only Rajput women could become true satis. These merchant castes now found their position being challenged by the new ruling. Their temple had for long organized an annual mela on Bhadra Amavasya, in the month of September. After the passing of the act, the district magistrate of Jhunjhunu banned the glorification of sati in any manner whatsoever all over the district by any individual or group,[26] and accordingly the temple was closed in August. Preparations for the annual mela on 10 September were halted. The Rani Sati Mandir Trust in Calcutta challenged this order in the High Court there, on the grounds that the order interfered with the freedom to practise one's religion, and was therefore unconstitutional. The High Court, in its order of 17 August 1988, upheld the right of the Rani Sati Temple in Jhunjhunu to conduct daily worship (*puja*) and service (*seva*), and also restored the right of individuals to worship in the temple. The court order also stated that the respondents should not cause interruption or harassment to visitors and devotees during the daily worship of deities located in the temple. However, as far as the annual public mela was concerned, the position of the court was ambivalent. It allowed individual notice to be given to members with respect to the Annual General Meeting but did not permit public announcement of the mela in newspapers. In its judgement the court clearly made a distinction between public and private religion; the public aspects of religion were to be regulated by the state as 'law and order' issues, leaving religion in everyday life to the individual conscience. This division, by which public festivals, routes of processions, and the regulation of noise in sacred places were to be treated as 'law and order' issues, has been part of the state's repertoire for the management of crowds and the protection of public order since the early nineteenth century.[27]

Not surprisingly, the Supreme Court, when hearing a special leave petition filed by the state of Rajasthan, said that 'Offering of puja inside the temple and holding of mela outside are certainly two different aspects and the mela may give rise to problems of

[26] This was reported on 22 August in all the major national dailies. For an analysis of the legal issues, see van den Boch, 1989.

[27] See for example, Das, 1990a and Roberts, 1990.

law and order.[28] While presenting their case in the Supreme Court, the trustees of the Rani Sati Mandir claimed that the offering of puja within the temple did not constitute a glorification of sati, whereas a writ petition filed by the All India Democratic Women's Association and the Janvadi Mahila Samiti questioned this particular interpretation.[29] These organizations requested a prohibition of *chunari mahotsava*, the event in honour of the sati goddess Narayani Devi.

The questions raised by the new legislation exist on two different planes. There is first the concern with preventing future occurrences of sati and punishing offenders who aid and abet such acts. Yet ambiguity is built into the heart of the legislation, for it does not quite know whether to treat the woman 'with respect to whom sati is committed' as victim or criminal. This difficulty is not insurmountable, for in all cases defined as 'hard' a thin line has to be maintained between legitimacy and law. From a simply legal point of view, suicide is a punishable offence in the Indian Penal Code, and symbolic recognition has to be given to this. The act, however, clearly lays out that in determining the extent of punishment (imprisonment up to a year, a fine, or both), the Special Court shall 'before convicting any person take into consideration the circumstances leading to the commission of the offence, the act committed, the state of mind of the person charged of the offence at the time of the commission of the act and all other relevant factors.' Such acts must remain suspended between legitimacy and legality, and only at the adjudicatory level shall we be able to see the working of the act. In contrast with the woman, stringent punishment, including life imprisonment, is laid out for those who abet or aid such acts, which means moving from the definition of sati as suicide to its definition as murder.

The second question relating to the glorification of sati as well as preventing the veneration of sati matas raises the entire issue of whether a community has the right to construct its past in the mythic or the historic mode, in accordance with its own traditions, or alternatively whether the state may exercise complete monopoly over the past. That no straightforward answer is possible must be

[28] Special Leave Petition (civil), no. 9922 of 1988, in the Supreme Court of India, Civil Appellate Jurisdiction.

[29] Writ Petition, Supreme Court of India, no. 913 of 1988.

clear from the earlier discussion. For on the one hand we have a hegemonic exercise of power by the state, which acts as the only giver of values—and this is affirmed when even its most vocal critics turn for help to the state; and on the other hand we witness constructions of past time in such a way that all new events are sought to be understood as mechanical analogies of a limited stock of past events, a process which often leads to hegemonic control being established over the individual by the community. This is especially so when the community draws its energy from the symbol of a divine sacrificial victim, as in the case of sati.[30]

Finally, I suggest that there is a new participatory model of legislation which is introduced by the act. This is a model in which the state acknowledges the role of women's groups when giving direction to legislation. In the earlier case of the Muslim Women's Bill, no acknowledgement was made of the legitimate interests of women. There the community was defined solely as a filiative community—i.e. those born as Muslims. In this later case of the Commission of Sati (Prevention) Act, women's groups and the interests they represented were given a legitimate place, making legislation at least a triangular contest between state, community, and women's groups.

There are two aspects of the community that I have identified with reference to the two cases discussed here. In the first case the contest between community and state was over the realm of law and the possibilities of the pluralism in the conduct of personal life. In the second case it was the right to organize memory. Both cases challenged the hegemony of the state as the only giver of values, but also showed deep-rooted contests between different definitions of 'community' itself. There was a particular polarization between the community defined on the basis of filiation and the community defined on the basis of affiliative interests. It is to the implications of this polarization that we need to briefly turn.

In debates between women's rights and the rights of a community, an implicit assumption which seems to have crept in is that the culture to which the community lays claim is essentially a male

[30] I am not unaware that the bazaars which came up on the *chunri mahotsava* to celebrate Roop Kanwar's sacrificial death show how even scared victims cannot escape commodification. See in this context Sangari and Vaid, 1988 (included in this volume).

creation. Indeed, there is a long tradition in the social sciences which asserts that the dominant public culture—what Simmel called the 'objective culture'—is historically a male creation. In a debate with Marianne Weber, Simmel denied the possibility of a *female* culture. Women, he said, could contribute to the private and subjective spheres but not transcend these, whereas for Marianne Weber the representation of male culture as objective and female culture as subjective was a result of historical circumstances, and therefore alterable.[31]

The Shah Bano and Roop Kanwar cases raise the further possibility of interrogating male definitions of the community. Since the organization of memory is a crucial issue for definitions of the community, it is necessary to define memory as both an archive and a history. Thus, women's practices have been historically suppressed in the public culture of all communities but they continue, both in the private spheres of life and as archive. If these were to be revived and given recognition in public self-portraits of the community, it would become necessary to address questions about the heterogeneity of the community and the multiplicity of identities. For instance, in the case of sati, women's narratives among many Rajput communities have emphasized the everyday presence of sati matas in the lives of women and dwelt rather less on their violent deaths. Would such a construction alter the community's portrait of its own culture? What appears now as a conflict between two different kinds of communities (e.g. Muslims and Rajputs) on the one hand and women's groups on the other, could well become a conflict *within* a community if women were to lay greater claims to the public cultures of filiative communities themselves.

The relation between a community and its culture brings two distinct sets of preoccupations in creative tension with each other. These are: (a) how does the culture of a community create a shared vision of the world—a resource for questioning ideologies of the state, including an unquestioned allegiance to the state; and (b) does this shared culture homogenize the community to the extent that other definitions of culture and community are effectively denied and silenced? At the heart of culture we saw an enormous conflict, not only between state and community but also between different definitions of community.

[31] See Marianne Weber, 1971.

A resolution to this problem can only occur if the state ceases to demand full ideological allegiance from the various collectivities which constitute it; and if communities, instead of demanding complete surrender from individual members on the pretext of preserving their culture, recognize the paradoxical links of confirmation and antagonism from its members. An individual's capacity to make sense of the world, as I said earlier, presupposes the existence of collective traditions; but individuals must be able to experiment with these collective traditions by being allowed to live at their limits. A simultaneous development of the rights of groups and individuals will depend upon the extent to which these paradoxes can be given voice, both in the realm of the state and in the public culture of civil society.

We have taken important, symbolic instances to examine how the relation between state and community, between alternative definitions of the community, between filiative communities and affiliative communities and finally between community and individual may all be seen as located within a web of creative or destructive tensions in the matter of cultural rights. This allowed us to consider the problem from the perspective of two major communities, Muslims and Hindus, in modern India. In the Shah Bano and Roop Kanwar cases the institutional context entailed a dramatic use of agencies of the state—mainly law courts, as well as a mobilization of the community through which the public sphere was sought to be transformed. In a sense *cultural memory*, as it embodies a portrait of the self, and *desire*, as it is embodied in sexuality and marriage, were brought out from the domain of the private into the public sphere.

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