

# Women's Rights in Conflict with People's Cultural Autonomy: Problems of Cultural Accommodation

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**Abstract**—The paper explores the cultural rights accommodation by the state which has left many unresolved problems. The cultural rights sometimes violate the basic individual rights of the members inside the community like women. The paper further explicates certain cultural norms and practices which violates the rights of women inside the community in the name of culture.

**Keywords**—Culture, Patriarchy, Rights, Women.

## I. INTRODUCTION

STATES in South Asia have very strong cultures; they are mostly governed by their cultural norms and practices. Countries like India are multicultural; there are people from different castes, cultures, religions and sects. With communities we address castes like dalits (lower castes), or religious groups like Hindus, Muslims, Christians. In the reminder of the paper we will call these groups “communities” as opposed to the “State”. The State denominates the political organized unit that incorporates all the different “communities” in its geographical jurisdiction into one formatted entity. As it is the case in India, there may be several states.

Each community has its own norms and practices; minority communities enjoy the autonomy to practice their own family laws. State has acknowledged these communities as “owners” of own rights, even as creators of own legal rules. The State guarantees their identity so that they do not get assimilated to the majority culture – that they do not get absorbed but maintain their identity and independency. The purpose of multicultural accommodation is to protect the identity of the minority culture. The basic idea behind it is that the minority culture should not be absorbed into the majority culture. This protection means freedom to practice their own cultural norms in certain areas like family affairs. Hence in order to protect the cultural identity of the cultural groups, the state grants certain cultural rights to the communities, so to help them to retain their identity. The state allows different communities to retain their own institutions, their rituals and their traditions. These mechanisms although retain the cultural identity and protect the communities from getting assimilated into the majority culture. But that protection also effects the distribution of the rights and authority within the local community.

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In the following paragraphs it will be shown that the protection of cultural traditions happens at the cost of individual rights of women. This cost burden favors victimization as will be shown afterwards.

Various scholars have argued in favour of granting freedom to the identity groups for maintaining their special rights and providing them some autonomy which is important for their self-definition [15]. Will Kymlicka explicates that minority group should have an option to maintain its normative universe in which law and cultural norms are indissoluble which cannot be separated. However multicultural societies generate a problem in which while leveling the accommodation of certain norms of these communities they ensue to the systematic maltreatment of individuals within the accommodated groups, sometimes the implementation of certain of these norms are so severe that it even abrogates the citizenship rights [15]. These conditions leave some subgroups in a more vulnerable position. The reason is that the accommodated structures often retain some of the most hierarchical elements of the culture. Shachar (2001) has very aptly described this phenomenon as paradox of multicultural vulnerability. She calls the attention to the ironic fact that individuals inside the groups can be injured by the very reforms that are designed to promote their status as group members in accommodating multicultural state [1].

The tension exists between the accommodating the group members and the rights of the vulnerable members of the communities inside the groups. These hierarchical traditional structures cause power disequilibrium between the dominant group (favored by tradition) and the (traditionally) dominated group. Tradition establishes the men as the dominant and the women as the dominated groups. The non-dominating groups in the name of their cultural rights sometimes abrogate the very basic individual rights of its members within the community especially the women, women are the most vulnerable group within the community. Women are made liable to carry the cultural norms and practices.

Unfortunately the state action of accommodation has left many unresolved problem. For instance, if the identity groups are given certain legal authority to protect and retain its culture and if that violates the basic individual rights of some of the members inside the identity group, then how do we protect those members from violation of their basic individual or citizenship right [2]. More so, state goes to the extent of providing the autonomy to the cultural and religious groups to enforce their own family law. The religious groups for that matter adjudicate the family law matters related to dowry, marriage and divorce.

## II. THE RELIGION BASED CULTURAL MODEL

There are countries that adhere to a strict separation of church and state. They follow the model of "Separation of State and Church". Other states – like India – follow the Religion-Based-Cultural Model (RBCM). In this model, community groups – or religious groups – are granted autonomy. The state never challenges the power of the religious groups even when this power affects the very basic rights of the individual inside the group. The individual has no choice. It has to succumb to the religious and cultural authority. That is the victimologically relevant essence of the religion based cultural model.

The Religion - based Cultural Model (RBCM) prevails in most of the South Asian countries like e.g. India, Bangladesh and Pakistan. This model perpetuates the cultural law so far the family affairs are concerned. The state does not regulate matters of marriage and divorce – this is left to the community or religious groups. It respects and grants, that the religious communities have the legal power to govern the related personal status and property relations. The RBCM gives priority to the normatively enshrined religious convictions of minorities. In case that these conflict with state law, state law has to give up. In the development of a concrete case in India – see footnote 3 - the validity of the model is demonstrated: The RBCM "settles" a conflict between the Muslim Personal Law and the state Civil Law. This is clearly demonstrated in the case of Shah Bano.

Shah Bano, 73 years old, was divorced by her husband according to the Muslim *talaq*<sup>1</sup> system (according to this system, the husband can give divorce to his wife by saying so three times) after forty- three years of her marriage. Shah Bano went to the competent court to get a state-decree alimony payment from her ex-husband. According to the Muslim Personal Law, (Article 26 of Indian Constitution guarantees freedom to manage religious affairs for every recognized religious denomination or sect) a woman is entitled to get such alimony only during the first three months after the divorce (*period of iddat*) [3].

On appeal of Shah Bano, the Supreme Court ordered the ex-husband to pay a monthly sum for support following the state law. According to the state law, a divorced woman is entitled to minimum maintenance support by her husband<sup>2</sup> (provided she cannot support herself or she does not remarry). That decision created a public uproar stirred by Muslim clerics. They regarded this Supreme Court decision as sign of an unacceptable trend to absorb Muslim minority culture into the majority Hindu culture. They claimed this would weaken

<sup>1</sup> It is the cultural practice among Muslims where the husband can give divorce to wife by saying talaq triple times. Talaq is an Arabic word which means divorce.

<sup>2</sup> Section 125 of 1973 Criminal Procedure Code states that ' an order for maintenance of wives, children, or parents,' if any person having sufficient means neglects or refuses to maintain his wife, children or parents in need. A magistrate may impose, upon proof of such neglect or refusal, an order upon such a person to make a monthly allowance for the person.

Muslim identity in India.<sup>3</sup> And the campaign was finally successful: One year after the Supreme Court's decision, the Indian Parliament succumbs to the pressure of the conservative Muslim clerics: it overruled the Court decision and enacted "Muslim Women's Protection of Rights of Divorce Act". Despite of its more conspicuous name the Act removed the right of the Muslim women to appeal to the Secular Court of law for maintenance in the post-divorce period. On the other hand it set free ex-husband in the Muslim community from the obligation of the maintenance of ex-wife.

After her long futile struggle for maintenance, the parliament *stripped* her of her individual rights. She was forced to succumb and to be formally "loyal the community culture". In brief, the religious communities order put the rights of women with in their community at risk. Shah Bano under the pressure to be labelled a traitor to "her" community and religion, felt moved to recant, disclaimed the decision of the Supreme Court. In fact, women sacrifice their rights to communal religious cultural identification and state also fails to pay heed to their misery within the community. If woman has to remain in the community then she has to sacrifice her individual rights as a cost of remaining in the community [1].

## III. COMMUNITY ACCOMMODATION AND FEAR OF ASSIMILATION

Communities in all the societies want to retain their identity, they fear to be absorbed into the majority culture of the state. Ironically, women are considered to be the torch bearer of the culture, and at the same time their rights are abrogated in the name of the culture. They bear the burden of culture; give it an identity at the cost of their individual rights. This has been very aptly pointed by *Shachar* (2001) by terming this whole phenomena as 'Paradox of Multiculturalism' she explicates the multicultural accommodation as paradox which require vigilance if we wish to both engage in accommodation and uphold rights. She also conjures up a vision of an *Ideal World* in which there would be enhanced autonomy to the cultural groups but at the same time it would also improve the status of at-risk individuals inside the groups at least would never serve to legitimize the maltreatment of certain group members. In such a world according to *her* the paradox of multicultural vulnerability would not arise [1]. Although the member of the cultural community is guaranteed the freedom to opt for secular law or the cultural law as per the norms of UN Declaration of human rights and the freedom of individual to chose. True it is that Religious groups are not allowed to exercise their rule on the people who do not want to follow. But the position of women in South Asian societies is quite vulnerable; the economic dependence on their male counterparts makes them more vulnerable. In such circumstances, even if a woman wants to choose the secular law cannot do it. As choosing the secular

<sup>3</sup>The plight of women in the communities is very hard to be identified as women rights are always put at stake for upholding the cultural autonomy. Ironically, in the cultural identity on one hand woman is considered as the forbearer of the culture and in the other hand they are most vulnerable and deprived of their rights for far this culture syndrome is concerned.

law above the cultural law means the disrespecting the cultural law which means facing the wrath of the community. Since women is already a vulnerable section hence many a times her decisions to a large extent depend on the will of the community.

However, the ideal is out of reach hence there is need to do something that is within the reach. In a way which would accommodate the cultural differences and at the same time protects the individual rights of the members inside these groups. Every society has been built on the edifice of certain norms and traditions which they want to retain by and large. Unfortunately, certain norms and rituals in some of the communities are so much against the rights and liberty of its women folks in the community. These norms infringe their right to live in community with respect and make them to act like puppets with no life of their own.

The cultural rights are generally protected in most of the societies as people see them as closer to their own identity than the secular rights. In South Asian context, these cultural identities are maintained sometimes in the name of multiculturalism and sometimes in the name of holding up cultural identity or beliefs for carrying out the customs and practices in the community. Women in almost all the societies have been subjected to violence against them in the name of culture. They are often suppressed and subjugated, at times even been killed, while giving no space for enjoying their basic rights, culture has totally tarnished the image of women as a mere object for carrying on culture and for living according to the dictates of culture. Women are discriminated and do not enjoy equal rights as their male counterparts within the boundaries of culture. This happens not only in the developing countries, even the developed countries like United States has given up their secular justice when it comes to the accommodation of cultural obligation.<sup>4</sup> The cultural laws are sometimes granted in the name of multiculturalism and sometimes in the name of religion in the South Asian context. Some of the cultural practices in the countries like India and Pakistan are briefly described below:

#### IV. CULTURE AND WOMEN IN PAKISTAN

Women in Pakistan are most vulnerable segment of the society. Pakistan is clearly a RBCM; it even is founded as a Muslim state. In Pakistan Islam is the State religion and the state guarantees that Islamic Law should reign supreme. However, there are certain cultural practices in Pakistan which

<sup>4</sup> A very famous case of Julia Martinez in 1941, a full-blooded member of the Santa Clara tribe and a citizen of United States, married someone outside her community. After marriage she got a daughter named Audrey, the daughter was brought up according to the tribal conventions, she also learned to speak the 'Tewa language' (Santa Clara tribe's language). For all practical purposes she was a Santa Clara Tribe but ultimately she is being denied to get the tribal membership. As per the rules of the Santa Clara tribe children who's both the parents belong to the community or children of the male member of the community who married outside the community would only get the membership of the tribal community. Julia and Audrey filed a law suit in the Supreme Court to get some relief and to grant Audrey and similar situated children the tribal membership. Ultimately Supreme Court upholds the tribal rules in its verdict. It rejected the legal claims of Martinez and thus denied the membership rights to her daughter.

are even anti-Islamic and violate the basic human rights of women.<sup>5</sup> Although the Constitution of Pakistan equality and protection to its citizens regardless of their gender, the question arises that do women really in Pakistan enjoy equality and protection at par with their male counterparts in the society? (Article 25 of the Constitution of Islamic Republic of Pakistan states that "All citizens are equal before law and are entitled to equal protection of law and there shall be no discrimination on the sex alone". Certain practices in the name of culture are so grave that they leave women in the vulnerable position in Pakistan. On the other hand this makes man more powerful and free to inflict violence against women. The cultural norms and practices are moulded in such a way so to make women more dependent and submissive to their male counterparts.

Article 9 of the Pakistan's Constitution says that "No person that shall be deprived of life and liberty save in accordance with law."

This paper has already established: In order to maintain a traditional community order (mainly religiously oriented), women are "sacrificed" – their rights are systematically violated. This will now be demonstrated by the phenomenon of "Honor Killings". Women are killed (or raped or injured) to maintain the "honorable" status of a family or even of the whole tribe. This is justified by local tribal convictions which sometimes even are perceived to be as religious duties. This section will show not only that these honour killings against women happen but that they are somehow favoured by the legal order. We will start with discussing the reforms of punishment for murder.

Killing of a woman is punishable under Pakistan law as murder. Pakistan's Criminal Law is based on English colonial law. After independence, it was adjusted to reflect more clearly the new spiritual orientation of the state. The rules of *Qisas* and *Diyat* introduced in 1990 as an ordinance to Islamize the Criminal Justice System and re-promulgated several times till it was passed as an Act of Parliament in 1997, replaced several portions of PPC relating to murder, manslaughter, physical injury etc [4]. The law of *Qisas* (two male witnesses are required to establish evidence of crime) and *Diyat* are customary state law, which the state of Pakistan has considered. However, the law of *Qisas* and *Diyat* has changed the entire nature of punishment. This has made crimes e.g. of killings or – more frequently – domestic violence - under certain conditions not a crime against the state but has put it in private domain. This law has given the victim or heir of the victim the power to prosecute, to condone or even forgive the offender. If the woman is killed by a male member of family, the family often is not very motivated to prosecute a member of the own family. Although the Court retain the power to claim jurisdiction, in most of the cases the

<sup>5</sup> The case of Mukhtar Mai in Pakistan where the lady was gang raped by some men in the community as a punishment as her younger brother of 12 years was accused of having sexual relation with a 21 year old lady from rival tribe without any evidence against him and solely on the basis on suspicion. In fact her story became prominent when a journalist learned about her case in 2002, that she faced gang rape a punishment as 'honor crime'.

Court leave it to the family. However victimologically the law of Qisas and Tazir<sup>6</sup> would not be followed if the murderer has direct relationship with the victim for example: if the husband has killed the wife and wife's *wali* (heir) is the direct descendent, hence murderer cannot be charged with punishment of murder. Thus, large number of husbands murdering their wives is convinced that they cannot be sentenced to the same punishment as a murderer of another person, but merely with the punishment of few years' imprisonment or with the fine [5]. These elements in the Pakistan Criminal Law, introduced by Zhia Ul Haq in 1978, he established Islamized state. In that he converted all shariat Law (Islamic law) into the state law, elevate customary law into the rank of state-wide written criminal law [6].

A similar development can be traced in the cases of honor killings. Killing Woman in the name of Honour women who exercise their right of self-determination are killed or otherwise victimized to force them under the control of the traditional rules. These are control murders or controlled assaults of the vulnerable section of the society. Woman inside such a traditional community following the RBCM is never considered as individual, endowed with certain natural rights by virtue of being a human being. She is instead considered as property and commodity by – mostly - their male counterparts in the society. The victim carries the burden – on her is demonstrated that the traditional values are still ruling. In Pakistan such practice of Honour killing is being practiced in certain parts of tribal areas with some variation in the manner of killing. In Sindh, for instance, one such custom prevails known as 'Karo-Kari' (Karis are woman accused of being involved in extra marital sexual relationship, Karos are their male counterparts). It is the central thesis of this part of the paper that traditional norms define women as the fore bearer of culture hence she has to maintain the cultural identity. This has a very simple sociological background – women can get pregnant and can get children, and then males will be the ones who have to come up for the support. This simple economical; principle is masked into unwritten, customary, tribal or otherwise religiously interpreted norms that prescribe a certain behavior. This can be assumed too if the women are "punished" for sexual activities of their 12 year old brother... (see case above).

If the woman enters into some illicit relationship with some male then it actually brings disrespect and bad name to the family. This is the traditional justification. It explains it very simply, that has to do with the risk of women becoming pregnant and the risk for male to pay for to upbringing of the children they did not produce themselves. If males could be pregnant all strict rules would apply to the males. All this considered not on the basis of evidences but largely depends on the public perception about the woman. So, even if the woman is not actually guilty but the public view is against her

<sup>6</sup> Section 299 (k) defines *qisas* as 'punishment by causing similar hurt at the same part of the body of the convict as he has caused to the victim or by causing his death if he has committed *qatl-i-amid* (murder) in exercise of the right of victim or the wali (heir)' and *Tazir* means punishment other than monetary compensation.

character then she would be considered as guilty and that affects the Honour of the family. The mere allegation on the character of woman is enough for man to take law in to his hand and to kill her. Women generally do not get the chance to prove her innocence and also to kill her male counterpart if he can be found [5]. Even the law agencies do not take any action against such violence. They are subject to this gender violence in the name of culture, custom or honour.

Customs in a way are more inclined and have added responsibilities on women. Women are considered as the liability and have the responsibility at the same time. She is considered as the fore bearer of culture, where she also has to put her individual rights at stake in the name of culture, even the state also do not do much in this and leave women in the vulnerable situation, insecure and at risk of violation of her individual rights inside the culture of her particular clan or community. Even in the cases of Karo-Kari (honour killing) in Pakistan are not taken as murderous heinous crime but is tagged as culpable homicide. Culpable homicide is considered as killing or an act of accident where a person lost his self-control and it leads to the death of another person. The court in Pakistan in one of the cases of honour killing stated that: In Pakistan, the meeting or casual talk by a woman with a stranger in suspicious circumstances is looked upon by the relation of woman (sic) with great disapproval or resentment. Any sexual indiscretion by her is seen by the male relative or admitted by her before him may cause him sudden and grave provocation [7].

Courts in Pakistan have thus supported such killings where they happen on the basis of mere suspicion. The courts at times have held that it is inevitable for an honorable father or brother or husband to take such extreme step when they get to know about some illicit relationships as in Muslim society illicit relationships are not acceptable. This shows that traditional based values not only clash with modern Human Rights oriented convictions (see the case above) but that courts indeed treat criminals differently.

## V. FORCED MARRIAGES

Another such practice in the name of culture is carried out in Balochistan called 'Walwar', which means selling of young girls into marriage. They are thus considered as a commodity or property by the guardians and not as human beings. This also in a way enforces forced marriages and girls are used as a source to get money in the family in the name of culture. The state has not put any restriction on the practice of such customs and punishment has been declared by the court against such heinous acts.

Another similar practice known as 'Sawara' is been practiced in NWFP. "Sawara" denominates a practice by that girls are either bartered or sold off in the name of ritual practices to settle the disputes. In this whole process woman has no say, this happen without their permission, as their permission is not required as necessary to barter them or to sell them off to the rival parties as a means or compensation to settle the dispute. Although section 310 of PPC states that "giving female in marriage shall not be a valid *badal-i-sulah*

(exchange for dispute settlement), but it does not categorically declare the customs illegal or provide any punishment for it [4].

Some of the lower income group people and also the *Sindhis* and *Punjabis* in Pakistan follow the custom of Watta Satta marriages. In this practice of Watta Satta marriage the women are exchanged during the marriage i.e. the woman in one family can marry the man in another family only on the condition if the woman in the groom's family marries a man from the bride's family. Now the treatment of woman in her in-laws home very much depends on the on the treatment of another woman in the bride's parental family. If the woman in one home is ill treated than another woman would equally or even be more subjected to violence. One such case highlighted about a woman who is serving life imprisonment in Multan Jail for murdering her husband. The case is as follows:

"She was given to her husband in marriage on the understanding that the husband's sister would be given to her brother as she was seven years old. The husband's family refused to uphold their end of the bargain and she was taken back by the family. She was pregnant at that time and in order to return to her husband, she had to give her brother her new born daughter whom he could exchange for a bride for herself" [7].

Another practice which violates the legitimate rights of women practiced in some parts of Pakistan called '*Haq Bakshwan*', according to which a woman is married to Holy Quran. This would ensure that she would never marry to anyone and would never have a family of her own. This is done mainly due to two reasons firstly, due to the low economic status or the economic vulnerability of family. Secondly, so to secure the land within the family, this means that the land she inherits would not be transferred to her children as she would not be having any children or family. And the land in her name would be transferred to her brother's children. Thus the reason behind this practice is to justify the act of not marrying her and to keep her in home only. As after the enforcement of this practice on women, she does not hold the right to marry or to have her own family. She does not have any say in this whole process as this is to be decided by the male members of the family.

Another customary practice called '*Swara*' entails child marriage. Young girls are given in marriage mainly as the retribution for the murder committed by the man in her family [4]. This practice is also linked with the Karo Kari murders, as the law allowed the aggrieved party or the family of the deceased to take retribution. So, the young girls from the offending party are given to the aggrieved party as retribution. In this whole process woman is the victim from both of the sides. One can see that men have always used women in these customary laws as means to get their way through the safer sides or for their honour or as a means of compensation. They are tortured, violated, suppressed and even at times killed by men and all this goes without questioning such practices in the name of culture.

In all this, state has a very minimal role to play. Although in Pakistan the minimum age of marriage fixed for girls is 16

years and for boys it is 18 years under Child Marriage Restraint Act (1929). But for the violation of this law the punishment set is very minimal i.e. one month or fine of Rs. 1000 or both. The conviction, however, does not make the marriage invalid. All this questions Pakistan obligation towards *Convention on Elimination of all forms Discrimination against Women (CEDAW)* which Pakistan ratified on 12<sup>th</sup> March 1996.

The Convention is an international obligation on part of Pakistan to protect women against all forms of violence and discrimination on the basis of customary practices. As Article 1 of the Convention defines that 'discrimination is understood as any distinction, exclusion or restriction made on the basis of sex in political, economic, social, cultural, civil or any other field..' it further make an obligation on the state parties to adopt all the appropriate measures full development and advancement of women and make endeavour to provide them equality at power with men.

## VI. WOMEN AND CULTURE IN INDIA

India is a multi-cultural, multi-lingual and multi-religion state. There are various cultures and religions practiced by the people and are divided on the basis of the communities. These cultures have their own different set of norms and practices which are considered as the identity of the communities. In each culture women have a major role to play so to put forward the culture and also considered as the forbearer of the culture. In practicing certain norms and traditions in these cultures, women have to sacrifice their basic individual rights, the rights which are free to everyone by virtue of being a human being i.e. Right to life, Right to dignity, Right to social justice. Women are not only vulnerable inside these cultural tangles but she is equally vulnerable outside these cultures as well, for being identified with a particular culture. She is considered as the representative of the culture and bears all the liabilities for carrying forward this culture in the patriarchal set up of the society.

The Indian Constitution adopted in 1950 was a landmark in terms of conceptualizing the women's question. By mentioning the principle of non-discrimination on the basis of sex, it places all women squarely in the public sphere as citizens of the country and therefore entitled by birth to equality with men [8].

Yet this equality ensured by the Constitution of India has not been able to pose a challenge in front of the customary practices which are gender biased practiced by different communities in India in the name of culture and traditions. Women in India continue to suffer violence, discrimination and subjugation even after independence, in the name of culture. The very good example of vulnerability of women in the community is the Shah Bano's Case as mentioned above. Women are killed in the name of Honour killing; this practice is prevalent in parts of Rajasthan and Haryana and also in Uttar Pradesh to some extent. If a woman tries to take action against the will of the family then the killing of the girl is justified in the name of honour.

Women from the lower caste community is doubly vulnerable, firstly, she has to bear the burden of being a lower caste and belonging to a lower caste community. Secondly, for being a woman she has to bear the stigma and burden of her own community. Lower women are humiliated, stigmatized, sexually abused and are also subjected to violence at the hands of men who wield the class and caste power. Often at the time of riots or some other crisis, it is the woman who has been targeted as she is considered as the fore bearer of culture, so the men from other community first inflict violence and victimize women as they uphold the cultural norms and practices. So subjugating and stripping off the dignity of a woman belonging to a particular community means stripping off the dignity of that particular community, for instance women were raped and sexually assaulted by the rioting mobs in Gujarat (India) during 2002 riots. They were not only physically suppressed but were also raped and brutally killed in most inhuman way by the rioters. Hence one can see that women are not only vulnerable inside the community for practicing certain cultural norms and practices which violate their own individual rights i.e. Right to Equality, Right to Equality before law and so on, but they are equally vulnerable outside their community for being the fore bearer of the cultural norms, practices and symbols of their own community.

There are many cultural practices in India which violates the legitimate rights of women. This paper already looked at the Muslim community. But the discrimination of women is prevalent in Hindu community as well.

The wife in Hindu marriage is called 'ardhagini', an euphemism that means "the better half of the husband" (such euphemism is used in an ironical meaning in German language too). If the "worse half" of the couple dies, that is: if the status of the married women changes to that of a widow, a completely different social status is attributed: Traditionally, in some regions in India widow has to face many customary hardships. Sure, formally she is still Indian citizen and the laws for all Indian citizen should apply without problem. But sometimes she has to change the residence: she has to move to some desolated place. She is not allowed to attend any ceremony, birthday, memorial or celebrations of her family: she is considered as the bad omen in the society. In general a Hindu widow is deprived of wearing Tali, flowers, glass bangles, nose ring and from applying kum kum (its a red color powder which is put by married hindu women on her forehead)

In strict Brahmin communities, a widow has to cut off her hair, usually the pride of an Indian woman. This is forced upon her by their local community, much against her will. Tonsures are not restricted to Indian widows, of course, the horrible, inhuman rite of tonsure [9]. It is a visible stigmatization: a sign that the individual has to leave all his past behind and has to start a new identity. The same is true of the Indian widow; she is disrobed of all attributes of her status as "better half" and is reduced to social "unperson"[9].

She made to be isolated in most of the family affairs and has to spend most of her time in devotion of God, where she is

generally separated from all the worldly affairs and pleasures. A widow is generally made to dress in a particular way which could identify her as widow and different from other women in the society like in Maharashtra she had to wear dark red saree and bangles, in South India she could not wear blouse and had to wear almond coloured saree, in Bengal she was forbidden from eating fish and combing her hair and in North India she had to wear white saree [9]. Although these practices are much prevalent but still could be noted in some regions in India. A widow woman is not considered as a woman but as a living symbol which only mentions death of her husband. The widow woman has to undergo many changes in her way of living right from her dress to her eating habits. In Hindu society a widow has lead a more ascetic life. She made to eat simple food which does not produce "passions". It fits into this that she has not to have sexual relationships (that would be a disgrace to the deceased former husband, and fits nicely in the surplus of women in India (quotation). Christians and Muslim society widows are not forced to wear unattractive clothing nor to refrain from eating normal healthy food. Remarriage, impossible for Hindu women, is socially not frowned upon for Christian or Muslim women.

The portrayal of widow woman even in cinemas is still that of a simple woman in white (as white signifies no colour and is colorless) sari with no bangles and no colour. She is shown as an ascetic colorful dressing. These cinema portrayals reflect social reality: In Hindu society a widow is deviant and unacceptable if a widow decorates her body in the 'solahsingar' (full make up with ornaments on her body that make her look beautiful); whereas a man widower has no obligations in the cultural rites and rituals to carry on rest of his life after the death of his wife. He is socially free to lead a very normal life. As to remarriage, nobody in the Hindu society questions his remarriage. On the contrary, it is very much acceptable. Hence in India with multicultural society all the communities have certain leverage to perform certain of their customs and traditions in their own way for maintaining their cultural identity.

Societies want to stay stable, want to maintain their cultural characteristics. They are in a way conservative and traditional. If they would not be, the world would be very simply mono-culturally globalized. In the maintenance of their cultural identities traditional societies habitually treat women and men differently. From a post enlightenment equal rights position it is justified to phrase this as a culturally prescribed sacrifice that is placed upon the women. According to Jellinek, a secular state with valid constitution is characterized by two things, by the binding written constitution and by the conviction of the population that they want to live in the way the constitution prescribes, if the state fails to guarantee the rights to the citizens then it is a failed state [10].

## VII. APPROACHES TO SOLVING

The statement of a state being a failed state does not help the citizen nor does it help the structurally disadvantaged discriminated women in this state. Cultures have strong

influence over the lives of the people, of course over women as well.

There is a principle that life is possible only within society – not against society. No matter how much an individual is liberal minded - at the end of the day (in the final analysis), the individual has to bend before the cultural norms and traditions. There is no way to put a sudden end to culture and to overnight adopt a modern secular culture – and consequently the secular law for all people. This might be especially true in family law, irrespective of their culture as people in all communities are closely attached to their cultures and with their cultures to the ruling ideologies.

Therefore there is little use in seriously studying and considering idealistic theoretical treatise that try to talk about the problem without really naming the underlying dimensions. There are three different “models” of what are called as accommodating the individual rights within the cultural contexts will be analyzed in more detail in the next paragraph. These are the three models she deals with: [1]

#### 1. Temporal Accommodation.

According to this approach certain life events are crucial to the continuation of the group’s collective identity (such as creation of family or early education of the children) are governed by the group tradition as the sole definitive source of authority. Outside these crucial moments individual can turn to the state law.

#### 2. Consensual Accommodation.

According to this perspective an individual is free to choose between the cultural law and state law. In this individual is free to select which legal authority would have jurisdiction over his/her personal affairs.

#### 3. Contingental Accommodation.

According to this perspective, the state grants the norm giving independence of the cultural groups in certain legal arenas but only as far as their exercise of this autonomy meets certain minimal state defined standards. If the group fails to meet those state defined minimal standard then state must intervene to effectively protect individual civil rights [1].

Several comments are in place that locates the theoretical contribution into its proper position. The term “accommodation” already merits a critical analysis: In the word sound concepts like commodity, modality, common modalities, and a movement towards a coexistence of two somewhat different concepts under one roof. Clearly the word comes from the ideology of a “consensus society” while other social scientists work with the concepts of “conflict societies”. These different concepts are not spelled out in the contribution. That is disappointing.

In “Accommodation 1” the term “temporal” is used – that is misleading. Temporal is related to time – what is described are social locations, institutions like marriage and socialization in childhood. The fact is that far more “temporal” contingencies exist, and the alleged unstructured “temporal” social spheres are irrelevant. The author completely leaves out who determines the character of essentiality. In Model 1 the

individual has no possibility to turn to the (secular civil law) state. There is no accommodation – hence, model 1 does not describe a social reality in which societal demands and individual demands can be reconciled.

In “Accommodation 2” a theoretical construct of a free human is depicted that has nothing common with reality. It therefore can be discarded from approaches to find the solution of the problem of individual freedom and social demands.

“Accommodation 3” is the constitutional model that is developed in continental Europe. As model perfect, it functions in reality only under two conditions the author does not even mention: 1. This constitution functions only when not only the verbal text of the state constitution is very clear on the side of the individual human rights (corresponding to the UN Declaration of Universal ...). 2. It functions if in addition to 1, the conviction of the population is ruling that they do want to live under such a constitution. Accommodation 3 is silent about the real situation e.g. in India. We have seen that the accommodation 3 is invalid in all the countries who have ratified the UN Convention mentioned but nevertheless fail to enforce what they proclaim to be their duty.

“Accommodation 3” has a certain distribution of power: the central civil secular constitutional state of law is the powerful.

What the “accommodation models” leave out is that customs and traditions are age old. They are not at all open to the outside authorities to govern their culture and are resistant to any change from outside.

Hence there is need to bring change from within, the change and reform should come from within the community and not from outside the community. That is not impossible, as the example of the French Revolution following the Enlightenment shows. If we continue in this line of thoughts, we have to analyse the role of power: Having addressed the two different ideologies of “consensus society” and “conflict society”, we have seen that in the societies addressed there is not a consensus society but a conflict society model that explains: The article looked at women rights, hence saw from the beginning on Civil right groups on one side. On the other side the article saw traditional religious community groups who maintain a divine justification of their beliefs and norms. This is a social fact that must be stated.

There should be consensus that solutions cannot be brought by force or from other outside power. The solution can – that is our contention – only be brought when the people support the “new” social order.

We have seen that this is almost impossible if one side calls upon divine rules to justify their position. The secular civil society calls upon pre-divine justifications – at least it conscientiously leaves out the invocation of supernatural powers or Gods. This article does not want to discuss premodern, modern and postmodern philosophies. It follows Habermas in his conviction that the modern project of rationality is to be pursued.

### VIII. LESSONS FROM THE RELIGIOUS TEXTS

These traditional religiously based cultures are moulded in such a way so to suit and serve the interest the male counterparts in the community, leaving women at vulnerable positions. Religious leaders, clerics, think tanks and similar institutions serve to maintain the traditional ideas. They rest on old texts, like the Bible, the Quran, the Hindu holy book, Bhagwat Gita. Change can come only from within the community instead of going outside for bring reforms inside the community. Secondly, lessons can also be learnt from the communities from other states, like the same communities which have brought out reforms for emancipation of women without harming the basic norms of the communities. Thirdly, the states in South Asia like India and Pakistan has not only signed CEDAW but has ratified it.<sup>7</sup> Hence they carry certain obligations to protect the rights of women to end the discrimination against women based on caste, culture, religion in society.

There is a school of thoughts that is represented by the philosophy of individual rights and cultural rights. Reforms from within the community for protecting women rights i.e. women rights in Islam. Instead of seeking women rights and to reduce the vulnerability of women in family and even outside the family, the researcher should look inside the customs and culture of the particular community to bring out the reform for women's emancipation.

So far Islam and women rights are concerned, Islam is the religion which grants so many rights to women. *They point out to the right* to property, right to education, right to own business with certain terms and conditions and even right to seek divorce (Khulah) with some reason behind it. *These thinkers go back to pre Islamic history* – that means they look at social conditions of women before 600 b.C. in Arab countries. They find that at that time women had no rights moreover, polygamy, female infanticide and seeking divorce was very common. During the Pre-Islamic period in Arab society, giving divorce (Talaq) was much easier and a man could divorce his wife on any trivial issue and then after sometime can even revert it back. So divorce could be given end number of times and even can also be taken back. There were women could also put stipulated condition during marriage that they would have right to divorce and they would live with their husbands as long as they would like, and would initiate divorce when they liked too. This was because of their high status in society [5].

Although these evil practices still persists, Islam permits the man to marry four times maximum but only with the consent of his first wife and should love both the wives equally, but it is categorically mentions in Quran that it is not possible to love two people equally at the same time hence it is better to stick to one only. Thus, the Qur'anic verse from which the control of polygamy is derived must be understood in the context of problems resulting from the battle of Uhud, 3/625,

which had caused the deaths of a substantial percentage of Muslim men:

*If ye fear that ye shall not be able to deal justly with the orphans, marry women of your choice, two or three, or four; But if ye fear that ye shall not be able to deal justly (with them) then only one. (Quran: IV, 3).*

This is there in Islamic law but the practice is totally different as men generally in Muslim community marries without the consent of the first wife and with no authentic reason behind it. The religion gives rights to women to seek divorce on some of the general grounds like if the husband is impotent, deserted, suffering from some incurable disease or is highly violent but women hardly practice their rights as the culture which develops in society always subjugate the rights of women. There were two types of marriages namely, muta marriage and sadiqa marriage in pre-Islamic period. Muta marriage was short term contractual marriage between man and woman with a definite expiration date [11]. However, Mohammed tried rigorously to abolish this type of marriage as it firstly, did not produce legitimate offspring. Secondly, in practicing such marriage woman was considered as a mere object of social enjoyment which could be left behind by man after the expiration of the term of marriage.

Another type of marriage was Sadiqa marriage was a permanent marriage and required husband to move to the woman's tribe. Woman was suppose to give him a tent and a spear, tent for the permanent accommodation and spear is to protect her and to go on wartime along with her tribes men [11]. As in pre-Islamic society polygamy was unlimited, men were free to marry as much number of times as possible. Prophet Mohammed confined it to four marriages, that man can marry only up to four times, that too with conditions as it is mentioned in Quran that a man can only marry second time if he could able to give equal love, affection and consideration to both the wives at the same time and then Quran further says that it is not possible to love both the wives equally hence it is preferable to stick to one:

Islam further gives rights to women to seek divorce under following circumstances:

- Option of puberty: In Islam if the women are under age during the time of marriage and her father or grandfather stand by her side during the time of marriage. Once she attains puberty she has right to repudiate and void such marriage.
- Economic support: if the man fails to provide financial support to her.
- Change of religion: since the marriage solemnized under Islamic nature of law, hence once husband renounce Islam then she can seek divorce.

<sup>7</sup> India signed the CEDAW Convention on 30<sup>th</sup> July 1980 and ratified it on 9<sup>th</sup> July 1993 whereas Pakistan ratified the Convention on 12<sup>th</sup> March 1996.



- Impotence: if it is proven that the husband is impotent and cannot produce children, provides a valid reason for woman to seek divorce.
- Infectious disease: if the husband is suffering from some communicable or infectious disease then also woman can seek divorce.

Moreover, so far the ownership of the economic independence is concerned, in Islam women are allowed to work but with some restraint i.e. they are not allowed to wear provocative dresses, they are not allowed to hold meeting with a man in a closed room. Prophet Mohammed maintained that woman has right to own property, to buy it and to sell it at its own whim. She even has right to establish business without the male relative's consent direction or involvement [11].

The point is here that within Islam there are many ideas which not at all force to think of women as the divinely discriminated group. It is a chance for arguing that the structures are not that rigid than the prevailing ruling doctrine maintains. At the end of the paper we will see what that means.

#### IX. WOMEN RIGHTS IN HINDUISM

We already mentioned the "better half of the man" as an euphemistic designation of females in Hindu culture. Women in a Hindu culture is much respected, she is compared with Goddess lakshmi. Women are respected and given rights in Hinduism which is faded away with time. Women in olden days were given equal opportunity to participate in the rituals. From the period of Rigveda Samhita (the holy scripture which guides Hinduism) upto the period of Sutra literature women of Brahmin, Kshtriya and Vaishya castes were eligible for the sacred thread ceremony and Vedic (religious text) study. Manu the Law Giver of the Hinduism also mentioned about the education of women, although in his scriptures the status of women is said to be lowered, but he mentions that daughter should be supported and educated with much care and attention as son. He also never supported child marriage. If one goes back to the epic age of Ramayana and Mahabharata (the Hindu mythology) it has been shown that girls that time enjoyed the freedom to choose their husband (Swayambara). This freedom to choose the husband was expected to be given to the girl with some amount of maturity and also power to decision making which nullify the theory of child marriage. In Mahabharata (*holy epic*) we got several examples of widow remarriage, Damayanti mother of two children declared to hold a *second swayambar* (husband) [12].

#### X. TAKING LESSONS FROM OTHER STATES

Development and democracy in true sense depends on women emancipation. Hence, democracy is rare where there is wide gender gap which increases authoritarianism and nexus of religious and political brotherhood, which obstructs democracy. Some of the Muslim dominated countries understood this and brought many reforms for the

development and emancipation of women. Some of the leaders in these countries like Mustafa Kemal Ataturk, founder of modern Turkey, pushed his country towards reforms by transforming the role of women. Considering women as intrinsically important to the society, he brought many reforms and provided women with better opportunities and equal rights [13]. He gave rights to women to inherit, divorce and also to get custody of children. Similarly in Tunisia, president Habib Bourguiba adopted revolutionary Code of Personal Status that greatly enhanced Women's rights: it banned polygamy, raised the minimum age to seventeen, and also allowed women to request divorce [13]. Similarly many Muslim countries like Tunisia, Qatar, Jordan, Morocco have brought reforms in their respective countries for emancipation of women by enhancing education and job opportunities for them. These are the good instances for the Muslim communities in south Asia to learn from these countries as these countries have introduced reforms keeping in mind the basic Shariat Law and have introduced reforms from within for emancipation of women which leads to overall development in the society.

#### XI. CONCLUSION

Most of the countries in South Asia have ratified the Convention on Elimination of All Forms of Discriminations Against Women (CEDAW). Hence, they have certain obligations towards it and to protect women rights. Also the Beijing Declaration, Fourth World Conference on Women, in China 1995. It was attended by almost all the countries who have signed CEDAW and have also ratified it.

The objective of Platform for Action, which is in full conformity with the principles of the United Nations Charter and international Law, is the empowerment of all women. The full realization of all human rights and fundamental freedom of all women is essential for the empowerment of women. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of the states, regardless of political economic and cultural systems, to promote and protect human rights and fundamental freedom [14].

Hence it is the duty of the state to keep these international considerations in mind for protecting women's rights. Once the countries like India, Pakistan once they have ratified the international conventions Like CEDAW they are bound up by some international obligation to protect the basic human rights of women.

The need of hour is to carve out space from within the cultures for protection of the women rights. Society in South Asia are almost patriarchal, they are dominated by the male members of the society. Women in these societies are bearing the cultural burdens for upholding the culture. In most of the cultures the men have the liberty to marry outside the culture but when it comes to women they are not allowed to marry outside their culture and once they take this step, then they are thrown out from the culture and are debarred from their

particular society. These rules are set out by the patriarchal hold in the society; they dictate all the actions of women and control them at their whims. Women are always given a secondary status in the society; they are never treated at par with men. As the result of this many women do not even receive education which led to their underdevelopment. Since women has to run the house and also the responsibility of bearing the children hence an illiterate/uneducated woman could not be able to run the household and also bear the children in the same manner as an educated women. Secondly, since they are not given chance for proper education hence they also remain economically vulnerable and dependent on their male counterparts. All these things further lower their status in the society. The development of a state to a large extent depends on the development of women in that state. When the women get proper educational opportunities and also participation in the decision making, they are able to assert themselves in the society. Hence able to take their family, community and state towards development and at the same time would be in a position to protect their rights and bargain for equal status in the society.

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