

Geo-Politics and Women's Bodies From the Perspective of the South Asian Diaspora

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The 1947 Indian Partition ("Partition") endures as a decisive moment in world history, not only for its significance in the emergence of India and Pakistan, but also for its impact on the legal rights of women. Before Partition, the planet had not witnessed such a massive and disruptive migration of people.¹ Partition is not a bygone event, but a modern phenomenon that continues to shape the gender dynamics in South Asia.² In large part, most Indian women still experience the enduring hurt from that era because many legal issues remain unresolved.³

I. Introduction

This article will explore women's legal issues regarding marriage, rape, inheritance rights, and property ownership in the South Asian context after Partition. The historical background of the British Raj and post-colonial India illustrate the impact of these legal issues on South Asian women. This article will analyze landmark Indian legal cases from the past fifty years to show the continued disparity in justice toward women. Only in the last twenty years has legislation even begun to counteract gender bias. Still, India remains a country scarred by extreme gender discrimination. It is beyond the scope of this article to discuss all forms of prejudice against women in India and the possible reforms to eliminate such discrimination. Therefore, this article will focus on the issues of wife-burning (*sati*), divorce, gang rape, custodial rape, inheritance rights, and property ownership.

A. Historical background

1. The culmination of the British Raj leaving India

Traditional Indian caste, gender, class, and religious oppressions were further worsened during the three hundred years of British colonial rule.⁴ The British Raj empowered some higher caste women through access to education and economy, but at the same time marginalized those

at the lower levels.⁵ Current economic conditions have exacerbated the divisions among women.⁶

The tragedy of Partition lies in the experiences of hundreds of thousands of Muslims, Hindus, and Sikhs who were slain in the midst of communal violence, which simultaneously forced 15 million people into refugee status.⁷ Ironically, the split between India and Pakistan only served to heighten hostilities. In the ensuing period of almost sixty years, the two countries have remained entrenched in a bitter animosity, fighting three wars in 1947-1948, 1963, and 1971.⁸ During the last decade, India and Pakistan have fought low intensity wars over Muslim-occupied Kashmir and the drawing of boundaries in the high Himalayas.⁹

2. The two theories of Partition

The portrayal of Partition differs based on one's point of view.¹⁰ In the making of Pakistan, religion appears to have been the determinant of nationality because the Muslims wanted their own state. According to Ayesha Jalal in *The Sole Spokesperson*,¹¹ two theories surface to explain Partition. The first theory says that Indian Muslims were always a distinct and readily identifiable community. Jalal says, "India, this theory argues, contained the seeds of two nations; the Muslims were never wholly assimilated into their Indian environment and had their own distinctive traditions."¹² Thus, the emergence of Pakistan would be a political progression enforced by religious ties.¹³ The other model concentrated on the role of imperialism in dividing two communities which history and tradition had joined.¹⁴ Both these theories are problematic because of the socioeconomic and religious intricacies involved due to the diversity of Indian culture and geography. It is difficult to base a theory of Partition on only one model. A juxtaposition of the two models with theories of religious and national consciousness may be more appropriate.¹⁵

B. The human impact of Partition

Immediately after Partition, Hindus, Muslims, and Sikhs raped women and murdered children.¹⁶ Property was seized from migrating groups.¹⁷ Civil tension continued for several months. More than 75,000 women were raped, kidnapped, abducted, or forcibly impregnated by men of the "other" religion.¹⁸ Thousands of families were split apart, homes burnt down, and villages abandoned.¹⁹ Some women were so embarrassed of the sexual humiliation that they refused to return home.²⁰ The destruction of families through murder, suicide, and kidnappings caused grievous Post-Partition trauma. In *The Other Side of Silence: Voices from the Partition of India*, Urvashi Butalia writes, "Refugee camps became part of the landscape of most major cities in the north, but, a half century later, there is no memorial, no memory, no recall, except what is guarded, and now rapidly dying, in families and collective memories."²¹ The focus of this passage is the women who were forgotten. The ignorance of women's contributions to independence illustrates the disparity of treatment.

II. Legal Issues Related to Marriage and divorce

While the laws relating to marriage in South Asia are extensive, the practice of *sati* (wife-burning) and the payment of maintenance after divorce remain two of the most controversial women's issues in this region. Dowry murders, child marriage, marital rape, reproductive rights, and female infanticide are other topics that merit discussion. These legal issues, however, are beyond the scope of this article.

A. Sati of Roop Kanwar

The genesis of the Commission of the *Sati* (Prevention) Act of 1987 was the ritual burning of Roop Kanwar over the funeral pyre of her husband in September 4, 1987, at Deorala in Rajasthan, a northern Indian state.²²

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The *Sati* Act banned commission and the glorification of *sati*.²³ The *Sati* Act proclaims, “*sati* or the burning or burying alive of widows or women is revolting to the feelings of human nature and is nowhere enjoyed by any of the religions of India as an imperative duty.”²⁴ In spite of the harsh penalties for committing and glorifying *sati*, the practice still occurs. In the decade following the enactment of anti-*sati* legislation, more than 21 people were registered under the Prevention of *Sati* Act.²⁵

B. The Shah Bano case

The controversial divorce case of Shah Bano highlights the continuing tensions in Indian personal law. Shah Bano, a 62-year-old Muslim woman, was divorced from her husband in 1978 after 50 years of marriage.²⁶ She filed a criminal case against her husband, asking that he be ordered to pay maintenance or alimony.²⁷ While the law entitled divorced and deserted women maintenance from their husbands, Muslim personal law forbade maintenance after the three-month *iddat* (waiting) period.²⁸ The courts granted Shah Bano maintenance from her estranged husband.²⁹ Yet radicals from both the left and right saw this case as a rallying point for their cause: “The old scars of partition in India in 1947 were raised again and communalism saw a steep rise with severe oppression of the Muslim community. Eventually the government reluctantly agreed to fundamentalist demands, eroding the limited rights of Muslim women.”³⁰

The case of Shah Bano has had far-reaching legal repercussions in South Asia. In *Danial Latifi & Anor v. Union of India*,³¹ the court upheld the constitutionality of the Muslim Women Act of 1986.³² The court ruled that a Muslim husband is liable to make reasonable and fair provision for the future of the divorced wife which obviously includes her maintenance as well.³³ The provisions of the Muslim Women Act, which related to divorced women’s maintenance, were held to not violate the Constitution of India,³⁴ which allowed for the implementation of religious personal laws.

III. Rape

A. Rise of incidents of rape since Partition

Rape is the most degrading crime possible because it not only physically harms the victim, but also destroys her psyche beyond repair. Therefore, the alarming incidence of rape in South Asia after the Partition era is outrageous. Last year, a young medical student was raped in broad daylight in New Delhi.³⁵ Instances of rape are making headlines daily throughout India: “It is now a throbbing, in-your-face possibility of violence waiting to happen to any woman, anywhere.”³⁶ Rapes by fathers, policemen, taxi drivers, and servants have become commonplace all over India.³⁷

Although rape is on the rise, acquittal rates for rape trials are likewise increasing. Trials are biased in favor of the accused male rapist and seek to humiliate the victim.³⁸ Any sexual crime against any woman is unacceptable. The government must be able to secure the environment so that women are free to travel and pursue their day-to-day activities, like attending school, going to work, and shopping.³⁹

B. Public outcry over verdicts in rape cases

When five upper caste men were acquitted in the gang rape of a lower caste woman in Jaipur, the capital of India’s desert state of Rajasthan, more than 3,000 protestors marched through the streets demanding a retrial.⁴⁰ Bhanwari Devi, a 43-year-old woman, was gang raped while she was campaigning against the customary practice of child marriage.⁴¹ “Bhanwari, fight on! We will fight with you!” the protesters chanted.⁴²

In an even more shocking verdict in 1979, the Supreme Court of India reversed the conviction of two policemen who had raped a 16-year-old tribal girl while she was in their custody.⁴³ In March 1972, Mathura, a young lady from Maharashtra, was taken to the police station by her relatives because they feared she would elope with her lover.⁴⁴ The two policemen on duty said they wanted to take her statement when she was alone.⁴⁵ While the relatives waited outside, the two policemen raped her.⁴⁶

The Mathura rape case created

a wave of public outcry and was instrumental in effecting changes in rape laws.⁴⁷ However, even under the changed laws, few substantive improvements occurred. Despite harsher punishments, the conviction rate has dropped tremendously in the post-reform years: “The insensitivity of the justice delivery mechanism and the trauma of the rape victim under an unsympathetic system continues unabated.”⁴⁸ The Mathura case catalyzed the women’s movement into seeking reforms of the criminal law that deal with rape.⁴⁹

IV. Inheritance Rights and Property Ownership

A. Second class status of women with respect to rights

Women remain the most vulnerable and oppressed members of South Asian society.⁵⁰ In India, this is especially true because constitutional rights have not had much impact on women.⁵¹ Personal religious laws with respect to marriage, divorce, and inheritance govern its members. These laws tend to be discriminatory and violative of women’s human rights.⁵² Without a Uniform Civil Code, women lack protection from the “oppressive clutches of their personal laws and their emancipation remains a far cry.”⁵³ Even though the Indian Supreme Court has boldly asserted that a “custom must yield to a fundamental right,” it is regrettable that the Supreme Court has not subjected oppressive personal religious laws to the rigors of the Indian Constitution’s Article 21 and the Equality Clauses of Part III.⁵⁴ As the Constitution protects religious freedoms, it also denies the personal dignity of individual women.⁵⁵ Recently, the Supreme Court of India called on the government to introduce a Uniform Civil Code “to pave the way for women’s liberation and strengthen national unity.”⁵⁶ Hopefully, the legislature will heed such a call to implement a Uniform Civil Code.

B. The crusade of Mary Roy

Meanwhile, Mary Roy, a Catholic woman and mother of famed Indian author Arundhati Roy, set out on a crusade to alleviate discrimination in property rights for Christian women.⁵⁷ In 1986, the Supreme Court

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violence. *Id.*

30 Jha, *supra* note 3.

31 Danial Latifi & Anor v. Union of India, 4 L.R.I. 36 (India, 2002).

32 *Id.*

33 *Id.*

34 *Id.* The court further concluded, "Such a reasonable and fair provision extending beyond the *iddat* period must be made by the husband within the *iddat* period Liability of [a] Muslim husband to his divorced wife . . . to pay maintenance is not confined to the *iddat* period. A divorced Muslim women who has not remarried and who is not able to maintain herself after the *iddat* period can proceed as provided under § 4 of the Act against her relatives. *Id.* The woman's relatives are liable to maintain her in proportion to the properties which they would inherit on her death according to Muslim law from such divorced women including her children and parents. *Id.* at 37. If any of the relatives are unable to pay maintenance, the magistrate may direct the State *Wakf* (Endowment) Board established under the Act to pay such maintenance. *Id.*

35 Shefalee Vasudev, *Rape Trials: Rape of the Law*, INDIA TODAY, December 16, 2002, at 76.

36 *Id.*

37 *Id.*

38 *Id.*

39 While women's groups do not emphasize caste and religion as factors in rape, they are troubled by wealthy, rural youth, who are flocking to the cities and colleges. *Editorial Terror on the Streets*, THE HINDU, October 26, 1997, at 25. Many of these young men are not interested in an education, rather in drinking, womanizing, and merrymaking. *Id.* In these situations, every woman becomes a possible target. *Id.* Most of the college girls in the city of Jaipur are terrified to even cross paths with these students. *Id.*

40 Jennifer Morrow Rural, *Indian Woman Protest Rape Verdict*, UPI, December 15, 1995 at <http://csf.colorado.edu/forums/femisa/1995/msg00063.html>.

41 *Id.*

42 *Id.* Five upper caste men assaulted Bhanwari Devi in September of 1992 after she protested the plans of an influential man in her village to marry off his one year-old daughter. *Id.* Bhanwari Devi, who was herself married when she was only three years-old, identified her five attackers, including the father of the young girl. *Id.* She alleged that two of the men raped her as the others held her husband back from her. *Id.* At trial, the defense attorneys contended that upper caste men would not have had sex with Bhanwari because she was from a much lower caste. *Id.* Moreover, doctors conducted a medical examination of her more than 52 hours after the alleged rape. Pinki Virani, *Long Wait for Justice*, THE HINDU, March 4, 2001, at <http://www.hindu.com/the-hindu/2001/03/04/stories/13040611.htm>.

Now Bhanwari still lives in the same village as her five attackers. *Id.* The rapists offered her compensation in 1994 to withdraw her case. *Id.* She curtly responded, "Tell our village elders you raped me, restore my dignity." *Id.* The rapists did not oblige. *Id.* Bhanwari's brothers

cut off relations with her because they said she should have settled. *Id.* Her eldest son and his wife along with her in-laws also broke off ties with her. *Id.* Her husband, though, took time to accept his family falling apart. *Id.* He remained supportive, warm, and caring. *Id.*

Bhanwari is a potter, and no one buys her pots anymore, but she still works because she needs hope. *Id.* She has been given numerous bravery awards. *Id.* Former Prime Minister Narasimha Rao even gave her 10,000 rupees or approximately \$200. *Id.* Yet when she got a standing ovation in New Dehli, she said, "Manney nyaay chahiye; [I don't want this.]" *Id.* Bhanwari only seeks justice before the law. *Id.*

She is the reason why every woman in India is legally protected from sexual harassment at work. *Id.* After the gang rape, some Dehli women worked on eliminating sexual harassment in the workplace. *Id.* Bhanwari, used to be a *saathin*, grassroots worker, because she was in need of resources. When she accepted the position, she would report upcoming child marriage to her supervisors, who would, in turn, tell the police. *Id.* The villagers refused to provide Bhanwari water from the well and would not sell her milk. On September 22, 1992, those men raped her. *Id.*

43 The Sessions Judge held that since she had eloped with her lover, she was habituated to sex and could not be raped. *Id.* Yet the High Court reversed that judgment and sentenced the policemen to a six year prison term. *Id.* Yet in 1979, the Supreme Court again reversed the order. *Id.* The judges said that the victim had not raised any alarm and no injury marks were visible on her body. Siddharth Narrain, *For an Effective Law on Rape*, THE HINDU, November 21, 2003, at <http://www.flonnet.com/fl2023/stories/20031121003109700.htm>. The judges concluded that she must have offered her consent to sexual intercourse with the two policemen. *Id.*

44 *Id.*

45 *Id.*

46 *Id.*

47 *Id.*

48 Swapna Mukhopadhyay, *Law as an Instrument of Social Change: The Feminist Dilemma* at <http://www.hsph.harvard.edu/Organizations/healthnet/SAsia/forums/crimes/articles/instrument.html>.

49 *Id.* In 1983, the legislature passed the Criminal Law Amendment Act, which created a rebuttable presumption in cases related to custodial rape. *Id.* The government made the criminal penalty for custodial rape for no less than seven years of imprisonment. *Id.* The disclosure of the victim's identity also became a punishable offense. *Id.* Moreover, video-taped proceedings were implemented. *Id.*

50. Vijayashri Sripati, *Human Rights in India: Fifty Years After Independence*, 26 DENV. J. INT'L L. & POL'Y 93, 132 (1997).

51 *Id.*

52 *Id.*

53 *Id.*

54 *Id.*

55 *Id.*

56 *Id.*

57 Mary Roy v. State of Kerala, 1986 A.I.R. 1011, (India, 1986)

58 *Id.*

59 Venu Menon, *Mother Roy*, REDIFF, Oct. 30, 1997, at <http://www.rediff.com/news/oct/30arun.htm>.

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.*

64 *Id.*

65 *Id.*

66 Khalsa Human Rights, *Women's Rights in India* at <http://dSPACE.dial.pipex.com/town/square/ev90495/women.htm>.

67 *Id.*

68 *Id.*

69 *Id.*

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these industries calls for a different type of analysis and raises different challenges.¹

II. Latin America Economic Background

According to the International Monetary Fund ("IMF"), the economies of Latin America are expected to grow.² Higher commodity prices, macroeconomic stability (including growing signs of fiscal discipline in the largest countries of the region), high oil prices, and controlled inflation will continue to drive the growth of Latin American economies.

Not so long ago, some major Latin American countries suffered economic crises of epic proportions. How-

ever, the region has steadily recovered in the past four years and the projections for 2006 show a healthy GDP growth which is higher than the IMF's estimates for the United States (3.3 percent) and the European Union (2.0 percent).³ While the leftist trend in the political map is a matter of concern, especially in those countries where the political leadership has populist connotations, such as Venezuela, the economic landscape of the region has not been adversely affected by this trend.

Foreign direct investment ("FDI")⁴, which has a direct correlation with mergers and acquisitions ("M & A") activity,⁵ for Latin America in 2005

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