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The Foundations of Modern Legal Structures in India

How did colonial rule gradually transform the legal systems of India? On what sources did the colonial administrators rely? In what ways did their focus on scriptural, religious sources frame and define the legal status of women in modern India? How was custom a challenge to early colonial formulations? Did the involvement of nationalist reformers substantially alter the reliance on scripture? How did early feminist interventions alter the picture? And which of these legacies continues to shape the legal status of women in contemporary India?

The East India Company (EIC) first gained political and economic control over India when it was granted the revenues of Bengal in 1765. Since it was more than just the new landlord of this part of India, the Company was compelled to fashion a legal–juridical apparatus for its new dominions, primarily to ensure the steady and painless yield of revenues that it had been granted. Following the first flush of victory, the EIC discovered that this was no easy task. For one, the British had no real understanding of the agrarian systems of India and the range of rights that existed on land, which bore no resemblance to the relatively clear-cut alienability of land in Britain, which, as E. P. Thompson has shown, was itself only a recent development then.[1] Also, British experience of the administration of its other colonies hardly prepared it for the first bewildering encounter with India and its many 'non-state' legal systems.[2] In the colonies of North America and the Caribbean, according to

[1] E. P. Thompson, 'Custom, Law and Common Rights', in *Customs in Common: Studies in Traditional Popular Culture*, by E. P. Thompson, pp. 97–184 (The New Press, 1993).

[2] The distinction between 'state' and 'non-state' legal systems was used by Upendra Baxi to identify legal institutions and practices that existed before, and alongside, the legal innovations of the colonial state. '"The State's Emissary": The Place of Law in Subaltern Studies', in *Subaltern Studies VII: Writings on South Asian History and Society*, ed. Partha Chatterjee and Gyanendra Pandey, pp. 247–64 (Oxford University Press, 1992), esp. p. 252.

Bernard Cohn, non-state legal systems were quickly replaced by state systems and, before long, were governed by institutions that were primarily an extension of the basic political and legal institutions of Britain.[3] Indigenous populations of these colonies were quickly subjugated or simply massacred by earlier conquistadors, but India appeared to have recognizable institutions and codes which had the force of law, for which there were no British equivalents. Before long, it also became clear that Indian territories could not be governed without a better knowledge of the Indian languages of governance (Persian and Sanskrit) and 'traditions' and 'local usages' in addition to a detailed knowledge of the better-known legal texts on which the indigenous people appeared to rely.[4]

Scholars such as Lauren Benton have argued that European administrations were by the mid-19th century replacing truly plural legal systems with 'state-centred legal pluralism'; state law capped the plural legal order through its monopoly on violence and subsumed weaker authorities in a nested or stacked legal system.[5] The accommodation made with 'non-state law' in societies like India, and the extent to which they were transformed, indeed rewritten, by the colonial administration, will be one of the concerns of this book.

A social history of law as it affected women must also plot the paradoxes that were generated by colonial rule: as Rachel Sturman notes, there was on the one hand a 'powerful postulate of abstract human equivalence'—that is, all humans are equal (and therefore entitled to equal rights); from the late 18th century, cases had cited 'justice, equity and good conscience' as their moral compass. But this commitment was simultaneously undermined by the

[3] Bernard S. Cohn, 'Law and the Colonial State in India', in *History and Power in the Study of Law: New Directions in Legal Anthropology*, ed. June Starr and Jane F. Collier, pp. 131–52 (Cornell University Press, 1989), esp. p. 131.

[4] This was especially true in regions such as Punjab, the northeast and southern India where, as we shall see, the scriptural tradition was either absent or had only a weak hold. Some of the strongest recent arguments that undermine the place of Dharmasastra in historical understandings of pre-colonial law are in Timothy Lubin, Donald R. Davis Jr and Jayanth K. Krishnan (eds.), *Hinduism and Law: An Introduction* (Cambridge University Press, 2010). Thus, as the authors show, no uniform code existed in early Indic societies previous to at least the 12th century (p. 23), Dharmasastra itself recognizes the 'laws of regions' (p. 59), Hindu legal practice was often independent of the Sanskrit scriptures (p. 60) and in many places founded on custom, all of which make 'the recovery of an Indian legal tradition' an impossibility (p. 4). See also Neeladri Bhattacharya, 'Remaking Custom: The Discourse and Practice of Colonial Codification', in *Tradition, Dissent and Ideology: Essays in Honour of Romila Thapar*, ed. R. Champakalakshmi and S. Gopal, pp. 20–51 (Oxford University Press, 1996).

[5] Lauren Benton, *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900* (Cambridge University Press, 2005 [2002]), pp. 6–7.

recognition of 'qualities and capacities that were nonetheless not viewed as universal'. This simultaneity created 'new universal categories of difference' on the axes of gender or race, while at the same time opening up new (often legal) potentialities for overcoming them.[6] As Thomas Metcalf has put it, British rule hovered 'between an acknowledgement of similarity and an insistence on difference'.[7] As a result, the process of producing a coherent reliable body of laws governing all Indian subjects was fraught with contradictions and compromises but equally, as recent research reveals, provided new opportunities.[8] We shall first consider the ideological bases for the development of legal structures in India, before considering how these structures were related to the material transformations of Indian society.

Orientalist Understandings of India and the Law

As their conquests extended over various parts of the world, European colonial powers had to produce a body of knowledge about the subject people which would enable both administration and exploitation, as well as provide the ideological justification for the introduction of alien rule.[9] The attempt to forge a manageable grid through which Indian realities could be understood, and thereby controlled by the new authority, produced a breed of scholars called the Orientalists, who mastered the classical languages of the subcontinent and translated what were identified as key texts.[10] The first set of efforts in this direction were made by Warren Hastings, a successful commercial agent

[6] Rachel Sturman, *The Government of Social Life in Colonial India: Liberalism, Religious Law and Women's Rights* (Cambridge University Press, 2012), p. 4. On the preferred mode of penal governance that propounded a 'universal standard of humanity' from the 1830s, even as it accommodated social and cultural norms, see Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (Oxford University Press, 2000).

[7] Thomas Metcalf, *Ideologies of the Raj* (Cambridge University Press, 1997), p. 66.

[8] On intra-Presidency differences, which produced other knowledges and generated other solutions, see Thomas Trautmann (ed.), *The Madras School of Orientalism Producing Knowledge in Colonial South India* (Oxford University Press, 2009).

[9] The most influential framework for understanding the links between power and knowledge in the encounter between Western colonizing powers and the East is in Edward Said, *Orientalism* (Penguin, 1978). Orientalism was not merely a study of Oriental pasts, but a system of power that constructed and defined this knowledge and produced 'truths' about the subject nation. 'Orientalist' still refers to the men who were actively engaged in the collection and translation of Indian texts, whether in Bengal or in Madras.

[10] David Kopf, *British Orientalism and the Bengal Renaissance*, *1773–1835* (University of California Press, 1969); Trautmann, *The Madras School of Orientalism.*

and later Governor General of India from 1772, who encouraged a group of younger servants of the Company to devote themselves to the study of classical Indian languages such as Sanskrit. As Rosanne Rocher puts it, 'Anglo-Hindu law was born in Calcutta on August 21, 1772, when the Bengal government adopted "A Plan for the Administration of Justice in Bengal".'[11] The parallel developments in Muslim law will be seen later in this chapter.

Historical understandings of the Indian past were derived largely from the interpretations developed by the Orientalists.[12] This reconstructed history was, however, framed as one of the benefits of colonial rule to be passed on to Indian subjects: the 'natives' were given back their own history and their law, of which they had become ignorant.[13] British Orientalists in India relied on texts for their reconstruction of the Indian past and privileged certain written texts over others. In the early decades of British rule in India, the administrators' search for the appropriate rule to be applied drove them towards the study of *sruti*s, *smriti*s, Dharmasastra and an assortment of digests and commentaries. The dynamic interaction between textual law and non-textual custom, which had gradually evolved in pre-British India, was therefore hypostatized.[14] J. D. M. Derrett says that the 'sastra tells us little or nothing about the customs of the mlecchas, forest or hill tribes or other untouchables living on the fringe of Hindu society: the jurisprudence did not grow to include them'.[15] As Eliza Guinchi has shown, this was equally true of the colonial creation of Anglo-Muhammadan law, which, through an application of textual Sharia law, abandoned the context-based nature of *fikh* (a more human, therefore

[11] Rosanne Rocher, 'The Creation of Anglo-Hindu Law', in *Hinduism and Law*, ed. Lubin, Davis and Krishnan, pp. 78–88.

[12] Romila Thapar, *The Past and Prejudice* (National Book Trust of India, 1975), p. 3.

[13] For a critique of Indian historiography's 'complicity with colonialist historiography', see Ranajit Guha, 'Dominance without Hegemony and Its Historiography', in *Subaltern Studies VI*: *Writings on South Asian History and Society*, ed. Ranajit Guha, pp. 210–309 (Oxford University Press, 1989).

[14] For a discussion of the relations between custom and *sastra* in the pre-British periods, see J. D. M. Derrett, 'Custom and Law in Ancient India', in *Religion Law and the State in India*, by J. D. M. Derrett, pp. 148–170 (Faber & Faber, 1968) and Derrett, 'Law and the Social Order before the Muhammedan Conquest', in *Religion Law and the State in India*, pp. 171–224. Axel Michaels shows that Hindu law recognized the laws of regions (*desadharma*) and all those 'dharmas propounded by country, caste, and families', including custom. See Axel Michaels, 'The Practice of Classical Hindu Law', in *Hinduism and Law,* ed. Lubin, Davis and Krishnan, pp. 58–77, esp. p. 59.

[15] Derrett, 'Law and the Social Order before the Muhammedan Conquest', p. 177.

fallible and changeable, understanding of the principles of Islamic law and the Koran).[16]

Two important commentators, Jimutavahana (*c.* 12th century, who elaborated the *Dayabhaga* system for Bengal and Assam) and Vijnaneswara (most probably a contemporary, therefore also of the 12th century, associated with *Mitakshara* as it prevailed in most parts of India), addressed the same body of *smriti* literature. But they came to very different conclusions regarding the rights of inheritance in the Hindu coparcenary.[17] Referred to as the two 'schools' of law from at least 1810, when translated by H. T. Colebrooke, they differed in two main ways. Vijnaneswara (the author of *Mitakshara*) held that any male member of the joint family becomes an undivided co-owner of the joint family estate by the mere fact of being born into the family. Jimutavahana (the author of *Dayabhaga*) held, however, that the proprietary rights of members of the joint family began only with the death or incapacitation of the prior owner.[18] They also differed in identifying the line of successors.[19]

For Muslims in India, on the other hand, the texts were always found to provide a reliable degree of certainty, and case law became less important. Indeed, as we shall see, enactments to modify Islamic law were few and far between. Most jurisprudential and legislative attention was focused throughout this period on Hindu law. But the reliance on Hindu and Muhammadan scriptural texts produced an understanding of Indian society as overwhelmingly religious; religion, rather than economics or politics, was considered the prime mover of Indian society throughout history.

Although Hastings did pay attention to custom and usage, scriptural texts were valorized and given an authority they had never before enjoyed. Derrett has quite justifiably called the British 'the patrons of sastra',[20] even showing that their desire for explicatory law texts encouraged the production of fresh ones in the late 18th and early 19th centuries. As D. A. Washbrook points out, 'With the support of British power, the Hindu law expanded its authority across large areas of society which had not known it before, or which for a

[16] Eliza Guinchi, 'The Reinvention of Shari'a under the British Raj: In Search of Authenticity and Certainty', *Journal of Asian Studies* 69, no. 4 (November 2010), pp. 1119–42, esp. p. 1134.

[17] Ludo Rocher (ed. and trans.), *Jimutavahana's* Dayabhaga*: The Hindu Law of Inheritance in Bengal* (with an introduction and notes) (Oxford University Press, 2002).

[18] Ibid., p. 21.

[19] Ibid., p. 25.

[20] J. D. M. Derrett, 'The British as Patrons of Sastra', in *Religion, Law and State in India*, by J. D. M. Derrett, pp. 225–73 (Oxford University Press, 1999).

very long period had possessed their own more localised and non-scriptural customs.'[21]

In the Madras Presidency, F. W. Ellis, unlike his Calcutta counterparts, recognized the distinct cultural and linguistic areas of which India was composed, requiring a knowledge of both Dharmasastra and customary law to aid the British in their administration.[22] His insistence on the centrality of customary law, and of the importance of translating *Mitakshara* into languages like Tamil to 'diminish the influence of the Brahmins', was in contrast to the Bengal Orientalists, and would pave the way for a historic Privy Council ruling of 1868. The correction took more than half a century, when J. H. Nelson, district judge in the Madras Presidency, recognized custom as more important than positive law, saying that 'the great bulk of the population of the Madras Province are not … subject to the general law of the Sanskrit castras [*sic*]'. He called on the Government of Madras to investigate and protect 'usage' as the highest form of dharma and save it from suppression by the court.[23] The ruling in *Collector of Madura v. Mootoo Ramaling Sathupathy* (1868) considered 'whether by the Hindoo law, [for the estate of Ramnad in the Madras Presidency], a Widow can adopt a Son to her Husband without his express authority'. It found: 'Under the Hindu system of law, clear proof of usage will outweigh the written text of law.'[24]

In other words, there was no clear transition from 'status' to 'contract' even when the institution of marriage became a matter of colonial public policy. Rather, accommodations were made between principles of contract law, custom and popular practice, alongside the anxiety to preserve caste authority. The consequences of this mix for women's rights were uneven and contradictory.

The Native Interpreters of Law

The Orientalists employed by Hastings confidently presumed that there were texts that could be interpreted in collaboration with indigenous scholars and

[21] D. A. Washbrook, 'Law, State and Agrarian Society in Colonial India', *Modern Asian Studies*, 15, no. 3 (1981), pp. 649–72, esp. p. 653. See also Derrett, 'Law and the Social Order before the Muhammedan Conquest', p. 239.

[22] Donald Davis, 'Law in the Mirror of Language: The Madras School of Orientalism on Hindu Law', in *The Madras School of Orientalism*, ed. Trautmann, pp. 288–309, esp. p. 290.

[23] J. H. Nelson, *Indian Usage and Judge-made Laws* (Kegan, Paul, Trench & Company, 1887), pp. 10, 190.

[24] *Collector of Madura v. Mootoo Ramalinga Sathupathy* (1868), 12, Moore's Indian Appeals (MLA), pp. 397, 436.

which would authoritatively establish the content of Hindu/Muslim law to be administered in the EIC's district courts.[25] These scholarly efforts often yielded conflicting views of the Indian past. Yet, for the main part, the scholars Hastings encouraged, as well as those who came later, such as Nathaniel Halhed, William Jones, and H. T. Colebrooke, strove to counter the most pervasive British conception about pre-British (Mughal) India—that it was 'despotic' and arbitrary, relying directly and entirely on the power of its rulers. This, for example, was the view that had been stressed by Alexander Dow, a servant of the EIC and the author of *Dissertation on the Origin and Nature of Despotism in Hindostan* (1779).[26] Dow claimed despotism sprang from the very nature of the soil and climate of India. In his view, before the independent and capricious will of the sovereign, no other law prevailed: the Mughal legal system was therefore a system of arbitrary and unchecked power.[27] In contrast, the British Orientalists encouraged the interpretation of Indian scriptures as the theocratic source of all binding codes, and the theory of pre-colonial despotism was replaced by a fresh theory of theocratic regimes.

Even organized effort by the Bengal and Madras Orientalists could not rule out dependence on the traditional intellectuals—Brahmins—whose monopoly of learning in a highly segmented society had ensured that they were the sole authorities conversant with the textual traditions of India. The law as it operated when the EIC acquired the *dewani* of Bengal was fundamentally Islamic 'but explicitly recognised the jurisdiction of the Hindu referees and arbitrators to settle disputes among the Hindus according to their laws and customs, reserving to itself exclusive jurisdiction in matters of crime and constitutional and fiscal matters'.[28] Robert Lingat, among others, has suggested that under Mughal rule, 'a law based above all on tradition and precedent attached more or less laxly to one or other of the schools of interpretation' prevailed rather than the consultation of 'that ocean of texts',[29] since the Muslim rulers left Hindu local bodies a great deal of autonomy, much like what Muslims themselves enjoyed under Hindu rulers. But the

[25] Singha, *A Despotism of Law*, p. 2.

[26] Ranajit Guha, *A Rule of Property for Bengal: An Essay on the Idea of Permanent Settlement* (Orient Blackswan, 2016), p. 26ff. Cohn, 'Law and the Colonial State in India', p. 138.

[27] Cohn, 'Law and the Colonial State in India', p. 138.

[28] Derrett, 'Law and the Social Order before the Muhammedan Conquest', p. 239.

[29] Robert Lingat, *The Classical Law of India*, trans. J. D. M. Derrett (University of California Press, 1973), p. 262. See also Guinchi, 'The Reinvention of Shari'a under the British Raj'; Faisal Choudhry, 'Rethinking the Nineteenth-century Domestication of the Sharīʿa', *Law and History Review* 35, no. 4 (November 2017), pp. 841–79.

relative autonomy of the village assembly, caste tribunal and *sreni* (guild) that had developed long before the advent of British rule was seriously undermined by the new structure of the court system as imagined by Hastings.[30]

From the rather narrow brief of early charters of the EIC, such as the one of 1668 which contemplated the establishment of courts on English lines for the Government of Bombay and factories elsewhere, the EIC's role had considerably expanded by the end of the 18th century, when it was both more ambitious and had learned to be more pragmatic.[31] In the early years of EIC rule in India, Hastings set up an administrative structure which included a dual court system: the Presidency courts, with English judges and lawyers, offset by the *mofussil* courts (including the *sadr* [chief] court) which were presided over by the judge/collector who entertained Indian pleaders. The judge/collector performed two kinds of functions, adjudicating on the *dewani* cases relating to revenue and civil litigation and the *faujdari* cases relating to criminal and internal legal affairs. 'Facts' were established on testimony from witnesses and through documentary evidence placed before the court, in which the judge/collector was assisted by the pandits and maulvis.

In an act of settlement in 1781, the Hastings plan made space for the operation of Hindu and Muslim law on matters pertaining to 'succession, inheritance, marriage, caste and all religious usages and institutions'. A specific effort was made to take customary law into consideration on these matters, but overwhelming reliance was on scriptural texts.[32] For this purpose, pandits and maulvis were directly appointed by the Supreme Court from 1777 and, by the time of Charles Cornwallis's Code of 1793, were attached to the district courts, provincial courts and the Sadr Dewani Adalat as well.[33] The appointment of pandits and maulvis to assist judges only ended in 1864, when the colonial authorities had achieved an adequate grasp of the mechanics of Indian legal systems. Also, a sufficient body of case law had been developed on which future generations of judges could rely.[34] Although customary law was being acknowledged as equally essential to the administration of justice in different parts of the subcontinent, such as Punjab and western and southern India, the

[30] As Radhika Singha points out, 'It was the laxity which indigenous rulers seemed to display in exercising their punitive rights rather than the barbarity with which they did so which drew the more strident criticism.' Singha, *A Despotism of Law*, p. 3.

[31] See Charles Fawcett, *The First Century of British Justice in India* (Clarendon Press, 1934), p. 12.

[32] Cohn, 'Law and the Colonial State in India', pp. 136–37.

[33] J. D. M. Derrett, 'Religion and the Making of the Hindu Law', in *Religion, Law and State in India*, by J. D. M. Derrett, pp. 97–121 (Oxford University Press, 1999).

[34] Ibid., p. 263.

new structure made the English judge the final authority on what was legally acceptable under the new legal system. Whether he followed the opinion of the pandits, or relied on his own knowledge of the texts, his exteriority to the legal traditions of India was never overcome.

In contrast to their admiration for the classical Indian past, the Orientalists were reluctant to 'name community adjudication as law'.[35] Neglecting the historical processes by which 'non-state legal systems' were accommodated by the state, the British in India, as part of their civilizing mission, undertook the task of welding the host of disparate practices that went in the name of Hindu law into a single legal code. For long, the village panchayat had arbitrated and adjudicated in small face-to-face village communities on questions relating to breaches of village norms, while caste councils arbitrated and adjudicated disputes internal to castes. Through a process of consensus and compromise, vertical ties of the village community in the former instance and horizontal ties within castes were secured.[36] The colonial legal–juridical structure—that is, state law—effected irreversible changes in the nature and importance of local law-ways, introducing, for the first time, adversarial proceedings. Here, too, was a division of labour, between disputes relating to caste and kinship rules which were invariably settled within the caste councils and disputes relating to land that increasingly made their way into state courts.[37] Similarly, the colonial judicature occupied a centrality in disputes over temple honours and rituals.[38] The colonial administration structured 'tradition' in multiple ways, equalizing structurally unequal people (such as an upper-caste landlord and his Dalit

[35] Upendra Baxi, '"The State's Emissary": The Place of Law in Subaltern Studies'. In *Subaltern Studies VII: Writings on South Asian History and Society*, ed. Partha Chatterjee and Gyanendra Pandey, pp. 247–64 (Oxford University Press, 1992), p. 252.

[36] Bernard Cohn, 'Notes on Disputes and Law in India', in *An Anthropologist among the Historians and Other Essays*, by Bernard Cohn, pp. 575–631 (Oxford University Press, 1987). On similar institutions among the tribals of Chotanagpur, see also Asoka Kumar Sen, *From Village Elder to British Judge: Custom, Customary Law and Tribal Society* (Oxford University Press, 2012), pp. 81ff.

[37] T. Scarlett Epstein, *Economic Development and Social Change in South India* (Manchester University Press, 1962), pp. 145–46. See also Oliver Mendelsohn, 'The Pathology of the Indian Legal System', *Modern Asian Studies* 15, no. 4 (1981), pp. 823–63.

[38] See, for instance, Franklin Presler, *Religion under Bureaucracy: Policy and Administrations for Hindu Temples in South India* (Cambridge University Press, 1987); Arjun Appadurai, *Worship and Conflict under Colonial Rule: A South Indian Case* (Cambridge University Press, 1979); Janaki Nair, 'Modernity and "Publicness": The Career of the Mysore Matha, 1880–1940', *Indian Economic and Social History Review* 57, no. 1 (2020), pp. 5–29.

servant) in a court of law, while ensuring that, in the cumbersome process of 'appeals, adjournments and counter appeals, the poorer litigant was ruined'.[39]

Yet the continued resilience of local law-ways, right up to the present day, is an indication that colonial (and post-colonial) legal systems rarely achieved the kind of dominance they aspired to, absorbing some aspects of local law while gradually transforming the meaning and content of others. One may therefore speak of a quest for, rather than an attainment of, certainty, consistency and uniformity.[40]

Producing an Intelligible Frame: An Obsession with Texts

The court appointments firmly established the male Brahmin pandits at the centre of the emerging judicial discourse, but retrained them at the Sanskrit colleges in Benares and Calcutta in the very *sastra*s which were considered 'little known and little read'.[41] The body of texts chosen for this training included *Mitakshara*, *Dayabhaga*, *Daya Krama*, *Daya Tattva*, *Dattaka Candrika*, *Dattaka Mimamsa*, *Vivada Chintamani*, *Tithi Tattva*, *Suddhi Tattva* and *Prayascitta Tattva*. This list, though impressive in itself, included no work from southern India until the publication of the *Malayala Vyavahara Mala* in the late 19th century.

The search for the earliest authoritative text and the most reliable indigenous system of jurisprudence led the Orientalists to the Dharmasastra, which provided actual rules for a wide variety of contexts. However, as a teaching of righteousness, it certainly included law but was not coextensive with it, and consisted of precepts and norms rather than legally binding statutes; *vyavastha*s were therefore quite an important source of legal interpretation. The *vyavastha*s of the pandits were an amalgam of customary practices, rough and ready readings of the *sastra*s, and diverse materials chosen from epics and

[39] Bernard Cohn, 'Some Notes on Law and Change in North India', in *An Anthropologist among the Historians*, pp. 554–74.

[40] Upendra Baxi, *Towards a Sociology of Indian Law* (Satavahan, 1986), p. 20. The colonial government's quest, according to Rosanne Rocher, was for not only legitimacy, authenticity and control but also consistency, particularity, replicability and acceptability. R. Rocher, 'The Creation of Anglo-Hindu Law'.

[41] 'Parliamentary Papers on Hindu Widows', 1821, p. 532, cited in Lata Mani, 'Production of an Official Discourse on "Sati" in Nineteenth Century Bengal', *Economic and Political Weekly* 21, no. 17 (26 April 1986), WS32–40, esp. p. WS35.

legends and from other treatises of relatively later date such as the *purana*s, spurious *smriti*s, *agama*s and *tantra*s.[42]

To reduce reliance on the indigenous experts and avoid corruption, an attempt was made to construct an abstract legal code in the late 18th century. Eleven pandits 'learned in the Shaster'[43] were chosen by Hastings from various parts of Bengal to compile a digest in 1773, a handy tool with which to cope with the flood of cases that had inundated the courts and to provide 'a precise idea of the customs and manners of these people which to their great injury have long been misrepresented in the western world'.[44] The digest which emerged in 1775 was appropriately called the *Vivadarnava Setu* (Bridge across the Ocean of Litigation) and was translated into English by Nathaniel Halhed from a Persian version of the original Sanskrit. Halhed's translation, suitably entitled *A Code of Gentoo Laws or Ordinations of the Pundits*, claimed absolute fidelity to the original, which in turn, he said, 'was picked out sentence by sentence from various originals in the Shanscrit Language, neither adding nor diminishing any part of the original text'. Quite apart from all the slippages and theoretical difficulties of the translation process, the entire exercise of making available a digested form of the Dharmasastra allowed the Brahmins to secure for themselves a new status in the emerging legal order, adroitly managing the transition from the legal systems that had prevailed.[45]

The pronouncements of the English judge in turn lent a fixity to Hindu law that had not previously existed. But as recent scholarship has shown, this process of 'translation' of indigenous legal systems to make them more intelligible to the colonial rulers not only involved active participation of its interpreters, but also created opportunities for those who would become adept at negotiating the system, including women.

William Jones, who was appointed to the Crown Court in 1783, was dissatisfied with the Halhed text, since it left judges at the mercy of Indian interpreters. Brahmin pandits were capable of pulling out appropriate authorities from the 'ocean of sastra'.[46] Jones proposed a far more complex and complete 'digest of Hindu and Mussalman Law' analagous to the British

[42] Derrett, 'Law and the Social Order before the Muhammedan Conquest', p. 230.
[43] Nathaniel B. Halhed, *A Code of Gentoo Laws or Ordinations of the Pundits* (Fort William, 1776), p. lxxiv.
[44] Ibid., p. i.
[45] J. D. M. Derrett, *Dharmasastra and Juridical Literature* (Harrassowitz, 1973), p. 9.
[46] William Jones et al., *Dissertations and Miscellaneous Pieces Relating to the History and Antiquities, the Arts, Sciences and Literature of Asia*, vol. 1 (G. Nichol, 1792), p. 91.

codes, for which he appealed to Cornwallis for help.[47] The compilation of Sanskrit and Arabic texts was complete in 1794, and translations were begun by Jones and completed after his death by Colebrooke. *The Digest of Hindu Law on Contracts and Successions* was published in 1798. In this work, a long-cherished dream of Jones came true: the English judge would now possess the ability to arbitrate on 'all disputes among the natives without uncertainty, which is in truth a disgrace, though satirically called a glory'.[48]

Colebrooke devised, some believe mistakenly, conceptual distinctions between schools of Hindu law which schematically bore close resemblance to the clearly established Islamic schools of law. Hindu law was divided into *Dayabhaga* and *Mitakshara*, and the latter subdivided into the Benares, Mithila, Maharashtrian and Dravidian schools, to parallel the distinctions between Sunni and Shia, and Hanafi, Maliki Shafai and Hanbali laws.[49] Colebrooke's interest in acquiring authentic texts led to the sudden flowering of new Sanskrit *sastra*s in the period after him, especially in the 1820s. The new texts were also a refutation of the assertions of Western scholars such as William Hay Macnaghten and Thomas Strange. One such text was the *Malayala Vyavahara Mala*, written almost certainly in the late 18th century to meet the British need for a usable text in the newly acquired dominions of Malabar. This was rediscovered by A. C. Burnell, a district and sessions judge of South Canara in 1877, and formed the basis of a south Indian law digest.[50]

However, as the British Indian empire expanded, the difficulties of privileging textual traditions became painfully obvious. Commenting on the ways in which the Bombay Regulation of 1827, to take one example, deviated from the Bengal precedents, P. C. Ilbert wrote that by this time 'Anglo-Indian administrators had become aware that the sacred or semi-sacred text books were not such trustworthy guides as they had been supposed to be in the time of Warren Hastings and that local or personal usage played a more important part than had previously been attributed to them'.[51] As a result, the Bombay regulation gave precedence to local usage over the written Mohammedan or Hindu law.

It is also significant that it was Hindu law, rather than Muslim law, that was the focus of reform and codification throughout this period. But in the latter case too, the strong preference for written documents rather than oral

[47] Cohn, 'Law and the Colonial State in India', p. 145.
[48] Jones et al., *Dissertations*, p. 91.
[49] Cohn, 'Law and the State in Colonial India', p. 146.
[50] Derrett, 'British as Patrons of Sastra', pp. 260–62.
[51] As cited in Tahir Mahmood, *Muslim Personal Law* (All India Reporter, 1983), p. 15.

testimonies led to the privileging of textual sources such as the Koran and the verbalized recordings (*hadith*) of the practices and pronouncements of the Prophet and his early community (*sunna*), rather than non-textual sources such as 'interpretation' (*ijtihad*) and the 'consensus' (*ijma*) of the community (of expert jurists).[52] When Muslim law did become the focus of attention, its scriptural roots were traced relatively easily by those anxious to produce administrable laws, to the Koran. Since the legal theory of Islam did not usually recognize custom as a formal or independent source of law, even when customary law was practised, as among the Mapillas of Malabar or the Khojas and Memons of western India, it was regarded as a result of Hindu influence, and therefore un-Islamic. Just as the Brahminization of Hindu law took place over the course of the 19th century, Muslim law was progressively Islamized. This had an unexpected effect on the power of the *ulema*: Guinchi says: 'The ulema, deprived of their traditional role as legitimizers of the Muslim rulers, increasingly focused on correct behaviour and adherence to the idea in everyday practice.'[53] Flavia Agnes shows that the gap between custom and textual law could also be exploited to deny Muslim women their existing rights under Islamic law—by invoking the restrictions imposed by custom. [54]

For Muslims, the core text that was translated for the use of officials was the *Hedaya*, or guide to Hanafi law written by Burhan al-Din al-Marghinani, chosen by maulvis, translated first from Arabic to Persian and then into English by Charles Hamilton. The post of *kazi*s, who performed judicial as well as non-judicial functions, was abolished in 1864, to be re-established by an act of 1880, although they were then confined to non-judicial private functions. Nevertheless, disputes concerning succession, marriage, divorce and family relations were increasingly referred to *mufti*s, functionaries who were assigned the task of conflict resolution, since the demand for Islamic institutions among the Muslim community was quite high.[55]

In short, the process of acknowledging the importance of custom and usage was well under way when Queen Victoria proclaimed her intention to honour the laws and customs of her Indian subjects, especially those grounded in religion, following the revolt of 1857. Meanwhile, a series of tribal revolts in

[52] F. Choudhry, 'Rethinking the Nineteenth-century Domestication of the Sharī'a', pp. 841–79, esp. p. 847.

[53] Guinchi, 'The Reinvention of Shari'a under the British Raj', p. 1133.

[54] Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* (Oxford University Press, 1999), pp. 50–51.

[55] U. Baxi, *Towards a Sociology of Indian Law*, pp. 18, 33.

the Chotanagpur area had stressed the urgency of codifying and systematizing customs into customary law administered by British-established panchayats.[56]

Towards Codification

The need for codification was increasingly felt by the 1830s since a sufficient body of substantive law had not been built up. It was precisely in order to bring some coherence to the body of laws that the idea of the Law Commission first came up. Thomas Macaulay, law member of the Government of India after 1833, echoed William Jones's and Thomas Strange's fears about excessive reliance on pandits and maulvis and urged immediate codification. By the 1830s, British rule was on a surer footing in almost all parts of the subcontinent and the optimism of that period was reflected in the passage of laws related to the transformation of certain social practices. Macaulay, more clearly than others, admitted that the codification of the laws was imperative and that this should be done by a small group of jurists. In 1833, he declared:

> This seems to me to be precisely that point of time at which the advantage of a completely written code of laws may be easily conferred on India. It is a work which cannot be well performed in an age of barbarism and which cannot without great difficulty be performed in an age of freedom. It is the work which specially belongs to a government like that of India: to an enlightened and paternal despotism.[57]

The first Law Commission (1834), under the leadership of Macaulay, produced the draft of the IPC which was adopted in 1860. The second Law Commission (1853–56) devised the Criminal Procedure Code (CrPC), enacted in 1861, and also reorganized the court system. The second Law Commission, however, expressed strong reservations against the codification of Hindu and Muslim law. Personal law was invented; it was at one and the same time adjudicated by the colonial court system and yet marked off as a sphere of non-intervention by the colonial state. Personal law was 'so denominated because it applied to persons regardless of domicile; it was the law inherent to their personal status'.[58] Thus, the most important sets of laws that governed the status of women, namely Hindu and Muslim personal laws, were increasingly identified

[56] A. K. Sen, *From Village Elder to British Judge*, pp. 61–80.
[57] Hansard Debates Third Series, vol. 19, pp. 531–33, as cited in M. P. Jain, *Outlines of Indian Legal History* (Tripathi, 1987), p. 405.
[58] Sturman, *The Government of Social Life in Colonial India*, p. 7.

as those which only the members of the respective communities could reform.[59] The Indian Succession Act of 1865, for instance, applied only to those other than Hindus and Muslims. That the fears of the second Law Commission were not unfounded became painfully evident in the revolt of 1857.

Although the third Law Commission (1861) drew up drafts codifying contracts, laws of evidence, negotiable instruments, and so on, it also left personal laws strictly alone. The fourth and last British Law Commission, appointed in 1879, attempted a further codification of substantive law, but it too left personal laws untouched. Courteney Ilbert, law member in 1882, recognized the need for codification of Hindu family law in order to enable judges to cut through the thickets of existing case law, but declared inability since the Hindus were reluctant to accept such reform. By 1864, when the pandits and maulvis were disbanded from their employment in the courts, the process of restating Hindu or Muslim law had more or less been abandoned, and a new relation between customs and local usages of people and scriptural texts was conceived.

The British had not given up their avowed aim of introducing a 'rule of law' and good government in India. Utilitarians James Mill and Charles Grant had already oriented the goal of British imperialism towards future improvement, emphasizing the morality and justness of the empire. After the revolt that posed the greatest threat to the British possessions in India in 1857, the legal theorist Henry Maine, while revising utilitarian understandings of the 'civilizing' role of the law, drew attention to the resilience and relative immobility of traditional institutions, proposing a newer approach to custom and usage, one of conciliation and accommodation of traditional structures of authority. At the same time, he proposed codification as the only route by which Indian society could proceed from status to contract, and towards a clearer notion of private property in land.[60] British courts continued the process of pronouncing judgment on Hindu, Muslim and tribal practices, and, as we shall see, the colonial state even transformed some practices when enough pressure was brought on it by educated Indians. But by setting even customary practice in writing, the capacity of customary law to be flexible and adaptive to circumstances was lost.[61] At the same time, as we shall see, historians like Asoka Sen argue that new opportunities, to widows and daughters, for

[59] Archana Parashar, *Women and Family Law Reform in India* (Sage Publications, 1992); Agnes, *Law and Gender Inequality.*

[60] Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Permanent Black, 2010), pp. 89–118.

[61] Ibid., p. 109.

instance, were opened up by the British redefinition of customary law in the Chotanagpur region.[62] Still, the processes that were well under way by the mid-19th century had transformed 'a matrix of real historical experience … into a matrix of abstract legality so that the will of the state could be made to penetrate, reorganize part by part and eventually control the will of the population'.[63]

Emerging Perceptions of Women's Legal Status

The Hindu woman's status was seen as emblematic of the degraded status of the Indian woman. The reference to normative texts such as the *sastra*s and their interpretation by the male pandits, easily drawn from the most conservative sections of Indian society, produced the first in a series of pronouncements about the scriptural standing of Hindu women in Indian society. The 20th chapter of Halhed's translation was on the duties of women. Halhed recognized that some of the precepts of that section were incommensurate with emerging bourgeois ideals of woman as companion, and felt constrained to say as a preface to the chapter that 'the Brahmins who compiled this code were men far advanced in years' by way of apology for 'the observations they have selected and the censures they have passed upon the conduct and merits of the fair sex'.[64]

In Halhed's apologetic preface, we may detect the first signs of an ambiguity which would plague the colonial authorities' search for the definitive text. The colonial state had to perform a delicate balancing act, poised between its aspirations as a paramount power and the respect for Indian 'tradition' that was first elaborated by Hastings. They also balanced what Sturman has identified as the tension between 'universal' norms and what was perceived as local and irreducible differences. Once British rule was more secure, one of the major planks of cultural legitimation for its continued economic and political domination of India rested on the scale of civilization that hierarchized the position of women in various societies. In any such scale, the women of England easily constituted the top while those of India lagged far behind.

In Halhed's book, the chapter 'Of What Concerns Women' began with a prefatory statement on the relations between the sexes, which drew heavily from Manu's Dharmasastra:

[62] A. K. Sen, *From Village Elder to British Judge*, pp. 104–08.
[63] Ranajit Guha, 'Chandra's Death', in *Subaltern Studies V: Writings on South Asian History and Society*, ed. Ranajit Guha, pp. 135–65 (Oxford University Press, 1987), esp. p. 141.
[64] Halhed, *A Code of Gentoo Laws*, p. lxv.

> A man, both day and night, must keep his wife in so much subjection that she by no means be mistress of her own actions if the wife have her own free will notwithstanding she be sprung from a superior caste.[65]

This clearly marked women off as a category of people who had few rights, if any, under the existing codes of law. It was also an attempt to homogenize the category of 'woman', specifying that caste (and class) could make no difference to the inherent characteristics of women, who deserved only to be subordinated and controlled. Betraying persistent upper-caste male fears was the assertion about the sexual proclivities of women, namely that 'a woman is never satisfied with the copulation of man' and 'in this case therefore, a woman is not to be relied on'.[66] It is in this context that Manu's famous injunction was given new life: 'Her father protects her in childhood, her husband protects her in youth, her sons protect her in old age: a woman does not deserve independence.'[67] If the natural urges of women, as in this description, were unspeakably evil, the *sastra*s also outlined the normative code for good women which once more spoke of fears and fantasies rather than remaining an expression of existing material reality.

> A woman, who is of good disposition and who puts on her jewels and clothes with decorum, and is of good principles, whenever the husband is cheerful the wife is also cheerful, and if the husband is sorrowful, the wife is also sorrowful, and whenever the husband undertakes a journey, the wife puts on a careless dress, lays aside her jewels and other ornaments and abuses no person and will not expend a single dam without her husband's consent and has a son, and takes proper care of the household goods, and at the times of worship, performs her worship to the deity in the proper manner, and goes not out of the house, and is not unchaste, and makes no quarrels or disturbances, and has no greedy passions, and is always employed in some good work, and pays proper respect to all persons, such is a good woman.[68]

This essentialized conception of Indian female nature distilled from several texts and authorities was soon deployed by the new intellectual current of utilitarianism in the early decades of the 19th century.[69] James Mill's *History*

[65] Halhed, *A Code of Gentoo Laws*, p. 249.
[66] Ibid., p. 250.
[67] Ainslie Embree (ed.) *Sources of Indian Tradition*, vol. 1, 2nd ed. (Columbia University Press, 1988).
[68] Halhed, *A Code of Gentoo Laws*, p. 251.
[69] Metcalf, *Ideologies of the Raj*, pp. 28–65.

of British India was written in 1826 as the text for civil servants educated in Haileybury College and found the normative code an ideal one to attack. Mill and the Evangelicals charted Britain's civilizing mission in India, marking the ideological shift from reverence for the Indian past to cultural contempt.

Yet, despite the early colonial focus on textual traditions, the position of women in pre-British India was by no means governed entirely by the misogynic pronouncements of Manu's *sastra* or the commentators who followed. As Derrett has pointed out, 'On the whole, the sastra turns a blind eye to the customs of the non-Aryan peoples, in particular, non-patrilineal communities.'[70] Tensions between custom (namely unwritten law) and *sastra* were particularly severe in the south and among the non-Brahminic peoples of other parts of India, such as Punjab and western India. Thus the 18th-century text *Dattaka Candrika*, 'comments on the strange customs of the wicked people of Malabar amongst whom the sister's son is the heir'.[71] The *sastra*s rarely acknowledged the independence or high status of women that prevailed in distinct pockets of Indian society, where women shared equal rights to matrimonial property and had access to divorce and where the remarriage of widows was encouraged.[72] For instance, adoption by women such as the *devadasi*s (temple dancers who were dedicated to the deity), though widely practised, was not acknowledged by the *sastra*s.[73] Women's absolute rights to *stridhana* were upheld by customary law in different parts of southern India, as Kanakalatha Mukund has shown.[74] Agnes cites Vijnaneswara (in *Mitakshara*) expanding the definition of *stridhana* to include 'property obtained by a woman through inheritance, purchase, partition, seizure (adverse possession) and finding'.[75] Likewise, Jimutavahana cited many texts which listed the forms of property enjoyed by women to conclude that under *Dayabhaga* 'the number of types of female property … is not fixed with the result that the

[70] Derrett, 'Law and the Social Order before the Muhammedan Conquest', p. 206.

[71] Derrett, 'Religion and the Making of the Hindu Law', p. 103. The unwillingness to see practices in southern India as amounting to more than deviations from 'Hindu law' has persisted even in contemporary India. This will become clearer in Chapters 7 and 8 which deal with personal laws and the Hindu Code Bill.

[72] Derrett, 'Law and the Social Order before the Muhammedan Conquest', pp. 206–07.

[73] This will be discussed in Chapter 6. See Janaki Nair, 'The Illicit in the Modern', in *Mysore Modern: Rethinking the Region under Princely Rule*, by Janaki Nair, pp. 197–218 (Minnesota University Press, 2011); Amrit Srinivasan, 'Reform and Revival: The Devadasi and Her Dance', *Economic and Political Weekly* 20, no. 44 (2 November 1995), pp. 1869–76.

[74] Kanakalatha Mukund, 'Women's Property Rights in South India: A Review', *Economic and Political Weekly* 34, no. 22 (29 May–4 June 1999), pp. 1352–58.

[75] Agnes, *Law and Gender Inequality*, p. 17.

number six which appears in some of them is not to be taken literally, though female property is anything a woman is entitled to gift, sell, or put to use independently of her husband'.[76] Among the peculiarities of Hindu law is that a wife and a widow enjoy superior rights in the coparcenary than a daughter ever achieves.[77]

Tensions between custom and sastric law were most severe in the realm of family law, not surprising given that entire communities neglected the sastric requirements of marriage. J. H. Nelson perhaps was the most trenchant critic of the tendency of colonial judges to rely on texts even in locations where they did not exert such a power, such as on the non-Brahmin people of the Madras Presidency, stressing that it was an error to administer *Mitakshara*:

> Unquestionably, the principal and most fruitful error in the administration of Hindu Law in Madras has been that of supposing that positive law, in its most strict sense, applicable to every inhabitant of India, whether dark skinned or fair, whether Brahman or non-caste and to every conceivable case, is to be found by adequate research somewhere in the pages of some Sanskrit works, such as the *Manava Dharma* sastra, the *Mitakshara* and others, and that such law must always prevail in judicial controversy when opposed to local usages and customs.[78]

The colonial encounter with tribal regions of Chotanagpur and the northeast also interpreted custom and usage as law, in ways that produced new kinds of litigants, weakened generational authority and allowed new kinds of rights to be articulated.[79] The District Collector's court became the fulcrum of new litigiousness. Customs were not unequivocally gender-neutral, since they were devised and sustained by male community elders, and women were rarely consulted in such formulation. So some legal interventions upheld customs that favoured women, while others were reinstated in ways that disadvantaged women. But as the debates on widow immolation, widow remarriage and child

[76] Rocher, *Jimutavahana's* Dayabhaga, p. 107.

[77] Lucy Carroll, 'Daughter's Right of Inheritance in India: A Perspective on the Problem of Dowry', *Modern Asian Studies* 25, no. 4 (October 1991), pp. 791–809.

[78] Nelson, *Indian Usage and Judge-made Laws*, pp. 6, 10. In Nelson's formulation, Anglo-Hindu law was 'a phantom of the brain, imagined by Sanskritists without law, and lawyers without Sanskrit'. As cited in R. Rocher, 'The Creation of Anglo-Hindu Law', p. 88.

[79] A. K. Sen, *From Village Elder to British Judge*, pp. 53–80; also, Khekali Zhimo, 'Producing the Litigant: Adjudication in the Naga Hills, 1866–1947', unpublished PhD thesis, Center for Historical Studies, Jawaharlal Nehru University, New Delhi, 2016.

marriage especially among Hindus revealed, British reformers, Indian liberals and orthodox opponents all came to rely rather heavily on the sastric record. But Mitra Sharafi rightly cautions us against taking this early obsession with scripture too far. Once one asks what judges actually did with these texts in the courtroom, judge-made law appears relatively autonomous of the executive and legislative branches.[80]

The critique of the Indian past initiated by the colonial authorities had an unintended effect: the discredited past was gradually sacralized by the subject population and became the basis for the development of a new cultural identity. It is hardly surprising that early Indian cultural nationalism sprang to the defence of a tradition it believed was under fierce attack. The argument in favour of Indian tradition was made throughout the 19th century and was deployed by anti-colonial nationalists who felt compelled to address well-founded critiques of Indian tradition. They admitted the necessity for reforms which would restore Indian tradition to its former glory and arrest the decline from the pinnacles of Aryan achievement.

In this, they were amply aided by the work of Max Müller, who provided a full collation and publication of the Vedas which formed 'the natural basis of Indian history'.[81] He discovered a common ancestry for the ruling European race and the subjugated Indian; the Aryan 'origins' of Indian civilization were enthroned as central to an understanding of Indian history only in the 19th century. 'The Aryan,' says Uma Chakravarti, was associated 'with vigour, conquest and expansion, in other words for its connotations of political and cultural achievement'.[82] The Aryan woman, singled out from the rich tapestry of historical choices, soon eclipsed all other figures to speak for all of Indian womanhood. This de-historicized figure was present in the discourse of Ram Mohan Roy, Ishwar Chandra Vidyasagar, Mahadev Govind Ranade, Bal Gangadhar Tilak and Vivekananda; even M. K. Gandhi's vision did little to challenge the formulation. It took the work of intellectuals such as Jyotiba and

[80] Mitra Sharafi, 'The Semi-autonomous Judge in Colonial India: Chivalric Imperialism Meets Anglo-Islamic Dower and Divorce Law', *Indian Economic and Social History Review* 46, no. 1 (2009), pp. 57–81.

[81] Uma Chakravarti, 'Whatever Happened to the Vedic Dasi? Orientalism, Nationalism and a Script for the Past', in *Recasting Women*: *Essays in Indian Colonial History*, ed. Kumkum Sangari and Sudesh Vaid, pp. 27–87 (Rutgers University Press, 1990), esp. p. 39.

[82] Ibid., p. 47. See also Kumkum Roy, *The Power of Gender and the Gender of Power: Explorations in Early Indian History* (Oxford University Press, 2010).

Savitribai Phule, Rokeya Sakhawat Hossain, Periyar Ramaswami Naicker and B. R. Ambedkar to question, and critique, these congealing stereotypes.

Thus, a new 'tradition' of a Vedic golden age was 'invented', replete with glowing heroines who stood shoulder to shoulder with the Aryan men.[83] The subsumption of all Indian womanhood to an idealized image of the Indian middle-class woman had important consequences. It translated in legal terms into instituting a Brahminical patriarchal family form with its reproductive sexual economy at the centre. Thus, spheres of female power, customs and practices that had long existed within pre-colonial society, such as the matrilineal communities of Kerala and South Canara, or the *devadasi*s and *basavi*s (girls symbolically married to a deity, and thereafter pledged to a life of temple duties, which could include sex work/prostitution) in parts of India, or the Khasis of northeast India, were identified as 'aberrations', archipelagos of un-Hindu practices. As we shall see throughout the book, new feminist research has pointed to a much more uneven, heterogeneous and possibly empowering set of kinship arrangements.

In its effects, ignorance of the rich plurality of Indian social forms was not benign. Reformist concern was usually expressed for the particular forms of oppression that affected women of upper-caste, middle-class households. Thus, what may have been construed as progressive legislation for the women of upper-caste households frequently succeeded in undermining or reversing privileges women may have enjoyed in non-upper-caste households.

Rule of Law or Rule by Law?

The process by which a range of customary privileges were codified into rights throughout the 19th and 20th centuries must be understood against the backdrop of transforming material realities. Colonial and nationalist ideologies alike met their most serious challenges, and made accommodations with conflicting interests, within an emerging framework of 'the rule of law'. Since the colonial state's power is derived from the 'rule of colonial difference', namely the preservation of the alienness of the ruling group,[84] the persuasive powers and instrumentalities of an abstract legality remained firmly

[83] This trope of the empowered Vedic woman continues to resonate among legal scholars and law teachers up to the present day.

[84] Partha Chatterjee, *The Nation and Its Fragments: Colonial and Post Colonial Histories* (Princeton University Press, 1993), p. 10.

subordinated to the use of naked force; as such, the colonial state exercised 'dominance without hegemony'.[85]

Yet what accounted for the relative success with which a culturally specific (British) achievement assumed universal significance? It was because of 'the pervasive power of the ideology of law in English political thought' and its dissemination worldwide in the age of capital.[86] Yet, although the worldwide expansion of capital contained the promise of tearing down all challenges and barriers to its expansion, under colonial rule, they were never really overcome.[87] Still, despite the partial, timid and circumscribed legality that emerged, colonial society developed a remarkable degree of litigiousness.

The mixture of administrative orders and legal regulations that constituted the totality of colonial governance were propelled by the needs of the colonial economy: revenue extraction required the introduction of a rule of property in land,[88] and the exigencies of recruiting and rendering the labour force on plantations, mines and factories stable and permanent required the introduction of rudimentary labour laws.[89] Yet, as the 19th century wore on, an indigenous moral-intellectual leadership, increasingly conscious of the impossibility of achieving economic 'modernity' under conditions of colonial rule, attempted the cultural regeneration of the Indian nation also through recourse to a matrix of abstract legality.

Law then was the domain which starkly defined the limits of the colonial state's own transformatory capabilities, even as it opened up sites of contestation on which the indigenous elites hoped to prove theirs. Both relied on scripture, custom and statutory law. To the extent that certain pre-colonial legal regulations embedded in kin and community networks were gradually

[85] R. Guha, 'Dominance without Hegemony', pp. 210–309. Alexander Dow's conception of pre-colonial law is discussed by Cohn, 'Law and the Colonial State in India', pp. 138–39. On how the notion of 'law' itself was appropriated by colonial law, see U. Baxi, '"The State's Emissary"'. See also F. Choudhry, 'Rethinking the Nineteenth-Century Domestication of the Sharī'a'.

[86] R. Guha, 'Dominance without Hegemony', p. 276.

[87] Karl Marx, *Grundrisse: A Contribution to the Critique of Political Economy* (Penguin Books, 1973), pp. 410–11.

[88] R. Guha, *A Rule of Property for Bengal*.

[89] Rajani Kanta Das, *History of Indian Labour Legislation* (University of Calcutta, 1941); S. D. Punekar and R. Varickayil (eds.), *Labour Movement in India: Documents, 1850–1890*, vol. 1 (Popular Prakashan, 1989).

loosened and redefined,[90] and an attempt was also made to homogenize and codify theological aspects of Indian law[91] and 'adversarial' proceedings were introduced where dispute settlements through consensus had been the norm, the colonial state did not function as a neutral arbiter of ongoing social struggles, nor did colonial law assume merely symbolic functions.[92] Colonial law often directly thwarted social mobility instead of encouraging it,[93] since homogenization was in effect a Brahminization of Indian law at the expense of customary law.[94] So an invidious distinction was made and retained between the spheres of 'personal' and 'public' law, to the continuing detriment of women's rights within the family.[95] Colonial law could not thus be an unqualified instrument of 'modernity'. Brahminism, posturing as a subcontinental 'tradition', even received a fresh lease of life.[96]

Recent feminist research has, however, challenged and reshaped the unidirectional understanding of the law. For instance, Rashmi Pant demonstrates the necessity of paying attention to 'a greater variety of familial and inheritance practices [that] may have existed than the dominant legal narrative, influenced by colonial/Orientalist ideas, allows for'.[97] As we shall

[90] Prem Choudhry, 'Customs in a Peasant Economy', in *Recasting Women*, ed. Sangari and Vaid, pp. 302–30. The colonial 'creation' of customary law, Francis Snyder informs us, is now widely recognized in studies of African societies as well. Francis G. Snyder, 'Colonialism and Legal Form: The Creation of Customary Law in Senegal', *Journal of Legal Pluralism* 9 (1981), pp. 49–79.

[91] Derrett, *Religion, Law and the State in India*.

[92] See U. Baxi, *Towards a Sociology of Indian Law*, pp. 14–15.

[93] See, for example, the Rudolphs's discussion of the aspirations of the Shanars to legally effect a change in caste status and the colonial judicature's refusal to endorse such caste transgressions. Lloyd I. Rudolph and Suzanne Hoeber Rudolph, *The Modernity of Tradition* (Orient Longman, 1967), pp. 40–43.

[94] See, for example, Lucy Carroll, 'Law Custom and Statutory Social Reform: The Hindu Widow's Remarriage Act of 1856', in *Women in Colonial India: Essays on Survival, Work and the State*, ed. J. Krishnamurty, pp. 1–26 (Oxford University Press, 1989).

[95] Parashar, *Women and Family Law Reform in India*, p. 66.

[96] In contrast, Cohn cites post-1864 law's reference to 'judicial precedence' to conclude that the English search for indigenous law finally ended up producing 'English Law as the law of India'. Cohn, 'Law and the Colonial State in India', p. 151.

[97] Rashmi Pant, 'Revisiting Family and Inheritance Old Age Endowments among Peasant Households in Early Twentieth Century Garhwal', NMML Occasional Paper, History and Society New Series, no. 29, Nehru Memorial Museum and Library, New Delhi, 2013. See also, on the ways in which the requirement for family labour in the peasant household in the Garhwal hills was met, through informal polygamous unions, *ghar jawain*s (sons-in-law residing in the wife's home) and substitute husbands, Rashmi Pant, 'Matrimonial Strategies among Peasant Women in Early 20th-century Garhwal', *Contributions to Indian Sociology* 48, no. 3 (2014), pp. 357–63.

see, imaginative manipulation of the Anglo-Indian law, particularly by widows, managed to successfully wrest some rights to family property.[98] Referring to property laws, Mytheli Sreenivas points out that the meaning of law for women depended on appeals both to local dispute resolution and to the social and economic settings within which the law was interpreted.[99] Tanika Sarkar has shown how the question of caste ran like a thread through all the discussions which positioned faith against the state in questions related to the age of marriage for girl children: to the extent that *kula-achara* (lineage-based custom), *jati achara* (sub-caste-related custom) and *loka achara* (locality-based custom) were all filtered through the Brahminical lens, they led to innovations which are now being tracked and understood. The colonial legal system thus allowed for stacked or layered arguments to be made, often allowing opportunities for women to pursue rights in the interstices of the law.[100]

Throughout this long struggle, between colonial authorities, indigenous elites and subaltern classes over the shape of the legal mechanism, there was a persistent tension of balancing customary and traditional forms of conflict resolution, which sought reconciliation through compromise and consensus rather than adversarial proceedings so characteristic of the 'rule of (state) law'. Furthermore, it is impossible to speak of a 'rule of law' when no more than 15 per cent of Indians were ever enfranchised, few of them sat in legislatures, and different legal standards were applied to Europeans and Indians in India. In effect, the deployment of a 'rule of law' in a colonial setting was inevitably despotic, and the mid-19th-century decision to support the reform of Hindu or Muslim law only if the demand came from within the respective communities was an indication of this. Similarly, the virulent European response to the Ilbert Bill in 1883, which proposed to remove invidious distinctions between Indian and European judges, unmistakably revealed the racist underpinnings of colonial rule.[101]

[98] Nita Verma Prasad, 'Remaking Her Family for the Judges: Hindu Widows and Property Rights in the Colonial Courts of North India, 1875–1911', *Journal of Colonialism and Colonial History* 14, no. 3 (Winter 2013).

[99] Mytheli Sreenivas, *Wives, Widows, Concubines: The Conjugal Family Ideal in Colonial India* (Indiana University Press, 2008), pp. 45–66.

[100] Tanika Sarkar, 'Between Faith and State: Colonial Personal Laws in 19th-century Bengal', webinar, Kerala Council of Historical Research, 4 March 2021. See also Meenu Deswal, 'Re-reading Status through Contract: Matrimonial Practices and the Colonial Civil Law, 1850–1920', unpublished paper (courtesy of the author).

[101] Mrinalini Sinha, *Colonial Masculinity: The 'Manly' Englishman and the 'Effeminate Bengali' in the Late Nineteenth Century* (Manchester University Press, 1995), pp. 33–68.

Not surprisingly, there were many contradictions between 'the individual freedoms supposedly supported by public law and the social constraints strongly imposed by the personal law'.[102] Though they had profound implications for all layers of Indian society, the contradictions were especially pronounced in definitions of the rights of women. As the 19th century wore on, it became increasingly clear that one of the colonial state's preferred modes of seeking collaborators among Indians was to support and buttress Indian patriarchies, rather than rescue women from them. In turn, the Indian nationalist movement fiercely resisted change in the domestic domain, which began to be regarded as an uncolonized space, one that would be guarded against any colonial intrusion. The rise of the Indian women's movement in the 20th century would form the basis of a new challenge to the structures of colonialism and its compact with Indian patriarchy.

Yet almost a third of the Indian subcontinent remained under princely rule, an autonomous domain where legislation aimed at transforming the familial structure could be passed without risking the opposition of the people. Not surprisingly, Baroda was the earliest state to introduce provisions for divorce; Mysore introduced and took several measures to implement an Infant Marriage Act as early as 1894, without the bitter debates that occurred in British India over the Age of Consent Act. A bill according rights to women under Hindu law, which granted maintenance, adoption and related rights, became law with relatively little opposition in 1933, a full four years before even a partial bill was passed in the central legislature.

Even so, such changes occurred under the paramountcy of the British, and the princely states were by no means isolated from the broader currents sweeping across the Indian subcontinent. Thus, both Malabar, a part of the Madras Presidency, and Travancore, a princely state, introduced and passed broadly similar bills relating to the reform of matrilineal traditions in roughly the same period. The lack of commensurable laws created its own administrative problems since the princely state was unable to prevent the violation of its laws beyond its borders. The colonial state could not admit to reciprocity of prosecution of laws since that would dilute the very concept of British paramountcy. Whether Mysoreans crossed over into the Madras Presidency in order to perform the marriage of underage children (which was illegal in Mysore after 1894) or whether coffee planters of Mysore complained bitterly about their inability to prosecute contractors and labourers under the

[102] Washbrook, 'Law, State and Agrarian Society in Colonial India', p. 657.

Mysore Breach of Contract Act since they escaped into British India, these discrepancies also undermined the rule of law.[103]

Throughout this period of change, the transition from 'tradition' to 'modernity' was by no means unilinear, nor were the terms unambiguously antithetical. In colonial India, neither 'tradition' nor 'custom', scripture or usage were brought under a secular, impartial operation of a 'rule of law'. Thus, the custom of *karewa* (widow remarriage) in Punjab was reinforced by the colonial state in order to ensure that property was not alienated by widows.[104] Even as late as 1937, the colonial state thought fit to introduce legislation that made the Sharia the basis of Muslim personal law.[105]

So the weight of Indian tradition (whether of caste, community or kinship) did not act as a brake on the modernizing impulse of the British colonial state. What were the coordinates within which traditions were accommodated, reinvented or altered in successive periods of British rule? As Marc Galanter notes, 'To find "the law" in India, we must look beyond the records of the legislatures and the higher courts, to the working of the lawyers and the police, in the proceedings of the lower courts, to the operations in informal tribunals, and popular notions of legality.'[106]

[103] D. R. Gustafson, 'Mysore, 1881–1902: The Making of Model State', PhD dissertation, University of Wisconsin, Madison, WI, 1969, pp. 270–74.

[104] This is discussed more fully in Chapter 3.

[105] This is discussed more fully in Chapter 8.

[106] Marc Galanter, *Law and Society in Modern India* (Oxford University Press, 1989), pp. 4–6.