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2. The Foundations of Modern Legal Structures in 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 awarded.

When the first flush of victory had subsided, 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 clearly shown, was itself only a recent development.[1] Also, British experience of the administration of its other colonies hardly prepared it for the first bewildering encounter with the problems of governing India. In the colonies of North America and the Caribbean, non-state legal systems were quickly replaced by state systems,[2] and before long they were governed by institutions that were primarily an extension of the basic political and legal institutions of Britain.[3] These colonies, whose indigenous populations were quickly subjugated or simply massacred by earlier conquistadors, required few of the innovations that were necessary in a country like India, which appeared to have recognisable institutions and codes which were binding and had the force of law. At the same time, several of the Indian codes had no equivalents in British law. To compound the bewilderment was the almost complete lack of knowledge of the languages of governance and of law (Persian and Sanskrit).[4] Before long, it became clear that Indian territories could not be governed without a better knowledge of the 'traditions' and 'local usages' in addition to a detailed knowledge of

the better known legal texts on which the indigenous people appeared to rely.

Any social history of law as it affected women must plot the contradictory pulls within the broader framework of social forces operating through successive periods of British rule. Simply put, India was no *tabula rasa* on which the interests of the colonial power could be inscribed. The process of producing a coherent reliable body of laws governing all Indian subjects was fraught with contradictions, compromises and sometimes overwhelmed by political and economic exigencies. We shall at first consider the ideological bases for the development of legal structures in India, before concluding with a brief consideration of 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.[5] 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.[6] The first efforts in this direction were made by Warren Hastings, a successful commercial agent 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, Persian and Arabic.

One of the enduring ironies of current historical knowledge of the Indian past is that it has been derived largely from the interpretations developed over the last 200 years, and, as a result, derived from ways of studying the past which were inaugurated by the Orientalists.[7] 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, of which they had been previously ignorant.[8] Accustomed as they were to a reading of history which relied

largely on written sources, which were also considered the most authentic ones, British Orientalists in India also began the process of privileging certain written texts in their reconstruction of the Indian past. Especially in the earlier decades of British rule in India, the administrators' search for certainty, for discovering the appropriate rule to be applied, drove them towards a study of the sacred *sastric* texts: the sources of Hindu law were the *srutis, smritis, Dharmasastras* 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 hypostatised.[9] J.D.M.Derrett says, for instance, 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."[10] Any decision to rely on sastric tradition therefore was a decision that overlooked the historical specificity of the text's application. For Islamic India on the other hand, from quite an early stage the texts were found to provide a reliable degree of certainty, as a result of which case law became much less important. Indeed, as we shall see, enactments to modify Islamic law were few and far between. Most jurisprudential and legislative attention was focussed throughout this period on Hindu law. Finally, the reliance on 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.

The scholarly efforts of the Orientalists often yielded conflicting views of the Indian past. Yet in the main part, Hastings and the scholars he encouraged as well as those who came after him, such as Nathaniel Halhed, William Jones, and H.T.Colebrooke, strove to counter the most pervasive British conception about pre-British (Mughal) India, i.e. 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, an East India Company servant and author of *Dissertation on the Origin and Nature of Despotism in Hindostan*.[11] His understanding of despotism, which it was claimed sprang from the very nature of the soil and climate of India, stressed the arbitrariness of the political order. In Dow's view, before the independent and, by definition, capricious, will of the sovereign,

no other law prevailed: the Mughal legal system was therefore a system of arbitrary and unchecked power.[12] Several scholars did much to dispel such deprecating knowledges of pre-British India. Nevertheless, these scholars argued that although there was a definite notion of "authority", there was no commensurate notion of "legality". This view continues to retain its persuasive power even today.[13] Such an interpretation of the pre-colonial past had important uses for colonial administrators, given their penchant for strong handed rule, i.e. establishing a long promised "law and order" in India which would earn them the respect of the indigenous people.

The work of the Orientalists employed by Hastings led to a recognition of the ancient constitutional basis of Indian legal codes, which scholars believed not only had to be discovered but interpreted for use by the British administrators. It was confidently presumed that there were texts which could be interpreted and understood by British scholars in collaboration with the indigenous scholars, and which would authoritatively establish the content of Hindu Law to be administered in the EIC's district courts. In this scheme of things, scriptural texts were valorised and given an authority they had never before enjoyed. J.D.M.Derrett has quite justifiably called the British "the patrons of sastra," even suggesting that the British desire for explicatory law texts encouraged the production of fresh ones in the late eighteenth and early nineteenth 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 very long period had possessed their own more localised and non-scriptural customs".[14] In their quest for an authority based on prevailing notions of power (which were nevertheless invested with new meaning), the British encouraged the interpretation of Indian scriptures as the theocratic source of all binding codes. As a result, the attempt to counter the theory of pre-colonial Indian states as despotic produced a fresh theory of theocratic regimes in its place.

The native interpreters of law

Even such organised effort could not rule out dependence on those "subtle natives" who could "perplex" the colonisers at every turn especially on tricky questions of customary practices. The interpreters of the Hindu code were naturally 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."[15] Robert Lingat has gone so far as to suggest 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" was strengthened at the expense of the consultation of "that ocean of texts".[16] This was primarily because the Muslim rulers left Hindu local bodies a great deal of autonomy, much like what Muslims themselves enjoyed under Hindu rulers.

The relative autonomy of the village assembly, caste tribunal and the *sreni* (or guild) that had long developed before the advent of British rule was seriously undermined by the very structure of the court system as it was imagined by Warren Hastings. The colonial state absorbed some aspects of local lawways even as it gradually transformed the meaning and content of others. 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 eighteenth century, when it was both more ambitious and had learned to be more pragmatic.[17] 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 collector/judge performed two kinds of functions, adjudicating on the dewani cases relating to the revenue and civil litigation, and the faujdari cases relating to the criminal and internal legal affairs. "Facts" were established on testimony from witnesses and documentary evidence placed before the court,

for which the collector/judge was assisted by the pandits and maulvis. In an act of settlement in 1781, the Hastings plan which made space for the operation of Hindu and Muslim law on matters pertaining to "succession, inheritance, marriage, caste and all religious usages and institutions" and was applicable only to mofussil courts, was extended to the Supreme Court of Bengal. A specific effort was made to take customary law into consideration.[18] For this purpose, pandits and maulvis were directly appointed by the Supreme Court from 1777, and by the time of Cornwallis' Code of 1793, were attached to the District Courts, Provincial Courts and the Sadr Dewani Adalat as well.[19] The appointment of pandits and maulvis to assist judges finally ended in 1864, when it was believed the colonial authorities had achieved an adequate grasp of the mechanics of Indian legal systems and a sufficient body of case law had been developed on which future generations of judges could rely.

The new structure undid the relative autonomy at the lower levels in one major sense: the English judge made the final decision as to what was legally acceptable under what was shaping up as a new legal system, whether he followed the opinion of the pandits, in the absence of detailed personal knowledge, or relied on his own knowledge of the texts.[20] As a result, his exteriority to the legal traditions of India was never overcome.

In contrast to the obvious admiration of the Orientalists for the classical Indian past was, as Upendra Baxi notes, the reluctance on the part of the colonial authorities to "name community adjudication as *law*. . ."[21] Neglecting the historical processes by which "non-state legal systems" were appropriated to the state, the British in India claimed this too as part of their civilising mission, namely to weld the host of disparate practices that went in the name of Hindu law into a single legal code. In the process of doing so, they transformed the nature of judicial discourse. 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.[22] The colonial legal-juridical structure, i.e. state law, effected irreversible changes in the nature and importance of

local law-ways, introducing for the first time, adversarial proceedings; while disputes relating to caste and kinship rules were invariably settled within the caste councils, disputes relating to land increasingly made their way into state courts.[23] Similarly, the colonial judicature occupied a centrality in disputes over temple honours and rituals.[24] This points to the multiple ways in which the colonial administration structured "tradition" through the agency of the courts, serving to equalise structurally unequal people (such as an upper caste landlord and his Dalit servant) in a court of law, while ensuring that, in the cumbersome process of "appeals, adjournments and counter appeals, the poorer litigant was ruined."[25]

Yet the continued resilience of local law-ways over state law, right up to the present day, is an indication that colonial legal systems rarely achieved the kind of dominance they aspired to. One may therefore speak of a quest for, rather than an attainment of, certainty, consistency and uniformity.[26] To take just one instance, the quest for a uniform legal code which was a central concern of early colonial rule, continues to inform the actions of the independent Indian state even today.

The first move towards codification

At the beginning of the process of producing a usable Hindu legal code in the eighteenth century, the court appointments firmly established the Brahmin pandits, invariably male, at the centre of the emerging judicial discourse. The pandits themselves were hardly left to their own devices. At the Sanskrit colleges in Benares and Calcutta that were specifically set up for the purpose, they were trained in the very sastras which were considered "little known and little read. . ."[27] The body of texts chosen for this training in the first half of the nineteenth century and probably even earlier included *Mitakshara, Dayabhaga, Daya Krama, Daya Tattva*, the *Dattaka Candrika*, the *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 nineteenth century.

The "unreliability" of the pandit, and the flood of litigation which soon overwhelmed the courts after 1772 made it imperative to forge a coherent and stable interpretation of the law

which the collector/judge could master, thereby reducing reliance on the indigenous experts and avoiding corruption. The search for the earliest, authoritative text and the most reliable indigenous system of jurisprudence led the Orientalists to the Dharmasastra, which, they were told by the Brahmin interpreters, held high prestige among the peoples of India and 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 rather than legally binding statutes; *vyavasthas* were therefore quite an important source of legal interpretation. The vyavasthas of the pandits were an amalgam of customary practices, rough and ready readings of the sastras and diverse materials chosen from epics and legends, and from other treatises of relatively later date such as the *puranas*, spurious smritis, *agamas* and *tantras*.[28]

From this pot-pourri, an attempt was made to construct an abstract legal code in the late eighteenth century. Eleven pundits "learned in the Shaster"[29] were chosen by Warren Hastings from various parts of Bengal to compile precisely such a digest in 1773, in order to produce a handy tool with which to cope with the flood of cases which 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."[30] The digest which emerged from the deliberations of the pandits 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 process of making available a digested form of the Dharmashastra 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.[31] The pronouncements of the English Judge in turn lent a fixity to Hindu law that had not previously existed.

It is also significant that it was Hindu law, rather than Muslim

law, that was the focus of reform and codification throughout this period. When Muslim law did become the focus of attention, its scriptural roots were traced relatively easily by those anxious to produce administrable laws. Since the legal theory of Islam did not usually recognise custom as a formal or independent source of law, even when customary law was practised, as among the Mapillas of Malabar or the Memons of Western India, it was regarded as a result of Hindu influence, and therefore un-Islamic. Just as the Brahmanisation of Hindu law took place over the course of the nineteenth century, Muslim law was progressively Islamised. For Muslims, the core text that was translated for the use of officials was the *Hedaya*, chosen by maulvis, translated first from Arabic to Persian and then into English by Hamilton. The posts of *kazis*, who performed judicial as well as non-judicial functions, were abolished in 1864, and re-established by an Act of 1880, although they were confined to non-judicial private functions. Nevertheless, disputes concerning succession, marriage, divorce, and family relations were increasingly referred to *muftis*, functionaries who were assigned the task of conflict resolution, since the demand for Islamic institutions among the Muslim community was quite high.[32]

Sir William Jones, (1746-94) 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. Jones' distrust of Indian interpreters ran deep, and he was troubled by the excessive reliance on Brahmin pandits, since they had proved themselves capable of pulling out appropriate authorities from the "ocean of sastra."[33] The Brahmin's supposed infinite capacity for deception and concealment could only be avoided by a reliable, authentic version of Hindu Law. It was believed that

> If the law were digested by an authoritative and independent authority, it would be easier to learn and refer to than the extensive and vague literature normally consulted . . .[34]

Jones himself proposed a far more complex and complete "digest of Hindu and Mussalman Law" analagous to the British codes, for which he appealed to Cornwallis for help.[35] The compilation of Sanskrit and Arabic texts was complete in 1794, translations were begun by Jones, and completed after his death by H.T.Colebrooke. It was as a result of these labours that *The*

Digest of Hindu Law on Contracts and Successions was published in 1798. In this work, a long cherished dream of William Jones had come 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."[36]

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.[37]

Colebrooke's interest in acquiring authentic texts led to the sudden flowering of new Sanskrit sastras in the period after him, especially in the 1820s. In part this was a response to the demand for new texts but the new texts were equally a refutation of the assertions of western scholars such as William Hay McNaghten and Thomas Strange. However, as Derrett points out, the process of procuring reliable texts for South India had barely begun in this period. One text that came conveniently to hand was the Malayalam *Vyavahara Mala*, written almost certainly in the late 18th century in anticipation of 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.[38]

Hastings had made it compulsory for the judges to consult the sastris but only on listed subjects such as inheritance, marriage, caste and other religious usages.[39] As far as unspecified topics were concerned, laws with which inhabitants were familiar, whether sastric or customary, were applicable, for which the consultation of the pandit by the judge was desirable but not necessary.[40] 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 previcon-

ously been attributed to them."[41] As a result, the Bombay regulation gave precedence to local usage over the written Mohammedan or Hindu law. This 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. Nevertheless, the relation between law and custom remained a troublesome one, and dogged British efforts at producing a uniform code.

The need for codification was increasingly felt by the 1830s since a body of substantive law had not been built up and the task of building this was placed on courts adjudicating cases on the doctrine of "justice, equity and good conscience". 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' 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 sub-continent 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, was willing to admit 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.[42]

The First Law Commission, under the leadership of Macaulay, produced the draft of the Indian Penal Code which was adopted in 1860. The Second Commission devised the Criminal Procedure Code, enacted in 1861, and reorganised the court system. The Second Law Commission however expressed strong reservations against the codification of Hindu and Muslim law. Thereafter, the field of personal law was marked off as beyond the reach of

colonial administrators. The most important set of laws that governed the status of women, namely Hindu and Muslim personal laws, were increasingly identified as those which only the members of the respective communities could reform. Thus the Indian Succession Act of 1865 applied only to those other than Hindus and Muslims. That the fears of the Second Law Commission (1853-56) were not unfounded became painfully evident in the revolt of 1857.

Although the Third Law Commission drew up drafts codifying contracts, laws of evidence, negotiable instruments etc., it left personal laws severely 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. Sir Courteney Ilbert, Law Member in 1882, recognised 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. The optimism of Bentinck's time had dissolved following the political challenge to British rule posed by the subject Indian people. There was a clear shift in the conception of the relation between customs and local usages of people and scriptural texts. Thus the famous Privy Council ruling of 1868, in *Collector of Madura vs. Moottoo Ramalinga*, (12 MIA 397, 436, 1868) declared, "Under the Hindu system of law, clear proof of usage will outweigh the written text of law."[43]

This must not be taken to mean that the British had given up their avowed aim of introducing a "rule of law" in India. British courts continued the process of pronouncing judgement on Hindu and Muslim practices, and the colonial state even transformed some practices when enough pressure was brought on it by educated Indians. If anything, the processes that were well under way by the mid nineteenth 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".[44]

The Code and women

The reference to sastras 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 women in Indian society. Chapter 20 of Halhed's translation was on the duties of women. Halhed recognised 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."[45] 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. 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 introduction of a scale of civilisation that hierarchised 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:

> 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.[46]

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 homogenise 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 about female sexuality was the assertion about the sexual proclivities of women:

> A woman is never satisfied with the copulation of man, no more than a fire is satisfied with burning fuel, or the main ocean with receiving the rivers, or the empire of death with the dying of men and animals: in this case therefore, a woman is not to be relied on.[47]

Women's wrongs thus formed the theoretical basis for men's rights, or more properly male duties towards moderating women's lust. Such lust was expressed by women not just for sex, but for "jewels, fine furniture, handsome clothes and nice victuals". It is in this context that Manu's famous injunction was understood: "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."[48]

If the natural urges of women from this description were unspeakably evil, the sastras also outlined the normative code for good women which once more spoke of fears and fantasies rather than remaining an expression of existing material realities.

> 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.[49]

Countless prescriptions for correct female behaviour, clearly intended to present an ideal notion of womanhood that would ensure the preservation of the patriarchal household, included a number of actions over which a woman had control, thereby appearing to acknowledge woman's agency. At the same time, it included several actions which were beyond her control, such as the duty of having a son. The bulk of the normative code spelt out the responsibility of women to curb their "natural" urges which were uniformly evil and dangerous, even as it strove to produce the figure of the desirable female.

Such an essentialised conception of Indian female nature extracted from several texts and authorities would soon be deployed in another framework altogether. The new intellectual current that swept through India was that of the Utilitarians, whose reforming zeal was most evident in the early decades of the nineteenth century. James Mill, whose influential *History of British India* was written in 1826 and formed the text for all those civil servants educated in Haileybury College, found the normative code an ideal one to attack in his diatribe on pre-colonial India. In his optic, as well as that of the newly ascendent Evangelical doctrines, Britain's civilising mission in India was clearly mapped out. Mill's optimism about the transformatory power of colonial rule sprang, in part, from a new political confidence in the expanding colonial empire in India. The ideological shift from reverence for the Indian past to cultural contempt was an expression of this emerging confidence. The Indian people could now be rescued from their stultifying laws and practices by the reforming efforts of the British.

Yet despite the extraordinary investment of early colonial energies in uncovering textual traditions, the position of women in pre-British India was by no means governed entirely by the misogynic sastric pronouncements of Manu 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. . . ."[50] Tensions between custom (namely unwritten law) and sastra were particularly severe in the south and among the non-Brahmanic peoples of other parts of India. Thus the eighteenth century text *Dattaka Candrika*, "comments on the strange customs of the wicked people of Malabar amongst whom the sister's son is the heir."[51] Indeed, at no point did the sastras acknowledge the independence or high status of women that prevailed in distinct pockets of Indian society, where women shared equal rights to matrimonial property, had access to divorce and where the remarriage of widows was encouraged.[52] For instance, adoption by women such as the Devadasis, though widely practised, was not

acknowledged by the sastras. Indeed, 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.

At the same time, by no means should the prevalence of customs that favoured women be taken to mean that customs were unequivocally gender neutral. Customs were after all also devised and sustained by male community elders, and women were rarely consulted in such formulation. In fact, some customs could, and were, reinstated by colonial rule in ways that disadvantaged women. But as the debates on widow immolation, widow remarriage and child marriage revealed, British reformers, Indian liberals, and orthodox opponents all relied rather heavily on the sastric record.

The utilitarian discourse on law

After war and intrigue had secured the Indian empire for the British and made their continued existence in India less uncertain than it had been in the 1770s, the colonial authorities were emboldened to undertake legislative measures which would form the basis of a whole new legal system. Law would become, in the words of Ranajit Guha, the "state's emissary" an instrument through which it could wield its power and deploy its disciplinary efforts. The first efforts of the nineteenth century were aimed at policing the populace and ridding it of the most "repugnant" of practices in the eyes of the British, as is evident from the legislation against sati and 'thuggee' in the first half of the nineteenth century. Transformations of law were unique because the struggle around it had to be "expressed in terms of general statements of principle" rather than "in particular statements of private and discrete interest."[53] As such, some higher ideal had to be in position as the aim of legal reform. Therefore, initiating legislation in the name of improving the status of women was no accident.

The very study of the Indian past which was intended to provide the Indians with their own history was soon skilfully deployed in a critique of Indian society itself. The critique was supposedly based on knowledge rather than ignorance. The foremost and extremely influential of these critics was James Mill. He never set foot in India nor, unlike the Orientalists, did

he study a single Indian language: nevertheless, he composed a five-volume history of India, which as Guha has pointed out, assimilated Indian history to the history of Great Britain: "Indian history. . .would henceforth be used as a comprehensive measure of difference between the peoples of these two countries."[54] In contrast to Orientalist accounts which had charted a decline in Indian civilisation from great heights, Mill suggested that Indian civilisation was inherently flawed and only worthy of thorough reform.

The cultural policy of the Marquess of Wellesley reflected the difference between Orientalist and Utilitarian doctrines influenced by the writings of Charles Grant and James Mill respectively. The emerging policy also sprung from the optimism characteristic of Utilitarianism in England: the empire could be made more permanent if it successfully seized the unlimited opportunities for reform in India.[55] Now "the British civil servant was to be an agent of cultural change and not an agent in the perpetuation of Hinduism."[56]

Mill's assessment of Indian society was in part based on the position of its women. In his work, the position of woman was taken as emblematic of the general state of that society. According to Mill, Hindu women were

> [in] a state of dependence more strict and humiliating than which is ordained for the weaker sex. . . . They are held in extreme degradation, excluded from the sacred books, deprived of education, and [of a share] in the paternal property.[57]

Although Mill was unwilling to suggest that women everywhere were ordained for anything other than a lower rung in the social hierarchy, he affirmed that there were degrees of oppression that were tolerable, even necessary, but that Indian society had plumbed the depths in this regard.

The state of "barbarity" to which Indian women were condemned was one from which they had to be rescued: admirably poised to play the role of rescuers were the colonial authorities. The protection offered by the colonial state to Indian women was a natural corollary of its characterisation of Indian men as effeminate and incapable, yet the very people from whom women had to be rescued.[58]

The critique of the Indian past initiated by the colonial authorities had an unintended effect: the discredited past was gradually sacralised 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 they believed was under fierce attack. The argument in favour of Indian tradition was made throughout the nineteenth century, and also redeployed in an anti-imperialist strategy. In order to do this, the nationalists had to address what they believed were some well founded critiques of Indian tradition. In other words, they admitted the necessity for reforms which would restore their tradition to its former glory. Indian history, in the optic of the nationalists, began to be understood as a narrative of decline from the pinnacles of Aryan achievement.

In this, they were amply aided by the work of the Orientalists. Despite the increasing political significance of James Mill and other Anglicists, and their continued irreverence, the work of the British Orientalists prepared the way for the work of the German Indologist, Friedrich Max Mueller (1823-1900). For Max Mueller, the Vedas, of which he provided a full collation and publication, formed "the natural basis of Indian history".[59] Further, he discovered and triumphantly flourished a common ancestry for the ruling European race and the subjugated Indian. The Aryan "origins" of Indian civilisation were discovered and enthroned as central to an understanding of Indian history only in the nineteenth century. The discovery of the Aryan past, and the valorisation of the Vedas resonated not only in the writings of the colonialists, but in the dialectically constituted oppositional discourse of cultural nationalism as well. "The Aryan," says Uma Chakravarti, "was an important element in the nationalist construction of a sense of identity for its association with vigour, conquest and expansion, in other words for its connotations of political and cultural achievement."[60]

In the cultural nationalism of the nineteenth and early twentieth centuries, the image of the Aryan woman as "helpmate" of the man in sacrifice and war, was a recurring motif which had enormous implications for emerging ideal-typical constructions of Indian women. The Aryan woman, singled out from the rich tapestry of historical choices, soon became the quintessence of India, eclipsing all other figures and speaking for all of Indian

womanhood. This thoroughly de-historicised figure was present in the discourse of Ram Mohun Roy, Ishwar Chandra Vidyasagar, Mahadev Govind Ranade, Bal Gangadhar Tilak and Vivekananda; even Gandhi's vision did little to challenge the formulation.

In the course of a century of study and reflection that was inaugurated during the colonial period, a new "tradition" was "invented" : that of a Vedic Golden Age, replete with glowing heroines who stood shoulder to shoulder with the Aryan males. The invented tradition of the Vedic heroine would play a critical role in fortifying the nationalist challenge to imperial rule; it also homogenised Indian womanhood and ignored existing inequalities among women along the axes of caste, class and community. The subsuming of all Indian womanhood to the idealised Indian middle class woman translated in legal terms into instituting a Brahmanical 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 Devadasis and Basavis in parts of South India, were identified as "aberrations", archipelagos of un-Hindu practices. For instance one specific claim about "Hindu Law", whether under the Mitakshara or Dayabhaga legal system,[61] as it was discovered and codified by the British, was that it did not grant women any rights to property. Twentieth century Indian nationalism could then claim to represent Indian womanhood by calling for the bestowal of rights to property on Hindu women from the top down.

In its effects, ignorance of the rich plurality of Indian social forms was not benign. The invention of a golden age in Indian history also determined the emphasis of "social reforms" through legislation even when they were initiated by Indian men. The most important aspects of reformist concern for the particular forms of oppression were those that affected the women of upper caste, middle class, households. The effect of reformist concern for the particular forms of oppression of women in these households was to universalise them, and thereby extend the reach of reform legislation to women in households that did not observe such practices. What may have been construed as progressive legislation for the women of upper caste households, then, frequently succeeded in undermining or reversing privileges women may have enjoyed in non-upper caste households.

The possibility of a "Rule of Law"

The account so far lays out some of the ideological bases for the development of colonial legal systems. Yet the process by which a range of customary privileges were codified into rights throughout the nineteenth and twentieth centuries cannot be understood in isolation of the material realities which determined the success or failure of ideological developments. It was precisely in the realm of negotiating conflicting interests that the ambitions of the colonial and nationalist ideologies alike met their most serious challenges, and made accommodations.

Since colonialism confers only subjecthood on the colonised, and is predicated on a denial of citizenship, the normalising functions of its state apparatuses are historically destined to remain unrealised. The colonial state's power after all, as Partha Chatterjee reminds us, is derived from the "rule of colonial difference", namely the preservation of the alienness of the ruling group.[62] In colonial societies such as India, the persuasive powers and instrumentalities of an abstract legality remained firmly subordinated to the use of naked force; as such the colonial state exercised "dominance without hegemony".[63]

Nevertheless, one of the most enduring myths of colonialist discourse, which has outlived its use as a justificatory mechanism for the conquest and exploitation of India, was that the East India Company, and the British Government thereafter, succeeded in establishing a "Rule of Law".[64] What accounts for the relative success with which a culturally specific (British) achievement assumes universal significance is, Ranajit Guha suggests, "the pervasive power of the ideology of law in English political thought" and its dissemination worldwide in the age of capital.[65] Yet though the worldwide expansion of capital contained the promise of tearing down all challenges and barriers to its expansion, under colonial rule, "the universality towards which [capital] irresistibly strives" encounters barriers that are a product of colonial rule: as such, they are only "ideally" but never "really" overcome.[66] The contradictions of a partial, timid and circumscribed legality on the one hand, nevertheless producing a remarkable degree of litigiousness in colonial society on the other were therefore symptomatic of the combined and uneven development of capitalism in India.

There cannot be "rights bearing subjects" where there are no citizens: the political conception of right, after all precedes the legal conception. Under colonial rule, this was an impossibility. How then may we chart the emergence of a specific set of relations, legal relations, instituted by a colonial regime in the absence of a civil society dissolved into independent individuals? How, except in conjunction with the ideology that promised citizenship and the nation state, namely nationalism? The mixture of administrative orders and legal regulations that constituted the totality of colonial governance were impelled by the needs of the colonial economy: revenue extraction required the introduction of a rule of property in land;[67] the exigencies of recruiting and rendering the labour force on plantations, mines and factories stable and permanent required the introduction of rudimentary labour laws.[68] Yet as the nineteenth 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 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. Therefore one cannot entirely agree with D.A.Washbrook's "materialist" reading of law in agrarian Indian society, that the colonial state merely arbitrated between already existing social forces in the Indian subcontinent.[69] While making the useful, if far from novel, suggestion that the British Raj cannot be viewed as a monolithic whole, Washbrook goes on to suggest that the undiluted sway of colonial power in India was restricted to a few decades of the early nineteenth century, the period of "high colonialism". In its previous mercantilist phase, the colonial state merely "adapted to its own ends the state structure which it had been bequeathed"; as such, the clumsy efforts of the colonial state to develop a market in land raise doubts about whether that was ever their intention.[70] By 1857, according to this reading, the high colonial state had passed its prime, yielding to the phase of the "incipient nation state" when the role of the colonial state was reduced to that of a "broker" between existing social and economic groups.[71] Even in that phase when the colonial state could effect significant change,

in the few decades between 1820 and 1857, the Raj merely undertook a "balancing act" of keeping control over land in the hands of agrarian corporations. We may recall, however, that this was the period when the Indian economy was restructured in such a way as to rule out all possibility of its transformation as a modern industrial power.[72] Washbrook thereby continues in the realm of law what is a wider project of conjuring away the effects of colonialism; if he dismantles certain colonial myths about the autonomy of law at all, it is by effacing colonialism itself. Colonial law, as colonial power itself, rather than effecting irreversible changes in the economy while exacerbating existing cleavages in society, appears in this account to be stepping between already prevalent social forces and their antagonisms, thereby reducing the history of colonialism to one made entirely by the Indian people themselves.

Nicholas Dirks offers a slightly different optic on the role of law in colonial society. While substantially agreeing with Washbrook's analysis, he goes on to suggest that colonial law performed a cultural function that has often been overlooked, providing, for example, the little kingdoms of South India, deprived of their political power, "a structural replacement for politics".[73] Their participation in this alternative theatre of action, however, amounted to no more than "rituals" since they "created [culturally] significant, if ultimately *unreal* taxonomies of power and control."[74] While law may indeed have functioned as the site on to which the political ambitions of the *palaiyakarars* were displaced, and thereby neutralised, the effects of colonial law more generally in producing, not just containing crises, and the substantial dislocations within the social space engendered by legal initiatives cannot be confined to a framework which assigns purely symbolic value to the law.

To the extent that certain pre-colonial legal regulations embedded in kin and community networks were gradually loosened and redefined,[75] an attempt was made to homogenise and codify theological aspects of Indian law,[76] 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.[77] To the extent that colonial law directly thwarted social mobility instead of encouraging

it,[78] homogenisation was in effect a Brahmanisation of Indian law at the expense of customary law,[79] and 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,[80] colonial law could not be an unqualified instrument of 'modernity'. A high cultural Brahmanism, posturing as an antique, universal 'tradition', was thus thoroughly imbricated in the articulation of colonial modernity, and as we shall see even received a fresh lease of life.[81]

Throughout this long struggle over the shape of the legal mechanism, between colonial authorities, indigenous elites and subaltern classes, there was a persistent tension of balancing customary and traditional forms of conflict resolution, which sought reconciliation through compromise and consensus rather than adversary proceedings so characteristic of the "rule of (state) law". Since racial difference was at the very root of colonial rule, rather than abstract notions of legality, it is impossible to speak of a "rule of law", especially when no more than 30 per cent of Indians were ever enfranchised, few Indians 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 by no means contained the liberatory promises of homogenisation. The mid-nineteenth century decision to support the reform of Hindu or Muslim law only if the demand came from within the respective communities was merely 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.

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."[82] Though they had profound implications for all layers of Indian society, the contradictions were especially pronounced in definitions of the rights of women. To the extent that codification of Indian law occurred at all, it held contradictory promises for Indian women: offering an escape from oppressive social practices on the one hand, while imposing a Brahmanic code that cut into certain customary privileges on the other. As the nineteenth

century wore on, it became increasingly clear that one of the colonial state's preferred modes of seeking collaborators amongst 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 uncolonised space, one that would be guarded against any colonial intrusion.

Yet almost a third of the Indian subcontinent remained under indigenous rulers: princely states constituted a relatively 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 Prevention 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 extended property rights, 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. It was not uncommon, for instance, for Mysoreans to cross over into Madras Presidency in order to perform the marriage of underage children, which was illegal in Mysore after 1894. More important, on no account would the colonial state admit to reciprocality of prosecution of laws since that would dilute the very concept of British paramountcy in India. Thus, the coffee planters of Mysore in the late nineteenth and early twentieth centuries complained bitterly about their inability to prosecute contractors and labourers, who had escaped into British India, under the Mysore Breach of Contract Act.[83] The autonomy of the princely state was therefore severely circumscribed.

Throughout this period of change, the reconceptualisation of Indian tradition was aligned with the 'modernising' consequences of India's incorporation into the capitalist world system, although the trajectory of such 'modernisation' was far from linear and unambiguous given the colonial and, therefore dependent, status of the country. The contradictory circumstances of colonial rule meant that figures like Ram Mohun Roy, Vidyasagar and Keshab Chandra Sen, who have long been considered patriarchs of the Indian renaissance, were incompletely absorbed in the very bourgeois modernity they espoused.

The transition from 'tradition' to 'modernity' was by no means unilinear nor were the terms unambiguously antithetical. In colonial India, 'tradition' and 'custom' whether of the scriptural kind or not, were hardly subordinated to the secular, impartial operation of a "rule of law". Instead, all too often, traditions were given a new lease of life within the 'modern' (in the purely technical sense) institutions of the Raj. 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.[84] Even as late as 1937, the colonial state thought fit to introduce legislation that made the Shariat the basis of Muslim personal law.[85]

It is therefore no longer sufficient to view the weight of Indian tradition (whether of caste, community or kinship) acting as a brake on the modernising impulse of the British colonial state. Rather it is more important to mark the co-ordinates within which the accommodation, reinvention or alteration of traditions took place in successive periods of British rule. A social history of law cannot content itself merely with abstract legal or sociological principles and their realisation, but must engage with the multiplicity of levels at which colonial society was decisively transformed.

Notes

1 E.P.Thompson, "Custom, Law and Common Rights," in *Customs in Common: Studies in Traditional Popular Culture* (New York: 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 Emis-

sary : The Place of Law in Subaltern Studies" in *Subaltern Studies VII*, ed. Partha Chatterjee and Gyan Pandey, pp.247-64, esp. p.252.

[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 (Ithaca: Cornell University Press, 1989), pp.131-152, esp. p. 131.

[4] Ranajit Guha, *A Rule of Property in Bengal* (Delhi: Orient Longman, 1981), p.13. In his discussion of early British encounters with the Indian agrarian system, Guha says, "For most of the English officers sent out to the districts to manage the collection of revenues, it was a journey into the unknown in more than one sense. At every step they came up against quasi-feudal rights and obligations which defied any interpretation in familiar western terms. The hieroglyphics of Persian estate accounts baffled them. It was only in part a difficulty that they could not easily master the languages in which the ancient and medieval texts relating to the laws of property were written; *for tradition recorded only in memory and customs embedded in a variety of local usages wielded an authority equal to that of any written code.*" (emphasis added).

[5] The most influential, and useful, framework for understanding the links between power and knowledge in the encounter between Western colonising powers and the East has been provided by Edward Said, *Orientalism* (New York: Penguin, 1978). Said's use of the word Orientalism diverged sharply from conventional understanding which saw Orientalism merely as a study of Oriental pasts without noting the ways in which power constructed and defined this knowledge and produced 'truths' about the subject nation. It is in this sense that Orientalism is used throughout this discussion although 'Orientalists' still refers to the men who were actively engaged in the collection and translation of Indian texts.

[6] David Kopf *British Orientalism and the Bengal Renaissance, 1773-1835* (Berkeley: University of California Press, 1969); Gowri Viswanathan *Masks of Conquest* (New York: Columbia, 1990).

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

[8] For a critique of Indian historiography's "complicity with colonialist historiography", see Ranajit Guha, "Dominance without Hegemony and its Historiography" in *Subaltern Studies VI* ed. Ranajit Guha (Delhi: Oxford University Press, 1989), p.210-309.

[9] 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", and "Law and the Social Order before the Muhammedan Conquest" in *Religion Law and the State in India* (London: Faber and Faber, 1968), pp. 148-224.

[10] Ibid., p. 177.

[11] Guha *A Rule of Property for Bengal*, 26 ff.

[12] Cohn, "Law and the Colonial State in India", p.138.

[13] See for example Robert Lingat *The Classical Law of India* translated with additions by J.D.M.Derrett (Delhi: Thompson Press, 1973), pp.257-59.

[14] Washbrook, "Law State and Agrarian Society in Colonial India", p.653.

[15] Derrett *Religion Law and the State in India*, p.239.

[16] Lingat *The Classical Law of India*, p.262.

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

[18] Cohn, "Law and the Colonial State in India", pp.136-37.

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

[20] Ibid., p.263.

[21] Baxi, "The State's Emissary", p.252.

[22] Bernard Cohn, "Notes on Disputes and Law in India" in *An Anthropologist Among the Historians and Other Essays* (Delhi: Oxford University Press, 1987), pp.575-631.

[23] T. Scarlett Epstein *Economic Development and Social Change in South India* (Manchester: Manchester University Press, 1962), pp.145-46. See also, Oliver Mendelsohn, "The Pathology of the Indian Legal System" *Modern Asian Studies*, 15.4 (1981) pp. 823-63.

[24] See for instance, Franklin Presler *Religion under Bureaucracy: Policy and Administrations for Hindu Temples in South India* (Cambridge: Cambridge University Press, 1987); also, Arjun Appadurai *Worship and Conflict Under Colonial Rule: A South Indian Case* (Cambridge University Press, 1979).

[25] Cohn, "Some Notes on Law and Change in North India", *An Anthropologist Among the Historians*, pp.554-74.

[26] Baxi *Towards a Sociology of Indian Law*, p.20.

[27] "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*, 21.17 (26 April 1986): p.35.

[28] Derrett *Religion, Law and State in India* p.230.

[29] Nathaniel B. Halhed *A Code of Gentoo Laws* (Fort William: 1776), lxxiv.

[30] Ibid., i.

[31] Derrett *Dharmasastra and Juridical Literature* (Wisebaden, 1973), p.9.

[32] Baxi *Towards a Sociology of Indian Law*, p.18.

[33] William Jones et al *Dissertations and Miscellaneous Pieces Relating to the History and Antiquities, the Arts, Sciences and Literature of Asia*, I (London: G.Nichol, 1792), p.91.

[34] Derrett *Religion, Law and State in India*, p.239.

[35] Cohn, "Law and the Colonial State in India", p.145.

[36] Jones *Dissertations*, p.91.

[37] Cohn "Law and the State in Colonial India", p.146.

[38] Derrett *Religion, Law and State in India*, pp. 260-62.

[39] Ibid., p.231.

[40] Lingat *The Classical Law of India*, p.135.

[41] As cited in Tahir Mahmood *Muslim Personal Law*, (Nagpur: All India Reporter, 1983), p. 15.

[42] *Hansard Debates* Third Series, Vol. XIX, pp.531-33, as cited in M.P.Jain *Outlines of Indian Legal History* (Bombay: Tripathi, 1987), p. 405.

[43] Jain *Outlines of Indian Legal History*, p. 480.

[44] Ranajit Guha, "Chandra's Death" *Subaltern Studies V* ed. Ranajit Guha (Delhi: Oxford University Press, 1987), p.141.

[45] Halhed *A Code of Gentoo Laws*, lxv.

[46] Ibid., p.249.

[47] Ibid., p.250.

[48] *Sources of Indian Tradition* edited and revised by Ainslie Embree, Second edn., Vol. 1 (New York: Columbia University Press, 1988).
[49] Halhed *A Code of Gentoo Laws*, p.251.
[50] Derrett *Religion, Law and the State in India*, p.206.
[51] Ibid., 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. Intervening in the debate on the divorce provisions of the Hindu Marriage act in the early fifties, S.P.Mukherjee, who opposed such provisions and was told of the long standing practice of divorce in South India said, "I say good luck to South India. Let South India proceed from progress to progress, from divorce to divorce...Why force it on others who do not want it?" As cited in Reba Som, "Jawaharlal Nehru and the Hindu Code Bill: A Victory of Symbol Over Substance" *Modern Asian Studies*, 28.1 (1994), pp. 165-94, esp, p.180.
[52] Derrett *Religion Law and the State in India*, 206-07.
[53] Washbrook, "Law, State and Agrarian Society", p.649.
[54] Ranajit Guha, "Dominance Without Hegemony and its Historiography" in *Subaltern Studies VI*, ed. Ranajit Guha, p.211.
[55] Francis Hutchins *The Illusion of Permanence* (Princeton: Princeton University Press, 1967).
[56] Kopf *British Orientalism and the Bengal Renaissance*, p.134.
[57] James Mill *The History of British India* with notes by H.H.Wilson, 5th ed. (London: James Madden, 1840), pp.312-13.
[58] Uma Chakravarti, "Whatever happened to the Vedic Dasi?" in *Recasting Women*, p.35. We may speculate briefly on the consequences of that construction of Indian masculinity: if the Bengali was indeed the weak, emasculated caricature and indistinctly gendered, how were the women to be characterised? Must the British critique of Bengali society be seen as an initial step in an attempt to realign Indian society on lines that were recognisably patriarchal in a British sense? This suspicion is confirmed when we turn to ways in which those parts of pre-colonial society where women enjoyed a measure of economic and social power under matriliny were aggressively transformed and brought in line with more recognisable patriarchal formations.
[59] Ibid., p.39.
[60] Ibid., p.47.
[61] The two systems originated sometime in the twentieth century, and formed the principal basis of Hindu law, particularly as they were identified and codified by the colonial state. The Mitakshara system, which was based on the commentary on *Yagnavalkya smriti* by Vignaneswara of the south, was followed in nearly all parts of the Indian subcontinent while the Dayabhaga system, based on a digest written by Jimutavahana of Bengal, prevailed in Bengal and Assam. There was a flowering of sub-schools under the Mitakshara system between the thirteenth and the sixteenth centuries, respectively identified as the Mithila, Bombay, Madras and Benares schools, but as far as inheritance rights of women were concerned, there was little to substantially distinguish between them. A.S. Altekar *The Position of Women in Hindu Civilisation* (Delhi: Motilal Banarasidass, 1956); P.V. Kane *History of Dharmashastra* III, (Poona: Bhandarkar Oriental Research Institute, 1946).

[62] Partha Chatterjee *The Nation and its Fragments: Colonial and Post Colonial Histories* (Princeton: Princeton University Press, 1993), p.10.
[63] Ranajit Guha, "Dominance without Hegemony and its Historiography" *Subaltern Studies VI, Writings on South Asian History and Society* ed. R. Guha, (Delhi: Oxford University Press, 1989), pp.210-309. Alexander Dow's conception of pre-colonial law is discussed by Cohn in "Law and the Colonial State in India", pp. 138-39. Upendra Baxi points out that even such sensitive scholars as Ranajit Guha and Shahid Amin are not fully cognizant of the extent to which the notion of 'law' itself was appropriated by colonial law. "'The State's Emissary': The Place of Law in Subaltern Studies" *Subaltern Studies 7*, ed. Partha Chatterjee and Gyan Pandey (Delhi: Oxford University Press, 1992), pp. 247-64.
[64] Lloyd and Susan Rudolph thus do not doubt the "intention" of the British to bring justice via a new legal system to India; they failed to do so because "Indians did not appreciate the system's morality and logic." *The Modernity of Tradition: Political Development in India*, (Chicago: University of Chicago Press, 1967), p.255.
[65] Guha "Dominance Without Hegemony", p.276.
[66] Karl Marx *Grundrisse: An Introduction to the Critique of Political Economy*, (Harmondsworth: Penguin, 1973), pp.410-11.
[67] Guha *A Rule of Property for Bengal*.
[68] Rajani Kanta Das *History of Indian Labour Legislation* (Calcutta: University of Calcutta, 1941); S.D.Punekar and R.Varickayil *Labour Movement in India: Documents 1850-1890* (Delhi: ICHR, 1989).
[69] D.A.Washbrook, "Law, State and Agrarian Society in Colonial India" *Modern Asian Studies*, 15.3 (1981), pp. 649-721, esp. p.668.
[70] Ibid., pp.658, 660, 665, 667.
[71] Ibid., p.711.
[72] See, for example, A.K.Bagchi, "Colonialism and the Nature of Capitalist Enterprise in India" *EPW*, 23 (July 30, 1988): pp. 38-49.
[73] Nicholas Dirks, "From Little Kingdom to Landlord: Colonial Discourse and Colonial Rule" in *Colonialism and Culture* ed. N. Dirks, (Ann Arbor: University of Michigan Press, 1992), p. 200.
[74] Ibid., p.191, emphasis added.
[75] Prem Choudhry, "Customs in a Peasant Economy" in Kumkum Sangari and Sudesh Vaid *Recasting Women: Essays in Indian Colonial History*, (New Brunswick: Rutgers University Press, 1990), pp.302-30. The colonial "creation" of customary law, Francis Snyder informs us, is now widely recognised in studies of African societies as well. Snyder, "Colonialism and Legal Form: The Creation of Customary Law in Senegal" in *Journal of Legal Pluralism*, 9 (1981), pp.49-79.
[76] Derrett *Religion, Law and State in India*.
[77] See Baxi *Towards a Sociology of Indian Law*, pp.14-15.
[78] See for example the Rudolphs' discussion of the aspirations of the Shanans to legally effect a change in caste status and the colonial judicature's refusal to endorse such caste transgressions. *The Modernity of Tradition*, pp.40-43.
[79] 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 (Delhi: Oxford University Press, 1989), pp.1-26.

[80] Archana Parashar *Women and Family Law Reform in India* (Delhi: Sage Publications, 1992), p. 66. Parashar points out that despite this distinction "by the time India gained independence from English rule, the personal laws of different communities were labelled religious laws, but in some cases they were actually state enactments, while in others the contents of the rules had undergone substantial changes", p.76.

[81] In contrast, Bernard 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." "Law and the Colonial State in India", p.151.

[82] Washbrook, "Law, State and Agrarian Society in Colonial India", p.657.

[83] See for instance, D.R.Gustafson, "Mysore, 1881-1902: The Making of a Model State" (PhD Dissertation: University of Wisconsin, 1969), pp.270-74.

[84] This is discussed more fully in the next chapter.

[85] This is discussed more fully in chapter 7.