Introduction

The British colonial state in India was continually forced to grapple with the forms of law and governance appropriate to Indian society. This question of the necessary, possible, and desirable relationship between colonial law and Indian social life produced a plethora of policies and dilemmas. It also created a new political significance for issues demarcated as social, particularly those related to religion, to women and the family, and to property and economic production and exchange.

This is a book about the practices of government that emerged as the colonial state delineated and engaged with this arena of Indian social life during the long century between the 1810s and the 1940s. It is also about how a group of largely elite Indians responded to and reworked these ideas and practices, shaping Indian political modernity in the process. Focusing on the dominant forms of Hindu law and the Hindu family, this study traces the increasing importance of governing society and the family to the work of the state in this era.[1] At the same time, it explores the uneven ways in which this modern state marked the significance of social differences understood as grounded in the body or defined by birth. Most pointedly, it places colonial debates on religious law, the history of the family, and women's rights within this framework of analysis.

The question of women's rights has a long genealogy in India, dating to the early colonial era. In the late eighteenth and early nineteenth

[1] It is because of the central place that the Hindu family has occupied in colonial, anticolonial, and postcolonial theorizing on the relationship between colonial law and Indian society that this book focuses on the formation and operation of colonial Hindu law, rather than exploring the systems of personal law more generally (including Muslim, and eventually also Parsi and Christian personal law).

centuries, many British commentators on Indian culture and "civilization" – missionaries, East India Company officials, liberals, and Utilitarians – articulated an idea of women as a universal category and the rights of women as indicative of a given civilization's hierarchical status in a ladder of civilizations.[2] Despite the significant legal and social subordination of British women at this time, these analyses typically placed Britain at the apex of the civilizational ladder, and India in a low and degraded position. By the 1820s, the colonial state began to identify for itself a moral imperative of protecting Indian women from their own customs and culture. This "obligation" established the grounds for intervention into Hindu religion, culture, and the family – first and most famously by prohibiting *sati*, or widow immolation – but eventually also in seeking to curtail high-caste prohibitions on widow remarriage, as well as female infanticide and the widespread practice of child marriage.

For postcolonial feminist scholars, this colonial history of women's rights has posed at least three dilemmas: (1) that the issue of women's rights was from its inception linked to a justification for colonial rule;[3] (2) that the colonial state articulated the issue of women's rights and enacted various measures putatively to advance those rights, and yet remained committed to retaining and consolidating patriarchal power in a variety of ways;[4] and (3) that because colonial governance placed matters relating to the family under the jurisdiction of Hindu and Muslim religious laws (as defined and enforced by the colonial state), women were and continue to be positioned "between community and state."[5]

[2] These ideas are most closely associated with James Mill, *History of British India, Vol. I* (1817), reprint of 2nd ed., London: Baldwin, Gradock & Joy, 1920 (New Delhi: Associated Publishing House, 1982). Yet they formed part of a broader stream of discourse and were widely recapitulated. For later Victorian feminist uses of this model, see Antoinette Burton, *Burdens of History: British Feminists, Indian Women and Imperial Culture, 1865–1915* (Chapel Hill, NC: University of North Carolina Press, 1994).

[3] Lata Mani, *Contentious Traditions: The Debate on Sati in Colonial India* (Berkeley: University of California Press, 1998); Mrinalini Sinha, *Specters of Mother India: The Global Restructuring of an Empire* (Durham, NC: Duke University Press, 2006).

[4] Ibid. Also: Flavia Agnes, *Law and Gender Inequality: The Politics of Women's Rights in India* (New Delhi: Oxford University Press, 1999); Uma Chakravarti, *Rewriting History: The Life and Times of Pandita Ramabai* (Delhi: Kali for Women, 1998); Janaki Nair, *Women and Law in Colonial India: A Social History* (New Delhi: Kali for Women, 1996); Samita Sen, "Offences against Marriage: Negotiating Custom in Colonial Bengal," in *A Question of Silence? The Sexual Economies of Modern India*, edited by Mary E. John and Janaki Nair (New Delhi: Kali for Women, 1998), pp. 77–110; Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (Delhi: Oxford University Press, 1998).

[5] Rajeswari Sunder Rajan, *The Scandal of the State: Women, Law and Citizenship in Postcolonial India* (Durham, NC: Duke University Press, 2003).

This last issue has meant that attaining equal rights for women in relation to men has been perceived as achievable only by limiting the operation of (or violating) the norms and prescriptions of the religious communities of which women are a part. Yet even positioning women in a direct relationship to the state has not produced equal rights or personhood but has rather rendered them vulnerable to other forms of state intervention, violence, and "protection."[6]

This ambivalent legacy of rights, coupled with the implications of a uniform or universal rights framework for further marginalizing minority communities (especially Muslims) in India today, has produced a debate about the value of rights as a feminist goal. Such concerns have been amplified by the overwhelming evidence that the enactment of legal rights does not necessarily change social practice: Progressive laws do not directly transform existing values or common sense and indeed often remain a dead letter.[7] In this context, some feminist scholars and activists have articulated powerful critiques of the liberal rights framework, while others have insisted on the value of rights, even as they recognize the dilemmas that such a framework sustains.[8]

This book emerges out of this context of debate, and it both draws on and seeks to extend the latter argument. Yet it does so by pursuing a line of analysis that has hitherto remained largely undeveloped: linking the question of women's rights to the broader dilemmas of the colonial state as a distinctive form of modern liberal state. Liberalism in its colonial incarnation has been famously characterized as adopting an attitude of "not quite, not yet," placing the colony within the perpetual "waiting room of history," with the educative, temporal deferral of political rights always securing colonial rule for an indefinite future.[9] Nonetheless,

[6] Ibid. Also, Ashwini Tambe, *Codes of Misconduct: Regulating Prostitution in Late Colonial Bombay* (Minneapolis: University of Minnesota Press, 2009).

[7] Bina Agarwal, *A Field of One's Own: Gender and Land Rights in South Asia* (Cambridge: Cambridge University Press, 1994); Srimati Basu, *She Comes to Take Her Rights: Indian Women, Property, and Propriety* (Albany: State University of New York Press, 1999).

[8] Nivedita Menon, *Recovering Subversion: Feminist Politics Beyond the Law* (New Delhi: Permanent Black, 2004), articulates a version of the former position. Some examples of the latter include Ratna Kapur and Brenda Cossman, *Subversive Sites: Feminist Engagements with Law in India* (New Delhi: Sage Publications, 1996); Sarkar, "A Pre-History of Rights: The Age of Consent Debate in Colonial Bengal," *Feminist Studies* 26, 3 (Fall 2000): 601–622; Sinha, *Specters of Mother India*; Sunder Rajan, *Scandal of the State* and "Rethinking Law and Violence: The Domestic Violence (Prevention) Bill in India, 2002," *Gender & History* 16, 3 (Nov. 2004): 769–793.

[9] Dipesh Chakrabarty, *Provincializing Europe: Postcolonial Thought and Historical Difference* (Princeton, NJ: Princeton University Press, 2000), p. 8. See also Uday Singh Mehta, *Liberalism and Empire: A Study in Nineteenth-Century British Liberal Thought*

elements of a liberal theory of personhood, society, and the state strongly shaped colonial state practice, and its assumptions structured the terms of debate, such that even institutional structures and policies grounded in different principles were framed explicitly in relation to liberal models, and often themselves collapsed into the paradoxes of liberalism, for example, rejecting liberal models as inapposite to Indian social life *in its present state*.[10]

The paradoxes intrinsic to liberalism took on acute form in the colonial context. At the core of these paradoxes was the powerful postulate of abstract human equivalence, but an equivalence grounded in the attribution of qualities and capacities that were nonetheless not viewed as universal. This simultaneous denial and reinstantiation of the significance of bodily difference at once produced new universal categories of difference (e.g., gender, race) and suggested new potentialities for overcoming them. Likewise, such potentialities produced a horizon supporting new struggles for political and social equality (and eventually also state policies). At the same time, they also heightened the paradoxical nature of such efforts at commensuration, which lessened inequalities but relied on and intensified the attribution of difference.[11]

A critique of colonial liberalism has shaped postcolonial theory and analysis, and likewise underlies this work.[12] Yet rather than seeking out dimensions of thought and experience that historically exceeded colonial liberalism, this book seeks to engage with its multifaceted operation. It does so by focusing on two aspects of liberal state power, both of which

(Chicago: University of Chicago Press, 1999); Homi Bhabha, *The Location of Culture* (London: Routledge, 1994). Certainly the fulfillment of the liberatory promises of liberalism, and even the existence of the autonomous individual rights-bearing subject that formed its philosophical foundation, remained quite attenuated, even in the West, for much of the nineteenth century. And in the colonial context, it was explicitly denied.

[10] Mehta, *Liberalism and Empire*. In addition to Mehta, see Joan Scott, *Only Paradoxes to Offer: French Feminists and the Rights of Man* (Cambridge, MA: Harvard University Press, 1996).

[11] Scott, *Only Paradoxes to Offer*; Elizabeth Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism* (Durham, NC: Duke University Press, 2002); Anupama Rao, *The Caste Question: Dalits and the Politics of Modern India* (Berkeley: University of California Press, 2009); Sinha, *Specters of Mother India*.

[12] See, for example, Dipesh Chakrabarty, *Provincializing Europe* and *Habitations of Modernity: Essays in the Wake of Subaltern Studies* (Chicago: University of Chicago Press, 2002); Partha Chatterjee, *The Politics of the Governed: Reflections on Popular Politics in Most of the World* (New York: Columbia University Press, 2004); Mehta, *Liberalism and Empire*; Gauri Viswanathan, *Outside the Fold: Conversion, Modernity, and Belief* (Princeton, NJ: Princeton University Press, 1998).

centered on the core problem of the relationship of persons to the state and of the state to its people. First, it examines the paradoxes of liberalism as they took shape within colonial state practice; in particular the ways in which Indian social life was at once depoliticized *and* rendered politically significant, as impinging on the possibility of recognizing persons as abstract bearers of universal legal and/or political rights. Second, it explores the elaboration of new modalities of governance that brought everyday social life to the attention of the state, in a manner that most closely approximates what Foucault described as "governmentality."[13] Governmentality references the simultaneous processes by which modern state power came to extend itself to diverse aspects of the life, health, welfare, and social functioning of the people, now viewed as potentially distinctive and crosscutting demographic populations, even as such concerns were increasingly absorbed by agencies outside the state (e.g., in the fields of economics, statistics, sociology, urban planning, public health, and, eventually, in NGOs) and internalized by individuals as matters of self-discipline or self-regulation.[14] This book thus examines how liberal political and political economic ideas, and their concomitant forms of governance, pervaded the colonial state's engagements with the family.

COLONIAL LAW AND INDIAN SOCIETY

The relationship between the colonial state and Indian society formed a – perhaps *the* – foundational question for colonial governance throughout the entire era of colonial rule. A question first and foremost about the legitimacy of an external, colonial rule founded on violent conquest, it initially resolved into a matter of the proper (legitimate and pragmatic) forms of colonial law and administration.[15]

[13] Michel Foucault, "Governmentality," in *The Foucault Effect: Essays in Governmentality*, edited by Graham Burchell, Colin Gordon, and Peter Miller (Chicago: University of Chicago Press, 1991), pp. 87–104.

[14] Ibid. See also Hannah Arendt, "The Public and the Private Realm," in *The Human Condition*, 2nd ed. (Chicago: University of Chicago Press, 1998; orig. 1958); Mary Poovey, *Making a Social Body: British Cultural Formation, 1830–1864* (Chicago: University of Chicago Press, 1994); Gyan Prakash, "The Colonial Genealogy of Society: Community and Political Modernity in India," in *The Social in Question: New Bearings in History and the Social Sciences*, edited by Patrick Joyce (London: Routledge, 2002), pp. 81–96.

[15] This was clearly at issue in the much-analyzed attack by Edmund Burke on Warren Hastings during the latter's impeachment trial. See Mithi Mukherjee, "Justice, War, and the Imperium: India and Britain in Edmund Burke's Prosecutorial Speeches in the Impeachment Trial of Warren Hastings," *Law and History Review* 23, 3 (Fall 2005): 589–630; Nicholas

Institutionally, from the earliest days of British trade and residence in Indian ports in the seventeenth century until the 1860s, a dual system of courts adjudicated disputes in areas of British residence and eventually conquest. Crown courts, eventually designated Supreme Courts, had civil and criminal jurisdiction over British subjects residing in what became the Presidency Towns of Calcutta, Madras, and Bombay, as well as over Indians residing there with whom these British subjects were engaged.[16] They operated essentially according to the procedure of British courts, and they applied British common law and English statutes. Beginning in 1772, in the countryside – or *mofussil* – outside of the Presidency Towns, East India Company courts had jurisdiction over disputes among non-British subjects in areas ceded to the Company. These courts applied a combination of British laws and procedures and British understandings of preexisting Indian legal systems. During this era of "Company Raj," it was the Company courts that formed the primary colonial arena for adjudicating disputes among Indians.[17]

Inseparable from the institutional structures of colonial law and administration was the question of whether the colonial state could and should enforce Indian or British laws and legal imaginations. As is widely known, the first governor-general of British India, Warren Hastings, argued strongly for a form of government that respected Indians' own laws; by this he meant primarily religious laws. In 1772, while governor

B. Dirks, *The Scandal of Empire: India and the Creation of Imperial Britain* (Cambridge, MA: Harvard University Press, 2006); Sara Suleri Goodyear, *The Rhetoric of English India* (Chicago: University of Chicago Press, 1992).

[16] These courts included the Mayor's Courts, first established in 1726, the Recorder's Courts (which briefly replaced the Mayor's Court in Madras and Bombay), as well as the Supreme Court (which definitively replaced the Mayor's and Recorder's Courts) established in Calcutta in 1773, in Madras in 1800, and in Bombay in 1823. This narrative is drawn from B. B. Misra, *The Administrative History of India, 1834–1947, General Administration* (New Delhi: Oxford University Press, 1970), pp. 501–511.

[17] The Company courts relied on the labor of Indian personnel from the beginning, employing Indians as judges and pleaders at the lower levels, as well as in virtually all aspects of their everyday operation. Nevertheless, until the second half of the nineteenth century, the judges at the appellate level – District Courts, Sadr Adalats, as well as the Privy Council in London – were exclusively British. See Richard Clarke, ed., *The Regulations of the Government of Bombay in Force at the End of 1850; to Which Are Added, The Acts of the Government of India, in Force in That Presidency*, Reg. 2, chapter 2, S. 30 and 31 of 1827 (London: J. & H. Cox, 1850), pp. 13–14; Herbert Cowell, *The History and Constitution of the Courts and Legislative Authorities in India*, 6th rev. ed. (Calcutta: Thacker, Spink & Co., 1936), pp. 249–254; Chittaranjan Sinha, *The Indian Judiciary in the Making, 1800–33*, chapter 2 (New Delhi: Munshiram Manoharlal, 1971); John Jeya Paul, *The Legal Profession in Colonial South India* (Bombay: Oxford University Press, 1991), pp. 12–13.

of Bengal (prior to his appointment as governor-general the following year), Hastings issued a Plan for the Administration of Justice, which ultimately formed the basis for the distinctive system that was put into place.[18] This plan established a bifurcated system of civil law, in which British law would form the basis for most matters of law – territorial law, as well as an edifice of procedural or adjectival law. In matters of a "religious" nature, however, Indians would be governed by their own religious laws, or what was termed "personal law," so denominated because it applied to persons regardless of domicile; it was the law inherent to their personal status.[19] This system of personal law construed Indians as essentially defined by religion and as divided into two religious categories: Hindu and Muslim. At the same time, it delimited the jurisdiction of religious law to matters relating to religion, caste, and especially the family. In Hastings's renowned words, "In all suits regarding inheritance, marriage, caste, and other religious usages, or institutions, the laws of the Koran with respect to Mahomedans, and those of the Shaster with respect to Gentoos [Hindus], shall be invariably adhered to."[20] These matters would be adjudicated in the colonial courts according to (British understandings of) the relevant dictates of Hindu or Muslim law.

Hastings's original 1772 plan had involved several presumptions: that religions constituted discrete entities and systemic structures of law and belief that directly governed people's everyday practice; that these religious laws primarily centered on the family (and on caste in the Hindu context), so that territorial laws grounded in British legal principles could be applied in other matters of civil law without significant violation of the core of religious law; and that the content of these systems of religious law was specified in religious texts.[21] Each of these presumptions

[18] Peter J. Marshall, *Bengal: The British Bridgehead, 1740–1828*, The New Cambridge History of India, II, 2 (Cambridge: Cambridge University Press, 1988); Ranajit Guha, *A Rule of Property for Bengal: An Essay on the Idea of Permanent Settlement* (Durham, NC: Duke University Press, 1996; orig. Paris: Mouton, 1963); Robert Travers, *Ideology and Empire in Eighteenth Century India: The British in Bengal* (Cambridge: Cambridge University Press, 2007).

[19] This original use of the term "personal" was thus not a reflection of the sensibility that religion was a private matter.

[20] Cited in Sir Courtenay Ilbert, *The Government of India: Being a Digest of the Statute Law Relating Thereto, with Historical Introduction and Explanatory Matter*, 3rd ed. (Oxford: Clarendon Press, 1915; reprint, Delhi: Neeraj Publishing House, 1984), p. 278. The word "succession" was later added to the list of covered topics.

[21] Travers argues that Hastings had a common-law or ancient-constitution view of personal law, not grounded exclusively in texts. Nonetheless, the projects in legal scholarship that Hastings initiated were those of textual translation and compilation. Travers, *Ideology and Empire*, 188–190.

had implications for the structure of colonial personal law, and historians have shown how the colonial system enacted a fundamental break, transforming preexisting social practices and legal forms.[22] Crucially, while the system was conceptualized as applying to Indians their own religious laws in matters related to inheritance, marriage, and the like, the state took on the role of defining and adjudicating that religious law. Personal law was thus construed at once as an integral part of the colonial legal system, adjudicated in colonial courts by colonial legal personnel, and as an arena of nonintervention by the colonial state.[23] That despite this explicit colonial model of nonintervention, the state inevitably did intervene in these "religious" matters, was widely recognized during the colonial era itself, and has also been a subject of considerable scholarly inquiry.

Such a focus on the dual problem of the law's inadequate reflection of Indian society and its intervention therein has drawn critical attention to the colonial nature of the systems of religious law. The system institutionalized a colonial sociology of India that perceived India as an agglomeration of communities, with religion and caste forming the primary building blocks of Indian society.[24] Because of the critical implications of this system, which first rendered religious community rather than the individual the unit of legal and political recognition, which in addition constituted Hindus and Muslims as separate legal subjects governed by different sets of laws, and which moreover enforced a variety of legal disabilities on women according to their religious community, scholars have typically underscored the particular features of this system and its divergence from secular civil law.[25]

This book instead insists on connecting the system of personal law to the broader context of colonial civil law and administration. As this work

[22] Bernard S. Cohn, "Law and the Colonial State in India," in *Colonialism and Its Forms of Knowledge: The British in India* (Princeton, NJ: Princeton University Press, 1996), pp. 57–75; J. D. M. Derrett, *Religion, Law and the State in India* (London: Faber & Faber, 1968; reprint, Delhi: Oxford University Press, 1999); Marc Galanter, *Law and Society in Modern India*, edited and introduction by Rajeev Dhavan (Delhi: Oxford University Press, 1989).

[23] A system that left these matters to adjudication by Indians in preexisting legal forums would have produced fundamentally different results, but ones no less colonial, as the system of indirect rule in Africa suggests. See Martin Chanock, *Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia* (Cambridge: Cambridge University Press, 1985); Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, NJ: Princeton University Press, 1996).

[24] Dirks, *Castes of Mind*; Prakash, "Colonial Genealogy."

[25] Cohn, "Law and the Colonial State"; Derrett, *Religion, Law and the State*; Marc Galanter, "The Displacement of Traditional Law," in *Law and Society in Modern India*, 15–36. An important exception is Singha, *Despotism of Law*.

shows, in that broader context of law and administration, debates in the field of liberal political economy profoundly shaped colonial visions, and the policies that emerged from those debates sought to redefine and secularize existing property forms and to render existing social relations of obligation more economical. This book contends that those coordinates of a liberal theory of property likewise became embedded within the system of personal law. Focusing on colonial Hindu law, this study shows how questions concerning the nature of individual ownership, the power to alienate property, or the nature of liability for contracts became the dominant terms of reference within the system of personal law. It argues that what was produced out of this was what might be termed a modern, "secular" Hindu law: a Hindu law that largely dispensed with questions of ritual status and the like in favor of an almost exclusive focus on property rights; a Hindu law that both implicitly and explicitly grappled with the ethics of reinforcing difference and inequality, in ways that resonated with the paradoxes of egalitarianism within liberal political thought.

The colonial system of personal law entailed a particular kind of secular stance, involving a claim by the colonial state at once to religious neutrality, to a sovereign ethical position above the various systems of religious law from which it would evaluate the substantive terms of those systems, and to sovereign jurisdictional reach to enforce (its interpretations of) the terms of religious laws. Thus, the system of personal law in some sense encapsulated in its most vivid form the broader and specifically liberal dilemmas of the relationship between colonial law and Indian society. It claimed to enforce Indian societal norms, but it also operated by distinguishing which elements and institutions of Indian legal sensibilities, values, and norms – that is, which elements of Indian *nomos* – would constitute law and which would simply have social force. Defining Indian social life from the perspective of law thus involved a doubled movement of integration into the state and distinction from it.

The colonial state thus posited itself as a secular agency, and yet it deployed religious values and governed via religious norms in a variety of ways. For some scholars, this suggests the nonsecular character of the state, and many have critiqued the colonial model of modernization as secularization in any case.[26] While this book finds any pronouncement on

[26] Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford, CA: Stanford University Press, 2003); Nandini Chatterjee, "English Law, Brahmo Marriage, and the Problem of Religious Difference: Civil Marriage Laws in Britain and India," *Comparative Studies in Society and History* 52, 3 (2010): 524–552; David Scott and

the secular or nonsecular character of the colonial state inherently unresolvable and unilluminating,[27] it nonetheless utilizes the terms "secular" and "secularization" as valuable for describing three distinct and at times countervailing processes: (1) the legal emptying out of ritual or hieratic significance from concepts of property and personhood, which involved less a Weberian process of disenchantment than a shift toward an inexorable focus on questions of comparative value, equality, or commensurability as the primary politico-legal mode through which persons and things signify; (2) the absorption of theological power by the state; and (3) the development of the category of social life as a residuum of the politico-legal domain, where matters of ritual significance would remain operative, but to which they would also now remain consigned. Thus, rather than a separation of religion from the state, one might think of secularization in the colonial Indian context as a process in which the state operated through religious law, shedding the ritual significance of that law into the domain of social life while absorbing its governing functions into the state. Such a process nonetheless remained unstable in its configuration of social life: If social life was to become the proper delimited domain of religion, it was also itself conceptualized as a domain where the operation of such beliefs, values, and norms was potentially and properly steadily diminishing. The secularizing force of the colonial state thus involved at once the development of the category of society or social life as distinct from state power and the potential transformation of social life through state norms that emphasized human rather than divine agency and ends. Secularism was (and is) an intrinsically ambiguous concept in its vision of religion and of social life.

This distinction between social life and the state posed a version of the problem that Karl Marx identified in contemporary mid-nineteenth-century European processes of state secularization: that the emergence of abstract political subjecthood – the model of the universal political equivalence of men – was effected through a political designification of social distinctions, such as birth, rank, education, property, and occupation, that nonetheless preserved those distinctions as operative within social life.[28] Abstract political subjecthood and the secular, universal claims of the

Charles Hirschkind, eds., *Powers of the Secular Modern: Talal Asad and His Interlocutors* (Stanford, CA: Stanford University Press, 2006).

[27] See the important piece, Hussein Ali Agrama, "Secularism, Sovereignty, Indeterminacy: Is Egypt a Religious or a Secular State?" *Comparative Studies in Society and History* 52, 3 (2010): 495–523.

[28] Karl Marx, "On the Jewish Question," in *The Marx-Engels Reader*, 2nd ed., edited by Richard Tucker (New York: W. W. Norton & Co., 1978; orig. 1844), p. 33.