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The Legacy of Colonialism: Law and Women's Rights in India

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Abstract

The relationship between nineteenth century England and colonial India was complex in terms of negotiating the different constituencies that claimed an interest in the economic and moral development of the colonies. After India became subject to the sovereignty of the English Monarchy in 1858, its future became indelibly linked with that of England's, yet India's own unique history and culture meant that many of the reforms the colonialists set out to undertake worked out differently than they anticipated. In particular, the colonial ambition of civilizing the barbaric native Indian male underlay many of the legal reforms attempted in the nearly hundred years between 1858 and India's independence in 1947. This Article looks at three areas of law reform in India affecting women's rights that were closely modeled on reforms in English law: changes in age of consent laws, changes in widow inheritance laws, and changes in abortion laws. The first two occurred in the nineteenth century and the last in the twentieth century, post-independence, yet the changes in abortion law still bore indelible traces of colonial authority. We explore ways in which, despite the change in legal sovereignty, the colonial influences that characterized the unsteady alliances and interests between colonial rulers, native elite men, and British women infused the law reforms with patriarchal and colonial values. In particular, we argue that the custom of adopting English laws to deal with unique Indian situations, without understanding the different culture and history, meant that many of the reforms within India either promoted British interests or frustrated the interests of Indian women. This Article offers new insights by exploring the interplay of British feminists and activists in law reform movements that usually are studied only from the

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perspective of colonial male rulers and native male elites. By focusing on the situation of Indian women and adding the perspective of British feminists, this Article highlights numerous ways in which colonial women undermined the reforms of their Indian counterparts.

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I. Introduction

Pre-colonial India was characterized by a pluralistic and fragmented cultural, religious, and political structure in which there was no monolithic Hindu, Muslim, or Christian authority.[1] Multiple tribes, castes, sects, and family groupings crossed religious and political lines, creating a heterogeneous population that may have had a definite notion of authority but no corresponding notion of legality.[2] Much of the law of the period was customary, with adjudication within segregated communities, which gave rise to a common interpretation by outsiders that pre-colonial India lacked law

1. *See* FLAVIA AGNES, LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA 12 (1999) ("Plurality of laws and customs and a non-state legal structure were the essential characteristics of the ancient Indian communities."). For a good general history of law's effects on women in colonial India, see generally JANAKI NAIR, WOMEN AND LAW IN COLONIAL INDIA: A SOCIAL HISTORY (2000).

2. *See* NAIR, *supra* note 1, at 22 ("[S]cholars argued that although there was a definite notion of 'authority,' there was no commensurate notion of 'legality.'"); *see also* Elizabeth Kolsky, *Codification and the Rule of Colonial Difference: Criminal Procedure in British India*, 23 L. & HIST. REV. 631, 652 (2005) (noting that some British reformers described India as a "country singularly empty of law").

altogether.[3] When the East India Company acquired the right to collect revenue in Bengal, Bihar, and Orissa in 1765, the company had to devise a new political and legal structure for the newly-acquired dominions.[4] British colonial rule in India began primarily as a political expedient through this quasi-private entity, the East India Company, to reap the benefits of imperialism without setting up a fully functioning sovereign state.[5] Colonial rule changed dramatically after 1858, when the company's rule was replaced by the Crown as the legal sovereign.[6] Throughout the Victorian period, colonial authority was largely premised on an ideology of the civilizing mission, both in Indian and English terms.[7] Within India, the company claimed legitimacy through its mission of defeating and replacing the Mughal rulers, who had been the source of aristocratic power and succession.[8] Legitimacy was gained for the English population at home through the self-proclaimed role of "civilizing" the natives by initiating reforms which represented the enlightenment spirit of the British, the harbingers of progress and modernity.[9]

After the transfer of power to the English Crown in 1858, there were two competing groups vying for political and legal legitimacy within India: the British colonial authorities and the native male elite.[10] In the ebb and flow of political bargaining, the colonial governors generally ceded authority in family law matters to the customary and/or canonical law of the dominant religions,

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3. *See* W.H. Rattigan, *Customary Law in India*, 10 LAW MAG. & L. REV. 1, 3–4 (5th ser. 1884–1885) (describing the unwritten customary law of Indian villages).

4. *See* NAIR, *supra* note 1, at 19 (noting the East India Company's desire to fashion a "legal-juridical apparatus" to control the Bengali revenues the company was granted in 1765).

5. *See* Jana Tschurenev, *Between Non-interference in Matters of Religion and the Civilizing Mission: The Prohibition of Suttee in 1829*, *in* COLONIALISM AS CIVILIZING MISSION: CULTURAL IDEOLOGY IN BRITISH INDIA 68, 69 (Harald Fischer-Tine & Michael Mann eds., 2004) (discussing British desire to secure the East India Company's economic success while remaining uninvolved in religious and cultural practices of the local populations).

6. *See* AGNES, *supra* note 1, at 59 (describing the administrative shift in India from the East India Company to the British Crown).

7. *See* Michael Mann, *"Torchbearers Upon the Path of Progress": Britain's Ideology of a "Moral and Material Progress" in India—An Introductory Essay*, *in* COLONIALISM AS CIVILIZING MISSION: CULTURAL IDEOLOGY IN BRITISH INDIA, *supra* note 5, at 4 (noting Britain's pursuit of a civilizing project in its colonies during the late eighteenth century).

8. *See id.* at 5 (discussing British conquest over Mughal rulers).

9. *See* Himani Bannerji, *Age of Consent and Hegemonic Social Reform*, *in* GENDER AND IMPERIALISM 21, 26 (Clare Midgley ed., 1998) (discussing colonial Britain's projection of an "enlightened" self-identity); *see also* Mann, *supra* note 7, at 5 (describing British justification for the civilizing mission).

10. *See* AGNES, *supra* note 1, at 65 (examining the contradictions between Hindu revivalists and British administrators); Bannerji, *supra* note 9, at 23 (discussing the indigenous male elite's role in Indian social reform and social control).

which had already gathered together groups that, in pre-colonial times, might not have accepted the authority of a monolithic Hindu or Muslim creed.[11] Negotiating those relationships and situations that would be governed by Hindu or Islamic law or would be governed by the secular (though clearly Christian) colonial law was a difficult task throughout the Victorian era.[12] In somewhat simplified terms, both the British interpretation of India as a society driven by religion and their own description of its glorious past compelled the colonial authorities to accommodate traditional/religious laws of the religious communities within their efforts to secularize and "enlighten" Indian society. On the other hand, this glory of the ancient Indian past was utilized by the Indian elite to discourage the logic of the civilizing mission. The civilizing mission was deemed a way of emasculating Indian men by asserting that they were not capable of taking care of their own women.[13]

This tussle over legal and political power between the native elites and the colonialists was fought on the backs of Indian women because it was the alleged degraded position of Indian women and the barbaric actions of Indian men that justified the colonial mission in the first place.[14] This brings into the picture a third group, British feminists, who claimed a moral imperative to reclaim for Indian women the dignity and rights of Western women.[15] Ironically, of course, English women had very few legal rights during the Victorian period, but that merely highlighted the problem of women in

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11. *See* AGNES, *supra* note 1, at 59 (noting that British administrators were restrained from interfering with the personal beliefs and practices of native Indians); *see also* NAIR, *supra* note 1, at 40 (stating that the British attempted to "homogenize and codify theological aspects of Indian law"). *See generally* CHARLES HEIMSATH, INDIAN NATIONALISM AND HINDU SOCIAL REFORM (1964) (providing a traditional history of Hindu reform). It is important to note that Hinduism was the predominant religion in the eighteenth and nineteenth centuries, though a "Hindu is defined as a person domiciled in India who is not a Muslim, Christian, Jew, or Zoroastrian." Malladi Subbama, *The Status of Indian Women—Legal and Customary Aspects*, *in* WOMEN IN INDIA: STUDIES IN THIRD WORLD SOCIETIES 93, 93 (Vinson H. Sutlive & Tomoko Hamada eds., 1996).

12. *See* Bannerji, *supra* note 9, at 23 (recognizing that British reform efforts "meandered along a tortuous path . . . .").

13. *See* NAIR, *supra* note 1, at 35 (explaining the British characterization of Indian men as effeminate and incapable).

14. *See* AGNES, *supra* note 1, at 54 (describing the British goal to rescue Indian women from barbaric family customs); Bannerji, *supra* note 9, at 25 (noting that British reform was initiated in the name of protecting Indian woman and describing Indian women's bodies as "the discursive battleground between indigenous men and a patriarchal colonial state").

15. ANTOINETTE BURTON, BURDENS OF HISTORY: BRITISH FEMINISTS, INDIAN WOMEN, AND IMPERIAL CULTURE, 1865–1915, at 17 (1994) (discussing British feminists' belief that Indian women were their "special imperial burden").

general.[16] British feminists claimed that they, rather than English and Indian men, better understood the plight of Indian women.[17] They claimed that by acquiring legal and political rights at home—particularly the right to vote—they would be able to better protect their native sisters.[18] The condition of the Indian woman, particularly within the home, became the battleground on which the contests of power between Indian and British men and between British men and women were fought.[19]

We argue that one of the post-independence legacies of this complex tussle for power is that even secular laws for women today are either protectionist and patriarchal, or else modern Indian women are not in a position to exercise their legal rights in meaningful ways. Victorian notions of womanhood (chastity, innocence, self-effacement, and passiveness) continue to pervade some laws, and certainly the traditional training of lawmakers and judges in the British legal system allows them to bring their often patriarchal understanding of the historical foundations of these laws to bear as precedents and jurisprudential principles, even when the laws are facially egalitarian.

Because of space limitations, this Article will focus on three contested reforms: (a) law reform in Britain and India around age of consent, prostitution, and sexual agency; (b) law reform in both countries around widow remarriage, widow reversion, and property rights; and (c) rights of abortion in India in an era of female feticide. These examples allow us to explore the linkages between colonial rulers, native elite, and British feminist interests and see how they map onto the body of the Indian woman. In the end, we see that gender reform in India was, and continues to be, motivated by a desire to strengthen elite, patriarchal, and upper-caste political power.

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16. *See* AGNES, *supra* note 1, at 53 (describing the "near subordination of women in Britain").

17. *See* BURTON, *supra* note 15, at 12 (discussing the British feminists' belief that "women, by virtue of their caretaking functions and their role as transmitters of culture, were responsible for the uplift and improvement of the national body politic"); Jane Haggis, *White Women and Colonialism: Toward a Non-recuperative History*, *in* GENDER AND IMPERIALISM, *supra* note 9, at 48 (noting the white woman's belief that she was better able to understand her native sisters than men because of her shared experience of being a woman in a male world).

18. *See* BURTON, *supra* note 15, at 10–19 (discussing British feminists' use of the position of Indian women to bolster the call for female emancipation).

19. *See id.* at 30 ("The Indian woman . . . was the discourse terrain, the playing fields on which Indian men and British feminist women each imagined their own liberation and political self-representation in imperial Britain.").

II. The Colonial Context and Competing Legal Authorities

Histories of pre-colonial India reveal an agrarian society in which very strict, but often diverse, customs developed in the multiple tribes and castes.[20] *Smritis*, or commentaries, that developed over the centuries to govern marriage and family relationships were quite varied, some giving women rights to inherit property, for instance, while others did not.[21] Some tribes, however, were not governed by *Smriti* law, and women's property rights in those communities were governed by customs, some of which were more liberal than *Smriti*-governed laws.[22] The Brahminical-Aryan customs that governed the upper castes of northern India were decidedly anti-woman and patriarchal.[23] Many of the customs governing the lower castes and the Dravidian regions were more liberal towards women mainly because women engaged actively in productive labor.[24] Divorce and remarriage, for instance, were prevalent among the *Lingayats*, *Kapus*, *Jats*, and certain castes among the *Maravars*, *Namosudras*, and *Banias*; remarriage was also permitted by all castes and tribes in the northern parts of Bihar, Orissa, Chota Nagpur, and Assam except the *Brahmins*, *Kayasthas*, *Banias*, and *Rajputs*.[25] Many of these customs were administered by family or caste councils or village *panchayats* that were not affiliated with a centralized state.[26]

There was a great diversity of customs among every caste and subcaste, and only the upper caste women in certain regions were rigidly governed by the heavily patriarchal Sanskritic customs.[27] In the early decades of colonial rule, a complex caste system, an agrarian society with a variety of land rights, a pluralist religious system, and customary laws set India apart from other British colonies.[28] "In North America and the Caribbean non-state legal systems were quickly replaced by state systems which were primarily an extension of the basic political and legal institutions of Britain."[29] But in India, it was difficult

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20. *See* AGNES, *supra* note 1, at 12 (describing the diverse customs, laws, and nonstate legal structures of ancient Indian communities).

21. *Id.* at 12–14.

22. *Id.* at 18.

23. *Id.* at 19–20.

24. *Id.* at 20.

25. *Id.* at 21.

26. *See id.* at 22 (explaining that village *panchayats* administered local customs in pre-colonial India).

27. *Id.* at 19–20.

28. *See* NAIR, *supra* note 1, at 19 (discussing the distinctions between India and the British colonies of North America and the Caribbean).

29. *Id.* at 19.

to understand the pluralist culture enough to devise a governing structure that would incur the least resistance from the native populations.[30] To control the pluralism, the British redefined Indian society along religious and caste lines that had little correspondence to the authorities and norms of power previously accepted by Indian communities.[31]

This precedence to religious identity over other types of community identity had a homogenizing effect for those groups that fell under Hinduism without sharing the religious laws and customs of the *Brahmins* but who were now subsumed under the Hindu label.[32] Having defined India as a society driven by religion and culture, it was thought that imperial reforms would occur more smoothly if religious precepts were incorporated into major aspects of colonial rule.[33] Ironically, however, it was not entirely clear whether the local customs and laws that the British authorities chose to recognize were actually religious in origin or were merely customs that, over time, took on the type of legitimacy that the British came to recognize as religious.[34] In other words, the customs and laws the British recognized were deemed to be religious in part because they recognized and labeled them as such and not as secular.

The codification movement of the 1880s brought the castes and tribes that were traditionally outside the Varna system into the Hindu fold, thereby broadening the scope of the Hindu law, and eventually ousting and replacing customary laws with a canonical Hindu law, at a time when there was no real uniform understanding of the term "Hindu."[35] To keep from being drawn into the Hindu net, Muslim political and religious leaders wanted to consolidate their base by unifying the Muslim community, and one way of doing this was by uniformly enforcing the *Shariat* law to bring about the "Islamization" of the diverse Muslim communities.[36] This process was simpler in the case of the

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30. *See supra* note 12 and accompanying text (noting that the British found it difficult to understand and reform Indian customs).

31. *See* NAIR, *supra* note 1, at 22 ("[W]ith 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 localized and non-scriptural customs.").

32. *See id.* at 41 ("[H]omogenisation was in effect a Brahmanisation of Indian law at the expense of customary law . . . .").

33. *See id.* at 21 ("[R]eligion rather than economics or politics, was considered the prime mover of Indian society throughout history."); *id.* at 40 (stating that the British attempted to "homogenize and codify theological aspects of Indian law").

34. *See* AGNES, *supra* note 1, at 43 ("The customs and laws, which the English administrators had decided to save, were in turn deemed to be religious.").

35. *See id.* at 24–25 (discussing the difficulties in defining the term "Hindu" and in applying that term to diverse communities).

36. *See* NAIR, *supra* note 1, at 27 ("Muslim law was progressively Islamised.").

Muslim community because of the existence of a written code and a text that could be followed as the general law.[37] For those people who fell outside either the Hindu or Muslim construct, colonial authorities imposed predominantly English laws, as in the case of the Married Women's Property Act of 1874, which was applicable to members of the Christian, Parsi, and Jewish communities in India.[38]

The unification and reform of law during this time was arguably a result of the negotiations of the colonialists with the native elites. At a time when new systems of economy and administration were being implemented, these elites wanted to secure for themselves the newly available resources. At the same time, in the context of confrontations between cultures, they wanted to make sure they had a voice in defining what was "Hindu" or "Muslim" or "Indian." This made them co-conspirators in matters of social reform related to women at the same time as they were resisting imperialist efforts to redefine Indian society. Conservative Muslim and Hindu leaders benefited from the British willingness to cede authority in private and family relationships, and power struggles to define the contours of Hindu or Muslim law often resulted in weakening customary rights and pluralist tendencies.[39] The British insisted on greater regularization of procedure and on the creation of state courts that would turn to scriptural sources rather than the varied and often ill-defined customs of different groups.[40] Many customs simply were eliminated within the emerging Anglo-Hindu law because British standards of proof as to their scope and content could not be satisfied.[41] The growing bureaucratization and centralization privileged those native leaders who could claim a position at the center, though not necessarily as allies of the British.

After the Mutiny of 1857, the East India Company's power over India was replaced by the British Crown, which was made the political sovereign by the

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37. *See id.* at 27 (pointing out that the scriptural roots of Muslim law were relatively easy to trace).

38. *See* AGNES, *supra* note 1, at 130 (discussing the application of English law to communities that were not Hindu or Muslim); NAIR, *supra* note 1, at 187 (noting that the Hindu Women's Property Act of 1874 did not apply to Muslims, Buddhists, or Sikhs).

39. *See supra* note 11 and accompanying text (explaining how British interference with Indian law affected traditional customs despite a professed policy of noninterference with religious and personal Indian laws).

40. *See* AGNES, *supra* note 1, at 43 (discussing the Anglicization of Hindu and Muslim scriptures).

41. *See id.* at 52 ("Unless it could be proved that the custom was ancient, certain, obligatory, reasonable and not against public policy, it had a very slim chance of survival."); *cf.* Kolsky, *supra* note 2, at 641–42 (discussing the codification movement's attempt to unify under English law the pluralistic communal law of indigenous India).

Queen's Proclamation of 1858.[42] With sovereignty settled in the British Crown, once again, authority over private family relationships was ceded to local religious authority.[43] Most important, all issues concerning personal matters were deemed to be religious rather than customary, sanctioning the use of scriptural and textual authorities rather than situational or practical authorities.[44] After 1858, the Indian Parliament also passed legislation concerning personal and family matters for those persons not within the monolithic Hindu or Muslim communities—namely Christian immigrants and converts, Jews, and Parsis—which were remarkably similar to those enacted in England.[45] Thus, when divorce was introduced in the 1869 Indian Divorce Act, the grounds were fault-based and premised on an adversarial structure of blame and innocence, which contradicted many of the local customs of marital dissolution by community-based arbitrations.[46] As English family law was imported through legislation as well as through judicial procedures and professional training of lawyers and judges in England, disparities between Hindu and English family law were highlighted.[47] The second half of the nineteenth century, therefore, became a battleground to remold Indian family law within a Western model.[48]

In a new adversarial world, battles between colonial British interests and native elites focused heavily on the status of Indian women and matrimonial rights and obligations.[49] The supposed "barbaric" state of Indian family law, however, was, in large part, a product of the colonial attempts to codify and canonize private family relations and customs.[50] Many supposed "settled infallible principles of Hindu and Muslim family law"[51] were actually recent constructs that arose out of English translations of certain religious texts made

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42. *See* AGNES, *supra* note 1, at 59 ("Queen Victoria . . . restrained [British] administrators from interference in the realm of personal beliefs and practices of the natives . . . .").

43. *Id.*

44. *Id.*

45. *Id.* at 61.

46. *Id.* at 62.

47. *See id.* at 64 (describing the differences between British laws and Hindu and Muslim customs).

48. *See id.* at 65 ("Hindu conjugality became the main battleground for the revivalist struggle for national identity and any reform within personal laws came to be viewed by this faction with extreme hostility.").

49. *See id.* at 64 (discussing the conflict between British interests and native elites).

50. *See id.* (noting that English translations of original Hindu and Muslim texts created legal principles of perceived anti-women biases).

51. *Id.*

more patriarchal through concessions to native elites and religious authorities in the eighteenth and early nineteenth centuries.[52]

The British wanted to bring Western enlightenment to the native Indian family by abolishing child marriages, *sati*, the prohibition of the remarriage of widows, *purdah*, and similar patriarchal customs that oppressed women.[53] And while widows did not throw themselves on their husbands' funeral pyres in Sussex, many of the so-called barbarities of Indian family life were exaggerated constructs that never represented true Indian family relations. It seems the British, in truly British fashion, had set themselves the noble task of reforming the barbaric Indian male, a fictional character that they had, in large part, created.

III. The British Feminist Reform Movement and the Civilizing Mission

British imperialists were not an entirely male species. The imagery of the civilizing mission, especially as it pertained to relieving Indian women of the horrors of their subjugated state, was profoundly attractive to British women who felt that they had some greater authority to speak on behalf of their Indian sisters than British men.[54] But even these altruistic female reformers could not escape their imperialist roots.[55] Antoinette Burton writes on how middle-class British feminists invoked images of Indian women as victims awaiting redress at the hands of imperial saviors in order to further their own claims for suffrage and political rights: "'The Indian Woman,' represented almost invariably as a helpless, degraded victim of religious custom and uncivilized cultural practices, signified a burden for whose sake many white women left Britain and devoted their lives in the empire."[56] British feminists identified themselves with the

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52. *See id.* at 64–65.

> The concern of reformers for changing the status of women became trapped within the binaries of a superior Hindu culture projected by the revivalists and the civilizing project of the British administrators. But the rigid Victorian morality was the parameter set by all factions for determining the status of women.

Id.

53. *See id.* at 205 (explaining that it was commonly believed that colonial intervention was driven by a desire to liberate Indian women from "the barbaric customs of sati, female infanticide and marital rape of infant brides").

54. *See* BURTON, *supra* note 15, at 3 (noting the British feminists' view that they were saviors of the entire world and trumpeters of a "global sisterhood"); *see also supra* note 17 and accompanying text (explaining how British feminists believed they related to Indian women).

55. *See* BURTON, *supra* note 15, at 3 ("[N]otions of universal sisterhood are predicated on the erasure of the history and the effects of contemporary imperialism.").

56. *Id.* at 8.

cause of Indian women and the civilizing mission of the empire, deploying nationalist and imperialist rhetoric to bolster their activist roles within England.[57] The essence of the white feminist burden was that votes for women would enable British women to "relieve Indian women's suffering and 'uplift' their condition."[58]

As British women were advocating in England for civil divorce, married women's property rights, the abolition of the Contagious Diseases Acts, suffrage, and a host of other women's reforms, they would routinely praise the enlightened state of Western law as it related to women because of its stark contrast to the family laws that prevailed in India.[59] These activists certainly could not unpack the socially-constructed nature of the images of the degraded Indian woman and, in many respects, helped to construct those images.[60]

There was an indelible link in the minds of British feminists that if they lost a battle on the Indian front, they would be likely to lose it at home as well. They cautioned against the moral as well as legal contagion coming from the colonies and argued that they were best situated to guard the home front.[61] There was a complex relationship between the British feminists' beliefs about their Christian duty to rescue their downtrodden Indian sisters and their self-interested motives in depicting Indian women as downtrodden to legitimize their own authority to speak at home. This conflict is, of course, also played out in the context of contested notions of Victorian femininity. British feminists were accused of being masculine, shrill viragos who had overstepped their proper natural spheres when they advocated for legal and political reform.[62] But British women used the legitimizing power of the civilizing mission to justify their transgression of these norms. They fought to give Indian women the right to be the proper, passive, and idealized Victorian women that they themselves rejected. The instrumental way in which British women tried to bring to Indian women the protections of Victorian notions of womanhood (as opposed to the sexually degraded image Indian women were

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57. *See id.* at 10 (recognizing that British women wanted to "uplift" Indian women and carry "the white woman's burden").

58. *Id.*

59. *See id.* (noting that British women used the image of Indian women to unite in a number of causes, including "suffrage, repeal, social purity, or a combination thereof").

60. *See id.* at 30 ("The Indian woman and the variety of images attendant upon this characterization was thus largely the invention of middle-class British feminists in an imperial culture.").

61. *See id.* (explaining how the British feminists' pledge to save Indian women was extrapolated into the argument that British feminism was going to save the faltering British empire itself).

62. *See id.* at 18 ("[A]ll feminist women were targeted as unwomanly . . . .").

imagined to portray) undermined their own efforts to reject those constraints as they applied to themselves.

As British feminists acted in paternalistic and protectionist ways, they sought to impose on Indian women precisely the constraints of Victorian femininity that they were fighting at home. Women should not be sex slaves locked up in harems, nor should they be child-brides at ten and widows at fourteen expected to throw themselves on their husbands' funeral pyre. They should instead be respectable middle-class English wives, dedicated to their families, running their homes, and guarding their chastity at all costs.

Any effort to understand legal reform in India must take into account the complex relationships between male colonial authorities and native elites, between male colonial authorities and imperial minded British feminists, and between native elites and British feminists. The political stakes in home-front legislative reform were indelibly tied to reform in India, which was being played out in a kind of complicated four-dimensional chess game. If British women were interfering in Indian law reform because they feared its effects at home, and their rhetoric was recasting the debates to suit their own political agenda, then colonial authorities had to negotiate with that constituency while they also negotiated the power and authority of native elites to define Indian culture. There was a delicate balance between the interests of these three groups that we see played out in a variety of law reforms.

IV. Reforms in Age of Consent Law

One of the legal reforms in India that most clearly followed upon the efforts of British reformers was "age of consent" law—law governing the age at which adolescents can legally consent to sexual intercourse.[63] Nineteenth century age of consent laws in England and India arose in the context of prostitution and child marriage, respectively, which were social issues directly linked to Victorian notions of domesticity and sexual restraint. The different cultural contexts, however, show how a concept as simple as age of consent takes on multiple meanings when different groups are vying for control over sexuality and for the power to define the appropriate contours of the family. In England, prostitution threatened the sanctity of the middle-class home and the Victorian wife's hold on reproduction. In India, the child-bride, an upper-caste phenomenon, brought colonial norms of sexual restraint and family structure into conflict with native claims over the right to define the private realm of the

63. *See* HEIMSATH, *supra* note 11, at 161 (describing the British effort to reform Indian age of consent laws).

family. In the end, however, British women cared most about age of consent, because both prostitution and the child-bride threatened their power to define the parameters of sexual access.

In the summer of 1885, William T. Stead of the *Pall Mall Gazette* published an exposé on the foreign trafficking of women and the entrapment of children into prostitution—one of the most successful pieces of scandal journalism published in nineteenth century Britain.[64] In *The Maiden Tribute of Modern Babylon*, Snead recounted the purchase, for five pounds, of young rural virgins for sale to satisfy the lusts of the decadent aristocratic class.[65] Judith Walkowitz explains:

> The series had an electrifying effect on public opinion: []By the third installment mobs were rioting at the *Pall Mall Gazette* offices . . . . An enormous public demonstration was held in Hyde Park (estimated at 250,000) to demand the passage of legislation raising the age of consent for girls from thirteen to sixteen. Reformers of all shades were represented on the dozen or so demonstration platforms. For one brief moment, feminists and personal-rights advocates joined with Anglican bishops and socialists to protest the aristocratic corruption of young innocents.[66]

The Maiden Tribute was inspired by Josephine Butler, who had been fighting the Contagious Diseases Acts, and Catherine Booth of the Salvation Army.[67] Together they had been unsuccessful in getting Parliament to deal constructively with prostitution.[68] In their reform pamphlets and rhetoric, they focused heavily on the sexual victimization of women, and they were uncomfortable with assertions of female sexual agency.[69] As Walkowitz explains, "[s]hifting the cultural image of the prostitute to the innocent child victim encouraged new, more repressive, political initiatives over sex."[70]

Victorian reformers were consistently conflicted in their attitudes toward female sexuality, and *The Maiden Tribute* provided a broad cultural discourse in which to critique male sexual license, upper class privileges, and the failings

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64. *See* Judith R. Walkowitz, *Male Vice and Female Virtue: Feminism and the Politics of Prostitution in Nineteenth-Century Britain*, *in* POWERS OF DESIRE: THE POLITICS OF SEXUALITY 419, 425 (Ann Snitow, Christine Stansell & Sharon Thompson eds., 1983) (describing W.T. Stead's *The Maiden Tribute of Modern Babylon* and stating that *The Maiden Tribute* "was one of the most successful pieces of scandal journalism published in Britain in the nineteenth century").

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 427.

70. *Id.* at 426.

of an unresponsive Parliament without really addressing women's sexual agency.[71] The exposé mobilized the population behind the issues of "white slavery" and aristocratic license in a way that reformers, lawmakers, and journalists could not have imagined before that summer.[72] Notably, the core of their concern was the male predator, generally the aristocratic male, whose open access to working-class girls was a time-honored prerogative.[73] For many, prostitution was seen as a social disease caused by economic woes among the rural peasantry who became vulnerable to the licentious decadence of the ruling elite.[74] The solution was to raise the age of consent for sexual intercourse from thirteen to sixteen, to reduce the victimization of girls who were believed to have little or no control over their sexual conduct.[75]

There can be no doubt that the uproar over *The Maiden Tribute* played a role in the reform movement in India to change the age of consent there as well. In 1891, an Age of Consent Bill was introduced to raise the age of consent from ten to twelve.[76] The bill was spurred by the publication of a rather heinous case involving the death of a child-bride of ten or eleven who was killed by a brutal

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71. The uproar over *The Maiden Tribute* also

> forced the passage of the Criminal Law Amendment Act of 1885, a particularly nasty and pernicious piece of omnibus legislation. The 1885 act raised the age of consent for girls from thirteen to sixteen, but it also gave police far greater summary jurisdiction over poor working-class women and children—a trend that Butler and her circle had always opposed. Finally, it contained a clause making indecent acts between consenting male adults a crime, thus forming the basis of legal prosecution of male homosexuals in Britain until 1967.

Id. at 427. *See generally* Criminal Law Amendment Act, 1885, 48 & 49 Vict., c. 69 (Eng.).

72. For a discussion of Josephine Butler's efforts to get lawmakers to take seriously the issues of prostitution and the sexual double standard and of the effects of *The Maiden Tribute*'s publication, see Walkowitz, *supra* note 64, at 425.

73. *See id.* at 426.

> The disreputable performance of MPs during the debates over the age of consent confirmed feminists' worst suspicions about "the vicious upper classes." During the debates, old rakes like Cavendish Bentinck treated prostitution as a necessary and inevitable evil, while others openly defended sexual access to working-class girls as a time-honored prerogative of gentlemen.

Id.

74. *The Maiden Tribute*'s focus on the plight of poor rural girls lured into the sex trade corresponded with Josephine Butler's argument that prostitution was not a choice, but rather a necessity. *See generally* JOSEPHINE BUTLER AND THE PROSTITUTION CAMPAIGNS: DISEASES OF THE BODY POLITIC (Emily Sharp & Jane Jordan eds., 2004).

75. *See generally* Criminal Law Amendment Act, 1885, 48 & 49 Vict., c. 69 (Eng.).

76. *See* MEREDITH BORTHWICK, THE CHANGING ROLE OF WOMEN IN BENGAL: 1849–1905, at 126–27 (1984) ("More direct measures were seen to be necessary, and were taken in the Age of Consent Bill of 1891 . . . . The 1890 bill proposed to raise the age of consent from ten to twelve.").

sexual encounter with her thirty-five year old husband, another image of male sexual license run amok.[77] The Age of Consent Bill, however, created strong opposition from the native population because it ultimately interfered with the rights of the native male over his wife.[78]

Because the politics of colonial masculinity had constructed an autonomous sphere for indigenous masculinity—the private sphere of the home and family—colonial rulers were caught between the demands of native males to keep out of the Indian home and the demands of British feminists to save Indian women. To counter the claim that they were interfering in the private realm of the Indian family, the colonial and reform authorities maintained that the Age of Consent Bill was not about age of marriage, but rather about an age at which sexual intercourse is appropriate.[79] Supposedly, the colonial state was not interfering in the autonomous Indian family but was, instead, protecting young girls from sexual acts that could be physically harmful.[80] But as the indigenous populations quickly pointed out, sexual intercourse within marriage is not rape. If the age of consent was raised without changing the age of marriage, the state was introducing the possibility of marital rape within Indian families at a time when England itself did not recognize the crime.[81]

It was not an accident that the debate over age of consent in India formed around the issue of marriage, while in England it formed around prostitution. And clearly, the concern was not for the welfare of the child-bride in India as legislation against child marriage was not passed until 1929, nearly forty years later.[82] The issue that gripped the English imagination was aristocratic male

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77. *Id.* at 128.

78. The issue of age of consent and conjugal rights of a man over his wife were especially pronounced in the *Rakhmabai* (also called *Rukhmabai*) case, which captured the attention of the English. *See, e.g.*, Meera Kosambi, *Gender Reform and Competing State Controls over Women: The* Rakhmabai *Case (1884–1888)*, *in* SOCIAL REFORM, SEXUALITY AND THE STATE 265, 265–289 (Patricia Uberoi ed., 1996) (discussing the *Rakhmabai* case in conjunction with gender reform in India); Nalini Rajan, *Personal Laws and Public Memory*, 40 ECON. & POL. WKLY. 2653, 2654–55 (2005) (discussing the struggle between British colonial rule and Hindu orthodoxy).

79. *See generally* Bannerji, *supra* note 9 (discussing how age of consent laws interfered in the family realm).

80. *See id.* at 25 ("The reforming impulse of the British colonial state in India had little to do with the protection of women and girls, though initiated in their names.").

81. *See* BORTHWICK, *supra* note 76, at 128–29 ("Hindu writers . . . represented the bill as an attempt to introduce 'unholiness' into this sacred bond by allowing the possibility of rape in marriage. It was pointed out that rape within marriage was not recognized under English law.").

82. *See* Sumita Mukerjee, *Using Legislative Assembly for Social Reform: The Sarda Act of 1929*, 26 S. ASIA RES. 219, 219 (2006) ("In 1929, the Legislative Assembly of India . . . passed [the Child Marriage Restraint Act of 1929] making the minimum age of marriage 14 years for girls.").

license, while the underlying issue in India was colonial interference in the sexual relations of a husband and his child-bride.

Age of consent arose in the context of prostitution in England because prostitution threatened efforts to curb sexual excess—a task taken on by Victorian wives, clergy, and middle-class men who equated sexual restraint with moral and civil superiority. These groups generally linked social stability with domestic stability, which they defined as compliance with norms of sexual restraint. Men and women were expected to postpone sexual intimacy until marriage and then to limit it to procreative purposes, overcoming their desires by channeling their energies into other arenas such as: work, church, or charitable endeavors. Child marriage was not considered a problem because the vast majority of couples married in their twenties, and it was the Fleet marriage or elopement that captured the British imagination.[83] Arranged marriages, while not unheard of, were certainly criticized in the literature of the day.[84] It was the prostitute, however, that most threatened the English wife's control over her husband's sexuality.

Most English women accepted the sexual double standard and separate spheres, so marriage for them was not problematic.[85] But everything about Indian child marriage was wrong to Victorian women and men. The brides were too young; the marriages were arranged without regard to the wishes of the woman; and her vulnerability made it unlikely that she would be able to stand up to her older husband if he should demand forced or unnatural sex acts. While Victorians had their own issues with sexuality, pedophilia and rape crossed a line that most felt comfortable drawing, and the Indian child marriage looked an awful lot like both. In many ways, therefore, British men and women simply wanted to protect these young girls from the same kind of sexual license they feared in *The Maiden Tribute*. But that was much more difficult when it came in the form of legitimate marriage and accepted socio-religious customs.

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83. *See* JOHN GILLIS, FOR BETTER, FOR WORSE: BRITISH MARRIAGES, 1600 TO THE PRESENT 111 (1985) (showing that the mean ages of marriage for men and women from 1550 to 1900 ranged between twenty-three and twenty-eight); DAVID LEVINE, FAMILY FORMATION IN AN AGE OF NASCENT CAPITALISM 48 (1977) (finding that in the towns of Shepshed and Bottesford approximately 70% of women were married by the age of twenty-nine); *see also* GILLIS, *supra*, at 90–98 (discussing Fleet marriages, clandestine marriages, and elopements that led to the passage of Lord Hardwick's Marriage Act in 1753).

84. *See* LAWRENCE STONE, THE FAMILY, SEX AND MARRIAGE IN ENGLAND: 1500–1800, at 272, 282–87 (1977) (discussing the trend in all but the highest classes for children to have some say in their marriage partners by the late seventeenth century and the rise in the romantic novel); *id.* at 274–81 (providing a sampling of literature from the seventeenth and eighteenth centuries).

85. *See* Danaya C. Wright, *"Well-Behaved Women Don't Make History": Rethinking English Family, Law, and History*, 19 WIS. WOMEN'S L.J. 211, 234–39 (2004) (discussing the acceptance of the sexual double standard and separate spheres).

By raising the age of consent by a mere two years, from ten to twelve, the colonial authorities appeared to be taking action when, in reality, they did very little to protect young girls. But as with age of consent reforms in England, the law ultimately forced a wedge into the absolute dominion of men over women by asserting that women should not be forced into marriage or sexual relations and should have some say in their domestic lives.

From the perspective of the colonial rulers, interference in Indian family and religious principles was to be avoided so long as those principles did not enrage the British public, as *sati*, child-brides, and polygamy did. They also did not want widows or single women falling on the welfare of the parish or the state because women generally were to be under the dominion of a man. So, as far as the colonial rulers were concerned, they had little to gain and much to lose by interfering too much in the Indian family and marriage. Similarly, native elites had much to gain by retaining control over the Indian family and marriage, particularly by retaining control over women's sexuality and property. Between these two groups of men, therefore, there was little incentive to upset the cultural norms, and it is not surprising, therefore, that it took another forty years before child marriages were outlawed.

British feminists, on the other hand, were deeply concerned about the infection of the British family from diseased prostitutes and sexual promiscuity, controlled in part by the Contagious Diseases Acts and age of consent laws. In order to maintain their own domestic control and status as moral superiors, they needed to enforce Victorian norms of the nuclear family and sexual restraint. They focused on the prostitute at home because it was the prostitute who infected their husbands, who then brought the disease into the sanctity of their English homes. The threat of venereal disease was a constant image in the feminist press of the Victorian period.[86] In India, however, the threat of sexual perversity pervaded marriage itself and gave rise to fears that male expectations about pedophilia and rape would make their way northward to threaten British marriages. The feminists focused in Britain on prostitution and in India on marriages because both threatened the Victorian marriage at home. While neither English men nor Indian men felt a great incentive to interfere with the regulation and examination of prostitutes under the Contagious Diseases Acts, the age of consent for sexual intercourse, or the age of marriage, these laws all threatened to weaken British women's control over the family sphere and the moral boundaries of sexual behavior by infiltrating the sanctity of the British home.

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86. *See generally* E.M. Sigsworth & T.J. Wyke, *A Study of Victorian Prostitution and Venereal Disease*, *in* SUFFER AND BE STILL: WOMEN IN THE VICTORIAN AGE 77 (Martha Vicinus ed., 1972).

V. Widow Remarriage, Reversions, and Dower Reforms

Not surprisingly, marriage has different legal meanings in England and India. In England, once married, a husband and wife would generally take up residence together in their own home and set about their collective life together. Anglo-American law views the married couple as its own independent legal unit, and neither a parent nor a child of the couple has any right to control the assets of the couple. This notion of marriage, that the couple becomes a single legal unit independent of their families, is the basis for the common law doctrine of coverture.[87]

In India, on the other hand, the bride leaves her home and "joins" her husband's family, often moving into a family house that includes her husband's parents, perhaps his brothers and their wives and children, and maybe even a grandparent or collateral relative.[88] Fathers would provide significant dowries on behalf of their daughters as they joined these new families, and this property would be assimilated into the overall assets of the husband's family. Feudal practices long discontinued in Britain, such as the paying of bride-price or *marritagium*, would accompany the transfer of the bride's domicile from the home of her father to that of her husband and his family. An Indian bride, therefore, had virtually no control over the property paid by her family when she married. That property would be controlled by her husband's father, her husband and his brothers, or perhaps even her husband's mother.

These differences in household structure and expectations meant that the power of the widow to control marital assets would be starkly different in the two countries. In England, the widow historically was entitled to a life estate in one-third of all land owned by the couple during the marriage and to the use of all personal property as her dower.[89] Because the couple would have taken up residence apart from the husband's parents, the widow's ability to resist pressure from her husband's parents would be greatly enhanced.

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87. Under coverture, all property brought to the marriage would be owned by the marital unit, though all management and dispository powers would be held by the husband. *See* Wright, *supra* note 85, at 231–34 ("Under coverture, wives' legal identities were merged in that of their husbands. They could not own their own property . . . ."). During the marriage, the husband has ultimate ownership and control of the marital property, and the wife has the legal right to be maintained, as well as a legal or equitable lien on all marital property in the event her husband predeceases her. *Id.*

88. *See* BORTHWICK, *supra* note 76, at 109–14 (discussing girls' fears of leaving home to join their husbands' families); *see also* VANAJA DHROVARAGAN, HINDU WOMEN AND THE POWER OF IDEOLOGY 35–40 (1989) (discussing the Indian joint family).

89. *See* EILEEN SPRING, LAW, LAND AND FAMILY: ARISTOCRATIC INHERITANCE IN ENGLAND, 1300–1800, at 40 (1993) (discussing the dower rights of the widow).

In India, however, the widow would continue to reside in the home of her husband's family, especially if they had children.[90] Her day-to-day life would be unchanged, in large part, because her support would come from the larger familial unit. For wealthy families, the widow's claim on the estate might be large while the actual expenses necessary for covering her support would be comparatively low, creating an obvious incentive to keep the widow joined to her husband's family in order to retain control over the deceased husband's estate. Add to this the unusual situation of the child-widow, an anomaly of the wealthy classes. She was often without children and therefore posed a significant threat to family unity. A cloistered life was the best that many of these child-widows could expect, which served the dual purpose of holding the widow's share of the estate within the household and controlling her sexuality. In the lower classes, on the other hand, where the husband's estate was relatively small or nonexistent and the widow's support comparatively substantial, the customary rules usually encouraged the widow to remarry.[91]

The differences between the Indian joint family and the English independent marital unit made it almost self-evident that the same laws on the widow's property rights would play out very differently in the two countries. The sad irony, however, is that the colonial authorities, under pressure from native elites, simply imported English laws on widow's property into late nineteenth century India to deal with the relatively anomalous condition of the child-widow.

In England, the widow originally was entitled to a life estate in one-third of the real property owned by her husband at any time during their marriage.[92] Because this had the obvious effect of hampering marketability of land (by requiring the wife's noncoerced signature to relinquish her dower rights), lawyers, fathers, and husbands devised numerous techniques to defeat the widow's share.[93] Over time, dower would be replaced with an annuity for support during widowhood, which was eroded to roughly ten percent per year of the property the wife herself brought to the marriage.[94] Thus, it would take

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90. *See* DHROVARAGAN, *supra* note 88, at 91–92 (discussing the loss in status of widows); *see generally* Lucy Carroll, *Law, Custom, and Statutory Social Reform: The Hindu Widows' Remarriage Act of 1856*, *in* WOMEN IN COLONIAL INDIA: ESSAYS ON SURVIVAL, WORK AND THE STATE 3 (J. Krishnamurty ed., 1989).

91. *See* Carroll, *supra* note 90, at 2 ("[T]he lower, particularly Sudra, castes . . . neither practiced child marriage nor prohibited the remarriage of widows.").

92. *See* SPRING, *supra* note 89, at 40–41 (discussing the evolution of the dower right into a firm one-third life estate).

93. *See id.* at 44 (stating that women sued successfully for their dower in English courts).

94. *See id.* at 50–51 ("The final ratio [jointure to portion] of [ten] percent is common . . . .

over ten years of widowhood before a woman would begin to consume any of the property in her husband's estate.[95]

Once the widow's claim upon her husband's estate was dramatically reduced, it became customary to view the husband's obligation to his widow as merely a duty to support her in her widowhood. This shift corresponded with the changing nature of the English family, from a partnership model typical of the artisan classes in which the wife and husband jointly contributed to the family's support, to a dependency model typical of the rising middle classes in which the wife remained at home, focused on child-rearing and domestic maintenance.[96] Notably, in England, the tendency was to encourage the remarriage of the widow because she would generally cease to have any support claims on the property of the first husband, which had descended to their eldest son, the daughters collectively, or in the absence of children, to collateral male relatives on both sides. But despite the technicalities of wills and estates laws, the English widow would usually reside in her own home, have control over at least an annuity if not real property, and remain free to remarry based on affection and desire rather than desperation.[97] For the English widow,

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The [ten] percent ratio thus clearly established before the end of the seventeenth century was to remain the norm all through the eighteenth century.").

95. *See id.* at 51–52.

> A widow would have to outlive her husband for ten years before she would consume her portion. Only after that would she become a charge upon her husband's land, and even then, in what must in normal circumstances be her last few years, she would be a charge far short of dower, for speaking to averages, [ten] percent upon her relatively small portion would be far short of one-third of his income.

Id.

96. *See* Wright, *supra* note 85, at 235 (discussing a change in the conception of the English family).

97. The first decade of civil divorce petitions, filed between 1858 and 1866, showed a somewhat surprising trend with regard to the likelihood of divorced wives to remarry. After civil divorce was made available in 1858, wives had the choice of seeking a judicial separation on the grounds of adultery, desertion, or cruelty (none of which allowed for remarriage), or a full divorce with the right to remarry on the grounds of aggravated adultery (adultery plus desertion, cruelty, or bigamy). Wright, *supra* note 85, at 247. It is notable that half of the young wives (women married five years or less) and half of the oldest wives (women married twenty-five years or more) attempting to end their marriages chose a judicial separation over a full divorce. *Id.* at 280–82. In contrast, women in between (married ten to twenty-five years) were four times more likely to seek a full divorce rather than a judicial separation. *Id.* These statistics may be skewed, however, because many wives might not have had sufficient proof of aggravated adultery to obtain a full divorce and were, therefore, forced to accept a judicial separation instead. This preference for separation over divorce leads to the conclusion that women did not view remarriage as a goal in these proceedings. If they did, they would seek a full divorce (assuming, of course, a woman who chose divorce over separation did so at least in part because it left her the ability to remarry). Admittedly this evidence is not direct evidence of

therefore, the decision to remarry was generally her own, to be made in consideration of the fact that she would often trade her annuity from her deceased husband's estate for the right to support from her new husband. Because she was often comfortable, she was not desperate to remarry, but there were financial implications of her decision.

Because wives in India joined the families of their husbands, the incentives and barriers to remarriage were quite different. As noted above, the young widow, who was often childless, faced a lifetime cloistered in her husband's family, vulnerable to abuse and resentment from those who did not want her but wanted to retain control over the property she brought with her.[98] Two aspects of this situation reveal stark differences between the English and the Indian widow. The first is control over property.

Because the Indian bride joined the family of her husband, her family had to provide dowry to assist them in providing her lifetime support. According to both the *Dayabhaga* and the *Mitakshara* systems of Hindu law, a widow could inherit the entirety of her husband's estate in the absence of a son, a son's son, or a son's son's son, although she only held this property during her lifetime.[99]

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attitudes toward remarriage, but late-Victorian census data confirms that the idea of remarriage was apparently not attractive enough to result in the majority of women moving to successive husbands. *See* W.A. Armstrong, *A Note on the Household Structure in Mid-Nineteenth-Century York in Comparative Perspective*, *in* HOUSEHOLD AND FAMILY IN PAST TIME 205, 208 (Peter Laslett ed., 1972) (finding that nearly 14% of households were headed by widows and an additional 5% were headed by single females, totaling nearly 20%, whereas the combination of households headed by widowers and households headed by single men totaled only 8%). Also, Peter Laslett's data of preindustrial England shows widows and single females heading 14% of households and widowers and single men heading only 7% of households. Peter Laslett, *Mean Household Size in England Since the Sixteenth Century*, *in* HOUSEHOLD AND FAMILY IN PAST TIME, *supra*, at 145. While this data does not identify the number of households in which the widow remarried, there were nearly three times as many widows as widowers. *Id.* Also, as many as 40% of children could expect to be orphaned (loss of at least one parent) before they reached the age of majority. Danaya C. Wright, DeManneville v. DeManneville: *Rethinking the Birth of Custody Law Under Patriarchy*, 17 L. & HIST. REV. 247, 269 n.71 (1999).

98. *See* Carroll, *supra* note 90, at 2.

> Irrevocably, eternally married as a mere child, the death of the husband she had perhaps never known left the wife a widow, an inauspicious being whose sins in a previous life had deprived her of her husband . . . . Doomed to a life of prayer, fasting, and drudgery, unwelcome at the celebrations and auspicious occasions that are so much a part of Hindu family and community life, her lot was scarcely to be envied.

Id.

99. *Id.* at 3; *see also* Karen I. Leonard & John G. Leonard, *Social Reform and Women's Participation in Political Culture: Andhra and Madras*, *in* THE EXTENDED FAMILY: WOMEN AND POLITICAL PARTICIPATION IN INDIA AND PAKISTAN 19, 23–24 (Gail Minault ed., 1989) (discussing the age of marriage—96% by age twenty—and the rate of widowhood).

On her death, in the event of her having no son, property would revert back to the husband's kin.[100] If she were to marry again and take with her the property of her deceased husband, it would mean a loss for the husband's family, or, even worse, if she inherited her husband's coparcenary rights in an undivided property, she might demand a partition.

The second concern was unlicensed sexuality. Young widows in particular were likely to be sexually active, though not always willingly so. The corresponding problems of illegitimate children and infanticide were exacerbated when vulnerable widows were kept within their husbands' families to maintain control over property, but their reproductive abilities could not be controlled and thus threatened caste and lineal purity. In 1837, the Law Commission considered the issue of widow remarriage seriously and concluded:

> [I]nfanticide could be curbed only if widow remarriage was legalized. But after deliberations and considering the then demands for a stable and unopposed rule, the government concluded that, even though such a law was socially highly desirable, passing it would involve going against Hindu strictures and laws of inheritance (*Dayabhaag*) and [was] hence infeasible.[101]

An important factor in the issue of widow remarriage was the supposed belief that Hinduism required an ascetic widowhood.[102] As the colonial authorities insisted on their policy of noninterference in the personal laws of the Hindus, we see that the replacement of customary laws with the "values of orthodox Hinduism,"[103] and the "'Hinduising' of castes and tribes on the fringes of Hinduism"[104] led to the recasting of pragmatic concerns over control of property in religious terms. No longer was the issue one of mundane and materialistic concerns about wealth; rather, the widow's life was to be focused on the spiritual realm where she could worship her dead husband's memory and devote her life to an ascetic existence that conveniently rejected material comforts. The ultimate rejection of her husband's wealth and manifestation of her spiritual existence came when she agreed to be a *sati*.

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100. *See* Carroll, *supra* note 90, at 2–3 (explaining what happened to a widow's property at her death).

101. Indranell Dasgupta & Diganta Mukherjee, *She Could or She Didn't? A Revisionist Analysis of the Failure of the Widow Remarriage Act of 1856*, at 1 (2006) (Ctr. for Research in Econ. Dev. and Int'l Trade, Univ. of Nottingham, CREDIT Research Paper No. 06/01), *available at* http://www.nottingham.ac.uk/economics/credit/research (last visited Feb. 20, 2008) (on file with the Washington and Lee Law Review).

102. *See* Carroll, *supra* note 90, at 2 (remarking on young widowhood).

103. *Id.*

104. *Id.*

The solution to the problem of ascetic widowhood was a compromise that reconciled the reformist concern of widow remarriage and the patriarchal concerns of the loss of familial property.[105] This reconciliation, embedded in the Hindu Widows' Remarriage Act of 1856 was the forfeiture clause (clause 2 of the Act). This clause called for the widow's property, on her remarriage, to be forfeited in favor of the deceased husband's next of kin, just as the law provided in England.[106] Ironically, the solution to the problem of *sati*, the child-widow, illegitimacy, and infanticide was to impose the English law of aristocratic inheritance onto all Indian families, even though most aristocratic English families for centuries had been renegotiating the effects of the common law of inheritance through strict settlements, trusts, and other devices.

The forfeiture provisions of the 1856 Hindu Widows' Remarriage Act of 1856 clearly envisioned a world in which widows deserved support but were not entitled to control marital property. By creating a new law to deal with a problem experienced by a relatively small percentage of upper-caste Hindus, the colonial authorities inadvertently eroded the customary laws of those groups that had generally allowed remarriage. The faint acquaintance of colonial adjudicators with Indian laws and customs, and the ambiguity caused thereby, is clear from the way in which different high courts interpreted the Act. The Allahabad High Court held that the Act did not apply to those communities which, by their customary law, had allowed widow remarriage.[107] This meant that not only could a widow remarry but, in accordance with her customs, retain the property inherited from her deceased husband. However, "the High Courts of Bengal, Bombay and Madras held that [the Act and the forfeiture clause] applied to all Hindu widows, whether or not the validity of their remarriage derived from the Act . . . ."[108] Thus, "outside the jurisdiction of the Allahabad

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105. *See* Prem Chowdhry, *Contesting Claims and Counter-claims: Questions of the Inheritance and Sexuality of Widows in a Colonial State, in* SOCIAL REFORM, SEXUALITY AND THE STATE, *supra* note 78, at 79 ("[T]he British acceptance of forfeiture on grounds of remarriage but not on grounds of unchastity was also tied up with their primary concern about sustaining the stability of rural society in the region . . . .").

106. *See* Carroll, *supra* note 90, at 4.

> All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance . . . shall upon her remarriage cease and determine as if she had then died; and the next heirs to her deceased husband or other persons entitled to the property on her death, shall thereupon succeed to the same.

Id.

107. *See* Chowdhry, *supra* note 105, at 69 ("[T]he Allahabad High Court . . . consistently held that Section 2 of the Hindu Widows' Remarriage Act of 1856 . . . was not applicable to castes where customary law permitted widow remarriage prior to its enactment.").

108. Carroll, *supra* note 90, at 5.

High Court, this humanely-inspired statute was retrogressive in its social effects."[109]

In India, property and sexual control were key aspects of the control of widow remarriage because of the customary (albeit artificially constructed) notion that marriage did not entail a separate entity, but the woman joined the husband's family. Thus, a widow who sought to leave by remarriage and take her property with her threatened to decrease the husband's family's property. In England, the common law historically gave women some (albeit not equal) rights to property subject to the husband's control under the entireties theory of marriage. But after her husband died, the widow was a problem, not just a potential problem, because she regained her independence. In England, the goal was to get women remarried so they would cease to be a burden to their children or their own families. It was no surprise, therefore, that the colonial authorities saw widow remarriage as a benefit and that forfeiture of the widow's claim on her deceased husband's estate was an easy answer. She was always entitled to a right to support and it mattered little whether that support came from an estate or her second husband.

Native elites and the Indian patriarchal power structure were the primary beneficiaries of the Widow Remarriage Act. By ceding authority to define family relations along English lines, the colonial authorities perpetuated the joint family structure and participated in the Hinduization that caused most of the widow problems in the first place. But the solution of forfeiture was not the right answer. Nowhere was the Indian woman's interest in sexual autonomy and control over property protected. And British feminists did not provide the vision and protection they claimed because they accepted the English norm that unattached women—redundant women—were a problem. They felt it was better to be the queen of one's own home than to be a hermit cloistered in the home of one's deceased husband, even if the former meant relinquishing claims to his estate.

VI. Abortion and Female Feticide in Post-Colonial India

Abortion reform in England and India occurred in the late 1960s and early 1970s, but the differences in social context between the two countries again make the comparison of the reforms particularly interesting. In England, abortion had been heavily regulated and restricted within a predominantly Christian ideology that stressed the sanctity of life and the notion that life

109. *Id.* at 24. For an interesting economic analysis of the failure of the Act, see Dasgupta & Mukherjee, *supra* note 101, at 1.

begins at conception. In India, social battles between pro-abortion and anti-abortion advocates never reached the feverish level found in England and America. Thus, when India faced profound population pressures, the move to legalize abortions was virtually unopposed. In India, the abortion debate did not pit women's rights against fetal protections, but rather presented abortion as social policy and population control.

In India, however, when these population pressures created a favorable environment for loosening abortion restrictions, the Indian Parliament simply adopted the same law that had been adopted four years earlier in England.[110] Rather than assess the different needs of the two countries, Indian lawmakers fell back on their colonial past and imported a law created out of a different context to deal with a different set of needs. And not surprisingly, the law has proven unable to deal with the unique situation in India of an ingrained patriarchy that favors male over female children. Consequently, liberal abortion policies have resulted in widespread female feticide—often forced on unwilling mothers by dominant family members who want to avoid the costs associated with female children, with some even believing they are doing girls a favor by relieving them from the fate of growing up in such a patriarchal society. Without any notion of abortion as an element of women's autonomy and control over their own reproductive functions, abortion in India has become a tool that wittingly and unwittingly reproduces colonialism and patriarchy.

Prior to the twentieth century, abortions in England were generally regulated through laws on murder and infanticide, especially when the mother died as a result of the procedure.[111] In 1938, in a widely publicized case involving the rape of a fourteen-year-old girl, therapeutic abortions were accepted both for cases threatening the life of the mother, as well as her mental health.[112] Ultimately, the medical profession became the guardians in determining the indications for medical abortion, and they led the gradual erosion of legal restrictions by finding that numerous physical and mental effects were legitimate medical grounds for performing an abortion.[113] In 1967, therapeutic abortions were legalized by statute, and the grounds for an abortion were liberalized beyond the woman's life and health.[114] The 1967 Abortion

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110. *See infra* note 130 and accompanying text (discussing the Medical Termination of Pregnancy Act of 1971).

111. *See* JOHN KEOWN, ABORTION, DOCTORS AND THE LAW 38 (1988) (stating that doctors of the time found abortion on par with infanticide).

112. *See id.* at 52 (describing how the case changed the perception of abortion in England).

113. *See id.* at 84 (recognizing that legal challenges by doctors brought legal thought and medical thought onto the same page).

114. Abortion Act, 1967, 15 & 16 Eliz. 2, c. 87 (Eng.).

Act provided that no one shall be guilty of an offense relating to termination of a pregnancy when continuation of the pregnancy "would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman, or any existing children of her family, greater than if the pregnancy were terminated."[115] The Act also legalized abortion for eugenic reasons if there is a substantial risk that the child, if born, would suffer from serious physical or mental handicaps.[116]

In 1974, the *Report of the Committee on the Working of the Abortion Act* noted that women at that time were less willing to suffer unhappiness or pain with a spirit of resignation and hopelessness that had often accompanied unwelcome and debilitating child-bearing.[117] Many women preferred to follow careers rather than devote themselves exclusively to family life.[118] Economic pressures, changes in sexual attitudes, and a reluctance passively to accept medical decisions moved society toward greater freedom in procuring abortions.[119] The medical profession resented the intrusion of the law into their professional judgments.[120] Interestingly, the pro-abortion advocacy group, the Abortion Law Reform Association, was formed in 1936, while its counterpart, the Society for the Protection of Unborn Children, was not formed until 1967, when the law was being debated.[121] In general, the Report noted that ideological differences in 1967 focused primarily on the relief of suffering of individuals rather than on the sanctity of life.[122]

Abortion reform in twentieth century England focused on the improved quality of life for women and the appropriateness of medical professionals to make these decisions.[123] Lawmakers were quite aware that women demanded

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115. *Id.* § 1(1)(c).

116. *Id.* § 1(1)(d).

117. *See* COMMITTEE ON THE WORKING OF THE ABORTION ACT, REPORT OF THE COMMITTEE ON THE WORKING OF THE ABORTION ACT, 1974, Cmnd. 5579, at 4 (describing how an unwanted pregnancy harmed the quality of life of the expectant mother and that an abortion could make a broader future of possibilities available to her).

118. *See id.* (acknowledging that British women increasingly favor a career over exclusively raising a family).

119. *See id.* at 5 (asserting that increased numbers of women in the workplace, a shift of sexual intercourse from procreation to recreation in nature, and the woman demanding an abortion against the recommendation of a doctor moved the public opinion in favor of a more liberal abortion policy).

120. *See id.* (noting that doctors in the United Kingdom do not like government regulation of their profession).

121. *Id.* at 7.

122. *Id.* at 6.

123. *See id.* (explaining that doctors believed they were inadequately protected by the law when they aborted a fetus for therapeutic reasons before the Act and that quality of life of

control over their reproductive decisions, and while women were willing to allow doctors to influence that decision, they generally were not willing to have lawyers or judges make that decision.[124] Moreover, the eugenic concerns cannot be understated. In the late twentieth century, with dual career households as the norm, it became increasingly difficult to expect women to sacrifice their careers in order to care for severely handicapped children. But while debates between pro-choice and anti-abortion forces continue unabated today in the West, usually pitting women's rights and autonomy against fetal protections, abortion in India routinely occurs without the least ripple of opposition.

Abortion was not regulated in India during the pre-colonial period.[125] But in the nineteenth century, induced abortion became illegal in India, unless "medically indicated to save the life of a pregnant woman," as governed by the Indian Penal Code and the Code for Criminal Procedure.[126] Anyone who performed the miscarriage with an intent to terminate the pregnancy and without a view to save the life of the pregnant woman was liable for punishment, including the mother herself.[127] However, as in England, illegal abortions were routinely conducted, which had an adverse effect on maternal mortality.[128]

Abortion was legalized in India by the Medical Termination of Pregnancy (MTP) Act of 1971.[129] This Act was a virtual copy of the 1967 English law, giving the same therapeutic and eugenic grounds for an abortion.[130] And the

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women justifies abortion in today's society).

124. *See* KEOWN, *supra* note 111, at 38 (discussing how doctors performed abortions regularly in the United Kingdom despite the possibility of punishment from the legal system).

125. *See* Siddhi Hirve, *Policy and Practice*, SEMINAR 532, Dec. 2003, at 14 (stating that abortion law in India began with nineteenth century British law).

126. *See* Amar Jesani & Aditi Iyer, *Women and Abortion*, 28 ECON. & POL. WKLY. 2591, 2591 (1993) (describing when an abortion could be obtained before the Medical Termination of Pregnancy Act passed).

127. *See* Hirve, *supra* note 125, at 14 (making clear that both the doctor and the mother were criminally liable for an abortion in the United Kingdom during the nineteenth century).

128. Nevedita Menon, *The Impossibility of "Justice": Female Foeticide and the Feminist Discourse on Abortion*, *in* SOCIAL REFORM, SEXUALITY AND THE STATE, *supra* note 78, at 375 (identifying the maternal mortality rate in India as the second highest in the world).

129. *Id.*

130. The MTP Act allows termination of pregnancies under the following conditions: (a) if the continuance of the pregnancy involves a risk to the life of the pregnant woman or a grave injury to her physical or mental health or (b) "there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities to be seriously handicapped." The Medical Termination of Pregnancy Act, 1971, No. 34, Acts of Parliament, 1971 § 3(2)(b), *available at* http://nrcw.nic.in/shared/sublinkimages/25.htm (last visited Feb. 22, 2008) (on file with the Washington and Lee Law Review). Qualifying these conditions, it is added that a pregnancy caused by rape would

law passed with essentially no dissent.[131] There were two main forces behind the move for liberalization of abortion: the demographers who saw abortion as a means of ending unwanted pregnancies and thereby an effective way of controlling the population growth; and the medical fraternity who were concerned with the way illegal abortions conducted by nonqualified and untrained medical professionals under unhygienic conditions had an ill effect on women's health.[132] The primary reason for liberalizing abortion, as cited by the Shantilal Shah Committee, was to put an end to unsafe and illegal abortions taking place in India, but it was quite evident that the government, which cast poverty and other related problems as a function of over-population, was also interested in decreasing the birth-rate.[133] Abortion was seen as another mean that could be employed, alongside the distribution of contraceptives, for controlling population growth.[134]

The parliamentary debates surrounding the MTP bill echoed these concerns of population control and limiting unsafe abortions.[135] On the whole, "there was no serious anti-abortion stream of opinion in India," to challenge the government's claims that abortion was an appropriate method for limiting population.[136] And none of the pro-abortion voices took a stance on the grounds of women's reproductive rights.[137] Thus, in its current form, the MTP Act does not grant women the "right" to abortion but simply permits abortion under certain circumstances, usually as determined by a doctor.[138]

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amount to "grave injury to the mental health" of the woman and hence can be aborted. *Id.* § (3(2)(b) explanation 1. Similarly if the pregnancy is a consequence of the "failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children" it constitutes an injury to the mental health of the woman and can be terminated. *Id.* § 3(2)(b) explanation 2.

131. *See* Menon, *supra* note 128, at 375 (discussing that only two members of parliament (MPs) opposed the bill, both on the ground that aborting the child is equivalent to murder).

132. *See* Jessani & Iyer, *supra* note 126, at 2592 (describing how demographers and doctors, guided by their own interests and beliefs, pushed for the Medical Termination of Pregnancy Act).

133. *See* Menon, *supra* note 128, at 375 (acknowledging that, despite the express language of the report, population control was not the goal of the recommendations, several MPs stated that the real objective of the recommendations was controlling the population).

134. *See id.* (reviewing MP Savitri Shyam's remarks that the family planning program of the government was unsuccessful and that abortion is another method of controlling the population).

135. *See id.* (providing the statements of MPs Savitiri Shyam and J.M. Gowder).

136. *Id.*

137. *See id.* at 383 (declaring that the spirit of the Medical Termination of Pregnancy Act is not rooted in a concern for women's health or individual freedom).

138. *See id.* (noting that the doctor has complete discretion).

Unlike in the Anglo-American West, which acknowledges women's rights to abort for whatever reason, the Indian law gives a privileged position to medical practitioners who "mediate women's access to abortion services" including determining if the pregnancy can be terminated or not. The "overall mindset of the state is to 'control' rather than 'facilitate' abortion services."[139] Generally, where the law facilitates women's autonomy and control over reproductive decisions, statistics show that abortions decline as women become more adept in contraceptive use.[140] But this is not so in India where women have little or no control over the decision to become pregnant or the decision to abort.[141] The Act has contributed little to women's rights.

In 1975, the All India Institute of Medical Sciences developed the method of amniocenteses for determining fetal abnormalities.[142] One result of this test was that the sex of the fetus could be known, which has inadvertently resulted in the abortion of a high percentage of female fetuses.[143] By 1985, the government had issued three circulars making it a penal offense to use prenatal sex determination techniques, but "the ban on the use of this technology in government institutions led to its privatisation and commercialisation."[144] Private sex determination clinics opened all over the country and, as many scholars have noted, even those areas which had a paucity of potable water and electricity had sex determination clinics.[145] People were willing to pay large amounts to know the sex of their fetus and to terminate it if it was female.[146]

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139. Hirve, *supra* note 125, at 16.

140. *See* D. Sundaram, *Development and Population Growth in India: Issues of Women and Fertility for Ideology and Action*, *in* CHANGING STATUS AND ROLE OF WOMEN IN INDIAN SOCIETY 83, 87–89 (C. Chakrapni & S. Vijaya Kumar eds., 1974) (discussing greater declines in fertility once antinatalistic behavior becomes common).

141. *See* RAJESWARI SUNDER RAJAN, THE SCANDAL OF THE STATE: WOMEN, LAW, AND CITIZENSHIP IN POSTCOLONIAL INDIA 183 (2003) (asserting that infanticide of female babies continues to express the misogynist position of Indian society).

142. *See* Menon, *supra* note 128, at 376 (discussing the experimentation leading to the development of testing discovering abnormalities).

143. *See id.* (noting that the majority of people who discovered the fetus was female aborted the fetus); *see also* D.V.N. Reddy, *Amniocentesis: Legal Implications*, *in* CHANGING THE ROLE OF WOMEN IN INDIAN SOCIETY, *supra* note 140, at 127–34 (discussing the movement to regulate amniocentesis because of the predominance of female feticide).

144. Menon, *supra* note 128, at 376.

145. *See id.* (stating that rural areas without basic health vaccines valued the sex selective abortion technology).

146. *See id.* (describing poor workers taking out high interest loans to know the sex of an unborn child).

Sex selection is not a new concern for Indian women.[147] Before independence, it was practiced in the form of female infanticide.[148] Infanticide itself was linked to other forms of violence, which women were subjected to in their later lives.[149] The practice of female infanticide was noted and documented by British officials and, as a result, the practice was outlawed in colonial India by the Infanticide Act of 1870.[150] But as a result of sex determination technology, there has been a growing movement to abolish sex-selective abortions.[151] As a result of rigorous protest, the Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act was passed in 1994.[152] The Act requires the registration of all facilities and equipment that may be used in prenatal sex determination.[153] It focuses on the regulation and control of the techniques used in prenatal sex determination, ostensibly without adversely affecting women's access to abortion.[154]

Despite the seemingly positive legislation, however, the practice of female feticide continues to take place illegally in many regions of the country.[155] Moreover, the implication of the Act, if applied, to the women who have terminated their female fetuses has proved paradoxical.[156] Laws which allow

147. *See* Rita Patel, The Practice of Sex Selective Abortion in India: May You Be the Mother of a Hundred Sons 2 (Jan. 12, 2007), *available at* http://gi.unc.edu/research/ pdf/abortion.pdf ("Although sex selective abortion is a fairly recent phenomena, its roots can be traced back to the age old practice of female infanticide.") (unpublished Master's thesis, University of North Carolina Chapel Hill) (on file with the Washington and Lee Law Review).

148. *Id.*

149. *See id.* (discussing the practice of a widow killing herself at her husband's funeral).

150. In 1871, British India had its first census survey, and it was noted that the ratio of females to males was 940 to 1000. This surprised the colonial authorities because in England and other European countries women outnumbered men. Despite laws outlawing female infanticide, the situation has not changed; in the last census conducted in 2001, the number of females to males was 933 to 1000 across India as a whole. The rural ratio was 946 women to 1000 men, while in urban areas it was 900 to 1000. This deficit, coined as the "missing" women problem, has been exacerbated by the practice of sex selective abortions. *Id.*; Leela Visaria, *The Missing Girls*, SEMINAR 532, Dec. 2003, at 24, *available at* http://www.india-seminar. com/2003/532/532%20leela%20visaria.htm (on file with the Washington and Lee Law Review).

151. *See* Patel, *supra* note 147, at 13 (stating that the feminist demands pressured the Indian government to ban prenatal sex determination in public hospitals).

152. *Id.* at 14.

153. The Pre-Natal Diagnostics Techniques (Regulation and Prevention of Misuse) Act, 1994, No. 57, Acts of Parliament, 1994, *available at* http://nrcw.nic.in/Shared/sublinkimages/78.htm (last visited Feb. 22, 2008) (restating the Act's requirement that facilities and equipment used in prenatal sex determination be registered) (on file with the Washington and Lee Law Review).

154. *Id.*

155. *See* Visaria, *supra* note 150, at 29 (showing that legislation is not succeeding in stopping sex selective abortions).

156. *See* Menon, *supra* note 128, at 378 (pointing out that a law against female feticide is likely to conflict with abortion laws).

abortion cannot prevent female feticide, and those which are designed to prevent feticide can be invoked against the right of abortion itself.[157]

Abortion reforms in India point out the danger of importing laws aimed at solving one country's problem into another country facing very different problems. In England, abortion was primarily an issue about women's quality of life, accompanied by a rise in the domination of the medical profession. But the discourse of women's rights was strongly articulated, and the law in practice has resulted in relative autonomy for women to make reproductive decisions. In India, population pressures and infanticide led to a liberalization of abortion laws, which had quite negative results for women. Pregnant women have very little autonomy under the Indian law, both because of medical control over the decision to abort and the lack of a popular demand by women for reproductive rights. The continuing patriarchal property and family laws, in conjunction with the joint family, leaves many young wives in disempowered positions, susceptible to the pressures of husbands and families to abort female fetuses. In countries that have a strong feminist tradition, the law must accommodate demands by women that they have legally enforceable rights. In countries like India, the same law that could empower women easily became a tool to further control their lives.

VII. British Feminists, Colonial Authorities, and Native Elites Negotiate the Female Body

The history of most gender relevant law reform in India during the colonial period has been a tussle for determining the contours of the public and the private.[158] On the one hand, nationalist politics described the private sphere as a sphere of autonomy for the Indian male, which itself was a product of the colonial construction of the Indian space. On the other hand, the reformist interventions by the colonial state tried to bring into public scrutiny the problems of the private. Many of the reforms that took place in India and expressed through legislation were those that concerned the lives of women in the private sphere but had very little effect on improving women's actual lives. Moreover, internal struggles within England over women's rights to make family and reproductive decisions spilled over into Indian reforms because

157. *See id.* (citing an abortion activist that concedes that the two issues of female feticide and abortion cannot be separated easily).

158. *See* RATNA KAPUR, EROTIC JUSTICE: LAW AND THE NEW POLITICS OF POSTCOLONIALISM 30 (2005) (discussing the implications of the public and private divide over law reforms and sexuality issues).

India was so forcibly present in the British imagination of the pre- and post-colonial periods.

Colonial authorities, native elites, and British feminists were engaged in a struggle over the power to define an authentic Indian tradition and culture as well as the proper parameters of gender within England and India. The Contagious Diseases Acts, age of consent laws, widow reversion, *sati*, and abortion are just a few of the targets of law reform that pitted these groups against each other in the struggle to define the appropriate contours of the private sphere. In no instance did one particular group ultimately control the reform discourse and the outcome of the reform. Each of these groups had to negotiate the interests of the others, learning to frame the reform issues in ways that would resonate with the others. As the colonial authorities were trying to appease the native elite by ceding authority to make laws governing the private sphere, they were pressured by British feminists to interfere and rework the Indian family. And while the British spent a lot of time talking about their civilizing mission, they ultimately did very little, and often what they did accomplish was to undo some of the structures and expectations that they had imposed on the Indian family in the first place. What is most notable, however, is that while British feminists and the colonial authorities were running to the defense of the Indian woman, to protect her from Indian men, they could not see her as an autonomous individual.[159] The entire colonial mission was, in many ways, predicated on righting the wrongs of Indian women, a group never consulted and never viewed as able to construct its own identity.

The age of consent and widow reversion controversies brought the two patriarchal forces, the native elite and the colonial rulers, in a head-on confrontation mainly for political legitimacy in an environment of growing Indian nationalism. And women and their sexuality became the ground for this confrontation. Indeed, the native resistance to the Age of Consent Bill rested on the argument that such regulation of consummation of marriage was a direct interference in the private lives of the natives, and was therefore unwarranted.[160] And while the East India Company authorities certainly had little concern for child-brides or child-widows, after 1858, it would be difficult for the English government to justify its sovereignty over a nation that subjected young girls to such a fate. England's own imperialist justifications

159. *See* BURTON, *supra* note 15, at 31 (explaining different ways the British feminists saw the Indian woman as representing a method of attaining her own freedom and self-representation).

160. *See* KAPUR, *supra* note 158, at 29–36 (describing the controversy over India's cultural norm of early child marriage against the backdrop of India's resistance against Britain's involvement in the "private" sphere of the family).

would crumble as its legitimacy was questioned by women within their home country.

Spurred in great part by a British feminist discourse of civilization and enlightenment that pervaded the mid- and late-nineteenth century English landscape, colonial authorities used the oppression of women that existed within the religious codes and customary laws to legitimize their nationalist and imperialist mission.[161] Thus, gender discourse became the subject of colonial reform before Indian women even rallied to demand rights or before a women's movement was really born.[162] To a certain extent, therefore, the legitimizing power of the gender discourse to the colonial mission ultimately led British authorities to co-opt women's rights discourse to serve their own ends. Not surprisingly, the outcomes benefited British interests and not Indian women's interests. Even after Indian independence, the interplay of the gendered and religious legacies of colonial rule have defined the legal landscape of the women's reform movement both in secular and religious spheres, creating a space for certain reforms to progress relatively rapidly while other reforms, primarily in the sphere of domestic and familial relationships, remain embedded in an artificial and patriarchal discourse of a pre-colonial Indian identity that never really existed.

Throughout these reforms, Victorian notions of womanhood and domesticity guided the discourse on family law and gender. And while the civilizing mission articulated the goal of emancipating Indian women from their degraded status, the ultimate beneficiaries were English women and their households. As British feminists sought to give Indian women a kind of idealized domestic femininity and power, they did so in order to break those bonds for themselves. While they applauded the middle-class ideals of sexual restraint, domesticity, and Victorian womanhood, they demanded political power and public legitimacy for themselves.

Finally, while the British were busy trying to redefine the pluralist Indian culture into a hegemonic religious one, they were also busy trying to redefine the religious private sphere in secular terms. This contradiction in the colonial mission has lead to a modern India in which Hindu, Muslim, and Christian women experience profound differences in legal rights and political agency. The British willingness to cede authority in the private realm calls into question their commitment to human rights and women's interests.

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161. *See id.* at 29 (providing examples of feminist writings that justified Britain's imperialism).

162. *See id.* at 30 (giving examples of how these same feminist arguments continue to be used today in feminist rhetoric).

The abortion reforms show just how great the colonial influence has been on post-colonial India and the problems inherent in once again using women's bodies to negotiate political ends. Until recently, India has lacked a strong feminist tradition to demand that laws affecting women's lives actually take into consideration women's interests. Even today, the legacy of that absence is that patriarchal and nationalist concerns trump claims for women's rights. Abortion reform in England, that was primarily rights-based, is not without controversy. But the reform in India, that was socialist and nationalist at heart, resulted in women's autonomy being denied and women's interests being subsumed into the greater goal of imagining a modern India that somehow retains its traditional character.

Even today, most judges and Indian lawmakers are trained in England, in a legal model that does not have the flexibility to deal with the pluralist traditions of modern India nor with the colonial legacy that remains embedded in the Indian state. As they rely on narrowly-defined legal principles and procedures, garnered from their ultimately secular past, their narrow views of evidence and civil procedure result in differential treatment for different women victimized by Indian men, Indian culture, and a hegemonic legal system that does not recognize their rights. What rights do exist within the secular Indian state are largely unexercised by Indian women because of religious and cultural norms that were historically constructed and artificially imposed. In the end, Indian women will not be able to rise above these conditions until their feminist groups understand the inherent patriarchal and colonial underpinnings of many of their gender-based laws.