

## The Colonial Legacy: Law and Women's Rights in India

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### Abstract

In the relationship between England in the nineteenth century and colonial India, it was challenging to strike a balance between all of the organizations that professed an interest on the financial and ethical advancement of the colonists. Close to India became governed by the English Monarchy in 1858, and its future became inextricably tied to England's, but India has its own unique past. Its culture ensured that many of the constitutional changes the colonists aspired for adoption proved to be successful distinct from what they had expected. This article examines three aspects of Indian law reform. Women's rights modifications that closely resembled changes to English legislation Laws regulating the legal consent age, widow's inheritance laws, and abortion bills changes. In the second half of the nineteenth century, the first two took place, and the final quarter of the 20th century after the declaration of independence, but the changes in Colonial dominance was still apparent in abortion law. We look for ways where the colonial affects that persist notwithstanding the loss in formal independence. Patriarchal principles were instilled into the changes in law by native aristocratic men and British women. We particularly contend that the practice of accepting. English law dealt with special Indian situations. Due to India's varied culture and history, multiple modifications have been under take neither supported British goals or worked against Indian women's interests. By studying how British feminists interact, this piece provides novel perspectives and stakeholders in law reform attempts.

**Keywords:** Colonial legacy, women's rights, laws, legal authorities.

## Introduction

The religious, cultural, and economic environment of pre-colonial India was diverse and divided, with no one Hindu, Muslim, or Christian authority<sup>1</sup>. Many classes, groups, tribes, and family units crossed spiritual and governmental boundaries to form a variety of groups that might have had a clear sense of power but no matching sense of legitimacy<sup>2</sup>. Because so much of the law at the time was custom or established by separate communities, foreigners at times believed that the earlier India lacked law<sup>3</sup>. It made sense for the East India Company to create an entirely novel political and legal framework for its newly established territories when it obtained the power to impose tax in Bihar, Orissa, and Bengal in 1764<sup>4</sup>. British colonial rule of India began with the Eastern Asia Company, a quasi-private corporation, political play to enjoy the rewards of imperialism without establishing an entirely functioning sovereign government<sup>5</sup>.

### 1.1. The British Colonial Background and Incompatible Law Authorities:

Colonial governance underwent an important shift in 1858, as the monarchy acquired official sovereignty in lieu of the company<sup>6</sup>. Colonial rule centered primarily on an idea of the civilizing mission throughout the Victorian period, in addition to regards to the Indian and British

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<sup>1</sup>See Flavia Agnes, *Law and Gender Inequality: The Polemics 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 Affects On Women In Colonial India, See Generally Janaki Nair, *Women And Law In Colonial India: A Social History* (2000).

<sup>2</sup>See Nair, *supra* note 1, at 22 (Scholars contended that while there was a clear definition of "authority," there was no equivalent concept of "legality"); see also Elizabeth Kolsky, *Codification and the Rule of Colonial Difference: Criminal Procedure in British India*, 23 *L. & History. Rev.* 631, 652 (2005) (pointing out that some British reformers had said that India was "a land utterly bereft of law").

<sup>3</sup>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).

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

<sup>5</sup>See Jana Tschurenv, *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).

<sup>6</sup>See Agnes; *supra* note 1, at 59 (describing the administrative shift in India from the East India Company to the British Crown).

cultures<sup>7</sup>. The firm sought to establish credibility inside India by claiming victory over and replacement the previous Imperial monarchs, who had provided aristocratic authority through inheritance<sup>8</sup>.

The English populace obtained credibility within own nation through embarking on the self-declared task of "civilizing". The locals accomplished this through enacting policies that reflected the astute attitude of the British, the forerunners of growth, and contemporary times<sup>9</sup>.

Following the handover of authority to the English Queen in 1859, the British colonial authorities and the masculine elite of Hindustan fought for political and judicial legitimacy<sup>10</sup>. The canonical and/or customary laws of the predominant faiths, that already brought jointly groups who, in early colonial times, although they might not have embraced the legitimacy of a strong Hindu or Muslim religion, they often held influence in family law problems from the colonial governors during the currents of government discussions<sup>11</sup>. Throughout the period known as Victorian times, it was challenging to negotiate those connections and circumstances that were going to be regulated by Hindu or Islamic law or under democratic colonial law<sup>12</sup>.

In somewhat simplified phrases, the colonial rulers were forced to respect traditional/religious laws of communities of faith in their attempts to secularize and "enlighten" Indian society

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<sup>7</sup>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).

<sup>8</sup>See id. at 5 (examining the British victory over Mughal rulers).

<sup>9</sup>See Himani Bannerji, *Age of Consent and Hegemonic Social Reform*, in *gender and imperialism* 21, 26 (Clare Midgley ed., 1998) (examining the portrayal of "enlightened" self-identity by colonial Britain); see also Mann; supra note 7, at 5 (summarizing the civilizing mission's British rationale).

<sup>10</sup>See Agnes, supra note 1, at 65 (investigating the conflicts between British authorities and Hindu revivalists); Bannerji, supra note 9, at 23 (examining the role of the indigenous male elite in Indian social control and change).

<sup>11</sup>See Agnes, supra note 1, at 59 (stressing that British officials were forbidden from influencing native Indians' personal beliefs and behaviors); see also NAMR, supra note 1, at 40 (By claiming that they tried to "homogenize and codify theological aspects of Indian law," the British). See generally Charles heimsath, *Indian nationalism and Hindu social reform* (1964) (providing a traditional history of Hindu reform). It is significant to remember that during the eighteenth and nineteenth centuries, Hinduism was the most common religion, even if a "Hindu is defined as a person domiciled in India who is not a Muslim, Christian, Jew, or Zoroastrian." *The Status of Indian Women-Legal and Customary Aspects* by Malladi Subbama is published in *Women in India: Studies in Third World Societies* on pages 93 and 93. (Vinson H. Sutlive & Tomoko Hamada eds., 1996).

<sup>12</sup>See Bannerji; supra note 9, at 23 (acknowledging that British reform initiatives "meandered down a convoluted route").

because the British believed that India was a society-driven country by religion as well as their own account of the country's glorious past. On the flip side, the Indian elites exploited this splendor of their ancient history to attack the justification for the civilizing mission. It was believed that the civilizing mission served as a way of reducing Indian males by saying because they were incapable or unable to care for their own women<sup>13</sup>. Because the British enterprise was first defended due to the purported inferior status of Indian women and the barbarous conduct of Indian men, the power struggle among the native elite and the colonialists was waged on their behalf of Indian women<sup>14</sup>. This pertains into foreground an additional set of British feminists, who asserted an ethical duty to uphold the worth and liberties of Western women for Indian women<sup>15</sup>. After course, it's paradoxical that all through the Victorian era, English women had very few legal rights, but that just served to highlight the problem with women throughout the world<sup>16</sup>. British feminists maintained they knew the suffering of Indian women better than English or Indian males<sup>17</sup>. They reasoned that if they attained legal and political rights back home, particularly the ability to vote, they would be better equipped to defend their native sisters<sup>18</sup>. The standing of the Indian lady in relationships with both British men and women as well as with Indian and British men, especially in the family, became the playing field on which power contests waged on<sup>19</sup>.

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<sup>13</sup>See Nair, supra note 1, at 35 (a justification for the British perception of Indian males as effeminate and incompetent).

<sup>14</sup>See Agnes, supra note 1, at 54 (portraying British efforts to save Indian women from their brutal familial traditions); Banerji, supra note 9, at 25 (stating that British reform was started in order to safeguard Indian women and referring to the bodies of Indian women as "the discursive battleground between indigenous men and a patriarchal colonial state").

<sup>15</sup>Antoinette Burton, *Burdens of History: British Feminists, Indian Women, And Imperial Culture, 1865-1915*, at 17 (1994) (criticizing the idea that Indian women were a "special imperial burden" for British feminists").

<sup>16</sup>See Agnes; supra note 1, at 53 (describing the "near subordination of women in Britain").

<sup>17</sup>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).

<sup>18</sup>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).

<sup>19</sup>See *id.* at 30 ("Indian males and British feminist women both envisaged their own liberty and political self-representation in imperial Britain on the playing fields provided by the Indian woman").

## 1.2. The Beginnings and Responsibility Law Reforms:

Histories of India prior to colonization show an agricultural society in which multiple tribes and castes established highly strict yet diverse customs<sup>20</sup>. The smites, or feedback, that evolved all through the years to govern marriage and family ties were strongly diverse; some, for example, granted women the ability to acquire property, whereas others did not<sup>21</sup>. However, certain tribes weren't adhering to law, and in these cultures, women's rights to property were controlled by conventions, a few of which were kinder than Smriti-dominated rules and regulations<sup>22</sup>. The most powerful caste of the northern region of India was enslaved by Brahmin-Aryan standards that were blatantly oppressive and anti-woman<sup>23</sup>. As more women engaged in productive work, many of the customs governing the lower castes became more accepting of women<sup>24</sup>. Remarriage was also permitted by all castes and tribes in the northern regions by the exception of the Banias, Brahmins, and Kayasthas. For example, separation and divorce were common among the other castes among the Banias, Maravars, and Namosudras<sup>25</sup>. Families, caste, or local panchayat committees, which were not part of a central state, handled many these kinds of celebrations<sup>26</sup>.

Each caste and sub caste had an extensive range of traditions, and only higher-caste women in some areas were strictly ruled through the highly masculine Sanskrit traditions<sup>27</sup>. In the early years of British colonial authority, India was distinguished from other colonies by a democratic religious system and customs<sup>28</sup>. Non-state juridical structures were quickly superseded with state systems in the Americas and the Caribbean that are largely a result of the basic political and legal

<sup>20</sup>See Agnes; supra note 1, at 12 (outlining the many practices, rules, and no state legal frameworks of ancient Indian groups).

<sup>21</sup>Id. at 12-14.

<sup>22</sup>Id. at 18.

<sup>23</sup>Id. at 19-20.

<sup>24</sup>Id. at 20.

<sup>25</sup>Id. at 21.

<sup>26</sup>See id. at 22 (describing how village panchayats in pre-colonial India managed local traditions).

<sup>27</sup>Id. at 19-20.

<sup>28</sup>See Nair, supra note 1, at 19 (comparing and contrasting India with the former British possessions in North America and the Caribbean).

institutions of England<sup>29</sup>. To understand a pluralistic society well enough to design a governmental system that would meet with the least amount of resistance among the indigenous people<sup>30</sup>. The British rebuilt Indian society on faith and class lines, which had absolutely nothing in do the status and norms concerning power that Indian societies once accepted, in order to regulate the multiplication<sup>31</sup>.

The Brahmins penchant for religious identification over other types of social identity had the effect of homogenizing those Hindu adherent groups who did not share their immigration or religious practices<sup>32</sup>. It was argued that if religious principles were infused into important aspects of colonial rule, imperial reforms would proceed more easily because India was regarded as an empire motivated by religion and culture<sup>33</sup>. Interestingly, it was unclear if the local laws & practices which the British government decided to acknowledge were truly religious in origin or simply agreements that, via time, take on the kind of justification that the British later came to define as catholic<sup>34</sup>.

At an era when there was not truly a common understanding of the term "Hindu," the codification movement that occurred in the 1880s encompassed tribes and castes which before weren't covered by the Varna system, so expanding the scope of Hindu law and eventually replacing traditional rules with a canonical Hindu law<sup>35</sup>. Muslim politicians and prophets sought to strengthen their base of support by uniting the Muslim community so as to avoid straying under the Hindu net. One way to achieve this was by generally using the sharia law in order to make it "Islamic" various Muslim pairs<sup>36</sup>.

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<sup>29</sup>Id. at 19.

<sup>30</sup>See supra note 12 and accompanying text (emphasizing that it was challenging for the British to comprehend and change Indian traditions).

<sup>31</sup>See Nair, supra note 1, at 22 ("With the help of British power, Hindu law was able to establish its dominance over sizable segments of society that had previously been unaware of it or had long practiced their own, more regionalized, non-scriptural norms").

<sup>32</sup>See id. at 41 ("At the cost of customary law, homogenization was essentially a Brahmanization of Indian law").

<sup>33</sup>See id. at 21 ("History has seen religion as the main force driving Indian society, not economy or politics"); id. at 40 (By claiming that they tried to "homogenize and codify theological aspects of Indian law", the British).

<sup>34</sup>See Agnes, supra note 1, at 43 ("The English governors' choice to preserve some practices and regulations was interpreted as being religious").

<sup>35</sup>See id. at 24-25 (examining the challenges of defining "Hindu" and using it to describe a variety of groups).

<sup>36</sup>See Nair, supra note 1, at 27 ("Islamic law gradually replaced Muslim law").

The focus of the study at hand is doctrine. Accessibility has been made easier to the research's data sources. Information has been collected from a variety of evaluation papers, articles, books, and magazines that have been published so far on another related topic. This study covers review of a few Supreme Court and High Court assessments, and from which key information has been derived afterwards combined.

## Case study

### Female feticide and abortion in India after independence:

However, when the same population growth in India made it feasible to loosen prohibitions on abortion, the Indian Parliament simply enacted an identical legislation that had been passed in Britain four years earlier<sup>37</sup>.

Indian parliamentarians reverted back to their colonial heritage and exported a law created in another setting that addressed an independent set of requirements after assessing the distinct needs of the two nations at the time<sup>38</sup>. Naturally, the legislation has demonstrated it incapable of dealing with the specific situation in India wherein an established discrimination based on benefits male over female offspring. Liberal abortion laws have thus led to common female feticide, which is frequently committed by powerful relatives who desire to avoid the expenses associated with raising female children<sup>39</sup>. Some of these people may believe that by protecting girls to the fate of growing up in such a male-dominated environment, that they are doing them something beneficial. Abortion in India has evolved into a tool that both intentionally and unintentionally perpetuates patriarchy and colonialism since it is no more seen as an essential part of women's power and influence over their own reproductive health<sup>40</sup>.

In England before the 20th century, pregnancies were frequently governed by rules preventing murder and other violent crimes, particularly if the mother passed away unexpectedly as a result

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<sup>37</sup>Id. at 24. For an interesting economic analysis of the failure of the Act, see Dasgupta & Mukherjee, *supra* note 101, at 1

<sup>38</sup>See *infra* note 130 and accompanying text (discussing the Medical Termination of Pregnancy Act of 1971).

<sup>39</sup>See John Keown, *Abortion, Doctors and the Law* 38 (1988) (stating that doctors of the time found abortion on par with infanticide).

<sup>40</sup>See *id.* at 52 (describing how the case changed the perception of abortion in England).

of the operation. Following the widespread publicity following the 1937 rape of a fourteen-year-old girl, therapeutic abortion was legal when the mother's life or psychological condition was in jeopardy<sup>41</sup>.

### **The study by a Committee Concerning the Abortion Act's Procedures:**

Based on the 1973 Report of the Committee on the Implementation of the Abortion Act, women were less likely to undergo an abortion at that time to endure agony or distress in the mood of despair and despair that had frequently followed unwanted and debilitating childbearing<sup>42</sup>. Many women opted to get jobs rather than focus merely on raising families<sup>43</sup>. Society is moving towards greater freedom in obtaining abortion as a result of economic limitations, changes in social views, and an objection to passively accepting medical conclusions<sup>44</sup>. The legal invasion into the medical society's professional judgments was opposed by the medical community<sup>45</sup>. It's interesting to note that although the Society for the Safety of Unborn Children, an organization opposed to abortion<sup>46</sup>, was founded in 1965, the Abortion Law Reform Association, a pro-abortion advocacy group, was established in 1945<sup>47</sup>. In general, the findings of the report concluded that ideological differences in 1968 were associated more with relieving personal suffering than with supporting the innocence of life<sup>48</sup>.

### **British feminists discuss the female embodiment alongside colony authorities and native elites:**

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<sup>41</sup>See *id.* at 84 (recognizing that legal challenges by doctors brought legal thought and medical thought onto the same page).

<sup>42</sup>See *Id.* at 1(1)(c).

<sup>43</sup>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 (detailing how the expecting mother's quality of life was impacted by an unplanned pregnancy and how an abortion would open her more options for her in the future.).

<sup>44</sup>See *id.* (Noting that British women are growing more interested in pursuing careers than only raising families).

<sup>45</sup>See *id.* at 5 (claiming that the rise of women in the workforce, the shift in sexual activity from reproduction to outdoor leisure, and a woman's demand for an abortion despite a doctor's advice influenced public opinion in favor of a more liberal abortion policy).

<sup>46</sup>See *id.* (There is nothing about government control of their profession that British physicians dislike).

<sup>47</sup>*Id.* at 7.

<sup>48</sup>*Id.* at 6.



The majority of gender-related legislation developments in colonial India focused on defining the lines between the public and the private spheres<sup>49</sup>.

Although the British discourse extensively about their initiatives to civilize India, they truly accomplished very little, undoing many of the frameworks and demands that they had initially set for the Indian family. Perhaps is most important, nevertheless, is that despite British feminists and colonial leaders protecting the Indian woman from Indian males, they were incapable to understand her really a person of independence<sup>50</sup>. In an environment of growing Indian nationalism, the era of consenting and widows revert issues pitted the two patriarchal The local aristocracy and the British rulers were directly at odds with each other in a conflict for political legitimacy. And the beginning of that clash was the sexuality of women. The innate hostility to the Age of Capacity is real. The foundation of the legislation was the claim that such oversight over marital fullness constituted an unnecessary disruption in personal concerns<sup>51</sup>.

Due partially to the British feminist commentary on society that dominated the native English surroundings by the mid- and late twentieth century, colonial rulers utilized the enslavement of women that existed within the religious code and customary laws to justify their nationalistic as well as imperialism mission<sup>52</sup>.

## Conclusion

To preserve the upper class, male-dominated, and aristocracy influence in politics, women's reform began in India. Colonial officials ran the risk of losing a lot of their gains by meddling in Indian marriages and family affairs. Similar advantages accrued to local elites by maintaining custody of houses and women. Since none of these two types of men had any incentive to defy societal norms, it shouldn't have been surprising that it took another 45 years after when the

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<sup>49</sup>See Ratna Kapur, *Erotic Justice: Law And The New Politics Of Post colonialism* 30 (2005) (discussing the implications of the public and private divide over law reforms and sexuality issues)

<sup>50</sup>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).

<sup>51</sup>See Kapur; *supra* note 158, at 29-36 (explaining the debate around the cultural practice of early child marriage in India against the backdrop of that country's opposition to British interference in the "private" realm of the family).

<sup>52</sup>See *id.* at 29 (citing instances of feminist works that supported British Empire).

coming of age the law was enacted to allow kids to be married legally. It became clear at the beginning of the eighteenth century that the British Empire was more interested in helping Indians in organizing itself than in liberating women from Indian patriarchies. Modernism often runs towards to customs; however feminists as well as recent historical study disagree with this viewpoint. Feminists contend that the 'conventional' race system was all that was needed for preserving the old modernization thesis in the Indian setting. It is obvious from the discussion of all the legal changes above that improving the standing of women in society has never been the main goal of any conversation. Instead, every discourse was the outcome of the conflict between colonizers and native elites. As a result, colonial laws failed to enhance the status of women or Indian views on women. But there have been specific developments, including the entry of middle-class women into the employment market. She started advocating her rights and criticizing the Indian patriarchy around the dawn of the century to come.