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Women Education in Bengal: A case study of Women's rights and growth of personal law

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ABSTRACT
The present study is an attempt to explore the question of Women's rights and growth of personal laws in Bengal. The most important think of this article are transformation of power, traditional rights under British rule and remoulding of Hindu and Muslim family laws of women in Bengal.

1. Introduction

Prior to the British rule Indian society is governed by Hindu, Muslim legal systems. After the British this system is change largely. More importantly codification of laws and enactment of some other laws as Kazi Act, 1881 throws light on the initiatives of colonial masters with regard to development of laws. It has been proved that as far as personal laws are concerned, Britishers left them untouched but decisions of the courts influenced them. Present Indian society is the inheritor of three different and distinct legal systems - Hindu, Muslim and British. The personal laws of Hindus and Muslims find their source and authority in their religious ancient texts. Since ancient time religion regulated almost every aspect of human life both public and personal. Religion was the guiding force behind all laws including personal matters as well as crime, evidence, procedure, contract, trade and commerce. The area of applicability of laws has been reduced, and is only confined to such aspects of life as marriage, dissolution of marriage, maintenance, minority, guardianship, adoption, succession and inheritance. These personal laws were considered immutable and beyond the legislative jurisdiction. From a historical perspective, many areas of Hindu law and Muslim laws have remained unaffected by centuries of political Historical Background of Personal Laws vicissitudes and socio-economic upheavals. Doubts have been expressed as to whether or not personal laws are protected under the religious freedom guaranteed by the Indian constitution. In this chapter an attempt has been made to examine the historical background of the application of the personal laws in India and their immunity from the purview of state legislations. This chapter deals with the constitutional, legislative and judicial attitudes of the problem.

2. Transformation of power and codification of personal laws

After the political upheaval of 1857, when the administration of India shifted from the Company to the British Crown, a reassurance of non-interference in religious beliefs and practices became imperative. In her historic proclamation, Queen Victoria promised equal protection of the law for all religions and restrained the administrators from interference in the realm of personal beliefs and practices of the natives by declaring: *We do strictly charge and enjoin all those who may be in authority under us that they abstain from all interference with the religious belief or worship of any subjects on pain of our highest displeasure.*[1] Since the British administrators had already concluded that practices governing family relationships are '*religious*' this proclamation could be construed to protect the family laws from any interference by the administrators.

The Government of India Act of 1858 transformed every aspect of the Indian administration. As part of this process, the legal structure also went through a major change. The Supreme Courts in the Presidency towns of Calcutta, Bombay and Madras which were set up in the preceding century during the Company rule and which operated with relative autonomy were replaced by an integrated system of High Courts with Privy Council as the final Court of Appeal. The residencies lost their autonomy and were joined into a unified imperial rule. The features of the administration as developed in Bengal were made the basis for new forms of unified administration for all the three Presidencies. The Bombay Presidency's treatment of selfgoverning groups and its acceptance of customary laws gave way to the Bengal practice of viewing all groups as possessing of a unified Hindu and Muslim legal entity.[2]

While the realm of the *personal* was largely left untouched as per the proclamation, the new legal structure based on the model of the English courts necessitated the enactment of statutes to regulate the *public domain*. The extent of codification can be gauged by the fact that under Henry Maine, member of Governor General's Legislative Council, from 1861 to 1869, 211 enactments were formulated; out of which 30 were major.[3]

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The cornerstones of this new legal edifice were the Indian Penal Code and the Indian Contract Act which facilitated smooth administration by laying down uniform laws regulating crime and punishment and commercial transactions. These two statutes formed the core of the criminal (penal) and civil (economic) legal principles in India. The Indian Penal Code of (1860) (along with the Indian Evidence Act of 1872 and the Criminal Procedure Act of 1898) replaced the Islamic criminal system. The Indian Contract Act of 1860 (along with the Specific Relief Act of 1877, the Negotiable Instruments Act of 1881 and the Transfer of Property Act of 1882) laid down uniform laws to facilitate smooth economic transaction for the capitalist economy of the corporate world.[4]

The Hindu notion of *dharma* differed a great deal from the British notion of law and justice. The term *dharma* was broad and inclusive and could be applied to all aspects of life.

Manu's categorization of 18 heads of law included both civil and criminal issues. The Islamic law also dealt with civil and criminal aspects. But the process of legislation adopted by the British was selective and affected only some aspects of civil and criminal law while a large area which was termed as *religious* was left out of its purview, to be regulated by the *natives* as per their religious doctrines. But the categorization of matters to be dealt with under personal laws was fluid and was determined by the needs of the rising colonial empire. For instance, the initial charters had listed *contract* as an issue left for application of customary law. But since contract was essential to the foundation of a capitalist economy, it was taken out of the realm of 'religious' personal laws and was legislated upon. By treating only some aspects of these laws as religious, the British jurists were applying to them the Roman categorization of ecclesiastical and temporal (Canon and Civil) laws. Further all issues concerning personal matters were deemed religious rather than customary. Over a period, the terms religious laws and personal laws were used as synonymous and interchangeable.[5]

The First Law Commission's recommendation to codify personal laws was rejected on the ground that these laws are religious and since British legislature cannot regulate Mohammedan or Hindu religion, it also cannot (or shall not) legislate for Mohammedans or Hindus.

But ironically, the new judicial system also provided an insidious backdoor entry for tinkering with and shaping every aspect of the so-called religious personal laws under the imperial rule. Under the new system of adjudication, case law or judicial interpretation of legal principles became an important new source of law entrusted with greater validity and binding force than the scriptures themselves. Through this source, inroads were made into the realm of personal laws. The Indian Law Reports Act of 1875 strengthened the already established practice of relying upon the rulings of other collateral or superior courts. By the end of the nineteenth century, the realm of uncodified 'personal law' was reduced primarily to case law reported in law journals.[6]The extent to which women's rights were subverted through this process makes an interesting study.

3. Traditional rights vs British legal rights of women

The establishment of courts based on the procedures of the English courts with English rules and procedures and a clear hierarchy of courts was meant to make the arbitration forum certain and definite, along the model of English courts. The English principles of justice, equity and good conscience were used as direct channels for introducing English laws and customs into areas reserved as personal laws.[7]These notions which crept into the Hindu and Muslim laws transformed the local traditions and usages in unforeseen directions. Despite the initial policy of non-interference in personal matters, as the British rule gained acceptance and stability, there was a gradual process of tampering with the established local customs through various means.

The legal structure was seen by the administrators as an important forte of its civilizing mission.

The much-acclaimed Sati Regulation Act of 1829 was followed by other legislations such as the Widow Remarriage Act 1856, the Age of Consent Act of 1860 and the Prohibition of Female Infanticide Act of 1872. These legislations, focusing on the 'barbaric' customs of the natives, convey an impression that the exception to the rule of non-interference in the realm of personal laws was for the benefit of women. There is a presumption that by incorporating the concepts of modernity into the native jurisprudence, the status of women in India was elevated. But recent scholarship has questioned this premise.[8]

The British intervention did not stop at the level of welfare legislation for women but extended into two other spheres which have not received due attention. One set of legislations carved the space for men's individual property rights into a system based on joint family property and rigid caste affiliations and laid the ground for the introduction of the capital mode of production in an urban setting.[9]

In 1868 in *Srinath Gangopadhya v Sarbamangala Debi*[10] the Calcutta High Court held that as per the Benares school, once a *stridhana* property devolves upon an heir, it loses its character as *stridhana* and devolves as per ordinary rules of Hindu law. In another landmark case around this time, the Privy Council held that the property inherited by the widow from her husband was not her *stridhana.* The Privy Council reversed the judgment of the lower court and proclaimed: Under the law of the Benares School, notwithstanding the ambiguous passage in the Mitakshara, no part of her husband's estate whether movable or immovable to which a Hindu woman succeeds by inheritance, forms part of her *stridhana.*[11]

This legal precedent set by the Privy Council became binding rule of law and dealt a lethal blow to the property rights of Hindu widows as the decisions of the various High Courts in the subsequent decade reveal. This principle was followed by the Calcutta High Court in 1874 in *GondaKooer v KooerGody Singh.*[12] The widow had purchased property out of the accumulated income from her *stridhana* and pleaded that it should be considered as her *stridhana.* But following the rule laid down by the Privy Council, the Calcutta High Court held that the property was not *stridhana* and hence she did not have

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the right to dispose it off by will and upon her death it would devolve on her husband's heirs. The court also ruled that the property inherited by a daughter from her father is not *stridhana*.[13]This principle was then extended to the property inherited by an unmarried daughter from her mother[14] and later stretched to include the property inherited from all female relatives, thus sealing all avenues for the continuation of property devolution in the female line.

The facts of two more cases on the issue of women's property are set out in detail. In the first case, *MussammatThakoorDeyhee v RaiBaluk Ram,*[15] a childless widow ChotehBabee, gifted the property she inherited from her husband to her niece. It is reported in the judgement that ChotehBabee, despite being a *purdah nishin*, was an excellent businesswoman who managed her property well. The husband's heirs challenged the deed, inter alia, on the ground that it was fraudulent and that she had no power of alienation over immovable property inherited from her husband. Sudder Ameen of Benares held that the widow was competent to gift the property. Sudder Dewaney Adawlut of Agra reversed the decision on the ground that the deed of gift was a forged document. At this point the right of the widow to gift her property was not a disputed issue before the court. The court only examined whether the gift deed was an authentic or a forged document. In appeal the Privy Council ruled: The widow has no power to dispose of immovable property inherited from her husband, whether ancestral or acquired.

The second case decided by the Privy Council in 1903, *Sheo Shankar v Debi Sahai*,[16] provides yet another illustration of the judicial trend. The woman had inherited the propertyfrom her mother. After her death, her sons claimed the property as heirs of the mother and grandmother and deprived their sister. The subordinate judge of Gorakhpur, on 7th December, 1897 held that the property inherited through the female line was the woman's *stridhana* and hence her sons had no right over it. On appeal, the Allahabad High Court reversed the decision. This resulted in an appeal to the Privy Council. In February, 1903 the Privy Council upheld the decision of the High Court and laid down that the property inherited by a woman from her mother is not her *stridhana* and hence it will not devolve on her daughter who is her *stridhana* heir, but upon her son.

The comments of Lord Erskine Perry while disallowing the woman's claim make interesting reading: A custom for females to take no share in the inheritance is not unreasonable in the eyes of the English law, for it accords in great part with the universal custom as to real estates where there are any male issues and with some local customs mentioned by Blackstone through which in certain manors females are excluded in all cases.[17] The judge commented further that since the attempt of the young women to disturb the course of succession, which had prevailed among their ancestors for many hundreds of years, has failed, they must now pay the price of this unsuccessful experiment by paying the cost to the defendants.[18]

In several litigations the widows from various Jain sects pleaded their right to adopta son to their deceased husband under a separate law or a local custom. But the customcould not be proved to the level of legal validity and women lost their right of adoption as *smriti* law was applied to them. It is through these disputes that Jains became categorized as a Hindu sect. Another illustration is the *Asura* (or an unapproved) form of marriage. Ifa custom to this effect could be proved, the property could be saved from the reversioers. Yet another example is the dispute between a widow and illegitimate sons within the Lingayat community. Since a custom could be proved of remarriages of divorcees and widows, the community was categorized as *sudra* and hence the illegitimate sons were declared as heirs to the father's property. The dispute could be confined between widows and illegitimate sons rather than its extension to reversioners.[19]

The period between 1850 and 1930 witnessed the elimination of a wide range of customs which diverged from the Anglo-Hindu tradition, as the standard of proof required was very high. 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. Derrett comments that in this manner, the Anglo-Hindu law with its Dharmashastra background was spread more widely than it had ever been before. The only customs which were saved from the crushing effects of the British courts were the customs of the agricultural classes in the Punjab and matrilineal practices of the Malabar region.[20] The tendency of both the British courts and of the urban Hindu middle class was to ignore the diversities and to impose legal Hinduism upon these communities.

Contrary to popular belief, many of the customs which were crushed were those in favour of women.

4. Remoulding of Hindu and Muslim family laws within western Model

Family disputes of Hindus and Muslims also had to be contested within the new legal structure founded on adversarial principles of English civil law. Matrimonial rights and obligations were reinterpreted within the paradigm of the matrimonial remedies of English courts. With their bulk, alien appearance, exotic trappings and Westminster's logomacy, the law of the country became alienated from the people.

It is not the intention to negate the fact that customary practices as well as the doctrinal precepts of the pre-colonial Indian society contained several anti-women stipulations. But the scriptures were not statutes and contained scopes for debates among different authorities within a region. The language and the context of these texts were open to several interpretations leading to diverse customs within a pluralistic society. It would be logical to infer that the customs and their interpretations were not uniformly anti-women and that there were spaces for negotiating women's rights.

The English translations of the original texts had already subverted the context and meaning of these precepts. The anti-women biases and the Orientalist approaches of the translators also coloured the translations. Within the new litigation fora, the opinions expressed in these translated texts became definite legal principles of universal application.

Published in law journals and relied upon in subsequent litigations, the most negative aspects of Hindu and Muslim laws were highlighted and over a period, became settled as infallible principles of Hindu and Muslim family law. The ancient texts were often used mainly to co-opt the anti-women provisions of English matrimonial statutes. The application of the medieval European (Christian) remedy of restitution of conjugal rights (incorporated in the English matrimonial statutes in 1857); to both Muslims and Hindus in India by re-interpreting their ancient legal texts is one concrete example of this new trend. Two landmark decisions of the Privy Council in *Gatha Ram Mistree v MoohitoKochinDomoonee*(1875) 14 BLR 298 and *MoonsheeBuzloorRuheem v Shumsoonissa Begum* (1867) 2 MIA 551 through which the remedy of restitution of conjugal rights was applied to Hindu and Muslim communities are particularly significant here.

Subversion of women's economic rights upon marriage, i.e. the Hindu woman's right to *stridhana* and the Muslim woman's right to *mehr* (both of which could include immovable properties) to the English concept of maintenance provides another example. The introduction of the English principle of widow's limited estate and the concept of *reversioner* (to whom the property would revert back upon the death of the widow) is a third example of this trend.

Ironically, while the British used the status of women to rationalize the political subjugation of India as a civilizing project, the Hindu revivalists tried to re-locate these principles in their ancient texts, armed by the Orientalists' approach of a shared distant Aryan past. 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 for determining the status of women.[21]

During the last phase of the nineteenth century, 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. The issue was foregrounded in the controversy regarding the Age of Consent both in Bombay and Bengal.[22] The controversy was galvanized by the decision of the Bombay High Court in the case of Rukmabai who was married in childhood and whose marriage had not been consummated.[23] It is necessary to stress the caste factor because it is crucial to the debate. Among most of the lower castes child marriage was not a custom and among those lower castes which practised the custom, the right of conjugality would commence not from the date of marriage but only on the performance of a second ceremony after attaining puberty. As already stated, within the customary law, the relief of restoring conjugality was non-existent and the husband could not obtain any relief in this sphere.

Conjugality has not been instituted and hence the question of 'restoring conjugality'— a European Christian remedy — did not apply to this case. Justice Pinhey who presided over the matter, had declined the relief on the ground that it was an outdated medieval Christian remedy under the English law and further that the Hindu law did not recognize such a barbaric custom.[24] But in the highly politicized climate these subtle legal points were lost. The debates raged round the audacity of an English judge to intervene in the realm of Hindu conjugality.

5. Discretion of secular and civil statutes

During this period, certain uniform and secular statutes governing family relationships were enacted, such as the Indian Succession Act of 1865 (re-enacted in 1925), the Special Marriage Act of 1872 (re-enacted in 1954) and the Guardians and Wards Act of 1890. Modelled on the principle of separation of the Canon and the Civil, which was gradually being accepted under the Anglo-Saxon law, these were purely civil enactments. There was no camouflage of religiosity here as in the enactments governing the Christian and Parsi communities.

The Special Marriage Act was a response to the demand raised by the Brahmos, as part of their campaign against Brahminical rituals within the Bengal Presidency, for a law enabling registration of simple, non-ritualistic civil marriages. The Act was passed despite opposition from orthodox sections and provided the opportunity for Indians to contract a marriage devoid of any religious trappings, in a civil registry. But it was mandatory for the parties contracting the marriage to declare that they had renounced religion. The stipulation of renouncing religion narrowed the scope of the Act. In 1912, a demand was raised for the deletion of this provision, and later, through an amendment in 1923, this clause was deleted. After marriage, for matters of property inheritance, the couple would now be governed by the provisions of the Indian Succession Act.

The Guardians and Wards Act of 1890 which authorized the courts to appoint guardians for minors was also applicable uniformly. Despite their limitations, the Special Marriage Act, the Indian Succession Act and the Guardians and Wards Act, provided secular and civil options to persons who did not want to be governed by religious enactments. These could have gradually developed into a comprehensive family code. But the growing resentment against the British rule and the British policy of constituting Hindus and Muslims as separate, homogeneous and antagonistic communities restricted the scope for developing uniform family laws.

6. Conclusion

It is generally believed that the interventions by the colonial state in the realm of family law were meant primarily for the liberation of Indian women from the barbaric customs of sati, female infanticide and marital rape of infant brides. It is also believed that women's right to property is a western concept introduced by the British during its modernizing mission. But such notions are proved to be totally wrong when we turn to history. It is necessary to recall that the Roman law as well as the English common law contained a number of stringent anti-women provisions and were imbued with anti-women bias. This bias crept into India through the AngloSaxon jurisprudence and subverted the traditional legal systems which provided women with a certain measure of economic security. The traditional systems were remoulded into linear, formal and stringent structures, which strengthened patriarchal control over women and their right to property.

The restructuring of the easily accessible non-state judicial fora, dispensing quick justice through community-based interventions, into an alien model of English courts rendered justice adversarial, expensive and dilatory. With the system of hierarchical organization of courts, the decisions of the Privy Council became binding principles of law and the process of evolving laws at the local level to suit the needs of local communities was arrested. Concepts of justice, equity and good conscience became the direct channels of introducing English laws, principles and puritanical notions of morality into India.

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2. I am grateful to Amrita Shodhan for sharing with me her unpublished doctoral thesis where she has dealt with this point elaborately.
3. G.C. Rankin, *Background to India Law*. Cambridge: Cambridge University Press, 1946.
4. While enacting the Indian Contract Act, the fact that contract was initially treated as a part of personal law was conveniently overlooked and it was transformed into territorial law uniformly applicable to all British subjects.
5. While a large part of the personal laws relates to family matters, the term also applies to issues like management of Hindu religious and charitable institutions and Muslim *wakfs*as well as the Muslim law of pre-emption and the Hindu law of Damduppat.
6. See B.S. Cohn, ‘Anthropological Note on Disputes and Law in India’, in L. Nader (ed.), *The Ethnography of Law*, American Anthropological Association, 1965, pp. 112–113. 22 FLAVIA
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8. This principle was laid down in a case of guardianship, Waghela Rajsanji v Shekh Masluddin (1887) 14 IA 89.
9. I am relying upon the work of Lata Mani and Uma Chakravarty on Sati and of Lucy Carrol on Widow Remarriage. Regarding the discourse on Sati, for example, Lata Mani has commented that women were not the central concern of this debate, but rather women were the site upon which the discourse on culture and identity was debated and women’s rights did not figure in this debate. See L. Mani, ‘Contentious Traditions: The Debate on Sati in Colonial India’ in K. Sangari, and S. Vaid (eds.), *Recasting Women, Essays in Colonial History,* New Delhi: Kali for Women, 1989, p. 88.
10. * The Caste Disabilities Removal Act 1850 set aside the provisions of Hindu Law which penalized the renunciation of religion by depriving a convert of his right in the joint family property.
11. The Hindu Inheritance (Removal of Disabilities) Act, 1928 prohibited the exclusion from inheritance of certain disqualified heirs.
12. The Hindu Gains of Learning Act 1930 stipulated that all gains of learning (income earned through professional qualifications) would be the exclusive and separate property of a Hindu male even if he had been supported to acquire professional qualifications from the funds of the joint family.
13. (1868) 10 WR 488.
14. BhugwandeenDoobey v Myna Baee (1867) 11 MIA 487.
15. (1874) 14 BLR 159.
16. DeoParshad v Lujoo Roy (1873) 20 WR 102.
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