

2. Patriarchy, Sexuality, and Property

*The Impact of Colonial State Policies
on Gender Relations in India*

FLAVIA AGNES

The nineteenth century is considered the century of social reform movements focused on violence against women in India. In response to these campaigns, significant pieces of legislation were enacted by the colonial state. Significant among these laws are the Sati Regulation Act of 1829, the Widow Remarriage Act of 1856, and the Age of Consent Acts of 1860 and 1891. These laws came to be projected as the colonial state's commitment toward protecting women and loosening the patriarchal hold over them by the conservative Hindu society. The campaigns focusing on the "barbaric" customs of the natives, such as burning of a child widow on the funeral pyre of her husband (suttee) or the marriages of infant girls to adult men that resulted in extreme sexual violence upon them, provided the colonial state a moral justification for ruling India as a harbinger of enlightenment. Through these legislative interventions, the colonists argued, the Hindu society could rid itself of its "barbarism" and enter an era of "civilization." They assumed that by incorporating the concepts of modernity into native jurisprudence, the status of women in India would be elevated.

But several postcolonial feminist historians have challenged this claim (Sangari and Vaid 1989; Chakravarty 1989; Mani 1989; Kumar 1993; Nair 1996). In the same vein, I argue that merely by tracing a few legislative interventions it cannot be surmised that the colonial state enhanced

women's rights. The working of the colonial state cannot be measured merely through legislative enactments but needs to be assessed through other markers such as judicial pronouncements, land regulations, and the economic restructuring of precolonial agrarian communities. The colonial interventions served to usher in a new patriarchal legal order that legitimized several traditional antiwomen practices and recast them into a new modernity through a complex interface of contest and collusion between colonial and local indigenous patriarchies.

This essay traces some important markers that vested economic power in the hands of individual men and consequently weakened women's position within the family and community. This weakening in turn boosted men's control and authority over women and gave a new lease to indigenous patriarchies. The power of individual men was consolidated and received a boost as title holders of land tenements in the new economic order as opposed to the earlier notion of community or joint ownerships and inalienability of land. Women's traditional economic rights over their *stridhana* (women's separate property) were weakened through judicial pronouncements that derived their ideology of women's rights over property from the English legal regime that denied all rights over property to married women. Alongside the material changes, the ideology of the patriarchal nuclear family gained acceptability with notions of Victorian morality woven into the modern family structure. The husband was vested with a new authority to enforce his conjugal rights over his wife. A claim of the wife to a meager maintenance dole could be denied by hurling allegations of unchastity against her.

The implications of the reconstitution of patriarchies in the colonial period bear significantly upon the present. The legal order and administrative norms that were introduced by the colonial state have continued in the postindependence period and resonate in contemporary Indian family law. Even while claiming to be a protector of women's rights, the family law regime has constantly pitted the economic rights of women against sexual purity in present-day matrimonial litigation. This essay sketches these developments and their implications for women's rights in India in contemporary times.

Conjugal Property, and the State: The Rukhmabai Case

Of particular importance to the motif of women's resistance is the struggle of a young woman, Rukhmabai, who defied tradition and the colonial legal dictates by refusing to be bound to a marriage contracted when she was barely eleven. The social drama that unfolded around her legal case has been described as a unique event in colonial India by some historians (S. Chandra 1998). Her legal battle can easily be termed one of the "glorious events played out in the theatre of a great court" (Agnes 2004). Questioning what was assumed to be natural, she offered a subversive model of assertion by women of their desires, as individuals, in a terrain dominated by family, community, and imperial notions of justice and governance.

The social drama was triggered when Dadaji Bhikaji filed a case against Rukhmabai in the Bombay High Court in 1884. It reached its peak in 1885, when Justice Pinhey, in a historic verdict, declined to pass a decree of restitution of conjugal rights in favor of the husband. In a bold and fearless verdict, he declared that since conjugality had not been instituted, the question of granting the relief of "restoring conjugality" did not apply in this case. The judge proclaimed:

It is a misnomer to call this "a suit for the restitution of conjugal rights." Restitution of conjugal rights can only apply to a situation when a married couple, after cohabitation, separate and live apart. Here, the husband has asked the court to compel the wife to go to his house, so that he may complete his contract with her by consummating the marriage. It seems to me that it would be a barbarous, cruel and revolting thing to do, to compel a young lady under those circumstances to go to a man whom she dislikes, in order that he may cohabit with her against her will. No law or practice justifies such an order. I am not obliged to grant the plaintiff the relief which he seeks, and to compel this young lady of twenty-two to go to the house of her husband in order that he may consummate the marriage arranged for her during her helpless infancy. . . . The practice of allowing suits for the restitution of conjugal rights originated in England under peculiar circumstances, and was transplanted from England into

India. It has no foundation in Hindu law. . . . For many years after I came to India such suits were not allowed. It is only of late years the practice of allowing such suits has been introduced into this country from England (I think only since the amalgamation of the old Supreme and Sadar Courts in the present High Courts which has brought English lawyers more into contact with the mofussil). It is, in my opinion, a matter for regret that the remedy of restitution of conjugal rights was ever introduced into this country. (*Dadaji Bhikaji v. Rukhmabai* 1885)

Ironically, the revivalists interpreted this judgment as an interference in the sacrosanct arena of Hindu conjugality by the British courts (and a breach of the assurance of noninterference).¹ For the reformers, the intervention of the English courts was an armor in their campaign against the upper-caste Hindu custom of child marriage. The litigation, the judgment, and the controversy that followed were all laden with ironies. The husband's case was trumpeted by the revivalists, and it was with their support that he had approached the English courts rather than the caste *panchayat* for the remedy of restoring his Hindu conjugality.² Within the customary law, the relief of restoring conjugality was nonexistent, and the husband could not obtain any relief in this sphere. Also, the parties belonged to the lower caste among whom the custom recognized the right of the wife to dissolve her marriage. And most important, Justice Pinhey 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!

But in the highly politicized climate these subtle legal points were lost. And within this politically surcharged atmosphere, the husband filed an appeal. The colonial courts succumbed to the political pressure. In 1886 the division bench presided over by Chief Justice Sir Charles Sargent and

1. "Revivalists" is the term used for the conservative Hindus during the late nineteenth century who wanted to bring in reforms within Hindu society by reviving the ancient Hindu traditions of the Vedic (5000 BC) and post-Vedic (that is, *smriti*, 200 BC–AD 500) period. The Hindus who wanted to bring in modernist reforms were termed "reformists."

2. A *panchayat* is a local (nonstate) dispute-resolution forum that was widely prevalent during the precolonial era and is still in existence in rural areas and among lower castes. The word indicates community representatives or community elders.

Justice Bayley rejected the argument that there was no authority for a decree for “institution” of conjugal rights under Hindu law and decreed: “The gist of the action for restitution of conjugal rights is that married persons are bound to live together. Whether the withdrawal is before or after consummation, there has been a violation of conjugal duty which entitles the injured party to the relief prayed.” The court ruled in favor of the husband and granted him the decree of “restitution of conjugal rights” (*Dadaji Bhikaji v. Rukhmabai* 1886, 301).

But how was this decree to be enforced? The civil courts did not have the power to bodily reinstate conjugality, a power that the European ecclesiastical (church) courts had. Hence, the only way the decree could be enforced was through civil imprisonment and attachment of property. In a moment of pride and glory for Indian women for centuries to come, Rukhmabai declared that she would willingly undergo imprisonment rather than let a man she detested enforce conjugality! If the court was compelled to execute its own order, it would indeed have been a matter of blemish for the colonial rulers, who had justified their rule on the premise of ushering in modernity and defending women’s rights. The prisons at the time were primitive places lacking provisions to imprison a woman, let alone a woman of Rukhmabai’s stature. Fortunately for all concerned, the matter was finally “settled” by payment of compensation by Rukhmabai to her husband.

Rukhmabai’s struggle is relevant not only for its times but even for the contemporary international women’s rights discourse. The motif of Rukhmabai’s defiance of both the verdict of the alien English judges and the patriarchal dictates couched in national pride, in defense of her right over her personhood, at a time when English women were waging a battle for their right to own separate property as wives, would indeed serve to shift the rigid and fixed binaries of first-world feminists and third-world victims (Agnes 1999).

Interspersing of Sexuality and Property: The Widow Remarriage Act

The Widow Remarriage Act of 1856 was enacted amid two sets of contesting claims: the revivalists’ proclaiming that the bill, if enacted, would

affect a vital part of the Hindu scriptures and widows marrying under it would be regarded as social outcasts and the reformers' claiming that the custom prohibiting widow remarriage was a modern innovation that was unknown in ancient Vedic times (Basu 2001, 69). These contentions were overlaid by another reality, caste hierarchies. The prohibition of widow remarriage was seen as a badge of respectability. Castes that did not allow it ranked higher in social estimation. This hierarchization was carried to the extent that castes were sometimes divided into two sections, one following and the other forbidding the practice.

Although this act is hailed as one of the first attempts to bring in legislative reforms in the realm of family law, in actual terms the act had little impact on improving the status of Hindu widows. At one level, there were competing claims regarding the scriptural prohibition to widow remarriage. At the other, it did not improve the economic rights of a Hindu widow. On the contrary, upon remarriage, it deprived her of her right to retain her late husband's property. Since the widows from the lower strata already had a customary right of remarriage, the enactment did not bestow any new rights on women from the lower strata of the Hindu community.

Through cases reported in law journals of this period, I will examine how the act unfolded upon women from the lower castes. From the brief sketch, it is evident that any woman remarrying under this act lost her right to her late husband's property. Even if one can concede that it would be logical to apply these constraints to women who acquired a right of remarriage owing to this statute, it is difficult to reconcile with the perverse logic through which even women who had a preexisting right of remarriage under the custom of their caste were deprived of their property.

The statute needs to be contextualized in comparison with the legal status of English women who obtained the right to divorce, and subsequent remarriage, only in 1857 and under very stringent grounds of a husband's adultery coupled with another matrimonial offense of cruelty or desertion. And the battle for the absolute and unhindered right of married English women to hold property was waged in 1870 and went on for another half century. The disabilities suffered by married women

with respect to separate ownership of property were finally laid to rest in 1935.³ Despite this fact, the rationale for denying Hindu widows their right to retain their property was based on judicial interpretations of Hindu law!

As per the British jurists, a woman could hold property only owing to the legal fiction under Hindu law that upon marriage she became a part of her husband's body. According to this view, a woman's personhood was sublimated into her husband's. A widow could be granted a right to inherit her husband's property only on the presumption that she was the surviving part of her husband's being. Upon remarriage, a widow ceased to be a part of her former husband's body, and hence she lost her right to hold his property. This prohibition against remarriage had no scriptural foundation. In any case, women from the lower castes were out of the purview of scriptural doctrines and had a customary right of remarriage. These interpretations of the principles of Hindu law governed judicial notions from 1860, when the new courts were set up, until the enactment of the Hindu Succession Act in 1956 that finally discarded this principle.

Regional and caste-based diversity in the property rights of women did not seem to have any bearing on this rigid notion, and the courts continued to apply these principles even to lower-caste women who were not governed by these principles. For instance, in the Maraveer caste, widows could remarry even prior to the 1856 enactment. But in 1877, while deciding the case of a woman from this community, the Madras High Court held, "The principle upon which a widow inherits is that she is the surviving half of her husband. So it cannot apply where she remarries. The law cannot permit the widow who has remarried to retain the inheritance. As per the principles embodied in Steele's Hindu Law and Custom, the custom in the shudras⁴ is that a widow on remarriage gives up all properties of her former husband's relations except what has been given her by her own parents" (*Murugayi v. Viramakali* 1877, 226).

3. With the enactment of the Law Reform (Married Women and Tortfeasors) Act of 1935 the distinction between the rights of married and single women was finally abolished.

4. *Shudras* are the lowest caste in the hierarchy, just above the *dalits* (oppressed), who as untouchables are outside the caste system.

The court relied on a quote that is attributed to Brihispati (one of the early lawgivers): “Of him whose wife is not dead half his body survives. How should any one else take the property while half his body lives?” (ibid.). This metaphor became a legal maxim in all subsequent judgments. The Madras High Court in 1884 applied this rule in the case of a woman from the Lingait Gounda community that followed the custom of remarriage prior to the act (*Kaduthi v. Madu* 1884, 321).

In the Deccan region widow remarriages in the name of *pat* or *natra* marriages were performed among several castes.⁵ But following the trend of the Madras High Court, in 1898 an Indian judge of the Bombay High Court, Justice Ranade, held, “So far as this Presidency is concerned it is obvious from the information collected in Steele’s Law and Custom of Indian Castes in Deccan among whom *pat* marriages were allowed or forbidden. But when a widow performs *pat* her husband’s relatives succeeded to her husband’s estate. There is not a single caste mentioned in which any custom to the contrary prevails” (*Vithu v. Govind* 1898, 321 FB).

The recording of customs within the Bombay Presidency, hastily and haphazardly done by Steele during the early phase of the presidency and published in 1827, seems to have provided the basis for denying women from the lower castes their customary right to property in litigation several decades later. Rather than relying on a living tradition of the people, the courts adopted the rules of sexual morality from the chronicles of an official administrator.

A dissenting and more rational view was expressed by the Allahabad High Court in the year 1933. Since the act was a beneficial legislation, the court ruled that it cannot be interpreted so as to impose further disabilities upon women who were not burdened with such disabilities prior to the enactment. The court held: “A custom of remarriage does not necessarily carry with it, a further custom of forfeiture upon marriage. Anybody who claims there has been forfeiture by reason of remarriage, must

5. *Pat* and *natra* are local indigenous terms used among lower castes to denote the remarriage of a divorcée or widow. What is denoted here is that these remarriages are not Brahmanic forms of marriages where *saptapadi* (seven steps around the sacred fire) is performed. The terms denote informal marriage alliances that have legitimacy.

prove affirmatively that such forfeiture is an incident of the custom under which the remarriage took place" (*Bhola Umar v. Kausilla* 1933, 247).

But, ironically, this decision was not followed by the high courts of Bombay, Madras, Calcutta, or Hyderabad even in the postindependence period. These courts continued to apply the principle of forfeiture to an increasing section of lower-caste women. Since the right was so well established among many lower castes, despite a century of negative interpretations, the claims of widows continued to be litigated even in the postindependence period. Many women lost, but not without a struggle. Cases were initiated in lower courts and were followed to the high courts and from then on to the Privy Council (and hence were reported in law journals). Individual women lost out to the combined strength of local patriarchies and a gender bias inherent in the imperial legal system. Some decisions of the postindependence period are mentioned below.

In 1952 the Calcutta High Court applied the rule of forfeiture to a woman from the Bairagi community who remarried under the custom of the caste (*Lalit Mohan v. Shyamapada Das* 1952, 771). In 1954 the Bombay High Court reversed the decision of the subordinate courts and applied the rule to a woman from Kolhapur district, which was a princely state until independence (hence the Widow Remarriage Act had not been applied there), and upon remarriage widows could retain the property of their former husbands. Ruling against the premise that as per the custom of the caste the rule of forfeiture upon remarriage did not apply, the court declared, "The foundation that widow is the surviving half of her husband does not disappear merely because certain communities recognise a custom of remarriage of widows. It would indeed be a startling proposition to say that even though she takes the property of her deceased husband by inheritance as his surviving half, she is entitled to take away that property with her to her new husband on remarriage when she can no more be regarded as the surviving half of her first husband" (*Rama Appa v. Sakhu Dattu* 1954, 315).

Hyderabad was another princely state that came under the new dominion. In 1952 a full bench of the Hyderabad High Court, by a majority view, overruled several of its earlier decisions that granted women the right of retention of property, despite a strong dissenting note from the

section of the judiciary that vociferously argued that Manu, the primary lawgiver of ancient (Brahmanic) Hindu law, did not lay down rules for the *shudras* and was concerned only with the three higher castes, and hence his views could not govern *shudra* women (*Basappa v. Parvatamma* 1952).

The significant factor here is that these decisions of the postindependence period with the constitutional mandate of equality were not even following the established rules of the community. They were setting new precedents for these communities through which women's right to property was being eroded, at a point in history when the debate about the reform in Hindu law and women's rights of inheritance was raging in the country.

Through an active collusion between patriarchal premises of the state and the manipulation of male relatives, women of the lower community were deprived of their rights over property. It is indeed ironic that just two years after the Bombay High Court unsettled the established rights of women in Kolhapur district, the Hindu Succession Act came to be enacted after a prolonged and acrimonious debate. One of the salient features of the act was the abolition of the concept of "limited estate," besides awarding widows an absolute right over property inherited upon the death of their husbands.

During the period 1860–1930 the rights of widows in general were adversely affected through the judicial interpretation of the concept of *stridhana* (women's separate property). A new legal principle was gradually introduced through court decisions that whether the property is inherited by a woman through her male relatives (father, son, husband) or through her female relatives (mother, mother's mother, daughter), it was not her *stridhana*, and it would devolve on the heirs of her deceased husband. The widow lost the right to will or give away her *stridhana*, and it acquired the character of a limited estate. Upon the widow's death, the property reverted back to the husband's male relatives. The introduction of this concept of "reversioners," which is basically a legal principle under English law, bestowed upon the male relatives the right to challenge all property dealings by Hindu widows (Agnes 1999, 46–52).

The establishment of a legal system based on the procedures and rules of the English courts and a clear hierarchy of courts was meant to

make the arbitration forums certain and definite. The legal structure was seen by the administrators as an important forte of its civilizing mission. The British interpretations of the ancient texts became binding and made the law certain, rigid, and uniform. This clear marker of modernity was welcomed by the newly evolving English-educated middle class of Bengal and provided the British a moral justification for ruling India as harbingers of enlightenment (Kumar 1993). Through the British's interventions the Hindu society could rid itself of its "barbarism" and enter an era of "civilization." An image of the cruel and superstitious natives who needed Christian salvation was deliberately constructed by the evangelists.

An interesting strategy used by women during litigation, it appears, was to claim *shudra* status and thereby application of customary law. Conversely, male relatives, in order to defend their rights, claimed Hindu status. If courts bestowed a Hindu status upon the communities, women's rights would be curtailed. Most of these situations were borderline cases where the pendulum swung from one end to the other. But when the issue was finally decided by the Privy Council or the respective high court, as the case may be, the religious status of the community (and thereby the fate of its widows) would be sealed for all future litigations. Since the standard of proof required to prove the existence of a custom was very high, a wide range of customs that diverged from Anglo-Hindu law were eliminated.

Lucy Carroll (1989) cites a case that was initiated by members of a tribal family claiming that on remarriage one of their widows had forfeited her right to the property that she had owned. The case was won through a minimal show of evidence that certain Hindu practices had been adopted by some branches of the tribe (the Rajbansis). The court held this fact as sufficient evidence to bring the entire tribe under the scope of the act. Carroll states that the act provided mercenary reasons for non-Hindus to "Hinduize" their customs. Contrary to popular belief, many of the customs that were crushed were ones in favor of women. J. D. M. Derrett comments that in this manner, Anglo-Hindu law, with its *dharmashastra* background, spread more widely than ever before. The only customs that 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 (1957, 78).

Land Settlements and Subversion of Women's Property Rights

The British interventions also carved out a space for men's individual property rights from a system based on community or joint ownership. Changes in property ownership through "permanent settlements" developed a landowning class, and conversely this shift served to undermine the claims of women. Although it is true for all of British India, in this section the specific focus is the Punjab region and the matrilineal practices of Kerala. The customs that Derrett mentions need to be reexamined in light of more recent feminist scholarship. To understand the imperial policies and subversion of women's property rights in the Punjab, I find the works of Prem Chowdhry (1989, 1994) and the more recent publication of Veena Talwar Oldenburg (2002) particularly useful.

Chowdhry (1989) contends that the mere practice of widow remarriage or bride price cannot be construed as a marker of a higher status for women within the communities practicing these customs. For instance, rural Haryana, one of the most backward and underdeveloped regions of the Punjab under the British, exhibited a peculiar contradiction in relation to its women. On the one hand, the region reflected accepted indexes of a high status for women, namely, bride price, widow remarriage, polyandry, and relatively greater economic participation of women in agricultural activities, and, on the other hand, it reflected indexes of women's backwardness, such as a very low female sex ratio,⁶ a total neglect of and prejudice against female education, and the complete absence of women from any positions of power and decision making.

The importance of a wife in the agrarian economy made marriage an acknowledged economic necessity among the Jats and other agriculturist

6. The sex ratio for Haryana continues to be far below the national ratio, which in itself is adverse. Per the 1991 census Haryana recorded a mere 865 females per 1,000 males as opposed to the national statistics of 927 females per 1,000 males. According to the 2001 census the national statistics improved slightly to 933, while Haryana recorded a further decline at 861 females per 1,000 males.

castes in the region, including Brahmins. The customs of bride price and widow remarriage have to be contextualized within this need (*ibid.*, 312). The term for widow remarriage was *karewa*, a custom that sanctioned the remarriage of a widow with the deceased husband's younger or elder brother or an agnate cousin. Chowdhry argues that the *karewa* form of marriage served to control a woman's sexuality in order to control her property. Even the limited right of an unmarried widow to retain her husband's property was seen as a menace, and the *karewa* form of marriage served to dispossess her of her rights (*ibid.*, 315). The widow could alienate the property for her own maintenance, for her daughter's wedding, or for payment of revenue, reasons termed as "strict necessity." That the women were able to manipulate these provisions to a certain extent to their advantage can be gauged from the constant appeals made to the Deputy Commission protesting against widows who had alienated their property "without consent." This self-assertion by widows in taking control of the economic resources after their husbands' deaths must have assumed such a proportion that for a variety of reasons, government action against it became essential.

She further mentions that J. M. Douie, compiler of *The Punjab Land Administration Manual* (1931), advised the revenue officials that a widow's attempt to partition the land should be disallowed. A widow's right to control land had been legalized under the Land Revenue Act because after the husband's death, she was held responsible for the payment of government revenue dues. However, since such advice could not have held much weight legally, the only solution to the fast-growing claims to partition was, according to official instruction, to be sought in a firm anchoring of the widow in remarriage. This setup, in the manual instruction, "could be the only satisfactory arrangement against which she had no appeal" (271).

Such advice was an inevitable outcome of the colonial policy followed in the Punjab because of its economic, political, and military importance. From the beginning, the imperial government had adopted the preservation of the village community as a settled policy for the Punjab. The general argument of British officials was that the mass of the agricultural population of this province did not follow either the Hindu or the Muslim

law. Therefore, a recording of tribal custom was done by settlement officers who at each settlement had compiled the local customs, known as *rivaj-i-am*, in consultation with the village headman of each principal landowning tribe in the district; these headmen were from the most influential families in each village.

Consequently, the customs of the landowning class in regard to civil matters such as succession, alienation, marriage, tenure of land, adoption, and the like came to be settled primarily by the Punjab customary law that then became the first rule of decision. Thus defined, the customary law of the land, backed by the full force of the colonial administrators, safeguarded the landed property from a woman's possession. Not allowing women to inherit property was a view that struck a sympathetic, even enthusiastic, chord among many British officials. The British perception of these customs, which they also made legally binding, is significant.

A curious parallel observation about the situation of women prevailing "back home" as compared to the circumstances in the Punjab discloses the ambivalent attitude of British officials toward women: "The proportion of females to males in England and Wales rises continuously from childhood to old age, indicative of the excessive care lavished on women in England qua women, and not merely qua child bearer. Social reformers may well stand aghast at the neglect of and the contempt for female life shown by all religious groups in the Punjab, but no less extensive, and, possibly fraught with serious consequences to the future of the race, is the excessive pampering of females in England" (*Census of India, 1921 1924*, 234). For *karewa*, they held, "Most officers conversant with this tract of country had entertained in the existence *sub rosa* of a system of polyandry. This institution is probably the first stage in development of a savage people after they have emerged from a mere animal condition of promiscuity. It is the concomitant of female infanticide. . . . The family is the first organization when all wealth including the wife are owned in common" (*Punjab District Gazetteer 1911*, 88).

In the Punjab the fundamental political interest of the British transcended their less well-defined concern for social progress. This low level of civilization as signified by *karewa* had to be retained because the British concern lay in strengthening the hold of the existing peasant

society over land; its breakup was inevitable if the widow was allowed to have her way.

The apprehension regarding the danger of social disequilibrium to Haryana was sharper because this region, with its insecure agricultural conditions, had provided the best recruiting ground for the British Indian Army. The *karewa* custom contributed significantly to the unceasing heavy recruitment, despite the insecurity of life and the equally heavy rate of mortality. Simultaneously, the agricultural interests of the recruits' families could not be allowed to be jeopardized by the ever-growing number of widows' claims. This situation could prove to be very costly to the imperial government and unsettle not only its military recruitment but also the social equilibrium upon which its rule in the state was founded. Moreover, even economically, such a demand, if conceded, would have only added to the fragmentation and subdivision of holdings and, consequently, to the fast-growing number of smaller uneconomic holdings in this region, as elsewhere in the Punjab, which were posing a direct threat to the agricultural prosperity of the province and hence to the collection of revenue.

Chowdhry concludes that widow remarriage—a seemingly progressive feature—continued to be applauded by the British administration. The practice, however, as it was encouraged to exist, merely reinforced the social ethos that safeguarded the land in the family, clan, and community. The British administrators' own attitudes regarding female inheritance were closely identified with the primary concern of the colonial government, which did not want to disturb the patriarchal equilibrium within the rural society of the Punjab (Chowdhry 1989, 320).

This causal connection between imperial policies and subordination of women's rights is explored further by Oldenburg, who argues that land-reform policies and the creation of a masculine culture deprived women of their rights and made them vulnerable to family violence. She traces the collusion of the imperial state and Punjabi men who reconfigured patriarchal values and manly ideals in nineteenth-century Punjab. The two became enmeshed in an unsurprising alliance against the customary right of women. Pressing for a need to look beyond the statute book to comprehend a central paradox of colonial policy in India that

persists in postcolonial India, she contends, "Although the legislative record is indeed impressive and includes the outlawing of several customs that underscored the bias against women, there was in the colonial period a profound loss of women's economic power and social worth. This was a direct consequence of the radical creation of property rights in land" (2002, 2).

Oldenburg argues that modern capitalist ideas in their attenuated form seeped unevenly through the mesh of colonial needs and priorities and infiltrated Punjabi society via two major colonial initiatives—the *ryotwari* system and the codification of "customary" law (*ibid.*, 100). Land was declared a marketable commodity capable of private and determinate ownership so that a fixed and settled land revenue in cash could be recovered on every plot of land in two annual installments on two fixed dates. Annual assessments that had been customary in preceding native regimes were abruptly discontinued because they were found to be cumbersome and expensive and provided an opportunity for corruption.

The British, in striving to put the administration on a rational, efficient, and economic footing, ordained that their revenue settlements for various districts would stay in effect for two or three decades without regard to the situation that prevailed in any given year, be it drought, famine, or plenty. This mandate was the policy in a nutshell and rationalized, in the British view, the jumble of competing shares, varied annual collections, bargaining matches, and corruption that had plagued the revenue collection of the Sindh regime.

The second initiative was the codification of "custom" as adjudicable law in the Punjab countryside (*ibid.*, 101). These two processes worked in tandem and illuminated how the equation of gender and power came to be skewed further. By tracking the enormous change that took place when the world of peasants of the Punjab became decidedly more masculine and as land, hitherto a community-held resource, became private property, we can recapture the moment women's voices and customs were erased as men's rights and voices were recorded with singular clarity. The shared control formerly accorded to all those individuals who worked the land came to be replaced by the arbitrary privileging of tillers as owners of the soil. Women—who sowed, weeded, hoed, harvested, and threshed

and milled grain and vegetables; looked after dairy cattle; collected fuel; and processed produce and prepared it as food—who had been implicit coparceners in precolonial landholding arrangements, found themselves tenuous legal dependents of men, with their access to economic resources subordinated increasingly to the control and will of the husbands. Oldenburg comments with a note of sarcasm:

The British had not granted their own women rights to property, so it was highly unlikely that they would shed their prejudice while introducing this “progressive” notion of private property to the Punjab. (And progress meant assimilation to modern European norms.) They granted these rights exclusively to men so that they could collect their taxes from male proprietors who could be taken to court or sent to jail if they defaulted. Clearly women, already hindered by the custom of seclusion and veiling, could not conveniently interact with the legal machinery of the new rulers so their husband and male kin quietly subsumed their rights. A robust patriarchal mentality was reinforced in this collusion. (ibid.)

According to Oldenburg, what made these initiatives doubly powerful was the fact that they were deployed simultaneously. At the same time that land titles were formalized and revenue settlements made for each district, revenue officials (earlier called settlement officers) went further by collecting, organizing, and constituting oral informal *rivaj* (literally, “custom”) from male heads of each “tribe” or “caste.” The officers themselves redefined these categories and reworked the information into a formal set of laws capable of being adjudicated in the new court system. The Punjab acquired a fully codified set of customary law that was laid out in a manual. By 1880 the revised recession of these laws was completed. They were to operate in lieu of the Muslim and Hindu personal laws (ibid., 102).

The registration of ownership of land was the first phase, the foundation stone, of making the agrarian economy masculine, Oldenburg comments. The next step taken in each district of the Punjab was the attempt to translate social and customary practices into legal codes. The new regime insisted on consulting only the male heads of a village, caste, or household in order to inscribe the *rivaj-i-am* (the customs of everyday life

situated in a place or region, particularizing them in the attributes of a caste or tribe). New meanings invaded the husks of many familiar words. The complex and plastic universe of oral, implicit, flexible, and informally transmitted customary practices, interpreted as much by women as by men, that ordered everyday life and relationships was systematically elicited from only males and reduced for administrative effect into a written, fixed, judicable, actionable, and enforceable corpus of laws. The timing of the project was, perhaps, as critical as the project itself. That customary laws were to be collected and written down for the first time when the record of who owned the land had just been noted, with the power and the danger of individual ownership unleashed, informed much of what the respondents, all male landowners, would call custom.

Women's share in production of the land became meaningless, but traces of what their rights might have been are discernible in these codes. They provide a faint approximation of the rights women had in a society where land was a common resource with varying levels of entitlements. According to Oldenburg, the process emptied the female category of older subtler meanings—of shares of birthright—and other safeguards of the indigenous patriarchal tradition (*ibid.*, 133–34).

Linking landownership to male preference, she continues, “Sons were the key to survival and prosperity in the relentlessly agrarian Punjab under the British. Acquiring land during auctions or sales, finding a job in the lower rungs of the imperial bureaucracy or the army, or finding a niche as a retainer in the expanding market were the new plums to fight over. The newly enhanced worth of sons with such prospects can be reflected in the confidence of some families in demanding a consideration for a marriage alliance” (*ibid.*, 16).

Conjuality, Morality, and Maintenance

The links between sexuality and property claims continue to the present day. It is indeed interesting to explore how this relationship between notions of morality and women's economic rights is foregrounded in contemporary matrimonial litigation.

Within Indian family law, women's economic claims arising out of a marriage contract are confined to recurring monthly maintenance.

Although these amounts owed can be claimed under the personal laws of the parties, most destitute and poverty-stricken women opt to claim them under the summary proceedings available under the Criminal Procedure Code (1973). This provision is beneficial social legislation to prevent vagrancy and delinquency.

This otherwise innocuous section came alive through the *Shah Bano* controversy in 1985 and is retained in public memory because of the furor it caused at the time.⁷ But the notions of sexual morality with which this section is governed have not received due attention in contemporary feminist legal discourse. The mischief is caused by clauses 4 and 5 of S.125 of the Criminal Procedure Code (1973), which stipulate:

(4) No woman shall be entitled to receive an allowance if she is living in adultery.

(5) On proof that any wife whose favor an order has been made under this section is living in adultery . . . the magistrate shall cancel the order.

These stipulations provide the armor for husbands to entangle women in vicious and dilatory litigation over a pittance of maintenance. A careful scrutiny of reported cases in any law journal would reveal the extent to which allegations of sexual promiscuity are made to subvert women's claims. To give an example, *Divorce and Matrimonial Cases* (2001), a journal widely used by lawyers practicing matrimonial law, reports around forty-five cases under the title "Maintenance." In almost half of these cases, sexuality and morality were the core issues that were contested. A significant point is the winding and prolonged litigation that the women had to undergo, despite the provision being summary. After the first round of litigation in the lower courts, these cases were appealed in the higher courts, which is why they merited reporting in the law journal. Hence, they reflect only the tip of the iceberg. In each of these cases the women

7. The case created a major political controversy and caused a backlash from the minority Muslim community for its adverse comments regarding Islam and resulted in a new enactment that deprived the divorced Muslim woman of the right to avail herself of the provisions under S.125 of the Criminal Procedure Code.

were assaulted and driven out. Most of these cases also contained allegations of dowry harassment. But none of these women had filed a criminal complaint under S.498A of the Indian Penal Code. All they did was file an application for maintenance, and it is then that the husbands lashed out with allegations of sexual promiscuity.

The layered and multiple contexts through which sexual morality surfaces, as per the norms of patriarchy, serve only one end: to challenge the legitimacy of women's claims. It is a clear case of "heads I win, tails you lose." The allegations ranged from adultery on the part of the wife and disputing paternity of a child to a subsisting previous marriage of the wife, a husband's subsisting first marriage, and concubinage and a husband's subsequent marriage. But issues of sexuality, morality, and polygamy, whichever way they emerge, can always be turned against a woman's claims of maintenance. For instance, it really does not matter whether a woman's previous marriage or a husband's previous marriage is in dispute. So long as sexuality is pitted against maintenance claims, it is the woman who has to pay the price.

Scanning through the judgments, one can see a positive trend emerging, where the courts have upheld the women's claims and disallowed the husbands' contentions. But despite this turnaround, S.125, clauses 4 and 5, provides the scope for husbands to entangle deserted women from the lower strata in prolonged, cumbersome, and costly litigation. And negative rulings, though less frequent, still prevail.

A judgment of the Allahabad High Court is quoted here to convey the extent of humiliation a woman goes through during such litigation:

If the man and woman choose to live together and indulge into sex no such marriage status can be conferred automatically by their so living upon such a woman. She is not entitled to the legal status of a wife in the eyes of law and society. Law and society treat such women either as concubine or a mistress. . . . The two may agree to live together to satisfy their animal needs. But such a union is never called a marriage. A woman leading such a life cannot be bestowed with the sacrosanct honor of wife. No marital obligations accrue to such a woman against

her husband. Such a wife must be termed as an adulteress. (*Malti v. State of Uttar Pradesh* I 2001, 104)

This section is included to highlight the fact that even in contemporary court proceedings, the courts continue to frame women's rights in archaic and sexist language. Notions of women's sexual purity have framed Indian family law reform from the colonial period to the present.