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Notes:
States and Women's Rights

The Making of Postcolonial Tunisia, Algeria, and Morocco

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Introduction

In the summer of 1956, when the winds of independence from French colonial rule were sweeping through Tunisia, the newly formed national state made a bold move. It reformed family law in radical ways by promulgating the Code of Personal Status, a legal code that constituted a sharp break from preexisting Islamic law. Among other changes, the Tunisian Code outlawed polygamy or the right of a man to have as many as four wives. It abolished repudiation, the unilateral right of the husband to terminate the marriage at will without court proceedings. Divorce now could take place only in court. The code also entitled women to file for divorce on the same grounds as men. It increased mothers’ custody rights and expanded inheritance rights for daughters and granddaughters. The Tunisian reforms became a yardstick against which to judge changes in family law in other Middle Eastern countries. Commenting on family law, an international report stated four decades later: “One of Tunisia’s greatest achievements since independence is the body of laws which [gave] women rights not enjoyed anywhere else in the Arab world.”

In contrast, Morocco promptly adopted a conservative family law after achieving national sovereignty in 1956. Its Code of Personal Status, promulgated in 1957–58, remained faithful to the prevailing Islamic legislation. For example, it maintained polygamy and repudiation and kept inheritance laws unchanged. In Algeria, family law became caught in a paralyzing gridlock between reformist and conservative tendencies for more than two decades after independence in 1962. During that time, reform plans aborted repeatedly until a conservative family code faithful to Islamic law was promulgated in 1984.

These differences occurred despite the fact that Tunisia, Algeria, and Morocco share several historical and cultural characteristics. All are located
on the western tip of the Arab world. They are collectively referred to as the “Maghrib” or “West” in Arabic. They are geographically contiguous; they are Arab-Islamic societies; they experienced a period of French colonization; and they became independent nation-states in the same historical period, in the mid-1950s and early 1960s. And, in Tunisia, Algeria, and Morocco alike, actions on family law came “from the top.” Nowhere in the Maghrib was there a broad-based, grassroots women’s movement demanding the expansion of women’s rights in the 1950s. Despite these similarities, upon gaining independence from French colonial rule, the newly formed national states in the three countries followed markedly different paths with respect to family law.

The core question posed in the book is: what are the structural and historical forces that led the three newly formed national states to follow different paths with respect to family law and women’s rights in the aftermath of independence? The central argument is that the process of state formation, especially the pattern of integration of tribes or tribal kin groupings in each nation-state, has been critical in shaping the state and its family law policy. In societies where social organization has historically been based on kinship, as in the Maghrib, state formation has generated contests for political power between the state and tribal kin groupings. Tunisia, Algeria, and Morocco differ on a key dimension: the extent to which the newly formed national state built its authority in alliance with kin groupings or, on the contrary, on bases independent of them. The study shows how states treated issues of family law differently, depending on the structure of the polity that emerged with national independence, and especially the relationship between state and tribe.

The theory developed in the book identifies three distinct paths to state formation and family law. In the first path, the newly formed national state emerges from colonization in close alliance with tribal kin groupings and promptly adopts a conservative family law policy, as in Morocco. In the second path, the state develops in partial alliance with tribal kin groupings and stalls between alternatives before finally enacting a conservative family law policy, as in Algeria. In the third path, the national state evolves in relative autonomy from tribal kin groupings and immediately promulgates a liberal family law, expanding the legal rights of women, as in Tunisia.
THE STATE AND WOMEN’S RIGHTS

Why the relationship of the state to tribe or kin grouping is key to reforms of family law and women’s rights can be understood only in the context of the historical development of the Maghrib. The formation of a national state with administrative control over fixed territorial boundaries is a relatively recent phenomenon in Tunisia, Algeria, and Morocco alike. In the absence of strong centralized states, kin groupings organized as tribes were a major locus of social organization, political authority, and economic activity. The political significance of kinship was manifested in the relative autonomy of tribes or kin groupings from central authority—in whatever form central authority existed at a given time—and in the continuing tension between these two poles of power. To varying degrees in the history of the Maghrib, political conflicts were played out between kin-based local communities and semibureaucratic states whose effective authority had ambiguous boundaries. The kin-based communities jealously safeguarded their autonomy while the states attempted to expand their control over wider segments of the society.

The importance of the central-local dialectic in the process of state formation is not specific to the three countries under investigation. It applies to the formation of many nation-states, but with different parameters. What is specific to the Maghrib, and to a number of other Middle Eastern countries, is the extent to which local solidarities have been defined by kinship ties. In the Maghribi context, the issue of state formation must be cast in terms of the confrontation between central authority and local kin-based collectivities. Important variations among the three countries notwithstanding, tribal kin groupings everywhere had retained enough strength through the colonial period to matter in the web of political alliances and conflicts that affected the emergence of the national state at the time of independence.

To call Maghribi societies “kin based” in the precolonial and colonial periods is to indicate that local ties understood in broadly defined kinship terms (tribe, kin group, clan, or lineage) served as a basis for political association and action. In a kin-based society, when people unite for political action, they do so primarily as members of a kin-based community rather than as members of a class, occupational group, or ideological movement. Despite economic changes in the broader social structure, kin groupings remain agents of social control, enforcing behavioral norms and ordering political life in their local areas.

Family law raises questions that are at the intersection of kinship and state. Law in general is best thought of as a boundary-setting device. It does not determine what people do, but it restricts their choices. Family law is promulgated by the state to regulate relations in the kinship unit. Any body of legislation regulating family relations contains a concept, an image, a normative model of the individual, the family, the society, and the relationships among them. Family law by definition embodies an ideal of the family and social relationships. Whether the legislation of a country conforms to the ideal of the family embodied in Islamic family law is central to the analysis presented in this study. As interpreted here, Islamic family law legitimizes the extended male-centered patrilineage that has served as the building block of kin-based solidarities within tribal groups in the Maghrib. It supports the patriarchal power not only of husbands, but also of kin, over women. Islamic family law is treated in this book as a “precision instrument” for the stability of patrilineages and tribal kin groupings.3

By remaining faithful to Islamic law, the Moroccan postindependence legislation retained the model of the family as an extended patrilineage. After being caught in political gridlock, the long-delayed Algerian Family Code was grounded on a similar concept. In contrast, by moving away from traditional Islamic law, the Tunisian legislation focused instead on individual rights and obligations within a nuclear family system. In promulgating the family law of the newly sovereign country, each Maghribi state presented its vision of kinship and the family. Each vision included different norms on kinship relations and at the same time a different set of rights for women.

Referring to the Islamic world in general, Asma Khadar, a lawyer and human rights activist, declared: “Family law is the key to the gate of freedom and human rights for women.”4 In the Maghrib, as in other parts of the Islamic world, women’s rights as defined in family law are the crux of the matter. They are experienced as fundamental, as is reflected in the use of the expression “women’s rights” in the Maghrib to refer to family law. At stake is the set of legal rights and responsibilities that men and women have in the family and, by extension, in the society at large. Involving matters of legal personhood, the central questions concern procedures for marriage, rights and obligations of each spouse, polygamy, conditions for divorce, custody of children, and inheritance. At issue is whether traditional Islamic family law prevails unchallenged or whether legal reforms alter the balance of power that the law gives to men and women in their
roles not only as spouses but also as members of larger kin groups. At the heart of the issue is the fundamental organization of society and the place of individuals and kin-based collectivities within it.

When family law reforms were made, as in Tunisia, they challenged identities that historically had been based on extended patrilineal kinship ties and that had served as a major anchor for social solidarity, social control, and collective political action. When Islamic family law was promptly reaffirmed as in Morocco, or tacitly maintained due to political paralysis and eventually ratified as in Algeria, the state preserved the form of kinship organization that had kept tribal kin groupings together. Since it defines the place of individuals and kin-based collectivities in society, family law in the Islamic world in effect contains within itself a blueprint for the social order. Policy choices with respect to national family legislation unavoidably brought to the fore the divisions and alliances of national politics. The choices embodied in each new Code of Personal Status or Family Code were an outcome of the structure of political power in each society. More specifically, they were shaped by the extent to which the newly formed state derived its support from political forces tied to tribes or kin groupings and by the place that the leadership intended to give to kin-based solidarities in the future society.

The achievement of national sovereignty represents an exceptional moment in the history of a society. This is a time when the national state is in the making and when contests over state power generate conflicts and alliances among potential contenders. Politics in that era reflect the social forces that previously united to overturn the colonial regime, but now tend to become rivals in the pursuit of power in the newly independent state. Focusing on the crucial period of independence, the book shows how family law policies resulted from the strategies pursued by the newly sovereign states to establish authority over the society as a whole. The strategies varied depending on the extent to which the political leadership found a basis for power in coalitions centered on tribal kin groupings in the period of independence.

Understanding the conflicts and alliances that entered into the state-building strategies pursued by the national leadership requires, however, that attention be paid not only to the period of independence itself, but also to the legacy of long-term structural forces inherited from previous eras. Historical trajectories over the long run created the context in which the state-building strategies of the political elites later unfolded. Developments before and during colonization combined with the characteristics of nationalist movements to leave Tunisia, Algeria, and Morocco with different political configurations on the eve of independence. This gave the nationalist movement and then the state leadership unequal chances for achieving autonomy from tribal kin groupings.

The degree of reliance on—or autonomy from—tribal kin groupings in turn offered the political leadership of the newly formed national states different possibilities and incentives for the reform of family law. Since leaders of the newly formed states derived their power from different sets of alliances, they were unevenly inclined to make reforms that risked disrupting kinship arrangements and undermining alliances with political coalitions anchored in tribal areas. Political leaders had high stakes in preserving Islamic family law when their support came primarily from social groups tied to kin-based solidarities. Further, it is precisely where local areas had remained heavily marked by divisions among separate tribal kin groupings and patrilineages, as in Morocco especially and to some extent in Algeria, that Islamic family law provided the most meaningful symbol of national unity readily available to the newly formed state.

In contrast, where tribal kin groupings had been largely subsumed within a national entity, as in Tunisia, the political leadership had more leeway for reform, for it operated in a context where bases other than Islamic family law existed to set national goals. This was also a context in which it was possible and realistic for the leadership to envision a future society where tribal kin groupings would become even more marginalized. Besides, the leadership in this case had incentives for reform, as family law reform was likely to further weaken what was left of already attenuated kin-based tribal solidarities. Tribal kin groupings that remained not only offered no support to the state leadership but constituted a potential basis for mobilization by other contenders for power, an additional reason for the leadership to undermine kin-based solidarities. As variations in th Maghrib suggest, newly formed states all have to address the reconstruction of society after colonization, but they do not all march down the same road. Indeed, states in culturally similar societies may follow markedly different paths.

A FOCUS ON THE POLITY

In developing a structural model, I draw on a body of theoretical and comparative writings on the state. A common thrust of the writings is to emphasize the impact of state structures and political organization on social change. Some scholars show how the conditions surrounding the formation of central states influence their policies or analyze the role of the sta-
in social transformation. Others propose an approach focusing on the potential autonomy of the state, reminding us that state policies are sometimes best explained by reference to state structures, interests, or capacities. These theories have called attention to the interaction between state and social class in shaping politics and policies. Taken together, the writings offer a perspective centering on the polity. That perspective has proven useful to analyze a wide range of political outcomes, particularly in societies where social class divisions have provided the main basis for collective political action. There is still much to be done, however, to apply the insights of state theories to political outcomes in times and places such as the precolonial, colonial, and postcolonial Maghribi where tribal kin groupings, rather than social classes, historically have played a major political role.

A key question to consider for such cases concerns the extent to which the state has been autonomous from, or, on the contrary, dependent upon, kin-based tribal groupings in the process of historical development. When dealing with the development of the state in the Maghribi and in other parts of the Middle East, we must confront the central importance of kin-based tribal groupings in the structure of the polity. Many policies of Maghribi (as well as other Middle Eastern) states in the last half century become more intelligible if one keeps in mind that they occurred in societies that were in part kin based and where tribal kin groupings represented a political force when sovereign nation-states were emerging from colonization.

With its focus on the relationship between state and tribe, the framework of this book departs from the prevailing model of the forces shaping state policies on gender. Influential studies have shown how state policies that either expand or limit women’s opportunities and rights are responses (positive or negative) to pressures from below by social and political movements (including women’s groups or women’s rights advocates). Developments in the Maghribi do not conform to that model, however. The effect of feminist activism from below does not account for state policies on family law and women’s rights as they evolved in the Maghribi in the aftermath of independence. Strikingly, the government of the country where the most radical reforms occurred (Tunisia) was not the object of pressures from below by an organized women’s movement. In the Maghribi, the strategy of state building as shaped by the relationship between state and tribe has been key.

In considering the region of the Middle East, scholars have emphasized the gendered and patriarchal practices of Middle Eastern states. These important contributions have deepened our understanding of gender policies in that part of the world. All Middle Eastern states are not alike, however. They vary in their gender policies with some being more patriarchal than others. Why this is so remains to be fully explained and provides the starting point for my inquiry into the political origins of women’s rights. I focus on variations among states and, in considering such variations in the Maghribi in the postcolonial period, I take state-tribe relations as a critical variable shaping state policies on women’s rights in family law.

In brief, the relationship between state and tribe made reforms of family law possible in Tunisia, uncertain in Algeria, and unlikely in Morocco. As this book shows, the structure of the polity made it more or less possible and advantageous for the political leadership to reform family law. Reforms were made in the Maghribi when they were in conformity with the interests of those political forces controlling the newly formed national state. They were rejected or avoided when they would have threatened alliances deemed critical to the existing political and social balance of power.

**Tribe and Autonomy**

Because the concepts of tribe, kin grouping, state autonomy, and tribal autonomy are pivotal to this study, definitions are in order at the outset. The meaning of “tribe” in particular varies greatly depending on the context. A Maghribi tribe is best conceptualized as primarily a political entity, bound by shared conceptions of patrilineal kinship serving as a basis for solidarity, and oriented toward the collective defense of itself as a group. I use the term “larger kin groupings” to refer to segments of a tribe, thus to a group that tends to be smaller than a tribe but shares the same logic of organization. I also use “tribal kin groupings” to emphasize the overlap between the political and kinship dimensions. Other terms used in the literature on the Maghribi include lineages, patrilineages, clans, kin groups, kin networks, kin-based forms of association, and sometimes large family groups.

The definition of a Maghribi tribe rests on a consideration of the links between tribes and the wider society. The tribes have combined a quest for autonomy with a degree of participation in a social whole larger than themselves. Elbaki Hermassi remarks: “If by tribe, we mean a self-sufficient social unit constituting a world unto itself—perceiving itself as the whole of mankind and recognizing no right or obligation beyond its limits—then tribes [did] not exist in North Africa.” The quest for tribal autonomy in
the history of the Maghrib refers to the struggles in which tribes engaged in order to escape interference in their affairs by central authority. Most often, tribes defended their autonomy in order to avoid taxation.

At the same time, however, tribal organization historically has coexisted with markets, states, and the religious universalism of Islam. Maghribi tribes have experienced a process of partial inclusion in the broader society at least since the early nineteenth century. Most tribes came into contact with the larger environment because they could not avoid altogether exchanging goods with other groups. Most tribes also encountered the agents of central authority at one time or another, despite their efforts to resist all forms of intrusion. In addition, Islam enveloped the cultural particularisms of nearly all tribal areas. It permeated the particularisms even where it did not eradicate them. Maghribi tribes thus existed in the context of universalizing forces that they sometimes resisted but could rarely escape altogether. Cultural unity and political fragmentation have gone hand in hand in Maghribi history.

By state autonomy from tribes, I mean that state actors did not seek political support from social groups that found their base among tribal kin groupings. This further suggests that state actors found political support in other sectors of society and had little incentive to make a place for tribes in the social order. The relationship between state and tribe is a complex one with several dimensions. In the period of nationalism and national independence, that relationship was shaped by: a) the extent to which kin-based tribal groupings remained as a potential basis for political mobilization in the fight against the colonizer; b) how much the nationalist leadership actually mobilized them; c) how kin-based tribal solidarities entered the politics of the newly formed national state; and d) the potential for bureaucratic centralization inherited from the precolonial and colonial periods.

Notes

All translations are the author’s unless otherwise indicated.

INTRODUCTION


2. Maghrib means “west” in Arabic. The region to which the term refers is the western tip of the Arab-Islamic world. I have chosen not to include Libya in the analysis because Libya was colonized by Italy, whereas the other three countries were all under French rule. In this study, the terms “Middle East” and “Middle East and the Maghrib” are used interchangeably to denote the region between Morocco and Iran.


6. Theda Skocpol, States and Social Revolutions: A Comparative Analysis


1 State Formation in Kin-Based Societies

Tunisia, Algeria, and Morocco share a common denominator with many postcolonial nation-states in that they are “old societies” at the same time that they are “new states,” to use Clifford Geertz’s classic formulation. What makes them new is the novelty of their political independence. Until fairly recently on the world historical scene, these countries were colonies or enjoyed only limited sovereignty. Their populations, however, are not new. They have had a cultural identity for centuries. Upon gaining sovereignty, a major imperative confronting postcolonial nations such as those of the Maghrib was to develop a national state and nation-wide institutions in the context left by colonial rule. The task often was to be done in a society characterized by a segmented social organization, as colonization had left many new nations with separate collectivities that were not integrated into a national whole. The separate collectivities varied in nature. They could be ethnic, caste or kinship-based, tribal, religious, or linguistic. In the case of the Maghrib, they were largely tribal and kin based.

The important similarity among many old societies and new states is that loyalties and foci of solidarity rested with the collectivities themselves rather than with nation-wide institutions. Postcolonial newly independent nations had to become nation-states in which the territoriality of the nation was coterminous with that of the state. Following a worldwide wave of decolonization in the mid-twentieth century, the development of nation-states generated tensions with local solidarities in many parts of the world. The problem of state formation, nation building, or national integration has been widespread in the postcolonial world, as is demonstrated by references “to ‘dual’ and ‘plural’ or ‘multiple’ societies, to ‘mosaic’ or ‘composite’ social structures, to ‘states’ that are not ‘nations’ and ‘nations’ that are not ‘states,’ to ‘tribalism,’ ‘parochialism,’ and ‘communalism.’”
This chapter discusses the conceptualization of state and state formation in societies characterized by politically significant local solidarities. The essential starting point is an appreciation of the tensions inherent to nation building and state formation in postcolonial nation-states in general and in the kin-based societies of the Maghrib in particular.

STATES, NATIONS, AND LOCAL SOLIDARITIES

When analyzing state formation, it is more appropriate to consider the extent to which a given collectivity meets criteria that are part of statehood in given periods than to ask whether a collectivity does or does not constitute a state. The same applies to nationhood. Max Weber offers a definition useful for the conceptualization of the state used in this book. He writes: “A compulsory political association with continuous organization will be called ‘a state’ if and in so far as its administrative staff successfully upholds a claim to the monopoly of the legitimate use of physical force in the enforcement of its order.”4 A state thus is an institution that places a claim on the authority to make binding decisions for all, on the monopoly of force, and on a territory. In the modern world, a state is usually associated with an administrative apparatus in the form of a bureaucracy.

By implication, state formation involves the expansion of administrative reach over a territory combined with authority within national boundaries.4 Nation building refers to the development of a collective identity and the integration of separate collectivities into a national whole. The connections between state formation and nation building are intricate and vary from case to case. Some countries face nation building and state formation all at once. Others already have a collective identity when they develop a central state. Still others become national entities only after the development of a central state.

As an overall concept for the social ties binding communities in old societies with separate collectivities, Geertz speaks of “primordial attachments.” He sees the attachments as stemming from the “givens of social existence,” mainly “immediate contiguity and kin connection,” including kinship, ethnicity, language, region, religion, or custom.6 The concept of primordial ties taps a crucial reality in the new nations because it highlights the segmentation of social organization. Primordial ties often serve as a source of solidarity and cohesion for communities in local areas. They serve as a basis for members of communities to claim their separateness both from other communities and central power. If primordial ties remain strong and separate collectivities persist, it is generally not because people refuse to relinquish centuries-old, deep-rooted beliefs that no longer make sense in a modern era. The ties remain, not as meaningless vestiges of the past, but as social forms that serve a useful function in the here and now. In some cases, ties previously forgotten are reinvented. In the Maghrib, as elsewhere, traditions are invented, abandoned, reinvented, and transformed for reasons rooted in the present.

There is a direct conflict between local solidarities based on primordial ties (which I refer to in brief as local solidarities) and a nation-state. Each institution requires loyalties of its members. Each involves mutually exclusive definitions of what the maximal political unit ought to be. Insofar as primordial solidarities sometimes become candidates for nationhood, they compete with the state or challenge its very existence. Precisely because they represent alternative institutions of power and social control, primordial communities and national institutions find themselves in a relationship of ongoing tension. The tension may be open or latent. Considering other nations may help to place the Maghrib in perspective. In India, for example, the tension has crystallized into violent conflict. Many of the problems of Indian society involve managing the complexities of a society that includes several languages, castes, religions, and ethnic groups. Similar conflicts based in part on similar kinds of solidarities have arisen in places as diverse as Morocco, Nigeria, Rwanda, China, the former Soviet Union, and the former Yugoslavia, to name only a few. One may think of Lebanon and Afghanistan as countries where in recent history, for a variety of national and transnational reasons, loyalties grounded in kinship, ethnicity, or religion challenged the state and one another.

The tension between communal solidarities and society-wide institutions is not unique to new nation-states. It was also experienced, but in a different way, by the West. Reinhard Bendix reminds us that Max Weber's lifework was an effort to analyze the tension. Bendix writes about Weber's work: “[It was an effort] to document the proposition that Christian doctrine and the revival of Roman law militated against familial and communal ties as foci of loyalty which compete effectively with the universal claims of legal procedure …”9 Such familial and communal ties as foci of loyalty competed also with national political, social, and economic entities. Some communal ties, particularly ethnic, linguistic, and religious, remain to this day social and political issues in advanced industrial nations. Witness, for example, French-speaking Canada, Basque nationalism in Spain, or, on a more limited scale, the Corsican movement in France. In general in Western Europe, however, communal solidarities were broken, or at least weakened, in a gradual fashion, over several centuries by industrial
capitalism and political struggles in absolutist regimes. Jack Goody traces the weakening of solidarities grounded in extended kinship ties to an even earlier period and associates it with the expansion of the Christian Church in Western Europe.10

In the Maghrib as in other new nations, there are two essential differences. First, the timing of state formation is different. Whereas England and France, for example, were already nation-states when industrialization took place, the new nations sometimes had to face state formation, nation building, industrialization, and a host of other imperatives all at once. Second, some of the primordial communities have remained basic social institutions up to the present in many new nation-states. This is not to say that there was no change in those societies until recently. In many cases, however, the dynamic of change was such that primordial communities were able to maintain themselves, either by making necessary but minimal adjustments or by openly struggling for their autonomy.

The development of a national state requires the redirection of resources previously embedded in local networks of obligation toward national goals.11 As new states attempt to channel resources away from local communities, they challenge primordial ties. Members of separate collectivities find their autonomy jeopardized and their life affected in all respects, sometimes even the most private. To establish the hegemony of the state, the groups in power must transfer social control at least in part from its prior basis in local, ethnic, or kin-based communities to national institutions. Only then is the state in a position to make binding decisions for all. Although new nation-states share the primordial-national dialectic, the particular way in which this dialectic is played out varies greatly, as is evinced by the diversity of institutional configurations in the postcolonial world.

There are multiple kinds of national unity, multiple kinds of nationwide institutions, and multiple forms of state hegemony. In theoretical terms, central power may a) confront kin-based solidarities and try to subordinate them; b) tolerate them and timidly chip away at their political leverage; or c) manipulate them in a divide-and-rule approach to politics.12 Conversely, kin-based corporate structures may exist in a variety of relationships to the state. Such structures may a) compete with the state by representing a focus of loyalties for those groups trying to escape state control; b) support the state in both direct and indirect ways; or c) compete among themselves in an attempt to gain the favors of the state. Groups in power can establish state hegemony in a variety of ways, thus giving different forms to the relationship between central power and local solidari-

ties. There also can be shifts in the strategy of any given state, resulting in variations from one historical period to another in the same country. And the process may reverse itself. As Lisa Anderson reminds us, “the march of bureaucratic domination,” to use Weber’s phrase, is reversible and states may lose power they once had over the periphery.13

CENTRAL/LOCAL TENSION IN THE HISTORY OF THE MAGHRIB

The nation-state had an ambiguous identity in the political history of the Maghrib. Only with the achievement of independence from colonial rule has the modern state emerged to challenge or undermine the authority of traditional structures of solidarity and social control. Historically, authoritative institutions were of two types in the Maghrib: the immediate kin-based community or tribe on the one hand and the world Islamic community on the other. Neither unit of reference overlapped with the boundaries of a nation-state. One unit of identification, the tribe, did not reach the level of the nation-state. The other unit, the world Islamic community, bypassed the nation-state altogether. It transcended it geographically, and it subsumed the political within an all-encompassing religious frame of reference.

In terms of social organization, the tribe or kin grouping is critical because it historically has constituted the basic community in the Maghrib. A feature shared by Maghribi and other Middle Eastern societies is their origin in a tribal structure. Nikki Keddie states that, when analyzing the history of the Middle East, it is necessary to consider how a large-scale tribal presence has affected the society as a whole.14 Tribal origins do not belong to a forgotten past. There are entire regions where individuals continue to identify themselves as members of a tribe. Scholars have documented the existence of a tribal structure to varying degrees in Tunisia, Algeria, and Morocco well into the twentieth century. Elbaki Hermasi, for example, indicates that most rural areas in the Maghrib “remained predominantly tribal, preserving their social structures intact until the beginning of the twentieth century.”15 Tribal solidarities may overlap with linguistic, ethnic, or other identities. In the Maghrib as a whole, however, significant local solidarities have rested primarily upon tribal roots.16

The Maghribi experience derives in large part from a history of tension between a social group holding power in the political center and autonomous local collectivities resisting its control. Precolonial states, with varying degrees of administrative capacities, expanded and contracted depend-
ing on how much control they could master over tribal areas in the periphery. Tribes coexisted with partially bureaucratic centers that had shifting boundaries and often lacked stable systems of administration at the regional and local levels.17 Keddie has suggested that Middle Eastern history could be reconstructed by looking at the "various permutations and combinations of a nomadic-agricultural-urban synthesis."18 This applies well to the Maghrib. The nomads were usually at the periphery, resisting control by the center. Settled agricultural populations occupied a middle position: they reluctantly submitted to partial control by central authority when it was ascendant. Urban groups, those at the center, constituted the core of the state’s domain. They submitted to taxation and provided a pool for the armed force of the ruler.

A phrase attributed to the Prophet Muhammad reads as follows: “The plow will not enter a family’s dwelling without also bringing debasement.”19 Whoever uses a plow is attached to a piece of land. The notion expressed in the phrase is that with the tie to land comes the obligation to submit to the demands of central authority and, in particular, to pay taxes. The nomad, who has neither plow nor land, has freedom to move and thus to escape obligations. The nomadic way of life is often glorified in Maghribi culture. Even today, it is not uncommon to hear that whoever has Bedouin blood (i.e., nomadic ancestors) belongs to the authentic core of Maghribi society. Until the nineteenth century in most of the Maghrib, power was the basis of wealth, which was under constant threat if it did not go hand in hand with control over tribes. Ruling elites usually had little or no stable landed patrimony and therefore lacked an enduring basis for support. Wealth in the form of land for the settled population and cattle for nomads could disappear suddenly in case of war among tribes—and these wars occurred frequently. It would also vanish if the social group in the center were displaced by another group—and this too happened quite often. The best way, then, to retain wealth was to be in a position of political power, that is, to say, to be in control of other tribal groups.

The clash between tribes and central authority in precolonial times characterized was less acute where central authority infringed little on the life of the population. In areas where central authority restricted its demands to the payment of a tribute and to respect for peace, settled agricultural communities could tolerate these demands. They did not feel overly threatened as long as the institutions of social control, the organization of production, and the general orchestration of communal life were still in their own hands. Furthermore, numerous communities were altogether out of the reach of central authority. The relative autonomy left to separate social groups—even to those from which the political center succeeded in extracting tributes—contributed to the preservation of different social norms and to the ongoing cohesiveness of each group.

The "Republics of Cousins" in Politics

Reflecting the importance of kin-based solidarities in the Maghrib, there has been a revival of the work of Ibn Khaldun, the great Maghribi historian of the fourteenth century (1332–1406).20 There are obvious differences between Ibn Khaldun's time and modern times. In particular there are now territorial nation-states with fixed boundaries. Yet, there is good reason for turning to Ibn Khaldun. His analysis provides insights for the understanding of the Maghrib in the nineteenth century and the first half of the twentieth. The main question preoccupying Ibn Khaldun was that of “solidarity” or “group cohesion.” He was concerned with what held a collectivity together, gave it strength and power, and prevented its atomization.

The concept of asabiyya, central to Ibn Khaldun’s work, has proven particularly useful for the analysis of Maghribi history. Asabiyya is often translated as “solidarity” or “esprit de clan.” A more accurate translation proposed by David Hart is “unifying structural cohesion” or “agniation in action.”21 What mattered greatly for the history of any group was the strength of its asabiyya, its “unifying structural cohesion” based on ties among agnates, or male kin in the paternal line. The groups with the greatest asabiyya were those best capable of resisting control by other groups, including central authority, and sometimes to displace central authority altogether. Hence, a strong asabiyya was politically advantageous and instrumental for the survival of the tribal group. The French anthropologist Germaine Tillion effectively captures this linkage between kinship and politics by referring to the many “republics of cousins” in the traditional political order of the Maghrib.22 The patrilineage historically has been the building block of tribal communities or larger kin groupings with political functions. Members of a tribe typically perceived themselves as related to one another through kinship ties, however broad the definition of a meaningful link might be.

Colonization did not fundamentally alter extended kinship systems in the Maghrib. Its effect on kinship was far from a simple restructuring. The era of colonization in the Maghrib as a whole covered part of the nineteenth century and the beginning of the twentieth. At that time, the world-historical setting was such that colonizers primarily were interested in the economic advantages provided by colonies. They were concerned with mat-
ters of social organization such as kinship or the family only insofar as these matters facilitated or hindered colonial rule and economic domination. Often, the objective of the colonizer was to make tribal kin groupings serve as conservative, stabilizing elements of the social order, as political power at the center was monopolized by colonial authority. Among the colonized, the extended kinship unit acquired further value as a refuge from those dimensions of society being transformed by the colonizer. Kin-based solidarities thereby were reinforced in response to the experience of colonial domination.

Kin groupings historically acted as corporate structures striving for autonomy from the centers of political power. In the precolonial and colonial periods and in some instances after independence, the republics of cousins engaged in intermittent conflict, latent or overt, with the political center. Because local collectivities found their source of cohesion in the nexus of kinship ties, the process of state formation demanded everywhere in the Maghrib a social transformation involving the integration of republics of cousins. Throughout the Maghrib, a transformation from a locally based society to a centrally integrated nation-state confronted the political leadership after independence, even where the process had started before colonization. The transformation was not smooth; on the contrary, it was accompanied by conflicts serious enough to threaten the stability of the polity.

During the nationalist period, kin-based local solidarities entered the political equation in all three countries in the Maghrib. Although it had developed a semibureaucratic state earlier than its neighbors because of developments starting in the precolonial period, Tunisia nevertheless experienced the turmoil of tribal politics during the anticolonial struggle. Algerian and Moroccan societies exhibited an even more segmented social organization in which ties of lineage and tribe remained stronger. About Algeria at the end of colonization, Jeanne Favret remarks that "social discontinuity was more marked than in any other country freed from colonial rule." About the formative history of Morocco, Clifford Geertz notes: "The critical feature of Morocco is that its cultural center of gravity lay . . . in the mobile, aggressive, now federated, now fragmented tribes who not only harassed and exploited [the cities] but also shaped their growth." Commenting on the later phase of the colonial period in Morocco, Ernest Gellner writes: "For the tribesmen, political life was the conflict of local groups, alignments, lineages, families, for local power, and the game was played out within the region." Solidarities based on kinship may respond to change in numerous and complex ways: they may resist; they may tighten up protectively in the face of external threats; they may change in limited ways so as to adapt to new situations; or they may change in substantial ways. Instead of treating kinship as an institution that is immediately altered in response to changes in the society at large, it is thus helpful to use a broader conceptualization of how kinship systems respond to social transformations. Furthermore, interesting questions can be raised if one considers the relationship between changes in kinship and in other institutional spheres. Kin groups or families have been primarily defined as economically relevant units, whether these units are seen in their productive function in preindustrial societies or in terms of their socio-economic status in advanced industrial countries. Once the economic aspect of kinship units is emphasized, the main question that arises concerns the reciprocal effect between kinship and the economy. This is an important question, but not the only one worth considering.

Kinship systems also can be seen in their political and integrative functions, and therefore in relation to the polity. This is especially the case in parts of the world where clans, lineages, and other kin-based forms of association remained meaningful social entities in the modern era. For example, Judith Stacey shows how kinship systems in China not only persisted but played a crucial role in shaping the course of social and political change. In the Maghrib, throughout the nineteenth century and in many regions in the first half of the twentieth, kin-based solidarities remained strong in local areas, although profound changes were affecting the region. Even when they had not maintained enough separate identity to be properly called a tribe, many republics of cousins had retained a sense of themselves as corporate entities and remained operative in the political order. In several regions of the Maghrib, the coming of national independence heightened the tension between local collectivities and central authority. The intervention of nationalists and then of the national government in rural politics reactivated kin-based local solidarities in all three countries but it did so within different scenarios.

In Morocco in the aftermath of independence, the monarchy was the key arbitrator in an intricate web of loyalty and dependence within a system of segmented politics. I. William Zartman indicates that the royal strategy was to form alliances with tribal notables in rural areas. John Waterbury calls attention to the king's ability to manipulate, encourage, and balance off factions. Given that many factions were anchored in rural coalitions that included a tribal base, it would not have been advantageous for the monarchy to challenge kin-based solidarities. It was more sensible
to maintain them and to leave unthreatened the kinship structure that served as the basis of social organization in rural areas.

In Algeria, the strategy of the political leadership was double-sided. A major postindependence insurrection showed a republic of cousins coming together. According to Favret, it was an example of the manipulation of kin-based groups in rural areas by what she calls their "elite city cousins" in national politics. She remarks that the primordial groups in newly independent Algeria survived "not as unconscious anachronisms but as a result of deliberate reaction." This was only part of the story, however. There was a tension in independent Algeria between the manipulation of local kin-based solidarities and an attempt to create a polity independent from such solidarities.

In Tunisia, conflicts involving kin-based solidarities flared up in violent outbreaks during the nationalist struggle and immediately following independence, but the conflicts ended with the defeat of tribally based coalitions. In the aftermath of independence, the balance of forces was favorable to those elements of the national leadership that were most interested in reducing the political weight of social groups attached to kin-based solidarities. As a result, the national state in Tunisia had a better chance to achieve autonomy from tribal kin groupings than either its Algerian or Moroccan counterpart.

To emphasize the importance of kin-based solidarities is not to say that the Maghribi was classless until the mid-twentieth century. Once capitalism developed as a world system, no world region escaped its influence. Furthermore, there was some form of semibureaucratic state with uneven control over territory and frequently changing boundaries in each Maghribi country already in the precolonial period. "State" by definition implies appropriation of surplus and therefore class inequality. The important point is that kin-based political organization and noncapitalist social formations coexisted with capitalist interests. Where kin-based political solidarities existed during the colonial period, they continued to make their mark on politics after independence, this time within a national context.

When nationalist leaders mobilized tribal areas in the nationalist struggle or after independence, most did so to increase their power in national politics, not to create a separate nation. It would be an anachronism to treat the politics of the mid-twentieth century as nothing other than a sheer reenactment of tribal dissidence in the precolonial period. Coalitions based on tribal kin groupings played a role in nationalism and then in the independent nation-state, and they did so by entering the modern politics of the mid-twentieth century.

In the context of the Maghrib, the solidarity of tribal kin groupings as political communities claiming the loyalty of their members thus must be given central place in the investigation of issues of political authority at least until the period of national independence. Whatever institution or policy at the national level is studied in the period of independence, it is necessary to ask how it was affected by the interaction between the local areas where tribal organization prevailed and the newly formed central state. The integration of tribes into a nation-state was a long process, often accompanied by bloodshed and violence. The timing and particular mechanisms of that process have shaped the development of the national state, its relationship to social groups, and the policies it adopted in the aftermath of national sovereignty. I turn next to another major similarity in the Maghrib, the centrality of Islam and family law.

CHAPTER 1. STATE FORMATION IN KIN-BASED SOCIETIES


2. Tunisia and Morocco were French "protectorates," whereas Algeria was declared a French "province." Tunisians and Moroccans participated nominally
in government, although actual power was in the hands of the French. On the
different forms of colonial rule in the Maghrib, see chapter 6, “Colonial Rule.”
3. On the development of the state in the Maghrib and other parts of the
Middle East, see Roger Owen, State, Power, and Politics in the Making of the
Modern Middle East (London: Routledge, 1992), 9–133; Nazih N. Ayubi,
Over-Stating the Arab State: Politics and Society in the Middle East (London:
Tauris, 1995), 38–134; Lisa Anderson, The State and Social Transformation in
and “The State in the Middle East and North Africa,” Comparative Politics
(London: Croom Helm, 1987); and Sami Zubaida, Islam, the People and the
State: Essays on Political Ideas and Movements in the Middle East (London:
Routledge, 1989).
4. Clifford Geertz, “The Integrative Revolution: Primordial Sentiments and
Civil Politics in the New States,” in Old Societies, ed. Geertz, 106.
6. Charles Tilly sees state formation in Western Europe as involving “ter-
ritorial consolidation, centralization, differentiation of the instruments of
government from other sorts of organization, and monopolization (plus concen-
tration) of the means of coercion.” Charles Tilly, “Reflections on the History
of European State-Making,” in The Formation of National States in Western
The formulation in this book is close to that used by Tilly. A key difference is
that I consider states that had to contend with lineages, tribes, and kin-based
coalitions, which Tilly does not examine. Nevertheless, the development of a
modern state involves similar processes in both cases.
7. Reinhart Bendix, Kings or People: Power and the Mandate to Rule
(Berkeley and Los Angeles: University of California Press, 1978) appropriately
warns that the variations are numerous, with national movements transcending
the geographic territories of states, and dissident minorities contesting the
legitimacy of nation-states. He nevertheless makes a useful distinction be-

tween the concepts of state and nation. He writes: “Nation refers to at least
two phenomena: 1) an historically developed community with a distinctive
culture and language in common; 2) the juxtaposition of the central govern-
am and a citizenry which consists of individuals who are equal under the
law, a principle of government introduced by the French Revolution” (605).
As to the emergence of the modern state, he defines it as “the gradual con-
centration of administrative functions in the hands of the central government”
(605). On Bendix’s treatment of nation building, see also his Nation-Building
and Citizenship: Studies of Our Changing Social Order (New York: John Wil-
ley, 1964). On nation and nationalism, see E. J. Hobsbawn, Nations and Na-

tionalism since 1780: Programme, Myth, and Reality (Cambridge: Cambridge
University Press, 1990); and Benedict Anderson, Imagined Communities: Re-

flections on the Origin and Spread of Nationalism, rev. ed. (London: Verso,
10. Jack Goody, The Development of the Family and Marriage in Europe
12. This formulation has benefited from discussions I had with Seymour
Martin Lipset, Theda Skocpol, and Ann Swidler.
13. This is exemplified by the case of Libya. See Anderson, State and Social
Transformation.
14. Nikki R. Keddie, “Is There a Middle East?” International Journal of
Middle East Studies 4, no. 3 (July 1973): 270. On tribes in countries of the
Middle East outside the Maghrib, see Dawn Chatty, Mobile Pastoralists: De-
velopment Planning and Social Change in Oman (New York: Columbia Uni-
versity Press, 1996); Mehran Kamrava, The Political History of Modern Iran:
From Tribalism to Theocracy (Westport, Conn.: Praeger, 1992); Linda L. Layne,
Home and Homeland: The Dialogics of Tribal and National Identities in
Jordan (Princeton: Princeton University Press, 1994); Schirin H. Fathi, Jordan—
An Invented Nation? Tribe-State Dynamics and the Formation of National
Identity (Hamburg: Deutsches Orient-Institut, 1994); Andrew Shryock,
Nationalism and the Genealogical Imagination: Oral History and Textual
Authority in Tribal Jordan (Berkeley and Los Angeles: University of Califor-
nia Press, 1997); Philip S. Khoury and Joseph Kostiner, Tribes and State Formation
in the Middle East (Berkeley and Los Angeles: University of California Press,
1990) (the individual case studies include Iran, Saudi Arabia, Yemen, and
Libya); Paul Dresch, Tribes, Government and History in Yemen (Oxford: Clar-
endon Press, 1989); and Martha Mundy, Domestic Government: Kinship,
Community and Polity in North Yemen (London: Tauris, 1995).
15. Elbakki Hermassi, Leadership and National Development in North Af-
rica: A Comparative Study (Berkeley and Los Angeles: University of Califor-
nia Press, 1972), 36. For an example of tribal life in the twentieth century, see
Dale F. Eickelman, “What Is a Tribe?” in The Middle East and Central Asia:
125–46.
16. On tribal organization in the history of the Maghrib, see the following overlooks: Daniel Nordman, Profils du Maghreb: Frontières, figures et terri-
toires (XVIIIe–XXe siècles) (Rabat: Université Mohamed V, Publications de la
Faculté des Lettres et des Sciences Humaines, 1996), 23–126; Rahma Bourja
and Nicholas Hopkins, eds., Le Maghreb: Approches des mécanismes d’articulation (Casablanca: Al Kalam, 1991), 118–222; and Ernest Gellner and
Charles Micaud, eds., Arabs and Berbers: From Tribe to Nation in North Africa
(Lexington, Mass.: D. C. Heath, 1972). Historical and anthropological studies
on each Maghribi country are cited in relevant chapters.
17. There were variations on this dimension among the three Maghribi countries, as discussed in part 2.


5 The Precolonial Polity

National Variations

Tunisia, Algeria, and Morocco exhibited similarities and significant differences in the basic framework of politics in the precolonial period. Throughout the Maghrib in that period, the polity was neither a stateless society nor a modern nation-state, but one in which issues of control were negotiated and renegotiated between central power and local areas. The model of power outlined in the previous chapter applied to some extent to all three countries, which displayed the two key elements of tribal politics: a tension between state and tribe, and the advantage provided by the support of a cohesive kin grouping to build a power base at the local and regional level. Although they shared these characteristics, Tunisia, Algeria, and Morocco differed with respect to the political leverage of kin groupings and the form of central authority in the precolonial era. This chapter examines differences in the polity of the three Maghribi countries in the precolonial period with an emphasis on political unification versus fragmentation. The implications of these differences for family law are then considered at the end of the chapter.

Tunisia experienced early state centralization, coupled with a weakening of the tribes as political actors. Algeria had powerful tribes and a weak state that often ignored each other. In Morocco, a division between a shaky *bilad al-makhzan* (land of government) and a feisty *bilad al-siba* (land of dissidence) caused frequent and bloody confrontations. Family law mirrored political organization in each country. The judicial system and the number of codes of family law in each territory reflected the degree of political unification, or on the contrary, the degree of fragmentation. Tunisia had a more unified system of family law and even attempted a few reforms of that system. Algeria and Morocco had a more diverse and frag-
mented system of law, with a substantial number of particularistic codes of customary law in regions and local areas.

I use two categories of indicators to analyze national differences in the capacity for control on the part of central authority versus the degree of autonomy of tribal groups. The categories of indicators are the incidence and character of tribal rebellions and the centralizing reforms attempted or actually implemented by central power. The first category, tribal rebellions, taps the degree of segmentation of the society. Within that category, the frequency of tribal rebellions refers to the actual occurrence of acts of disidence and resistance to central power. It indicates the frequency with which local areas activated kin-based solidarities to oppose controlling efforts on the part of the state. The features of tribal rebellions, whether tribal groups revolted each in isolation or could generate a measure of coordination among themselves, reflect social organization in the region considered. The nature of the grievances made by rebelling tribes tells us something about the nature of the relationship between kin-based groups and the state. Whether tribal groups revolted to preserve their autonomy or on the contrary to demand assistance from central power reflects a different kind of relationship.

The second category of indicators—centralizing reforms—taps the characteristics of the state. It shows the ability of the state to extract taxation from the population and channel resources toward developing its bureaucratic and military apparatus. In the absence of systematic information on the overall amount of taxation that each state extracted at different times, I made a judgment. If a state were able to strengthen its bureaucracy and army and to extend its administration over a larger territory, I took the evidence as a reason to assume that the state had the resources to do so and thus levied taxes with some degree of success and that tribal groups had surrendered some of their autonomy.

At the outset, the time periods and the geographic areas considered in this chapter must be clear. The precolonial era covered different chronological periods for the three countries. Colonial rule started in 1830 in Algeria, in 1881 in Tunisia, and in 1912 in Morocco. In considering the polity in the decades before colonization, this chapter thus examines different time periods for each country. With respect to geographic area, precolonial Tunisia, Algeria, and Morocco did not constitute nation-states as we usually understand the concept today, with (more or less) fixed borders and a territory under the (more or less) accepted authority of a state. Julia Clancy-Smith shows how the borders represented "zones of exchange, compromise and contest." It was not until Tunisia and Morocco became sovereign states in the mid-1950s that borders became more or less fixed, although conflicts over territorial boundaries also have occurred since then. Map 2 indicates the changing borders over time. To be precise, one should say "in the territory that later became Algeria or Tunisia or Morocco," when considering Maghribi politics in the precolonial period. For the sake of simplicity, however, I refer to the countries by their current names in all historical periods.

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CHAPTER 5. THE PRECOLONIAL POLITY

1. This was not the only factor, but without it, one had little chance of success in building a power base.
6 Colonial Rule

French Strategies

* * *

COLONIAL MANIPULATION OF FAMILY LAW

In all three countries, the French policy on family law was shaped by the form of colonial domination at the same time that it contributed to it. In,
Tunisia, the French could exert colonial rule without changing family law. Neither the colonial economy, heavily based as it was on large commercial interests, nor the expansion of the preexisting Tunisian bureaucracy, made changes in family law a pressing agenda for the colonial state. The French left family law in place, essentially as it was at the beginning of colonization.

By contrast, the French manipulated family law in Algeria and Morocco. In Algeria they introduced a number of changes that aimed overwhelmingly to tighten the colonial grip over the Algerian population. Maintaining the basic framework of Islamic family law, most of the French initiatives converged toward the objective of facilitating bureaucratic rule. Taking advantage of the existence of customary law in several regions in Algeria, the French also encouraged the divisions among regions and the particularism that prevailed in each. In Morocco, the French overtly politicized family law. Playing on the existing diversity of Moroccan society, they exacerbated the divisions in family law and set one part of Morocco against another. They encouraged the divisions between Islamic and customary law, makhzan and siba, and Arabs and Berbers. Map 7 shows the significance of areas of Berber speech in Algeria and Morocco and their absence in Tunisia. Not all, but many, Berber areas had their own codes of customary law. Among other factors, linguistic diversity offered the colonizer different opportunities for a divide-and-rule strategy.

**Algeria: Reforms and Colonial Grip**

When they occupied Algeria in 1830, the French pledged to respect the codes of personal status and family law of the various Algerian populations. On the whole, they kept that pledge for reasons of political expediency and self-interest. They preferred to avoid causing more violent resistance than they already faced. They knew Algeria well enough to realize that Algerians overwhelmingly saw Islam as the cornerstone of their identity. When the French introduced reforms, they made only relatively small ones and kept the framework of Islamic law. Allan Christelow shows how in the 1850s the French maintained Islamic law for the majority of the population in Algeria while placing the courts under French control. In tribal areas, colonial authorities often had no choice but to respect customary law when they negotiated with tribal communities to gain their allegiance or minimize their resistance. In addition, the French also found it politically advantageous to keep customary law as a way of exacerbating divisions among Algerians.


The French encouraged regional and local particularisms by granting legal recognition to particularistic codes of family law. For example, in 1889, Kabyle customary law in the Berber region of Kabylia received official recognition. This was not meant to change actual practice but only to give a stamp of approval to an existing situation. In most of Kabylia, tribal councils were applying Kabyle customary law, although in some areas, such as Tizi Ouzou and Bougie, French judges or local officials legislated on the basis of their interpretation of Kabyle law. In 1902 and 1925, French officials in Kabylia made some attempts to codify Kabyle law, but these were sporadic and unsystematic attempts with limited impact.

In another example, the French colonial regime gave official recognition to the family law of the Ibadites of the Mzab region, in the south of
Historical Differences

Algeria. The Ibadite code of family law followed the Shari'a, but it consisted of a more austere and intransigent interpretation of Islam than the Maliki school of law, which predominated in other parts of the Maghrib. Ibadite interpretation of Islamic law was even more conservative regarding women. The Mzab region traditionally had been involved in trading with other regions. This took some of the men to other parts of Algeria while women, even married, usually stayed in the Mzab as their husbands came and went.

Following the French conquest of the Mzab, one of the French officers in charge, Général Randon, and the tribal confederation of the Beni Mzab came to an understanding in 1853. The French promised to accept the legitimacy of Ibadite law and local institutions if the Ibadites accepted French authority. In January 1883 and December 1890, the French issued formal decrees officially granting the Ibadites the right to have their own courts, meaning their own local assemblies, not only in the Mzab but in every geographic area where Ibadite groups were present. This allowed the Ibadites to have their own law and assemblies in those areas where their trading activities had taken them. There were twenty-six such courts or assemblies throughout the Algerian territory, most of which legislated for the essentially male Ibadite population scattered outside the Mzab.

In 1950, a hundred years after the initial conquest of the Mzab, another decree reiterated the same policy in maintaining the legitimacy of specifically Ibadite courts. It also added an option that allowed members of the Ibadite community to refer matters of personal status and inheritance either to their own courts or to Islamic judges, if they so wished. This additional option changed nothing; it was meant only to expedite judicial cases when a member of the Ibadite community wanted a quick resolution to a simple matter. Jules Roussier explains the care taken by the French colonial regime in asserting and reasserting the privileged status of Ibadite law and courts in terms of political prudence. The French wanted to keep areas such as the Mzab and Kabylie quiet. They also wanted to maintain the particularistic law that distinguished these areas from other parts of Algeria.

Another major aspect of the colonial policy in Algeria was an attempt to codify Islamic family law to facilitate the work of French courts. The French instituted French courts that had the responsibility to apply Islamic family law as defined by the Shari'a and customary law where it prevailed. The French gave Algerians who fell under the Shari'a the choice between going either to Islamic judges or to the French courts that applied Shari'a law for cases involving Muslims. French law regulated all penal cases and civil matters other than the family for everyone in Algeria.

Colonial officials undertook to codify Islamic law in 1905. The résident général formed a commission under the chairmanship of Marcel Morand who lent his name to the report that became known as the "Code Morand." Morand raised the issue of heterogeneity in Algerian law and underlined the desirability to unify the law. He argued that it would be useful to formulate a code faithful to Islamic precepts and at the same time applicable to all Algerians. Unification of family law would have made practical sense from the point of view of colonial administration in that it would have helped the work of judicial authorities in Algeria.

Thoughts about unifying family law raised a number of complex and conflicting considerations for the colonial state, however. Any effort to develop a unified family law immediately raised the issue of tribal customary codes. After the sustained tribal revolts of the nineteenth century and the high military cost paid to subdue Algerian tribes, the French were not about to confront tribal groups on this sensitive question, thereby running the risk of renewed resistance. Unification of the legal system under French law was out of the question because the French expected it to inflame anticolonial feelings. The imposition of French law by the colonial state might even have brought Algerians to overcome their divisions and unite around the defense of Islam, precisely what colonial officials feared most. Because of the significance of customary codes in several regions, unification under Islamic law was also problematic. Nor would it have been advantageous to the French. Even though the diversity of family law caused difficulties for the judicial system, colonial authorities found it politically useful to maintain differences among Algerians instead of running the risk of fostering unity.

The résident général avoided facing those sensitive political questions by giving the Morand commission a mandate that precluded it from considering issues of a political nature. The role of the commission was limited to systematizing existing Islamic laws and regulations. "Our mission is not to innovate," wrote Morand, "we have no other goal than to formulate clearly, in a methodical order, the true principles of Islamic law." Doing just that, the commission produced the Code Morand, a text that presented in a methodical style legal principles and rules that appear in several Islamic sources. Composed of judicial commentaries, the Code Morand was what it was meant to be, nothing more than a clarification of Islamic regulations. Published in 1916 and never meant to become law, it remained a conven-
different source of reference on family law and a guide for French judicial authorities.

As of the 1940s, more than a century after colonization, Algeria still had a multiplicity of codes of personal status and family law. The result was inextricable complexity. There were so many judicial authorities applying so many codes that the authorities themselves had difficulty deciding under whose competence and under which code a particular case should fall. Algerians could opt for French citizenship, in which case they had to give up their own code of personal status and come under French law. Two laws, one in 1944 and the other in 1946, reversed the situation by giving Algerians the option to acquire French citizenship without renouncing Islamic law.65 Similarly, the Kabyles, who had their own customary law, and members of other areas of customary law, could opt for French citizenship while remaining under their own code. They could also decide to fall under French law, however, in which case all they needed to do was to declare their intent to do so. Despite these accommodations, the overwhelming majority of the Algerian population opted neither for French citizenship nor for the French civil code. This would have meant giving in to the colonizer and losing their identity, something that few Algerians were prepared to do.

As a result of the policies in force, the situation looked something like the following in Algeria. The French were under French law, while Algerians who had opted for French citizenship were divided among French law, Islamic law, and customary codes. After a law confirmed the legitimacy of customary codes in 1944, the Kabyles, the Ibadites of the Mzab, the people of the Aures, and other local groups all kept their respective customary law.66 Members of Arab tribes living in Kabyle areas fell under Islamic law or under the French code if they had opted for the latter. Members of the Kabyle tribes, however, could not opt for Islamic law as long as they resided in Kabylia. They could do so only after they established residence outside of Kabylia, in which case they could choose between the Hanafi or Maliki rites. To complicate matters further, someone falling under Islamic law could go either to Islamic judges (qadis) or to French courts that would then apply Islamic law. Judicial institutions were of three kinds. Tribal councils applied customary laws, Islamic judges applied Islamic law, and French courts applied French law, Islamic law and, in some cases, customary law.

It was a maze, one that created considerable difficulties in the handling of cases. Despite the confusion that the situation caused, the French nevertheless maintained the multiple codes. When reforms were introduced late in the colonial period, in the late 1950s, they concerned the application of the Shari'a. The reforms essentially left intact the diversity of local codes. The very diversity continued to be advantageous to the colonial state and preferable to a policy of unification that might have fostered a sense of unity among Algerians.

The period from 1954 to independence in 1962 was critical for Algeria. The war of national liberation, which intensified in that period, brought turmoil, violence, and misery. The French increased their efforts to maintain their rule in Algeria, while Algerians intensified their resistance in the hope of national liberation. It is during that period that the French made changes in family law. The first step concerned the registration of marriages in civil records. Already in 1882 and again in 1930, colonial officials had made some attempt in that direction by urging Algerians to register their marriage with the qadis.66 But there was no sanction in case of noncompliance. Marriages contracted in the Islamic fashion, as a private act unrecorded by civil authorities, had remained valid after the attempts of 1882 and 1930.

In 1957, the colonial state promulgated a law concerning marriage certificates.66 Containing many exceptions, the 1957 law was meant to facilitate the work of French courts. It was not meant to introduce deep-reaching changes in the practices of the Algerian population. The law required that a proof of marriage in the form of a certificate be delivered at the time the marriage was registered. In actuality, the certificate served mostly to prove marriage to a French court. It was made mandatory only for further legal procedures that might be handled by French courts on the basis of French law at a later time, but it was not mandatory for procedures handled by qadis or by French courts applying Islamic law. Since it concerned only those legal actions that would take place outside the framework of traditional family life as defined by Islamic law, the law of 1957 did not institute a compulsory registration of marriages for everyone. The same law also set the age of legal majority at twenty-one for all Algerians, again with exceptions. It made an exception for the Kabyles, who had their own customary code and for whom majority had been set at eighteen by an earlier law.67 It also made an exception for the Ibadites of the Mzab, who had already been entitled to keep their own code unaffected by the new law.

In 1959, in the midst of the struggle of national liberation, the French promulgated another law on the registration of marriages.66 The 1959 law made marriage a public act, made its registration mandatory, and established a system of civil registry records similar to that existing in France.
Requiring the registration of birth, death, marriage, divorce, and other civil matters in records available to every branch of the administrative apparatus throughout the country, a civil registry could only help the proper functioning of the French administrative apparatus. It also facilitated colonial control over the Algerian population. In a politically motivated caveat, the first article of the law of 1959 asserted that Islamic law would continue to regulate all other aspects of marriage. This kind of caution accompanied every legal modification, however slight. Colonial officials meant it as a reassurance to the Algerian population, a way to claim that the change did not call into question the basic principles of Islamic law.

Despite the claim made in the caveat, the move represented by the law of 1959 had implications for the substance of family law in Algeria. In requiring the registration of marriages, the law of 1959 took marriage out of the private realm, where Islamic law located it. It made it a civil matter to be recorded by state authorities. The same law stipulated that marriage was to be contracted in the presence of two witnesses and a civil authority or a qadi. The civil authority or the qadi had to deliver to the couple a document, in effect more than a marriage certificate: since it later would include information on the birth of children. The document became the only valid proof of marriage for all other legal procedures.

The same law of 1959 brought a few other changes. It suppressed the principle of matrimonial guardian as it existed in Islamic family law, thus taking away the father’s or guardian’s power to express the woman’s consent to marriage in her stead. This potentially undermined the power of kin in the patrilineage. The law permitted the guardian’s consent only when the bride had not yet reached the age of legal majority, twenty-one. The law also set the minimum age for marriage at eighteen for a man and fifteen for a woman. The 1959 law made a minor change with respect to repudiation. It maintained repudiation as a legitimate form of divorce in that the husband kept his unilateral right of dissolving the marriage at will, without any court decision. The only difference from Islamic law was that now all forms of divorce, including repudiation, had to be recorded by a qadi or a judge.

The French took 129 years to introduce reforms of family law in Algeria. The reforms show an attempt on the part of colonial legislators to counteract the practice of child marriages. The abolition of the matrimonial guardian’s prerogative made compulsory marriages more difficult. Marriages and divorces now had to be recorded in the civil registry, making the country more amenable to administrative control. Many aspects of Islamic family law remained untouched, however, such as repudiation, polygamy, rights and responsibilities of the spouses, filiation, and inheritance. Although some changes made by the French in 1959 were noteworthy, such as the abolition of matrimonial guardianship, most did not challenge the framework of Islamic family law. Instead, the changes were meant to tighten the colonial grip on Algeria by facilitating bureaucratization.

Morocco: Overt Politicization

In Morocco, the French overtly politicized family law. They manipulated it for political purposes and exacerbated the divisions that they found in place. The dynasties that ruled Morocco before colonization had been unable to apply Islamic family law to tribal areas just as they had been unable to impose taxation. As in Algeria and in contrast to Tunisia, the French found enclaves of tribal customary codes in Morocco, and they used the situation to their advantage. In Morocco as in Algeria, they refrained from creating a homogenous legal system that might have contributed to the development of a sense of national unity in the country. On the contrary, the French accentuated existing differences among tribal groups as a way of strengthening their rule. In so doing, they not only acknowledged the segmentation of Moroccan society; they actively encouraged it. The diversity of codes of personal status existing in Morocco offered the French colonial regime an ideal weapon for its strategy of divide and rule in that country.

In 1914, only two years after the signing of the protectorate, a dahir officially recognized the right of tribal areas to apply their customary laws. A dahir was a decree signed by the sultan and having value of law. Issued whenever French colonial officials judged it necessary, a dahir was a device through which French policy in all domains was carried out in colonial Morocco. The dahir of 1914 stated: “The tribes of the so-called Berber custom are and will remain ruled and administered according to their laws and customs under the control of the authorities.” Referring to colonial authorities, the last clause, “under the control of the authorities,” was in effect gratuitous. In 1914, most of the tribal areas, particularly Berber, violently opposed and successfully escaped colonial control. Map 8 shows the Berber speaking areas of Morocco in that period, the areas targeted by the dahir.

The purpose of the dahir was not to introduce any change in how tribal areas handled their laws and customs, something over which the French had no control in any case. The purpose was instead to let the Berbers know that they could submit to the French without losing their judicial autonomy. In 1924, a committee appointed by the French résident général
matters of personal status, family law, and inheritance, as well as over civil
and commercial matters. In all cases, the “customary tribunals” were to apply
the local customary law of the area and not Islamic family law. The
same dahir also introduced changes in the sphere of penal law by estab-
lishing French tribunals that were to apply French penal law to all criminal
matters in the tribal areas.78

The decree of 1930 was a continuation of the colonial policy of setting
one part of Morocco against another. The French saw Berbers in the bilad
al-siba as potential allies. Catholic circles in Morocco believed that the
distinctiveness of Berber customary law implied that Berber allegiance to
Islam was shaky, even in Islamicized areas. They entertained the notion
that, with some encouragement, the Berbers could be weaned away from
Islamic faith.79 Adoption of Christian values, it was presumed, would make
Berbers culturally closer to the French and more amenable to French rule.
By openly recognizing the customary codes as legitimate and by bringing
French penal law to Berber areas, the dahir of 1930 in effect placed those
areas outside of both the jurisdiction of Islamic law and the authority of
the sultan. In the same way that he signed other decrees issued by the
French colonial state, the sultan signed this one.

The reactions were tremendous. The Berber decree triggered strong
protests in Morocco, from both Islamic and Berber groups. Many Mor-
ocans saw the 1930 dahir as an attack on Islam combined with a threat
to the country. They saw it as an attempt on the part of the French to divide
the country into two blocs. The decree became a powerful symbol of co-
lonial injury to Moroccan identity then and later, for it has remained in-
scribed in collective memory as a vivid example of colonial domination.
Setting Berbers apart from the rest of the Moroccan population, the Berber
decree suggested that Berber areas had not fully adopted Islam and that
this state of affairs should be encouraged to continue. The irony is that a
large segment of the population, mostly Berber, had in fact not been under
Islamic law until then. To have this state of affairs officially recognized
and politically manipulated, however, shed a disturbing light on the issue.
The decree placed in sharp focus the lack of unity of Moroccan society. It
provided a rallying cause to the nationalist movement that was developing
among intellectuals in Morocco. Family law became an overtly political
issue that ignited national consciousness as no other issue had done so
far.76

Recitations of the latif, an invocation to God, were organized in
mosques throughout the country to deplore the Berber decree of 1930.77
Street demonstrations took place. Shops closed and there was a general
atmosphere of national mourning. In several cities, the Friday prayer was of the kind called for “in case of grave danger threatening the community.” The French arrested those whom they deemed responsible for leading the opposition. This only furthered the determination of many Moroccans to organize more recitations of the latif. After the arrests, the latif increasingly included an invocation of God’s help in the national struggle against the French. Throughout the Islamic world, a latif was recited in support of Morocco. Articles on the Berber decree appeared not only in Morocco, but also in the Middle East and in France. Muslims in other countries perceived the decree as a way to isolate the whole Berber population of Morocco and pull it away from the world Islamic community. Voices to save the Berbers and Islam were heard in far away places. Gellner notes that “protests were echoed in Muslim lands as far as Indonesia.” Clifford Geertz writes that “committees to save the Berbers for Islam were set up in Egypt, India, and . . . Java.”

In 1934, four years after the promulgation of the Berber decree, a political association made up in part of intellectuals, and called “Committee of Moroccan Action,” presented a petition to the sultan demanding a unified judicial system for the whole country. The committee requested the creation of Islamic courts responsible for all matters of civil law, including therefore family law. It also requested that all courts be placed under the authority of the sultan. Finally, it asked that a single Moroccan legislation be developed and made applicable to all Moroccans. The petition was only partly satisfied. The French never rescinded the Berber dahir of 1930. A new dahir, promulgated in 1934, reversed the parts of the 1930 dahir in regard to penal cases only, which were now placed everywhere in the country under the jurisdiction of Islamic judges (qadis) and administrative officials (qadis). Nothing was done to reverse the parts of the 1930 dahir that concerned family law, however. Morocco was left with two sets of codes: Islamic law and Islamic judicial organization in parts of the country, multiple customary codes and tribal councils in other parts. This situation remained unchanged throughout the remainder of the colonial period.

Colonization had a major effect on the local-central dialectic throughout the Maghrib, but a different one in each country. The different strategies of colonial rule used by the French had a differential impact on tribal organization and state centralization in Tunisia, Algeria, and Morocco. The policy on family law was part and parcel of the form of colonial domina-

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In Tunisia, French rule expanded and strengthened centralization. At the beginning of colonization, the state was already more bureaucratized in Tunisia than in the other two countries, with an administrative apparatus that was more developed and better able to extract taxation. The French ruled by using the existing Tunisian administration on which they grafted a bureaucratic apparatus of their own. The effect of colonization was to weaken tribal organization further and to reinforce the trend toward state bureaucratization. Left with greater centralization than its Maghribi neighbors at the end of the colonial period, Tunisia in effect had the foundation of a modern state. Throughout the colonial period in Tunisia, the French left Islamic family law essentially as they found it when they came. The kind of bureaucratic expansion that they undertook and the absence of significant areas of customary law required no particular action with respect to family law.

In Algeria, the French set out to “break the tribes.” Did they succeed in doing this? Measured against the initial objective of destroying the tribe in an Algeria defined as France in the making, success was quite limited. Although colonial rule resulted in the fragmentation of many Algerian tribes, it did not eliminate tribal solidarity, even though it changed tribal politics in a significant way. Large tribes could no longer form powerful confederations, and regional competition among tribal groups was no longer an issue. The cohesiveness of kin groupings remained an asset for political influence, however, in that smaller tribal units continued to be important political actors at the local level. Although French military and administrative domination inevitably fragmented many tribes, colonial rule in Algeria failed to dissolve kin-based solidarities altogether.

 Algerian society in effect withdrew into itself when faced with the threat of disintegration. In the absence of any other forms of associative and political life, which colonization precluded, Algerians “adhered to a traditionalism of despair” by tightening the networks of kin-based solidarities in search of a refuge from French domination. The French made some changes in family law in Algeria. Even though any change in family law felt at the time like a painful aggression on Algerian identity, in retrospect, the French initiatives do not appear as a shift in the basic framework of Islamic law. Most of the initiatives reflected instead the French
objective of maximizing the bureaucratic efficiency of the colonial state and its control over the Algerian population. In addition, the French encouraged local particularism by maintaining enclaves of customary law in Algeria.

In Morocco, the particular form of colonial rule combined with the precollonial social structure to preserve tribal organization. It took the French twenty-five years longer to conquer the land of dissidence than the land of government. After they had tamed the land of dissidence, the French actively preserved the tribes as part of a conscious strategy of divide and rule. They manipulated tribal rivalries and used tribal leadership to administer local areas. The tribes came under the authority of a state—the colonial state—and lost their ability to effectively resist central authority through armed struggle for sustained periods. At the same time, however, the internal life of Moroccan tribes remained insulated, for much of the French administrative structure was simply superimposed over tribal organization. Rarely did it penetrate or truly transform collective life in tribal areas. Although the subduing of the tribes is a major turning point in the history of Morocco, the fact that the colonial state preserved tribal organization is equally significant. Colonial handling of family law in Morocco reflected the divide-and-rule strategy that was central to French domination in that country. Just as the form of colonial rule contributed to preserve the tribes in Morocco, the colonial policy on family law helped preserve particularistic customary law and divisions among tribal areas.

The different forms of colonial rule and the different family law policies in the three countries created different conditions for nationalist movements and sovereign national states in the next period.

76. Brown, "The Impact of the Dahir."
77. Ibid., 213; Eickelman, *Knowledge and Power*, 135–36.
Women and Law in Colonial India
A Social History

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3. ‘Social Reform’ and the Women’s Question

The liberal and democratic ideals of the Enlightenment in Europe have usually been cited by historians as the inspiration for ‘social reforms’ initiated in nineteenth century India. Susie Tharu and K.Lalita point out that these reforms have often been viewed as arising not out of “the politics of exploitation or oppression” but from “an ethical concern for regeneration.” Yet the extraordinary energy with which the colonial intelligentsia debated questions of social reform concerning women, for example sati, widow remarriage or child marriage, i.e. issues which concerned primarily upper caste, middle class women, cannot be understood as separate from, and indeed is deeply embedded in, the wider changes in the political economy of colonial India.

The de-industrialisation of India that transformed it from a manufacturing nation into a raw material producer, the assignment of property rights to zamindars that underwrote their feudal powers and reduced the rights of tenants, the development of enclaves of capital in plantations and mines, the active discouragement of industry, and the constant effort of the British to widen their circle of indigenous collaborators — these are some of the events that form the context for the period of “social reform”. These transformations in the economy produced serious realignments in the nature of the family and in gender relations. Alongside these material changes, the ideology of the patriarchal nuclear family gained ground through the efforts of colonial administrators, missionaries and educators. The ideal of companionate marriage, for example, took root amongst those classes of Indians who received a colonial education and began to staff the imperial machine, the emerging Indian intelligentsia. As the nineteenth century wore on, the early optimism of liberal intellectuals such as Ram Mohun Roy and Ishwar Chandra Vidyasagar gave way to a growing disillusionment with the
progressive potential of British rule in India. This disenchantment with the limited opportunities offered by colonialism developed a strand of nationalism which Tanika Sarkar has called “nationalist revivalism.” Nationalist revivalism regarded the household, and specifically conjugality, as “the last independent space left to the colonised Hindu.” Indian patriarchy was therefore recast to reflect some of these contradictory ideals, offering women new responsibilities towards race and nation and new opportunities for education, producing the middle-class Indian woman as the bearer of an Indian tradition, a spiritualised, uncolonised Other who could be deployed as part of the combative arsenal of nationalist politics. Viewed in this light, the efforts of early Indian reformers more appropriately constitute the bridgehead of cultural nationalism. The nationalists, as Partha Chatterjee has remarked, established their hegemony over the home even before they launched their political battles.

Yet the separation of the spheres of the public and private, hegemonised by the colonisers and nationalists respectively, cannot be exaggerated. A formulation like this cannot account for the fact that the colonisers also protected their own private/domestic sphere, especially the domain of women, from the indigenous population even if it went against prevailing practices in Britain itself. Second, and more important, such a formulation cannot account for the willingness of the British to intercede in the domain so well protected by the nationalists, as it did in restoring the conjugal rights of Dadaji in the famous Rakhubai case of the late nineteenth century. The colonial judiciary often intervened to preserve Indian patriarchy, and sometimes to challenge it, as the case law seems to suggest. Finally, the modalities of power in the princely states were quite different from the areas under direct British rule, and the willingness of indigenous bureaucracies to enter the field of social reform through legislation, where the colonial State feared to tread, led to a far less defined separation of private and public domains.

More recent scholarship also analyses competing discourses on particular issues to trace the commonalities between the ways in which colonialists, nationalist reformers and traditional intellectuals addressed questions concerning the status of women. The British reformers in the early part of the nineteenth century were confident of their legal authority in transforming the social, but later made shifts, accommodations, and even took lessons from the more absolute forms of patriarchal domination in India. Fearful of the limited, but significant, advances made by British women in the latter part of the nineteenth century, as well as the increasing clamour for constitutional changes by Indians themselves, the colonial zeal for reform was considerably diluted at the turn of the century. Analyses which pay attention to these compulsions complicate our understanding of social reform, clearly acknowledging limitations so that reform may no longer be seen as unequivocally “good” for women in particular or Indian society as whole, but as instituting new possibilities even as it defined new boundaries.

A more serious challenge to the long-held notion of the nineteenth century as the century of “social reform” has arisen from the increasing attention paid to the writings of women of the period. Women’s writings rarely reflected the same concerns as those which so seriously engaged their male counterparts in the earlier part of the century. Legislation was never seen as an adequate mode of transforming Indian society, and the institution of marriage, however democratised, was not always conceived as the only framework for the resolution of women’s problems. The writings therefore provide fresh insights on the emerging subjectivities of women, enabling a far sharper evaluation of the nineteenth century impulse to reform.

Imperialism and a critique of Indian womanhood

The bulk of the early productions of British writers were aimed at highlighting the peculiarities of Hindu tradition and especially the “barbarities” to which the Indian woman was subject. A strategy which was followed by nearly all imperial powers in the nineteenth century was the denigration of politically and economically subjugated cultures by foregrounding the position of women in those societies, compared with the more obvious freedoms of the European woman. This was done by singling out the most extraordinary of cultural practices for attention, which were then taken as emblematic of the culture as a whole, and worthy of reform.

In India, the most obvious practice which warranted the early reforming attention of colonial and missionary authorities was the practice of widow immolation, to which Hindu religious
ideology had attached great symbolic value and reinscribed as sati. Excessive reformist concern with widow immolation in India bore remarkable resemblance to the early expressions of horror by Western missionaries when they encountered the Chinese practice of curtailing female mobility through footbinding. In a similar fashion, the practices of veiling and clitoridectomy in the Arab world and the North African region was the focus of much colonial concern.

The focussed attacks of the Evangelicals, Utilitarians and Anglicists in India were on those practices which were declared indicative of the sexual depravities of the Indian people. Foremost among these were the early age of marriage, the multiplicity of wives or husbands and in some Indian households, the mysteries of the zenana or women's quarters. Even more striking to the colonial observers was the fact that those practices which appeared particularly unjust to women had their roots in pervasive Indian notions about the insatiable sexual appetites of women. Thus, upper caste fears about the incorrigible sexuality of widows led to the imposition of extraordinary constraints and regulations on the lives of these women.

The conviction that interference with religious practices of the indigenous people would be to risk the continuation of British rule in India, (a matter of grave concern to the earliest colonial authorities) often yielded, as British rule became more secure, to direct and forceful interventions in the social life of Indians. In part, this was enabled by the emergence of the Indian middle class which recognised the need for reform in their social practices, however marginal such reform may be. In equal part, an increasing confidence in the loyalty of its indigenous subjects emboldened British measures relating to religious questions. But as the century wore on, the intensity of anti-British feeling, especially as it was expressed in the rebellion of 1857, produced fresh anxieties and led to the Queen's solemn proclamation in 1859 promising absolute non-interference in religious matters. The initiatives for, and efficacy of, legislation for social change in nineteenth century India will be considered in this context with reference to four principle regulations of the century relating to sati abolition, widow remarriage, age of consent and female infanticide.

The abolition of sati

Widow immolation held peculiar fascination for the colonial official not just because there was a particular horror attached to a woman being publicly burnt alive, but since the practice appeared to enjoy the sanction of the sastras. Halhed's version of the digest for use by English judges concluded its chapter on the duties of women by saying:

"It is proper for a woman, after her husband's death, to burn herself in the fire with his corpse; every woman who thus burns herself shall remain in Paradise with her husband 3 crores and 50 lakhs of years by destiny; if she cannot burn, she must in that case preserve an inviolable chastity, if she always remains chaste, she goes to paradise, and if she does not preserve her chastity she goes to hell."

For a long time, the British refused to legislate on sati, fearful of social revolt. Yet this was at odds with its self-proclaimed role as the force that introduced "civilisation" to India. Therefore, one early compromise was to make an elaborate distinction between 'good' (scripturally sanctioned) and 'bad' sati.

The first recorded enquiry about the practice took place in 1789. In exactly forty years the practice was outlawed.6 Widow immolation was outlawed in Calcutta proper from as early as 1798 because the city fell under the jurisdiction of British Law. M.H. Brooke, the Collector of Shahabad, uncertain about the status of regions beyond Calcutta, prohibited the burning of a widow and sought approval for his action. Since the stated policy of the EIC was to avoid any action that would raise the indignation of the inhabitants, the Governor General advised tactics of persuasion rather than the use of official authority in discouraging the practice. (There was, we may note, as yet no recourse to the scriptures).

In 1805, an acting Magistrate of Bihar, Elphinstone, similarly intervened against the burning of an intoxicated 12 year old widow. This time the issue was referred to the Nizamat Adalat, with specific instructions to establish whether there was a scriptural basis for the practice and whether it precluded abolition. Pandit Ghanshyam Surmoni, who was called upon to comment on the issue, did declare that widow immolation had scriptural sanction but also mentioned that it was a voluntary act in-
tended to ensure the long afterlife of the couple. He further specified the conditions under which it was prohibited: i.e. when a woman was pregnant, intoxicated, less than 16 or coerced. Surmuno's comment formed the basis of the instructions which were circulated among the District Magistrates, requiring them to judge whether widow immolations which occurred in their jurisdiction were being performed according to the sastras. The practice was not abolished but regulated according to what was perceived as the correct rendering of the scriptures.

Three further circulars of 1813, 1815 and 1822 clarified certain provisions of the first circular: an 1813 instruction allowed jogs to bury their dead as ordained by the scriptures, the 1815 circular specified that women with children under three would be allowed to burn only if adequate provisions had been made for their maintenance, and also specified the difference between Brahmins and non-Brahmins since antumaraana (burning with the body) for the former and salamarana (burning with an article of the deceased husband) for the latter were acceptable practices. The 1822 circular specified that in addition to the name, age and caste of the husband, which were already required, the husband's occupation and circumstances were also to be included in the records of widow immolation.

Between 1815 and 1824, 6,632 cases of immolation were reported from the three Presidencies of Bengal, Madras and Bombay, of which 90 per cent occurred in Bengal: within Bengal itself, an overwhelming 5,119 cases of the 8,134 reported from 1815-28 were in the Calcutta division, despite the ban on the practice in the city proper. The breakdown of widow immolation by caste indicated that the incidence of immolations among Brahmins was definitely higher than among the lower castes. It was clear then that the practice was far from universal or common.

Even so, the British in India began an unprecedented effort at collating scriptural and empirical evidence which would form the basis for eventual abolition. In the early nineteenth century, the British obsession with widow immolation was boundless, producing thousands of Parliamentary Papers on the subject, while the mortality of millions from disease and starvation, often as a result of British policy itself, received little mention. The sheer volume of documents generated at various levels of the colonial judiciary have permitted analysis of the nature and incidence of the cases themselves.

By its very definition, sati could neither be common nor widespread since its very moral force was derived from it being heroic or exceptional. Anand Yang has pointed to the fact that the practice was known only to some very specific communities. The incidence of widow immolation in the Hugli district, which consistently showed higher returns than any other part of India, amounted to 1.2 per cent of the overall number of widows; in 1824 the average number of immolations amounted to a mere 0.2% of the total number of widows.

Yang notes a high proportion of poor women amongst those immolated and, in many cases, these were women of advanced years. In 1881, out of 839 cases, 14.6 per cent were over 70 and only 11.6 per cent were 25 and under. The caste status of the widows varied enormously ranging from primarily upper caste in the Benares region to a more mixed population in the Bantul Paraganas. These empirical analyses indicate that widow immolation was a practice confined to some social groups, was far from common even among those groups, and was in many cases a solution to the dire straits in which most poor widows found themselves. In addition it has been shown that the extraordinary attention paid to widow immolation, and the ban on it, sometimes served to encourage the practice, providing an unusual cultural resource for a community in crisis.

Lata Mani examines the colonial record in order to uncover the dominant strands in the discourse on sati, that of the colonial authorities, of the nationalist reformers, such as Ram Mohun Roy and of the indigenous orthodox elite. Such an analysis does not assume that there was an identifiable 'problem' perceived by everybody in exactly the same way, and for which solutions were envisaged, also in the same way. After all, the practice of widow immolation, however restricted, was prevalent long before India was colonised by Britain but entered into the public world of reform only in the nineteenth century. Discourse analysis therefore enables us to determine the way in which the problem was developed in these discourses, and what measures were seen as a solution to the problem. It also reveals those aspects of the problem which were deliberately suppressed or overlooked in order to make a case for State intervention.

The desirability of legislative intervention to abolish the prac-
tice altogether was never in doubt, but became feasible only when British rule in India was more assured: when colonial rule was extended across Rajputana, Central India and Nepal, the Governor General Lord William Bentinck showed no hesitation in saying:

Now that we are supreme, my opinion is decidedly in favour of an open avowed and general prohibition of sati resting altogether upon the moral goodness of the act and our power to enforce it.\(^{11}\)

Undergirding the discourse on widow immolation was a belief in the centrality of religion in Indian life, and the centrality of scriptures to that religion. Thus Walter Ewer, Superintendent of the Police in the Lower Provinces, observed that in many cases, widows were coerced, which went against specified scriptural injunctions. Such transgressions, he found, were encouraged by corrupt Brahmans and relatives, leaving little or no room for the widow to exercise her own will. The intervention of the colonial regime, it followed, was necessary in order to enable the Indian people to live their lives according to scriptural injunctions and allow the woman to exercise her will.

Perhaps no other aspect of women’s lives in India is as saturated with the notion of female volition as the question of widow immolation. For, by introducing the question of female will, it became possible to ideologically produce a widow immolation as ‘sati’ and distinguish ‘good sati’ from ‘bad’ ones. Thus, records of the district magistrates are replete with statements such as “the widow voluntarily sacrificed herself”, “ascended the pyre of her own free will,” etc.\(^{12}\) At the same time, despite this admission of the woman’s volition, the widow who was immolated was considered a victim, either of the immediate family or of the religion as a whole.

It was also clear that the official discourse on immolation would not entertain the ambiguities of the evidence presented by the pandits. Scriptural sanction that was decisively opposed to widow immolation was deliberately overlooked. Indeed, the selective use of scriptures was a recurring theme of later State sponsored legislation as well. The vyavastha of Mrutyunjay Vidyalankar, the Chief Pundit of the Supreme Court, in 1817 is a case in-point: it questioned the colonial government’s decision to uphold scriptural sanction for widow immolation and even questioned the status of immolation as an act of virtue, but the vyavastha was relegated to just an appendix.

If that was the official understanding of widow immolation, was the understanding of the cultural nationalists significantly different? Here too, the terms of indigenous discourse on widow immolation were in many ways set by the colonial interest in the subject itself, focussing as it did on the centrality of the scriptures, female volition etc. In other words, there was a considerable degree of overlap between the manner in which colonisers and Indian liberals saw sati as a problem to be solved by a legislative ban. Even such reformers as Ram Mohun Roy, who has been unproblematically identified as the one who ushered an age of modernity into India, did not in fact make a decisive break with the past, and their efforts were of a limited and deeply contradictory kind.\(^{13}\)

Roy’s early rationalism, best formulated in his Persian work Tuhfat al Muwahhidin (A Gift to Deists) was remarkably radical for its time, enshrining the concept of Reason in ways that came close to denying religion altogether. From such a position, he gradually began to show greater willingness to accommodate the possibility of religious sanction in his discourse on sati, relying on scriptural sources to counter British attacks on Indian society. Rather than examining the necessity for such a practice at all, Roy attempted to establish whether or not such practices were sanctioned in the scriptures. Thus, in his “Abstract of Arguments Regarding the Burning of Widows as a Religious Rite”, which was written in 1830 and constitutes the sum of his arguments between 1818 and 1830, Roy began:

*The first point to be ascertained is whether the practice of burning widows alive on the pile and with the corpse of the husband is imperatively enjoined by the Hindu religion?*\(^{14}\)

His own answer was to offer an extract from Manu as evidence that this was not the case. He then cited Yagnavalkya as proof that a widow was enjoined to live with her natal or marital family after her husband’s death: Roy thus tried to replace the notion of sanctioned widow immolation with that of ascetic widowhood.

Although Roy was astute enough to perceive the ways in
which Indian patriarchy operated to reduce the status of women to such a deplorable state that even death was no option, he nevertheless shared a great deal with colonial discourse by placing an emphasis on scriptural sanction, thereby conceding the religious basis of Indian tradition. By 1830, Roy had moved from "a trenchant critique of religion to a strategy which argued for social reform in terms of the scriptural." In an 1830 petition sent to Bentinck, signed by Roy and 300 others applauding the abolition of sati in 1829, it was claimed that widow immolation had no scriptural sanction. The more conservative Indian intelligentsia also made references to Indian scriptures although for completely different ends from those of the liberal reformers. While the conservatives wished to cite the sastras in order to preserve tradition, the other group cited sastras to change it. In a petition to Bentinck, the orthodox intelligentsia questioned the colonial State for its choice of scriptures, and for consulting "men who have neither any faith nor care for the memory of their ancestors or their religion" on questions "so delicate as the interpretation of our sacred books." Over 20 pandits presented scriptural evidence in favour of sati in an appendage to the petition, and went further in questioning the nature of scriptural evidence cited by their opponents, blaming oversights and omissions, and suggesting that sruiti be privileged over smriti in conflicts between the two.

Although there was striking similarity in reliance on the scriptures by the three contending discourses, more significant was an ambivalence towards the practice of widow immolation itself. Thus, what was first marked out as an offensive practice and an affront to civilization becomes less easy to condemn out of hand. Thus Roy made a surprising shift from his early intellectual conviction about the irrelevance of religion in such contexts: instead, he increasingly placed reliance on the religious frame to defend or reform Indian tradition.

What all these discourses on sati had in common, and this commonality remained a constant feature of other debates through the twentieth century, was that the focus of reform was tradition itself rather than women. According to Mani:

Tradition was thus not the ground on which the status of women was being contested... women in fact became the site on which tradition was debated and transformed..."
Macaulay, which had undertaken the task of framing a penal code, discovered a link between the prevailing high rate of infanticide and the prohibition against the remarriage of widows. The Sadr Nizamat Adalat Court in 1837 in the North Western Provinces informed the Law Commission that child murder was a prevalent crime and recommended that “the endeavour of a woman to conceal the birth of her dead child by secretly disposing of the body” should be made illegal. In making such a connection, the Law Commission did not disagree fundamentally with the prevailing notion of a threatening female sexuality nor did it attempt to seek solutions for the problems of widows beyond the framework of marriage. The conclusion of the Law Commission was by no means the only possible reading of the evidence, before it we do not know whether all infanticides so noted were confined to unmarried women, nor whether more girls were killed than boys. Female infanticide among certain castes and tribes of North India was perceived as a separate problem, and invited a different set of regulations of family life, as we shall see.

In a letter of 30 June 1837, the Indian Law Commission sought opinions of the Sadr courts of Calcutta, Allahabad, Madras and Bombay whether there were any objections to the passage of such a law, to which the Calcutta Sadr Court immediately replied saying that it would violate the pledged faith of the Government to the Indians, since “it was distinctly clear of their shastras and distinctly believed by them that the remarriage of a widow involved guilt and disgrace on earth and exclusion from heaven.” The proposal was opposed on the same grounds by the Sadr Court of the North Western Provinces while other Sadr and Faujdari Courts said that such a law would allow the Hindus of upper castes and classes to be confused with the inferior castes and tribes among whom remarriage was common. As a result, the Law Commission in its drafting of the code of 1837 appears to have bowed to the opinions of the regional courts, and no such legislation was introduced.

It took nearly 18 years before the question of a legislative challenge to the customary status of widows was raised again, this time in a campaign inaugurated by Ishwar Chandra Vidyasagar (1820-91). Vidyasagar was not a member of the Bengal Brahmo Sabha but collaborated with that organisation and with the Tattvabodhini Sabha to initiate several written pleas for the reform of the institution of marriage, including the abolition of kulin polygamy. His public efforts culminated in the publication of a book Marriage of Hindu Widows which attempted to cite appropriate sastric authorities for the remarriage of widows. Indeed, he argued, “a total disregard for the shastras and a careful observance of mere usages and external form is the source of the irresistible stream of vice which overflows the country.”

Vidyasagar saw the passage of a bill that legalised the marriage of widows, including those of brides who had never left the natal home or consummated their marriage, as a logical second step to the ban on widow immolation, which saved women from the pyre but condemned them to a living death. Yet even his commitment to the idea of social reform was marked by an ambiguity remarkably similar to the one that marked Ram Mohun Roy’s career of reformism. Whereas he had written against child marriage without invoking the authority of the shastras, and even held them as outmoded and senseless and as responsible for such evils, his tracts on widow remarriage relied heavily on sastric authority. This has been interpreted by Asok Sen as prompted by strategic considerations, but the value of discourse analysis has precisely been to unveil the inconsistencies and silences of the discourse of reform. The way in which the question of widow remarriage was framed bore striking similarity to the discourse on widow immolation, especially in its reliance on sastric authority.

Vidyasagar’s book was widely debated by supporters and opponents, and some inhabitants of Barisat even testified to Vidyasagar’s credentials as a scholar of Hindu Law referring to the ways in which the practice of prohibiting widow remarriage in fact strayed from Hindu tradition and was unnatural, and therefore “highly prejudicial to the interests of morality and is otherwise fraught with the most mischievous consequences to society.” An underlying unity between the concern for reform and the opposition to it was the anxiety about the sexuality of the dangerous non-wife, outside the protective influence of husband or father. Both sides therefore raised the spectre of declining morality. Thus 784 petitioners of U.P. and Calcutta said that legalising widow remarriage would bring back the same state of
affairs as under the Nawab, namely “whosoever may wish will run away with any one’s wife.”

Also striking was the reference on both sides to the authority of the scriptures. The 991 professors of Hindu Law from Nadia, Trabani, Bhatparah and Bansbarah cited scriptures such as the Vedas, the code of Manu, the first book of the Mahabharata, Aditya Purana, Ratnakara, Niranya Shudhos, Hemadri and Madan Parjata, to say “the marriage of widows, the gift of a larger portion to the elder brother, the sacrifice of a bull, the appointment of a man to beget a son on the widow of his brother and the carrying of an earthen pot as the token of an ascetic, these five are prohibited by Kaliyuga.”

There was tremendous resistance to such a measure from the conservatives in Bengali society. Thus although 23 petitions signed by 5,191 prominent Bengalis supported the bill, an overwhelming 51,746 signed petitions against any such measure. But it is an indication of the distance travelled by the colonial State, from its earlier reluctance to alter the customs of the indigenous people by legal fiat that it now chose to ignore the majority. One member of the Law Commission, Grant, argued, “if the learning, reason, and conscience of a single Hindu father directed him to save his little child from life long misery or vice the law of the country should not stand in the way.”

Grant’s introduction of a bill in the legislative council was prompted by one part of Vidyasagar’s argument: that a ban on widow remarriage led to depraved morals. Some historians have taken this to mean that the British committee was fulfilling a commitment to women’s rights, since it gave the Hindu widow the right to marry and raise children. But granting the father the right to act according to his conscience was hardly the same as according women more control over their own lives, property or sexuality. What it did instead was to legally strengthen the protective hold of father and husband.

The Hindu Widows Remarriage Act XV of 1856 produced meagre returns. Vidyasagar himself expressed dismay at the lack of enthusiasm for implementing the new measure. Indeed the first few years after the act was passed he paid for numerous widow remarriages until he was in debt. Worse still, Vidyasagar found that those who had married widows threatened to desert their wives if he did not meet their unreasonable demands.

The situation was not very different in Maharashtra. Mahadev Govind Ranade, the Maharashtrian social reformer, addressing the Bombay Social Conference at Satara, in 1900, estimated that no more than 300 remarriages of upper caste widows had taken place since the bill was passed. This is hardly surprising given the restricted nature of the practice itself, which excluded nearly 90 per cent of the population. Even the tactic of using advertisements, especially in newspapers of the South, to locate widows testified more to the personal courage of a handful of reformers rather than to widespread enthusiasm for the measure.

The failure of Vidyasagar’s campaign to effect significant changes has been interpreted as signalling the lack of fit between his unwavering commitment and social consciousness and the objective difficulties of translating such commitment into practice, in the absence of a social milieu willing to carry it forward. Others have suggested that the nineteenth century reform process intended no more than a reconceptualisation of tradition, of which the legislative effort was only a part. But women’s own writings and testimonials of the late nineteenth century force us to revise these evaluations of legislative transformation. Many women did not see the resolution of their problems within the framework of marriage, and sought educational and work opportunities for widows instead, aspiring to economic independence rather than a return to the domestic fold. Many others detected the contradictions between the avowed British commitment to the protection of women, and the colonial authorities’ readiness to comply with the demands of a new patriarchal order.

Although Bengal was the bridgehead of reform in the early part of the nineteenth century, the debate over widow remarriage was enacted in many other parts of the country. The Bombay Widow remarriage association was started by Vishnu Sastri Pandit, who sought the sanction of the highest religious authority in the land. A debate was staged in 1870 between supporters and opponents of the Act under the auspices of the Shankarcharya of Karve and Sankeshwar, and after which 10 arbitrators decided against the reformers.

In Madras Presidency, it was Veerasalingam Pantulu who started the Rajahmundry Widow Remarriage Association in 1878, and support for widow remarriage was also expressed by
Dayananda Saraswati who founded the Arya Samaj in Punjab in 1875. Yet the new act had less of an impact on encouraging the remarriage of upper caste widows, and was more effective in transforming, in a very material sense, the control over the property of the widow. The clauses on property rights, ironically, made remarriage more difficult for widows belonging to castes and tribes that had never placed restrictions on their remarriage. The ambiguous words of the act on the right of a widow to property produced nearly a century of dramatic judicial controversy among the High Courts of the British legal system. It is to some of these issues that we shall now turn.

Widows and property, law vs. custom

Before the modifications introduced by the Hindu Women’s Right to Property Act XVIII of 1937, and the Hindu Succession Act XXX of 1956, under both Dayabhaga and Mitakshara Law, the widow “only succeeded to her husband’s estate in the absence of a son, son’s son, son’s son’s son of the deceased and the estate which she took by succession to her husband was an estate which she held only for her lifetime.” At her death, the estate reverted to the nearest living heir of her dead husband. The Dayabhaga school allowed such succession whether or not the husband was a member of an undivided coparcenary, whereas the Mitakshara only allowed succession if he were separate. Importantly, such succession in either case was contingent on the chastity of the wife.

The provisions of the act as it was applied in several parts of the country were soon found to be ambiguous, and “to some extent misleading” especially with regard to the regions and castes among which widow remarriage was not proscribed. In Punjab, where the customary law as it operated allowed the woman to inherit property in the absence of male lineal descendants, British officials found to their alarm that a widow often alienated property for her own maintenance, daughter’s marriage or payment of revenue, but not for sale. These forms of self-assertion by widows had become so common, that in the late nineteenth century, officials felt constrained to take action prohibiting the partition of land “in the wider interest of preserving the ‘village community’ or the ‘cohering community.’” Instead, they chose to give increasing judicial support to the custom of karewa, the custom of widow remarriage that was practised among Jats. Petitions from widows who resisted the efforts of the husband’s family to remarry them within the family became very common by 1921, yet the “customary law of the land backed by the full force of the colonial administration safeguarded the landed property from a woman’s possession” thus retaining patrilateral hold over the property. Cases of polyandry and of fathers marrying their son’s widows were not uncommon. The 1881 census of the Bombay Presidency similarly noted how the provisions of the 1856 act were used to prevent property from moving outside the family. Nor was this practice confined just to the upper caste families; middle and lower caste families were affected in equal measure.

The anxiety of the British to preserve the old order in Punjab was quite simply because it was these sturdy Jat peasant-communities on which the revenue was settled. The prevention of the fragmentation of landholdings was a prime concern of the British even as late as 1936, and especially after the 1856 act served to keep property within the patriarchal family. The actual operation of the 1856 act was therefore quite different from the stated intentions of reformers such as Vidyasagar or Pandit. It was often invoked in ways that curtailed possible economic independence of widows. The paradox arose precisely because widow remarriage had not been proscribed in most communities of India, and in many cases, customary law allowed enjoyment of the property of the husband. The contentious interpretations of the statutes of the Act XV of 1856 referred especially to communities where remarriage and inheritance by widows was common.

Lucy Carroll demonstrates that the High Courts of Bengal Bombay and Madras uniformly held that “section 2 [of the act] involving forfeiture of the deceased husband’s estate upon remarriage applied to all Hindu widows whether or not the validity of their marriages were solemnised by ceremonies prescribed in section 6.” The Allahabad High Court alone consistently held that the Act was inapplicable to individuals who were permitted by customary law to remarry prior to the passage of the act. The landmark case for this was Har Sara vs. Nandi, in which Nandi, a woman of the sweeper caste, inherited two kothas of land after her husband died and she subsequently
remarried. The husband's brothers contested the right of the widow to continue to retain the property under the 1856 act, which the lower court upheld. However, the High Court overruled the lower court's decision in the name of caste privileges which antedated the act and to which the act was not intended to apply.

Further confusions arose out of the need to determine where the statutes of the act ended and Hindu law took over. A case in point was _Malangini Gupta v. Ram Radan Roy_. Gupta was a childless widow who had succeeded to her husband's property, then converted to the Brahmo sect and remarried under the Special Marriage Act of 1872. Under this act, she declared she was not a Hindu. Her right to her husband's property was therefore challenged by the reversioner under Section 2 of the Hindu Widows Remarriage Act XV of 1856. The court ruled that the widow should forfeit the property on the grounds that "where second marriages are sanctioned by custom... such remarriages entailed a forfeiture of the first husband's estate." Although there was no empirical evidence on which to confirm this ruling, great reliance was placed in arriving at this conclusion on the metaphor of widow as "half the body" of the deceased man: "... the estate of a Hindu widow can only last as long as she continues to be the wife and half the body of her deceased husband...."

Universally applying a law that was intended to facilitate remarriage among a small section of upper caste Hindus produced regressive material consequences for the majority of castes among whom widow remarriage was customarily practised. The process of homogenising the law on the basis of Brahminical tradition resulted in the displacement of the plurality of customary laws, with very serious consequences for the lower castes and tribals. In the case of newly Hinduised groups, such as the Rajbansis of the Darjeeling Terai, widows were divested of the first husband's property even though it was established that the customs of the community had long permitted remarriage without affecting the inheritance of the woman. The sole upholders of the customary law that we have noted, i.e. the Allahabad High court, succeeded ironically in freezing customary law by arbitrarily setting 1856 as the cutoff date for customs: thus "to prove a valid custom of widow remarriage, it was absolutely necessary to prove that the custom had existed prior to July 1856."  

From the number of cases which came before the Bombay High Court in the decade 1875-84 studied by Sandra Rogers, widows, especially those from wealthy families appear to have pursued litigation with some vigour. By _customary law widows_ could inherit property of the husband if there were no sons, grandsons, or coparceners. Not surprisingly, widows were participants in nearly half of the cases involving women: very often suits were initiated by widows against debtors charged to their estates. Many other cases concerned maintenance of widows by the husband's family. A large number of these were decided in favour of the widow who was awarded assured and adequate means of maintenance.

Yet this maintenance was often granted under very strict terms which reinforced that the widow herself could not be allowed to stay away from the husband's household. In 1887, Justice Westropp of the Bombay High Court ruled that a widow could not live with her own family as long as she received maintenance from her husband's family. He said:

"She does not lose her right to maintenance by visiting her own relatives, but a widow is not entirely her own mistress, being subject to the control of her husband's family, who might require her to return and live in her husband’s house."

Keeping a widow in the husband's house was a way of confirming the continued chastity of the woman. Between the courts' general belief that widows had to be provided adequate maintenance and the insistence on chastity, the court often chose to uphold the latter by sacrificing the former.

A permissive measure such as the Widow Remarriage Act aimed to reduce popular illegalities such as infanticide, and sexual relationships of women outside marriage, by extending the protective arm of the State where familial patriarchy could not reach. A law, in other words, which aimed to make an 'honest' woman of the widow, often succeeded in making her propertyless. Yet, if one of the intentions of codification was to attain a degree of homogeneity, even this was not achieved. The princely state of Mysore, for example, did not pass the law for eight decades after 1856: although repeated attempts were made,
beginning in 1912, the law permitting the remarriage of widows was only passed in 1938.

The role of pandits, as we have already seen, was considerably diminished after 1864 when they were dismissed from employment in the courts. But the new interpreters of the law, the educated male elite, nevertheless continued well into the twentieth century to rely heavily on scriptural traditions to make arguments for and against changes in the legal position of women in Indian society. By the late nineteenth century, the active encouragement of women's education by reformers such as Keshab Chandra Sen and M.G. Ranade had produced a climate in which women became articulate participants in the debate on social reform. They, in turn, developed quite a different conception of scriptural authority as the basis for social reform.

Women's responses

Resistance to the provisions of the Act regarding forfeiture of the property of the husband took the form of spirited responses to challenges in the courts but never amounted to a full blown critique either of the patriarchal basis of existing legal systems or the system that appeared to be taking its place. From the latter half of the nineteenth century a new voice was beginning to be heard, that of the educated Indian woman, which sometimes echoed the male discourse on womanhood but also quite often offered trenchant critiques. Tarabai Shinde (1850-1910) and Pandita Ramabai (1858-1922), both from Maharashtra, were among those whose writings displayed an acute awareness of the realignments of patriarchy that were enabled by colonial rule.

Tarabai Shinde's incisive analysis in Stri Purush Tulana [A Comparison of Men and Women] was prompted by the tragic case of a young Brahmin widow, Vijayalaxmi, who murdered her illegitimate child in 1881, and was condemned to hang for her crime by the Sessions Judge at Surat. The ground for such a judgement was not social deprivation but moral depravity. The sentence was commuted to life imprisonment in the high court and later reduced to five years, but not before it had provoked a furious debate by male writers on women and immorality in leading Maharashtrian papers such as Swadhi Patrika, Bombay Samachar, and Pune Vaibhav. Stri Purush Tulana, an essay of about 40 pages, was a very irreverent and impressive riposte against the male charge of female immorality. It was a critique of patriarchal society that went far beyond envisaging remarriage as a solution for the problems of widows. It showed up the inconsistencies of the satiric record and pointed to the disjuncture between scripture and reality:

Can adultery be considered an act of the most heinous nature? Our shastras certainly do not seem to think so! There is no need to think that such things did not happen in the past. In fact, those very shastras most freely sanctioned such practices in several circumstances.

Shinde's writing was an indictment of male hypocrisies, but was equally a call to a notion of justice that did not force women to shoulder the burden of morality alone. Stri Purush Tulana, recognised, above all, the complicity between British and Indian patriarchy in refusing to acknowledge the responsibility of men for sustaining moral standards. And it minced no words in exposing the inadequacies of legislation:

Here, under British rule, not a leaf can be moved without a witness. But in such delicate affairs, witnesses are conspicuously absent. The Government also deserves to be blamed for this. They have passed a law that the punishment given to a man who offers a bribe will be double that given to him who accepts it. Similarly, I would suggest that they should pass a law in such cases as well by which the man should get twice as much punishment as woman gets.

It is significant that we do not hear from Tarabai Shinde again: the public hostility to Stri Purush Tulana in 1882 was too great to bear, and she disappeared from the public world of letters.

A far less easily daunted critic of British imperialism and of Indian nationalist patriarchy was Pandita Ramabai Saraswati (1858-1922). After a remarkable childhood education in the scriptures under the able guidance of her parents, her marriage and early widowhood, Ramabai campaigned consistently and vigorously for women's education and their right to a life of freedom and dignity. After a successful tour of England and America, during which she also chose to convert to Christianity, she arrived in India in 1889 to start Sharada Sadan, a home for
widows intended to make them financially and emotionally independent. She, too, chose to expose the contradictions in the sastric record vis-a-vis upper caste Indian women. Her efforts met with little support from male reformers. Reflecting the spirit of the politics of cultural nationalism, which valorised tradition, they viewed her conversion to Christianity with great suspicion and hostility. Her book *The High Caste Hindu Woman* was also an important intervention in the celebrated case of Rakhmabai, who was married at the age of 11 to Dadaji Bhikaji, but whose marriage was not consummated when she reached puberty some years later since she refused to join her consumptive and illiterate husband. In 1884, her husband moved the court for the restitution of conjugal rights, an act which received the support of hundreds of men across the country. Rakhmabai contended that Bhikaji was unable to earn a decent living, was immoral, uneducated and unhealthy. So the lower court did not insist on her going to live with her husband. However, as Ramabai put it, “the conservative party all over India rose as one man and girded their loins to denounce the helpless woman.” Large sums of money were collected to help the aggrieved husband file an appeal, but Rakhmabai refused to join her husband even after the Bombay court ordered her to do so under act XV of 1877 (which permitted the restitution of conjugal rights), preferring to court arrest.

This incident helped Ramabai to pierce the veil of social reform and perceive with astonishing clarity the complicity between the supposedly reformatory impulse of the colonial legal system and reconstituted Indian patriarchy, which only increased the oppression of women.

The learned and civilised judges... are determined to enforce, in this enlightened age the inhuman laws enacted in barbaric times four thousand years ago... There is no hope for women in India whether they be under Hindu rule or British rule...

She then went on to say “We cannot blame the English government for not defending a helpless woman; it is only fulfilling its agreement made with the male population of India...” Ramabai thus expressed open scepticism about the claims of the British to protect the rights of women.

The Rakhmabai case and the fierce contestations that it engendered marked the beginning of a new phase in the history of nationalism, since it brought to centre stage the question of the consent of the woman herself. In drawing to a close a century of male elite sponsored reform, it also marked a move towards a definite defence of tradition as political strategy, placing the burden on women as the embodiment of tradition. This new direction received clearest articulation in the debate about raising the minimum age for consensual sex between men and women.

The age of consent controversy

A statute that declared rape an offence punishable with death when the girl was below eight years and imprisonment in other cases, had been part of the criminal justice code administered in the towns of Calcutta, Madras and Bombay from as early as 1828. In 1846, the Law Commissioners who drafted the Indian Penal Code first decided to extend the penalties of rape to husbands who consummated marriages with underage wives. Among Indians themselves, a concern for fixing the minimum age for marriage of men and women by law, was voiced as early as the mid nineteenth century by Ishwar Chandra Vidyasagar and Keshab Chandra Sen. Vidyasagar himself attacked the institution of child marriage for causing misery and blamed the practice on “outmoded shastras.” In response to Vidyasagar’s article in 1850, the Government of India decided on 10 years as the “age of consent” for sexual consummation with girl children whether married or unmarried. Any violations of this, i.e. intercourse with girls under 10 years of age, was considered statutory rape and was punishable under section 376 of the Indian Penal Code of 1860.

Part of Vidyasagar’s argument rested on the belief that child marriage was detrimental to the health of women and consequently detrimental to the health of the nation. This argument, which mirrored the anxieties of eugenicists and racists in nineteenth century Britain, was repeated from the time of Ram Mohun Roy as an explanation for the weaknesses in the Indian social fabric that had led to colonial rule. (That the decline of female liberty and individuality had occurred as a result of Muslim rule in India was another explanation that had enduring conse-
quences.

If the Widow Remarriage Act had set the stage for the mobilisation of reformers nationally, it was the Age of Consent bill which polarised the debate on women and tradition most forcefully.

Despite Vidyasagar's efforts, the question of prohibiting early marriage was not easily resolved, and absorbed the energies of another Bengali Brahmo, Keshab Chandra Sen, who continued Vidyasagar's efforts in the 1870s and 1880s. Particular efforts were made to revise the marriage customs of Brahmos culminating in the Native Marriage Act III of 1872 which instituted prohibitions against polygamy, a legal allowance for divorce, no reference to the casts of the marriage partner, and instituted a minimum age for marriage of 14 for girls and 18 for men. There was stiff opposition to the act from male memorialists, so although the act was passed it effectively separated Brahmos from the rest of Hindu society and was applicable only to them. Yet even those who were committed to liberalising the position of middle class women within the family and in the field of education faltered in their personal lives. Sen's own commitment to the education of women, it was he, incidentally, who encouraged Pandita Ramabai to read the Vedas and the encouragement of widow remarriage etc., was seriously undermined when he allowed his daughter to marry the 16-year-old Maharaja of Cooch Behar, when she was just 13, in other words when both bride and groom were below the ages he himself had recommended when drafting the Native Marriage Act. The gap between the public (political) and private positions of reformers such as Roy, Sen or Ranade, was one of the persistent ironies of the process of social reform, and was an expression of the contradictions inherent in the colonial social order.

The theatre of action for the debate on age of consent shifted from Bengal to Maharashtra in the late nineteenth century, where it was revived by the journalist and publicist Behramji Malabari (1853-1912). Malabari did not have much of a public following but did have considerable energy to use in a campaign like this. His influential work, written in 1884, was entitled "Notes on Infant Marriage and Enforced Widowhood", which was based on statistics generated by the census, and was an argument for regulating the age of consent. Comparing the English Criminal Law Amendment with the Indian Penal Code, he found the protection of girl children in India fell far short of the protection offered to English girls under a comparable regulation.

Malabari's efforts paralleled those of Mahadev Govind Ranade (1842-1907) a prominent theist and social reformer. Ranade encouraged his friends and relatives to pledge themselves to personally assist him in the demand for increasing the age of consent.

The Government of India displayed no haste in acting on the pleas of reformers, seeking instead the opinions of several groups of people, orthodox and liberal, Indian and English. The majority of the 200 replies received appeared to favour some form of Government intervention. In fact, the National Social Conference involving several Congressmen, was set up in 1887 partly as an outcome of the response of the public. In his thunderous speech on that occasion Mahendralal Sircar said:

The Hindu Race consists at the present day . . . by virtue of this blessed custom, of abortion and premature births. . . .

And are you surprised that the people of a nation so constituted should have fallen easy victim to every blessed tyrant that ever chose to trample on them?

Yet State interference in Hindu Law went against the stated proclamations of 1858, and was the key objection of those opposed to the reforms. In response, Ranade used the well-worn strategy of the nineteenth century reformers, painstakingly refuting doubts by citing the authority of the sattriya and the smritis.

Two cases of the period rivetted national attention and spoke of an urgent need for reform. The more spectacular case was the 1890 death of Phulmoni Das at the age of ten as a result of injuries sustained during sexual intercourse with her 35 year old husband, Hari Mohan Maity. Not only did Maity defend himself by citing the 1860 law fixing age of consent at ten, but his conviction to 12 months of hard labour aroused a chorus of orthodox protest. Hot on the heels of the public uproar about Phulmoni Das and Hari Maity came the Rakhmabai case, in which Rakhmabai's refusal to live with her uneducated, consumptive and unemployed husband Dadasji Bhikaji, led to two legal suits stretching over four years.

The Rakhmabai case also polarised the views of the elite. Rakhmabai's plight was most useful in supporting the plea for
raising the age of consent but also aided those opposed to social transformation. Bal Gangadhar Tilak was one of the most vociferous opponents of reform of the Indian tradition, which was, in its unreformed state, seen as the bulwark against imperialism. Tilak saw Rakhmabai’s refusal to live with her uneducated husband as indicative of the dangers of female education. Accusing the reformers of using the case “to fire bullets at our religion with the intention of castrating our eternal religion” he insisted that it be dealt with under criminal rather than civil law.

Tilak was quite firmly against reforming Indian tradition until Indians were allowed to govern themselves; thus he once remarked facetiously that he would “arrange the marriage of 100 widows the day India became independent.” He therefore strictly subordinated the question of social reform to the cause of political freedom. Tilak represented an important moment in the transformation of cultural nationalism into a distinctly political nationalism, when embarrassment about Indian tradition was turned to pride. To some extent the new-found pride was the response of a community in crisis: mounting challenges from tenants in the late nineteenth century, for example, were a cause for anxiety among the propertied classes. In contrast to the earlier formulation which envisaged reform as a mode of national regeneration, “the household... became doubly precious and important as the only zone where autonomy and self-rule could be preserved.” This shift was symbolised by the physical expulsion of the National Social Conference from the Congress Pandal in 1887. The anti-Western element of this revivalist strand had other pernicious implications: thus, in Bengal, revivalism in the writings of Rabindranath Tagore emphasised not only anti-westernism but anti-Muslim sentiments as well.

But the debate over Rakhmabai clearly indicated that while the nationalists were reluctant to allow colonial law to penetrate and reorganise familial arrangements, especially when it resulted in greater female power, they did not hesitate to invoke colonial law to strengthen patriarchy, such as in the restitution of conjugal relations. Respect for the sanctity of the domestic sphere was not scrupulously observed by colonial authorities. The Rakhmabai case revealed that the colonial regime was only too willing to step into the holy sphere of the family in order to reinforce patriarchal arrangements. Act XV of 1877 recognised the right of the husband to his conjugal privileges, and provided for the imprisonment of recalcitrant wives. Rakhmabai was thus sentenced under this act. Though some attempts were made to introduce a concept of divorce or judicial separation, these were stoutly resisted, and imprisonment continued to be a legally permitted method for implementing the restitution of conjugal rights until Act XXXIX of 1923 finally did away with it. Meanwhile Dadaji, who lost a third suit filed against the Bombay Gazette for libel, appears to have been greatly motivated in reclaiming his marital rights following knowledge of Rakhmabai’s inheritance from her mother, and finally negotiated an out of court settlement for Rs 2,000, a far from considerable sum, assuring Rakhmabai of no further legal action.

Malabari shifted his energies from India to England in 1890, where there was a more receptive climate for the extension of the State into private life after the passage of the Criminal Law Amendment Act of 1885 which legislated a shift in patriarchal arrangements, raising the age of consent for girls in Britain from 13 to 16, purportedly to defend the interests of girls from sexual offenders. In an emotional pamphlet entitled “An Appeal from the Daughters of India” Malabari echoed English fears about early marriages producing a serious shortage of heroes and heroines. Dayaram Gidumal, another campaigner, also attributed the physical feebleness of Hindus as arising from the custom of early marriage thus making them “unfit to be colonisers”; both however, drew attention to medical rather than sectarian reasons for prohibiting infant marriage.

The Age of Consent Act, which raised the age of consent for girls to 12 while leaving the arrangement and performance of marriage unrestricted, was an indication of the compromises that had been affected by opponents of the bill. In March 1891, both the Indian Penal Code and the Criminal Procedure Code were amended to raise the age of consent to 12 for married and unmarried girls; sexual intercourse with girls below that age was punishable with up to ten years in prison or transportation for life. However, since it was consummation rather than marriage that was prohibited, prosecution under the act was difficult if not impossible.

The act’s real importance was hardly in the effects it had on the marriage practices of Hindus but in staging a nation-wide
confrontation between the agendas for social and political change, believed to be mutually incompatible. Indeed, the transformation of the position of women’s social status legislatively did not occupy the attention of nationalists after 1891 to the extent that it did before.

Even as these battles raged in British India, one Indian princely state was able to push through the first Infant Marriage (Prevention) Regulation with much less fanfare.\(^7\) As a state which enjoyed relative political autonomy, Mysore passed the regulation in 1894 after a debate which was not as acrimonious as the one in British India. Mysore staked a claim to being a model state on the basis of its progressive agenda of economic, political and social reform. This status has rarely been called into question even by contemporary historians, who give credit to the ideology of modernisation favoured by its bureaucracy. A closer examination of these initiatives and the rigour, or the lack of it, with which they were enforced, reveals a far more complex and contradictory effort, quite often supported by the Mysore intelligentsia, to reconcile the idiom of princely rule (and its concomitant notion of the sovereign as the source of all authority and power) with the idiom of representative politics and the “rule of law”. Far from marking itself off from monarchical despotism, the administration of Mysore continued a form of despotism in the name of “law”. The people of Mysore continued to remain subjects, rather than citizens, but were given certain concessions in the form of legislation, often even when such change was not solicited but also to deflect and dilute the critique of indirect British rule. In this process, as we shall see, the formal democratic processes of debate, discussion and even of voting on bills in the State Legislature could be overturned by the will of the Dewan acting on behalf of the sovereign.

As soon as the amendments to the Indian Penal Code regarding the age of consent were passed in British India, pleas were made for the introduction of a similar act in Mysore.\(^7\) The Dewan however thought such an act unnecessary in the state. In 1893, however, to a request for prohibiting the early marriage of girls, and of young girls to old men, which was couched in terms of a violation of sastric injunctions, the Dewan responded more warmly, admitting the responsibility of the Mysore Government to “interfere for the protection of children” supported by his belief that “such marriages are equally opposed to Hindu Law and common sense”. His first response was to call on the heads of leading mathis (Hindu monasteries and corporations) to prescribe the limits within which such legislation could take place. Accordingly, it was suggested that the marriage of a girl below 8 years and of a man above fifty to a girl below 16 may be safely prohibited, since the spiritual heads confessed they could not contain these evils.\(^7\) While 53 members of the Representative Assembly supported the draft legislation, only suggesting that fines, but not imprisonment, be imposed for violation of the law, and that permission be sought for marriage in exceptional cases, the bill was opposed by 164 members.\(^8\) The Dewan, however, threw his weight behind the progressives by citing the details of the Mysore Census which showed a 50 per cent increase in the marriages of girls under nine, even though the population had only increased by 18 per cent. Confident that the growing practice of child marriage was “as much opposed to the spirit of the shastras as to the best interests of society” the Dewan approved of a regulation prohibiting Infant Marriages in Mysore in 1894.

The pragmatics of implementing such a regulation were somewhat more complex. To begin with, the provisions of the regulation had to be popularised and this was done with varying degrees of success with tom-toms and announcements in villages. The primary task was to convince people that the caste practices to which they were accustomed were now liable to invite criminal prosecution. This was done primarily through the use of prosecution itself, which was intended to serve as a deterrent. Yet even the process of prosecution was fraught with difficulties: if some village authority thought fit to report a case of infant marriage, proving the age of the girl at the moment of marriage was far more difficult, since the regulation was predicated on the existence of an efficient registration of births and marriages at the village level, which was by no means guaranteed in this period. What the Government of Mysore may have possessed by way of a will to change was not matched by a comparable machinery of implementation.

Yet the central paradox of the Mysore legislation was pointed out during the discussion in the assembly and studiously ignored. Arguing for a real and effective regulation, K.Ranginagar (advocate from Mysore) said, “This regulation, by punishing the
promoters of an infant marriage, without declaring that marriage is illegal, would for the first time make an act right in civil law but wrong in criminal law. Indeed the cases that came up for prosecution, which even in its most vigorous period of implementation never exceeded two dozen, frequently did not end in conviction. The conviction itself was no more than a symbolic fine, in most cases ranging between one and twenty five rupees. It was not long before provisions for fines were made as part of marriage expenses.

There were on the other hand, remarkably few protests against the regulation, and certainly nothing compared with the bitter British Indian debate. There were 202 prosecutions, ending in 175 convictions, in the first 16 years of the act’s operation, the larger number taking place in the first three years 1895-98, then dwindling to five or six prosecutions per year in the 1901-06 period. The figure steadily fell, and no cases were reported for a while, with just four prosecutions involving 14 persons between 1922 and 1927.

The Mysore act has been interpreted as yet another effort by the Mysore state to make a claim for its status as a model state, passing the act in order to please the paramount power, and not implementing it out of deference to feudal interests. A close analysis of the kinds of cases which came before the administration and the manner in which they were prosecuted reveals a variety of points at which the experience of Mysore as a princely state differed from that of British India. Mysore officials were concerned with the institution of a particular form of legality, absorbing to the realm of the state certain aspects of customary law-ways. Although some compromises were made, as for instance in declaring eight rather than twelve the age of marriage for girls, the Government did not hesitate to punish even its own officials who violated provisions of the regulation. If the very small number of cases prosecuted under the comparable act in British India was an indication of how ineffective the legislation had been, the dwindling numbers of cases prosecuted in Mysore in the 1920s suggests a decline in child marriages throughout the two previous decades.

Nevertheless the Mysore example may be taken as an illustration of how the passage of such laws was compatible with a form of despotism. Despite repeated requests, the Mysore state did not raise the legal age of marriage in the years before independence and when, following the passage of the Sarda Act, the Mysore Legislative council passed a similar bill, the Dewan declared that the climate of public opinion was not willing to accept this.

Although it was long believed that women were practically absent in the discussions on the Age of Consent during the 1880s and 1890s, fresh scholarship has shown this was not the case. Apart from the better known instances of Ramabai and Rakhumabai, (the latter wrote copiously for the press, arguing against infant marriage and enforced widowhood) several other women participated in the debate. In the first decades of the twentieth century not only were women voicing critiques of legislation, they were demanding new rights and protections. By the 1920s and 1930s they shed their timidity and became vociferous participants in the debate leading up to and after the passage of the Child Marriage Restraint Act of 1929.

The Sarda Bill and the women’s movement

A definite sign of the shifts in the constellation of political forces in the country and the emergence of women as a significant, though subordinate, group within the Congress political order was the passage of the Child Marriage Restraint Act of 1929. The All India Women’s Conference, set up in 1927, pursued the bill outside and within the Legislative Assembly.

From as early as 1922, following the enhanced powers of the reformed legislatures, various bills were introduced to raise the age of consent within and outside marriage, but these were obstructed, frequently by the government itself. Thus H.S. Gour’s 1924 bill to amend Section 375 of the Indian Penal Code raising the age of consent for girls to 14 years in both marital and extra marital cases, was not passed due to the intransigence of Government members.

Nevertheless a Government sponsored bill in 1925 fixed 14 as the age of consent in extra marital cases and, 13 in marital cases. The bill was passed by 84 votes to 11 and the opinion of the local governments and administrations sought. The 1925 amendment for the first time made a distinction between consummation within and outside the marriage. Opinions on the amended law were sought from various parts of India. It was generally
acknowledged that “very few cases of a breach of law within the marital relationship” came before the courts even though there were clearly more infringements of the act within marriage. The reasons were not too far to seek: there was widespread ignorance of the law, the raising of the age of consent by a mere year made no impact, and most important, the wife and her parents were usually reluctant to speak out.

Before long, a bill to raise the age of consent for girls and boys to 14 and 18 respectively was introduced in the Legislative Assembly by Har Bilas Sarda in 1927. Meanwhile, opinion was already growing on the need for a more effective step than a mere rise in the age of consent, namely the prevention of early marriages altogether. Already in circulation at the time was the Children’s Protection Bill introduced by Gour which Sarda felt insufficiently addressed the problem of child marriage.

The Sarda Bill was referred to a Select Committee, which altered the name of the Bill from the Hindu Child Marriage Act to Child Marriage Restraint Act making it applicable to all communities and not just Hindus. Meanwhile, the Joshi Committee appointed to consider Gour’s bill, expanded its mandate to consider the Sarda Bill and presented its detailed report to the Assembly in 1929.

Rameshwar Nehru and M.O’Brien Beadon were the two women members of the committee. In addition several women, such as Lady Ramabai Nilkanth from Gujarat, testified before the committee, strongly urging that the minimum age of marriage of girls be fixed at 16 years—primarily on the grounds of protecting maternal health. In Madras, some women even suggested that the age of consent be fixed at 18: in 1928, the Madras Legislative Council unanimously passed a resolution recommending 16 as the age of marriage.

The Committee recommended 15 as the minimum age of consent for married girls, and termed the offence of consummation with underage girls “marital misbehaviour” rather than rape. Sections 375 and 376 of the Indian Penal Code were applied to sex with girls below 18 outside the marriage. The committee also called for widespread publicity, and held the State responsible for popularising and also developing conditions conducive to prosecution under the act, encouraging the appointment of women police, jurors and doctors. It recommended that the

punishment be at least ten years with fine if the married girl was less than 12 years, and imprisonment of one year and a fine for sex with girls between 12 and 15 years, and transportation for life in cases of rape.

In a separate note, Nehru voiced open scepticism about the effectivity of such a law while specifying that “we have recommended this law and I have agreed to its retention because of its educative value.” She urged the reduction of the penalty but recommended better application and strongly opposed the holding of trials in camera, suggesting instead that shame the offender was an effective way of preventing future offences. She also suggested that the right of complaint be withdrawn from anyone except social reform associations and parents.

The bill weathered opposition from the Hindu orthodoxy and from some Muslim representatives. At a time when communal tensions were high, the Government was less willing to override the opinions of prominent Muslim members who rejected social reform from a Hindu dominated assembly. Yet other influential members such as Jinnah were convinced by the evidence in the committee report that child marriages were common among Muslims, and the bill as it was passed finally included Muslims as well. The age of marriage was fixed at fourteen. The bill became law with surprisingly little opposition, with only 14 votes against and 77 for the bill, which spoke of the success with which consensus had been built around the question of prohibiting child marriage.

Women had sought support for various legislative measures between 1922 and 1927, but the Sarda bill infused their campaign with new vigour. The bill was debated and discussed quite thoroughly at meetings of the Conference. Recognising the close link between its commitment to education of women and the debate on age of consent, AIWC member Maharaní Chimanbai said “On the reform of our marriage system will, I believe, rest the success or otherwise of our educational programme.” A deputation was sent to the age of consent committee meeting in Patna. Responding to the statement that raising the age of marriage may lead to the immorality of young girls, the women argued that such girls could be looked after just as well as widows were. Although the women were concerned with the prohibition of marriage of children, there was no attempt to
offer, at such a moment, any critique of "the protection" of the family.

The articulation of support for, or opposition to, the bill recalled earlier debates on the scriptural sanction for any such practice. Some members of the Legislative Assembly, such as M.A. Jinnah and T.A.K. Sherwani, argued that child marriage had no scriptural sanction among the Muslims. In an interesting inversion of the rapidly congealing stereotypes about the two major communities, Sherwani said that Muslims only practised child marriage in India because they were corrupted by the Hindus. Male reformers’ support for the Child Marriage Restraint bill was couched in terms of societal and moral regeneration as well as a concern for the physical well-being of premature motherhood; the opposition framed its arguments in moral and social terms, tending to avoid the more controversial biological arguments.

Hindu opposition led by Madan Mohan Malaviya, argued against raising the marriage age beyond 12 for girls and cited the sastras in his defence. This drew sharp and pointed responses from the AIWC delegation, who then said, "We want new sastras." By the 1920s, it was clear that women nationalists were acutely aware of the use and abuse of ‘custom’, ‘tradition’ and ‘sastras’ in denying women equality before law.

The proof of any such legislation’s capacity for social transformation lay in its implementation. British authorities were extraordinarily reluctant to overtly contest Indian patriarchal ideologies, fearful of the political repercussions of interference in a ‘private domain’ which was increasingly being represented as anti-colonial and autonomous. Thus just days after the 1891 Age of Consent amendment was passed, the Governor General, Lansdowne, advised local governments via a circular that the Act be applied only cautiously; enquiries were to be held only by Indian magistrates and prosecutions postponed if any doubts arose. Not surprisingly, the new legislation was relatively toothless. In 1930 again, the Government of India warned against vigorous prosecutions under the new act, since it would "unnecessarily disrupt family relations and ruin the wife’s prospects for life" although the body of case law suggests that the barriers to interference in family affairs were rarely respected in courts.

The Child Marriage Restraint Act XIX of 1929 came into operation in 1930. Members of the women’s movement realised that their job did not end when the law, whatever its limits, was passed. Indeed, the Sarda Act’s greatest lesson was "to show the women who supported it how powerless they were when it came to actually effecting social change through legislation." There were few prosecutions under the act despite the fact that the AIWC constantly demanded amendments to make the prosecution of offenders easier, and urged the formation of vigilance committees. An editorial in the Indian Social Reformer remarked rather angrily in 1936 that there was a “veritable stampede” to register (child) marriages between September 1929, when the bill was passed, and April 1930, when it became enforceable. Citing an earlier article the paper said, “the pigtailed pundits have sanctioned rather juvenile unions to stave off perdition”. The results of such haste, the Reformer noted, was “a hideous legacy of a large increase in child widows in one year so as to be clearly reflected in the census of 1931.”

On at least one other occasion, the act was struck down on technical grounds. In 1932, the Tamil Nadu and the Dravidian of Madras noted that the Calcutta High Court had set aside a conviction made under the Child Marriage Restraint Act since the defendants had successfully pointed to two EIC acts of 1780 and 1797 that remained unrepuled. These acts prohibited anyone from interfering in the marriage of a Hindu girl that was celebrated by her father. In addition, the Dravidian commented on the low fines that were imposed on lawyers themselves who contravened the provisions of the act. So slight were the fines, that they were simply provided for when wedding budgets were planned.

In Mysore, where a women’s movement comparable to the one in British India failed to develop, legislators demanded a raise in the minimum age of marriage for girls more than 12 times, but their demands were easily dismissed. After the Sarda Act was passed, a private bill was introduced to legislate similar changes. The Mysore Ladies Conference even demanded that the marriageable age be extended to 16 and 21 for girls and boys respectively. Ironically, one of the two women members of the assembly, Kamalamma Dasappa herself expressed concern over the introduction of such a bill, arguing for education, rather than legislation, as a way of bringing about social change. Some
members of the Mysore Ladies Conference, she said, had agreed that “whatever the social laws of a country might be, let them stand outside the compound and not enter the household.” Protecting the domain of the family from state interference even when the administration was Indian was somewhat ironic. Although the bill was passed, with 98 members of the Legislative Council for and 87 against, the Dewan declined to give his assent, explaining that “the balance of considerations seems to be in favour of leaving things alone.” By exerting its will against the voice of liberal reformers, the government reasserted its claim to represent the true aspirations of the people of Mysore.

Whatever the limits of their actions on social reforms, the incipient Indian women’s movement was quick to learn one important lesson. Under colonialism, the citizen-subject was a political and therefore a legal impossibility. The language of rights for women could only be legitimately deployed if it was linked to a larger question of national independence and the formation of the nation-state. To make the demand for women’s rights per se was seen as unwomanly, undignified and finally illegitimate. The demand for new rights was received with less hostility if women spoke of their duties to race and nation: at the same time, “rights” could only be bestowed or granted by patriarchal heads, the preferred arrangement of power relations under colonialism.

Female infanticide

On quite a different register from the reform discourse of the nineteenth century was the law which banned female infanticide. Compared with the relatively long gestation periods of most social legislation, and their indifferent implementation, there was an extraordinarily brisk quality to the British initiatives against female infanticide especially in parts of north-west India. The Special Act of 1870 was considered so effective in curbing the crime of female infanticide in the North-West Provinces that it was withdrawn in 1906. This is probably a unique example of legislation which was short-lived because of its effectiveness.

The practice of female infanticide was most common among certain castes and tribes such as the Rajputs, Jats, Gujars, Ahirs, Jharejas, Jaitwas and some Sikh groups, of the Kathiawar, Rajputana, Punjab and North West Provinces regions. While the strict laws of exogamy forbade intermarriage between families of the same clan, rivalries between Rajput clans about superior and inferior ranks further restricted the marriageable clans to which women could be given. The pressure to display dignity and rank at marriages often reduced Rajput families to penury. It was equally disgraceful to raise an unmarried daughter. In these areas and among these agrarian clans, therefore, girl children were considered an unmitigated burden from which infanticide provided an easy release.

The earliest efforts to suppress the system were made in Kathiawar and Kutch. The Jhreja Rajputs were encouraged through coercive, sumptuary and edictive measures to preserve, rather than destroy, infant girls. Alexander Walker, the Chief Resident of Baroda, attempted to encourage clan chiefs to enter into deeds renouncing the practices in 1808, and later even rewarded those with babes in their arms with cash awards. When the authorities discovered that the deeds were violated with impunity and implementation was weak, they issued threats of heavy penalties, alongside the establishment of an infanticide fund to defray marriage expenses. The Assistant Resident Willoughby gained notoriety for his elaborate system of informers, and the punitive measures of 1834-35 included fines and imprisonment. Though these coercive measures worked to an extent, they also produced terrorised and resentful communities. An 1841 report showed that the entire Jhreja male child population of Kathiawar was 5,760 against 1,370 girls. Though better progress was made in Kutch, which had a cooperative indigenous ruler, the 1841 census showed only 335 girls to 2,625 boys. The new political agent in Kathiawar, Erskine, recognised the need for educative measures and encouragement to end the practice without surveillance. Although census takers faced an uncooperative population determined to suppress all information on births, by 1852 it was believed that a progressive preservation of daughters by Rajputs had occurred.

In Rajputana, the chiefs and rulers were more co-operative, and were encouraged to dissuade their followers from practising infanticide, but since the extortions of the Bhatis and Charans in the area were what made the marriage of daughters burdensome, the colonial authorities attempted to regulate the payments due
to these communities in 1839. In addition, sumptuary and educative measures were passed, restricting marriage expenses. In mid-century, the strategy followed in Rajputana appeared to have borne fruit and had sufficiently reduced the importance of Bhat and Charran, as well as the incidence of female infanticide.

In the North West Provinces, Regulation XI of 1795 was passed against the Rajkumars of Benares, making infanticide punishable, and Regulation VIII of 1863 extended the law to areas ceded by the Nawab of Oudh. Yet it was soon realised that some effective means of restricting dowries and finding suitable bridegrooms was called for. Civil servants in some areas found that moral pressure was useful, but the method was too reliant on the personal influence of magistrates and officers, and the Rajputs soon reverted to the custom in the absence of such pressure. There appeared to be no alternative to criminalising the practice. Elaborate mechanisms of coercion, including strict surveillance involving village servants, such as the chaprasí (peon), gorai (messenger), chowkidar (watchman), midwife and even the patwari (accountant) were introduced, and met with striking success in controlling the practice.

Anti-infanticidal measures in Punjab once more adapted to local peculiarities. Recognising that infanticide there resulted from intense factional rivalry, Government efforts were directed at bringing about reconciliation. Punitive measures tried elsewhere and sumptuary regulations for marriage celebrations and exchanges constituted the most holistic set of measures adopted anywhere. It is a sign of the relative lack of hostility to these measures that Punjab remained loyal to the British during the Revolt of 1857.

The North West Provinces were more difficult, and the fiercely combative stance of its inhabitants during 1857 temporarily stalled the efforts of colonial authorities who were determined to push ahead with special legislation to outlaw the practice. The Jats, Gujars and Ahirs appeared to be less guilty than the Rajkumars against whom measures had earlier been passed. Furthermore, turbulent political conditions in the region produced a situation where the severe shortage of girls for marriage had led to kidnapping of lower caste girls to be sold as brides.

John Strachey's draft bill streamlined the measures the Government could take, ranging from increased surveillance, thorough censuses, an enlarged police force, and restrictions on marriage expenses. Despite considerable scepticism about its effectiveness, and resistance from the local chiefs, Strachey's bill became law in 1870 and was applicable to the North West Provinces, the Punjab and Oudh but could be extended elsewhere.

The apparatuses necessary to implement such an act, from periodic censuses, monitoring of pregnant women by the village authorities, meticulous registration of births and inquests if the child died within a week, leading to imprisonment, were altogether far more invasive than anything that had gone before. In his draft bill, John Strachey gave local governments legal authority to effectively enforce the measures, and disobedience of any of the provisions of the bill was punishable with six months imprisonment or a fine of Rs 1,000 or both.

In a region where the percentage of women and girls was decidedly lower than men, there had to be a way of distinguishing only the most guilty families. How then were the communities which come under the act identified? In 1872, after the first comprehensive census, it decided that those clans which had a proportion of girls less than 40 per cent of the total in the age group under 12 were declared guilty of the crime, and those with less than 25 per cent girls were very guilty.

The act was comprehensive and directly affected the lives of large numbers of people, and involved keeping a family record of nearly half a million families. In 1872-73 alone, the 40 per cent standard was enforced in the 25 districts of the North Western Provinces, and 4,959 villages inhabited by 4,85,938 people were considered guilty of the crime. Of these, 1,713 villages were "blood red", with girl populations less than 25 per cent. However, when it was thought that innocent families may be unjustly penalised with such strict criteria, it was decided to lower the cut off point between guilty and non-guilty families to 35 per cent.

Within just two years of the operation of the act, there was a slight but perceptible rise in the population of girls, from 32.3 to 35.4 per cent. Of the actual number of inquests held, a very minute percentage were actually convicted. Nevertheless, the maintenance of registers of births deaths and marriages was an effective instrument of suppression. By making the local midwives, dais and chowkidars also responsible for the crime, and by keeping a vigil on pregnant women, a considerable number of
people were discouraged from attempting the crime. Between 1875 and 1881 alone the percentage of girl children rose from 30.2 to 38.6 per cent. From 1881 onwards the age under which children were placed under surveillance was reduced to six, and by 1888 the number of proclaimed villages dropped to 1381 from 1951 just five years before. By 1905, the Government of United Provinces, Agra and Oudh (the former North West Provinces) were of the opinion that the Special Act of 1870 was no longer necessary since “one of the worst social crimes had been stamped out”, and the act was withdrawn in 1906, only placing certain pockets under close watch.

This totalising legislation combined both positive and negative sanctions, held a range of village officials and functionaries responsible, and pursued prosecutions and convictions with vigour. Though there were attempts at evasion, with some clans going to the extent of borrowing girls from neighbouring villages at the time of the head count, or hiding in the fields, overall results of the legislation were promising.

In her detailed study of the passage and implementation of this act Lalitha Panigrahi does not discuss the meaning of this practice and measures taken against it within the wider social formation of the area. Nor are the reasons for this extraordinary interest of colonial officials in the prevention of female infanticide really examined, except for suggesting that it was “humanitarian concern”. While humanitarian concern could certainly have played a part in the decision to introduce such drastic measures, especially as part of the civilising mission, the absence of more detailed information on the interests that were served makes anything more than speculation difficult. Yet if British authorities claimed that the protection of the cohering community in Punjab lay at the root of their decision to support karewa, it is unlikely that humanitarian concern fully explains the extent and scope of anti-infantical measures and their withdrawal.

There is no doubt that “illiberal means” were used “to achieve liberal and human values”. But most important, the measures against female infanticide also revealed the confidence with which the colonial State interfered in most private spheres of family life, and regulated the reproduction of the proclaimed populations (i.e. those who were under surveillance). This was a clear instance of the colonial State’s fearless eradication of practices which had long gone under the name of “custom” and “tradition”, without too much fear of political consequences. In other words, if the colonial State had the will, there was little that could stop it from implementing legislation that was framed as “liberal” and “humanitarian”, or entering that thicket of “tradition” where it had formerly feared to tread. In the case of both sati and female infanticide, the colonial State was anxious to maintain a monopoly over the right of taking human life, so its respect for custom was severely limited by its needs to establish the overwhelming authority of the State, overriding those customs which encroached on its monopolies.

Colonial officials recognised that female complicity lay at the heart of the continuation of female infanticide. Speaking of the Jharejas, Erskine said in a letter to Trevelyan, the Deputy Secretary of Government in 1835 that he could understand why the men were reconciled to female infanticide since it was part of their culture, “but several instances have been told to me where young mothers, just before married from other tribes...and even brought in from other countries have strenuously urged the destruction of their own infants.” Once more, the patriarchal structures which sustained the practice of infanticide were obscured by the recourse of colonial discourses to arguments about female “nature”. It even confirmed the Raipur communities’ belief that such drastic practices were necessary in order to control women thus Erskine again, “their tenets are that women are innately vicious and it must be confessed that they have good cause to draw this conclusion in Kutch in which I strongly suspect there is hardly one chaste female.”

The century-long debate on Indian tradition as it was staged on the ground of the “women’s question” appears to have dropped out of the nationalist agenda by the late nineteenth century. Partha Chatterjee has suggested that this was partly a result of the fact that nationalism had to establish its hegemony over the domestic sphere before it staked its claims in the political one. In other words, Chatterjee argues that the process of reforming Indian tradition, and thereby indirectly the position of women, was neither incomplete nor poorly formulated, but resolved in keeping with nationalist intentions. These intentions may broadly be characterised as creating some liberal space for women within middle class families without levelling gender
relations in any fundamental way. The Indian woman therefore emerged in twentieth century public political discourse embodying a reformed tradition. Set off from the westernised woman, the lower class woman and the upper caste conservative woman, the middle class woman took her place in the public sphere, a sphere that was defined, enlarged, and actively mobilised in the phase of Gandhian nationalism. A newly reformed Indian tradition was now at the centre of any attempt to combat imperialism.

The innumerable instances of a faltering commitment to the ideals of reforming tradition, especially on the part of men, are perhaps more comprehensible when we consider that, given the fragmented nature of the integration of the Indian economy in the capitalist world system, forms of marriage and family that were commensurate with the changing order in Europe, could only take root in India in some enclaves. Thus Ranade himself, an indefatigable campaigner against child marriage, admitted defeat when he was forced to marry an 11 year old girl. His protest could only take the form of teaching Ramabai Ranade to read and write.

In equal part, the women’s question dropped out of the nationalist agenda because it was being reformulated in the women’s movement, though not necessarily in ways that challenged the fundamentals of the nationalist agenda. The long century of social reform, its contradictory relation to scriptural tradition, and the increasing strength of revivalist nationalists gave rise not only to the ideal of Aryan womanhood, but to Hindu communalism. Indeed the advocates of women’s education and legal rights were successfully able to reconcile their demands within a broader framework of religious regeneration. The increasing identification of Aryan with Hindu and of Hindu with Indian drew on the very biological arguments which cultural nationalists made.

Whether the nineteenth century actually saw an improvement in the position of women is somewhat less certain. Indeed rarely was the reform of the position of woman at the centre of the discourse on reform: there were innumerable points at which the discourse of proponents and opponents of social legislation intersected. Some advances which were made cannot be denied, particularly as the education of the middle class woman and her entry into professional work was made acceptable. She in turn would stake her own claims for independence after the 1920s, remaining by and large within the framework that was already in place, but also articulating, however weakly, a critique of Indian patriarchy as well.

Notes

4 The study of “discourses”, as discussed in this work, is the study of documents and practices elaborated by Michel Foucault in The Archaeology of Knowledge (New York: Pantheon Books, 1972). Following Foucault, discourse is not equivalent to, or reducible to language but refers to “practices that systematically form the objects of which they speak.” (p.49). The study of “discourses” permits plotting the ways in which persistent themes emerge in simultaneous, successive, even incompatible contexts (p.35).
6 Lalita Mani, “The Production of an Official Discourse on Sati in nineteenth century Bengal” EPW, 21.17 (April 1986). The account of the legislative efforts that follow in the next few paragraphs is based on Mani’s account, unless otherwise specified.
9 Yang, “Whose Sati?”, p.22.
10 Ibid., p.29.
12 Mani, “Production of an Official Discourse on Sati”, p.35.
THE NATION AND ITS FRAGMENTS

COLONIAL AND POSTCOLONIAL HISTORIES

Partha Chatterjee
CHAPTER SIX

The Nation and Its Women

THE PARADOX OF THE WOMEN'S QUESTION

The "women's question" was a central issue in the most controversial debates over social reform in early and mid-nineteenth-century Bengal—the period of its so-called renaissance. Rammohan Roy's historical fame is largely built around his campaign against the practice of the immolation of widows, Vidyasagar's around his efforts to legalize widow remarriage and abolish Kulin polygamy; the Brahmo Samaj was split twice in the 1870s over questions of marriage laws and the "age of consent." What has perplexed historians is the rather sudden disappearance of such issues from the agenda of public debate toward the close of the century. From then onward, questions regarding the position of women in society do not arouse the same degree of public passion and acrimony as they did only a few decades before. The overwhelming issues now are directly political ones—concerning the politics of nationalism.

How are we to interpret this change? Ghulam Murshid states the problem in its most obvious, straightforward form. If one takes seriously, that is to say, in their liberal, rationalist and egalitarian content, the mid-nineteenth-century attempts in Bengal to "modernize" the condition of women, then what follows in the period of nationalism must be regarded as a clear retrogression. Modernization began in the first half of the nineteenth century because of the penetration of Western ideas. After some limited success, there was a perceptible decline in the reform movements as popular attitudes toward them hardened. The new politics of nationalism "glorified India's past and tended to defend everything traditional"; all attempts to change customs and life-styles began to be seen as the aping of Western manners and were thereby regarded with suspicion. Consequently, nationalism fostered a distinctly conservative attitude toward social beliefs and practices. The movement toward modernization was stalled by nationalist politics.

This critique of the social implications of nationalism follows from rather simple and linear historicist assumptions. Murshid not only accepts that the early attempts at social reform were impelled by the new nationalist and progressive ideas imported from Europe, he also presumes that the necessary historical culmination of such reforms in India ought to have been, as in the West, the full articulation of liberal values in social institutions and practices. From these assumptions, a critique of nationalist ideology and practices is inevitable, the same sort of critique as that of the colonialist historians who argue that Indian nationalism was nothing but a scramble for sharing political power with the colonial rulers; its mass following only the successful activation of traditional patron-client relationships; its internal debates the squabbles of parochial factions; and its ideology a garb for xenophobia and racial exclusiveness.

Clearly, the problem of the diminished importance of the women's question in the period of nationalism deserves a different answer from the one given by Murshid. Sumit Sarkar has argued that the limitations of nationalist ideology in pushing forward a campaign for liberal and egalitarian social change cannot be seen as a retrogression from an earlier radical reformist phase. Those limitations were in fact present in the earlier phase as well. The renaissance reformers, he shows, were highly selective in their acceptance of liberal ideas from Europe. Fundamental elements of social conservatism such as the maintenance of caste distinctions and patriarchal forms of authority in the family, acceptance of the sanctity of the sástras (scriptures), preference for symbolic rather than substantive changes in social practices—all these were conspicuous in the reform movements of the early and mid-nineteenth century.

Following from this, we could ask: How did the reformers select what they wanted? What, in other words, was the ideological sieve through which they put the newly imported ideas from Europe? If we can reconstruct this framework of the nationalist ideology, we will be in a far better position to locate where exactly the women's question fitted in with the claims of nationalism. We will find, if I may anticipate my argument in this chapter, that nationalism did in fact provide an answer to the new social and cultural problems concerning the position of women in "modern" society, and that this answer was posited not on an identity but on a difference with the perceived forms of cultural modernity in the West. I will argue, therefore, that the relative unimportance of the women's question in the last decades of the nineteenth century is to be explained not by the fact that it had been censored out of the reform agenda or overtaken by the more pressing and emotive issues of political struggle. The reason lies in nationalism's success in situating the "women's question" in an inner domain of sovereignty, far removed from the arena of political contest with the colonial state. This inner domain of national culture was constituted in the light of the discovery of "tradition."

THE WOMEN'S QUESTION IN "TRADITION"

Apart from the characterization of the political condition of India preceding the British conquest as a state of anarchy, lawlessness, and arbitrary despotism, a central element in the ideological justification of British co-
lonial rule was the criticism of the "degenerate and barbaric" social customs of the Indian people, sanctioned, or so it was believed, by the religious tradition. Alongside the project of instituting orderly, lawful, and rational procedures of governance, therefore, colonialism also saw itself as performing a "civilizing mission." In identifying this tradition as "degenerate and barbaric," colonialist critics invariably repeated a long list of atrocities perpetrated on Indian women, not so much by men or certain classes of men, but by an entire body of scriptural canons and ritual practices that, they said, by rationalizing such atrocities within a complete framework of religious doctrine, made them appear to perpetrators and sufferers alike as the necessary marks of right conduct. By assuming a position of sympathy with the unfree and oppressed womanhood of India, the colonial mind was able to transform this figure of the Indian woman into a sign of the inherently oppressive and unfree nature of the entire cultural tradition of a country.

Take, for example, the following account by an early nineteenth-century British traveler in India:

...at no period of life, in no condition of society, should a woman do any thing at her mere pleasure. Their fathers, their husbands, their sons, are verily called her protectors; but it is such protection! Day and night must women be held by their protectors in a state of absolute dependence. A woman, it is affirmed, is never fit for independence, or to be trusted with liberty... their deity has allotted to women a love of their bed, of their seat, and of ornaments, impure appetites, wrath, flexibility, desire of mischief and bad conduct. Though her husband be devoid of all good qualities, yet, such is the esteem they form of her moral discrimination and sensibilities, that they bind the wife to revere him as a god, and to submit to his corporeal chastisements, whenever he chooses to inflict them, by a cane or a rope, on the back parts... A state of dependence more strict, contemptuous, and humiliating, than that which is ordained for the weaker sex among the Hindoos, cannot easily be conceived; and to consummate the stigma, to fill up the cup of bitter waters assigned to woman, as if she deserved to be excluded from immortality as well as from justice, from hope as well as from enjoyment, it is ruled that a female has no business with the texts of the Veda—that having no knowledge of expiatory texts, and no evidence of law, sinful woman must be foul as falsehood itself, and incompetent to bear witness. To them the fountain of wisdom is sealed, the streams of knowledge are dried up; the springs of individual consolation, as promised in their religion, are guarded and barred against women in their hour of desolate sorrow and parching anguish; and cast out, as she is, upon the wilderness of bereavement and affliction, with her impoverished resources, her water may well be spent in the bottle; and, left as she is, will it be a matter of wonder that, in the mo-

ment of despair, she will embrace the burning pile and its scorching flames, instead of lengthening solitude and degradation, of dark and humiliating suffering and sorrow?1

An effervescent sympathy for the oppressed is combined in this breathless prose with a total moral condemnation of a tradition that was seen to produce and sanctify these barbarous customs. And of course it was untrue that came to provide the most convincing example in this rhetoric of condemnation—the first and most criminal of their customs," as William Bentinck, the governor-general who legislated its abolition, described it. Indeed, the practical implication of the criticism of Indian tradition was necessarily a project of "civilizing" the Indian people: the entire edifice of colonialist discourse was fundamentally constituted around this project.

Of course, within the discourse thus constituted, there was much debate and controversy about the specific ways in which to carry out this project. The options ranged from proselytization by Christian missionaries to legislative and administrative action by the colonial state to a gradual spread of enlightened Western knowledge. Underlying each option was the liberal colonial idea that in the end, Indians themselves must come to believe in the unworthiness of their traditional customs and embrace the new forms of civilized and rational social order.

I spoke, in chapter 2, of some of the political strategies of this civilizing mission. What must be noted here is that the so-called women's question in the agenda of Indian social reform in the early nineteenth century was not so much about the specific condition of women within a specific set of social relations as it was about the political encounter between a colonial state and the supposed "tradition" of a conquered people—a tradition that, as Lata Mani has shown in her study of the abolition of satidaha (immolation of widows), was itself produced by colonialist discourse. It was colonialist discourse that, by assuming the hegemony of Brahmanical religious texts and the complete submission of all Hindus to the dictates of those texts, defined the tradition that was to be criticized and reformed. Indian nationalism, in demarcating a political position opposed to colonial rule, took up the women's question as a problem already constituted for it: namely, as a problem of Indian tradition.

THE WOMEN'S QUESTION IN NATIONALISM

I described earlier the way nationalism separated the domain of culture into two spheres—the material and the spiritual. The claims of Western civilization were the most powerful in the material sphere. Science, tech-
nology, rational forms of economic organization, modern methods of statecraft—these had given the European countries the strength to subjugate the non-European people and to impose their dominance over the whole world. To overcome this domination, the colonized people had to learn those superior techniques of organizing material life and incorporate them within their own cultures. This was one aspect of the nationalist project of rationalizing and reforming the traditional culture of their people. But this could not mean the imitation of the West in every aspect of life, for then the very distinction between the West and the East would vanish—the self-identity of national culture would itself be threatened. In fact, as Indian nationalists in the late nineteenth century argued, not only was it undesirable to imitate the West in anything other than the material aspects of life, it was even unnecessary to do so, because in the spiritual domain, the East was superior to the West. What was necessary was to cultivate the material techniques of modern Western civilization while retaining and strengthening the distinctive spiritual essence of the national culture. This completed the formulation of the nationalist project, and as an ideological justification for the selective appropriation of Western modernity, it continues to hold sway to this day.

The discourse of nationalism shows that the material/spiritual distinction was condensed into an analogous, but ideologically far more powerful, dichotomy: that between the outer and the inner. The material domain, argued nationalist writers, lies outside us—a mere external that influences us, conditions us, and forces us to adjust to it. Ultimately, it is unimportant. The spiritual, which lies within, is our true self; it is that which is genuinely essential. It followed that as long as India took care to retain the spiritual distinctiveness of its culture, it could make all the compromises and adjustments necessary to adapt itself to the requirements of a modern material world without losing its true identity. This was the key that nationalism supplied for resolving the ticklish problems posed by issues of social reform in the nineteenth century.

Applying the inner/outer distinction to the matter of concrete day-to-day living separates the social space into ghar and bābīr, the home and the world. The world is the external, the domain of the material; the home represents one’s inner spiritual self, one’s true identity. The world is a treacherous terrain of the pursuit of material interests, where practical considerations reign supreme. It is also typically the domain of the male. The home in its essence must remain unaffected by the profane activities of the material world—and woman is its representation. And so one gets an identification of social roles by gender to correspond with the separation of the social space into ghar and bābīr.

Thus far we have not obtained anything that is different from the typical conception of gender roles in traditional patriarchy. If we now find continuities in these social attitudes in the phase of social reform in the nineteenth century, we are tempted to label this, as indeed the liberal historiography of India has done, as “conservatism,” a mere defense of traditional norms. But this would be a mistake. The colonial situation, and the ideological response of nationalism to the critique of Indian tradition, introduced an entirely new substance to these terms and effected their transformation. The material/spiritual dichotomy, to which the terms world and home corresponded, had acquired, as noted before, a very special significance in the nationalist mind. The world was where the European power had challenged the non-European peoples and, by virtue of its superior material culture, had subjugated them. But, the nationalists asserted, it had failed to colonize the inner, essential, identity of the East, which lay in its distinctive, and superior, spiritual culture. Here the East was undominated, sovereign, master of its own fate. For a colonized people, the world was a distressing constraint, forced upon it by the fact of its material weakness. It was a place of oppression and daily humiliation, a place where the norms of the colonizer had perforce to be accepted. It was also the place, as nationalists were soon to argue, where the battle would be waged for national independence. The subjugated must learn the modern sciences and arts of the material world from the West in order to match their strengths and ultimately overthrow the colonizer. But in the entire phase of the national struggle, the crucial need was to protect, preserve, and strengthen the inner core of the national culture, its spiritual essence. No encroachments by the colonizer must be allowed in that inner sanctum. In the world, imitation of and adaptation to Western norms was a necessity; at home, they were tantamount to annihilation of one’s very identity.

Once we match this new meaning of the home/world dichotomy with the identification of social roles by gender, we get the ideological framework within which nationalism answered the women’s question. It would be a grave error to see in this, as liberals are apt to in their despair at the many marks of social conservatism in nationalist practice, a total rejection of the West. Quite the contrary: the nationalist paradigm in fact supplied an ideological principle of selection. It was not a dismissal of modernity but an attempt to make modernity consistent with the nationalist project.

DIFFERENCE AS A PRINCIPLE OF SELECTION

It is striking how much of the literature on women in the nineteenth century concerns the threatened Westernization of Bengali women. This theme was taken up in virtually every form of written, oral, and visual
communication—from the ponderous essays of nineteenth-century moralists, to novels, farces, skits and jingles, to the paintings of the *patua* (scroll painters). Social parody was the most popular and effective medium of this ideological propagation. From Ishwar Chandra Gupta (1812–59) and the *kabiya* (songsters) of the early nineteenth century to the celebrated pioneers of modern Bengali theater—Michael Madhusudan Dutta (1824–73), Dinabandhu Mitra, Jyotirindranath Tagore (1849–1925), Upendranath Das (1848–95), and Mrinal Bose (1853–1929)—everyone picked up the theme. To ridicule the idea of a Bengali woman trying to imitate the ways of a *memsahib* (and it was very much an idea, for it is hard to find historical evidence that even in the most Westernized families of Calcutta in the mid-nineteenth century there were actually any women who even remotely resembled these gross caricatures) was a sure recipe calculated to evoke raucous laughter and moral condemnation in both male and female audiences. It was, of course, a criticism of manners, of new items of clothing such as the blouse, the petticoat, and shoes (all, curiously, considered vulgar, although they clothed the body far better than the single length of sari that was customary for Bengali women, irrespective of wealth and social status, until the middle of the nineteenth century), of the use of Western cosmetics and jewelry, of the reading of novels, of needlework (considered a useless and expensive pastime), of riding in open carriages. What made the ridicule stronger was the constant suggestion that the Westernized woman was fond of useless luxury and cared little for the well-being of the home. One can hardly miss in all this a criticism—reproach mixed with envy—of the wealth and luxury of the new social elite emerging around the institutions of colonial administration and trade.

Take, for example, a character called “Mister Dhurandhar Pakrashi,” whose educated wife constantly calls him a “fool” and a “rascal” (in English) and wants to become a “lady novelist” like Mary Correlli. This is how her daughter, Phulkumari, makes her entrance:

**PHULKUMARI:** Papa! Papa! I want to go to the races, please take me with you.

**DHURANDHAR:** Finished with your tennis?

**PHULKUMARI:** Yes, now I want to go to the races. And you have to get me a new bicycle. I won’t ride the one you got me last year. And my football is torn; you have to get me another one. And Papa, please buy me a self-driving car. And also a nice pony. And please fix an electric lamp in my drawing-room; I can’t see very well in the gaslight.

**DHURANDHAR:** Nothing else? How about asking the Banerjee Company to rebuild this house upside down, ceiling at the bottom and floor on top?

**PHULKAMARI:** How can that be, Papa? You can’t give me an education and then expect me to have low tastes?"
The literature of parody and satire in the first half of the nineteenth century clearly contained much that was prompted by a straightforward defense of existing practices and outright rejection of the new. The nationalist paradigm had still not emerged in clear outline. In hindsight, this period—from Rammohan to Vidyasagar—appears as one of great social turmoil and ideological confusion among the literati. And then a new discourse, drawing from various sources, began to form in the second half of the century—the discourse of nationalism.

In 1851, for instance, a prize essay on “Hindu female education” marshalled evidence that women’s education was encouraged in ancient India and that it was not only not harmful but positively beneficial for women to be educated. It went into numerous practical considerations on how women from respectable families could learn to read and write without any harm to their caste or their honor. In 1870, however, a tract on the duties of wives was declaring that the old prejudices about women’s education had virtually disappeared. “Now the times are such that most people believe that . . . by educating women the condition of the country will improve and that there will be happiness, welfare and civilized manners in social life.”

The point of the new discussions was to define the social and moral principles for locating the position of women in the “modern” world of the nation. Take, for example one of the most clearly formulated tracts on the subject: Bhudeb Mukhopadhyay’s Pāribārik prabandha (Essays on the family), published in 1882. Bhudeb states the problem in his characteristic matter-of-fact style:

Because of the hankering for the external glitter and ostentation of the English way of life . . . an upheaval is under way within our homes. The men learn English and become sāhibs. The women do not learn English but nevertheless try to become bībis. In households which manage an income of a hundred rupees, the women no longer cook, sweep or make the bed . . . everything is done by servants and maids; [the women] only read books, sew carpets and play cards. What is the result? The house and furniture get untidy, the meals poor, the health of every member of the family is ruined; children are born weak and rickety, constantly plagued by illness—they die early.

Many reform movements are being conducted today; the education of women, in particular, is constantly talked about. But we rarely hear of those great arts in which women were once trained—a training which if it had still been in vogue would have enabled us to tide over this crisis caused by injudicious imitation. I suppose we will never hear of this training again.

The problem is put here in the empirical terms of a positive sociology, a genre much favored by serious Bengali writers of Bhudeb’s time. But the sense of crisis he expresses was very much a reality. Bhudeb is voicing the feelings of large sections of the newly emergent middle class of Bengal when he says that the very institutions of home and family were threatened under the peculiar conditions of colonial rule. A quite unprecedented external condition had been thrust upon us; we were forced to adjust to those conditions, for which a certain degree of imitation of alien ways was unavoidable. But could this wave of imitation be allowed to enter our homes? Would that not destroy our inner identity? Yet it was clear that a mere restatement of the old norms of family life would not suffice; they were breaking down because of the inexorable force of circumstance. New norms were needed, which would be more appropriate to the external conditions of the modern world and yet not a mere imitation of the West. What were the principles by which these new norms could be constructed?

Bhudeb supplies the characteristic nationalist answer. In an essay entitled “Modesty,” he talks of the natural and social principles that provide the basis for the feminine virtues. Modesty, or decorum in manner and conduct, he says, is a specifically human trait; it does not exist in animal nature. It is human aversion to the purely animal traits that gives rise to virtues such as modesty. In this aspect, human beings seek to cultivate in themselves, and in their civilization, spiritual or godlike qualities wholly opposed to the forms of behavior which prevail in animal nature. Further, within the human species, women cultivate and cherish these godlike qualities far more than men. Protected to a certain extent from the purely material pursuits of securing a livelihood in the external world, women express in their appearance and behavior the spiritual qualities that are characteristic of civilized and refined human society.

The relevant dichotomies and analogies are all here. The material/spiritual dichotomy corresponds to animal/godlike qualities, which in turn corresponds to masculine/feminine virtues. Bhudeb then invests this ideological form with its specifically nationalist content:

In a society where men and women meet together, converse together at all times, eat and drink together, travel together, the manners of women are likely to be somewhat coarse, devoid of spiritual qualities and relatively prominent in animal traits. For this reason, I do not think the customs of such a society are free from all defect. Some argue that because of such close association with women, the characters of men acquire certain tender and spiritual qualities. Let me concede the point. But can the loss caused by
The point is then hammered home:

Those who laid down our religious codes discovered the inner spiritual quality which resides within even the most animal pursuits which humans must perform, and thus removed the animal qualities from those actions. This has not happened in Europe. Religion there is completely divorced from [material] life. Europeans do not feel inclined to regulate all aspects of their life by the norms of religion; they condemn it as clericalism. . . . In the Aryan system there is a preponderance of spiritualism, in the European system a preponderance of material pleasure. In the Aryan system, the wife is a goddess. In the European system, she is a partner and companion. 11

The new norm for organizing family life and determining the right conduct for women in the conditions of the modern world could now be deduced with ease. Adjustments would have to be made in the external world of material activity, and men would bear the brunt of this task. To the extent that the family was itself entangled in wider social relations, it too could not be insulated from the influence of changes in the outside world. Consequently, the organization and ways of life at home would also have to be changed. But the crucial requirement was to retain the inner spirituality of indigenous social life. The home was the principal site for expressing the spiritual quality of the national culture, and women must take the main responsibility for protecting and nurturing this quality. No matter what the changes in the external conditions of life for women, they must not lose their essentially spiritual (that is, feminine) virtues; they must not, in other words, become essentially Westernized. It followed, as a simple criterion for judging the desirability of reform, that the essential distinction between the social roles of men and women in terms of material and spiritual virtues must at all times be maintained. There would have to be a marked difference in the degree and manner of Westernization of women, as distinct from men, in the modern world of the nation.

A GENEALOGY OF THE RESOLUTION

This was the central principle by which nationalism resolved the women’s question in terms of its own historical project. The details were not, of course, worked out immediately. In fact, from the middle of the nineteenth century right up to the present day, there have been many controversies about the precise application of the home/world, spiritual/material, feminine/masculine dichotomies in various matters concerning the everyday life of the “modern” woman—her dress, food, manners, education, her role in organizing life at home, her role outside the home. The concrete problems arose out of the rapidly changing situation, both external and internal, in which the new middle-class family found itself; the specific solutions were drawn from a variety of sources—a reconstructed “classical” tradition, modernized folk forms, the utilitarian logic of bureaucratic and industrial practices, the legal idea of equality in a liberal democratic state. The content of the resolution was neither predetermined nor unchanging, but its form had to be consistent with the system of dichotomies that shaped and contained the nationalist project.

The new woman defined in this way was subjected to a new patriarchy. In fact, the social order connecting the home and the world in which nationalists placed the new woman was contrasted not only with that of modern Western society; it was explicitly distinguished from the patriarchy of indigenous tradition, the same tradition that had been put on the dock by colonial interrogators. Sure enough, nationalism adopted several elements from tradition as marks of its native cultural identity, but this was now a “classicalized” tradition—reformed, reconstructed, fortified against charges of barbarism and irrationality.

The new patriarchy was also sharply distinguished from the immediate social and cultural condition in which the majority of the people lived, for the “new” woman was quite the reverse of the “common” woman, who was coarse, vulgar, loud, quarrelsome, devoid of superior moral sense, sexually promiscuous, subjected to brutal physical oppression by males. Alongside the parody of the Westernized woman, this other construct is repeatedly emphasized in the literature of the nineteenth century through a host of lower-class female characters who make their appearance in the social milieu of the new middle class—maidservants, washer women, barbers, peddlers, procurers, prostitutes. It was precisely this degenerate condition of women that nationalism claimed it would reform, and it was through these contrasts that the new woman of nationalist ideology was accorded a status of cultural superiority to the Westernized women of the wealthy parvenu families spawned by the colonial connection as well as to common women of the lower classes. Attainment by her own efforts of a superior national culture was the mark of woman’s newly acquired freedom. This was the central ideological strength of the nationalist resolution of the women’s question.

We can follow the form of this resolution in several specific aspects in which the life and condition of middle-class women have changed over the last one hundred years or so. Take the case of female education, that contentious subject that engaged so much of the attention of social reformers in the nineteenth century. 12 Some of the early opposition to the
opening of schools for women was backed by an appeal to tradition, which supposedly prohibited women from being introduced to bookish learning, but this argument hardly gained much support. The real threat was seen to lie in the fact that the early schools, and arrangements for teaching women at home, were organized by Christian missionaries; there was thus the fear of both proselytization and the exposure of women to harmful Western influences. The threat was removed when in the 1850s Indians themselves began to open schools for girls. The spread of formal education among middle-class women in Bengal in the second half of the nineteenth century was remarkable. From 95 girls’ schools with a total attendance of 2,500 in 1863, the figures went up to 2,238 schools in 1890 with a total of more than 80,000 students. In the area of higher education, Chandramukhi Bose (1860–1944) and Kadambini Ganguli (1861–1923) were celebrated as examples of what Bengali women could achieve in formal learning: they took their bachelor of arts degrees from the University of Calcutta in 1883, before most British universities agreed to accept women on their examination rolls. Kadambini then went on to medical college and became the first professionally schooled woman doctor.

The development of an educative literature and teaching materials in the Bengali language undoubtedly made possible the quite general acceptance of formal education among middle-class women. The long debates of the nineteenth century on a proper “feminine curriculum” now seem to us somewhat quaint, but it is not difficult to identify the real point of concern. Much of the content of the modern school education was seen as important for the “new” woman, but to administer it in the English language was difficult in practical terms, irrelevant because the central place of the educated woman was still at home, and threatening because it might devalue and displace that central site where the social position of women was located. The problem was resolved through the efforts of the intelligentsia, which made it a fundamental task of the national project to create a modern language and literature suitable for a widening readership that would include newly educated women. Through textbooks, periodicals, and creative works, an important force that shaped the new literature of Bengal was the urge to make it accessible to women who could read only one language—their mother tongue.

Formal education became not only acceptable but, in fact, a requirement for the new bhadramahila (respectable woman) when it was demonstrated that it was possible for a woman to acquire the cultural refinements afforded by modern education without jeopardizing her place at home, that is, without becoming a mensahab. Indeed, the nationalist construct of the new woman derived its ideological strength from making the goal of cultural refinement through education a personal challenge for every woman, thus opening up a domain where woman was an autono-

mous subject. This explains to a large extent the remarkable degree of enthusiasm among middle-class women themselves to acquire and use for themselves the benefits of formal learning. They set this goal for themselves in their personal lives and as the objects of their will: to achieve it was to achieve freedom. Indeed, the achievement was marked by claims of cultural superiority in several different aspects: superiority over the Western woman for whom, it was believed, education meant only the acquisition of material skills to compete with men in the outside world and hence a loss of feminine (spiritual) virtues; superiority over the preceding generation of women in their own homes who had been denied the opportunity of freedom by an oppressive and degenerate social tradition; and superiority over women of the lower classes who were culturally incapable of appreciating the virtues of freedom.

It is this particular nationalist construction of reform as a project of both emancipation and self-emancipation of women (and hence a project in which both men and women had to participate) that also explains why the early generation of educated women themselves so keenly propagated the nationalist idea of the “new woman.” Recent historians of a liberal persuasion have often been somewhat embarrassed by the profuse evidence of women writers of the nineteenth century, including those at the forefront of the reform movements in middle-class homes, justifying the importance of the so-called feminine virtues. Radhazani Lahiri, for instance, wrote in 1875: “Of all the subjects that women might learn, housework is the most important.... Whatever knowledge she may acquire, she cannot claim any reputation unless she is proficient in housework.” Others spoke of the need for an educated woman to develop such womanly virtues as chastity, self-sacrifice, submission, devotion, kindness, patience, and the labors of love. The ideological point of view from which such protestations of “femininity” (and hence the acceptance of a new patriarchal order) were made inevitable was given precisely by the nationalist resolution of the problem, and Kundamala Debi, writing in 1870, expressed this well when she advised other women:

If you have acquired real knowledge, then give no place in your heart to mensahab-like behavior. That is not becoming in a Bengali housewife. See how an educated woman can do housework thoughtfully and systematically in a way unknown to an ignorant, uneducated woman. And see how if God had not appointed us to this place in the home, how unhappy a place the world would be.

Education then was meant to inculcate in women the virtues—the typically bourgeois virtues characteristic of the new social forms of “disciplining”—of orderliness, thrift, cleanliness, and a personal sense of responsibility, the practical skills of literacy, accounting, hygiene, and the ability to run the household according to the new physical and economic
conditions set by the outside world. For this, she would also need to have some idea of the world outside the home, into which she could even venture as long as it did not threaten her femininity. It is this latter criterion, now invested with a characteristically nationalistic content, that made possible the displacement of the boundaries of the home from the physical confines earlier defined by the rules of purdah to a more flexible, but nonetheless culturally determinate, domain set by the differences between socially approved male and female conduct. Once the essential femininity of women was fixed in terms of certain culturally visible spiritual qualities, they could go to schools, travel in public conveyances, watch public entertainment programs, and in time even take up employment outside the home. But the “spiritual” signs of her femininity were now clearly marked—in her dress, her eating habits, her social demeanor, her religiosity.

The specific markers were obtained from diverse sources, and in terms of their origins, each had its specific history. The dress of the bhadrakali, for instance, went through a whole phase of experimentation before what was known as the bhadrakali sari (a form of wearing the sari in combination with blouse, petticoat, and shoes made fashionable in Brahmo households) became accepted as standard for middle-class women. Here too the necessary differences were signified in terms of national identity, social emancipation, and cultural refinement—differences, that is to say, with the mms, with women of earlier generations, and with women of the lower classes. Further, in this as in other aspects of her life, the spirituality of her character also had to be stressed in contrast with the innumerable ways men had to surrender to the pressures of the material world. The need to adjust to the new conditions outside the home had forced upon men a whole series of changes in their dress, food habits, religious observances, and social relations. Each of these capitulations now had to be compensated for by an assertion of spiritual purity on the part of women. They must not eat, drink, or smoke in the same way as men; they must continue the observance of religious rituals that men were finding difficult to carry out; they must maintain the cohesion of family life and solidarity with the kin to which men could not now devote much attention. The new patriarchy advocated by nationalism conferred upon women the honor of a new social responsibility, and by associating the task of female emancipation with the historical goal of sovereign nationhood, bound them to a new, and yet entirely legitimate, subordination.

As with all hegemonic forms of exercising dominance, this patriarchy combined coercive authority with the subtle force of persuasion. This was expressed most generally in the inverted ideological form of the relation of power between the sexes: the adulation of woman as goddess or as mother. Whatever its sources in the classical religions of India or in medi-
eval religious practices, the specific ideological form in which we know the “Indian woman” construct in the modern literature and arts of India today is wholly and undeniably a product of the development of a dominant middle-class culture coeval with the era of nationalism. It served to emphasize with all the force of mythological inspiration what had in any case become a dominant characteristic of femininity in the new construct of “woman” standing as a sign for “nation,” namely, the spiritual qualities of self-sacrifice, benevolence, devotion, religiosity, and so on. This spirituality did not, as we have seen, impede the chances of the woman moving out of the physical confines of the home; on the contrary, it facilitated it, making it possible for her to go into the world under conditions that would not threaten her femininity. In fact, the image of woman as goddess or mother served to erase her sexuality in the world outside the home.

There are many important implications of this construct. To take one example, consider an observation often made: the relative absence of gender discrimination in middle-class occupations in India, an area that has been at the center of demands for women’s rights in the capitalist West. Without denying the possibility that there are many complexities that lie behind this rather superficial observation, it is certainly paradoxical that, whereas middle-class employment has been an area of bitter competition between cultural groups distinguished by caste, religion, language, and so on, in the entire period of nationalist and postcolonial politics in India, gender has never been an issue of public contention. Similarly, the new constitution of independent India gave women the vote without any major debate on the question and without there ever having been a movement for women’s suffrage at any period of nationalist politics in India. The fact that everyone assumed that women would naturally have the vote indicates a complete transposition of the terms in which the old patriarchy of tradition was constituted. The fixing by nationalist ideology of masculine/feminine qualities in terms of the material/spiritual dichotomy does not make women who have entered professional occupations competitors to male job seekers, because in this construct there are no specific cultural signs that distinguish women from men in the material world.

In fact, the distinctions that often become significant are those that operate between women in the world outside the home. They can mark out women by their dress, eating habits (drinking/smoking), adherence to religious marks of feminine status, behavior toward men, and so on, and classify them as Westernized, traditional, low-class (or subtler variations on those distinctions)—all signifying a deviation from the acceptable norm. A woman identified as Westernized, for instance, would invite the ascription of all that “normal” woman (mother/sister/bride/daughter) is not—brazen, avaricious, irreligious, sexually promiscuous—and this not only from males but also from women who see themselves as con-
forming to the legitimate norm, which is precisely an indicator of the hegemonic status of the ideological construct. An analogous set of distinctions would mark out the low-class or common woman from the normal. (Perhaps the most extreme object of contempt for the nationalist is the stereotype of the Anglo-Indian piyāś—Westernized and common at the same time.) Not surprisingly, deviation from the norm also carries with it the possibility of a variety of ambiguous meanings—signs of illegitimacy become the sanction for behavior not permitted for those who are “normal”—and these are the sorts of meaning exploited to the full by, for instance, the commercial media of film, advertising, and fashion. Here is one more instance of the displacement in nationalist ideology of the construct of woman as a sex object in Western patriarchy: the nationalist male thinks of his own wife/sister/daughter as “normal” precisely because she is not a “sex object,” while those who could be “sex objects” are not “normal.”

ELEMENTS OF A CRITIQUE OF THE RESOLUTION

I end this chapter by pointing out another significant feature of the way in which nationalism sought to resolve the women’s question in accordance with its historical project. This has to do with the one aspect of the question that was directly political, concerning relations with the state. Nationalism, as we have noticed before, located its own subjectivity in the spiritual domain of culture, where it considered itself superior to the West and hence undominated and sovereign. It could not permit an encroachment by the colonial power in that domain. This determined the characteristically nationalist response to proposals for effecting social reform through the legislative enactments of the colonial state. Unlike the early reformers from Rammohan to Vidyasagar, nationalists of the late nineteenth century were in general opposed to such proposals, for such a method of reform seemed to deny the ability of the nation to act for itself even in a domain where it was sovereign. In the specific case of reforming the lives of women, consequently, the nationalist position was firmly based on the premise that this was an area where the nation was acting on its own, outside the purview of the guidance and intervention of the colonial state.

We now get the full answer to the historical problem I raised at the beginning of this chapter. The reason why the issue of “female emancipation” seems to disappear from the public agenda of nationalist agitation in the late nineteenth century is not because it was overtaken by the more emotive issues concerning political power. Rather, the reason lies in the refusal of nationalism to make the women’s question an issue of political negotiation with the colonial state. The simple historical fact is that the lives of middle-class women, coming from that demographic section that effectively constituted the “nation” in late colonial India, changed most rapidly precisely during the period of the nationalist movement—indeed, so rapidly that women from each generation in the last hundred years could say quite truthfully that their lives were strikingly different from those led by the preceding generation. These changes took place in the colonial period mostly outside the arena of political agitation, in a domain where the nation thought of itself as already free. It was after independence, when the nation had acquired political sovereignty, that it became legitimate to embody the idea of reform in legislative enactments about marriage rules, property rights, suffrage, equal pay, equality of opportunity, and so on. Now, of course, the women’s question has once again become a political issue in the life of the nation-state.

Another problem on which we can now obtain a clearer perspective is that of the seeming absence of any autonomous struggle by women themselves for equality and freedom. We would be mistaken to look for evidence of such struggle in the public archives of political affairs, for unlike the women’s movement in nineteenth- and twentieth-century Europe or America, the battle for the new idea of womanhood in the era of nationalism was waged in the home. We know from the evidence left behind in autobiographies, family histories, religious tracts, literature, theatre, songs, paintings, and such other cultural artifacts, that it was the home that became the principal site of the struggle through which the hegemonic construct of the new nationalist patriarchy had to be normalized. This is the real history of the women’s question whose terrain our genealogical investigation into the nationalist idea of “woman” has identified. The nationalist discourse we have heard so far is a discourse about women; women do not speak here. In the next chapter, we will explore the problem of enabling women in recent Indian history to speak for themselves.

The location of the state in the nationalist resolution of the women’s question in the colonial period has yet another implication. For sections of the middle class that felt themselves culturally excluded from the formation of the nation and that then organized themselves as politically distinct groups, their relative exclusion from the new nation-state would act as a further means of displacement of the legitimate agency of reform. In the case of Muslims in Bengal, for instance, the formation of a new middle class was delayed, for reasons we need not go into here. Exactly the same sorts of ideological concerns typical of a nationalist response to issues of social reform in a colonial situation can be seen to operate among Muslims as well, with a difference in chronological time. Nationalist reforms do not, however, reach political fruition in the case of the Muslims in independent India, because to the extent that the dominant cultural formation among them considers the community excluded
from the state, a new colonial relation is brought into being. The system of dichotomies of inner/outer, home/world, feminine/masculine are once again activated. Reforms that touch upon what is considered the inner essence of the identity of the community can be legitimately carried out only by the community itself, not by the state. It is instructive to note how little institutional change has been allowed in the civil life of Indian Muslims since independence and to compare the degree of change with that in Muslim countries where nationalist cultural reform was a part of the successful formation of an independent nation-state. The contrast is striking if one compares the position of middle-class Muslim women in West Bengal today with that of neighboring Bangladesh.

The continuance of a distinct cultural “problem” of the minorities is an index of the failure of the Indian nation to effectively include within its body the whole of the demographic mass that it claims to represent. The failure becomes evident when we note that the formation of a hegemonic “national culture” was necessarily built upon the privileging of an “essential tradition,” which in turn was defined by a system of exclusions. Ideals of freedom, equality, and cultural refinement went hand in hand with a set of dichotomies that systematically excluded from the new life of the nation the vast masses of people whom the dominant elite would represent and lead, but who could never be culturally integrated with their leaders. Both colonial rulers and their nationalist opponents conspired to displace in the colonial world the original structure of meanings associated with Western liberal notions of right, freedom, equality, and so on. The inauguration of the national state in India could not mean a universalization of the bourgeois notion of “man.”

Indeed, in setting up its new patriarchy as a hegemonic construct, nationalist discourse not only demarcated its cultural essence as distinct from that of the West but also from that of the mass of the people. It has generalized itself among the new middle class, admittedly a widening class and large enough in absolute numbers to be self-reproducing, but is situated at a great distance from the large mass of subordinate classes. My analysis of the nationalist construction of woman once again shows how, in the confrontation between colonialist and nationalist discourses, the dichotomies of spiritual/material, home/world, feminine/masculine, while enabling the production of a nationalist discourse which is different from that of colonialism, nonetheless remains trapped within its framework of false essentialisms.
Moral autonomy and family law

"The shari'a was not abandoned," writes Nathan Brown, "but it was restricted to matters of personal status and to areas where it could be clearly and easily codified." But when the shari'a is structured essentially as a set of legal rules defining personal status, it is radically transformed. This is not because the shari'a, by being confined to the private domain, is thereby deprived of political authority, something that advocates of an Islamic state argue should be restored. On the contrary, what happens to the shari'a is best described not as curtailment but as transmutation. It is rendered into a subdivision of legal norms (fiqh) that are authorized and maintained by the centralizing state.

In the perspective on law reform in Egypt that I adopt, a citizen's rights are neither an ideological legitimation of class rule ("Marxism") nor a means for limiting arbitrary government ("liberalism"). I see them as integral to the process of governance, to the normalization of social conduct in a modern, secular state. In this scheme of things the individual acquires his or her rights mediated by various domains of social life—including the public domain of politics and the private domain of the family—as articulated by the law. The state embodies, sanctions, and administers the law in the interests of its self-governing citizens. The state's concern for the harms and benefits accruing to its subjects is not in itself new. But—as Foucault argued—the modern state expresses this concern typically in the form of a new knowledge (political economy) and directs it at a new object (population). It is in this context that "the family" emerges as a category in law, in welfare administration, and in public moralizing discourse. The family is the unit of "society" in which the individual is physically and morally reproduced and has his or her primary formation as a "private" being. It is often assumed that colonial governments were reluctant to interfere with family law because it was the heart of religious doctrine and practice. I argue, on the contrary, that the shari'a thus defined is precisely a secular for-

48. Hacking, p. 58.
bodied in prescribed forms of behavior. It is therefore quite different from the idea of a society made up of equal citizens governing themselves individually (through conscience) and collectively (through the electorate). That idea was just beginning to be deployed in Western Europe in the nineteenth century as the object of knowledge-based interventions—by movements for universal franchise, as well as movements for the moral improvement of the poor, for the practical reform of education and the law, and for the organization of sanitation and hygiene in urban space.

It is in this context that I think one may place the reform that eventually translates the shari'a as "family law." For the family is not merely a conservative political symbol or a site of gender control. By virtue of being a legal category it is an object of administrative intervention, a part of the management of the modern nation-state—not least in the twentieth-century projects of birth control. (Paradoxically, the "family" becomes salient precisely when modern political economy, the principal source of government knowledge and the principal object of its management, begins to represent and manipulate the national population in terms not of "natural units" but of statistical abstractions—economic sectors, consumers, active labor force, property owners, recipients of state benefits, demographic trends, and so forth. At the level of public knowledge and activity "the individual" becomes marginalized.)

It is because the legal formation of the family gives the concept of individual morality its own "private" locus that the shari'a can now be spoken of as "the law of personal status"—qanun al-abwal al-shakhshiyah. In this way it becomes the expression of a secular formula, defining a place in which "religion" is allowed to make its public appearance through state law. And the family as concept, word, and organizational unit acquires a new salience.

The modern "family"

The sense of the word 'a'ila (translated into English as "family") as used by Abduh and other reformers is modern—a fact reflected not only in its relatively recent coupling with shari'a law, but also in changing literary Arabic. Eighteenth-century dictionaries do not give the modern sense of 'a'ila and umma, meaning a unit consisting of parents and children. One can see how the modern usage was probably derived: the form 'asya is given as meaning "to give help and support to dependents," but also as "the process of having more children"; umma meant "tribe," or "agnates" (relatives on the father's side). By the late nineteenth century, 'a'ila becomes a part of common usage and generally signifies "a man and his wife and his children and those who are dependent on him from his paternal relatives"—such as younger siblings or aged parents. A modern dictionary has a definition in terms of unit of habitation: 'a'ila means "those who are gathered

53. Hamid Zaki states that the term al-abwal al-shakhshiyah (personal status) is new to Egypt, having been introduced from Europe with the laws now administered by the National Courts, and he notes its absence in the codes administered by the shari'a courts. Accordingly, he traces the definition of the term through French legal authorities, from the division between "personal status" and "real status" in the Napoleonic Code, to the contemporary recognition of multiple status categories. The term "personal status" (al-abwal al-shakhshiyah) now refers, Zaki notes, to the ensemble of juridical institutions that define the human person independent of his wealth, obligations, and transactions ("Al-Mahdiyin al-abwal wa al-shakhshiyah," in Majallat al-qanun wa al-is+s, December 1934, pp. 793–95). This abstraction subverts the old shari'a categorization of the human person. In the writings of medieval Islamic jurists the particular categories of male and female, free and slave, are essential to the legal interpretation of the human body, intention, and agency (see Baber Johansen, "The Valorization of the Human Body in Muslim Sunni Law," in D. J. Stewart, B. Johansen, and A. Singer, Law and Society in Islam, Princeton: Markus Wiener, 1996).


55. See Taf al-Urwa.

56. See Mabt al-Mubin.
together in one house, including parents, children and near relatives.”58 So much for shifting referents.59

The things signified are also being transformed. Social historians have traced the rearticulation of kinship units and networks among the rural population in mid-century and ascribed it both to state and market: forced labor and military conscription, a general decline in the economic condition of handicraft workers and petty traders due to the penetration of European capitalism, as well as the reform of landholding and taxation systems. Thus Judith Tucker notes that although it was common for several brothers to live and work together with their wives and children, sharing goods, livestock, and land in a unit recognized in law as a partnership (štirk), the state’s draconian measures seriously affected the structure of such units and networks. For example, “Despite the migration of women and children in the wake of drafted husbands in a conscious attempt to maintain the family unit, conscription made inroads on traditional [that is, existing] structures. The military family was a nuclear family; the man, wife and children were removed from their village community, and more importantly, from the extended family which had formed their social and economic environment. A network of economic relations and social responsibilities bound them to their parents, brothers and sisters, and relatives by marriage. The formation of a nuclear family unit at some distance away weakened these ties. If the woman remained without her husband in the village, the man’s absence affected patterns of material support and the division of tasks.”60 (It is of some interest that the “family” makes its appearance as a category in the census registers of Egypt only in 1917.61)

So if Muhammad Abdul Hadi regards the family as the basic unit of society, it is not because he invokes a nostalgic past but because something new is now emerging in the changing social structure.

Among the urban upper classes, Western-type schooling (in European languages) and the adoption of Western domestic styles and manners

58. See al-Mu’jam al-Wasīli.
59. The Qur’ān, which is the basic source for the šari‘a, contains neither ḍīla nor wasa. The words that are used there, buṣa and abī, and that are translated into English as “family,” have much wider or looser connotations.

also produced a discourse of the ideal family—typically expressed in terms of “the problem of the status of Muslim women”—among Western-educated reformers in the late nineteenth century. Perhaps the most famous text that exemplifies this is Qasim Amin’s controversial book on The Emancipation of Women,62 long regarded as a major step in the history of Egyptian feminism. In a powerful critique of that work, Leila Ahmed has argued that “In calling for women’s liberation the thoroughly patriarchal Amin was in fact calling for the transformation of Muslim society along the lines of the Western model and for the substitution of the garb of Islamic-style male dominance by that of Western-style male dominance. Under the guise of a plea for a ‘liberation’ of woman, then, he conducted an attack that in its fundamentals reproduced the colonizer’s attack on native culture and society.”63 It was designed, in other words, to help eradicate bad habits among the natives.

Amin’s book is devoted to a sustained condemnation of the seclusion of women (symbolized by the veil) and a reiteration of the condition that makes for happiness in the family. As he puts it, when a “woman learns of her rights and acquires a sense of her self-worth, marriage will become the natural means for realizing the happiness of both the husband and wife. Then marriage will be based on the inclination of two persons to love each other completely—with their bodies, their hearts, and their minds.”64 Thus the nuclear family is the essential site for the happiness of the married couple through the fulfillment of their dreams. The material conditions of their existence are irrelevant. “Look at spouses who love one another, and you will see that they enjoy the blessings of paradise. What do they care if they are penniless, or if they have only lentils and onions to eat? Their cheerfulness throughout the day is enough for them—a cheerfulness that energizes the body, reassures the self, awakens feelings of joy in life, and renders it beautiful.”65 The core of the happy modern family is a monogamous relationship; a polygynous household can only be a space of conflict, hatred, and misery. But if even monogamous families are not to-
day full of happiness and true love, if on the contrary they are usually the site of continuous quarrels, it is because the uncivilized practice of veiling prevents the wife from acquiring the minimal education and from interacting with men in order to make the (middle-class) family successful. 66

Ahmed is right to describe Amin’s text, with its contempt for Egyptian domesticity and its insistence on the supreme importance of abolishing the veil, as the reproduction of a “Western colonial discourse.” But here I want to focus on something else: the appearance of the conception that love between a man and a woman is the necessary basis of the only kind of family life that can have any value, and the assumption that legal conditions are necessary for ensuring domestic bliss. Of course monogamy in itself is not a Western phenomenon, nor was affection between husband and wife unknown in Egypt until Westernized reformers proposed it—although Amin, like many other Egyptian reformers of his time, believed that that was so. My concern is simply to draw attention to the condition of equality in the mutual sentiments of love between a man and a woman that Amin regards as essential to the private institution called “family” 67—and to the fact that this equality is entangled with legal definitions.

It is for this reason—to secure mutual love within a monogamous family—that the reform of marriage and divorce provisions in the shari'a plays such an important role throughout Amin’s text. Thus polygyny, which unfortunately for Amin seems to be condoned by the Qur'an, should be legally circumscribed as much as possible. Indeed he argues, like other reformers before and since, that the intention of the relevant Qur'anic verses is that polygyny be allowed only if it is secured against injustice. “If there is injustice among the wives as is evident in our times,” Amin writes, “or if moral corruption comes to families from the plurality of wives, and if the limits of the law that should be respected are transgressed, and if there is enmity among members of a single family and it spreads to the point that it becomes general—then it is allowed to the ruler who cares for public welfare [al-malaha al-‘umma] to prohibit polygyny, conditionally or unconditionally, according to what he sees as suitable to public welfare.” 68 Thus although state legislation is necessary for creating the conditions for moral behavior, the argument for overriding the Qur'anic permission of polygyny is simply a generalized sense of public welfare that is still justified in Islamic terms. 69 Although, paradoxically, the ideal that exemplifies the solution is the monogamous nuclear family among the Westernized classes (whose men now engage in the publicly regulated professions of law, medicine, the higher civil service), increasingly separated from “public life,” and becoming the principal domain in which moral behavior is to be learned and always to be practiced.

66. The Islamic journal al-Manâr, edited by Muhammad Abduh’s disciple Rashid Rida, was very favorable to Qasim Amin’s book—as well as to its sequel The New Woman. See Sami Abdulaziz al-Kumi, as-Sahâfa al-isâmiyya fi misr fi-l-qarn at-tâsi‘‘ ashara, Mansura: Dar al-Wafa‘, 1921, pp. 96–97.

67. In his magisterial study of European bourgeois sexuality in the long nineteenth century, Peter Gay observes: “Intimate love, intimate hatred, are timeless; Freud did not name the Oedipus complex after an ancient mythical hero for nothing. But the nineteenth-century middle-class family, more intimate, more informal, more concentrated than ever, gave these universal human entanglements exceptional scope and complex configurations. Potent ambivalent feelings between married couples, and between parents and children, the tug between love and hate deeply felt but rarely acknowledged, became subject to more severe censorship than before, to the kind of repression that makes for neurosis. The ideology of unreserved love within the family was attractive but exhausting. Father’s claims on daughters and mother’s claims on sons, assertions of authority or demands for devotion often masquerading as excessive affection, acquired new potency precisely as the legal foundations for authority began to crumble. Increasingly, family battles took place, as it were, not in the courtroom, but in individual minds” (The Education of the Senses, New York: Norton, 1984, pp. 444–45).


69. This position is quite different from that of Ahmad Safwat, which I discuss below, but it is not unrelated to arguments produced by recent Muslim modernists, such as Fazlur Rahman—see, for example, his “Law and Ethics in Islam,” in Ethics in Islam, ed. R. G. Hovanissian, Malibu, CA: Undena Publications, 1985.