The Hindu Code Bill and the making of the modern Indian state

This thesis is submitted for the degree of Doctor of Philosophy

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January 2008
This dissertation is the result of my own work and includes nothing which is the outcome of work done in collaboration except where specifically indicated in the text.

An earlier version of the text in pages 141-154 was submitted for the degree of MPhil in Historical Studies, University of Cambridge, 2004.
No other part of this thesis has been submitted for any other qualification
This thesis is 76,381 words in length
Abstract

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Eleanor Newbigin

This dissertation examines debates about women’s rights and family law reform in inter-war and early independence India. Focusing on the Hindu Code Bill, an attempt to reform and codify Hindu family law that began in 1941 and culminated in 1956, it argues that these reforms sought to alter the way in which male authority was exercised within the Hindu family but also to consolidate the power of north Indian Hindu men over other regional Hindu and non-Hindu communities.

Managed through alliances between colonial rulers and ‘local men of influence’, British governance in India helped to ensure and even sharpen the hierarchical structure of patriarchal authority in India. Enabling a small number of officials to maintain order over large regions of the subcontinent, colonial modes of governance served to subordinate not only women but also many men to the authority of a small number of patriarchs. The family and the personal legal system governing relations within it were particularly crucial to the framework of colonial power.

Constitutional reform and changes in the political-economy of colonial rule after World War I began to place this hierarchical structure of power under pressure and created growing interest, amongst Indian legislators and colonial officials, in its reform. Though couched in the language of women’s rights, reform of personal law was driven by a desire to reconfigure the balance of power within both the Hindu family and the Indian state. Opening up competition between regional Hindu elites who sought to establish their own practices as the basis of the new Code, after independence these debates were also drawn into nation- and citizenship-building projects with important consequences for the emerging secular state. Reflecting the rising power of north Indian legislators, the Code Bill project served to consolidate conservative patriarchy of Hindu men from this region as the basis, not only of Hindu legal identity, but of Indian citizenship.
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Acknowledgements

This dissertation is the result of a number of different influences, beginning with my very first experience of family life in India during a trip in 1998. Though I doubt I will ever meet her again to tell her, my time with Madam Lalitha from Anchigramam, Tamil Nadu helped to generate many of the questions that drive my research even today. More directly, one of the major sources of inspiration for this work comes from the late Dr. Raj Chandavarkar. Raj supervised both the undergraduate and MPhil dissertations that slowly and often surprisingly opened the roads of enquiry driving this study. His death in April 2006 was a huge blow and I am in many ways still processing his loss. His advice and ideas have continued to shape my work—shape my work even now and I doubt I have acknowledged sufficiently his intellectual influence in these pages. This thesis is dedicated to his memory.

Dr. William Gould stepped gallantly into the breach after Raj’s death and has been an endless source of support and guidance for which I am enormously grateful. I would like to thank the staff of several archives and libraries in the UK and in India. In India I am grateful to the staff of the Nehru Memoria Museum and Library and in particular of the Library’s archive, all of whom have, over several years of research, always been both fantastically helpful and friendly. Thanks also to the staff of the National Archives of India, New Delhi, the U.P. State Archives, Lucknow, the Punjab State Archives, Chandigarh, the Maharashtra State Archives, Bombay. I would like to thank the librarians at the Indian High Court, New Delhi and the staff and librarians at the Delhi headquarters of the AIWC. In Britain I owe thanks to the staff of the Asian and African Studies Reading Room at the British Library, London, the University Library, Cambridge and the Centre of South Asian Studies, Cambridge. I am most grateful to those who have helped and advised me with this project along the way, Dr. Joya Chatterji, Professor Christopher Bayly, Professor Polly O’Hanlon, Dr. Samita Sen, Dr. Dilip Menon, Dr. Francesca Orsini.

For looking after my health and housing in Delhi I am most grateful to the Sharma Family, in Munirka New Delhi. For looking after my mental well-being and happiness in India I would like to thank Dr. Taylor Sherman, Rosie Peppin-Vaughn, Dr. Rachel Berger, Leigh Denault, Dr. Justin Jones, Chanchal Dadlani, Dr. Mrinalini Rajagopalan, Penny Sinanoglou and Dr. Manuela Ciotti. Particular thanks go to Taylor for not only helping me think through many of the ideas in this thesis but also for helping me to express them more clearly in this, and previous, drafts. A huge thank you also to Emma Hunter, who proof read multiple copies of this dissertation and was a constant and helpful source of advice. I am indebted to my family for their love and support for me and my work. All three of my parents have given large amounts of time to talking through ideas with me, as well as reading my work. And finally, but most particularly I would like to thank Tom Rahilly for putting up with long and difficult stints apart, for his engagement with my project and for his unending faith in me and my work. For his help in making sure I kept calm and carried on I am eternally grateful.
## Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>AICC</td>
<td>All-India Congress Committee</td>
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<tr>
<td>AIWC</td>
<td>All-India Women’s Conference</td>
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<tr>
<td>CAID</td>
<td>Constituent Assembly of India Debates</td>
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<tr>
<td>CAI(L)D</td>
<td>Constituent Assembly of India (Legislative) Debates</td>
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<tr>
<td>HCB</td>
<td>Hindu Code Bill</td>
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<tr>
<td>HLRRA</td>
<td>Hindu Law Research and Reform Association</td>
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<tr>
<td>IOR</td>
<td>India Office Records, British Library, London</td>
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<tr>
<td>LAD</td>
<td>Legislative Assembly Debates</td>
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<td>MSA</td>
<td>Maharashtra State Archives</td>
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<tr>
<td>NAI</td>
<td>National Archives of India</td>
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<tr>
<td>NMML</td>
<td>Nehru Memorial Museum and Library, New Delhi</td>
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<tr>
<td>PD</td>
<td>Parliamentary Debates</td>
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<tr>
<td>PSA</td>
<td>Punjab State Archives, Chandigarh</td>
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<tr>
<td><em>SWJN</em></td>
<td><em>Selected Works of Jawaharlal Nehru</em></td>
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<tr>
<td>UP</td>
<td>Uttar Pradesh</td>
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<td>UPSA</td>
<td>Uttar Pradesh State Archives</td>
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**Glossary**

Aliyasanthana  system of matrilineal inheritance followed by Bants of south Canara (now in Karnataka) in south India.

coparcenary  1. concept whereby two or more people inherit a title equally between them which can not be renounced, divided or passed on to other unless all living title owners agree.
2. the name of the property holding unit governed by this system of inheritance.

Dayabhaga  Hindu legal doctrine dated around twelfth century AD followed in Bengal and Assam.

gotra  lineage determined by principle sage or family priest

karta  coparcenary manager, the eldest patriarch in the coparcenary.

Marumakkatayam  customary system of inheritance practised by the matrilineal communities of Kerala and the Lakshadweep Islands.

Mayukha  sub-school of Mitakshara law followed by communities along western coast of India based on Vyavahara Mayukha, seventeenth-century commentary by Nilakantha.

Mitakshara  Hindu legal doctrine dated around twelfth century AD followed in most of India.

ryotwari  land tenure system based around the cultivator land-owning peasant.

sapinda  lineage traced through father, within seven degrees of common ancestor, and through mother, within five degrees of common ancestor.

saptapadi  Hindu wedding ceremony in which couple take seven steps around the fire.

stridhan  women’s property, though some dispute as to what goods this actually entails.

tarward  matrilineal joint family, holding property in common, traditionally characteristic of communities following Marukakkatayam.

waqf  Muslim endowment or trust.

Zamindar  land owner.
Introduction

This dissertation explores the changing nature of Indian patriarchy during the transition to independence in order to look at the apparent inconsistency of women’s position in modern Indian society: why, in spite of a constitutional pledge to maintain gender equality has the advent of democracy in India brought little improvement to the social status of Indian women and even, in some areas, been accompanied by a decline in their quality of life? In 1974, the Government of India’s ‘Towards Equality’ report declared that, while the quality of life for women living in urban areas had improved since independence, little had changed, and in some cases had even grown worse, for the majority of women living in rural India. Members of the committee writing this report were somewhat surprised and worried by their findings. The inter-war years but particularly the nation-building process that followed independence had seemed to promise so much both for women’s politics and social reform. The development of a more populist nationalist movement in India had seen large numbers of women drawn into anti-colonial campaigns, both as supporters but also as active participants. Women had led Gandhian pickets of alcohol stores and shops selling foreign clothes, they had offered satyagraha and successfully courted imprisonment. In many ways, women and ideas of the feminine were given centre stage in Gandhi’s programme of non-violence. The 1920s and ‘30s had also seen a growing preoccupation with women’s status and rights in the legislature. As Indian representatives began to enter state apparatus in larger

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1 The imbalance in sex ratios since independence has perhaps been the most well publicised aspect of gender inequality in India. Some examples of studies from this growing canon of literature are Barbara Harriss-White, ‘Gender-cleansing: the paradox of development and deteriorating female life chances in Tamil Nadu’ in R. Sundar Rajan & U. Butalia (eds.), Signposts: gender issues in post-independence India (New Delhi, 1998), pp. 125-154; R. Sundar Rajan & S. Irudaya, ‘Persistent daughter disadvantage: what do estimated sex ratios at birth and sex ratios of child mortality risk reveal?’ Economic and Political Weekly 38, no. 42, (11th October 2003), pp. 4361-69.


3 Geraldine Forbes, Women in Modern India (Cambridge, 1996), Chapter 3, 4 & 5; Radha Kumar, The History of Doing: An Illustrated Account of Movement for Women’s Rights and Feminism in India 1800-1990, (Delhi, 1993), Chapters 3, 4, and 5.

4 The inter-war period saw Indian women play an increasing role in Congress demonstrations; see GOB Home Department (Special), F.800 (48)/1932; GOB Home Department (Special), F.355 (21)/1927 MSA.

numbers, a significant number of bills relating to women’s legal position were introduced and debated in the provincial and all-India legislatures. The move towards greater self-rule for Indians seemed to be intimately tied up with a move towards new rights for Indian women. When the Indian nation attained independence on 15th August 1947 many assumed that this would be a turning point for the freedom of the nation’s women. Such sentiments were written into the Fundamental Rights of the new republican constitution which promised to protect Indian citizens against discrimination “on grounds only of religion, race, caste, sex, place of birth or any of them.”

Why, in spite of the achievements of independence, in spite of the new constitution and other, accompanying women’s legislation, did these changes appear to effect so little?

In seeking to explain this conundrum many previous studies have focused on women’s political participation and mobilisation in the inter-war period. This dissertation takes an entirely different approach. It argues that, while the women’s organisations that emerged in this period played some role in shaping debates about women’s rights, the political conditions in which these debates took place were shaped by competition between different groups of men. Seen from this perspective, it becomes clear that the principal force driving the inter-war debates about law reform were not concern about women’s rights but attempts to improve and reconfigure the legal rights of Indian men. Focusing on the Hindu Code Bill, this thesis looks at the range of interests involved in the debates about personal law reform that ran from the early 1920s, all the way through to the 1950s. Growing out of these debates, the Hindu Code Bill was an attempt to reform and codify Hindu personal law. Work began on the bill in 1941, but the final part of the Hindu Code was not passed by the legislature until 1956. Analysis of the debates about the Code and the various interests playing out on them can thus help to explain changes in attitudes to women’s status and law reform in this crucial period.

Given this, it is somewhat surprising that the Code has not sparked more interest from academics. In the few studies that have explored its history, the Code Bill has been

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6 Article 15 of the Indian constitution.
considered primarily as a women’s bill, rising out of Indian women’s growing political awareness and involvement in inter-war politics. On the whole, these studies have argued that while male legislators and nationalists were willing to tolerate, or even support calls for social reform and women’s rights in relation to debates about fitness to rule during the inter-war period, once in power these promises were quickly abandoned. Almost all these studies have highlighted the personal role of Jawaharlal Nehru in reviving the Code Bill after independence and his commitment to the measure as part of steps towards a new, more ‘socialist’ Indian society. Opposed by conservative politicians and members of the religious orthodox on the grounds that the reforms went too far, and by women’s groups and more liberal politicians on the grounds that they did not go far enough, the Code Bill was redrafted and watered down so that any teeth that it might have had were removed in order to see it through the legislature. These studies have argued that Nehru’s determination to establish a ‘symbol’ of reform, to which the Indian state should aspire in the long-term was central in finally securing the enactment of the law reforms. Though academics have debated the success of the Hindu Law Acts in inspiring or guiding further change, all these accounts have emphasised that, when they were passed, these reforms had little impact on the everyday life and legal powers of the vast majority of Indian women.

While it deals with the main points of the Code Bill’s history, this argument is unsatisfying on a number of fronts. Presenting a large number of Indian nationalists as self-interested traditionalists, who are simply masquerading as popular leaders, these studies raise as many questions as they try to answer: why did Indian men promise their

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11 See also A. Basu and B. Ray, Women’s struggle: a history of the All India Women’s Movement 1927-1990, (Delhi, 1990), pp. 64-68 and, for a general assessment of legislative reform of women’s legal rights Jana Matson Everett, Women and social change in India, (Delhi, 1981).
female counterparts so much before independence if they never had any intention of improving their social and legal position? Why if the pre-independence women's movement was powerful enough to help shape the legislative agenda before independence, was it unable to push through the measure afterwards? To account adequately for the Hindu Code Bill and its legacy, it seems, we need to take a different perspective, of the measure itself and of the forces driving it forward.

*The Hindu Code Bill: an alternative view*

This dissertation offers a new view of the pre-independence debates, a view that might help us to understand better why the Hindu Code Bill failed to bring about radical reform. Situating the inter-war debates about women's rights within a longer historical view, it calls for a re-examination of the idea of equality within these discussions. It argues that while many reformers invoked arguments about women's rights to support their calls for reform during the inter-war debates, these had little to do with equality for women. Rather, the primary focus of these debates was the reconfiguration of Hindu men's legal rights and patriarchal authority within the family but also vis-à-vis the Indian state. It was this competition between different groups of men and accompanying changes in the structure of the Indian state that propelled the debates about family law reform and women's legal rights and not concern about women themselves.

This study shows that the relationship between political power and structures of domestic authority that helped to guide the Hindu Code Bill debates had its origins in the modes of governance employed by British officials in India. Focused on the deployment

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12 These accounts of the Hindu Code Bill are deeply influenced by narratives about the development of women's politics in India which raise similar questions to the ones listed here. The 1920s-1940s are seen as a period in which a strong and fairly powerful women's movement evolved, that put much faith in its alliance with the nationalist cause. After independence, therefore, they were willing to accept arguments that the new nation had women's interests at its heart and that, just as during the freedom struggle, women should continue to support its work, rather than pit their own self-interests against it. Indian women accepted these promises, hoping for improvements to materialise but grew increasingly frustrated as this failed to happen. It was only in the 1970s, after Nehru's death that, this disappointment was channelled back into women's political activities which saw a resurgence in this period. The arguments made in chapter 2 of this dissertation have implications for arguments about the existence of a strong and powerful women's movement in the inter-war period. See also Samita Sen, ‘Towards a Feminist Politics? The Indian Women's Movement in Historical Perspective’ in Karin Kapadia (ed.), *The Violence of Development: The Politics of Identity, Gender and Social Inequalities in India*, (Delhi, 2002), pp. 459-524.
of Indian resources as best suited British international interests, colonial rule developed on the basis of highly coercive relationships between British officials and influential Indian elites. Peace and public order were crucial for the smooth running of this process; though the expense of developing and maintaining a large and powerful state structure in India ran contrary to the fiscal logic of colonial rule, the management of a colony through brute force was costly, both in economic and political terms. Seeking to maintain law and order at the minimal cost to the state, colonial officials looked to their patron-client networks and the established power of local elites. These local ‘men of influence’ were encouraged to use their authority to discipline and order local society, the colonial government often turning a blind eye to the ways in which this was done so long as it did not impinge on their own interests. Political power and governance in colonial India was often characterised by the use of force and strong powers of coercion. Yet, the colonial state that emerged in this context was very thin, with many important areas of authority dominated by local power structures rather than those of the state. To borrow Rajnarayan Chandavarkar’s phrase, the ‘façade’ of colonial order rested on the protection of spheres of ‘lawlessness’.

Of these spaces of indigenous power, the family was one of the most important. Fearful of invoking social unrest and aware of the financial and political limitations facing the colonial state, British administrators largely refrained from trying to reform or alter the domestic practice of their subjects. At the same time, domestic relationships and family structures were crucial in informing the social hierarchies through which colonial officials sought to govern, particularly as a source of labour and as a property

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13 The key importance of the colonial government was in its power to distribute surplus from the agrarian economy. British officials upheld the titles of the landed elite, requiring them to continue to perform the task of revenue-collection they had performed under previous rulers. The traditional service communities linked to the landholders tended to form the next layer of government, at sub-district level. The few British officers who headed this chain of command focused on making this structure more efficient. As a result this was not a static system of alliances but one which created competition and the possibility of social mobility. Anil Seni, *The Emergence of Indian Nationalism: Competition and Collaboration in the Later Nineteenth Century* (Cambridge, 1971), pp. 4-11, 32-113; C.A. Bayly, *The Local Roots of Indian Politics: Allahabad 1880-1920*, (Oxford, 1975), pp. 8-18, Chapter 3.


holding unit. Colonial governance thus often served to protect patriarchal and hierarchical family structures that reinforced the authority of family heads over larger groups of subordinate family members.

These concerns were reflected in the development of the colonial legal system which differentiated between public law, in which the state was prepared to intervene, and family or personal law. Determined in accordance with the religious, regional, caste and customary practice of the individual, rather than a territorial body, personal law shaped relations within the immediate family unit while also influencing other social relationships, such as caste customs and notions of religious community. While its exact operation, particularly in relation to property rights, was understood to vary between regions and legal schools, colonial interpretations of Hindu personal law had come to regard the normative Hindu family as a ‘joint’ hierarchy, in which the elder, usually male relatives, held authority over younger males and all female relations. Economic and social developments in the latter half of the nineteenth century, in particular, the expansion of the state and the movement of many younger men from wealthy families away from the authority of their fathers to take up professional posts in urban areas, had placed this hierarchical family structure under pressure. Tensions were often played out in the colonial court-room as attested to by the large number of cases dealing with family property rights and disputes about their ‘joint status’ during this period. Yet, given the

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16 The British inherited a highly coercive labour structure in India. Low levels of surplus in the agrarian economy made the British, like previous rulers, dependent on flexible production strategies often managed by family or kinship communities. Subordinating women and their wage-free labour in the home was a crucial aspect of this labour system. M.R. Anderson, ‘Work Construed: Ideological Origins of Labour Law in British India to 1918’ in Peter Robb (ed.), Dalit Movements and the Meaning of Labour in India, (Delhi, 1993) pp. 89-107; Samita Sen, ‘Offences against marriage: negotiating custom in colonial Bengal’ in Mary E. John & Janaki Nair (eds.), A question of silence? The sexual economies of modern India, (New Delhi, 1998), pp. 77-110.

17 Under the matrilineal schools of Hindu law, the family head could also be the eldest female relative. However, as noted in the introduction to this dissertation, over the course of the nineteenth-century British interpretations of Aliyanthan and Marumakkattayam law served to reinforce the hierarchical and patriarchal aspects of these legal schools. See also G. Aruminta, There comes papa: colonialism and the transformation of matriliney in Kerala, Malabar c.1850-1940, (New Delhi, 2003). It is also worth remembering that lawyers and colonial legal scholars’ interpretations of Indian personal law often did not reflect or affect the everyday practices of most Indian families.

expense in terms both of finance and family relationships in going to court, these cases must be seen to represent only the tip of the iceberg.\textsuperscript{19}

Constitutional reform and the devolution of political power to Indian representatives after World War I created new opportunities for the restructuring of familial authority. Shifts in the political economy of colonial rule during the inter-war years and the accompanying constitutional reforms served to broaden the social base with which the state interacted. Changes in global trade, in Indian production and in the financial needs of the metropole prompted colonial officials, and particularly the central government, to seek new political alliances with interests that lay beyond the powerful landed interests and men of influence on whom colonial governance had previously depended. Many of the new Indian legislators sought to use their new found powers to push the changes in existing political alliances in a direction which suited their interests. Reform of personal law and the customs reinforcing family hierarchy became the focal point of much legislative debate. The patriarchal structure of familial authority meant that the opening up of personal legal systems inevitably raised questions about women’s rights. However, many of the reforms proposed in these debates served also to grant new authority to members of the family who had been subordinated under the existing legal structures, particularly younger sons in the case of Hindu personal law. The aim of these reforms therefore was not to radically restructure the Indian family or give the legislature greater control over it. Rather it was to rework the balance of power within the family and secure patriarchal authority to a new group of men whose autonomy over the family the state continued to respect.

Doctrinal and political differences meant that these debates played out in different ways amongst Hindu and Muslim legislators. The more defined scriptural basis of Muslim law and the existence of a Muslim electorate allowed Muslim legislators to use the law reform debates to reinforce the call for greater recognition of a distinct and separate Muslim political and social identity.\textsuperscript{20} The size and diversity of the Hindu community made it much more difficult to develop an equivalent sense of united identity.

\textsuperscript{19} For a description of the financial and social complexities of bringing a case to court see the account of the conflict between Jagat Singh and his kinsman Ragbhir Singh in Oliver Mendelsohn, ‘The pathology of the Indian legal system’ Modern Asian Studies 15, no. 4, (1981), pp. 829-832.

In addition to different customary practices, Hindus in different parts of British India were ruled according to a number of regional schools of Hindu law, which will be described in detail below. Based on different interpretations of similar Sanskrit texts, details of practices varied between these schools, though all possessed some notion of the hierarchical joint family collective. Consequently, while there was considerable support amongst Indian legislators for law reform in general, there was also much debate about the structures and practices that should replace the existing legal system. Thus reform of Hindu Law initially took the shape of piecemeal reform through private members bills. Focused on one particular aspect of the joint family relationship, these bills allowed legislators to alter the hierarchical relationship between different Hindu men without affecting too far other aspects of the family hierarchy. Such measures won support in the legislature but they also raised many questions and complications about how the reforms corresponded to existing, regionally divergent practices.

This tension between regional practices and the drive for all-India family reform played a major role in shaping the debates and the reform legislation passed subsequently. Support amongst Indian Muslims for the claim that there existed a single and united Muslim community in India provided further momentum to discussions already underway about the construction of a more coherent, unified Hindu legal system. At the same time, constitutional reform during this period had seen the British withdraw from provincial government and concentrate their interests and authority at the centre, a shift which put even more pressure on the local alliances around which the state had developed. This impetus for centralised change culminated in the establishment in January 1941 of a Hindu Law Committee, a body of ‘experts’ to look into comprehensive reform of the Hindu legal system as a whole.

The very process of reforming the whole body of Hindu personal law to create a single, all-India Code provided a new momentum to the law reform debates. Whereas inter-war reformers had sought to balance changes to the relationship between different male relatives with protection of patriarchal order overall, the Hindu Law Committee’s more explicit focus on women’s rights undermined this carefully managed equilibrium. Furthermore, while piecemeal reform had left some room for regional diversity, the codification project did not. The Committee’s focus on constructing a single bill for all
Hindus necessarily entailed granting greater legitimacy to one set of practices, as the basis of the Code, while marginalising others. When the Committee began to circulate their proposals they were met with opposition not simply from staunch conservatives who had opposed reform previously, but also from legislators who had themselves brought piecemeal reform measures during the inter-war years. Though overshadowed by the events of World War II and the transfer of power, the controversy of the Code Bill began to grow in the years following independence as the questions it raised about a single Hindu identity were drawn into debates about national unity and citizenship-building.

The chaos and confusion of the transfer of power period, coupled with the terrible rioting that had accompanied independence had generated much uncertainty about the security and stability of the new Indian nation. As a result, citizens and government alike looked for ways to project and develop a sense of national unity. While they had, in some ways, contributed to this sense of insecurity by highlighting the division and regional differences amongst Indian Hindus, the pre-independence personal law reform debates had also seemed to offer Hindu legislators a means to develop a stronger all-India Hindu identity. Furthermore, the failure of these debates to secure significant reform of existing hierarchical family structures meant that many Hindu legislators remained interested in the subject of personal law reform.

The situation was not the same for Muslim legislators and community leaders left in India after 1947. The pre-independence Muslim law reforms had gone further in securing the interests of these leaders than those of Hindu legislators. Also, whereas Muslim men had been willing to use the legislatures to alter their personal legal system under the supposedly neutral rule of British officials, the numerical dominance of Hindu legislators after partition made them far less willing to do so. Instead, Muslim leaders sought to assert their authority by marking Muslim personal law as a sphere in which the state could not enter. This had profound implications for the nature and operation of the new state’s policy of secularism. The secular Indian state was distanced from Muslim identity at the same time as it was drawn into defining correct Hindu family practice and arguments about what it meant to be a Hindu.  

21 The contradictions between the Indian state’s non-interventionist stance in Muslim personal law and its greater involvement in Hindu legal practices continue to drive both academic and political debate about
Just as partition altered the context of the Code Bill debates, so its psychological and political impact helped to shape the practices and attitudes that came to be recognised by the state as the basis of a new Hindu personal law and thus also Hindu identity. The political topology of independent India ensured that legislators from the Hindi-speaking provinces of northern India enjoyed the greatest political influence within the new state. As a result, the conservative view of Indian identity, with strong links to Hindi language and Hindu practices came to dominate the new polity. \(^{22}\) Partition and the nation-building process that followed independence served in many ways to further undermine the influence of representatives from other regions. Previously India’s most populous state, partition stripped Bengal of much of its inhabitants as the new nation adopted a constitution in which political power was decided on the basis of population. Questions about linguistic identity and political representation served to divide southern representatives, therefore strengthening the north Indian block in the central legislature. The drive to reform Hindu personal law during the inter-war period had come primarily from legislators in southern and western India, where customary legal systems had granted Hindu women more power than they enjoyed in other regions, particularly the north. North Indian Hindus’ already conservative attitude towards the family was only to become more hard-lined after 1947. Coming from the areas most affected by the communal rioting, many north-Indian legislators responded to partition by promoting a highly patriarchal notion of Hindu community. \(^{23}\) Representatives from Punjab in particular drew on the province’s historical links with the colonial army to promote a notion of Hindu masculinity that drew on physical strength and martial prowess. The view of the family that came to inform the Code Bill legislation that was eventually

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Indian secularism today. Indeed, the state’s inconsistency with regard to intervention in personal law was central to the Shah Bano controversy which has proved to be, many argue, one of the greatest challenges to the stability of Indian secularism. Madhu Kishwar, ‘Pro-women or anti-Muslim? The Shah Bano Controversy’ in Religion at the Service of Nationalism, (Delhi, 1998), pp. 206-224; Flavia Agnes, Law and Gender Inequality: The Politics of Women’s Rights in India, (New Delhi, 1999) pp. 94-5, 100-6.

\(^{22}\) On the historical development of this Hindu/Hindi identity see Francesca Orsini, The Hindu Public Sphere, 1920-1940: Language and Literature in the Age of Nationalism, (Oxford, 2002), Chapters 1, 2 & 5; William Gould, Hindu Nationalism and the Language of Politics in Late Colonial India, (Cambridge, 2004).

\(^{23}\) This is particularly well illustrated in the view of the family put forward by north Indian legislators in debate about the Abducted Person’s Restoration Act, adopted in response to the partition violence. This is discussed in greater detail in Chapter Four.
passed in the mid 1950s was strongly influenced by this discourse of patriarchy and male-dominated tradition.

Developed in response to changes in the state structure and political governance, the resultant Code Bill legislation played an integral role in settling the nature and character of the post-colonial polity that emerged after 1947. Broken down into five parts, the final Hindu law bills helped to cement the power not only of a new group of patriarchs within the Hindu community, but also the dominance of north-Indian, upper caste Hindu men over the post-colonial state. Situating the twentieth-century reform debates within the context of a wider project to reconfigure Indian patriarchy, this thesis shows how the Hindu Code Bill raised questions about political power and representation that went to the heart of structures of governance during the crucial transition to independence. In so doing it argues that, far from being the simple ‘women’s bill’ identified by previous historians, the story of the Code Bill is also the story of the modern Indian state.

*Patriarchal authority and colonial rule*

One of the principal arguments advanced by this thesis is that the maintenance of patriarchal authority was integral to the operation of political power under both the colonial and post-colonial Indian state. This dissertation does not seek to present a ‘woman’s history’ of India’s transition to independence or even to re-tell this history from the point of view of the family. Rather, it argues that, from the outset of British rule in India, ideas about gender and notions of patriarchal authority formed the corner stone of political power structures. That the important political transitions of the inter-war period were accompanied by much debate about the position of women and men in the family was not coincidental but an indicator of the deep rooted connection between notions of gender and political power within the structure of the Indian state.

As mentioned above, this thesis concurs with Rajnarayan Chandavarkar and David Washbrook’s view of the Indian state as a ‘thin’ political entity structured around ‘spheres of lawlessness’ in which Indian men of influence enjoyed relative autonomy in
the exercise of their power. Washbrook has focused on land rights and property law to look at how British decisions to devolve important areas of authority to Indians affected the state’s political power and social leverage, while Chandavarkar has argued that the colonial state’s desire to subordinate labour played a crucial role in structuring the ‘spheres of lawlessness’ through which colonial governance operated.\(^{24}\) While in many ways complementing the findings of these studies, this dissertation shows that notions of gender relations and patriarchal power provided the overarching structure for other systems of governance including property law and labour relations. Changes in the ways in which male and female rights and authority were conceived had important implications for claims over property and labour in the family but also in society more generally.

While patriarchal power forms the basis of almost all contemporary political systems, it played a very specific role in structuring political power in British India. At the most basic level ‘patriarchy’ describes a social system in which men enjoy power over women particularly in the home, with a model of household relationships in which the father is the dominant figure. Yet, this does not mean that all men are powerful or all women are powerless in such a society. Rather, a patriarchal society is one that is characterised by systems of social ranking and hierarchy through which a collection of elevated men exert influence and control over others, including other men.\(^{25}\) While a patriarchal society is always stratified in some way, the exact structure of this hierarchical influence ranges from society to society.\(^{26}\) Patriarchal power can operate within a very hierarchical structure, in which a small number of men might enjoy a great deal of influence over many others, or in a society organised along more horizontal lines in which the greatest power is held by a larger group of men who are able to exert dominance over smaller social group than in the first model. Patriarchal power structures are frequently underpinned by ideologies which celebrate masculine qualities and power, while equating those who are subordinated by this structure with feminine


\(^{25}\) This understanding of patriarchy is taken in part from Allan G. Johnson, The gender knot: unraveling our patriarchal legacy, (Philadelphia, 1997).

\(^{26}\) For a discussion on this see Bina Agarwal, (ed.), Structures of patriarchy: state, community and household in modernising Asia, (Delhi, 1998).
characteristics. Patriarchy is not a fixed concept therefore, but a mode of exercising control. Looking at changes over time in who holds power and how it is operated, allows historians to assess processes of social and economic transformation.

The advent of British rule in India affected both the structures through which Indian men exercised authority but also the way in which this authority was perceived. On the one hand, the establishment served to weaken the political authority of those elite Indian men who had governed under pre-British polities and to render them vulnerable to the authority of an all-male British administration. Through their sheer presence, Company officials placed Indian men in a position of greater distance from the political state and its power than had been the case under previous Mughal or Hindu polities. This racial division of power was reinforced by British administrators’ own ideas about a separation of political and social powers based on western notions of temporal and spiritual authority. While religious rites and social status had been integral to the functioning of the political power of Hindu kings and Mughal rulers, under Company rule, social practices and ritual customs came to be rendered as distinct and separate from the political state. Reflecting the interest of the numerically weak colonial administration in cataloguing and ordering the vast population over which it ruled, Indian society was recast within this ‘social’ sphere as comprising not of individuals but of communities, constituted through apolitical social bonds. This separation and view of society was most clearly expressed in the colonial legal system which was divided between public and personal spheres. Shaping relations in the market place and political sphere, public law drew on English legal notions of the property-owning individual unfettered by other constraints, while the system of personal law developed under Company rule “entrenched ascriptive (caste, religious and familial) status as the basis of individual right.”

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At the same time as distancing Indian men from the operation of political power, colonial modes of governance provided new spaces for Indians to exercise social authority and control. Interested in governing through existing, indigenous networks of influence, colonial officials sought alliances with Indian men who, it was believed, were already able to exercise considerable hierarchical authority within their local community.\(^{30}\) The effect of this policy was not to centralise or make uniform the very different regional social structures of the subcontinent but rather to introduce a new layer of hierarchy to existing structures of power and dominance which continued to vary from area to area. These developments provided new incentives for men to adopt practices that heightened their own authority and power within the ‘social’ sphere, while also serving to reaffirm colonial views of Indian society as comprising of groups and communities, rather than individuals. Social groups which had secured landed power and influence only a few decades before the advent of colonial rule adopted languages of caste right and tradition to reinforce their position of dominance.\(^{31}\) The very structure of the colonial state, its division between ‘social’ and ‘political’ power thus served to recast Indian men’s authority in terms of the control they were able to exercise over other members of their family and kinship group.\(^{32}\) In this context, gendered notions of authority became of paramount importance.

As the framework governing the ‘social’ sphere, personal law formed a principal site of interaction between Indian men and the colonial state. Reflecting the different social divisions through which the colonial state viewed Indian society, personal law was constructed around religious texts but also local and caste customs. British interest in textual legal sources gave more rigidity to some aspects of the personal legal system

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\(^{30}\) British officials appointed members of the Nawabi administrative cadre in Bengali, such as Mahomed Reza Khan and, in Awadh, Muslim court servants such as Ali Ibraham Khan, who could demonstrate and teach about existing techniques of management and diplomacy. C.A. Bayly, *Empire and information: Intelligence gathering and social communication in India 1780-1870*, (Cambridge, 1996), pp. 49-51. As well as landed elites, British officials formed relationships with established banking and trading families, many of whom also owned land. The close relationship between mercantile families, many of whom were of Punjabi or Bengali descent and the British government were reaffirmed during the 1857 revolt as they continued to provide the government with trade and credit. C.A. Bayly, *The Local Roots of Indian Politics: Allahabad 1880-1920* (Oxford, 1975) pp. 33-39.

\(^{31}\) Susan Bayly, *Caste, society and politics in India from the eighteenth century to the modern age*, (Cambridge, 1999), pp. 81-85.

administered by the colonial state and also introduced a particular focus on religious identity. As well as textual prescriptions, customs and family traditions were incorporated into the legal systems to mean that in some areas of British India there was greater affinity of practices between groups of different religious identities than within a religious community, while regional divergence in practices meant that the family law of a south Indian Brahmin had little in common with that of Brahmans in north Indian provinces. Under Company rule, administrators also employed Indian informants to advise them of correct legal practice. At the same time, the colonial state’s own interest in securing the social structures through which they exercised authority also affected officials’ interpretation of indigenous practices. In this way personal law provided a point of interaction and negotiation between the colonial state and Indian men wishing to further their own influence; not as individuals but as representatives of wider groups and social structures.

Colonial notions of the relationship between property rights and legal personhood also served to reconfigure the power of Indian men within personal legal structures and before the colonial state. According to English law an individual’s legal status was determined by his capacity to own property, beginning with his control over his own labour. Established by agreement between property-owning individuals, the primary aim of the state was to protect the property of those living under its powers. Within this context, a person who could not own property in their own right did not have a legal

34 P.B. Gajendragadkar, The Hindu Code Bill: two lectures delivered by the Honorable Mr. Justice Gajendragadkar under the auspices of the Karnatak University at Dharwar, 12th-13th April 1951, (Bombay, 1951).
35 Company officials maintained not only continuity of policies but also of personnel used by previous rulers in the regions they controlled. Though there was from the outset of Company rule some distrust of and suspicion about the honesty of Indian informants, the Company state was dependent on Indian functionaries as late as 1830. C.A. Bayly, Empire and information: Intelligence gathering and social communication in India 1780-1870, (Cambridge, 1996), especially pp. 78-88.
identity before the state, thus, up until the end of the nineteenth century, a British woman was not conceived of as a legal subject in her own right but as the dependent, and property, of her husband.\textsuperscript{38}

The same kind of correlation between capacity to own and legal personhood did not exist in pre-colonial Indian law however, where one could exercise certain legal claims and rights without holding property and even, in the case of slaves, while being the property of another.\textsuperscript{39} Indeed, control over property, under these indigenous systems, was often not autonomous but dependent upon bonds created by gift giving and the performance of certain functions.\textsuperscript{40} Neither did the absence of an autonomous or absolute right over property remove the possibility of a person's control over certain goods and services. Low population density meant that access to produce mattered more than owning land. Landless groups enjoyed access and certain rights to agrarian produce according to customary arrangements and in spite of their lack of ownership. Thus, though important in structuring pre-colonial relationships, property rights were not the definitive or exclusive source of power and influence in the Hindu and Mughal polities that preceded the Company state.

This began to change under the colonial legal system. The Permanent Settlement of 1793 legally compelled a clearly identifiable group of landholders, or zamindars, to make payments of a fixed level of rent to the state in perpetuity. In so doing, it secured revenue for the state without requiring it to intervene in Indian society, or its affairs, beyond the level of the zamindar. While it bound them to regular payments, the Settlement also gave power to those it identified as zamindars by making them the sole proprietor of their estate. In this way it made them the exclusive and autonomous owners of their land, undermining previous commitments or obligations to share produce or services with others who used the land.\textsuperscript{41} As the named landowner, the zamindar

\textsuperscript{38} See the description of the court case regarding a theft from Millicent Garrett Fawcett, as well as detailed discussion of English women's property rights were reformed in the second half of the nineteenth century in Lee Holcombe, \textit{Wives and Property: Reform of the Married Women's Property Law in nineteenth-century England}, (Oxford, 1983), pp. 1-2.

\textsuperscript{39} Indrani Chatterjee, \textit{Gender, slavery and law in Colonial India}, (New Delhi, 1999), Chapters 3 & 4.


\textsuperscript{41} Indrani Chatterjee, \textit{Gender, slavery and law in Colonial India}, (New Delhi, 1999), pp. 127-130.

\textsuperscript{41} David Washbrook, ‘Land and labour in late eighteenth-century south India: the golden age of the pariah?’ in Peter Robb (ed.), \textit{Dalit movements and the meaning of labour in India}, (Delhi, 1993), pp. 68-86.
possessed a legal right over the land that none of his relatives or tenants shared. This also
gave him greater power before the state, which recognised only his rights in relation to
the estate; providing he paid his full rent on time, the zamindar enjoyed relative
autonomy, with officials turning a blind eye to the terms of tenancy agreements or the
ways in which landowners extracted revenue for their payments to the state. Internal
debate within the colonial administration meant that, as the British state expanded in
India, different regions were brought under the control of revenue systems that varied
considerably from the Permanent Settlement. Concern about production incentives and
calls for greater recognition of tenants’ rights led to the introduction of another system of
land settlement known as ryotwari. Introduced in southern and parts of western India, the
exact operation of this system varied according to time and location.42 Under all these
schemes, however, land was understood as a commodity that could be owned absolutely
by one individual or by a defined collective. In this way, the property-owning rights of
the few were given new meaning and power, within local society but also before the
state.

The development of this binary opposition between the propertied and non-
propertied members of Indian society also affected the way in which gender relations
were conceived. Regional studies of pre-colonial Bengal and Maharashtra have pointed
to the absence in these legal systems of universal categories such as ‘man’ and ‘woman’.
Rather they have shown the ways in which rights and claims to power and resources were
mediated through sophisticated social hierarchies based on caste, marriage and kinship
ties that were often highly fluid.43 This is not to argue that pre-colonial legal systems
were egalitarian; under Peshwa rule, for example, Brahmin women in western
Maharashtra were expected to adhere to a strict code of moral conduct and behaviour,
based on ideas of purity and scriptural dictates. However, this was not true of all women;
females in lower caste groups probably enjoyed a greater degree of freedom over their
sexuality.44 The emphasis on power through property-ownership, together with British

*Ancient rights and future comforts: Bihar and the Bengal Tenancy Act of 1885 and British rule in India*,
(London, 1997), Introduction and Chapter 7; Christopher John Baker, *An Indian Rural Economy 1880-
43 Indrani Chatterjee, *Gender, slavery and law in Colonial India*, (New Delhi, 1999), Chapter 3.
44 Uma Chakravarti, *Rewriting history: the life and times of Pandita Ramabai*, (Delhi, 1998), Chapter 1.
administrators’ own conceptions of domestic patriarchy, undermined the indirect influence certain groups of women had been able to exercise within the household. Over the course of colonial rule the subtle gradations between different groups of Indian women were worn away to form a more universal legal category of ‘womanhood’ as understood by English law. Though few Indian women had enjoyed access to property rights and had often been seen as the property or dependents of their father or husband prior to British rule, they found their legal status reinscribed under the colonial legal system that cast all Indian women under the universal definition of legal ‘dependents’ in similar terms to their English counterpart. This collapsing of the boundaries through which social differentiation had been maintained was accompanied in some areas, such as Maharashtra, with a rigidifying of notions of caste identity. While upper caste men sought to strengthen their authority over their women to prove their status, lower caste men and those whose power had been eroded by the new legal system also sought to tighten their control over women within their community. Consequently, men from these lower status communities argued before the state that they too adhered to upper caste gender norms. In this context, English legal notions of marriage as a universally applicable bond governing property relations between men and women became a point of much interest amongst Indian men. The nineteenth century saw many lower caste men adapt the customs governing their sexual relationships in order to bring them into line with the legal practices which, in the state’s view, upheld a proper marital union.

While the role of custom in colonial personal law allowed room for negotiation between Indian men and the state, the emphasis on religious texts under British rule placed some limitation on this freedom. Indeed, concern about the reliability of their informants encouraged many colonial administrators to establish a more formal and rigid system of textual law that they themselves could apply. An important step was made in this direction with the law reforms of 1860s when personal law was recast as a more conclusively ‘religious’ system, based more firmly on religious texts. The effect of this was quite different on Muslim and Hindu personal law. The clear doctrinal and textual

basis of Islamic law provided a much more defined base for Anglo-Muslim personal law. Though custom continued to play an important role, the reforms of the 1860s incorporated certain aspects of *shari`at* legal prescriptions into the Anglo-Muslim legal system.48 Koranic succession practices, under which property was divided amongst a man’s children, were praised in particular, even though they divided the collective family structure. One Orientalist scholar, W.H. Macnaughten commented that it was “difficult to conceive of any system containing rules more just and equitable”.49 Indeed, this was to become one of the central features defining Muslim family practices against those of Hindus: Muslim families were considered to comprise of property-owning individuals whereas the natural condition of a Hindu family was assumed to be ‘joint’.

The size and diversity of the many Hindu communities in India meant that the exact operation of this joint structure varied from region to region and between the schools of Hindu law that had gained a more standardised form under British rule.50 These structures will be examined in more detail in the next section, yet under all of them, while property was held by a (usually) all-male collective, the eldest male relative enjoyed ultimate control over the estate as spokesman for the family. Greater individual rights for Muslim men brought with it a different set of problems regarding control over property, including protecting a large family estate from fragmentation.51 However, Muslim men did not face the same restrictions to their authority as did younger Hindu men who were subject to the authority of an older family member.

The eldest male in a Hindu family was considered the head patriarch of a male-dominated property owning unit and, as a result of the relationship between property rights and political power under British rule, the main representative of this unit before

48 Gregory C. Kozlowski, *Muslim endowments and society in British India*, (Cambridge, 1985), p. 128-31. Muslims in Punjab were governed by Punjabi Customary Law and not Muslim law, this is discussed in Chapter One. See also N. Hancock Prenter, ‘Custom in the Punjab’ *Journal of Comparative Legislation and International Law*, 3rd Ser. 6, no. 1, (1924), pp. 67-80.


the state. Younger Hindu men held property rights, and thus legal power, in a general sense, however, their capacity to use this power was limited by the very hierarchical structure of power within the family. At the same time, the corporate nature of the joint family unit placed important restrictions on any Hindu man, old or young, exercising individual control over wealth inherited from the family. Though younger men stood to gain the most, reform of joint family property rights could bring benefits to Hindu men of all ages. It was an attempt to restructure the corporate patriarchy of the Hindu joint family, this dissertation argues, that provided the major impetus behind the Hindu Code Bill.

Looking at how patriarchal power and ideology came to operate under British rule in India, this section has sketched the complex way in which notions of gender informed structures of authority under colonial rule. Colonial rule served to disempower Indian men as individual actors before the state and bound the operation of their influence according to ascriptive categories of caste, religious and custom. However, the modes of colonial governance and the dependence of the state on local men of influence provided some men with the opportunity to carve out greater authority by presenting themselves to the state as spokesmen for a wider community. At the same time, the introduction of new ideas about property rights and gender relations served to further reconfigure the balance of power between Indian men and women. The erosion of systems of power that had structured women’s status according to customs, rather than by gender, served to forge a notion of women’s universal legal status, the power of which was understood, in light of colonial property rights, in terms of dependency on men. Yet, new notions of the relationship between property and legal personhood meant that this development was accompanied by a sharpening division between different groups of men. Women were thus given less room to assert their own interests within both the polity and at home, as they were tied to more exploitative and hierarchical systems of social governance. A new culture of male dominance was thus developed in conjunction with a system of very hierarchical structure of patriarchal authority in which a few men exercised power not only over women but over many other men.

It was this structure of patriarchal authority, rather than the culture of male dominance, that was the central focus of the Hindu Code Bill. The deep links between
these two forms of patriarchy, however, meant that attempts to alter the hierarchical structure of power in Indian society raised important questions about male power more generally. It is the attempts to alter this structure and to balance it with protection for male interest more generally that this dissertation tracks.

Hindu joint family structures

Over the course of colonial rule and particularly after the law reforms of 1860, the ‘joint’ family came to be understood not simply as a sociological unit but, with regard to Indian Hindus, as a legal, property-holding unit also. Comprising of several generations of relatives, the exact operation and status of the Hindu joint family varied throughout the subcontinent. These differences were given greater uniformity under the different schools of law that also became more standardised under British rule. Hindu law was seen to be largely divided between two principal schools: Dayabhaga and Mitakshara - itself divided into sub-schools the most notable being Mayukha law. Dayabhaga governed Hindus in Bengal, Assam and parts of Eastern India while Mitakshara was followed by most Hindus in the areas outside this, with Mayukha followed by some Hindu communities of the Bombay presidency and western India. Outside these two main schools were a number of matrilineal systems of Hindu law followed by certain groups in parts of south India. Providing an overview of these various systems, this section shows that these legal schools shared a common emphasis on the property-owning rights of the family collective. In the case of Dayabhaga, but particularly Mitakshara law, this had important implications for the ways in which younger sons accessed their powers. As this section will show, governing access to power amongst different generations of Hindu men, the joint family system played a crucial role in shaping the hierarchical structure of Indian patriarchal authority sketched in the section above.

Both Mitakshara and Dayabhaga law were based on different legal interpretations of the same shastric texts: Mitakshara was a commentary on Yajnyavalkya and certain provisions of the Manusmriti, while Dayabhaga law was based on Jimutāvahāna’s
analysis of the same texts.\textsuperscript{52} Both schools advocated joint family living and collective ownership of ancestral property but differed somewhat in their prescriptions regarding the nature of these collective rights.\textsuperscript{53} Under Dayabhaga law, a Hindu man enjoyed absolute rights over all his property, which on his death devolved by succession to his nearest male heirs. Ancestral property descended to all sons equally on the death of their father. In the case of sons who had died before their father, the deceased son’s share of the property passed on to his own sons or, if they too were dead, his grandsons. While the sons’ individual rights in their inherited property were fixed and absolute they could choose to separate their father’s property but more usually held it collectively as tenants-in-common. For example in the case of land or a house, the brothers could either sell the property and divide the profits equally or retain its integrity on the basis that they all had equal shares in any income derived from it or any future sale.

Under Mitakshara law, as with Dayabhaga, a man had absolute rights over his self-acquired property which devolved upon his widow, children and other nearest heirs on his death. However, access to ancestral property for Hindu men under Mitakshara law was governed by a system of survivorship. On birth a Mitakshara male became a member of a coparcenary family unit which held the rights to the family estate. Extending up to four generations the coparcenary expanded and contracted with births and deaths within the family, meaning that an individual’s share of the wealth fluctuated accordingly. The coparcenary unit was managed by the eldest member who could make any transaction concerning the property only with the consent of all other property holders. Thus a coparcenary manager, \textit{karta}, was a representative of the unit as a whole and could not sell, mortgage or otherwise alienate any part of the joint estate on his own behalf, the logic behind this being that it was the duty of the coparcenary to protect the interest of family members both living and unborn.\textsuperscript{54} By preventing the possibilities for a reckless

\textsuperscript{52} \textit{The Hindu Code Bill: Two lectures delivered by the Hon’ble Mr. Justice Gajendragadkar under the auspices of the Karnataka University at Dharwar on 12\textsuperscript{th} and 13\textsuperscript{th} April 1951}, (Karnatak University Extensions Lectures, Series no. 2), pp. 9-10, also Bina Agarwal, \textit{A field of one’s own}, (Cambridge, 1994), pp. 84-5.

\textsuperscript{53} The following descriptions of the different Hindu legal schools are based on information from Bina Agarwal, \textit{A field of one’s own}, (Cambridge, 1994), pp. 84-91, D. Derrett, \textit{Religion, Law and the state in India}, (London, 1968), D.N. Mitter \textit{The position of women in Hindu Law}, (Delhi 1913, reprinted 1989) and P.V. Kane \textit{Hindu custom and modern law}, (Bombay, 1950).

\textsuperscript{54} See Sahu Ram Chandra vs Bhup Singh [(1917) ILR, 39 All. 377 (PC)].
father to squander the family fortunes and deny future generations the economic resources he currently enjoyed, the coparcenary system had strict rules regarding its management which suited the concern of the colonial administration to protect stable landholding patterns and to maintain the influence of the agrarian elites with whom they interacted. This ideal of stability placed important limitations on the actions of family members. While the karta was limited in his actions by the wishes and agreement of his male relatives, the younger male coparceners were circumscribed in their ability to access ancestral inheritance to fund independent projects and lifestyles. Women were entitled to maintenance from the joint family estate as wives marrying into the family (or widows after the death of their husband) and unmarried daughters. Funds for a daughter’s wedding and associated costs and gifts came from the ancestral unit also, but daughters themselves were barred from membership of the coparcenary estate. The exclusion of women from the coparcenary itself, when considered in relation to traditions and laws governing Hindu marriage, served to reinforce further a family’s long term hold over property.

Both Mitakshara and Dayabhaga law governed communities in which exogamous marriages and patrilocal residency was practiced, meaning that the bride left her father’s family to live with that of her husband. The strict and complex rules governing proscribed and permitted relationships between brides and grooms varied slightly between the two schools. Though practices differed between castes and regions, marriage outside the caste group was often discouraged. Amongst upper caste groups in Maharashtra, marriage between an upper caste Hindu man and lower caste woman was valid but not between an upper caste woman and lower caste man. There were also regulations governing marriage within one’s caste. Marriage between a couple from the same gotra, a form of religious lineage, was considered invalid by many Brahman communities, though the specificities of how this ban operated varied between north and

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57 Uma Chakravarti, Rewriting history: the life and times of Pandita Ramabai, (Delhi, 1998), pp. 21-22.
58 One’s gotra was derived in two different ways, depending on a Hindu’s caste identity. A Brahmin’s gotra was determined by the ‘principal sage’ through which he claimed his lineage. Kshatriyas and Vaisyas however took the gotra of the family Brahmin or priest, the descendents of which officiated at the religious ceremonies of the same families in perpetuity. D.N. Mitter, The position of women in Hindu Law, p. 227.
south India. The result of these provisions was that frequently daughters married men far removed from their natal family both in terms of geography and immediate kinship networks. To grant a daughter a share of the ancestral estate, therefore, would mean that on her marriage she would either take property away from her father’s home or, in the case of immoveable goods, become an absentee owner. Alternatively, in light of the patriarchal nature of this legal system, her husband, a relative stranger to her natal family, could take control of her share. As a result, arguments about the need to avoid division within the family and protect the integrity of the ancestral estate were often cited as justification for the exclusion of daughters from membership of the coparcenary under Mitakshara law.

While Hindu women of both schools of law had little right to the family estate of their father, they could inherit the self-acquired property of their husband or father in the absence of male heirs. Providing a man left no sons or agnatic male relatives a widow could succeed to his estate on the condition that she remained chaste and did not remarry. Daughters in both schools were eligible to their father’s property in the absence of a widow or agnatic male relatives. Adoption, however, reduced the chances of a daughter being the only surviving heir. While practices varied extensively it was generally accepted that a Hindu man could adopt a male child to perform religious rites and oblations after his death. In cases where there was no widow or surviving male heir, unmarried daughters were given preference over married daughters to their father’s estate. Under Mitakshara law, only a man’s self-acquired property could be passed onto

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59 The origins and operation of gotra identity has been the subject of much dispute amongst Indologists, historians and anthropologists. The formers’ focus on Sanskrit texts have led several scholar to argue that it is primarily a Brahmanic institute while anthropological studies have shown that gotra is also important in some non-Brahmin communities. T. N. Madan, ‘Is the Brahmanic Gotra a Grouping of Kin?’ *Southwestern Journal of Anthropology*, Vol. 18, No. 1, (Spring, 1962), pp. 59-60. The celebrated anthropological works of M.N. Srinivas and Iravati Karve have shown that gotra is important in shaping marriage practices amongst Brahmin communities in south India though the term itself is understood in slightly different ways in this region to north India. Iravati Karve, *Kinship Organization in India*, (Bombay, 1965 edn., 1953), pp. 115-133; M.N. Srinivas, *Marriage and Family in Mysore*, (Bombay, 1942), pp. 35-7.

60 Pandit Mukut Bhikari Lal Bhargava of Ajmer-Merwara opposed the introduction of property rights for the daughter on the grounds that “The son has to remain all through his life from his inception to his death, with the family in which he has taken birth. The daughter has to go to a stranger’s family.” 12th December 1949, *CAI(L)D*, p. 466. See also Bina Agarwal, ‘Widows vs. daughters or widows as daughters? Property, land and economic security in rural India’ *Modern Asian Studies* 32, no. 1, (1998), pp. 30-31.

61 Usually a man could adopt the son of a woman whom he would have been eligible to marry were she a virgin, though under some customary practices a man could adopt his sister’s children or closer relatives. See D.N. Mitter, *The position of women in Hindu law*, (Delhi, 1913), pp. 134-5.
female heirs, whereas under Dayabhaga, a man’s share in his family wealth was included amongst his self-acquired property when he died. Thus, under Dayabhaga law women stood a chance to inherit a greater share of a man’s property in cases where he left no male relative.\textsuperscript{62} Under both schools, however, women took only a limited estate in the property inherited from their husbands. This meant that while a woman could enjoy the property and any income it might generate for her lifetime, she was not entitled to sell, gift or alienate it except in a period of great necessity and under certain specified circumstances, including funding religious service and oblations for her deceased father or husband.\textsuperscript{63} On her death, the property reverted back to the agnatic heirs of the previous male owner. Mayukha law, a sub-school of Mitakshara law prevailing in Bombay, presented one exception to this rule. Under Mayukha law daughters enjoyed an absolute estate over property inherited from their father, though they inherited under the same conditions as daughters governed by more mainstream Mitakshara law, i.e. in the absence of both male heirs and a widowed mother. Women did have absolute rights over their \textit{stridhana} – literally meaning women’s property. The exact definition of which property was included was a source of controversy throughout British rule in India but the term seems to have included goods given to a woman by her parents and family before her marriage and anything received from her husband afterwards, before his death.\textsuperscript{64}

Hindu women therefore enjoyed succession rights to moveable goods and gifts, particularly on marriage, but were excluded from the family units that commanded rights over more valuable goods such as houses and, especially, land. This was not true, however, of the Hindu women governed by matrilineal law in southern India. The Marramakkattayam and Aliyasantana schools of law were also structured around a joint


\textsuperscript{63} The exact nature of these conditions was subject of considerable legal debate and decision. The Privy council heard a number of appeals concerning the conditions of ‘limited ownership’ – the legal term to describe the rights of female Hindu heirs – and the exact definition of ‘legal necessity’ remained unresolved until the early twentieth century, as the Madras Hindu Limited Owners Bill demonstrated, GOI Home Department, Judicial B Proceedings, February 1917, nos.251-252 and February 1918, nos.120-121 NAL. Kane also argues that the nature of women’s rights was disputed for centuries even before British rule. P.V. Kane, \textit{Hindu custom and modern law}, (Bombay, 1950).

\textsuperscript{64} For an explanation of the many interpretations of \textit{stridhana} see D.N. Mitter, \textit{The position of women in Hindu Law}, pp. 603-649.
family unit known in both as a taward or taravad. The structure of taward ownership mirrored the Mitakshara coparcenary system with one crucial difference. As with the coparcenary system a taward was a legal and property owning unit, rather than a simple kinship unit. Similarly, ancestral property was held collectively rather than as tenants-in-common, with the most senior member given powers of management and all others enjoying only a right to maintenance. Division of the taward could take place only with the consent of all members. However, whereas the Mitakshara coparcenary system excluded women, succession under the taward system followed the female line. This did not mean that men were excluded from the taward unit. A woman’s son and grandsons held the same status in the unit as a daughter or grand daughter until they were married; what varied was the nature of their rights over the ancestral estate. Like women under the coparcenary system, sons and husbands were members of their taward during their life time and could enjoy its income and rights to maintenance, on their death the property reverted back to the heirs of their mother or wife. The effect of marriage on the status of taward members was the inverse of that under Mitakshara law: on marriage, a son left his mother’s taward to join that of his wife while the daughter remained a member of her natal family unit for life, her marital status having no effect on her rights over the

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65 While this basic matrilineal taward system was common to both Marrumakkatayam and Aliyasanthana schools, it is worth pointing out several differences in the way they operated. Firstly a variety of castes were governed by Marrumakkatayam but the communities following Aliyasantana law comprised of Brahmins only. Secondly, whereas Aliyasantana law decreed that the eldest member, regardless of sex should be taward manager, in Marrumakkatayam communities it was preferred that the eldest male member of the family would take up this role with the eldest woman taking it only in the absence of a male relative. Thirdly, under Marrumakkatayam, when a male taward member died his self-acquired property reverted back to his taward while under Aliyasantana law it reverted to his nearest heirs, usually his wife and children. This difference was perhaps reflected in the residential practices of followers of the two schools. Women governed by Marrumakkatayam law tended to reside with members of their own taward whilst Aliyasantana women resided more generally with their husband’s family. The greater control enjoyed by women of both schools over their property also impacted on marriage customs within communities governed by these legal systems was considered more like western-style companionate marriages than the indissoluble, sacred marital bond inscribed in Mitakshara and Dayabhaga practices. Though both legal systems set out prescribed relations for marriage these were much more relaxed than under Dayabhaga and Mitakshara law; though inter-caste marriage was disapproved of under Aliyasantana law, such unions did not result in the degradation or excommunication of the parties involved, while under Marrumakkatayam they were common practice. These are all taken from N.R. Raghavachariar, Hindu Law: Principles and Precedents, Vol. II (1935, 1980 edn.), pp. 703-4. For a historical background and more information about the workings and social impact of the Marrumakkatayam and Aliyasantana law, and also their local variations see Bina Agarwal, A field of one’s own: gender and property rights in South Asia, (Cambridge, 1994), pp. 109-120.

66 Though this was very similar to a limited estate, this legal term was used to refer only to Hindu women, Bina Agarwal, A field of one’s own: gender and property rights in South Asia, (Cambridge, 1994), p. 87.
ancestral estate. As under the Mitakshara school, both the Marumakkatayam and Aliyasanthana legal systems focused on protecting the integrity of the taward and preventing the intrusion of non-family members. There is evidence that some Marumakkatayam and Aliyasanthana communities permitted adoption in cases where the taward lineage was on the brink of extinction, but this required consent from all taward members and was not common practice.67

For reasons described above, the focus of the Hindu legal system came increasingly in the nineteenth-century to rest on the joint family structure and its collective ownership of property. Underpinning the variations of this structure was a notion of familial, usually paternal, hierarchy. While the rights of women were subordinated under both Mitakshara and Dayabhaga law, the structure of the coparcenary system under Mitakshara law served to subordinate the rights and claims of younger men also, who had to abide by the authority of the karta. Within this system, male and female subordination within the family was deeply interlinked. The stability and long-term survival of the coparcenary were understood to be predicated on the exclusion of women from the unit itself. At the same time, the rules about a women’s maintenance under Mitakshara law made a wife dependent not exclusively on her husband but on the coparcenary estate of which he was but one member. In terms of who actually controlled the family estate and even the politics of relations within it, therefore, ultimate power rested with the karta. Much of the twentieth century debates about law reform were to revolve around this issue. However, while the majority of Hindu property-owning families were governed by Mitakshara law, the coparcenary system did not apply to all Hindus. Though the mid-nineteenth century law reforms had made it more possible to speak of a Hindu legal system, there existed no singular notion of Hindu law or of a distinct Hindu community over which it governed. The Mitakshara coparcenary system had vague echoes in the joint family systems of other Hindu legal schools, but, permitting a greater sense of individual property rights, these structures did not have quite the same repercussions for younger men. As chapter one begins to demonstrate, against a backdrop of state centralisation, economic change and the politicisation of religious identity,

debates about the Mitakshara coparcenary became a basis for debates about law reform and ultimately a single all-India Hindu legal identity.

Overview of the dissertation

Like the Hindu Code Bill itself, this dissertation spans the division between the late-colonial period and the government of early independent India: the first three chapters look at the interests driving the debates about social reform and codification of Hindu personal law in the three decades preceding independence and the second three look at how partition and the post-colonial nation building project served to shape the Code Bill. While the chronology of the Code Bill makes this layout almost self-evident, this dissertation is amongst very few historical works to traverse the 1947 divide. Even previous studies of the Hindu Code Bill have focused predominantly on the bill’s passage and progress under the Nehruvian government, rather than on the early 1940s when the Code was first proposed and drawn up. Thus, while this study follows the events surrounding a specific legislative project, its findings and analysis also shed light on the important and turbulent events of India’s transition to independence. In so doing it provides a vantage point from which to understand better both the continuities and changes between the late colonial and early post-colonial state in India.

Situating the personal law reform debates within the context of constitutional reform and changes in the political economy of colonial rule during the inter-war years, the first chapter argues that the colonial state played a much more significant role in facilitating and shaping the Hindu Code Bill project than previous historians have

assumed. Changes in the political economy of colonial rule following World War I brought the state into new social alliances which, at times, seemed to conflict with the hierarchical structures of governance through which British power had developed. Though they did not lead the Code Bill project itself, colonial officials played an important role in shaping the questions and approaches to law reform that led eventually to the calls for codification. Crucially, however, this did not mark a shift in the state’s attitude towards society and a move towards a more interventionist position vis-à-vis the Indian family; much of the legislation served to protect rather than to erode Indian men’s autonomy within the domestic sphere. Building on the view of the ‘thin’ colonial state, in which power was devolved to Indian men, the first chapter argues that the inter-war reform debates must be seen in terms of a reorganisation of patriarchal dominance within the family, rather than as an attempt by the state to assert greater control or regulation over domestic life.

The inter-war debates about Hindu law reform are explored further in Chapter Two, this time from the perspective not of the British administration but of Indian legislators. This section examines the ways in which contemporary notions about rights and modern state-hood, colonial discourses about fitness to rule, the place of women in Muslim shariat law and regional Hindu family practices intersected in the reform debates to make Indian women the central focus of reform legislation. However, looking in detail at the arguments used to call for reform, the chapter shows how Indian legislators’ claims about gender equality and women’s rights often served to conceal some of the important changes these bills made to the rights and independence of Indian men. Though often framed in a language of individual rights, the chapter shows that the inter-war Hindu reform legislation was not concerned with the rights of the single person individuated from society, but of the rights of the married couple, under the authority of the husband, individuated from the joint family.

Chapter Three looks at some of the difficulties legislators encountered in their efforts to balance rhetoric based on individual rights and gender equality with reforms that sought to alter, but ultimately protect, the structure of male dominance in the family. While the ‘gap’ between the language of reform and the more conservative interests driving it forward went largely unnoticed in the piecemeal legislation debated during the
inter-war years, it became much harder to ignore after 1941, as work began to draw up a single Code of family law for all Hindus. The chapter looks at how, in opening up the patriarchal structure of the Hindu joint family, the reform debates made it possible to conceptualise an individual under Hindu law whose rights were unconstrained by the patriarchal hierarchies of gender, caste or age. In so doing, the Code Bill came to be seen by many Indians as a deeply threatening project, particularly following the chaos and uncertainty of the transfer of power and partition violence. Yet, the notion of individual rights set out in the Code also won support from those who hoped to use independence to establish a new kind of state and society in India, most notably B.R. Ambedkar. Looking at the Code Bill in relation to Ambedkar’s own political ideology and support for the abolition of caste, this chapter shows that the philosophical underpinnings of the bill fitted the Law Minister’s political interests surprisingly well. Though the inter-war reform debates had been driven by men looking to reform their own property rights, this chapter shows how the relationship between men’s individual rights and women’s position in the Hindu family could be used to question the hierarchical structure of Indian society more generally.

If the first part of this thesis explores the range of different ideas being presented in the inter-war years about how Indian patriarchy should change, the second half looks at how these debates were eventually settled and the impact of their resolution on the character of the independent Indian nation-state emerging in the late 1940s. Chapter Four examines the impact of partition and the communal violence that accompanied it on the projects to reconfigure Hindu and Muslim patriarchy. The chapter begins by looking at how the division of the subcontinent on the basis of religious community helped to construct a closer affinity between the Indian state and its Hindu population. This situation was mirrored in the reform debates as Hindu and Muslim legislators adopted opposing stances vis-à-vis the state’s role in personal law. Fearing domination by the Hindu majority, Muslim men sought to assert their authority by marking Muslim personal law as a sphere into which the state could not enter, while Hindu men were happy to use state legislative power to cement a new legal status. As a result, the Indian state came to be identified with the notion of ‘true’ Hindu patriarchy being defined in the debates – a
notion which was, in the violent aftermath of partition, shaped by a north Indian view of Hinduism.

This view of Hindu patriarchy and its implications for wider Indian citizenship are explored in the last two chapters of the dissertation. Focusing on marriage reform, Chapter Five shows how partition and the redistribution of power after 1947 allowed for a more conservative view of the family, in line with north Indian ideals, to be established as the ‘norm’ for Hindu society. However, following the government’s decision to divide the legislation between a Hindu and more ‘secular’ marriage act, this view of the family also came to affect the state’s interaction with non-Hindu, particularly Muslim, Indians. The chapter shows how the legacy of social reform during the colonial period, especially the Special Marriage Act of 1872, facilitated a situation in which Hindu family practices could be re-interpreted as a model for marriage legislation applicable to all Indians. The adoption of north-Indian Hindu marriage practices as the basis of the new marriage laws, particularly the strict focus on exogamous relationships, rendered as illegitimate the niece-uncle marriages common amongst South Indian Hindus as well as the Muslim practices of inter-cousin marriage.

The final chapter looks at how the notion of the Hindu family set out in the Code Bills affected succession practices and women’s property rights in the new nation-state. It shows how the return of the all-male Mitakshara coparcenary unit to the reform legislation when it was re-drafted after 1951 can be explained in terms of the rising influence of north-Indian Hindu male legislators in the debates. Yet, the Hindu Succession Act also introduced important new changes to the operation and structure of the Hindu joint family. The chapter explains how the reforms served to grant Hindu men greater individual control over their property while continuing to exclude female succession to the family estate. Looking at these provisions in relation to the land reform legislation passed at the same time, the chapter shows how the Succession Act was part of a wider process of reconfiguring patriarchal and representative structures within the new independent state.

The Hindu Code Bill set out the framework within which the post-colonial state interacted with Indian society. While the inter-war debates seemed to raise the possibility of a state that was more involved with the family, the Hindu Code reinforced the distance
between the state and the family in a reconfigured patriarchal structure. Moving away from the patriarchal hierarchy of the joint family, the Code Bill granted a wider group of Hindu men power over their families, without introducing apparatus or legislation to place checks on the way in which this authority was used. The passage and negotiation of the Hindu Code Bill, therefore, demonstrates both the continuities but also changes that took place in the transition from colonial to post-colonial state. As this dissertation will demonstrate, it came to play a central part in framing the modern state in India.
1. An all-India Hindu Code Bill: the late-colonial state in transition

Work began on the Code Bill in 1941 and the first draft of the Code, on which all post-independence legislation was based, was presented to the legislature in April 1947, several months before British withdrawal from the subcontinent. However, until now, academics have focused almost exclusively on the measure’s post-colonial history, often regarding it as a facet of Jawaharlal Nehru’s nation-building project.\(^1\) In so doing, these studies have served to reinforce arguments put forward by contemporary legislators that the Code Bill was a ground-breaking and radical reform measure that marked a difference in the aims of the colonial and post-colonial Indian state.\(^2\) Many studies have highlighted legislators’ rhetoric in the debates, unpicking numerous claims by contemporaries that the Code was more ‘modern’ and ‘progressive’ than the existing legal system. However, by focusing on the post-independence history of the Code, these studies also imply a link between this interest in ‘modernity’ and the end of the colonial state.\(^3\)

The sense in these studies of a clear break between the interests of the colonial and post-colonial state creates the impression that the Code Bill debates were symbolic of an opportunity, following British withdrawal, in which it might have been possible to enact far reaching social change. Yet, the majority of these studies have concluded that, while perhaps setting out an ideal of gender equality towards which the Indian nation-state should work in the long-term, the legislation that was eventually passed in the 1950s

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2 While expressing reservations about the Code Bill itself, and also the ability of the non-elected Constituent Assembly to enact it, Dr. B. Pattabhi Sitaramayya of Madras urged the government and legislature to pay close attention to social reform policy which he identified as being integral to the project of developing the new Indian nation and as important to the upcoming elections as “the nationalisation of the key industries, abolition of drink and zamindaris.” 13th December 1949, *CAIL(I)*, p. 546.
3 Madhu Kishwar argues that the Code Bill represented a continuation of colonial social reform policy and imperial views about modernity and the ability of the state to impose changes on society without its consent. Though she argues that the Code Bill has a long history, “The attempt to codify Hindu law was begun in the late 18th century” she makes no mention of the pre-independence history of the Code Bill or the Hindu Law Committee, presenting the “first decades of Indian independence” as the time frame in which the Hindu Code Bill specifically was debated. Madhu Kishwar, ‘Codified Hindu law: myth and reality,’ *Economic and Political Weekly*, XXIX, no. 33, (13th August 1994), pp. 2145-61.
failed to bring about any real, substantial difference to the lives of Hindu women. A number of these studies have attributed this failure to the inability of male legislators to abandon their own patriarchal interests and concede a share of power to women. Lotika Sarkar has argued that while legislators were willing to pay lip service to the Code and “welcomed” its re-introduction in April 1948, once the debates began “members shed all inhibitions and came out openly to oppose the passage of the Hindu Code.” Conveying a sense that a more altruistic set of legislators might have succeeded in bringing about substantive social change for women, these studies find sympathy with a wider narrative that regards the legislators of the post-independence period as self-interested elites, using the language of nationalism and democracy to take over the state for their own ends.

Examining the pre-independence origins of the Code Bill project, this chapter begins to set out the very different perspective of the Code and its history presented in this thesis. It argues that, more than questions of gender equality, it was concern about property law that first sparked calls for personal law reform and a Hindu Code. When seen from this perspective it becomes clear that, far from being a measure associated primarily with the post-colonial state, the origins of the Code Bill project can be found in the policies and interests of the late-colonial state. The period following World War I witnessed important changes in the political economy of colonial rule and in the way that colonial officials sought to manage their relationship with the subcontinent, and it is in this context that the Code Bill project must be analysed.

Divided into three parts, the first section of this chapter looks at the development of Indian property rights under colonial rule, particularly following the switch to crown control in 1858. It shows how many of the legal difficulties with which the Code Bill sought to deal were the result of colonial policies and modes of governance. Attempts to reform the personal legal structure were therefore deeply linked with and had important implications for the operation of political authority in India. This point is developed in the

5 Lotika Sarkar, ‘Jawaharlal Nehru and the Hindu Code Bill,’ in B.R. Nanda (ed.), Indian women: from purdah to modernity, (New Delhi, 1990), p.91; She continues acerbically “The volte face is understandable; lip service to the concept of equality was one thing, its implementation was another” Ibid, p. 92.
second section of the chapter which looks at debates about law reform in the inter-war years. Changes in the political economy of colonial rule in the wake of World War I prompted British officials to adopt new approaches to governance in India, including policies of devolution and Indianisation. As the section demonstrates, the close relationship between political power and property rights meant that this restructuring of state power helped to trigger new interest amongst colonial officials in the condition of Indian property law. Rising out of processes that marked a break with the modes of governance that had characterised late nineteenth-century colonial rule, personal law reform in the inter-war years can perhaps be seen, as other historians have argued, to mark the emergence of new political structures. Yet, while the reforms represented a rupture with the political and legal structures of the previous century, to what degree was this a break away from a colonial past? Though the 1920s and 1930s saw the metropole place different kinds of demands on the colonial relationships to those of previous decades, the inter-war years did not witness a major shift in the general nature of colonial rule itself. The colonial administration continued to be guided by the same kind of interests and constraints as had been the case prior to World War I. The third section of this chapter looks at how these continuities affected the ways in which personal law reform was pursued in the inter-war years. It argues that while the reforms of the inter-war years marked a renegotiation of the framework through which the state interacted with society, altering the balance of property rights within the family, they did not necessarily signify a major shift in the way in which the state exercised power over Indian society. This gap between reform and continuity of political structures suggests that, from the very outset and even with the support of male legislators, the Hindu Code Bill was unlikely to bring about dramatic change in Hindu women’s power and status within the family.

**Indian property rights under colonial rule**

Much of the legal confusion with which the state grappled during the inter-war years had its origins in the long-term history and politics of colonial rule. By the early twentieth century, there existed a number of different legal systems governing the property and
succession rights of subjects in British India. British and Europeans living in India were subject to a system of civil law, based on family law practiced in Britain itself. Indian subjects, however, were governed according to a personal legal system, a system of law that was understood to have existed in India prior to British rule and under which practices were dictated by the religious, caste and regional identity of the individual, rather than by a single territorial body. The decision to retain this system of personal law, rather than imposing a new form of family law throughout the subcontinent, reflected the East India Company's 'state mercantilist' approach. With limited resources of its own, a large and active army to support and little income from the depressed state of Indian agriculture, Company officials sought, on the whole, to continue but adapt the political structures they inherited. Realising that social unrest raised both the economic and political cost of governance, the Company co-opted local elites wherever possible. The effect of this was the construction of a 'thin' state structure with very shallow roots in Indian society, control over which was largely maintained by Indian men of influence, away from the regulation of the state or an autonomous legal system.7 Far from imposing new economic and social structures on society, the law became a means of protecting and reinforcing the hierarchical authority of local patriarchs over their own community, in exchange for assistance from Indian elites in administration and revenue collection.8 Such imperatives and interests served to shape the way in which colonial officials recorded and understood Hindu law, an amorphous structure with which, unlike Muslim law, they had had no prior experience.9 Officials regarded the hierarchical, multi-generational Hindu joint family not simply as a social structure but as a property-owning legal unit, the basis of which was, as a result of religious personal law, grounded in theology.10 Setting out strict and complex laws about the ability of a family member to alienate property, the

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legal joint family provided a crucial safety net for landholding families to stay afloat in the agriculturally impoverished, coercive and largely lawless context of Company India.11

The shift to Crown rule in 1858 was accompanied by important changes to the Indian legal system. Reforms made during the 1860s altered the structure of the courts and personal legal system. While custom had previously played an important role, at least theoretically, in the administration of personal law, the reforms reinforced the religious grounding of the personal legal system. Removing the role of Indian religious advisors to the courts and replacing them with written scriptures and legal glosses, the reforms imposed a much more rigid definition of both Hindu and Muslim law. Though some aspects of custom did continue to prevail in Muslim personal law, Koranic prescriptions about individual rights were established as the basis of Muslim property law in India.12

The reforms reinforced the sacred nature of the ‘Hindu’ joint family however, as ‘joint’ status was assumed to be the default position of a Hindu family, with the onus on litigants to prove their non-joint or divided status.13 This difference in the legal view of the Muslim and Hindu family was to prove crucial in shaping the historical trajectory of law reform debates within the two religious communities.

These reforms coincided with a period of economic boom in India, beginning around the 1840s, the effects of which served to place under pressure the hierarchical structure of the joint family. Agricultural growth and international trade saw the opening up of market relations in India. At the same time, state expansion and new employment opportunities in government service, prompted many young men, often from elite agrarian families, to move away from their family home to take up administrative jobs in the urban hubs of state governance. Members of this emerging professional class had access to the cash economy, through paid employment, and often lived away from the family collective in their own independent households. While the state responded to these developments by reinforcing certain aspects of private property rights in the market

place,\textsuperscript{14} the strengthening of the joint family unit under the 1860 reforms meant that Hindu men – Hindu women did not enjoy property rights under British law\textsuperscript{15} - found their individual control over resources and property increasingly restricted. As a result, the later nineteenth century saw growing debate across India about the ‘correct or ‘ideal’ structure of Hindu family life. Though debates were wide-ranging, reflecting both the regional framework of colonial power and the great variety of practices covered by the Hindu legal system, at their heart was a struggle between a larger, multi-generational joint family system and a more nuclear view of the family in which the husband had greater individual control over property.\textsuperscript{16} \\

The struggle between the authority of older patriarchs over the joint family collective, and greater individual property rights for younger Hindu men was also played out in the courtroom. The rise of the agrarian economy had, from around the 1840s onwards, sparked a rising rate of land transfers, although figures varied considerably from region to region.\textsuperscript{17} Yet the strength of joint family control under Hindu law created much confusion about the role of contract law and individual property rights. This was particularly true in cases where land was owned by a joint family governed by Mitakshara law.\textsuperscript{18} Individuals looking to buy or lease part or all of a family estate, or moneylenders seeking to repossess an unpaid mortgage could find themselves involved in lengthy legal battles if Mitakshara coparceners questioned the validity of the transaction. While a \textit{karta} was forbidden to sell, mortgage or transfer land for personal gain or without the consent of his relatives, he was permitted to make transfers on the ground of legal necessity or for the good of the estate.\textsuperscript{19} What these two conditions actually meant

\textsuperscript{14} E. Whitcombe, \textit{Agrarian conditions in northern India}, (Berkeley, 1972), Chapter 5; David Washbrook, ‘Law, state and agrarian society in colonial India,’ \textit{Modern Asian Studies} 15, no. 3, (1981), pp.672-3. 
\textsuperscript{15} This will be explored in more detail in Chapter Three.
\textsuperscript{17} In Aligarh district, UP, for example, by 1868 83% of the total area of land had been transferred as Baniya and Brahmin castes bought out the traditional Jat and Thakur landowning castes of the region; by 1903 40% of the landholders who had owned land in 1833 had been permanently alienated from their land. Zoya Hasan, \textit{Dominance and mobilisation: rural politics in western UP}, (New Delhi, 1989), pp. 29-31. 
\textsuperscript{18} See the explanation of the Mitakshara joint family in Introduction.
\textsuperscript{19} In the case of Sahu Ram Chandra vs. Bhp Singh, the Privy Council ruled set out that while the father “is subject to the control of his sons and the rest in regard to the immoveable estate” he also had the power to
was unclear, however, and had been a source of much debate during the later nineteenth century. Furthermore, the idea of survivorship to the coparcenary raised questions about whether an heir who was not born at the time of an alienation could later contest its validity on the grounds that he had not given consent. This situation was further complicated by the notions of a woman’s limited right to property as set out by the colonial courts. British rule had whittled away much of the customs by which women had historically enjoyed access to resources, constructing instead a notion of women’s dependency. The courts did recognise, however, a woman’s ‘limited ownership’ over her husband’s estate after his death. This meant that a Hindu woman did not enjoy absolute rights over her dead husband’s property but could use it for ‘valid’ reasons – “her own maintenance and to pay maintenance of other female members of the family, payment of debts, religious rites etc”. On the widow’s death it passed back to her husband’s male heirs. Any sale, lease or mortgage from a Hindu limited owner to a party outside her husband’s family could thus also be called into dispute at a later date. Indeed, reflecting the strength of the joint family’s legal rights under the new system, the Indian Limitation Act permitted agnatic heirs to launch declaratory suits, and suits for possession, even decades after a transfer, sale or mortgage had been made.

\[^{20}\text{See description of this debate in the statement of objects and reasons of Hari Singh Gour’s bill to define the liability of a coparcener. GOB Home Department, F.2730/1923, MSA.}\]

\[^{21}\text{Unlike devolution by succession, where a fixed share in a property passed from one individual to a list of enumerated heirs, devolution by survivorship, the system governing the coparcenary, meant that property was held as a single unit, with individuals share in it remaining totally fluid until it was decided to partition the estate. With a coparcenary able to comprise of up to four generations, the amount an individual would receive if the property was partitioned diminished with every birth and grew with every death in the family. A situation could thus arise whereby a coparcenary could appeal against a sale or lease of property made before he was born, on the grounds that it was not for the good of the estate and he would not have consented to it. For more on the coparcenary structure and survivorship see Introduction and Lucy Carroll, ‘Daughter’s rights of inheritance in India: a perspective on the problem of dowry,’ Modern Asian Studies 25, no. 4, (Oct 1991), pp. 793-800.}\]

\[^{22}\text{Note on the consequences of delay in civil courts by Sir T.B. Sapru, 20\textsuperscript{th} August 1922, ‘Report of the Civil Justice Committee’ pp. xvi-xvii, IOR V/26/143/1.}\]

\[^{23}\text{See Introduction.}\]

\[^{24}\text{Madras Hindu Limited Owners Bill, Statement of Objects and Reasons GOI Home Department, Judicial B, Proceedings February 1917, nos.251-252, NAI. This point of law and its consequences are also discussed in more detail in the second part of this chapter.}\]

\[^{25}\text{In cases where an alienation had been made by a Hindu woman, a limited owner, heirs could contest the transaction 12 years after her death, rather than 12 years after the deal itself. Note on the causes of delay in civil courts by Sir T.B. Sapru, 20\textsuperscript{th} August 1922, ‘Report of the Civil Justice Committee’ pp. xvi-xvii IOR V/26/143/1.}\]
While these developments seemed counterintuitive to the development of the ‘enlightened’ society and free market economy promised in colonial rhetoric, the economic climate of the late nineteenth century meant that this position was sustainable for the state. Though the confused state of Hindu law gave new landowners little incentive to invest in their land or develop new means of production, the demand for raw and unprocessed primary material meant that India could continue to engage with international markets without agricultural innovation. In the late 1880s, with colonial finances in a healthy condition thanks to India’s position in the global markets, antagonism between different social interests seemed manageable and sustainable. Revenue was coming in, social stability was maintained and the colonial state could take a back seat and leave the economy to take care of itself.26

Constitutional reform and property rights in the inter-war years

The First World War and its aftermath had an important impact on India’s position in British imperial policy. Having managed to survive economic crisis in the years immediately after the war, over the course of the next decade Indian traders found it increasingly difficult to find a market for their goods. Developments in production methods during the war removed the need for costly imported goods,27 while the global markets that did begin to develop in the post-war period, arms manufacturing and consumer goods, had little need for the goods produced in the sub-continent. By the late 1920s, it had become apparent that, not only would the Raj no longer be able to generate easy income for its European masters, it was struggling to pay for itself. Yet, the events of 1914-1918 had demonstrated to the British the centrality of India to their position in international politics. The peace settlement had served to bring many more people and lands under British authority, making British officials increasingly aware of the

27 For example the development of more sophisticated chemical technology and the creation of synthetic dyes replaced the need for indigo which having represented almost 8% of Indian exports in 1870-1, 2% in 1900-1, shrank to nothing after World War I B.R Tomlinson, The economy of modern India, (Cambridge, 1993), p. 52.
importance of the subcontinent as a reservoir of men and military resources. Devolution and a policy of Indianisation provided a means of extending state power and ability to intervene in Indian society the cost of which could be born by the Indian, rather than British, taxpayer. The Montagu-Chelmsford reforms, that became the 1919 Government of India Act, marked something of a change in the colonial state’s approach to securing its aims. While the economic climate of the late nineteenth century had allowed colonial officials to secure British international interests with little intervention in the Indian economy, the impact of World War I and changes in Britain’s demands from its empire, prompted officials to take on a more involved role in the management of Indian resources – a role that was, in the face of mounting fiscal difficulties, only to grow over the course of the 1920s and 1930s.

Whereas the tangled web of rights and practices surrounding Indian property had done little to hinder colonial policy in the late nineteenth century, it was, by the mid 1920s, proving to be a source of growing annoyance to some colonial officials, particularly those in central government. As this next section explores, colonial policy, rather than nationalist ideology, played a central role in shaping the law reform debates and legislation that eventually paved the way for the Hindu Code Bill project.

The 1919 Government of India Act introduced important changes in the structure of both political and economic power within the colonial state. While the new constitution set out to decentralise power and give greater authority to the provinces, the Meston Settlement, setting out the redistribution of government income under the new constitution, served in many ways to heighten the economic power of the central government. With payment of India’s sterling debts left in the hands of the Government of India, many British officials were anxious to ensure that the central government retained economic potency. Regional difference in landholding structures meant that

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30 Meston himself had served as Lieutenant-General in the United Provinces between 1912-8 but was a strong central man having also held positions as Secretary to the central Finance Department (1906-12) and as Finance Member on the Viceroy’s Council between November 1918 and May 1919. In preparing the settlement he expressed the view that the centre “ought to keep and shall be thoroughly justified in keeping a substantial margin of safety for our Imperial requirement.” Minute by Meston, 31 August 1919, Financial Dept. Collection no. 323, no. 10, no. 5456 of 1919, IOR, cited in Neil Charlesworth, ‘The Problem of
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land revenue was given to the provincial governments. Though it had previously been the primary source of state income, land tax was not such a lucrative source of revenue in the post-war economic climate with provincial governments struggling to raise rates without inciting popular opposition. The central government, on the other hand, was granted control over other systems of taxation in which there was greater scope to raise revenue, such as income tax and excise duty, an arrangement which proved a source of considerable tensions within the reformed state structure.31

While the proportion of national income gleaned from excise and custom duties began to rise in this period, the state’s access to income tax was more problematic. Though its new devolved structure brought state apparatus into contact with a larger number of Indians, the confused state of property law and legal uncertainty about property rights made accurate calculations of income difficult and created much space for dispute. Falling global demand for the raw good produced in India, coupled with rising population levels meant that, over the course of the 1920s and ‘30s, rights to land became an increasingly contentious subject that could, at times, give rise to social conflict.32 Whereas during the nineteenth century the colonial state had felt little obligation to respond to calls to reform the Hindu joint family system, or even the weak and overburdened court system, the early 1920s saw the Government of India take a growing interest in the state of the legal system, particularly property law.

In the years following the passage of the 1919 constitution, debate opened up within the Government of India about the state of civil law, particularly property rights. Officials continued to steer clear of claims that the structure of Hindu law, with its focus on the joint family, was to blame for legal chaos, but were much exercised about the length of time it took for courts to deal with cases and the processes surrounding documentation of property rights. In August 1922, Sir Tej Bahadur Sapru, then Law Member on the Imperial Legislative Council, circulated a note ‘on the causes of delay in

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31 Ibid, pp. 536-40.
civil courts'. An eminent Indian lawyer and liberal, Sapru highlighted confusion about property law as a source of particular problems. The laws of documentation and evidence provided individuals with the opportunity to bring false and disruptive suits that delayed the courts, undermined the claims of "honest suitors" and prevented the exact registration of property, he argued. The laws of limitation and lenient treatment of Hindu reversioner heirs also came in for much criticism.

One of the commonest class of cases is represented by suits filed by reversioners to set aside alienations made by a Hindu widow without any legal necessity. Now a Hindu widow may survive an alienation made by her for a period of fifty years. Only recently I recollect reading a case in the Privy Council Reports in which an alienation made between 70 and 80 years ago was sought to be set aside. I have appeared in numberless suits of this description in which alienations of 30 to 40 years were attacked.

To free the Indian legal system from lengthy civil cases, delay and frustration, Sapru argued, the government needed to revise and reform its laws of limitation and evidence.

Looking into the matter, officers at the Home Department in Delhi agreed with Sapru, taking his argument even further to warn that "the course of litigation [in civil courts] is...subject to such delays as tend to cause some lack of confidence in our administration of justice and must inevitably create an obstacle to the commercial and industrial development of India." Unable to afford or countenance deep legal intervention into social relationships, W.T.M. Wright, the joint secretary of the Home Department attributed these difficulties not so much to structural as procedural problems and the idiosyncrasies of Indian society. Customary practices and a "social system which involves in some cases the necessity of considering the claims of members of joint families and in other those of numerous collaterals and reversioners" were blamed for legal confusion and lengthy, unnecessary delays. Indians themselves and not the

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35 Ibid.
36 "In some provinces the disposal of suits relating to land involves a lengthy consideration of the bearing of customary laws which have not up to the present been codified, or even crystallised in a definite or unified form. In other provinces the state of the local law, as for instance that relating to impartible estates, is itself responsible for the great delay which characterises this class of cases. Throughout India the fact that the courts have to depend on the services of an inferior and sometimes unreliable ministerial agency leads
colonial state were responsible for these problems. This of course was a long standing argument used to free officials from the obligation of social reform.\textsuperscript{37} Yet, on this occasion, Wright’s note was in fact followed by government action along the lines he had suggested.

In a letter to his colleagues in the provinces, Wright set out plans to clarify and streamline certain problematic aspects of civil law. Previous government attempts at piecemeal reform and “general or particular modifications in the Civil Law or the procedure of the courts” had, Wright explained, led to some “Substantial improvements” in the system but had failed to expedite the course of civil litigation. “[I]f any improvement is to be now effected,” he maintained “it can only be as the result of a review of the whole question in its widest aspects.”\textsuperscript{38} The Government of India was taking steps to centralise legal practices and bring control over property rights under its own authority. This was to be done, however, at the minimum expense. At a time when extracting revenue in India was becoming increasingly sensitive, this project was about making, not spending, money. Certainly, costs could not be defrayed to the provinces, who were already complaining that the Meston Settlement had left them over burdened with payments to the centre.\textsuperscript{39} In his letter Wright explained the Government of India’s desire “to make it clear” to the provinces that an enquiry into the centralised reform of civil law “would not deal with considerations connected with the strength of the judicial establishment, for they have no desire that measures should be suggested which would involve an increase of expenditure on Local Governments.”\textsuperscript{40}

While this announcement sought to allay provincial opposition to centralised law reform, the financial constraints on the Government of India set strong limits to what

\textsuperscript{38} Letter to all provincial governments from the joint secretary to the Government of India, Home Department, 25\textsuperscript{th} June 1923, ‘Report of the Civil Justice Committee 1924-25’ IOR V/26/143/1.
\textsuperscript{40} Letter to all provincial governments from the joint secretary to the Government of India, Home Department, 25\textsuperscript{th} June 1923 ‘Report of the Civil Justice Committee 1924-25’ IOR V/26/143/1.
these reforms could actually achieve. Indeed, as devolution placed the state under greater pressures of accountability, the entire project can be read, to some extent, as an attempt to detract public attention from the slow and ineffective judicial system by creating an appearance of political concern. Yet, a month after Wright’s letter, the Government of India announced its first steps towards the amendment of civil law, focusing particularly on succession. In July 1923, Sir Alexander Muddiman, Home Member, introduced to the central assembly, on behalf of the government, an Indian Succession Bill. The measure would not change or reform any laws but simply “consolidate the law applicable to intestate and testamentary succession in British India”. As the government explained, “The separate existence on the Statute-book of a number of large and important enactments renders the present law difficult to ascertainment and is, therefore, every justification for an attempt to consolidate it.” Rather than major structural reform, the measure sought to collate separate statutes, on the basis that this would provide greater legal clarity and therefore smoother functioning of the law. Significantly, the bill did not deal with religious personal law but with non-religious Indian law statutes based on English law. Governing British and Anglo-Indian subjects, most of these statutes had been passed during the nineteenth century, in the same period as English law was radically reformed.41 Thus, although the Succession Act marked a change in the Government of India’s general attitude to law reform, colonial officials remained deeply reluctant to embroil themselves in religious personal law, in spite of the specific difficulties cited by Sapru in relation to Hindu law.

However, as the government was soon to realise, having been interpreted and developed in parallel, the line between ‘secular’ civil law and religious personal law was, in certain areas, somewhat blurred. Setting out the law of marriage for subjects not governed by religious personal law in India, the Special Marriage Act of 1872 had also recognised the right of Hindus, Muslims, Indian Christians and Parsis to have a civil rather than religious marriage, in cases, for example, of inter-communal marriage or in situations where the union did not comply with religious or customary edict. However, following much debate and controversy, the final wording of the Marriage Act demanded

41 A.P Muddiman’s Statement of Objects and Reasons to the Indian Succession Bill, 21st July 1923 GOI Home Department, Judicial, F.549/1923, NAI.
that, to marry under it, a couple must renounce their religious faith and give up their right to be governed by religious personal law in all other matters of family relations.\textsuperscript{42} There was one important exception to this ruling however: a Hindu who married under the 1872 Act would continue to be governed by Hindu personal law with regards to succession to his joint family property.

Though few Hindu couples had married according to the Act, in the sensitive political climate of the inter-war years the government clearly did not relish rekindling controversy by removing the clauses protecting joint family, or ancestral, property.\textsuperscript{43} Yet, as investigation continued, the government found a number of other measures pertaining to civil succession but also affecting religious personal law or regional landholding agreements, an area that had been placed beyond the centre’s jurisdiction after 1919. Consequently, it was decided to leave outside the purview of the bill the 1923 version of the Special Marriage Act and the Hindu Disposition of Property Act; the Oudh Estates Act, 1869, Malabar Wills Act, 1898 and Bombay Regulation VIII of 1827, on the grounds that “These are enactments of local interest which would not properly find a place in a general consolidating enactment.”\textsuperscript{44} As a result, there were almost as many areas of succession law left out of the Indian Succession Act of 1925 as were included.

The Government of India’s attempt at legal clarification through consolidation and centralisation did not stop with the Indian Succession Act. In January 1924 a Civil Justice Committee (CJC) was established to see through the centralised “improvement” of the civil legal system as outlined by Wright. Comprising of five senior ranking

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\textsuperscript{42} This is dealt with in chapter 5 see also Pervez Modi, ‘Love and the Law: Love-Marriage in Delhi’ Modern Asian Studies 36, no. 1, (2002), pp. 228-235.
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\textsuperscript{43} Proposals made by Sir Arthur Froom that the process of consolidating succession law be used to simultaneously update it in accordance with corresponding contemporary English law demonstrated this problem. Froom sought to introduce “the more liberal rule of the English law” with regards to widow’s inheritance by bringing the rights granted to widows under the Indian Succession Act of 1865 into line with the English Intestate Estates Act of 1890. While the bill was intended “clearly... to provide for cases of persons not domiciled in India [and for]...a few persons domiciled in India, for example, more or less wealthy Anglo-Indians or domiciled Europeans” Home Department officials pointed out that the bill could meet strong opposition from “Hindus, Buddhists, Sikhs, Jains, etc. to whom the provisions would apply by the reason of the Special Marriage Act”. The bill was thus only allowed to pass after amendments were included specifically exempting Hindus who married under the Special Marriage Act from its provisions. See Note by Tonkinson, 2\textsuperscript{nd} March 1926, GOI Home Department, Judicial, F.179/1926, NAI and also Home department notes in GOI Home Department, Judicial, F.549/1923, NAI.
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\textsuperscript{44} Report of the Joint Select Committee on Indian Succession Act GOI Home Department, Judicial, F.549/1923, NAI.
justices, the committee received help from co-opted members, including those who supported legislative reform of religious personal law such as Sir T.B. Sapru and Hari Singh Gour. Looking into the problems surrounding the operation of civil law, the committee highlighted confusion about heirs’ rights within the Hindu joint family as a particular cause for concern. Regarding Hindu widows’ position as limited owners, the Committee was very critical about the current laws that prohibited a widow from selling property inherited from her husband and using the profits to secure her own financial security. “[T]he law should be restored or changed” it argued, so “as to permit of alienations, which, though not strictly necessary for the preservation of the estate, would be distinctly beneficial to it”. Yet, as before, reforming the structures of Hindu personal law provoked considerable concern and opposition within the administration. “Any legislation styled as one relating to the transactions of a member of a joint Hindu family,” the Government of India’s Legislative Attaché, J.R. Dhurandhar warned, “would meet with commendable opposition which would no doubt be of sentimental nature.” Similarly, both Sir Alexander Muddiman and the then Law Member, Mr S.R. Das, expressed reluctance at granting Hindu widows too much power and weakening the laws protecting the reversioner. Even the CIC was uneasy about calling for full scale reform of the Hindu joint family unit itself. Instead, they proposed a reform of the Indian limitation laws setting out the period in which reversioner heirs could contest a sale or alienation by a widow, to allow such a suit only up to twelve years after the transaction

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45 The CIC was chaired by Hon’ble Mr Justice George Claus Rankin of Bengal. Its other members were Hon’ble Mr Justice Louis Stuart, CIE, ICS, Puisne Judge of the High Court of Judicature at Allahabad; Dr. Francis Xavier DeSouza, ICS Barrister-at-Law, District and Sessions Judge in the Bombay Presidency; Dewan Bahadur Sir Tirumalai Desika Acharyyar Agarval, Kt. Vakil, Trichinopoly with Mr C.V. Krishnaswami Ayyar, Subordinate Judge in the Madras Presidency serving as secretary of the Committee.

46 The eminent Hindu jurist Dr (later Sir) Hari Singh Gour was a keen advocate of law reform on grounds of consistency and clarity of administration. In 1919 he published his Hindu Code in which he called for Hindu law to be codified to aid its administration. Along with many other members of his profession, Gour entered the colonial legislatures in the 1920s and used his position there to continue to push forward his reform agenda. Gour brought a range of bills to reform Hindu law including his Bill to define the liability of a Hindu coparcener. GOB Home Department, F.2730/1923, MSA.


48 Note by J.R. Dhurandhar, Legislative Attaché, 25th July 1926 GOI Home Department, Judicial, F.296-I-29-32/1925, NAI.

49 Minute of a meeting between A.P. Muddiman and S.R. Das, 9th September 1926 GOI Home Department, Judicial, F.630/1924, NAI.
itself had taken place.\textsuperscript{50} Once again, the Government of India recoiled from the prospect of reforming the structures of Hindu succession law, in this case, the way in which women held property, choosing instead to tackle the legal confusion surrounding Indian property rights through a policy of codification and clarification of existing succession laws.

If the Government of India felt uneasy about its ability to intervene in religious law, many of the Indian representatives who entered the provincial and central legislatures after the 1919 reforms did not.\textsuperscript{51} Whereas previously the government had shown reluctance to support bills calling for law reform, officials showed little resistance to measures which, in the economic climate of the inter-war period, seemed to sit well with their own agenda. Consequently, the 1920s saw the enactment of a handful of private members bills, dealing with law reform in general, but property rights and succession in particular. These bills shared a common focus on greater central regulation of practices and greater documentary registration under family law, all of which served to make the legal system more homogeneous.\textsuperscript{52} In late 1928 Hari Singh Gour revived and navigated through the central assembly two bills dealing with the order of succession under Mitakshara law.\textsuperscript{53} Of more significance to the overall workings of the coparcenary system was M.R. Jayakar’s Gains of Learning Bill. Passed in 1929 it gave educated Hindu men greater control over their income and individually acquired property.\textsuperscript{54}

Though these bills furthered some of the Government of India’s aims regarding property law reform, they also opened up the legislature to the debates about the Hindu joint family that had arisen in response to the law reforms of the 1860s, as discussed in the previous section. Indian legislators brought their own interests, supporters and power

\textsuperscript{50} Extract from ‘Report of the Civil Justice Committee: Powers of alienation of Hindu Limited Owners, PART I, Chapter 40’ GOI Home Department, Judicial, F.630/1924, NAI.

\textsuperscript{51} Indian legislators’ support for personal law reform is analysed in the next chapter.

\textsuperscript{52} These included the introduction in 1922 by Hari Singh Gour of a bill for Hindu adoption to be valid only with a written instrument, as well as a bill to define the liability of a Hindu coparcener; other bills are discussed below and in more detail in the next chapter.

\textsuperscript{53} These were originally introduced by Seshagiri Ayyar in 1922. The ‘bill to amend the Hindu Law relating to exclusion from inheritance of certain classes of heirs’ regarding mentally and physically disabled heirs was passed into law in September 1928 but the ‘bill to amend the Hindu Law of inheritance and alter the order in which heirs of a deceased Hindu male dying intestate are entitled to succeed to his estate’, amending women’s succession rights, was not passed until 12\textsuperscript{th} February 1929 GOI Home Department, Judicial, F.1017/1927 and F.615/1927, NAI.

\textsuperscript{54} See Chapter Two.
struggles to the assembly so that Indian-led reform of religious law was often not any less controversial than had it been moved by colonial officials. The explosion of hostility around Rai Harbilas Sarda’s Child Marriage Restraint Act in 1927 was to prove this point to the government. Having worked, albeit reluctantly, with Sarda to formulate and reform his bill, the Government of India came under pressure from regional officers to back down and maintain distance from family law reform.

By the end of the 1920s, therefore, in spite of debate and various government initiatives, much of Indian succession law remained in the same confused and decentralised state it had been in at the turn of the century. However, the redistribution of economic power under the 1919 Government of India Act had prompted the Government of India to begin to consider more deeply the structure of the personal legal system. A personal legal structure built around the large, multi-generational joint family had served the interests of the Company-ruled state, while the complex regulations regarding alienation of property had been vital to the early colonial economy. Though its structure and the controls on property rights had created much confusion as the agrarian economy and market trade had begun to develop and prosper towards the end of the nineteenth century, they had not jeopardised the state’s power or income sufficiently to warrant concern. Changes in British imperial interests and in the subcontinent’s international trading position had served to change this. By the early 1920s, while there was still much hesitation about the impact on political security of tampering with ‘traditional’ family structures, the Government of India was beginning to see the problems and drawbacks of the joint family model enshrined in colonial law. Beyond the law, the state was also

56 In a speech in the legislature around the time of the agitation against the Sarda Act, Muddiman explained that “With a Government constituted as ours, definitely pledged to religious neutrality, it is far more difficult for the legislature to intervene in these matters. Our critics often say that we are too slow in moving in them at all. I hold the view that caution must be the watch-word of Government in these matters. In a homogenous community we are well aware that legislation of this nature may rend the social and political structure. In a vast country like India with its many sects and communities that is even more true...I think that it may be generally admitted that in a matter of this kind the Government do not bring forward proposals which have not been very carefully considered and based upon the views of legal authorities and other persons. The reason is clear. Government as I have said is naturally and must be, cautious in these matters and there is not the slightest probability of such Bills emanating from Government” Notes for speech prepared for Muddiman regarding proposals to establish communally constituted select committees to consider personal law reform bills discussed concurrently with the Sarda Act, undated GOI Home Department, Public, F.2/2/1930, NAI.
beginning to take on a new, more involved role in other areas of Indian life, particularly the economy, in an attempt to keep it financially stable. Basic development projects and credit facilities were being set up to assist peasant farmers,\textsuperscript{57} while in the cities the state was even beginning to intervene in labour disputes and negotiations.\textsuperscript{58} Across the board, colonial officials were being drawn into more involved relationships with Indians from a wider range of backgrounds and interests than had been the case previously. Reconsidering the colonial legal system, with regards to property rights and succession was very much part of this movement to adapt old colonial structures to the new changing circumstances of twentieth-century imperialism. Plunging the state into even greater financial and political crisis, the depression of 1929 only served to heighten the impetus for reform.

\textit{Economic depression and law reform}

As had been the case after World War I, economic and political events served as the major catalyst for reform debates in the latter part of the inter-war period. The global slump of 1929 demonstrated clearly the extent of Indian agriculture’s stagnation and decline, to which the legal confusion about land rights had contributed. While on the one hand, the British used the Raj to cushion the impact of the crash on the economy of the metropole, as the Indian economy spiralled into a deep and long depression, its foreign masters were eventually forced to introduce policies to help the subcontinent’s financial and social situation. The depression only began to lift in September 1931 with the decision to tie the rupee to the sterling, prompting export of the country’s gold reserves in a bid to pay off the national deficit.\textsuperscript{59} Such developments forced a realisation that the largest sector of the Indian economy was too dilapidated and under-funded to be able to lift the country out of depression. As India struggled to keep up her payments to London, the depression also exposed the extent to which the Indian and British economies had


\textsuperscript{58} Rajnarayan Chandavarkar, \textit{Imperial power and popular politics: class, resistance and the state in India, c.1850-1950}, (Cambridge, 1998), Chapter 3.

grown apart since the late 1890s. The subcontinent could no longer provide a strong market for the heavy industry and consumer goods produced in Britain. Furthermore, with the Indian state in desperate need of revenue, new import tariffs were introduced that penalised British producers, subverting the economic basis on which the British Raj had flourished. In its attempt to keep the domestic economy afloat, the government was drawn into an increasingly involved role, having to improvise institutions able to manage the distribution of resources, including capital and food.60

Hoping to develop the manpower and networks within society to help with these sensitive tasks, the colonial administration looked to devolve more power to Indian representatives. The 1935 Government of India Act widened the Indian franchise still further and granted autonomy to the provinces.61 Yet, even more than in 1919, the desperate economic situation meant that this transfer of power to the provinces was matched by a corresponding heightening of central power as the Government of India tightened its grip on Indian production and expenditure. While the Government of India sought to use its power to prevent economic meltdown and maintain the subcontinent’s military and financial commitments, Indian nationalists also grew more interested in the strengthening of centralised power. Sweeping the board in a surprise but decisive victory in the 1937 elections, the first held under the new constitution, provincial Congress committees were able to form governments in nine out of 11 provinces.62 This success lifted the eyes of the Congress High Command from the provinces to the national stage, with leaders arguing that the elections demonstrated a clear endorsement of their claim to speak for the Indian nation as a whole. Such arguments fed into debates about personal law as many of the new Indian representatives moved private members bills dealing with this subject. While there had been much criticism of existing legal and social structures and a gradual movement towards centralised consolidation of non-religious law in the 1920s, the later 1930s saw a more clear-cut drive towards centralised reform of religious

personal law, led not by government officials however, but by Indian legislators.¹ These measures were to provide major impetus for the decision to begin work on a Hindu Code Bill in the early 1940s.

When situated within this longer term context of law reform during the inter-war years, it becomes possible to see the private member's bills of the late 1930s as following a similar course to the official bills introduced by the Government of India. Many of the reforms proposed in this period sought to introduce a more streamlined view of family relations and greater uniformity of practice in all areas of religious, family law across the subcontinent. In so doing Indian legislators did not always share the same interests as colonial officials, of course, and acted in accordance with their own particular motivations. Discussed in greater detail in the next chapter, the most prominent of these were the Muslim Personal Law (Shariat) Application Act and the Hindu Women's Right to Property Act, both of which were introduced soon after the elections in 1937. The Shariat Act was largely successful in removing the regional and customary differences that had characterised Anglo-Muslim law, introducing in its place a single, uniform legal system based on Koranic teachings.² Though it sought also to introduce a single system of family property rights for all Indian Hindus, the Hindu Women's Right to Property Act seemed to raise more questions than it answered. Unable to draw on a single, scripturally-sanctioned legal system like the Shariat, the Act created problems of application and generated disputes about the family structure replacing the joint family. An amending act, passed in 1938 failed to put an end to debate or further calls for reform. By September 1939, the central legislature faced no fewer than seven private member's bills dealing with reform of family structure and access to resources under Hindu personal law.³

While this alone may have prompted the Government of India to take steps to limit what were proving to be time consuming debates, the announcement that India

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¹ See the second section of Chapter Two
² One exception to this was that the Act did not govern succession to agricultural land, which was placed outside its scope following opposition from powerful Muslim landlords in Punjab and Bengal. This will be discussed in greater detail in the next chapter. See also Ayesha Jalal, *Self and sovereignty: individual and community in South Asian Islam since 1850*, (Oxford, 2001), pp. 384-5.
³ The central legislature faced a Hindu Law of Inheritance (Amendment) Bill, a Hindu Women's Property Bill, a Hindu Women's Estate Bill and a Hindu Married Women's Right to Separate Residence and Maintenance Bill as well as proposals for three bills to alter the already amended, 1938 version of the Hindu Women's Property Act. Like Deshmukh's original bill, these measures were all brought before the Central Assembly by Indian legislators. 'Report of the Hindu Law Committee' 1941, Appendix VI.
would join the British war effort against the Axis powers provided a significant incentive for the decision to appoint a Hindu Law Committee. Eager to avoid hours of long and protracted debate about Hindu law, the government was stepping up its centralised control over state apparatus in order to prepare for the war effort. Seeking to move debate outside the legislature, on 25th January, the Government of India appointed a committee to consider and advise on the growing backlog of private members bills dealing with Hindu law.\(^{66}\)

Comprising Indian justices, the Hindu Law Committee and its subsequent Hindu Code can hardly be described as the work of the colonial government. Yet, viewed from this longer term historical perspective, it is clear that British administrators played a key role in shaping the processes and interests that drove the Code Bill project. Reform of Hindu personal law was deeply interlinked with changes taking place during the inter-war years in Britain’s imperial relationship with India. The imperial relationship had begun to change in the aftermath of World War I as Whitehall saw the value of the Raj to lie not in its role as a global trader but as a means of securing men and military resources. Devolution provided a means of tightening state powers that was, in placing the financial burden on the Indian taxpayer, in accord with the fiscal logic of colonial rule. Yet, the restructuring of political and, with it, economic power brought colonial officials into conflict with the ambiguous legal structures on which British rule in India had originally developed.\(^{67}\) Changes during the inter-war years in the political-economy of colonial rule finally forced colonial officials to take heed of the complaints that Hindu litigants had been making for decades about the confused state of their personal legal system, particularly with regards to joint family property. In line with these changes in the colonial context, the 1920s saw the Government of India begin to take significant initiatives in considering reform of property law. Though British official sought originally to avoid the controversial issue of religious law reform, as the system governing property rights for the majority of Indian subjects, it was only a matter of time before personal law became the focus of these reforms. It was private members’ bills that provided the immediate impetus for the decision to appoint a Hindu Law Committee in

\(^{66}\) Ibid, p. 17.
\(^{67}\) Discussed in the sub-section above, the Government of India’s response to T.B. Sapru’s 1922 note regarding court delays is one example of this development.
1941. However, the origins of these bills, their focus on family structure and on property rights, must be seen to lie in the debates and legislation pursued by the Government of India since the end of World War I.

Viewing the Code Bill not as a nationalist project but as a step linked to the constitutional reforms of the late-colonial period raises important questions about the Code’s potential to bring about significant social transformation. While the years following World War I saw a shift in Britain’s international position and demands on the subcontinent, these developments were not illustrative of a change in colonial interests themselves. Late-colonial policy continued to focus on extracting Indian resources to serve the interests of the metropole, and not on constructing political systems that would serve the demands of the Indian people themselves. Furthermore, the new state structure being developed in this period remained firmly bound by the financial limitations that had characterised the very early colonial state and which had been significant in creating the ‘thin’, non-interventionist legal system that had spawned many of the difficulties which the Code Bill set out to remedy. Showing how this continuity of colonial policy was vital in shaping the nature of the law reform pursued by the colonial state in the 1920s and 1930s, the next section argues that this legacy served to undermine the reforming capacity of the Code Bill project from the very outset.

**Change and continuity in the inter-war period**

Lacking the money and willpower to intervene in Indian society, British administrators in India had, over time, established a state structure that was characterised by a reluctance and inability to intervene in and restructure social relations. While the developments of the inter-war years provided colonial officials with a new interest in the structures of its personal legal system, they did not alter the colonial administration’s financial position. In fact the opposite was the case: representatives of the Government of India expressed interest in reform of the court system during the inter-war period because they were looking to secure more income. Given the historical relationship between the colonial state’s economic status and its exercise of political power and leverage, it is, therefore, unsurprising that the inter-war reforms did not bring with them an extension of state
power and control over Indian society. With the Raj on increasingly precarious financial and political ground, British officials were interested in building new hierarchies to ensure income and social influence, but not in the development of costly and potentially unpopular legal apparatus that could police family life more closely.  

Two different exchanges between central and provincial governments during the First World War begin to illustrate this point. In 1915, Diwan Bahadur M. Ramachandra Rao, a nominated member of the Madras legislature, sought to introduce a bill to resolve problems and confusions arising from Hindu widows’ limited ownership rights. His Hindu Limited Owner’s Bill set out provisions by which an individual buying or leasing land from a Hindu female limited owner could register the contract in court, shoring up the legal validity of the agreement and binding coparcenary heirs to uphold it in the future. Though women owners’ control over property would be mediated by the courts, the bill proposed a restructuring of rights that seemed to undermine the established patriarchal joint family. At the same time in calling on the courts to take on something of a policing role in these cases, the bill sought to make the state more responsible and involved with social processes than was currently the case.

While the Madras Government permitted Rao to introduce his proposal, the Government of India were quick to step in to block the introduction of the bill, arguing that such legislation should be taken up by the Imperial Legislative Council, rather than by a provincial assembly. Rao responded angrily to this move, arguing that a forward thinking and socially progressive province such as Madras should not be made to wait for more conservative regions to catch up. In response, Delhi officials decided to circulate Rao’s proposals to other provincial governments in order to ascertain whether they “see any objection to legislation being undertaken in Madras if it is not thought desirable for all India”. The majority of provincial officers and local lawyers and jurists who were

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68 This is discussed in greater detail in Chapter Two, see also Rajnarayan Chandavarkar, ‘Customs of Governance: Colonialism and Democracy in Twentieth Century India,’ Modern Asian Studies 41, no. 3, (May 2007), pp. 441-70.
69 The social background of this measure and its focus on women owners is explored in greater depth in the following chapter.
70 Letter from Mr Muddiman, Government of India to the Secretary to the Government of Madras, Legislative Department, 29th December 1916 GOI Home Department, Judicial, B Proceedings, February 1917, nos. 251-252, NAI.
71 Note by S.R. Hignell, Private Secretary to the Viceroy 19th December 1917 GOI Home Department, Judicial, B Proceedings, February 1917, nos. 251-252, NAI.
asked to provide opinions strongly opposed all-India level reform of such a fundamental structure as the Mitakshara joint family. In Rao's home province of Madras, while commercial groups supported the bill, some landowners and agrarian elites voiced strong opposition. Subbarayulu Reddi, a landowner and lawyer with considerable political influence, having held a number of local government posts in his district of South Arcot, argued that the bill would undermine the traditions and wealth of the majority of the Hindu community for whom "the joint family status is the rule."

As a result, the bill was abandoned. Rao did attempt to revive the measure some years later, redrafting it to apply not only to Madras but to Mitakshara joint families throughout India. Introduced to the central assembly in July 1924, the revised bill was referred to the Criminal Justice Committee who vetoed its measures, arguing that it would serve to raise, rather than lower, litigation levels. A revision of the Indian limitation laws to allow reversioner heirs to contest alienations only 12 years after the death of the widow was adopted instead.

Developments in Punjab, around the same time, form a very interesting point of contrast. In September 1915 Sir Michael O'Dwyer, the Lieutenant-Governor of Punjab, organised a conference attended by 23 of the "best judicial, legal and administrative talent of the Province" to discuss the state of Punjabi customary law. Governing not all Punjabis, only designated agriculturist tribes and families, Punjabi customary law reflected the particularly close relationship between the government and the cross-communal landholding community in this, the final province to be annexed by the British. Designed to protect the interests of the multi-religious community of landholders, Punjabi customary law was held to be secular rather than religious, having evolved, according to colonial officers and western academics, not from religious practice but

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72 Précis of provincial opinions, summary of collected opinions in letter to Secretary of State for India, Right Hon’ble Edwin Montagu, signed by Sir William Hailey and other Home Department officials, 21st November 1919 GOI Home Department Judicial, A Proceedings November 1919, nos. 293-306, NAI.
74 The Committee argued that 'Every alienee would probably feel obliged to have recourse to these means of safeguarding his title. If he does not do so, an inference would inevitably be drawn against him.' Extracts from the Report of the Civil Justice Committee: Powers of alienation of Hindu Limited Owners, Part I, Chapter 40, Italics in original. Home Department, Judicial, F.296-I-29-32/1925, NAI.
from the traditions of a martial-turned-agrarian community.75 In spite of this non-religious status, Punjabi Customary law emphasised hierarchical authority and the rights of male agnatic heirs over family property in a way that was very similar to Hindu personal law, especially the Mitakshara system of coparcenary. As a result, it too suffered from similar kinds of confusion regarding the rights of heirs and the primacy of ancestral claim over individual contract.76 In a letter to Delhi, H.M Cowen, Revenue Secretary in the Government of Punjab, explained that a very large proportion of the civil cases heard in the province were between agricultural parties governed by custom;

Of this general mass of customary litigation, again, a very large proportion consists of suits either for a declaration that the alienation of ancestral property by its owner is void on the ground that it has not been made for reasons of valid necessity, or for the possession of property alleged to have been so alienated. Some of such suits are of a blackmailing or speculative character or are brought with the collusion and support of the alienor, while many of them are under the existing law of limitation brought many years after the alienation impugned has taken place. Such litigation obviously has the effect of rendering titles uncertain, as the alinee of property which was, or which is alleged to have been, ancestral so far as the alienor is concerned, cannot be confident that his possession will not be attacked till many years have elapsed since the date of the alienation; while even if his possession is legally secure, he is exposed to blackmailing claims on the part of alleged collaterals or heirs of the alienor who have little to lose if their suit is unsuccessful.77

Concerned about the implications of this situation both for social stability and for agricultural productivity, the Lieutenant-Governor convened his September conference to discuss the possible reform and codification of Punjab Customary Law.78

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77 Letter from H.M. Cowan, Revenue Secretary, Government of Punjab and its Dependencies to the Secretary to the Government of India, Home Department, 27th August 1918 GOI Home Department, Judicial, B Proceedings, December 1918, nos. 27-30, NAI.

78 ‘Report of the conference on the codification of Punjab Customary Law’ GOI Home Department, Judicial, B Proceedings, Feb 1919 nos.9-10, NAI.
commitments slowed government response to these suggestions, but, by 1918, administrators had drafted two bills. The first reduced the period of limitation for suits relating to family alienations, meaning that it allowed heirs to take legal action only up to six years after the transaction had taken place.\textsuperscript{79} The second imposed restrictions on the power of descendents and heirs to take legal action against an alienation on the grounds that such a transaction was alien to their custom.\textsuperscript{80} When presented with the bills, Sir Alexander Muddiman, then serving as a secretary in the legislative department of the Government of India, pointed to some drafting concerns but offered the Government of Punjab general backing for the legal reform.\textsuperscript{81} The two bills were enacted as the Punjab Limitation (Custom) Act, and the Punjab Custom (Power to Contest) Act, Act 1 and 2 of 1920 respectively. These acts were to form an important precedent for the legislation passed by the state later on in the 1920s and for the general drive towards reform through codification.

The Punjab legislation and Rao’s proposed Hindu Limited Owners Bill tackled slightly different aspects of the same kind of problem: the confusion relating to the rights of reversioner heirs vis-à-vis the sale and transfer of family property. The ways in which they sought to reform this situation were very different however. Firstly, applied to a very small, closed community of landowners, the Punjabi legislation posed little threat to the power and economic stability of rural elites, on whom the provincial government felt their authority to depend. Punjab’s role in the Raj as a crucial border state and as the primary recruiting ground for the Indian Army made government officials much more willing to act on the interests and needs of the land owning classes than in southern India.\textsuperscript{82} However, Rao’s bill did not seem to be in consonance with the interests of already powerful landowners. Altering property rights within Hindu society as a whole, at first in Madras but later throughout India, Rao’s bill was seen by many powerful

\textsuperscript{79} This had been set out as 12 years under the Punjab Limitation Act.
\textsuperscript{80} Copy of the Punjab Customary Suits Restrictions Bill which was later passed as the Punjab Custom (Power to Contest) Act, GOI Home Department, Judicial, B Proceedings, February 1919, nos.9-10, NAI.
\textsuperscript{81} Hon’ble Mr. A.P. Muddiman, Secretary to the Government of India, Legislative Department to the Revenue Secretary, Government of Punjab, Simla 8\textsuperscript{th} November 1918, GOI Home Department, Judicial, B Proceedings February 1919, nos.9-10, NAI.
agrarians to threaten one of the key structures through which they exercised their economic and social power. Whereas the Punjab bills reinforced the established balance of power, and were thus seen as uncontroversial, Rao’s bill was seen as a potential threat to existing social structures. Secondly, Rao sought to resolve and improve legal confusion surrounding property rights in his province by placing greater emphasis on court regulation. Making the court responsible for overseeing the legitimacy of land transfers, his bill advocated a much greater policing role for the civil legal system than it currently held. It was this aspect of his measure that came under particular criticism from the CJC. Consolidating into written acts the regulations governing heirs under Customary Law, the Punjabi bills proposed a solution to the problem that was cheaper and placed little burden on state apparatus. While contemporaries heralded this process of codification as a step towards legal modernity, in comparison to Rao’s proposals it appeared a much more superficial response. Within the financial constraints of the ‘thin’ colonial state structure, however, this more restricted approach was welcomed and quickly endorsed by the legislature.

This discussion forms quite a different context for consideration of the inter-war reform legislation and the codification project it inspired. As examined in the earlier sections of this chapter, the Government of India’s growing support for centralisation and codification of succession law during the inter-war years seemed to suggest a gradual break from its nineteenth-century approach to governance and apathy regarding law reform. Though understood in relation not to changes in colonial rule but rather to an emerging nation-state, previous historians have seen this shift in attitude to law reform as marking an important break in political structures, providing an opportunity to bring about far-reaching social change. Yet, this comparison of the reform debates in Punjab and Madras demonstrates important continuities as well as ruptures in colonial policy. In Madras the Government of India expressly rejected a measure that would bring the state into much closer contact with society and convert the colonial judiciary from a structure that protected vested interests, into a system for imposing and policing individual, private property rights. The two Punjab Acts of 1920 altered the balance of power within the

83 N. Hancock Prenter, ‘Custom in the Punjab II,’ *Journal of Comparative Legislation and International Law, 3rd Ser.* 6, no. 4, (1924) p. 230.
agriculturalist family unit but did not give the state any new powers of intervention in the unit, thus continuing to uphold the autonomy that the family head had come to enjoy under colonial personal law. These experiences would suggest that the reform and centralisation of personal law in the inter-war period did not necessarily entail a profound reconfiguration of the state’s relationship with society. Codification and the type of centralisation pursued by the state did not impose state power deeper into Indian society. While the model of the family at the heart of the legal system underwent modification, the legal system itself was not transformed to become a tool to enforce the rule of law. Though the Code Bill was a much more comprehensive and ambitious project than the Punjab Acts, its focus on codification rather than major reform of Indian legal apparatus and its powers meant that, from the outset, the Hindu Code Bill was unlikely to be able to impose drastic reform of women’s position in the family.

That is not to say that the Hindu Code Bill would inevitably fail to bring about change. Setting out a new vision of the Hindu family, the Hindu Law Committee had the capacity to dramatically alter the range of social interests propped up by the colonial legal system. Indeed, following in the wake of the Shariat Act and the Hindu Married Women’s Rights to Property Acts, the Hindu Code Bill looked set to weaken the rights of the older patriarchs who enjoyed power under the joint family structure. Whether or not this would lead to a restructuring of Indian society, around notions of individual rights and more market-driven relationships remained to be seen, however. Certainly the state’s past record on codification and legal reform held little promise of a profound move towards a ‘thicker’ state apparatus and tighter legal regulation of society.

**Conclusion**

This chapter began by looking at the ways in which previous historians have seen the Code Bill as a crucial break with a colonial past and an opportunity, albeit one not taken, to enact real and substantial social reform. It has gone on to argue that far from being indicative of the new interests of a post-colonial state, the Hindu Code Bill project was rooted firmly in transformations taking place in colonial policy and in drives to strengthen British interests in India during the inter-war years. Yet, in so doing, it has
also sought to demonstrate why people have come to see the Code Bill project as marking a new period in Indian politics.

Beginning with an examination of the personal legal system in nineteenth-century British India, personal law reform seemed to provide a space in which the very foundations of colonial governance could be altered. Indeed, the Code Bill set out to undo the legal confusion that had arisen in large part as a result of the colonial state’s long term alliances with local men of influence and support for their hierarchical power. The economic climate of the later nineteenth century meant that colonial officials failed to see, or managed to ignore, the increasingly tangled and paradoxical structure of property rights under religious, though specifically Hindu, law. But World War I and its aftermath prompted important shifts in colonial administrators’ approach to governance in India, including legal structures. Devolution and the redistribution of revenue under the 1919 Government of India Act prompted the central government to engage with the question of reform of succession rights specifically. These concerns about property, rather than concern about women’s rights, were of primary significance in driving forward the debates about personal law reform.

The Hindu Code Bill project can thus be seen in many ways to mark a significant break with nineteenth-century colonial policy. Yet, this view of the Code as linked to colonial interests also helps to highlight continuities in the colonial administration’s approach to Indian society and social reform. Reflecting the many financial and social constraints facing the imperial project in India, the colonial legal system had developed as a means of protecting the interests and autonomy of influential Indians rather than making them accountable to the rule of law. While some Indian reformers did advocate the introduction of measures that would give the courts more teeth and independent power over society, the general sentiment behind the inter-war drive for reform was far more conservative. Indeed the focus on codification and clear rejection of calls to introduce structural or procedural reform during the inter-war period reflects this most prominently. The central government lacked the resources and political will to reach into society and overhaul social structures, while many of the Indians who enjoyed considerable power under the existing system were reluctant to support changes that
would undermine their autonomy.\textsuperscript{84} Codification of family law provided a means of reorganising the model of the family through which power was negotiated in the courts but, without a corresponding reform and strengthening of legal structures to enforce the new law, would never bring about substantive change in the way that property was held and accessed. Inter-war law reform was about changing the interests reflected in personal law but not about the way that law was exercised or imposed. The legislation of the 1920s and ‘30s reflected a desire to expand and develop the social hierarchies and interests with which the colonial state interacted, rather more than a desire to improve and strengthen legal accountability, market relations and the rule of law.

This analysis provides us with a much stronger background from which to begin to assess the debates and interests playing out in the Hindu Code Bill debates. The Code Bill had the capacity to bring about enormous and important change in the subcontinent, but, was circumscribed by powerful conservative attitudes right from the start. As subsequent chapters will explore, events between 1941 and the enactment of the final sections of the Code Bill in 1956, were vital in shaping the measure, its aims and its effectiveness. Yet the structure of political and legal power under British rule was to continue to play an important role in shaping the Code Bill, even after independence.

\textsuperscript{84} See Chapter Two.
2. Individual rights and family reform in the inter-war reform debates

Analysis of the Child Marriage Restraint Act, more commonly known as the Sarda Act after its sponsor Rai Harbilas Sarda, has come to dominate discussion of personal law in the inter-war years. While the act itself has widely been seen as ineffective, the agitation and campaigns that surrounded its passage have been presented as a crucial moment in the development of a women’s movement in India.¹ In their support for the Sarda Act Indian women leaders and organisations, particularly the All-India Women’s Conference were catapulted onto the international stage, while the focus of the act itself, on the rights and claims of the child bride has been seen as a transformative movement in the development of ‘modern’ citizenship in India.² Together with nationalist leaders’ promises about women’s liberation after independence and the commitments to gender equality contained in the constitution of 1950, this view of the events surrounding the passage of the Sarda Act helps to explain the sense of disappointment with which many contemporaries, and historians subsequently, viewed the provisions of the final Hindu Code Bills. The years between World War I and independence seemed to promise so much to Indian women, which was never delivered.³

While not contesting what has become the accepted narrative about the Sarda Act, this chapter offers a very different view of the inter-war debates about social reform and of the Sarda Act’s place within them. The furor surrounding Katherine Mayo’s Mother India has been seen as particularly significant to the passage of the Sarda Act.⁴ Published to coincide with another round of constitutional negotiations between British and Indian representatives, Mayo’s blistering attack on Indian, and particularly, Hindu sexual mores,

challenged head on the ability of Indians to rule themselves at the moment when demonstrating this mattered most to political representatives. As a result, it was decried by Indians across the world. In Britain, the book also triggered a campaign amongst British women imperialists who sought to use Mayo’s argument to negotiate greater power for themselves in colonial policy-making on the grounds that they would protect the interests and well-being of their Indian sisters. Such arguments served to undercut the claims by the relatively young all-India women’s groups that they were best able to speak for the interests of Indian women. As a result, Indian women and men from across the political spectrum were brought together to protest against Mayo and her book.

The dynamic between Indian male representatives and women leaders in presenting this opposition to Mayo’s claims has been the object of considerable study. The focus in Mother India on domestic relations and on women’s status in particular meant that arguments about gender and Indian political identity were increasingly fused together in Indian responses. Historians have argued that in this context, Indian women leaders were able to seize the international limelight. Denouncing Mayo’s book, these women presented themselves as strong figures who, far from being oppressed by their male folk or in political opposition to them as were many European women leaders, enjoyed the political support of Indian male leaders. While this committed women leaders to using language and arguments in line with those of male nationalists, it also

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5 Mayo set out the main points of her argument in the first chapter of her book, entitled ‘Argument’. "Why" ask modern Indian thinkers, "why, after all the long years of British rule, are we still marked among the peoples of the world for our ignorance, our poverty, and our monstrous death rate? By what right are light and bread and life denied?...it is precisely at this point, in a spirit of heavy sympathy with the suffering people, that I venture my main generality. It is that: The British administration of India, be it good, bad or indifferent, has nothing whatever to do with the conditions indicated above. Inertia, helplessness, lack of initiative and originality, lack of staying power and of sustained loyalties, sterility of enthusiasm, weakness of life-vigor itself – all are traits that truly characterize the Indian not only of today, but of long-past history. All, furthermore, will continue to characterize him, in increasing degree, until he admits their causes and with his own two hands uproots them." Katherine Mayo, Selections from Mother India, edited by Mrinalini Sinha, (Delhi, 1998), pp. 78-9.

6 As well as opposition in India, Indians living in America and Britain also held public demonstrations and issued written protests against Mayo and Mother India. Later these communities also called for her subsequent photograph book The Face of Mother India, which was banned in India, to be prohibited throughout the British Empire. JOR L/P&J/12/322

strengthened their position vis-à-vis their male counterparts, placing pressure on the latter to support women’s demands in their claim to speak for the nation as a whole.

The Sarda Act became the focus of these intersecting and competing claims, its amendment reflecting the convergence of the interests of women’s groups, social reformers and political leaders interested in proving their fitness for power. Starting life as a civil measure designed to prevent child marriages within the Hindu community, the bill was amended, in the wake of the Mayo controversy, as a criminal measure, to apply to all Indian communities. The act included provisions to punish an adult groom but also the couple’s guardians in cases where the age of consent, set finally at 14 for girls and 18 for boys, was broken. These changes sent a powerful message to the world that seemed both to undermine Mayo’s arguments and strengthen Indian representatives’ position in the constitutional negotiations. That the measure now applied to all Indians, regardless of religious identity, strengthened claims about Indian unity made by groups like the Congress and All Indian Women’s Conference. Secondly, that this was a private members bill, rather than a government measure, suggested that it was Indians, and not the colonial state, that were the agents of social reform in India. The revised bill also appeared to transform the relationship between the ‘social’ and ‘political’ spheres that underpinned colonial policies of religious neutrality.\(^8\) Whereas the family had hitherto been distanced from the state, part of the realm of tradition in which the state did not intervene, the revised Sarda Act seemed to give the government power to enter into and mediate relations within the domestic sphere. In so doing it created an impression that, while the colonial government had shied away from tackling the social problems Mayo had highlighted, an Indian-led state would involve itself more directly in the family in order to secure its improvement.

This argument has been made most forcefully by Mrinalini Sinha who sees the *Mother India* controversy and events surrounding the Sarda Act as paving the way for a new configuration of Indian citizenship. While she concedes that the Act itself was a dead letter, sabotaged by colonial officials following considerable opposition from

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Muslim and Hindu men who opposed legislative intervention in their familial practices, she argues that its legacy has had long term repercussions. Cutting through the hierarchy of religious law in which a person’s rights were ascribed by their age, religious and caste identity, she argues that the Sarda Act acknowledged the state’s responsibility to an individual citizen. Unlike the male engendered citizen of classical republicanism, the individual citizen set out in this act – child bride – was firmly female. The Sarda Act paved the way for what is known now as ‘positive discrimination’ or ‘affirmative action’, she argues, by committing the state to securing and defending the individual rights of its female citizens against male transgressors. In India, this view of citizenship became the basis for the constitutional pledges made by the independent nation-state in the Fundamental Rights.

This chapter demonstrates why the image of the child bride citizen was unique and left an extremely powerful legacy in Indian politics. Yet it raises serious questions as to whether the Sarda episode helped to empower Indian women, arguing instead that it provided powerful ammunition for the re-subordination of the women’s movements that had risen to prominence during the Mayo controversy. Sinha maintains that women’s power in the Sarda episode was never anything more than transitory and was quickly subsumed within the nationalist project in the years after the Act. This chapter shows that the Sarda Act must be seen not simply against the backdrop of the nationalist movement but within a longer term context of social reform debates taking place in the inter-war period, debates that turned not on the need and claims of women but on the rights of men. Tracing the regional origins of this debate it shows how and why Hindu men sought to improve their own access to property by presenting their claims as beneficial to the

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9 Fearing public unrest, from the Muslim community in particular the Central Government circulated orders to Provincial Governments to allow the Act “to come into operation slowly and if sufficient time is allowed for the knowledge of its salutary provisions to spread, and that, in order to secure this result, care should be taken to ensure that the introduction of the Act is not made the signal for numerous and sensational persecutions...Government are further of opinion that, until some experience of the effects of the Act has been gained, nominal sentences should be imposed in cases of conviction, and that sentences of imprisonment should be avoided as far as possible.” As a result the Bill was left un-enforced in almost all provinces and became a virtual dead letter. Government of Bombay to Government of India, 26th February 1935. L/P&J/8/716 IOR.


interests of women. It is within the framework of these fairly conservative reform debates that the true legacy of the Sarda Act becomes clear.

The controversy surrounding Mother India had an enormous impact on the inter-war reform debates. On the one hand, Mayo’s re-statement of the colonial civilising mission seemed to threaten the state’s policy of non-intervention in religious practices, and thus also Indian men’s autonomy in the domestic sphere. On the other, the confluence of interests around the Mayo agitation provided a moment in which Indian women could seize the initiative and use the language of women’s rights in the reform debates to pursue their own agenda. The political dominance of male reformers vis-à-vis Indian women allowed them to regain control of the debates quickly, passing a number of reform measures after the Sarda Act that sought to protect Indian men from the reformist drive of outsiders. As the second part of this chapter explores, the desire to frame reform in specifically indigenous terms served to heighten the emphasis on religious community in the debates. At the same time, reformists were quick to see the rewards they could reap from the Sarda experience. Women’s role in the Sarda debates was used to reaffirm the progressive and egalitarian nature of what were in fact highly patriarchal reforms. The focus on indigenous practice in reform measures also helped to perpetuate the myth that Sinha highlights as the key innovation of the Sarda episode – that Indian-led reform signified a willingness amongst Indian men to allow the state to intervene in the home and help Indian women. In fact, claims that Indian men, rather than the colonial state, were best able to secure the interests of Indian women served not to secure greater rights for women but to reinscribe male autonomy over the family.

**Property claims and family structures in the inter-war reform debates**

While, the nineteenth-century had seen much debate about social reform in India, questions about women’s rights and family practices took on new meaning and potency during the inter-war years. This had much to do with social and economic changes as well as the political reforms that followed World War I.\(^{12}\) Increased interaction between the Indian and world economies, new educational and employment opportunities and

\(^{12}\) See Chapter One.
urban growth from the late nineteenth century onwards created pressures and tensions within the Indian family, as the previous chapter began to explore. Reflecting the long history of colonial presence in these regions, the Indian Presidencies were most directly exposed to economic and institutional change under the British. The impact of these changes on family structures was felt most acutely by Hindus governed by Mitakshara law, colonial interpretations of which had stressed the collective nature of property ownership over individual access to resources. Consequently, debate about family law reform was led by representatives from Madras and Bombay, where Mitakshara was the dominant school of Hindu law. Significantly, the Bengal Presidency did not play a prominent role in these debates. Having led discussions about social reform for much of the nineteenth century, Bengali legislators were no longer interested in questions about women’s status and position in the family.13 Furthermore, following the division of the Presidency in 1905, many influential members of the Hindu community in Bengal were more focused on the distribution of political power within their own province than the wider social reform debates.14

The dominance of representatives from Madras and Bombay in debates about the family and social reform was not a new situation. By the turn of the twentieth century, the southern and western presidencies had established their position as the central hubs of social reform debate in the subcontinent. However, before 1919, these debates had remained largely regional in focus. The constitutional reforms that followed the end of the First World War saw the movement of these more regionalised debates into an emerging national political sphere. As a result ideas that had been developed in response to local customs and legal structures came to form the basis of a debate framed in terms of the interests and needs of Indian society as a whole.

In sketching the development of women’s legal rights in India, most academics have focused on the debates that, at first glance, were of greatest pertinence to women’s lives, particularly questions about marriage and the age of consent. This thesis argues

13 Partha Chatterjee has argued that this is because, by the latter nineteenth century the ‘women’s question’ had been ‘resolved’ by social reformers in Bengal. Partha Chatterjee, ‘The resolution of the women’s question’ in K. Sangari & S. Vaid (eds.), Recasting women: essays in colonial history, (Delhi, 1989), pp. 233–53. See also Tanika Sarkar, Hindu wife, Hindu nation: community religion and cultural nationalism, (London, 2001), Introduction.
14 Joya Chatterji, Bengal divided, (Cambridge, 1994), especially Chapter 4.
that, though these discussions were highly important, they must be understood within a wider framework of debate about the distribution of power and resources within the family. In singling out for particular attention the 1891 Age of Consent Act and 1929 Sarda Act, historians have eclipsed a highly important issue in the reform debates and one that was much discussed in the almost forty year period between these acts. From 1891 to 1929 a number of important social reform bills were introduced to the legislatures, some of which did seek to bring about all-India legal changes. Unlike the 1891 and 1929 bills, however, these did not deal with child marriage and consent. It was the question of property rights that dominated these measures, many of which were proposed by representatives from the Madras and Bombay Presidencies.

The argument presented here is not simply that there are other strands of the social reform debate that are worthy of interest, academic or otherwise, but rather that the debate about property rights formed the crucial framework in which social and family reform were contemplated and discussed. Chapter One has looked at how, from the mid-nineteenth-century onwards, competition for resources between different groups of Hindu men came to place the colonial state’s view of the Hindu family as a paternal hierarchy under pressure. In opening up to scrutiny the hierarchical structure of male power within the Hindu family, these debates raised important questions not simply about the claims of individual men to resources, but also those of women. Advocates of reform were by no means blind to the fact that, when taken to their logical conclusion, arguments about individual property rights could loosen not simply the authority of the elder patriarch over the family, but undermine patriarchal dominance altogether. In this context, discussion about marriage and the conjugal relationship took on more significance for reformers, as a means of mediating women’s claims as individuals to family resources.

Colonial claims about the civilising mission and fitness to rule meant that demands for political as well as material power coalesced in these debates. Thus, debates that were seemingly about women and their interests were, on closer consideration, driven by a

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15 Charles Heimsath goes so far as to suggest that “Perhaps the opponents of the Age of Consent Bill could be held responsible for the fact that no major social reform legislation was passed between 1891 and 1929, when minimum ages for marriage were established by the Sarda Act.” “The origin and enactment of the Indian Age of Consent Bill, 1891” The Journal of Asian Studies 21, no. 4, (Aug, 1962), p. 504.

competition for power between older patriarchs and the younger representatives entering the legislatures during the inter-war years. Divided into two parts, this section of the chapter looks at how differences in regional legal structures and also in political relations helped to shape the calls for family reform in the southern and western regions of British India during the inter-war period.

Madras: conjugality and property rights

Though the religious basis of Anglo-Indian personal law conveyed some sense of discreet Hindu and Muslim communities united by a common faith or set of practices, the persistence of different pre-colonial customs that varied between regions also served to shape debates about the family and its reform. As areas of the Madras Presidency were opened up to global market forces, from the end of the nineteenth century onwards, Hindu men found their own economic interests to be challenged not only by the coparcenary system but also by the legacy of pre-colonial practices under which women had enjoyed greater access to property than under colonial law. Many of these customs, particularly those related to the matrilineal Marrumakkatayam and Aliyasanta legal schools had been the subject of provincial reform debates in the late nineteenth century. The constitutional reforms of the inter-war years brought with them an opening out of these provincial reform debates onto a more all-Indian stage. As a result, the issues that had shaped the earlier south Indian reform debates continued to influence the emerging national debate, with important implications for the language of reform and place of women within law reform legislation.

The existence of matrilineal legal systems under which women enjoyed considerable recognition of their property claims necessarily meant that questions about patriarchy and women’s place within the family were more complex in southern India than in other regions. Yet, at the same time, while there were considerable differences between the Mitakshara coparcenary and the taward, the joint family unit in matrilineal schools of law, colonial rule had served to tighten the hierarchical structure of both units in ways which meant they were affected in similar ways by the economic and political changes that accompanied the switch to Crown rule. As south Indian agriculture was drawn into closer relationship with world trading patterns, from the late nineteenth
century onwards, new tensions began to emerge within both the nuclear and coparcenary structure. The family came under further pressure from state expansion as many educated men moved away from their rural family home towards the city to take up professional positions. As wealthy younger sons began to live away from their family home and establish their own independent households, there was growing support for reform of joint family property holding structures. Beginning in the 1890s, this drive for reform focused on Mitakshara law, the legal system by which the majority of Madrasi Hindus were governed.

In 1891 Sir Bhashyam Iyengar proposed a Gains of Science Bill, to make the income of a professional Hindu man his own, individual property. Up until this point, colonial courts had ruled that such funds did not pass to the earner but into the joint funds of his family coparcenary estate, as repayment for money spent by the family on a son’s education. In altering this situation, Iyengar’s bill sought to break down the paternal authority of the Mitakshara karta over the wider family, and to establish stronger individual rights of the professional man over his income. The bill won considerable support from the young liberal crowd, much to the surprise of Iyengar, who argued that his bill sought to introduce economic efficiency, not radical reform. After nine years of legislative wrangling and disputes, the bill was eventually passed in 1900 only to be vetoed by the Governor of Madras.

Questions about marriage and conjugality were of great importance to the late-nineteenth-century debates in Madras about access to family resources and the status of matrilineal law. For young men, living away from their natal home, the conjugal relationship offered an alternative property owning structure to that of the coparcenary and joint family system. Whereas the karta spoke for a large family unit, comprising of

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19 Colonial interpretations of Hindu legal texts held that while any income acquired as a result of an ‘ordinary education’ paid for by his family was the property of the earner, income acquired by an individual on the basis of ‘extraordinary education’ paid for in a similar way, was to be divided amongst members of the coparcenary. ‘Extraordinary education’ was deemed by the Privy Council to include training for entry into the Indian Civil Service and in particular schooling abroad, primarily in England. See Gokal Chand vs. Hukam Chand Nath, L.R. 48 Indian appeals, p.162 cited in original draft of statement of objects and reasons for the Hindu Gains of Learning Bill. M.R. Jayakar Papers F.636 NAI.

male agnates, the financially independent Hindu male, as presented in Iyengar’s Gains of Science Bill, became the representative of a smaller, nuclear family structure, in which access to property was based on marriage. In this family structure, property was to be held by the husband, or father, whose ability to bestow and look after his wife and children underpinned his patriarchal authority.

Though this seemed to provide a solution to the difficulties of young men governed by Mitakshara law, the question of a family based around the conjugal bond presented certain challenges to men governed by Aliyasantana and Marrumakkatayyam matrilineal law. The sambandham relationship, the form of ‘marriage’ recognised under Marrumakkatayyam and Aliyasantana law, did not carry with it property claims for the husband. While a man retained control over his individual property, his access to ancestral property was as a dependent in his wife’s taward. At the same time, the non-contractual basis of the sambandham relationship meant that it could be terminated at will, by either party. In late nineteenth-century Malabar, sambandham relationships were also deeply connected to caste relationships and class hierarchy. In southern Malabar, it was customary for women from the Nayar caste, a caste that followed matrilineal law, to form sambandham relationships with not only Nayar men but also younger sons from upper-caste Nambudri families.21 Nambudri Hindus formed the bulk of the landlord or janmi class in this area while Nayar Hindus were largely intermediary tenant cultivators. Consequently, tension between men from these different classes was often expressed with relation to sambandham practices. As Nayar men began to take advantage of new political and educational opportunities, many, such as Sir C. Sanakaran Nayar, began to voice opposition to the sambandham relationship, arguing that it was an infringement of their property claims and patriarchal authority.22 By the late nineteenth century, Nayar male reformers had started a campaign for the abolition of sambandham and the

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21 The Nambudris practices institutionalised primogeniture and the eldest son married within his caste, while younger sons were expected to establish sambandham relationships with Nayar women or with women from the Ambalavasi, or temple service, caste. Praveena Kodoth, ‘Courting Legitimacy and delegitimising custom? Sexuality, sambandham and Marriage Reform in Late Nineteenth Century Malabar,’ *Modern Asian Studies*, 35, no. 2, (2001), p. 352.

22 Sir C. Sanakaran Nayar was a lawyer of the Madras High Court who, in March 1890, proposed a bill to provide for legal marriage amongst the Nayar community. This led eventually to the formation of the Malabar Marriage Commission in 1891 to consider this question more fully. Ibid, p. 351.
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introduction of contractual marriage, that carried with it property rights, within matrilineal law.\textsuperscript{23}

Questions about ‘proper’ marriage and the construction of the wife as submissive and financially dependent on her husband in these discussions were themes which also influenced debates about access to property within the Mitakshara coparcenary.\textsuperscript{24} While the bar on women’s membership of the coparcenary served to reinforce their legally dependent status, the corporate structure of property rights under this system also curtailed a younger man’s control over property and thus, by extension, his masculinity. At the same time, while Hindu men enjoyed a monopoly over property rights in theory, this was not always the case in practice. Pre-colonial customs meant that, in certain areas of the Madras Presidency, Hindu women did enjoy considerable control over property. Though law reforms of the 1860s had served to disenfranchise women’s property claims within the family, and to heighten the authority of the karta, they did not appear to have wiped out this tradition completely. A study of Nellore district, on the east coast of what is now Andhra Pradesh, has shown that certain regions of Madras may have had higher incidences of women property owners than other areas of India. From 1850 onwards, female lessors were found “in sizeable numbers...in all types of leases and in all the taluks” in Nellore district.\textsuperscript{25} The devadasi community found in the Presidency, women who were ‘married’ to a temple and who, on retirement, could be given rights over a plot of land, might also have served to raise numbers of women owners in the area.\textsuperscript{26} This not only seemed to threaten male control over property but, during the agricultural boom of the late nineteenth century, the ‘discrepancy’ between on-the-ground practice and colonial interpretations of Hindu property rights, particularly with regards to a women’s limited estate, was also a source of considerable economic frustration for Hindu men.

\textsuperscript{23} Ibid, p. 349-84.
\textsuperscript{24} For the relationship between debates about ‘proper’ marriage and legal protection of a husband’s power over his wife under colonial rule see Samita Sen, ‘Offences against marriage: negotiating custom in colonial Bengal’ in Mary E. John & Janaki Nair (eds.), A question of silence? The sexual economies of modern India, (New Delhi, 1998), pp. 77-110.
\textsuperscript{25} M. Atchi Reddy Lands and tenants in South India: a study of Nellore District 1850-1990 (Delhi, 1996) p. 144. Atchi Reddy also explains that the custom of Devadasi, or temple dancing women, in Madras would have added to levels of women property owners in the region. Devadasi women were granted rights over land by the temples in which they worked after they had retired.
Though women’s rights in land were, in some areas, still recognised, women owners faced particular difficulties in the highly patriarchal structures of the land market that was emerging under colonial rule. Social conventions limited women lessors’ ability to cultivate land themselves, and also to supervise tenants. Frequently forced to lease their land as a result, these challenges meant that women owners were often in a weak position to set the terms of rental or sale agreements.\textsuperscript{27} The view supported by the Privy Council that women enjoyed only limited rights of alienation further exacerbated this situation. With control of landed property reverting to the heirs of her husband on the widow’s death, a woman owner often struggled to secure an advantageous tenancy or mortgage agreement. While the impermanency of the arrangement allowed moneylenders or tenants to secure a deal that suited their interests in the short term, they did not stand to gain in the longer term, as any investment in the property could be lost if a coparcenary sought to impose their ancestral rights and reclaim the land. Such a state of affairs seems to have had particular resonance in Nellore district where land sales had increased from 1860 onwards and where many of these purchasers acquired land for their own cultivation and not for revenue rights, as had been the case before 1850.\textsuperscript{28} Thus, in part of the Madras Presidency at least, the heightening of patriarchal authority within personal law served not to eliminate women heirs but to introduce new challenges and difficulties to the way in which they were able to farm, lease, sell and operate the land they owned.

Bahadur Rao Pantulu’s Hindu Limited Owners Bill of 1917 is best understood in this local context. A representative from the city of Elore, also situated on the eastern coast a little further north from Nellore district, Rao was attempting to use his legislative powers to deal with the very real problems facing aspiring landowners in his local region.\textsuperscript{29} Discussed in the previous chapter, Rao’s bill sought to give Hindu widows absolute right over any land they controlled, rather than the limited estate that had been recognised by the courts. Allowing his heirs to reclaim property long after a landowner’s death, the court’s recognition of a Hindu widow’s limited property rights had, in this area


\textsuperscript{29} Elore is now Eluru, in the West Godavri district of Andra Pradesh. This district and Nellore district both made up the empire of the Eastern Chalukyas, governing in the seventh century AD. K.A. Nilakanta Sastri, \textit{A History of South India}, (Oxford, 1966 edn., 1955), Chapter 10; pp. 456-7.
of Madras, served not to open up access to land but to ensure that property remained in a single family for generations. Rao’s bill attacked the idea that male agnates enjoyed greater right to a man’s property than his married wife. In so doing, Rao wanted not to encourage greater gender equality, but to allow women owners to sell their land to interested male parties. The measure was about consolidating a Hindu woman’s right to sell, rather than own, land without the intervention of her husband’s family. The principal aim of the bill was to loosen the ancestral claims to land of the coparcenary unit and to improve the position of men wishing to buy land. Women would be given stronger rights over property but only as a means of wresting control over land away from the male relatives of those families who had owned it for many years so that it might be transferred more easily to men looking to invest in and buy land.\(^{30}\) With courts across India recognising the limited nature of a Hindu widow’s estate, this issue could affect men throughout the subcontinent. What appears to be different in Madras, however, is the scale and prevalence of widow or female heirs, largely the consequence of specific pre-colonial practices. This in turn made the problem more pressing and urgent, inspiring legislation to appear in this Presidency first.

While there was some sympathy expressed for the bill and its aims, many felt that it went too far in dismantling the coparcenary system.\(^{31}\) In attempting to loosen the control of the joint family over property Rao’s bill seemed to fit into the same kind of arguments for reform as advocated by Iyengar with his Gains of Learning Bill. Yet, these measures were very different in the proposals they set forth. In calling for greater individual rights for Hindu men, Iyengar had been careful to avoid calling for individual rights for all Hindus, emphasising instead the subordinate nature of the wife to the property-owning husband. Rao had not done the same in his proposals. His attempt to weaken the joint family structure in order to improve the position of men wishing to buy land suggested that that women, as well as men, should be given individual property rights. Consequently the bill threatened the patriarchal order of not only the Hindu joint

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\(^{30}\) For some description of the tension between more established landowning classes and migrant workers with access to capital, looking to invest in land during the inter-war period see Christopher John Baker, *An Indian Rural Economy 1880-1955: The Tamilnad Countryside*, (Oxford, 1984), pp. 181-3.

\(^{31}\) One Tamil newspaper condemned the bill as appealing to “people who are utterly devoid of sympathy towards their parents and relations” *Swadesamitran*, 24\(^{th}\) March 1891, translated in *Madras Native Newspaper Reports*, 1891, cited in Mythili Sreenivas, ‘Conjugality and Capital: Gender, Families and Property under Colonial Law in India,’ *Journal of Asian Studies*, 63, no.4, (November, 2004), pp.944-5.
family, but Hindu men more generally. As a result, many Madrasis opposed the bill, though few presented their resistance in terms of opposition to women’s rights, arguing instead that it attacked the fundamental pillars of their society.\footnote{In a letter sent a few years after the introduction of Rao’s bill, S. Palaniandy Mudadil, a vakil from Tinnevelly district sought to explain to the Government of Madras that “Hindu Law is a system held sacred and dear by all Hindus. But unfortunately it suits some persons to get it altered and amended and certain others are oppressed by a feeling that India will be prosperous and even self governing but for conservative Hindu Law. The disruption of Hindu Society as at present constituted and the Mitakshara Joint family system are confessedly the prime object of a certain section of the public men of this presidency and are the calculated objects of the bills introduced and contemplated by various malcontents in Hindu Society. It must be remembered that for every man that would condemn the Mitakshara joint family system there are a hundred thousand who bless it; the Hindu Law in general and the joint family system in particular are largely responsible for the preservation of family property amidst destructive influences in this presidency.” Memorial from S Palaniandy Mudadil to the Secretary to the Government of India, Law Department Delhi, 20th November 1923. GOI Home Department F.788/1923 Judicial NAI.} Opponents raised questions of religion and traditional practices to attack the bill, reminding the colonial government of their pledge to refrain from intervention in religious matters.\footnote{See Letter from the Hon’ble Mr Muddiman, Secretary to the Government of India to the Secretary to the Government of Madras, Legislative Department, 29th December 1916. GOI Home Department, Judicial B Proceedings February 1917, nos.251-252 NAI.}

Though the Government of India’s decision to prevent the introduction of Rao’s bill did not prompt widespread opposition, neither did it put an end to regional debates about restructuring property rights within the joint family. In fact, in the context of the 1919 Government of India Act and the opening up of colonial legislatures to Indian representatives, discussions about law reform took on new momentum. Support for social reform was a means by which aspiring Indian leaders could reach out to voters, and society at large. At the same time, those seeking power were anxious to present themselves as representative of as large a group as possible and thus often sought to voice their policies in language that could appeal to Indians across the political spectrum. A. Subbarayulu Reddi, a landowner and lawyer from South Arcot, argued that, while Rao’s bill might be welcomed by “a small minority of the Hindu community”, the proposals were totally contrary to the practices and interests of the “vast majority” of Hindus, “viz. the agricultural community” which he represented.\footnote{17th November, 1916, Government of Madras Order No. 2708 Home (Judicial), cited in Mythili Sreenivas, ‘Conjugality and capital: gender, families and property under colonial law in India,’ Journal of Asian Studies 63, no. 4, (November, 2004), p. 945.} In this bid to present oneself as spokesman for a broad constituency, the idea of a religious community, providing unity not only at the provincial but also the national level, was a powerful rhetorical tool.
Towards a new patriarchy – property and the nuclear Hindu family

Over the course of the 1920s, debate about property rights within the Hindu joint family began to move to the central legislature, with a number of Madrasi representatives introducing private members bills on this issue. Drawing on the lessons learnt in the debates about the Hindu Limited Owners Bill, these representatives looked for reforms that could improve individual rights for men in ways that did not affect patriarchal authority more generally. Rather than advocating individual property rights for both men and women, these proposals emphasised the conjugal relationship as a means of mediating property rights within the family. Growing out of this, much of the debate turned on questions of maintenance for widows. In January 1922 Sambanda Mudaliar35 called on the Government of India to formulate a bill that would “enable the widows of members of undivided coparcenary families governed by Mitakshara Law to get for their maintenance during their lives the whole income accruing from their husband’s shares of the family properties.”36 Unlike the Hindu Limited Owner’s Bill, Mudaliar proposed to grant women greater access to property as personal maintenance without giving them any rights to sell, alienate or gift the property away. However, his recommendations provoked little legislative action.

Later that year, another Madrasi, T.V. Seshagiri Ayyar, introduced a measure to alter the order of succession for female heirs governed by Mitakshara law in Madras and in the United Provinces. Pointing to the rights enjoyed by women governed by Mayukha law in the Bombay Presidency, Ayyar argued that his bill would provide greater uniformity to Hindu legal practices.37 This apparently modest bill did not raise the same degree of anxiety within the colonial state as had Rao’s measure, and the bill was enacted in March 1923. Yet, in giving greater emphasis to women’s rights the legislation did

35 Pammal Sambanda Mudaliar (1873-1964) was a legal practitioner in Georgetown and later became judge of the Small Causes Court. Like a number of other Tamil lawyers, he combined his interest in the law with a love of theatre and music. He composed ragas, adapted Shakespeare and wrote his own plays for Tamil audiences. He has been hailed as “the Father of Modern Tamil theatre” The Hindu, 27th September 2002.
36 Recommendation to the central legislature by Mr. Sambanda Mudaliar, an elected member of the assembly representing Salem and Coimbatore cum North Arcot (Non-Mohammaden Rural), 12th January 1922. GOI Home Department F.755/1922 Judicial NAI.
37 A Bill to alter the order in which certain heirs of a deceased Hindu dying intestate are entitled to succeed to his estate. GOI Home Department Judicial, F.155/1922 NAI.
carry important implications for the position of coparcenary power within the joint family. Thus, while voicing support for the measure, Tej Bahadur Sapru, then Law Minister, also reminded the legislature that “in changing the law of inheritance *qua* the women we may also be changing the order of succession of the [coparcenary] reversioners and the bill must be examined from this point of view.”

Indeed, Ayyar’s bill was significant in two key ways. Firstly, it marked a decisive shift away from the highly patriarchal, exclusively-male focus of the coparcenary structure. Introducing female heirs into the order of succession created greater scope for thinking about the family as a nuclear rather than paternal hierarchy. Secondly, the drive for cross-Indian uniformity in this bill was important and was to set an important precedent for future reform legislation.

Debates about reform of Mitakshara family structures and of erasing ‘improper’ aspects of matrilineal legal practice were brought into even tighter interplay with the introduction in July 1925 of a Jain Succession Bill, drafted, in the words of D. Manjayya Heggade, its sponsor “to bring a small Bill to effect some changes in the Aliyasantana Law of succession and inheritance by which the Jains of South Kanara are governed.”

A South Kanara Jain himself, Heggade, explained to the Madras Legislative Council that while, the South Kanara Jains conform to the Jains in other parts of India...In matters of social usages, they conform to those prevailing among the higher classes of Hindus governed by Mitakshara Law of Inheritance...Yet, by a strange irony of facts while they have everything in common with the Jains in other parts of India who are governed by rules of Hindu Law and who observe the Makkala santhana system of Inheritance to their property, the Jains in South Kanara are governed by the Aliyasantana system of Inheritance by which the line of descent to property is traced to females and whereby the property devolves on sisters and nephews rather than to sons and daughters...
Dealing with a community found only in the Madras Presidency the measure was considered by the provincial legislature, yet Heggade was careful to frame his argument in terms of the wider drive for greater clarity and uniformity in legal practices that had been promoted in Seshagiri Ayyar’s bill. Heggade combined support for a more standardised form of Hindu law with the sense of a single Hindu community being promoted in the law reform debates. Crucially, however, his bill sought to alter the gender basis of property relations amongst the south Indian Jain community and secure much greater economic power for men. This aspect of the bill was played down by Heggade who argued that his proposals did not attempt “to revolutionise the whole system of Aliyasantana inheritance and the Taward or family rights are not in any way touched upon and are kept in tact...The bill effects [sic] only the self-acquired or Taward properties of the last surviving owner”. Rather, the main thrust of the measure, in his presentation of it, was its unifying drive as an “attempt...to bring [the practices of South Indian Jains] into a line with the rights of inheritance enjoyed by Jains in other parts of India who follow the Mitakshara Law of inheritance under Hindu law.”42 While at least one legislator raised opposition to the bill, pointing out that the bill made “a serious inroad into the principles governing the [South Indian Jain] people”, the Legislative Council, and the colonial government were willing to accept the measure.43 Passed on 27th November 1928, the Jain Succession Act represented a major inroad into the already much re-shaped matrilineal traditions of southern Indian Hindu communities.

—or marriage ceremony by both parents, the rules of pollution on the occasion of birth and death are observed as in Makkala Santana system. The Jain temples are officiated by Jain priests called ‘Indras’ and they preside at the marriage and other ceremonies.” Heggede’s Statement of Objects and Reasons for Jain Succession Bill. GOI Home Department, Judicial F.647/1925.

42 Heggede’s Statement of Objects and Reasons for Jain Succession Bill. GOI Home Department, Judicial F.647/1925.

43 Diwan Bahadur M. Krishnan Nayar used arguments about women’s property rights to oppose the Jain Succession Bill. Challenging Heggede’s claims that the bill was not revolutionary the Diwan argued that it “aimed at...the introduction of the Mitakshara Hindu law into the Aliyasanthana system. We know that the Mitakshara of Hindu law does not recognise the rights of women to properties. If this Bill becomes law, if a man who owns private property dies leaving a widow and daughters, the widow will have no right to the property and the daughters also will have no right except the right to enjoy the properties during their lifetime. That is against the fundamental principle of the Aliyasanthana law. Aliyasanthana system like Marumakkatayam law recognises the rights of females to properties” Extract from ‘Proceedings of the Second Session of the Third Legislative Council of the Governor of Madras’, Thursday 20th October 1927. GOI Home Department, Judicial F.419/1927.
While the south Indian debates about social reform in the late nineteenth- and early twentieth-centuries seem, at first glance, to be focused on women and their role in the family, on deeper analysis it is evident that much of the impetus driving these discussions came from the rivalry between older patriarchs and younger men seeking to use their new found position in the legislatures to extend their own interests. The hierarchical structure of joint family patriarchy, however, meant that attempts to loosen the control of the karta or family head inevitably raised questions about the operation of patriarchy more generally. At the same time, the particularities of the landholding and caste structures in south India, combined with the prevalence of matrilineal customs, meant that reformers were forced to engage with questions about women’s rights more thoroughly than they might have had to in other regions. As a result, reformers often sought to secure greater male autonomy away from the patriarchy of the joint family without giving women greater rights as individuals and thus placing at risk patriarchal control more generally. Late nineteenth-century debates between Nayar and Nambudri Hindus about marriage and property provided an important precedent for this situation, and reformers looked increasingly to the conjugal relationship as a way of asserting male individuality and female subordination. Though driven by regional factors, constitutional reforms meant that, by the early 1920s these debates were already being drawn into wider political manoeuvrings. They were to become an important foundation for the discussions about reform that were to dominate the all-India stage in the inter-war period.

**Bombay: religious identity and personal law reform**

While specific regional practices shaped the ways in which Madrasi representatives tackled reform, particularly those related to land, many of the problems addressed in these debates and the tensions between kartas and their younger sons were beginning to affect Hindu joint families throughout India. The ideas presented by Madrasi reformers seem to have had particular resonance for Bombay representatives, who began to take a more active role in reform debates towards the end of the 1920s. This was due in part to the prevalence of common practices between the two regions, for example, devadasi
communities were also found in southern districts of the Bombay Presidency. Pre-colonial legal structures and in particular the rules of Mayukha law, under which daughters and widows enjoyed some access to their father or husband’s estate, meant that questions about women’s property rights had also played an important role in nineteenth century reform debates in the western presidency. As in Madras, state expansion and market growth had served to reshape social and family structures in the Bombay Presidency. One of the foremost trading posts of the British Raj, Bombay city was home to a significant proportion of the growing urban professional and mercantile classes that were emerging in the late nineteenth and early twentieth century. In Madras, questions about land rights had propelled debates about family reform during the early 1920s. Over the course of this decade, representatives from urban Bombay found some of these ideas had particular pertinence to their own position and began to take up arguments that had grown out of rural life in south India and adapt them in line with their own more urban interests.

As in the case of Madras, constitutional changes were an important part of the reform drive in the western Presidency. During the later decades of the nineteenth century, the Bombay Presidency had dominated, not simply debates about social reform, but also the nationalist political arena. This was due not so much to unity of purpose amongst provincial leaders, but to the divisions and differences between them. More liberal reformers such as Gokhale and Ranade supported the view that social reform could benefit and strengthen the Indian nationalist cause but were willing to work with the state and use its apparatus to achieve their goals. They faced growing opposition, however, from Tilak’s conservative faction who, while supporting reform in principle,

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44 Devadasis could be found in the Bombay Deccan, where they were also known as murali or murli. Rachel Lara Sturman, ‘Family values: refashioning property and family in colonial Bombay Presidency, 1818-1937,’ (Unpublished PhD thesis, University of California, Davis, 2001), pp.258-60.
contested the right of a foreign, colonial power to intervene in the religious and social realm of Indian’s lives. There was also a geographical element to the competition between these factions with Tilak occupying Poona, the capital of the Peshwa kingdom and a city associated with Marathi identity, pushing Gokhale and his sympathisers towards Bombay city where they too built up their support bases.\(^{48}\) The opening up of legislatures to wider Indian influences had important implications for the shape of both factional politics and debates about social reform in the Bombay Presidency. Devolution of power in the 1919 reforms broke down perceptions of the colonial state as an exclusively foreign power amongst Indian nationalists. As the previous discussion about Madras has shown, far from distancing themselves from the colonial state, many of the Indians who entered the assemblies sought to use legislative power to secure greater influence and economic power in the family and Indian society more widely. Even supporters of Tilak began, in some cases, to rethink their stance in terms of state involvement in questions of social reform. Amongst these, Mukund Ramrao Jayakar was perhaps most prominent. An advocate in the Bombay High Court, and a contemporary of Muhammad Ali Jinnah, Jayakar emerged in the inter-war years as a fiery and uncompressing advocate of social reform. Drawing on many of the questions, ideas and even legislation that had been raised in the Madras debates of the early 1920s but refashioning them in line with his own regional religious nationalism, Jayakar worked hard to promote a model of the Hindu family best suited to his own urban, middle-class interests.

**M.R. Jayakar and Hindu social reform**

Born in Bombay in 1873, Jayakar belonged to the small Pathare Prabhu caste, a high-status and traditionally highly educated but non-Brahmin caste found almost solely in Bombay. A keen and able Sanskrit scholar, Jayakar combined his interest in ancient Indian tradition and Vedic culture with a strong belief in the benefits of contemporary urban, middle-class life. His hybrid intellectual viewpoint coupled with his own concerns about his mother’s experiences as a widow gave Jayakar a particular interest in the

position of women in Indian society. Following a degree at Oxford and legal training at the London Inns of Court, Jayakar returned to Bombay in 1905 a self-consciously modern Indian man, identifying himself with a young, progressive and educated generation that was rising to prominence in early twentieth-century Indian politics, not least through their engagement with social and family reform.\(^{49}\) He was drawn quickly into the social reform debates, finding in Tilak a highly inspiring figure.\(^{50}\) Like his guru, Jayakar’s brand of nationalism combined religion and politics with a strong sense of Maharashtrian identity. Unlike Tilak, however, Jayakar’s political life and networks were based firmly in Bombay. Involved first with the Congress, and several other parties after that, the Bombay lawyer showed a particularly keen interest in political relations between Hindu and Muslim Indians, and was involved in encouraging the entente between the INC and Muslim League during their overlapping sessions in Bombay in 1909.\(^{51}\) Belying this belief in communal unity, however, was a strong sense that Hindu and Muslim Indians represented two quite different and distinct communities.\(^{52}\)

Muslim separatism seems also to have played a critical role in shaping Jayakar’s attitude to Hindu law reform. As leaders like Jinnah sought to carve out a separate political identity for Indian Muslims during the inter-war period, Jayakar worked with other Hindu leaders to sharpen the sense of Hindu identity and community. For Jayakar, this was clearly linked to the economic developments of the inter-war period. Living in Bombay Jayakar witnessed first hand the social effects of industrialisation and growing competition for resources within the urban environment.\(^{53}\) He was heavily involved with a range of philanthropic charities and support groups serving the Hindu community in the city and beyond, many of which called for Hindu unity in the wake of modernising processes that tended to exacerbate caste and class divisions.\(^{54}\) Jayakar followed reform

\(^{50}\) Jayakar served on the managing committee of the Ganapathi Utsav and was involved with its organisation through the Young Man’s Hindu Association. M.R. Jayakar Papers F.24 NAI. See also M.R. Jayakar, *The story of my life*, (Bombay, 1958), pp. 57-8.
\(^{51}\) M.R. Jayakar, *The story of my life*, (Bombay, 1958), pp. 139-140.
\(^{52}\) This view bore a striking resemblance to that of Jayakar’s contemporary, Jinnah. See Ayesha Jalal, *The Sole Spokesman: Jinnah, the Muslim League and the demand for Pakistan*, (Cambridge, 1985).
\(^{54}\) As President of the city’s Young Man’s Hindu Association, Jayakar was involved in the organisation’s attempt to build “social consolidation and solidarity” amongst Hindus its education programmes and
debates in the Madras Presidency and was a friend and financial supporter of M.K. Natrajian, the Madrasi founder of the Indian Social Reformer.\textsuperscript{55} His political leanings also had much affinity with the language and activities of Pandit Malaviya and the Hindu Mahasabha in north India, and some resonance with the calls of the Arya Samaj in Punjab.\textsuperscript{56} However, Jayakar’s calls to bridge caste division was somewhat tempered by his own caste status and Mahasabite politics. Though he stressed his non-Brahmin identity, this never manifested itself in a violent anti-Brahmin or even strong anti-caste stance.\textsuperscript{57} Rather, his own educated background and the established, elite position of the Prabhu caste in Maharashtrian society meant that Jayakar was able to mingle and compete with Brahmin and other high-caste groups on not unequal terms.\textsuperscript{58} Against the backdrop of constitutional reform, Jayakar’s connections with reformers across the subcontinent and the wide ranging appeal of his programme of Hindu unity were powerful political tools.

The marriage of ‘Hindu’ tradition and religious identity with what Jayakar clearly viewed as the economic needs of the day was given further articulation by the Hindu Law

endevours to help and support local Hindu women. The Association’s economic programme formed a core part of its activities, the objectives of which were to: 1. Maintain a directory of Hindu employers, businessmen, manufacturers and requesting them to give preference to Hindu employees. 2. Maintain a register of Hindus who are in need of employment. 3. Prepare a list of industries and professions which are in the hands of Hindus and give encouragement to the Hindus to start such industries. 4. Start classes for vocational training and small scale industries. 5. Start an Industrial Home for Hindu ladies on the lines of the Tata Industrial Home for Parsee Ladies. YMHA Programme of Work, June 1937. M.R. Jayakar Papers F.24 NAI.

Jayakar was a key financial supporter of the Indian Social Reformer and worked with its founding editor, K. Natrajian, to try to raise money and support for their cause amongst the wealthy, Hindu commercial classes. On 24\textsuperscript{th} December 1929 Natrajian wrote to Jayakar lamenting the absence of Hindu benefactors “At present” he explained “the two largest share-holders are Sir D.J. Tata [a Parsi] and the Aga Khan [Muslim] – Rs. 15,000 and Rs., 10,000 respectively and I have long felt that there should be some Hindus who can equal, if not exceed them, considering that social reform among Hindus has demanded most of our attention. You have already helped the paper both financially and by your association, and I trust I may count on your continued assistance.” M.R. Jayakar Papers F.606 NAI. Natrajian was originally from the Madras presidency but, disillusioned by that failure of the social reform movement to take hold in the southern districts, he moved to Bombay in the early 1900s. Charles H. Heimsath, Indian Nationalism and Hindu Social Reform, (Princeton, 1964), p. 256.


Research and Reform Association (HLRRA), founded by Jayakar in 1923. Like many of the legislators calling for law reform, the HLRRA argued that the existing Hindu legal system did not serve the needs and interests of contemporary Indian Hindus. While advocating reform, the HLRRA was opposed to ‘westernisation’ of the legal system, or even a sense that it should be moved forwards along a linear trajectory of progress as defined by European thought. Instead the Association argued that reform would ‘return’ Hindu law to its ‘true spirit’, to a Hindu Code that existed before the arrival of the British. Their claim that the Hindu legal system, in its most authentic and original form, had existed as a single and coherent Code of law allowed the Association to assert, by extension, the historical unity of all those governed by it. While in 1923, Indian Hindus might be divided between Mitakshara, Mayukha, Dayabhaga and many other schools or legal interpretations, they shared a common past, the principles and values of which the Association was committed to rediscovering. The HLRRA planned to develop committees throughout the subcontinent as a means of institutionalising this single Hindu community. 

The HLRRA’s reform campaigns drew on long-standing colonial and orientalist discourses about Indian civilisation and subverted them to serve their own ends. While some legislators had argued that colonial rule had institutionalised what had once been a dynamic Hindu legal system, leaving it out of touch with the needs of the people, Jayakar and his colleagues questioned the authenticity and religious basis of the current system in its entirety. Turning arguments about the civilising mission on their head, Jayakar contended that British rulers had, as a result of linguistic limitations and ignorance of Hindu life, misinterpreted the sacred Sanskrit legal texts to establish a rigid

59 The full aims of the HLRRA were listed as “(a) promote the study of original works on Hindu Law; (b) examine judicial decisions and statues affecting Hindus in the light of principles underlying the system of Hindu Law, which are to be determined by interpretation of texts and customs, according to the recognised canon of interpretation enunciated by Hindu jurists; (propose legislation with a view to rectify errors in the administration of Hindu Law, arising from departure from the true spirit of Hindu Code; (d) propose introduction of changes not in direct conflict with the spirit of Hindu Law (e) take all steps conducive to the attainment of the aforesaid purposes; and (f) to co-ordinate the working of differing provincial bodies.” Undated pamphlet setting out the Aims and Objectives of the All-India Hindu Law Research and Reform Association. M.R. Jayakar Papers F.4 NAI.

60 This argument was to be made by numerous legislators during the Hindu Code Bill, as Reba Som has highlighted in her analysis of these discussions. Reba Som, ‘Jawaharlal Nehru and the Hindu Code Bill: a victory of symbol over substance,’ Modern Asian Studies 28, no. 1, (1994), pp.169-70; 186-7.
system of law that served neither Hindu traditions nor the interests of the community. At the same time as rejecting arguments about India’s progress under British rule, the vision of pre-colonial Hindu law presented by the HLRRA was much influenced by European rationalism and notions of modernity. The Association emphasised the uniformity and the all-Indian reach of this more ‘original’ legal system, in the face of the deeply localised and irregular administration of personal law in colonial India. Jayakar and the HLRRA maintained that the “equitable and liberal spirit which pervades the utterances of the Smriti writers” had been lost on British interpreters of these texts, prompting them to introduce practices which removed the rights enjoyed by women under ‘true’ Hindu law.

Far from ‘civilising’ India, the Association argued, British rule had undermined the structure that epitomised enlightened and civilised life: the ‘true’ Hindu family. With negotiations already under way for further constitutional reform, there were important political implications to this stance. These arguments about the assertion of Hindu unity, provided a platform for Jayakar and the HLRRA to compete with Indian Muslim leaders’ assertions of their own community’s separate identity. Distancing the Hindu community – though not Muslims or other non-Hindus – from ‘uncivilised’ family practices, the HLRRA were taking on age-old colonial arguments about the fitness of Indians to rule themselves. They were thus trying to persuade the colonial state to devolve political power not simply to all Indians, but to Hindu leaders specifically. Jayakar was very interested in such claims, particularly after his election in 1926 to the Bombay Legislative Council.

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61 Jayakar expressed his views clearly in a letter to the then Law Minister, N.N. Sircar written over a decade after the foundation of the HLRRA, explaining that “it has always been my view that, owing to the ignorance of the language in which the ancient Sanskrit texts have been written, as also equal ignorance of the rule of interpretation contained in Minasa books, the spirit of the ancient texts, in many departments of Hindu Law, has been ignored in our judicial decisions. When I say this I do not refer exclusively to Judges of British nationality. I include in my criticism many Indian Judges too…It is needless to add that my criticism of such judicial interpretation is not based on racial grounds, but rests on the Judges’ ignorance of the languages of the texts and also ignorance of the sentiments of the community whose law was being interpreted. This is due to the fact that Judges are often drawn from strata which are out of touch with the Indian sentiment and are therefore ignorant of the cultural conditions of Indian society, ancient or modern. It would be the same as if Japanese Judges, with imperfect knowledge of the English language and the changing conditions of English society, gave the law to the British people, sitting isolated in Tokyo and interpreting the old rules given in Brackton and Coke-on-Lytleton. The living contact which is so necessary between Courts of Justice and the people whose legal systems are being gradually built up is wanting.” 16th August 1936. M.R. Jayakar Papers F.4 NAI.

62 Statement of Objects and Reasons for Jayakar’s Hindu Gains of Learning Bill, 12th July 1929. GOI Home Department 624/1929 Judicial NAI.
Council. In this way, personal law reform was important to Jayakar, and other legislators, to secure control both over resources within the family but also over political power within state structures, as representative of that family unit and even wider social groups.

Thus, several years before the publication of Mother India, Jayakar and his Hindu Law Association were proclaiming a connection between family law reform and Hindu nationalism. They were thus deeply aware of the political implications of Mayo’s anti-Hindu rhetoric, which went to the heart of their claims for political power. Turning on issues of women’s rights and all-community unity, the campaign against Mayo’s book that grew up around Sarda’s bill did not seem to fit comfortably with the Association’s Hindu rhetoric. Yet many of the wider arguments made about the Sarda bill, particularly in terms of law reform and fitness to rule, echoed strongly with those put forward a few years early by the Association. Indeed, once placed within the context of the debates about family law reform looked at earlier in this chapter, we can begin to see the agitation surrounding the Sarda Act in new light. In linking social reform with Indian political power, the Sarda Act served to strengthen the political position of those men who advocated reform against those who did not. Thus, though the Sarda Act itself was about women’s rights as citizens, its passage consolidated the power of male groups who were interested in reforming the family not to free women as individuals but to re-inscribe their subordination as wives within a conjugal unit.

Seen within this wider context, the Sarda Act appears to run against the grain of the inter-war reform debates. The possible consequences of family reform for the operation of patriarchal authority more generally had been highlighted with the debates about Rao’s Hindu Limited Owners Bill, since when reformers had sought to balance individual rights for men with the subordination of women as wives, widows and daughters. The inter-play of international events in the summer of 1927 affected the ability of male reformers to maintain control over the gender ‘balance’ in reform debates. Though Indian representatives had, in their support for the Sarda Act, successfully undermined claims that the colonial administration was the agent of reform in India, the Mother India debate had raised important questions about the role of the state in social reform and its right to intervene in the family. Legislators had for much of the 1920s sought to use the legislatures to secure their own power within the family, rather than that
of the state. Thus, as the passage of the Sarda Act reached its final stages and public attention was re-orientated to the constitutional reform negotiations, male reformers quickly reasserted their control over the debates and over the family.

**Citizenship and state intervention: the social reform debates of the 1930s**

The political dominance of male reformers in comparison to the nascent women’s groups meant that it did not take them long to regain control of the social reform debates. Situating them within a framework of global politics, has allowed Sinha to argue that the Sarda Act debates were of great significance in creating a new view of Indian citizenship, focused on the female and not the male subject. Yet, by neglecting the wider debates about social reform taking place in India during the inter-war period she has ignored some of the immediate implications of the Act. The notion that Indian women could call on the state to arbitrate domestic relations attacked one of the key arenas in which, under colonial power, Indian men had exercised autonomy: the family. The law reforms of the 1920s had seen particularly Hindu men attempting to use the legislature to restructure relations between men within the coparcenary, but not to bring its power to bear on the family more permanently. Hindu reformers were thus quick to demonstrate that the husband-family head who dominated over the ‘nuclear’ family of their bills should enjoy the same autonomy over the family as had the *karta* previously. Leading this charge was Jayakar.

Yet, the cross-communal reach of the Sarda Act meant that it was not merely Hindu men who were affected. The Shariat (Application) Act of 1937 can be seen from one perspective as a Muslim response to the threat posed by the *Mayo* controversy. In seeking to defend their autonomy in the home, both Hindu and Muslim reformers argued that their provisions were based not on westernised norms of progress and civility but on practices that were inherently part of indigenous culture. That ‘indigenous culture’ had come, over the course of colonial rule to be associated primarily with religious practices, together with the religious basis of personal meant that religious identity played a crucial
role in these reforms.\textsuperscript{63} Against the backdrop of heightening communal tension, these reforms helped to feed into claims about the distribution of political power on the basis of religious identity. As a result, though the focus on women’s rights and social progress was stepped up in the language of the reform debates following the Sarda Act, in the legislation itself the figure of the female citizen whose rights on the state were unbound by religious identity was quickly obliterated.

*The Gains of Learning Bill: the other side of the Mother India agitation?*

In the summer of 1929, when the enactment of Sarda’s bill was in its final stages, Jayakar reintroduced Bhashyam Iyengar’s Hindu Gains of Science Bill with some minor changes, most notably to its title, which became the Hindu Gains of Learning Bill.\textsuperscript{64} While Iyengar’s bill had raised much anti-liberal opposition in 1891, Jayakar felt that the anti-Mayo and pro-Sarda Bill agitation had changed the all-Indian political climate sufficiently to assure a different reception to his draft of the bill. The emphasis on individual rights for male Hindu earners in the bill, and also on their authority over a more nuclear family arrangement was almost the inverse of the Sarda Act’s provisions. Yet, Jayakar was careful to frame the arguments in support of his bill in much the same language as those used by Sarda’s supporters, about women’s interests, fitness to rule and Indian-led reform. In the context of the constitutional negotiations, such a tactic served to reinforce the paternal power of urban, professional men in the domestic and also political sphere.

Drawing on the same historical view of Hindu law as had been put forward in earlier HLRRA literature, Jayakar inverted the colonial state’s rhetoric about teleological progress to present his Gains of Learning Bill not as a radical departure from tradition but as a move back to authentic practices. Jayakar argued that his bill “reproduces...the true

\textsuperscript{63} On the construction of construction of the ‘religious’ nature of Indian custom see Andrea Major, *Pious Flames: European Encounters with Sati 1500-1830*, (Delhi, 2006), especially Chapter 3.

\textsuperscript{64} On 12\textsuperscript{th} June 1929 Jayakar wrote to Alladi Krishnaswamy Iyer, the Advocate General, to ask “May I trouble you to send me, at your earliest convenience, a copy of the Bill called ‘The Gains of Science Bill’ which was at one time drafted by the late with the view of modifying the strict Hindu law in that behalf, but which unfortunately had to be dropped owning to hostility of public opinion. I am going into the whole question and it will be a great help to me to peruse a copy of that Bill.” M.R. Jayakar Papers F.636 NAI. The Sarda Act was passed on 19\textsuperscript{th} September 1929.
rule of the Hindu Law, in the matter of individual and personal earnings by the member of a joint family.” Individual, rather than joint family, control of earnings was not only more in line with the essence of “authentic” law but also “a question of natural justice which in modern times can hardly be gained by any fair minded person”. While emphasising the importance of individual property rights in ‘traditional’ Hindu society Jayakar’s bill did not in any way dismiss or seek to undermine the role of the family within the Hindu community. Though his bill attacked the joint family as a legal, property owning structure, Jayakar maintained that the reform would help to protect the Hindu family as it should be constituted, as a social structure, based on affection and not legal obligation. “Knowing, as we all do, the great intensity of family ties among Hindus,” he argued “it would be absurd to contend that, if legal obligations were removed, the moral obligation [to family members] would cease to be recognised even to the extent to which it prevails among non-Hindu races.” Instead the bill would help to protect the joint family and aid it in looking after all its members. It would prevent the “wasteful, harassing and unrighteous litigation [and] distrust” that, he argued, characterised the existing joint family system and would “greatly tend to promote peace and goodwill among [family] members”. The current legal system, Jayakar maintained, “checks the natural impulse to earn and save” with potentially disastrous consequences for financially dependent relatives, who were in most situations, women. Thus,

an important result of the proposed Bill will be that it will immensely improve the position of the female members in a Hindu family. The widow and the daughter of the acquirer, often left helpless, will, in the absence of male issue, take by inheritance the deceased’s gains of learning, in preference to distant male members who can, under the present law, lay claim to the same by survivorship.66

Providing a means of protecting vulnerable family members in the current economic and social climate, Jayakar could argue his bill in fact reflected the caring and family

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65 Original draft Statement of Objects and Reasons for Jayakar’s Hindu Gains of Learning Bill, undated. Jayakar Papers, F.636, NAI.
66 Statement of Objects and Reasons for the Gains of Learning Bill, 12th July 1929. GOI Home Department 624/1929 Judicial NAI.
orientated characteristics that were an essential part of the make-up of what he thought of as the ‘Hindu race’.

In this way, Jayakar sought to push through reform that benefited Hindu men from his own urban background in the language of tradition that had been used by those who had opposed lyengar’s original bill. Yet, Jayakar’s overall aim was not simply to build a coalition or wider support for law reform but rather to assert the political authority of men from his own class in the upcoming constitutional negotiations. If the status of women signified a society’s suitability to rule itself, as Mayo and other colonial sympathisers argued, then, according to Jayakar, ‘true’ Hindu society had always been fit to govern itself. This was not an argument that the Hindu community as a whole was fit for self-rule, since, according to Jayakar, most Hindus no longer lived according to authentic traditions. Political power should be given, therefore, to those who knew the spirit of the ‘real’ Hindu law, men, in other words, such as Jayakar. The upper-caste, Hindu male professional was to mediate resources both within the ‘traditional modern’ Hindu family unit envisioned by Jayakar and the wider structure of the Hindu community.

That the measure reflected the interests of political leaders is demonstrated by its easy passage through the central legislature. Whereas the Sarda Act had taken over two years to pass, the Hindu Gains of Learning was passed in July 1930, a little more than a year after Jayakar had first begun to work on the measure. The image of the family, and of women’s place within it, set out in the two bills could not have been more different. The idea of female citizenship and state protection of women that underpinned the Sarda Act were absent from Jayakar’s measure which granted Hindu men power to ‘protect’ women as subordinates and financial dependents. Yet reformers had been quick to see the political expediency of supporting the vision of female agency set out in the Sarda Act. In the context of colonial rule and devolution of power, arguments about women’s rights and India-led reform could be harnessed to support claims about fitness to rule. In so

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67 Jayakar does not talk of a ‘Hindu race’ specifically but in the original, extended draft of his Statement of Object and Reasons for the Gains of Learning Bill he argued that the “non-Hindu races” were not united by a sense of family tie and obligation to the same extent as Hindus. See quote above, also Original draft Statement of Objects and Reasons for Jayakar’s Hindu Gains of Learning Bill, undated. Jayakar Papers, F.636, NAI.
68 The Hindu Gains of Learning Act was passed on 25th July 1930 as Act XXX of 1930. Copy of the Hindu Gains of Learning Act. GOI Home Department 624/1929 Judicial NAI.
doing, male reformers were able to push through reform measures that had little to do with creating greater rights for women and everything to do with strengthening their own social, economic and political power.

*Personal law reform and claims to power 1937-1939*

Jayakar's Act was to set a powerful precedent for the law reforms passed by the legislature in the 1930s. The negotiations for further constitutional reform dominated the Indian political agenda in the early 1930s, during which time debates about reform ground to a halt. Growing tension between Congress and Muslim League representatives during the discussions about the new constitution did much to undermine the image of cross-communal solidarity that had been projected by women leaders during the Sarda campaign. The 1935 Government of India Act further consolidated the legislative power of male reformers over that of female representatives in the wake of the Sarda episode. The Act did enfranchise more women, though not as many as Indian women leaders had hoped, and the number of new women voters paled into insignificance when compared to the numbers of men granted suffrage rights. The years following the 1937 elections, the first to be held under the new constitution, witnessed a significant surge in social reform legislation, all of which was introduced by private members. Reformers continued to frame their measures in terms of the improvement they would bring to women's lives but the extension of adult franchise created further pressure on legislators to demonstrate their representative credentials and seek the biggest constituency possible. Over the course of the late 1930s, therefore, reformers sought to use the religious basis of personal law to argue that their proposals reflected the views and best interests not only of a specific regional group or class but of a nation-wide religious community. Over this

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69 The failure of League and Congress leaders to agree on a formula for Muslim political representation in the negotiations between 1927 and 1929, followed by differences regarding Muslim representation under the eventual 1935 Government of India Act were particularly crucial for the worsening of communal relations. See Sharif al Mujahid, 'Jinnah and the Congress Party' in D.A. Low (ed.), *The Indian National Congress: Centenary Highlights*, (Delhi, 1988), pp. 217-235; see also William Gould, *Hindu Nationalism and the Language of Politics in Late Colonial India*, (Cambridge, 2004), Chapter 3.

70 30 million Indians were given the right to vote under the 1935 Government of India Act of which only four million were women. Wendy Singer, *A constituency suitable for ladies and other social histories of Indian elections*, (New Delhi, 2007), p. 39.
period the gap between the liberal rhetoric of women's rights and the conservative aims of the reform legislation was to grow ever wider.

One of the first bills to be brought before the new central assembly was the Muslim Personal Law (Shariat) Application Bill, introduced by Mohammad Ali Jinnah, leader of the All-India Muslim League. Differences in the ways in which colonial jurists had interpreted family property rights under Hindu and Muslim law meant that Muslim men did not suffer from the same restraints on individual ownership as their Hindu counterparts. Yet, the legal dominance of the individual in Anglo-Islamic law created a different set of problems for Indian Muslims. The colonial state's rigid application of Koranic laws governing individual property rights and testamentary succession made it very difficult to protect the integrity of large family estates for future generations.\(^7\)

British judges rejected arguments that \textit{waqf} law, a system of endowment that had developed in Islamic societies to deal with these difficulties, could be used to endow not only a religious organisation but also family members. As a result, it could be very difficult for Muslim men to accumulate substantial capital or sustain a family business. While the colonial government rejected more 'customary' uses of \textit{waqf} law, custom played an important role in reinforcing the power of rural elites, with whom the state preferred to interact, over religious leaders and urban professionals.\(^7\)

By the 1930s, therefore, Anglo-Muslim law had also become a source of tension, not so much within the family as with Anglo-Hindu law, but amongst Muslim political representatives. As a lawyer, Jinnah was well versed in \textit{waqf} law and had been one of the key figures leading calls for this system of customary inheritance to be recognised by colonial courts.\(^7\) As leader of the Muslim League, he was well aware of the ways in


\(^{73}\) Problems with which Jinnah was very familiar having represented clients in some of the most groundbreaking disputes about \textit{waqf} practices and brought private members bill regarding this when
which the dominance of rural elites and regional variation in custom undermined the League’s claims to speak on behalf of a united Islamic community in India. In the election of 1937 his Muslim League had secured seats in non-Muslim majority provinces but Muslims in the majority provinces had failed to flock behind his banner. In Punjab and Bengal, Muslims enjoyed enough power as a result of their numerical strength and historical relationship with the colonial governments to see little benefits for their own interests in joining the Muslim League. Reform of Muslim law was thus of special interest to Jinnah.

Jinnah’s campaign to replace Anglo-Muslim law with the Shariat legal system, set out in the Koran, drew, more implicitly than explicitly, on similar arguments to those presented by Jayakar with regards to his Gains of Learning Act. In giving preference to custom over scriptural law, Jinnah claimed, Islamic personal law, as implemented under colonial rule, was a corruption of true Muslim law. Koranic Muslim law, or Shariat law was both religiously more authentic but in acknowledging the right of daughters to inherit property from their fathers, the right to divorce and to maintenance, also more progressive than the current legal system.

The state of Muslim Women under customary law is simply disgraceful. The Muslim women’s organisations have condemned customary law as it adversely affects their rights and have demanded that the Muslim Personal Law (Shariat) should be made applicable to them. The introduction of the Muslim Personal Law will automatically raise them to the position to which they are naturally entitled.

Such an argument also built heavily on the legacy of the Sarda agitation. Following Indian representatives’ success in using popular support for the Sarda Act to subvert Mayo’s claims that Britain’s right to govern India was derived from its commitment to social reform, Jinnah’s presentation of the inherently “progressive” nature of Islamic religious scripture can be seen as an argument to reinforce Indian Muslim’s claim to political power. His reference to support for his measure from “Muslim women’s

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74 Ayesha Jalal, *The Sole Spokesman: Jinnah, the Muslim League and the demand for Pakistan*, (Cambridge, 1985), Chapter 3.

organisations” reinforced the “progressive” status of the Shariat, but it also served to imply a sense of unity amongst all Muslim representatives, and by extension, their political constituency – Indian Muslims. Yet, in basing Islamic political power in terms of adherence to “progressive” practice, Jinnah’s call for reform also undermined the political power of those that benefited from the current, “un-progressive” system of customary law, the regional, rural elites. The scriptural basis of Shariat law not only made it harder for Jinnah’s Muslim opponents to speak out against his bill, it also reinforced the religious nature of the Muslim family governed by the legal system and, as such, its autonomy from the ‘religiously-neutral’ colonial state.76 Though couched in terms of women’s interests and progressive practices, therefore, the primary aim of Jinnah’s Shariat Act was to reinforce the political claims to power of its sponsor and his supporters.

In the final call, Jinnah’s interest in, securing a sense of political unity amongst Indian Muslims prompted him to make some compromises. To secure the support of the powerful Muslim landed elite in Bengal and Punjab, Jinnah agreed to remove agricultural land from the purview of the act.77 Yet, in spite of this, the measure was significant in the long run in reshaping the balance of power amongst Muslim political representatives. Bringing all Indian Muslims under a common legal system provided greater legitimacy to Jinnah’s claims that there existed a single Muslim community which he was able to represent. The religious and scriptural nature of these laws reinforced an Islamic identity over regional, kinship and even national affiliations. The legal unity of Indian Muslims became an important aspect of the claim for Muslim nationhood formulated most clearly during World War II.78 While the nexus of gender, law and community identity had already become established under colonial rule as one of the structures shaping Indian

76 Though many aspects of Indian life were not brought under state control under Company rule, the divide between ‘political’ and ‘social’ or ‘spiritual’ realms became more formalised with the Empress Victoria’s declaration in 1858 that the new Crown state refrain from interference in the religious and customary practices of its subjects. For more on this division between ‘political’ and ‘social’ spaces and its implication for women and governance see Introduction. For an example of how male autonomy over the ‘social’ space was upheld by the colonial state see the discussion in the second part of Chapter One.
society, enactment of the Shariat Act further reinforced these bonds within the Muslim community in the language of development, progress and, eventually, nationhood.

The passage of the Shariat Act and the image it created of all-Indian Muslim unity had important repercussions in the debates about Hindu personal law reform. Through the debates of the 1920s, a new model of the Hindu family had been presented, structured not through the corporate bonds of the joint family but around the conjugal relationship. In the discussions about law reform after 1937, this remodelled Hindu family was drawn into wider debates about Hindu unity and political representation. Jinnah’s success in using personal law reform to transcend the regional divisions of the new constitution and present a single, united Muslim constituency appeared to increase his political status as an all-India leader. Jayakar’s Gains of Learning Act had asserted the autonomy of educated, urban professional husbands over their family, but it had done so with regards to only one aspect of family law and property rights. As the bid for political power grew increasingly focused on the all-Indian, central stage, Hindu representatives sought to create a more uniform system of Hindu law that would both grant them greater control over resources within the family but also reinforce their representative claims and calls for power before the state.

Introduced in the same year as Jinnah’s measure, the Hindu Married Women’s Rights to Property Bill set out to provide a comprehensive set of property laws for Hindu women, that would bring into greater alignment regional customs and the practices of different legal schools. At the heart of the bill, which was drafted and proposed by G.V. Deshmukh, a surgeon from Bombay with links to Jayakar and his HLRRA, was a vision of the Hindu family based around the conjugal unit. The most radical reform introduced under the bill was the inclusion of a dead man’s widow and daughter in the list of heirs to succeed to his property, including his share in the family coparcenary. It also rendered their share in this property absolute, rather than limited.

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79. The bill’s most radical reform was the inclusion of the widow and daughter in the list of nearest heirs to an intestate Hindu male. While it did not give women absolute property rights over their dead husbands’ or fathers’ estates it awarded them access to the estate for the duration of their lifetime.

80. This would result in the gradual phasing out of the all-male coparcenary and a move to a situation in which property remained in the hands of a more nuclear family structure. This was in fact questioned by many representatives when the bill was circulated for opinion who wondered whether this was a result of poor wording of the bill’s provisions. See for example the opinions of the Governor of Bombay and Mr.
The bill met with considerable opposition, however, when it was circulated for opinion. While many agreed with the general aims of the bill, many of those questioned voiced concern about specific provisions.81 There was particular opposition amongst officials in northern India who argued that the bill both “militated against” the Hindu joint family and gave too much power to Hindu women, placing them in a better financial position than men by allowing them to inherit both from their father’s, as daughters, and from their husbands, as widows.82 The bill was thus referred to a select committee, membership of which included Deshmukh himself, where it underwent significant revision. Differences between the Mitakshara and Dayabhaga schools of law, neither of which were mentioned in the first draft, were made more explicit in the revised bill. Under Dayabhaga law, which did not recognise any system of coparcenary, the widow was to be given the same status as a dead man’s male relatives in succeeding to his property; while under Mitakshara a widow was to be allowed to inherit a share in her husband’s coparcenary equivalent to that held by him on this death, though only for the duration of her lifetime. Any reference to the daughter, however, was removed from the revised draft. The bill was enacted, in its redrafted form in April 1937 with Deshmukh’s consent.

Yet, problems with wording and discrepancies in the regional High Courts’ interpretations of its provisions soon led to problems. As a result an amending act was passed a year later, although even this did not manage to resolve matters fully and many aspects of its provisions continued to be debated. Where the Shariat Act had imposed a clear, scripturally sanctioned legal Code on Indian Muslims, Deshmukh’s act had exposed the highly complex and diverse nature of Hindu law and family practices. Hindu representatives seemed broadly to agree on the need for law reform in some form, but not about the practices that should form the basis of a new Hindu legal system. Influenced perhaps by the rights to property enjoyed by daughters under the Mayukha school of Mitakshara law practiced in his native Bombay, Deshmukh’s call for daughters’ claims to

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81 Ibid.

82 Note from the Government of the United Provinces to the Secretary of the Government of India, Legislative Department, 15th January 1935. GOI Home Department, Judicial F.28/25/1938.
property to be included in his act was challenged by other legislators and officials, particularly those from the more conservative regions of northern India.\textsuperscript{83}

Muslim leaders were therefore able to claim the superiority of their new legal system on the basis of the rights enjoyed by women, as Hindu legislators and jurists continued to argue about the reform of their own personal laws.\textsuperscript{84} Furthermore, the religious basis of Shariat law served to reinforce the autonomy of Muslim men’s power over the family. Jayakar’s Gains of Learning Act had sought to make similar arguments in respect of Hindu men’s earnings but was much more limited in focus than the Shariat Act and lacked the political potency of the latter. While the Shariat Act seemed to close down legislative debate about Muslim personal law, the period following the passage of the 1938 Act to amend Deshmukh’s bill saw a surge in reform bills brought by Hindu members, all of which focused on the introduction of a more uniform legal system for Indian Hindus. By the end of 1939 the Central Legislature faced a Hindu Law of Inheritance (Amendment) Bill, a Hindu Women’s Property Bill, a Hindu Women’s Estate Bill and a Hindu Married Women’s Right to Separate Residence and Maintenance Bill as well as three proposed revisions to the amended 1938 Hindu Women’s Property Act.\textsuperscript{85} It was this backlog of time consuming legislation that spurred the Government of India into forming a Hindu Law Committee. Established in January 1941 under the chairmanship of B.N. Rau, the committee was charged with investigating ways in which the complications surrounding women’s property rights in the proposed bills could best be resolved. After six months of research, Rau and his colleagues expressed their view that the principal reasons for this build up of bills were ongoing attempts to reform Hindu law piecemeal.

\textsuperscript{83} This is not to suggest that the bill received unanimous support in either Bombay or Madras. However, opposition seemed to be more resolute amongst those questioned in UP and Punjab. Mr Justice Ganga Nath of the Allahabad High Court opposed all aspects of the clause to include widows and daughters in the list of decedents while representatives of the Sanatan Dharam Pratinidhi Sabha of Punjab suggested “that the widow and the daughter should get a share only in the absence of the son and that the daughter’s share should lapse to the son on her marriage.” ‘Précis of opinions on the Hindu Women’s Rights to Property Bill.’ GOI Home Department, Judicial F.28/25/1938.

\textsuperscript{84} In an article for the All-India Women’s Conference journal, Roshini, Shareefah Hamid Ali, the organisation’s president supported the Shariat Act as it gave Muslim women “many advantages compared to women of other creeds”. However, she did urge Muslim women to continue to fight for further reform maintaining that “There are many other inhibitions which can never be altered unless the Shariat is put aside, and a modern code is accepted, as has already been done to a large extent in the Indian Penal Code.” Shareefah Hamid Ali, ‘A Civil Code for India,’ Roshini, August 1940, Vol. II, No.2, pp. 44-6.

\textsuperscript{85} Hindu Law Committee ‘Report of the Hindu Law Committee,’ (June, 1941), Appendix VI.
“We ourselves,” they opined in their report, “think that the time has now arrived to attempt a code of Hindu law.”

Conclusion

This chapter has argued that the passage of the Sarda Act in October 1929 was a key moment in the drive for social reform in India, but not in the radical way in which Mrinalini Sinha suggests. It has shown how the Act was not simply the product of a short-lived historical moment, a point when events and interests fleetingly overlapped to create a new way of looking at society. Rather, they rose out of longer term debates about social reform that, though couched in the language of women’s rights, were driven by the interests and claims to property of Hindu men. The provisions of the Sarda Act threatened the conservative interests of male reformers whose focus on restructuring without undermining patriarchal authority had shaped discussions about reform hitherto. It is the consequences of the Sarda Act for the direction of this more long term, conservative reform drive, this chapter has argued, that makes it so significant.

Growing out of the impact of economic change on social structures in the Madras Presidency in particular, the reform debates of the 1920s had remained focused on protecting men’s power but had also given rise to new ways of thinking about women’s legal rights and access to property. This was in part an inevitability of opening up to scrutiny the patriarchal hierarchy of the coparcenary unit. Yet it was also the product of pre-colonial practices in which women’s access to property rights raised important questions about their place within the family.

Though reformers were aware that restructuring the coparcenary, if taken too far, could threaten rather than improve male rights, the view of the female citizen set out in the Sarda Act demonstrated particularly clearly the perils of reform. Motivated by the arguments made by Katherine Mayo and British imperialists about the relationship between fitness to rule and the social reform, the Sarda Act also opened up the possibility of greater state intervention in the family and thus the loss of Indian male autonomy over the domestic unit. Male legislators’ reactions to these developments served to strengthen

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86 Hindu Law Committee ‘Report of the Hindu Law Committee,’ (June, 1941), p. 10.
arguments for reform most associated with Bombay reformers and, above all, with M.R. Jayakar. Re-inscribing women’s rights in the family in terms of the conjugal bond, the Gains of Learning Act served as a powerful antidote to the Sarda Act by reaffirming male dominance and autonomy over the domestic sphere. Yet the firm association between reform and Hindu identity in Jayakar’s Act also added a new dimension to the debates.

Introduced as Indian politics took on an increasingly communal hue, the Shariat Act addressed not entirely dissimilar pressures within the Muslim community to those that had driven the Hindu law reforms in the 1920s. Seemingly to construct a sense of unity and common practice amongst all Indian Muslims the Act served to weaken the political power of the rural Muslim elites with whom the British had co-operated while strengthening the authority of urban Muslims such as Jinnah himself in decidedly religious terms. As such, the Act reaffirmed this new Muslim leadership’s autonomy over the domestic unit and seemed to bring an end to legislative debate about Muslim personal law. The implications of this development during the transfer of power period are explored in chapter four.

While Hindu reformers looked to enact an equivalent comprehensive reform measure they were unable to do so. Responses to Deshmukh’s Hindu Married Women’s Rights to Property Act suggested that, in the aftermath of the Sarda debates, a growing number of Hindus were interested in personal law reform, not simply those in the south and west. However, if there was consensus that the existing legal system needed to be changed, there was much less agreement about what should replace it. Indeed, growing regional interest in Deshmukh’s Act did not create a more permissive attitude towards the direction in which reform could go, particularly with reference to women’s rights. The debates of the 1920s had seen some discussion about the claims and interests of women, as widows but also as daughters. Male legislators calling for reform between 1937 and 1939 continued to draw on the language of women’s interests invoked in earlier debates, making women’s position in the home the central focus of their campaign for legislative change. Yet the bills that were in fact passed by the legislature in this period were markedly more conservative in tone. This reflected both the perceived ‘communal situation’ of this period but also the rising dominance of the more traditionalist view of the family propagated by Hindu representatives in north India, which was itself deeply
linked with religious identity. As the rest of this dissertation examines, the gap between the language of the inter-war reform debates and the conservative and patriarchal interests around which legislation was in fact framed was to prove crucial both for the development of the codification project and its outcome.

87 Charu Gupta, Sexuality, obscenity, community: women, Muslims and the Hindu public in Colonial India, (Delhi, 2001).

Thus far this dissertation has argued that the drive to reform personal law in the inter-war period was driven by conservative, patriarchal interests. It has also shown that much of the demand for the Hindu Code Bill project came from Indian representatives themselves. Far from imposing reform on a reluctant assembly, the decision to appoint a Hindu Law Committee in January 1941 reflected an accession by the government to the will of Indian representatives. Yet opposition and resistance to the Hindu Code began to mount soon after the Hindu Law Committee presented early drafts of its work. Following independence, the Code Bill came to be seen as a hugely controversial measure, with many legislators arguing that it set out to impose radical changes on Hindu law. This chapter looks at how and why this opposition grew so rapidly and vociferously.

While previous chapters have stressed the conservative nature of the interests driving personal law reform in the inter-war period, they also explored the inherent tensions involved in these debates which sought to employ a language of women’s rights and social progress in support of proposals designed to further entrench male authority. The notion of gender equality and individual rights presented by reformers could greatly undermine the hierarchical and patriarchal structures through which power was maintained in colonial society. As long as conservative, male reformers were able to dominate the debates about the family and law reform, new legislation was unlikely to bring about a dramatic change in the balance of power within Indian society. Reformers had largely been successful in this task during the inter-war years, with a minor interruption around the Sarda controversy. Changes in the composition of the legislatures during World War II, particularly following the Congress’s boycott, made it much harder for these more conservative interests to maintain their influence in the debates. Looking at how the Hindu Law Committee drafted their Code Bill, the first section of this chapter argues that the central legislature was unable to play the same buffering role in wartime law reform as it had during the debates of the 1920s and 1930s. Without the prominent presence of many Hindu male legislators, the Law Committee was left to pursue unchecked a line of reform that favoured individual rights rather than on those of the
family collective and patriarchal authority. This is not to argue that a contingent of radical reformers was able to dominate the central assembly during the war, but rather that their influence went further in a thinned and less politically powerful legislature.

The more radical take on family reform proposed in the Hindu Law Committee’s Code Bill owed much to the pressures of the codification processes itself. The drive for universal clarity and consistency in the Code, which took on not a single area of Hindu law but the entire body of the legal system, made it much harder to mix reform with protection of patriarchy. Furthermore, taking the inter-war debates about women’s rights at face value, the Hindu Law Committee’s commitment to eliminate laws discriminating against women while also creating legal uniformity, generated a much stronger focus on gender equality than had been the case in the early reform debates. Beginning with reform of Hindu succession and marriage law, the full consequences of this process became apparent only as the Code Bill was expanded and new legal areas incorporated. However, it was not until independence that the social implications of this new, more egalitarian Hindu legal system were fully realised. The final section of this chapter looks at how B.R. Ambedkar used the Law Committee’s focus on non-discrimination and equality to pursue his own anti-caste agenda. In his hands, the Code seemed to become a tool for the introduction of radical reform that threatened not only men’s power within the home but also much wider patriarchal hierarchies. By 1949, therefore, the Code Bill project seemed, to some, to threaten the very fabric of Indian society.

Patriarchy and individual rights in the Hindu Law Committee’s Code Bill

Appointed in January 1941, the Hindu Law Committee comprised of four Hindu male jurists; the Committee chairman, B.N. Rau was assisted by Dr Dwarka Nath Mitter, a Justice of the Calcutta High Court, J.R. Gharpure, Principal of the Law College at Poona and R.V.V. Joshi, a pleader in the High Court of Baroda.¹ The Committee was instructed

¹ Joshi had been a prominent figure in the inter-war debates about personal law reform and served on the law reform committee established by the Maharaja of Baroda established in 1929, during the agitation surrounding the Sarda Act. Letter from Manjulaal Sevaklal Dave to Jayakar, 9th January 1930, M.R. Jayakar Papers F.4 NAI He had also worked with the All-India Women’s Conference, publishing a series of pamphlets on women’s rights and personal law reform. Geraldine Forbes, Women in
to look into and comment on the current state of Hindu personal law. In addition the Committee members were asked to consider almost a dozen bills relating to women’s property rights and to advise the government as to how the objectives of these bills might best be realised with the minimum of legal confusion and uncertainty.\(^2\) In their report, submitted six months later, the Committee expressed the view that the 1937 and 1938 Acts were creating more problems than they solved, in particular with regard to the legal position of Hindu widows vis-à-vis the Mitakshara coparcenary.\(^3\) Aware that the pressures of war meant that “this is not the time for controversial legislation”, the Committee expressed reluctance to step directly into debates about the coparcenary, arguing that they would inflame opposition whatever stance they took.\(^4\) To repeal the acts, however, was unthinkable as it would reverse the important improvements made to Hindu women’s legal status.\(^5\) The best path, they advised the government, would be to take up gradual reform and codification of Hindu law, one branch at a time, with an emphasis on building consensus and agreement between Indian legislators. Following the support for reform shown during the debates of the 1920s and ‘30s, the Committee were

\[\text{ modern India, (Cambridge, 1996) p.116; Aparna Basu and Bharati Ray, Women's Struggle: a history of the All India Women's Conference, (Delhi, 1990), pp. 48-9; Jana Matson Everett, Women and social change in India, (Delhi, 1981), p. 146.} \]

\(^2\) The Law Committee were asked to “(a) to examine the Hindu Women's Rights to Property Act, 1937, with particular reference to the following non-official Bills: (i) The Hindu Women's Rights to Property (Amendment) Bill promoted by Mr. Akhil Chandra Datta, (ii) The Hindu Women's Rights to Property (Amendment) Bill promoted by Mr. A.N. Chattopadhyaya and others, (iii) The Hindu Women's Rights to Property (Amendment) Bill promoted by Dr. G.V. Deshmukh and Mr. Kailash Bihari Lal, (iv) The Hindu Women's Property Bill promoted by Mr. N.V. Gadgil, and (v) The Hindu Women's Estate Bill promoted by Dr. G.V. Deshmukh; and to suggest such amendments to the Act as would - (1) resolve the doubts felt as to the construction of that Act (2) clarify the nature of the right conferred by the Act upon the widow, and (3) remove any injustice that may have been done by the Act to the daughter;” and were also asked to examine and advise government on two, other, separate bills, (I) The Hindu Law of Inheritance (Amendment) Bill promoted by Mr. K. Santhanam, and (II) The Hindu Married Women's Right to Separate Residence and Maintenance Bill promoted by Dr. G.V. Deshmukh,” Government of India - Home Department: RESOLUTION, New Delhi 25th January 1941 'Report of the Hindu Law Committee,' 1941 Appendix VI, pp. 48-9.

\(^3\) After six pages detailing problems and flaws in the bill the Committee explained that “We need not continue any further this distasteful analysis of the technical defects of a legislative measure which was inspired by high motives and which, in spite of its faults marks an important stage in the evolution of women's rights. Defects of this kind are inevitable in piecemeal legislation effecting fundamental changes in Hindu law. The only safe course is not to make any fundamental changes by brief isolated Acts; if fundamental changes have to be made, it is wisest to survey the whole field and enact a code if not of the whole of Hindu law, at least of those branches of it which are necessarily affected by the contemplated legislation.” Ibid, pp. 4-10.

\(^4\) Ibid, p. 17.

\(^5\) Ibid, p. 23.
confident that such an approach would prove highly feasible and would not slow down
the pace of reform.

Our own experience leads us to believe that a substantial measure of agreement
will be possible, provided reformer and conservative resolve to appeal to the
best in each other. After all, no one, however conservative his instincts, can fail
to be moved by a real human problem.⁶

The Government of India was convinced by this argument and by late July 1941 the
Committee had already set to work on drawing up their Code, beginning with the law of
succession and then other key branches of Hindu law.

While the inter-war years had seen much debate about and support for Hindu law
reform, none of the legislation of this period had attempted such a comprehensive
overhaul of the Hindu legal system as was now being proposed. Indeed, although many
earlier reform bills had been couched in a more general, universalising language of
progress and modernity, the vast majority had focused on one aspect of the legal system –
the structure of the Mitakshara coparcenary. Right from the start, therefore, the Law
Committee’s codification project seemed more in tune with the rhetoric of the inter-war
reform debates, rather than the aims of many of the reformers involved. Analysing
the work of the Hindu Law Committee and the development of their Hindu Code Bill this
section looks at how the codification process shaped the formation of the Hindu Code.
The inter-war reform debates had been shaped by a focus on reforming the coparcenary
without undermining patriarchal power more generally. While it was not the expressed
intention of the Hindu Law Committee to produce a radical bill, the focus on uniformity
and women’s rights in their Code upset the balance struck in earlier reform debates so
that it became possible to think about strengthening individual rights for all Hindus,
female and male. Though it remained overshadowed by, first, the war and, later, the
transfer of power debates, the Law Committee’s draft Code Bill began to expose the
radical potential of law reform, for the distribution of power within the family, but also
within wider Indian society.

The wartime context of the Code Bill project was important in shaping its
outcome. By 1941, Central Assembly had undergone significant changes, in terms of

⁶ Ibid, p. 25.
composition and character, making it very different to the legislature of the inter-war years. The Congress's boycott in protest at Britain's declaration of war on behalf of India left the assembly severely depleted of Hindu representatives. The boycott did not affect Muslim representation to the same degree, however, as Muslim Leaguers and non-Congress politicians continued to attend. While Renuka Ray, the women's member appointed by the Government of India, argued that Congress legislators would have supported the Code, the absence of these representatives seems in fact to have strengthened the political power of legislators interested in more far-reaching reform of women's legal rights than had been proposed in the inter-war debates. The legislative support for protection of the husband's patriarchal authority that had served to circumscribe calls for reform of women's property rights during the 1920s and 1930s was not strong enough to dominate debate in the same way during the wartime period.

The scale and comprehensive reach of the Code Bill project also affected the direction of the wartime debates. Whereas earlier piecemeal reform measures had focused on one aspect of Hindu law alone, the Law Committee had to consider the legal system as a whole and ensure that reforms in one branch of law were in consonance with the provisions in another. In March 1941, as the Committee was working on its original report, M.R. Jayakar, a prominent reformer from Bombay,\(^7\) wrote to the Committee's chairman, Sir B.N. Rau, to express his strong opposition to piecemeal reform. Those who supported such legislation, he argued,

> forget that, running through the whole domain of Hindu Law, as the nervous system in the human body, there are important basic principles founded upon religious, social and economic theories, which were current when the Hindu Law system was built up. Unless these basic principles are dealt with, with the aid of an expert body of lawyers, who are aware of and can trace their existence in the several departments of Hindu Law, mere alternations of these rules in one or two departments will not help the cause.\(^8\)

Jayakar argued that attempts to change one aspect of Hindu law without reference to its wider foundations could only generate the confusion and litigation that had prompted the formation of the Law Committee in the first place. "You write about your present work [the HLC's preliminary report] being taken up as a 'chapter' of a 'new Hindu Code'" he

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\(^7\) See the section on Jayakar and his Hindu Gains of Learning Bill in Chapter Two.

\(^8\) Letter from Jayakar to Rau, 17th March 1941. M.R. Jayakar Papers, F.723 NAI.
wrote to Rau, “but how can you do that unless you decide the principles on which what you call the ‘new Hindu Code’ is based”? The Hindu Law Committee was quick to respond. In their initial instructions the Government of India had asked the Committee for advice on securing the aims of several proposed bills with the minimum of legal confusion. All of these measures had been focused to some extent on securing stronger property rights for women within the Hindu family. Taking these proposals at face value, the Committee explained that the removal of gender disqualifications was to be the “fundamental principle” of the new code. The Code’s succession legislation, the area of law on which the Committee first began to work, was to be constructed on the basis “that no woman shall be disqualified for succession merely by reason of sex.”

This was not a commitment to complete equality between the sexes; different laws could still be applied to women on the basis of characteristics other than her sex, for example on the grounds of adultery or due to her status within the family, as married or unmarried. But it did represent a much stronger pledge to free women of their legal subordination than many of the measures presented during the inter-war reform debates.

The Committee’s code of succession law was thus developed around two key commitments: legal uniformity and the removal of gender discrimination. The differences between the two schools of Hindu law, Mitakshara and Dayabhaga, presented a crucial barrier to legal uniformity. Significantly, the Law Committee took up the laws governing devolution of the individual property of a Hindu man and, in Dayabhaga law, his ancestral property, but not the controversial issue of the Mitakshara coparcenary. However, even in spite of this, there remained some key differences in the order of heirs between the two schools. To aid the establishment of a single, less gender-biased succession law the Committee compiled a series of notes, breaking down into the most basic form the key practices of Mitakshara and Dayabhaga law with reference to the general orders of succession, the succession of female heirs to the property of their male

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9 Letter from Jayakar to Rau, 24th March 1941. M.R. Jayakar Papers, F.723 NAI.
10 HLC’s note: ‘Intestate succession: Mitakshara school’. M.R. Jayakar Papers, F.723 NAI.
11 See the discussion of the inter-war legislation in Chapter Two.
12 Which was governed by the law of survivorship – see the description of the various schools of Hindu law in the Introduction.
relatives and the nature of Stridhana or women’s own property. Having done so, the Committee argued that the key difference between the schools lay in the order to which heirs succeeded to property; under Dayabhaga law, widows and daughters were included in the order of heirs, whereas under Mitakshara law they had traditionally been excluded. However the Committee went on to suggest that, in introducing female heirs to the Mitakshara order of succession, the piecemeal reforms of the inter-war period represented an acceptance by Mitakshara jurists of Dayabhaga principles in this crucial area. The Committee thus proposed to combine practices from both legal schools to form a single, more gender equal system of succession: “The rules are mainly those of the Mitakshara, while the enumeration [of heirs]...is mainly that of the Dayabhaga.”

The widow, unmarried daughter and widowed daughter-in-law were to be included with sons in the list of class one heirs to which property would devolve first. The few changes introduced as a result of this assimilation should not be, difficult for either Mitakshara or Dayabhaga jurists to accept, the Committee argued and “A uniform law is well worth this small price.”

Though women enjoyed a stronger claim to property under Dayabhaga law, their share in an estate was not equal to that of other, male heirs under this school, a fact that clearly contravened the Committee’s aim to remove discrimination on grounds of sex alone. To grant widows a share in property equal to that of the son seemed straightforward and in consonance with many of the bills introduced during the inter-war years. But a daughter’s share was more complicated. The clauses to grant daughters a share in the property of their fathers in G.V. Deshmukh’s original Hindu Woman’s Right to Property Act had been rejected by the central assembly on the basis that, as soon as she was married, a daughter left her father’s family to join that of her husband’s. Such exclusion, however, went against the Law Committee’s commitment to remove

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13 Four enclosures sent from the Hindu Law Committee to legal advisors and jurists, including Jayakar on 18th July 1941, entitled ‘Intestate Succession: Mitakshara school’; ‘Mitakshara school: succession of female heirs to the property of males’; ‘Intestate Succession: Dayabhaga school’; ‘Stridhana or women’s property: Mitakshara School.’ M.R. Jayakar Papers, F.723 NAI.
14 HLC’s note: ‘Intestate Succession: Dayabhaga school.’ M.R. Jayakar Papers, F.723 NAI.
16 Especially with reference to the 1937 and 1938 Hindu Women’s Rights to Property Acts.
17 ‘Report of the Select Committee on the Hindu Women’s Right to Property Bill’ (January 1937) GOI Home Department, Judicial, F.28/25/1938, NAI.
discrimination and it was decided that a daughter should be given a share of her father’s property “whether she is unmarried, married or a widow; rich or poor; and with or without issue or possibility of issue”. Her share was to be only half the size of that of her mother and brother, on the basis that she would also inherit property from her marital family. To this end, the Committee included provisions setting out that the wife of any male heir to a property should, if she were a widow when succession opened, be entitled to the same share of the property as she would have enjoyed had her husband been alive. To support this change, the Committee cited Brihaspati’s dictum “that a widow is the surviving half of her deceased husband”. In applying the maxim to property rights, the committee were, they argued, not subverting the Hindu legal system but rather reinforcing it. “[W]e consider”, they explained,

that our laws of succession should be in aid of our ideals of marriage. Clearly, a widow who succeeds to property as the living half of her deceased husband has fewer temptations to depart from the high Hindu ideal of ‘fidelity until death’. Of course, if she re-married, she will forfeit her inheritance.

Though the Committee argued that their reforms were grounded in religious text, this interpretation of Brihaspati’s dictum had important repercussions for another of the major doctrines underpinning Hindu succession law: the woman’s limited estate, which was seen by the committee as a clear example of the current legal system’s discrimination against women. Echoing some of the inter-war reformers, the committee argued that the limited estate was “one of the most fruitful sources of litigation in our Courts today” and, as a result, should be replaced with legislation giving women full control over their property. Given that “In India, Muslim women, Christian women, Parsi women and

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19 Brihaspati’s view of marriage as a sacred union of man and wife lay at the heart of upper-caste marriage practices and had been cited a century earlier to defend the practice of sati. Brihaspati’s dictum was cited in relation to property rights under Dayabhaga, which Rammohan Roy saw as related to the practice of sati.
20 HLC’s note ‘Mitaksha school: succession of female heirs to the property of males.’ M.R. Jayakar Papers, F.723 NAI.
21 In the copy of their succession bill printed in the Gazette of India the Hindu Law Committee explained that “it may appear at first sight that as, even under the existing law, a widow has full powers of alienation for legal necessity, she ought to get full value for her property. But it is notorious that she does not; for, if the reversioners do not join in the sale, the purchaser, not being sure of the legal necessity, cannot afford to pay the full value of the property, and in most cases the reversioners will not join unless they get a share of the price. The result is that although in theory the woman has full powers of alienation in such cases, in
Jaina women all take a full estate”, the committee argued “it is difficult to maintain that Hindu women alone are incompetent to enjoy full rights.”

Under colonial rule, Hindu women’s legal rights had come to be defined by their incapacity to own property. Barred from the main joint family unit, Hindu women were seen as dependents rather than legal actors in their own right. The Hindu Law Committee’s succession reforms overturned this, making women property owners in their own right and thus also able to exercise legal autonomy. Just as Jayakar warned, this had important ramifications for other branches of Hindu law, particularly Hindu marriage, which, had over the course of colonial rule, come increasingly to be framed in terms of women’s legal subordination. The nineteenth century had seen the flourishing of the doctrine of sacramental marriage amongst Hindu communities in India. Whereas marriage under Muslim and Christian law was understood as a contractual or civil arrangement, Hindu marriage was interpreted as a sacramental, indissoluble bond. This did not discriminate directly against women, as the husband’s individuality was also negated by the bond. However, the acceptance of polygamy but most crucially the fact that, as non-property owners, women had no legal rights, meant that the husband enjoyed domination over his wife. This subordination became open to contestation if Hindu women were understood to enjoy legal personhood.

To ensure that all branches of their Code were uniform and worked coherently together, the Law Committee would also have to alter Hindu marriage law in line with their reforms to succession practices. Earlier attempts to develop a notion of contractual Hindu marriage, most notably the attempts to establish a Brahmo Marriage Bill in the late 1860s, had been met with great hostility and opposition amongst Hindu men. Anxious
to avoid public antagonism and resistance to their Code, the Hindu Law Committee was also aware of their goal to iron out contradictions and anomalies within Hindu law. As a result, they decided to divide Hindu marriage law and to impose their ‘fundamental principle’ on a new branch of ‘civil marriage’. Based largely on the wording of the 1872 Special Marriage Act, the new ‘civil marriage’ was established as a contractual ceremony between two equal and consenting individuals. While it did not impose greater gender equality, the ‘religious ceremony’ that was also included in the bill did introduce greater uniformity of marriage practices by making two ceremonies “essential to the validity of a sacramental marriage... invocation before the sacred fire [and] saptapadi, that is the taking of seven steps by the bridegroom and the bride jointly before the sacred fire.”

These Brahman ceremonies were to replace all other customary practices as the basis of the marriage ceremony. Under existing colonial law, the recognition of customary practices that differed from Sanskritic prescriptions played a crucial role in underpinning caste identity and categorisation. Therefore, while it created a more streamlined system, the new marriage law seemed to threaten one of the primary hierarchical bonds structuring Hindu society. There was, however, one exception to this drive against customary diversity. The bill expressly excluded Hindus governed in matters of succession by the matrilineal Marrumakkatayam, Aliyasantana or Nambudri laws, legal systems which the committee felt did not need reform to introduce greater gender parity. Other than this, however, the provisions of the new bill were to be applied equally to all Hindus, whether Brahmans or Shudras.

Though the Committee had not set out to introduce far-reaching changes to the Hindu legal system and had steered away from the difficult subject of the coparcenary, their focus on legal uniformity and the removal of legal discrimination against Hindu women had reframed the debate about individual rights within the family. In the inter-war debates, support for women’s property rights had often been voiced in conjunction with calls for reform of the coparcenary system in ways that would also give men greater individual control over property. The Hindu Law Committee’s work placed women’s rights at the centre of the reform debate, in isolation from the joint family system. In so

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25 These changes and the Code Bill’s marriage legislation is discussed in much greater length in Chapter Five
doing, they had introduced much stronger rights for women as legal individuals, able to make claims, control property and give consent along with men. The focus on uniformity and equality throughout the Hindu legal system had repercussions for Hindu marriage law, which was transformed by the civil marriage provisions, a development which affected the hierarchy of practices by which caste identity had come to be determined. Thus, although the Committee’s proposals could be seen to build on existing legislation and practice, their marriage and succession reforms created the possibility to conceptualise a Hindu individual, unrestricted by gender or caste identity, that seemed to undermine the hierarchical relationships through which power had come to be exercised under colonial rule.

The wartime Code Bill debates

Legislators began to voice concerns about the marriage and succession reforms as soon as they were introduced before the Central Assembly in March 1943. Not all opponents of the bills condemned them outright, some expressed more measured caution about the direction and extent of the Law Committee’s reforms. Representing the Hindu urban middle class of the United Provinces, where attitudes towards women’s position in the family had always been more conservative than in the Presidencies, Mr. R.R. Gupta called for the consequences of the reforms set out in the Bill be discussed and publicised.26

I admit, Sir, that the question of right in property for our womanhood is very important and it must be conceded. All the same I find that the provisions have been framed in a way that they go far beyond what is actually essential or what is sufficient to meet the necessities of the times...I think it is essential that their effect should be clarified at this stage in this House so that those provisions may be before the public to enable them to form their opinion.27

While the debate about the Law Committee’s succession and marriage bills was seen by some contemporaries,28 and more recently by some historians,29 as a straightforward

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27 29th March 1943, LAD, pp.1553-4.
28 In a letter to Jayakar P.N Sapru described the Joint Select Committee’s debates and the position taken by a self-styled ‘progressive group’ in which he included himself. He wrote that “We have been able to carry through the Select Committee the main principles of the Bill (1) abolition of the Hindu Women’s Estate
battle between liberal factions who supported reform and conservatives who opposed it, a number of legislators attacked the codification process rather than the issue of reform itself. The joint select committee that considered the Law Committee’s succession bill during the summer of 1943 included G.V. Deshmukh, sponsor of the Hindu Women’s Rights to Property Acts, and Akhil Chandra Datta, deputy president of the Legislative Assembly, whose bill to amend Deshmukh’s acts had been the immediate reason for the Government of India’s decision to convene the Hindu Law Committee. Though both men had been significant supporters of law reform in the 1930s, they refused to endorse the codified succession law. In a brief note of dissent A.C. Datta explained that he found himself unable to support the Hindu Law Committee’s more comprehensive attempt to reform succession law, opposing it on “economic grounds” and because it went too far against “the general principles governing the Hindu Law of Succession.” G.V. Deshmukh stood opposed to the committee’s decision to continue with the codification project, arguing that the succession bill should be able to stand alone and “be complete by itself.”

Support for family law reform during the inter-war years had, in June 1941, inspired confidence amongst the Law Committee that a Hindu Code could be drawn up and granted legislative approval with little difficulty. Yet, neither Datta nor Deshmukh, both of whom had previously called for reform of women’s rights under family law, saw the Code Bill as compatible with their own aims. Tension between reform of the joint family system but protection of patriarchal authority more generally had shaped the inter-war debates about family reform, with legislators seeking to strike a balance between the two that would allow Hindu men greater individual rights, without threatening their authority over their wives. This had provided the major context in which women’s rights had previously been discussed by the legislature. When the Hindu Law Committee began

and (2) the acceptance of the principle of simultaneous heirs. We had agreed to give a share to the daughters which would be half of that of a son. While some of us would make a distinction between a married and an unmarried daughter, the progressive group including Kunzru, myself and Mahtha are not prepared for any such differentiation.” Sapru to Jayakar, 7th July 1943. M.R. Jayakar Papers, F.723 NAL. 29 A. Basu & B. Ray, Women's struggle: a history of the All-India Women's movement 1927-1990, (Delhi, 1990), pp. 65-6; Lotika Sarkar, ‘Jawaharlal Nehru and the Hindu Code Bill’ in B.R. Nanda (ed.), Indian women: from purdah to modernity, (New Delhi, 1990), pp. 87-98. 30 Note of dissent by G.V. Deshmukh ‘Report of the Joint Committee on the Bill to amend and codify the Hindu Law relating to intestate succession with the amended Bill’ (1943) IOR.
to consider women’s rights outside this ‘patriarchal framework’, however, the emphasis moved from individual rights for men to individual rights for all Hindus. The focus on uniformity in the codification project meant that no aspect of Hindu law was to be protected against this drive to break down discrimination and hierarchy. The threat to patriarchal power was clearly demonstrated when the Law Committee presented its complete Code Bill, covering all areas of Hindu law. The decision to continue with the codification process had been made by the joint select committee considering the marriage and succession bills. This resolution reflected not so much support for the Code Bill as an inability within the select committee to reach consensus about the proposed reforms.  

If anything, the decision represented the ability of a relatively small ‘progressive’ group within the committee to dominate proceedings and cajole the more sceptical majority to continue with codification.

Work on a single, comprehensive Code Bill began soon after the joint select committee had presented their report and by early 1944 the Hindu Law Committee had been reassembled, with one exception; legislators criticism of V.V. Joshi’s legal skills meant that he was not re-called to the revived Committee but was replaced by T.R. Venkatarama Sastry, a lawyer from Madras who was considered well versed in Sanskrit law. To assist the Committee’s construction of a complete Hindu Code, it was proposed that Rau and his colleagues tour the country to interview legal experts and members of the general public. In January 1945 the Law Committee embarked on a six week tour

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31 When they finally submitted their report, only two members, one of whom was the Law Minister Sir Ahmed, did not wish to register some measure of dissent or disagreement with the committee’s findings.

32 Kunzru, Sapru and Ray formed the active bastion of the pro-bill lobby in the debates, receiving support also from G.B. Nairing, Hossain Imam and S.N. Mahtha. In a letter to Jayakar P.N Sapru gave a brief outline of the Joint Select Committee’s debates in Simla, explaining that “We have been able to carry through the Select Committee the main principles of the Bill (1) abolition of the Hindu Women’s Estate and (2) the acceptance of the principle of simultaneous heirs. We had agreed to give a share to the daughters which would be half of that of a son. While some of us would make a distinction between a married and an unmarried daughter, the progressive group including Kunzru, myself and Mahtha are not prepared for any such differentiation,” Sapru to Jayakar, 7th July 1943. M.R. Jayakar Papers, F.723 NAI. However, the ‘progressives’ did not succeed in defeating a motion to re-publish and re-circulate the amended bill, a measure which they felt simply delayed reform. See note of dissent by P.N. Sapru, H.N. Kunzru, S.N. Mahtha ‘Report of the Joint Committee on the Bill to amend and codify the Hindu Law relating to intestate succession with the amended Bill’ (1943) IOR. Ultimately, however, the decision to recirculate the bill prompted the reformation of the Hindu Law Committee and the beginning of work on a more complete Code Bill.

33 See Appendix I and also footnote 27 in Chapter 5.
with stops in all the major Indian cities. While the Code Bill had created divisions within the central legislature, press coverage of the measure had been largely overshadowed by the events of the war and Congress’s anti-government campaigns. Yet the testimonies collected by the Law Committee exposed a growing sense of public unease about law reform and the possible impact of a complete Hindu Code. Many of those interviewed argued that the Code took reform too far, risking the stability both of the Hindu family and social structures more generally. In Punjab, representatives of the Sanatan Dharam Pratinidhi Sabha argued that the Code was based on western and Muslim legal norms, violating the principles of Hindu “Dharma” on which, “for Hindus every aspect of their life, whether physical, economic, political, educational, industrial or spiritual is based”

Sri D. Subrahmanya Varma, a lawyer from West Godavari in the Madras Presidency argued that the Code Bill “strikes at the root of the institutions that are the cherished pride of a vast majority of the peoples of this country. Of the uses of the caste system, the joint family, or the marriage laws generally one need hardly go into an elaborate discussion to point out their excellence or utility.”

K. Ramamurthy, an advocate from Hyderabad state and representative of the Secunderabad Sree Sanathana Dharma Mahasabha, expressed his view that the Code Bill attacked not only the spiritual values of Hinduism but also the “economic free life of the members of Hindu society” by undermining the property holding unit of the joint family. “In fact”, he continued, the bill “makes inroads on religion of Hindus [sic], destroys their rights and the structure of their society, without defining their rights or offering an economic structure for a self-sufficient India.”

There was some support for the Code amongst the testimonials, though much of this was framed in opposition to conservative or orthodox opposition.

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34 The full details of the tour were as follows: Bombay: 29th, 30th and 31st January and 2nd February (4 days); Poona: 3rd, 4th and 5th February (3 days) Bombay: 6th February (1 day); Delhi: 8th, 9th, 10th, 12th and 13th February (5 days); Allahabad: 17th, 18th and 19th February (3 days); Patna: 22nd, 23rd and 24th February (3 days); Calcutta: 26th, 27th and 28th February and 1st, 2nd and 3rd March (6 days); Madras: 5th, 6th, 7th, 8th, 9th and 10th March (6 days); Nagpur: 12th and 13th March (2 days); Lahore: 16th, 17th, 18th and 19th March (4 days) Report of the Hindu Law Committee 1944-5 (1947) pp. 2-3. Over the course of their tour the committee heard the opinions of 227 individuals or organisations, including many judges, advocates or those involved in the law, women’s groups and religious leaders.


36 Ibid. p. 555.

37 Ibid. p. 625.

38 The Indore Branch of the All India Women’s Conference expressed their opinion that the Code Bill was “necessary” and its provisions welcomed, but they also argued that opposition to the Code came from men.
On 27th September 1945, following its provincial tour, the Law Committee met again in Bombay to consider the evidence gathered and draft the final branches of the Code. Though the earlier succession legislation had steered clear of the Mitakshara coparcenary, the Committee was no longer able to dodge the question of reforming this crucial institution. The coparcenary unit and the system of survivorship that reinforced it were based on the exclusion of women on the basis of sex alone. A daughter’s movement, on marriage, away from her dependency on her father to become a member of her husband’s family had often been cited to explain this bar on women’s inclusion in the coparcenary. Yet the succession bill had already acknowledged the daughter’s rights in her father’s self-acquired estate while the view of women as property, first of her father and then, on marriage, her husband had been negated under the marriage bill. If the Committee were to retain consistency and uniformity in the Code they had little option but to propose the abolition of the Mitakshara coparcenary.

This decision caused uproar within the Committee. On 30th September, after only three days of discussion, D.N. Mitter, announced that he was resigning from the committee in protest at the decision to continue with codification. Tabulating views for and against codification in both oral and written evidence, Mitter concluded that while 206 of those interviewed supported the principle of a Hindu Code, 352 were opposed. It was not only the quantity of opposition that affected Mitter, but also the quality and validity of these views. In his opinion, the tour had shown that “Hindu ladies and gentleman representing the wealth, the talent and the public spirit of this vast country are

only and if women were to be found resisting they were “instigated by selfish men and are convenient tools in the hands of the latter.” Ibid, Vol. I, p. 97. In his evidence to the Hindu Law Committee Sir T.B. Sapru explained “I have no hesitation in submitting my opinion. It must, however, be understood that I represent in no sense the orthodox Hindu point of view and I have a fear that neither at present nor in future can we look forward with much hope to our legislature agreeing to bring the Hindu Law radically into line with modern conditions.” Ibid, p. 122.

39 Summarising opinions collected on G.V. Deshmukh’s original draft of the Hindu Women’s Rights to Property Act, in which it was proposed to grant daughters a share in their father’s property, the secretary of the Judicial Department, Government of the United Provinces explained that “Another strong objection to the Bill is that the effect of it would be to place women in a more favourable position than men. A married Hindu woman for instance, would be in a position in certain circumstances to inherit property not only from her own family but also from that of her husband” Letter from the secretary of the Government, United Provinces Judicial (Civil) Department to the Secretary of the Government of India, Legislative Department, January 15th, 1935, GOI Home Department, Judicial, F.28/25/1938, NAI.

almost unanimous in condemning the Hindu Code. Mitter’s colleagues expressed some sympathy with these views; indeed, one of the three remaining members of the Committee agreed to the abolition of the Mitakshara coparcenary only after it was confirmed that agricultural land would be excluded from the purview of the Code. Yet on the general benefits of codification they remained resolved. Expressing disappointment at Mitter’s decision, the Committee argued that poor publicity about the tour had given a false impression of public views about the Code and inflated levels of opposition as many of those who had testified “were under the impression that only opponents of the Code should appear before us.” However, in their final report, submitted in April 1947, the Committee argued that wider political events rendered public opposition to the Code Bill unimportant. The end of World War II and the British Government’s declaration that they were to withdraw from India provided an opportunity for the image of progressive Indian nationalism that had been created during the inter-war period to prove itself. Seen in that light, continuing with the Code was imperative:

In recent months, India has been participating in the international conferences and pleading for human rights and for equal treatment of Indians in foreign countries with an eloquence which has commanded universal admiration. The eyes of the world are upon her now and it would be more than a misfortune if at this juncture she were to fail to enact within her own borders a Hindu Code in which there was equality before the law and in which disabilities based on caste or sex were no longer recognised. We are now almost bound in honour to remove these disabilities at the earliest possible moment. This should be a sufficient answer to the question, who demands these changes in the law?

Thus, in April 1947 a complete Hindu Code was introduced for circulation in the legislature. Including the succession and marriage reforms that had been presented earlier to the house, the new Code set out a radical new vision of a Hindu legal system,
the basic unit of which was not the multi-generational, male dominated joint family but a Hindu individual, unfettered by gender and caste identity.

Though it had not set out to court controversy, by taking the focus on women’s rights in the inter-war reform debates at face value, the Law Committee had created a Hindu Code that constructed a much stronger sense of individual rights than many inter-war legislators, and certainly Deshmukh and Datta, had desired. As the Committee worked through the different stages of the legal system, initial concern about the possible effects of reform on wider social structures and the operation of authority began to snowball into more aggressive opposition to what was seen by some as a ‘destructive’ Code. This view was voiced most powerfully and vociferously not in the legislature or the select committee that considered the bill, but amongst the general public. It seems that the Congress’s wartime boycott of the assemblies and the focus on events outside the legislature upset the constellation of interests that had protected patriarchal interests in the inter-war reform debates. The Law Committee’s very legalistic focus and drive for uniformity had, in this political context, produced a Code more radical than its own members, who were far from radical reformers, may have intended. Wider political events at this time served to further downplay, or even mask, the Code’s far-reaching potential. Britain’s declaration that it was to leave India and the transfer of power declarations produced an atmosphere of optimism and a sense that reforms that had been subordinated to freedom struggle could now be enacted. The substance of the Indian legislature’s commitment to real and lasting social change was to face its most serious test after 1947, however, when Bhimrao Ramji Ambedkar took up supervision of the Code Bill.

Caste, the individual and Ambedkar’s Hindu Code Bill

On 17th November 1947 the Constituent Assembly of newly independent India accepted a motion moved by the then Law Member, B.R. Ambedkar, to reintroduce the Hindu Code Bill. Under Ambedkar’s patronage the Code was to become one of the most controversial and divisive issues to be considered by the new nation-state. A labour leader and a member of the low caste Mahar community, Ambedkar was better known for his struggle
against caste inequality than for women’s rights. While the primary focus of the Hindu Law Committee had been on removing bars on women’s legal rights, the interconnection between Hindu women’s position under customary practices and caste hierarchies had prompted the committee to address some issues of caste inequality in their reforms. For example, the Committee’s more ‘egalitarian’, ‘civil’ marriage ceremony had removed the bar on intercaste marriage, in line with the ‘secular’ Special Marriage Act of 1872. Ambedkar’s patronage of the Code Bill did not spell a reversal or even a major reinvention of the Law Committee’s agenda but merely a stepping up of the drive towards uniformity and the removal of discrimination that had characterised the codification project before independence. In so doing, however, the Law Member pushed the issue of caste relations to the fore of the post-independence Code Bill debates. In the evidence collected by the Hindu Law Committee during their tour of 1945 many people had voiced concern about the potential impact of the Code on Indian social structures. In guiding the Code Bill through the post-independence legislature Ambedkar left little room for ambiguity about this question. As this next section explores, the consequences for Indian society of a legal system based around a Hindu individual, unfettered by restrictions based on caste or gender, was to be more fully realised in Ambedkar’s Code.

Ambedkar’s history as an outspoken critic and prominent thorn in Gandhi’s side throughout the 1930s made Jawaharlal Nehru’s decision to appoint him as Law Member in the constituent assembly something of a surprise. Yet, in many ways Ambedkar’s educational background and rationalist view of politics and society meant that he occupied a political viewpoint far more akin to Nehru’s own position than many of the Prime Minister’s colleagues in the Congress. Indeed, it seems to have been this common bond, and support for social change, that brought the Prime Minister and his

46 For more on Ambedkar’s relationship with Gandhi see Christophe Jaffrelot, *India’s silent revolution: the rise of the law castes in north Indian politics*, (Delhi, 2003), pp. 13-31.

47 Benefiting from shifts in the colonial administration’s alliance with caste groups in Maharashtra Ambedkar’s father, and his uncles, acceded to the position of Subedar Majors, the highest that Indians could reach. As a result, Ambedkar was able to access state education facilities. His higher education, first at Elphinstone College and later in London and New York was funded by Maharaja Sayajirao of Baroda. W.N. Kuber, *B.R. Ambedkar*, (Bombay, 1978), pp. 12-14.

Law Member together in their promotion of the Hindu Code. As the Code Bill debates progressed, however, differences in the two men’s political aims and styles began to emerge. Unlike Nehru, Ambedkar had not joined the Congress’s legislative boycott but had been present for at least parts of the wartime Code Bill debates and was thus aware of the Code Bill’s more radical potential. Seeing the Code Bill primarily as a measure to help women, Nehru hoped the legislature would accept it as one element in a new Indian social order. For Ambedkar, however, the Code was a crucial vehicle for his anti-caste crusade which he was determined to make the basis of any independent Indian state, with or without popular consent.

Much of Ambedkar’s pre-independence politics had drawn on a language of rights and equality inspired by Enlightenment philosophy and not entirely dissimilar to the language used by the Hindu Law Committee with regard to the Code Bill. In his Annihilation of Caste, written in 1936, Ambedkar attacked the caste system and warned that Indian progress in the future would depend on its abolition. In place of a caste-ridden society, he called for democracy based on “Liberty, Equality and Fraternity” in which there were “varied and free points of contact with other modes of association. In other words there must be endosmosis.” Theories of biological integration had also inspired an earlier work on caste in which he had set out clearly his views on the interrelationship between Hindu custom, the suppression of women’s rights and caste inequality.

Twenty years before his Annihilation of Caste Ambedkar argued in a seminar paper given at Columbia University that Brahman marital practices had helped to create

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49 Though there is no evidence of the dialogue between these two men, legislative assembly records suggest that Ambedkar felt a very strong personal level of involvement in the Code, while Nehru seems to have seen it as an extension of the Fundamental Rights he helped to pass in the 1931 Congress held at Karachi. Reba Som, ‘Jawaharlal Nehru and the Hindu Code Bill: a victory of symbol over substance.’ Modern Asian Studies 28, no. 1, (1994), pp. 166-9.

50 Ambedkar’s presence in the chamber is referred to in a speech by Babu Baijnath Bajoria against the Code Bill on the 29th March 1943, LAD, p. 1571.

51 “There is no doubt, in my opinion, that unless you change your social order you can achieve little by way of progress. You cannot mobilize the community either for defence or offence. You cannot build anything on the foundations of caste. You cannot build up a nation, you cannot build up a morality. Anything that you will build on the foundations of caste will crack and will never be a whole” Ambedkar ‘Annihilation of Caste’ Ambedkar: Writings and Speeches Vol. I, p. 66.

52 Ibid, p. 57.
and sustain the entire caste structure.\textsuperscript{53} Analysing earlier anthropological literature on the origin of caste in India, he was dismissive of European academics who saw caste in terms of occupational communities, based on social practices.\textsuperscript{54} He was considerably more sympathetic, however, to the views of his fellow Marathi, Dr. Shridhar Venkatesh Ketkar,\textsuperscript{55} who had argued that endogamy was the defining feature of caste.\textsuperscript{56} Theorising the origins of the caste system, Ambedkar argued that it was the “superposition of endogamy on exogamy” that had created caste in India.\textsuperscript{57} In a diverse and exogamous community, which he believed Indian society had once been, the adoption of endogamous practices raised certain difficulties. In most exogamous societies, he argued, a community tended to comprise of an equal number of men and women who could be divided into fairly equally balanced groups based on age. In practice, however, this equality was never totally realised due to the unlikelihood of a husband and wife dying at the same time. There would always be, therefore, a number of “surplus men and women”.\textsuperscript{58} Of little consequence in an exogamous community, this “surplus” created numerous problems if a community sought to establish itself as endogamous, as these men and women looked outside their equally balanced community for another partner.\textsuperscript{59}

It was in precisely this problem that Ambedkar identified the origins of caste. The shift to endogamy in India, he argued, had produced three main practices designed to deal with the problem of “surplus men and women”. However, the patriarchal structure of

\textsuperscript{53} His paper ‘Castes in India: their mechanism, genesis and development’ was presented by Ambedkar at the Anthropology Seminar of Dr. A. A. Goldenweizer at Columbia University, New York on 9th May 1916 http://ambedkar.org/

\textsuperscript{54} Ambedkar summarised, and criticised, the theories of Mr Senart “a French authority”, Mr Nesfield and Sir H. Risley. He felt that the definition of caste offered by all three men was neither “complete or correct by itself and all have missed the central point in the mechanism of the caste system. Their mistake lies in trying to define caste as an isolated unit by itself, and not as a group within, and with definite relations to, the system of caste as a whole.” ‘Castes in India: their mechanism, genesis and development’ in V. Rodrigues (ed.), \textit{The Essential Writings of B.R. Ambedkar}, (New Delhi, 2002), pp. 243-4.

\textsuperscript{55} Shridhar Venkatesh Ketkar was born in the last decade of the nineteenth century and died in April, 1937. He is a prominent figure in the Marathi literary academy and is best known as the author of the first Marathi Encyclopaedia, although he is also celebrated for his novels, essays and histories. His \textit{History of Caste in India} was first published in 1909.


\textsuperscript{57} Ibid, p. 246.

\textsuperscript{58} Ibid, pp. 246-7.

\textsuperscript{59} Ibid, pp. 248.
society had provided for very different types of solutions being presented for men and for women.

From time immemorial man as compared with woman has had the upper hand. He is a dominant figure in every group and of the two sexes has greater prestige. With this traditional superiority of man over woman his wishes have always been consulted. Woman, on the other hand, has been an easy prey to all kinds of iniquitous injunctions, religious, social or economic. But man as a maker of injunctions is most often above them all. Such being the case, you cannot accord the same kind of treatment to a *surplus man* as you can to a *surplus woman in a Caste*.60

Practices of widow immolation, *sati*, and its more “practicable” counterpart, enforced widowhood and been developed to contain surplus women, while the practices of child marriage had been developed to ‘contain’ surplus men within the community. As these were and always had been seen as Brahman practices, Ambedkar concluded that “it needs no argument to prove what class is the father of the institution of caste.”61 Moving into the question of how caste became pervasive amongst non-Brahmans also, he pointed to the “‘infection of imitation’ that caught all these sub-divisions [non-Brahman classes] on their onward march of differentiation and has turned them into castes.”62 The theocratic nature of Indian society and the fact that Brahmans were the first to adopt “a closed-door policy”63 meant that this class set the terms of the caste society that emerged. Those communities closest to the Brahmans and who valorised their religious status were the first to adopt their endogamous practices, setting off a domino effect throughout society.64 As a result,

Those castes that are nearest to the Brahmans have imitated all the three customs and insist on the structure observance thereof. Those that are less near have imitated enforced widowhood and girl marriage; others, a little further off, have only girl marriage and those furthest off have imitated only the belief in the caste principle.65

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63 Ibid, p. 256.
64 Ibid, p. 258.
Several decades before M.N. Srinivas was to coin the term ‘Sanskritization’, Ambedkar had theorised the ‘spread’ of caste practices from upper to lower caste groups as a process driven primarily by the need to suppress the sexual desires of ‘surplus men’ but above all ‘surplus women’. For the new Law Member, therefore, reform of marriage laws and of women’s position in Hindu customs held the key to reform and even ‘annihilation’ of the Hindu caste system, paving the way for a return to a more permeable, class based society.\(^66\)

*Ambedkar’s Code Bill*

From the outset of his time as Law Member, Ambedkar sought to put into practice his anti-caste agenda. Throughout the 1930s, his views on caste had been seen by many as extreme and by nationalists as dangerous in that they threatened to split the Hindu community in its fight against British rule. In the fervour and optimism of the period that followed independence, however, his political position seemed to win greater sympathy. Editors of the *Indian Social Reformer* who had previously seen him as something of a destructive figure now seemed far more open to his ideas.\(^67\) In its first edition following Independence, the editors of the *Indian Social Reformer* argued that:

> The great achievement of British rule in India was the liberation of the women force of this country and to have it firmly enlisted on the side of progress. The other great social reform, namely the abolition of caste and communal distinctions yet remains... The immediate task of Free India in the field of social reform is to get rid of caste and communal differences so that the people of India will live, think and speak to the world as one people.\(^68\)

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\(^{66}\) Ambedkar’s notion of the difference between a static, caste-based society and a more dynamic class-based one appears in many of his writings. In his notes for a planned book to be called ‘India and Communism’ he wrote that while caste was destructive, class was unavoidable: “Even a free social order will not be able to get rid of the classes. What a free social order aims to do is to prevent isolation and exclusiveness being regarded by the classes as an *ideal* to be followed. For as long as the classes do not practice isolation and exclusiveness they are non-social in their relations towards one another.” *Ambedkar: Writings and Speeches*, Vol. III, pp. 106-113.

\(^{67}\) Reporting on his address of 6\(^{th}\) May 1946 to the meeting of the Scheduled Castes Federation held in Bombay one journalist wrote “Dr. B.R. Ambedkar for the first time in several years gave up his theme of abusing caste Hindus and settled down to be constructive” in his call to the Scheduled castes to work with caste Hindus in order to establish safeguards for minority communities. *ISR*, Vol. LV, No. 35, Saturday, May 12\(^{th}\) 1945, pp. 209-210.

\(^{68}\) *ISR*, Vol. LVII, No. 50, Saturday, 16\(^{th}\) August 1947, p. 394.
As Law Minister, Ambedkar played an active role in the process of drafting the new constitution, to which he brought his particular brand of political thought. Unlike Gandhi who called for a heavily decentralised state, with a village republic at its base,\textsuperscript{69} Ambedkar called for a strong, centralised state with the power to protect its citizens.\textsuperscript{70} He was also a strong advocate of the inclusion of a bill of Fundamental Rights for the new Indian nation and no doubt personally ensured the inclusion of article 17 in the new Constitution which declared:

‘Untouchability’...abolished and its practices in any form...forbidden. The enforcement of any disability arising out of ‘Untouchability’ shall be an offence punishable in accordance with law.

The Law Minister welcomed the Fundamental Rights as an opportunity to carry out social reform in line with his own political agenda. But he was not content to simply enshrine these rights in the Constitution. Interested in using the law to strengthen the rights of lower castes and in removing the customs and practices through which caste identity was constructed, he saw in the Code Bill the perfect vehicle for securing this drive against untouchability. It was with this goal in mind that he took steps to revive the Code and reintroduce it to the central assembly.

The first Code Bill controversy under Ambedkar’s stewardship came early on. On 9\textsuperscript{th} April 1948 the Constituent Assembly passed a motion to refer the Hindu Code Bill to a select committee comprising of members of the current legislature many of whom, as a result of the Congress boycott, had not been present during the wartime Code Bill debates. When the new committee met, however, they were presented not with the original Code Bill drawn up by the Hindu Law Committee, but with a re-drafted version. Though Ambedkar insisted that “The revised draft does not make any substantial changes to the body of the original Bill, but within the framework of the original Bill it has recast it so as to be in the form in which Bills are usually presented to the Legislature”, the Law Minister’s decision raised criticism and suspicion from his colleagues, in the select

\textsuperscript{69} Gandhi’s writings are littered with references to India’s ancient communities and to the importance of village republics in the construction of a non-violent, independent India. See in particular ‘Village Swaraj’ an article printed in Gandhi’s journal *Harijan* 26\textsuperscript{th} June 1942, CWMG, Vol. 83, pp. 112-114.

committee and in the legislature.71 When the committee began to draw up their report for submission to the Constituent Assembly, along with a copy of the bill that they too had amended, there was heated debate amongst its members about whether the bill had changed so significantly as to require re-circulation.72

The most evident changes were those of form; the sections and order of subjects had been reconfigured from six parts into nine, in the hope of making it more straightforward and easy to read. However, some changes had also been made to the body of the Code’s text, primarily with regard to the role of custom in Hindu law, the position of the joint family and succession practices. Often in keeping with the general sentiment of the Hindu Law Committee’s work, these amendments heightened further the emphasis on uniformity in the bill. In so doing they tended to heighten the tension between individual rights and group responsibility, usually in favour of the former. In the wake of partition, family and religious identity had come to inform notions of national identity and citizenship.73 Ambedkar’s reforms opened up these still fragile identities to interrogation. As a result, many of the concerns that had been voiced during the Hindu Law Committee’s 1945 tour were expressed with more vigour and urgency.

Ambedkar was particularly insistent that uniformity of custom should be enshrined in the Code. As discussed above, customary law and women’s position under it was the key to enforcing the differences between castes and their position in the caste hierarchy. Consequently he called for the abolition of all customary practices under the Code which would impose in its place a single system of law governing all Hindus. There was some precedence for this in the Hindu Law Committee’s marriage reforms which had set out a uniform form of ‘religious’ marriage, based it is worth noting, on Brahman practises, any deviation from which would not be valid according to the Code. However, the Committee had also included saving clauses to protect certain customary practices, particularly the matrilineal practices of south Indian Hindus, on the basis that women already enjoyed greater rights under these legal systems. Yet for Ambedkar, this set a

72 Though the majority maintained that these changes were not significant enough to warrant re-circulation of the bill, five of the seventeen committee members disagreed and called for further opinions to be gathered on the bill, with several more expressing only reserved support for the bill and its aims.
73 This is discussed in detail in Chapter Four.
dangerous precedent. As long as custom was permitted to remain a source of law, so the means of distinguishing between castes would be perpetuated. As a result, the revised Code abolished all customary practices, including the Marrumakkatayam, Aliyasantana and Nambudri matrilineal legal systems.

Ambedkar set out his position on this front a little more clearly later on, during the legislative debates about the revised Code. Facing strong opposition to his drive against customary law he argued that the bill’s wording meant that some customary practices could be ‘saved’. However, he continued, “it is only in very very rare cases that I propose to yield on this subject, subject to the fact that anyone who presses upon me that the custom should override this particular Code in any particular way will carry upon him the burden of proof showing that that custom is more progressive than the provisions of this particular Bill.” Customary practices in any area of law dealt with by the Code would only be considered legally valid if acknowledged in the wording of the legislation itself. In this way Ambedkar maintained for himself as Law Minister the prerogative to decide which bills were “progressive”, by which, no doubt, he meant compatible with his anti-caste stance.

A similar kind of all-or-nothing attitude was adopted with regards to the Mitakshara coparcenary. The Code introduced to the Legislative Assembly in April 1947 had decreed that “Any interest in joint family property (other than property excluded from the operation of Part II by section I thereof) possessed by a male Hindu dying after the commencement of this Code, shall devolve in every case not by survivorship, but by testamentary or intestate succession, as the case may be.” Thus, succession by survivorship, the legal principle underpinning the Mitakshara coparcenary, would be phased out gradually, as the current generation of Hindus passed away leaving their estates to devolve to their heirs on the basis set out in the bill. By contrast, Ambedkar’s Code proposed that “to make the Code really effective” it would be necessary “to go further [than the earlier draft] and put an end to the tenure of joint family property in existence at the commencement of the Code by converting such tenure into a tenancy in

74 21st September 1951, PD, col.2993.
common as if there was a partition at the commencement of the Code."\textsuperscript{76} On the enactment of the new Code, all Mitakshara coparceners throughout India would become Dayabhaga joint family properties held by tenants in common, creating complete uniformity in Hindu property rights.

The focus on complete uniformity had important repercussions not simply for the legal unit of the joint family but for family structures in general. The revised Code made no concession to patrilocal marital practices or the notion that a daughter joined another family on marriage: she was to be considered as equal to a son in every respect. Consequently, the Hindu Law Committee’s scheme of succession was revised to create a new model of the family, formulated “by reference to natural love and affection.”\textsuperscript{77} While this model was closer in structure to that of the nuclear structure advocated by many reformers, it went further than the inter-war legislation and Law Committee’s Code Bill by granting sons and daughters an equal share in their fathers’ estate. The idea that women were equal and consenting individuals vis-à-vis Hindu marriage was reinforced in Ambedkar’s Code. The Hindu Law Committee’s Code had permitted Hindus to apply for divorce under a ‘civil’ act but the revised Code imported the text of the Indian Divorce Act into the bill itself, making divorce a right under Hindu law. Measures to make adultery grounds for seeking divorce were also inserted, against the views of the Hindu Law Committee, who had expressly rejected adultery as a ground for divorce.\textsuperscript{78} One concession was made to religious sentiment, however. Reflecting the communal violence and attacks on women that had accompanied partition,\textsuperscript{79} provisions were also inserted into the Code barring any man or woman who converted from Hinduism to another religion from adopting or acting as a guardian over a Hindu minor. The earlier bill had made it the legal duty of any guardian appointed under the Code to raise the minor as a Hindu but had had nothing to say with regards to the guardian’s own faith.

In many ways, therefore, Ambedkar’s Code went much further than the Hindu Law Committee’s in freeing women from the patriarchal hierarchies of Hindu family law.

\textsuperscript{76} Report of the Select Committee of the Hindu Code, 12\textsuperscript{th} August 1948, printed in Supplement Bombay Government Gazette, 3\textsuperscript{rd} March 1949, p. 24.

\textsuperscript{77} Ibid, p.25.


\textsuperscript{79} See Chapter Four, also Ritu Menon and Kamla Bhasin, Borders and boundaries: women in India’s partition, (New Delhi, 1998) and Urvashi Butalia, The other side of silence: voices from the partition of India, (Delhi, 1998).
but in some crucial areas, his focus on the abolition of custom, and his emphasis on uniformity, had the effect of moving the bill away from its original aim of introducing greater gender equality. The two women members of the select committee that considered the bill in April 1948, Renuka Ray and Ammu Swaminadhan, were forthright in their condemnation of the abolition of matrilineal customary practices, under which, they argued, women enjoyed greater rights than laid out even in the new Code. Together with another select committee member, B. Shiva Rao, the labour leader and B.N. Rau’s younger brother, the women called for ‘saving’ clauses to be reintroduced to the Code so as to protect the more egalitarian practices of the matrilineal legal system, alongside the new legal system.  

Ambedkar was undeterred by his opponents. Introducing his Code to the legislature, he was clear that the Code Bill was important, not simply for the progress of women, but for the good of the nation as a whole. The time had come for India to make real social progress, whether popular opinion supported it or not. While Nehru stressed his commitment to the bill, but also his preparedness to compromise over certain issues in order for the legislature to accept it, his Law Minister refused to couch his support for the Bills in conciliatory tones, demonstrating very little sympathy for Hindu tradition or public opinion:

80 “The majority of our colleagues have deleted the ‘saving’ clause from the Chapter on ‘Registration of adoptions’ viz.: ‘Nothing in Chapters I and II of this Part shall apply to any Hindu governed by the Marumakkattayam or Aliyasanthana Law of Inheritance’. We cannot agree to this deletion for the reason stated in the Rau Committee’s Report, namely that the law of adoption among persons governed by these systems is of girls. We would, therefore, exclude persons governed by such laws from the scope of operations of this part of the Code. Under the Madras Marumakkattayam Act of 1932, the nearest preferential heirs to the property of a male member dying intestate are his mother, widow and children. We would therefore retain part (iii) of clause 96 of Part VII on ‘Intestate Succession’ which runs as follows: “This part shall not apply to any property of a Hindu governed by the Marumakkattayam, Aliyasanthana or Nambudri law of inheritance.”” Note of dissent signed by Ammu Swaminadhan, Renuka Ray and S. Shiva Rao, 12th August 1948, ‘Report of the Select Committee of the Hindu Code,’ 12th August 1948, printed in Supplement Bombay Government Gazette, 3rd March 1949, p. 31.

81 In a speech before the legislature Nehru explained that “We have achieved political freedom in this country, political independence. That is one stage in the journey, and there are other stages, economic, social and others and if society is to advance, there must be this integrated advance on all fronts. One advance on one front and being kept back on other fronts means functioning imperfectly, and also means that the first advance is also in danger. Therefore, we have to consider this matter in this spirit, how we should advance on all fronts, always keeping in view of course, that the advance is co-ordinated and meets with the approval of the great majority of the population. I say this because, after all, we function as a democratic assembly answerable to the people of India, and we must carry them with us. Keeping that view it is not good enough for us and for this House merely to be led. We have to lead and we have to give the lead, and in giving that lead we have to carry others with us, and we propose to give the lead in this and other matters, but always carrying others with us.” 19th December 1949, CAH(L)D pp. 784-5.
When society is in a transitory stage, leaving the past, going to the future, there are bound to be opposing considerations: one pulling towards the past and one pulling towards the future, and the test that we can apply is no other than the test of one’s conscience. I have not the slightest doubt in my mind that the provisions of this Bill are in perfect consonance with the conscience of the community, and I have therefore no hesitation in putting forth this measure although it may be as a matter of fact, that a large majority of our countrymen do not accept it.  

For the Law Minister there was no doubt about whether or not the Constituent Assembly should enact the Hindu Code Bill; the constitution passed by members of the Assembly made its ratification essential. A number of Assembly members argued that the Constituent Assembly, established as it had been under British rule and without the full electoral mandate of Indian people, was unqualified to deal with such an important matter. Ambedkar countered this with the assertion that the constitution had made its enactment unavoidable. Article 15 of the Indian Constitution set out that “The state shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.” Yet, Ambedkar pointed out,

Any one who has studied Hindu Law carefully will have to admit that apart from the many defects which the Hindu Law has, there are principles in the Hindu Law which discriminate between Suvarna castes and the Shudras. They also discriminate between a male Hindu and a female Hindu...It is therefore quite clear that parts of the Hindu Law will be in conflict with the provisions of the Constitution.

Hindu Law and custom as it had come to exist was simply incompatible with the notion of equality on which legislators had thought the new nation should be based and, as a result, was *ultra vires* of the Constitution. This was a far cry from the aims and interests of the inter-war reformers, many of whom were themselves from upper caste backgrounds. Focusing on the emphasis on women’s rights and equality in the language used by the inter-war reformers the Hindu Law Committee had drafted a bill that had introduced reforms that gave women a far greater degree of equality than they had intended. Under Ambedkar, traditional structures of patriarchal authority had been further obliterated. The close nexus between women’s rights under customary law and caste

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83 19th December 1949 *CAI(L)D*, p. 790.
hierarchies meant that law reform and the introduction of a single, uniform Hindu Code did much to undermine upper caste dominance. Many of those who testified before the Hindu Law Committee during their 1945 tour had voiced concern about the impact of the Code Bill on what they believed were ‘traditional’ relationships and customs. By the end of the decade, the Code Bill had come to be seen as a measure which could fundamentally undermine the patriarchal order of Hindu law, and even Indian society.

Conclusion

While reform of Hindu women’s property rights had, during the 1920s and 1930s, offered an avenue for Hindu men to reconfigure their own legal rights and access to resources, this issue had, by 1949, become a threat to Hindu patriarchy and social structures. The legislators involved in the inter-war reform debates were often urban, male professionals who, as younger sons within the Mitakshara Hindu coparcenary, could not access capital from their family estate or enjoy full control over their own incomes. Though these men felt their influence to be curbed by older patriarchs, drawn largely from wealthy and upper caste backgrounds, they enjoyed a position of dominance in other power structures away from the family. Many of the private members bills they proposed and debated in this period, sought to strengthen their own property rights without weakening this wider social authority. The piecemeal reform bills proposed during the inter-war years had succeeded in straddling these twin aims. However, in a wartime legislature much depleted of Hindu men, the drive for legal uniformity and explicit focus on removing discrimination against Hindu women that underpinned the codification project paved the way for a Code Bill that attacked not only karta control over the family, but patriarchal dominance in general. This Code created scope for greater individual control over property for all Hindus, not only men. To the surprise of members of the Hindu Law Committee as much as those who had not been involved in its work, the 1947 Code Bill exposed what that had been lurking in the background of the inter-war reform debates: reconfiguring the hierarchical structure of the joint family had the potential to affect caste hierarchies and other relationships of authority through which Indian society was constituted.

Independence has been seen to be the crucial turning point in both the Hindu Code Bill debates and the movement for women’s rights in India. The 1920s and ‘30s have been viewed by historians as periods of great optimism and support for social change but the period following 1947 seems to be characterised by a rise in conservatism.¹ British withdrawal, and perhaps even more importantly the partition of the sub-continent along religious lines, had a dramatic impact on the context of the Hindu Code Bill debates. Congress leaders continued to insist on the secular nature of the new Indian state but the communal tension that accompanied the transfer of power debates and subsequent mass migration of Muslims to Pakistan had important consequences for what it meant for the state to debate a Hindu Code Bill after independence.

However, many of the issues that were raised by these changes had their roots in developments that pre-dated the transfer of power negotiations. So far this dissertation has argued that the inter-war reform debates, and subsequently the Hindu Code Bill, must be seen as part of a drive to reconfigure Hindu patriarchy within the family and reconfirm the autonomy of Indian men, both Hindu and Muslim, over the domestic sphere. Chapter Two argued that Hindu and Muslim attempts to do so had given rise to a very different kind of relationship between the state and male representatives of the two religious communities. The Shariat Act had helped to inscribe the autonomy of the Muslim family away from the state, while regional diversity and disagreements between Hindu representatives meant that, even in 1947, they remained dependent on legislative power to restructure, though not intervene in, Hindu personal law.

The transfer of power process placed these different approaches to securing patriarchal authority in a new context. With the structures of the Indian state still

¹ This is discussed in Chapter Two but for a sense of this trajectory in other literature see Geraldine Forbes, ‘The Politics of Respectability: Indian Women and the Indian National Congress’ in D.A. Low (ed.), The Indian National Congress: Centenary Highlights, (Oxford, 1988), pp. 54-67; Samita Sen, ‘Towards a Feminist Politics? The Indian Women’s Movement in Historical Perspective’ in Karin Kapadia (ed.), The Violence of Development: The Politics of Identity, Gender and Social Inequalities in India, (Delhi, 2002), pp. 459-524. Independence is also a crucial turning point in Reba Som’s account of the Hindu Code Bill debates, as the point at which Nehru begins to realise his isolated position within the Congress with regards to personal law reform Reba Som, ‘Jawaharlal Nehru and the Hindu Code Bill: A Victory of Symbol over Substance,’ Modern Asian Studies 28, no. 1, (1994), pp. 165-95
identified as British, legislative reform of Hindu law sparked debate amongst Hindu representatives about the ‘religious’ nature of Hindu legal identity but did not affect the religious identity of the state itself. The communal tension surrounding the transfer of power negotiations had enormous repercussions for this situation. The first part of this chapter looks at how the struggle between the Muslim League and Congress prior to independence made it possible to interpret the Congress’s political programme as running counter to arguments about Muslim interests. Though Congress leaders continued to invoke the language of secularism, the ambiguity of their political platform meant that, at times, it became possible for their supporters to associate ‘Indianness’ with Hindu identity and interests. The eventual partition of the subcontinent along religious lines only added to a situation in which the Indian state could be identified, at important moments, as Hindu. Though in keeping with the religious-neutrality of the colonial state’s approach to law reform, the decision to revive the Hindu Code Bill but not debates about Muslim law reform after independence seemed to some to confirm the Hindu identity of the new Indian state.

Yet, by 1947, there remained important questions about what constituted Hindu identity, at least in terms of legal and family practices. The inter-war reform debates had done much to criticise the existing balance of power within the Hindu joint family but quite how power within the Hindu family should operate remained open to question. In the context of nation-building, as the legislature began to debate the Code Bill and thus the legal structure that had come to define Hindu identity, it became all too easy for these discussions to blend into wider questions about Indian identity also being discussed at the time. The violence that accompanied partition and the sense of vulnerability many Indians felt to an attack from Pakistan, added new emotions and interests to the debate about Hindu patriarchy. The second section of this chapter explores how Hindus in northern India, the area most affected by communal violence, reacted to partition by stressing the potency and martial prowess of the Hindu community. The vision of Hindu patriarchy presented by legislators from these areas stressed the importance of protecting the family, and male authority over it. In the wider atmosphere of insecurity and concern about the stability of the Indian nation as a whole, the imagery and language of these north Indian leaders seemed to offer a platform from which to emphasise national strength and power. Looking at the way these forces played out in the Abducted Persons Restoration Act, the final section of this chapter explores the ways in which debates about Hindu
patriarchy came, albeit unintentionally, to form a basis for constructions of Indian citizenship. It shows how, having played a key role in structuring power relationships under British rule, debates about women and their status became the site for the construction of new social hierarchies in the Indian nation-state, based on divisions between the Hindu and Muslim community. Bringing an innovative view to the vast canon of literature dealing with Indian secularism, this chapter argues that debates about Hindu patriarchy and the Hindu Code Bill came to be pivotal in shaping the operation of Indian secularism under the independent state.

Independence and patriarchy: the impact of the transfer of power on Hindu and Muslim personal law reform

Independence and the partition of the subcontinent had enormous repercussions for questions about the relationship between state and religious community in the Code Bill debates. Whereas before 1947, the Code Bill had been regarded as a measure applicable to one community within India, in an independent India, formed by the division of provinces along religious lines, some political representatives began to argue that the Code Bill should be extended to apply to all Indians. While the significance of partition in shaping relations between religious communities in India cannot be underplayed, confusion about the relationship between the state and religious personal law was not simply born out of the transfer of power negotiations. Rather, many of the complexities of this relationship had their origins in the ambiguous secular legacy bequeathed to the Indian state by its colonial predecessor.

The different approaches adopted by Hindu and Muslim men seeking to reform patriarchal authority within their personal legal system has already been discussed earlier in this dissertation. Chapter Two argued that the passage of the Shariat Act in 1937 moved Muslim legislators away from the social hierarchies of Anglo-Islamic law by adopting a more religious identity for their personal law. Regional differences and the complex nature of the Hindu legal system meant that the same had not been true for Hindu legislators and the late 1930s saw a growing

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2 When the central legislature began to consider the Code Bill on a clause by clause basis Shri Sarwate, a Congress representative from Madhya Pradesh called for an amendment of the Code’s application clause to read “This Code applies to all Hindus... The expression ‘Hindu’ in this Code, shall, unless otherwise provided, mean a citizen of India.” Shri Indra Vidyavachaspati of Uttar Pradesh introduced an amendment calling for the Code Bill to be made applicable to “All Indians irrespective of their religion, caste or creed”. Shri Jhumjhumwala of Bihar tabled a second amendment calling for the Code to apply “to all citizens of India that is Bharat, irrespective of their caste, creed and irrespective of their belonging to or professing any religion.” 5th February, 1951 PD, Vol.VIII Pt.II, col. 2363-5.
number of Hindu representatives seek to use legislative power to alter Hindu law. In so doing, Hindu reformers were not advocating greater state involvement in the Hindu family and domestic relationships without the consent of Hindu men. Rather, they sought to use the legislature to push through a reform that would give Hindu husbands power over their family, away from the interference of older patriarchs and also of the state, in a way not dissimilar to the impact of the Shariat Act on Muslim society. Hindu and Muslim reformers were thus united in their aims, but differed in the means by which they sought to secure their goals. Muslim reformers were able to impose their authority within the community, and vis-à-vis the state, by asserting the religious nature of Muslim personal law. For Hindu reformers to achieve the same ends involved a much more complicated process of drawing on state power, thus opening up to question the 'religious' status of Hindu law.

By the early 1940s, it could be argued that far from discriminating between the Hindu and Muslim community, the state's involvement with Hindu law reform, but not with Muslim, reflected attempts to achieve greater parity in terms of the functioning of personal law. Indeed, criticism of the state's greater involvement with Hindu personal law reform came not from Muslims, but from Hindus who opposed the Code Bill. Amongst the Muslim community there were many who supported the Hindu Law Committee and their work. Thus, for many advocates of reform, both Hindu and Muslim, greater state involvement with Hindu law reform was not an act of bias or prejudice but rather a means to secure greater equality between personal legal systems.

The racial context of colonial rule provided an important backdrop for this 'parity through difference' approach to personal law reform. The role of the legislature in Hindu personal law had raised questions about the non-religious, civil status of Hindu identity. With the state, the largest organ of civil power, under the authority of a foreign, Christian power, the notion of Hindu civil status could be differentiated from civil power more generally. The Hindu community, whether

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3 Diwan Bahadur Pandit Sitacharan Dube, an advocate from Nagpur told the Hindu Law Committee “While apparently the effort would seem to be laudable in connexion [sic] with any other branch of law, to my mind the codification would deprive Hindu Law of its personal nature... If codification of Muhammadan Law is not necessary, I do not see the compelling necessity in the case of Hindu Law.” Written Statements submitted to the Hindu Law Committee* Volume II (Delhi, 1947) p. 635.

4 Particularly Muslim women, in 1934 Lady Abdul Qadir, a prominent member of the AIWC played a leading role in calling for the formation of a committee to inquire into legal disabilities of women from all religions and recommend reforms. A. Basa & B. Ray, *Women's struggle: a history of the All-India Women's movement 1927-1990,* (Delhi, 1990), p. 63.
religious or otherwise, remained distinct from the state and its official representatives. Greater state involvement in Hindu law did not, therefore, grant greater political privileges or access to political power to the Hindu community. Independence and the partition of India were to transform this situation, however.

The revival of the Hindu Code Bill after partition was not a statement of the new state’s Hindu identity, but rather a decision to continue with the colonial state’s approach to managing religious interests. Far from marking a change in Congress leaders’ avowed policy of secularism, therefore, the reintroduction of the Code can be seen as a commitment to furthering the interests and influence of Muslim and Hindu men over their families and wider communities. This was not always how it appeared however. While the Shariat Act appeared to provide a more defined identity for the Muslim community in India, this was certainly not true of Hindu identity, the understanding of which was being reformulated in the Code Bill debates themselves. With the nature and identity of the new nation state also in formation at this point, it became possible, in the years following independence, to collapse notions of Hindu and Indian identity into one another. In the context of nation- and citizenship-building, the Hindu civil identity presented in the Code Bill provided important foundations for the construction of a more general Indian civil identity.

Religious and national identity during the transfer of power period

Academic interest in British withdrawal and the eventual partition of India has produced a wide body of literature that covers these events from both high-political and more grass-root perspectives. It is not the intention of this dissertation to revisit the more general arguments about partition but to look at how the debates about personal law reform changed during the transfer of power period and in the years immediately following. While communal tension and the division of the subcontinent along religious lines altered dramatically the relationship between the Hindu community and the state, reformers during the 1920s and 1930s had already raised

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important and far reaching questions about the civil, non-religious status of the Hindu community. Analysing the interplay between the reform debates and arguments about religious and national identity during the late 1940s, this section looks at how the relationship between the state and the Hindu community was transformed in the transfer of power period.

On 19th September 1945 the British Government announced formally that it was to withdraw from India. Over the next two years, negotiations for the transfer of power to Indian representatives became increasingly divided along religious lines. As has been convincingly demonstrated elsewhere, the split in the negotiations along the lines of religious community was by no means inevitable but rather the outcome of political wrangling.\(^6\) Examination of the personal law reform debates earlier in this dissertation has shown that ideas about the true nature of the Hindu and Muslim family, and by extension of the religious identities understood to legally underpin the family unit, had undergone considerable debate and contestation during the inter-war years and, in the case of Hindu legal identity, had not been resolved by September 1945. This was to have significance for the ways in which Muslim League and Congress leaders formulated their claims before the British. In calling for a Muslim homeland in which all Muslim interests would be protected Jinnah’s claims were much more positively defined than those of the Congress. That is not to say that Jinnah’s agenda was transparent or clear cut. Jinnah’s claim to be the sole spokesman of Muslim interests depended on his ability to unite a Muslim electorate that had previously been very regionally divided, to bring together Muslims in majority provinces had shared little of the concerns and anxieties prevalent amongst Muslims living in areas where they constituted a minority community.\(^7\) Thus, Jinnah was careful not to set out too clearly the geographical or political reality of the Pakistan he envisaged. While his claim was vague, it still required some basic definition of Muslim interests and unity. The idea of religious solidarity and common interest presented in the Shariat Act served to support this position.

Presenting themselves as representatives not of one group but of all Indian interests, Congress leaders did not have to define their platform in the same way. Indeed, ambiguity and an indistinct, all-encompassing view of the nation were vital to


\(^7\) Ayesha Jalal, *The Sole Spokesman: Jinnah, the Muslim League and the Demand for Pakistan*, (Cambridge, 1985), pp. 18-20, 82-84.
the Congress’s ability to present itself as representative of all. Operating as an umbrella organisation, with somewhat vague relationships to the diverse groups associated with it, the Congress was able to avoid rifts with any groups who could call into question its representative claims. The vision of the Indian nation ‘constructed’ by the party as a result was highly opaque and dislocated, a vision which could mean all things to all men. Impossible to pin down as a coherent entity, the potency of the Congress’ programme lay in its mediation through skilled leaders, Gandhi particularly, who made it relevant and real for the people or situation they were addressing at that moment in time.\footnote{Rajnarayan Chandavarkar, \textit{Imperial power and popular politics}, (Cambridge, 1998), Chapter 8.} \textit{Swaraj} was freedom for all, protection for Indian labour and capital, emancipation for women and the scheduled castes, equality of religious communities within a secular state. The Congress leadership’s insistence that these freedoms could be attained only with independence allowed them to avoid providing answers about the real and tangible ways in which these freedoms would be attained. This in turn provided a powerful flexibility to the organisation’s political rhetoric and a plethora of interpretations of the Congress agenda, not only amongst followers but also its more senior leadership.\footnote{For an examination of the diversity of views amongst Congress leaders about secularism in the UP see William Gould, \textit{Hindu nationalism and the language of politics in late colonial India}, (Cambridge, 2004).} In the transfer of power negotiations, the weight awarded by the British to the Muslim League’s agenda and interests over those of other minority groups, obliged the Congress to present its visions of India’s future in relief to the League’s interests and no others. As a result, Congress opposition to Muslim separatism could, at times, be translated into support for Hindu power and Hindu rule in India.

The view articulated in the Hindu Law Committee’s Code that there existed both a Hindu ‘religious’ and a Hindu ‘civil’ legal identity served, in some ways, to facilitate the Congress campaign by allowing leaders to use rhetoric that was not directly religious but which was still seen to apply to the Hindu community. This was not an entirely new state of affairs. With less doctrinal definition of what it meant to be a ‘Hindu’ than a ‘Muslim’, Congress leaders had, during the inter-war years, been able to evoke the symbolism associated with Hinduism at the same time as maintaining a secular position.\footnote{See for example the way in which Hindu identity and socialist principle were brought together in the politics of Purushottam Das Tandon and Sampurnanand; William Gould, \textit{Hindu nationalism and the language of politics in late colonial India}, (Cambridge, 2004), Chapter 4.} The Congress’s secularism and even the colonial
policy of state neutrality resonated with the concepts of tolerance within Hindu philosophy. The law reform debates had exacerbated this position further, making the division between being a Hindu and being an Indian citizen in a Congress-controlled India highly ambiguous.

Over the course of the transfer of power negotiations, the line between Hindu and Indian identity was blurred not only in terms of political language but also by the physical interaction of politicians. From the collapse of the Simla Conference in May 1946 onwards, the programme of nation-building in India took place within a context which involved the exclusion of Muslim interests from the main political arena. Nehru’s apparent lack of commitment to the blue-print for transfer drawn up by the British government, followed by rifts within the interim government as a result of budget plans, prompted the Muslim League to boycott the proposed Constituent Assembly. Muslims within the Congress party continued to be part of the political process, indeed Maulana Azad played a critical role in negotiating Congress interests at Simla and within the Government after 1947; however, their interests as Muslims were subordinated to the apparently ‘secular’ interests of the nation as a whole. At Simla the Congress delegation argued that, given the numerical inferiority of the Muslim community, Jinnah’s call for parity between the representatives of Hindu and Muslim interests was undemocratic and not the political basis on which an independent India should rest. “India’s progress as a free nation”, they claimed, would be hindered by disproportional representation of religious interests. Azad explained that, while the Congress took seriously the concerns of religious minorities, their interests would not receive any special representation; “The only reasonable course appears to us is to have a Constituent Assembly with perfect freedom to draw up its constitution with certain reservations to protect the rights of minorities.”

Though it was Maulana Azad who adopted this system at Simla, the subordination of religious interest to those of the nation as a whole was a situation far easier for the majority community, the Hindus, to accept. As the most populous religious

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13 Letter from Maulana Azad to Lord Pethick-Lawrence at Simla, 6th May 1946 and ‘Suggested Points for agreement between the representatives of Congress and the Muslim League’ also sent to Lord Pethick-Lawrence by Azad. AICC Papers File 41/1946-47 NMML
14 Letter from Maulana Azad to Lord Pethick-Lawrence at Simla 9th May 1946. AICC Papers File 41/1946-47 NMML
community, it would be easier to equate the interests of Hindus with those of the nation. The position outlined by Azad was also essential to the Congress’s political position as to acknowledge the separate needs and interests of Indian Muslims would undercut the organisation’s secular agenda and its belief in the supremacy of national over religious interests.

Regional politics moved this merging of religious and national identity out of political rhetoric and into everyday life. The struggle for power at the centre created competition amongst provincial politicians to secure their own power and resources for the future. As leaders on the all-India stage attempted to cajole the Cabinet Mission with arguments about their political strength and support base, leaders at provincial and local levels sought alliance with the national organisation that looked able to deliver the greatest political rewards. With the two-nation theory at the heart of the Congress-League split, the effect of this was to heighten rivalries and enmity between religious communities, particularly in areas where they lived side by side. Competition between ‘nationalisms’ and uncertainty about the long term presence of the Muslim community in provinces where they represented a sizeable population, placed established social relations and the distribution of resources between the communities under pressure. Throughout India, but in these provinces in particular, nationalist imaginings took on an increasingly communal hue. Competition and disputes between local politicians were channelled into arguments about religious differences; politicians drummed up support with cries of religion in danger; members of the ‘other’ community were identified increasingly not only as religious but also as national adversaries. In these communal battles there was no area of grey in terms of religious and national identity: Muslims were seen as Pakistani nationalists fighting against Hindu citizens of India. In Punjab, the large Sikh community, based in the very middle of the province, were invited by Hindu nationalists to recognise their

18 Contemporaries commented that the violence was so serious that it transcended the term riot and was better understood as “fratricidal war” G. D. Khosla, Stern reckoning: a survey of events leading up to and following the partition of India, (Delhi, 1945), p. 3.
‘Hindu heritage’ and thus their Indian citizenship. Many Sikh representatives resisted being swallowed up under the category of Hindu, calling instead for the creation of their own nation, Khalistan. However, their lack of political clout at the negotiation table and their strong opposition to the division of Punjab brought Sikh leaders into closer collaboration with the Congress. The uncertainty surrounding this alliance was to have long term repercussions for Sikh citizenship in independent India.

It was in this ambiance of communal tension, in which the good of the Hindu community could be easily conflated with the good of the Indian nation, that work began on the new Indian constitution. The Central Legislature continued to function up until British withdrawal, but the first meeting of the Constituent Assembly, a separate body formed with the express purpose of drawing up the new Constitution, was held on 11th December 1946. Though it was not elected on a general franchise and ran concurrently with the legislative assembly, the Congress asserted the authority of the Assembly on the basis of its connection with the national will. The Assembly declared its power to come from its ability to derive “from the people...all power and authority.”

Congress had always maintained that it represented the Indian nation, but as the dominant organisation in the Constituent Assembly, the Assembly’s claim to embody popular sovereignty drew the organisation and national will even closer together. Yet, following the Muslim League’s boycott of the Constituent Assembly in July 1947, much of the Muslim community and its representatives were left outside the Assembly and thus, by extension, the nation. “A constitution”, Sir Radhakrishnan declared in his speech congratulating the election of Rajendra Prasad as permanent chairman of the Assembly, “is the fundamental law of the nation. It should embody

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19 Though Sikhism drew inspiration from both Muslim and Hindu traditions, the nature of the violence prompted some Sikh and Hindu leaders to emphasise the closeness of their religions and to distance Sikhism from its more Islamic roots. In an article in the Organiser, the mouthpiece of the RSS, a staunchly Hindu-rightwing organisation, A.J. Singh declared that “Sikhs form part of Hindus [sic]” and argued that it was “absurd” to consider that Sikhism had anything to do with Islam. “Vedanta is the basic culture of the Sikhs” he wrote. Organiser, 23rd October 1947 Vol.I No.17.

20 This had implications in terms of the HCB, as will be discussed later but also more generally, particularly after Operation Blue Star and Indira Gandhi’s assassination in 1984. See Urvashi Butalia, The Other Side of Silence: Voices from the Partition of India, (Delhi, 1998), Introduction.

21 Objectives Resolution passed by the Assembly; CAD I, 5, 59, cited in Granville Austin, The Indian Constitution: cornerstone of a nation, (Delhi, 1966; 1999 edn.) p. 2.

22 From Simla onwards, the Congress maintained that the Constituent Assembly would “represent the will of the free Indian nation and give...effect to it.” Letter from Maulana Azad to Lord Pethick-Lawrence at Simla, 6th May 1946. AICC Papers File 41/1946-47 NMML.
and express the dreams and passions, the ideals and aspirations of the people. It must be based on the consent of all, and respect the rights of all people who belong to this great land."23 The overwhelming predominance of Hindu politicians within the legislatures made it extraordinarily difficult to draw a clear line between national interests and those of the majority community.24

The division of the subcontinent along religious lines served to reinforce the Hindu identity of the new Indian state, even though millions of Muslims remained in India and large parts of the country, especially the south, were unaffected by the communal violence. At the same time, the mistrust and uncertainty of the transition period had done much to undermine popular stability and confidence. The violence between Hindu and Muslim communities triggered by, and further contributing to, the tense political situation created problems for law and governance in the subcontinent. The combination of rioting, economic problems and food shortages, ongoing since World War II, fostered a general sense of insecurity. In this climate, the eventual partition of the subcontinent seemed to be the final realisation of the breakdown of the established order.25 There were calls for the new government to restore stability and endow the new country with a sense of strength and unity. The far reaching resonance and significance of Hindu identity and symbolism made them an important part of trying to bring together the new Indian nation whose birth had been marked by the exodus of millions of Muslims. In those areas exposed to the communal violence, where the structure of families and communities had come under attack, ‘stability’ was often seen to involve the restitution of patriarchal authority, an issue that will be dealt with in more detail in the next section. Seeking to establish a single and coherent model of the Hindu family, the Hindu Code Bill took on new meaning and appeal in this post-partition context.

The desire to establish unity and stability after independence was strongly reflected in the nation-building process that followed independence. Continuity and consistency was highlighted in the new constitution which adopted many of the features of the 1935 Government of India Act, under which the Congress had secured

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24 The appointment of B.N. Rau, chairman of the Hindu Law Committee that had drafted the Hindu Code Bill during the war, as advisor to the constitutional drafting committee is interesting in this context. To some extent he was moved from one committee dealing with the drafting of a Hindu legal code to another.
significant political success in the provinces. Prior to World War II the centre had been limited in its powers by the provincial governments but, following the growth of state power during the war, the new constitution strengthened the centre’s political supremacy. The Indian nation was to be governed by a parliamentary system, overseen by a President who “represents the nation but does not rule the Nation”, much like the King under the English Constitution.26 This system of rule would operate under a federal constitution made up of central and subsidiary state polities. Unlike the American federation, however, all sovereignty was derived to the states from the centre, making the possibility of state secession, one of the crucial possibilities raised by the British during the transfer of power negotiations, constitutionally illegal. As B.R. Ambedkar, the Law Minister, explained,

The Constitution of the Unions and of the states is a single frame from which neither can get out and within which they must work...The Drafting Committee wanted to make clear that though India was to be a Federation, the Federation was not the result of an agreement by the States to join in a Federation and that the Federation not being the result of an agreement, no States has the right to secede from it.27

There was to be no dual citizenship and “care...taken to eliminate all diversity from [the different state’s] laws which are at the basic civic and corporate life” by placing certain key legal areas, such as “the Codes of Civil and Criminal Laws...Transfer of Property Act, Laws of Marriage, Divorce and Inheritance...in the Concurrent List so that the necessary uniformity can always be preserved without impairing the federal system.”28

Such wording suggested that the new state was more interested in involving itself with the everyday lives of its citizens than its colonial predecessor. This new ‘social’ role for the state was articulated even more clearly in the list of Fundamental Rights that was included in the constitution. Drawing heavily on the ideas about rights and equality voiced during the Sarda Act,29 the Fundamental Rights, seemed to present a new relationship between state and society, in which the former was willing

26 Ambedkar ‘Basic features of the Indian Constitution’ in V. Rodrigues (ed.), The Essential Writings of B.R. Ambedkar, (Delhi, 2002) pp. 474-5. This aspect of the constitution became the subject of much controversy during the disagreement between Nehru and Prasad about the Hindu Code Bill in 1950-51, see H.N. Pandit, The PM’s President: A New Concept on Trial, (Delhi, 1974).
28 Ibid. p. 477, 483.
29 See Chapter Two.
to secure the interests of all its citizens. Based on the resolution passed at the Congress’s meeting in Karachi in 1931 the Fundamental Rights covered Rights of Equality, Rights relating to Religions, Cultural and Educational Rights and Rights to Property. They laid out a notion of citizenship for all Indians based on total equality of rights and freedoms and committed the state to the protection of any citizen from discrimination “on grounds of religion, race, caste, sex or place of birth, or any of them.” Crucially however, the constitution remained silent on what these rights would mean materially for Indian citizens and how they would be upheld. As the process of nation-building progressed, popular attitudes and the limitation of the new government’s powers shaped the actual implementation of citizenship and thus the realisation of the Indian nation.

In addition to the Fundamental Rights, the constitution also included the non-justiciable article 44 in which the state pledged to work towards the establishment of a uniform civil code for all citizens. In August 1940 Shareefah Hamid Ali, a prominent Muslim woman leader, wrote in support of the idea for a civil code for all Indians, regardless of their religious background. While maintaining that the Shariat Act had not resolved all their legal difficulties, she argued that the Act had granted Muslim women “many advantages compared to women from other creeds”. “Those unwilling to change should not be compelled to do so” she argued “as forcing any law on an unwilling people has harmful reactions. We must shape the lives of the younger generation in such a manner that the introduction of the modern Indian code would follow automatically after 20 years or so.”

A very similar sentiment seems to have inspired those involved with drafting article 44. Yet, whereas certain sections of Muslim society had supported the idea of a civil code before 1947, very few of the Muslim leaders left in India after partition favoured such a plan. Many of the upper class families, from which women such as Shareefah Hamid Ali came, left for Pakistan, while the male leaders of the Muslim community left in India felt that community unity and suppression of dissent was vital for the protection of their power against the Hindu majority. Protecting the religious

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31 Cited in ISR Vol. LIX No. 16 Saturday, December 18th 1948, p.126.
32 ‘A civil code for India’ Roshini, August 1940, Vol. II, 2 pp. 44-46. This article is also a good example of the perception that codified law was more modern and therefore synonymous with improvement and progress.
and autonomous status of the Muslim family became necessary for the preservation of Muslim men’s patriarchal power within the family and community at large.\textsuperscript{33}

For Hindus, however, there was, after independence, even greater reason to accept state power in terms of reforming the family. Now comprising the dominant force within the state, upper caste Hindu male legislators had little to fear from legislative-led law reform. While many of the representatives that supported article 44, including prominent women leaders, did so on the grounds that it would move the nation towards secular unity, there was concern after partition about Muslim opposition to the proposal and it was decided to make the article non-justiciable.\textsuperscript{34} This move reflected the continuation of the colonial state’s ‘parity through difference’ approach to law reform. While a single legal code was something to be worked towards in the future, it was decided, in the post-partition aftermath, that the restitution of communal harmony should be dealt with first. As a result, the Muslim community and family were placed outside the sphere of state influence, in the name of national unity and even secularism.

While this state of affairs protected the interests of (male) Muslim leaders, it had important consequences for the functioning of citizenship more generally. In the drive to establish national unity, but also to deal with the tension and mistrust of the transfer of power period, defining who was and who was not an Indian citizen became a major preoccupation. The uncertainty and sense of dislocation created by the division of the subcontinent generated anxiety about anti-nationalism. Fear of the disloyal ‘other’ became all too easily synonymous with, not only Muslims who had supported the League, but the Muslim community as a whole. While Nehru implored the Assembly and the people of India not to view citizenship in terms of religious identity – “the mere fact of a person’s religion does not make a person loyal or disloyal to the state; it is a very wrong way of describing a person or considering a question on those lines” – the positioning of the Muslim community as outside state


\textsuperscript{34} Amongst the constituent assembly members, Minoo Masani, Rajkumari Amrit Kaur and Hannah Mehta offered their strong support for the movement towards a uniform civil code to be included as a justiciable measure in the constitution in March 1946. In late July 1947, however they wrote to Vallabhai Patel, chairman of the Advisory Committee, to say that “In view of the changes that have taken place since”, a phrasing that Austin argues referred meant “certainly Partition”, they were willing to accept this as a non-justiciable clause. G. Austin, The Indian Constitution: Cornerstone of a Nation, (New Delhi, 1966; 1999 edn.), pp. 80-81.
influence seemed to raise questions about Muslim loyalty and commitment to the
nation. In his opening address to the meeting of the AICC held on 15th November
1947 in New Delhi, the party’s then president, Acharya Kripalani declared that people
“have no right to deprive others of the elementary rights of citizenship for no other
crime than that of belonging to a different religion”. But, he continued,

Those of our Muslim countrymen, and they formed the overwhelming
majority of the Muslim community, who misguided by the League
leadership helped in the establishment of Pakistan assure us today that they
no longer believe in the two-nation theory. They are as vehement in their
loyalty to the Indian Union as they were for the division of the country.
Although we welcome these verbal expressions of loyalty, it is only by
their deeds that this loyalty can be tested... In spite of the national and non-
communal basis of our state we cannot ignore the fact that whatever is done
in Pakistan has its inevitable repercussion in India... The safety of the
Muslims must come from their Hindu neighbours who form a majority of
the population and from whom the majority in the ranks of the police and
the army must come. These will not be active in affording this protection
unless they know that their co-religionists in Pakistan are getting a fair
deal. If that is so the Muslim community must organise itself to bring
pressure on Pakistan to do justice to its minorities. This is the only way that
it can show its loyalty to the Indian Union at this critical juncture...

The sense that being a Hindu was as much a civil as a religious identity, postulated in
the pre-independence Code Bill debates, was given far more meaning and coherency
in the aftermath of partition. The dominance of the League-Congress split within the
transfer of power debates meant that ‘Indianness’ became, effectively and at crucial
moments in the definition of the Indian state, about being Hindu, even whilst the
language of secularism was in vogue. Prior to World War II, debates about the
codification of Hindu law had taken place against the backdrop of a more general
drive to consolidate and unify personal legal systems, with the introduction of the
Shariat Act providing impetus for the appointment of a Hindu Law Committee. After
partition, however, Hindu law no longer appeared to be one of many personal legal
systems, but rather the dominant one. This was reflected in the wording of the
application clause of the Hindu Code Bill, amended by a second select committee that
met throughout the summer of 1948. It was “presumed, until the contrary is proven”
that the Code was applicable not simply to “all Hindus, that its to say, to all persons

35 Starred question 1292 ‘Alleged government pledges to Mahatma Gandhi re. rehabilitation and
NMML.
professing the Hindu religion in any of its forms or developments, including Virashaivas or Lingayats and members of the Brahmo, the Prarthana or the Arya Samaj... [and]...to persons professing the Buddhist, Jaina or Sikh religion” but more simply to “any persons who is not a Muslim, Christian, Parsi or Jew by religion”.\textsuperscript{38} The implication of this definition was, therefore, that all citizens of the Indian Dominion, unless they were adherents of Islam, Christianity, Zoroastrianism or Judaism, were legally defined as Hindu.

Partition did not mark a difference in leaders’ attitudes and approaches to questions of law reform and secularism so much as a difference in political context. Indeed, leaders of independent India took up and continued colonial policies towards Hindu and Muslim law reform, as the\textsuperscript{*}debate about article 44 of the constitution demonstrates. Yet, by 1947, the implications of this approach for the relationship between the state and religious community had been transformed. While the state had been seen as ‘neutral’ under British rule, this position had become more complex following independence. Partition served to blur the line between civil authority and religious identity, so that, particularly in its aftermath, Hindu identity could often be presented as Indian identity. In this climate, established policies of managing religious communities served to reinforce the ambiguous relationship between Indian and Hindu. Even if the intention was to create greater equity in the functioning of personal law, or rather equity in the rights of Hindu and Muslim patriarchs, by taking a role in Hindu but not in Muslim law reform, the Nehruvian government served to construct a stronger bond and greater political recognition of the place of Hindus within the new nation-state. Muslims were not denied citizenship, but their loyalty was open to question, while the commitment of Hindu citizens to the nation was assumed to be natural. In this transformed political context, the Hindu Code Bill debates were no longer only about a struggle for power between Hindu men, but were drawn into much wider debates about Indian citizenship and the reform of post-colonial Indian society more generally.

**Partition, citizenship and gender: the Abducted Persons Restoration Act, 1949**

The impact of partition on the subsequent nation- and citizenship-building projects also had important ramifications for the position of women in the new nation. The

\textsuperscript{38} The Hindu Code Bill, April 1947. IOR L/P&J/7/5496.
nexus between women, religious identity and law had long been established under colonial rule but had been re-inscribed in Indian society during the debates about personal law reform in the 1930s.\textsuperscript{39} This nexus was further reinforced in the attacks on both Muslim and non-Muslim women in communal violence that accompanied partition. The psychological and material impact of the partition riots also affected attitudes towards women under the new state. The violence and disorder of the riots directly undermined the established patriarchal order, highlighting the weakness of male leaders to defend their communities, and particularly their women folk. Whereas one of the consequences of Hindu law reform had been to posit the prospect of women as equal actors in Hindu society, the public response to the communal violence reiterated more conventional views of women as men’s property. Seeking to reinforce their weakened potency, male leaders from the affected communities linked their authority to the power of the new state and called on the government to demonstrate its strength by restoring ‘proper’ social order. The sense of what this ‘proper’ social order should be was defined by the geographical location of the violence, which was situated largely in north India. Thus, in this discourse of religious pride and national identity, north Indian patriarchy was presented as the social norm, not only for the Hindu community, but for Indian society more generally. In this way, the violence and the discourses of rehabilitation that followed played a key role in shaping the on-going struggles between regional elites to define Hindu identity in the Code Bill debates. This had important implications, not only for the construction of the family within the post-independence Code, but for the functioning of Indian women’s citizenship more generally.

The communal violence that erupted over the course of 1946 and 1947 affected much of northern India but was of unparalleled proportions in Punjab and Bengal. Much was at stake in these two multi-religious provinces, as any plan for partitioning the subcontinent raised the very real prospect of dividing communities, land and material resources. In the violence that eventually broke out in these regions, women of the ‘other’ community were deliberately targeted, while the purity of a

community’s own women became the index of its power and religious superiority.\footnote{40} In the context of the transfer of power debates, this strength was extrapolated to represent not only the power of religious communities but also the honour of either the Muslim nation, Pakistan, or the Hindu nation, India. In Punjab this latter group included many Sikhs, who had traditionally inhabited the middle regions of the province through which the new national boundary was now drawn.\footnote{41} As communities struggled to assert their claims to the province, the ability of a local community to protect the honour, izzat, of their women against aggressors was a mark of its strength and respectability.\footnote{42} The martial background of the Sikhs, and of the Punjabi community more generally, was important in shaping these discourses.\footnote{43} Indeed, as will be clear from the discussion below, Punjabi experiences have dominated accounts of the partition violence, both at the time and in subsequent academic accounts.\footnote{44} This explains, perhaps, the nature of the popular responses to partition and rehabilitation, much of which drew heavily on masculinity and military prowess, a fact that had important implications for the post-independence Code Bill debates as will be examined in the conclusion to this section.

As Punjab and Bengal erupted in violence, reports circulated about women who had been raped, abducted and branded with symbols of the other religious community.\footnote{45} The accounts of social workers who helped with the rehabilitation of partition victims indicated that it was not uncommon for attackers to cut off women’s breasts, to mutilate their genitalia and to carve into their skin religious insignia, such

\footnote{40} Most studies of gender and violence in partition have focused in particular on Punjab: Urvashi Butalia, The Other Side of Silence: Voices from the Partition of India, (Delhi, 1998); Ritu Menon and Kamla Bhasin, Borders and Boundaries: Women in India’s Partition, (New Delhi, 1998); Gyanendra Pandey, Remembering Partition: Violence, Nationalism and Indian History, (Cambridge, 2001). In the past few years there have been attempts to examine the effects of partition in Bengal, see in particular Joya Chatterji, ‘The Fashioning of a Frontier: The Radcliffe Line and Bengal’s Border Landscape, 1947-52,’ Modern Asian Studies 33, no. 1, (Feb., 1999), pp.185-242 and also The spoils of partition: Bengal and India 1947-67, (Cambridge, 2007). Another region which saw large-scale violence against women during this period is Kashmir, though this has received decidedly less academic attention. The restoration of abducted Hindu Kashmiri women was raised along with the restoration of Hindu women to India in parliamentary questions. During February 1948, the Indian Government claimed 974 Kashmiri women were returned to India, see CAD(L) Part I pp. 1872-3.

\footnote{41} Ian Talbot, Punjab and the Raj: 1849-1947, (New Delhi, 1988), Chapter 1.

\footnote{42} Urvashi Butalia, The Other Side of Silence: Voices from the Partition of India, (Delhi, 1998), Chapter 5.


\footnote{44} See footnote 40 above.

\footnote{45} Ritu Menon and Kamla Bhasin, Borders and boundaries: women in India’s partition, (New Delhi, 1998), pp. 41-44.
as the ohm symbol or Islamic crescent moon.\textsuperscript{46} Large numbers of women were also abducted, converted and married, or simply kidnapped and brought to the ‘other’ nation. Stories of abduction and rape were used to discredit a community’s potency, undermine the strength of its men and the purity of their women’s sexual honour. Two weeks after the official partition of India a non-commissioned officer of the former British Indian army reported home about his ‘platoon’s’ actions in Guraspur district, Punjab:

Whosoever from the Hindus and Sikhs came in front of us, were killed. Not only that, we got them to come out of their homes and ruthlessly killed them and disgraced their womenfolk. Many women agreed to come with us and wished us to take them, but we were out for revenge.\textsuperscript{47}

Those men who had been the victims of attacks emphasised in their accounts of events the refusal of their women to give in to their aggressors and allow their purity to be contaminated. After the riots, the story of women in Thoa Khalsa, a village in the Rawalpindi district of Punjab, now in Pakistan, became a legend within the Sikh community in which the ‘glorious’ act of martyrdom performed by the community’s female population were commemorated. When Muslim aggressors demanded that the community hand over its women or face certain death, the community’s leaders collected their women together and told them that they would rather kill them than accede to this request.\textsuperscript{48} Instead, the women gathered together and, warning the Muslim mob that no earthly power could destroy the women of this community’, jumped into the village well, drowning themselves so that the men “should not have to witness the dishonouring of any (Sikh) daughter.”\textsuperscript{49}

While men who had suffered attack told stories highlighting their patriarchal authority, the physical impact of the partition of the subcontinent placed real demands on the state to act in a benevolent and paternalistic way. India’s division involved not only the dissection of territory but also of armies, administrators and populations. From the announcement that British India would be divided to create two separate

\textsuperscript{46} Urvashi Butalia, \textit{The Other Side of Silence}, (Delhi, 1998), p. 204.
\textsuperscript{48} As one member of the village recalls the men in the village told the women, “whatever may happen we are not going to agree to this condition, we would rather kill you all. There was no protest...no noise, all of them, all the women said kill us.” Interview with Bir Bahadur Singh in Urvashi Butalia, \textit{The Other Side of Silence}, (Delhi, 1998), pp. 179-80.
states, refugees began to flood into the territories of what would become the Indian nation-state. Refugee camps were set up in the partitioned provinces and also in Delhi where large numbers, mostly from Punjab, came to put down new roots. The post of Minister for Relief and Rehabilitation was created in Nehru’s cabinet to which Shri Mohan Lal Saksena was appointed. As the government made plans to resettle the initial influx of refugees, reports began to circulate of disillusioned Muslims returning from Pakistan to India. A year after India had been granted independence, the Deputy Prime Minister, Sardar Patel, estimated that approximately 30,000 Muslims had returned to India. The impact of this refugee crisis on the national economy, already devastated by World War II, was enormous. Military expenditure had resulted in imbalances in production, shortages of consumer goods, tight economic controls and inflation. Food shortages did not ease up after the war and poor millet and wheat harvests in 1946 and 1947 respectively served to worsen the situation. By the end of 1946 around 150 million people were covered by rationing of some kind.

The government’s focus on national solidarity and on the restoration of order following partition produced strong popular support for the ‘repatriation’ of non-Muslim women abducted during the partition violence. The influx into India of Hindu and Sikh refugees was a lasting memory of the brutality and displacement of partition. The large-scale human displacement put enormous pressure on already scarce resources, creating difficulties both for refugee families and for those living in the areas to which they had relocated. The abduction of Hindu and Sikh women became a metaphor for the confusion and patriarchal disorder felt in homes on a national scale. Indians from a range of backgrounds called for the government to intervene and ‘restore’ India’s kidnapped women from their Pakistani (Muslim) captors. No consideration was given in public discourse to a possibility that some of these women had gone willingly or established a happy marriage and relationship with men of the other community. Their return to India came to be seen as part of the empowerment of the Indian people.

50 By 15th January 1948 the Government stated that 51,979 refugees were applying for employment through its Live Register of Employment Exchanges, the largest number of figures coming from East Punjab, where 15,590 people had registered, and Delhi province, where the figure was 2,149. Starred question 459 ‘Unemployed refugees Registered in Employment Bureau’, 25th February 1948, LAD, Vol. I Pt I, p. 1204.

51 Starred question 79 ‘Restriction on Return of Muslims from Pakistan and Restoration of Mosques in Delhi’ 10th August 1948, LAD Vol. VI Pt I., p. 108.

Such campaigns played an important part in shaping the government’s rehabilitation policies. While the majority of Punjabis and Bengalis were given the choice as to which side of the border they wished to settle, this choice was not given to all groups.\footnote{Jinnah always insisted that he wanted Pakistan to be a secular Muslim homeland though from its inception, the nation’s religious identity came to inform its political structure and outlook. Ayesha Jalal, The State of Martial Rule: the origins of Pakistan’s political economy of defence, (Cambridge, 1990).} Though the Congress had insisted that it was fighting for a secular India and despite assurances from the League that the interests of non-Muslim minorities would be safeguarded in Pakistan, the nationality of certain members of the armed forces, prisoners and asylum patients and abducted women and their children was settled on the basis of religious identity.\footnote{Within a fortnight of partition, the Joint Defence Council of India and Pakistan declared that of those forces based in Punjab, “Those units which are mixed (i.e. which contain Muslim and non-Muslim sub-units) will be split, so that Muslim are located in Pakistan and non-Muslims in India.” ‘Communiqué of the special meeting of Joint Defence Council held in Lahore’, 29th August 1947, PSA East Punjab Liaison Agency Files 4/V/2; Muslim prisoners, both in the partitioned provinces and in a number of other regions, agreed with Pakistani authorities, were sent to Pakistan, starred question 380, ‘Agreement between India and Pakistan regarding the exchange of prisoners in East and West Punjab Jails’, 23rd February 1948, \textit{LAD}, Vol. II Pt. I, p. 1082; see also Urvashi Butalia, \textit{The Other Side of Silence}, (New Delhi, 1998), pp. 78-83.} At the Inter-Dominion Conference held on 6th December 1947 it was decided that “abducted persons will not be permitted to make a choice to remain and must be restored to the Dominin to which they belong even by force if necessary.”\footnote{Deputy High Commissioner Lahore to Kripalani, 10th December 1947. East Punjab Liaison Agency Files File 31/LV1/5 PSA.} The Dominion to which such women belonged was determined by their Muslim or non-Muslim identity.

The campaign for women’s ‘restoration’ helped to construct a highly gendered view of both Indian and Pakistani national identity. The public discourse about abducted women kept alight the discourse of the Muslim ‘other’ constructed in the Indian public imagination at the time of the riots: a sexually depraved and violent barbarian.\footnote{This imagery and view of Muslim sexual behaviour in juxtaposition to Hindu patriarchy and mores had its roots in nineteenth-century reform movements and attempts to mark out the differences between the Hindu and Indian communities of northern India. See Charu Gupta, \textit{Sexuality, Obscenity, Community: Women, Muslims and the Hindu Public in Colonial India}, (Delhi, 2001).} These women were regarded in public discourse as the unwilling captives of licentious Muslim men and any cross-communal relationship established around the time of partition was considered illegitimate. The ‘sexual molestation’ of these girls represented the weakness of non-Muslim, Indian men and thus of India, Hinduism and Sikhism in the face of Pakistani potency. On the return of these women depended India’s national honour: “the honour that was staked on the body of Mother
India and therefore, by extension, on the bodies of all Hindu and Sikh women, mothers and would be mothers.”

The right-wing Hindu lobby outside the legislature, but also Congress legislators themselves, recounted the story of the Hindu king Rama’s epic struggle to save his pure and virtuous wife from the demon king Ravana, arguing that the Hindu nation now had to rise up and reclaim their women in the same way.

But, it was not simply Muslim men who had abducted Hindu women; a large number of Muslim women had also been captured by Hindu men and brought to India. This problematic dimension to the ‘restoration’ process was defused by a high profile campaign which set out to ‘recover’ abducted Muslim women and return them to Pakistan. Agreements were made with Pakistan to ‘restore’ abducted Hindu and Sikh women to India in exchange. Some right-wing Hindus defended the actions of men from their own community, arguing that they had been the victims of Muslim women who had moved into their homes and were living off their wealth. More usually, however, it was argued that the actions of Hindu men were equally deplorable but, as a civilised nation, India knew how to right their wrongs.

Under a special ordinance, the Pakistani and Indian states assumed extraordinary powers to recover and repatriate these women, with or without their consent. Military Evacuation Organisations were established by both the Pakistani

57 Urvashi Butalia, The other side of silence, (Delhi, 1998), p. 191.
58 Pandit Thakur Das Bhargava of Punjab appealed to the Central Legislative Assembly that “we all know our own history of what happened in the time of Shri Ram when Sita was abducted.” 15th December 1949, CAI(L)D, Vol. VI, Pt. II, p. 642. The Organiser, mouthpiece of the right-wing Hindu nationalist group the Rashtriya Swayamsevak Sangh, referred to Sita’s honour and Rama’s battle against Ravana in relation to the abducted women in articles that carried headlines such as “Pakistan the sinner: 25,000 abducted, thousands sold, all outraged.” Organiser, 21st December 1949, Vol.III, no.18.
60 “I know the genius of our people, the high morality of our people and we are all willing to see that every Muslim girl should be restored.” Pandit Thakur Das Bhargava, 15th December 1949, CAI(L)D, Vol. VI, Pt. II, p. 641. In the years in which the restoration programme operated the charge was levelled time and again at the Pakistani authorities that while India was keeping her side of the bargain, their own nation was simply too immoral to comply. “The Pakistan Government does not understand the language of morality, it only understands the language of force and retaliation” Pandit Thakur Das Bhargava CAI(L)D ibid; See also questions to the Government about Pakistani obstruction to the rehabilitation and recovery process, starred question 98 ‘Recovery of abducted women in dominions of India and Pakistan’ 4th February 1948, CAI(L), Vol. I, p. 217-8; starred question 688 ‘Rescue of abducted women and children in India and Pakistan’ 11th March 1948, CAI(L), Vol. I.
61 The AIWC took action on this point only in 1955 following their annual conference at Paltan during which a resolution was passed stating that “This Conference is of opinion that abducted women of India and Pakistan should not be restored to their relations under compulsion, in view of the hardship caused to married women with children and that after they had been recovered, they should be allowed to opt freely for either India or Pakistan”. A copy of this resolution was sent to Jawaharlal Nehru who replied the same day wishing to inform Pushpaben Mehta, then Honorary General Secretary of the
and Indian Governments to help evacuate such communities but also to ‘restore’ and ‘repatriate’ women abducted by the ‘other’ community during the violence. In addition to these bodies, a non-military, civilian run Liaison Agency was established on both sides of the Punjabi border to deal specifically with the restoration of women. When the ordinance expired, a bill was drawn up to shore up and continue the powers of the east Punjab Liaison Agency. On the 15th December 1949 Nehru’s Government introduced the Abducted Persons (Restoration and Recovery) Bill to the Constituent Assembly. The bill defined an abducted person as:

...a male child under the age of sixteen years or a female of whatever age who is, or immediately before the first day of March 1947, was, a Muslim and who, on or after that day, has become separated from his or her family and is found to be living with or under the control of a non-Muslim individual or family, and in the latter case includes a child born to such female after the said date.

Though the object of the bill was to de-legitimise a family’s ‘control’ over any woman from the ‘other’ religious community, the legislation did not undermine the idea of familial control or ownership over a woman more generally. Rather, the bill reinforced the highly conservative view of women as ‘property’ of a male family unit, with the state playing the role of patriarch in re-claiming the women that ‘belonged’ to it. In so doing, the provisions of the Abducted Persons Restoration Act presented state authority and power in a manner that was strongly reminiscent of a wider family collective, such as the male coparcenary unit that lay at the heart of the joint family organisation “that it is our fixed principle and rule not to send any women to Pakistan against their will. There may have been in the past some mistakes made about this, although the rule was there. Now it is strictly enforced. Therefore there is no question of compulsion in sending them. It is true that in the initial stages they are brought to a home in India where they are allowed to meet their relatives etc. But they are not sent to Pakistan unless they themselves agree. I hope you will make this clear to your Conference.” Letter from P. Mehta to J. Nehru, 11th March 1955. AIWC Papers F.206 NMML.

62 Relations between the MEOs (Military Evacuation Organisations) on either side of the border were rarely easy or harmonious and there was constant disagreement as to which duties their respective forces should be undertaking: “It appears that MEO Pakistan is belabouring under some misunderstanding. The evacuation of non-Muslim is quite different from the recovery of girls. In the latter case according to the belief of the Pakistan Government the recovery of girls and women is entirely left to the police and the military and the civilians belonging to the Dominion concerned have no liability to come in, but as you will agree the evacuation of men is quite a different affair and this question was never discussed in the conference held on 6th December 1947, between the representatives of the two Dominions. Evacuation work is therefore to continue as usual and our troops and our Liaison Officers have to operate taking out village parties and bringing back their nationals from small pockets.” From R.B. Nathu Ram, Chief Liaison Officer, East Punjab Government to Col. Randhir Singh, MEO (India), 26th December 1947. East Punjab Liaison Agency Files File 31/LVI/2 PSA.


64 Ibid, p. 645.
governed by both Mitakshara and Punjabi customary law. The implication of this legislation was that proper order and national unity was synonymous with the protection of the male-dominated joint family. As the Code Bill was revived after independence, this implication was to be given a more concrete reality as pressure was placed on the government to retain the joint family system.

The crisis of patriarchy that was triggered by the partition riots made many Indians very wary of experimenting with social structures and relationships. While it had been possible during the inter-war period to open up to scrutiny the Hindu family, after partition such acts seemed to threaten one of the few things that provided a clear basis for national unity and citizenship. For the north Indian Hindu men who had been affected by the violence, rehabilitation required a shoring up of traditional structures of hierarchy, not a weakening. As the political topography of the new nation began to emerge, these men were able to muffle out calls for far-reaching reform of the coparcenary. The numerical dominance of north Indian leaders in the new parliament and the physical relocation of many Punjabi refugees to the capital in Delhi gave these men greater access to state power. Consequently, the various regional claims and lobbies within the reform debates were slowly overwhelmed and a vision of the family based on the conservative practices of north Indian Hindus came to form the base of the Hindu Code Bill and Indian citizenship more generally. In this context, it is interesting to note that the debates on the Abducted Persons Bill ran concurrently with one of the longest and most heated sessions of the Hindu Code Bill debates with several legislators speaking in both. However, unlike the latter, the Abducted Persons Bill received almost no opposition and was passed with little amendment on 19th December 1949. If there had been a moment, during World War II, to use the

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65 Non-agriculturist Hindus in Punjab were governed largely by Mitakshara law while land-owning classes, which included many Sikhs were governed by Punjabi customary law, which bore strong resemblance to the coparcenary system. For more of this see Chapter One. In this way, the Abducted Person’s Restoration Act is further evidence of the marginalisation of Bengali Hindus in the post-partition rehabilitation campaigns, many of whom were governed by Dayabhaga law.

66 Though Ambedkar resisted these calls, the joint family system was retained under the Hindu Succession Act, which was drafted after the division of the Code Bill into 5 consecutive parts. This re-drafting of the Code Bill will be explored in the subsequent chapters, with the revival of the joint family dealt with in detail in Chapter Six.

67 See Table 1 in the next chapter.

68 These included Sjt. Rohini Kumar Chaudhuri (Assam), The Honourable Shri K. Santhanam (Minister for Railways), Mr. Naziruddin Ahmad (west Bengal: Muslim), Pandit Balkrishna Sharma (UP: General), Pandit Thakur Das Bhargava (East Punjab: General) and Shri Krishna Chandra Sharma (UP: General).
codification project to introduce a significant rebalancing of gender relations amongst Indian Hindus, this opportunity was lost after partition.

Conclusion

While the inter-war reform debates had raised important questions about the operation of Hindu patriarchy and the rights of widows and daughters, in the aftermath of partition and the national rehabilitation programmes, discussions about the Hindu family grew decidedly more conservative. This was due in part to the trauma of the partition violence. India, it was felt, had been too rattled to countenance change. What was needed instead was a return to the stability of the past, a stability that reinforced rather than queried patriarchal authority. Yet, this rise in conservatism was also due to the growing dominance of north Indian male legislators following independence. The prevalence of pre-colonial customs and matrilineal legal systems in southern and parts of western India had ensured a particular focus on women in the inter-war debates. After independence, debates about the family came to be influenced far more by the more rigid and conservative views of women and family practices prevalent amongst upper-caste men in northern India and articulated very clearly in the Abducted Persons Restoration Act.

Significantly, this did not spell an end to discussions about personal law reform. Though important headway had been made in the inter-war period with measures such as the Hindu Gains of Learning Bill, many of the Hindu men who sat in the Constituent Assembly continued to feel that the existing system of Hindu law did not serve their economic interests.\(^{69}\) As a result, there was enough support for the Code Bill to pass a motion calling for the house to continue consideration of the measure on 17\(^{th}\) Number 1947.\(^{70}\) What legislators would support in terms of how to reform the family, however, began to change after independence. In this climate

\(^{69}\) For a breakdown of the caste backgrounds of representatives see Granville Austin, *The Indian Constitution: Cornerstone of a Nation*, (New Delhi, 1966; 1999 edn.), Appendix III. The vast majority of representatives between 1947 and 1949 were Hindu, of which most were men largely from the upper castes. Many of the key framers of the constitution were lawyers who would have been living away from their joint family and operating their own household accounts. For a breakdown of the professional background and age of many Congress leaders see Gopal Krishna ‘The Development of the Indian National Congress as a Mass Organization 1918-1923,’ *The Journal of Asian Studies*, Vol. 25, No. 3., (May, 1966), pp. 424-5. On the role of lawyer-politicians in the Code Bill and in the inter-ware reform debates see Harold Lewis Levy, ‘Lawyer-scholars, lawyer-politicians and the Hindu Code Bill, 1921-1956’, *Law & Society Review*, Vol. 3, No. 2/3, (Nov., 1968 - Feb., 1969), pp. 303-316.

\(^{70}\) 17\(^{th}\) November 1941, *CAH(L)D*, p. 41.
Ambedkar’s confrontational style and radical agenda was particularly inflammatory, as legislators attacked not only the changes made by the new Law Member but also the more liberal aspect of the Hindu Law Committee’s proposals.\textsuperscript{71}

The heated atmosphere following partition was also significant for the functioning of Indian secularism. While there exists a canon of literature exploring the principles and operation of Indian secularism, these studies have largely ignored the debates about Indian patriarchy and their role in shaping the operation of the independent state’s secular policy.\textsuperscript{72} Looking at the continuity between the late-colonial and independent state’s attitude to Hindu and Muslim law reform, this chapter has argued that, far from undermining equality between the two religious communities, the revival of the Code Bill after independence was an attempt to ensure that patriarchs in both communities enjoyed the same kinds of rights. However, while the reintroduction of the Code Bill and protection of Muslim personal law can be seen as the successful functioning of Indian secularism, it served, within the wider context of the transfer of power period, to in fact undermine equality between the two communities. The communal tension of the transfer of power period had done much to distance the Muslim community from popular imaginings of the Indian nation. The communal violence that swept north India, speeches about Muslim loyalty in the wake of partition and legislation such as the Abducted Persons Act all served to reinforce the position of the Muslim community as being outside the nation. So too did the state’s position on personal law reform; the Muslim family was seen to exist beyond legislative powers while debates about Hindu personal law came to merge with ideas about good citizenship. In this way it was not simply the break with the past brought by independence, but also the new state’s continued pursuit of colonial policies that created a very different context for the post-1947 Hindu Code Bill debates.

\textsuperscript{71} This will be discussed in greater detail in Chapters Five and Six.

5. Marriage, civil law and citizenship in the Hindu Code

The introduction of divorce into Hindu law with the passage of the Hindu Marriage Act on 4th May 1955 was hailed by Indian men and women alike as an important step towards gender equality. Yet, studies of marriage and divorce law in contemporary India indicate that Hindu women still do not enjoy easy access to divorce or the equality of partnership in marriage that the provisions of the 1955 Act seemed to give. It seems that low divorce rates in Indian society are not necessarily indicative of happy marriages. This chapter argues that, while the Hindu Marriage Act was pivotal in undermining ideas about the sacred and indissoluble nature of Hindu marriage, it was by no means as progressive in terms of women’s rights as has been commonly perceived.

Looking at how the marriage reforms were developed and presented by legislators, this chapter examines the gap between the notion of ‘social progress’ associated with the legislation and the reality of the provisions actually introduced. The process of legal codification had itself been considered a modern innovation, long before work began on the Code Bill project. That it marked a break and a movement away from a legal system based on that of the coloniser must, in the Indian context, have added to its appeal as a more beneficial and forward-thinking way of administering law. Yet, the attempt to construct a homogenous Hindu community, governed by a single, codified legal system, necessarily entailed the exclusion and de-legitimisation of certain practices as a patchwork of varied social customs was replaced with a single model of the family.

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1 In their 1955 annual session at Phaltan, the AIWC passed a number of resolutions giving unanimous support to the Hindu Marriage Bill and celebrated its passage as part of their ‘Women’s Disability Week’ in which they urged that further steps be taken to improve women’s legal rights. ‘Reports of the different AIWC branches for 1955,’ AIWC Papers, F.283/1956 NMML.
3 Sara Hossain, ‘The right to choose: whether, when and whom to marry’ in Indira Jaising (ed.), Men’s laws, women’s lives: a constitutional perspective on religious, common law and culture in South Asia, (Delhi, 2005), pp. 374-89; Flavia Agnes, Law and gender inequality: the politics of women’s rights in India, (New Delhi, 1999), pp. 83-90.
The inter-war reform debates had demonstrated that, while many Hindu legislators supported law reform in general, there existed considerable regional difference about the direction in which reform should go and the shape a new legal system should take on. Confusion about a single ‘true’ Hindu legal identity was compounded by growing ambiguity about the relationship between Hindu law and legislative power. The Hindu Law Committee’s decision to introduce a ‘civil’ Hindu marriage ceremony in this Code served, in many ways, to further problematise attempts to define Hindu legal identity. This identity did begin to take on greater definition in the aftermath of partition, as the previous chapter demonstrated. Legislation such as the Abducted Persons Restoration Act, served to present the more conservative family practices of regions such as Punjab and other northern states, particularly Uttar Pradesh, as an ideal model of the ‘true’ Hindu family. The development and amendment of the Code Bill’s marriage provisions served also to reinforce the Hindu identity and propriety of north Indian family practices. As the Code Bill was altered and redrafted, south Indian marital practices, particularly regarding prohibited degrees of relationship, came to be sidelined in favour of north Indian practices. While south Indian Hindus practiced uncle-niece and aunt-nephew marriages, the strict exogamy of north Indian Hindus, and by implication disapproval of these close family unions, were written into the Marriage Act. Consequently, the 1955 Hindu Marriage Act granted greater state recognition to north Indian marital practices as the basis of a single Hindu law, while undermining the legitimacy and Hindu nature of other regional Hindu practices.

The decision taken in 1952 to split the Code Bill’s marriage provisions between a Hindu and a secular bill, was pivotal both in maintaining the ‘progressive’ image of the legislation and in imposing greater restrictions on women’s legal rights in reality. A revised version of the 1872 Special Marriage Act, the widely held view of this original bill as a ‘progressive’ measure did much to reinforce the ‘modern’ status of the 1954 Special Marriage Act. At the same time, as the first section of this chapter explores, the regional focus of the 1872 Act, together with the distribution of power in the post-

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5 See in particular the discussion about the Hindu Married Women’s Rights to Property Act in Chapter Two.
6 The inter-war origins of this gap between rhetoric and reality in the Code Bill are examined in Chapter Two.
independence legislature, meant that the dominance of north Indian practices in the revised Hindu Marriage Bill also came to affect non-Hindu communities and their relationship with the new state. Ruling out not only uncle-niece unions but also inter-cousin marriage, the 1954 Special Marriage Act delegitimised practices common to Muslim and other non-Hindu communities in India. Following the policy of religious ‘parity through difference’ discussed in the previous chapter, it was not the intention of Nehru and his ministers to discriminate against Muslim Indians. However, both the Special and Hindu Marriage Acts granted greater state recognition and thus legitimacy to north Indian Hindu patriarchal practices over those of the Muslim and south-Indian Hindu communities.

Though supporters of the Hindu and Special Marriage Acts stressed the ‘progressive’ and ‘modern’ nature of these measures, the rights they in fact provided to women were not as ground-breaking as many have assumed. As the second section of this chapter explores, the acts did grant Hindu women the right to divorce their husbands, however the way in which this right was framed and regulated in the new legislation greatly limited women’s ability to exercise it. Returning to an argument explored in Chapters One and Four of this dissertation, this chapter shows that reforming family structures and personal law did not involve greater state control over or penetration into the Hindu domestic realm or society more generally. However, it was the provisions permitting divorce, and not those regarding its regulation, that gained publicity when the acts were passed. Presented as a measure in tune with the notion of individual equality promulgated in the Hindu Law Committee’s Code Bill, the Hindu Marriage Act seemed to shut the door on further discussion about divorce rights or Hindu women’s entitlement to them. As such, the marriage acts were something of a ‘coup’ for the Hindu men who wished to improve their own, individual legal rights without compromising their authority over their wives. Far from liberating women, these measures served to reconfigure north Indian Hindu patriarchy in the political lexicon of progress, modernity and even secularism adopted by the independent nation.
The ‘progressive’ legacy of the Special Marriage Act 1872 in the Hindu Code

That the marriage legislation was seen as ‘modern’ owed much to the particular context of the Hindu Code Bill debates, as will be discussed in the next section, but the codification project also inherited many perceptions about modern legal practices from earlier reform debates. This was particularly true in relation to the Special Marriage Act of 1872. From the outset, it played a key role in shaping the marriage legislation, implicitly at first, as the blueprint for the Hindu Law Committee’s ‘civil’ marriage ceremony, and more explicitly after 1952, when a bill to amend the 1872 Act was introduced to the legislature to facilitate the passage of the Hindu Marriage Act. Growing out of agitation for a Brahma Samaj marriage bill, the 1872 Act had became tangled up in the secularising project of colonial administrator and jurist, Sir Henry Maine. Its association with one of the most prominent social reform movements of the nineteenth century and with notions of social progress held by colonial officials meant that the 1872 Act was seen very much as a measure for ‘modern’ times, something that was not seen by all Hindus as a good thing. As a result, it set an important precedent for the Code Bill debates.

The origins of the Special Marriage Act of 1872 lie firmly in the social reform debates and political factionalism of mid-nineteenth century Bengal. In 1868, a group from Keshab Chandra Sen’s faction of the Brahma Samaj called on the government to enact legislation that would grant legal legitimacy to the practices making up the Brahma Samaj wedding ceremony. The Bengali-based Brahma Samaj had developed from the philosophy of Rammohan Roy and was deeply critical of many contemporary Hindu practices. Following Roy’s campaign against sati the Samaj were focused on the treatment of women within Hindu society. The Samaj’s emphasis on individual enlightenment prompted opposition to the notion that Hindu marriage was an indissoluble sacrament. The philosophy of sacramental marriage had gained ground over the course of the nineteenth century, largely in response to the economic and legal context of colonial

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rule. Inheriting a highly coercive system of household labour, colonial governance and the legal system underpinning it served to reinscribe women’s subordination within the home and to render a woman even more vulnerable to the authority and demands of her husband. Together with legislation granting rights of conjugal restitution, scriptural teachings about the sacramental and indissoluble nature of Hindu marriage served to bind women and their labour to the home. The strength of Brahmo’s opposition to these practices varied, however, and helped to contribute to the Samaj’s split around 1865. It was Keshab Chandra Sen, leader of the more radical wing of the Samaj, who supported separate marriage legislation that would give Brahmos a legal status distinct from that of the wider Hindu community. Emphasising the responsibility and faith of the individual, in 1868 the Keshabites presented the government with a draft Brahmo marriage bill that set out a contractual union, in which a couple used the Christian phrasing of ‘I take thee’. The bill required a couple to be consenting ‘adults’, setting an age limit of 18 years for men and 14 for women, and to declare themselves followers of the Brahmo Samaj.

These proposals met immediately with opposition from many Hindus outside the Samaj, who objected to the Keshabites’ attack on sacramental marriage, and with the more conservative wing within the Brahmos which objected to the notion that the Samaj was non-Hindu, as implied in the bill. The range of interests involved in the bill grew further still with the involvement of Henry Maine, then colonial Law Member, who saw

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9 M.R Anderson, ‘Work construed: ideological origins of labour law in British India to 1918’ in Peter Robb (ed.), Dalit movements and the meaning of labour in India, (Delhi, 1993), pp. 87-120.
10 This particularly affected poorer Hindu women, who, prior to British rule had not been governed according to scriptural teachings. Upper caste prohibitions against divorce and widow remarriage were taken up over the course of the nineteenth and early twentieth century by lower caste groups who were in more desperate need to control the unpaid domestic labour of their womenfolk. Samita Sen, ‘Offences against marriage: negotiating custom in colonial Bengal’ in Mary E. John & Janaki Nair (eds.), A question of silence? The sexual economies of modern India, (New Delhi, 1998), pp. 77-110.
13 This was led by Debendranath Tagore, see Charles H. Heimsath, Indian Nationalism and Hindu Social Reform, (Princeton, 1964), pp. 89-93.
it as an opportunity to enact what he considered to be more progressive, civil marriage legislation that could apply to any Indian who ‘objected to [being] married in accordance with the rites of the Hindu, Muhammadan, Buddhist, Parsi or Jewish [though not Christian] religion’.

Opposition to this bill prompted another draft bill, the Brahma Marriage Bill of 1871, which followed Keshab Chandra Sen’s original proposal almost exactly but provoked an even greater outcry than the original. Though the Brahmos had sought to advocate contractual marriage as more progressive, these reactions did much to reaffirm the idea that, according to ‘true’ Hinduism, marriage was a sacrament rather than a mutual union between two individuals.

As a result of these exchanges and controversies the Special Marriage Act that was eventually passed in 1872 was much closer to Maine’s act than to the legislation desired by the Keshabites. The Special Marriage Act (Act III of 1872) drew on the Christian marital contract put forward by the Keshabites but was open to any Indian who renounced his faith, including Christians. As a result the measure was transformed from an act to legitimate marriages “conducted with unorthodox religious rites. It instead sought to legitimate marriages for those willing to renounce altogether their profession of faith.” This created a somewhat curious ‘secular’ measure that required a couple to give up their religious identity, which included the right to be governed by religious personal laws in other matters including succession, but married them according to rites, the historical origins of which lay in Christian practices. As well as using the Christian

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14 Having proposed that all societies move from status to contract, Maine believed that different social groups were moving along a single trajectory of progress. He understood Indian society to operate in the same ways as earlier British society and to be moving towards social structures and practices more akin to those of contemporary Britain. With much of Western Europe embracing secularism at this time, it is probable that he saw a ‘civil’ marriage bill as a way to move Indian marital practices towards what he viewed as these better, more modern European practices. See Bernard S. Cohn, ‘From Indian Status to British Contract,’ The Journal of Economic History, 21, no. 4, (Dec.1961), pp. 613-28.


17 A couple was asked to declare that they “do not profess” a religious faith. Perveez Modi points out the discrepancy between Maine’s view of religion as an identity that an adult can chose to adopt or discard and Indian conception of religious identity as a marker of community and gene pool, and examines the consequences of this for contemporary ‘love marriages’ in India. Perveez Modi, ‘Love and the Law: Love-Marriage in Delhi,’ Modern Asian Studies, 36, no. 1, (2002), pp. 223-256.

marriage vow, the Act required a couple to give notice of their marriage and to remain resident in the district where the ceremony was to take place for a period of 28 days in total, in a practice not dissimilar to the reading of Christian banns. It also included certain provisions that if the marriage did not fulfil, would lead to the dissolution of the union under the Indian Divorce Act. These included adherence to the registration process, that no partner should have a living spouse and that the couple were not “in a nearer relationship than that of great-great-grandfather, or great-great-grandmother.”

This condition was in line with the exogamous practices and notions of prohibited degrees of relationship adhered to by Hindus in Bengal and other areas of India but not by all Indians. Though frowned upon by high-caste Hindus in northern and western India, marriages between uncles and nieces were common amongst Hindus in southern India. Amongst Indian Muslims, inter-cousin marriage was quite common, as it provided a means of maintaining property within the family in the face of the strict interpretation of Islamic property rights in the colonial courts. With the nineteenth-century debates having been so focused within the Hindu community of Bengal and areas of north India, this discrepancy does not seem to have been drawn to the government’s attention. It was, however, to be of vital significance in the Hindu Law Committee’s attempts to draw up its marriage legislation.

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19 In this time the couple had to maintain their residence for 14 days after which they had to submit notice of their intention which was then publicised so that anyone who objected could declare themselves to the authorities. Their marriage ceremony could only be held 14 days after notice had been given. Ibid p. 233-4
22 See the discussion of the Shariat Act 1937 in Chapter Two. The emphasis on individual property rights and the division of an estate between a man’s sons and daughters under Anglo-Muslim, and also Shariat law made it very difficult for a Muslim family to protect the integrity, and in terms of agricultural land economic sustainability, of an estate. Gregory C. Kozlowski, *Muslim endowments and society in British India*, (Cambridge, 1985), Chapter 4; Inter-cousin marriage provided one way to avoid the disintegration of an estate and to keep property within the family but also to aid political relationships. Joyce Aschenbrenner, ‘Politics and Islamic marriage practices in the Indian subcontinent,’ *Anthropological Quarterly* 42, no. 4, (Oct., 1969), pp. 305-15.
Marriage law and the Hindu Law Committee

From the initial stages of the codification project, the Special Marriage Act of 1872 became a blueprint for attempts to draw up what contemporaries viewed as progressive, non-discriminatory but also non-controversial code of Hindu marriage law. Though strong feelings had been expressed about the Act when it was first debated in the legislature, after almost seventy years on the statutes, with few marriages taking place under the measure, it had lost its more controversial edge. The view of marriage as a contract in the Act appealed to members of the Hindu Law Committee, who were struggling to draw up a marriage bill that was compatible with the ideas of non-discrimination and female autonomy set out in their succession legislation. Though the Act had eventually been drafted as a secular, rather than a Brahma, marriage bill, its link to the Samaj with its strong Hindu origins meant that it appealed to the Committee as a basis for a civil Hindu marriage ceremony in their plans to divide Hindu marriage law between a religious and a secular ceremony. From this perspective, the Special Marriage Act seemed to provide a ready made model for the new Hindu Code.

While the Committee members were committed to greater gender equality, they were also anxious to avoid taking any steps that could “arouse acrimonious controversy.” To this end, members decided to include two forms of marriage in their code: a sacramental ceremony, designed to appease more orthodox views, the validity of which depended on the performance of brahmanical practices such as saptapadi; and a civil marriage ceremony, the wording of which was taken almost wholesale from the 1872 Special Marriage Act, including the notion of contract implied by the couple saying “I take thee”. The ‘progressive’ status of this civil service was in part implied by the fact that it was based so clearly on a legislative measure that had itself been very publicly labelled as forward thinking. At the same time, some important changes were made in order to give the new marriage law more popular appeal. Whereas the 1872 Act had

24 See Chapter Three.
25 In their report of June 1941 the HLC expressed their view that “The aim [of any Code] should be, as far as possible, to arrive at agreed solutions and to avoid anything likely to arouse acrimonious controversy...Our own experience leads us to believe that a substantial measure of agreement will be possible, provided reformer and conservative resolve to appeal to the best in each other.” ‘Report of the Hindu Law Committee,’ (Delhi, 1941), p. 23.
required a couple to renounce their religious faith, couples marrying according to the new civil ceremony could retain their religious identity and would continue to be governed by religious law in other matters, including succession. Furthermore though the civil marriage proceedings were included in a bill entitled ‘to amend Hindu law relating to marriage’, it was possible for a couple in which one partner was not Hindu to marry under its provisions. A couple who married according to the civil provisions of the bill, or which registered their marriage under them subsequently, could apply for a divorce in accordance with the Indian Divorce Act. Those marrying in accordance with the terms of sacramental marriage, however, could not avail themselves of this provision. The bill thus sought to introduce divorce to Hindu law while at the same time protecting the indissoluble nature of sacramental marriages.

It was not only the civil ceremony that was reformed by the bill. Combining the two forms of marriage within one ‘Hindu’ Code had important implications for the construction of ‘religious’ marriage presented in the Code Bill. Polygamy was prohibited under the provisions for both sacramental and civil marriages. However, it was in regard to the instructions governing degrees of prohibited relationship that the bill was to have its biggest impact on the functioning of religious marriages, not so much in terms of ‘modernising’ them but in terms of ‘nationalising’ different regional religious practices. The rules governing exogamous marriage in the Special Marriage Act, along with their north-Indian bias, were retained in the legislation drawn up by the members of the Hindu Law Committee, none of whom came from regions in southern India.  The Committee’s

26 Clause 8 of the HLC’s first marriage act set out that “A civil marriage may be contracted under this Act by any person professing the Hindu religion, with any other person professing the Hindu, Buddhist, Sikh, or Jaina religion.” Gazette of India, Saturday, May 30, 1942, p. 116.

27 The marriage legislation included in the final Code Bill was drawn up by the first Law Committee that comprised of B.N. Rau, Judge of the Calcutta High Court, Dr. Dwarka Nath Mitter, a former Judge of the Calcutta High Court, Mr. J.R. Gharpure, Principle, Law College, Poona and Rajatna Vasudeo Vinayak Joshi, a pleader in the High Court of Baroda. ‘Report of the Hindu Law Committee’ (Delhi, 1941), Appendix VI. V.V. Joshi was later dropped from the Law Committee that was formed in December 1943, following the legislature’s consideration of the marriage and succession bill, and replaced with a south Indian representative, T.R. Venkatarama Sastry, a lawyer from Madras. The Brahman Tamil lawyer appears to have been little interested in defending south Indian customs or representing different practices. The select committee that had considered the marriage and succession bills had raised questions about Joshi’s knowledge of Sanskrit and the ancient Vedic texts. Amerendra Nath Chattopadhyaya’s note of dissent, ‘Report of the Joint Committee on the Bill to amend and codify the Hindu Law relating to intestate succession with the amended Bill’ (1943), IOR. Venkatarama was brought into the Committee as an expert more learned than Joshi in scriptural, as opposed to customary and practiced, Hindu law. The provisions regarding degrees of prohibited relationship were left unchanged in the comprehensive Code Bill.
draft marriage bill set out degrees of prohibited blood relationships, which, reflecting
their own high-caste background, included brahmanical provisions about gotra
relationships based on religious lineage through a family priest. In addition it was
expressly stated that “two persons are said to be within ‘the degrees of relationship
prohibited by this Act’ if they are related by blood to each other lineally, or as brother
and sister, or as uncle and niece, or as aunt and nephew.”28 In terms of inter-religious
marriages the provisions undermined the legitimacy of more endogamous practices or
customs of marrying closer within the family. The measure’s uniforming drive was
somewhat weakened by the proposal to extend the factum valet rule to any marriage that
contravened these provisions, meaning that the validity of such a marriage could not be
called into question once the religious, though not civil, rites had been completed.29 In so
doing, the Committee’s marriage bill continued to uphold key aspects of the colonial
state’s practice of non-intervention in family matters.

Even with this caveat, the bill served to privilege or normalise north Indian
practices while rejecting important aspects of south Indian Hindu practice. The marriage
bill established north Indian marital practices as best, both for Hindus wishing to adhere
to ‘tradition’ and those wishing to adopt more ‘civil’ apparently ‘progressive’, non-

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28 See J. Duncan M. Derrett, ‘Factum Valet: The Adventures of a Maxim,’ The International and
Comparative Law Quarterly Volume 7, Part 2 (1958), pp. 280-302. This issue had also been raised during
the debates about the original draft of Sarda’s Child Marriage Restraint Bill which set out to use criminal
law to prosecute and render invalid marriages in which the bride was aged below twelve years. In a letter to
Delhi officials summarizing official opinion on the bill in the United Provinces, R.L. Yorke of the Home
Department, UP, explained that “such Hindu opinion, apart from judicial opinion, as this Government have
been able to elicit, strongly supports the view expressed by some speakers in the debate in the Legislative
Assembly that the present Bill and in fact any civil legislation which will have the effect of making invalid
marriages which are according to Hindu religious ideas unquestionably valid will give grave offence to
religious practices. As the codification project developed and the civil marriage proceedings were incorporated into the larger Code, a notion of ‘civil’ rather than ‘religious’ Hindu identity became more firmly established. However, apart from its countenance of contractual marriage, civil Hinduism differed very little to the new religious Hindu identity that the Code also put forward; north Indian Hindu practices and structures of patriarchy lay at the root of both.

The transfer of power negotiations created a very different context for these questions about civil and religious Hindu identity, as has been explored in the previous chapter. In the communal tension and violence that surrounded partition, it became possible to conflate Hindu identity with Indian identity, even outside of an overtly Hindu nationalist framework. The ambiguity between these identities was further compounded by the similarities between the ‘civil’ and ‘religious’ practices set out in the marriage provisions of the Code Bill. Against the background of nation-building and a desire to move away from the colonial past, the apparently un-religious, ‘modern’ nature of Hindu civil law could, at times, be consumed within arguments about national progress and citizenship more generally. This created complications for the working of Indian secularism, a doctrine designed to manage relations between religious communities. Without the notion of religious identity to mediate the relationship between the state and the Hindu community, the new nation seemed increasingly involved with and drawn into a civil Hindu identity. Indeed, defined in terms of law rather than religious practice, the construction of such an identity was only made possible by the Hindu community’s willingness to use the state legislature, rather than religious bodies, to reform their personal law. At the same time, the parameters of this civil Hindu identity were not being defined in isolation from religious identity. Through the codification project, both religious and civil Hinduism were being reconstructed and redefined, often in ways that seemed very similar. In spite of the concern of figures such as Nehru with maintaining a secular state, as the Code Bill project progressed, maintaining political equality between religious identities became increasingly difficult.

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30 This has been discussed in the previous chapter. See also Gyan Pandey, ‘Can a Muslim be an Indian?’ Comparative Studies in Society and History 41, 4, (1999), pp. 620-659; Remembering Partition: violence, nationalism and Indian history, (Cambridge, 2001), Chapters 6 & 8.
31 See Chapter Four.
Ambedkar’s marriage bill

B.R. Ambedkar’s intervention in the codification project had important implications, both for conceptions of social progress and for the division between civil and religious identity within the Code Bill. As has been examined in Chapter Three, Ambedkar saw the Code Bill as a pivotal tool in his campaign to dismantle the caste system. Seeing customary practices as one of the primary means of distinguishing, and thus also discriminating, between different caste groups, Ambedkar heightened the emphasis in the Code on uniformity and on the abolition of custom. Though Ambedkar oversaw important changes to the Hindu Law Committee’s Code, the view of the family set out in the original draft Code remained the central focus of the post-independence Code – including some of its north-Indian biases. Indeed, in some ways, the provisions governing prohibited degrees of relationship in the original Code sat well with Ambedkar’s own sentiments. Viewing endogamy as the cornerstone of caste hierarchy, the Law Member was less concerned with protecting south-Indian customs that were not in keeping with his drive to establish more exogamous Hindu marriage practices.  

As a result, though it was not Ambedkar’s intention, his redrafted Code reinforced the dominant position of north Indian conceptions of the family even if it did not seek to uphold their patriarchal values. Under Ambedkar’s stewardship, more conservative north Indian attitudes towards marriage and prohibited degrees of relationship were presented by the state as better and more legally valid than other regional practices, in terms of both Hindu and civil law. In addition, widespread opposition to his radical proposals seemed to affirm conservative conceptions about what was and what was not ‘true’ Hindu practices. As a result, when the bill was redrafted between 1951 and 1952, it was to become significantly more conservative and sympathetic towards north Indian patriarchal practices, even as the image of the Code Bill as progressive and egalitarian lived on.

Though he presented the Code and his own political views in the universalising language of rights and equality, Ambedkar sought to use the Code Bill to reform the caste practices identified with Hinduism specifically. Together with Jawaharlal Nehru,

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32 See the section on Ambedkar in Chapter Three.
Ambedkar was adamant that the Hindu Code should not be applied to Muslims or other non-Hindu groups. Hindu law, Ambedkar argued, was in more desperate need of reform than Muslim law and to broaden the application of the Code to Muslims also could be seen as Hindu domination.\footnote{20th September 1951, *PD*, Vol.XV Pt.II, col.2951. Ambedkar strongly resisted calls to make the Hindu Code Bill the basis of a Uniform Civil Code for all religious communities arguing that legislation such as the Indian Succession Act and Special Marriage Act offered the basis of a secular civil law, not legislation such as the Hindu Code which was designed specifically to deal with the issues facing the Hindu community. 6th February 1951, *PD* Vol.VIII Pt. II, cols. 2464-5. Responding to queries and criticism of the Code’s application to Hindus only, Ambedkar argued that while the Code Bill had been circulated amongst Hindus for their opinions “Nobody can say that so far as this particular Bill is concerned, any Committee or Government at any time consulted the Muslim community...the reason why we did not is because some communities like the Hindu community needed the reform so badly – it was like a slum clearance”. To alter this and broaden the jurisdiction of the Code, Ambedkar argued, would be “not only unwise but a most tyrannical piece of political action to subject the Muslim community to any such provision without their being consulted before hand.” 20th September 1951, *PD*, Vol.XV Pt.II, col.2951. See also the discussion on Indian secularism and the family in the previous chapter.}

At the same time, Ambedkar openly attacked practices associated with Hinduism. Blowing apart the attempt to balance divorce and sacramental marriage in the earlier draft, the redrafted bill made divorce available to all Hindus, whether they married according to the civil or religious ceremonies. The revised bill met with opposition as soon as it was introduced. Shri Rohini Kumar Chaudhuri, a Hindu representative from Assam, argued that the Code, and in particular its divorce provisions would benefit only the interests of the westernised, un-religious urban elite and not the Hindu masses.

The large mass of people who depend on agriculture and agricultural property are outside the pale of this legislation. Are the poorer Hindus in our villages clamouring for divorce? Are they clamouring for properties to be got from their parents? Not at all. You want this legislation for what you call the enlightened sections of our people, men and women.\footnote{6th April 1948, *CAI(L)D*, Vol. V No.1, p. 3649.}

Dr. B. Pattabhi Sitaramayya, a Telugu representative from the Madras Presidency, argued that in America divorce had become so commonplace that it was disrupting families and warned against creating a similar situation in India.\footnote{Ibid p.3638} The Law Minister rebuffed these comments with an argument about majority and minority practices. The Code’s measures regarding divorce, he insisted, were in “no way an innovation”, as *Shudra*, or untouchable, communities “have customary divorce”
Nobody has ever probably made any calculation as to the total number [of Shudra]...but I have not the slightest doubt in my mind that the Shudras form practically 90 per cent of the total population of the Hindus...and the question that I want to ask of honourable Members is this: are you going to have the law of the 90 per cent of the people as the general law of this country, or are you going to have the law of the 10 per cent of the people being imposed upon the 90 per cent?36

While caste formed the major argument in Ambedkar’s support of divorce, he insisted that these changes were necessary to protect women’s rights. Those who were resisting reform in the name of Hindu heritage and religious tradition were protecting practices that did not benefit the Hindu community, but which had, over time served to weaken it, Ambedkar argued. Indian society had survived, he contended, “as people who have been from time to time subjugated, vanquished and enslaved...[while] the vanquished people in other parts of the world have tried to achieve their liberty...I have not seen any such thing in this country.”37 Marriage practices, as the foundation of the caste system, lay at the heart of this enslavement and social stagnation and thus had to be reformed if the new, independent society was to progress.38 For Ambedkar, the “Sacramental ideal of marriage described in as few words as possible, is polygamy for the man and perpetual slavery for the woman.”39 Challenging his fellow legislators, he argued that

in all economic matters, we have...been insisting that there must be free labour...Now what is the difference between slavery and free labour? I think if you examine it carefully, you will come to the conclusion that free labour means the ability and capacity to break the contract when the necessity for breaking the contract arises...if you mean to give liberty - and you cannot deny that liberty in view of the fact that you have placed it in your Constitution and praised the Constitution which guarantees liberty and equality to every citizen - then you cannot allow this institution [of sacramental marriage] to stand as it is.40

Unmasking the relationship between women’s labour and sacramental marriage, this was a radical argument for divorce. The new Constitution and its Fundamental Rights,

38 Ambedkar had no faith that Indian society would make these changes naturally or on its own accord. “Whatever else Hindu society may adopt” he argued, “it will never give up its social structure for the enslavement of the sudra [sic] and the enslavement of women.” Ibid col. 2941. See also Ambedkar section in Chapter Three.
40 Ibid, col. 2943.
Ambedkar maintained, made the exploitative nature of Hindu sacramental marriage illegal; the introduction of divorce to Hindu law was not simply advisable, it was a constitutional imperative.

While the introduction of divorce into Hindu law had the potential to radically transform power relations and the operation of patriarchy in the domestic sphere, the way in which the Code Bill permitted this right to be used served to lessen this impact. Under the existing system many, indeed the majority that Ambedkar spoke about, were able to avail themselves of the right to divorce without going to court. The Code Bill, however, granted the judiciary a monopoly over the regulation of divorce: under the new proposals legal recognition of divorce would require a court order.\(^{41}\) This was a result of drafting procedures and amendments made to the Code as it developed. The Hindu Law Committee had not included their own divorce legislation in the Code Bill but enabled couples to avail of this right in accordance with the provisions of the Indian Divorce Act of 1869. Designed primarily to fulfil the needs of European residents in India and therefore based in English law, the Divorce Act did not recognise customary divorce but required an individual to petition the District or High Court for a divorce.\(^{42}\) The expensive and difficult consequences of this provision for Hindus, who had previously been able to practice divorce in accordance with custom, was pointed out in the debates.

“By abrogating all customs and making it obligatory on all who want the marital tie to be dissolved to take resort to a court of law” the Indian President Rajendra Prasad wrote to Nehru in 1951, “with all the trouble, expense, delay and uncertainty which litigation in this country involves, the majority of the Hindu community will be deprived of its rough

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\(^{41}\) Clause 30 of the 1948 version of the Code expressly set out that “no marriage [was] to be dissolved except by order of court.”

\(^{42}\) Indian Divorce Act (Act IV of 1869) Chapter III; section 10. Chapter II; section 7 of the act set out that those “Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said courts, are, as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial Causes in England for the time being acts and gives relief”. For a discussion of Victorian views about customary divorce with reference to south Indian matrilineal practices see Praveena Kothod, ‘Courting Legitimacy and Delegitimising Custom? Sexuality, Sambandham and Marriage Reform in Late Nineteenth Century Malabar,’ *Modern Asian Studies* 35, no. 2, (2001), pp. 349-384 and G. Arunima, *There Comes Papa: Colonialism and the Transformation of Matriliney in Kerala, Malabar C.1850-1940*, (New Delhi, 2003), Chapters 3 & 5.
and ready though none the less effective and certainly cheaper method."\textsuperscript{43} Setting out only five grounds on which a divorce would be granted, the Code also introduced new regulations specifying that only a spouse could file a suit for divorce.\textsuperscript{44} As a result, the Code placed a number of prohibitive barriers before any individual looking to dissolve his or her marriage. The Code did contain an important caveat, however: "if the dissolution is sought on grounds which are fundamental in the sense that the State is interested in them, dissolution should be available not only at the instance of the spouse but of third persons as well who are adversely affected."\textsuperscript{45} This provision granted the state the legal possibility of intervening in a marriage, and therefore of potentially assisting a subordinated woman, though this of course depended on the state being willing to do so. Significantly this clause was later omitted from the Hindu Marriage Act, the consequences of which will be discussed below.

Ambedkar’s spirited drive to undermine hierarchical dominance in Hindu society by pushing for a clear and universally applicable legal system, did little to preserve south Indian Hindu customs. At many points in the revised Code, Ambedkar’s preoccupation with removing sources of caste discrimination threatened to eclipse any notion that regional practices should be represented under the new Hindu law. All the restrictions that had previously limited inter-caste marriage under Hindu law were removed from the 1948 draft of the Code Bill, on the basis that these changes were permissive and therefore did not restrict those Hindus who wished to marry only within their caste group.\textsuperscript{46} Provisions regarding blood or sapinda relationships were simplified, but gotra relationships were omitted from the redrafted bill, in line with Ambedkar’s strong

\textsuperscript{43} Note dated 14\textsuperscript{th} September 1951, appended to letter from Prasad to Nehru dated 15\textsuperscript{th} September 1951. Rajendra Prasad Papers F.no.30/1950 NAI. Other legislators agreed with this view, Pandit Mukut Bihari Lal Bhargava argued that in making divorce dependent on the courts, Ambedkar was creating “a haven for lawyers” 12\textsuperscript{th} December 1949, CAI(L)D, Vol. VI Nov-Dec 1949, p. 468.

\textsuperscript{44} A couple could sue for divorce on the grounds that “(i) either party to the marriage was impotent at the time of the marriage and continued to be so until the institution of the proceeding; (ii) the husband is keeping a woman as a concubine or the wife has become the concubine of any other man or leads the life of a prostitute; (iii) either party to the marriage has ceased to be a Hindu by conversion to another religion; (iv) either party is incurably of unsound mind and has been continuously under treatment for a period of not less than five years preceding the petition; and (v) either party is suffering from a virulent and incurable form of leprosy.”


\textsuperscript{46} 24\textsuperscript{th} February 1949, CAI(L)D, Vol. II Part II, pp. 821-52.
feelings about upper-caste exogamy. Sacramental marriages were re-termed *dharmik* marriages and their validity no longer determined by the performance of the *saptapadi* ceremony. Instead the ceremony could be held according to the "rites and ceremonies of either party". While wishing to allow for a variety of wedding practices, Ambedkar sought more generally to move away from customs which could be used to differentiate between caste groups and to insist on a more homogenous set of Hindu practices. As discussed in Chapter Three, most customary practices, including the matrilineal customs of south Indian Hindu groups, were removed from the draft bill first presented to the house by Ambedkar, a move that was widely condemned. This decision was reversed however, following a conference held, at Nehru’s request, between Ambedkar and opponents of the Code that will be examined in greater detail in the next chapter. South Indian representatives supported the reintroduction of clauses preserving Aliyasantana and Marrumakkatayam practices regarding divorce and adoption, although other aspects of the Code, including its property provisions, continued to apply to Hindus governed by these legal schools.  

North-Indian Hindu attitudes about the degrees of relationship within which a couple could marry persisted and were even heightened under Ambedkar. The 1948 version of the bill removed similarity of ‘*sapindaship*’ as a bar for civil marriages, though it was retained for *dharmik* unions. The bar on niece-uncle marriage remained however, and indeed inter-cousin unions were now added to the list of prohibited relationships. This may have been an attempt to win over conservative support for the change regarding ‘*sapinda*’ relationship under civil marriage, for this move prompted immediate criticism even within the Select Committee which worked with Ambedkar to reform the bill. Tek Chand of Punjab and Balkrishna Sharma of UP appended a note of dissent to the Select Committee’s final report expressing their view that “While we support the incorporation in the Code of the provisions relating to civil marriages between Hindus…the rules of

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48 See Chapter Six.
propinquity and affinity should be the same as in sacramental marriages." 50 Though it was framed in the terms of ‘proper’ Hindu practices, support for a bar on inter-cousin and uncle-niece marriages also reflected the communalised-context in which notions of Hindu identity and patriarchy had developed in northern India, from where both these Committee members hailed. As a result, though there was never a direct attack on the Muslim community, struggles between north and south-Indian Hindu representatives also raised questions about the appropriateness and ‘propriety’ of Muslim family practices. While no doubt anti-Muslim feeling did drive some legislators, this was eclipsed by the more overt competition between regional Hindu elites.

Even though the 1948 draft Code retained much of the Hindu Law Committee’s provisions regarding prohibited degrees of relationship, Ambedkar’s hard-line attitude towards the abolition of caste increased the focus in the Code on exogamous practices. While those in favour of the Code Bill used arguments about eugenics to support their case, 51 opponents alleged that the bill prescribed incest and inappropriate marital relations. 52 The difference between south and north Indian Hindu customs was also raised in relation to questions of social propriety. Speaking against the bill Dr. S.P. Mookerjee, then Minister for Industry, expressly raised the issue of uncle-niece marriages amongst southern Indian Hindus to discredit ideas about the supposedly progressive nature of this community. “Somebody said, when I was speaking earlier” he explained, “that south India was specially progressive and many of the laws which we are considering are already in existence there today. I say good luck to south India. Let south India proceed from progress to progress, from divorce to divorce. I have absolutely no quarrel with

51 Developing a line of argument used in the Mother India debates, Shri K. Santhanam, Minister of State for Transport and Railways, argued that the Code Bill should be supported on the grounds of the unity and health it would give the Hindu community: “If we could convert the present disintegrated, weak and for a thousand years servile Hindu community into a very strong, healthy and great community, we would have done a work which our sons and grandsons will be proud of.” 12th December 1949, Calcutta Law Journal, Vol. VI Nov-Dec 1949, p.485. See also Mrinalini Sinha, Specters of Mother India: The Global Restructuring of an Empire, (Durham N.C., 2006), Chapter 2.
52 The Organiser carried a spoof letter to the editor asking “can a man marry his sons’ widow or a woman her daughter’s widower? Yes this is possible. The great Hindu Code, applauded as the 13th Smriti by one of the MPs will permit such marriages”. 13th March 1950, Vol. III No.29.
south India but why force it on others who do not want it?" Pandit Mukut Bihari Lal Bhargava representing Ajmer-Merwara, also criticised south Indian Hindu customs regarding contact between a married daughter and her natal family. While the strict patrilocality of marriage practices in northern India meant that daughters, once married, had little contact with their natal families, amongst some south Indian Hindus communities, a daughter continued to maintain ties to her own parents after leaving home. Discussing the devolution of a woman’s property or stridhana under the provisions of the Code, Pandit Bhargava, argued that while it might be custom or usage in southern India for a family to accept property from their daughters,

in my part of the country, an overwhelming majority will be opposed to the idea. They cannot even imagine receiving any inheritance from the daughter. Therefore the entire fabric of the rules of devolution is based on anti-Hindu ideals.

Pandit Bhargava argued that to grant daughters a share in the family estate would go “hand in hand with widening the scope of the right to contract marriage with first cousins” a practice he associated with Egyptians, Greeks, Romans but above all Muslims. From “the Hindu point of view”, he argued, inter-cousin marriage “would be a calamity which no Hindu family can tolerate.” By the turn of the 1950s, therefore, southern marriage practices had come to be associated in the debates with non-Hindu and especially Islamic practices. In contrast, the patriarchal practices of the north and west were presented as truly and authentically Hindu.

Though Ambedkar attempted to use the Hindu Code Bill to effect real and far-reaching social reform, his hard-line attitude towards uniformity served to reinforce a narrow definition of what were correct Hindu practices. At the same time, the sense of radical change associated with Ambedkar’s Code drew him into dialogue with opponents, many of whom came from regions with more conservative legal practices, particularly Punjab and Uttar Pradesh. These were often upper caste Hindu men who felt they stood

53 He went on to read out a letter sent to him from a gentleman in Nuzvid, Kistna district that protested the impact of the Code Bill on the south Indian custom of uncle-niece marriage explaining that this was “just, by the way, for those who were talking about the progressive nature of the people living in those territories. Naturally they have gone very far ahead... Those who may follow him may consider it absolutely progressive.” 17th September 1951, CAI(L)D, Vol. XV Pt. II, col. 2716-7.
to lose power and influence as a result of his reforms. As a result, over the course of his stewardship of the bill, Ambedkar was forced to make a number of concessions to his opponents, most notably with regard to the Mitakshara coparceny, as will be discussed in the following chapter. This was not enough to see the bill through the legislature however, and, on the eve of India’s first general election Nehru intervened to suspend discussion of the Code. Between 1951 and its reintroduction in 1952, the Code Bill legislation was broken down and reformed, to try and secure its progress through the legislature. The challenge facing Nehru and his government in so doing, was to make the Code more acceptable to the legislature, without compromising too far the scope of its reforms or its status as a ‘progressive’ measure.

Introducing contractual Hindu marriage? Another view of the Hindu Marriage Act

By late 1951, the Hindu Code Bill had became a highly controversial measure, dividing public opinion, the legislature and even seeming to threaten the constitution. Many of those opposing it argued that the Code would bring about the end of Hindu society and culture. Yet within five years the Code Bill, broken down into five separate bills, had been passed by the legislature. This next section looks at how the marriage legislation changed in the early 1950s. It explores the ways by which the marriage bills continued to be presented as progressive, even as they imposed conservative north Indian customs as the basis for both Hindu and Indian family life. It argues that the marriage bills did not mark a break with patriarchal marriage practices. They did not institute a more equal

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56 The Indian President and veteran Congress leader Rajendra Prasad had been a vocal opponent of the Code Bill since independence but had been careful to keep his views private. On 15\textsuperscript{th} September 1951, however, as Ambedkar and Nehru sought to speed up the passage of the Bill, Prasad wrote to Nehru threatening to use presidential prerogative to veto the bill even if it was ratified by parliament. Letter from Prasad to Nehru, 15\textsuperscript{th} September 1951. Rajendra Prasad Papers F.30/1950 NAI. The letter sparked a terse series of exchanges and much political tension in the week that followed as Nehru strongly contested the existence of presidential powers of veto in the Indian constitution. The Prime Minister won on his constitutional point, but, fearing more outright dissent, the Code Bill was pulled from the legislature and put on hold until after the 1952 elections. See also H.N. Pandit, \textit{The PM’s President: a new concept on trial}, (New Delhi, 1974).

57 In a long note discussing his opposition to the Hindu Code Bill President Rajendra Prasad argued that “The measure, if passed, will introduce or rather force revolutionary changes in the existing structure of Hindu society and will inevitably create conflicts and dissensions resulting in litigation, if not open violent conflict among members of a family.” Untitled note dated 14\textsuperscript{th} September 1951, appended to a letter from Prasad to Nehru, 15\textsuperscript{th} September. Rajendra Prasad Papers F.30/1950 NAI.
conjugal relationship, but rather served to reconfigure patriarchal dominance within marriage, with important implications for inter- and intra-communal relationships.

The 1952 elections were pivotal in determining the eventual shape of the Code Bill. From World War I onwards India’s constitution had been constantly redrafted and reformed, preventing representatives from any one regional of India from consolidating their dominance over the political stage. The constitution that was ratified in January 1950 and the elections that followed a year later lay the foundations for a new more stable framework of political authority in India, in which the northern state of Uttar Pradesh was the most powerful unit.\textsuperscript{58} The Congress enjoyed its most significant electoral victories in UP, and the other northern and western states, even as it conceded a considerable number of seats in the south and in parts of eastern India.\textsuperscript{59} More divided than their northern colleagues and with many outside the government, the opportunity for south Indian Hindu representatives to defend their practices in the Code Bill debates was weakened further. Indeed, north Indian practices continued to dominate the Code which was re-drafted again and broken into separate parts, with the marriage provisions divided between the Hindu Marriage Bill and a bill to amend the Indian Special Marriage Act of 1872.

Before going on to look at the passage and impact of these two marriage acts, it is important to examine the rights and provisions they set out. The right to divorce was granted to couples marrying under both the Hindu and the Special Marriage Bills, with very similar provisions governing the way in which a couple could secure a dissolution. Reflecting their historical association, via the 1872 Act, with English law, both the marriage bills included complex English legal distinctions between void and voidable marriages, differentiating between marriages that could simply be annulled and cases in which a divorce was required. Sections 11 and 12 of the Hindu Marriage Bill laid out the legal status of a marriage if it contravened the conditions deemed necessary for validity. In cases where one of the parties had a living spouse at the time of the marriage, or where the couple were within the prohibited degrees of relationship, the marriage was null and void. Rendering a union legally invalid, in spite of the fact that the couple had performed

\textsuperscript{58} See Chapter Four.
\textsuperscript{59} See Table 1 below.
the religious rituals, these provisions marked a break with colonial legal precedent based on the rule of *factum valet* to which the Hindu Law Committee had referred in their marriage bill.\(^6^0\)

However, as had been the case under the Law Committee’s Code, the bills also specified that in either circumstance, a marriage would be annulled or void on legal grounds only with a court petition. Thus, if a man married a second woman while his first wife was still alive and married to him, the second union would be legally valid until a case was brought before a court to recognise its invalidity. The same was true of voidable marriages. Furthermore, the bills laid down that a petition for nullity or divorce would be accepted only if it was brought by either of the parties in the marriage.\(^6^1\) Thus, for a divorce to be legally valid a couple had to go through the expensive procedure of a court case. However, section 29(2) of the Hindu Marriage Act protected the right of customary divorce, setting out that the legislation would not be “deemed to affect any right recognised by custom”. As a result the bill upheld the family practices of the group Ambedkar called the ‘majority’, allowing these couples to continue to practice divorce customs without going through the courts. Yet, by differentiating these systems of divorce as ‘custom’ rather than part of the ‘modern’ Hindu Code, non-court divorce proceedings were seen as inferior.

Thus, although the Hindu and Special Marriage Acts granted women the right to divorce, the conditions around which this right was framed meant that, in practice, the Acts did little to grant women equal status to their husbands or to provide them with the tools they needed to liberate themselves from unhappy or oppressive unions. An individual could obtain a divorce if he or she had the money and influence to access the legal system in the first place, but the patriarchal structures and family practices prevalent throughout India meant that the vast majority of Indian women would struggle to gain access to these resources. While seeming to radically reform Hindu marriage law, therefore, the acts in fact served to protect existing patterns of male patriarchy.

In spite of the many barriers that prevented women from exercising their right to call for dissolution of their marriage, many legislators and members of the public

\(^{6^0}\) See footnote 29 above.

continued to voice strong opposition to the inclusion of the divorce clauses in the marriage bills. Indeed, the decision to divide the civil and religious ceremonies between two different bills seems to have been an attempt by Nehru and his government to dampen down resistance and facilitate the passage of the Hindu Marriage Act, complete with its provisions regarding divorce. By introducing the Special Marriage Bill first, the government hoped to debate the merits of marriage reform away from accusations that the Code was destroying Hinduism. Once basic support had been established for the Special Marriage Act, the government believed, it might prove easier to see the Hindu Marriage Act through the legislature. The reorganisation of marriage reform after 1951, was not an attempt to water down the Hindu Code legislation but appears to have been a political move to speed up the reform debates.

The 1954 Special Marriage Bill upheld many aspects of the original Special Marriage Act, including inter-caste marriage, and the contractual wording of the vows. It was also open to all Indian citizens as a permissable, rather than compulsory, measure and, like the civil ceremony included in the Hindu Law Committee’s marriage provisions, it did not require a couple to renounce their religious affiliation. Significantly, however, the provision in the 1872 Act that required a couple to give up their right to be governed by religious law in terms of succession was retained, even though the Law Committee had declared this clause to be one of the most ‘glaring anomalies’ of the Act. Ignoring the Hindu Law Committee’s views, the government played on the ‘progressive’ reputation of the non-religious 1872 Act to present this amended version as a modern bill in keeping with the nationalist image of the modern, secular society of independent India. As a result, contractual marriage and divorce were praised as beneficial and progressive rights that should be available to all citizens. This masked the fact that the definitions of prohibited relationships included in the 1954 version of the Act were even more restrictive than had been the case with the 1872 Act. Whereas the earlier measure had prohibited marriages between couples who were within three degrees of relation to

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62 Explanatory note, Hindu marriage bill Gazette of India Saturday, May 30, 1942, p. 122. The requirement that a couple give up their right to be governed by religious personal law seems to have been the enduring legacy of Sir Henry Maine’s attempt to secure the bill as a secularising measure.

one another, the 1954 Special Marriage Act specifically prohibited marriage between first-cousins and uncles and nieces.

The implications of the list of relationships for the working of the Special Marriage Bill were pointed out almost as soon as parliamentary debate began. Seeta Parmanand, Rajya Sabha representative for Madhya Pradesh and an active figure in the AIWC leadership, argued that the bill discriminated against Muslims. Khwaja Inaiitullah, a Muslim representative, backed up her argument, asking the government:

> Are those Muslims who live in India not your citizens? You should keep them in mind when you are making one law and you claim that you wish to make such a law that will apply to all Hindustanis, you should make good your claim. When you wish to include all of us, how can you prevent the son of one brother marrying the daughter of another brother?

In the report of the joint select committee on the bill Sucheta Kripalani, K.A. Damodara Menon and Rajendra Pratap Sinha similarly lodged minutes of dissent, objecting to the schedule of prohibited relationships.\(^\text{64}\) Though there was much debate about prohibited relationships under the act, those in favour of the bill’s provision greatly out-weighed those against and questions about divorce and a suitable age limit for marriage dominated discussion. Even though the arguments made by Kripalani and others ultimately failed, the fact that their objections to the bill were on the grounds that such provisions discriminated against non-Hindu citizens reinforced the idea that the list represented Hindu practices. That the provisions outlawed southern Hindu marriage practices was not mentioned.

Though the government had hoped that, as a non-religious bill, the Special Marriage Bill would have been easier to see through the legislature, the bill incited enough passion in the lower and upper legislatures to mean that the measure was debated for two years. As discussion wore on, supporters of the Hindu Code grew increasingly agitated about the fate of the other, and some argued more pressing, bills.\(^\text{65}\) In early May


\(^{65}\) In April 1954 as debate about the Special Marriage Bill dragged on, the AIWC and NCWI issued joint press releases praising the legislation but arguing that as it was “a permissible measure...[i]t would not affect the majority of the people”. “[Impressing upon Government and the Parliament the urgent need for bringing about reforms embodied in the Code without further delay” they called for the new Hindu law
1954, as the bill was in its final stages of enactment, a new controversy arose when the upper house, the Council of States voted to raise the age of marital consent from 18 to 21 but also to include provisions accepting divorce by mutual consent. The decision sparked national furore. Women’s organisations were deeply split in their views about divorce by mutual consent. The AIWC argued that such an approach to divorce was “fraught with grave and unpredictable consequences as it may adversely affect the interest of the children and integrity of the family” 67 Interestingly however, the National Congress of Women did not concur with this view but issued a somewhat cautious statement in support of the Council’s intervention. 68 The most vehement opposition to the plan came from the Hindu right. As news of the Council’s decision was received at the Hindu Mahasabha session being held in Hyderabad, N.C. Chatterjee charged the upper house “which is supposed to be a body of elders” with “behaving irresponsibly like a pack of urchins.” Divorce by mutual consent, he proclaimed, would “be like leading a bestial life”. The Mahasabha gathering ended with a resolution on Hindu marriage and divorce which argued that Hindu marriage was not contractual but a sacred union and as such was irrevocable. 69

Under mounting popular pressure to intervene and amend the Councils’ proposals, Biswas agreed, in a speech to the Lok Sabha on 1st September 1954, to redraft the clauses relating to the age limit and divorce by mutual consent. 70 Many expected fireworks and lengthy debate but when the re-drafted bill was referred back to the Lok Sabha its final passage was considerably smoother than had been the case in earlier discussion. Though the clause regarding divorce by mutual consent was rejected by the lower house, there was unexpected support amongst MPs for the divorce clauses more

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67 Minutes of the Standing Committee Meeting of the AIWC, 20th-22nd June 1954. AIWC Papers, F.175 NMML.
68 “While realising and fully supporting the need to have stable marriage, this Congress supports in the Special Marriage Bill the idea of divorce by mutual consent after all attempts at reconciliation have ended fruitlessly. This eliminates the need for washing dirty linen in public which is demeaning for all concerned.” Social Disabilities resolution forwarded to General Secretary of the AIWC by P.M. Boss, President, National Federation of Indian Women [formerly National Congress of Women], 18th June 1954. AIWC Papers, F.175, NMML.
70 *Hindustan Times*, 2nd September 1954; *Times of India*, 2nd September 1954.
generally. The Lok Sabha also moved against the upper house’s attempts to raise the age of marriage, which was restored to 18 as before.

The battle against Chatterjee and the Hindu-right that dominated the final stages of the Special Marriage Bill debate reinforced a notion of the measure’s progressive, and even secular, or non-religious nature. Though the Act contained permissible, rather than compulsory measures, the fact that anyone could marry under its provisions made it, in Biswas’s view, “a step in the right direction” towards a uniform civil code. Updated for ‘contemporary’ Indian society, the system of civil law and family relations laid out in the bill was presented as ‘modern’ and ‘progressive’, while practices which diverged from its proscriptions were labelled archaic and denigrated by comparison.

The main thrust behind the Special Marriage Act, indeed behind the whole of the Hindu Code, was not anti-Muslim or even for the construction of a strong bond between state authority and the Hindu community. It was the rivalry during the Code Bill debates between north and south Indian Hindus that prompted the prohibition of inter-cousin marriage rather than any calculated attack on the Muslim community and its practices. Support for reform itself was motivated by a desire to reconfigure patriarchal power within the family in order to give Hindu men, not the state, greater individual power and control over relatives and resources. However, because Hindu men required legislative authority to restructure and secure their patriarchal power, they were necessarily brought into greater contact with the state, unlike Muslim men who sought to protect their domestic authority by urging non-intervention. Thus, in spite of Nehru’s intention that Hinduism and Islam received equal treatment in the political sphere, the fact that the legislature was more actively engaged with the operation of Hindu customs inevitably gave these practices greater recognition and thus legitimacy.

At the same time, it is important to remember that the notion of ‘Hindu’ presented in the Special Marriage and other Hindu Code Bill debates was itself a developing and changing identity. The view that the Code Bill presented ‘proper’ and legitimate Hindu

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71 The Statesman, 2nd September 1954.
72 The Statesman, 3rd September 1954.
73 LSD, 19.v.1954, cols.7797-99; See also Nehru’s speech on the bill LSD, 14.ix.1954, cols.1860-62. A Bengali newspaper also reported that “If anyone brought forward a Bill for a common civil code, Shri Nehru said, it would have his extreme sympathy” Amrita Bazar Patrika 15th September 1954. N.C. Chatterjee Files, Vol.12 NMML.
customs rested on the marginalisation of many other practices that had, until the Hindu Law Committee began its work, also been seen as legally valid Hindu practices. Though it was seen as a secular and all-inclusive measure, the Special Marriage Act had done much to assert north-Indian Hindu patriarchy as the only correct model of Hindu family life. The marital practices of south Indian Hindus and of Muslims had been labelled un-Hindu and unprogressive by the Special Marriage Act. This was reinforced with the Hindu Marriage Act which included exactly the same list of prohibited degrees of relationship, serving in turn, to blur further the line between Hindu and Indian practices. The passage of the Special Marriage Act made it easier for the legislature to accept what had previously been seen as the controversial elements of the Hindu Marriage Act, divorce, monogamy and inter-caste marriage. As a result, the issue of prohibited degrees of relationship was not raised in the debates about the Hindu Marriage Act. In fact, the notion that there existed one true Hindu identity and law was reinforced in these discussions which continued to focus on whether or not divorce could be acceptable under ‘true’ Hindu law.

After the passage of the Special Marriage Act, the government was successful in pushing the Hindu Marriage Bill through the legislature, divorce clauses and all. Indeed, the 1954 Special Marriage Act was, in some cases, seen to provide an incentive to introduce the right of divorce into Hindu law. While the clause in the 1872 Special Marriage Act requiring couples to renounce their faith had been removed from the 1954 amendment, couples marrying in accordance with the later bill renounced their right to be governed by religious law in matters of succession.74 In his opposition to the Special Marriage Act N.C. Chatterjee had argued that these provisions could have an adverse effect on the ‘proper’ structure of the Hindu community.75 While he had no doubt about the strong character of the ‘Hindu community’ in some areas of life, Chatterjee was less

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74 Clause 21 of the Special Marriage Act, 1954. Clause 19 of the Act decreed that “The marriage solemnized under this Act of any member of an undivided family who professes the Hindu, Buddhist, Sikh or Jaina religion shall be deemed to effect his severance from such family”.

75 As well as corrupting Hindu morality, Chatterjee argued that the provisions affecting the personal legal status of those marrying under the Special Marriage bill would have an adverse effect on the Mitakshara joint family that had already been threatened by Ambedkar. Bringing people under the Indian Succession Act in terms of inheritance the bill would, he claimed, “cause an automatic disruption of any Mitakshara coparcenary, if any member of an undivided family married under these laws.” Hindustan Times, 1st September 1954. This will be discussed in greater detail in the next chapter.
optimistic about the ways in which Hindu men would use the Special Marriage Act. Based on his “knowledge of the country and women”, he could tell that “husbands would easily be able to coax wives to get their marriages registered under the proposed law”. As a result, he predicted that “The inviolability of the marital union which is the cardinal principle of Hindu marriage is likely to be torpedoed by this kind of side-attack provided by the Bill”.76 Once the Special Marriage Act was on the legislative books, however, this argument could be turned on its head: if more orthodox Hindus did not support the introduction of divorce to the Hindu Marriage Act, they opened the possibility that Hindus might marry under the Special Marriage Act and thus leave the fold. It was the pro-divorce lobby that won out and on 5th May 1955 the Hindu Marriage Act was passed, introducing the right of divorce into Hindu personal law.

Echoing the language of legislators at the time, academics who have assessed the Code Bill in relation to women’s rights, have seen the Hindu Marriage Act as one of its more progressive provisions. The introduction of divorce into Hindu law, for those marrying according to both religious as well as civil rites, was an important landmark in Indian marriage law reform. However, the way that this right was framed meant that in reality it was a victory of symbolic reform over substantive social change.77 While this may have set out an ideal of gender equality for which the state could strive in the future, in the immediate context of the 1950s it in fact served to introduce new legal restrictions and social hierarchies based on regional identity by imposing a narrow view of correct and legal marriage practices on the Hindu community.78 This is not to argue that the Hindu marital customs practiced in south India were any less patriarchal than those prevalent in north-India. Rather, the evolution of marriage law in the Code Bill must be seen as a battle between different kinds of patriarchies. However, the communal situation

76 Hindustan Times, 1st September 1954.
77 This phrasing is taken from Reba Som’s article on the Hindu Code Bill. However Som herself does not identify the problems and limitations involved with the rights of divorce granted by the Hindu Marriage Act. ‘Jawaharlal Nehru and the Hindu Code Bill: a victory of symbol over substance,’ Modern Asian Studies, 28, no. 1, (1994), pp. 189-90.
78 Patricia Uberoi has raised the question as to why, in such a litigious society, there has not been more case law brought by south Indian Hindus to contest the degrees of prohibited relationships under these acts. As explained above, this chapter argues that the construction of a homogenous Hindu identity through the Code Bills and other post-independence government policy, might have served to discourage such cases. Enlightenment eugenics, Hindu orthodoxy and north Indian prejudice: legislating the family in post-independence India, Occasional Paper No.8 Institute of Economic Growth, University of Delhi Enclave, (2004).
in north India and its impact in shaping notions of religious identity meant that north Indian Hindu customs and ideologies were defined against and in contrast to Muslim practices. Though anti-Muslim sentiment was not the dominant force driving the debates, the strength of north Indian Hindu interests in shaping the Code created much more scope for the reforms to appear anti-Muslim than might have been the case had southern Indian customs formed the new Hindu legal norm. As it was, the Hindu Marriage Act became a foundation stone in establishing upper caste and conservative north-Indian family practices as the basis of not only Hindu but Indian citizenship, a legacy which lives on in the language and iconography of contemporary Hindu nationalist politics.\(^79\)

Conclusion

The passage of the Hindu Marriage Act marked a major break with the view of Hindu marriage as an indissoluble sacrament that had become entrenched during the nineteenth-century. Under the Act, a Hindu couple could appeal for a divorce even though they had been married according to religious rites that had, up till then, been considered unbreakable.\(^80\) In marriage law, it appeared, Hindu men and women had been made equal. However, while the Hindu and Special Marriage Acts permitted men and women to file for divorce, they did not include any provisions to provide equal access to the mechanisms needed to exercise these rights. This in fact owed much to the legacy of the colonial ‘rule of law’, under which the legal system had not penetrated society or actively applied justice but had rather been a tool for dominance available to those with the greatest resources.\(^81\) This system had done much to uphold patriarchal authority and


\(^80\) The act did include a ‘fair trial rule’ under which a couple had to wait for three years after their marriage before they were able to file for divorce on the basis that this would encourage them to try to make their union work. Section 14 of the Hindu Marriage Act, see also Paras Diwan, ‘The Hindu Marriage Act, 1955,’ *The International and Comparative Law Quarterly* 6, no. 2, (Apr., 1957), p. 270.

women’s subordination, as powerful patriarchs had argued that the home was a space away from the public sphere, the mechanisms of the state and judiciary.\textsuperscript{82} The provisions regarding void and voidable marriages in the Special and Hindu Marriage Acts, together with the rule that only the couple themselves could file for divorce did little to amend this situation. Exercising the equality granted to women under the Hindu Marriage Act thus rested on the provisions made available to them under the rest of the Hindu Code, particularly its succession laws. Given the interests and aims that had driven the Code Bill project from the outset, it is unsurprising to discover that the other aspects of the Code did not lay quite the same emphasis on gender equality as the Marriage Act. Indeed, while the legislature endorsed provisions making women liable for payment of alimony on grounds of gender equality,\textsuperscript{83} no similar arguments were made regarding daughters’ rights of inheritance during the debates about the Hindu Succession Bill, discussed in greater depth in the next chapter. Thus, far from introducing groundbreaking reform and even bringing an end to women’s subordination within the conjugal unit, the two Marriage Acts served to reconfigure old systems of dominance in a new language of rights and equality, a language that was more acceptable to and compatible with the nation-building project.

Yet the Marriage Acts did not uphold the patriarchal authority of all men, Hindu or otherwise. While on the one hand restructuring existing inequalities, the Special and Hindu Marriage Acts also introduced new patterns of hierarchical domination. Imposing one, narrow view of correct Hindu patriarchy based on north Indian custom, the Acts rendered retrograde and un-Hindu patriarchal practices that deviated from the norm they set out, particularly those of south Indian Hindus. This marginalisation of south Indian Hindu patriarchy had some roots in the Special Marriage Act of 1872, which had, as a result of Bengali interest in the measure, been based around north Indian Hindu marriage

\textsuperscript{82} Partha Chatterjee, ‘The resolution of the women’s question’ in K. Sangari & S. Vaid (eds.), Recasting women: essays in colonial history, (Delhi, 1989), pp. 233-53.

\textsuperscript{83} Seeta Parmanand, one of the most vocal women in the post-independent Hindu Code Bill debates wrote “To make any discrimination in the share of a son and a daughter, would be clearly ultra-vires of the Constitution, as equal rights have been guaranteed to all citizens irrespective of sex and all new legislation should be based on this principle. Accepting this principle the Rajya Sabha has laid down alimony to be payable by a wife also to her husband, even when alimony by a woman to a man, has been sanctioned in the advanced USA only in four states and in the UK only recently” ‘The Hindu Code Bill’ undated pamphlet for the AIWC. AIWC Papers, F.209, NMML.
customs as the norm. The process of codification adopted by the Hindu Law Committee in 1941 served to reinforce north Indian practices as the basis of all Hindu law while the regional rivalry of the inter-war period and redistribution of power under the 1951 constitution had ensured north Indian political hegemony. The construction of north-Indian practices as the only ‘true’ form of Hindu family life in the Code Bill served as a catalyst for a process already under way by the 1950s: the discrediting of south Indian matrilineal customs.\(^{84}\) In the mid-1970s Marrumakkatayam and Aliyasantana became the first legal systems in history to be officially abolished.\(^{85}\) This has also affected the status of south Indian patriarchy in the post-colonial state. Uncle-niece and aunt-nephew marriages had been discredited in the debates and effectively written out of Hindu law.\(^{86}\) In addition, south Indian Hindu practices have been marginalised in terms of the Hindu identity presented by religious nationalists after independence which draws much more heavily on north Indian customs.\(^{87}\)

These developments, including the impact of the 1872 Special Marriage Act, also had consequences for non-Hindu Indians, and for the operation of Indian secularism. The curious blend of Christian and north Indian Hindu practices that had formed the basis of the ‘secular’ Special Marriage Act created a precedent that allowed for the rise of north Indian Hindu patriarchy in Hindu law to be accommodated in ‘non-religious’ civil legislation. Though never intended to be an overtly anti-Muslim measure, the inter-Hindu struggle to shape the list of prohibited relationships in the Acts had the effect of undermining the legitimacy of Muslim marital customs and placed them beyond the pale of what the state considered acceptable practice for modern Indian society. The Hindu characteristics of the Special Marriage Act’s provisions reflected the state’s continued adherence to the ‘parity through difference’ approach to secularism rather than an attempt

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\(^{84}\) See the discussion about \textit{sambandham} relationships in Chapter Two.


\(^{87}\) While legislation such as the Hindu Marriage Act has undoubtedly played a role in cementing the dominance of this vision of Hinduism in the post-colonial state, there are of course other reasons for this north Indian dominance, including the historical development and regional origins of organisations such as the Hindu Mahasabha. See for example C. A. Bayly, \textit{The local roots of Indian politics: Allahabad 1880-1920}, (Oxford, 1975) and B.D. Graham, \textit{Hindu nationalism and Indian politics: the origins and development of the Bharatiya Jana Sangh}, (Cambridge, 1990).
to impose Hindu practices as the basis of Indian citizenship. Yet, by bringing the state into closer relationship with Hindu but not Muslim interests, the Act conferred greater legal legitimacy on the former while marginalising the latter. Legislation such as the Special Marriage Act has proved a powerful tool in the hand of Hindu nationalists today, who argue that Hindu practices should form the basis of a ‘true’ secular, civil citizenship in India. In this way the Code Bill, and the language of progress and modern citizenship in which it was framed, laid the foundations for the post-colonial nation and the balance of power within it.

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88 See Chapter 4.
89 'Common Civil Code: need of the hours,' Status Paper by Ved Prakash Goyal, President Bhartiya Janata Party (BJP), Mumbai (June, 1995).
Table 1: General election results 1951/2

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<thead>
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<th>State name</th>
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<th>Number won by Congress</th>
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<td>Delhi</td>
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<td>Vindhyapur Pradesh</td>
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<td><strong>TOTAL</strong></td>
<td><strong>478</strong></td>
<td><strong>361</strong></td>
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6. Family and nation: the Mitakshara coparcenary in post-colonial India

By late 1951 the Hindu Code Bill project looked set for defeat. After several years of debate, the government had succeeded in passing only the first three clauses into law. In the face of President Rajendra Prasad’s opposition and public demonstrations outside the assembly, Nehru’s decision to suspend the Code Bill debates on 25th September 1951 seemed to spell an end to the codification project. Yet, only five years later, the Code, broken down into five separate bills, had been passed into law.1 Significantly, when the bills were reintroduced to the legislature, after the 1952 elections, politicians argued that they bore little resemblance to the original Code Bill. Sardar Hukum Singh, a Sikh legislator from Punjab, argued that if there was greater support for the new bills it was “not that the public opinion has changed its attitude...This is not the original Bill...That Hindu Code has practically been given up by the Government.”2 The most significant difference between the pre- and post-election measures was the introduction, in the revised Hindu Succession Act, of clauses ‘saving’ the Mitakshara coparcenary system. While the Hindu Law Committee and Ambedkar had argued that the coparcenary had to be abolished in order to make Hindu law more gender equal, the revised measure placed the coparcenary system beyond the purview of the Hindu Succession Act, and therefore of its reforms.

In her study of the Hindu Code Bill Reba Som has argued that the Code Bill was revised after the elections in order to make it “more acceptable by whittling down the controversial points.”3 The post-election Hindu law bills, she maintains, reflected Jawaharlal Nehru’s realisation, after years of debate, that the Indian nation was not as receptive to social change or his own vision of a ‘modern’ social order in India as he had first hoped. Unwilling to accept complete defeat, Nehru worked hard to see the new legislation enacted so as to provide a “symbol” of reform and gender equality which the nation could eventually move towards. As he wrote to his Chief Ministers on the eve of the election itself, “You have to make a beginning somewhere”, the bills

1 The Code was revised to form the ‘secular’ Special Marriage Act, passed in 1954, and four Hindu law bills: the Hindu Marriage Act passed in 1955 and the Hindu Succession Act, the Hindu Minority and Guardianship Act and Hindu Adoption and Maintenance Act passed in 1956.
3 Ibid, pp. 188-9.
could be reformed and improved in the future; but for now “the essential principles underlying [any future changes] could not be given up.”\textsuperscript{4} Thus, though he failed to bring about substantive changes to women’s position in Indian society, “Nehru’s symbolical victory did help to establish the notion of women’s equality as a desirable ideal to which the Indian polity was committed.”\textsuperscript{5}

While this may have been the way that Nehru, and others, viewed the legacy of the Hindu Code Bill, this chapter argues that the Hindu law bills passed between 1955 and 1956 did more to obstruct future social reform than to inspire change. Though the Hindu Code did little to alter women’s position of legal subordination, it did much to redistribute legal power between groups of Hindu men, in the family and within the new post-colonial polity. The Hindu Succession Act and its provisions regarding the coparcenary were in many ways, the lynchpin of this reconfigured patriarchal system. The Act did not simply reinforce the existing coparcenary system that had inspired so much opposition from Hindu men in the late nineteenth and early twentieth centuries. Rather, its provisions served to protect the all-male hold over property while also securing greater individual property rights for Hindu men. In so doing, the Act represented the success of more conservative, male interests in wresting control of the reform debate from the more radical figures such as Ambedkar. This was achieved without upsetting too far public conceptions of the reforms as essentially ‘modern’ and ‘progressive’. As a result, this chapter argues that the Hindu Succession Act should be understood not as a watered down reform bill but as the zenith of a complex and precarious drive to reconfigure patriarchy within the family that had begun in the inter-war period.

This restructuring of male authority within the family was not an isolated event but must be seen in terms of a much wider reconfiguration of political power within the emerging Indian nation-state. Returning to the issue of land rights, competition for which had helped to trigger calls for personal law reform, this chapter shows how land reforms in the years following independence provided a view of the family that was influential in shaping the provisions of the Hindu Succession Bill. Revisiting some of the pressures behind law reform during the inter-war period, it argues that plans to abolish zamindari gave individual male cultivators stronger


control over their lands and stronger rights vis-à-vis the state, while at the same time reinforcing their power to exploit the unpaid labour of their wives and wider family. The second part of this chapter shows how the Hindu Succession Act altered the Mitakshara coparcenary in a similar way. Together, anti-zamindari legislation and the Hindu Succession Act provided a new system of Hindu patriarchy that was more in tune with the interests and demands of the Hindu men who, by the early 1950s, had come to dominate the independent Indian state.

Zamindari abolition and the Hindu joint family

Questions of land ownership had been one of the issues helping to drive debates about personal law reform in the inter-war period and even in the years before the First World War. The constitutional reforms of 1919 had driven a wedge between questions about land and other forms of property ownership as agricultural land was placed on the list of subjects dealt with by provincial legislatures, rather than the Government of India. Chapter One has shown how this redistribution, particularly in terms of taxation revenue, helped to spark debate about personal law reform at the central level of government. Yet 1919 did not spell an end to questions about land rights. Indeed, as this next section explores, land reform and the Hindu Code Bill project were in many ways intrinsically linked. This had much to do with the highly patriarchal modes of colonial governance. The imperatives of colonial rule had served to strengthen existing social networks of influence in ways that heightened the patriarchal and hierarchical structure of both the Mitakshara coparcenary and the zamindari revenue system. The inter-war years saw growing support for reform of land rights and revenue structures that was motivated by the same kinds of interests as personal law reform, most notably by the interest in dismantling the hierarchical relationships established by the colonial state to grant greater individual freedom to male tenants whose powers and rights over land were subordinate to those of larger landlords. While in the debates about Hindu law the major beneficiaries of reform were sons and wage-earners younger than the karta, in the land reform debates the subordinated group calling for change consisted of wealthy peasant cultivators. Just as with the Hindu Law Committee’s Code Bill, land reform created the possibility for an attempt to radically restructure agrarian relationships and the distribution of property

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6 See Chapter One, especially the second section comparing bills in Madras and Punjab.
rights. The land reform programme that was eventually enacted, however, succeeded in securing greater legal rights for male peasant cultivators without granting new powers to poorer landless labourers or to women for their unpaid work. In so doing it too created a new model of patriarchy through which the post-colonial state interacted with agrarian society.

Designed to reorganise state finances, the constitutional reforms enacted in 1919, also set in motion processes of change that offered opportunities to relieve the social pressures affecting both family and agrarian structures. The Meston Settlement affected the taxation policies of both the Government of India and provincial governments, who were left dependent on land revenue to fund both their expanding administrative apparatus and their payments to the centre. This was, from the outset, an almost impossible challenge and payment of the ‘provincial contribution’ to the centre was abandoned, for many provinces, soon after the introduction of the 1919 constitution. Indian representatives strongly resisted attempts to draw up legislation to review revenue rates, which, as a result of inflation were vastly out of date. They voiced opposition to raising land revenue, a move which would have important implications for their own social standing and political position. Yet, there was also increasing recognition that things could not continue as they were. By the mid-1920s, the Government of India was becoming increasingly concerned about the state of Indian agriculture. Attempts to set up a central Royal Commission to look into the state of agriculture in India were met with considerable suspicion and resistance from many provincial officials who, unwilling to relinquish any further control over their one major source of income, argued that “the problems of agriculture are largely local in character and even the results of general research frequently require prior local investigation before they can be applied successfully to any particular area.”

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8 Bengal was the first province to have its contribution waived though many others protested the charge from the outset, particularly Bombay. Ibid, pp. 537-8.
9 Punjab passed a land revenue bill in 1928 but was the only province to do so. Ibid, p.523.
10 Telegram from Government of Bombay presented to the Council of States by Mr. K.C. Roy (a non-official member of the Legislative Assembly from Bengal) 15th February 1926 *Council of States debates*, p.63 The Royal Commission did take place subsequently, though only after very clear expressions from the Government of India that it would not impinge on provincial interests. Indeed, only a few days before Roy’s speech to the legislature, the Viceroy, Lord Reading, had himself appeared before the Council of States to reassure members that “there was no dark political motive, as had been hinted, underlying the appointment of a Royal Commission on Agriculture.” Extract from speech made by Lord Reading at the opening ceremony of the Indian Council of States, 9th February 1926 IOR 1/E/9/1
It was only during the 1930s that attitudes to agrarian reform began to change. The depression that followed the 1929 stock market crash did much to expose the weak state of the agricultural economy and to draw the colonial state further into economic management, a task it had begun to undertake in World War I.\textsuperscript{11} As the state took on a more involved role in shaping demand and distribution of rural produce, so it was encouraged to pay greater attention to the interests of tenants as well as landlords, as was reflected in legislation at this time.\textsuperscript{12} The Congress ministries that took power in 1937 quickly became aware of these pressures. Many senior figures within the Congress party had strong links with elite and capitalist interests such as zamindars and big business, a state of affairs that was reflected in the party’s support for political change without social revolution.\textsuperscript{13} Once in power, however, Congressmen began to realise both the dangers of ignoring peasant-landlord tensions and the political backing they could win if they presented themselves as supportive of peasant interests.\textsuperscript{14} In parts of the United Provinces in particular, where zamindars had enjoyed enormous benefits under colonial rule, the Congress government made moves to secure support amongst the upper echelons of the peasantry, the wealthy small landholders who exercised some social and economic influence but felt their interests frustrated by the legal privileges enjoyed by the zamindar. In Madras also, the Congress revenue minister, T. Prakasam, supported the rights of tenant cultivators, ryots, over those of the large zamindar landowners, and called for the latter to reduce their rents.\textsuperscript{15} Such legislation served to undermine further the economic position of large zamindars, already weakened by the depression, and to strengthen the political power of smaller landowning peasants.


\textsuperscript{12} Ibid, pp. 694-5; Peter Reeve, Landlords and governments in Uttar Pradesh: a study of their relations until zamindari abolition, (Delhi, 1991), Chapter 3; Joya Chatterji, Bengal divided, (Cambridge, 1994), pp. 56; 72; 104-107.


\textsuperscript{14} Ibid, pp.201-2.

Thus, at the same time as the personal legal structures were undergoing their most comprehensive reform, with the passage of the Shariat and the Hindu Women’s Rights to Property Acts, agrarian social structures seemed also to be in flux, with a movement away from the hierarchical dominance of the larger landlords that echoed the restructuring of the Hindu joint family.

The common features of reform of agricultural land and Hindu property law were noted by the Hindu Law Committee early on in their work. The Committee were forced to think about the relationship between personal law and land rights following a ruling by the Federal Court in April 1941, in which it was decided that the Hindu Women’s Rights to Property Acts 1937 and 1938 were *ultra vires* of the constitution in respect of their application to land; as a subject under the jurisdiction of provincial governments, agricultural land could not, the Court ruled, be altered by legislation passed in the central assembly.\(^\text{16}\) On presenting their report to the Government of India, and their advice to support the reform and codification of Hindu law, the Law Committee acknowledged that, as had been the case with the 1937 and ’38 Hindu Women’s Rights to Property Acts, codification passed by the central legislature would not apply to agricultural land. Such a bifurcation of succession practices would, the Committee agreed, undermine the attempt to centralise and clarify Hindu property law. However, as provinces had already been debating the question of land rights before the war, the Committee suggested that provincial governors use their own legislative powers to extend the principles of any newly codified succession law to agricultural land.\(^\text{17}\) Thus, when the Committee began their work to draw up such a code, they were working on the assumption that it would apply to all forms of property.

At exactly the same time as the drive to reform Hindu personal law was gaining momentum, certain members of the Congress were taking steps to further

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\(^{16}\) "Report of the Hindu Law Committee’ (June, 1941), Appendix I.

\(^{17}\) As the Hindu Law Committee explained in their report, the 1937 and 1938 Hindu Women’s Rights to Property Bills “seek to legislate in respect of agricultural land not only for the past, but also for the future: legislation as to the past is necessary to cover the completed transactions already referred to, and legislation as to the future is necessary if women are to have the full rights which the Act meant to confer on them and also if the rules of succession for all forms of property are to be the same as far as possible...How is this legislation to be enacted? The Centre cannot normally legislate upon succession to agricultural land. The provisions of Section 103 of the Government of India Act 1935 which enable the Central Legislature to legislate with respect to matters in the Provincial Legislative List upon resolutions by the Provincial Legislatures are not of much avail in present circumstances, when the normal Legislatures are not functioning in most of the Governors’ Provinces. It follows, therefore, that the legislation proposed can be enacted only be means of Governor’s Acts in most of the Provinces and by the Provincial Legislatures in the rest.” Ibid, p.21.
develop plans to alter agrarian structures and reform zamindari rights. In late 1938, Jawaharlal Nehru formed the National Planning Committee (NPC), with the support of then Congress President Subhas Chandra Bose, though not of Gandhi and other more conservative Congress leaders.\(^8\) Established to draw up a policy for national reconstruction and social planning, Nehru hoped that the NPC would lay plans for a stronger centralised and industrialised economy. As a result, many of the NPC sub-committees focused on reforming and developing India’s heavy industry, though a sub-committee was also appointed to deal directly with the question of reforming land rights.\(^9\) The initial report submitted by the land reform committee proposed social revolution and a radical programme of land redistribution. Arguing that “Ownership in all forms of natural wealth [should] belong to and vest absolutely in the people of India collectively,” the report proposed that

> After the coming into effect of the Plan, there must be no rights of inheritance in any of these forms of Natural Wealth.\(^20\) No transfer, sale, alienation, mortgage, lease or any agreement of subinfeudation, or usufructuary management by individual holder to another, should be permitted with respect to any such form of Natural Wealth.\(^21\)

These proposals were quickly vetoed by Nehru who opposed such an approach on the ground that it would split the Congress organisation. The clash between Subhas Chandra Bose and Gandhi during the 1939 Congress presidential elections weakened the leftist position within the High Command and thus further undermined the call for radical agrarian reform. A fortnight after Bose’s resignation Nehru wrote to K.T. Shah, the Congressman heading the NPC, that, while “…planning as most of us conceive it, is inevitably connected with a socialist society…constituted as we are, and constituted as the planning committee is, we can hardly begin tackling the question on a socialist basis."

> If we start with the dictum that only under socialism there can be planning we frighten people and irritate the ignorant….Here, in India, a premature conflict on class lines would lead to a break-up and possibly to prolonged inability to build anything…I feel that in India today any attempt to push

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\(^{19}\) The NPC consisted of 28 subcommittees including The Women Subcommittee; the Engineering Industries and Transport Industries Subcommittee; the Labour Sub-committee; the Manufacturing Industries Sub-Committee and the Population Sub-Committee.

\(^{20}\) Which included, as well as agricultural land, mines and forests and their produce.

\(^{21}\) Interim report of the sub-committee on land policy, agricultural labour and insurance, p.1 AICC Papers F.23 (KW5)/1940 NMML.
out the middle class is likely to end in failure. The middle class is too
strong to be pushed out and there is a tremendous lack of human material in
any other class to take its place effectively, or to run a planned society.

That was not to say that there should be no change. It was clear that the existing
economic structure had frustrated Indian interests and hampered economic growth.
Thus “it would be folly to strengthen the vested interest in the existing structure. We
should do nothing to create fresh barriers in the way of a change-over”. To embark
on a programme of “full-blooded socialism”, Nehru believed, would be not only
foolhardy but positively destructive. The course to take, in his view, was to “think in
terms of planning apart from socialism, and thus inevitably arrive at some form of
socialism, that is a logical process which will convert many who are weary of words
and slogans”. In this way, he believed, a plan for economic and social democracy in
India could be put in place “without challenging the existing structure”. 22

Reflecting Nehru’s request, and the more conservative views of the majority
of Congress members, the language of radical property right reform was totally absent
from the subsequent NPC report, drawn up by Dr Radhakamal Mukherjee, chair of
the NPC sub-committee dealing with land. Instead, the case for reorganising
agricultural relations drew on arguments about the rights of the landlord vis-à-vis the
cultivator that had formed the cornerstone of earlier colonial debates about land.
Under the banner of ‘land to the tiller’ Mukherjee and his committee called for the
strengthening of individual land rights on the basis of self-cultivation. If one worked
the land, one should own it, while subletting was to be permitted in only a very few,
specific circumstances. The report set out provisions for amalgamating and
restripping landholdings to create integrated plots, to be capped at a size which it was
possible for the average-sized family to work without employing workers. This was
by no means a promise to redistribute agricultural resources to the poor and landless;
participation in the land restrippment and consolidation programmes was limited to
those who already possessed land rights. 23 Such a policy allowed for the break up of

23 The report clearly stipulated that these programmes aimed not at redistribution but at consolidation
of plots: “Each cultivator participating in the re-stripping should receive out of the regrouped area, in
exchange for his old property, an area of land of equal value and equal quality with that which he
possessed before the exchange or a suitable compensation, in case such exchange holdings are not
available.” Land Policy Sub-Committee: Note by Dr Radhakamal Mukherjee, undated AICC F.23
(KW5)-1940 NMML.
the large estates owned by non-cultivating landlords but protected the resources, and social dominance, of middling peasant cultivators against the claims of the rural poor.

To protect and support this new system of landownership, the report also made proposals about a system of inheritance that operated aside from the succession practices of religious personal law. Inheritance, along with restription and consolidation of land, should be administered by special land courts, the report proposed, and “The economic holding should be heritable on condition that the heir himself cultivates the holding to the best advantage of the State. Otherwise the holding will lapse to the state.” What would happen if the heir was female, however, was not addressed in the report which was, in fact totally devoid of consideration about how the land proposals would affect gender relations. Yet, the position of women in agricultural society went right to the heart of the reform plans. In building the new reforms around family sized plots, the reforms took for granted the labour of both women and children. Women’s unpaid domestic labour had, from the days of Company rule, provided one of the mainstays of the Indian agricultural economy, a fact recognised in the relationship between the restitution of conjugal rights and contractual rights over labour in early colonial legislation. By the early twentieth century, women’s agricultural labour had also come to underpin systems of cheap labour recruitment, with wives, daughters and mothers staying on in rural areas and operating as subsistence farmers in order to feed the family in situations when husbands or fathers had migrated to the city in search of paid employment. As a result, it seemed that the subordination of women’s labour was part of the “existing structure” with which Nehru and the NPC were not prepared to tamper. While a programme of far-reaching structural reform might never be accepted by the government, Nehru’s hopes of bringing about change without altering existing social arrangements promised little to the poorer women of rural India.

While the NPC did not engage with the question of women’s rights in their work, the impact of law reform on agricultural productivity was raised in relation to the Law Committee’s Code Bill. During the legislature’s consideration of the Hindu Law Committee’s succession bill, Dr. P.N. Banerjea, a Hindu representative from

24 Ibid, paragraph 3.VI.
26 Samita Sen, Women and labour in late colonial India, (Cambridge, 1999), Chapters 1 and 2.
Calcutta, expressed his concern about the wider consequences of the bill. “Equality of status” he warned, would also entail “equality of functions”. Women would compete in the labour market alongside men:

If you give a woman a right to property in agricultural land, you should expect that the woman should herself be a tiller of the soil; you should not expect that she should be the owner of the land while a man should be the tiller of the soil. Similarly, when women expect to be owners of capital, it would not be desirable for them merely to control the capital and not to manage the industry and trade.\textsuperscript{27}

Though women had, for decades, contributed much labour to domestic production, certain tasks, amongst them tilling the soil, were considered men’s ‘work’.\textsuperscript{28} Legislators argued that to give a daughter a share in her father’s landed property not only opened the risk of her husband, an outsider, upsetting family control over the land. It also threatened to subvert the structure of agrarian life and thus put agricultural production at risk.\textsuperscript{29} In the wake of the Bengal famine and increasing food shortages, many legislators warned vociferously that this was not the time to consider the restructuring of property rights in agricultural land.\textsuperscript{30} Just as Nehru had argued that economic and agricultural change had to take place without putting existing

\textsuperscript{27} 30\textsuperscript{th} March 1943, LAD, p. 1626.
\textsuperscript{29} Mr. T.T. Krishnamachari of Tanjore \textit{cum} Trichinopoly argued that inclusion of land in the Code would lead to fragmentation of agricultural holdings with dire economic consequences. “[Land] is an important element in the economy of the country and as I foresee it today it would not be possible for any Provincial Government to allow further fragmentation of land. It will not be possible for any Provincial Government to allow division of land by people who are absentee landlords.” 30\textsuperscript{th} March 1943, \textit{LAD}, p. 1618. The argument about absentee landlords was linked to marital practices: Bhai Parma Nand of Punjab argued that it was virtually impossible to give daughters share in immovable property because they left the family “Naturally, she will bring in altogether a stranger in the family…in the Punjab, no agriculturalist is willing, nor would ever be willing to give a share to the daughter in land because she will bring in a new man into the family. In the case of the Hindus their daughters are married at great distances. A new man comes to that family. How can he manage to cultivate the agricultural land? If he cannot manage it he will have to sell it and he might sell it to anyone at any price, which will lead to breaking up of the family system altogether. Therefore, I say, Sir, taking the family as the unit of society, this Bill would be destructive of the family and also of society as a whole.” 24\textsuperscript{th} March 1943, \textit{LAD}, pp. 1419-20.
\textsuperscript{30} In his note of dissent about the Hindu Law Committee’s succession bill Susil Kumar Roy Chowdhury, a member of the select committee considering the measure wrote “at the present moment the whole attention of the people as well as the Government should be to ameliorate the food situation in the country and to alleviate the miseries and sufferings of the people…The condemnation [of the bill] would have been stronger if the Bill was circulated and if the people of Bengal were not living in close proximity to the war zone and also faced with the severest famine since the days of the East India Company…” ‘Report of the Joint Committee on the Bill to amend and codify the Hindu Law relating to intestate succession with the amended Bill’ (1943).
social structures at risk, so many legislators argued that personal law reform should not alter the patriarchal structure of the joint family in relation to land.

The Hindu Law Committee thus came under mounting pressure from both legislators and Congressmen to see the question of land rights as something that should be dealt with by a separate, specialist group. The worsening agrarian situation and the Government of India’s decision, immediately after the war to undertake reforms not unlike those proposed by the NPC only added to the strain on the Committee. Thus, in their final report, published in 1947 to accompany their draft of a complete Hindu Code, the committee explained that

we have aimed at...a uniform law for all Hindus and not necessarily a uniform law for all forms of property. It may well be that in the interest of agriculture, special laws will in due course by enacted to secure the consolidation and prevent the fragmentation of agricultural holdings; and these may include a special law of succession, differing from the law applying to other forms of property.

To some degree, the removal of agricultural land from the purview of the Code had allowed its framers to advocate more radical reform of Hindu law than might have been possible otherwise, particularly with regard to the Mitakshara coparcenary. As the HLC explained in their report, “Even we ourselves are divided in opinion” on the abolition of Mitakshara survivorship, “and one of us has been able to agree in [sic] the particular provisions of the proposed Code only because they do not affect agricultural land.” Yet, without access to land, one of the most valuable but also commonly held commodities in India, this more radical restructuring of the coparcenary system would never achieve the gender parity intended by the Committee.

This fact was pointed out by numerous legislators in the debate about the Code Bill under Ambedkar’s patronage. Yet, the government and even, it seemed, Ambedkar, remained convinced of the need for land reform to be dealt with on a

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31 ‘Statement on Agriculture and Food policy in India’ distributed to chief secretaries of all provincial governments, 16th January 1946 GOI Home Department F.180/1946 – Public NAI.
34 It was mostly those who criticised the Code that drew attention to this point. Mr. Naziruddin Ahmad (West Bengal: Muslim) strongly opposed the Code, arguing that it did not fulfil its aim of centralisation and clarity because, legally, it could not apply to land, 9th April 1948, CA(J)D, Vol. V No. 1, p. 3641, as did Shri B.M. Gupte (Bombay: General), 12th December 1949, CA(J)D, Vol. VI Pt. II, p. 503.
provincial basis, separate from personal law reform. In spite of his insistence on uniformity in relation to custom and family legal practices, Ambedkar explained that

...I believe there is no necessity that a uniform law of inheritance should apply to all sorts of property. Property varies in its nature, varies in its importance in the social life of the community and consequently it may be a matter of no mean advantage for society to have one set of laws of inheritance for agricultural property and another set for non-agricultural property. It may be that on a better consideration of the situation, Indian or Hindu society may come to the conclusion that land which is the foundation of its economic life had better be governed by the law of primogeniture so that neither the junior sons nor females may take part in its inheritance.35

This point of view was reiterated following the revision of the Code and its division into separate bills after the 1952 elections. Regarding the Hindu Succession Bill, H.V. Pataskar, the third Law Member to take up the Code Bill after independence,36 dismissed calls to include provisions regarding succession to agricultural land in the Code, arguing that “the problem of land reforms is being solved”. The laws governing land, he explained, “being property laws, apply to all whether Hindu or non-Hindu. The present law is what is known as the personal law and it cannot override the provisions of a property law enacted in the interests of the agricultural economy of the country”.37 Concern about agricultural productivity and the health of the economy took dominance over questions of social reform or women’s rights in relation to land.

Indeed, after independence, the NPC’s second set of more conservative proposals became the basis of the Government of UP’s Zamindari Abolition and Land Reforms Act, passed in 1950. In building the new reforms around family sized plots, the legislation made protecting the unity of the family a cornerstone of agricultural production. While the agricultural family might be officially estimated by law makers to comprise of two individuals, the reforms discouraged attempts to break down or restructure larger family arrangements. At the same time, the anti-zamindari legislation meant that land was no longer owned by the Hindu family collective, but by the individual owner. This had the effect of freeing agricultural land from the clutches of the Mitakshara coparcenary and its many reversioner heirs, whose power to question land transfers had prompted much concern amongst provincial and central

36 C.C. Biswas was the first – see Appendix II
governments in the inter-war years.\textsuperscript{38} It did this, however, not by imposing a radical restructuring of the family unit or even of agricultural society. Excluded from the land restription programmes, poor, non-landowning classes remained susceptible to domination by more powerful landowning classes. Women and children were also given little power to protect their labour, the exploitation of which became part of the formal basis of land reform.\textsuperscript{39} The refrain of ‘land to the tiller’ adopted by the UP and later other regional governments in their anti-zamindari legislation, allowed the land reform programme to be presented as a progressive movement towards a more egalitarian, post-colonial society, even as it reinforced many of the exploitative relationships of colonial agrarian production, including the subordination of women and landless labourers.\textsuperscript{40}

The programme of land reform legislation and zamindari abolition pursued after independence was highly successful in reconfiguring the hierarchical relationship between large landowner and peasant cultivator that had come, in many regions, to characterise rural life under colonial rule. The new laws reinforced the ownership rights of only those peasant cultivators who were wealthy enough to own land before the legislation was passed. However, in addition to their property rights, the land reforms granted the peasant cultivator new political power by establishing him, rather than the zamindar, as the main representative of agrarian society in post-colonial India. Giving authority to a new group of men, the legislation attacked the hierarchical but not the patriarchal structure of colonial agrarian governance. Thus, the reforms did not entail any substantial redistribution of wealth or influence; the legislation removed the top layer of agrarian patriarchy, the already much weakened power of the zamindar, but did little to the structures beneath it.\textsuperscript{41} In so doing, the legislation satisfied peasant cultivators’ demands for greater individual power without upsetting the wider structure of patriarchal authority. As the next section explores, the UP Zamindari Abolition Act set an important precedent for the debates about Hindu

\textsuperscript{38} See Chapter One.


\textsuperscript{40} The government of Uttar Pradesh, formerly the United Provinces, passed anti-zamindari legislation that set the precedent for similar legislation adopted by other state governments. B.K. Sinha & Pushpendra, (eds.), Land Reforms in India: An Unfinished Agenda, (Delhi, 2000) pp.31-2

\textsuperscript{41} In reality, however, many zamindars in fact found ways to round the legislation to continue to exert influence over land and agrarian society more generally. See Bipan Chandra, Mridula Mukerjee and Aditya Mukherjee, India after independence 1947-2000: (Delhi, 2000 edn., 1999), pp. 376-384.
personal law that ran concurrently. The imperatives of colonial rule had served to sharpen the hierarchical structure of agrarian and family relationships in not dissimilar ways; after 1947 both these structures were reformed again, this time to bring them into line with the needs and interests shaping the post-colonial state.

Reconstructing the joint family for post-colonial society

The wrestling of control away from Ambedkar and a return to a greater focus on protecting patriarchal authority in the Code Bill took place in three stages. Firstly, in April 1950 a conference was held between Ambedkar and many of the Code Bill’s staunchest critics. Held at Nehru’s behest, the meeting was intended as a chance for the government to strike some compromise with its critics in order, the Prime Minister hoped, to facilitate the Code’s passage. As a result, the Code under went revision in the summer of 1950 and clauses protecting the Mitakshara coparcenary were added. The elections of 1951/2 were the second significant stage in this process. The new legislatures, the first to be elected under universal franchise, claimed greater legitimacy than the Constitutional Assembly in dealing with a measure such as the Hindu Code. But the elections also brought to power a legislature, dominated by north-Indian Hindu representatives who were able to secure their more conservative practices as the basis of the Code Bill. The final stage in the shoring up of conservative interests came with the revisions and proposals made by H.V. Pataskar, the final Law Member to guide the law reform project. Tracing these stages, this next section argues that reform of the Code to protect the coparcenary was not an attempt to water down the bill, to win over public opinion, but rather a return to the interests that had driven law reform before the Second World War.

Clauses ‘saving’ the patriarchal structure of the Mitakshara coparcenary were first introduced to the Code Bill in the summer of 1950, following a meeting between Ambedkar and opponents of the bill. The meeting had arisen out of a series of exchanges between Nehru and Ambedkar the previous year, as, in the wake of the

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42 While questions about the legislature’s legitimacy to debate questions of religious personal law were raised from the outset of the Hindu Law Committee’s work, the unelected nature of the Constituent Assembly came under fire from opponents in the post-independence debates. Mr. Naziruddin Ahmad of West Bengal, (see footnote below) argued that “The present Bill, which is really of a very sweeping and complicated character, and its principles have not been before the public and it would therefore be better to wait to digest opinions and to pass a constitution and hold elections making this a definite issue before the public. It will then be seen whether the public at large really desire it.” 9th April 1948, CAI(L)D, Vol. V No.1, p. 3641.
lengthy debates about the Code, the Prime Minister sought to convince the increasingly frustrated Law Minister that the government should adopt a new and, if necessary, conciliatory approach to the Code Bill. Though Nehru continued to express his support for Ambedkar and the Code, he was also facing mounting pressure from key party members whose opposition threatened the unity of the party and government. In March 1949, Nehru wrote to Ambedkar, reassuring him of his support for the Code, “As you know,” he wrote “I am entirely in favour of the Bill, but I want to proceed in a manner so as to lessen or tone down opposition, not only in Parliament but also outside.” As the debates within the Assembly dragged on, Nehru proposed to organise more informal meetings between Ambedkar and “persons chiefly interested in the Bill either way”. The Minister finally accepted this approach and on 19th December Nehru put a measure before the House that proposed to continue the debate in more informal discussion “and not to vitiate the atmosphere by acrimonious debate anywhere at this stage”. It was supported.

Plans were put in place for an informal conference to be held in April 1950 to which were invited interested parties inside the legislature, and representatives of groups with strong views on the bills from outside the House. In spite of Nehru’s hopes that moving debate outside the legislature might help to ease some of the tension surrounding the Code Bill, the government’s plans were beset with problems

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43 As the debates wore on Ambedkar began to accuse some representatives of deliberately impeding discussion. He was particularly critical of Naziruddin Ahmad, the only Muslim representative to play a part in the Code Bill debates between 1948 and 1950. Ahmad expressed strong opposition to the bill on three different occasions between this time, arguing against the legitimacy of the assembly to legislate on this issue and calling for the Code to be re-circulated for the purpose of eliciting opinion amongst local officials and interested parties. 9th April 1948, CAILJ 0 Vol.VI, No.I, p. 3639-42; 31st August 1948, CAILJ 0 Vol.V, No.II p. 776, p. 779. He later proposed a motion for re-circulation of the bill in the late December 1949 debates, which Ambedkar spoke strongly against, arguing that 22 of the 33 representatives who had spoken on the measure had in fact voiced general support for the Code. 19th December 1949, CAILJ 0, Vol. VII Pt. II, p. 787.

44 Rajendra Prasad and Vallabhbhai Patel both opposed the bill. Prasad had voiced doubts about the Bill from its introduction to the Constituent Assembly. Writing to Nehru towards the end of July 1948 he argued that a measure which would introduce some “very fundamental and far-reaching changes in the Hindu law...need not be passed by the Constituent Assembly sitting as a legislature” which was “a make-shift arrangement.” Prasad to Nehru, 21st July 1948, Rajendra Prasad Correspondence and Selected Documents Vol. 9, p. 220. Stressing this point in a letter written a few days later, he urged the withdrawal of the Bill in order to avoid a major crisis in “the Party and in the country on a matter which cannot on its merit claim the priority that belongs to so many other things which we have not been able to take up”. Prasad to Nehru, 24th July 1948, Ibid, p. 240.


46 19th December 1949, CAILJ 0 Vol. VII Pt. II, p.784. These informal meetings were first proposed by Nehru to Ambedkar on 26th February 1949, ibid pp. 326-7, but received little interest from Ambedkar. Nehru proposed informal talks again in a letter to Ambedkar of 8th June 1949, SWJN 2nd Series Vol.11 p. 207. Ambedkar finally bowed to the Prime Minister’s will towards the end of the December 1949 legislative session on the Bill.
from the outset. The announcement that the conference would be convened on 14th April met with a shower of petitions complaining that this date clashed with that of the sacred Kumbh Mela festival to be held at Haridwar. As a result the conference was moved to 20th April, only to be overshadowed by reactions to the Nehru-Liaquat Ali pact to safeguard minorities in India and Pakistan, signed only days before Ambedkar was due to convene the meeting. The Government of India’s display of diplomatic concord with Pakistan was met with anger and protests by Dr Syama Prasad Mookerjee, Minister of Industries and Supplies, and Mr. K.C. Neogy, Minister of Commerce, both of whom tendered their resignation as a result. After a flurry of correspondence between the two ministers and their colleagues, Mookerjee made his official speech of resignation before the legislature on 19th April. The minister’s criticism of the government for ignoring Hindu sentiment in signing the pact, coming so soon after the clash of dates, provided further ammunition for those who argued that the government had shown complete disregard for Hindu culture and tradition in their support for the Code. These events were to set the tone of the conference.

The 30 member strong conference over which Ambedkar presided met for three days and comprised of representatives from a wide range of interest groups, the majority of whom opposed the Code. Many of the groups who had supported the Code Bill previously, and in particular the national women’s groups, were not present. Only three members of the post-independence select committee joined the conference, Mihir Lall Chattopadhyay, Bakshi Tek Chand, and Renuka Ray (both of whom had included minutes of dissent). As a member and former president of the AIWC Ray was able to put forward views in line with the Conference’s position even though the organisation itself was not officially invited to attend. Twelve other MPs also attended, including Alladi Krishnaswami Aiyar, former Attorney-General of Madras who had entered the Constituent Assembly as a representative of that

47 Hindustan Times, 4th and 12th April 1950.
49 He made his speech on the morning of the 19th and left Delhi for Bengal that afternoon in demonstration of his support for Hindu refugees coming across the border from East Pakistan. Letter from Mookerjee to Nehru, 19th April 1950. S.P. Mookerjee Papers NMML Subject File (V-VII Instalment), F.8.
50 Ambedkar had explained earlier to his legislative colleagues, the government had invited only women’s organisations “such as were not very favourable to the Bill.” Hindustan Times 4th April 1950.
province, and Shrimati Durgabai, also of Madras, who supported the Code.\textsuperscript{51} The fourteen representatives from outside the legislature included vocal opponents of the Code Bill such as Pandits Madhwhacharyaje and Harihar Swarup Sharma of the All India Anti-Hindu Code Committee, based in Calcutta, and the All India Hindu Code Review Committee, of Delhi, respectively.\textsuperscript{52} Women’s views were represented by Shrimati Jankibai Joshi, President of the All-India Hindu Women’s Conference - the women’s branch of the Hindu Mahasabha - and Shrimati Vidya Debji, the Honorary General Secretary of the Arya Mahila Hitakarini Maha-Parishad of Banaras.\textsuperscript{53}

Such a body represented opinion more akin to that of the inter-war legislators than that of Ambedkar and the Hindu Law Committee. The furor raised around the Nehru-Liaqat Ali pact had damaged the image of national unity presented in the legislature following independence. For Nehru and the Congress to prevent the splits widening and to continue to maintain their position as representatives, not of one section of society but of the nation as a whole, it was important to win over opponents of the Code Bill. Many of the reforms introduced to the Bill as a result of this conference demonstrated this atmosphere of conservatism. Discussion focused on issues of monogamy, divorce, the joint family, women’s property, succession (including both the order of heirs and the daughter’s share of her father’s estate) and also the question of agricultural land.

While it was generally agreed that the joint family was being gradually broken up by individuals seeking partition of their ancestral property, the majority of members argued that “Mitakshara coparcenary has still a great hold on the masses, especially in rural areas and therefore should be retained for the time being, allowing it to disappear in course of time.” As a result they called for Mitakshara joint property

\textsuperscript{51} Shrimati Durgabai spoke in favour of the Code, and the provisions of succession in particular on a series of occasions during the legislative debates in September 1951, until this point she had not played a prominent role in the debates.

\textsuperscript{52} The other representatives were N.C. Chatterjee, a lawyer and member of the Hindu Mahasabha from Calcutta. Chatterjee went on to stand in the 1951 elections and became the most prominent opponent of the Code Bill in Parliament; several jurists and local administrators also attended the meeting, amongst them B. Vasudeva Murthy, Advocate General, Mysore; Kuttu Krishna Menon, Government pleader, Madras; Mr Justice H.V. Divata, Chief Justice, Saurashtra, Rajkot. In addition D.G. Dalvi, Bombay President Social Reforms Association, Bombay and Dr P.V. Kane, advocate of the High Court Bombay and a prominent figure in the pre-World War II social reform debates, also participated. Hindustan Times, 22\textsuperscript{nd} April 1950.

\textsuperscript{53} Before independence Joshi had written to Viceroy's Linlithgow and Wavell to express her opposition to the Code Bill. Following independence she also corresponded with President Prasad about her views on the Code Bill, writing in early February to strongly protest against the Hindu Code Bill and outlining her views about how it should be reformed. Letter from Jankibai Joshi to Rajendra Prasad, 4\textsuperscript{th} February, AIHM Papers, F.C-183 NMML.
to be exempted from the bill.\textsuperscript{54} There was some consideration of the proposal to give wives a share in their husband's coparcenary and then to exclude them from inheriting anything from their father's estate. It was decided by a majority, however that this would generate too much legal confusion and that, rather than compensating a married daughter with property from her husband's family, she should simply be given half the share that an unmarried daughter would receive. With members calling for a return to the original distribution of property, as laid out in Rau's Hindu Code, this meant that an unmarried daughter would receive half the share of a son, and a married daughter would get one quarter.\textsuperscript{55} Significantly, the committee called for the son's right over his father's property to be further strengthened by the introduction of provisions securing his right to "compel" his sisters to accept partition of the ancestral estate. The revised bill contained clauses enabling heirs of an ancestral estate to demand partition, but it was felt that the disruption caused by the introduction of a stranger to the family in the form of the son-in-law was so great that provision should be made to ensure that sons were "at liberty to buy off the share of their sister in the property compulsorily".\textsuperscript{56} The question of bringing agricultural land into the remit of the bill was also raised in discussions\textsuperscript{57} which prompted a number of members to call for provisions barring the succession of female heirs to a share in either "the family dwelling house" or "agricultural properties".\textsuperscript{58}

The conference disagreed with Renuka Ray's arguments that Hindus governed by the matrilineal Marrumakkatayyam and Aliyasantana schools of law should be exempt from the bill, and supported the select committee's decision to include them. However, given the regional nature of these questions it was decided to leave full consideration of this matter to suitable experts and a further conference was specially convened at Trivandrum, in the far south of the country, the following month. Ambedkar also presided over this meeting which, once again was highly conservative in tone. The panel of male experts who discussed these proposals supported the application of some aspects of the Code to those governed by Marrumakkatayyam and Aliyasantana, but they did propose the introduction of 'saving clauses' to protect

\textsuperscript{54} Hindustan Times, 19\textsuperscript{th} November 1950.
\textsuperscript{55} Hindustan Times, 7\textsuperscript{th} June 1950.
\textsuperscript{56} Hindustan Times, 19\textsuperscript{th} November 1950.
\textsuperscript{57} Hindustan Times, 20\textsuperscript{th} April 1950.
\textsuperscript{58} Hindustan Times, 7\textsuperscript{th} June 1950.
some of the customary practices of divorce and adoption under these legal systems.\textsuperscript{59} Their changes received unanimous support from the other members and it was decided to include them, along with the other provisions decided in the conference, in the revised Code.\textsuperscript{60}

In spite of these amendments, opposition both to the Code, and Ambedkar’s patronage of it, remained strong. The April conference was accompanied by popular demonstrations in the capital against the Code. As representatives gathered for the first day of their discussions, 130 people were rounded up and arrested in Parliament Street, following a protest outside the Assembly House.\textsuperscript{61} Having already been pressed in the conferences to back down on many of the issues most important to him, this campaign of opposition from his\textsuperscript{7} Hindu opponents proved too much for Ambedkar. While he had complied with Nehru’s appeals at the beginning of the year to strive for unity and consensus,\textsuperscript{62} by early May his frustration began to show. The same month saw the publication of unconfirmed reports that Ambedkar had called on untouchables to reject Hinduism and convert to Buddhism.\textsuperscript{63} Though these claims were played down and Ambedkar himself did not convert in this period, these stories served to reinforce views that the Law Member and his Code were opposed to ‘true’ Hindu sentiment. By early June, the scale of the anti-Code bill satyagraha had grown with the Hindu nationalist press reporting figures of “20-30 dharamvirs…arrested daily.”\textsuperscript{64}

Such events only added to the frustration Ambedkar felt as legislators continued to mount opposition to his Code Bill. The Code was reintroduced in February 1951 but, after several months of debate, the legislature had still failed to move beyond consideration of the initial clauses. Debate remained just as slow, even after the decision to consider only its marriage provisions. As the Congress party

\textsuperscript{59} Interest in improving and extending the individual property rights of men was present amongst men governed by matrilineral and patrilineral law. See the Jain Succession Act discussed in Chapter Two.

\textsuperscript{60} Hindustan Times, 19\textsuperscript{th} November 1950.

\textsuperscript{61} Hindustan Times, 22\textsuperscript{nd} April 1950. Demonstrations and agitations continued for the duration of the conference with 40 people being taken into custody on the orders of the District Magistrate on 24\textsuperscript{th} April, Hindustan Times, 25\textsuperscript{th} April 1950.

\textsuperscript{62} On 12\textsuperscript{th} January, in a speech in Bombay, Ambedkar called upon the Scheduled Classes to “give up their ‘political aloofness’ and co-operate with other communities in ‘strengthening our newly won freedom’” albeit in a manner which would maintain the separate entity of the Schedule Caste Federation. Hindustan Times, 13\textsuperscript{th} January 1950.

\textsuperscript{63} Hindustan Times, 4\textsuperscript{th} May 1950; Organiser, 15\textsuperscript{th} May 1950.

\textsuperscript{64} Organiser, 12\textsuperscript{th} June 1950; Dharamvir translates literally as a supremely righteous or virtuous person Oxford Hindu-English Dictionary.
prepared for India’s first general election, Nehru came under increasing pressure to drop the controversial Code.\textsuperscript{65} At the close of parliamentary proceedings on 25\textsuperscript{th} September, it was announced that the bill would be postponed indefinitely. Ambedkar tendered his resignation two days later.

The events of 1950, the split in the government, followed by the Code Bill conference in April, served to shift the emphasis of the Code Bill project away from the ideas about individual equality, as had been promoted by the Hindu Law Committee and Ambedkar, and towards a more overt focus on the protection of patriarchal authority. Opponents who attended the conference did not call for the Code Bill to be dropped entirely but rather sought to amalgamate aspects of the original Hindu Law Committee’s Code\textsuperscript{7}Bill with pre-reform legal structures, most notably the Mitakshara coparcenary. Ambedkar’s decision to resign as Law Minister, influenced in part by his anger at the ways in which these amendments disrupted his own reform agenda,\textsuperscript{66} reinforced the power of the more conservative lobby. With Ambedkar out of the way, codification became a much ‘safer’ project which could be controlled by more conservative male legislators who had opposed the initial Code Bill. While the decision to revive the Code Bill after the elections may have been driven by Nehru’s doggedness to ensure that some symbol of his commitment to social reform was enacted into law, the government’s success in enacting the revised Code Bills reflected the reintroduction to the legislation of measures that were in consonance with the interests and objectives that had guided law reform in the inter-war years.

\textit{The Mitakshara coparcenary and the Hindu Succession Act}

While the focus of the codification project under the Hindu Law Committee and Ambedkar had been on individual rights for all, the Hindu Succession Act reflected the desire to secure greater individual rights for men that had driven the inter-war reform debates. Passed by the Lok Sabha on the same day that consideration of the Hindu Succession Act began, the Hindu Marriage Act permitted a Hindu woman to

\textsuperscript{65} Especially from Prasad – for more details see footnote 43 above.

\textsuperscript{66} In addition to the Code Bill’s failure Ambedkar criticised the Nehruvian government’s foreign policy and its failure to do more to help the backward classes of India. ‘On the eve of resignation from the Cabinet – 27\textsuperscript{th} September 1951’ in Bhagwan Das, (ed.) \textit{Selected Speeches of B.R. Ambedkar.} (Jullundur, 1963), pp. 71-83.
sue for divorce albeit with important restrictions on her ability to exercise this right. In so doing, the Act created further incentive for Hindu men to maintain tight control over Hindu women’s access to property and protect their patriarchal authority within the conjugal relationship.\(^{67}\) Protection of the Mitakshara coparcenary ensured that, for the majority of Hindus to whom this system of law applied, family property would remain under male control. Yet, the hierarchical structure of the coparcenary system had been the primary source of discontent with regards to personal law, with many legislators calling for Hindu men, of all generations, to enjoy greater individual control over property. This next section examines how legislators succeeded in shaping the Hindu Succession Bill so that it allowed adult Hindu men greater power over their property away from their father or older patriarchs, while retaining authority over their wives.

During the inter-war years there had been considerable support for reform of the coparcenary system on economic grounds to give men greater individual control over property. This argument was not absent from the Hindu Law Committee’s work either. When the remaining members of the Hindu Law Committee, without B.N. Mitter, came to present their final Code they maintained that their bill was beneficial because it sought to secure gender equality,\(^{68}\) but also because it would establish a legal system more in keeping with “the new pattern to which Hindu society seems to be rapidly adjusting itself.”\(^{69}\) The phasing out of the coparcenary system, Rau and his colleagues argued, would give Hindus far greater control over property as individuals. No longer required to obtain the consent of family members to access their wealth, they would be granted greater access to capital for investment and enterprise.\(^{70}\) When their Code was circulated for opinion, this argument had received support from notable key figures. In the view of Srinivasa Sastri, “The choice is between maintenance of big estates and recognition of the independence of individual members of the joint family. The latter in my opinion, is a more important aim as it affords greater scope for individual initiative and prosperity”. C.L. Anand, principal of the Lahore Law College agreed, arguing that “The power of free disposition is recognised in every other system of law and it is time for the Hindu Law to fall into

\(^{67}\) See Chapter Five.
\(^{68}\) Explanatory note accompanying ‘a bill to amend and codify the Hindu law of succession’ printed in Gazette of India, Part V, Saturday, May 30, 1942. See also HLC’s note ‘Intestate succession: Mitakshara school.’ M.R. Jayakar Papers, F.723 NAI.
line. The theory of coparcenary rests on conceptions of primitive law and is a relic of patriarchal theory.\textsuperscript{71} However, a number of other witnesses to whom the full Code was circulated could not agree with these viewpoints, feeling that, in abolishing the coparcenary system, the bill took the introduction of individual rights too far and in fact threatened the economic security of Hindu families. Interviewees in the north Indian provinces, in particular from UP, Bihar and the Punjab, had argued that the break down of the coparcenary system would affect business, in particular banking.\textsuperscript{72} Indeed, it had been precisely these kinds of arguments on which post-independence debate about the coparcenary had come to turn.

The introduction of clauses protecting the coparcenary at the April 1950 conference had marked an important move away from the Hindu Law Committee’s arguments about individual rights for all Hindus and towards a more conservative agenda. This shift in attitude in the Code Bill debates was reinforced by the results of independent India’s first general elections that were announced in February 1952. The new parliament was dominated, both numerically and in terms of influence, by Hindu male representatives from the traditionally conservative regions of northern India. Politicians representing parties on either side of the Congress’s centrist position did not fare well,\textsuperscript{73} and the election also saw the defeat of more radical legislators, including Acharya Kripalani, Kamaladevi and Ambedkar.\textsuperscript{74} The Law Minister who succeeded Ambedkar was cut from a very different political cloth. Shri H.V. Pataskar, who became Law Member in 1955 and led the Hindu Succession Act through the legislature, was a staunch opponent of the Code Bill’s provisions to eliminate the

\textsuperscript{71} Ibid, p. 15.
\textsuperscript{72} Ibid, p. 13.
\textsuperscript{73} S.P. Mookerjee’s Bharatiya Jana Sangh, a right-wing Hindu nationalist party that he founded in October 1951 when he left the government, secured only 3 seats; the leftist lobby within the Congress had, by the time of the elections, already been much weakened by the clash between Purushotam Das Tandon and Kripalani in the Congress Presidential elections of September 1950 and Kripalani’s subsequent decision to leave the party. His Kisan Mazdoor Praja Party (KMPP), which he formed with Congress dissidents from Andhra and West Bengal won only 9 out of the 145 seats it contested, with candidates forfeiting their deposit in 74 seats. Indeed, amongst the national parties, the left vote was split between the KMPP, the Communist Party of India, who won 16 seats and the Socialist party that won 12 seats.
\textsuperscript{74} Struggling to come to terms with his defeat Ambedkar accused the Congress party of sabotage. Ambedkar wrote to Kamalakant about a plot hatched by Dange and Savarkar to defeat him in the election on the basis of their opposition to his proposals to partition Kashmir. Letters from Ambedkar to Kamalakant, 14\textsuperscript{th} and 18\textsuperscript{th} January 1952, Correspondence files, B.R. Ambedkar Papers, NAI. He appealed to the national electoral board against the results, but was not successful. Bombay Chronicle, 18\textsuperscript{th} October 1952.
coparcenary system. During the pre-election debates he had condemned the drive towards individual rights in Ambedkar’s Code as being opposed to Hindu traditions and practices.

In the structure of our society the basic unit is the family. And on the continuity of the family as a unit rested naturally the stability of our society. It is not based on an individual as a unit, but more or less the basis of the whole structure is the family as a unit...The trend in the modern world is towards individualism. The joint family system is cracking in many places. I would go to the length of saying that the joint family system would not continue for all time under modern conditions. But as it is there, the question is whether we shall gradually replace it by the individual as the basis of our society or whether we shall break it up by law as is proposed to be done by this measure. If we want to break up the Hindu society [sic] suddenly, then I am afraid we shall be rocking and shaking the foundations of that society which may result in consequences unforeseen and unpredictable.

Consequently, he was sympathetic to the petitions made during the April 1950 conference regarding protection of the coparcenary system. Indeed, the Succession Bill which he introduced to the Lok Sabha in May 1955 was almost exactly the same as the succession provisions of the Code Bill as amended by the April 1950 conference. The bill upheld women’s rights to take an absolute estate in the property they inherited, and included widows and daughters in the list of heirs to intestate property. Just as had been suggested at the 1950 conference, widows and sons were granted equal shares in the intestate property of a Hindu man while the share available to daughters had been limited to a half. Most importantly, however, it decreed that the Mitakshara coparcenary unit would not be affected by any of the new bill’s provisions. No other Hindu system of joint family ownership was to be protected by the bill. Property held in common by a family under Dayabhaga was to succeed along the lines of succession set out in the Code, to daughters, widows and sons. So too was the joint family, or taward, property of the south Indian matrilineal systems. In families governed by Mitakshara law, the individually owned property of a Hindu man would also be governed by the more gender equal principles of the Code

75 Pataskar was the third law minister to take up the bill since independence but the sixth overall. See Appendix II
77 In introducing the bill to the legislature Pataskar, explained that “To a large extent this Bill is based on the version of the corresponding portion of the Hindu Code as amended by the Select Committee of the Constituent Assembly (Legislative) but with one very important change, viz. that joint family property which is governed by the Mitakshara rule of survivorship is taken out of the purview of the Bill altogether” 5th May 1955, LSD, Vol.IV Pt.II, col. 8013.
succession law, but ancestral property would not. Just as the prohibited relationships of the Hindu Marriage Act had implied the ‘true’ Hindu-ness of north Indian practices, so the protection of the coparcenary but not other joint family units, conveyed a notion that Mitakshara law was the most significant system of patriarchal joint ownership in Hindu law, and thus the most worthy of special protection.\textsuperscript{78}

Yet, as Pataskar pointed out to the legislature, to place the coparcenary system beyond the purview of the Hindu Succession Bill was also to raise important logistical difficulties for the operation of this measure:

To retain the Mitakshara joint family and at the same time put the daughter on the same footing as a son with respect to the right by birth, right of survivorship and the right to claim partition at any time, will be to provide for a joint family unknown to the law and unworkable in practice.\textsuperscript{79}

The integrity of the coparcenary system rested on its all-male composition. One of the primary arguments that had been made against granting daughters a right in their father’s property was that their marriage would lead to the dissolution of the family unit or the introduction of a stranger to the family estate. The list of prohibited relationships passed under both the Special and Hindu Marriage Acts made inter-cousin marriage illegal, which would keep property within the family, and established as the legal norm the exogamous, patrilocal marital practices which had been particularly linked with the preservation of the coparcenary system in north and west India. Pataskar was able to propose one way around these difficulties

...If the joint family is therefore to be preserved and if the daughter’s right to a share is to be recognised, it could only be done by giving the daughter a right by birth similar to that of a son or by giving the father a right to dispose of his coparcenary interests in the property by will or some such device.\textsuperscript{80}

Neither the earlier Codes, nor the original draft of Succession Bill had provided rights for a Hindu man to will away his ancestral property. Indeed, in 1955 only Hindu men governed by Dayabhaga law, from Bengal, Bihar and Orissa, and governed by Mitakshara law in Presidency Towns of Bombay and Madras possessed the rights to practice testamentary succession, and this only in relation to their individual, rather

\textsuperscript{78} See Chapter Five.
\textsuperscript{79} 5\textsuperscript{th} May 1955, \textit{LSD} Vol.IV Pt.II, col. 8014.
\textsuperscript{80} 5\textsuperscript{th} May 1955, \textit{LSD} Vol.IV Pt.II, col. 8014.
than ancestral property. Following Pataskar’s advice to the legislature, the bill was revised to include a new section, governing testamentary succession. Though the Mitakshara coparcenary remained outside the purview of the bill, the new clauses set out that “The interest of a male Hindu in a Mitakshara coparcenary property... be deemed to be property capable of being disposed by him... within the meaning of this section.” This move raised criticism from some legislators who argued that these provisions could be used to disinherit daughters and called for restrictions to be placed on the percentage of the family property that could be willed away, as under Muslim shariat law. However, supporters of this viewpoint failed to convince the majority of legislators, with one member of the Lok Sabha appealing to his colleagues to refrain from such cynicism. Shri C.C. Shah, representing Gohilwad-Sorath in Saurashtra, Gujarat urged fellow Sabha members

Don’t distrust all fathers. That would be bad law; that would be a bad approach. We should not think that because the right of testamentary deposition is given to the father, forthwith every Hindu father will go and make a will depriving every daughter of her share in the property... A Hindu father will never do it. To proceed on such a basis of distrust is to proceed on a wrong basis.

Debate about other clauses of the bill did not suggest an overwhelming concern to prioritise the financial interests of the daughter, however. Many legislators continued to raise familiar objections that attempts to grant daughters a share in their fathers’ property would disrupt the structure of the Mitakshara joint family by bringing into its midst a male outsider in the shape of the daughter’s husband. The Hindu Marriage

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81 This was under the Hindu Wills Act of 1870. The Oudh Estates Act of 1869 gave the same opportunity to taluqdras from that province. However, under the Indian Succession Act, passed in 1865 and according to which anyone marrying under the Special Marriage Act was governed, Hindus and other Indian subjects were expressly prohibited from making a will over their ancestral property. Hindus and Muslims who claimed the right under customary law to make an oral will could take out letters of administration on their personal estate under the Probate and Administration Act of 1881. Under all cases, however, evidence of the will needed to be produced in court, and probate charges paid. The Civil Justice Committee of 1924 had proposed an amendment to the 1870 Hindu Wills Act that was passed in August 1926. However, while the colonial government were willing to give Hindus greater power over the succession of their individual, self-acquired property, the amendment included no provisions to extend this right to ancestral property which continued to devolve on the basis of familial rights and collective ownership. Extract of the report of the Civil Justice Committee, 1925, GOI Home Department, Judicial F.296-I-32/1925.

82 Hindu Succession Act (Act XXX of 1956) Cl.30.

83 An amendment to insert the clause “Providing that no such disposition under this section shall be valid to the extent to which it deprives any daughter or son’s wife of any property which would devolve on her but for such disposition” was defeated by 19 votes to 14. 30th November 1955, LSD, Vol.XI no.1-7, col. 1002.

Act had established north Indian Hindu patrilocal marital practices, with which this argument was most associated, as the basis of ‘true’ and ‘correct’ Hindu marriage. Thus, as one legislator argued with regards to the Succession Bill, “In ordinary cases, so far as the family is concerned, [when she marries] a daughter is supposed to go to another’s house”. Difficulties could therefore arise if she was eligible to inherit a share in immovable property, for example a house. With this problem in mind, the joint select committee, that considered the Hindu Succession Bill in late 1955, added a new “special provision respecting dwelling-houses” to the bill, under which a female heir was barred from demanding a partition of jointly held property.

Pataskar issued strong support for this provision when the revised Succession Act was reintroduced to the legislature. Evoking the marriage provisions set out in the Hindu Marriage Act as the norm for Hindu families, Pataskar opined,

A dwelling-house of the family is a matter of great sentiment in our country. Besides, in the rural conditions obtaining in our country, it is the prime family necessity. A daughter generally passes by marriage into another family and has to stay normally in her husband’s family house. She is also likely to act under the influence of her husband.

Explaning the logic behind the select committee’s decision to include this clause, the Law Minister insisted that “It is not a question of making a distinction between sex and sex or male and female.” Rather, he argued, the measure reflected the committee’s concern for the plight of ‘ordinary’ Hindu families. During the joint select committee’s considerations it had been argued that while ‘dwelling-houses’ varied enormously in size, “in the majority of cases” small dwelling-houses “were owned by lakhs and lakhs of people”. Should a daughter, who lived outside this house, be granted the right to claim partition of the family property, it would be these families, rather than those who owned big homes, who would suffer most. Unable to legislate according to the size of the home, therefore, the committee decided to add the clause thinking “that it was better that at least on account of someone who had gone out of the family, there should not be any disturbance in the [living] arrangement” of other male family members. The clause, Pataskar explained, was not

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86 Cl.23 Hindu Succession Act, 1956. Though this was a new provision it built on the demands made in the April 1950 conference to restrict a woman’s claim over her natal home.
designed to restrict women’s property rights but was simply a “realisation of the existing state of things”.

When the revised bill was placed for consideration before the Rajya Sabha, however, a further amendment was included to the “dwelling-houses” clause. The added proviso stipulated that daughters only, and not any other female heir, were entitled to a right of residence in their father’s ‘dwelling-house’, though “only if she is unmarried or has been deserted by or has separated from her husband or is a widow”. Legislators such as Renu Chakravarti and Pandit K.C. Sharma argued that the amendment clearly discriminated against women and was ultra vires of the Fundamental Rights. This was not the view of the majority of the legislature however, who supported Pataskar’s argument that the provisions were practical, rather than gender biased. Thus, women’s access to their family ‘dwelling-house’ was limited in the name of ‘economic security’.

Similar arguments and attitudes shaped the final stages of debates and the final wording of the provisions regarding succession to coparcenary property. As the Lok Sabha began its clause by clause consideration of the bill, Pataskar moved to add an amendment to the bill setting out “if the deceased had left surviving him a female specified in class I of the schedule [the closest heirs, the son, daughter, widow, mother and grand children up to two generations]...the interest of the deceased in the Mitakshara coparcenary property shall devolve by testamentary or intestate succession as the case may be, under this Act and not by survivorship.” While Pataskar argued that the amendment would serve to preserve the coparcenary in families with only male children but dissolve it in those with a daughter, the complexity of the coparcenary system meant that this was not, in fact, an accurate description of its effect.

The amendment set out that, on his death, the father’s share in the coparcenary would pass by succession, just as Dayabhaga and all individual property, rather than by survivorship. But this did not affect the coparcenary as a whole. For example, if a father had two sons, they would, on birth and in accordance with the principles of survivorship, become members of the family coparcenary, while the father’s daughter,

88 8\textsuperscript{th} May 1956, \textit{LSD}, Vol. IV Pt.II col. 7564-5.
89 Cl.23 Hindu Succession Act, 1956.
90 8\textsuperscript{th} May 1956, \textit{LSD}, Vol. IV Pt.II col. 7548 & col. 7550-51.
would not. On the death of the father, his share in the coparcenary, i.e. one third, would be divided between his widow and children. According to the rules of succession set out in the Hindu Succession Act, that third would be divided to give the widow and sons equal shares, while the daughter would receive half that amount. On this basis the two sons and their mother would be given two sevenths of their father’s estate each, while the daughter received one seventh. This would not, however, affect the sons’ share in the coparcenary property which they would retain to mean that, overall, while the daughter would receive one twenty-first of the wealth tied up in the coparcenary, the widow would receive two twenty-firsts and the sons would hold nine twenty-firsts each.

As a result, Pataskar’s proposed amendment to the Mitakshara coparcenary system received a mixed response amongst legislators. Several representatives voiced concern about the change, with one arguing that sons could partition the property before their father’s death and therefore deny a sister any access to the family estate. Shrimati Sushama Sen “congratulate[d]” Pataskar on the amendment but argued that the revised bill still granted women far less than the original Code drafted by Rau’s Hindu Law Committee had intended. Renu Chakravarti lamented the unwillingness of the government to “go as far as ending the Mitakshara system” and argued that, together with the expansion of testamentary laws under the bill, the provisions of the amendment had very little effect in providing safeguards for the daughter’s rights. To the majority of legislators, however, Pataskar’s amendment seemed to provide the perfect balance between maintaining the coparcenary system and protecting women’s rights.

This amendment, made during the final stages of parliament’s consideration of the Succession Bill provided a sense of commitment to women’s rights, even if, in practice, this translated into a paltry share in an estate for a women vis-à-vis her male relatives. Yet, even if it denied women equal property rights, the system of inheritance set out in the Hindu Succession Act, that was given presidential assent on 17th June

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92 This example is operating on the basis that the father is himself not a member of a coparcenary but has succeeded to property as a result of the partition of the coparcenary he was part of along with his father and brothers. This wealth becomes part of a new coparcenary over which he is manager or karta. For a very clear demonstration of this system see Lucy Carroll, ‘Daughter’s rights of inheritance in India: a perspective on the problem of dowry’ Modern Asian Studies 25, no. 4, (Oct 1991), pp. 793-801.
93 Shri N.P. Nathwani, 3rd May 1956, LSD, Vol.IV. Pt. II, col.7143
94 Ibid. col. 7145-6.
95 Ibid. col. 7163.
1956, was not the same as the coparcenary system, or even the succession practices, that had operated hitherto. All women enjoyed absolute control over their estate, effectively abolishing the idea of the Hindu limited owner. The act also gave widows a share equal to that of a son in their husband’s property, both his self-acquired and his coparcenary property. The rights of Hindu daughters were also improved by the bill, except for those governed by Mayukha Hindu law in Bombay, who had enjoyed some access to their father’s property under their own legal system. But these changes fell far short of the abolition of the coparcenary for which both the Hindu Law Committee and Ambedkar had called. Since the Law Committee had begun work on a succession bill, in July 1941, the Code Bill had been drafted to reflect a movement towards individual equality for all Hindus, regardless of gender, and even of caste identity. April 1950 marked a shift in the focus of the Code Bill project, however. The concessions made by Ambedkar and Nehru to conservative opinion during the April conference marked the beginning of a movement away from a Code focused on equality and towards legislation that granted individual rights to Hindu men, but protected wider patriarchal structures, such as the Mitakshara coparcenary. Such a shift marked not simply an attempt to water down the original aims of the Code Bill project but to bring the codification drive back into line with the conservative interests that had guided reform during the inter-war years.

This chapter has highlighted three key stages in this process. The April conference helped to give rise to a Code Bill, the provisions of which reflected the desire to protect Hindu patriarchal authority; Ambedkar’s decision to resign the following year removed a figure whose own political agenda had greatly threatened the interests of upper-caste Hindu male representatives; the elections of 1951 brought to power a largely conservative parliament with a popular mandate no other legislative house had enjoyed during the earlier Code Bill debates. Finally, in H.V. Pataskar parliament found a Law Minister who was sympathetic to calls to protect the joint family while also willing to do the bidding of the legislature. From the outset, his Hindu Succession Bill sought to establish a balance between women’s rights and the protection of the patriarchal structure of the joint family. After only a year of debate – a very short time in the larger history of the Code Bill – a formula was found to create

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96 Except if she inherited property by testamentary succession in which case a Hindu man could expressly stipulate that a woman heir should not have absolute control, Cl.14;2 HSA
97 For the difficulties arising from this legal doctrine see Chapter One.
a Succession Bill that granted Hindu men greater individual control over their property without undermining their authority over women relatives or forcing them to adopt a more egalitarian legal structure. This rested on three key provisions.

Firstly, the Hindu Succession Act introduced testamentary powers that had not existed in Hindu law previously. While north Indian Hindu representatives were keen to impose their marriage practices as the legal ‘norm’ for the Code Bill, they were willing to adopt practices followed by Hindus from other provinces if it served to further their patriarchal authority. The right enjoyed by Hindu men in the Madras and Bombay Presidency Towns, to will away their self-acquired property, was extended to all Hindus but also opened up to cover coparcenary property also. Though anyone making a will would have to follow the laws of probate, the testamentary provisions of the Hindu Succession Act granted Hindu men the possibility of complete, individual control over the devolution of their entire estate. Testamentary rights also provided a means to undermine any of the provisions in the act designed to improve women’s access to property. The second important clause in the act regarded a daughter’s rights in her natal family home. Reinforcing the legal and social ‘propriety’ of the exogamous marital practices of the Hindu Marriage Act, the Succession Act placed strict restrictions on the ability of a daughter to return to the family home in which she grew up. Together, the two acts enforced the notion that on her marriage a daughter ceased to belong to her father, and could only rejoin the family if she was deserted or divorced by her husband. The provisions restricting a daughter’s right to a share in the value of her father’s house followed the same logic. A daughter was legally entitled to inherit a share in the family estate but she was not able to access that share until her brothers decided they would partition the estate and distribute it amongst the various stake holders, thereby diminishing the power and value of the daughter’s share. The third major provision, regarding devolution of a father’s share in a Mitakshara coparcenary, undermined the daughter’s share further. Presented by Pataskar as a way to ‘dissolve’ the unequal coparcenary system in families with daughters, the introduction of succession, rather than survivorship, to a father’s coparcenary estate, did very little to introduce parity between sons and daughters. As long as the coparcenary system continued, sons would enjoy, by right of birth, a larger share in the family estate than a daughter could ever possess through intestate succession. Indeed, with daughters barred from inheriting agricultural land and effectively barred from a share in the family home, the estate to which a daughter
was able to succeed would always be considerably less valuable than that of her brother.

The situation of the Hindu widow was different and considerably better than that of the daughter, reflecting the assumption that all daughters would marry and, as widows, enjoy these rights. Granting widows a claim in their deceased husband’s estate was seen as a way of protecting them within the larger patriarchal joint family.\(^98\) In so doing, the act reinforced the position of the widow within her marital family, while correspondingly distancing the daughter from her natal family. As recent studies of contemporary Indian society have pointed out, in some families these provisions have resulted in the mother supporting the property claims of her sons, upon whom she can depend for her maintenance, while encouraging her daughters to forfeit the small share to which they are entitled in their father’s estate.\(^99\) Thus, both through the wording of the provisions themselves, and through their consequences for Indian society, the Hindu Succession Act has done much to reconfigure the Mitakshara coparcenary in ways that give Hindu men greater individual control over their property at the same time as they reinforce the operation of patriarchal authority, in both existing and new ways.

**Conclusion**

The UP Zamindari Abolition Act of 1950 and the Hindu Succession Act, passed five years later, have both been criticised by historians for their failure to bring about substantive social reform.\(^100\) Yet this failure is hardly surprising when one considers the interests driving both measures. Together these acts played a pivotal role in a wider project to reconfigure Indian, but above all Hindu, patriarchy for the context of

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98 To disinherit a widow was, by the twentieth century, seen as cruel and unkind but it also created the possibility of a community of women existing outside the conjugal bond and thus patriarchal control. For a discussion of the historical relationship between reform legislation regarding widowhood and the protection of male patriarchy see Aishika Chakrabarti, ‘Widowhood in colonial Bengal 1850-1930,’ Unpublished doctoral thesis, University of Calcutta, 2004.


post-colonial government. Under British rule patriarchal authority and hierarchical social structures had formed the lynchpin of the state’s modes of governance and channels of control. The Zamindari Abolition Act along with the four Hindu Law Acts, served to restructure these mechanisms, to loosen the hierarchical relationships circumscribing the power of Hindu men, particularly non-karta sons and peasant cultivators, without affecting too much the wider functioning of patriarchal authority. The tension between reforming the rights of certain Hindu men within existing structures and destabilising patriarchal control more generally had affected both the land and personal law reform debates. The first report submitted by the NPC subcommittee on land showed clearly how calls for law reform could be incorporated into a more radical, leftist programme of social reform, while the concern raised by the Hindu Law Committee and Ambedkar’s Code Bill has already been much discussed in this dissertation. For legislators who supported the law reforms and Hindu Law Acts that were eventually passed, the greatest success of these measures must have been their ability to steer away from the more extreme side of the reform spectrum. At the same time, invoking the language of workers’ and women’s rights, of law and equality rather than custom, the legislature presented these measures in the egalitarian political lexicon of the post-colonial nation-state.

Whereas the colonial state had viewed Indian society in terms of hierarchical structures, at the heart of the Hindu Law and Zamindari Abolition Acts was a model of the family that was not necessarily nuclear, but which most definitely was under the control of a single patriarch. Indeed, the emphasis in the Zamindari legislation on workers rights imposed the idea of a younger, working father figure as the head of the household. While the coparcenary structure lived on in the Hindu Succession Act, the provisions regarding testamentary succession provided Hindu men of any age much greater individual control over their property than had been the case before. The emphasis on family labour in the Zamindari Abolition Act, together with the provisions of both the Hindu Marriage and Succession Acts ensured that male heads of family enjoyed strong powers over both their wife and daughters. In addition to control over property and labour within the family, the new acts granted greater political authority to the father figure as the representative of this new family model. Where the zamindar and Mitakshara karta had been regarded as the spokesman for the agrarian community and Hindu family under British rule, the new acts presented the Hindu husband as the principle interlocutor between state and Indian society. In
this way, far from setting out a symbolic agenda for reform in the future, the Hindu Law Acts, along with legislation such as the Zamindari Abolition Act, had an important and more immediate impact on the distribution of political power within post-colonial Indian society.
Conclusion

The Hindu Adoption and Maintenance Act was given Presidential assent on 21st December 1956, bringing the Hindu Code Bill project to an end, fifteen years after the Hindu Law Committee had begun its work. The Hindu Adoption Act, together with the three other Hindu Law Acts, fell far short not only of the gender equality for which Indian women’s organisations had campaigned, but also the reforms proposed in the original Code Bill, drawn up by the Hindu Law Committee before independence. The Hindu Law Acts did give women important new rights, granting them absolute rights over property, the right to inherit property as widows and daughters and the right to seek divorce. However, they also rendered the exercise of these rights very difficult, with clauses that reinforced and reconfigured men’s legal power over their family. As a result, the Acts did succeed in reforming patriarchal power within the Hindu community but were relatively ineffective in terms of women’s interests. This fact was neither an unintended consequence of the Law Acts nor simply the result of government attempts to water down the legislation in order to see it through the legislature. Focused on securing greater rights for men without upsetting patriarchal order, the Law Acts, far more than any earlier draft of the Code Bill, were in consonance with the powerful, conservative interests that supported law reform.

This dissertation has argued that it is a mistake to interpret the Hindu Code Bill as an attempt to improve women’s rights. In fact it became the corner stone of a drive, first, to reconfigure the way in which male authority was exercised within the Hindu family and then, in subtle ways and over time, to consolidate the dominance of north Indian Hindu patriarchy, and by extension, patriarchs, within the new nation. Over the last two decades, a growing number of studies have emphasised the importance of analysing patriarchal structures under British rule not simply as an end in itself but as central to understanding the modes of governance employed by the colonial state and their impact on Indian society. Though the policies and networks of alliance pursued by the colonial state varied from region to region, these works have demonstrated the ways in which the expansion of colonial rule was accompanied by a reconsolidation and heightening of existing social hierarchies and relationships of
dominance throughout India. Women's subordination and legal dependency under pre-colonial legal systems were reinforced and given new meaning by the colonial state, particularly with reference to property rights; however, so too were the power relationships and social hierarchies between different groups of men, between fathers and younger male relatives, between landlords and tenants and between upper and lower caste groups.

The history of the Hindu Code Bill project shows that just as the advent of British rule prompted the reconstitution of Indian patriarchy, so too did its withdrawal from the subcontinent. Led by Indian legislators seeking to secure both greater rights within the family and greater political authority, the legislative debates about personal law reform during the interwar years were part of a process of revising and adjusting the hierarchical power relationships on which colonial rule had developed. Yet, ongoing constitutional reform, followed by British withdrawal from India, meant that the shape of the Indian state and the constitution of interests within it remained deeply uncertain throughout the first half of the twentieth century. The breadth of views and opinions put forward in the debates about law reform, during and after the interwar years, reflected the range of different male groups and their struggle for power in this period. Affecting caste relations, the functioning of Indian secularism and the structure of agrarian society as well as questions about women's rights, it was only with the passage of the constitution and the establishment of a more settled regional balance of power within the post-colonial polity that some sort of resolution to these debates was achieved. The structure of patriarchal authority that was set out in the Hindu Law Acts both reflected and helped to shape the political configuration and modes of governance on which the post-colonial Indian nation state came to be established.

Through its focus on the personal law debates, this study has shown how the post-colonial nation-building project and in particular the advent of democracy served

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2 Amongst Hindu legislators the interest in reform was focused primarily on the hierarchical structure of the Mitakshara coparcenary, while Muslim legislators were interested in weakening the political dominance of the landed Muslim classes and securing greater power for Muslim men from urban professional backgrounds. See Chapter Two.
to reinscribe social inequalities by privileging a highly conservative view of the family. In so doing, it created new hierarchies of dominance but also retrenched many of the authoritarian power relationships that had structured life under colonial rule. The interwar debates about personal law reform expose the powerful battles between regional interests to shape the patriarchal structures of the changing Indian state, as discussed in Chapter Two. Legislation moved in the 1920s, by representatives from Madras in particular, while focused on protecting male dominance within the home, showed greater flexibility and scope for considering the legal position and claims of Hindu women. The expansion of representative politics, first under the 1935 Government of India Act, but more particularly under the 1950 Indian Constitution, allowed north Indian leaders to enjoy greater dominance within the state and the reform debates. Known for its social conservatism even before partition, the violent experience and trauma of partition in north India served to reinforce amongst the upper-caste Hindu elite of this region a more hard-line view of the family that was often couched in highly communal terms. Ambedkar’s passionate attempt to use the Code Bill to make real his dream of abolishing caste served only to reinforce this conservative opposition. From the late 1940s onwards the more liberal aspects of the Law Committee’s Code Bill were whittled away and replaced by provisions that reinforced patriarchal dominance over the family, even as legislators continued to evoke a rhetoric of ‘social-progress’, ‘modernity’ and women’s rights.

Analysing the nation-building programme in terms of patriarchal interests has also provided an innovative perspective from which to observe the operation of Indian secularism in relation to personal law in India. In recent years, differences in the Indian state’s attitude to Hindu and Muslim personal law have become a major focus for criticism by both critics and defenders of Indian secularism. Highlighting the historical origins of this debate, Chapters Four and Five have argued that the decision to revive the Code Bill after independence, but not to intervene in Muslim personal law, reflected an attempt to uphold the Indian secular agenda. Pointing to the continuities between the colonial state’s policy of religious neutrality towards law reform and the independent state’s role in the Hindu Code Bill, this dissertation has

argued that this stance reflected a commitment to protect and treat equally the patriarchal interests of Hindu and Muslim leaders. Yet, in spite of the intentions of the new government, in the tense religious climate of partition, Hindu reformers’ use of the legislatures to alter their power within the family served to bring the state into closer alignment with the interests of Hindu patriarchs, while distancing itself from those of Muslim men.

This was particularly true with regard to the debates about marriage legislation in the Hindu Code Bill. Chapter Five looked at how the prohibited degrees of relationship adopted by the Hindu Law Committee in their original Code Bill helped to delegitimise south-Indian Hindu practices and affirm north-Indian Hindu customs as the basis of a new, uniform Hindu legal identity. In the context of the Hindi cultural movements of the late nineteenth and early twentieth-century, upper-caste north Indian Hindu men had promoted notions of Hindu patriarchy drawn in sharp relief from Muslim family practices which were portrayed as debased and immoral.4 The Nehru government’s decision in 1952 to split the marriage legislation into Hindu and secular measures was made in an attempt to facilitate the passage of the Hindu Law Acts following the outrage and opposition generated when Ambedkar had led the Code Bill debate. Though the revised Special Marriage Act of 1954 was never intended to be a specifically anti-Muslim measure, its provisions regarding the prohibited degrees of relationships served to render Muslim customs of inter-cousin marriage improper and unprogressive. The ‘secular’ act seemed to present north-Indian Hindu patriarchy as a valid basis for Indian citizenship, serving, in the tense and suspicious atmosphere that followed partition, to present Indian Muslims as un-Indian. The legacy of this situation lives on in contemporary debates about Indian secular citizenship, in which Hindu nationalists have become one of the most prominent supporters of a uniform civil code while their opponents contest it on grounds that such a code would lead to ‘Hindu-isation’.5

In using the Code Bill debates to trace the relationship between changes in Indian patriarchy, the transition to independence and operation of Indian secularism,

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this dissertation has implications for the ways in which we think about and study the modern Indian state. In addition to the many changes taking place between the end of World War I and the early 1950s, this study has also highlighted significant areas of continuity between the colonial and post-colonial state. Chapter One argued that the historical framework of colonial governance was a key factor in helping to promote the drive to reform property rights and the personal legal systems in the interwar period. The financial and social constraints facing the colonial administration during the days of Company rule had prompted officials to develop their governance by building on and strengthening existing networks of patronage, patriarchy and hierarchical authority. The result was a very ‘thin’ colonial state in which social order was maintained largely through the often unchecked power of coercive hierarchies, rather than by autonomous administrative structures with a strong reach into Indian society. The family, this dissertation argues, was one of the most important areas of Indian male autonomy in this structure. Though this network of alliances expanded and developed over the course of British rule, officials did not seek to ‘thicken’ the power of these hierarchies or push state power ‘deeper’ into Indian society, fearing both increased expenditure and social unrest.

The alliances with Indian men of influence were able to fulfil the interests of the colonial state throughout the nineteenth century. Tensions began to occur, however, with the changes in the global economy and a shift in Britain’s imperial interest in India that followed World War I. Falling demand for the export commodities that had sustained the Raj in the late 1880s was accompanied by the erosion of the economic and social influence of many of the agrarian elites who helped to maintain colonial governance. At the same time, Whitehall’s interest in securing India as a military base for the Empire prompted the state to seek alliances with men drawn from quite different social backgrounds, who could mobilise the financial resources and manpower needed for this new direction. Devolution of political and economic power under the 1919 Government of India Act was a crucial first step in this process. Yet, in some areas, this process of restructuring power was limited by the hierarchical structures of governance upon which the colonial administration had hitherto depended. Chapter One demonstrated that new taxation policies created an incentive amongst British officials to re-examine property law, the tangled state of which owed much to the ‘thin’ state style adopted previously. In terms of land rights, Chapter Six showed how the interwar period saw provincial
governments begin to rethink structures of zamindari power which no longer seemed to be as effective in the post-war climate. Many of the new ‘men of influence’ who entered the state in this time also voiced opposition to the hierarchical frameworks of patriarchal authority that had sustained the more ‘traditional’ colonial elites but impeded their own interests.

The interwar years thus saw a gradual change in the personnel involved in colonial governance, but not a change in the way this governance was achieved. Devolution and changes in colonial fiscal policy prompted a scaling down of the hierarchical networks of influence governing society but did not serve to draw the state into a closer relationship with Indian society or give it powers to intervene and arbitrate in social relationships, as some historians of the early women’s movement have assumed. Chapter Two argued that while Indian leaders were happy during the interwar years to encourage the view that an Indian government would intervene in and reform aspects of the social and domestic spheres from which the ‘thin’ colonial state had distanced itself, very few Indian men actually supported greater state intervention in the family. While the home may have provided a site for constructions of Indian national identity and power under British rule, few Indian men wished to relinquish their control over this space, even to an independent Indian state. The rhetoric of reform provided a powerful weapon against the patriarchal authority of colonial administrators and British social reformers, as exemplified in the Sarda agitation. Indeed, the language of reform and the apparent commitment of an Indian state to uphold the rights of women and other oppressed citizens were crucial in constructing ideas of Indian self rule in contrast to the colonial state. After independence, the notion that the state would protect vulnerable citizens became the basis of the Fundamental Rights, the inclusion of which in the 1950 Constitution was heralded as a significant break with the colonial past. Yet, away from this rhetoric and the battle against British rule, improving women’s legal position and improving women’s ability to access their rights were not the primary motivations of Indian

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legislators. The attempts to reconfigure Indian patriarchy in the first half of the twentieth century were driven by a desire to secure greater authority for Indian men, in the family and over state structures.

The Hindu Marriage and Succession Acts demonstrate clearly the survival of the ‘thin’ state after independence, albeit in a new form. Chapters Five and Six argued that zamindari abolition and the Hindu Law Acts reinforced the political power of a new set of patriarchal elites, who differed from their colonial predecessors in terms of hierarchical structure of their influence but not in the unchecked way in which they wielded their power. Even as they introduced new rights to divorce and property, the Hindu Marriage and Succession Acts in fact offered women little chance of exercising these new powers. A woman’s ability to seek a divorce was deeply circumscribed by provisions in the Marriage Act requiring that she bring the case herself and, while the Succession Act granted widows greater right to property than they had enjoyed previously, it limited a woman’s access to property before the death of her husband, first by granting daughters a very small share in their father’s estate and, secondly, by including provisions that encouraged her to relinquish control of that share to her brothers. Thus, though the Hindu Law Acts introduced new rights for women, they did not include provisions that would have allowed the exercise of those rights to disrupt the existence balance of power. Rather, the only people able to enjoy the new rights granted by the acts were those with enough financial power and resources to access the courts. While the Hindu Succession Act reshaped the way in which financial resources were distributed amongst Hindu men, it did little to affect women’s access to property. The Hindu Law Acts thus presented a male-dominated model of the family that was different from the one that had underpinned early colonial rule. Rather than a large, multi-generational structure headed by a single, older male, the Acts, together with the land reform legislation, created the potential for a large joint family but granted greater legal powers to all the individual adult males within it. In spite of this, these reforms were heralded as progressive and a significant break with the exploitative colonial past.

The mismatch between the rhetoric of a powerful, ‘thick’ democratic state and the reality of state power that emerged after independence goes to the very heart of the way in which the history of the Code Bill has been understood hitherto. It also helps to explain the question highlighted at the beginning of this thesis about the perceived ‘gap’ between the Indian state’s legislation regarding women’s rights and
gender equality and women’s actual status in contemporary Indian society. The reactions of the 1974 ‘Towards Equality’ commission and historians’ focus on the Code Bill’s failure to bring about better rights for Indian women owe much to the assumption that independence should have brought about significant change at all. Part of a process of securing power and autonomy for different groups of Indian men, the drive in the interwar years to reconfigure the state’s patriarchal networks of influence created space for discussion about rights and state power more generally. Chapters Two and Three looked at how, in spite of the conservative framework of interests that dominated discussions, the debates about personal law reform could, at moments, appear to be a call for a radical restructuring and redistribution of power within Indian society. Always quick to shut down any threat to their own power posed by these ideas, Indian legislators, both Hindu and Muslim, were happy to encourage the impression created by these debates that law reform, and more particularly their own proposals, were progressive and even democratic. This provides an interesting perspective from which to consider the adoption of a democratic constitution by the post-colonial Indian state. The new constitution heralded and legitimised a new political system but one that continued to depend on the unchecked power and autonomy of patriarchal elites, particularly those from north-India who were now able to dominate the legislatures. Independent India’s political history has demonstrated that while the masses may vote, political power and resources continue to lie firmly in the hands of a powerful minority, comprising largely of upper-caste Hindu men.\footnote{Francine R. Frankel, \textit{India’s Political Economy 1947-1977}, (Princeton, 1978); Zoya Hasan, \textit{Dominance and mobilisation: rural politics in western UP}, (New Delhi, 1989); Paul Brass, \textit{The politics of India since Independence} (Cambridge, 1994 edn., 1990).} Democracy, it seems, has broadened the range and background of the patriarchal elites that dominate the state but has not strengthened the power or the political will of the state to address inequality and exploitation.

Such arguments provide a firm historical context for studies of the post-colonial state in India which have, up till now, been dominated largely by political scientists. The legacy of the ‘thin’ colonial state offers a more concrete framework within which to consider the recent arguments advanced by social theorists about a division between Indian civil and political society.\footnote{Sudipta Kaviraj, ‘On State, Society and Discourse in India’ in James Manor (ed.), \textit{Rethinking Third World Politics}, (New York, 1991), pp. 72-99; Partha Chatterjee, ‘Beyond the nation? Or within?’ \textit{Social Text} 56, (Autumn, 1998), pp. 57-69, \textit{The politics of the governed: reflections on popular politics in most of the world} (New York, 2004).} It also provides a more
universalising view of the operation and structure of state power for the growing body of ethnographic studies which, in looking at how citizens experience the Indian state in their day to day life, have tended to look at the individual in isolation from wider society. Indeed, it is the relationship between macro-level political events and micro-level social structures such as the family that makes the story of the Hindu Code so interesting. By focusing on patriarchy as the driving force of political rule in India this dissertation has sought to present a view of India’s transition to independence that integrates changes in family relations with the events taking place in the wider political arena at this time. Seen in relation to a longer term struggle to reconfigure Indian patriarchy, this analysis helps to explain the high levels of violence against women during the partition riots; the ways in which this in turn impacted upon the nation-building and citizenship-building that followed independence; and the extent to which it continues to shape life and power in contemporary Indian society.

The current political climate makes study of the processes of decolonisation all the more pressing. This dissertation problematises what has become one of the central tenets of American and European foreign policy in the late-twentieth and early-twenty first centuries: the view of democracy as a coherent doctrine the introduction of which will liberate a nation and, in particular, its women. That is not to oppose the development of democratic politics and modes of governance across the world. However, this dissertation demonstrates clearly the importance of pre-existing power structures and relationships in shaping the operation and egalitarian functioning of an emerging democratic state. Thus, democracy does not automatically empower women but can, as in the case of independent India, produce new modes of oppression. Without the social structures that allow citizens to access state power and protection, enabling legislation, for women or any subordinated social group, will fail to bring about on-the-ground change. Analysing and re-thinking the nexus between gender, state power and democracy is thus a task of the utmost importance for our understanding of the post-colonial world.

12 This is of course true for all countries, not only India. For an excellent study of the relationship of law reform and patriarchal dominance in Britain see Maeve E. Doggett, Marriage, Wife-Beating and the Law in Victorian England, (London, 1992).
Appendix I:
Timeline for the Hindu Code Bill

1941 25th January  Rau Committee appointed. Members: Sir B.N. Rau (Chair) – Judge of Bengal High Court Dr Dwarka Nath Mitter – Justice Calcutta High Court J.R. Gharpure - Principal, Law College, Poona Rajrana Vasudeo Vinayak Joshi – Pledger in the High Court Baroda and involved with codification in the Princely State

22nd April Federal Court ruling deciding that the Government of India can not legislate for succession to agricultural land.

19th June Report of 1st HLC published.

Summer HLC regroup and begin working on the Code Bill, beginning with succession and marriage law.

1942 Spring Intestate succession and Marriage legislation drawn up and circulated.

30th May Succession and Marriage Bills published in Gazette of India.

1943 March Marriage and Succession Bills debated in LA (17th session of 5th Assembly).

30th March Motion to refer succession Bill to Joint Select Committee adopted.

June Joint Select Committee meet in Simla.

8th November 19th Session of 5th Assembly: Joint Select Committee report presented.

17th November Motion passed to re-form HLC to draw up the remainder of the Code Bill.

24th November B.N. Rau takes up office as chair of 2nd HLC.

December HLC revived following Select Committee and begins work on rest of Code.

V.V. Joshi is replaced by T.R. Venkatarama Sastri. See footnote 27 on page 166.
1944 20th session, 5th Assembly
7th February Motion to continue debate on the marriage bill adopted.
26th February HLC’s first meeting: lasts for 3 days.
3rd April Motion to refer marriage bills to Joint Select Committee adopted.

May HLC draw up rough Code and circulate it.

5th August Revised Code (in light of opinions) published with explanatory statement and margin notes.

1945 20th January Examination of witnesses begins in Bombay.
23rd January Preliminary sitting in Bombay.

19th March End of witness examination (Lahore).

27 – 29th September HLC meet at Bombay to draw up conclusions. Mitter withdraws.

1946

17th November HLC meet (without Mitter) in Bombay.

1947 11th-12th January HLC meet (without Mitter) in Delhi – final settling of report.

11th April Complete Hindu Code Bill introduced to Central Legislature.

15th August India’s independence

17th November Motion to continue consideration of HCB adopted.

1948

9th April Motion to refer Hindu Code Bill to Joint Select Committee adopted.

12th August Presentation of report by Joint Select Committee (chaired by Ambedkar) on HCB.

31st August Debate on the revised HCB begins.

1949 17th, 24-25th, 28th February Debate continues.

1-2nd April Debate continues.

12-14th, 19th Debate continues – Abducted Persons (Recovery and
<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
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<tbody>
<tr>
<td>December</td>
<td>Restoration) Bill debated concurrently on 15th, 16th, 17th and 19th December.</td>
</tr>
<tr>
<td>1950</td>
<td>26th January  India becomes a republic.</td>
</tr>
<tr>
<td>8th April</td>
<td>Delhi or Nehru-Liaqat Pact signed.</td>
</tr>
<tr>
<td>19th April</td>
<td>Dr S.P. Mookerjee delivers formal resignation speech in Delhi and leaves for Calcutta.</td>
</tr>
<tr>
<td>20-22nd April</td>
<td>Ambedkar chairs informal conference on the Code Bill.</td>
</tr>
<tr>
<td>November</td>
<td>Conference of South Indian delegates held in Trivandrum to discuss the position of Aliyasantana, Murrumakkatayyam legal systems in the Code.</td>
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<tr>
<td>1951</td>
<td>17th-22nd September  Clause by clause consideration of the marriage legislation in the Code Bill.</td>
</tr>
<tr>
<td></td>
<td>25th September   Clause 4 passed during reading of bill then Deputy-Speaker closes business.</td>
</tr>
<tr>
<td></td>
<td>27th September  BRA tenders his resignation to Nehru.</td>
</tr>
<tr>
<td>October</td>
<td>57th Session of the INC: Nehru insists on inclusion of reference to HCB in Prasad’s presidential address.</td>
</tr>
<tr>
<td>11th October</td>
<td>Ambedkar tries to deliver resignation speech in parliament but is thwarted, instead gives speech to press outside, criticising Nehru.</td>
</tr>
<tr>
<td>1952</td>
<td>February  Election results decided.</td>
</tr>
<tr>
<td>16th May</td>
<td>Presidential Address, mention made of HCB to be passed this session but broken down into separate parts to ease its passage.</td>
</tr>
<tr>
<td>28th July</td>
<td>Biswas introduces Special Marriage Bill.</td>
</tr>
<tr>
<td>20th December</td>
<td>Biswas introduces Hindu Marriage and Divorce Bill.</td>
</tr>
<tr>
<td>1953</td>
<td>20th April  Biswas introduces Hindu Minority and Guardianship bill.</td>
</tr>
<tr>
<td>1954</td>
<td>9th October Special Marriage Act given Presidential assent.</td>
</tr>
<tr>
<td>1955</td>
<td>18th May  Hindu Marriage Act given Presidential assent.</td>
</tr>
</tbody>
</table>
1956  17th June Hindu Succession Act given Presidential assent.

25th August  Hindu Minority and Guardianship Act given Presidential assent.

13th December  Hindu Adoption and Maintenance Bill introduced.

21st December  Hindu Adoption and Maintenance Act given Presidential assent.
Appendix II:
Law Members involved with the Hindu Code Bill

1941-1943
Sir Syed Sultan Ahmed
Born 24th December 1880 in Bihar, Sir Syed Sultan Ahmed was called to the Bar in 1905, appointed Deputy Legal Remembrancer of the Government in Bihar and Orissa in 1913. He acted as a Government Advocate between 1916 and 1937, with a stint as a Judge in Patna High Court from 1919 to 1920. He was Vice Chancellor of Patna University from 1923 to 1930, and was a member of the Hartog Education Committee 1928-9. He was also a member of the Round Table Conferences 1930-31. He served as an acting member of the Executive Council of Governor of Bihar and Orissa in 1932. He became the acting member of the Governor-General’s executive, in charge of Railways and Commerce, in 1937 before progressing to become Law member in July 1941.

1943-1946
Sir Asoka Kumar Roy
Born 9th September 1886 in Bengal, Sir Asoka Kumar Roy served twice as a Judge of the Calcutta High Court. He held the post of Advocate General of Bengal between 1934 and 1943, when he became Law Member.

1947
Mr. Jogendra Nath Mandal
A Bengali Dalit leader with links to the Muslim League, Jogendra Nath Mandal was appointed by Jinnah to the post of Legislative Member in the interim government on 25th October 1946.1

15th August 1947-

October 1951
B.R. Ambedkar
Born in April 1891 in Mhow, central India. Ambedkar’s health deteriorated following his resignation as Law Member in 1951 and his defeat in the elections the next year. He converted to Buddhism, along with many of his followers, at a mass conversion ceremony held in Nagpur in October 1956 and died only weeks later in his sleep on 5-6th December 1956. For more see Chapter Three.

October 1951-

March 1952
Dr. Kailas Nath Katju
Born on 17th June 1887 in Jaora then a Princely State, now in Madhya Pradesh. He joined the Allahabad High Court Bar in 1914. He was a member of the Council of United Provinces Provincial Congress Committee for several years and was elected as Chairman Allahabad Municipal Board between 1935 and 1937. During this time he also

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served as Minister for Justice, Industries and Development in the Government of the United Provinces, resigning his seat in 1939. He became a member of the All-India Congress Committee on 16th February 1940 and was sentenced in November 1940 in connection with the Civil Disobedience Movement to serve 18 months; he was released on 19th November 1941. He was detained again from November 1940 to November 1941.

March 1952- April 1955

C.C. Biswas

Charu Chandra Biswas a former High Court judge from Bengal and Minister for Minority Affairs before the election. When he took office he was described by the Bombay Chronicle as "something of an unknown entity". A not entirely uncontroversial figure in the law courts during British rule, he was not seen as an arch conservative but, certainly in comparison with Ambedkar, was no radical. Biswas was the only Indian judge on the High Court bench during the infamous legal case involving the identity of the Kumar Bhawal in the early twentieth century. He eventually ruled in favour of the alleged Kumar over the Court of Wards, giving the prince control over the landed estate that had been repossessed by the colonial administration.

April 1955- 1957

H.V. Pataskar

Born in Indapur, Pune. Following the passage of the Hindu Code Bills Pataskar went on to become governor of Madhya Pradesh from June 1957 until February 1965.

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