Introduction

ELIZABETH KOLSKY

How do we understand the relationship between law, power, and agency in colonial contexts? Broadly speaking, scholarly opinion is divided between those who view law as a core instrument of colonial control and those who emphasize the ways in which the complexities and ambiguities of colonial legal rule created room for maneuver and manipulation. The articles in this forum skillfully advance our insight into these issues by analyzing the workings of the personal law system in British India, with an emphasis on laws related to marriage. My introductory essay briefly summarizes the two primary approaches to the study of law and empire, clarifies the contribution of the articles to the broader literature, and draws out the thematic links that tie the forum together.

The first approach to colonial law, exemplified by the work of Ranajit Guha, interprets law as the "state's emissary," a technology of empire

Elizabeth Kolsky is Associate Professor of History at Villanova University <elizabeth.kolsky@villanova.edu>. She is the author most recently of *Colonial Justice in British India: White Violence and the Rule of Law* (Cambridge: Cambridge University Press, 2009) and *Fringes of Empire: People, Places and Spaces in Colonial India*, coedited with Sameetah Agha (New Delhi: Oxford University Press, 2009). This forum is the result of close exchange and interaction between the authors and a wider community of scholars who participated in an international research collaborative (IRC) on colonial South Asian legal history sponsored by the Law and Society Association. As cochairs of the IRC, Elizabeth Kolsky and Mitra Sharafi would like to express their appreciation to Sally Engle Merry, the LSA, the anonymous reviewers of this journal, and to those members of the IRC not represented in this forum, including Nandini Chatterjee, Kusha Haraksingh, Iza Hussin, Kriti Kapila, Malavika Kasturi, Renisa Mawani, Rob McQueen, Mary Jane Mossman, Prabhu Mohapatra, Anupama Rao, Sudipta Sen, Narendra Subramanian, Stelios Tofaris, John Strawson, Sylvia Vatuk and Anand Yang.

Law and History Review November 2010, Vol. 28, No. 4
© the American Society for Legal History, Inc. 2010
doi:10.1017/S0738248010000738

https://doi.org/10.1017/S0738248010000738 Published online by Cambridge University Press

that expanded and entrenched the power of the colonial state.[1] As Guha and others have shown, British officials not only used law to create the colonial state (the Permanent Settlement Act of 1793, for example, provided the early colonial state with a legal mechanism to collect land revenue) but they also used the language of law to legitimize their rule.[2] The idea that India had long been enslaved by the tyranny of Oriental despotism made law a critical instrument by which Britons simultaneously established their authority and differentiated colonial law and order from the anarchy of previous regimes.[3] The rhetoric of law's liberating and civilizing power, however, was contradicted by colonial legal practices and conventions that sanctioned various forms of physical and economic violence.[4] As in other British colonies, law in colonial India dispossessed indigenous people of their property and created conditions for the growth of global capitalism by privatizing land and contractually regulating labor.[5] One can literally trace the expansion of British power in India by following the enactment of new legislation. British rule was formally terminated following the passage of a parliamentary statute, the Indian Independence Act of 1947.[6]

The second approach to law and empire, which is the approach embraced by the authors in this forum, proposes that colonial law sometimes constrained the very forms of power it made possible and provided avenues for resistance and maneuver.[7] In India, law offered a rhetorical language in which anticolonial nationalists, many of whom were trained lawyers, could make claims upon the state by challenging its legality and demanding legal and political rights. The rule of law also offered spaces in which ordinary Indians could contest power and seek justice. In a very literal sense, the administration of justice provided countless

1. Ranajit Guha, "Chandra's Death," in *Subaltern Studies V*, ed. Ranajit Guha (New Delhi: Oxford University Press, 1987), 134–65.

2. Ranajit Guha, *A Rule of Property for Bengal: An Essay on the Idea of Permanent Settlement* (New Delhi: Orient Longman, 1982).

3. Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003); and Robert Travers, *Ideology and Empire in Eighteenth Century India: The British in Bengal, 1757–93* (Cambridge: Cambridge University Press, 2007).

4. Elizabeth Kolsky, *Colonial Justice in British India: White Violence and the Rule of Law* (Cambridge: Cambridge University Press, 2009).

5. Rana P. Behal and Prabhu P. Mohapatra, "'Tea and Money versus Human Life': The Rise and Fall of the Indenture System in the Assam Tea Plantations, 1840–1908," *Journal of Peasant Studies* 19 (3/4) (1992): 142–72.

6. 10 and 11 Geo VI, c. 30.

7. Sally Engle Merry's work provides a good example of this approach. Merry, *Colonizing Hawai'i: The Cultural Power of Law* (Princeton, N.J.: Princeton University Press, 2000).

https://doi.org/10.1017/S0738248010000738 Published online by Cambridge University Press

occasions for dialogue between the colonizers and the colonized to the extent that the courtroom was a site of exchange and interaction, a place where subject populations could sometimes speak truth to power.

The system of personal law offers a productive opportunity to explore the ambiguities of law and the possibilities for claims making in a colonial context. The personal law system was established by India's first governor-general, Warren Hastings, who believed that British governance had to be congruent with Indian ideas and institutions. Hastings's Plan for the Administration of Justice (1772) sought to preserve existing laws and emphasized the systematic application of clear and consistent rules. Hastings equated personal law with religious law and proposed that in civil suits pertaining to inheritance, marriage, caste, and other religious matters, Islamic law would be applied to Muslims and Hindu law to Hindus. This set in motion a search for ur-texts of Hindu and Islamic law, written works that could be used by British judges to verify the decisions of native law officers. Such texts did not previously exist and had to be created, dramatically altering the very systems Hastings sought to preserve. In the late eighteenth century, through a process of dialogue and translation with paid Hindu and Islamic legal figures, colonial officers compiled textual digests of Hindu and Islamic law. Indian intermediaries played an important role in shaping the books used in colonial courts. Ironically, the digests came to displace these intermediaries in practice as colonial judges could make legal decisions in consultation with the texts alone.[8]

Hastings's Plan was based on the assumption that Hindus and Muslims were distinct communities with separate and uniform bodies of law. This assumption was inconsistent with the diverse identities and syncretic religious practices existing among people on the subcontinent. As Britain's empire in India expanded, colonial authorities found that Hindus and Muslims in different regional locations followed customary practices that did not square up with the laws prescribed in the colonial digests. Recognizing the importance of local, tribal, caste, and family usages, new textualization projects in the nineteenth century aimed to digest customary law. This, too, had a problematic effect. In Punjab, for example, the textualization of customary law reified the authority of written sources and denied the essentially fluid and changing nature of custom.[9]

8. Bernard Cohn, "Law and the Colonial State in India," in *Colonialism and Its Forms of Knowledge: The British in India* (Princeton: Princeton University Press, 1996), 57–75.

9. David Gilmartin, "Customary Law and Shari'at in British Punjab," in *Shari'at and Ambiguity in South Asian Islam*, ed. Katherine Ewing (Berkeley and Los Angeles: University of California Press, 1988), 43–62.

https://doi.org/10.1017/S0738248010000738 Published online by Cambridge University Press

Hastings's Plan created a plural legal system defined by a two-fold division. First was the division of the administration of justice into two spheres—a public sphere and a private sphere, the latter being the sphere of personal law. Second was the establishment of a personal law system that administered different laws to members of different religious communities. The system of personal law was designed to reflect, rather than create, indigenous realities and was conceived according to the eighteenth-century Orientalist vision of ruling religious communities according to "their own" laws.

Upon close examination, we find stark inconsistencies between colonial claims about preservation and noninterference and colonial practices of state control and transformation. In parceling out different rights and privileges to members of different religious communities, the law actively reconstructed and redefined religious identities in ways that ran up against the reality of their porousness and instability. Not only did the colonial state determine the content of Hindu and Islamic law but personal law was also applied in state courts rather than in separate communal courts. The state did not allow communities to decide what their own law said on any issue, nor did it let them apply "their own" personal law through religious or community bodies. The personal law system in colonial India was, in fact, entirely state centered.[10] But did this mean that there was no room for maneuver? Certainly not. In fact, the personal law system is revealed in this forum as a space of manipulation and maneuver that provided opportunities for litigants to lay claim to rights granted to different groups in different jurisdictions.

In her magisterial study *Law and Colonial Cultures*, Lauren Benton argues that local agents shaped colonial legal cultures by strategically using the ambiguities of law to their own benefit. This was accomplished by legal moves such as forum shopping, a method in which litigants exploit jurisdictional ambiguities in a legal system by seeking out the jurisdiction most advantageous to their case. Taking its cue from Benton, this forum shifts our focus from laws in books to laws in action. Each author advances Benton's argument about native agency by questioning the unitary and unidirectional power of colonial laws. By taking a bottom-up approach that shows how ordinary Indians carefully and opportunistically

10. The Ottoman Empire adopted a different model for dealing with minority religious communities. The Ottomans extended to non-Muslim groups a large degree of judicial autonomy by allowing then to litigate most of their legal affairs under their own laws in their own communal courts. The Ottomans also permitted non-Muslims to litigate personal matters in shari'a courts if they chose to (Najwa al-Qattan, "Dhimmis in the Muslim Court: Legal Autonomy and Religious Discrimination," *International Journal of Middle East Studies* 31 (3) (1999): 429–44).

https://doi.org/10.1017/S0738248010000738 Published online by Cambridge University Press

used the plural legal system, these essays offer a nuanced portrait of how the personal law system simultaneously expanded the power of the state (all of the litigants presented in these essays went to state courts, thereby affirming colonial law) while also expanding possibilities for local actors (litigants strategically used different laws and jurisdictions in their own best interest).

A particularly novel feature of this forum is its exploration of the relationship between gender, law, and empire. If, as Benton argues, the colonial legal order offered opportunities to colonized populations, was the structure of opportunity equally available to all? What prospects did women have when it came to navigating and negotiating the colonial legal system? Scholarship on nineteenth-century social reforms in India demonstrates that colonial legislation, such as the abolition of *sati*, was a means of "white men saving brown women from brown men."[11] This forum suggests that women in the twentieth century—white and brown—were rather adept at backdoor maneuvers that utilized the white man's laws to protect themselves and advance their interests.

Mitra Sharafi's essay, "The Marital Patchwork of Colonial South Asia: Forum Shopping from Britain to Baroda," explores how Parsi litigants (male and female) working within the confines of the colonial legal system tried to reconfigure their marital situations. Sharafi argues that the plurality of territorial, religious, and customary laws and legal forums created a "feast of legal options" that allowed parties to seek out the jurisdictional path of least resistance to achieve their own objectives. Sharafi insightfully concludes that success at forum shopping was determined less by a litigant's class or gender than by a willingness to permanently relocate to the chosen jurisdiction.

Rohit De's article, "The Two Husbands of Vera Tiscenko: Apostasy, Conversion, and Divorce in Late Colonial India," illustrates how women took advantage of the provisions of the personal law system to open up their legal options. Conversion and apostasy are shown to be divorce strategies that gave women alternatives to the limitations of their presumed religious law. De highlights cases in which women moved towards Islam (conversion to Islam forced dissolution of a marriage to a non-Muslim) and away from Islam (apostasy of a Muslim dissolved a Muslim marriage in British courts). Given what we know about some of the harsher features of Islamic family law, such as the husband's ability to divorce his wife by simply uttering the word *talāq* three times, the cases of conversion to Islam are particularly illuminating and reveal certain unintended outcomes of

11. Gayatri Spivak, "Can the Subaltern Speak?" in *Marxism and Interpretation of Culture*, ed. Cary Nelson and Lawrence Grossberg (Chicago: University of Illinois Press, 1988), 297.

https://doi.org/10.1017/S0738248010000738 Published online by Cambridge University Press

colonial law as well as the capacity of women to maneuver within a plural legal order.

Chandra Mallampalli's piece, "Escaping the Grip of Personal Law in Colonial India: Proving Custom, Negotiating Hindu-ness," foregrounds the efforts of Indian women to secure rights by claiming to practice customs at variance with codified religious laws. By revealing how a legal order that was theoretically based on clearly defined differences between religious communities ran up against the reality of syncretic practices, Mallampalli explores how Indians exercised agency in proof of custom cases. Rather than assigning litigants with religiously based identities and rights defined by legal texts, Mallampalli finds an openness of the colonial judiciary in the early period to allowing Indians escape the "grip of personal law" and to define their own rights and identities based on their lived experiences. Over time, however, the agency of female litigants was foreclosed through a more rigid implementation of personal laws.

Read collectively, the articles in this forum offer a complex and compelling perspective on the operation of legal pluralism in colonial India and the ways in which colonized subjects skillfully navigated the empire's legal terrain. By taking a bottom-up approach to the history of the personal law system in action, the essays highlight the power of local actors and collectivities to exploit their legal options. By using gender as an analytical lens, the authors uncover how those who were presumably doubly disadvantaged within the colonial world (native women) were quite adept at the art of jurisdictional jostling. What we are ultimately shown by this forum is that the soft and accommodating hand of the personal law system strengthened the power of the colonial state even as it expanded the opportunities for contestation and maneuver across a plurality of laws and jurisdictions.

https://doi.org/10.1017/S0738248010000738 Published online by Cambridge University Press