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**FRAMING CUSTOM, DIRECTING
PRACTICES: AUTHORITY, PROPERTY
AND MATRILINY UNDER COLONIAL
LAW IN NINETEENTH CENTURY
MALABAR**

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**FRAMING CUSTOM, DIRECTING PRACTICES: AUTHORITY,
PROPERTY AND MATRILINY UNDER COLONIAL LAW IN
NINETEENTH CENTURY MALABAR**

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ABSTRACT

Colonial judges and jurists interpreted matrilineal customs in terms of a theory of matrilineal law, which they shaped in the process of interpretation, rather than on the basis of existing practices. This paper analyses critically the process of interpretation of customs or what is referred to as the legal discourse on matriliney, from the standpoint of its own assumptions, i.e., the ideas and theory that shaped and governed it. It is argued that a theory of matrilineal law, informed by mid nineteenth century anthropological and comparative legal perspectives, gendered the detail of matrilineal law, emphasising rigidly older male control over property and excluding women, virtually, from all functions of authority. The legal discourse on matriliney then despite or precisely because of the implicit connection between women and matriliney, was not so much about matriliney or women but about what comprised 'authentic' custom.

Key words : colonial law, customary practice, matriliney, gender, property rights

Action guided by a ‘feel for the game’ has all the appearances of the rational action that an impartial observer, endowed with all the necessary information and capable of mastering it rationally, would deduce. And yet it is not based on reason. You need only think of the impulsive decision made by the tennis player who runs up to the net, to understand that it has nothing in common with the learned construction that the coach, after analysis, draws up in order to explain it and deduce communicable lessons from it. The conditions of rational calculation are practically never given in practice: time is limited, information is restricted, etc. And yet agents *do* do, much more often than if they were behaving randomly, ‘the only thing to do’. This is because, following the intuitions of a ‘logic of practice’ which is the product of a lasting exposure to conditions similar to those in which they are placed, they anticipate the necessity immanent in the way of the world.

Pierre Bourdieu¹

By the close of the nineteenth century, British judges and jurists had built up a corpus of matrilineal custom in Malabar and South Canara districts of the erstwhile Madras Presidency through legal theorizing, dispute arbitration and precedents established by the civil courts. In the

1 *In other Words: Essays towards a Reflexive Sociology* (Cambridge: Polity Press, 1990), p11.

legal discourse on matriliney, these customs were framed as the real customs i.e., as against others that had not stood the test of court procedure.² This paper is a critical analysis of the legal discourse from the standpoint of its own assumptions, i.e., the ideas and theory that shaped and governed it. Colonial administrators were agreed that customary practice, rather than any religious precepts embodied in written sources, was the source of personal/family law for the matrilineal groups in this region.³ Operationally, it was left to the civil courts to interpret, define and administer custom as and when disputes were brought before them.⁴ There having been no effort to collect and code them, the courts sought to determine custom at the point of a dispute on the assumption then that the real practices could be filtered from the context and yet regardless of the specificity of disputes.⁵ A perusal of

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- 2 Legal discourse on matriliney refers to a specific mode of interpretation of matrilineal customs articulated through the administrative, specially, legal and judicial processes of the colonial state.
 - 3 In the words of William Logan, an administrator-historian with extensive experience of Malabar, “if it were necessary to sum up in one word the law of the country... that word would undoubtedly be the word “*custom*”. In Malayalam it would be “*Maryada*”, “*Margam*”, “*Acharam*” all signifying established rule and custom...” (emphasis in the original). William Logan, *Malabar Manual*, in two volumes, Vol I, New Delhi: Asian Educational Services, 1995, p 111.
 - 4 The first general inquiry into customary practice in Malabar was undertaken by the Malabar Marriage Commission, set up in 1891, a full century after the East India Company wrested control from Tipu Sultan in 1792. Besides, this inquiry was more to assess the mood for change in the customary marriage practice than to codify custom on the basis of existing practices. Report of the Malabar Marriage Commission, (henceforth RMMC) I (Madras: Lawrence Asylum Press, 1891), p 1.
 - 5 Consider further Cohn’s observation that British modeling of the process of adjudication in the courts on that of British law courts of the period had implications for the nature of cases. For disputes which had continuity (stretching back and forth in time) and complex contexts were reduced to the specificity of a ‘case’. Bernard Cohn, ‘Some Notes on Law and Change in North India’, in *An Anthropologist among Historians and Other Essays* (New Delhi: Oxford University Press, 1987), pp 568-574.

the case law on matrilineal customs suggests that customs were interpreted not on the basis of existing practices but in terms of a theory of matrilineal law, itself shaped in the process of interpretation. P R Sundara Aiyar, a Madras High Court Judge and an early twentieth century compiler of matrilineal law, seems keenly aware of this, “[w]hile the law of property among the marumakkatayis was based entirely on usages, British exponents of the law allowed little weight to the views of the people and were guided by their own notions of a perfect system of marumakkatayam law”.⁶

Central to the colonial theory of matrilineal law was a regulatory notion of custom — the principles of *marumakkatayam* or *aliyasantana*⁷ law. In turn these principles were defined externally with reference to modern patrilineal frameworks of interpretation, i.e., informed by comparative legal and nineteenth century anthropological theories from Europe and north America. By the middle of the nineteenth century, Lewis Henry Morgan had marshaled considerable if scattered evidence of cross cultural kinship to stake a conjectural but influential history of the evolution of the family. Morgan relegated matrilineal societies to the prehistory of patriarchal society. However, if Morgan had helped dispatch matriliney to antiquity, it was Henry Summer Maine’s Patriarchal theory that informed the detail of the legal understanding of the

6 *A Treatise on Malabar and Aliyasantana Law*, (Madras: Madras Law Journal Office, 1922), p 13. *Marumakkatayam* refers to the practice of inheritance by one’s sister’s children. Here ‘ego’ is necessarily male. *Marumakkatayam*, however, was understood in opposition to *makkatayam* (literally, inheritance to one’s children, where again ‘ego’ is male), the lineage practice of the Nambudiris (brahmins).

7 *Aliyasantana* is a Kannada term for matriliney followed by certain Tulu-speaking castes in the erstwhile South Canara district of the Madras Presidency.

matrilineal family.⁸ Nineteenth century comparative legal perspectives made it possible to move easily between Roman and Hindu law and to interpret matrilineal families in terms of the patrilineal (whether Roman or Hindu) i.e., as the archaic form of the patriarchal family in a linear evolutionist theory of society.⁹ From this it became possible to identify with the matrilineal family characteristics associated with the patriarchal family in its archaic form and matrilineal customs were interpreted in analogy with more familiar customs of patrilineal and patriarchal societies – both western and ‘Hindu’ – albeit of another time.

This is not to suggest that there was no effort to collect information on customs. Apart from the cases made out by the litigants, when the judges of the High Court felt the need, they sent for more information from the lower courts. Such information however was evaluated in terms of the theory. The judges denote acceptable or ‘authentic’ custom in terms of certain characteristics. Foremost custom had to be general and consistent. They had to be established on the basis of the ‘clearest evidence’ and ‘proof’ as against ‘vague statements’. ‘Evidence’ in this

8 Publishing before Morgan, Maine had posited the Patriarchal Theory, wherein the Patriarchal family was at the ‘primitive’ stage. Morgan posits the patriarchal family at a much higher stage in the evolution of the family. The differences between Morgan and Maine though wide were of little importance to the legal discourse. For an insightful discussion of these differences as of the coming into being of kinship as a field see Thomas R. Trautmann, *Lewis Henry Morgan and the Invention of Kinship*, (Berkeley: University of California Press, 1987).

9 Maine’s work, which set up a comparative legal perspective on evolution using Roman, Greek and Hindu law, was particularly influential. However, the study of Indo-European languages and orientalist literature beginning in the late eighteenth century had already ‘invented’ a common base for Roman and Hindu societies/languages. *Ibid.*

sense was already inscribed by a theory.¹⁰ As Neeladri Bhattacharya points out it was assumed that the underlying principles of practices could be grasped through modern theories. “Observed facts made sense only within such a framework of explanation...[O]nce the essential principles were understood, ambiguities and confusions could be ironed out and the real practices systematized into codified rules.”¹¹ In some cases, the weight of information was heavily against the dictates of the theory, certain practices were accepted as ‘exceptions’, a term used to suggest a movement away from the ‘authentic’ and ‘original’ customs towards altered forms.

However there were more impetuous ways in which a patrilineal ‘commonsense’ spoke through the colonial administration. Face to face with matriliney, British judges betrayed a sense of acute uneasiness. They warned that the system was “difficult”, “peculiar” and potentially anarchic, moving then to contain the difference that it marked through tight enforcement of rules. This anxiety was particularly apparent when adjudicating on claims that contested the authority of the senior male.

It is instructive that much of the direction and inflexibility regarding the rules of matrilineal law emanated from the higher courts,

10 Neeladri Bhattacharya’s reading of the project of codification of custom in colonial Punjab has been very useful in understanding the conception of custom deployed in the project. In Punjab too custom was recognized as the basis of personal law but unlike in Malabar the government made efforts to codify custom on the basis of an extensive inquiry in the middle of the nineteenth century. Not unlike the theory of matriliney, “Indian evidence had no constitutive power in the making of this theory; the theory provided the frame through which the evidence was understood and ordered.” Neeladri Bhattacharya, ‘Remaking Custom: The Discourse and Practice of Colonial Codification’, in R. Champakalakshmi and S. Gopal eds. *Tradition, Dissent and Ideology: Essays in Honour of Romila Thapar*, (Delhi: Oxford University Press, 1996), p 26.

11 Ibid, p 38.

the District and High Courts. For instance, cases brought to court seeking the partition of *taravads* (matrilineal joint family),

were constantly successful in the Provincial Courts, but were invariably foiled on appeal to the Sudder Court at Madras, the objection being frequently taken for the first time by an English Barrister. It so happened that... the Sudder Court possessed one or more Judges, who were thoroughly acquainted with Malabar custom, and by whom cases from the district were invariably heard.¹²

Family customs as well as land relations came up for arbitration increasingly in the second half of the nineteenth century; a time when the importance of control over property and other resources was becoming clear.¹³ Besides, matriliney was coming under increasing moral censure for the ‘non-conformative’ sexual and property practices that it sanctioned. It is not unlikely then that the information collected was

12 Lewis Moore, *Malabar Law and Custom* (Madras: Higginbothams, 1905), p 16. In a case under *aliyasantana*, Holloway held that, “[I]f this indisputable rule had been abrogated by decisions of the highest courts of appeal... how much so ever I should have lamented that Judges had overstepped their proper duty of declaring law, I should... have followed such decisions. Here, however, the only decisions pronounced are those of inferior Courts, evidently influenced by their view of expediency in the particular case before them. ...Decisions dividing the family property have also been passed in Malabar and it is one of the claims of our late colleague Mr Justice Strange...that he successfully resisted the attempts of lower courts... to introduce foreign admixtures into a law of which whatever may be thought of the policy *none can deny the consistency of the theory upon which it is based*” (emphasis added). *Munda chetti v Timmaju Hensu*, Madras High Court Reports (henceforth MHCR), Vol 1 (1862-63), p 380.

13 Sharpening the struggle for land as property, this period saw a series of agrarian revolts by Mappilla tenants against the denial of their conventional land rights by upper caste ‘Hindu’ *janmis*. K. N. Panikkar, *Against Lord and State: Religion and Peasant Uprising in Malabar, 1836-1921*, (Delhi: Oxford University Press, 1989).

skewed against such practices, both consolidating patriarchal hold over property and resisting the censure of Victorian morality.¹⁴

And yet this was only one part of the determination of customs. Sections that stood to benefit from court interpretations disputed plural practices. This sometimes led to complications and over time the courts were forced to set new boundaries to earlier interpretations, which however, did little to dispel the ‘framework of rules’. But just how far did the colonial legal processes go to alter the plurality of practice? It is apparent from the cases that came to court in the late nineteenth and early twentieth centuries that plural practices continued to prevail. Precedents sent signals regarding what was acceptable ‘according to the law’ and opened up possibilities against variant practices.

The analysis here is not restricted to any one social group or form of matriliney. *Marumakkatayam* and *aliyasantana* were perceived as founded upon the same principles and hence partaking of the same customs. Deriving the validity of practices from abstractions of matriliney such as ‘that system which vests property in the females of the family’, or ‘the rule of nephews’ made the interpretation of practices of one form available to the other; it gave them a common base in the legal

14 Information regarding matrilineal customs was accessed invariably from upper caste men (who were also the superior interest groups in land). This is a settled tendency by the time of the Malabar Marriage Commission, which states that, “[m]arumakkatayam possesses no code... Prior to the advent of the British there were no courts of justice to record case law; and the Nambudiri Brahmins monopolized the study of the Shastras and were the sole recognised repositories of the unwritten custom of the country.” RMMC I, p 9.

discourse.¹⁵ The only major difference in interpretation lay in the recognition of female heads of family as customary under *aliyasantana* law.¹⁶ The framework of matrilineal law, evolved in the civil courts, was generalised for matrilineal groups in Malabar and South Canara. They included the *marumakkatayam* Tiyas, and Nairs and the *aliyasantana* Bants and Billavas,¹⁷ categorised as Hindu and the *marumakkatayam* Mappillas, a Sunni Muslim group.¹⁸ Initially the judges were hesitant in recognising that the Mappillas in north Malabar observed *marumakkatayam* and not Islamic rules. However in a case in 1860, Judge William Holloway seems to have settled the issue holding that,

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- 15 For instance, *aliyasantana* was brought under the purview Malabar Marriage Act, 1898 and was removed only at the very last moment from the Madras Marumakkatayam Act, 1933. Judges took recourse frequently to cross references. Refusal to grant legitimacy to customary marriage in *aliyasantana* was extended to *marumakkatayam*, while previously the judges used the incidents of marriage general among the Nairs of south Malabar/central Kerala to assess the legal status of marriage under *aliyasantana*. For a discussion see Praveena Kodoth, 'Courting Legitimacy or Delegitimising Custom? Sexuality, *Sambandham* and Marriage Reform in Late Nineteenth Century Malabar', *Modern Asian Studies*, Vol 35 (2), 2001.
- 16 In Holloway's words, "[t]his system of inheritance differs only from that of Malabar in more consistently carrying out the doctrine that all rights to property are derived from the females". *Munda Chetty V Timmaju Hensu*, MHCR 1, (1862-63), p 380.
- 17 The Tiyas of north Kerala and the Billavas observed similar forms of social and property organization and were predominantly small peasant and agricultural labour castes, who with the benefit of colonial ethnography, were better known for the 'caste occupation' of toddy tapping. The Nairs, a 'middle' caste, were matrilineal throughout Kerala but their position in the land hierarchy varied regionally. The Bants were a principal land 'owning' and cultivating caste and in aspects of social and property organization were very like the Nairs of north Malabar.
- 18 Mappillas in north Malabar were matrilineal and had considerable interests in land and trade. Also their socio-economic profile was quite distinct from that of the Mappillas of south Malabar. Kathleen Gough, 'Mappillas, North Kerala', in David Schneider and Kathleen Gough eds. *Matrilineal Kinship* (Berkeley: University of California Press, 1961), pp 416-17.

“[t]he presumption of course is that the descent is that of nephews, as is the rule of North Malabar universally”.¹⁹

The *taravad* referred to relations of property (*mudal sambandham*) shared by a group tracing descent from a common ancestress. In fact, this was the only sense in which the *taravad* was understood in the legal discourse. The outer boundary of *taravads* seems to have been defined by relations of pollution (*pula sambandham*), whereby a wider matrilineal kin group was knit by symbolic ties — prominently in sharing birth and death pollution and a memory of common descent.²⁰ This paper is in five sections. Section two is an attempt to take up issues of administration of justice during the British period. In the following section I have reviewed critically two very different approaches to matriliney to be found in anthropological literature in an attempt to draw out their assumptions. Section four is a gendered analysis of the legal discourse on matriliney. The conclusion draws together the interplay of theory and ‘commonsense’ in the colonial discourse on matriliney.

Administration of Justice

The larger picture of course was the administration of civil justice through the courts of law; an important function of governance and a site of the articulation of colonial authority. The Joint Commissioners reporting on Malabar in 1792-93 display keen awareness of this.

19 The decision in the case was affirmed by the Sudder Court in Madras. Mallile Uppanna Pallich V Telalkunata Musaliyar Avella, Moore, *Malabar Law*, p 324.

20 However there are indications that when expediency demanded it was possible to break off pollution ties. C. H. Kunhappa illustrates this for the divisions that traced lineage to Ayilliam in Chirakkal taluk. Being a numerically large *taravad*, comprising a considerable section of the population of this territory, death and birth pollution spelt a great inconvenience. It had been decided to terminate pollution ties, even while the related groups continued to share a cremation ground C. H. Kunhappa, *Smaranakal Matram*, (Autobiography) (Kozhikode: Mathrubhumi Press, 1981), p 17.

And with a view to opening the eyes of the natives to the real and effectual control of our government, in respect of the judicial as well as the other branches of administration, the 49th article directs the courts to itinerate during the fair season, throughout their respective jurisdictions... “to the end” “that their judicial influence, powers and control, may as speedily and as effectually as possible, be felt and understood to pervade every branch of administration so as to secure everyone his just rights.”²¹

Malabar was fragmented politically in the precolonial period before the Mysorean regime sought to contain the local rulers in the eighteenth century. The nature of legal institutions and processes prior to colonial rule in Malabar has received little scholarly attention. Kathleen Gough notes almost in passing that the greater proliferation of rulers and chieftains in northern Kerala (read also north Malabar) went along with less centralized judicial than in central Kerala.²² E. J. Miller is more forthcoming in his accounts of caste and village structure.²³ His account suggests that political dominion (kingship) and legal

21 Reports of a Joint Commission from Bengal and Bombay, appointed to inspect into the State and Condition of the Province of Malabar in the year 1792 and 1793, (Madras: Fort Saint George Gazette Press, 1862) p 124.

22 Kathleen Gough, ‘Nayars: North Kerala’ in Schneider and Gough (ed). *Matrilineal Kinship*, p 386. See also C. A. Innes, *Malabar Gazetteer*, (Trivandrum: Government Press, 1999), pp 381-384. The undulating terrain, with mountains coming close to the sea and extensive forest cover, facilitated both scattered settlements and fragmentation of authority structures.

23 Eric J. Miller: ‘Caste and Territory in Malabar’, *American Anthropologist*, Vol 56, 1954, pp 415-16. See also his ‘Village Structure in North Kerala’, in M.N. Srinivas (ed.) *India’s Villages*, (Bombay: Asia Publishing House, 1960).

jurisdictions did not necessarily coincide.²⁴ However, “juridical authority neatly coincided with political authority and economic power and the political and juridical authority of headmen and chieftains was also buttressed by trusteeship of the chief temple in the area and in certain other ways.”²⁵ He suggests that every caste in the village had some sort of internal organization through which internal disputes could be settled and that the higher castes could sometimes intercede in dispute arbitration of lower castes.²⁶ But the village was not necessarily or the only unit of justice administration. For instance, among the Tiyas of

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- 24 This is apparent from several commentators of the period. K.P. Padmanabha Menon is particularly caustic in pointing out that rulers did not function as chief magistrates and the details of internal administration was left to chieftains and elders of communities who had their own organizations for the purpose. K.P. Padmanabha Menon, *History of Kerala*, Vol 2, (New Delhi: Asian Educational Services, 1983), p 248.
- 25 Miller, ‘Village in North Kerala’, p 46 and ‘Caste and Territory in Malabar’, pp 412-414. There is considerable evidence of the interlocking of religious-ritual and civil institutions in defining the functioning of justice. K.K.N. Kurup notes the role of local shrines (*kavu*), with dominant Nair *taravads* of a locality as controlling patrons, in punishing infringement of norms. Kurup (ed.), *Koodali Granthavari*, Calicut University Historical Series, (Calicut: Empire Press, 1995), p xiii, p 24. In an account of Kottayam taluk, Kumaran points out that the position of a *tara karanavan* (a village elder) among the Tiyas was tied to responsibilities arising from local shrines. Murkkoth Kumaran, ‘Atmakatha’, in Murkkoth Kunhappa (ed.) *Murkkoth Kumaran* (Kottayam: National Book Stall, 1985), p 32.
- 26 Ibid pp 46-47. See also Padmanabha Menon, *History of Kerala*, p 248. Kumaran describes the legal institutions of the Tiyas a) for internal administration and b) with authority over specific lower castes. To break a spell of ritual pollution arising from death, birth or menstruation, the Tiyas and higher castes were required to receive a change of clothes from a Vannati (a woman of a caste lower than the Tiyas). Authority over this caste was with the Tiya elders of a locality, who could prevent the *mattu* (change of clothes) being presented to families even of higher castes. Denial of *mattu* was hard punishment prescribed against those who flouted caste regulations (*jatyacharam*). However, this subversive edge of caste organization was rarely used. Kumaran, ‘Atmakatha’, p 32. See also Thurston and Rangachari, *Caste and Tribes*, Vol. 7, pp 39-40.

Chirakkal, a Tiya *stani* (dignitary or holder of title) from the Muthedath Aramanakkal family had the authority to decide caste disputes and his jurisdiction was invoked on appeal.²⁷ Among the Tiyas in Kottayam, juridical authority was dispersed and vested in the *nattu karanavanmar* (caste elders), a right possessed by specific *taravads* for each locality.²⁸

Caste intersected with region defining variations in territorial jurisdictions differently for each group. For instance, it is known that the Nambudiris were to some degree above territorial or political divisions and had easy mobility throughout Kerala.²⁹ This went along with greater uniformity of custom throughout Malabar/Kerala than among the lower castes.³⁰ For instance, the organization of marriage among the Nairs and Tiyas in the region north of the Korapuzha (Kora river, about 9 miles north of Calicut) was considerably different from south

27 Depositions by Muthedath Aramanakkal Kunyi Kelappan Mannanar, and K. Krishnan Vazhunavar, RMMC II, Appendix IV. The family, with vast land holdings in the eastern hilly tracts of Chirakkal taluk, is noted to have given refuge to *Antarjanams*, Nambudiri women, who were declared outcastes in a *smarthavicharam*, an inquiry held when an *antarjanam* is suspected of adultery. Logan, *Malabar*, Vol I, p 126. Thurston and Rangachari, *Caste and Tribes*, Vol. 5, p 43.

28 Deposition by Panangandan Raman, RMMC II, Appendix IV, C. K. Revathiamma, *Sahasrapoornima* (Autobiography) (Tellicherry: Vidyavilasom Press, 1977), p 101. In Kottayam, unlike in the other taluks, there were a number of dominant Tiya *taravads*, who were *janmis* and village heads. Ibid. Murkkoth Kumaran, 'Atmakatha', p13. Kumaran calls them the *tara karanavanmar*, denoting the *tara* (very generally a village) corresponding broadly with three or four amsams. The *taras* were grouped into *desams* and further into a *nadu*. The elders or *karanavar* of a *tara*, *desavazhis* and *naduvazhis* (chieftains) administered justice but not in the mode of paid officials. Besides, Tiya elders of a locality could constitute different kinds of *sabhas* according to the nature of a complaint. Ibid. See also K.P. Padmanabha Menon, *History of Kerala*, Vol 2, p 248.

29 Gough, 'Nayar: Central Kerala', in Schneider and Gough (ed). *Matrilineal Kinship*, p 306. Miller, 'Caste and Territory in Malabar', p 416.

30 Ibid.

Malabar.³¹ Even in the early twentieth century there were clear restrictions against Nair women from north Kerala marrying men from south Malabar.³²

If Conflict resolution and the processes of reproducing norms of justice were locally embedded they were also dispersed over several sites. Clearly they were not defined centrally in relation to the state, but they were also not exhausted over any single site — state, family, caste based and cultural institutions. The complexity of this dispersal over even a single site is evident in the ritualistic performative practice of *teyyam* (*daivam* or god) observed in Kasargod, Chirakkal and the norther part of Kottayam taluks.³³ The preparation for and performance of *teyyam*

31 Miller has noted that Nair *taravads* in north Malabar were matrilineal with virilocal post marital residence for at least 300 years preceding British rule. Cited in Dilip Menon, *Caste, Nationalism and Communism in South India, Malabar 1900-1940*, (Cambridge: Cambridge University Press, 1994), p 11. See also Miller, *Caste and Territory in Malabar*, p 416. Gough, 'Nayar: North Kerala', p 390.

32 In the nineteenth century the Korapuzha constituted a cultural boundary and social relations for the lower castes/social groups were to some extent restricted to the region, though it formed several political units. Miller, 'Caste and Territory in Malabar', p 416. Ravindran Gopinath, 'Garden and Paddy Fields: Historical Implications of Agricultural Production Regimes in Colonial Malabar' in Mushirul Hasan and Narayani Gupta (eds.), *India's Colonial Encounters: Essays in Memory of Eric Stokes*, Delhi: Monohar Publishers, 1993, p 367. There is extensive discussion of this and local efforts to challenge it in the evidence collected by the Malabar Marriage Commission RMMC II. See also K. T. Chandu Nambiar, *Samudaya Chinta*, Address to the 21st Session of the Uttara Kerala Nair Samajam, (Tellicherry, 1932), p 25 and S. J. Puthenkalam, *Marriage and Family in Kerala*, (Calgary: Department of Sociology, University of Calgary, 1977), p 55.

33 There were numerous *teyyams*, with thematic categorizations corresponding broadly to eco-cultural zones, the eastern hilly region, midlands and coastal areas, though this did not prevent a *teyyam* observed mostly in the coastal areas from having its 'source' (*asthanam*) in or from tracing its story to places in the eastern hills. *Teyyams* and their stories crisscrossed over the different eco cultural regions but retained a distinct flavour of one or other of them. Certain *Teyyams* were associated primarily with one or other caste but drew in other castes as patrons, service providers or worshippers. I am indebted to K.K. Marar, a scholar from Tellicherry, who has done extensive research on *teyyam*, for this perspective.

drew together different sections of local society through specific *avakasams* (an inseparable combination of privilege and responsibility associated with a service or status) or as a community of believers.³⁴ “The *teyyattam* sought to create a moral community through the establishment of a sense of limits – thus far and no farther. By deification of victims, it created a collective imagination of what was just and unjust.”³⁵ As a *teyyam*, a ‘performer’ from specific lower castes could chastise people much higher in the caste hierarchy as also people of local importance for misdeeds.³⁶ Several of the stories performed dealt with local tensions, injustice, and punishment in the context of day to day caste and family tensions; they retold time and again the distinction between acceptable codes of behaviour and excess.

It was against these severally layered processes of administration of law, informed by notions of territory, caste and gender that the British set up the multi-tiered civil courts.³⁷ That the existing institutions would decline only gradually was in some measure anticipated by the early officials.³⁸

34 Though the shrine festivals and Teyyam performances in north Kerala were associated with the lower castes, in some instances the Nambudiris too, who in the region were few and far between, were drawn in as patrons.

35 Dilip M Menon, ‘The Moral Community of the Teyyattam: Popular Culture in Late Colonial Malabar’, in *Studies in History*, Vol 9, No. 2, 1993, p 199.

36 Ibid, p 199. Besides, *teyyams* continue even today to be called upon to intercede directly in dispute arbitration. I thank Rajesh Kumar Komath for drawing my attention to this.

37 As Marc Galanter notes in undertaking to administer the law in government courts rather than merely supervising the administration of law, the British initiated a process of ‘expropriation’ of law. It gave the government the power to “find, declare and apply” the law. Marc Galanter, *Law and Society in Modern India*, (Delhi: Oxford University Press, 1994), p 17.

38 For instance several *smartavicharam*, inquiry-based effort to elicit a confession from an antarjanam suspected usually of adultery, were conducted in the nineteenth and twentieth centuries. One of the last effective ones was conducted in 1918 under the sanction of the Raja of Cochin. A.M.N Chakiar, ‘*The Last Smarta Vicharam*’, (Tripunitara, 1998), p 95.

The regulations [for the administration of justice in civil cases]...went rather to secure to the inhabitants one certain Judicature where they might, if they found it necessary, apply and obtain justice than entirely to deprive and prohibit the different Rajas from the exercise of the full and general judicial powers which they themselves considered as inherently vested in them,...accompanied with this further precaution that Rajas inquiries and decisions on such reference were revisable by the said court in all cases in which either of the parties were dissatisfied with the results thereof....³⁹

In some cases the colonial regime picked up and concentrated authority in existing institutions as in the incorporation of village

39 Reports of the Joint Commission, p 124. Established hence in a higher appellate role, the courts could dispute the procedures of caste institutions without directly taking issue with the institutions. A decision of a *smartavicharam*, excommunicating a woman and a man she had implicated, was taken to and overruled by the High Court in Madras on the grounds virtually that the *smartavicharam* had not observed procedures acceptable to the civil courts. The High Court held that “the plaintiff [the excommunicated man] not having been charged, nor having had an opportunity to cross-examine the woman, or enter on his defence, and otherwise vindicate his character... the defendants had not acted *bonafide* in making the declaration”. Indian Law Reports (Madras Series) 12, 1889 cited in Thurston and Rangachari, *Caste and Tribes*, p 224. In an earlier instance where the court took on a supervisory role, O. Chandu Menon describes a caste-based procedure for determining guilt (an ordeal of the balance) that he witnessed at Calicut around 1876 when he was Sub Judge of Canara. This was in connection with a suit before the Sub Court at Calicut to determine whether a Nambudiri, who was party to the suit, had lost caste for breach of some caste rule. The ordeal was well attended and ended in “so much confusion and uproar that many officials including myself were unable to see how exactly the scales stood; but the judges [Brahman priests who officiated as judges] loudly and vehemently declared in favour of the poor accused”. K.P. Padmanabha Menon, *History of Kerala*, pp 267-270.

heads (as *adhikaris* or *patels*) in the lower rungs of the administration.⁴⁰

The manner of shift effected on the question of laws and customs to be applied to the people was more complicated by the pressures of social governance. However, officials were predisposed to see the division of topics of law in terms of the contemporary English division.⁴¹ A division in English law between private and public shaped the category of personal laws, which were to govern the ‘private’ realm of family, marriage and inheritance.⁴² On these topics the courts were to go by the former laws of the people, whether *shastric* or customary.⁴³ Officials, in the greater part of India, took on the task of determining ‘Hindu law’ in accordance with the *shastras*, resorting variously to existing *smritis* or commentaries and to commentaries/codes developed by select *pandits*

40 The village heads selected were in most cases former hereditary authorities and they were vested with powers to try minor civil and criminal cases. In such cases “the economic sanctions for his political and juridical authority nevertheless remain, and to these are added the sanctions issuing from his position in the modern administration”. Miller, ‘Village in North Kerala’, p 49.

The physical structure of legal justice took clearer shape in 1845 with the establishment of the Civil and Sessions Courts at Tellicherry and Calicut, the Subordinate Court of Calicut and the Principal Sudr Amins’ Courts (in 1875 the Principal Sudr Amins were designated Subordinate judges) at Tellicherry and Cochin. The District Munsiff’s Court continued to function, while the Provincial courts and Zillah courts of the early nineteenth century were abolished. Re-organisation continued into the twentieth century. Innes, *Malabar Gazetteers*, p 384.

41 J. Duncan M. Derrett: *Religion, Law and the State in India* (Delhi: Oxford University Press, 1999), p 233.

42 Tanika Sarkar, ‘Rhetoric against Age of Consent: Colonial Reason and Death of a Child Wife’, *Economic and Political Weekly*, Vol 28 (26), 1993, p 1869.

43 Derrett: *Religion, Law and the State*, p 234.

under government instruction.⁴⁴ Several scholars have pointed to the official presumption in favour of written/*shastric* law.⁴⁵ Where *shastric* law was recognized, this did away with the distinction between written law and custom.⁴⁶ However textual authority was introduced in the interpretation of custom, not based on written sources as well.⁴⁷ In Malabar and South Canara, besides the textual authority ascribed to customary practices, written codes too were to intrude into the interpretation of custom.⁴⁸ Derrett suggests the kind of influence that

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- 44 Derrett discusses the ‘making’ of colonial Hindu law and the elusive search for a definitive code. *Ibid.*, pp 225-74.
- 45 *Ibid.*, pp 233-35, Lucy Carroll: ‘Colonial Perceptions of Indian Society and the Emergence of Caste(s) associations’, *Journal of Asian Studies*, Vol 37, no 2, p 237. It has been noted that the very general adoption of ‘Hindu’ (book) law led gradually to erosion of customary law. Carroll: ‘Law, Custom and Statutory Social Reform: The Hindu Widows Remarriage Act of 1856’, in J. Krishnamurthy (ed.) *Women in Colonial India: Essays in Survival, Women and the State*, (Madras: Oxford University Press, 1989) p 2. Madhu Kishwar: ‘Codified Hindu Law: Myth and Reality’, *Economic and Political Weekly*, Vol 29, no 33, (1994) p 2145.
- 46 Carroll, ‘Law, Custom and Statutory Social Reform’. See also Kishwar’s insightful discussion of how the authors of the *smritis* discuss the contingency, variability and flexibility of the precepts they lay out and speak of the importance of custom as distinct from these precepts. ‘Codified Hindu Law’, pp 2147-48.
- 47 Significantly, the Punjab case was seen as closer to English common law and posed against the Bengal tradition of *shastric* law, which was based on written sources and clearly textual. British officials then drew upon the English common law theorists and nineteenth century anthropologists to develop a theory of the evolution of Punjab’s society. Bhattacharya, ‘Remaking Custom’, p 26.
- 48 Notably, the Malabar Marriage Commission validates the resort to custom as if it were a consequence of the absence of written sources. Hence it has to first dismiss the claims of the *Kerala Mahatmayam*, a well known text in Malabar. *Ibid.*, p 10. In an instructive variation, the *Aliya Santanada Kattu Kattale* was relied on as an authoritative account of matrilineal customs in South Canara until it was declared a fraud by the court. Several important decisions of the High Court were based on it and in a case in 1883 though the Chief Justice noted that its “authority had been seriously impugned”, he based his judgement on a precedent that relied on the book. Moore, *Malabar Law*, p 83.

was ear marked for written sources in Malabar. “Though the Malayalam *Vyavahara-mala*... says nothing about the British, it seems certain that it was written to provide a book-law for the Malayalam-speaking inhabitants of Malabar at a time when they returned to relative self-government after the East India Company acquired the Malabar District from Tipu Sultan... The Malayalam law-book was available in 1800”.⁴⁹ Noticing a considerable *sastric* element in the text, the bulk of which concerned contracts and customs relating to Malabar, or Kerala, he adds that

[t]here is no likelihood that such a work would have been written but for the presence of the British rulers and their notions of how local law should be found out and administered. And the attempt to give the whole system, including maxims of wisdom, legal procedure, land-tenure and rent questions, was evidently based upon the theory that if local laws could be made out the rulers would have them applied. *And so in fact it turned out, by and large, in Malabar, more than in any other district of the Madras Presidency, though we cannot attribute this decisively to the law-book itself.* The text, he points out, reflected colonial notions of how local law should be found out and administered.⁵⁰ (emphasis added).

49 Derrett, *Religion, Law and the State*, p 262.

50 “Bengal works” of the *shastras* were copied and studied in Kerala, almost certainly in the early years of British rule “before civil procedure had commenced on its Anglo-Indian path” and Jonathan Duncan, one of the Joint Commissioners who reported on Malabar, wanted the ‘Gentoo Code’, the first major colonial digest on Hindu law published in 1776, to be consulted in Malabar. Ibid, p 242, pp 257-263.

Though the treatise was not drawn upon in arbitration of cases or legal theorizing, 'Malabar law' was incorporated into influential treatises of 'Hindu law' that found immediate reference with judges.⁵¹

Issues of Matrilineal Practice: A Critical Review

It is only in recent years that the scholarship on matriliney has addressed the interpretation of customs by the colonial civil courts as an aspect of the transformation of matriliney.⁵² Much of the research on matriliney in Kerala has come from the discipline of anthropology.⁵³ Clearly within a discursive frame, this literature tended to generalize a view of matriliney garnered from the socio-economic configuration of one region, central Kerala. Nambudiri settlements were concentrated in

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- 51 John Mayne's *Hindu Law* and T.L. Strange's *Manual of Hindu Law* were referred to by judges and compilers of Malabar and Aliyasantana law to bolster interpretations. See for instance Moore, *Malabar Law*.
- 52 K. Saradmoni: *Matriliney Transformed: Family, Law and Ideology in Twentieth Century Travancore*, New Delhi, 1999, pp 66-70. G. Arunima, 'Multiple Meanings, Changing Conceptions of Matrilineal Kinship in Nineteenth and Twentieth Century Malabar', *The Indian Economic and Social History Review*, Vol 33 (3), 1996, pp 283-307, and 'A Vindication of the Rights of Women: Families and Legal Change in Nineteenth-Century Malabar', in Micheal Anderson and Sumit Guha eds. *Changing Concepts of Rights and Justice in South Asia*, New Delhi, 1998, pp 114-39.
- 53 The most extensive is the work of Kathleen Gough, who documents also regional and social group based variations. See 'Nayar: Central Kerala'; 'Nayar: North Kerala'; 'Tiya: North Kerala'; 'Mappilas: North Kerala'; and 'The Modern Disintegration of Matrilineal Descent Groups', in Schneider and Gough (ed.) *Matrilineal Kinship*. 'Changing Kinship Usages in the Setting of Political and Economic Change among the Nayars of Malabar', *Journal of the Royal Anthropological Institute*, Vol 82, 1952. Joan Mencher, 'The Nayars of South Malabar', in M. F. Nimkoff (ed.) *Comparative Family Systems*, (Boston: Houghton Mifflin, 1965). C. J. Fuller, *The Nayars Today*, (Cambridge: Cambridge University Press, 1976). Melinda Moore, 'Taravad: House, Land and Relationship in a Hindu Matrilineal Society', Unpublished Dissertation, Department of Anthropology, University of Chicago at Illinois, (1983).

central Kerala and I have argued elsewhere that this factor shaped the central Kerala experience of matriliney and land relations.⁵⁴ In the taluks of north Malabar (as also South Canara and southern Travancore), the nature of tenancy, cropping pattern and matriliney were different from the central Kerala (south Malabar, Cochin and the north Travancore) pattern.⁵⁵

Importantly, Kathleen Gough is keenly aware of these differences leading her to treat matrilineal kinship north and central Kerala separately.⁵⁶ However this does not prevent Gough from generalizing matriliney in terms of the central Kerala experience and positing a uniform trajectory of change, beginning with the entry of land into the market in the colonial period.⁵⁷ She , accommodates departure from law/‘rules’ in a distinction between the ‘formal’ structure of ‘traditional’ matrilineal kinship and ‘informal’ practices. Crucially, however, Gough was retrieving ‘traditional’ matriliney, in the mid-twentieth century, when the influence of colonial definitions of customs in local understanding of/author’s retrieval of practices cannot be underestimated. There are

54 See Praveena Kodoth, ‘Courting Legitimacy or Delegitimising Custom?’, p 10.

55 There were only two settlements of Nambuidris in north Kerala in Payyanur (a matrilineal settlement) and Taliparamba in Chirakkal taluk and their influence in the region was less than in the south Malabar/central Kerala, reflected in differences in land and marriage practices. For a fuller discussion see Praveena Kodoth, ‘Women and Property Rights: A Study of Land Relations and Personal Law in Malabar, 1880 – 1940’ Unpublished Ph. D. Dissertation, Department of Economics, University of Hyderabad, (1998), p 127-35. Variation in cultivation regimes and tenures of north and south Malabar is discussed in Ravindran Gopinath, ‘Garden and Paddy Fields’.

56 She points out that the failure to distinguish between regions had given rise to much confusion. ‘Nayar: Central Kerala’, p 305.

57 Gough, ‘The Modern Disintegration of Matrilineal Descent Groups’, p 640.

suggestions of the assumption of colonial interpretations as law. For instance, Gough writes that gifts of land occasionally by men in north Malabar “to their wives and children was known long before the colonial period, *although they were against the law.*”⁵⁸ (emphasis added) While the law on this point, long before the colonial period, is unclear and certainly not addressed by Gough, nineteenth century colonial law permitted alienation of only ‘separate’ property and only during a person’s lifetime.⁵⁹ Colonial law was also distinctly uneasy on the question of transfer of property from husband and father to wife and children, a discomfort that Gough too displays in understanding such practice in a structural frame.⁶⁰ There are several such instances in her work where custom brushes uneasily against the ‘law’.⁶¹

Gough’s engagement with the significant authority that senior women seem to have had over property and kin is instructive. The senior woman, Gough indicates, was not necessarily determined by seniority and might well be the oldest competent woman and yet seniority was a crucial factor in determining power relations between the *karanavan* and the senior woman.⁶² If the *karanavan* was the son or

58 Gough, ‘Nayars: North Kerala’, pp 391-92.

59 This was until the Malabar Wills Act, 1898 and the Malabar Marriage Act, 1896 came into effect. Even prior to this however the courts were known to have upheld *marumakkatayam* wills. Moore, *Malabar Law*, p 182.

60 *Putravakasam*, which referred to the certain claims that children had to their father’s property, did not have the force of law but several respondents to the Malabar Marriage Commission attest to its prevalence particularly in north Malabar. RMMC II, p 271.

61 Gough writes of north Kerala that when a junior man leased land on *kuzhikanam* (uncultivated waste or forest land taken on tenancy) from his taravad, the improvements that he made on it “might *by custom although not by law* become the separate property of his mother’s matrilineal descendants”. (emphasis added) ‘Nayars: North Kerala’, p 391.

62 Gough, ‘Nayars: Central Kerala’, pp 338-41.

younger brother of the senior woman, “she might indeed be the *de facto* head of the group” keeping accounts in her own hands and counseling him; but were he the older brother of the senior woman then she was subordinate to him.⁶³ Do we have a suggestion of the historical contingency of authority and practice?

More recently, Arunima has argued that the identifiers of matrilineal kinship in colonial law such as residence, impartibility and the inalienability of property were not essential parts of customary practice in pre-colonial Malabar and that the colonial interpretation of matriliney often militated against the rights that were historically available, particularly to women and junior members, within the *taravad*.⁶⁴ Contending rightly that matrilineal kinship needs to be historicized, she fails however to address historical changes and regional distinctions in inheritance, marriage, residence or descent beyond speculating on how *taravads* were established and took on distinct ‘caste’ and political identities in the precolonial period. Her argument, based partly on an attempt to retrieve precolonial practice, is fraught with problems.

As Arunima points out the crucial difference lay in that descent was traced from women. And it is perhaps in having to reconcile this and the possibility of women’s agency arising from this, with the ‘structural’ patriarchy of the *karanavan*, that the tensions so evident in Gough’s work arise. However several of Arunima’s inferences are questionable. Take for instance her claim that in early colonial north Malabar women had rights to management of the *taravad*, where the ‘evidence’ that she cites reveals only that Nair women managed domestic

63 Ibid, pp 341-42.

64 Arunima, ‘A Vindication of the Rights’, pp 116-19.

affairs in their natal *taravads*.⁶⁵ As Bina Agarwal has noted, this much is evident from Gough, who documents the senior woman's decision-making role in the inner domain of larger *taravads* in central and north Kerala.⁶⁶ It must also be noted that besides the legal discourse, ethno-historical writing produced under colonial rule and post-colonial ethnography, there is little to suggest that the senior male had absolute powers in the *taravad*. A critical reading of the above discourses could raise the possibility suggested by Ehrenfels that unlike in patrilineal families there was more than one node of power and a plural authority structure.⁶⁷

Arunima's claim that by the eighteenth century most new *taravads* were set up by women undermines her own later recognition of the several ways in which *taravads* were set up in the eighteenth as against

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- 65 Arunima cites Francis Buchanan's early nineteenth century travelogue. Arunima, 'A Vindication of the Rights', p 118. Contrary to twentieth century anthropological wisdom, Buchanan records, that a woman in north Malabar could return to take up permanent residence in her natal *taravad* only on the death of her husband or on having been turned out of her husband's *taravad*. On the other hand, a woman could not divorce her husband. Perhaps a crucial factor here is that the information was gleaned exclusively from some principal men of the area. Francis Buchanan, *A Journey from Madras through the Countries of Mysore, Canara and Malabar*, Vol II, (Madras: Asian Educational Services, 1988), p 513. The Joint Commissioners cite a report furnished by the Chirakkal Raja, which indicates that there were greater constraints on women in north Kerala in relation to marriage. Report of the Joint Commissioners, p 234.
- 66 Gough: 'Nayars: Central Kerala', pp 337-41 and 'Nayars: North Kerala' p 397. Bina Agarwal, *A Field of One's Own: Gender and Land Rights in South Asia*, (Cambridge: Cambridge University Press, 1994), p 113.
- 67 The mother, as the center of the family, the mother's brother, as legal adviser and representative to outsiders and the father as of psychological importance an honoured guest and outsider. U.R. Von Ehrenfels, 'Matrilineal Joint Family Patterns in India', George Kurien (ed.) *The Family in India: A Regional View*, (The Hague: Mouton, 1974), p 95. Gough records the limited but important customary rights of the father in North Kerala. Gough, 'Nayars: North Kerala', pp 400-02.

the provisions of colonial law in the nineteenth century.⁶⁸ If Gough and Melinda Moore document that *taravads* or *tavazhis* (branches of taravads) were set up in a number of ways, Moore also finds that it was comparatively rare for a remembered founder of a *taravad* to be a woman alone.⁶⁹

That in some wealthy *taravads* lands were set aside for women as *stanum* (a special status) property or otherwise over which they enjoyed varied claims does not in any way suggest ‘separate rights’ or “access to their own separate revenues and properties”.⁷⁰ For even evidence of women having sold their share of *taravad* property in the pre colonial period does not provide insights into the nature or dimensions of the ability to transfer land by *taravads* or their members separately.⁷¹ To suggest that women (or men) had separate rights in a uni-dimensional

68 Arunima, ‘A Vindication of the Rights’, p 117, ‘Multiple Meanings’, p 291. She takes the establishment of the Nileswaram royal family, when “a princess from the Samuthiri’s family eloped with a prince from Kolathanad to establish her own dynasty”, as an instance of “the common enough strategy of establishing *taravads* through elopement or marriage”. In doing so, Arunima interprets rather drastically Sreedhara Menon’s account of the establishment of the family prior to Portuguese arrival in Kerala. For Menon writes that as a consequence of elopement, the princess and her descendants were denied the right to a share in the Samudiri’s property and that the Samudiri used the threat of arms to force the Raja of Kolathanad to create a separate estate for the princess at Nileswaram. See A. Sreedhara Menon, *A Survey of Kerala History*, (Kottayam: National Book Stall, 1970) p 181.

69 Gough, ‘Nayars: North Kerala’, 391-393. Moore, ‘Taravad: House, Land’, pp 121-39. Moore notes that branches may split off for different reasons including fall from caste, quarrels or the desire of a husband to endow his wife and children. *Ibid*, p 145

70 Arunima, ‘Multiple Meanings’, p 292.

71 Deed no. 35 in Logan’s collection refers to a transfer by sale in 1739 by two women Kurikkalote Palakkal Mittalevittil Ummanga and Uchchira, of ‘as far as their share of the Tara, kandum (fields) and swamps below their house’. Logan, *Malabar*, Vol II, p cxlvii.

sense has the unwarranted consequence of projecting back into the pre colonial period a conception of rights that formed the basis of the colonial interpretation of matriliney (discussed later on in this paper).

The Legal Discourse on Matriliney

I adhere most strongly to the opinion that where a rule of law indisputably exists it is the duty of the judges not to fritter it away on the specious pretense of bringing rules of law into harmony with what they may consider the requirements of society. If they are wrong in their view of such requirement... the evil is unmixed, if right, the mischief still predominates over the good because it prevents that systemic reform from which alone good can result. Such systemic reform is for the legislature.

William Holloway ⁷²

It was in the second half of the nineteenth century that *marumakkatayam* began to take sharp legal contours, coeval with increasing conflict over legal interpretations. This section will look at the interpretation of specific customs that determined the nature and extent of women's and men's functions of authority and rights to property in the legal discourse. Interpretation of conventional marriage, very generally referred to as *sambandham*, has not been addressed here. Yet as differences in property rights are so closely associated with the organization of marriage, it bears mention that one of the reasons why the civil courts refused to recognise *sambandham* as marriage was that it did not establish property rights — the assumption of course being

72 Munda Chetti v Timmaju Hensu, 1862-63, p 383.

that the establishment of (patrilineal) property rights was a defining incident of marriage.⁷³

The Right *against* Partition

Though a decision against partition was confirmed as early as in 1814, the provincial courts continued to allow it until the mid nineteenth century, when the higher courts ruled against it.⁷⁴ Two seemingly divergent explanations were advanced for the ‘right against partition’. The understanding of the *taravad* in analogy with the impartible “archaic Hindu family” avoided any reference to matriliney or to women. In his compilation of Hindu Law, John D. Mayne places the *taravad* at the stage corresponding to the “antique Patriarchal form”, of the modern Hindu family, whereby “the doctrine that property was by birth – in a sense that each son was the equal of his father – had then no existence... The son was a mere appendage to his father, and had no rights to property as opposed to him”. In doing so he generalizes Henry Maine’s Patriarchal Theory, formulated in his *Ancient Law*. This validated impartibility except by common consent i.e., “no one member, nor even all but one can enforce a division upon any who object.”⁷⁵ Hence each one had a right to resist division — *an individual right* in the last instance. The notion of collective rights, said to govern the *taravad*, was trapped conceptually in a polarisation of rights between individual and collective

73 The colonial interpretation of *sambandham* raises distinct and complex issues of sexuality, property and legitimacy that have been addressed in Praveena Kodoth, ‘Courting Legitimacy or Delegitimising Custom?’

74 Moore, *Malabar Law*, p 13, p 16. *Munda Chetti v Timmaju Hensu*, p 380.

75 Moore, *Malabar Law*, p 17.

rights, which, a) turned necessarily on a form of individual right and b) excluded the very possibility of different bases of claims.⁷⁶

However, William Holloway, who along with Herbert Wigram was a driving force in giving a sharp legal outline to the *taravad*, invoked matriliney and women as determining factors of the rule of impartibility. In a case that established impartibility as custom, the judges disallowed a plea for division under *aliyasantana* law, which had come up before the High Court in 1862.⁷⁷ The plaintiff, a woman, sought division and the District Munsiff ruled in her favour generally but disallowed her claim to a piece of land on the ground that it had been shown to be the self acquisition of the second defendant. Both parties appealed against the decision and the Principal Sadr Amin awarded to the plaintiff the entire lands claimed in the plaint.

In a special appeal before the High Court, the appellants contended that under the rules of *aliyasantana*, division could not be legally enforced. Noting that neither the District Munsiff nor the Principal Sadr Amin had pronounced an opinion on this point, the High Court remitted the issue to the Civil Judge for evidence of existing usage. The Civil Judge observed that division of family property had been allowed in numerous suits since 1825. This however did not deter the judges Frere and Holloway from denying such a usage.

Frere contended that division at the behest of individual members is “undoubtedly at direct variance with the ancient law on the subject”.

76 Sundara Aiyar points out that the nature of the rule was due to the British courts for it was extremely unlikely that a single member should have been given the right against the will of the majority in the *taravad* to resist partition. *A Treatise on Malabar Law*, pp 11-13.

77 *Munda Chetti v Timmaju Hensu*, p 380-83.

He goes on to consider whether the “ancient law... had been superseded by any custom or usage which has by long prescription or usage acquired the form of law” and finds that the precedents submitted by the Civil Judge concerned division in favour of males, i.e., “in none does the question of compulsory division between the females who alone are recognized as the proprietors of the family estate, appear to have been judicially tried and decided”.⁷⁸ Holloway however was decisive in rejecting the claim to division.

The divisibility of family property in Canara is one of those propositions, which fall within the category of law taken for granted, and is found when examined to have no solid foundation... [I]t has not been disputed, as indeed it could not be, that the compulsory division of the family property is wholly opposed to the authorities upon which the Aliya Santana system of inheritance rests. *It is equally opposed to the principles of that system which vests property in the females of the family....*⁷⁹ (emphasis added)

The rule against partition is seen as deriving from a system that vested property in women.⁸⁰ For we might also ask as Sundara Aiyar does, how could it be said that non-division followed logically from succession through females? “And even if it did the question is not

78 Ibid, p 382.

79 Ibid, p 383.

80 Against division, both judges cite the authority of the *Aliyasantanda Kattu Kattle* or Bhutala Pandya's Kattoo, later denounced as a forgery. The text asserted that if a disagreement took place between sisters, the eldest sister was to provide the younger sister with a separate house and its necessary apparatus, retaining the general managership and the performance of ceremonies. In his judgment, Holloway interpreted this to constitute far from a claim to division a “positive authority against it” Ibid .

logical plausibility or perfection but what were the usages among the communities who are governed by it?”⁸¹ Clearly then, despite or precisely because of the implicit connection between women and matriliney, the colonial discourse on matriliney was not about matriliney or women but about what comprised ‘authentic’ custom.⁸²

Targeting precisely the right *against* partition, the plaintiffs in a case in 1870 staked their claim to the property of another *taravad* with whom they shared descent.⁸³ The defendants maintained that while they had descended from a “common stock”, their *taravad* and the plaintiff’s were distinct. Given the way matrilineal law was developed with the emphasis on denying partition, a decision against the plaintiff could have meant affirming partition. In denying the contention of the plaintiff, holding it to be a case where one of several branches had become better off and another, “by virtue of ambiguity of a word” had sought to reap the benefits, Holloway argued that,

As in all Hindu law so in the archaic form of it, which exists in Malabar, the first conception of the family is of an indissoluble unit, a mere aggregate with no separate rights... In Malabar as elsewhere, the inconvenience of this state of things has made itself felt and families... have split into various branches.

81 Sundara Aiyar, *A Treatise on Malabar Law*, p 13.

82 Lata Mani has argued that the debate on *sati* reconstituted tradition, such that all parties to the debate invoked the ‘authenticity’ of a particular corpus of texts – the *shastras* – in defence of and against the practice of *sati*. Despite the intimate connection between women and tradition in the colonial discourse on *sati*, the debate was not about women but about what constituted authentic tradition. Lata Mani, ‘Contentious Traditions: The Debate on Sati in Colonial India’, in Sangari and Vaid (ed.) *Recasting Women*, pp 88-126.

83 *Erambapalli Korapen Nayar v Erambapalli Chenen Nayar*, Regular Appeal no. 120 of 1870, MHCR 4, (1870-71), p 411.

To validate the existence of formerly-partitioned *taravads*, however, he calls to his aid the local concepts of *mudal sambandham* (community of property) and *pula sambandham* (community of pollution) and contends that the movement from *mudal sambandham* to *pula sambandham* was one of divisions. Yet, acknowledging that divisions had occurred along *tavazhis* did not lead to a search for a different basis for partition or to questioning the doctrine of ‘common consent’.⁸⁴ On the contrary, stipulations were set to identify formerly partitioned *taravads*. In a decree upheld by the High Court, 40 years of separation was held as sufficient to prove effective partition the burden of proof resting with those claiming common descent.⁸⁵

Residence and Maintenance

It was assumed that under matriliney women necessarily resided in their matrilineal homes even after entering into a marriage. In north

84 In the early decades of the twentieth century, demands for partition were along the lines of *tavazhis*. Making out a case for *tavazhi* partition, T. Vasudeva Raja pointed out that “...Malabar is merely suffering from arrested growth, and the administration of law by the courts constituted by the British government on principles recognized in English jurisprudence is in no small degree responsible for this stunting process.” Home (Judicial) Department, 60-62, (1912), National Archives of India, New Delhi. U.C.S. Bhatt, member of the Madras Legislative Council from South Canara, argued that it had been routine to partition taravads until the High Court ruled against it in the mid nineteenth century. Proceedings of the Madras Legislative Council, Vol 59 (Jan 10, 1932), p 205. Importantly, Melinda Moore studies several taravad histories to indicate that branches may split off for different reasons including fall from caste, quarrels or the desire of a husband to endow his wife and children. “Taravad: House, Land”, p 145. See also an account of partition in a dispute stretching over four years and settled through the lower courts in 1856 in K.T. Gopindranath, *K.T. Chandu Nambiar*, (Kannur: S.C. Printers, 1996), p 85 and K.K.N. Kurup (ed.) *Koodali Granthavari*, (Calicut: Calicut University, 1995), p xviii.

85 Moore, *Malabar Law*, p 19. In the early twentieth century it was held that in a proper case, in the interests of family peace and order a partition may be supported as a family arrangement. Parakkateri v Koran 1912, in Sundara Aiyar, *A Treatise on Malabar*, p 15. Further, it was held in a case in 1916 that “separate residence, separate assessment and separate management are the common indicators of partition”. Ibid, p 17.

Malabar and South Canara however women resided in the matrilineal homes of their husbands during the tenure of their marriage. This point was not taken to court and tried directly. However, in a case before the District Judge of North Malabar in 1878, a woman and her son claimed maintenance from the *karanavan*. The claim included maintenance for the wife and children of the son. The defendant, the *karanavan*, pleaded that the plaintiffs were not entitled to maintenance as they had declined to live in the house that he had allotted to them. The judge went on to disallow maintenance to the wife and children of the son on the grounds that it was against the ‘principles of *marumakkatayam law*’, a point that was not even at issue.⁸⁶ Previously, the Subordinate Judge, who did not take objection to the inclusion of the son’s wife and children, had ruled in favour of the plaintiffs. He did so on the grounds that the house in question was already occupied by 11 members and had no spare accommodation. The plaintiffs took the case to the High Court, where the judge remitted the case to the lower court for more information. On the basis of information received, the judge held that the claim was a proper one. It was pointed out that even the first defendant did not object to the custom of wives and children of men living in the husband’s/father’s taravads. However the court upheld this in the mode of an exception.

Although it would seem inconsistent with the principles of the marumakkatayam law that the tarawad should contribute to the maintenance of the ladies with whom the male members cohabit and of the issue of such cohabitation,... it is urged in this Court that it is the practice of the country in North Malabar for females to reside

86 Varikara Vadake Vittil Valiya Parvati v Varikara Vadake Vittil Kamaran Nayar, Indian Law Reports (all references are to the Madras Series) (henceforth ILR), Vol 6, (1883), p 341.

during the whole year in the tarawad of the male with whom they cohabit,... (emphasis added).

In a sweeping move the practice of women residing in their natal *taravads* after marriage, specific to south Malabar, was generalised to matriliney itself.

More generally, the accent on co-residence and impartibility meant that legally the *karanavan* could refuse requests for separate maintenance, outside the allocated *taravad* house, or even flexible maintenance arrangements within the household. However this is one area where over half a century the claims of junior members to maintenance found increasing support in the civil courts.⁸⁷

Dismissing a suit for separate maintenance in the District Court in Tellicherry in 1858, the judge had observed that

[t]he junior members of the family are not entitled to be supported out of the family house from the family property... To give them a cause of action, they must have alleged, and to succeed, *they must have proved, that by the acts of their karanavan they were deprived of subsistence in their own family house.*⁸⁸ (emphasis added).

87 In 1881 when a senior woman of a *taravad* refused to give up her possession of a room in the house, the *karanavan* sued. He maintained that he has the right to redistribute rooms in the house and the judge held upheld his claim on the ground that the powers of the *karanavan* were absolute. Moore, *Malabar Law*, p 121. However in 1917, a woman living in a separate room in the family house owing to scruples about cooking fish was allowed separate maintenance. It was held that, “[w]hen a state of things has gone on for a number of years without objection, it may be unreasonable on the part of the *karanavan* to terminate it arbitrarily”. Sundara Aiyar, *A Treatise on Malabar Law*, p 139.

88 Moore, *Malabar Law*, p 124.

By the 1880s suits for maintenance were more successful indicating not so much a change in the provisions of the law as the widening of the scope of disputes, the adjudication of which pushed at the boundaries of earlier interpretations. Pleas for separate maintenance were successful as “rare exceptions... as the *karanavan* has been the cause of quarrels that necessitate the plaintiff leaving the family house”.⁸⁹ A judgement in 1882 directed that members were entitled to claim maintenance if there was no room for them in the *taravad* house.⁹⁰ In this case it was decided also that if the *karanavan* made insufficient allowance, members of the *taravad* could apply to the court to determine what was sufficient in the context of family circumstances and to a raise in allowance when the family wealth increased.

The Rule of the *Karanavan* and Women’s Rights to Manage Property

As the ‘general’ rule in Malabar, management and control of property was vested in the senior male of the *taravad*, against which management by women was framed as an ‘exception’. Except in the case of the *kovilagams* (royal families), management by women was held to be “opposed to the present usage of every other Nayar family in Malabar”.⁹¹ In the *karanavan*, the eldest male of the *taravad*, was “vested actually (though in theory in the females), all the property movable and

89 The maintenance granted, viz., two rupees per mensem it was stated was intended to discourage such applications. *Peru Nayar v Ayappan Nayar*, *Ibid*, p 128.

90 *Ibid*, p 132.

91 *Ibid*, p 121. The right of the senior woman to management was recognized in the Calicut and Walluvanad *kovilagams* (residences of royal families), each of which had separate estates attached to it. The senior woman of the family (of the three *kovilagams*) was entitled to its management. *Ibid*, pp 343-345.

immovable belonging to the *taravad*.”⁹² Taking the presumption in favour of men a step further, in matters such as sales of *taravad* property, where there was an adult *anandiravan* his consent was required even when the sale was assented to by a female member and was shown to be for *taravad* necessity.⁹³

As the legal executor of the *taravad*, the *karanavan* was seen to represent it in its relations with people outside the *taravad*, importantly tenants or possible buyers of property. Land was the most important form of property among the matrilineal social groups in Malabar. Control over land also meant a degree of control over certain groups of people, tenants, labourers and service (artisan) castes. Possession, control or management of land was understood in terms of the roles of land owners and / or tenants as *janmis*, *kanakkar* or *verumpattamkkar* (cultivating tenants) and facilitated, inevitably, their coming together with the *karanavanmar* of *taravads*.

The powers of the *karanavan* were seen as growing out of his position as ‘head of family’. However in assuming that the *karanavan* was indeed a ‘head of family’, it is evident that the legal discourse drew upon a theory of law rather than on local practice. In a case before the High Court in 1872 in which the custody of a child was in dispute, Morgan and Holloway held that,

by the principles of the laws of Malabar, the mother herself, while alive, and her children too, were under the guardianship of the head of the family, the *Karanavan*.

92 Varankot Narayanan Nambudiri v Varanakot Narayanan Nambudiri, ILR 2, (1878-81), p 328.

93 Sundara Aiyar, *A Treatise on Malabar Law*, p 63.

Their position was precisely analogous to that of the members of a Roman family under the *patria potestas*. The *Karanavan* is as much the guardian and representative, for all purposes of property, of every member within the *taravad* as the Roman father or grandfather.⁹⁴

The Civil Judge had drawn upon criminal law, which required the father of a child unable to maintain itself to maintain it, and “the natural equity found in positive law” to entitle the father to guardianship of his children. The High Court reversed the order on the grounds that it was “wholly opposed to the very principles upon which *Marumakkatayam* depends”.⁹⁵ In a later case, *Morgan and Holloway* held that the “person to whom the *karanavan* had the closest resemblance is the father of a Hindu family” and that like the latter, his position as head of family “comes to him by birth”. The *karanavan*’s “office is not conferred by trust or contract but is the offspring of his natural condition”.⁹⁶ These cases laid the field for understanding the position of authority of the *karanavan* in relation to all other members of the *taravad*. Clearly, the *karanavan*’s position was natural because he was in the position of the father. Further, both these judgments show that the authority of the *karanavan* was posed not as ‘natural’ or internal to matriliney but derived through an imputed relation with a ‘patriarch’ as ‘head of family’.

The practice of setting aside property for the maintenance of women in Nair *taravads*, which property they were entitled to manage,

94 *Thathu Baputty v Chayakath Chathu*, Civil Miscellaneous Regular Appeal no. 406 of 1872, MHCR 7 (1871-74), p 179.

95 *Ibid*, p 181.

96 *Eravanni Revivarman V Ittapu Revivarman*, ILR 1, (1876-78), p 153.

was disallowed by the High Court in the middle of the nineteenth century.⁹⁷ Among the bigger *taravads*, property was sometimes set aside specifically for the maintenance of women and children, though the arrangements differed from one family to another.⁹⁸ In a suit brought against the Kavalapara Valia Nair (also referred to as the Moopil or senior Nair) by his sister the Valia Kava Nethiar, in the 1850s, even the defendant and his witnesses maintained that it was the practice to set aside properties separately for the maintenance of women, which was under the control of the senior woman. If the senior woman found this inadequate and informed him, the Moopil Nair, usually paid the deficit. It was pointed out that the senior woman also received 1000 *fanams* from the 16000 *fanams* received as malikhana by the Moopil Nair.⁹⁹

The general presumption in favour of management by the senior male was all too often turned into an exclusion of women from managerial roles or used to exhaust women's claims. To establish a custom against

97 Moore, *Malabar Law*, p 347. Moore points out that the practice was adopted by certain Nair families of distinction until disallowed by the High Court in *Kondi Menon v Vadakentil Kunni Penna*, where a distinction was claimed between property set apart for women and the common taravad property. The notion of *striswothu* (women's property) came up in arbitration and it was held to be "known to marumakkatayam and not invalid". Only written evidence, however could establish the right. *Bivi Umah v Keloth Chiriyath Kutti*, S.A. no. 932 of 1894, *Madras Weekly Notes (MWN)* (1919), pp 693-94. *Puthelath Chatti Soopi v C.V. Kannan Nair*, *MWN*, (1929), pp 873-77.

98 Commentators on custom have pointed out that a considerable portion of the *janmam* property of *taravads* was set aside for women and children and that women had access to the management of such property. For instance see '*Stanawsothu*', *Janmi, Edavam* (May-June), 1908.

99 K.K.N.Kurup (ed.), *Kavalappara Papers*, (Calicut: Calicut University Press, 1984), pp 20-24. The Moopil Nair had opposed his sister's claim to maintenance while she resided at one of the many family residences on the grounds that it was not the usual residence of the women of the family. Contrary to the stance of the courts in later years, the Valia Kava Nethiar was held entitled to her claim.

the ‘general’ custom of management by the senior male, the ‘evidence’ produced had to conform to certain requirements. For instance, it was not enough to argue that, “the woman has always been the manager. To establish a custom contrary to the general customs of the country, the clearest evidence is required”.¹⁰⁰ This implied that a defence of practice as practice could be dismissed as constituting “vague statements” rather than “proof”.¹⁰¹

But what constituted clear evidence? The turn of interpretation on this point is indicated in an appeal suit before Holloway in 1855 wherein the Munsif had held that the authority over a *paramba* (garden) resided in the female and not in the male members.¹⁰² Looking at documents including one dated 1822-23, Holloway pointed out that as the names had been obliterated it was not clear from them that the former *karanavatti*, Ittiyachi, had been the one to demise the *paramba* (garden) on tenancy. But, he argues, even if this were clear “it would indeed be a violent inference that therefore the authority resides in women only”. Not pausing to consider whether authority could have been more inclusive and contingent, he suggests that, “it may well be that from the incapacity of males from tender age the woman was *karanavatti* in her life-time”. According to him, the weight of the evidence clearly showed that the grantor of the *janmam*, Rama Panikar, had succeeded Ittiyachi. What was this force of evidence? Holloway inferred that since Rama Panikar had been paying revenue on the *paramba* he had authority over it. Such acts as the payment of revenue “would carefully have been avoided if the truth were that in this family females

100 Moore, *Malabar Law*, p 121.

101 Zillah *Decisions*, March 1857 in *Ibid*.

102 A.S. 299 of 1855 in Moore in *Ibid*.

had the management of some portions of the property and males of others. *The separation in all acts of ownership would have been most carefully enforced*” (emphasis added).¹⁰³ It could of course be asked whether payment of revenue was a determinate marker of control, indeed of ‘ownership’ itself. By the time the Malabar Marriage Commission took evidence in 1891, it is clear that tenants were paying part of the revenue on land ‘owned’ by the *janmis*.¹⁰⁴ The frame of reference adopted excluded fluidity regarding family management and the possibility of diverse arrangements regarding revenue payments, sharing of income, or management and control of property itself within a single family.

With the odds high against formal recognition of women in positions of authority it was difficult to supply ‘sufficient’ proof. In an appeal suit before him in 1878, Wigram disagreed with the Munsif’s finding of a custom of female management.¹⁰⁵ Acceding that the defendant had indeed shown that her mother had, during her lifetime, managed the affairs of the *taravad*, as even the plaintiff had admitted; also that the defendant’s mother had managed excellently for no less than thirty-five years, he infers, almost tendentiously, that, “it may well be that the male members as they grew up should wish to leave the management in her hands”, and further that the evidence of the defendant was “perfectly consistent with her [the defendant’s mother] having

103 Ibid.

104 Malapurath Para Nambi, for instance pointed out that while his *taravad* paid Rs 500, his tenants paid Rs 10,000. RMMC II, Appendix IV. An appeal suit in 1927 involved a *karar* (written contract) made in 1876 by which *taravad* property was described as *striswothu* and it was agreed that government assessment and renewal demises would be in the name of the senior woman and that the senior male member would collect rents. Puthelath Chatti Soopi v Kannan Nair, pp 874-77.

105 S.A. 434 of 1878 in Moore, *Malabar Law*, p 122.

assumed the management because there were no males of age in the taravad”. He also cautioned that “[t]he management of a female, like the management of an Anandravan must (in my opinion) *always be presumed* to be with the consent of those on whom the law confers the right of management i.e., the senior male, and may at any time be resumed.”¹⁰⁶ (emphasis added). Stipulating that in some *taravads* females were entrusted with the management with the consent of the males, Wigram contends that he had not yet heard of a case where headship was claimed as a *right* by a female. The decree was confirmed by the High Court.¹⁰⁷

The presumption in favour of management by men in Malabar carried with it suspicion of managerial claims by women. In contrast in South Canara, the presumption was in favour of women.¹⁰⁸ Yet, a close look at available evidence from two cases, less than ten years apart, from Malabar and South Canara respectively, suggests that judicial approach

106 Ibid.

107 Wigram is ‘alert’ to the deceptive potentials of claims of management by women. In his compilation on Malabar law, he takes objection to a High Court judge’s decision to secure the rights of a minor girl to the *taravad* estate against efforts to enforce a lease of certain forests for ninety nine years, entered into by the three surviving adult males of the *taravad* on familiar grounds – that, “it assumes without sufficient proof that there was a valid custom in the family vesting the management in the females”. Besides, he warns that, “the experience of those best competent to judge tells them that, in nine cases out of ten, where a family arrangement has been made vesting the management in females, it has been done for the purpose of fraudulently delaying or defeating creditors”. Ibid, pp 123-124.

108 “The legal right to the family property is vested in the female members of the family jointly, but for little other practical purpose than regulating the course of succession... [P]ossession and control of the property belongs exclusively to the *ejaman*, or manager, of the family, who is ordinarily the senior of the female members... [and members] individually have no right to anything beyond such support”. Ibid, p 124

was more at ease with and hence privileged male authority. In a suit brought by the younger of two adult males in a *taravad* to remove the elder, who was *karanavan*, the latter's conduct was found to be such as to warrant his removal.¹⁰⁹ On appeal, Wigram, the acting District Judge, chose to appoint a Receiver rather than rule in favour of the plaintiff's claim to the position of *karanavan*.

Meanwhile a second suit was brought by the senior female in the *taravad* to remove the elder male and appoint her in his place. In fact Wigram was aware of the second suit and makes the following observation. "I do not think it would be in the interests of the taravad to allow young married females to manage the property and their interests will be amply protected by the course I propose to adopt."¹¹⁰ With both suits before them, the Judges of the High Court, Morgan and Holloway, came down strongly on "the mischievous extension of the doctrine as to the removal of *karanavans*... *The state of families and property in Malabar will always create difficulties. Their solution will not be assisted by bringing in the anarchy and insecurity which will always follow upon any attempt to weaken the natural authority of the Karanavan*"¹¹¹ (emphasis added).

109 Eravanni Revivarman v Ittapu Revivarman, p 153

110 Ibid, p 153.

111 Ibid, p 156. The need to protect the *karanavan*'s powers in the interests of discipline was invoked elsewhere too. In a case the *de jure karanavan* had renounced his rights and the *taravad* had been managed as two *tavazhis* for 78 years. On the right of a *tavazhi karanavan* to sue for recovery of property, the High Court held that no delegation of powers by the *karanavan* was irrevocable even by the delegator and still less by his successors. The judges cautioned that "with so peculiar a condition of property as that of Malabar, it is most essential for the avoiding of complete anarchy and consequent ruin to maintain the distinct rule as to the *Karanavan*'s powers." Velia Kaimal v Velluthedatha Shamy, SA no 372 of 1870, MHCR 6, (1870-71), p 401.

They categorized these as a new crop of litigation facilitated by the sympathies of judges who were themselves junior members of *taravads*. “[I]t has been exercised on the mistaken principle that a man can properly be removed whenever a single departure from his duty to act equally for the benefit of all can be proved against the *karanavan*... The plaintiff in the regular suit was really the Brahmin paramour of one of the women and a by no means desirable manager for a Malabar family”. They ruled that the question was *not whether a man was unworthy of his position as karanavan but whether the removal would benefit the family*, a position suggesting the expediency of the move.¹¹²

Quite in contrast to the Malabar case, the High Court on appeal overturned the South Canara District judge’s decision against management by males.¹¹³ Two women, Deyi and Ammu sought to remove Devu Shetty, the senior male, from his position as *yejamanan* (*karanavan*) and to recover property belonging to the family. The plaintiff claimed that the senior woman was the *yejamanan* under *aliyasantana* law. Two questions were taken up for decision in the High Court: whether it was the senior male or female or only the senior female that is entitled to be the *yejamanan* and assuming the latter whether she is entitled to countermand a *karar* (written contract). The High Court judges concluded that the first question was still *res integra* but found that they were unable to concur with the District Judge’s decision in favour of the plaintiff and particularly with his observation that management by males was detrimental to the interests of the family and that their natural instincts were in conflict with the duty, which they owe to the family. They pointed out that “*the question was not merely*

112 Ibid.

113 *Devu v Deyi*, ILR 8, (1885), pp 358-61.

one of expediency”, (emphasis added) and that in neighbouring Malabar the general rule was in favour of management by males!¹¹⁴

Conclusion

Anthropological literature on matriliney, read against the grain, could help contend with the historical contingency of and regional differences in practices and power relations in the matrilineal *taravad*. Quite at odds with this picture, the legal discourse on matriliney insisted on a timeless and immutable frame for customs. Colonial administrators tended to interpret matrilineal customs as binaries of more familiar patrilineal customs. Matriliney itself was understood virtually as the absence of patriliney. This also gave rise to an idealised conception of matriliney. Constituting this the *karanavan* implied the absence of the father. By maintaining that the *karanavan* in a matrilineal joint family was in exactly the same position as the father in a Hindu family, the civil courts merely replaced the father (in the patrilineal mode) with the *karanavan* (also in the patrilineal mode of the father) exhausting the role, place and legitimacy of the father. That the *karanavan* as ‘head of family’ was also vested with guardianship of ‘married’ women (and of *taravad* property) made room for greater difficulty, for this constituted a breach of the sexual contract embedded in ‘marriage’. The notion of ‘marriage as a contract’ endorsed by the courts (embedded in the European social contract theories) required the husband to assume these roles, in the absence of which it was argued there could be no legally valid notion of marriage!¹¹⁵ Legitimacy then was seen as tied to a specifically

114 Regarding the *karar*, where the District Judge found that it showed only a temporary arrangement made for separate enjoyment, the High Court Judges held that, “[t]he arrangement is in our opinion a family arrangement made by all its members... and even assuming that the senior respondent is the lawful yejaman, we do not think that the *karar* can be arbitrarily set aside by her”. Ibid, p 361.

115 Typically, for instance, the Malabar Marriage Commission uses the notion of ‘marriage as a contract’ to conclude that “the principles of Marumakkatayam law do not recognise the institution of marriage”. RMMC I, p 26.

European notion of marriage and could not be internal to societal contexts.

The patrilineal ‘commonsense’ of the colonial administration also facilitated older male control over property. The interpretations created asymmetrical possibilities along the axes of gender, generation and proximity to the nodes of power a) by specifically ordering functions according to gender and generation and b) by constituting positions of authority in a patriarchal and patrilineal mode. Hence the legal discourse, marked by an absence of serious engagement with local expressions of matriliney, lent pace and direction to the homogenization of practices across regions and social groups.

Importantly, in patrilineal societies, authority and lineage/descent of property were seen to flow together or at least very substantially together among the same set of persons (among men). In contrast, in matrilineal societies, and when patriarchal as in the legal discourse in Malabar, authority descended through the senior males and lineage/descent through women. In deriving rules by analogy with familiar patrilineal rules, the legal discourse poses as potentially destructive, the tension between lineage/descent of property in the female line and significant roles of authority/responsibility for men. Judges were exhorted to “maintain the distinct powers as to the karanavan” so as to avoid that anarchy that was only to be expected of a system so “peculiar” and “difficult”; matrilineal descent was read as conferring merely a theoretical right to property to women collectively, as having no practical implications for power relations.

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