SEEKING GENDER EQUALITY IN THE FAMILY SPHERE:
A COMPARATIVE LEGAL HISTORY OF WOMEN'S INHERITANCE
RIGHTS IN INDIA, HONG KONG AND SINGAPORE

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SUMMARY

Seeking Gender Equality in the Family Sphere:
A Comparative Legal History of Women’s Inheritance Rights in India, Hong Kong and Singapore

This paper examines the history of women’s inheritance rights in three Asia societies from a comparative perspective: India, Singapore and Hong Kong. The introduction of the British colonial administration and its legal apparatus into the three societies under review provides a common experience to explore the different responses of each society with regard to gender and property.

The historical narrative is structured around the question: How and to what extent has the encounter with modernity, mediated in part through colonialism, created space for change in gender power in the inheritance systems of Hong Kong, India and Singapore? To address this question systematically, the chapters are structured chronologically, addressing pre-colonial, colonial and post-colonial developments among three customary legal systems: Hindu, Chinese and Muslim.

For the pre-colonial era, the thesis concludes that on the eve of colonization patrilineal devolution of property was the order of the day for most Hindus and Han Chinese. Real property generally belonged to a family unit with ownership vested in one or more of its male members. This property was divided equally among sons at a succession. Bilateral with a male bias, the Islamic inheritance system was more favorable toward women than the Hindu and Han Chinese inheritance systems. Nevertheless, the Islamic inheritance system often adapted itself to local customs;
the resulting customary practices favored women in places such as southwest India and Malaya where either matrilineal or bilateral succession was the norm, but disfavored women in much of the rest of India.

Among the complex and perhaps contradictory tasks of colonial rule were ensuring that a system of property interests was in place in which titles were clear, the tax base transparent, and assets fungible without unduly disturbing a status quo in which these attributes may not have been present. Although some social legislation designed to improve the lives of women was enacted, throughout most of the colonial era women’s property rights did not figure in any progressive agenda. This is not to say that women never benefitted from British property policy – in cases of intestacy the Chinese women in the Straits Settlements benefitted from the decision to apply English law to the colony; it is to say that any benefits so accrued were incidental to decisions made for other purposes.

Eventually, the women’s movement and the concept of gender equality did reach the Hindu and Chinese communities of India, Singapore and Hong Kong. Although some changes were introduced by Britain as a colonial power, the most sweeping changes were initiated later by representative governments.

Meanwhile, the minority Muslim communities of India and Singapore have effectively worked to develop their autonomy from the prevailing succession laws of both colonial and independent states. Although a vigorous debate thrives around the issue of women’s place in Islam, under the science-of-the-shares, Muslim women remain in a realm of lesser property entitlements.
CHAPTER ONE

INTRODUCTION

The legislator regulates the estates of citizens once and he rests for centuries: motion having been given to his work, he can withdraw his hand from it; the machine acts by its own force and is directed as if by itself toward a goal indicated in advance. Constituted in a certain manner, it gathers, it concentrates, and it groups around some head property and soon after power; in a way, it makes aristocracy shoot up from the soil. Guided by other principles and launched on another track, its action is more rapid still; it divides, it partitions, it disperses goods and power;...¹

In the statement quoted above Tocqueville expresses a bold assumption about the relationship between law and society; in Tocqueville’s opinion society is but putty in the hands of the law and by extension those who make the law. One may find problematic Tocqueville’s view of society as so malleable; nevertheless, in the study of inheritance law in Asia, Tocqueville’s perspective is suggestive.

Consider the question: If property and power confined to a few produces

¹ Tocqueville, Democracy in America, Vol. 1, pg. 47.
aristocracy, then does property and power confined to males produce patriarchy? This would seem to be a logical conclusion given the patrilineal descent characteristic of traditional Hindu and Chinese patriarchal societies. The interrelationship between property and power raises an essential issue of causation relevant to many communities, including many of the communities of Hong Kong, India and Singapore where Chinese and Hindu customary laws and practices, as well as those of Islamic law kept women either out of the line of inheritance altogether, or in a realm of lesser property entitlements: Does enhancing women's property entitlements empower them within society?

This work assumes that property rights are an essential element of empowerment for any group, although the focus of this work is the women of India, Singapore and Hong Kong. Following Tocqueville’s logic, this work asserts that transforming a patriarchal society into one that is more egalitarian requires the right legislative and judicial action. Although neither the problem of patriarchy nor its rectification in the interests of gender equality may be so simply rooted in positive law, a supportive legal framework is essential to effecting such fundamental change.

An accurate picture of the law-society relationship requires a nuanced approach, for neither law nor society is unitary in either structure or objectives. Indeed, customary law is particularly diffuse. Bina Agarwal characterizes the state in her seminal work, A Field of One's Own: Gender and Land Rights in South Asia, as “... a differentiated structure through which and within which gender relations get
constituted *through a process of contestation.*”² Just as the state is a “differentiated structure”, so too are law and society differentiated structures. The relationship between these structures or elements is dynamic rather than immutable. In this context patriarchy is but one characteristic, albeit a dominant one in the histories examined here.

In India, Hong Kong and Singapore, this complex relationship between law and society is complicated further by the experience of colonization during which time many of England’s laws and England’s legal procedures were imposed upon the local inhabitants, either modifying or displacing these diverse customary laws and practices. Here again the colonizer must not be seen as a monolith, but as a dynamic projection of another society also in the throes of the processes of industrialization, modernization and globalization. It is in this complex milieu that this work analyzes the impact of the concept of gender equality on the inheritance systems of Hong Kong, India and Singapore, asking: **How and to what extent has the encounter with modernity, mediated in part through colonialism, created space for change in gender power in the inheritance systems of Hong Kong, India and Singapore?** To the extent that space for change in gender power has been created, **what role did colonialism play in this change?** As suggested above, the answers require situating each of these societies in the confluence of numerous processes, including colonization, decolonization, industrialization, modernization and globalization. In order to so situate them, we must look not only to the

² Agarwal, Bina, *A Field of One’s Own*, pg. 79; emphasis in original.
inheritance laws themselves, but also to the context in which they were introduced, the discourses at the time of introduction and judicial interpretations post-implementation. Customary laws, statutes and case law, together with the discourses and debates surrounding them, will be used to analyze the nature of the inheritance rights conferred to the extent such rights are gender dependent. Anthropological and sociological materials also will be used to flesh out the implications of these laws.

A. What is an “inheritance system”?

What is meant by an “inheritance system”: David S. Powers in his work “The Islamic Inheritance System: A Socio-Historical Approach” invokes “a distinction that social scientists have drawn between inheritance laws and inheritance systems: inheritance laws indicate who shares in the estate and how much he or she will inherit; the term ‘inheritance system’ refers to a combination of laws, customs, land tenure rights and settlement restrictions that regulate the division of land at a succession.”

This examination of women’s inheritance rights necessarily looks at inheritance systems, as gender equity in inheritance laws is a necessary, but not sufficient condition for determining whether women’s inheritance rights are commensurate with those of men.

The inheritance systems examined here will include the rights as well as customary practices in making inter vivos gifts (also referred to as donative transfers) and testamentary dispositions, as well as the laws and customs of

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intestate succession, i.e. succession without a will. For example, in traditional Chinese inheritance practices, family property may have been distributed either before or after the death of the family patriarch and his wife, as both pre-mortem and post-mortem inheritance practices were common at different points in Chinese history. Similarly, in India partition of a joint family estate or coparcenary under the Mitakshara system did not necessarily follow the death of the patriarch, but may have taken place either at an earlier or a later date, depending on the will of the coparceners. Nevertheless, all of these practices are subsumed within the rubric of “inheritance system”.

It is also important to note that this discussion will include all forms of property. As important as land is, other forms of property can also be important in a succession, particularly in urban areas where various forms of personal property may take on greater importance.

B. What is “customary law”?  

The use of the term “customary law” is problematic; this is primarily because the use of the term presumes that the behavioral systems involved constitute “laws” in the Western sense. For example, Ved P. Nanda and Surya Prakash Sinha commence their book entitled Hindu Law and Legal Theory with a rejection of the “notion held generally in Western legal thought for over 2000 years that law is something universal.” Instead they see as universal the existence of “fundamental
principles of social organization” of which law is one and the Hindu concept of
*dharma* another. According to this view, law is concerned with the
“institutionalization of rights and responsibilities,” whereas *dharma* is concerned
with “the discovery of one’s duty”. Since this comparative analysis is concerned
with the specific practices involved in the succession to property, it need not engage
in this debate on the nature of social structures. Instead, this discussion will finesse
the issue of defining “customary law” by using a set of context specific definitions
relevant to each of the communities under discussion.

Chinese customary law has been described as comprised of three elements,
specifically, 1) statutory law derived primarily from Confucian ethics and the
concept of *li*; 2) “generally accepted customs and conventions, which were largely
influenced by Confucian ethics and *li*, and which statute law gave countenance or
made enforceable; and 3) locally accepted customs and conventions, which, though
not necessarily coinciding with morals or precepts of any kind, statute law did not
forbid.” While Confucianism was an important element in customary law
throughout much of China’s history, the degree to which Chinese statutory law and
customs and conventions were derived from Confucian ethics and the concept of *li*
varied over time and across dynasties and is often a point of disagreement among
historians. Thus, this discussion of Chinese customary law will not be limited to
statutes, customs and conventions derived from Confucian conceptions of the

appropriate order of society, but will include statutes, customs and conventions contrary to Confucian precepts when and where these informed the ordering of Chinese society. For our purposes statutory law may include, depending on the context, not only dynastic codes, such as the Tang Code and the Qing Code, but also the statutes passed during the brief Republican period of Chinese history. Of course, this discussion of statutory law as part of Chinese customary law also includes (if not primarily includes) those statutes enacted and case law produced by the colonial legislature and judiciary in Hong Kong and the Straits Settlements to the extent that such statutes and case law were intended to codify or render into common law Chinese codified law and the local customs and conventions of the Chinese residents of the Straits Settlements, Hong Kong Island and the Kowloon Peninsula, and the New Territories.

The inheritance practices common among Hindus, although uncodified, were the subject of learned commentaries which influenced inheritance practices. These practices varied over time and by region. Thus, Hindu customary law shall refer to the following three elements: 1) “the precepts of behavior found in the literature of the Vedas, Dharmasutras and Dharmasastras, and elaborated in various commentaries”;10 2) locally accepted customs and conventions of Hindus; and 3) “the personal law of the Hindus given effect by the courts, both in the British period and in the post-independence era.”11

10 Nanda, Ved P. and Surya Prakash Sinha, ed.s, Hindu Law and Legal Theory, pg. xii.
11 Nanda, Ved P. and Surya Prakash Sinha, ed.s, Hindu Law and Legal Theory, pg. xii.
The terms Islamic law or Shari’a, which are used interchangeably here, refer to Muslim law and customary practices as they existed from time to time in India and Singapore, which is referred to in the relevant historical periods as Malaya, the Straits Settlements and, finally, Singapore. Wael Hallaq has described the pre-modern Shari’a as

...not only a judicial system and a legal doctrine whose function was to regulate social relations and resolve disputes, but a discursive practice that structurally and organically tied itself to the world around it in ways that were vertical and horizontal, structural and linear, economic and social, moral and ethical, intellectual and spiritual, epistemic and cultural, and textual and poetic, among much else.12

This description captures the complex relationship between the Shari’a and those societies where it is practiced, reinforcing the need as described by Powers above, to approach all inheritance practices, including Islamic inheritance practices, as a part of a social system, rather than simply as a set of laws or rules.

C. Why does this paper discuss “inheritance rights”?  

Some might wonder why women’s “rights” should be discussed in the context of inherited property. If the reader comes from a jurisdiction where testamentary freedom is the norm, then this assertion of entitlement may seem misplaced. Although many jurisdictions with testamentary freedom do impose some restrictions in favor of a surviving spouse or minor children, these rights, if they

12 Hallaq, Wael B., “What is Shari’a?”, pg. 156.
exist at all, are often restricted to maintenance rights. Indeed, the issue of safeguarding women’s newly won property rights under the various inheritance systems does become more salient in the colonial and the post-colonial eras as people avail of testamentary freedom and thereby possibly deprive their family members of property they would have acquired through intestacy. Nevertheless, in contexts in which most property either passes outside of a testamentary system, whether by intestacy for Hindu and Chinese customary law, or by the Shari’a law system referred to as the “science of the shares” discussed below which permits testamentary disposition of only 1/3 of a decedent’s estate, it is fair to assert that the customary or statutory rules which determine who receives a decedent’s property constitute “rights” in the sense of an entitlement.

D. **What makes the comparison between the inheritance systems of Singapore, Hong Kong and India valid?**

Approaching the inheritance systems of these three Asian societies from a comparative perspective is valid and promising because of their common experiences with British colonialism and its common law system in contrast and confrontation with their ancient and established systems of customary law.

Inheritance laws in particular fall under the British colonial construct known as “personal law” which:

... is a unique phenomenon and is found only in the ex-British possessions which had English (common) law as the general law for the population. It may be defined as rules (a) applicable only to persons of a
specified race or religion (b) formulated in English law terminology (c) derived from indigenous manners or customs (d) but subject to English law standards of justice, equity, and good conscience.\textsuperscript{13}

The inheritance practices imbedded in the customary legal systems from which the personal laws were derived are those of the Chinese customary law of Hong Kong and Singapore, the Hindu customary law of India\textsuperscript{14} and the Islamic customary law of India and Singapore. With a few exceptions within each society as will be discussed below, all three inheritance systems had long established practices of either excluding women from inheriting property, especially real property, or of placing them in deeply subordinated positions in relation to the inheritance rights of male heirs. In contrast, today Chinese customary inheritance law has disappeared almost completely from the legal landscapes in Hong Kong\textsuperscript{15} and Singapore\textsuperscript{16} and

\textsuperscript{13} Hooker, M.B., “English Law and the Invention of Chinese Personal Law in Singapore and Malaysia” in Law and the Chinese in Southeast Asia, M. Barry Hooker, ed., pg. 95.
\textsuperscript{14} Hindu customary law was also present in Singapore, however the development of this law will not be discussed in this work.
Hindu customary law has been codified to the effect that women have statutory inheritance rights in cases of intestacy equal to those of men.17

Indeed, the transformation of customary law through the codification of inheritance laws so that genders take equally in intestacy, captures to some degree the story of inheritance law in the majority communities of colonial and post-colonial Hong Kong, India and Singapore. In these societies Hindu and Chinese customary laws which were predominantly patrilineal and patriarchal have been modified by judicial holdings and amended by legislative enactments to create more gender-neutral alternatives in the interests of promoting gender equality. As Chinese and Hindu customary practices were premised upon the subordination of women who often had few rights to property, either women were to remain subordinated, or these laws and customary practices had to change. As Harriet Samuels asserts in her work on women in Hong Kong, “ultimately, the New Territories laws could not survive because they offended the principle of formal equality for women that has been absorbed, at least on some level, into modern Hong Kong culture.”18

To say that inheritance laws in cases of intestacy have been rendered gender neutral implies that legal means exist for testate succession, or the passing of property by will. Generally speaking, pre-colonial Chinese and Hindu customary

laws did not permit testate succession.\textsuperscript{19} Property passed at a succession in accordance with established rules and practices which were particular to the propositus’ community. Directing property to be distributed by will in a manner contrary to established practice was not part of either Chinese or Hindu pre-colonial inheritance systems. (There is some evidence that in China during the Tang and Song Dynasties households without sons may have had some testamentary control over how their property devolved. However, even in this situation the power to devolve property by will had largely disappeared by the Ming Dynasty.\textsuperscript{20}) For the Chinese and Hindu inheritance systems testamentary freedom was a colonial innovation. The relationship between the introduction of testamentary freedom and the development of women’s inheritance rights is uneasy as testamentary freedom opens the possibility of circumventing the new rights created for women under the intestacy laws.

Formally, Islamic law, for centuries has through the “science of the shares” combined a system of testamentary freedom for one-third of an estate with set mandatory distribution for the remaining 2/3 (or all if there is no will). In theory this system endures relatively unchanged in respect to the inheritance rights of women, though in practice, as discussed below, implementation may vary to accommodate local custom. The “science of the shares” is a complex system

\textsuperscript{19} See Wakefield, David, \textit{Fenjia: Household Division and Inheritance in Qing and Republican China}, pp. 13-14; and Desai, Sunderlal T., \textit{Mulla Principles of Hindu Law}, Sec. 367.

\textsuperscript{20} See Wakefield, David, \textit{Fenjia: Household Division and Inheritance in Qing and Republican China}, pp. 32-33.
governing post-mortem distributions based in part on Qur’anic verses and in part on doctrines developed within the Sunni and Shi’i sects and their respective sub-sects. A principle common to both Sunni and Shi’i interpretations is that to a male goes a portion equal to two females (when the male and female are similarly situated in relation to the propositus).\textsuperscript{21} Thus, ancillary to the question of how the modern concept of gender equality has altered the inheritance systems of India, Hong Kong and Singapore is the question of why it has altered some customary legal systems more than others; specifically, why have Hindu and Chinese customary laws at least as relates to intestacy yielded to legal provisions in favor of women’s equal inheritance rights, while Islamic law as implemented in India and Singapore has not?

Despite the commonality of British colonialism, the advent of legislation revising the customary laws to enable women to inherit came in disparate ways and at different times in each of these societies. For example, one might think that since Chinese customary law was the heritage of a majority of the inhabitants of Singapore and Hong Kong, that the development of women’s inheritance rights and related rights to property would develop similarly in these two societies. However, this is not the case. Women in Singapore were able to inherit real property anywhere in Singapore well before this right was fully realized by women in the New Territories, who only received this right in 1994 with the passage of the New Territories Land (Exemption) Ordinance (Enacted 1994). This paper examines the

\textsuperscript{21} Pearl, \textit{A Textbook on Muslim Personal Law}, 2\textsuperscript{nd} Edition, Croom Helm (1987), pg. 149.
factors that led to these and other differing judicial and legislative adaptations to the concept of gender equality.

While much of this paper will focus on historical developments, the topic remains of vital importance to these societies today. As indicated above, as recently as 1994 women in Hong Kong’s New Territories “were subject to Chinese customary law and, under British colonialism, still unable to inherit land”. The passage of the New Territories Land (Exemption) Ordinance finally redressed this discriminatory situation. In 2005 the Hindu Succession (Amendment) Act, 2005 finally gave daughters full rights as coparceners with their brothers for properties governed by the Mitakshara branch of Hindu law which covers most of India. Of course, the common law, statutory law and contemporary discourse may support gender equality, but whether women are able to avail of those laws to enjoy inheritance rights equal to their brothers, sons and husbands is a separate, but related question, one that will not be addressed here. Indeed, in India and Hong Kong’s New Territories the dramas are still unfolding and those stories are yet to be told.

E. Why should we be concerned about gender equality?

Many nations now profess that gender equality is necessary for a just society. Indeed, India prohibits sex discrimination in the section of its constitution dealing

23 Hong Kong: New Territories Land (Exemption) Ordinance (Enacted 1994).
24 India: Hindu Succession (Amendment) Act, 2005
with fundamental rights where at Part III Fundamental Rights, Article 15 on the "Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth" at Section (1) it states: “The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.” In recognition of historical inequalities Section (3) of the same Part and Article also states that: “Nothing in this article shall prevent the State from making any special provision for women and children.”

Article 22 of the Hong Kong Bill of Rights Ordinance, 1991 (Cap. 383) on equality before and equal protection of law states: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” Article 25 of the Hong Kong Basic Law simply states that “All Hong Kong residents shall be equal before the law.”

Although the Singapore Constitution contains no provision for the equal rights of women, Singapore, as well as Hong Kong and India, are all parties to the Convention on the Elimination of All Forms of Discrimination against Women (hereafter “CEDAW” or the “Convention”). India ratified the CEDAW on July 9,

26 Petersen, Carole J., “Engendering a Legal System”, pg. 23.
1993,\textsuperscript{27} while Singapore ratified the Convention on October 5, 1995.\textsuperscript{28} Britain finally extended the CEDAW to Hong Kong in 1996. Although Britain ratified the CEDAW on April 7, 1986\textsuperscript{29}, the Convention was not extended to Hong Kong at that time due to opposition from the local Hong Kong government, which did not want to be bound by the Convention.\textsuperscript{30} When China resumed sovereignty over Hong Kong on July 1, 1997, it also assumed the Hong Kong Special Administrative Region’s (“Hong Kong SAR’s”) obligations under the Convention, which the People’s Republic of China had itself ratified on November 4, 1980.\textsuperscript{31}

The basic premise of formal equality is to treat like things alike;\textsuperscript{32} the next premise comes from human rights law and it is that men and women are alike for the purposes of the enjoyment of human rights. The Preamble to the CEDAW expresses well this version of gender equality. To quote in part:

\textit{The States Parties to the present Convention,}

\textsuperscript{27} CEDAW website (http://www.un.org/womenwatch/daw/cedaw/states.htm), last visited on April 21, 2009.
\textsuperscript{28} CEDAW website (http://www.un.org/womenwatch/daw/cedaw/states.htm), last visited on April 21, 2009
\textsuperscript{29} CEDAW website (http://www.un.org/womenwatch/daw/cedaw/states.htm), last visited on April 21, 2009. See also the website for the Centre for Comparative and Public Law at the Faculty of Law, the University of Hong Kong (http://www.hku.hk/ccpl/research_projects_issues/cedaw/index.html), last visited on April 21, 2009.
\textsuperscript{30} Petersen, Carole J., “Engendering a Legal System”, pg. 23.
\textsuperscript{31} Centre for Comparative and Public Law at the Faculty of Law, the University of Hong Kong (http://www.hku.hk/ccpl/research_projects_issues/cedaw/index.html), last visited on April 21, 2009.
Noting that the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women,

Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex,

Noting that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights,…

Have agreed on the following: (then commences Article I)

Ratification of CEDAW was an important symbolic affirmation of a woman’s right to equality in each of these societies. Nevertheless, none of these societies endorsed the Convention unequivocally, but rather each made significant restrictive declarations or reservations. For example, all of them exempted themselves from paragraph 1 of Article 29 of the Convention, which empowers the International Court of Justice to resolve any dispute under the Convention not otherwise resolved by arbitration. In addition, India made the following two declarations:

i) With regard to articles 5 (a) and 16 (1) of the Convention on the Elimination of All Forms of Discrimination Against Women, the
Government of the Republic of India declares that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent.

ii) With regard to article 16 (2) of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declares that though in principle it fully supports the principle of compulsory registration of marriages, it is not practical in a vast country like India with its variety of customs, religions and level of literacy.\(^{33}\)

Article 5(a) of the Convention requires “States Parties” “to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”.\(^{34}\) Article 16(1) states that “States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:


\(^{34}\) CEDAW website (http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm), last visited on April 21, 2009.
(a) The same right to enter into marriage;

...

(h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration.35

Similarly, Singapore made the following reservation, among others:

(1) In the context of Singapore’s multi-racial and multi-religious society and the need to respect the freedom of minorities to practice their religious and personal laws, the Republic of Singapore reserves the right not to apply the provisions of articles 2 and 16 where compliance with these provisions would be contrary to their religious or personal laws.36

The relevant provisions of Article 16 are as set forth above. Article 2 of the CEDAW states in relevant part that:

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if

not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; ...

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;...37

When the United Kingdom extended the Convention to Hong Kong in 1996 it made a number of clarifications as declarations, including the following:

Laws applicable in the New Territories which enable male indigenous villagers to exercise certain rights in respect of property and which provide for rent concessions in respect of land or property held by indigenous persons or their lawful successors through the male line will continue to be applied.38

Taken as a whole, these declarations and reservations indicate that India, Hong Kong and Singapore are in favor of women’s equality – or at least in favor of being seen as being in favor of women’s equality – so long as they do not need to venture into the family sphere to secure women’s rights. In the conclusion this

38 Centre for Comparative and Public Law at the Faculty of Law, the University of Hong Kong (http://www.hku.hk/ccpl/research_projects_issues/cedaw/index.html), last visited on April 21, 2009.
paper will examine the implications of these reservations on contemporary inheritance systems.

F. Why should we be concerned about gender equality in inheritance rights?

In the face of the reservations made by Singapore, India and Hong Kong concerning the equal rights of women in the family sphere, this work holds that inheritance, though it be part of this family realm, is an important economic right. If men and women are to achieve equality in society, then they need to enjoy this and other economic rights in equal measure. The interests of family, as well as women’s, welfare require that inheritance rights be equal between genders.

Bina Agarwal, in A Field of One’s Own: Gender and Land Rights in South Asia, argues that “women’s struggle for their legitimate share in landed property can prove to be the single most critical entry point for women’s empowerment in South Asia.”39 Her arguments in favor of land for women are not only compatible with, but also fortify the position that women should have inheritance rights equal to those of men, a position also advocated by Agarwal. Both establishing that women should have equal opportunities to own land in their own names, and arguing that women need inheritance rights equal to those of men require challenging the “long-standing assumption in economic theory and development policy, namely, that the

39 Agarwal, Bina, A Field of One’s Own, pg. 2.
household is a unit of congruent interests, among whose members the benefits of available resources are shared equitably, irrespective of gender”.

Refuting this view of the household as egalitarian, Agarwal asserts that:

... there is considerable evidence of intra-household gender inequalities in the sharing of benefits from the household’s resources. For instance, in large parts of South Asia a systematic bias against women and female children is found in intra-household access to basic necessities such as health care, and in some degree also food.

Agarwal goes on to note that differences have been found in many states in India in the way that “men and women of poor rural households spend the incomes under their control...” with women spending almost all their income “to purchase goods for the family's general consumption and for the children” while men “spend a significant part on their personal needs (tobacco, liquor, etc.).” These gender differentials are reflected in “research findings which suggest that children’s nutritional status tend to be much more positively linked to the mother’s earnings than the father’s”.

40 Agarwal, Bina, *A Field of One’s Own*, pg. 3.
41 Agarwal, Bina, *A Field of One’s Own*, pg. 28.
42 Agarwal, Bina, *A Field of One’s Own*, pg. 28.
Similarly, the Research Development Institute in its report on "Women’s Access and Rights to Land in Karnataka" lists five reasons why women should own land as follows:

1. Holding land in her own name or jointly with her husband gives a woman a secure right to land if she separates from her husband, is deserted, or widowed.

2. Ownership of land gives a woman control over, and a continuing right to, a major source of income.

3. Land ownership enhances a woman’s ability to access credit as it gives her an asset that can be used as collateral.

4. Land ownership increases a woman’s respect and leverage within her family.

5. Land ownership can qualify women for benefits under programs that require beneficiaries to own land.

Although inheritance is only one of several means of acquiring land for landless women, it is one of the most critical avenues as discussed by Bina Agarwal.

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47 Agarwal, Bina, A Field of One’s Own, see in particular her chapters on “Customary rights and associated practices”, pp.82-152.
and as emphasized in the Rural Development Institute Reports. This is especially true given the decline in communal land so that access to private land acquires critical importance. Agarwal estimates that as of 1987-1988 “about 85.6 percent of arable land is likely to be in private hands.”

Thus, having established the importance of rural women acquiring either individual or joint title to property, especially real property, the importance of inheritance as an avenue for the acquisition of such property logically follows, given that most real property, particularly arable land, is already in private hands. If an agricultural worker does not already own land, then acquiring the means to purchase land on the open market is particularly difficult. Furthermore, most of the five reasons advanced for rural women to acquire real property also apply to the acquisition of property, both real and personal, by urban women. As with rural women, once the advantages of property ownership are established, the importance of inheritance as a means of acquiring that property is clear when assuming a system of private property ownership.

49 Agarwal, Bina, A Field of One’s Own, pg.24.
CHAPTER TWO
THE STATUS OF WOMEN UNDER THE INHERITANCE SYSTEMS
PRIOR TO BRITISH COLONIZATION

Prior to colonization, of the three inheritance systems to be examined in this chapter, with the exception of pockets of matrilineality in southern India and in Malaya as will be discussed below, women’s inheritance rights were strongest under Shari’a Law. Although the philosophical foundations and structural manifestations of the inheritance systems under Hindu and Chinese customary laws diverged significantly, these two systems were nevertheless strikingly similar in the prevalence of patrilineality and endogamous marriages, both of which worked to deprive women of inheritance rights in most situations.

A. Hindu Customary Law: Of Dharma and Diversity

Classical Hindu law was indistinguishable from religion and morality; all were considered aspects of dharma and were of divine inspiration. The three essential sources of dharma are: “Shruti (the divine revelations or utterances, primarily the Vedas), Smriti (the memorized word – the dharmasutras and the dharmastra) and sadachara (good custom).” Of the smritis, the Manu smriti is considered the “most orthodox, and the Yajnavalkya smriti among the more liberal

50 Agnes, Flavia, “Law and Gender Inequality: The Politics of Women’s Rights in India”, pg. 12, Sec. 2.1.
in granting women rights.”

This *shastric* literature is generally recognized as prescribing appropriate practice, rather than describing actual practice.\(^{52}\) It is, nevertheless, a useful place to start because of the shastras “did draw upon custom in some degree and in term shaped custom.”\(^{53}\)

Although the *Vedas* and related works are considered the sources of Hindu law, it is the commentaries on these works which were written some centuries later that served as the foundation for what came to be known as Anglo-Hindu law.\(^{54}\) For example, the *Mitakshara*, a running commentary on the Code of Yajnavalkya, was written in the eleventh century by Vijnaneswarā.\(^{55}\) The *Dayabhaga* of Jimmutavahana, another important commentary relied upon by the British, was written in the twelfth century.\(^{56}\)

As the purpose of this section is to provide a thumbnail sketch of the parameters of women’s inheritance rights in India on the eve of colonization, it is imperative here to acknowledge a conundrum. Although the British colonizers professed to be applying “the law” of the colonized, their (perhaps inevitably) misguided attempts to define and apply such a law necessarily altered forever not only the laws, but also the customs and practices of the peoples they were governing.

\(^{51}\) Agarwal, Bina, *A Field of One’s Own*, pg. 85.
\(^{52}\) Agarwal, Bina, *A Field of One’s Own*, pg. 84.
\(^{53}\) Agarwal, Bina, *A Field of One’s Own*, pg. 84.
\(^{56}\) Agnes, Flavia, “Law and Gender Inequality: The Politics of Women’s Rights in India”, pg. 13, Sec. 2.1.
The errors of the British in their attempts to apply indigenous law may be traced at least as far back as 1772-1773 when Warren Hastings first became governor of Bengal, then Governor-General of India. Hastings set an enduring precedent for the British administration of India when he determined in his oft-cited statement that in “suited regarding inheritance, marriage, caste and other religious usages and institutions, the Laws of the Koran with respect to Mahometans, and those of the Shaster with respect to the Gentoos (Hindus) shall invariably be adhered to.”

The plethora of assumptions inherent in this statement regarding the legal ordering of the lives of both Muslims and Hindus will be explored at greater length below. For the moment it is sufficient to note that the British quest for Hindu law disregarded the predominantly customary nature of this law and how it was a living and evolving order set within a primarily oral culture. Instead, the essential thrust of the British project to administer indigenous law to Hindus was textual and Brahminal. The translations of Shastric texts and Sanskrit commentaries formed a foundation for the prodigious case law that British jurists built upon them like an inverted pyramid. This circumstance renders any contemporary excavation of traditions and customs of the past, especially on a topic as contested as women’s rights, a task of great difficulty.

57 From the quote appearing at page 26 of “The Command of Language and the Language of Command” in Colonialism and Its Forms of Knowledge – The British in India by Bernard S. Cohn, citing to “Reports from Committees of the House of Commons...” 1772-1773 4:348-50.
Having acknowledged this problem, this section, nevertheless, attempts to set forth briefly what can be told about inheritance practices as they relate to women and their interests on the eve of colonization. First, as implied above, diversity in the laws and customs of the peoples known as Hindus must be acknowledged as the primary trait. Though the original texts were Aryan in origin, their assimilation “between Aryan and non-Aryan tribes led to diverse customs and practices.”\(^{59}\) Diversity of practice was present due to caste differences, geographic dispersion, as well as sectarian allegiances. While some of the many variations of customary laws and practices will be discussed below, readers should bear in mind that this bird’s eye view glosses over much of this diversity in the interests of brevity. In addition, though what is written below purports to discuss the status of women’s inheritance rights on the eve of British colonization, its analysis and structure bears the indelible print of Warren Hastings and the army of translators, jurists and \textit{pundits} dispatched to realize his vision. More specifically, the division of inheritance practices into the \textit{Dayabhaga} and the \textit{Mitakshara} systems, together with the subdivision of the \textit{Mitakshara} system into four schools, has been attributed to the active imagination of H. T. Colebrooke, an employee of the East India Company with a knowledge of Sanskrit.\(^{60}\) Bearing in mind that the discussion of the \textit{Dayabhaga} and \textit{Mitakshara} inheritance systems is most likely an over systemization

\(^{59}\) Agnes, Flavia, “Law and Gender Inequality: The Politics of Women’s Rights in India”, pg. 12, Sec. 2.1.
of the various customs which confronted Company officials, this paper, nevertheless, proceeds to use these analytical tools as a more accurate picture of the inheritance systems in use on the eve of colonization appear to have been lost to time.

Traditionally, Hindus lived in a joint family system, which was joint, not only in estate, but also in food and worship.\textsuperscript{61} Within the joint family system, there were several systems of inheritance, two of the most prominent being the \textit{Mitakshara} system and the \textit{Dayabhaga} system. The \textit{Dayabhaga} system prevailed in the region known during British rule as Bengal, which today is comprised of West Bengal and Assam.\textsuperscript{62} The \textit{Mitakshara} system prevailed in most of the rest of India.\textsuperscript{63}

\textbf{i) The \textit{Mitakshara} System}

There were at least four recognized schools under the \textit{Mitakshara} system, the Bombay, Madras, Benares and Mithila schools.\textsuperscript{64} While a detailed discussion of the differences between these schools is beyond the scope of this paper, it is important to note that there was much variation within the \textit{Mitakshara} system. Specifically as relates to women, “there [were] many who [were] recognized as heirs in the Bombay and Madras schools but [were] not recognized as such in the Benares and Mithila schools.”\textsuperscript{65}

\textsuperscript{61} Desai, Sunderlal T., \textit{Mulla Principles of Hindu Law}, Sec. 21.
\textsuperscript{62} Although the period under discussion predates partition and the creation of India’s states, geographical references are generally to regions and states as they exist within contemporary India only, unless otherwise noted.
\textsuperscript{63} Desai, Sunderlal T., \textit{Mulla Principles of Hindu Law}, Sec. 22.
\textsuperscript{64} Desai, Sunderlal T., \textit{Mulla Principles of Hindu Law}, Sec. 33.
\textsuperscript{65} Desai, Sunderlal T., \textit{Mulla Principles of Hindu Law}, Sec. 33(2).
Under the *Mitakshara* system there were two “modes of devolution of property”, survivorship and succession,\(^66\) which applied to the two essential types of property, joint family property and separate property. Joint family property (also referred to as coparcenary property) passed by survivorship. Separate property passed to a decedent’s heirs through succession. Coparcenary property consisted “principally of ancestral property (that is, property inherited from the father, paternal grandfather or paternal great-grandfather), plus any property that was jointly acquired or was acquired separately but merged into the joint property.”\(^67\) A man’s separate property included self-acquired property (as long as such property was acquired without detriment to joint family property), as well as property inherited from anyone other than his father, his paternal grandfather and his paternal great-grandfather.\(^68\)

Only sons were born into the coparcenary system; a Hindu male born into a *Mitakshara* coparcenary immediately took a portion equal to that of his father, thus each coparcener’s property interest decreased in the case of births and increased upon a death among the coparcenary members.\(^69\)

The “Hindu daughter was excluded from succession to her father’s property by the presence of a son, a son’s son, a son’s son’s son, or a widow. Further, when a woman did succeed to property, she held it in limited, as opposed to absolute, estate.

\(^{67}\) Agarwal, Bina, *A Field of One’s Own*, pg.85.
\(^{68}\) Agarwal, Bina, *A Field of One’s Own*, pg. 86.
\(^{69}\) Agarwal, Bina, *A Field of One’s Own*, pg. 86.
She was entitled to possess, use, and enjoy the property, but not to waste or alienate it, during her tenure....”70 When a woman’s tenure over the property came to an end, usually by death, but also sometimes by marriage or remarriage, the property “passed not to her heirs, but to the relatives of the last male holder....The woman’s tenure merely delayed or postponed succession from one male owner to another male owner in the context of a system of succession which confined full ownership rights to men.”71

Of course, as indicated above, there were exceptions to and variations on these rules within the Mitakshara system. For example, although a daughter under the Bombay school could only take in the absence of three generations of males and if her deceased father did not leave a widow, if she was able to take, she took an absolute estate.72

ii) The Dayabhaga System

Unlike the Mitakshara system, the Dayabhaga system did not recognize the right of survivorship between coparceners; instead, all property passed by succession.73 Thus, a man was the absolute owner of all of his property, whether self-acquired or ancestral. He could dispose of this property at will, as his sons did not acquire an automatic interest by birth in their father’s ancestral property.74

Property division could take place among heirs only at a man’s death; the first in the

70 Carroll, Lucy, “Daughter’s Right of Inheritance in India”, pp. 791- 792.
71 Carroll, Lucy, “Daughter’s Right of Inheritance in India”, pg. 792.
72 Agarwal, Bina, A Field of One’s Own, pg. 87.
73 Desai, Sunderlal T., Mulla Principles of Hindu Law, Sec. 78.
74 Agarwal, Bina, A Field of One’s Own, pg. 88.
line of succession were a man’s sons who took in equal shares. If any of the sons had predeceased the father leaving a son or a grandson, then that male descendant of the predeceased son would take the share of the predeceased son. Only if there were no male descendants for three generations could a chaste widow take a limited estate. If there was no chaste widow, then a daughter could take a limited estate, with an unmarried daughter superior in priority to a married daughter.75

For purposes of assessing women’s inheritance rights under these two different systems of inheritance, the principle difference between the Dayabhaga and the Mitakshara systems was that the “Dayabhaga recognized the widow and (after her) daughters as heirs even when the man’s ancestral estate had not been separated before his death. Hence, unlike under Mitakshara, women inherited an interest in all property, irrespective of whether it was ancestral or separate.”76 This meant that women under the Dayabhaga system had a somewhat greater likelihood of inheriting some property than women under the Mitakshara system.77

iii) Stridhana

This discussion of the pre-colonial inheritance rights of women in India would be incomplete without introducing the concept of stridhana. The term “stridhana” literally translates as “woman’s property” and has been the subject of extensive analysis from antiquity to the present, including the commentaries in both

75 Agarwal, Bina, A Field of One’s Own, pg. 88.
76 Agarwal, Bina, A Field of One’s Own, pg. 88.
77 Agarwal, Bina, A Field of One’s Own, pg. 88.
the Mitakshara and Dayabhaga systems.78 Despite the name, in most schools not all property acquired by a woman was considered her stridhana. Whether property constituted a woman’s stridhana -- and the type of stridhana it constituted -- depended on the following three factors:

(1) the source from which the property was acquired;

(2) her status at the time of acquisition, that is whether she acquired it during maidenhood, coverture, or widowhood; and lastly,

(3) the school to which she belong(ed).79

Generally speaking, whether property was considered stridhana or not determined a woman’s capacity to dispose of the property at will and determined who received the property at her death. During her lifetime, a woman could dispose of her stridhana at her pleasure and a woman’s stridhana passed to her heirs at her death, rather than to her husband’s heirs,80 or to the heirs of the person from whom she inherited the property.81 For our purposes it is important to note that if one assumes that colonial jurisprudence correctly ascertained the parameters of stridhana that existed prior to their arrival – a very big assumption – then only in one school, the Bombay school, could property inherited by a woman be her stridhana; even in this limited case the property had to have been inherited from

78 Desai, Sunderlal T., Mulla Principles of Hindu Law, Sec. 112.
79 Desai, Sunderlal T., Mulla Principles of Hindu Law, Sec. 124. (Emphasis in original)
80 Desai, Sunderlal T., Mulla Principles of Hindu Law, Sec. 124.
81 Desai, Sunderlal T., Mulla Principles of Hindu Law, Sec. 130.
another female.\textsuperscript{82} In all other circumstances a woman acquired only a limited estate (often referred to as a “widow’s estate” or a “woman’s estate”) in property which she inherited, that is she could not alienate the property except for very limited circumstances, and, as mentioned above, the property did not pass to her heirs at her death.\textsuperscript{83}

Having said this much, it is nevertheless important to note that this discussion greatly simplifies the concept of \textit{stridhana} and the multitudinous interpretations given it over time and across regions. Even the brief generalizations given here will be found wanting upon close scrutiny. Suffice it to say that the topic of the scope of women’s property rights – especially property over which a woman had freedom of disposition -- produced a copious variety of disquisitions, which as a body serve as a testament to the contested nature of women’s property interests.

\textbf{iv) Other Systems of Succession in Pre-Colonial India}\textsuperscript{84}

Although the two patrilineal inheritance systems, the \textit{Mitakshara} system and its various schools, together with the \textit{Dayabhaga} system, accounted for the inheritance practices of the vast majority of Hindus in India, there were a couple of significant pockets of matrilineal and bilateral inheritance among Hindus in southern India. The Nangudi Vellalars of Tamil Nadu practiced bilateral

\begin{footnotes}
\item[82] Desai, Sunderlal T., \textit{Mulla Principles of Hindu Law}, Sec. 147.
\item[84] The descriptions and conclusions contained in this section are drawn from Bina Agarwal’s work, \textit{A Field of One’s Own}, particularly the segments on “Women’s land rights in traditionally matrilineal and bilateral communities”, pp. 100-133, and on “Women’s land rights, structural conditionalities, and gender relations”, pp. 133-152.
\end{footnotes}
inheritance, while matrilineal inheritance was practiced by the Nayars and Tiyyars of Kerala, the Bants of south Canara (now in Karnataka state), and the Phadiyas and Chettis of Wynad district (bordering northern Kerala and Tamil Nadu).85

The matrilineal descent of ancestral property existed within a system of collective property ownership as part of a matrilineal joint family. The attributes of property ownership by matrilineal communities were not akin to a freehold estate, but rather like an inherited right to tenancy, which often was sublet then again to those who worked the land. Typically, all of the adult members of the matrilineal joint family needed to consent before there could be a partition of the joint family’s property interest.

The existence of these communities in which land passed by matrilineal and bilateral descent, as opposed to patrilineal descent, raises the question of the degree to which these patterns of inheritance contributed to greater equality between the sexes. Indeed, it does appear that certain advantages accrued to women and girls in these societies. First, girl children were particularly desired in matrilineal groups and the education of females was more likely to be a community value. Furthermore, women in these communities had greater freedom of movement and more public interaction than many women in communities where land passed by patrilineal descent.

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85 Agarwal, Bina, A Field of One’s Own, pp. 83-84. Bina Agarwal also discusses the matrilineal practices of several other tribal groups located in the Northeast of India, including the Khasi and Garo communities. They are not included in this discussion because they are not considered Hindu.
Yet despite these clear advantages, matrilineality did not herald gender equality as even these societies exhibited certain critical patriarchal characteristics. First and foremost, in all of these communities jural authority, that is the authority to make and adjudicate the rules governing society such as the power exercised by caste councils, remained entirely in the hands of men. Thus, men were able to use these bodies to “consolidate social prestige and political power.”86 Neither did matrilineality alter the gender division of labor. Domestic work and childcare remained women’s domain; formal managerial authority of the joint family assets, particularly the land, remained primarily with men. Finally, rights in land did not guarantee equal sexual freedom.

B. Chinese Customary Law: Women at the Margins of an Enduring Patriliny

Singapore and Hong Kong, the two city-states87 included as subjects of this study, are essentially colonial creations. As such it is pertinent to query what the legal and customary inheritance system antecedents are for the peoples who came to inhabit them, as well as whether and to what extent these pre-colonial inheritance systems are relevant. Here it is posited that there are at least two reasons why the pre-colonial inheritance systems of the peoples of Singapore and

86 Agarwal, Bina, A Field of One’s Own, pg. 151.
87 While acknowledging that Hong Kong is now a part of the People’s Republic of China, as a Special Administrative Region (SAR) it for the time being possesses certain autonomous powers and systems, including a separate legal system, that justify its analysis as an independent entity, even if it is no longer a separate city-state – if, indeed, Hong Kong ever could be considered a city-state in the sense of possessing the sovereignty of a modern state.
Hong Kong are relevant to charting transformations in women’s rights to inheritance. First, although the British colonizers sought to govern those who came to live in Singapore and Hong Kong in accordance with the laws of England, they did seek to make adjustments for local customary practices so that the English laws would not be too oppressive. As discussed in the chapter on the colonial era, the degree of adjustment to accommodate Chinese customary practice differed greatly between Singapore and Hong Kong. Second, to assert that the pre-colonial practices of the peoples who came to inhabit Singapore and Hong Kong are irrelevant is to assert that they arrived devoid of culture or community – a kind of social *tabula rasa*, an assertion that the discussion of the colonial era provided below will reveal as false.

While the fact that the British sought to accommodate to some degree the customary laws and practices of the Chinese in Singapore and Hong Kong is important in establishing the relevance of Chinese inheritance practices, this investigation into the inheritance practices of Han Chinese is distinct from the efforts of the colonial rulers to determine such customs, a subject which will be discussed separately below. This summary of pre-colonial Han Chinese inheritance systems is distinguishable from the colonizers efforts to determine such customs in four ways. First, this investigation is free of the omnipresent ulterior motive of the colonizers to ease administration of the colonies. Second, this study is not compelled to fit its findings within the confines of either British statutory law or the common law system of precedents. Third, this study benefits from recent
scholarship on the subject, scholarship which shares the first two benefits just listed. Finally, this study enjoys the benefit of hindsight.

The essential characteristics of the Han Chinese inheritance system were rendered in detail in an edict issued during the Tang dynasty (618-906) and are summarized by David Wakefield in his work *Fenjia: Household Division and Inheritance in Qing and Republican China* as follows:

The edict stated that, first, family property was to be divided equally among brothers. Second, if a brother died, his son or sons inherited the share. Third, unmarried sons were entitled to extra property to pay marriage expenses. Fourth, a sister-in-law’s dowry property was not divided when her husband and his brothers divided their father’s property. And, fifth, a widow without a son received her husband’s share of property. This pattern of property division would remain largely intact down to the twentieth century and the Republican Revolution...88

While these continuities are striking – especially the provision that son’s inherit equally to the exclusion of daughters – there were some important variations across dynasties in women’s inheritance rights. Some of these variations are the subject of controversy among scholars of China’s imperial past. The more recent controversies, some of which will be explored here, are successors to a debate

88 Wakefield, David, *Fenjia: Household Division and Inheritance in Qing and Republican China*, pg.12.
“begun in the 1950s and led by two eminent Japanese sinologists, Shiga Shuzo, and the late Niida Noboru, over whether Chinese women can be said to have inheritance rights.” As discussed in the Introduction, inheritance rights are an important element of women’s empowerment, contributing as they do to women’s financial security and personal autonomy.

Recent iterations of the debate over Chinese women’s historical rights to inherit address such issues as:

1) whether dowries should be considered a significant part of intergenerational transfer and as such part of the inheritance system;

2) whether there was a rule in the Song Dynasty that daughters received a share equal to one half of her brother’s share; and

3) whether widows without sons in the Song Dynasty inherited their husband’s property outright, instead of as custodians for the next male heir.

However these controversies are resolved, a consensus can be forged among these contemporary scholars of imperial China that women’s property rights reached their zenith during the Song Dynasty, only to be eroded during Yuan and Ming rule so that on the eve of the establishment of the British colonies in Singapore and Hong Kong during the Qing Dynasty Han women’s inheritance rights had reached a nadir.

Kathryn Bernhardt in her book entitled *Women and Property in China, 960-1949* discusses two types of property succession common in imperial China. One

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was “household division” and it refers to the division of a family’s property in the presence of sons. Depending on the laws in effect at the time, the proclivities of the family involved, and other factors, a household division could take place either before or after the death – sometimes long after the death – of the head of the family, but always involved the equal division of property among living sons, with the sons of a deceased son taking his share, per stirpes.

Bernhardt refers to the other form of succession as “patrilineal succession” which she defines as “those principles and practices that governed inheritance in families where there were no birth sons.” Bernhardt argues that it was in the absence of birth sons that women’s property rights were most likely to come into play and where, in contrast to the continuity of the laws and practices of equal division among birth sons, law and practice varied over time and the rights of women as daughters and widows waxed and waned.

Bettine Birge does not challenge Bernhardt’s typology of succession as divided into household division and patrilineal succession. Nevertheless, she disagrees with Bernhardt on at least three points regarding the inheritance rights of Song women: the role of dowry in the succession scheme, whether there was a half-share rule for daughters during the Song, and whether widows were custodians or more autonomous inheritors of their husbands’ shares in the absence of sons. These

90 Bernhardt, Kathryn, Women and Property in China, 960-1949, pg. 2.
91 Wakefield, David, Fenjia: Household Division and Inheritance in Qing and Republican China, pg. 40.
92 Bernhardt, Kathryn, Women and Property in China, 960-1949, pg. 47.
issues are indicative of the degree of variability in women’s inheritance rights in Imperial China. At issue is whether China in the Song ever flirted with adopting a more bilateral mode of succession rather than strictly adhering to the parilineal Confucian ideal. The exchange between Bernhardt and Birge explores this trist with female empowerment, but also documents China’s return in the Yuan and Ming to its Confucian passion, patrilineality, an ardor which endured through the Qing.

i) The Role of Dowry

On the issue of dowry Bernhardt maintains that in the presence of sons, a daughter's interest in natal family property was limited to a dowry “at most”; the amount of this dowry could be specified in a father’s will, otherwise the amount was left to the determination of her brothers.\(^93\) Bettine Birge in her review of Bernhardt’s book explicitly confronts Bernhardt’s dismissive attitude toward dowry; Birge asserts that “both household division and patrilineal succession operated as a vehicle for the transmission of property to women in part of the overall dowry regime in premodern China.”\(^94\) According to Birge, dowry was an important part of a family’s intergenerational transfer of wealth, particularly during the Song Dynasty, a period during which dowry portions for elite women increased in size\(^95\) and gifts of real property were not uncommon.\(^96\)

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ii) The Daughter’s Half-Share

Bernhardt and Birge also do not agree on whether there was ever a half-share rule for daughters during the Song Dynasty. Bernhardt notes that the evidence for the half-share law came from only two cases of a single official\(^97\) both of which were reported in the *Collection of Lucid Decisions by Celebrated Judges* (*Minggong shupan qingmingji*), a compendium of 473 judgments from the Southern Song generally referred to as the *Qingmingji*. In the context of a lengthy discussion of the substance of the cases themselves, their treatment within the *Qingmingji*, and the likely effects of such a practice on the political economy, Bernhardt dismisses them as “implausible, even within the context of the Southern Song.”\(^98\) Taking a contrary view, Birge asserts that the half-share “rule is not an anomaly when seen as part of a changing discourse on dowry in the Song and within long-term developments in the dowry regime in China.”\(^99\)

iii) The Widow’s Inheritance Rights

The third area of disagreement between Bernhardt and Birge is whether the sonless widow was a mere custodian of her husband’s property as Birge asserts, or a more autonomous agent as maintained by Bernhardt. This portion of the debate

\(^{96}\) See Birge, Bettine, “Review: Gender, Property, and Law in China”, pg. 596 where she implies that land was commonly included in Song dowries with the statement that “Dowries after the Song rarely included land and were never again as large on average.”


focuses on the role of widows in households in danger of becoming “extinct”. If the heads of the household both died without a son, then the household would become an extinct household, ceasing to exist as a lineage and as a tax unit. Generally speaking, this outcome was considered both culturally and administratively undesirable. There were a number of options open to households at risk of becoming extinct. A husband could take on a concubine in hopes that she would produce the desired son. (Among Han Chinese in imperial China the sons of concubines and the sons of principal wives shared equally in family property.) Alternatively, the couple (or the surviving spouse if one had died) could adopt a son in what will be referred to as a pre-mortem adoption. Finally, if both husband and wife had died without a son, a son’s son, or a son’s son’s son, the clan could adopt a son on their behalf through what will be referred to as a post-mortem adoption. Whether the adoption was pre-mortem or post-mortem, the adopted son had to be of the appropriate generation and kinship proximity to the adopting father (whether the adopting father was living or deceased) for the adoption to be effective for inheritance purposes.

During the Tang Dynasty (618 - 907 CE) the state made no distinction between pre-mortem and post-mortem adopted sons; both inherited the same property interests as biological sons, i.e. the entire family estate.\textsuperscript{100} The Song

\textsuperscript{100} Bernhardt, Kathryn, “The Inheritance Rights of Daughters: The Song Anomaly?”, pg. 274.
Dynasty (960 - 1279 CE) created a “novel distinction”\(^{101}\) between pre-mortem and post-mortem heirs such that only the pre-mortem heir could inherit the family estate. The post-mortem heir could only acquire a fractional interest in the extinct family estate. It is generally agreed that the purpose of this distinction between pre-mortem and post-mortem heirs was to increase the likelihood of state confiscation of land that could be resold or leased in order to feed the state fisc, which was continually drained by conflict and war. At issue is the degree to which the Song state’s interest in land confiscation took priority over the more traditional Confucian goal of the Chinese state which was to ensure patrilineal succession. Bernhardt asserts that the interest in confiscation created a space for widows to inherit their husband’s property outright in conformity with the state’s goal of ultimately confiscating the property and that this “expansion in the state’s claim on the property of extinct households” was the most important change in the Song Dynasty.\(^{102}\) While Birge agrees that the “hands-off policy of the Song state (compared to later dynasties) gave widows considerable freedom”, she denies that this freedom encompassed inheritance outright or that it was a manifestation of a lack of interest in patrilineal succession on the part of the state.\(^{103}\) Birge concludes that “widows were meant to have custodial powers over family property to preserve it for a patrilineal heir. The logic of the law may have been unchanged in imperial times, but this logic intersected differently with the priorities and power of each

\(^{101}\) Bernhardt, Kathryn, “The Inheritance Rights of Daughters: The Song Anomaly?”, pg. 274.
\(^{103}\) Birge, Bettine, “Review: Gender, Property, and Law in China”, pg. 590.
dynastic state, Song, Yuan, Ming, and Qing.” In sum, where Birge sees consistency in Song policies in support of the patrilineal lineage system in comparison with preceding and succeeding dynasties, Bernhardt see differentiation based on the specific fiscal needs of the Song state.

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Not subject to contestation by Birge is Bernhardt’s position that the reduction in the rights of the post-mortem heir came as a benefit not only to the state, but also to any daughters left in the extinct household. The fraction to be received by the post-mortem heir depended on whether there were daughters present and whether those daughters were unmarried, married or “returned”. For example, if there were a post-mortem heir and one or more unmarried daughter(s), the unmarried daughter(s) would take $\frac{3}{4}$ of the estate, while the post-mortem heir received $\frac{1}{4}$. In this situation the state received nothing. If there were a post-mortem heir in combination with one or more married daughter(s), the daughter(s) would receive $\frac{1}{3}$, the post-mortem heir $\frac{1}{3}$ and the state $\frac{1}{3}$; this was the greatest portion a post-mortem heir could receive, and it was the amount he received when either there were no daughters, or the only daughters in existence were married. (If there were only unmarried daughter(s) (or a combination of

105 Bernhardt, Kathryn, “The Inheritance Rights of Daughters: The Song Anomaly?”, pg. 274. On this page Bernhardt presents an interesting chart on the “Distribution of Extinct Household Property in the Southern Song”.}
unmarried and returned daughters) of an extinct household, these daughters were entitled to all of the property belonging to the extinct household.106)

Differentiating between daughters based on their marital status was another Song Dynasty innovation. During the Tang Dynasty the presence of daughters, whether married or unmarried, prevented property from being confiscated by the state. While the position of all daughters was strengthened vis a vis the post-mortem heir under the Song Dynasty, the position of married and returned daughters eroded vis a vis the state.

Bernhardt and Birge also agree that widows had great latitude in selecting an heir,107 though as discussed above Bernhardt sees this as part of a much greater autonomy accorded a widow over her husband’s estate during the Song.108 But whether or not Birge’s account of the importance of dowry in Song Dynasty successions is accepted, whether or not Song daughters enjoyed a share of the family estate equal to ½ of their brothers’ shares as Birge maintains, and whether or not widows inherited their husband’s shares outright as opposed to as custodians for the next male successor as argued by Bernhardt, it seems clear from both

scholars’ accounts of the Yuan-Ming transition that none of these advantages to women survived the changes wrought by the Yuan and Ming Dynasties.109

The Yuan Dynasty (1271-1368), founded by the Mongols off the northern steppes, was a foreign dynasty administered in accordance with many customs and practices alien to traditional Chinese culture and society as such customs and practices had existed during the Tang and Song.110 Birge’s discussion of the changes wrought by Yuan rule demonstrates how the priority of the Yuan government, i.e. “to preserve every household intact in order to mobilize sufficient numbers of men for military and other corvee service”, resulted in a deterioration of the position of women in relation to their opportunities to succeed to and control property.111

A daughter’s inheritance rights were diminished by at least three developments during the Yuan Dynasty. First, the distinction between pre-mortem and post-mortem heirs did not survive the Song Dynasty,112 so that a post-mortem heir, i.e. an heir selected by the clan after the passing of the head of the household and his wife, succeeded to the family estate rather than any surviving daughters, whether married or unmarried. If the clan did not appoint a post-mortem heir for

an extinct household, daughters still had difficulty claiming the estate due to the second development which was that for the first time in the history of imperial China daughters in extinct households could not inherit their father’s estates unless they “invited in a uxorilocal husband who could rescue the household from extinction and assume its existing military service and other tax and corvee obligations.”113 Even when a daughter invited in a husband to preserve the family estate, the property did not go to the daughter, but to the uxorilocal husband.114 Finally, there is no evidence that any rule which gave a daughter a share of the family estate equal to ½ that of her brother survived into the Yuan Dynasty.115

The position of widows suffered a similar deterioration with, for example, the introduction of the Mongol custom of levirate marriage, a custom that had been anathema to the Chinese prior to the Yuan. In a levirate marriage as practiced by the Mongols a younger male relative of a widow’s deceased husband inherited the widow.116 This practice became legal for Chinese pursuant to a declaration by Khubilai Khan in January 1272. The legalization of the levirate marriage enabled an eligible levir to “take over a widow’s estate and usurp her authority by marrying

116 Birge, Bettine, "Women and Confucianism from Song to Ming: The Institutionalization of Patrilineality", pg.225.
Although the plight of the widow eased somewhat in 1276 when Yuan law was revised to allow “widows to resist levirate unions by staying chaste and not marrying at all”, and again in 1330 when the Yuan outlawed the levirate for all Chinese, according to Birge’s narrative the damage to the widow’s authority had been done.

The subordination of women’s succession rights during the Yuan created an opportunity for advocates of Confucianism. In the waning days of the Yuan and the rise of the Ming, Neo-Confucianists invoked a mythical past, a time of a pure patrilineal succession. Capitalizing on women’s subordinated status under the Yuan, proponents of Confucianism during the late Yuan and early Ming successfully advocated for the institution of a new legal regime, one which asserted the legal and cultural authority of patrilineal descent in line with Confucian ideals so that “in matters of inheritance, Ming law can be seen to follow neatly from Yuan precedent while also conspicuously incorporating Daoxue ideals and support for lineages.”

Some aspects of this new legal regime, such as the restoration of the status of the post-mortem heir, can be seen as a return to Tang law. Other aspects were unprecedented, such as the transformation from a moral obligation to a legal

120 Birge, Bettine, ”Women and Confucianism from Song to Ming: The Institutionalization of Patrilineality”, pg. 220.
obligation of the necessity of appointing an heir for a household in danger of becoming extinct. This latter development coupled with the adoption of “mandatory nephew succession”\textsuperscript{121} not only made it unlikely for a daughter to inherit the family estate, it also severely curtailed the widow’s discretion on the selection of an heir. “This shift toward patrilineality and the loss of property rights for women continued into the Qing.”\textsuperscript{122}

In the context of this ascendant patrilineality there were two bright spots for the women of late Ming and Qing China. One was the improvement in the status of the concubine. Bernhardt describes the concubine's transformation as one in which she is elevated from “little more than a sexual servant to a kind of minor wife.”\textsuperscript{123} Although the concubine remained subservient to the wife throughout the Qing, if the wife predeceased her husband, then upon the husband’s death if he died without sons, it became possible for a concubine to obtain custody of his property and to designate his heir.\textsuperscript{124}

The other bright spot was the increase in the power of the chaste widow to select the heir of her choice after a period of restricted authority in the early Ming. Where Song law had permitted a widow without sons so much latitude in handling the family estate that she could bequeath property to others through a will so long

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\textsuperscript{121} Bernhardt, Kathryn, \textit{Women and Property in China, 960-1949}, pg. 47.
\textsuperscript{122} Birge, Bettine, “Women and Confucianism from Song to Ming: The Institutionalization of Patrilineality”, pg. 221.
as the beneficiaries were above the fifth degree of mourning,\textsuperscript{125} in 1369 an early Ming law decreed that a widow was obligated to select a nephew of the appropriate generation as heir. Furthermore, in selecting this heir she was required to obtain the consent of the lineage head, thus severely curtailing the widow’s discretion in the selection.\textsuperscript{126} The ordinance went so far as to create in the nephews most closely related to the deceased a legal claim to the succession, and through it to the underlying property.\textsuperscript{127} It was this regime of compulsory nephew adoption that the cult of the chaste widow altered by returning some discretion to widows who agreed to remain chaste after the death of their husbands. Initially, the move to provide chaste widows with more authority in the selection of an heir came through legal practice as reflected in judicial digests, as opposed to through changes to codified law. Only in the 1770’s was codified law changed to give to succession based on affection the same legal standing accorded to succession based on lineage order.\textsuperscript{128}

Thus, on the eve of the establishment of the British colonies of Singapore and Hong Kong in the Nineteenth Century, among Han Chinese the essential features of the Tang Dynasty inheritance system remained intact:\textsuperscript{129}

1. Family property was inherited equally among brothers;

\textsuperscript{125} Bernhardt, Kathryn, \textit{Women and Property in China, 960-1949}, pg. 17.
\textsuperscript{127} Bernhardt, Kathryn, \textit{Women and Property in China, 960-1949}, pg. 64.
\textsuperscript{128} Bernhardt, Kathryn, \textit{Women and Property in China, 960-1949}, pg. 71.
\textsuperscript{129} Wakefield, David, \textit{Fenjia: Household Division and Inheritance in Qing and Republican China}, pg.12.
2. If one brother died before the household division, his sons took his share to be divided equally among themselves, i.e. *per stirpes*;

3. Sons who were unmarried at the time of household division received extra property to cover their marriage expenses;

4. The dowry property of a sister-in-law was not included in the property to be divided among the brothers; and

5. A widow without a son received her husband’s share of the property.

As pertains to the inheritance rights of women, variations in the Chinese inheritance system occurred over time within the parameters of these basic rules, so that by the Nineteenth Century the following additional attributes were added to this list of Han Chinese inheritance practices:

1. A widow without sons was required to adopt an heir of the appropriate generation and lineage, though she had some discretion in the selection of this heir;

2. The surviving concubine of a man without sons who died having been predeceased by his wife, if she remained chaste, could receive the family estate in custody for the next male heir, and with such property the discretion to select the heir, as long as her selection was of the appropriate generation and lineage; and

3. If both husband and wife died without a son and there was no eligible concubine, the lineage would select an heir of the appropriate generation
and lineage; this heir, though adopted post-mortem, had the same rights to the family estate as a biological son or a son who was adopted pre-mortem.

In this Confucian patrilineal scheme a daughter had little chance of inheriting any family property, though she may have received a dowry at the discretion of her male kin. In sum, women’s property interests in the late Qing Dynasty existed only in the interstices of a firmly patrilineal/patriarchal system of succession.

C. The Inheritance Rights of Women under Shari’a Law

The Islamic law of inheritance is often thought of in its narrow sense which is to think of it as the “science of the shares” or ‘ilm al-fara’id. This is the intricate law which determines the distribution of a propositus’ property at death. Although this law is founded upon a number of Qur’anic verses, it has evolved, nevertheless, into substantively separate bodies of law for the Sunni and the Shi’i, with further divisions within each sect.130 As comprehensive as these bodies of law are, they are but part of the Islamic inheritance system.

i) The Science of the Shares

The jurisprudence of the science of the shares, like all of the Shari’a, evolved through a “process of discovery of Allah’s law”131, a process which required “speculative reasoning on the part of scholar-jurists.”132 Building upon the divine

130 Coulson, N. J., Succession in the Muslim Family, pp. 4-5.
131 Coulson, N. J., Succession in the Muslim Family, pg.4.
132 Coulson, N. J., Succession in the Muslim Family, pg.4.
revelation embodied in the Qur’an, and the Sunna of the Prophet Muhammad, yet divided by fundamental theological differences and a plurality of local social standards and practices, the scholar-jurists produced what have come to be recognized as at least eight separate versions of the Shari’a. These divisions are reflected in the science of the shares so that in order to ascertain the distribution of a propositus’ property at death one must know whether the propositus was a Sunni or a Shi’i and if a Sunni whether he or she was a follower of the Hanafi, Maliki, Shafi’i or Hanbali School. Shi’i are divided into three distinct branches, the Ithna ‘Asharis, Isma’ilis and Zaidis. As reflected in these divisions, “diversity of doctrine is the essence of traditional Shari’a law.”

Traditionally, the Shari’a “represented a complex set of social, economic, cultural, and moral relations that permeated the epistemic structures of the social and political orders” in a way alien to a modern audience. Unlike modern law which is imposed on a population by a centralized, bureaucratized, homogenized state, the Shari’a “originated from, and cultivated itself within, the very social order which it came to serve in the first place.” Cultivated within the social order by respected jurists, the Shari’a developed an authority autonomous from the “political-executive” powers of the state.

133 Coulson, N. J., Succession in the Muslim Family, pg.4.
134 Coulson, N. J., Succession in the Muslim Family, pg.5.
135 Coulson, N. J., Succession in the Muslim Family, pg.5.
137 Hallaq, “What is Shari’a?”, pg. 156.
This description of a socially and culturally embedded Shari’a aptly captures the status of Shari’a law in South and South-East Asia prior to colonization. In each region followers of the Muslim faith had integrated this faith with local traditions and customs. The influence of these disparate local customs on the implementation of Shari’a law in each locale resulted in a plurality of inheritance practices. These inheritance practices, which included matrilineal and patrilineal, as well as bilateral succession, meant that the status of Muslim women across South and South-East Asia varied by region. Thus, while this section commences with a general discussion of the principles of Islamic succession, it will conclude with an examination of how these principles were manifest within the societies of South and South-East Asia.

Given the organic contextualizing of the Shari’a in each locality, the diversity of schools, and the exquisite detail with which the science of the shares has been worked out in each, a comprehensive elaboration on this jurisprudence is well beyond the scope of this work. Nevertheless, a small sampling of the fundamental rules is necessary to appreciate the basic attributes of this jurisprudence. As the Sunni Hanafi School is most prevalent in South Asia, and the Sunni Shafi’i most prevalent among the Malay of South-East Asia, preference is given to these interpretations.

139 Coulson, N. J., Succession in the Muslim Family, pg.5.
140 Hooker, M.B., Islamic Law in South-East Asia, pg. 3.
The testamentary freedom afforded a Muslim testator is generally limited to 1/3 of his or her estate, though this rule, like most rules, is modulated by contingencies and exceptions:

Sunni (Hanafi and Shafi’i) Rule: a bequest which distributes greater than 1/3 of the net estate is *ultra vires* and therefore requires agreement to the distribution by the heirs after the death of the propositus.\(^{141}\)

Shi’i (Ithna ‘Ashari) Rule: a distribution of greater than 1/3 of the net estate is similarly *ultra vires*, however consent of the heirs can be obtained either before or after the death of the propositus.\(^{142}\)

Sunni (Hanafi and Shafi’i) Rule: a bequest (within the bequeathable 1/3) to an heir is *ultra vires* and therefore ineffective without the post-mortem consent of the other heirs.\(^{143}\)

Shi’i (Ithna ‘Ashari) Rule: a bequest (within the bequeathable 1/3) can be made to an heir.\(^{144}\)

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\(^{141}\) Regarding Hanafi law see Pearl, *A Textbook on Muslim Personal Law*, pp. 142-146; regarding Shafi’i law see Ahmad Ibrahim, *The Distribution of Estates According to Shafi’i Law*, pg. 15.

\(^{142}\) Pearl, *A Textbook on Muslim Personal Law*, pp. 145-146.

\(^{143}\) For the Hanafi rule see Pearl, *A Textbook on Muslim Personal Law*, pp. 145-146; for the Shafi’i rule see Ahmad Ibrahim, *The Distribution of Estates According to Shafi’i Law*, pg. 19.
The remaining 2/3 of the estate of the propositus (or all if he or she died intestate) is to be divided into fixed fractional parts among his or her heirs. Coulson divides these heirs into two categories, the “inner family” and the “outer family”, the inner family being all the male agnates and all the relatives specifically nominated by the Qur’an (i.e. the Qur’anic heirs), the “outer family” being everyone else.\textsuperscript{145} Under Sunni law there are twelve Qur’anic heirs:\textsuperscript{146}

(1) Husband.

(2) Wife.

(3) Father.

(4) True Grandfather [a male ancestor between whom and the propositus no female intervenes, i.e. a paternal grandfather]

(5) Mother.

(6) True Grandmother [a female ancestor between whom and the propositus no false grandfather intervenes – note that both the maternal and paternal grandmother can inherit under this definition]

(7) Daughter.

(8) Son’s daughter (however low)\textsuperscript{147}.

(9) Full sister.

\textsuperscript{144} Pearl, \textit{A Textbook on Muslim Personal Law}, pp. 145-146.
\textsuperscript{145} Coulson, \textit{Succession in the Muslim Family}, pg. 31.
\textsuperscript{146} Pearl, \textit{A Textbook on Muslim Personal Law}, pp. 149-150.
\textsuperscript{147} Note that the son’s daughter is a Qur’anic heir, i.e. inner family, whereas the daughter’s daughter is outer family.
(10) Consanguine sister. (children of the same father, but different mothers)

(11) Uterine brother. (children of the same mother, but different fathers)

(12) Uterine sister.

Qur’anic heirs may receive a fraction of the estate depending upon what other relations have survived the propositus. One general rule is that the nearer excludes the more remote.148 Another general rule, the one most pertinent to this project, is that to a male goes a portion equal to two females when the parties are similarly situated in relation to the propositus.149 Thus, if a man dies intestate leaving a wife, a son and a daughter, the wife will receive 1/8 of the estate, the son 7/12 and the daughter 7/24. If this man had died leaving more than one wife, the surviving wives would have shared the 1/8.150 However, if a woman dies intestate survived by her husband, a son and a daughter, the husband receives ¼, the son ½, and the daughter ¼.151 These specific proportions are contingent on the specific constellation of survivors, but the two to one principle, especially as relates to brothers and sisters, remains the same.

As implied above, the science of the shares involves the compulsory division of the propositus’ property, both real and personal, immovable and movable, into 

149 Pearl, A Textbook on Muslim Personal Law, pg. 149.
151 These shares are calculated in accordance with the “Table of Succession According to the Shafi’i School of Law” provided in The Distribution of Estates According to Shafi’i Law by Professor Ahmad Ibrahim.
what may be numerous fractional parts. This is the system that was in place from around the second century A.H. Thus, in Power’s words Muslims “found themselves burdened by a system of inheritance that not only severely constrained the freedom of the individual to determine the ultimate devolution of his property, but also resulted in the inevitable fragmentation of property.”

ii) Gifts and Endowments

Into this restrictive system of inheritance the jurists, through interpretations of the Hadith, introduced the doctrine of hiba or gift, and the doctrine of waqf or endowment. While a propositus was limited to the testamentary (including death bed) disposition of only 1/3 of his or her estate, the propositus was and (generally) is “legally free to dispose of his property in any way he sees fit prior to his final death sickness. Islamic law places no limitations whatsoever upon the amount of property that a person may alienate during his lifetime, whether in favor of his eventual heirs or anyone else.”

A waqf, like a gift, requires the permanent and irrevocable dedication of the subject property. Among the essential requirements of a waqf are the following:

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153 Pearl, A Text on Muslim Personal Law, pg. 189.
155 This qualification reflects the diminished availability or utility of gifts to a waqf as is discussed below.
156 Powers, “The Islamic inheritance System”, pg. 21; on page 22 Powers qualifies this by stating that the donor may not favor one child over another.
157 That a waqf is irrevocable from the moment of declaration is the majority view within Hanafi law. Maliki jurists and a minority within the Hanafi school permit
• That the subject of the endowment be of a permanent and tangible nature and yield a usufruct;

• That the object of the \textit{waqf} be pleasing to Allah;

• That the \textit{waqf} be created in perpetuity; and

• That the \textit{waqf} be inalienable.\textsuperscript{158}

Fulfillment of the requirement that the \textit{waqf} be pleasing to Allah did not require that the immediate beneficiary of the \textit{waqf} be a public charity; rather, the \textit{waqf} or settlor could make his or her family, children or descendants the initial beneficiaries of the \textit{waqf}, with the charity as a secondary or remainder beneficiary.\textsuperscript{159} The advantage of this kind of family endowment is that it “provided a proprietor with a legal means to remove all or part of the patrimony from the effects of the Islamic law of inheritance...and enabled the proprietor to establish a lineal descent group with exclusive usufructory rights to the endowment revenues...”\textsuperscript{160}

Powers notes that this circumvention of the requirements of the science of the shares was controversial among early Muslim jurists, but finds that this controversy was resolved in favor of the \textit{waqf}.\textsuperscript{161} Powers concludes that “whatever the arguments for and against the institution, there can be no denying the fact that the revocation until the \textit{waqf} is confirmed by a \textit{qadi}. See Pearl, \textit{A Text on Muslim Personal Law}, pg. 197.

\textsuperscript{158} Pearl, \textit{A Text on Muslim Personal Law}, pp. 195-197.
\textsuperscript{159} Pearl, \textit{A Text on Muslim Personal Law}, pg. 195.
\textsuperscript{160} Powers, “The Islamic Inheritance System”, pg. 23.
\textsuperscript{161} Powers, “The Islamic Inheritance System”, pg. 23.
overwhelming majority of Muslim jurists belonging to all four schools of law approved of the institution, which became an integral part of Islamic Law.”

Kozlowski also demonstrates that *awqaf* (plural of *waqf*) were used prior to the nineteenth century C.E. to fulfill both personal and public objectives. He notes that Muslims found the promise of stability and continuity offered by the *waqf* (however ephemeral) to be attractive for dealing with land. More specifically, Kozlowski finds *waqf* to be a favored political and religious tool among Muslim rulers in India dating from the twelfth century A.D. on.

Thus, the *modus operandi* for the transmission of property at a succession “throughout the Muslim world...from the ninth to the nineteenth centuries A.D.” was through an Islamic Inheritance System embedded within an organically cultivated, discursive Shari’a; this socially engaged System was one whereby a propositus could transfer his or her property by *inter vivos* gift to individuals, could transfer revenue-producing property to a *waqf* for the benefit of family or charity, and could make a testamentary transfer of up to 1/3 of the balance of the estate, if any, to the beneficiaries of his or her choice (so long as such beneficiaries were not heirs). Everything else – which may have been nothing – was left to postmortem division through the science of the shares.

iii) **Muslim Inheritance Systems in Cultural Context: Of Islam and Adat**

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163 Kozlowski, *Muslim Endowments and Society in British India*, pg.17.  
164 Kozlowski, *Muslim Endowments and Society in British India*, pg. 22.  
Social engagement in South and South-East Asia often meant incorporating some of the attributes of the local cultures into the fabric of Islamic law and practice. In the realm of inheritance law these incorporations sometimes worked to the benefit and sometimes to the detriment of women, depending on the attributes of the cultures around them. Thus, throughout much of India Muslims adopted the patrilineal customs of the local Hindus, restricting women’s inheritance rights so that, for example, “widows could only inherit the husband’s ancestral landed property in the absence of sons, and only as a life interest.” However, in parts of southwest India where some of the local Hindu communities practiced matrilineal descent, local Muslims adopted this practice as well so that in those communities women “inherited landed property to which men had use rights.”

A similar process of adaptation transpired in South-East Asia where Islam became entwined with local customs or “adat”. The word “adat” comes from the Arab word ‘adat, “meaning culture, refinement, propriety, humanity”; it “refers to the total constellation of concepts, rules and codes of behavior which are conceived as legitimate or right, appropriate or necessary”. In the Malay context “adat prescribes codes of ethics and behavior in a range of different social circumstances or situations affecting individuals or groups.”

166 Agarwal, Bina, A Field of One’s Own, pg. 98.
167 Agarwal, Bina, A Field of One’s Own, pg. 98.
As the intent of this section is to assess the inheritance rights of women in pre-colonial society among the Islamic population of Singapore, it is important to note that as of the year 2000 13.9 percent of the population of Singapore were Malay;\(^{170}\) of these Malay, 99.6 percent were followers of Islam.\(^{171}\) The total percentage of Muslims in Singapore in 2000 was 14.9 percent.\(^{172}\) From these statistics it is clear that the vast majority of Muslims in Singapore are Malay. Thus, the following discussion focuses on the Malay heritage of this population.

In the context of Malay inheritance practices prior to colonization by the British, “who had imposed their colonial presence in Negeri Sembilan and neighboring Malay states by the final quarter of the nineteenth century”,\(^ {173}\) there was no unified adat or customary practice. Instead, by region and over time the Malay adat included patrilineal, matrilineal and bilateral practices,\(^ {174}\) all of which co-existed with the Islamic faith of the majority of the Malay peoples. Generally, scholars of Malay adat have divided adat systems into two types, the adat perpateh and the adat temenggong. M. B. Hooker defines adat perpateh as “the system of law found primarily in Negri Sembilan and parts of Malacca which assumes a (kinship) principle of matriliny.”\(^ {175}\) Hooker goes on to state that the adat perpateh is “now

\(^{173}\) Peletz, Michael G., *Social History and Evolution in the Interrelationship of Adat and Islam in Rembau, Negeri Sembilan*, pg. 1.
confined to family law and the law relating to land ownership and devolution.”

While *adat perpateh* was a more comprehensive legal system prior to colonization after which certain aspects of its domain were supplanted by foreign law, it is interesting to note that its inheritance practices survived into the modern era.

Evidence suggests that sometime around the 1500s Indonesian immigrants who were mostly from the Minangkabau clan from central Sumatra navigated across the Straits of Malacca and up the Linggi and Rembau rivers to found new settlements. With them they brought their matrilineal society, which has come to be known as *adat perpateh*. According to Azizah Kassim there are six basic principles of *adat perpateh*. These basic principles are as follows: 1) that descent is traced through the female line; 2) that the society is divided into twelve clans each of which is further divided into lineages; 3) that ancestral land is registered to and transmitted through its female members with male members having usufructory rights over the land; 4) that each clan and lineage practices exogamy; 5) that transmission of titles and status is through the female line; and 6) that residence is matrilocal or uxorilocal.

As with the matrilineal systems in South Asia, matrilineality did not mean gender-equality as supra-household activities in the

political realm remained the domain of men, while household economic activities remained the domain of women.\textsuperscript{179} Nevertheless, the matrilineal system meant great economic autonomy for women. Although technical ownership of the property was vested in the clan, women were the \textit{de facto} owners and principal cultivators of homestead plots and rice fields. “Since adult women obtained goods and services from their brothers and female kin and usually held enough cultivable rice land to satisfy their households’ subsistence needs, their husbands’ contributions to the domestic coffers – forest produce, commercial items, and/or cash – were not usually of vital economic importance.”\textsuperscript{180} This economic autonomy meant that women in the \textit{adat perpatih} system were less vulnerable in the event of death or divorce.

Hooker defines \textit{adat temenggong} as “a term used to describe any \textit{adat} which is not \textit{adat perpatih}” and he asserts that it “implies the existence of a bilateral kinship system.”\textsuperscript{181} On the other hand, Noor Aisha Abdul Rahman states that the term is used to designate the customs of Malay states other than Negri Sembilan and that these Malay states were organized on patrilineal lines.\textsuperscript{182} In combination these definitions suggest that \textit{adat temenggong} included both bilateral and patrilineal succession.


\textsuperscript{180} Peltz, Michael G., \textit{Social History and Evolution in the Interrelationship of Adat and Islam in Rembau, Negeri Sembilan}, pg. 4.

\textsuperscript{181} Hooker, M. B., “Glossary of Malay Terms”, \textit{Readings in Malay Adat Laws}, pg. xi.

\textsuperscript{182} Rahman, Noor Aisha Abdul, \textit{Colonial Image of Malay Adat Laws}, pg. 12.
The ease of the co-existence of Islam and Malay adat, both historically and in the present, has been and remains a controversial topic. For example, Rahman devotes her book on the Colonial Image of Malay Adat Laws: A Critical Appraisal of Studies on Adat Laws in the Malay Peninsula during the Colonial Era and Some Continuities to a critique of colonial writers; a significant portion of her criticism is leveled against those, such as R. J. Wilkinson and E. N. Taylor, who posited that there was conflict between adat and Islam. She quotes Wilkinson as calling the two “absolutely irreconcilable”.  

She denounces Taylor, whom she identifies as “one of the main exponents of adat law on inheritance” and a “prominent member of the colonial legal service” for arguing that adat principles governing inheritance accorded with practical wisdom and were more suitable to the condition of Malays. Rahman disagrees with Taylor’s assertion that Islamic law, having originated from a different social context, could not practically serve the needs of the Malays.

Rahman charges the British colonial writers on Malaya of Orientalism, bias against Islam, as well as ignorance if its laws, history and customs. More contemporary writers of Malay histories and ethnographies, such as Josselin de Jong, M. B. Hooker and Michael G. Peletz, are similarly criticized for holding a static view of Islam, for perceiving it as a monolithic faith incapable of incorporating local adat without violating its own integrity. Doubtless, many of Rahman’s criticisms are

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well placed. Her position is that the conflict is not between adat and Islam, but between different visions of Islam itself, i.e., that “Islam is understood differently by different groups of Malay Muslims.”  

But where Rahman sees a harmonization of adat and Islam, Wazir Jahan Karim, another Malay writer seeking to dispel the misconceptions of Orientalism and Eurocentrism, sees an inherent tension between Islam and adat; Karim sees this tension as providing room for the leveraging of gender power. According to her view the gender role interplay between Islam and adat renders the society essentially bilateral. Thus, in the introduction to her book entitled Women and Culture: Between Malay Adat and Islam she states:

The way in which adat and Islam integrate and separate over different epochs in history appeared to express differences in Malay constructs of gender. Generally a pattern seemed to emerge. Inasmuch as the power of Malay men lies in Islam and local articulations of Islam and Islamic thought vis-à-vis adat, Malay women’s historical and contemporary value is located in the bilaterality of adat which, with its emphasis on seniority, parenthood, reciprocity and productivity, gives them a fair share of human ritual and resources to work on.  

Affirming this interplay later in the text, she states:

186 Karim, Wazir Jahan, Women and Culture: Between Malay Adat and Islam, pg. xiii.
Islamic ritualization and public policy generally enable men to command more power in formal decision-making, at the level of the village or state. However, their ability to dominate the formal domains of social activity does not entirely suggest significant or radical separation of powers between men and women. This is mainly because a woman's relative inaccessibility to roles in the formal or public domains of activity in Islamic ritual does not necessarily make her ‘invisible’ or ‘marginal’. She has access of a range of public roles which are importantly upheld by *adat*.\(^{187}\)

The presence of the *adat* alternative in traditional Malay society meant that the devolution of land and property did not automatically follow the science of the shares prescribed by Islamic law. Rather, under *adat perpatah*, property, particularly real property, passed matrilineally and under *adat temenggong* property devolution was often bilateral as final decisions were frequently based on customary notions of agreement resulting in equal opportunities for women and men to inherit property.\(^{188}\)

**D. Hindu, Chinese and Islamic Customary Inheritance Systems on the Eve of Colonization**

\(^{188}\) Karim, Wazir Jahan, *Women and Culture: Between Malay Adat and Islam*, pg. 5.
On the eve of colonization patrilineal devolution of property was the order of the day for most Hindus and Han Chinese. Real property, i.e. the most valuable property in these largely agrarian societies, generally belonged to a family unit with ownership vested in one or more of its male members. This property was divided equally among sons at a succession which may have been before, at or long after the death of the patriarch.

Bilateral with a male bias, the Islamic inheritance system was more favorable toward women than the Hindu and Han Chinese inheritance systems. Nevertheless, the Islamic inheritance system often adapted itself to local customs; the resulting customary practices favored women in places such as southwest India and Malaya where either matrilineal or bilateral succession was the norm, but disfavored women in much of the rest of India where the patrilineal devolution of real property was the dominant mode for many Muslims, as well as for most Hindus.
CHAPTER THREE

BRITISH COLONIALISM AND ITS IMPACT

ON THE STATUS OF WOMEN UNDER THE INHERITANCE SYSTEMS

Stability through the preservation of the status quo was the primary goal of the British colonizers in their administration of the personal laws, i.e. the laws concerning marriage, divorce, guardianship, adoption and inheritance (also referred to as succession). Stability through the preservation of the customs of the inhabitants was the primary goal even in Singapore where the British saw fit to impose English law on all the inhabitants, whether European or not, “so far as the several religions, manners and customs of the inhabitants will admit.” Yet, the introduction of common law jurisprudence into India, Singapore and Hong Kong, systems of justice which are usually administered by English judges, rendered what was intended as a conservative structure into one of profound change. This chapter examines the effects on the inheritance rights of women of the introduction of the British Common Law into judicial spaces formerly occupied by indigenous legal systems which bore few similarities to the jurisprudence of the colonizers.

A.  Culture, Case Law and the Quest for the Authentic: The British Legacy in India

i) The British Decision to Administer Indigenous Law

In 1757 the British East India Company defeated the forces of the Nawab of Bengal at the Battle of Plassey. With this victory came the right to collect revenues
in Bengal, Bihar and Orissa on behalf of the Mughal Emperor. Unfortunately, the venality of Company officials once given this license at least exacerbated, if it did not in fact cause, Bengal’s famine of 1769-1770, a calamity which is estimated to have led to the deaths of up to 1/3 of the population of Bengal.¹⁸⁹ Not only did the corruption of Company officials wreak havoc on the peoples of Bengal, the Company itself was on the verge of ruin when the British state intervened with the Regulating Act of 1773. This Act provided for greater parliamentary control over the Company and placed the Company under the rule of a Governor-General. Warren Hastings became the first Governor-General of India pursuant to the passage of this Act. One of Hastings’ first acts was to issue the directive quoted above in Chapter Two. This directive required that:

> In all suits regarding inheritance, marriage, caste and other religious usages or institutions, the laws of the Koran with respect to the Mohamedans and those of the Shaster with respect to the Gentoos [Hindus] shall invariably be adhered to.¹⁹⁰

This directive, apparently intended to preserve the status quo at least in the substance of the designated areas of the law, instead led to profound social, political, economic and religious, as well as legal changes, many of which endure to this day. Hastings’ directive is the foundation for what have become known as the “personal

¹⁸⁹ Cohn, Bernard S., “Law and the Colonial State in India” in Colonialism and Its Forms of Knowledge – The British in India, pp. 59-60.
¹⁹⁰ From the quote appearing at page 26 of “The Command of Language and the Language of Command” in Colonialism and Its Forms of Knowledge – The British in India by Bernard S. Cohn, citing to “Reports from Committees of the House of Commons...” 1772-1773 4:348-50.
laws”, an area of the law marked as private, domestic and familial which through the directive became designated as the bastions of indigenous tradition as defined by Hindu and Muslim religious authorities. It is therefore unsurprising that such a pivotal directive has been the subject of much scholarly analysis. Because Hastings and other British colonizers considered inheritance law an important topic in their plan to enforce indigenous law, this section taps into this scholarly discourse to evaluate the accuracy and impact of Hastings’ assumptions in light of current scholarship.

Before commencing the analysis of Hastings’ directive that follows, there are two important points to bear in mind regarding its implementation. First, the preservation of the substance of these areas of law did not at the time of the directive conceive of the preservation of the procedure for determining the law. Since substance and procedure are linked inextricably in law, their separation alone ushered in vast changes to both the nature of Indian jurisprudence, as well as the substance of the law as it applied to India’s colonized peoples. The second point regarding the implementation of Hastings’ directive is that the colonizers did not, in fact, always adhere to the laws of the Qur’an and the “Shasters”, even as they in conjunction with the selected Muslim maulavis / qadis and the Hindu pundits defined those laws. Efforts were made at social reform; in the early years of Company administration these efforts focused on sati and female infanticide, but came in time to include, through the interconnection of these issues, acts that affected the inheritance rights of women. The effects of these forays into the social
realm were by no means uniformly positive for women, nor were they intended to be, as will be discussed below. 191

One of the first questions raised in a reading of Hasting’s directive is how he selected the topics to be governed by Hindu and Muslim law. Why were “inheritance, marriage, caste, and other religious usages or institutions” to be governed by indigenous sectarian laws while other topics were left open to the implementation of foreign laws? Derrett sees two forces at work in this decision: “the influence of the local jurists on the Company’s representatives, and the predispositions or prejudices of the latter”. 192 Local jurists believed that on matters of caste and other religious topics pundits and maulavis would need to be consulted. Furthermore, this array of topics in England was “within the exclusive jurisdiction of the Bishops’ courts, and the law was ecclesiastical law.” 193 Thus, the jurisdictional equivalent of canon law was introduced on the subcontinent pursuant to Hastings’ directive.

The importation of the jurisdictional equivalent of canon law introduced modernist binaries – secular/religious – public/private – civil/criminal – into worlds where such distinctions were unknown. Both dharma and the Shari’a were comprehensive life systems in which virtually all behavioral considerations, from what to eat and whom to marry, to the consequences of theft and murder – all implicated dharma for Hindus and the Shari’a for Muslims with their attendant

191 For a comprehensive social history of the impact of colonial law on the women of India see Janaki Nair’s Women and Law in Colonial India: A Social History.
192 Derrett, J. Duncan M., Religion, Law and the State in India, pg. 233.
193 Derrett, J. Duncan M., Religion, Law and the State in India, pg. 233.
moral, ethical, religious, as well as “legal” ramifications. This is not to say that Hindus and Muslims were part of some undifferentiated “Tradition”; the distinct epistemological roots of each belief system yielded separate paths of appropriate action. More importantly, for our purposes, pure forms of these belief systems did not exist, except, perhaps, in the minds of the colonizers and their Orientalists. Further confounding the colonizers, these comprehensive life systems were not unitary in doctrine or practice, but varied by location and sect.

The next portion of Hastings’ directive instructed that “the laws of the Koran” and “those (i.e. the laws) of the Shaster” were to be applied to their respective communities. The British view that the whole of Islamic law was a code was implicit in this statement. The parallel construction regarding the “Shaster” indicates that they held the same view of Hindu law, i.e. that it was a code of law requiring only translation and application. Closely allied with the concept that Muslims and Hindus each possessed established codes of law was the notion that Muslims and Hindus were at all times and throughout India distinct and separate communities. In Kugle’s words, the British “assumed that India was inhabited by communities which were ancient and discrete; furthermore, these discrete

194 See Ludo Rocher’s “Hindu Conceptions of Law” for a discussion of the breadth of the term “dharma”; Wael Hallaq’s “What is Shari’a?” presents a thorough discussion of the problems with equating law and Shari’a.
195 Emphasis added.
196 Kugle, Scott Alan, “Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia”, pg.270.
communities rigidly and ritualistically followed their own law in all matters of social
custom, religious duty, and commercial transaction."

Reality on the ground in India was far more complex. Chapter Two discussed
how Muslim inheritance practices could be influenced by practices of surrounding
communities, becoming matrilineal in southwest India, but more strictly patrilineal
in other regions, both of which practices are at variance with a rigid application of
the science of the shares. Another example of the complexity in the Muslim-Hindu
divide comes from the 1911 Census in which some individuals in Gujarat identified
themselves as “Mohammedan Hindus”. Though the conflation of the Hindu-Muslim
identity undoubtedly was the exception, rather than the norm, there was
ample diversity within these communities to render as problematic Hastings’
proclamation regarding the application of “the laws of the Koran” and “those of the
Shaster”.

The topic of how Muslim law in India was administered before colonization,
i.e. before it became Anglo-Mohamedan Law, is so vast that it is not only beyond the
scope of this paper, but also may be beyond the comprehension of the modern mind.
In the words of Wael Hallaq:

198 Kugle, Scott Alan, “Framed, Blamed and Renamed: The Recasting of Islamic
Jurisprudence in Colonial South Asia”, pg.270.
199 See page 32 of Gauri Viswanathan’s paper on “Colonialism and the Construction
of Hinduism” where she refers to work by Ashis Nandy entitled “The Politics of
Secularism and the Recovery of Religious Tolerance” in Veena Das, ed., Mirrors of
...we stand before the wide expanse of the Shari’a and its history is nearly helpless. Our language fails us in our endeavour to produce a representation of that history, which not only spoke different languages none of which was English (not even in British India), but also articulated itself conceptually, epistemically, morally, socially, culturally, and institutionally in manners and ways utterly different from those material and non-material cultures that produced modernity and its Western linguistic cultures.  

For our purposes we can merely note that the Mughals administered what Kugle calls a “substantively rational system of law” which provided for a distinction between “extraordinary justice” and “ordinary justice”. As Kugle describes it: “Day-to-day affairs were guided by custom and government procedure; however, for certain offences, the shari’ah was invoked to guide decisions... Most importantly, this dual system allowed room for the jurists to continually address new situations according to the practice of fiqh.”  

Fiqh is the form of Islamic jurisprudence whereby a mufti seeks from the Qur’an and the Sunnah of the Prophet religiously appropriate modes of behavior. Kugle goes on to state that:

201 Kugle, Scott Alan, “Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia”, pg.279.
203 Kugle, Scott Alan, “Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia”, pg.279.
Traditionally, shari’ah is substantively rational because the law is found: individual rulings are extracted from a sacred source. Shari’ah has a set source and a single telos, both unified by religious belief. This source and telos encapsulate and unite all the conflicting and divergent opinions extracted by traditional Islamic jurists through the legitimate operations of *usul al-fiqh*. ‘Islamic law, as the law of jurists, has been in its formative and later periods an eclectic body of rulings, responding to its immediate social context … the rationality of the Shari’ah was substantive rather than formal.’

Thus, Islamic jurisprudence in South Asia, as elsewhere, transpired within various cultural milieus to which it was able to respond with the flexible application of *fiqh*.

An eclectic body of rulings given in response to their immediate social context may well describe pre-colonial Hindu law as well as pre-colonial Muslim law. However, the relationship between Hindu judicial rulings and Sanskrit texts is more problematic than the relationship between Muslim *fiqh* and the Qur’an. The connection between Hindu jurisprudence and scriptures such as the *Manusmriti* or *Laws of Manu* as it is sometimes called has long been the subject of dispute. Sir William Jones who translated and published the *Manusmriti* in 1794 was convinced that in this text he had access to the laws applicable to Hindus not only in 1794, but

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also since the days of antiquity. However, by 1861 Sir Henry Sumner Maine disputed this proposition, proclaiming of the Laws of Manu that: “...it does not, as a whole, represent a set of rules ever actively administered in Hindustan. It is, in great part, an ideal picture of that which, in the view of the Brahmins, ought to be the law.” Maine’s view resonated well with James Henry Nelson, a British administrator in South India who queried: “Has such a thing as ‘Hindu Law’ at any time existed in the world? Or is it that ‘Hindu Law’ is a mere phantom of the brain, imagined by Sanskritists without law and lawyers without Sanskrit?”

Ludo Rocher posits that these two positions, i.e. that of Sir William Jones that the Manusmriti was the law of the land and that of Sir Henry Sumner Maine, that the Manusmriti was a work of Brahminical fantasy, can be reconciled with the knowledge that pre-colonial Hindu jurisprudence was predominantly an oral practice. In Rocher’s view the Dharmasastras are neither fact nor fantasy but collections of legal maxims that were true from time to time and from place to place, but never universally applicable to all Hindus in India.

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207 Rocher, Ludo, “Law Books in an Oral Culture: The Indian ‘Dharmasastras’”, pg. 258, citing to James Henry Nelson’s A View of the Hindu Law as Administered by the High Court of Judicature at Madras (Madras: Higginbotham, 1877), pg. 2.
Perhaps the status of the *Dharmasastras* as abstract collections of customary laws without general applicability was not a secret. According to Alan Gledhill writing in 1954 the *pundits* knew this all along:

The *pandit* knew that the law of the Sanskrit texts was an ideal law, never susceptible of complete and identical application, but subject to modification by custom, which varied from time to time, place to place, family to family, and caste to caste, but the English lawyer and the judge of the Anglo-Indian court was too often disposed to regard the texts in the same light as an English statute.  

Gledhill goes on to note that the “system developed from 1773 imposed a degree of rigidity and uniformity upon the Hindu law which it had not known earlier, and applied its rules to many persons who had not been aware that it was binding on them.”  

Embedded in this last phrase is the issue of whether Hinduism itself was a colonial construct, a collective identity which British colonizers, especially Warren Hastings, foisted on disparate groups of people living on the Indian subcontinent. Robert Frykenberg takes this position, stating as his central argument in a piece on this subject that “unless by ‘Hindu’ one means nothing more nor less than ‘Indian’ (something native to, pertaining to, or found within the


continent of India), there has never been any such a thing as a single ‘Hinduism’ or any single ‘Hindu community’ for all of India...Furthermore, there has never been any one religion\(^{211}\) – nor even one system of religions – to which the term ‘Hindu’ can accurately be applied.”\(^{212}\)

Referring to this position as the “‘construction of Hinduism’ theory”, Gauri Viswanathan notes that:

...the tendency to interpret modern Hinduism as the unification of a loose conglomeration of different belief systems remains trapped within a monotheistic conception of religion, which constitutes the final reference point for judging whether religions are coherent or not...The notion that modern Hinduism represents a false unity imposed on diverse traditions replays a western fascination with – and repulsion from – Indian polytheism.\(^{213}\)

Although not in agreement on Hinduism as a single religion, both Viswanathan and Frykenberg would likely recognize as erroneous Hastings’ assumption of homogeneity within the workings of Hindu jurisprudence. This lack of homogeneity was manifest in the diverse customs of Hindus throughout India. Nor, as suggested above, was Muslim *fiqh* as uniform as Hastings’ averred.

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\(^{211}\) Frykenberg notes here via an endnote that: “Wilfred Cantwell Smith 1964, argues that the very term ‘religion’ is itself no less erroneous or dangerous. It is the invention of modern times, arising and being applied, for the most part, in the 19th and 20th centuries.”

\(^{212}\) Frykenberg, Robert Eric, “The Emergence of Modern ‘Hinduism’ as a Concept and as an Institution: A Reappraisal with Special Reference to South India”, pg. 29.

Nevertheless, the directive had been issued; compliance was required.

Unsurprisingly, the following examination of the implementation of Hastings’ directive reveals that execution was no less problematic than the terms of the directive itself.

ii) The Implementation of Hastings’ Directive

Kugle describes jurisprudence as “the nexus where authoritative texts, cultural assumptions, and political expediency come together during a crisis.”\(^{214}\) These come together to create an “interpretive experience”, but it is an interpretive experience distinct from others “because it is also an exertion of power.”\(^{215}\) The British exercise of power through the jurisprudential nexus wrought “epistemological violence”\(^ {216}\) on the peoples of the subcontinent, for as Barney Cohn states: “In coming to India, they unknowingly and unwittingly invaded and conquered not only a territory but an epistemological space as well.”\(^ {217}\)

Epistemological violence is, perhaps, nowhere as evident as in the implementation of Hastings’ directive.

But before delving into the details of the directive’s implementation, citation to Cohn’s statement that the colonizers were “unknowing” and “unwitting” presents an opportunity to discuss briefly issues surrounding the colonizers’ intentions and

\(^{214}\) Kugle, Scott Alan, “Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia”, pg. 257.

\(^{215}\) Kugle, Scott Alan, “Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia”, pg. 257.

\(^{216}\) Dirks, Nicholas B., “Foreword” in Colonialism and Its Forms of Knowledge: The British in India by Bernard S. Cohn, pg. xii.

\(^{217}\) Cohn, Bernard S, Colonialism and Its Forms of Knowledge: The British in India, pg. 4.
culpability. Is Cohn too charitable in asserting they were ignorant of their invasion of a separate “epistemological space”? Does it matter whether or not they were cognizant of the consequences of their actions? Is it even possible to ascribe intent to the colonial endeavor? As Dirks states in his Foreward to Cohn’s book: “Any attempt to make a systematic statement about the ‘colonial project’ in India runs the risk of conflating cause with effect, or ascribing intention as well as system to a congeries of activities and a conjunction of outcomes which, though related and at times coordinated, were usually diffuse, disorganized and even contradictory.”

To the question of whether Cohn is too charitable, Dirks would likely respond in the negative as he states in his Forward that: “although the British in India were always aware that their power was dependent on their knowledge, they were never aware of all the ways in which knowledge was, in any direct or strategic sense, power.”

Does this ignorance of all of the manifestations of their own power make them less culpable as colonizers, or is the will to power sufficient to implicate the colonizers in their violence – epistemological and otherwise?

Hastings certainly had a will to power, seeking as he did control over the judicial processes of the occupied territories of India, among other exercises of authority as the first governor-general. Was his exercise of power rendered more benevolent by virtue of his seeing India as a rule-governed society – a theocracy – as

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218 Dirks, Nicholas B., “Forward” in Colonialism and Its Forms of Knowledge: The British in India by Bernard S. Cohn, pg. xvi.
219 Dirks, Nicholas B., “Foreword” in Colonialism and Its Forms of Knowledge: The British in India by Bernard S. Cohn, pg. xvii.
opposed to a despotic society, as presumed by some? Hastings’ determination that the rules governing Indian society were determined by Muslim *maulavis/qadis* and Hindu *pundits* with reference to codes based in scripture opened the door to the Orientalists. These Orientalists set about learning Persian and Sanskrit in order to translate these texts perceived as pivotal to the legal order. Was Orientalism, “the phase of western scholarly engagement with eastern religions”, a phase described by some as “less hostile to Indian culture than the Anglicism that superseded it”, preferable to that Anglicism? Viswanathan does not think so: “colonial perceptions of Hinduism should not be divided along the lines of those who were positively inclined and those who were opposed, since this assumes hostile reactions are produced by the intrusion of a western framework of reference and benevolent ones by its suspension, whereas it is clear the same frame persists regardless of whether the attitude is positive or negative.” In a similar vein Viswanathan rejects any distinction between affirmative and negative Orientalism. In this view there is a uniform culpability among all colonizers throughout the period of British colonialism. These issues of intent and culpability are relevant as the analysis proceeds to the effects of the implementation of Hastings’ directive, as well as to

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221 Viswanathan, Gauri, “Colonialism and the Construction of Hinduism”, pg. 25.
224 See Endnote 1 in Gauri Viswanathan's “Colonialism and the Construction of Hinduism”, pg. 41.
consequences of efforts at “social reform”, both of which frequently produced unintended results.

One of the principle features of implementation was the separation of the substance of the laws from the procedures used to administer them. Ostensibly the laws were indigenous, but the procedures were expressly those of the British Common Law. Thus, both Hindu and Muslim jurisprudence were subjected to the following methods of adjudication, all of which had been alien to them prior to colonization:

1. A separation between the processes of the determination of the relevant facts and the application of the law;

2. The decontextualization of judicial conflicts so that there was no weighing of community interest;

3. Codification;

4. The resolution of conflicts through an adversarial system of “win – lose” justice; and

5. The cumulative effects of precedent / stare decisis.

To implement his directive Hastings established a dual court system. This system consisted of the Supreme Courts in the Presidency towns which were presided over by English judges with cases presented by English lawyers, and the district *mofussil* courts presided over by a British East India Company officer known
as the collector who heard cases presented by Indian plaintiffs.225 In the collector
“Hastings had invented the emblematic figure of British imperialism who was to
appear in Africa, Southeast Asia, and the southwest Pacific, the man on the spot who
knew ‘the natives,’ who was to represent the force of ‘law and order’”.226 The
collector had both judicial and executive powers within his district, the boundaries
of which generally “followed preexisting Mughal revenue units”.227 In his judicial, as
opposed to executive, capacity the collector presided over two types of cases:
“dewani cases relating to revenue and civil litigation, and the faujdari cases relating
to the criminal and internal legal affairs.”228 The court of appeal for the Company’s
mofussil courts for the first eighty-eight years of their existence, i.e. from 1773-1861,
were the Sudder Diwani Adalats, bodies staffed by East India Company personnel.229
In 1861 the Supreme Courts and the Sudder Diwani Adalats were amalgamated into
the system of High Courts.230 All the while the ultimate appeal was to the Privy
Council back in London, however theoretical this might have been to most litigants.

This alien judicial structure was grafted onto India’s system of dispute
resolution with the help of the pundits and qadis. Although the pundits and qadis
were initially perceived by the colonizers as critical for both creating the perception
of legitimacy and providing legal insights in accordance with Hastings’ directive,

225 Nair, Janaki, Women and Law in Colonial India: A Social History, pg. 23.
226 Cohn, Bernard S., “Law and the Colonial State in India”, pg. 60.
227 Cohn, Bernard S., “Law and the Colonial State in India”, pg. 60.
228 Nair, Janaki, Women and Law in Colonial India: A Social History, pg. 23.
229 Gledhill, Alan, “The Influence of Common Law and Equity on Hindu Law since
1800”, pg. 578.
230 Gledhill, Alan, “The Influence of Common Law and Equity on Hindu Law since
1800”, pg. 578.
their roles were nevertheless quite circumscribed. The British judge would hear the dispute, determine which facts were relevant to the case, then present this packaged case to the *pundits* or *qadis* for the application of the relevant law. But even in the determination of the relevant law, the discretion of the *pundits* and *qadis* was limited.

The determination of the relevant law was confined to specific texts or scriptures determined by the British in consultation with local religious authorities to be the foundations of Hindu and Muslim jurisprudence. For example, one of the early texts authorized for use by Hindu *pundits* in British courts in India was a digest comprised of topics selected by Hastings. “The” Hindu law on topics such as debt, inheritance, partnership, slavery, master and servant and “duties of women” among other topics was compiled by eleven *pundits* in Calcutta. Their original compilation appeared in Sanskrit first, but then was translated into Persian so that it could be rendered into English by N. B. Halhed.

Hastings sought a similar codification of Islamic law, initially selecting a text called the *Hedaya* for translation. This text, which came to serve as one of the foundations of Anglo-Muhammadan law, went through a similarly tortuous series of translations rendered as it was from Arabic to Persian to English. As Kugle describes the process “contradictions and subtleties were excised from the original

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text” so that it must be said that “Hastings did not just find a text. He created one.”\textsuperscript{234}

With the creation and English translation of these and other texts and scriptures, even the role of determining the applicable law was appropriated gradually by British judges. Finally, in 1864 the posts of court-appointed pundit and qadi were abolished, the British having determined that they had sufficient knowledge of the relevant laws and that there was sufficient case law to eliminate these roles.\textsuperscript{235}

Indigenous forms of dispute resolution such as caste councils and village assemblies known as panchayats continued to function throughout the colonial period, however their effectiveness and autonomy were severely undermined by the British court system.\textsuperscript{236} Litigants were drawn to the colonial courts by what Derrett described as the “immediacy and violence of the remedies offered”.\textsuperscript{237} Derrett elaborated on the attraction of the British courts: “The chances of losing a good case were high, but if one won, the prizes were larger than would be available under the native system.”\textsuperscript{238} Disputes relating to land were particularly likely to find their way into the colonial courts.\textsuperscript{239}

\textsuperscript{234} Kugle, Scott Alan, “Framed, Blamed and Renamed: The Recasting of Islamic Jurisprudence in Colonial South Asia”, pp. 272.

\textsuperscript{235} Nair, Janaki, Women and Law in Colonial India: A Social History, pg. 24.

\textsuperscript{236} Nair, Janaki, Women and Law in Colonial India: A Social History, pg. 23.

\textsuperscript{237} Derrett, J. Duncan M., Religion, Law and the State in India, pg. 279.

\textsuperscript{238} Derrett, J. Duncan M., Religion, Law and the State in India, pg. 279.

\textsuperscript{239} Nair, Janaki, Women and Law in Colonial India: A Social History, pg. 25.
The value of a judgment awarded a prevailing party under the British system was enhanced by the winner-take-all nature of the proceedings, as opposed to the compromises and consensus building more common in indigenous dispute settlements. Compromise and consensus building as dispute resolution mechanisms were more likely to take into consideration the judgment’s impact on the community, considerations not a part of the British common law adversarial process.240

iii) Women and the Colonial Legal System

Women did not become jurists in any of these judicial hierarchies, whether Hindu, Muslim, or colonial, until the colonial era had passed into history. Nevertheless, they were subject to them, were not infrequent litigants in the courts administered by them, and their interests were determined by their judgments. Patriarchal power was the order of the day reigning supreme through both male and, in most instances, female visions of the natural order of things. This is not to say that there were no conflicts or issues between the colonizers and the colonized regarding the status of Indian women. Indeed, there was much debate regarding the practice of sati, and, to a lesser extent, female infanticide. It is to say that these conflicts and issues transpired within the narrow confines of a discourse of woman’s proper place within tradition – i.e. not whether women should be subordinated, but how subordinated should they be?

Lata Mani explores the boundaries of colonial era discourse on women and tradition through an analysis of the discourse on sati, the immolation of widows on their husband's funeral piers. Through her close scrutiny of positions taken by Walter Ewer, a colonial official in favor of the abolition of sati, and those espoused by renowned Indian reformer, Rammohun Roy, who was also in favor of abolition, Mani shows how “the equation of scripture, law and tradition, and the representation of women as tradition produced a specific matrix of constraints within which the question of sati was debated.”

Mani goes on to assert that:

Whatever their stands on the prohibition of sati, colonial officials and the indigenous male elite agreed that scripture overrode custom, that explicit scriptural evidence had greater weight than evidence based on inference and that, in general, the older the text the greater its value. This privileging of the more ancient texts was tied to another discursive feature: the belief that Hindu society had fallen from a prior Golden Age.

As the discussion of Hastings’ directive above suggests, this matrix of constraints was a direct consequence of the theocratic view of Indian society espoused by Hastings and implemented through his directive.

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242 Mani, Lata, “Contentious Traditions: The Debate on Sati in Colonial India”, pg. 145.
In her analysis of the debate over sati, Mani posits a “woman / tradition / law / scripture nexus”; it is a place where questions of “scriptural interpretation, the relation between scripture and society, the role of protective legislation for women,” and the tension between women as individuals and women as members of communities are raised. Through her scrutiny of the debate over sati Mani shows that women were neither the subjects nor the objects in that discourse, but rather the “ground of the discourse on sati.” Instead of focusing on women, the sati debate revolved around whether the practice was endorsed by the Brahminic scriptures deemed to be the foundation of all Hindu law.

While the discourse of the debate over the Hindu practice of sati, which was abolished by the British in 1829, is the primary focus of Mani’s article, she affirms the contemporary relevance of this nexus, as well as its relevance to the Muslim community, through reference to the case of Mohammed Ahmed Khan vs. Shahbano Begum. So although sati has been outlawed and is an extremely rare occurrence

\[244\] Mani, Lata, “Contentious Traditions: The Debate on Sati in Colonial India”, pg. 154.
\[245\] Mani, Lata, “Contentious Traditions: The Debate on Sati in Colonial India”, pg. 152.
\[246\] Mani, Lata, “Contentious Traditions: The Debate on Sati in Colonial India”, pp. 143-145.
\[247\] In the Shahbano case the Supreme Court of India decided on April 23, 1985 that a divorced Muslim woman, Shahbano Begum, was entitled to lifelong maintenance. Her husband had argued that under Muslim personal law his only obligation was to support her for three months after the divorce, which he had done. The decision ignited a heated debate throughout India on the rights of Muslim women in relation to Muslim personal law, a conflict which culminated in the passage of the Muslim Women (Protection of Rights on Divorce) Act, 1986. Despite the name, this Act was
today (unlike some other outlawed practices such as dowry the practice of which is rampant), the woman / tradition / law / scripture nexus has remained relevant up to the present through the “personal laws”.

iv) Anglo-Hindu Law: Conservatism in the Woman / Tradition / Law / Scripture / Property Nexus

Women as the embodiment of tradition remained the ground for the discussion of the contours of the life of the devout Hindu throughout the colonial era and beyond. Having determined that sati was not required by the scriptures, the discussion moved on to whether it would be permissible for a Hindu widow to remarry. Under Anglo-Hindu law as administered by the British courts in India the remarriage of higher caste Hindu widows was prohibited and any children of such unions were considered illegitimate. The issue of widow remarriage, like sati, concerned a relatively small minority of Hindus. Lower caste Hindus and Dalits (formerly known as Untouchables or Harijans), groups estimated to comprise 80 percent of the Hindu population, did not prohibit widow remarriage.

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a victory for those who opposed the right to life-long maintenance for divorced Muslim women as awarded by India’s Supreme Court.

248 See Janaki Nair, Women and Law in Colonial India, at page 55 where she indicates the rarity of widow immolation: “The incidence of widow immolation in the Hughli district, which consistently showed higher returns than any other part of India, amounted to 1.2 percent of the overall number of widows; in 1824 the average number of immolations amounted to a mere 0.2% of the total number of widows. (Nair cites to Anand Yang (1990), “Whose Sati? Widow Burning in Early Nineteenth Century India” in Journal of Women’s History 1.2, pg. 22.)

Responding to pressures for social reform advocated by Pandit Vidyasagar and others, the British-Indian government enacted the Hindu Widows’ Remarriage Act of 1856 (Act XV of 1856). Despite confinement of the problem to upper caste Hindus, the legislation was interpreted by most High Courts as being comprehensive so that the legislation came to have an impact – a negative one – on the larger portion of the population of Hindu widows which had never experienced the prohibition in the first place.

As discussed in Chapter 2, prior to any legislation altering what was through the conjoined effects of scripture and case law considered to be Hindu law, a widow under both Dayabhaga and Mitakshara law would not inherit any interest in her husband’s estate, except a right to maintenance, unless the husband died without a son, a son’s son, or a son’s son’s son. Even then, under Mitakshara law, she could only inherit an interest in her husband’s estate if he was not at the time of his death part of a joint family coparcenary; if he was part of such a coparcenary then she only had a right to maintenance. Under the Dayabhaga system the widow could inherit an interest in her husband’s estate regardless of the existence of any joint family ownership.

Nevertheless, when a widow did inherit an interest under either system, she did not inherit the property outright, but received an interest known as a widows’ estate or (more accurately) a woman’s estate, as daughters sometimes took this

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limited estate as well. While the parameters of the Hindu woman’s estate as
developed under Anglo-Hindu law will be explored below as an example of colonial
conservatism in the woman / tradition / law / scripture / property nexus, here it is
sufficient to note that the woman’s estate entitled a woman to income from the
property during her lifetime, but did not grant her the power of alienation except for
“legal necessity”, i.e. “in case of need or for the benefit of the estate” or for religious
purposes that were for the deceased owner’s spiritual benefit. When the
woman’s estate came to an end, it did not pass to her heirs, but to the heirs of the
last male holder. In the words of the courts, the woman did not become a “fresh
stock of descent”.

As determined under Anglo-Hindu law, a woman’s estate terminated at her
death or, under the Hindu Widows’ Remarriage Act of 1856 (Act XV of 1856), upon
her remarriage. Given that upper caste Hindu widows traditionally were forbidden
to remarry and that lower caste Hindu widows were generally not restricted in
either their ability to remarry or, in many instances, in their ability to take the
property inherited by them from their deceased husbands into their new
marriage, the incorporation of the provision terminating the woman’s estate
upon remarriage is curious.

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251 Gupte, S.V. Hindu Law of Succession, Art. 43 (2) (C).
252 Gupte, S.V. Hindu Law of Succession, Art. 43, para. 10.
Remarriage Act of 1856”, pg. 9.
The preamble and sections 1, 2, 5, and 6 of the Hindu Widows’ Remarriage Act are as follows:

"Whereas it is known that, by the law as administered in the Civil Courts established in the territories in the possession and under the Government of the East India Company, Hindu widows with certain exceptions are held to be, by reason of their having been once married, incapable of contracting a second valid marriage, and the offspring of such widows by any second marriage are held to be illegitimate and incapable of inheriting property; and

Whereas many Hindus believe that this imputed legal incapacity, although it is in accordance with established custom, is not in accordance with a true interpretation of the precepts of their religion, and desire that the civil law administered by the Courts of Justice shall no longer prevent those Hindus who may be so minded from adopting a different custom, in accordance with the dictates of their own conscience; and

Whereas it is just to relieve all such Hindus from this legal incapacity of which they complain, and the removal of all legal obstacles to the marriage of Hindu widows will tend to the promotion of good morals and to the public welfare;

It is enacted as follows:
1. No marriage contracted between Hindus shall be invalid, and the issue of no such marriage shall be illegitimate, by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindu Law to the contrary notwithstanding.

2. All rights and interests which any widow may have in her deceased husband’s property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to remarry, only a limited interest in such property, with no power of alienating the same, shall upon her re-marriage cease and determine as if she had then died; and the next heirs of her deceased husband or other persons entitled to the property on her death, shall thereupon succeed to the same...

5. Except as in the three preceding sections is provided, a widow shall not be reason of her re-marriage forfeit any property or any right to which she would otherwise be entitled; and every widow who has re-married shall have the same rights of inheritance as she would have had, had such marriage been her first marriage.

6. Whatever words spoken, ceremonies performed or engagements made on the marriage of a Hindu female who has not been previously married, are sufficient to constitute a valid marriage, shall have
the same effect, if spoken, performed or made on the marriage of a Hindu widow; and no marriage shall be declared invalid on the ground that such words, ceremonies or engagements are inapplicable to the case of a widow.”

Section 2 of the Act expressly deprives Hindu widows who remarry of any interest in their deceased husbands’ estates. What was the justification for this in an Act the purpose of which was to facilitate widow remarriage? The provision was alleged to be based on Hindu Law, a passage from Vrihaspati where he states: “Of him whose wife is not deceased half the body survives. How then should another take his property while half his person is alive?” This passage, which could logically be interpreted as a justification for a widow to take an interest in her husband’s estate, was then turned around to mean that if a widow remarried she ceased to be half the body of her deceased husband, so that the successors should take the estate. Carroll notes the irony of the majority of justices relying on this “quaint legal fiction” instead of the more direct statement of the law found in the Yajnayavalkya Smriti:

Wife (widow), daughter, father, mother, brother, their sons, gotraja (of the same family), bandhus, disciple and Brahmacharias of the same

school, each succeeding one is heir in the absence of the person immediately preceding him in the order of enumeration – this is the law in respect of the inheritance to the property of a sonless deceased person of whatever caste.257

Lucy Carroll in her analysis of the effects of this statute upon implementation and interpretation by the courts finds that:

... although the ceremonies so prescribed differed significantly from those observed among castes which had a custom of widow remarriage, the High Courts of Bengal, Bombay and Madras held that section 2, involving forfeiture of the deceased husband’s estate on remarriage, applied to all Hindu widows, whether or not the validity of their remarriage derived from the Act, and whether or not their marriages were solemnized by the ceremonies prescribed in section 6; or, alternatively, that if section 2 did not apply, the same forfeiture was enjoined by Hindu Law. The exception to this judicial trend was the High Court of Allahabad, which held consistently – and in the face of contrary rulings and open criticism from the other High Courts – that the Act of 1856 was inapplicable to individuals who were, prior to the passing of the Act, permitted by Customary Law to remarry.258
In the final analysis, few upper caste women availed of the right to remarry\textsuperscript{259} so that the greatest impact of the Act was visited upon those who customarily had been permitted both to remarry and to keep their inheritances, but who became subject to the forfeiture provision in section 2 under the Act\textsuperscript{260}. Thus, this progressive social legislation was undermined by the pervasive conservatism in the woman / tradition / law / scripture / property nexus and by the colonial administrators’ failure to acknowledge the variety of inheritance practices among Hindus on the subcontinent.

There are multiple nodes at the nexus where woman / tradition / law / scripture / property intersect in colonial India. Women are perceived as the embodiment of tradition; tradition is defined by the scriptures; the scriptures determine the laws; and the laws define property rights, which in turn determine women’s interests in the material world. Inheritance law as a species of property law is implicated in this nexus, being defined by the scriptures and defining women’s material interests in a sphere governed by tradition.

Prior to the enactment of the Hindu Women’s Rights to Property Act of 1937 altering what was through the conjoined effects of Shatric scriptures and case law considered to be Hindu law, a widow under both \textit{Dayabhaga} and \textit{Mitakshara} law

\begin{footnotesize}
\begin{enumerate}
\item Dasgupta, Indraneel and Diganta Mukherjee, “A Revisionist Analysis of the Failure of the Widow Remarriage Act of 1856”, pg. 1. This article provides an interesting argument that the failure of the Act was an example of an informational market failure, rather than failure due to prevailing social prejudices.
\end{enumerate}
\end{footnotesize}
would not inherit any interest in her husband’s estate, except a right to maintenance, unless the husband died without a son, a son’s son, or a son’s son’s son. Even then, under Mitakshara law, she could only inherit an interest in her husband’s estate if he was not at the time of his death part of a joint family coparcenary; if he was part of such a coparcenary then she only had a right to maintenance. Under the Dayabhaga system the widow could inherit an interest in her husband’s estate regardless of the existence of any joint family ownership.

Enactment of the Hindu Women’s Rights to Property Act gave the Hindu widow “a right to intestate succession equal to a son’s share in separate property among those governed by Mitakshara, and in all property among those governed by Dayabhaga. It also gave her the same interest as her deceased husband in the undivided Mitakshara coparcenary, with the same right to claim partition as a male coparcener...”\textsuperscript{261} The enactment created these rights for the widow of the intestate decedent, the widow of a predeceased son, and the widow of a predeceased son’s predeceased son. However, there were three substantial constraints on these rights as granted: 1) the enactment did not apply to agricultural land; 2) the inherited interest was forfeited on remarriage; and 3) the widow did not inherit the property outright,\textsuperscript{262} but received an interest sometimes known as a widows’ estate or (more accurately) a woman’s estate, as daughters and sisters sometimes took this limited estate as well.

\textsuperscript{261} Agarwal, Bina, \textit{A Field of One’s Own}, pg. 206.
\textsuperscript{262} Agarwal, Bina, \textit{A Field of One’s Own}, pg. 206.
v) The Hindu Woman’s Estate

The woman’s estate entitled a woman to income from the property during her lifetime, but did not grant her the power of alienation except for “legal necessity”, i.e. “in case of need or for the benefit of the estate” or for religious purposes that were for the deceased owner’s spiritual benefit. When the woman’s estate came to an end, it did not pass to her heirs, but to the heirs of the last male holder. In the words of the courts, the woman did not become a “fresh stock of descent”. The following examination of the parameters of the Hindu woman’s estate as developed under Anglo-Hindu law is another example of the colonizer’s conservatism in the woman / tradition / law / scripture nexus when property rights are added to the mix. The woman’s estate also illustrates the homogenizing effect of the colonial judicial apparatus.

Colonial jurists and contemporary scholars have grappled with the relationship between the smriti scriptures and their commentaries and local usage and practice, trying to determine which preceded which. While the more contemporary view would seem to assert that the smriti commentators had to accommodate local practice to a large extent, the Privy Council expressed the view most prevalent throughout the colonial era which was that the text was primary: “The Commentator puts his own gloss on the ancient text; and his

263 Gupte, S.V. Hindu Law of Succession, Art. 43 (2) (C).
264 Gupte, S.V. Hindu Law of Succession, Art. 43, para. 10.
265 See for example pg. 29 of Ludo Rocher’s introduction to his edited and translated text of Jimutavahana’s Dayabhaga and §262 of the Eleventh Edition (1953) of Mayne’s Treatise on Hindu Law and Usage.
authority having been received in one and rejected in another part of India, Schools with conflicting doctrines arose”.266

The primacy of the text suited colonial jurists well when it came to determining the extent of a widow’s authority over property inherited from her husband when he died without a son under the Dayabhaga school of Bengal and Assam. Under these circumstances under this school there was express authority in Jimutavahana’s Dayabhaga, the commentary generally considered to be the foremost authority in Bengal and Assam, that the widow took all the husband’s interest, but as a restricted estate.267 This position suited colonial jurists own perceptions of the natural order of the subordination of females everywhere – especially when property rights were concerned -- and the scripturally mandated submissiveness of the Hindu woman.

However, the text of the Mitakshara was less obliging. As the Privy Council lamented in Mussumat Thakoor Deyhee v. Rai Baluk Ram and others:

The text is wholly silent as to the disabilities of the woman, or the nature of the interest which she takes in her husband’s estate. It may also be conceded that nothing on these points is to be found in the rest

266 Collector of Madura V. Mootoo Ramalinga [1868] 12 M.I.A. 397, 435.
267 See Chapter Eleven, Section One, Paragraph 56 of Jimutavahana’s Dayabhaga as edited and translated by Ludo Rocher wherein it states: “Note that the only right the widow has is the usufruct of her husband’s property; she may not gift, mortgage, or sell it. Indeed, [A] Katyayana says: “If a widow who has no male offspring remains faithful to her husband and continues to live with one of the elders, she may, within reason, enjoy the usufruct of his property till she dies; after that it goes to her husband’s heirs.”
of that portion of the *Mitacshara* which has been translated by Mr. Colebrooke, and published under the title of “The Law of Inheritance from the *Mitacshara*”.268

While the *Mitakshara* text was silent on the imposition of the woman’s estate, the local Hindu Law Officer or pundit consulted by the lower Sudder Dewanny Court took a compromise position, indicating that ancestral real property was subject to the woman’s estate, but that the widow could give away “to anyone she likes” real property acquired with the proceeds of the couple’s share of the ancestral estate.269

Despite this absence of scriptural authority in the *Mitakshara* and in the face of the more nuanced recommendations of an indigenous religious authority, the Privy Council went on to hold that the deceased widow “had no power of disposition over the immovable property inherited from her husband, whether ancestral or acquired.”270 With this holding the Privy Council determined that the diminished property rights known as the woman’s estate reached beyond Bengal into *Mitakshara* territories, applying it to widows who inherited in the Benares School.

The determination of whether these restrictions applied to moveable property as well as immovable (real) property was left for another day, however,

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269 *Mussumat Thakoor Deyhee v. Rai Baluk Ram and others*, 11 M.I.A. 139, 150 (1866).

that day was not long in coming. In 1867 in the case of *Bhugwandeen Doobey v. Myna Bee* the Privy Council came to the conclusion that:

According to the law of the Benares School, notwithstanding the ambiguous passage in the *Mitacshara*, no part of her Husband’s estate, whether moveable or immoveable, to which a Hindoo woman succeeds by inheritance, forms part of her *stridhun*, or particular property;...\\(^{271}\)

The logic behind this Privy Council decision to apply the restrictions to movable as well as immovable property reveals how much the restrictions attached to the women’s estate, albeit attributed to Hindu law, accorded with their Lordships’ sense of the natural order of things:

The reasons for the restrictions which the Hindoo law imposes on the Widow’s dominion over her inheritance from her Husband, whether founded on her natural dependence on others, her duty to lead an ascetic life, or on the impolicy of allowing the wealth of one family to pass to another, are as applicable to personal property invested so as to yield an income as they are to land.\\(^{272}\)

Further decisions of the Privy Council extended the reach of the woman’s estate not only geographically and to all types of property, but also from widow to woman. For example, in *Chotay Lall v. Chunnoo Lall and others* the Privy Council

\(^{271}\) *Bhugwandeen Doobey v. Myna Bee*, 11 M.I.A. 487,513-514 (1867).

\(^{272}\) *Bhugwandeen Doobey v. Myna Bee*, 11 M.I.A. 487, 513 (1867).
held that under all Mitakshara schools except the Bombay School a daughter inheriting from her father in the absence of male heirs or a widow also took a limited estate.\textsuperscript{273} Again rejecting interpretations of the Mitakshara more favorable to women, and although their Lordships had not decided the issue before, the Privy Council decided to defer to the decisions of the lower courts, saying:

Their Lordships think that after the series of decisions which has occurred in Bengal and Madras, it would be unsafe to open them by giving effect to arguments founded on different interpretations of old and obscure texts; and they agree in the observations which are to be found at the end of the judgment of the High Court, that Courts ought not to unsettle a rule of inheritance affirmed by a long course of decisions, unless, indeed it is manifestly opposed to law and reason. They do not think this rule is opposed to the spirit and principles of the law of the Mitakshara; on the contrary, it appears to them to be in accordance with them.\textsuperscript{274}

Yet despite the Privy Council’s citation to the weight of decisions in Bengal (the heart of the expressly more restrictive Dayabhaga School) and Madras, it was not until 1881 in the case of Muttu Vaduganadha Tevar v. Dora Singha Tevar that the Privy Council determined that the restricted woman’s estate was applicable in the

\textsuperscript{273} Chotay Lall v. Chunnoo Lall and others, 4 Cal. 744 or 6 I.A. 15 (1878).
\textsuperscript{274} Chotay Lall v. Chunnoo Lall and others, 4 Cal. 744 @ 755-756.
Carnatic. In this decision it becomes clear that by this time the momentum of prior
decisions had obviated reason:

They [the appellants] rely mainly on the much-discussed passage in
the *Mitakshara* (Cap. II, Sec. XI, Verse 2) where its author Vijnanesvara
adds to the text of Yajnavalkya by declaring that the character of
*stridhan* attaches not only to the acquisitions by a woman which the
text specifies as such, but also to property which she acquires by
inheritance, or in fact by any other mode. It is not necessary now to
state in any detail how impossible it is, whether with regard to the
authority of other commentators or to other parts of the *Mitakshara*
itself, to construe this passage as conferring upon a woman taking by
inheritance from a male a *stridhan* estate transmissible to her own
heirs. The point is now completely covered by authority. In the case
of *Mussamat Thakoor Deyee v. Rai Baluk Ram* (11 M.I.A., 139) such an
interest was claimed on behalf of a widow in her husband’s
immovable property. In the case of *Bhugwandeen Doobey v. Myna
Baee* (11 M.I.A., 487) such an interest was claimed on behalf of a
widow in her husband’s movable property. In the case of *Chotai Lall v.
Chunnoo Lall* (L.R., 6 I.A., 15; I.L.R., 4 Cal., 744.) such an interest was
claimed on behalf of a daughter in her father’s property. All these
cases were covered by *Mitakshara* law. And in all it was held that the
woman took only a restricted interest and that on her death the
property devolved on the line of the last male owner.\textsuperscript{275}

In this decision the textual uncertainties and the contrary advice of pundits in the
prior cases cited are swept aside in the rising tide of precedent.

To reiterate a point made in Chapter Two, whether property was considered
\textit{stridhana} or not determined a woman’s capacity to dispose of the property at will
and determined who received the property at her death. During her lifetime, a
woman could dispose of her \textit{stridhana} at her pleasure and a woman’s \textit{stridhana}
passed to her heirs at her death, rather than to her husband’s heirs,\textsuperscript{276} or to the heirs
of the person from whom she inherited the property.\textsuperscript{277} Ultimately, as the case law
suggests, it came to be settled Anglo-Hindu law under most schools grounded in the
\textit{Mitakshara} that any time a woman inherited property it did not become her
\textit{stridhana}, but a limited estate; she inherited this restricted estate regardless of
whether she inherited the property from a male or a female, whether she inherited
the property during maidenhood, coverture or widowhood, or whether that
property was moveable or immoveable.\textsuperscript{278}

In theory it was possible to establish that one was a member of a community
whose customs varied from that of the \textit{Mitakshara} as interpreted by the courts.
However, legal doctrine made these customs very difficult to prove. The burden was

\textsuperscript{275} \textit{Muttu Vaduganadha Tevar v. Dora Singha Tevar}, 3 I.L.R.-M. 290 @ 301.
\textsuperscript{276} Desai, Sunderlal T., \textit{Mulla Principles of Hindu Law}, Sec. 124.
\textsuperscript{277} Desai, Sunderlal T., \textit{Mulla Principles of Hindu Law}, Sec. 130.
\textsuperscript{278} Gupte, S.V., \textit{Hindu Law in British India}, Chapter XVIII, Art. 157, ¶ 37.
on the person trying to establish the variation from the “ordinary law”; such a variation had to be proved by clear and unambiguous evidence.\textsuperscript{279} Furthermore, in alleged variations involving succession law, such customs had to be “ancient and invariable”.\textsuperscript{280}

Only the Bombay School succeeded in maintaining a textual interpretation more beneficial to at least some women. The jurists of the Bombay Presidency determined that the Bombay School was governed by the \textit{Mitakshara} as modified in certain respects by the \textit{Mayukha}, another commentary on the \textit{Dharmashastras}. Under the \textit{Mayukha} as interpreted by the Bombay High Court, the general rule was that “property inherited by a woman (whether from a male or female) is \textit{stridhan}.”\textsuperscript{281} Women taking a restricted estate were considered exceptions to this general rule. Thus, “according to the Bombay school property inherited by a woman from a \textit{female} is \textit{stridhana} in all cases without exception.”\textsuperscript{282}

Property inherited by a daughter from her father also was held to fall under the general rule of the Bombay School and therefore be the daughter’s \textit{stridhan}.\textsuperscript{283}

The case of \textit{Balwant Rao and Others v. Baji Rao and others} is an interesting

\begin{itemize}
  \item \textsuperscript{279} \textit{Bhikubai Chunilal Ambaidas v. Manilal Bhagchand Raychand}, A.I.R. 1930 Bom 517, (1930) 32 BOMLR 1217 @ ¶ 21.
  \item \textsuperscript{280} \textit{Bhikubai Chunilal Ambaidas v. Manilal Bhagchand Raychand}, A.I.R. 1930 Bom 517, (1930) 32 BOMLR 1217 @ ¶ 21 citing to \textit{Ramanalakshmi Am-mal v. Sivanantha Perumal Sethwayar} (1872) 14 M.I.A. 570.
  \item \textsuperscript{281} \textit{Gandhi Maganlal Motichand v. Baid Jadab} and others, 1899 I.L.R. 24 Bom 192 @ 217 F.B.
  \item \textsuperscript{282} Gupte, S.V., \textit{Hindu Law in British India}, Chapter XVIII, Art. 157, ¶ 36. (A) (italics in original).
  \item \textsuperscript{283} \textit{Balwant Rao and Others v. Baji Rao and others}, (1920) 57 Ind. Cas. 545, MANU/PR/0041/1920.
\end{itemize}
illustration of this principle in several respects. First, it is interesting because it is an example of the Privy Council affirming the alternative interpretation of female inheritance rights in the Bombay Presidency under the Mitakshara as modified by the Mayukha:

The quality of the right which a daughter takes, who inherits immoveable property from her father, has been differently determined in different parts of India. The absolute right has been affirmed by the Courts of Western India, according to the view of the High Court of Bombay. The limited right has been affirmed by other Courts, and this Board has upheld the rule as determined in each case as applicable to the persons whose law is the law of western or of other parts of India.  

_Balwant Rao and Others v. Baji Rao and others_ is also interesting because neither the real property under dispute nor the deceased father of the inheriting daughter resided in the Bombay Presidency; rather it was that either he or his ancestors (the court did not know which) had migrated from the region of the Bombay Presidency to Central India. Nevertheless, the court determined that the decedent father was a Maharashtra Brahmin and therefore that the law of the Bombay Presidency applied:

Now it is absolutely settled that the law of succession is in any given case to be determined according to the personal law of the individual

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whose succession is in question. It is well put by Mr. Mayne in paragraph 48, where he Bays (sic):

‘Prima facie, any Hindu residing in a particular province of India is held to be subject to the particular doctrines of Hindu Law recognized in that province... But this law is not merely a local law. It becomes the personal law, and a part of the status of every family which is governed by it. Consequently, where any such family migrates to another province, governed by another law, it carries its own law with it.’

Thus, under Anglo-Hindu law the personal laws attached to an individual not only based on religion, but also based on jurisdictional origins.

However, like the other schools governed by the Mitakshara, a widow inheriting from her husband took a restricted estate and so was an exception to the general rule in the Bombay Presidency. Even so, some Bombay jurists seemed to have taken this position reluctantly, noting that the restrictions on the widow’s estate had been “imposed against the general opinion of the native lawyers.”

The broad and uniform imposition of the woman's estate across geographic, doctrinal and sectarian boundaries exemplifies the conservatism of the British colonial jurists in their interventions in the woman/tradition/law/scripture/

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286 Gandhi Maganlal Motichand v. Baid Jadab and others, 1899 I.L.R. 24 Bom 192 @ 201 F.B.
It is unnecessary to venture into the morass that is the controversy over the “correct” interpretation of the *Mitakshara* – to whatever extent this was and is relevant to the practices of any particular community of Hindus. It is sufficient to note that there were multiple interpretations of the *Mitakshara* as it related to women’s inheritance available to be embraced by colonial jurists as revealed by the varied opinions of court *pundits*. Indeed, colonial authorities repeatedly bemoaned the lack of uniformity in the advice of the *pundits*.287 Yet in adjudicating female inheritance rights the most conservative position was taken in all jurisdictions except that of the Bombay Presidency.

The stifling uniformity of the decisions on women’s inheritance rights begs the question why. Why did the British colonizers take this conservative, rather than the more progressive path they had taken with several social issues? The position that the male colonial jurists took the more conservative path because it accorded with their own view of gender roles is implied in the narrative above. Other probable factors include the need to align themselves with existing patriarchal powers in the interest of stability and the likelihood that the more patrilineal property devolution favored by colonial jurists facilitated the collection of revenues and thus was more aligned with the imperatives of the administration and financing of empire. Further research needs to be conducted in this area to assess the relevance of these factors.

287 See *Sheo Shankar Lal and Anr. V. Debi Sahai*, (1903) L.R. 30 I.A. 202, MANU/PR/0028/1903.
vi) Anglo-Muhammadan Law and the Inheritance Rights of Muslim Women in India: A Mixed Legacy

Similar to the experience of their Hindu counterparts in the case of widow-remarriage, Muslim women found that what the British might give with one hand they might take with the other. In the words of Gregory Kozlowski, “...the presence of alien laws and institutions added new opportunities at the same time as they eliminated a number of old ones.”

In favor of women’s inheritance of property and their control thereover was the tendency of Anglo-Indian courts to “apply a text-book version of Islamic social dogmas.” In practice this meant a rigid application of what was referred to in Chapter Two as the “science of the shares”. Although a woman’s portion under the “science of the shares” was typically half that of a similarly situated male, receipt of some property outright was often an improvement over Mughal Era distribution practices and was certainly preferable to the restrictions imposed on the “woman’s estate” inherited by her Hindu sisters.

Another example of a rigid application of Islamic law by Anglo-Indian courts that redounded to the benefit of some Muslim women was the enforcement of the husband’s provision of mehr, the bridal gift. Although not a form of inheritance, its enforcement usually occurred as a result of litigation after the husband’s death.

288 Kozlowski, Gregory C., “Muslim Women and Control of Property in North India”, pg. 116.
289 Kozlowski, Gregory C., “Muslim Women and Control of Property in North India”, pg. 117.
During the late Mughal Era the practice of inflating the *mehr* had arisen as a means of acquiring greater prestige. However, only a small fraction of this sum was generally given at marriage, with the expectation that the wife would ultimately renounce her rights to the balance of the payment. “However, the literalist bent of the British courts meant that judges usually ordered that the money promised be paid.”

“Because such great sums had been pledged, the courts gave women what was in effect lifetime control of the property.”

At least two developments belong on the deficit side of the ledger in this calculation of the impact of Anglo-Muhammadan Law on the inheritance rights of Muslim women. One was the determination, particularly after the 1857 Rebellion, that the interests of the Raj required stability in agricultural holdings. “Thus, the government tolerated the exclusion of female heirs so long as it pacified the pillars of the imperial social and economic order.”

The second development best placed on the deficit side of the ledger was the British treatment of the Islamic Endowment or *waqf*. The reasons for the British dislike of the *waqf* were at least three-fold. First, the colonizers needed to support their government administration; when regular tax receipts were insufficient, they examined tax-exempt properties more carefully. In this context they determined

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290 Kozlowski, Gregory C., “Muslim Women and Control of Property in North India”, pg. 130.
291 Kozlowski, Gregory C., “Muslim Women and Control of Property in North India”, pg. 130.
292 Kozlowski, Gregory C., “Muslim Women and Control of Property in North India”, pg. 127.
293 See Chapter Two for a brief discussion of the attributes of a *waqf*. 
that *awqaf* established for the benefit of individuals, such as the *waqif’s* family members were tax dodges. 294 Second, the British Orientalist scholars who studied and wrote on Anglo-Muhammadan law on behalf of the Raj were great admirers of the science of the shares, an attitude which was communicated to British magistrates who, perhaps because of this endorsement, rigorously enforced this aspect of the law at the expense of the *waqf*. 295 Finally, the division of property upon death in accordance with the science of the shares accorded with the British view of real property as privately held and inheritable.

Although the family *waqf* had been around as long as the waqf itself, it had not been prevalent in pre-British India, if it had been present at all. 296 However, the desire to create such *awqaf* on the subcontinent was born of the two-fold phenomenon under British colonial rule: first, that under British treatment of property law land became worth owning, and second, the strict enforcement of the science of the shares by British courts meant the fragmentation of this land once acquired. 297 Muslims in India under British colonial rule perceived these actions as a threat to their welfare so that the status of the *waqf* became a “hotly debated political issue.” 298

This debate found expression through litigation. At least one justice held, in conformity with much of Islamic Law, in favor of family *waqf* so long as a charitable

or a public institution was the ultimate beneficiary. The case was *Fatima Bibi versus The Advocate General of Bombay* and it was decided by Justice Raymond West in 1882.\(^\text{299}\) Seven years later this recognition of the validity of the *waqf* was rejected by Lord Hobhouse of the Privy Council in London, the supreme authority in the British empire, in *Shaikh Mahomed Ahsanulla Cowdhry versus Amarchand Kundu (and others)*. Holding that the endowment was “illusory” and for the “self-aggrandizement of the founder’s family”, Lord Hobhouse ruled in favor of the endowment’s Hindu creditor, Amarchand Kundu. However, this ruling was limited to the endowment in question, leaving for another day the determination of the validity of family endowments generally.\(^\text{300}\) That day came in 1894 in the case of *Abdul Fata Mahommed Ishak (and others) versus Russomoy Dhur Chowdhry (and others)*. In this case Lord Hobhouse, writing on behalf of the Privy Counsel, asserted that family endowments were created to avoid the law of inheritance. Based on this belief Hobhouse further stipulated that *waqf* should be subject to the same limitations as provided under the science of the shares, that is that only a maximum of 1/3 of the net estate could be subject to a *waqf* and that the beneficiaries of the *waqf* could not be persons who would inherit a portion of the estate.\(^\text{301}\) In so holding Lord Hobhouse re-wrote the history of the *waqf* and fundamentally altered the Islamic Inheritance System.


\(^{300}\) Powers, “Orientalism, Colonialism, and Legal History”, pg. 558.

The demise of the *waqf* has been placed on the deficit side of the ledger because of its negative effects on women’s access to inherited property. Nevertheless, as noted by Kozlowski, the effects of the demise of the *waqf* on women’s inheritance rights was, in fact, somewhat ambivalent: “For women, endowments were something of a two-edged sword which could cut off male cousins, but, if they had brothers, it could also be used to cut off daughters.”

In sum, like the inheritance rights of their Hindu sisters, the inheritance rights of Muslim women became entwined in the colonizer’s quest for stability and authenticity, with a firm emphasis on the former, particularly after the Rebellion of 1857. There was no progressive agenda where women’s rights to property were concerned. Although Muslim women benefited some from the enforcement of the science of the shares and *mehr*, these benefits were incidental to the British quest for stability through authenticity in their enforcement of Islamic personal law.

**B. Chinese and Muslim Succession Law in Singapore under British Colonial Rule: The Question of Accommodation**

i) The Reception of English Law into the Straits Settlements

Sir Stamford Raffles founded Singapore on February 6, 1819 through a treaty signed by Raffles, Sultan Hussein and Temenggong Abdul Rahman, the leader of the small Malay community present at that time. The treaty formalized prior

302 Kozlowski, Gregory C., “Muslim Women and Control of Property in North India”, pg. 129.
arrangements permitting Raffles to establish a British factory on the island.\textsuperscript{304} Through subsequent treaties and payments the British were allowed finally to alienate the whole island in August 1824.\textsuperscript{305}

Although these events mark the beginning of colonial rule in Singapore, they do not mark the commencement of the story of women’s inheritance rights there. As indicated in Chapter Two, which explores the pre-colonial inheritance systems of the peoples who came to inhabit Singapore, in some respects this story begins earlier. However, in terms of laws concerning women’s inheritance rights promulgated and administered by the British colonizers in Singapore, the story begins later for the various prerequisites for the determination of such rights were not in place at that time. These prerequisites include the establishment of a legal system, the accumulation of private capital amongst a significant portion of the population and the presence of women. Although Singapore’s population grew rapidly after the colony was established,\textsuperscript{306} evidence indicates that many of the male laborers and traders came without their families. Maurice Freedman reports that in the 1881 census there were “4,513 ‘Straits-born’ men in a total Chinese male population of 72,571, and 5,014 ‘Straits-born’ women in a total Chinese female population of 14, 195.”\textsuperscript{307}

\textsuperscript{304} Tan, Kevin Y.L., “A Short Legal and Constitutional History of Singapore”, pp. 28-29.
\textsuperscript{305} Saw, Swee-Hock, \textit{The Population of Singapore}, pg. 3.
\textsuperscript{306} Saw, Swee-Hock, \textit{The Population of Singapore}, pg. 10.
\textsuperscript{307} Freedman, Maurice, “Chinese Kinship and Marriage in Singapore”, pg. 66, footnote 3.
The question of the legal system, although technically resolved fairly expeditiously with the reception of English law, nevertheless presented administrators and judges with a number of issues regarding the degree of applicability of that law. As the Recorder, Maxwell, muses in *Regina v. Willans*:

> Having regard to the circumstances under which this place became a British possession, it may be doubted whether any, or if any, then what body of law ought *de jure* to have been considered at the time of the establishment of the Colony, as its *lex loci*, that is, as the territorial law applying to all classes of its inhabitants indiscriminately, without distinction of race, creed or nationality. The general rule of law determining what is the law of a territory is, that if the new acquisition be an uninhabited country found out by British subjects and occupied, the law of England, so far as it is applicable [1 *Bl. Com. 107*], becomes, on the foundation of the Settlement, the law of the land [2 *P. Wms. 75*], that if it be an inhabited country obtain by conquest or cession, the law in existence at the time of its acquisition, continues in force, until changed by the new Sovereign. In the one case the settlers carry with them to their new homes, their laws, usages and liberties, as their birthright. In the other, the conquered or ceded inhabitants are allowed the analogous, though more precarious privilege of preserving theirs, subject to the will
of the conqueror. This Settlement however, did not fall exactly under either branch of the above rule.\textsuperscript{308}

Perceiving the Straits Settlements to be neither uninhabited lands to be populated with British subjects, nor lands populated by indigenous subjects with one established legal system, the British faced a conundrum in their determination of an appropriate legal system for the Straits Settlements. What they settled upon was English law with accommodations; the nature and extent of these accommodations in family and succession law vexed Straits Settlements courts for over a century.

The First Charter of Justice had been issued in 1807 thereby establishing a “Court of Record for the Prince of Wales’ Island\textsuperscript{309} with the jurisdiction and powers of the superior courts of England.”\textsuperscript{310} The Court of Record established by the First Charter of Justice was called the Court of Judicature; this court was endowed with the jurisdiction of an ecclesiastical court “so far as the several religions, manners and customs of the inhabitants will admit.”\textsuperscript{311} The Second Charter of Justice, issued in 1826, extended the jurisdiction of the Court of Judicature to Singapore and Malacca, thereby covering all of the three territories that came to be known as the Straits Settlements.\textsuperscript{312} Echoing the language of the First Charter, the Second Charter of Justice stated that the courts “...shall have and exercise Jurisdiction as an

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\textsuperscript{309} Prince of Wales’ Island is today known as Penang.
\textsuperscript{310} Leong, Wai Kum, Principles of Family Law in Singapore, pg 5.
\textsuperscript{311} Leong, Wai Kum, Principles of Family Law in Singapore, pg 5 (emphasis added).
\textsuperscript{312} Leong, Wai Kum, Principles of Family Law in Singapore, pg 5.
\end{flushleft}
Ecclesiastical Court, so far as the several Religions, Manners, and Customs of the said Settlement and Places will admit.”313

A Third Charter of Justice was issued in 1855. Acknowledging the growing population and commerce of Singapore, this Charter reorganized the court system of the Straits Settlements into two divisions, one for Penang, and another for Singapore and Malacca. One Recorder (judge) was appointed for each division. Again the courts received the same mandate regarding the exercise of ecclesiastical jurisdiction.314

Before 1858 the English ecclesiastical courts administered the law of probate and administration,315 as well as marriage law,316 so that one of the effects of the Second Charter of Justice was to commence the development of two lines of family law: “First, common law rules and equitable principles concerning the family and existing English legislation were received” as the basic law of the Straits Settlements.317 Second, these common law rules and statutes were to operate only to the extent that the results were not unjust.318 The case of Choa Choon Neoh v. Spottiswoode319, a case cited with approval by the Privy Council,320 is widely

313 Leong, Wai Kum, Principles of Family Law in Singapore, pg 5 (emphasis added).
315 Raman, G., Probate and Administration in Singapore and Malaysia, pg. 2.
316 2 Law Magazine Quarterly Review of Jurisprudence n.s. 1 (1845).
317 Leong, Wai Kum, Principles of Family Law in Singapore, pg. 20.
318 Leong, Wai Kum, Principles of Family Law in Singapore, pg. 20.
320 See Yeap Cheah Neo and Others v. Ong Cheng Neo, 6 P.C. 381 (1875).
recognized as the most accurate statement of the meaning of this second principle.

The court in *Spottiswoode* found that:

> In this Colony, so much of the law of England as was in existence when it was imported here, and as is of general [and not merely local] policy, and adapted to the condition and wants of the inhabitants, is the law of the land; and further, that law is subject, in its application to the alien races established here, to such modifications as are necessary to prevent it from operating unjustly and oppressively on them.\(^{321}\)

Guided by these ambiguous principles, the expatriate English judges proceeded to impose their distorted interpretations of the customs of the inhabitants of the Straits Settlements on those peoples. Often these distorted perceptions were made manifest through succession litigation.


If a singular verdict were to be rendered with regard to the inheritance rights of Chinese women during Singapore’s colonial era, that verdict must be that women were the beneficiaries of the reception of English law into the Straits Settlements, especially in cases of intestacy. Under the (English) Statute of Distributions 1670 in cases of intestacy wives became beneficiaries of at least one-third, if not half of their husbands’ estates and daughters were entitled to shares equal to those of their

\(^{321}\) Choa Choon Neoh *v.* Spottiswoode, (1808-1884) 01 KY 216; (1869) KY 1.
brothers. However, as with the benefits of colonialism bestowed on Muslim women in India, the inheritance rights granted to Chinese women were incidental – in the case of the Chinese women of Singapore, it was a consequence of the decision to govern the Straits Settlements Colony by English law. It was not a result of any Enlightenment movement toward gender equality.

Initially, the British ruled the Chinese settlers in Singapore only indirectly through “a system of headmanship by Capitans China. Under this form of loose supervision the only legal rules and mechanism applied to the Chinese were of their own choice and devising.”\textsuperscript{322} Legally, this situation began to change in 1826 with the British Crown’s issuance of the Second Charter of Justice, heralding the formal establishment of the judicial system of Singapore; nevertheless, it was not until “the last quarter of the nineteenth century that government intervention in Chinese affairs had any great influence....Legally and politically the Chinese contrived to maintain their own world.”\textsuperscript{323}

Some areas of law at least in theory were outside the jurisdiction of the English courts. As stated in \textit{Spottiswoode}:

Thus in questions of marriage and divorce, it would be impossible to apply our law to Mahomedans, Hindoos, and Buddhists, without the most

\textsuperscript{322} Freedman, M., "Colonial Law and Chinese Society", pg. 97 (italics in original).
\textsuperscript{323} Freedman, M., “Colonial Law and Chinese Society”, pg. 98.
absurd and intolerable consequences, and it is therefore held
inapplicable to them.\footnote{Choa Choon Neoh v. Spottiswoode, (1808-1884) 01 KY 216; (1869) Ky 1.}

Indeed, the courts in the Straits Settlements held that the English law of marriage
was so inapplicable to the alien inhabitants of the colony that the courts would not
accept jurisdiction of a case involving a woman married in accordance with Chinese
custom who sought from the courts restoration of her conjugal rights.\footnote{Leong, Wai Kum, Principles of Family Law in Singapore, citing Lim Chye Peow v. Wee Boon Tek (1808-1884) 01 KY 236; [1871] KY 2, pg 5.} Nor would
Straits Settlement courts make a determination regarding the marital status of a
Jewish woman who came to the courts seeking such a determination, as well as a
decree for the restitution of her conjugal rights.\footnote{Leong, Wai Kum, Principles of Family Law in Singapore, citing Florence Mozelle Meyer v. Isaac Manasseh Meyer, (1927) S.S.L.R. 1.}

This circumspection in the area of marriage law was not followed in
interpreting the applicability of the (English) Statute of Distributions 1670, which
was one of only two pieces of “significant English legislation on the family received
into the territories”,\footnote{Leong, Wai Kum, Principles of Family Law in Singapore, pg 21.} the other being the (English) Statute of Frauds.\footnote{Leong, Wai Kum, Principles of Family Law in Singapore, pg 21.} The
English law of succession as received into the colonies permitted all subjects
testamentary disposition by will. However, if there was no will, then the property
passed by intestacy in accordance with the provisions of the Statute of Distributions.
Under the Statute of Distributions a widow received one-third of the estate if her
husband died with issue and one-half if he died without issue.\textsuperscript{329} If a male decedent had both a widow and issue surviving him, then those surviving descendants took the remaining two-thirds of the estate, per stirpes, i.e. by right of representation. Each surviving descendant took his or her share regardless of gender. On the other hand, if a woman died survived by her husband, then he was entitled to her entire estate.

But who was entitled to receive the widow’s portion under Chinese custom? There were several cases of intestate succession by Chinese male subjects of the Straits Settlements in which a man died survived by a woman referred to as a t’sai\textsuperscript{330} or “principal wife” and one or more t’sip or “secondary wives” or, depending on one’s position on the subject, “concubines”\textsuperscript{331} Thus, one of the great succession controversies arose: Who qualified as a widow capable of taking the widow’s share in the presence of a “principal wife” and one or more “secondary wives”? Resolution of this question required the courts to determine the decedent’s marital status in relation to one or more women with claims to the widow’s portion of the estate. While the courts had refused to determine the marital statuses of the women in the cases cited above in which the women had come to the courts seeking restoration of their conjugal rights, the Straits Settlement courts in their determination of the appropriate application of the Statute of Distributions to the Chinese subjects of the

\textsuperscript{329} McGovern, William M. Jr., Sheldon F. Kurtz and Jan Ellen Rein, Wills, Trusts and Estates – Including Taxation and Future Interests, §1.2, pg. 3.
\textsuperscript{330} The Romanization of Chinese characters employed here is the same as that used by the courts at the time.
territories determined the marital statuses of innumerable Chinese. They did this through the determination that the Chinese were polygamous. The Straits Settlements Court of Appeal reached this decision after an extensive review of evidence presented before the lower court in the famous case of In the Matter of the Estate of Choo Eng Choon, Deceased, Choo Ang Chee v. Neo Chan Neo, Tan Seok Yang, Cheang Cheng Kim, Lim Cheok Neo, Mah Imm Neo, and Neo Soo Neo, generally referred to as the Six Widows Case.

In Chapter Two Kathryn Bernhardt was quoted as describing the improving status of the concubine. According to Bernhard, the concubine’s status during the Qing Dynasty progressed from being “little more than a sexual servant to a kind of minor wife.” In this context the decision of the British judges that the Chinese were polygamous can be seen as the next logical step in this gradual elevation of the status of the concubine. Nevertheless, the decision in the Six Widows case that the Chinese were polygamous was contrary to the testimony of several experts of Chinese ancestry, all of whom asserted that the Chinese were monogamous. The judgment written by Hyndman-Jones in the Six Widows case justifies this disregard with the following statement:

I say however great the respect we may entertain for the views of these gentlemen, we cannot allow them to decide this question for us. On the contrary it is our duty to consider the position which the law of China has

332 [1911] XII SSLR 120; [1908] SSLR 2.
given to these women so far as we can gather it from all the sources above indicated, and in the light of that law and having regard to the position and being aided but not restricted by the evidence to which I have referred, decide for ourselves the question whether the Chinese as a nation are monogamous or polygamous.  

This statement of judicial autonomy also makes clear that there was no special interest in the status of women or in improving that status. The court was simply concerned with marrying the correct customary practice with the Statute of Distributions as received into the colony. The problem was in the question which was one of inaccurate binaries -- “widow” / “not-widow” or “polygamous” / “monogamous” without any allowance for positions on a spectrum between these concepts. Apparently the accommodations the colonial judicial authorities were willing to make to prevent oppression and injustice could not encompass the distinctive family system prevalent among the Chinese of the Straits Settlements.

Once the courts determined that Chinese were polygamous, litigation focused on determining who qualified as a t’sai or a t’sip so that they or their offspring could share in the decedent’s estate. Thus began the process of “watering down the requirement of proving solemnization of marriage.” The courts moved from requiring extensive proof of ceremonies, with those alleging to be principal wives

334 In the Matter of the Estate of Choo Eng Choon, Deceased, Choo Ang Chee v. Neo Chan Neo, Tan Seok Yang, Cheang Cheng Kim, Lim Cheok Neo, Mah Imm Neo, and Neo Soo Neo, [1911] XII SSLR 120.
335 Leong Wai Kum, Principles of Family Law in Singapore, pg. 90.
bearing the greater burden since such a status was held to require a more elaborate ceremony than that required to take a secondary wife / concubine / t’sip. However, the variety of ceremonies, or in some cases the absence thereof, gradually led the courts to look to the duration of cohabitation and to public repute to determine a valid marriage. Even this standard underwent further dilution until all that was required was a mutual intention to become man and wife. The courts first applied these lower standards to concubines, but given that the principal wife’s share was no greater than that of a concubine, the courts subsequently determined that it would be unjust to hold a principal wife and her offspring to a higher standard. As Leong Wai Kum states:

The stage was thus set for the ultimate development, viz., to extend the latest liberalization, decided regarding claims of having been married as concubine, to the principal wife. As there was no difference in the status of the concubine and the principal wife, there was no reason to withhold the extension. Not only was it natural to so extend, to fail to do so would, with irony, punish the principal wife. She would be held to stricter proof than the concubine. The courts, having done the principal wife the injustice of equating the concubine with her, would not compound that by requiring of her stricter proof to no higher status.336

336 Leong Wai Kum, Principles of Family Law in Singapore, pg. 102. For a detailed discussion of the evolution of the law of marriage and the shifting standards of proof for the purposes of succession, see pages 87-105 of this work.
The courts’ holdings regarding the polygamous nature of the Chinese and the devaluation of the status of the principal wife which resulted therefrom reveal the challenges of discussing the inheritance rights of women as a unitary group. Surely principal wives or t’sai would have preferred that the courts determine Chinese to be monogamous so as to be entitled to the entire widow’s share. Nevertheless, a good case can be made that part of a share is better than no share or the vulnerability of a maintenance right, the principal wife’s entitlements in a traditional Chinese succession.

The accommodation that was made, i.e. that of the alleged polygamy of the Chinese, was not the kind of accommodation of Chinese custom desired by the (presumably male) leaders of Chinese society. Indeed, Maurice Freedman cites W.J. Napier’s “The Application of English Law to Asiatic Races” for the proposition that there were “three main points on which ‘the whole-sale introduction of English law has disappointed Chinese expectations and ideas.’” The three points were as follows:

1) “The non-recognition of adoption” particularly of male children for succession purposes;
2) “Giving the wife and the daughter a large, and in the case of the latter an equal share with that of the sons; and
3) “...The impossibility of tying up property for several generations” for the purpose of ancestral worship.

Women as widows and daughters were the direct beneficiaries of the second point, and, in many respects, the indirect beneficiaries of the first and third points. Daughters born into families without a son in cases of intestacy did not have to share their father’s estate with an adopted son, let alone lose the entire estate to him as such daughters would have under customary Chinese rules of succession. Furthermore, it is likely that some widows’ and daughters’ shares were enhanced by the inability of a decedent to leave a portion of his estate in perpetuity for the performance of ancestral worship.

Nevertheless, the non-recognition of adoption and the shares to wives and daughters were limited to cases of intestacy; it is important to remember that English succession law permitted testamentary freedom through the execution of a will. It is unclear how many potential Chinese testators availed of this opportunity once the degree to which the local application of the English Statute of Distributions differed from customary Chinese succession became evident. While testamentary freedom would not have permitted a patriarch to devote funds to perpetual ancestral worship, it would have enabled him to disinherit his widow(s) and daughter(s) in favor of his son(s).

iii) Muslim Succession in Colonial Singapore: Of the Will and the Waqf

The impact the reception of English law had on the inheritance rights of Muslim women is more difficult to ascertain than that law’s impact on Chinese women. Although the portions allotted Muslim widows and daughters in intestacy under English law would compare favorably with the portions allotted to them
under Islam's science of the shares, traditional Muslim succession practices would not have permitted these portions to be willed away. Not so with English succession law in which it was possible for a testator to disinherit his wives and daughters.

Straits Settlements courts determined that the testamentary freedom available under English law applied to Straits Settlement Muslims in the case known as *In The Goods of Abdullah* decided in 1835. In this case there was --

...an application to set aside the administration granted to the widow of the deceased, a Mahometan, and to admit an alleged Will to probate. There was no dispute as to the execution of the paper treated as a Will; but it was urged on the part of the widow that the Will was inoperative, as not being conformable to the rules of the Mahometan law: the fact that is was not so conformable is admitted, and the only question is, whether for that reason, the Will ought not to be admitted to probate.

The court held that English law, including the power to make a will to dispose of the entirety of one’s property, applied to all of the inhabitants of the Straits Settlements, regardless of religion or race. Indeed, the judge in this case, Recorder Malkin, believed that testamentary freedom bestowed by the English offered all of the inhabitants the opportunity to follow their own succession practices by simply incorporating the provisions of such practices in their wills:

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It may be desirable to call to notice, that it is the fault of native holders of property if any inconvenience results from the present decision, supposing it to be established as law. The law to which I consider them as subject, gives the most unlimited freedom of disposal of property by Will; and any man therefore who wishes his possessions to devolve according to the Mahometan, Chinese, or other law, has only to make his Will to that effect, and the Court will be bound to ascertain that law and apply it for him.342

However, the litigation that ensued over subsequent years revealed that implementing the desires of the members of the Muslim community through testamentary instruments subject to interpretation by English judges was not as simple as Recorder Malkin asserted. Like the Chinese, Muslims found that their conceptions of appropriate charitable and religious uses of property continually ran afoul of the English Rule Against Perpetuities.

The Rule Against Perpetuities remains in effect in many jurisdictions rooted in English Common Law. As stated in its modern form it holds that:

No interest in real or personal property shall be good unless it must vest, if at all, not later than 21 years after some life in being at the creation of

342 In The Goods of Abdullah, [1808-1884] 02 KY 8; [1835] KY 1. (Emphasis in original.)
the interest and any period of gestation involved in the situation to which
the limitation applies.\textsuperscript{343}

The rule, renown for its complexity in application, is designed “...to facilitate the free
alienation of property which in turn helps assure its proper maintenance and
changing use as dictated by the changing circumstances of its various owners and of
society as a whole.”\textsuperscript{344} In its essence it is a rule designed to protect commercial
interests.

Critically, charitable uses are exempt from the application of the Rule Against
Perpetuities. Even so Muslim and Chinese testators had difficulty tailoring their
perpetual charitable bequests to the fit this exception to the satisfaction of English
judges. For example, in \textit{Fatimah \& Ors. v. D. Logan \& Ors.} a Muslim testator gave the
residue of a certain devised premises to be part of the “Whakoff of Mahomed
Noordin” as follows:

\begin{quote}
To expend for the yearly performance of kandoories and entertainments
for me and in my name, to commence on the anniversary of my decease
according to the Mahomedan religion or custom, such kandoories and
entertainments to continue for ten successive days every year, and also
in the performance of an annual kandoorie in the name of all the
\end{quote}

\textsuperscript{343} California Civil Code §715.2 as cited in \textit{Wills, Trusts and Estates Including
Taxation and Future Interests} by William M. McGovern, Jr., Sheldon F. Kurtz and Jan
Ellen Rein, §13.1, pg.504.
\textsuperscript{344} Klugh \textit{v. United States}, 588 F.2d 45, 53 (4\textsuperscript{th} Cir.1978) as cited in \textit{Wills, Trusts and
Estates Including Taxation and Future Interests} by William M. McGovern, Jr.,
Sheldon F. Kurtz and Jan Ellen Rein, §13.2, pg.505.
prophets, and to expend the same in giving a kandoorie or feast according to the Mahomedan religion or custom, to the poor, for ten successive days in every year, from the anniversary of my decease, to the extent of three hundred dollars, including the cost of lighting up the mosque or burial-place of my deceased mother and the school-rooms thereto adjoining. And also to give kandoories or feasts to the poor as aforesaid, once every three months, to the extent of one hundred dollars, and provided there should remain any surplus moneys, then the same is to be expended in purchasing clothes for distribution to the poor.\footnote{Fatimah \& Ors. v. D. Logan \& Ors., [1808-1884] 01 KY 255; [1871] KY 1.}\footnote{Fatimah \& Ors. v. D. Logan \& Ors., [1808-1884] 01 KY 255; [1871] KY 1.}

In making his determination regarding the fate of this disposition the judge lamented that the clause “was not discussed at any length, and I have no means of knowing the meaning of the word kandoorie except from the context, as there was no evidence on the point”.\footnote{Fatimah \& Ors. v. D. Logan \& Ors., [1808-1884] 01 KY 255; [1871] KY 1.} Nevertheless, the judge determined that, except for the gift of the surplus for purchasing clothing for the poor, the bequest failed as a non-charitable perpetuity:

But the whole object of this clause seems to be to provide funds for certain ceremonial entertainments to be given in honour of the testator, in accordance with the Mahomedan religion or custom. As the gift is to last for ever, the question arises whether it is charitable or not, as if it is not, it is void as tending to a perpetuity. No evidence was given to shew
the nature of object of these feasts and kandoories, and whether they are
enjoined by the Mahomedan religion, and I confess that looking at the
description of the objects of the testator’s bounty in the most liberal
manner, it does not appear to me that they can, in any sense of the word,
be called charitable.347

Yet despite the failure of portions of the testator’s bequests to a waqf to be
established in his name, the petitioners, Fatimah, who alleged to be the decedent’s
wife, and Tengah Chee Mah, his acknowledged daughter, did not achieve their goal.
By their petition they had sought to have the will declared invalid under either
English or Muslim law, whichever the court determined to be applicable, with the
assets of the estate passing by intestacy under the prevailing law. Instead, the court
interpreted the residuary portion of the waqf, a portion working primarily in favor
of the decedent’s sons and their descendants, as valid. Indeed, Fatimah was found to
have been divorced by the decedent in accordance with Muslim law years before his
death. As for the decedent’s daughter, the testamentary freedom afforded her father
under English law deprived her of inheritance rights she would have enjoyed under
Muslim law. Again it is clear that the interests of women were not foremost in the
minds of the colonial administrators.

In other instances the “next-of-kin” did benefit from the refusal of the courts
of the Straits Settlements to recognize purposes that Muslim testators clearly saw as
charitable or religious. For example in Re Hadjee Esmail Bin Kassim, Deceased.

Mohamedeen And Others v. Hussain Beebee Binte Shaik Ali Bey the testator attempted to set aside a portion of his estate as a waqf dedicated to five purposes:

(a) Ceremonies to be performed in his honor. (b) Alms to the poor. (c) Pilgrimages to Mecca. (d) A yearly remittance of such sum as his trustee should think proper to his brother and sister in India. (e) A provision for the maintenance of any of his children and their descendants and other relatives who might be in indigent circumstances.348

Although the court found that (b) and (e) were charitable purposes, they failed because the amount was left uncertain. Like the kandoories in the Fatimah case, (a) was found not to be charitable, as well as to be uncertain. As for (c), the pilgrimages to Mecca, the Attorney-General had asserted that this purpose was religious and therefore prima facie charitable. The court rejected this position, stating:

There being therefore no evidence, nor indeed any suggestion that these pilgrimages do anything more than merely solace the pilgrim, and possibly his family, I am of [the] opinion that this purpose was not charitable.349

With all but (d) failing for uncertainty, lack of a charitable purpose or both, the court determined that the bulk of the income should go to the next-of-kin, with the

principal to be similarly distributed at the end of the perpetuities period, i.e. “twenty-one years after the death of the last surviving child of the testator.”

The next-of-kin benefited again when Syed Shaik Alkaff’s attempt to create a waqf through testamentary disposition was held invalid by the Singapore court. In this instance the testator had executed his will in Arabic; the court worked off a translation which all parties accepted as accurate. The testator had divided his (extensive) property into 300 shares. Of these, the testator directed that two hundred be distributed amongst his wife, children and other relations in proportions not described in the case. The remaining third was to be used to create a waqf to fund certain “good works”. These “good works” were to include:

(1) The relief of indigent blood relatives of himself, of his deceased father and of his deceased brother, (2) the distribution on the eve of Friday of the usual meal to the poor; and (3) the spending of the balance in good works in Terim and its districts and in Saion, Mecca and Medina at the discretion of his executors.

In this instance the court honed in on the term “good works”, the English rendering of the Arabic term amur-al-khaira. According to “two Mohammedan witnesses” who gave evidence at the trial, the term used in a Muslim will would mean “works such

as the Kuran would approve.” Again the Attorney-General argued in favor of upholding such as charitable, asserting that “amur-al-khaira represent to the mind of a Mohammedan works of a religious purpose which are therefore prima facie charitable and must be held to be charitable, unless they can be proved to be immoral or contrary to public policy.” Again the court rejected this argument with the following analysis:

Now, as it seems to me, the fallacy in this argument lies in the assumption that a purpose which is religious in the eyes of a devout Mohammedan is for that reason religious in the sense in which the word is used in the proposition “religious purposes are prima facie charitable.” The word as used in the proposition has no very exact meaning, but its sense is sufficiently restricted to exclude the ideas associated with such words as “benevolent,” “philanthropic” and “altruistic.” To be “religious” in the true sense, a purpose must tend to the promotion of religion not merely secure “the approval of the Almighty.” Whereas in the eyes of the Mohammedan such approval is the only test. One illustration is sufficient to point the difference: to make provision for one’s children is an act which has the approval of the Almighty and is therefore, to a Mohammedan, a religious act, but it is not, even prima facie charitable in the legal sense. For these reasons I have no hesitation in holding that a

purpose is not prima facie charitable simply because it is regarded by a devout Mohammedan as religious.\textsuperscript{355}

In the end the court approved only purpose (2), with the balance to be distributed to the next-of-kin. Interestingly, the judge told the parties that the “distribution amongst the next of kin may give rise to a question as to whether some part of the property will not devolve according to the Mohammedan Law, but I have no doubt the parties will be able to decide that question without further reference to the court.”\textsuperscript{356} Was the judge winking at an intestate distribution that under the law of the Straits Settlements as it existed at that time should have been distributed in accordance with the English Statute of Distributions, but was likely to be distributed by the estate’s representatives in accordance with Muslim law? It is interesting to note that the case was decided in 1923, as it was in 1923 that an Amendment was made to the Mahomedan Marriage Ordinance which provided in part that:

In the case of any Mahomedan person dying intestate after the 1\textsuperscript{st} January, 1924, the estate and effects shall be administered according to Mahomedan law, except insofar as such law is opposed to any local custom which prior to 1\textsuperscript{st} January, 1924 has the force of law.\textsuperscript{357}

\textsuperscript{355} \textit{Re Syed Shaik Alkaff, Decd.; Alkaff & Anor v. Attorney General, S.S., [1958] 01 MC 38; [1923] MC 1.}

\textsuperscript{356} \textit{Re Syed Shaik Alkaff, Decd.; Alkaff & Anor v. Attorney General, S.S., [1958] 01 MC 38; [1923] MC 1.}

\textsuperscript{357} Talib, Naimah Said, “British Policy Towards Islam in the Straits Settlements (1867-1941)”, pg 40, citing to the 1923 (No. 26) Mahomedan Amendment, Section 27.
So while the estate of a Muslim intestate in 1923 would pass by English law, such an estate would pass by Shari’a law in 1924.

The 1923 act was an amendment to the Mahomedan Marriage Ordinance (no. 5 of 1880). The 1880 Ordinance contained three parts,\textsuperscript{358} one to address the registration of marriages and divorces, a second calling for the appointment of Kathis, and a third “to define the modifications of the laws of property to be recognized in the case of Mahomedan Marriages”\textsuperscript{359} The purpose of the Ordinance, as stated by the Attorney General at the time, was to: “place the Mahomedan women here in the same position as she would be in an Mahomedan country, that is to say her property is untouched and it remains the same after her marriage as before.”\textsuperscript{360} Thus:

\begin{verbatim}
X. All the property belonging to a woman on her marriage, whether moveable or immovable, and however acquired, shall, after marriage to a Mahomedan husband, continue, in the absence of special written contract to the contrary, to be her own property; and she may dispose of
\end{verbatim}

\textsuperscript{359} Ordinance No. V of 1880, as printed in the \textit{Straits Settlements Government Gazette}, August 27, 1880, pg. 839.
the same, by deed or otherwise, with or without the concurrence of her husband.\textsuperscript{361}

The effect of this provision was to take married Muslim women of the Straits Settlements outside the legal disabilities of coverture that attached to married women under English law such that a married woman could not own property free from her husband's claim or control.\textsuperscript{362}

Through the Mahomedan Marriage Ordinance and the amendments thereto, the British made greater accommodations to Muslim law than they made for Chinese customary law in the Straits Settlements. It is likely that this was due to their greater familiarity with Muslim law through their administration of that law in India. But even this accommodation was not complete as there were at least two important substantive areas in Muslim inheritance law where English law prevailed. The first was expressed in Section 27 of the 1923 Amendment where it states, contrary to Muslim law, that: “any of the next of kin who is not a Mahomedan shall be entitled to share in the distribution as though he were a Mahomedan.”\textsuperscript{363} More critically, and again contrary to Muslim law, Muslim testators in the Straits Settlements were free to dispose of their entire estates as they pleased, whereas this

\textsuperscript{361} Ordinance No. V of 1880, Section X, as printed in the Straits Settlements Government Gazette, August 27, 1880, pg. 847.
\textsuperscript{362} Black, Henry Campbell, M.A., Black's Law Dictionary, pg. 366.
\textsuperscript{363} Talib, Naimah Said, “British Policy Towards Islam in the Straits Settlements (1867-1941)”, pg 41, citing to the 1923 (No. 26) Mahomedan Amendment, Section 27.
testamentary freedom is limited to 1/3 of an estate under Shari’a law and even then it is subject to restrictions.364

In sum, an idiosyncratic mélange of laws governed the distribution of Muslim estates in the Straits Settlements. Initially, the law was strictly English law, though the degree to which this law governed Muslim practices in the early years is an issue. As time went on the English made certain accommodations for Muslim practices, in 1880 taking Muslim women out from under the disabilities of coverture and from 1923 on allowing intestate estates to pass pursuant to Shari’a law. Although a wife would have been assured a share of her husband’s estate under Shari’a law, the retention of complete testamentary freedom for all Muslim testators meant that under Straits Settlement law, Muslim women could be disinherited by their husbands. This left Muslim women in a more vulnerable position than they would have been under a true administration of Shari’a law.

C. Succession Among the Chinese of Colonial Hong Kong: Elliot’s Proclamations and the Perpetuation of Qing Law

Throughout most of British colonial rule, the Chinese women of Hong Kong did not fare as well as their Singapore sisters. Although both inhabited British colonies the majority populations of which were ethnically Chinese, the inheritance law which the British colonizers applied in Hong Kong differed radically from that applied in Singapore. Specifically, the Hong Kong judiciary determined that Chinese

customary law rather than the (English) Statute of Distributions 1670 applied to Hong Kong’s Chinese inhabitants. As a consequence, the Chinese women of Hong Kong endured the same kind of inequitable succession practices that Chinese women had endured for centuries.

Although the effects of the British choice of law on the Chinese women of Hong Kong were profound, again we find no evidence of any consideration being given to those effects at the time of the establishment of the colony. Only in the waning years of colonial control did women’s issues find explicit expression through reformation of the inheritance laws to make them more gender equal. The following examination of the development of inheritance law as it applied to and affected Chinese women in Hong Kong during the colonial era, an era which only ended in 1997, will explore the factors in the implementation of British rule in Hong Kong that led the colonizers to take an approach so different than that taken in Singapore, as well as the factors which led the colonial administration in its later years to take women’s interests into consideration.

i) The Foundations of Hong Kong’s Dual Law System

British occupation and administration of Hong Kong Island and harbor may be said to have begun on January 7, 1841 when the Chinese Imperial Commissioner, Chi-shan, having lost a few battles to British forces, signed the Convention of Chuan-pi with Captain Charles Elliot, the British Plenipotentiary in China. Formal

occupation began pursuant to this Convention on January 26, 1841. Among Captain
Elliot’s first official acts were the issuance of two proclamations, one dated February
1, 1841, which he issued jointly with Commodore Bremer, and another dated
February 2, 1841 which he issued alone. The first proclamation stated in part:

The inhabitants . . . are further secured in the free exercise of their
religious rights, ceremonies and social customs and in the enjoyment of
their lawful private property and interests. They will be governed,
pending Her Majesty’s further pleasure, according to the laws, customs
and usages of the Chinese (every description of torture excepted) by the
elders of villages, subject to the control of a British magistrate...

The second proclamation reinforced the first, stating in part:

And I do hereby declare and proclaim, that pending Her Majesty’s further
pleasure, the natives of the island of Hong Kong, and all natives of China
thereto resorting, shall be governed according to the laws and customs of
China, every description of torture excepted. And I do further declare
and proclaim, that pending Her Majesty’s further pleasure, all British
subjects and foreigners residing in or resorting to, the island of Hong

366 Lewis, D. J., “A Requiem for Chinese Customary law in Hong Kong”, 32
International and Comparative Law Quarterly 347, pg. 348, citing to J.W. Norton-
Kyshe, The History of the Laws and Courts of Hong Kong (1898), Vol. 1, pg. 5.
Kong, shall enjoy full security and protection, according to the principles and practices of British law...

Both governments subsequently repudiated the Convention of Chuan-pi as beyond the authority of the signing officers, the Chinese on January 30, 1841 and the British on April 30, 1841. Furthermore, the British Foreign Office considered the proclamations premature since no formal treaty had been ratified by the sovereign. “Nevertheless, the proclamations appear to have formed the basis of the application of English law in Hong Kong until 1844.” They are also generally cited as the origins of China’s dual system of law. Indeed, D. J. Lewis in his article called “A Requiem for Chinese Customary Law in Hong Kong” calls them “the first legal basis for the application of Chinese customary law…”

Hong Kong Island was formally ceded to the British in the Treaty of Nanking (signed August 29, 1842, ratifications exchanged June 26, 1843). Hong Kong further expanded its territory in 1860 whereby part of Kowloon Peninsula was

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370 Wesley-Smith, Peter, The Sources of Hong Kong Law, pg. 88.
372 Wesley-Smith, Peter, The Sources of Hong Kong Law, pg. 88.
ceded to the British.\textsuperscript{373} Hong Kong’s final territorial accretion came with the ratification of the Convention of 1898 through which Great Britain obtained a 99-year lease of the area generally known as the New Territories.\textsuperscript{374}

A Charter dated April 5, 1843 established Hong Kong as a colony with a law-making body: the Governor, acting by and with the advice of a Legislative Council.\textsuperscript{375} From this point on the parameters of colonial law were set by a series of Supreme Court Ordinances beginning in 1844. As reported in the case of \textit{In Re Tse Lai-Chiu, Deceased Tse Moon-Sak v. Tse Hung and Others}, the enactments relevant for determining the applicability of English law were:

(a) s.5 of the Supreme Court Ordinance, Cap. 4, 1950 Revised Edition, (originally s.3 of Ord. No. 15 of 1844 and s.7 of Ord. No. 12 of 1873) which reads as follows: -

Operation of laws of England. 5. Such of the laws of England as existed when the Colony obtained a local legislature, that is to say, on the 5th day of April, 1843, shall be in force in the Colony, except so far as the said laws are inapplicable to the local circumstances of the Colony or

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{373} Hsu, Berry Fong-Chung, \textit{The Common Law System in Chinese Context: Hong Kong in Transition}, pg. 9.
\item \textsuperscript{374} Hsu, Berry Fong-Chung, \textit{The Common Law System in Chinese Context: Hong Kong in Transition}, pg. 9.
\item \textsuperscript{375} Wesley-Smith, Peter, \textit{The Sources of Hong Kong Law}, pg. 89.
\end{itemize}
\end{footnotesize}
of its inhabitants, and except so far as they have been modified by laws passed by the said legislature.\textsuperscript{376}

This portion of the text of these Supreme Court Ordinances is reminiscent in spirit of the Charters of Justice promulgated in the Straits Settlements whereby courts there were empowered to exercise ecclesiastical jurisdiction “so far as the several religions, manners and customs of the inhabitants will admit.”\textsuperscript{377}

Nevertheless, Hong Kong’s judiciary interpreted their Supreme Court Ordinances as requiring a much greater accommodation with Chinese customary law than Straits Settlement courts found necessary to be in compliance with their Charters of Justice. Why?

There are two interrelated factors that help account for this difference. First, the British perceived the inhabitants of the Straits Settlements as migrants upon whom they could impose English law, albeit with accommodations. Hong Kong’s inhabitants were perceived, on the other hand, as “native” subjects of the sovereign power from whom they had wrested the island. As such the inhabitants of Hong Kong were entitled to the benefits of their own law until altered by the new sovereign, Great Britain. Captain Elliot’s Proclamations gave expression to this understanding and were intended to provide reassurance to Hong Kong’s inhabitants. The existence of Elliot’s Proclamations thus constitutes the second factor leading to the development of Hong Kong’s dual law system. The importance

\textsuperscript{376} In Re Tse Lai-Chiu, Deceased Tse Moon-Sak v. Tse Hung and Others, [1969] HKLR 159 @ 159-160.

\textsuperscript{377} See note 311 supra.
of Elliot’s Proclamations is expressed in the colony’s case law -- despite the ultra
vires character of those Proclamations.

The importance of Elliot’s Proclamations is nowhere more evident than in
the 1915 case of Ho Tsz Tsun v Ho Au Shi.378 In this case the full court held on appeal
that “the Statute of Distributions does not govern the devolution of the leasehold
estate of a Chinese intestate.”379 In so holding, the court in Ho Tsz Tsun finally
clarified that Hong Kong operated under a dual law system:

We have in the Colony two systems of distribution, one under the Statute
which as been recognized by the Courts, and the other the Chinese law of
inheritance or succession which according to the evidence is and always
has been observed by Chinese residents.380

The judges in Ho Tsz Tsun founded this system upon Elliot’s Proclamations. As Chief
Judge Rees-Davies says in his concurring opinion:

It is therefore clear that, at the cession of the island to the British Crown,
express reservation was made on behalf of the Sovereign, in so far as
Chinese were concerned, of the laws and customs of China; whilst
extending to British subjects and foreigners security and protection

378 Ho Tsz Tsun v Ho Au Shi, Yeung Siu Chi, Ho Hong Chung, Ho Cheng Shi and Chan Ho Shi, [1915] 10 HKLR 69.
379 Ho Tsz Tsun v Ho Au Shi, Yeung Siu Chi, Ho Hong Chung, Ho Cheng Shi and Chan Ho Shi, [1915] 10 HKLR 69.
380 Ho Tsz Tsun v Ho Au Shi, Yeung Siu Chi, Ho Hong Chung, Ho Cheng Shi and Chan Ho Shi, [1915] 10 HKLR 69 @ 72.
according to the principles and practice of the British law; thus recognizing a dual prospective system of law in the Colony.\textsuperscript{381}

Having decided that Hong Kong was based on a dual law system, the colony's judges were free to assess and apply that law without being required to apply the English concepts embedded in the Statute of Distributions. While, perhaps, a laudable application of the concepts of legal pluralism, women were not the beneficiaries of Hong Kong's bifurcated justice.

ii) The Attributes of Chinese Customary Inheritance Law as Administered in Colonial Hong Kong

In order to determine whether Chinese customary law could be adapted to the Statute of Distributions the court in \textit{Ho Tsz Tsun} collected affidavits on Chinese law and customs. The court gave particular weight to the affidavits of a Mr. Ross and of Mr. Lin Wei Chang, the latter identified as President of the High Court of the province of Kwangtung. The court reached its conclusions on the principal features of Chinese succession practices based on these affidavits:

Shortly stated it is clear from these that China is a polygamous country; that the first wife has precedence, but that the other wives are wives and not merely concubines; that the children of all are legitimate; that the children adopted into the family are in the same position as children by

\textsuperscript{381} \textit{Ho Tsz Tsun v Ho Au Shi, Yeung Siu Chi, Ho Hong Chung, Ho Cheng Shi and Chan Ho Shi}, [1915] 10 HKLR 69 @ 79.
blood, that those adopted out of it lose their right to inherit, and this system of adoption is common; that males inherit to the exclusion of females, who also on their marriage cease to be members of the family; that wives principal and secondary are entitled as widows to maintenance so long as they behave themselves properly, but are not entitled to any share in the succession. Such being the law which governs Chinese succession, it not only seems to me impossible to ascertain under it classes who might take under the Statute of Distributions; but, what is more important, it seems impossible to hold that the Statute can, without oppression, be made applicable to a people subject to such a law of inheritance.\textsuperscript{382}

So it was that as of 1915 the Statute of Distributions was deemed too oppressive to apply to Chinese in Hong Kong, leaving succession to a customary system oppressive to women. This was an anomalous decision in light of the determination in the Straits Settlements to impose the Statute of Distributions on the majority Chinese population there. Nevertheless, both decisions were made independent of any concerns for women’s property rights; in both cases the impacts of these decisions on women were mere by-products of the colonizer’s quest for stability and order in the administration of its empire.

\textsuperscript{382} Ho Tsz Tsun \textit{v} Ho Au Shi, Yeung Siu Chi, Ho Hong Chung, Ho Cheng Shi and Chan Ho Shi, [1915] 10 HKLR 69 @ 73-74.
Meanwhile, events in China were neither stable nor orderly. By 1915 the Qing Dynasty had fallen with no credible authority to replace it. “Between 1916 and 1928 and in peripheral areas even longer, China was divided among a number of competing warlords, or local military leaders.” The late 1920’s and 1930’s saw the rise of the Guomindang Nationalists and the late 1930’s and 1940’s brought the Japanese invasion followed by civil war. Hong Kong was itself occupied by the Japanese from 1941-1945. The Chinese Communist Party finally prevailed in its war against the Guomindang in 1949, unifying China’s governance, but initiating a new era of upheavals.

The place of women in society was an integral part of the ideological battles that raged during this period. Even in the midst of this violence and turmoil laws reflecting a more equitable order found expression. The Guomindang began its codification efforts in 1927; its “books on family and on inheritance were promulgated in December 1930 and went into effect on May 5, 1931.” Gender equality in inheritance rights and the dismantling of patrilineal succession were central to this legal effort.

It was in this context that the colonial administration in Hong Kong appointed a committee in October 1948, with the mandate:

To consider and make recommendations as to how far Chinese law and
custom as existing in 1843 –

(a) is now applicable to Chinese domiciled in Hong Kong or other
Chinese resorting here;

(b) should with or without modification be incorporated by Ordinance
into the law of the Colony;

(c) should whether already incorporated or not be superseded with or
without modification by the law of the Colony applicable to persons
to whom such Chinese law and custom does not apply or by any
other law;

and generally to consider and make recommendations as to what is
the best course, legislative or otherwise, to adopt in relation to
Chinese law and custom in force in Hong Kong.

The results of the committee’s efforts, a report that came to be known as the
Strickland Report named after the chairman of the committee, was issued in
December of 1950. As incorporated in the committee’s mandate, the Strickland
Report included recommendations for changes in those parts of the law then
governed by Chinese law and custom, i.e. marriage, divorce, adoption, and
inheritance and the law of succession. In this latter area the committee’s
recommendations included the allowance of testamentary freedom for all property,
including land in the New Territories, and the abolition of “Tsing law as to
succession on intestacy in all cases except in so far as such law may be applicable to
intestate succession to land in the New Territories and substitute the law applicable to such succession under the Chinese Civil Code (Nationalist)” with specified modifications.³⁸⁶ The Chinese Civil Code (Nationalist) was the more gender equitable inheritance law developed by the Guomindang.

Unfortunately, the Hong Kong government refused to accept the major recommendations of the Strickland Report, including those recommendations concerning the law of succession.³⁸⁷ Nevertheless, the report is valuable as an assessment of the role and character of Chinese law and custom in Hong Kong in the middle of the Twentieth Century; these practices remained largely in accord with Qing customary law. Thus, those entitled to succeed were “all sons and their male descendants, whether born of the principal wife or of a concubine.”³⁸⁸ Of a decedent’s daughters, only those who were unmarried had any claim on the estate and that claim was to “a certain sum as agreed upon in each particular case”.³⁸⁹ If a man had no sons born to him, he could adopt or the elders could appoint one for him. Only if there were no biological, adopted or appointed sons so that the male

³⁸⁷ Wong, Pik Wan, “Negotiating Gender: The Women’s Movement for Legal Reform in Colonial Hong Kong”, pg. 179.
line was “extinct” were daughters entitled to divide the property.\textsuperscript{390} As for the position of widows, the report was remarkably sanguine:

No special provision is made for the widow as such, but she is amply cared for. If she is also the mother of the family she can refuse to consent to a division of the estate, in which case she has the practical control of the whole inheritance, and if she is a widow of a son dying before division, she is entitled to the custody and management of her husband’s share in trust for her sons or the adopted successor.\textsuperscript{391}

\textbf{iii) The Beginning of the End of Chinese Law and Custom in Hong Kong}

Although the recommendations of the Strickland Report were not followed, D. J. Lewis suggests -- indeed laments – that the report seemed to affect the attitudes of the judiciary so that in the case of \textit{Wong Yu Shi and Others v. Wong Ying Kuen},\textsuperscript{392}

Chief Justice Hogan announced that:

\begin{quote}
In our view Chinese law and custom prevails only if the corresponding English law is inapplicable in the sense that it cannot be applied without injustice or oppression and if it is not shown to be excluded by Hong Kong legislation.\textsuperscript{393}
\end{quote}

\begin{flushleft}
\textsuperscript{390} \textit{The Strickland Report on Chinese Law and Custom in Hong Kong} – Report of a Committee appointed by the Governor in October, 1948, pg.17.
\textsuperscript{391} \textit{The Strickland Report on Chinese Law and Custom in Hong Kong} – Report of a Committee appointed by the Governor in October, 1948, pg.17.
\textsuperscript{392} [1957] HKLR 420.
\textsuperscript{393} \textit{Wong Yu Shi and Others v. Wong Ying Kuen}, [1957] HKLR 420 @ 443.
\end{flushleft}
In his requiem Lewis finds that this case reverses the positions of Chinese and English law:

English law would henceforth be generally applicable to all the inhabitants of Hong Kong, including the Chinese, with Chinese law and custom only being entertained upon a showing that the application of English law would result in “injustice or oppression”. Importantly, the burden of producing evidence on the issue of inapplicability was shifted from the party claiming English law to the party claiming Chinese law and custom.394

The case of In Re Tse Lai-Chiu395 illustrates well the more vulnerable status of Chinese law and custom when English law is assumed to prevail unless it is shown to result in injustice or oppression. This case finally settled the issue of whether Chinese had testamentary capacity or whether such was prohibited by Chinese customary law. Holding in favor of testamentary capacity, the court determined this power worked no injustice or oppression on Chinese society as it existed at the time of the testator’s death in 1960.

The penultimate nail in the coffin for Chinese law and custom in Hong Kong was hammered in shortly after the decision in the Tse Lai-Chiu case with a flurry of legislative activity that transpired in 1969 - 1971. (These legislative acts represented only the penultimate nail because of exceptions related to the

394 Lewis, D.J., “A Requiem for Chinese Customary Law in Hong Kong”, pg. 353, citing In re Tse Lai-chiu [1969] HKLR 159 @ 177 for the final proposition.

395 In re Tse Lai-chiu [1969] HKLR 159 @ 193.
devolution of land in the New Territories.) Like the dismantling and reconstruction of so many interlocking pieces, these legislative acts were intended to deconstruct the Chinese polygamous, patrilineal family system and replace it with a strictly monogamous, bilateral system modeled on English law. As D. M. Emrys Evans, then a professor and head of the Department of Law at the University of Hong Kong, notes in his 1973 article entitled “The New Law of Succession in Hong Kong”, the monogamy envisioned was not that which, some would argue, prevailed in Chinese customary law, i.e. that of one principal wife, together with one or more concubines, but that “used in the sense explained by Lord Penzance in Hyde v. Hyde (1866) L.R. 1 P. & D. 130 at 133 to the effect that it implies the ‘voluntary union of one man and one woman for life to the exclusion of all others.’”396

A litany of the acts passed to implement these changes must commence with the Marriage Reform Bill, which first appeared in 1969 and passed into law in 1970, though it was brought into force only in 1971, “the date upon which other, complementary or ‘partner’ legislation was brought into force.”397 “Partner” legislation would include at least the following:398

- Legitimacy Ordinance (Cap. 184, LHK 1971 ed.; originally No. 29 of 1971);

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396 Evans, D.M. Emrys, “The New Law of Succession in Hong Kong”, 3 Hong Kong Law Journal 7 (1973) @ 12, footnote 17.
397 Evans, D.M. Emrys, “The New Law of Succession in Hong Kong”, 3 Hong Kong Law Journal 7 (1973) @ 11.
398 The following list of the interrelated legislation is taken from footnotes 12 and 13 in D.M. Emrys Evans’ “The New Law of Succession in Hong Kong”, 3 Hong Kong Law Journal 7 (1973) @ 11.
• Married Persons Status Ordinance (Cap. 182, LHK 1971 ed.; originally No. 27 of 1971, as amended by No. 39 of 1972);

• Deceased’s Family Maintenance Ordinance (Cap. 129, LHK 1971 ed.; originally No. 12 of 1971);

• Probate and Administration Ordinance 1971 (Cap. 10, LHK 1971 ed.; originally No. 26 of 1971);

• Intestates’ Estates Ordinance (Cap. 73, LHK 1971 ed.; originally No. 1 of 1971, as amended by No. 49 of 1971 and No. 39 of 1972); and


While it was the combined effect of these Ordinances which brought sweeping changes to the Hong Kong succession landscape – that terrain on which familial structures meet property rights – the following discussion focuses primarily on Section 4 of the Intestates’ Estates Ordinance (IEO) which concerns the “Succession to estate on intestacy”. Pursuant to this section, summarily stated, a surviving spouse was entitled to:

• Half the estate if also survived by descendants of the decedent, or the decedent’s parents or siblings;399 or

• All of the estate if there were no surviving descendants, parents or siblings of the decedent.400

399 Intestates’ Estates Ordinance (Cap. 73, LHK 1971 ed., sections 4(3) and 4(4)) as reported in D.M. Emrys Evans’ “The New Law of Succession in Hong Kong”, 3 Hong Kong Law Journal 7 (1973) @ 37.
Furthermore, regardless of the presence of other survivors, the surviving spouse was entitled to the first $25,000 in the estate and was first in line for appointment as the estate’s personal representative.

The position of daughters was similarly improved, any daughters taking as “issue” the same as sons. Although a widow without a son could adopt under the appropriate statute, customary adoptions and, consequently, posthumous adoptions were no longer recognized. As a result, daughters’ entitlements were no longer jeopardized by postmortem actions.

Special “transitional provisions” regarding unions of “concubinage entered into before 7 October 1971” were made so that concubines were entitled to support from the estate and so that their children could take as the legitimate issue of their father.

Unsurprisingly, these improvements in women’s property rights, albeit delayed in comparison with other Chinese societies, were controversial in Hong Kong. The most sophisticated opponents argued from a legal pluralist point of view.

400 Intestates’ Estates Ordinance (Cap. 73, LHK 1971 ed., section 4(2)) as reported in D.M. Emrys Evans’ “The New Law of Succession in Hong Kong”, 3 Hong Kong Law Journal 7 (1973) @ 37.
402 Evans, D.M. Emrys, “The New Law of Succession in Hong Kong”, 3 Hong Kong Law Journal 7 (1973) @ 37.
403 Intestates’ Estates Ordinance (Cap. 73, LHK 1971 ed., section 4(3)) as reported in D.M. Emrys Evans’ “The New Law of Succession in Hong Kong”, 3 Hong Kong Law Journal 7 (1973) @ 37.
404 Evans, D.M. Emrys, “The New Law of Succession in Hong Kong”, 3 Hong Kong Law Journal 7 (1973) @ 36.
405 Intestates’ Estates Ordinance (Cap. 73, LHK Section 13).
D. M. Emrys Evans was one of the more articulate, if not the most articulate, of those objecting to the importation of English law reflected in the 1971 ordinances. His knowledgeable writings on Hong Kong succession reflect his dismay as he asserts in an article published in 1973 that the widow:

...has usurped the position of the eldest son in relation to administration of the estate, and she has also usurped his position in that, in the appropriate circumstances, she can take the whole of the estate to the exclusion of the children where the net value of the estate is below $25,000.406

By 1979 Evans had developed a more nuanced position when, writing as the Dean of the School of Law, University of Hong Kong, he penned the following objection:

But I would like to make a general criticism of the trend evinced by Hong Kong’s 1971 legislation. The trend which can be seen in both the common law world and elsewhere has been to move away from dependence on the ‘legitimate’ relationship, in the old-fashioned sense, towards a readier acceptance of the nexus of the blood relationship, whether strictly legitimate or not. The child born out of wedlock is widely treated as much as the child born in wedlock, and factual dependency assumes a greater importance than dependency within

406 Evans, D.M. Emrys, “The New Law of Succession in Hong Kong”, 3 Hong Kong Law Journal 7 (1973) @ 36. (Italics in original; underlining added)
prescribed legal degrees defined by reference to marriage. This is something to which we could well pay some attention in Hong Kong.

Though it is almost heresy to suggest it, it may be that Hong Kong has taken a backward step: the ‘old’ law, based on a traditional view of the family in Chinese cultural terms, provided a wider basis of support within a wider family unit. The formal destruction of the system which underpinned that wider basis has had the effect, for example, of making unmarried, yet dependent, women mistresses without the hope of any rights and their children equally unprotected bastards in terms of their property rights. Yet this change was achieved in the name of progress under the banner of enhancing the status of women and freeing them from what was seen as a demeaning yoke imposed on them by Chinese customary law. Was the change really necessary?407

While Evans’ question should be answered with a resounding “YES”, there is some validity to his critique. For example, Evans’ vision of a legal regime in which at least the children of out-of-wedlock unions are not made to suffer for the decisions and actions of their parents is one that should be embraced.

Evans also criticizes the 1971 legislation as being based on English law and the English concept of the family, rather than being reflective of Chinese culture or

founded upon sound sociological research. Yet, if there was a way to achieve gender equality in succession law in Hong Kong without resorting to the wholesale importation of English statutes, it was lost to the hegemony that was Western thought and values at that point in time.

At the time of its enactment in 1971 the IEO exempted land in the New Territories from its application so that land in that part of the Colony continued to devolve in accordance with Chinese custom. As Evans explained in his 1973 article:

The IEO thus continues the implementation of a long-standing and deliberate policy with regard to the New Territories. This part of the Colony has always received special treatment in an effort by its new rulers to preserve something like the general administrative framework which obtained at the time of the lease as well as the customs and usages of the time.

But, as will be demonstrated in the final chapter, there could be no such thing as a cultural museum piece in the heart of a thriving metropolis.

D. Summary Comparison of the Impact of Colonialism

The developments detailed in this chapter all transpired within the context of British colonialism, a context in which property concerns were paramount. Among the complex tasks of colonial rule was ensuring that a system of property

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409 Evans, D.M. Emrys, “The New Law of Succession in Hong Kong”, 3 Hong Kong Law Journal 7 (1973) @ 39.
interests was in place in which titles were clear, the tax base transparent, and assets fungible without unduly disturbing a status quo in which these attributes may not have been present. Some legislation designed to improve the lives of women, such as the Hindu Widows Remarriage Act, was enacted to the extent permitted by these property imperatives. However, throughout most of the colonial era women’s property rights did not figure in any progressive agenda. This is not to say that women never benefitted from British property policy – in cases of intestacy the Chinese women in the Straits Settlements benefitted from the decision to apply English law to the colony; it is to say that any benefits so accrued were incidental to decisions made for other purposes.
CHAPTER FOUR
THE POST-COLONIAL CATHARSIS
AND THE INHERITANCE RIGHTS OF WOMEN

Not until the waning days of colonial rule did women’s rights, including women’s property rights, rise in priority. The higher profile given women’s issues was due to a host of interrelated factors, including the spread of the influence of the women’s movement which at times, though not always, worked in tandem with campaigns for political independence. Demands for independence paved the way for limited forms of political representation as the illegitimacy of direct domination of foreign territories began to be acknowledged even in British domestic opinion. Political representation provided a focus for activists’ demands.

Although progress on women’s issues was made in India and Singapore prior to their achieving independence, full equality in inheritance law did not come until after independence – with major legislation following shortly after independence in a cathartic expression of liberation and equality. In this narrative Hong Kong is an anomaly, having achieved gender equality in inheritance rights under British rule. On the other hand, by the time women achieved equal inheritance rights in the New Territories the remaining days of colonialism were few in number. The Sino-British Joint Declaration was a decade old and the transfer of sovereignty to China but three years away.

This chapter recounts these histories leading to at least statutory equality in the inheritance rights of the Hindu women of India and the Chinese women of
Singapore and Hong Kong. Although an inadequately regulated testamentary freedom leaves some room for further reform in India and Singapore, the goal of statutory equality largely has been achieved for the Hindu women of India and the Chinese women of Singapore and Hong Kong.

Islamic law, a legal system long at the forefront of women’s inheritance rights, as currently in effect in India and Singapore enshrines an inequality at odds with the rights accorded women of other faiths. This chapter also will examine this situation and the prospects for change.

A. INDIA’S HINDU CODE STRUGGLE

The early Twentieth Century witnessed much political activity on the Indian subcontinent as the struggle for independence intensified. The formation of several women’s organizations to push for changes in women’s legal status was part of this political fervor. Among the leading women’s organizations were the Women’s Indian Association (WIA) founded in 1917, the All India Women’s Conference (AIWC) founded in 1927, and the National Council of Women in India (NCWI) founded in 1925.410 Once The Government of India Act of 1935 came into operation so that nationalist organizations could legislate on the family, these organizations lobbied for legislation that would remove women’s legal disabilities in marriage and inheritance.

410 Agarwal, Bina, A Field of One’s Own: Gender and Land Rights in South Asia, pg. 205.
One of the early pieces of legislation to be introduced was The Hindu Women’s Right to Property Act, 1937. Introduced by Dr. G.V. Deshmukh, the bill was intended to “set right the problems created by the judicial decisions of the English courts which had constrained the scope of stridhana, during the later phase of the nineteenth century.” The bill’s goal, “...to achieve equality between Hindu men and women in respect of their property”, was ambitious. It included provisions to ensure that the property of an intestate Hindu male “would devolve upon the wife, mother, daughter and wife of a predeceased son along with the sons and all would have equal share in the property.” Another provision in the bill as introduced “equated the status of women to that of men and made them absolute owners of the property.” The bill met with strenuous opposition from orthodox Indian members of the assembly. Ultimately, the “liberals had to seek the support of the colonial government to by-pass this opposition, and The Hindu Women’s Rights to Property Act of 1937 was a compromise.”

In comparison with the initial aspirations of the bill’s supporters’, the compromise was eviscerating. Although the bill gave the Hindu widow some

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412 Agnes, Flavia, “Law and Gender Inequality: The Politics of Women’s Rights in India”, pg. 68, in Women and Law in India.
413 Agnes, Flavia, “Law and Gender Inequality: The Politics of Women’s Rights in India”, pg. 69, in Women and Law in India.
414 Agnes, Flavia, “Law and Gender Inequality: The Politics of Women’s Rights in India”, pg. 68, in Women and Law in India.
415 Agarwal, Bina, A Field of One’s Own: Gender and Land Rights in South Asia, pg. 206.
interests in her husband’s estate that had previously been excluded by the presence of a son, a son’s son, or a son’s son’s son, these interests were subject to severe limitations. So, for example, the widow received “…a right to intestate succession equal to a son’s share in separate property among those governed by Mitakshara, and in all property among those governed by Dayabhaga,” as well as her husband’s interest in the undivided Mitakshara coparcenary. However, these interests were limited to that of a woman’s estate, all interests were forfeited on remarriage, and the Act excluded agricultural land from its purview. Daughters received no additional rights under the Act.

Nevertheless, the Act was useful in stimulating discussion and in raising more questions than it answered regarding the status of women in relation to property. To sort through these questions and propose additional legislation to answer them, the colonial government appointed the Rau (Hindu Law) Committee in 1941. Upon reviewing the situation the Committee determined that it was too confused to be repaired by piece-meal legislation:

Instead it strongly recommended that a complete code of Hindu law be prepared, beginning with the law of inheritance and followed by the law of marriage and other aspects of Hindu law. The code as envisaged by

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416 Agarwal, Bina, A Field of One’s Own: Gender and Land Rights in South Asia, pg. 206.
417 Agarwal, Bina, A Field of One’s Own: Gender and Land Rights in South Asia, pg. 206.
418 Agarwal, Bina, A Field of One’s Own: Gender and Land Rights in South Asia, pg. 206.
the Committee would be one ‘which . . . recognize[d] that men and women are equal in status with appropriate obligations as well as rights’.419

Women’s organizations supported the appointment of the Rau Committee “. . . even while they protested the absence of women on the Committee.”420 However, the tactics of the Independence Movement presented them with a dilemma. Around the time of the appointment of the Rau Committee, the Congress Party began an intensification of its civil disobedience, including a boycott of the Legislatures. In response the colonial government incarcerated many Congress members. In this context support of a committee appointed by the colonial government could be interpreted as disloyalty to the Independence Movement so that women were faced with a choice of either supporting a committee committed to women’s rights or supporting independence. As not many of the nationalist men were supportive of women’s issues, many women opted to support the Committee.421

A reconstituted Rau Committee with a mandate to prepare a Hindu Code was appointed in January 1944. With active support from women’s groups such as the

420 Agarwal, Bina, A Field of One’s Own: Gender and Land Rights in South Asia, pg. 208.
421 Agarwal, Bina, A Field of One’s Own: Gender and Land Rights in South Asia, pg. 208.
AIWC, the Committee issued a Draft Code by August. Provisions affecting inheritance rights predominated, including the following:

- “abolition of the Mitakshara right by birth and principle of survivorship;
- equal property shares for the sons and widow of the deceased, and half the sons’ shares for the daughters in all intestate inheritance;
- an absolute estate for the widow (as opposed to a limited interest);
- introduction of monogamy as a rule.”422

The battle over the Hindu Code commenced as opposition to these reforms was fierce. Amidst this opposition a Hindu Code bill was introduced into the Legislative Assembly in April 1947, just four months before India achieved independence. Opposition remained strong.

The conflict continued unabated after independence. However, even with the support of Prime Minister Nehru, the Hindu Code Bill could not pass. Rather than continue to fight for this omnibus bill, Nehru had the bill broken into a number of separate pieces of legislation. These separate pieces of the Hindu Code finally passed into law in 1955 and 1956. The Acts that passed into law at this time were a reaffirmation of Hastings’ personal laws:

- The Hindu Marriage Act, 1955;
- The Hindu Adoptions and Maintenance Act, 1956;

The Hindu Minority and Guardianship Act, 1956; and

The Hindu Succession Act, 1956.

Inevitably, there were compromises in the passage of the Hindu Succession Act, 1956 (HSA). The goal of equal inheritance rights for women as for men was not achieved, though there were important improvements over the colonial law. One of the most critical of these was the abolition of the woman’s estate. This was accomplished through Section 14 of the HSA which provides as follows:

14. Property of a female Hindu to be her absolute property.

(1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

*Explanation:* -- In this sub-section, “property” includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as *stridhana* immediately before the commencement of this Act.⁴²³

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Importantly, paragraph 2 of Section 14 permits the creation of a limited estate when expressly provided in a will or a deed of gift.

More disappointing in the HSA was the retention of some of the basic elements of the *Mitakshara* coparcenary system in which males acquired an interest by birth and females did not. Thus, even though a daughter shared in her father’s interest in the coparcenary upon his death if he died intestate, her interest would still not equal that of her brother due to her brother’s birth-interest.

The power to change succession law is concurrent between India’s central government and its states.\(^{424}\) Thus, between 1956 and 2005 several states took advantage of succession’s place on the Concurrent List to enact gender progressive legislation. Kerala did so through the Kerala Joint Hindu Family System (Abolition) Act of 1976, an act which, as its name suggests, abolished the joint ownership by deeming family members to be separate owners, thus eliminating the son’s advantage in the joint family system.\(^{425}\) Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra took a different approach to enhancing women’s property rights in succession practices.\(^{426}\) They opted to preserve the coparcenary system, but make

\(^{424}\) See Part XI, Section 246 and List III of the Seventh Schedule of the Indian Constitution.

\(^{425}\) Agarwal, Bina, *A Field of One’s Own: Gender and Land Rights in South Asia*, pg. 214.

\(^{426}\) From “Women didn’t receive rights without struggle”, *The Indian Express*, Tuesday, September 13, 2005, on line at [www.binaagarwal.com/popular%20writings/hsaa_interview%20_indianexpress_13sep05.pdf](http://www.binaagarwal.com/popular%20writings/hsaa_interview%20_indianexpress_13sep05.pdf) (last visited on July 19, 2010).
unmarried daughters coparceners by birth, just like sons. Married daughters and agricultural lands were excluded from the acts which preserved the coparcenary system.

Meanwhile, pressure continued for action at the national level. The approaches taken by Kerala on the one hand, and the other reforming states on the other presented two distinct models for legislation: the abolition of the Mitakshara coparcenary system, i.e. the Kerala approach, or the approaches taken by Andhra Pradesh, Tamil Nadu, Karnataka and Maharashtra i.e. its reform through inclusion of the daughter as a coparcener by birth. Although most activists in favor of women’s equality in inheritance rights favored abolition of the Mitakshara system, the legislation as finally passed in 2005 preserves the joint family system, but makes a number of other far reaching changes in Indian inheritance law. These changes are as follows:

428 From “Women didn’t receive rights without struggle”, The Indian Express, Tuesday, September 13, 2005, on line at www.binaagarwal.com/popular%20writings/hsaa_interview%20_indianexpress_13sep05.pdf (last visited on July 19, 2010).
429 From “Women didn’t receive rights without struggle”, The Indian Express, Tuesday, September 13, 2005, on line at www.binaagarwal.com/popular%20writings/hsaa_interview%20_indianexpress_13sep05.pdf (last visited on July 19, 2010).
430 Agarwal, Bina, “Landmark step to gender equality”, The Hindu, September 25, 2005, as found at
• The inclusion of all agricultural lands under the purview of the HSA, as amended. (Prior to the amendment extensive tracts of agricultural land and been excluded, with devolution to such lands subject to tenurial laws enacted at the state level. These tenurial laws were very gender discriminatory.)

• The inclusion of daughters, including married daughters, as coparceners in joint family property.

• The inclusion of the daughter, whether or not married, in all rights with respect to the family dwelling house. (Prior to this change Section 23 of the HSA “did not allow married daughters (unless separated, deserted or widowed) even residence rights in the parental home. Unmarried daughters had residence rights, but could not demand partition.”)

As these readings and citations should make clear, Bina Agarwal, Director and Professor of Economics at the Institute of Economic Growth, Delhi University, has been one of the principal forces behind the move toward the equalization of women’s inheritance rights in India. Upon passage of the 2005 Amendment to the HSA, she was interviewed by Sonu Jain of The Indian Express. When asked whether inequalities still remained she responded with an argument in favor of restricting testamentary freedom over at least 1/3 of an estate so that women can be assured a


Men’s power to exclude women through testate succession remains an impediment to an equitable distribution of assets from a gender perspective in India. This also remains an issue in Singapore and Hong Kong, though some protective legislation has been enacted in these two jurisdictions.

**B. MONOGAMY AND THE SINGAPORE WOMEN’S CHARTER**

The introduction of English law into the Straits Settlements -- and with it the Statute of Distributions -- went a good distance toward the equalization of inheritance rights between genders, in contravention of Chinese customary law. Nevertheless, the determination that Chinese were polygamous and that accommodations should be made for this practice by having the t’sai or “principal wife” and the t’sip or “secondary wife” or concubine share equally in the widow’s portion left many women dissatisfied with the status of the law. As with India, this dissatisfaction found expression once some form of representative government was permitted.

Singapore’s representative government came into existence as a result of negotiations between a number of political parties and the colonial government in London during March and April of 1957. As a result of these talks it was agreed that “General Elections toward a fully elected government in Singapore (with charge

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432 From “Women didn’t receive rights without struggle”, The Indian Express, Tuesday, September 13, 2005, on line at www.binaagarwal.com/popular%20writings/hsaa_interview%20_indianexpress_13sep05.pdf (last visited on July 19, 2010).

of all matters except foreign affairs and defence that would still be controlled by Britain)" would be held in May 1959.434

As in most Singapore political dramas, the People’s Action Party (PAP) played the lead role, holding out the emancipation of women as one of the tasks in their first five-year plan. The party made it explicit that such emancipation necessarily included monogamy for all non-Muslims.435 The PAP’s election victory was overwhelming, taking 43 out of 51 seats in the 1959 General Elections.436

The PAP was faithful to its promise, using its thumping majority to pass the Women’s Charter into law at the Second Session of the First Legislative Assembly on 24th May 1961.437 Subject to an applicability provision that excepts Muslim marriages, Part II, Sections 4(1) – 4(3) of the Women’s Charter provide:

4.—(1) Every person who on 15th September 1961 is lawfully married under any law, religion, custom or usage to one or more spouses shall be incapable during the continuance of that marriage or marriages of

contracting a valid marriage under any law, religion, custom or usage with any person other than such spouse or spouses.

(2) Every person who on 15th September 1961 is lawfully married under any law, religion, custom or usage to one or more spouses and who subsequently ceases to be married to that spouse or all the spouses shall, if he thereafter marries again, be incapable during the continuance of that marriage of contracting a valid marriage with any other person under any law, religion, custom or usage.

(3) Every person who on 15th of September 1961 is unmarried and who after that date marries under any law, religion, custom or usage shall be incapable during the continuance of that marriage of contracting a valid marriage with any other person under any law, religion, custom or usage.

Thus, monogamy became mandatory for all Singaporean Chinese, as well as all other non-Muslims residing in the city-state.

As with India and Hong Kong, testamentary freedom remains a potential source of gender injustice. Although this freedom is limited in Singapore by the Inheritance (Family Provision) Act438, it has been argued that the family maintenance standard enshrined in that Act as it currently exists in Singapore is inadequate to protect family left behind.439 According to this argument courts

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438 Cap 138, 1985 ed.
should have the same authority to allocate assets that they exercise in divorce court to ensure that a surviving spouse and any dependents receive a fair share of the family wealth.\footnote{Ong, Debbie Siew Ling, “Family Provision after Death”, 7 \textit{Singapore Academy of Law Journal} 379 @ 387.}

\textbf{C. HONG KONG’S NEW TERRITORIES: BRINGING AND END TO AN EXCEPTION}

Although the issue of equal inheritance rights for women waned for over a decade after the 1971 legislation while women’s groups focused on other issues, the issue resurfaced in the mid-1980’s with the emergence of a Chinese feminist movement in Hong Kong.\footnote{Wong, Pik Wan, “Negotiating Gender: The Women’s Movement for Legal Reform in Colonial Hong Kong”, pg. 180.} The emergence of this movement coincided with the greater democratization of Hong Kong initiated by the British prior to the transfer of sovereignty over Hong Kong to the People’s Republic of China. In July 1984 legislation was “published setting the introduction of indirect elections to the Legislative Council (Legco) for 1985.”\footnote{Wong, Pik Wan, “Negotiating Gender: The Women’s Movement for Legal Reform in Colonial Hong Kong”, pg. 298.} On December 19, 1984 the Sino-British Joint Declaration, an Agreement between these two sovereigns on the future of Hong Kong, was signed.\footnote{From documentation obtained on the website of Hong Kong Baptist University [http://hkbu.edu.hk/~pchksar/JD/jd-full1.htm] (Last visited on July 15, 2010).} Appendix 3 of this Agreement set forth the intent to preserve inheritance along the male line for land in the New Territories beyond
China’s resumption of sovereignty in 1997. This reminder of the enduring unequal status of women in the New Territories revived this issue for Hong Kong’s feminist movement, which renewed its campaign to change the law.

The movement received a boost in 1993 when the government published a Green Paper on Equal Opportunities for Women and Men; the Green Paper included the issue of inheritance rights for women in the New Territories. Following on this report, the Hong Kong newspaper, Ming Pao, reported that the restrictions on the inheritance rights of women prevailing in the New Territories applied not just to native inhabitants, but to all women:

What was most astonishing to the public was the realization that all public housing estates developed in the N.T. had not yet been exempted from the NTO [New Territories Ordinance]....By 1991, 41.9% of the Hong Kong populace (close to 2.4 million) was residing in the N.T.... Less than 12% of the N.T. population was now native to the area.

444 Wong, Pik Wan, “Negotiating Gender: The Women’s Movement for Legal Reform in Colonial Hong Kong”, pg. 298.
445 Wong, Pik Wan, “Negotiating Gender: The Women’s Movement for Legal Reform in Colonial Hong Kong”, pg. 298.
446 Wong, Pik Wan, “Negotiating Gender: The Women’s Movement for Legal Reform in Colonial Hong Kong”, pg. 181.
about land titles and succession rights caused grave concern and anxiety among indigenous and non-indigenous N.T. land and property owners.\(^{448}\)

With Hong Kong’s Legco having held its first direct election in September of 1991, Beijing scheduled to host the 1995 U.N. World Conference on Women, and other favorable factors in place, action was relatively swift. On June 22, 1994 the New Territories Land (Exemption) Ordinance was passed, giving all women in the New Territories equal inheritance rights over land and other property.\(^{449}\)

Testamentary freedom was and is a threat to this new order, but one that has been ameliorated considerably by the Inheritance (Provision for Family and Dependents) Ordinance enacted in 1995. Unlike the Singapore act which only empowers the court to consider the maintenance needs of family members,\(^{450}\) the Hong Kong ordinance empowers the court to ensure that “reasonable financial provision”\(^{451}\) has been made and can take into consideration what the husband or wife “might reasonably have expected to receive if on the day on which the deceased died the marriage, instead of being terminated by death, had been terminated by a decree of divorce.”\(^{452}\) Thus, in Hong Kong the court’s broad powers to allocate

\(^{448}\) Wong, Pik Wan, “Negotiating Gender: The Women’s Movement for Legal Reform in Colonial Hong Kong”, pg. 181.

\(^{449}\) Wong, Pik Wan, “Negotiating Gender: The Women’s Movement for Legal Reform in Colonial Hong Kong”, pg. 182.

\(^{450}\) Singapore Statutes, Chapter 138, Inheritance (Family Provision) Act, Section 3(1).

\(^{451}\) Hong Kong Statutes, Chapter 481, Inheritance (Provision for Family and Dependents) Ordinance, Section 4(1).

\(^{452}\) Hong Kong Statutes, Chapter 481, Inheritance (Provision for Family and Dependents) Ordinance, Section 5(2)(b).
properties between parties on divorce have been brought to bear in cases of allegedly unfair testate distributions of property.

D. MUSLIM MINORITIES, ISLAMIC INHERITANCE LAW AND THE GENDER ISSUE

In both India and Singapore the Islamisation begun during the colonial period has continued into the post-colonial era. In both these countries the distinctive personal laws of the Muslim community have been statutorily recognized. Apart from the broader application of the science of the shares, there has been little change in Muslim succession law in India. This is largely true in Singapore with one exception. The complete testamentary freedom afforded all testators under colonial law has been curtailed for Muslims to bring testamentary practice into compliance with Shari’a law. This is consistent with the trend toward Islamisation. This lack of activity may be attributed in part to the sensitivities inherent in having a majority community dictate through legislation to a minority community.

i) Muslim Inheritance Practices in Independent India

The creation of a representative assembly elected pursuant to the Government of India Act of 1935 focused the efforts of the Ulema who desired a greater adherence to Shari’a law in succession and inheritance, an area in which customary law prevailed in many areas. They obtained support for this new legislation from Muslim women’s groups by asserting that a strict application of

Nair, Janaki, Women and Law in Colonial India: A Social History, pg. 192.
Shari’a law would improve their status in comparison with that under customary law. Indeed, a strict application of the science of the shares would benefit Muslim women in India in comparison with most customary law which tends to be more strictly patrilineal.

The Muslim Personal Law (Shariat) Application Act, 1937 did pass; it remains good law today in India, governing Muslim inheritance and succession practices. Nevertheless, the exclusion of agricultural land from its purview has limited its value to women. As with reforms to the Hindu Mitakshara, some southern states have taken the lead in including agricultural land as part of the property to be distributed in accordance with Shari’a law. Tamil Nadu, Karnataka and Andra Pradesh included agricultural land through legislation enacted in 1949. Kerala enacted similar legislation in 1963. “Elsewhere, however, succession to agricultural land continues to depend variously on customs, tenurial laws, etc., with differing implications across the unamended states.”

In sum, in India today the strict application of the science of the shares would be an improvement over current practice. The struggle continues to have

agricultural land included under Shari’a law and to ensure that women receive their portions as determined under the science of the shares. Equalization of the shares themselves is a remote prospect. Given the sensitivities between communities in India, any such change would have to come as a reform from within India’s Muslim community.

**ii) The Administration of Muslim Inheritance Law in Singapore**

The property of intestate Muslims in Singapore had passed by Shari’a law ever since the enactment of the 1923 amendment to the Mahomedan Marriage Ordinance on January 1, 1924, but Muslim testators had full testamentary freedom until the enactment of the Administration of Muslim Law Act (AMLA) in 1968, Section 111(1) of which provides:

111. – (1) Notwithstanding anything in the provisions of the English law or in any other written law, no Muslim domiciled in Singapore shall, after 1st July 1968, dispose of his property by will except in accordance with the provisions of and subject to the restrictions imposed by the school of Muslim law professed by him.\(^ {457}\)

The Administration of Muslim Law Act governs all Muslims in Singapore. The Act establishes a “Syariah Court”\(^ {458}\) with jurisdiction over Muslim marriages and divorce. Regarding succession, the Syariah Court is empowered to determine the persons entitled to share in the estate under Islamic law. Although the Singapore

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\(^ {457}\) Administration of Muslim Law Act, Singapore Statutes Chapter 3, Section 111(1).

\(^ {458}\) Administration of Muslim Law Act, Singapore Statutes Chapter 3, Section 34.
Court of appeal has held that "the question as to what assets constitute the estate and effects of a deceased Muslim has first to be determined according to his personal law, where applicable to the circumstances, and not according to the common law",\(^{459}\) certain attributes of ownership determined under common law or by civil law statute may take that property out of the estate. Thus, it has been held that property held by joint tenancy passes by survivorship and does not become a part of an estate,\(^{460}\) and that assets passing to a nominee upon the death of the holder of a Central Provident Fund Account also do not become part of the estate.\(^{461}\) Both rulings ran counter to *fatwas* issued by Majlis Ugama Islam Singapura (MUIS), an Islamic body established under the AMLA, the courts holding that such *fatwas* were expert opinions not binding on the civil courts.\(^{462}\)

Under these rulings it is possible for a substantial portion of the assets of a Muslim domiciled in Singapore to pass outside of the distributional rules of the science of the shares, though, as Singapore courts would argue, still within the acceptable limits of the Islamic Inheritance System as described by Powers.\(^{463}\) It is interesting to note that women were the beneficiaries in the two decisions at issue.

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\(^{459}\) *Shafeeg bin Salim Talib and another v Fatimah bte Abud bin Talib and others*, [2010] SGCA 11 @ Section 27.

\(^{460}\) *Shafeeg bin Salim Talib and another v Fatimah bte Abud bin Talib and others*, [2010] SGCA 11 @ Sections 35-49.


\(^{462}\) *Saniah bte Ali & Ors v Abdullah bin Ali*, [1990] 3 MLJ 135 and *Shafeeg bin Salim Talib and another v Fatimah bte Abud bin Talib and others*, [2010] SGCA 11 @ Section 63.

\(^{463}\) See David S. Powers, “The Islamic Inheritance System”.
Importantly, in *Shafeeg*, the court’s ruling enabled the widow to retain the family home. Only time will tell if this is a typical result.

**E. CONCLUSION**

The introduction of the British colonial administration and its legal apparatus into the three societies under review has furnished us with a common experience to explore the different responses of each society with regard to gender and property. Britain as a colonial power in India and Hong Kong was a force for conservatism in the realm of women’s property rights. In both India and Hong Kong the colonial authorities allied themselves with the existing patriarchies in a tacit pact to preserve customary laws. The British, including most of the British judiciary, perceived those customary laws as ancient, uniform and immutable. Thus, in India and Hong Kong throughout most of the colonial era the property rights of women were entrapped in a reification of an imagined regime. That imagined regime, never accurate at any time, became increasingly inappropriate as it stood rigid in the face of social changes – transformations often engendered by the presence of the colonizers themselves. In India this conservatism expressed itself through the strict enforcement of the “woman’s estate” and the provisions of forfeiture of inheritance rights upon remarriage. In Hong Kong colonial conservatism led to the continuation of discriminatory policies dating from the Tang Dynasty, if not earlier, until the early 1970’s for those on Hong Kong Island and Kowloon, and until 1994 for those in the New Territories.
Singapore would seem to defy this pattern. In Singapore the application of the English Statute of Distributions led to a more gender equitable distribution of property in intestacy than would have been the case under customary law. However, it is argued here that the benefits to Chinese women in Singapore were an incidental legal consequence of the decision to apply English law in the Straits Settlements, rather than a result of any progressive policy toward women. This position is supported by Britain’s subsequent decision to apply the more conservative customary Chinese law in Hong Kong. Starting from India where indigenous laws were implemented through Hastings’ directive in 1772, then moving chronologically forward and geographically eastward to Singapore where English law was applied pursuant to the Second Charter of Justice issued in 1826, then on to Hong Kong where again indigenous laws were implemented as a consequence of Elliot’s Proclamations in 1841, it seems clear that factors other than a progressive agenda were at work. Whatever may have been the personal inclinations of the social reformers, like those who sought to reform sati, in the end it was the imperatives of stability and governability that ruled the day. In sum, for all the interest the British colonial authorities had in property and its transmission, they were not particularly concerned about equality of women’s rights therein.

Eventually, the women’s movement and the concept of gender equality did reach the shores of India and the harbors of Singapore and Hong Kong. Although some changes, such as Singapore’s Statute of Distributions and Hong Kong’s Intestates’ Estates Ordinance (albeit not until 1971), were introduced by Britain as a colonial power, the most sweeping changes were produced by representative
governments: India’s Hindu Succession Act and the 2005 amendment thereto; Singapore’s Women’s Charter, and Hong Kong’s New Territories Land (Exemption) Ordinance. This paper began with a quote from Tocqueville implying that all the legislator has to do is to change the law of inheritance and power relations will re-arrange themselves accordingly. But as these examples show, often the legislator is not moved to enact such transformative legislation unless pushed by popular will.

Today, statutorily, there is much to celebrate in the realm of inheritance rights in cases of intestacy. Although some legal restrictions on testamentary freedom may be necessary to ensure women aren’t disinherited, the current state of the law is a vast improvement over the past. Of course, implementation, i.e. the penetration and effectiveness of the laws, is another question -- one which must be pursued, especially in India and the New Territories.

Meanwhile, the Muslim community has effectively worked to develop its autonomy from the prevailing succession laws of both colonial and independent states. In colonial India Muslims were allowed to follow Islamic law pursuant to Hastings’ directive, albeit subject to the jurisdiction of the courts of the Raj. In colonial Singapore, lobbying by the Muslim community led the colonial government to enact legislation exempting the community from the application of English succession law. Post-Independence the governments of India and Singapore have continued the policy of administering a separate personal law for their Muslim minorities. Although not made explicit, there is little doubt that India’s and Singapore’s reservations to and declarations on the Convention on the Elimination
of All Forms of Discrimination Against Women are designed to exempt their Muslim communities from its purview. Given the gender disparities inherent in the science of the shares, it is germane to query what the prospects are for reform so that, for example, Muslim daughters enjoy a share equal to that received by their brothers.

Followers and supporters of Islam who are concerned with the status of women in Muslim society offer three complementary narratives to account for the gender disparities under the science of the shares. The first narrative, the “Comprehensive System” narrative, explains how the science of the shares is but part of a more comprehensive Islamic Inheritance System. According to this narrative other means exist to compensate for the gender disparities inherent in the science of the shares. This narrative asserts that alternatives to the science of the shares, such as the inter vivos gift and the waqf, provide sufficient alternative avenues of property transmission to permit rectification of any inequities, including gender inequities, inherent in the science of the shares.

The second narrative asserts that the science of the shares from its inception was a progressive force in the lives of women, granting them property rights previously unknown to Arabian women. An extension of this narrative is that the true spirit of Islam is egalitarian, a fact which advocates of this narrative say should be reflected in contemporary interpretations of the Shari’a.
The third narrative, the “Maintenance Rights” narrative, justifies the greater entitlements of men based on their social and religious obligations to support their female kin “whether or not she owns independent resources.”

While the True Spirit of Islam narrative is the most promising in its ability to serve as a foundation for formal equality of inheritance rights between men and women under Islamic law, a vigorous scholarly debate thrives around the issue of women’s rightful place in Islam.

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