

Law and Identity in Colonial South Asia

Bhavani Raman

SHARAFI, MITRA. 2014. *Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772–1947*. New York: Cambridge University Press, also 2017 Ranikhet, India: Permanent Black. Pp. xxiii + 343.

This essay articulates the contributions of Mitra Sharafi's study of Parsi legal culture to colonial legal studies. Situated at the intersection of the literature on legal pluralism and legal institutions, Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772–1947 (2014) uses a range of new legal sources and case law to recover a remarkable history of collective identity that emerged via the medium and infrastructure of law. The Parsis' active participation in colonial legal institutions not only reshaped their normative worlds but also de-anglicized imperial law.

Legal historians have by and large focused on how British colonial rule in South Asia installed a plural legal order to dispense justice and that, in turn, fortified the ascriptive identity of colonial subjects (Washbrook 1981). While one thread of this scholarship has studied the criminalization of subjects, especially of the underclass (Freitag 1991; Singha 1998), much of the literature on culture and ascriptive identity has focused on the elaboration of personal laws based on religious difference. In a now classic essay, Bernard Cohn argued that the governance of the Indian colonies was without precedent in British constitutional history. Considered to be neither settlers nor slaves, South Asia's inhabitants posed a "culture" problem that officials sought to resolve through the "administrative instrumentalities of rulership" (1989, 133). To find precedents for crafting their rulership, colonial officials turned to scriptural traditions that they categorized in terms of the religious affiliation of Hindus and Muslims. The resulting torturous engagement with Indian norms and conventions left a fertile archive of positive law that critical legal scholars have used to unpack colonial legal authority and its correlate: the emergence of subjectivities profoundly mediated by law and ideas of religious community.

The story of personal law and identity in South Asia is a complex one. Legal experts serving the East India Company codified personal law—matters related to individuals or their families in areas such as inheritance, divorce, adoption, and marriage—as digests of Mahomedan and Hindu law. Judges initially used these digests in consultation with native interpreters, *maulvis* and *pandits* who had religious and legal training. From the 1860s the system changed when personal laws were written up as statutes and interpreted in law courts modeled on case law adjudication. The system of legal interpretation may have changed but the primacy of personal law in the courts meant that these laws, alongside the administrative

Bhavani Raman is Associate Professor of History, University of Toronto. She can be reached at bhavani.raman@utoronto.ca.

categorization of the population by caste and ethnicity, laid the foundations of justice. By creating a body of “Anglo-Hindu” or “Anglo-Mohammadan Law” (Derrett 1961, 1963, 1977; Lingat 1973; Anderson 1993), scholars have generally concluded, colonial administrators and judges redefined the terms upon which Indian subjects were accorded political recognition and legal rights. These legal definitions continue to animate postcolonial constitutionalism (Bajpai 2011).

The study of personal law in colonial South Asia has unearthed rich histories of group identity that have, on the one hand, preoccupied legal scholars working on contemporary legal issues (Agnes, Chandra, and Basu 2004) and, on the other, paved the way for more recent historical and comparative work on legal pluralism and colonial jurisdictions (Benton 2002). However, far less attention has been paid to how the participation of colonial subjects in the institutions of British imperial law as litigants, judges, and lawyers shaped imperial law. Was colonial law more than a tool for governing culture and parsing rights? How did new forms of self-making and new normative worlds draw upon the law? Was this legal culture more than “forum shopping” as it moved with communities following the British flag? Can the study of colonial archives reveal new insights for legal theory?¹

As Ritu Birla (2011) observes, legal studies of colonial worlds have tended to split law into its system-producing incarnations as command, alongside its incarnation as *nomos*, in which the latter often operates as *prior* cultural context that receives or limits the former. This double vision of law has shaped the legal historiography of South Asia since the 1950s as a series of binaries—rights/customs, law/informal law-ways (Galanter 1968). In turn it has focused scholarly attention on colonial statutes, rather than case law, and a search for subjectivity autonomous from the colonial state and its law.

“Like culture itself, legal culture is about who we are not just what we do,” writes David Nelken (2004, 1). This is exactly the approach taken by Mitra Sharafi in *Law and Identity in Colonial South Asia: Parsi Legal Culture, 1772–1947*. Taking up the puzzle of “Parsi legalism,” Sharafi explores how the Parsi community, a minority that traces its arrival in the Indian subcontinent from ancient Persia, played an intrinsic role in making colonial legal culture. In turn, she explores how a Parsi *habitus* cohered under colonial rule for which legalism served as a principle means of making self-identity as they worked in the imperial legal institutions in British territories across India and the Bay of Bengal. In this sense, Sharafi deftly brings together two distinct literatures in legal history: law and culture, conventionally analyzed through the lens of legal pluralism (Galanter 1981; Benton 2002), and legal culture, a more institutional and social historical account of the legal profession, broadly conceived and remarkably understudied for South Asian and imperial materials.

The braiding of these two themes has shaped a book that is more than the sum of two parts. Sharafi’s work evokes Robert Cover’s (1983) prescient call to think *nomos* and narrative together—to look for how the normative world of law is a part of a larger world of norms and norm making that responds to and structures contexts. The significance of Sharafi’s approach lies in bringing the lens of legal

1. On the question of law and record keeping more generally, see Vismann (2008).

culture to bear on identity making and vice versa, rendering realms of law and identity permeable to social history, memory, race science, and normative production in new ways. Sharafi studies legal actions undertaken by Parsis both before the law and through the apparatus of the law to map the affective, racialized, social, and patriarchal registers that shape Parsi identity. This allows the meaning of law to emerge as something more than a pronouncement on social categories and identity to emerge from legal infrastructure or the medium of law.

As Sharafi shows us, the Parsis chose not to maintain collective autonomy and integrity by avoiding interaction with the state, but rather to sink deeply into the colonial legal system, an action that inaugurated a new era in their self-making. The spectacular legal successes of the Parsis was one of creative appropriation, argues Sharafi, that enabled them to fashion semiautonomous pockets in the very heart of the colonial legal apparatus. This ingenuity begins on an ironical note. The empire's most active lawyers were initially deemed by the British to lack a religious constitution or appropriate scriptural texts. Parsi religious life is carefully calibrated around a scrupulous adherence to rites of passage that mark birth, death, marriage, and community. Having few religiolegal texts that survived the migration to India, they were governed by common law. But Parsis successfully elaborated their distinct cultural identity in two ways. First, they moved across state and non-state forums for dispute resolution. In matrimonial disputes, for instance, Sharafi notes these forums ran the gamut of unofficial family and kin networks to the official courtroom, the latter serving as the arena to salvage damaged reputations. At the same time, they also lobbied professionally to create a substantive body of Parsi personal law in relation to common law frameworks. The fruits of their efforts were a set of distinct legal institutions and substantive law such as special marriage and inheritances acts and a unique jury of senior Parsi men who adjudicated intracommunity divorces that fortified the power of patriarchs.

Sharafi notes that in the course of building these institutions within rather than outside state law, the Parsis shaped colonial law by authoring legal commentary and entering the legal profession in large numbers. In turn, the law distinctly impressed itself in Parsi everyday life and aspirations by providing the resources and the language to debate cultural identity, and family norms through debates on inheritance, matrimony, and divorce, trusts, and libel. Like other groups, the Parsis built civic institutions—newspapers, schools, civic buildings—wherever they went, and used Western intellectual tools to recount Parsi cultural history. However, they went further by taking a turn to self-ethnography in the courtroom, notes Sharafi, a process in which law's anthropological imperative played an important role. Here it was not a search for an authentic textual authority but the self-presentation of and commentary on Parsi rites. Both reformers and orthodox followers chose to drop the code of privacy that had surrounded the rites to describe them in the courtroom as they debated the features of an authentic Parsi body. Parsi legal expertise drew equally on European Orientalist research on Parsi culture and on anthropological-cultural theories of race and blood, narrowing the ambit of Parsi identity to a form of blood descent. This redefinition had important implications for inheritance and trust law, serving to exclude the recognition of non-Parsi wives and offspring as heirs and the beneficiaries of trusts. The aspiration to be seen on a par with Indian

Muslims and Hindus, but distinct from them, fueled Parsi efforts to restrict primogeniture and coverture.

Thus, *Law and Identity* uses the instance of a minority community's engagement with the law to show how, by the twentieth century, legal interpretation rearticulated culture as a seamless continuum between racial purity, bloodlines, and ritual. While case law and the colonial courtroom in the late nineteenth century served as sites of cultural contestation to map the particularization of the normative Parsi family, Sharafi also sees these as mediums that distilled and transmitted particularly restrictive ideas of race and blood. Solicitors and jurists absorbed prevalent biological race theory, eugenics, and miscegenation into Parsi legal contexts, an act of translation that was particularly central to libel cases in which this knowledge was contested, interpreted, and internalized.

Sharafi's fresh analytical perspective is based on the innovative use of legal sources largely overlooked by the historians of South Asia. South Asianist writings on the law have been slow to use case law and even slower to study the sociology and the history of the legal profession. They have relied on the examination of statutes and tended to focus on cases that determined the statutory provisions, largely because the official archives of the state have provided much of the material for the study of legal history in India. The records of the law courts in India are poorly maintained (another topic worthy of deeper discussion); as a result, even when cases have been used, scholars tend to rely on decisions and summaries of important cases published in the various law journals and law reports and on the newspaper publicity surrounding the cases. However, case papers, where they exist (and they do), in the offices of law firms, in family and private collections, or, as Sharafi found, in a rich treasure trove of judges' notebooks stacked in the courtrooms of the Bombay High Court, are invaluable resources to study litigation and the ways it densely shapes the lives of litigants. Courts often judged issues before legislation governed them, using analogy and precedent to cite cases from all over the British Empire, but her book's strength is also its innovative reading of this work-a-day archive of case law. Sharafi shows how law was central to community making from the inside out. Litigation and case law pertaining to inheritance, marriage, housing, business relations—and in particular her analysis of trusts—are read not just for the way in which subjects articulated with or against colonial adjudication but always how they did that alongside other members of the community and kin.

The Parsis have long exemplified colonial mimic men. Tanya Luhmann described this model minority as the "Good Parsi," an instance of a colonized elite who defined themselves through the values of Western colonizing culture and who as postcolonial subjects were forced to reconstruct and reorient a quite complex sensibility (1996, ix). Homi Bhabha (1984) offered a less assimilative reading of mimicry when he argued that the uncanny perfection of colonial mimicry could in fact unsettle the colonizer. In contrast to these approaches, Sharafi calls our attention to the way in which Parsis partook of colonial law. Parsi identity remade by these debates emerged in public discourse as a distinct racial identity—hyperconscious of purity and anxious about community boundaries. But perhaps also, here lies as well the book's biggest provocation. For Sharafi argues that in the process of entering the legal arena, Parsis *de-anglicized* colonial legal culture. By suggesting this, the book seeks to engage

the bind that colonial studies often find themselves in, which is the urge to classify subjectivities they study in terms of society on community (Birla 2009). In Sharafi's hands, the particular puzzle of Parsi legalism and its racializing effects asks how colonial legal culture left its enduring imprint on postcolonial understandings of the tragedy, promise, and power of modern law.

REFERENCES

- Agnes, F., S. Chandra, and M. Basu. 2004. *Women and Law in India: An Omnibus Comprising Law and Gender Inequality; Enslaved Daughters; Hindu Women and Marriage Law*. Delhi: Oxford University Press.
- Anderson, M. R. 1993. Islamic Law and the Colonial Encounter in British India. In *Institutions and Ideologies: A SOAS South Asia Reader*, ed. David Arnold and Peter Robb. Richmond, UK: Curzon.
- Bajpai, R. 2011. *Debating Difference: Group Rights and Liberal Democracy in India*. New Delhi: Oxford University Press.
- Benton, L. 2002. *Law and Colonial Cultures: Legal Regimes in World History, 1400–1900*. New York/Cambridge: Cambridge University Press.
- Bhabha, H. 1984. Of Mimicry and Man: The Ambivalence of Colonial Discourse. *October* 28: 125–33.
- Birla, R. 2009. *Stages of Capital: Law, Culture and Market Governance*. Durham, NC: Duke University Press.
- . 2011. Performativity Between Logos and Nomos: Law, Temporality and the Non-Economic Analysis of Power. *Columbia Journal of Gender and Law* 21 (2): 492–515.
- Cohn, B. 1989. Law and the Colonial State. In *History and Power in the Study of Law: New Directions in Legal Anthropology*, ed. June Starr and Jane Fishburne Collier. Ithaca, NY/London: Cornell University Press.
- Cover, R. 1983. The Supreme Court 1984 Term—Foreword: Nomos and Narrative. *Harvard Law Review* 97:4–68.
- Derrett, J. D. M. 1961. The Administration of Hindu Law by the British. *Comparative Studies in Society and History* 4 (1): 10–52.
- . 1963. *Introduction to Modern Hindu Law*. Oxford: Oxford University Press.
- . 1977. *Essays in Classical and Modern Hindu Law: Anglo-Hindu Legal Problems* (Vol. 3). Leiden: Brill.
- Freitag, S. B. 1991. Crime in the Social Order of Colonial North India. *Modern Asian Studies* 25 (2): 227–61.
- Galanter, M. 1968. The Displacement of Traditional Law in Modern India. *Journal of Social Issues* 24 (4): 65–91.
- . 1981. Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law. *Journal of Legal Pluralism and Unofficial Law* 13 (19): 1–47.
- Lingat, R. 1973. *The Classical Law of India*, trans. J. Duncan M. Derrett. Berkeley, CA: University of California Press.
- Luhmann, T. 1996. *The Good Parsi: The Fate of a Colonial Elite in a Postcolonial Society*. Cambridge, MA: Harvard University Press.
- Nelken, D. 2004. Using the Concept of Legal Culture. *Australian Journal of Legal Philosophy* 29:1–28.
- Singha, R. 1998. *The Despotism of Law: Crime and Justice in Early Colonial India*. Delhi: Oxford University Press.
- Vismann, Cornelia. 2008. *Files: Law and Media Technology*. Palo Alto, CA: Stanford University Press.
- Washbrook, D. A. 1981. Law, State and Agrarian Society in Colonial India. *Modern Asian Studies* 15 (3): 649–721.