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NINETEENTH CENTURY COLONIAL IDEOLOGY AND SOCIO-LEGAL REFORMS: CONTINUITY OR BREAK?

Subhasri Ghosh

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INSTITUTE OF DEVELOPMENT STUDIES KOLKATA
DD-27/D Salt Lake City, Sector - 1
Kolkata - 700 064
Phone : +91 (33) 23213120/21 Fax : +91 (33) 23213119
e-mail : idsk1@vsnl.net, Website : www.idsk.edu.in

Nineteenth Century Colonial Ideology and Socio-Legal Reforms: Continuity or Break?

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The paper attempts to juxtapose the socio-legal reforms undertaken by the British administration in nineteenth century with the dominant colonial ideology of the period and assess the degree to which these reforms conformed to the same. Drawing upon the works of Bernard S. Cohn, Eric Stokes, Thomas R. Metcalf and Karuna Mantena, the paper, seen through the legal prism, proposes to test the veracity of Metcalf's argument that the post-1857 period witnessed a perceptible shift in colonial practices in the socio-legal sphere directly impinging on the personal space of the native population. The cardinal issue that the paper aims to address is whether in actual reality the second half of nineteenth century can be treated as a disjuncture so far as government forays into domestic sphere, more precisely with regard to marriage and cohabitation, are concerned. By discussing at length the notions of the main ideologues of the nineteenth century and intertwining the same with various reform measures carried out simultaneously during the said time-span, the paper argues that despite the apparent ideological change that the Revolt brought about, the basic tenet of the colonial administrators vis-a-vis social reform remained unchanged and their commitment unflinching.

The East India Company was established in 1600 as a joint-stock association of English merchants who received, by a series of charters, exclusive rights to trade to the 'Indies', which was a collective term for the land lying between the Cape of Good Hope and the Straits of Magellan. The Company soon established a network of warehouses or 'factories' throughout south and east Asia. With the grant of Diwani in 1765, it was transformed from an essentially commercial body with scattered Asian trading interests,

* *Subhasri Ghosh is Post-Doctoral Fellow at Rabindranath Tagore Centre for Human Development Studies*

into a major territorial power in India with its headquarters in Calcutta. The grant put the Company in a bit of a quandary since it could not decide on as how to proceed with the governance of the acquired territories. As Bernard S. Cohn says, "The constitutional and legal issues presented by the emergence of the East India Company… could not be analogized to existing colonial experiences."[1] The pertinent issue that stared at the face was that of the nature of sovereignty in India. Under the circumstances, the British were rankled with the question, "…whether a private company that was exercising state functions could do so on the basis of royal grants and charters?"[2]

While groping for an answer to this question, the essence of British administration in the second half of eighteenth century, was in preserving Indian society and its institutions against the anglicising danger. The general consensus in the official circle was that India had a glorious past being the seat of an ancient civilization and blessed with a deeply entrenched local government. British governors from Lord Clive (1757-1760; 1765-1766) to Lord Wellesley (1798-1805) regarded the East India Company as inheritors of the Mughal rule, however decadent the latter might be, rather than innovators—"the revivers of a decayed system and not the vanguard of a new."[3] Till Warren Hastings, the inscription that appeared on the seal of the Governor General, declared him to be the servant of the Mughals. Though Cornwallis and Wellesley had no respect for indigenous system of government under Indian officials and did introduce English constitutional principles, Eric Stokes points out that the 'movement of anglicization' was still defensive in character. It was not designed to effect a wholesale revolution of Indian society, but to limit the interference of government. Wellesley himself declared that the British system of public law, administered by an independent judiciary, was the best guarantee of toleration and protection for those interests to which the great mass of people were truly attached.

By the dawn of the nineteenth century, the East India Company had spread its tentacles across the length and breadth of India. The jurisdiction of the Company extended over the three Presidencies of Madras, Bengal and Bombay and a newly-created dependent province known as the North-Western Provinces. With the exception of the Indus delta, the whole coastline of India was in British

possession, while thanks to Lord Wellesley's Subsidiary Alliance, the native states, too bowed down to British subservience. Placed on a surer footing, the British now looked upon India as a viable commercial market and as Stokes shows that from then onwards, British policy in India was conditioned "…in the direction set by the development of the British economy…"[4] British power in India came to be regarded as an "instrument for ensuring the necessary conditions of law and order by which the potentially vast Indian market could be conquered by British industry."[5] This necessitated the task of justifying their rule for which they found an ideology based on India's 'difference' from Britain. Under the influence of the ideals of Evangelicalism and Utilitarianism, the British identified themselves as a civilised and modern people and decisively set the non-European world as the 'other.' To describe oneself as 'enlightened' implied that someone else had to be shown as 'savage.' As the British endeavoured to define themselves as 'British' and thus as 'not Indian', they had to make of Indian whatever they chose not to make of themselves. This process had as its outcome an array of polarities that shaped much of the ideology of the Raj during the first half of the nineteenth century.

The British conceptualised the 'difference' between Britain and India, among other things, in terms of race, gender and character. The Aryan theory was exploited to project the difference between Indians and the English. It has been postulated that both the Indians and British originated from the common stock—the Aryans. But if that is so, how could the Indian people be marked out as inferior which would help the British in justifying their rule? Thus they coined the myth that while the European branch of the Aryans triumphed over other races, those Aryans who migrated to India lost their purity of race by inter-mingling with the aboriginal races (Dravidian) and by the innate decay by the climate. As the men of the stronger race took to themselves the women of the weaker, the amount of Aryan blood flowing through the veins of Indian people became very less until by the colonial period, it had become 'infinitesimally small.' Thus the racial theory proved England's 'progress' in relation to India's 'decline.'

British men, British women, Indian men and Indian women were all fitted in distinct roles to spell out India's difference. The British believed that more 'ennobled' the position of women in a society

the 'higher' would be the civilisation. By this measure, not surprisingly India lagged far behind Britain. India's women were not 'ennobled' by their men but instead 'degraded'—"India is unhappily an example to prove how manifold are the ramifications of evil spreading out of a demoralised and degraded state of domestic relations. Bigamy, polygamy, adultery, prostitution, abortion, infanticide, incest, fraud, robbery, violence, and all kinds of murder are the melancholy results...for the proper regulation of domestic society in India, remarriage of widows must be allowed, marriage of infants must be abolished, females must be educated, and restraints must be placed on marriage..."[6] As the Indian men did not perform their duty of uplifting the pitiable condition of women, the British determined that they themselves should act as the protector of India's women by which they could proclaim their 'masculine' character and moral superiority over the Indian male. Charles Grant, who was elected member of the East India Company's Board of Trade by Lord Cornwallis and subsequently in 1805 rose to be its chairman, argued strongly in favour of evangelizing India since, "…we cannot avoid recognizing in the people of Hindostan, a race of men lamentably degenerate and base; retaining but a feeble sense of moral obligation…governed by malevolent and licentious passions, strongly exemplifying the effects produced on society by great and general corruption of manners, and sunk in misery by their vices…"[7]

Amongst the factors contributing to the peculiarities of the Indian character, Grant identifies the debilitating influence of climate. The heat and humidity of the climate were regarded as conspiring to subvert manliness, resolve and courage—"The climate of India …must be allowed to be less favourable to the human constitution…the bodily frame is less hardy, the faculties have less energy, their exercise is less expanded and delightful, ardour is checked, the oppressed spirit gives more easily to indolence and indulgence…"[8] Thus the British saw India as a land ruled by womanly men, who ran away from battles and hence deserved British subjugation. To James Mill, the reason behind India's retrogressive and debased state of affairs was the despotism of native government which throttled individual rights and sapped the motive to labour. The resultant poverty led to moral vices which afflicted Indian character.

Hence the British strongly believed that they have the white-man's

burden to civilise barbaric India. To the Evangelicals, the hand of God was nowhere more visible than in the miraculous subjugation of India by a handful of English. Utilitarianism, the ultimate goal of which was to turn every individual into a free autonomous agent capable of making choices, sought to liberate the individuals from the shackles of slavery and custom. The administrators had this strong conviction that it was they who would usher in India's modernisation by introducing modern institutions and ideas and rescue India from being immersed in tradition and morass. Thus as James Fitzjames Stephen wrote, the British looked upon their rule in India as a vast bridge over which the multitude of human beings were passing from a dreary land of cruel wars, ghastly superstitions, wasting plague and famine on their way to a country orderly, peaceful and industrious. John Stuart Mill emphasised a government's main task required promulgation of a 'parental despotism' which trained its subjects in Western knowledge and self-government. The British officials in the first half of the nineteenth century worked on the assumption that by ushering in new ideas they would act as the harbingers of change and create an India with modern political public who would be capable of self-government.

The impact of such outlook culminated in the reformist rule of Lord Bentinck (1828-1835) when a rigorous campaign was launched for the reconstruction of Indian society by removing all contemporary social evils. A significant step towards this was the abolition of Sati in 1829, followed by the passing of the Widow Remarriage Act in 1856 during the governor-generalship of Lord Dalhousie. Social reforms at that point were grounded in scriptural interpretation of ancient Hindu texts. The thrust was on the eradication of those practices, revolting to the feelings of human nature, which were not enjoined by the Hindu religion.

Legal reform, in the first half of the nineteenth century, was undertaken in the same spirit of liberal imperialism. James Mill insisted that "the most effectual step which can be taken by any government to diminish the vices of the people is to take away from the laws every imperfection."[9] Imperfection in the legal system was identified by Mill as the fulcrum of all evils plaguing India. Once the Indian legal system enshrined the principles of clearness, certainty,

promptitude, and cheapness, with penalties graduated according to the nature of the offense, it would, he concluded, confer 'unspeakable benefits' upon the Indian people; indeed a system of law was "the only great political blessing" they were then capable of receiving.[10] The champion of Utilitarianism, Jeremy Bentham, identified a comprehensive body of law as the basic prerequisite for the greatest happiness of the greatest number, which was the clarion call of the Utilitarians, "In every Political State, the greatest happiness of the greatest number requires, that it be provided with an all-comprehensive body of law."[11] Bentham prescribed that law must be "efficient and swift, clear and easily intelligible, simple and readily available."[12] He staunchly believed that if every infringement of right be met with peremptory punishment crimes and litigation would cease and human behaviour would be channelised along a more constructive path. The basic prerequisite for the realization of this ideal was that laws should be scientifically designed and embodied in a written form in codes. This 'pannomium' as Bentham termed this set of codes, would comprise the whole gamut of laws which should be laid down in simple, lucid language that could be understood directly by every man of ordinary intelligence.

The need for the codification of scattered body of laws and a structured judicial system which was being articulated from the late eighteenth century, finally found a cogent expression during Bentinck's tenure in the Charter Act of 1833. By the third decade of the nineteenth century uniformity in the legal and judicial system was urgently needed in the interest of just administration. Till then, what prevailed was a mishmash of Hindu law, Muhammedan law and English law. In each of the three Presidencies of Bengal, Madras and Bombay, the Governor-General or Governor and the Council exercised legislative powers under authority from the Acts of Parliament. These enactments were called Regulations.[13] Sir Elijah Impey, the Chief Justice of the Supreme Court in Calcutta, prepared a Regulation for the administration of the district civil courts. With a total of 95 sections, it consolidated all previous rules so as to carve a simple code for district civil courts. It was approved by the Governor-General and Council and came to be known as the Regulation of 1780. In this Regulation, Impey introduced the English doctrine of 'justice, equity and good conscience' as a rule of substantive law to be administered in civil cases not otherwise

provided for. Lord Cornwallis, in 1793, collated the existing Regulations in the form of a Code, which was essentially a body of 48 enactments. From then onwards, till the Charter Act of 1833, the Governor-General in Council passed a total of 675 Regulations, generally known as the Regulation of the Bengal Code.

The Regulations, having been made by three different legislatures of the three Presidencies of Bengal, Madras and Bombay, contained as might be expected, very different provisions. Thus in Bengal serious forgeries were punishable with imprisonment for a term double of the term fixed for perjury:[14] in the Bombay Presidency, on the contrary, perjury was punishable with imprisonment for a term double the term fixed for the most aggravated forgeries:[15] in the Madras Presidency, the two offences were exactly on the same footing.[16] The main purpose of these Regulations was essentially 'current legislations' or more precisely, measures that were necessary to meet particular cases. These Regulations were "frequently ill-drawn…frequently conflicting…"[17] As Thomas Babington Macaulay, under whose aegis the Penal Code was finally put into shape, observed, "Our Regulations in civil matters do not define rights; they merely establish remedies. If a point of Hindu law arises, the judge calls on the pandit for opinion. If a point of Mahometan law arises, the judge applies to the Cauzee."[18]

In the sphere of civil law, in the cities of Calcutta, Bombay and Madras the law of England was the *lex loci*, or the law of the land for all the British-born subjects, having been introduced by the charters granted to the Mayors and Supreme Courts—"a very artificial and complicated system...a system which was framed without the smallest reference to India..."[19] When persons from any other nation, other than England, committed offences the Courts endeavoured to administer law according to the nationality of the persons concerned. But problems arose when one party was a Frenchman and the other of a different nationality. In the case of the natives of the country, during the tenure of Warren Hastings, a clause was inserted in the Plan of 1772, giving the natives the right to be governed by their own laws, with Maulvis and Pundits attending the Courts to expound the law and assist in passing the decree.[20] The Regulating Act of 1773 specified that "…the rights and authorities of fathers of families and masters of families, according as the same might have been exercised by the Gentu or Mahomedan law,

shall be preserved to them respectively within their said families…"[21] These were further chiselled in the Regulation of 1780, where it was explicitly stated that "in all suits regarding inheritance, succession, marriage, caste, and other religious usages and institutions, the laws of the Kuran with respect to Mohammedans, and those of the Shastras with respect to the Gentoos should be invariably adhered to."[22] The Cornwallis Code of 1793, too, stated that "in all suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, the Mohammedan laws with respect to Mohammedans and Hindu laws with regard to Hindus shall be considered as the general rules by which the Judges are to form their decisions."[23] In Bombay, Regulation IV of 1797, secured to Hindu and Muslim defendants in civil suits the benefit of their own laws with regard to inheritance of landed and other property, mortgages, loans, bonds, securities, hire, wages, marriage and caste and every other personal or real right and property so far as shall depend upon the point of law. Thus by official acknowledgement, the civil rights of Muslim and the Hindu inhabitants were to be governed by their own laws and usages.

The penal law of Bengal and the Madras Presidency followed the Muhammedan law in name only, since the original law was distorted to such an extent as to deprive it of all the religious veneration of Muhammedan, but at the same time retained enough of its original peculiarities to perplex and encumber the administration of justice. In Bombay, however, the so-called Muhammedan penal law was supplanted by the Bombay Regulation of 1827. Mountstuart Elphinstone, as the Governor of Bombay, felt the need of a more uniform system of law—civil and criminal—and in 1827, the Elphinstone Code, based entirely on the English model, took the shape of a formal and ordered set of Regulations (about thirty in number) drafted upon a uniform system. This was necessitated by the conviction that sacred and semi-sacred books were not trustworthy guides and that local or personal usages played a much more important role. Accordingly, the Bombay Regulation gave much more precedence to local usage over and above Hindu and Muhammedan law. Even after lauding the Elphinstone Code of 1827, which was operational in Bombay, for being a digest of written laws, the Law Commissioners dismissed the Code "…that the penal law of the Bombay Presidency (the Elphinstone Code) has over the

penal law of the other Presidencies, no superiority…".[24] James Mill derided the penal law, prevalent in India as "...defective to a degree that never was surpassed..."[25]

As the Charter Act of 1833 put an end to Company's trading activities altogether, an influx of Europeans for commercial purpose, was expected since they would no longer be treated as 'interlopers'.[26] The expected influx impressed upon the framers of the Act, the necessity of codification, "…to leave Europeans no just ground of complaint against the institutions of the country in which they might come to live, and on the other to afford effectual protection to the natives against their encroachments."[27] Macaulay, too, echoed the spirit of equality very specifically in his speech on the Charter Act, "Unless…we mean to leave the natives exposed to the tyranny and insolence of every profligate adventurer who may visit the east, we must place the Europeans under the same power which legislates for the Hindoo…"[28] While he believed that the natives would immensely benefit from such interactions with the Europeans, legal equality was urgently called for to eliminate the possibility of exploitation.

The 1833 Act introduced certain important changes in the administration of India, and empowered the Governor-General-in-Council to pass formal Acts for the whole of India and deprived the subordinate Presidencies of their legislative powers. A fourth member known as Law Member was added to the Governor-General's Council and a Law Commission was appointed to frame laws for the whole of British India—"...such laws as may be applicable in common to all classes of the inhabitants of the said territories..."[29] James Mill stressed the importance of the fourth member of the council, "His will naturally be the principal share…in giving shape and connexion to the several laws as they pass…"[30]

The Indian Law Commission was appointed by the Governor-General in Council in 1834 to help the legislature in framing laws—"The preparation of such a Code must be set about immediately, and it is principally with a view to that object and for the purpose of collecting and arranging the necessary materials, and of advising the Govt. as to the disposal of them, that the Law Commission are to be appointed."[31] The Law Commission consisted of the Law Member of the Council as President who would be an English

Barrister and three Civil Servants of the Company with a Secretary. The other members were selected from the judicial branch of the Civil Service. Till independence, four law commissions were constituted.[32] The first Commission consisted of Thomas Babington Macaulay (the first Law Member of the Governor General's Council) as the President and J. M. Macleod of the Madras Civil Service, G.W. Anderson of Bombay Civil Service who had taken part in the framing of the Elphinstone Code and F. Millet as its members. The scope of the Commission was to look into the jurisdiction, powers and rules of the existing courts of justice and police establishments in the Indian territories and all existing procedure and into the nature and operation of all laws whether Civil or Criminal prevailing in India. The Commission commenced its work in August 1835.

The first reflection of the spirit of equality, as enshrined by Macaulay, was the Black Act in 1836. The Act sought to place the Europeans and natives on equal footing so far as civil jurisdiction was concerned by making native and Europeans outside Calcutta, subject to the jurisdiction of the Company courts in civil cases. Macaulay defended the principles of equality in no uncertain terms: "I am not desirous to exempt the English from any evil under which his Hindu neighbour suffers. I am sorry that there should be such evils, but whilst they exist, I wish that they should be felt, not only by the mute, the effeminate, the helpless, but by the noisy, the bold and the powerful."[33]

However, the pioneering work of this Commission was the framing of the Indian Penal Code. Macaulay was convinced that "...no country ever stood so much in need of a Code of laws as India..."[34] In doing so, Macaulay was speaking almost in a similar voice to that of Bentham and James Mill. Macaulay was, however, not a firm endorser of Mill and the Utilitarian philosophy of politics as apparent from the caustic comments in the articles written for the Edinburgh Review in 1829, "...these people (referring to the Utilitarians), whom some regard as the light of the world...are in general ordinary men, with narrow understanding and little information...many of them are persons...having read little or nothing..."[35] Macaulay was a staunch Whig—"...the greatest, and indeed almost the only great, advocator and expounder of Whig principles since the time of Burke."[36] The difference in opinion sprang from their contrasting views on electoral reform in England in the first half of nineteenth century, in which the

Whigs and the Utilitarians were at loggerheads. For the greatest happiness of the greatest number, Mill recommended a political institution in which there would be minimal encroachment of the members of that institution in enjoying other people's labours. This was not possible either in a monarchy or in an aristocracy or in a direct democracy. For Mill the ideal set-up was representative democracy, wherein citizens would elect their representatives to debate and legislate on their behalf. Citing representative democracy as the grand discovery of modern times, Mill maintained that a properly structured representative democracy on the basis of a wide electoral base would fulfil the ideals it was created for. What Mill was trying to hammer in was that voting rights should be bestowed on maximum number of people so that effective checks could be exercised on the elected few. It was indeed a revolutionary concept in the given situation since franchise was confined to the propertied class.

The Utilitarian demand for enfranchising every male member of the society was criticised by Macaulay as being unrealistic and unpractical. In his speech during the debate on the Reform Bill in 1831, he justified his opposition to including the labour class within the ambit of suffrage, "If the labourers of England were in that state in which I wish to see them—if employment was always plentiful, wages always high, food always cheap...the principle objections to universal suffrage would, I think, be removed."[37] In the given situation, Macaulay made a strong case for franchise being grounded in the principle of pecuniary qualification. Thus Macaulay denounced Mill on the ground that "...the theory of Mr. Mill rests altogether on false principles, and that even on those false principles he does not reason logically."[38]

However much differing with the utilitarians on the structure of government and the election procedure, Macaulay's utmost respect for Bentham's contribution to jurisprudence is revealed in his essay titled *Mirabeau*, "Some generations hence, perhaps, when legislation had found its Watt, an antiquarian might have published to the world the curious fact, that, in the reign of George the Third, there had been a man called Bentham...who for his age, taken a most philosophical view of the principles of jurisprudence."[39] Bentham's sequence of his pannomium was the codification of penal, civil and the constitutional laws. Following in the footsteps of Bentham,

Macaulay, too, started with the codification of penal law and intended to take up the Code of Criminal Procedure in 1837 and then lay his hand in the framing of the Code of Civil Procedure in early 1838. Stokes shows, how in framing the Penal Code, Macaulay followed the Benthamite principle of a code of law not being a digest of the existing practice or a compilation from foreign law systems—"…the system of penal law which we propose is not a digest of any existing system; and that no existing system has furnished us even with a ground work."[40] The Penal Code, Stokes analyses, reflected most of the improvements which Bentham had advocated—the division into chapters and the numbering of paragraphs, the precise definition of a term, the allocation of separate paragraphs to each distinct idea, the use of third person singular number to denote a member of either sex.

Macaulay defined a Code as "…not a mere series of unconnected provisions; it is one great and entire work symmetrical in all its parts and pervaded by one spirit."[41] By this Code, the Muhammedan Criminal Law, so long operational was to be abolished and the new Code would be applicable to all classes without exception.[42] Macaulay is credited with much of the framing of the Code, "...justly entitled to be called the author of the Indian Penal Code", which for all practical purposes was referred to as the Macaulay Code.[43] During the span of less than two years (June 1835-May 1837), the Law Commission was successful in submitting the draft Code, which as the Commissioners themselves acknowledged was "...among the most difficult tasks in which the human mind can be employed."[44] The draft code titled "The Indian Penal Code, as Prepared by the Indian Law Commissioners" with 488 clauses and with Notes appended at the end, was submitted to the Governor-General in Council, in May 1837 and after being revised and printed by the Commission was resubmitted in October 1837.[45] The Legislative Council despatched this draft code to different local Governments, to all the high legal functionaries in the country for their opinion on its provisions. After undergoing several alterations, the Code was at length passed into law on 6 October 1860. Finally, it was decided by Act VI of 1861, that the Code would take effect from 1 January 1862. James Fitzjames Stephen identified many other preoccupations of the Government as one of the principal reasons for the Penal Code being relegated to the background. During the

decade preceding the Revolt, the Afghan disaster and triumphs, the war in Central India, the wars with Sikhs and Dalhousie's annexation policy, threw law reform out of gear.[46]

Marriage is regarded as one of the most sacrosanct institutions in Indian society. Hindu law recognises marriage as one of the ten *sanskars* or sacraments, necessary for regeneration of men of the twice-born classes, namely the Brahmins, the Kshatriyas and the Vaishyas and the only sacrament for women and *Sudras*.[47]

The Government acknowledged that "…it is essential to the comfort and welfare of the inhabitants of Hindostan, that the law of marriage should be established on safe principles, adapted to the condition of the population of that country" and that the law of marriage should be 'local and general, or personal."[48]

The Charter Act, while insisting on codification to iron out the discrepancies in the legal system, categorically stated that in establishing a code of law applicable to Europeans as well as natives, due regard should be given to the "...Rights, Feelings and peculiar Usages of the People..."[49] That they had paid heed to this directive is evident when in their introductory note to the draft penal code, the Law Commissioners, too, noted, "We are perfectly aware of the value of that sanction which long prescription and national feeling give to institutions. We are perfectly aware that law-givers ought not to disregard even the unreasonable prejudices of those for whom they legislate."[50] Macaulay placed great importance on sentiments and public opinions. Whitley Stokes, claimed that the Penal Code, "Besides repressing crimes common to all countries, it has abated if not extirpated the crimes peculiar to India, such as thugee, professional sodomy, dedicating girls to a life of temple harlotry, human sacrifices, exposing infants, burning of widows, burying lepers alive, gang robbery, torturing peasants and witnesses sitting *dharna*."[51] They were trying to prove that as just administrators they have given due cognizance to the specific exigencies and have made room for accommodating the same.

In the draft penal code that was submitted in 1837, offences relating to marriage were delineated in Chapter XXIV. Marriage, still very much remained under the purview of Hindu and Muslim personal

laws, but the penal code identified certain matters involving 'moral or equitable issues'. The chapter, at that point, underlined three sections, namely 466, 467 and 468, which essentially identified enticements and frauds with regard to marriage as punishable offences—punishments ranging from fourteen years to three months, depending on the degree of the crime.[52]

However, it was not the provisions but the omissions that raised a storm in the official circles. Significant exclusions were the crimes of adultery and bigamy. Adultery was altogether ignored while bigamy, though the term was not specifically used, was defined in a very constricted sense.

Adultery, which was recognized as an offence by the existing laws for the administration of criminal justice in the Company's Courts in all the Presidencies as also by both Hindu law in the form of amputation of a limb and the Muhammedan law in the form of stoning the criminal to death, was not made an offence by this Code.

The reasons for omitting it were stated in the Note appended at the end of the Code. At the outset the Law Commission, did set out to provide a punishment for adultery, and in order to enable them to come to a right conclusion on this subject, collected facts and opinions from all the three Presidencies—"The opinions differ widely. But as to the facts there is remarkable agreement."[53] After sifting through these, the omission was justified by the framers on three grounds: that the existing laws for the punishment of adultery were altogether inefficacious for the purpose of preventing injured husbands of the higher classes from taking the law into their own hands; secondly, that scarcely any native of the higher classes ever took recourse to the Courts of law in a case of adultery for the redress against his wife, thirdly, that the husbands who had taken recourse in cases of adultery to the Courts of law were generally poor men whose wives had run away, that these husbands seldom had any delicate feelings about the intrigue, but thought themselves injured by the elopement, that they considered their wives as useful members of their small households, that they generally complained, not of the stain on their honour, but of the loss of a menial whom they could not easily replace, and that generally their principal object was that the woman may be sent

back. Where the complainant did not ask to have his wife again, he generally demanded to be reimbursed for the expenses of his marriage. Those whose feelings of honour were painfully affected by the infidelity of their wives would not apply to the tribunals at all. Those whose feelings were less delicate would be satisfied by a payment of money. The Commissioners thus concluded, "Under such circumstances we think it best to treat adultery merely as a civil injury. These things being established it seems to us that no advantage is to be expected for providing a punishment for adultery. The population seems to be divided into two classes—those whom neither the existing punishment nor any punishment which we should feel ourselves justified in proposing will satisfy, and those who consider the injury produced by adultery as one for which a pecuniary compensation will sufficiently atone."[54]

The Law Commission faced lot of flak on account of omitting such a provision, and was criticised for giving fillip to immorality. In defence, the commission countered, "This was not altogether a strong argument favouring adultery to be made a punishable offence."[55] A Penal Code, they argued, was by no means to be considered a body of ethics and that the legislature ought not to punish acts merely because those acts were stamped immoral, or that because an act was not prohibited at all did not tantamount to the legislature considering that act as innocent. Many things which were not punishable were morally worse than many things which were punishable—"The rich man who refuses a mouthful of rice to save a fellow creature from death may be a far worse man than the starving wretch who snatches and devours the rice. Yet we punish the latter for theft, and we do not punish the former for hard-heartedness."[56]

If these were to be made punishable the degree of severity of the punishment would always be considered as indicating the degree of disapprobation with which the Legislature regarded them. The Commissioners apprehended that among the higher classes nothing short of death would be considered as a punishment for such a wrong. An adulterer/adulteress was either killed by the family members or considered symbolically dead by the family. Manada Debi recalls that when she became pregnant and fled with a married man, who happened to be a distant cousin, her father refused to report the matter to the police fearing social stigma and declared

that he considered his daughter, who was his only child, to be dead and he was no longer interested in having her back even if she was repentant.[57] Macaulay was, however, dead against corporal punishment.[58] In such a state the framers thought it prudent that compensation for such an offence would be far better suited than inflicting a punishment which would be regarded as 'absurdly and immorally lenient'.

The other significant exclusion was bigamy. Punishable under English criminal law, the Commissioners criticised the same on being too severe and at the same time being too lenient, since it made no distinction between "bigamy which produces the most frightful suffering to individuals, and bigamy which produces no suffering to individuals at all."[59] When it came to India, the framers acknowledged that in a country which recognised polygamy "the difficulty of framing such a law…is great. To make all classes subject to one law would, evidently, be impossible. If the law be made dependent on the race, birth-place, or religion of the offender endless perplexity would arise."[60] To resolve this perplexity without antagonising the vast mass of people, what was needed was a thorough revision of the laws of marriage and divorce. Within the official circle, polygamy was seen as a social and religious institution prevalent throughout the whole country and "it is not only a few scattered individuals who advocate and practise polygamy, but the largest proportion of all classes, Hindoos and Mahomedans, who are in a position to maintain plurality of wives…"[61] The District Magistrate of Noakhali, L.S.S. O' Malley opined that "plurality of wives is as suited to the people [of the East] as a strict rule of monogamy is in the West…I would therefore, strongly disapprove of any extension of the Christian law against bigamy as retrograde and unsuited to the people."[62] Thus the Commissioners decided to play safe by making bigamy, when practised with deceit and fraud, a punishable offence for the Christians of India only, leaving the vast multitude outside its pale. This found approval of the experts also as Sir R. Comyn and others particularly expressed assent to the suggestion of applying the existing law relating to bigamy to Christians in India.

The draft Penal Code was referred to a Select Committee which reflected on suggestions and opinions, including the offences on

‘bigamy’ and ‘adultery’, which the original code had omitted. There were however, no unanimity on the issue, but the majority decision was in favour of inclusion.

Information collated from the Session Judges and Magistrates of Bombay on the ‘defective state of the Law for punishing the crime of adultery’ impressed upon the Law Commissioners the need for the inclusion of such a clause.[63] The Additional Secretary of the Judicial Department noted with concern that “...adultery and licentiousness are the fertile grounds of bloodshed and murder in this country.”[64] Based on the observations of 17 native judicial officers, the acting Sessions Judge, Mr. Newton, despatched a report to the Legislative Council to the effect that the crime of adultery which the Bombay Code of Regulations considered simply as an offence against morality not graver than petty assaults and thefts, and which was punished in many cases with little fines only, had generated “...a general feeling among natives, of the higher ranks at least, that we treat adultery as an offence so trivial as scarcely to require any notice...”[65] As a result, the Moonsiff of Ahmedabad concludes, “the crime of adultery is on the increase…”[66] To check this growing menace, the majority of the Select Committee members clamoured for the inclusion of such a clause as a punishable offence.

Vis-a-vis bigamy, buoyed by the growing anti-polygamy public opinion, the Government from the early years of the 1850s was seriously contemplating the banning of the practice. Polygamy, mostly prevalent amongst the Kulin Brahmins of Bengal, increasingly came under vitriolic attack by the upper caste Hindus. The anti-polygamy sentiment, which could be felt from the 1830s, gained momentum by the middle of the century. Leading Bengali newspapers of the period, *Sambad Prabhakur, Sambad Poornochandrodoy, Sumachar Durpun* carried editorials and letters from its readers on a regular basis condemning the evil practice. Petitions poured in from several sections of the Hindu society, namely the, Raja of Nadia, the Rani of Cossimbazar, Raja of Burdwan—all vociferously advocating for the abolition of the practice of polygamy. Some of the prominent petitioners were the Raja of Nadia, Raja of Dinajpore, Inhabitants of Calcutta, Hindu Assistants attached to the principal public and other offices in Calcutta, Ishwar

Chandra Vidyasagar, Inhabitants of Bhawanipore and Alipore, three separate petitions from the Inhabitants of Hooghly, Inhabitants of Krishnagar, Inhabitants of Aatpore, five petitions from the inhabitants of Burdwan, two petitions from the inhabitants of Nadia, Inhabitants of Santipore, Separate petitions from the inhabitants of Midnapore, Jessore, Dacca, Birbhum, Murshidabad, Rajshahi, Bankura, Dinajpore, Mymensingh. Propped up by the support of the upper class Hindus, talks were on in the official circle about a Bill for the abrogation of Kulin Polygamy, their attention being drawn to the evils of such marriages in Bengal.[67] Hence by the mid-1850s, gauging the mood of the upper-caste Hindus, which castigated adultery and polygamy, the Government was keen to include these two clauses in the final version.

It was thus expected that these two would find their way in the final code. The Indian Penal Code that was finally adopted in 1860, laid down the offences related to marriage in Chapter XX. The chapter had six sections—section 493, 494, 495, 496, 497 and 498—each identifying ‘aberrations’ in relation between a man and a woman bound by holy matrimony. Two new sections were added—one headed bigamy and the other adultery. Section 493 provides for a ten year punishment to a man who, by deceit, causes any woman, who is not lawfully married to him, to believe that she is lawfully married to him and thus entices her to have sexual intercourse with him. Section 494—Marrying again during lifetime of husband or wife.[68] A guilty person would be subjected to seven years’ imprisonment together with a fine to be decided by the court. Section 495—Same offence with concealment of former marriage from person with whom subsequent marriage is contracted. The sentence would be ten years’ imprisonment together with a fine, to be decided by the court. Section 496—Marriage ceremony fraudulently gone through, without lawful marriage. The punishment would be seven years prison term and shall also be liable to fine. Section 497—Adultery—Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. Section 498—

Enticing or taking away or detaining with criminal intent a married woman, i.e., whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man, or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

Surprisingly, after all the hullabaloo surrounding bigamy, it still came to be punished in the narrow sense of the term. In case of Section 494, the Code specified that if a person half-European and half-Asiatic impressed upon a Muhammedan or a Hindu woman that he was of the same religion as the woman, thus duping her to marry and cohabit with him, would be liable to be charged under this clause. It was explicitly stated that second marriage was an offence when "the accused belonged to a country or of a religious creed which does not recognise polygamy…"[69] Thus in essence the earlier version was retained.

The moot question is why? When public opinion was in favour of banning polygamy, why did the government detract from its earlier commitment? To understand this, one needs to rewind three years back and turn attention to the momentous upheaval of 1857—the Revolt—that changed the whole complexion of the situation. The Revolt left a deep wound in the colonial psyche. Asa Briggs points out "no single event more powerfully affected the mind of that generation than the 'Indian Mutiny' in 1857."[70] The conviction that "the natives will not rise against us…there will be no reaction…" was severely dented by the turn of events in 1857.[71]

The dominant memory for the rulers, post-1857, was arguably one of an elemental fear caused by as yet the most comprehensive challenge to its legitimacy. The participation of the civil population in the Revolt was explained in terms of an inbuilt resistance of a tradition-bound oriental culture against the forces of westernisation and modernisation.[72] Benjamin Disraeli saw the causes of the uprising as not being the 'conduct of men who were...the exponents

of general discontent' amongst the Bengal army. For him the root cause was the overall administration by the government, which he regarded as having 'alienated or alarmed almost every influential class in the country.'

The Revolt that produced a crisis of the Raj saw a new ideology now taking over—India's unreformable difference manifested in the irrational behaviour of Indian peasants and soldiers during the Revolt. It was in this context that political ideology during this period was devoid of its reformist commitment. There was a straight-forward denial of India's capability to modernise itself. Thus the dominant ethos of the latter half of the nineteenth century was an argument in favour of permanent British rule. The main intellectual enterprise in the latter half of nineteenth century was to create an image of India's lack of commitment to political reform.

Racial inferiority which was in the foreground of British ideology in the first half of the nineteenth century still served as the pivot of the newly-constructed ideology post-1857. Charles Darwin's *Origin of the Species,* published in 1859, provided the theoretical back-up. The theory of the survival of the fittest came to be used to assert the difference between the superior and the inferior—the British and the Indians in this case. The victory of the British over the Indians in the Revolt crowned them as superior and justified their right to rule India. As G.O. Trevelyan boasted, the struggle "irresistibly reminded us that we were an imperial race, holding our own on a conquered soil by dint of valour and foresight."[73] India, the British felt, being inherently conservative, no amount of external impetus would be helpful in bringing about the change that would usher in India's modernisation. Charles Dilkey argued that while self-government could be granted to the white settlement colonies, India would need the permanent paternal guidance of the British. The belief in the official circle was that "East is East, and West is West, and never the twain shall meet."

The British realised that Indians were not like Englishmen and it would be fatal to treat them so. Since India was so different it would have to be ruled in an oriental fashion, as the Indians tend to attach enormous value to very slight distinctions. Stafford Northcote said, "What to us may appear exceedingly trumpery and trivial distinctions, are in their eyes of the greatest importance."[74] Thomas R. Metcalf

sums up, “From the Mutiny they drew the lesson that the Indians were not simply backward and inept, in need of guidance, but irredeemably mired in Oriental stagnation.”[75]

The Revolt resulted in what Karuna Mantena calls a ‘crisis of liberal imperialism.’ Battered by the experience, the colonial administrators now embarked upon a reassessment of the policies adopted so far and recast the contours of colonial ideology in a new mould—‘tranquillization of the public mind’. This led to what Francis Hutchins calls, ‘a seemingly paradoxical resurgence of Orientalism.’[76] Those oriental fashions which the British abhorred in the first half of the nineteenth century were revived by them like the durbari system, the Mughal practices of nazar and peshkash. That the oriental customs and practices came to be adopted by the administrators in a big way is testified by Lord Canning’s extensive tour in 1858, the main features of which were the holding of a series of viceregal durbars, meeting with large number of Indian princes and presentation of honours and rewards. At these durbars titles such as Raja, Nawab, Rai sahib were granted along with rewards in the form of pension and land grants. This durbari culture, which Bernard Cohn calls, ‘neo-durbari culture’ was ably utilised by the late nineteenth century British officials to project themselves as able successors of the Mughals.[77] This process of holding imperial assemblages reached its climax in 1876 with the grand Jubilee Durbar held in London. To commemorate the occasion of Queen Victoria being declared as the Empress of India in the Indian Royal Titles Act—the year she completed her golden jubilee on the throne—a grand durbar was held, where the Indian princes and kings were welcomed in a grand display of opulence in oriental style—the royals were dressed in all their regalia, resplendent in jewels and headgears and paying homage to the Queen in true eastern manner, namely touching her feet with their swords. As Viceroy Lord Dufferin wrote to Lord Cross, Secretary of State, “English society seems disposed to put everything Indian upon a pedestal...”[78] Twelve Indian soldiers, selected from all corners of the Indian army, became the Queen’s Escort for the Jubilee celebrations. At the end of the celebration Queen Victoria emphatically called for the welding of “India and the Mother Country into one harmonious and united community.”[79] Perhaps to personify this saying herself she employed an Indian teacher, brought down from Agra, to learn Urdu which

she mastered in a few years as testified by the journals in which she copiously jotted down her Urdu lessons.

The avowed policy of the British Government at this stage was the policy of non-interference. They realised through the hard way the price of their reformist zeal. The Proclamation of 1858 specifically sounded, “We disclaim…the Right and Desire to impose our Convictions to any of Our Subjects.”[80] Colonial administrators were seldom willing to embark upon extensive programmes of social and political reform—“the security of the Empire demanded a policy of caution and conciliation.”[81] James Stephen sounded a note of warning not to tamper with the social or religious customs of the indigenous people—“I would not touch a single one of them...”[82]

This ‘conservative temper’ finds echo in the writings of Sir Henry Sumner Maine whom Metcalf calls the ‘ideal representative’ of this school. His writings were crucial “...both in terms of providing a methodological foundation for...better ethnographic knowledge of traditional India...”[83] Maine pointed out that the Indians were inherently conservative, clinging tenaciously to their traditional ways. In fact they “detest that which in the language of the West would be called reform.”[84] India was a stagnant society, and thus social and religious reform could be introduced with extreme caution. A society where the old customary bonds had not yet dissolved into contractual relationships simply could not be remodelled overnight. Nor could Benthamite ideas be adopted wholesale. Maine dismissed Bentham’s theory of jurisprudence that societies modify, and have always modified, their laws according to modifications of their views of general expediency. He argued that “Expediency and the greatest good are nothing more than different names for the impulse which prompts the modification; and when we lay down expediency as the rule for change…all we get by the proposition is the substitution of an express term for a term which is necessarily implied when we say that a change takes place.”[85] Maine summed up, “The people of this country were not only welded by custom and religious feeling to complex system of law, but prided themselves on their usages in proportion to the complexity of those usages. If this were so, the foundation of Bentham’s doctrine collapsed and the doctrine itself had no application in India. The Legislature was stopped, by the condition of our tenure of the country, from so simplifying the law.”[86]

Propelled by this new ideology which called for extreme caution and diligence, Metcalf shows that the years immediately following the Revolt witnessed the British Government refraining from enacting measures that directly interfered with Hindu social customs—the only exception, being the prohibition in 1865 of banning hook-swinging during Charak festival and that too only after the Government had convinced itself that such a legislation posed no threat to the Hindu religion. In fact, *Sumachar Chandrika,* one of the leading Bengali newspapers of that period, opined that there was no necessity of the Lieutenant Governor's passing a law to stop the practice of swinging at the Charak festival "since the people and Zeminders seem not to care much for it, and since they have in many places given up the practice, there can be no doubt but that in a short time it will cease everywhere."[87] The zeal with which Bentinck steadfastly clung to his mission of rooting out social evils, was subsumed within the British ideology of non-interference, post-1857. Metcalf states that the British "…carefully dissociated themselves from comprehensive schemes of social reform…Indian religious belief, and the social customs bound up with it, were to be left strictly alone."[88]

That the policy of non-interference was strictly adhered to is attested by two measures which were under contemplation during the pre-Mutiny period but were put into the backburner following the Revolt—the practice of taking sick people to the riverside to die and the suppression of polygamy. Local administrators in fact warned the Lieutenant Governor of Bengal, against the petition of the Maharaja of Burdwan and 'other Hindus' to legislate against the practice of polygamy. The refusal to tread the reformist path was instrumental in the government's backtracking on the issue of the abolition of polygamy. From mid-1850s, upper class Hindu society increasingly became polarised on the question of government's role in abolishing polygamy. The Hindu Intelligencer reports in 1855, "We observe that the presentation of the petition for the abolition of Koolin Polygamy...has produced some sensation among the Brahmins. Some of the more influential members...held two preliminary meetings...to concoct measure...to petition the Legislative Council soliciting them not to interfere with their domestic concerns."[89] A powerful lobby, opposing government

initiative to ban polygamy, emerged which counted amongst its supporters the leading Bengali novelist of the period, Bankim Chandra Chattopadhyay. But at the same time, the government could not entirely wash its hands off the issue. In 1866 in response to a petition submitted to the Lieutenant Governor of Bengal Cecil Beadon, the latter met some of the eminent members amongst the signatories—Raja Sarada Prasad Roy, Debendra Mullick, Durga Charan Saha. Beadon assured them of his full cooperation in the matter. Accordingly, he urged the Legislative Council to undertake measures for eradicating polygamy at least from the face of Bengal. The government however refused to comply. In 1867, the government of Bengal appointed a committee to suggest the feasibility of a legislative measure for the suppression of the system.[90] Basing their argument on the premise that Kulin Polygamy was not endorsed by the Shastras, the Committee reported, "A law could, of course be passed, rendering such contracts illegal under penalties on both the contracting parties."[91] At the same time, however, the Committee expressed its apprehension about the viability of such a law since it would intrude into native practices and thus concluded, "…neither can we think of any legislative measure that…will suffice for the suppression of the abuses of the system of Polygamy…"[92] In fact the Committee opined that as a result of the rapid spread of education and enlightened ideas the custom of marrying more than one wife, except in cases of absolute necessity, had come to be looked down with general reprobation. The number of wives, seldom exceeded four or five, except in very rare instances and there was ample reason to believe that the polygamous Kulin Brahmins would settle into monogamous habit like the other classes of the community, what with education permeating deep into every social strata. However, within the Committee also, there was no unanimity. Vidyasagar refused to conform to the conclusion of the Committee about the non-viability of government legislation because of the declining number of polygamous Brahmins. He submitted a statement of his own recording his opposition to the majority decision, "I do not concur in the conclusion come to by the other gentlemen of the Committee. I am of the opinion that a Declaratory Law might be passed, without interfering with that liberty which Hindoos now by law possess in the matter of marriage."[93] To

counter the argument of his colleagues that polygamy was on the decline, he identified by name 11 Kulins in Hooghly and 1 in Burdwan, who had contracted between 50 and 80 marriages each, 24 in Hooghly and 12 in Burdwan, who had married between 20 and 50 times, whereas 48 in Hooghly and 20 in Burdwan, whose number of marriages ranged between 10 and 20.[94]

In his critique of Vidyasagar's tract opposing polygamy, Bankim Chandra's essay *Bahubibaha* (Polygamy) in 1873, took a dig at Vidyasagar's view. Claiming himself not to be well-conversed with the Shastras, which Vidayasagar claimed did not attest to such brutal practices, Bankim's main argument against any proposed ban, hinged on the fact that polygamy was not that much of an universal practice as was made out to be. Thus he was speaking in the same voice as that of the committee members. Bankim's assessment was that amongst one crore eighty lakh Hindus residing in Bengal, not even 1800 practiced polygamy.[95] Even that paltry number was on the wane, "Nobody has to take any initiative—no government measure is needed—no interference of the pundits is required, the number is decreasing on its own."[96] Although concurring with Vidyasagar on the evil effects of polygamy, Bankim Chandra differed on the issue of petitioning to the government to promulgate a law to root out the practice, because as per his estimate, polygamy would soon die a natural death. Caught between the two lobbies, the government abstained from taking sides. Although polygamy still came to be censured by many and newspapers still highlighted the deplorable state of girls and women, with the spectre of Revolt still fresh in their minds the colonial administrators refrained from taking any radical stance.[97]

All-round condemnation of adultery led to its inclusion as a punishable offence in the Penal Code because the Government realised if they remained mute on this sensitive issue in the face of growing opposition to this immoral practice, they would further lose ground. Sanctioned as punishable by religious dictum, the administration realised that not sailing with the tide would send a wrong signal. By marking off adultery as a criminal offence, they were endorsing the majority opinion that would elevate them in the eye of the natives as being sensitive to their wishes and aspirations.

In case of polygamy, it was a case of once beaten, twice shy. Its immediate precursor, Widow Remarriage Act of 1856, came under the scanner in the post-Mutiny review of events. Disraeli launched a scathing attack, denouncing the Act as, "...disquieting the religious feelings of the Hindus..."[98] The Magistrate of Muzaffarnagar remarked that the Hindus "...regard it with extreme aversion and deprecate Government interference in what they declare to be directly a matter of religion."[99] As regards the Widow Remarriage Act, there were 40 petitions against the proposed Bill, signed by nearly 50,000-60,000 persons and some 25 petitions in favour of the Bill signed by around 5,000 inhabitants.[100] Ignoring the rebellious voices, Dalhousie in 1856, went ahead with his 'civilizing mission', throwing caution to the wind. Post-revolt, the government refused to toe the reformist line so far as polygamy was concerned, since Hindu opinion was divided on the issue. As John Kaye warned, "We must be very careful not to give to the Natives of India any reason to believe that we are about to attack their religious feelings and prejudices..."[101] In consonance with the philosophy of non-interference, no intervention was made. Maine justified this on the ground "…a part of the community came forward to allege that they were the most enlightened members of it, and call on us to forbid a practice which their advanced ideas lead them to think injurious to their civilization...both as regards themselves and as regards their less informed co-religionists who do not agree with them."[102] Hence, the government thought it prudent to remain non-committal on the issue.

But was this the reality? Was the administration really shaken to the core to that extent that it did a volte-face so far as its attitude towards India was concerned? Was there a gap between what they preached and what they practised? This section deals with some of the important socio-legal reforms carried out during this period and try to establish that if one scratches the surface of this non-interventionist attitude of the British and makes an in-depth analysis of some of the major socio-legal reforms carried out in late nineteenth century, one can question the validity of Metcalf's argument.

A major digression in the Penal Code, so far as the policy of non-encroachment is concerned, is the fixing of the age of consent, i.e., the age in which a girl was legally declared fit to consummate. As regards the marriageable age of a female, leading Hindu theologists like Manu, Vrihaspati, Vasistha, Kasyapa and Vyasa, strictly enjoin that a girl must be given in marriage before puberty. The lower limit of age is not exactly defined. Ordinarily the lowest age for marriage is eight years, but Manu allows a girl to be married even before the proper age if a suitable match is found. Minors are not only eligible for marriage but they are considered the fittest to be taken in marriage.[103]

As per Statute 9 Geo. IV s. 74, which governed the criminal justice of Her Majesty's Courts in India, sexual intercourse with a girl under the age of eight was a crime of the same degree as rape. The draft penal code raised this age from eight to nine. Rape was defined in Chapter XVIII—Of Offences Relating to Human Body. While outlining the circumstances that would constitute rape, the last of the five circumstances outline intercourse "with or without her consent when she is under nine years of age."[104] Even in case of consensual sex, if the girl was under nine years of age, the intercourse would amount to rape. Exception was made in case of "sexual intercourse by a man with his own wife..."[105] implying that a husband had the right to exercise his marital rights and force himself upon his wife, irrespective of her age. No explanation was appended to the clause since the law-makers felt that "The provisions which we propose on the subject of rape do not appear to require any remark."[106]

Objections to the exception were, however, raised by three Judges of the Sudder Court at Bombay, Mr. Thomas, Mr. W. Hudleston and Mr A. D. Campbell. Mr. Thomas expressed his doubt at the propriety of this exception, "The early age at which children are married and in the eye of the law become wives, makes it necessary that protection should be given to them by the law till they are of age to reside with their husbands."[107] The Law Commissioners in their report concurred with the objections raised by the trio and admitted that marriage among Muhammedans and Hindus were contracted at an age when the bride had not reached puberty. Although the practiced norm was for the bride to stay with her parents till she was fit to

consummate the marriage, which essentially meant the time she started to menstruate, "...the check of the law may be necessary to restrain men from taking advantage of their marital right prematurely; to meet such cases it may be advisable to exclude from exception cases in which the wife is under nine years of age."[108]

In the final Penal Code of 1860, Section 375 laid down the rape clause and identified five circumstances which constituted rape. Of these, the last mentions, "With or without her consent when she is under ten years of age,"[109] exception being made in case of "sexual intercourse by a man with his own wife, the wife not being under ten years of age."[110] The logic offered was the same as was forwarded by Mr Thomas. Not only was the clause retained, the cohabitation age was further raised a year to ten. After the nightmarish experience of 1857, though the government knelt down on certain issues as elucidated by Metcalf, a careful perusal will show that it would be erroneous to conclude that the administration recast itself in a new mould, post-Revolt. It is true that fear of backlash was minimum in raising the age of consent from eight to ten. Hindu scripture demanded that once a girl experiences her first menstrual cycle, a ceremony called *garbhadhana* was performed after which she was considered fit to perform her wifely duties. As long as the government-dictated age of consent did not overstep the menstruating age of a Hindu girl, native condemnation was not expected. But even then, the very fact that the government not only retained the clause, but modified upon it, is a pointer to the deviant mood of the administration and perhaps of their future designs on the issue. They were testing waters before the final plunge. In fact, the post-1857 period saw a number of acts being passed which specifically dealt with issues pertaining to the domestic sphere, more precisely marriage, cohabitation, divorce, maintenance. This section will deal with three such acts—The Special Marriage Act of 1872, The Indian Limitation Act of 1877 and the Age of Consent Act of 1891.

The first of the three is significant since the main advocate of the Act was Sir Henry Maine, Law Commissioner from 1862-1869 whose tenure, Karuna Mantena says, signalled the end of liberal imperialism. In 1868, Keshab Chandra Sen submitted a petition to

the Viceroy, pleading for government intervention in passing a 'measure of relief' sanctioning what they termed as 'Brahmo Marriage' as legal, thereby freeing them from the fetters of 'idolatrous, superstitious or immoral' Hindu marital practices. The Brahmos had derived customs and rites in accordance with their own idea of reason and religion. Brahmo marriage was defined as "…a holy union between persons professing the Brahmo religion...solemnized with the worship of the One God and with such rites as are not idolatrous."[111]

Accordingly, a bill was introduced in August 1868, which aimed to legalize marriages between 'Natives of British India not professing Christianity', if the marriage was solemnised in the presence of at least three witnesses, if the persons were unmarried and the husband had completed eighteen years of age and the wife fourteen years, if the parties were not related to each other as parents or children or ancestors or descendants of any degree and if the marriage solemnized be certified by a government-appointed Registrar. So long, non-Christian marriages, unless held as per Hinduism, Muhammedanism or some other religion recognized by law were treated as illegal and children of such persons were deemed to be illegitimate and deprived of their property rights. In other words, Brahmo marriages were not endorsed by law. The Bill sought to rectify this lacuna by taking a broader view of the subject.

While introducing the Bill, Maine argued strongly in favour of such relief to be granted to the Brahmos because "it was not the policy of the Queen's Government in India to refuse the power of marriage to any of Her Majesty's subjects..."[112] But at the same time, he was convinced that in matters pertaining to religion, when any relief was sought it would be judicious to confine the limit to the particular sect or body making the application, instead of taking a sweeping view of the matter. However, in reality when it came to the Native Marriage Bill, he deviated from the said principle. The reason cited was the difficulty in defining a Brahmo. Hence arose the necessity of 'some degree of generality' and thus it was stated that the Bill would legalise marriages between Natives of India not professing the Christian religion and objecting to be married under Hindu, Muhammedan, Buddhist, Parsi or Jewish religion.

The Bill relieved from all civil disabilities, persons excommunicated from any recognised native religion and treated marriage as a civil contract. The other issue that the Bill touched upon was the age of consent. The Penal Code fixed the age at ten, the Native Marriage Bill sought to raise the age-bar by a few more notches at fourteen. Another landmark provision of the Bill was making bigamy a punishable offence, "Every person married under this Act who during the lifetime of his wife or husband, contracts any marriage without having been lawfully divorced from such wife or husband, shall be subjected to the penalties provided in Section 494 and 495 of the Indian Penal Code for the offence of marrying again during the lifetime of a husband or wife."[113]

Understandably, the Bill elicited criticism from various sections of the native population—from the Parsi community, the Hindus as also a section of the Brahmos—all of which submitted several petitions denouncing the Government for barging into their age-old religious practice.[114] The main bone of contention was that the Bill introduced "…disturbing element and unsettle the customs and usages recognized by law of the whole body of the people."[115] The proposed law, the British Indian Association alleged, would practically encourage people to dispense of with the sanction of religion while forming a marriage contract. It gave an individual the freedom to choose one's life-partner in the widest sense since a person could marry outside his caste, creed, or religion. Social organisation would be torn asunder, once the Bill came into operation, since, "…a Mahomedan woman will be introduced into a Hindoo family under the protection of the proposed law."[116]

In his defence of the Bill, Maine argued that the proposed Bill was basically an extension of the Lex Loci Act (Act XXI) of 1850, also known as the Liberty of Conscience Act. In essence the 1850 Act meant to relieve from all civil disabilities, dissidents from native religions. The Act stated that any Hindu convert would not be deprived of his property rights on account of his conversion. This ran contrary to traditional Hindu law which stipulated that if a person lost his caste or renounced his religion, he would be rendered incapable of performing the religious trusts as also from holding the estates he had received.[117]

Dalhousie's Act served as the template of religious liberty in India till that point. But what was amiss in the Lex Loci Act, Maine felt, was the omission of the provision—to contract a lawful marriage—because without marriage the question of inheritance would not arise. The Native Marriage Bill was meant to fill-in this gap and introduce civil marriage in India—'an universal institution of the Western World.' Maine, in fact, questioned the validity of the protection offered by the government to native religions, "…there is some sort of…protection to Native religions given by this state of the law of marriage in the existing condition of the Native society. Now, can we continue this protection? I think we cannot."[118] Although acknowledging that the government is bound to refrain from interfering in native religious opinions on the ground that "…those opinions are simply not ours…", Maine passionately argued that by "..trampling on the rights of conscience", the government, in fact was protecting the interests of the sincere believers and for the advantage of native religions.[119]

Maine's argument in favour of the Bill reflects the continuity notion vis-à-vis traditional customs and usages. The existence of an undercurrent of civilizing mission is testified by Maine's vociferous support of advocating civil marriage in India. Maine ardently believed that India was a backward civilisation, because its inhabitants had not moved from status (ascribed position) to contract (voluntary stipulation). The movement of progressive societies had been uniform in one respect, i.e, moving towards a phase of social order in which all relations arise from the free agreement of the individuals. He condemned the Code of Manu governing Hindu society as being a system of law 'of suspicious authenticity.' Through this Bill, Maine proposed to remodel marital practices by giving individuals free hands in forming associations with persons of their choice. What Maine envisaged was "…the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family."[120] By freeing marriage from being imprisoned by meaningless religious diktat, Maine was trying to facilitate the elevation of native society towards "…a phase of social order in which all…relations arise from the free agreement of Individuals."[121] This would help improve India's position in the 'scale of civilisation.'[122]

The Bill ultimately had to be pared down in the face of furore raised within the native circle and the rising number of signatories opposing it because of its direct bearing on the marriage practices of the native society as also for encouraging immoral practices. It took four long years for the Bill to finally become an Act in 1872. The preamble was amended to read that the Act would be applicable to persons, not professing the Christian, Jewish, Hindu, Muslim, Parsi, Buddhist, Sikh or Jaina religion, ostensibly referring that it should be limited to the Brahmos only. By toning down the Bill, the Government no doubt adhered to its 'play it safe' policy, but the very fact that the Law Commissioner's arguments were laced with allusions to interference and civilizing mission as regards native customs, affirm that remodelling of native society on Western lines was very much a part of the scheme of things. Maine's continuous reference to the pre-1857 acts, namely the Bengal Regulation of 1832 and the Lex Loci Act of 1850 and his open admission of the Bill being an extension of the same, establishes the continuity factor. In fact the original Bill, by making bigamy under such marriages a punishable offence under the provisions of the Indian Penal Code, was trying to fulfil one long-standing agenda of the British—banning of polygamy. The thread of continuity is thus too apparent to ignore.

The next major marker of intervention in the domestic sphere was the Indian Limitation Act of 1871 which was replaced by the Indian Limitation Act of 1877. The professed aim of the Act was to fix a period of time after which no suit could be brought. Among other things, the Act sought to empower the husband with the right to file a suit for the recovery of his wife. The period of limitation was two years and the time from when the period would begin to run was when possession was demanded and refused (Article 34 of Act XV of 1877). The Act also provided for the restitution of conjugal right, the limitation period was the same and the period would start from the time when restitution was demanded and refused by the husband or the wife being of full age and sound mind (Article 35 of Act XV of 1877).

This act, to some extent, can be treated as bulwarking of the traditional norms, since schedule 34, conformed to the norms of personal law. The implication of the clause was that the right of a husband to the possession of his wife was one which would continue so long as the marriage bond continued. According to Hindu Law,

marriage is regarded as an indissoluble union. Manu emphatically declares, “Neither by sale nor desertion can a wife be released from her husband.”[123] The inherent implication is that divorce is not obtainable even by a husband because a wife can never be released from a marital bondage. Thus, under all circumstances, a husband had the right to enjoy the company of his wife and if the same was denied to him he was armed with the power to file a suit for the same. Mohammedan law recognises the concept of divorce, but it is the husband who should exercise the upper hand. A husband may divorce his wife without any misbehaviour on her part or without assigning any valid reason. It is he who would take a final call on the matter. Thus practically the wife would have no say and was at the receiving end.

The basic premise of the next schedule, i.e. restitution of conjugal rights too, is borrowed from the law of Manu. Manu says that a husband must be constantly revered as a god. Under exceptional circumstances can a wife desert her husband, which is degradation and loss of caste on part of the husband. Occasions which would entail loss of caste, as identified by Manu, include drinking of liquor, killing a Brahmin, false boasting of high tribe, malignant boasting in front of a king. However, most of these offences were expiable by penance and after expiation a sinner was allowed to mix in the society and could claim restitution of conjugal rights. Thus all said and done, so long as a man was not excommunicated from society, he would be entitled to claim conjugal society of his wife. And since excommunication is revocable, a man’s claim to his marital rights, too, remains constant.

While at the outset this schedule might seem to be a reinforcement of personal law, it simultaneously provided the necessary counter-balance to offset the whims of the husbands. Any arbitrary demand of a husband could be thwarted since restitution of conjugal rights equipped a wife, after attaining adulthood, to refuse such demands. The most significant addition to Schedule 42 of Act IX of 1871, in 1877 was the phrase ‘of full age and sound mind.’[124] The term ‘full age’ was subject to debate. Schedule 15 of the new Bill, defined a minor as a person who had not completed eighteen years of age. Thus after she attained eighteen years of age, a girl would herself take the decision as to whether she would go over to stay with her

husband or not. The previous act had established that unless the wife reached puberty she would not be deemed fit to go over to her husband’s home. In 1874, the court in Suntosh Ram Doss v Geru Pattuck case dismissed the plea of the former on the ground that though the marriage was valid according to personal law, the wife should remain away from her husband ‘until a certain event had occurred.’ Since no such ‘contingency’ had happened the court refused to order the wife to go to her husband.[125]

In the 1877 Act, the government wanted to be more specific and zero in on the age. What it was trying to do was to keep the bride at bay till the age of eighteen from the physical onslaught of her husband and consequent pregnancy and child-birth which often resulted in death of the mother or birth of deformed children. By the time she became a ‘major’ she would be physically matured to consummate the marriage and be prepared for subsequent motherhood. By specifically defining the term ‘minor’, the government was cocooning the child-bride, since even when she had her menarche, her organs would not be developed to bear the brunt of intercourse.

Hindu law recognised that a girl, given in marriage as an infant, should be allowed to remain in her natal home. But it stipulates that the time when she would leave for her husband’s home with the intention of staying there, was to be determined by the husband or his guardian. Usually, after the child-bride had her menarche, she stepped into her in-law’s household to take up the position of a daughter-in-law and wife. It is this reference that B. P. Thumboo Chetty, Assistant Secretary to the Chief Commissioner of Mysore, cited when he urged that the newly-added phrase, ‘when possession is demanded and refused’ should be read as ‘when, after the woman has attained puberty, possession is demanded and refused.’[126] The implication is that once a girl has her first menstruation, which was well below the age of eighteen, her husband could demand to exercise his marital rights and refusal, under such circumstances, would enable him to file a case.

Definition of the term ‘minor’ became the crux, since it caused confusion within the official circle also. Section 3 of the Indian Majority Act, which came into force on 3 June 1875, specified that every minor of whose person or property a guardian had been

appointed by any Court of Justice and every minor under the jurisdiction of a Court of Wards shall be deemed to have attained majority on the completion of twenty-one years of age. Every other person domiciled in British India, whether native or foreigner, would be deemed to be a major on attaining eighteen years of age. The problem that arose was that in certain cases a person of eighteen, nineteen or twenty was not allowed to institute a suit, though limitation would be calculated as soon as that person completed eighteen. The guardian may not have filed a suit on behalf of the minor when the clock started ticking after the person had attained the age of eighteen the result being that by the time the concerned person completed twenty-one, the specified time limit of two years was over. The Select Committee, to which the 1877 Bill was referred, suggested the deletion of the definition of minor, which was ultimately heeded to.

Because of the minor/major controversy the term 'full age' could not be quantified by this Act, as a result of which the term remained open-ended and when it came to implementation was subject to interpretation by the court as per the circumstances specific to the concerned case. If accepted it would have raised the age of consent to eighteen. One of the landmark cases that stirred contemporary society was the case of Rukhmabai. Rukhmabai was married to Dadaji Bhikaji in 1873, when she was eleven and he nineteen. As per custom, she was living in her natal home. But after 'coming of age', she refused to live with him because of his wavering lifestyle. In 1884, Dadaji filed a petition in Bombay High Court claiming 'restitution of conjugal rights' under Act XV of 1877. Dadaji's petition was dismissed in 1885. He appealed against the judgement and in March 1886, two appellate judges ordered that the suit be remanded for a decision. The verdict went against Rukhmabai. She was ordered to go and live with Dadaji or face six months' imprisonment. An appeal was filed against the judgement and Rukhmabai was determined to present her case before the Privy Council in England, if the need arose. Dadaji, finally, agreed to relinquish his claims in July 1888, in lieu of a payment of Rs 2000. In this context, from the timing of the filing of the case, it would seem that limitation period commenced when Rukhmabai was around 18-19 years of age.[127]

What becomes evident is that, time and again the government under some pretext or the other, be it defining rape (Indian Penal Code), be it regulating marital practices (Native Marriage Bill), be it fixing the time-frame of filing a suit (Indian Limitation Bill), was relentlessly trying to push forth the consummation age of girls. It seems that fixing the age of consent became the fixation of the government, who refused to bow down even after their efforts were being frustrated. Colonial government was determined to penetrate into the innermost sanctum of husband-wife relationship.

The situation reached a crescendo in 1891, when a Bill specifically dealing with the issue was introduced—Age of Consent Bill. No longer hidden in veiled references or caught in the vortex of larger issues, the Bill was a direct assault on cohabitation. It proposed to raise the age of consent from ten to twelve. In doing so, the government was trying to replicate the English model since under the English law, the age of consent was twelve in case of women. The death of ten year old Phulmonee due to excessive bleeding because of forced intercourse by her thirty-five year old husband Hari Maiti in 1890, acted as the catalyst. Native public opinion had been steadily crystallising in favour of an age-raise. Behramji Malabari, a Parsi social reformer, was rigorously campaigning for raising the age from ten. In his tract "Infant marriage and Enforced Widowhood in India" published in 1887, Malabari passionately argued on the social evils of child marriage and demanded legislative intervention to prevent it. The Hindu reformist press systematically collated and published accounts highlighting the plight of the child-bride. Riding high on native support, the colonial administration ventured to introduce the Bill. After several failed attempts to raise the age-bar from ten, this bill fixed the lower limit at, what they believed to be, a more acceptable twelve. No longer couched in rhetoric, the frontal attack on the sacred domestic sphere led the conservatives to bare their fangs and launch a scathing attack. Bal Gangadhar Tilak opposed the Bill for interfering in the age-old customs of the Hindus. A section of the Bengali press, namely, *Bangabashi, Dainik O Samachar Chandrika* too, sided with the opponents. However, backed by a solid chunk of indigenous support, the law was signed on 19 March 1891 by the

government of Lord Lansdowne raising the age of consent for consummation from ten to twelve years. The Indian Penal Code and the Code of Criminal Procedure were accordingly amended to raise the age from ten to twelve, thereby making sexual intercourse with girls, either married or unmarried, below twelve years rape and punishable by ten years' imprisonment or transportation for life.[128]

It is true that in treading into the domestic sphere, the government did pay heed to the native voice and pruned many of its proposed measures so as not to incur the wrath of the indigenous people. But the very fact that they showed the temerity of delving into issues, considered sensitive to the natives, in the years following the Revolt invalidates the non-interventionist argument. Cutting across the debate that rather than facilitating women's emancipation, woman's body became the site of contest between the colonial government on one hand and the native society on the other, where the voices of the women, their wants and desires remained unheard and muffled, the paper concludes that if one traces the entire trajectory from third decade of the nineteenth century to the last decade—if one takes the entire gamut from the Abolition of Sati in 1829 to the Age of Consent in 1891—the leitmotif of continuity so far as the colonial government's preoccupation with the private space is concerned is unmistakable.[129] In fact, one can push the date further back by a decade, since Regulation VII of 1819 brought marriage under criminal jurisdiction by providing for imprisonment, not exceeding one month, to persons found guilty of deserting their wives and families and wilfully neglecting to support them.

The House of Lords passed a Bill in July 1858, for the better government of India, which amongst other things, exhorted the Secretary of State in Council, to submit "…a Statement prepared from detailed Reports from each Presidency and District in India in such Forms as shall best exhibit the moral and material Progress and Condition of India in each such Presidency."[130] The concept was borrowed from Lord Dalhousie, who in 1856 prepared a Minute wherein he narrated the measures undertaken under various heads during his eight year tenure in India (1848-1856). It was during

Dalhousie's reign that a resolution was passed that "…henceforth from the Government of every Presidency, from each Lieutenant-Governor, and from the chief officer of every province, an annual report, narrating the incidents that may have occurred during the year within their several jurisdictions, and stating the progress that may have been made…in each principal department of the civil and military administration."[131] Not only was Dalhousie's idea executed, the fact that such a report was required to be submitted annually and titled, *Statement Showing the Material and Moral Progress of India* attests that somewhere down the line, the administration was trying to project itself as the keeper of native morality and hence was keeping its fingertip on the pulse of the 'moral progress of India.'

The Revolt might have caused a serious jolt leading to an evaluation and rethinking of philosophy behind governance. Words like caution, restraint may have echoed at the corridors of power. But an assessment of some of the landmark acts passed during this given period proves a reification of ideological underpinnings of early nineteenth century. The issues that pre-occupied the colonial mind in post-1857, namely, marriage, bigamy, age of consent, have their genesis in the ideological trappings of the first half of the nineteenth century. The seeds of the three above-mentioned acts have been sown at a time when the prevalent sentiment was 'we shall stoop to raise them' and it is in the post-Revolt phase that these took concrete shapes. And herein, can one detect the thread of continuity being inextricably woven into the pattern of colonial administration in the nineteenth century.

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NOTES

1 Bernard S. Cohn, “Law and Colonial State in India” in June Starr and James Fishburne Collier ed. *History and Power in the Study of Law: New Directions in Legal Anthropology* (Cornell, 1989), p. 132

2 Cohn, op. cit., p. 133

3 Eric Stokes, *The English Utilitarians and India* (Oxford, 1959), p. 1

4 Stokes, op. cit., p. xiii

5 Ibid

6 *The Bombay Quarterly Review, Vol. IV July and October 1856* (Bombay, 1856), p. 388

7 Charles Grant, *Observations on the State of Society among the Asiatic Subjects of Great Britain, particularly with respect to Morals and on the Means of Improving it* (no date), p. 71

8 Grant, op. cit, p. 72

9 James Mill, *History of India, Vol. V* (London, 1840), p. 374

10 Ibid, pp. 474-475

11 Jeremy Bentham, “Codification Proposal” in *The Works of Jeremy Bentham: Part IV* (Edinburgh, 1822), p. 536

12 Stokes, op. cit., p. 70

13 In Bengal, enactments date back to Cornwallis Code of 1793, in Madras to 1802 and in Bombay to 1827 with the Elphinstone Code.

14 Bengal Regulation XVII of 1817, Section IX. Cited in Indian Law Commission, *A Penal Code Prepared by the Indian Law Commissioners* (Calcutta, 1837), p. 2

15 Bombay Regulation XIV of 1827, Sections XVI and XVII. Cited in Ibid

16 Madras Regulation VI of 1811, Section III. Cited in Ibid.

17 H.H. Dodwell*, The Cambridge History of India, Vol. VI* (Cambridge, 1929), p. 5

18 Lady Trevelyan, *Miscellaneous Works of Lord Macaulay, Vol. IV* (New York 1880), p. 163. Hindu Law Officers called Pandits and Muslim Law Officers called Kazis or Muftis were regularly appointed in Bengal in the district courts and city courts till the enactment of the Code of Criminal Procedure in 1861 which reorganized the court system and abolished such appointments. They were primarily asked to interpret scriptural law in civil cases.

19 Letter to Lord John Russell, from the Commissioners appointed to inquire into the state of Criminal Law, dated 19th January 1837.

20 The Plan of 1772 was the first attempt to regularize the judicial and legal system. Under this Plan the province of Bengal was divided into several districts, each headed by a collector responsible for collecting land revenue. In each district a Dewani Adalaut for trying civil cases and a Fauzdari Adalaut for trying criminal cases were set up. The collector was vested with the right to head these adalauts. Over and above these were the Sadar Dewani Adalaut and the Sadar Nizamat Adalaut, over which the Governor and the member of the Council presided.

21 *The Law Relating to India and the East India Company* (London, 1842), p. 51

22 A.C. Banerjee, *English Law in India* (New Delhi, 1984), p. 40.

23 Ibid

24 Indian Law Commission, op. cit., p. 4

25 Mill, *History of India,* vol. V, p. 474

26 The Charter Acts granted to the East India Company by the British Parliament defined the administrative, commercial, social and economic responsibilities and duties of the Company in India. The duration of each Act was of twenty years after which it was renewed. The first of these was granted in 1793 and the last in 1853, after which in 1858 the administration of India directly passed over to the Crown. The Charter Act of 1813 trimmed the monopoly of the Company in several respects. With the concept of laissez-faire steadily gaining ground in Europe, other Europeans, too, demanded their share in the India trade. The 1813 Act thus terminated the monopoly of the East India Company in India trade, with the exception of trade with China and tea trade, over which they were still allowed to hold sway. This, too, was ended by the Charter Act of 1833. Thus India trade, China trade and tea trade—all were thrown open.

27 John Stuart Mill, “Penal Code for India”, *London and Westminster Review,* XXXI (II), April-August 1838, p. 394

28 Lord Macaulay, *Speeches and Poems*, Volume I (New York, 1867), p. 147

29 *Index Record of the Legislative Department,* p. 43, National Archives of India (NAI)

30 Public Despatch to India, 10 Dec. 1834, para. 33. Quoted in Stokes, op. cit., p. 195.

31 Legislative Department, *Dispatch From The Hon’ble Court Of Directors No. 3 Of 1843 To The Governor-General Of India In Council Dated 1st Of March 1843,* NAI

32 The Second Law Commission was constituted in 1853 with Sir John Romilly as the President and Sir Lord Jarvis, C.H. Cameron, J.M. Macleod, Edward Ryan and R. Lowe as members. The Third Law Commission was formed in 1861 with Sir John Romilly as the President and Edward Ryan, R. Lowe, J.M. Macleod, Justice Wills and Sir W. Erle as members. Later on Sir W. Erle and Justice Wills were replaced by Sir W.M. James and J. Henderson respectively. The latter was further replaced by Justice Lush. The Fourth Law Commission was formed in 1879 with Sir Whitley Stokes as the President and Sir Charles Turner and Raymond West as members.

33 C.D. Dharker, *Lord Macaulay's Legislative Minutes: Selected with a Historical Introduction* (London, 1946), p. 190

34 Macaulay, *Speeches*, p. 197

35 Thomas Babington Macaulay, *The Miscellaneous Writings of Lord Macaulay* (London, 1865), p. 670

36 J.F. Stephen, *Essays by a Barrister* (London, 1862), p. 99

37 Thomas Babington Macaulay *"*A Speech Delivered in the House of Commons on the 2d of March 1831" in *Speeches of Lord Macaulay* (London, 1866), p. 2.

38 Ibid

39 Thomas Babington Macaulay, *Essays, Critical and Miscellaneous* (Philadelphia, 1853)

40 Indian Law Commission, op. cit., pp. 1-2

41 Dharker, op. cit. p. 256.

42 The provisions of the Code will be applicable to offences committed by soldiers, as well as to offences committed by other members of the community. But for those purely military offences which soldiers only can commit, no provisions were made.

43 J. M. Macleod, *Notes On The Report Of The Indian Law Commissioners, Dated 23rd July 1846 On The Indian Penal Code* (London, 1848), p. 1. The other three members of the Commission during the greater part of 1835 and 1836, remained unavailable due to ill-health. As Macaulay himself admitted, "During the twelve months which followed (August 1835), they were able to attend to their duties with alight interruptions. During the last rainy season…every member except myself was wholly incapacitated for exertion." Dharker op. cit., 252. Ironically Macaulay was not much in favour of a single person being entrusted with the framing of the Code. But circumstances forced him to work almost single-handedly.

44 Indian Law Commission, op. cit., p. 1. Macaulay in fact patted the Law Commission on its back for the swiftness with which it framed the Code.

Comparing the Indian Penal Code, with French Penal Code and the Code of Louisiana, Macaulay commented, "Indeed if we compare the progress of the Indian Code with the progress of Codes undertaken under circumstances far more favourable we shall find little reason to accuse the Law Commission of tardiness." Dharker, op. cit, p. 254

45 In the Notes A—R every chapter of the Code was explained and defended. G.C. Rankin believes, "We see here if anywhere Macaulay's assumptions and lines of reasoning and his very intense labour." G. C. Rankin, *Background to Indian Law* (Cambridge, 1946), p. 207

46 G. O. Trevelyan, *The Life and Letters of Lord Macaulay Vol. I* (London, 1876), pp. 417-418

47 The ten samskaras are *Garbhadhana, Jatakarma, Namakarana, Niskramana, Annaprasana, Chudakarana, Upanayana, Savitri, Samavartana, Vivaha*

48 *Second Report of the Commissioners Appointed to Inquire into the State and Operation of the Law of Marriage: East India Marriages* (London, 1850), p. v

49 Arthur Mills, *India in 1858* (London, 1858), p. 96

50 Ibid, p.2

51 Whitley Stokes, *Anglo-Indian Codes* Vol. I, p. 71

52 466. Every man who by deceit causes any woman, who is not lawfully married to him according to the law of marriage under which she lives, to believe that she is lawfully married to him according to that law, and to cohabit with him in that belief, shall be punished with imprisonment of either description for a term which may extend to fourteen years and must not be less than two years, and shall also be liable to fine.

467. Every woman who by deceit causes any man to believe that he is lawfully married to her according to the law of marriage under which he lives, and to cohabit with her in consequence of that belief, shall be punished with simple imprisonment for a term which may extend to one year, or fine, or both.

468. Whoever, with any fraudulent intention, goes through the ceremony of being married according to any law in force in the Territories of the East India Company, knowing that he is not lawfully married, shall be punished with imprisonment of either description for a term which may extend to three years and must not be less than six months, and shall be liable to fine.

53 Indian Law Commission, op. cit., p. 90

54 Indian Law Commission, op. cit., p. 91

55 Ibid

56 Indian Law Commission, op. cit., p. 92

57 Manada Debi, *Sikshita Patitar Atmacharit* (Calcutta, 2010)

58 Capital punishment was provided for only in cases of homicide. In all other cases where the Islamic law had provided for mutilation or death, corporal punishment was abrogated in favour of exile, imprisonment and fine.

59 Indian Law Commission, op. cit., p. 90

60 Ibid

61 West Bengal State Archives, General Miscellaneous, January 1867, A3. Quoted in Samita Sen, "Offences Against Marriage: Negotiating Customs in Colonial Bengal" in Mary E. John and Janaki Nair ed. *A Question of Silence: The Sexual Economies of Modern India* (New Delhi, 1998), p. 83

62 L.S.S. O'Malley, *Bengal District Gazetteers: Birbhum* (Calcutta, 1910), p. 38

63 *Papers Relating to Act XIV of 1860, Legislative Department: Other Series Of Records Of The Legislative Department (1819-1938)* NAI

64 Ibid

65 Ibid

66 Ibid

67 *Proceedings of the Legislative Council of India from January to December 1856, Vol. II* (Calcutta, 1857), p. 434.

68 This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years, and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real state of facts so far as the same are within his or her knowledge.

69 W. Morgan and A. G. Macpherson, *The Indian Penal Code (Act XLV of 1860) With Notes* (Calcutta, 1861), p. 433.

70 Asa Briggs, , *Victorian People: A Reassessment of Persons and Themes, 1851-1867* (Chicago, 1975), p.13

71 Charles E. Trevelyan, *On the Education of the People of India* (London, 1838), p. 193

72 Although colonial historians like Charles Ball categorized the Revolt as merely an uprising of the Sepoys, recent studies have clearly brought out the mass character of the Revolt. In not a very few cases the rebels

enjoyed the covert support of the civil population. The linkages established by them with the Zamindars of Bengal, the kookies, with Manipur princes, Chera chiefs, the Bhutias, and also in the Santhal Pergunnahs to name a few, are indicative of a wider network. In Purulia, one of the most prominent instances of the wider connection between the mutinous sepoys and the civil population can be found. In the month of November it was reported that the Rajah of Pachete, Nilmani Singh (Neelmoney Sing Deo), was suspected to be a privy to the 'rebel' bands who scoured the country and blocked the road to Ragunathpur, the sub-divisional town of Purulia. The Rajah had not only refused assistance to the Government to suppress the disorder, he was in fact trying to instigate the 'rebel' sepoys and was having a large amount of gunpowder and other ammunitions. Subsequently, the Government issued orders to arrest the Rajah. However, when the Company army reached Raghunathpur to arrest him, they had to face resistance from the local populace. E.H. Lushington, the officiating Commissioner, and Colonel Forster with a wing of the Shekawattee battalion was able to arrest the Rajah from a camp near Raghunathpur only when the latter realized that he had no other option but to give up. His house was later searched and military stores and arms of various descriptions were found. *Special Narrative Number 20, Government of Bengal, Judicial Department 29th August 1857, pp. 188-189.* Neeladri Chatterjee, *The Revolt in the Periphery: Bengal in 1857* (Paper read at the Annual Conference of the British Association of South Asian Studies, Edinburgh, 2009).

73 G.O. Trevelyan, *The Competition Wallah* (London, 1864), p. 41

74 Andrew Lang *Life, Letters and Diaries of Sir Stafford Northcote: First Earl of Iddesleigh* (London, 1892), p. 183

75 Thomas R. Metcalf, *The Aftermath of Revolt: India, 1870-1950* (Princeton, 1964)

76 Francis Hutchins, *Illusion of Permanence: British Imperialism in India* (Princeton, 1967).

77 Bernard S. Cohn, "Representing Authority in Victorian India" in Eric Hobsbawm and Terence Ranger (ed.), *Invention of Tradition* (Cambridge, 1983)

78 Shrabani Basu, *Victoria and Abdul: The True Story of the Queen's Closest Confidant* (New Delhi, 2010), p. 21

79 Basu, op. cit, p. 23

80 *East India Proclamations* (London 1908), p. 2

81 Metcalf, op. cit, 321.

82 Stephen, op. cit. p. 53

83 Karuna Mantena, *Alibis of Empire: Henry Maine and the End of Liberal Imperialism* (Princeton, 2010), p.5

84 Metcalf, op. cit., p. 321

85 Ibid

86 Grant Duff, *Life and Speeches of Henry Maine* (New York, 1892), p. 251-252. Quoted in Metcalf, op. cit. p. 323

87 *Sumachar Chandrika*, 31 March 1864, *Report on Native Papers For the Week Ending 2nd April 1864.* That the government was not very keen in the implementation of the said prohibition is borne out by the following report published in Som Prakash on 3 May 1869, "There is between the Pergunnahs of Bhograi and Kakrachore, in the district of Balasore, and the subdivision of Khati respectively, a temple known as Hooghly Chundunasur and dedicated to Seeb. At this spot the Churruck festival is annually celebrated notwithstanding the injunction placed by the authorities against it...On the last occasion two men…submitted to the operation of boring their backs and swung. This was witnessed by a large concourse of people, amongst whom Nundulall Singh and three other Constables, from the Rugunathpore Thannah and Muheshpore Outpost, were the most conspicuous in their enjoyment of the festivities of the occasion." *Report on Native Papers for the Week Ending 8th May, 1869.* The Kusthia correspondent of Sungbad Prabhakar of 1869 mentions several deaths and severe injuries done by the breaking of the Churruck pole in that locality. *Report on Native Newspapers for the Week ending 22nd May, 1869*

88 Metcalf, op. cit., pp. 107-108

89 *Hindu Intelligencer,* 6 August 1855

90 The committee comprised of C.P. Hobbhouse, H.T. Prinsep, Raja Sutto Shurn Ghosaul Bahadoor, Iswar Chandra Vidyasagar, Roma Nath Tagore, Joy Kissen Mookerjee, Degumber Mittra

91 "Kulin Polygamy", *The Calcutta Review, Vol. XLCII,* 1868, p. 144

92 Ibid

93 Iswar Chandra Vidyasagar, "Introduction" in *Vidyasagar Rachanabali,* Volume 4, (Calcutta, 1969), p. 15

94 Iswar Chandra Vidyasagar, "Bahubibaha Rahit Howa Uchit Kina Etodbishayak Bichar" in *Vidyasagar Rachanabali,* Volume 4, (Calcutta, 1969), pp. 42-49

95 Bankim Chandra Chattopadhyay, "Bahubibaha" *Bankim Rachanabali: Prabandha Khanda* (Calcutta, 1973), p. 404

96 Ibid

97 Polygamy amongst the Hindus came to be declared illegal only after Independence by the Hindu Marriage Act, 1955. One of the conditions laid down in the said Act is that for the solemnization of marriage neither party should have a spouse living at the time of marriage. The Act not only makes bigamous marriage void but makes it a punishable offence under s. 17 read with sections 494 and 495 of Indian Penal Code. *The Hindu Marriage Act, 1955, http://indianchristians.in/news/images/resources/pdf/hindu_marriage_act_1955.pdf*

98 *Hansard's Parliamentary Debate, CXLVII.* Quoted in Metcalf, op. cit., p. 93

99 Ibid

100 *Proceedings of the Legislative,* p. 434.

101 Speech of 1 August 1859, *Hansard,* CLV, p. 781. Quoted in Metcalf, op. cit., p. 93

102 *Legislative Department: Other Series of Records, Papers Relating to Act III of 1872,* NAI

103 Gooroodass Banerjee, *The Hindu Law of Marriage and Stridhan* (Calcutta, 1879), p. 38

104 Indian Law Commission, op. cit., p. 92.

105 Ibid.

106 Indian Law Commission, op. cit., p. 69

107 *Special Reports of the Indian Law Commissioners*, *Vol. IV: Report on the Indian Penal Code,* p. 78

108 Ibid.

109 Morgan et al, op. cit., p. 323

110 Morgan et al, op cit, p. 324.

111 Petition from Baboo Keshub Chunder Sen and Others, *Legislative Department: Other Series of Records, Papers Relating to Act III of 1872,* NAI

112 Abstract of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 Vic., Cap. 67, *Legislative Department: Other Series of Records, Papers Relating to Act III of 1872*, NAI

113 Ibid

114 Petitions were submitted by the British Indian Association, Adi Brahmo Samaj, Parsi community of Bombay, Members of the Allahabad Institute, Hindu community of Bombay, *Legislative Department: Other Series of Records, Papers Relating to Act III of 1872*, NAI

115 Memorial of the Parsees of Bombay against the Native Marriage Bill, *Legislative Department: Other Series of Records, Papers Relating to Act III of 1872*, NAI

116 Memorial of the Members of the Allahabad Institute, *Legislative*

Department: Other Series of Records, Papers Relating to Act III of 1872, NAI

117 The Lex Loci Act, in turn, was an extension of Lord Bentinck's Regulation VII of 1832, passed for Bengal, by which the civil disability consequent on the renunciation of Brahminism was ended.

118 Abstract of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 Vic., Cap. 67, *Legislative Department: Other Series of Records, Papers Relating to Act III of 1872*, NAI

119 Ibid

120 Sir Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas* (London, 1908), pp. 149-150

121 Ibid

122 James Mill in his seminal work titled *History of British India* analysed various aspects of the Indian society and assessed its place in the 'scale of civilization.' Deriding Sir William Jones for exalting Hindu civilization by digging out their past glory, Mill commented, "It is not from one feature, or two, that a just conclusion can be drawn…It is from a joint view of all great circumstances taken together, that their progress can be ascertained; and it is from an accurate comparison, grounded on these general views, that a scale of civilization can be formed, on which the relative position of nations may be accurately marked." James Mill, *History of British India*, Vol. I (London, 1817), p. 431. The yardsticks for Mill, in judging a nation's position in the scale of civilization, are form of taxation, form of law and form of government.

123 Banerjee, op. cit., p. 113

124 As per Article 41 of the Limitation Act of 1871, the time would be counted from "when possession is demanded and refused."

125 B.D. Bose, *A Digest of Indian Cases: Containing High Court Reports of Appeals from India, 1836-1909* (Calcutta, 1912), p. 10773

126 Memorundum by B.P. Thumboo Chetty, Assistant Secretary to Chief Commissioner, Mysore (dated 25th May 1877), *Papers Relating to Act XV of 1877, Legislative Department: Other Series of Records,* NAI

127 For details see Antoinette Burton "From Child Bride to "Hindoo Lady": Rukhmabai and the Debate on Sexual Respectability in Imperial Britain" in *American Historical Association 103(4) October 1998*; Sudhir Chandra, *Enslaved Daughters: Colonialism, Law and Women's Rights* (New Delhi, 1998).

128 For in-depth analysis on the Age of Consent Act, see Tanika Sarkar,

"Conjugality and Hindu Nationalism: Resisting Colonial Reason and the Death of a Child-Wife" and Padma Anagol, "Rebellious Wives and Dysfunctional Marriages: Indian Women's Discourses and Participation in the Debates over Restitution of Conjugal Rights and the Child Marriage Controversy in the 1880s and 1890s" in Sumit Sarkar and Tanika Sarkar (ed.) *Women and Social Reform in Modern India,* Volume I (Ranikhet, 2007)

129 For details of the debate see, Lata Mani, "Contentious Traditions: The Debate on Sati in Colonial India" in Kumkum Sangari and Sudesh Vaid ed., *Recasting Women: Essays in Colonial History* (New Delhi, 1989)

130 *A Bill [As Amended by the Lords] Intituled An Act for the Better Government of India,* p. 17. The reporting should detail the works done in the spheres of Revenue, Finance, Public Works, Legislation, Judicature and Police, Education, Emigration, Agriculture, Sanitary Measures, Municipalities, Population, Postal Communication, Ecclesiastical Establishment, Native States, Army, Marine, Trade

131 *Minute by the Marquis of Dalhousie, dated the 28th day of February 1856, reviewing the Administration in India, From January 1848 to March 1856*, p. 45

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