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Theoretical Assessment of New Sanhithas

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ABSTRACT

The need to reform criminal laws arises from a fundamental misunderstanding of their true implications and effectiveness. When the theoretical framework of these laws remains unchanged since the colonial era, the new legal system will inevitably retain its imperial characteristics. How can the new Sanhithas be praised for ending the colonial mindset when the core principles remain the same? This question has caused an appeal to a rigorous examination of the historical overview of the Indian Penal Code by exploring why the British wanted a criminal law for India and, in the event, how they subtly incorporated English Legal principles. The underlying notion is that English legal principles are the only understandable system of laws known to the British. Clearly, the same principles have guided the creators of the new Sanhithas in establishing laws while preserving most provisions of the IPC. This is because it is the only framework they fully grasp.

***Keywords**: Colonialim, Utilitarianism, Macaulay, Criminal system.*

I. INTRODUCTION

Three new criminal laws named The Bharatiya Nyaya Sanhita (BNS) in the place of Indian Penal Code, the Bharatiya Nagarik Suraksha Sanhita (BNSS) in the place of the code of criminal procedure, and the Bharatiya Sakshya Adhiniyam (BSA) in the place of the Indian Evidence Act, have received the President's assent and came into force on 1st of July, 2024. The purposes and objects of these laws are "to consolidate and amend the provisions relating to offences and for matters connected therewith or incidental thereto"[2]. Even though Macaulay's laws were influential and possessed the special character of long-surviving capabilities, the government proceeded to replace them with new laws with the intention of modernization and a more justice-oriented approach. Most certainly, it is a good time for those who wish to assess these new laws through philosophical analysis and normativity. Scholarly discussions and debates have shifted their focus on the organizational structure of the existing criminal justice system, examining the challenges it can possibly face in the future. Even some of these discussions, by far, are political. However, the displacement of old colonial penal laws has not settled long-standing debates of the Indian criminal jurisprudence rather, it seems to have committed to

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[2] The Bharatiya Nyaya Sanhita, 2023, No.45 Of 2023.

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reinvigorating the existing challenges into new forms.

The need for reform of the criminal justice system was premised on several commonly acknowledged criticisms about the penal code, including the reminiscent of colonialism. The formidable challenges the system had were to mitigate huge pending cases, inordinate delays, and low rates of convictions in cases where heinous crimes are involved. The Indian government has reason to believe that these criticisms are grinding the criminal justice system, and that reformation is the most effective way to save its future. This process was greatly influenced by the perception that India did not benefit from the colonial laws. Now, the sincerest question we must answer is – can the newly enacted criminal laws settle the old debates and mitigate the challenges? In order to examine, we need to investigate a detailed historiography and motivation behind the enactment of the Indian Penal Code of 1860. I believe that it will provide us with clarity about the background and overview of the Indian Penal Code and further facilitate us in understanding the fundamentals upon which the whole tenor of criminal justice has been constructed. Furthermore, it would also allow us to identify the issues within the legal institution. Having done that, we will analyze the new criminal laws by resorting to the rigorous examination of the intention behind such reformation so that we may understand their philosophical consistency. There won't be any necessary on my part to provide a comparative study of the old and new criminal laws as most of the provisions of the IPC have been retained by the government in the new sanhitas. It is, of course, important to recognize that minor modifications in the new codes may have a substantial impact on the effectiveness of the criminal administration system. However, there has been a widespread public discussion about those changes, and hence, I choose not to burden myself with those irrelevancies in the context of the aim and focus this paper purports to. I will strictly adhere to this rule in my research.

Lord Macaulay and the impoverished nature of the Indian Penal Code.

Undoubtedly, the Indian Penal Code (Herein after will be referred to as IPC) and several other penal and substantive laws drafted by Lord Thomas Babington Macaulay are sophisticated, revealing a great deal of positivist attributes with the history of long-survived criminal code and a perfect resemblance of Benthamite philosophical stance expressing the nuances of 'scientific legislation' and 'universal jurisprudence'[3]. While Macaulay's sheer commitment to creating a criminal code as such can be worthy of appreciation and respect, his motive behind enacting the code - which he wanted to be a code for the common world – is largely critical. What made the

[3] Chan, W.C., Wright, B. And Yeo, S.M.H, Codification, Macaulay and The Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform. Burlington, 2011.

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British to draft a law and construct a legal system for India? One can provide a simple answer by reasoning all the actions related to the creation of code were to perpetuate modernization with some associated features of imperialism. This above line of the statement, although, seemingly loud and plausible and needs no contradiction from the people of India, it still requires more constructive arguments with some historical references.

Until 1765, the British maintained a non-interference policy in local customs[4] as there was a steep ascent in resistance from Hindus and Muslims. Richard Lariviere argues that the British did not want to interfere with Hindu law, so they turned to the pandits and the Sastric texts for the law[5]; likewise, the Moulavies for the Mohamedan law. M. C Setalvad covers a major portion of this subject explains that the British parliament passed the Regulation Act of 1773 soon after the East India Company took control over the jurisdiction of Bengal, which led to the establishment of the Supreme Courts in each presidency. In 1781, Parliament passed the Act of Settlement, which established a system of courts for the mofussil, known as the Adalat courts. Eventually, a dual court system was formed operating side-by-side. The British and Indian judges in the presidency and Adalat courts have had the practice of following Hindu, Muslim, and British laws and applied them in the cases. They did this through the assistance of the pundits and Moulavies who could interpret and extract laws from their sacred scriptures and customs. Surely the credit must be given to the Warren Hastings plan of 1772. It mandated the courts to adjudicate the matters of inheritance, marriages, and caste-based on the Dhramashastras for Hindus and The Holy Quran and the traditional sayings of the Prophet for Muslims. Consequently, the courts were steered to deliver judgments based on religious exegesis and other penal regulations that are so different in each presidency court. For example, In the Bengal Regulations Act of 1818 "serious forgeries are punishable with imprisonment for a term double of the term fixed for the perjury, in the Bombay Regulations Act of 1827 on the contrary, perjury is punishable with imprisonment for a term double of the term fixed for the most aggravated forgeries, in the Madras Regulations Act, 1811, two offences are exactly in the same footing"[6].

Even with indigenous laws, the British maintained double standards by enacting obsolete provisions in cases of a trivial nature. Section 10 of the Madras Regulations Act vested the

[4] Skuy, David, (1998), "Macaulay and The Indian Penal Code Of 1862: The Myth of The Inherent Superiority and Modernity of The English Legal System Compared to India's Legal System in The Nineteenth Century." Modern Asian Studies 32, No. 3, 513–57.
[5] Lariviere, R. W. (1989). Justices And Paṇḍitas: Some Ironies in Contemporary Readings of The Hindu Legal Past. The Journal of Asian Studies, 48(4), 757–769.
[6] Lady Trevelyan, 1880, Miscellaneous Works of Lord Macaulay, Vol.1v, Harper & Brother Publishers, Franklin Square, New York.

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heads of the village with punitive powers to deal with petty cases, such as abusive language and inconsiderable assaults and affrays. Interestingly, the Company regulations prescribed two kinds of punishment based on the caste of the offender. For trivial cases, if the offender belongs to any kind of the lower castes, he will be locked up in the stocks for up to six hours and in the village choultry for a maximum period of up to twelve hours in the case of ordinary people[7]. David Skuy asserts that the judgements of these courts were not uniform and besides, it showed their poor understanding of India[8].

The Charter Act 1833, finally, led to the organization of the British government in India and created a unified legislative body by forming an appointed Legislative Council headed by the Governor General, which centralised and co-ordinated civil and military authority and East Indian Company commercial interests[9]. The British government entrusted Macaulay with the task of annihilating the fissure between India and England by transplanting the intellectual work of English legal principles. There has been a formal and informal opposition to the English laws, in the early period of the codification, from Hindus and Muslims. The response of the Indian Muslims towards the British political and social developments may be cited as an appropriate illustration in this regard. A.C. Patra asserts that Muslims were totally intolerable to any rival group or community[10]. However, this strong resistance could not be held for much longer when the British consolidated almost half of the administration and processed a system consistent with the present-day 'theory of universal jurisprudence'. The peculiarities of Islamic laws were soon superseded by the British Regulations Act.

It was for this reason, Macaulay intended to propose an ideal system of penal laws for India. He was well aware of the complexities of the work and faced numerous challenges during the codification. In the report, he said that "the system of laws which we propose is not a digest of any existing system, and that no existing system has even furnished with us a groundwork"[11]. Macaulay was neither in a position to digest the defects in the system nor had the intention to moderately correct it. For him, he firmly believed that any gradual attempt to retain the three distinct bewildering mixtures of laws would put India at her worst[12]. The Barrister and a lineal

[7] Manoj Mitta, 2023, Caste Pride, Battles for Equality in Hindu India, Westland Books, Chennai, India.
[8] Ibid, 521, See Also, Preston, L.W. (1989) The Devs of Cincvad: A Lineage and The State in Maharashtra. Cambridge [England]: Cambridge University Press.
[9] Mill, J. (2010) The History of British India. Place Of Publication Not Identified, Cambridge: Publisher Not Identified, Cambridge University Press. See Also, Chan, W.C., Wright, B. And Yeo, S.M.H. (2011) Codification, Macaulay and The Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform. Burlington.
[10] Patra, A. C. (1961). An Historical Introduction to The Indian Penal Code. Journal Of the Indian Law Institute, 3(3), 351–366.
[11] Lady Trevelyan, 1880.
[12] Ibid, 163.

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descendant of Macaulay and Maine, James Fitzjames Stephen, provides another lucrative work of Europeanization in India. For him, "the elimination of native law was legitimate so far as it was necessary for the firm establishment of British power [and] the principles which it represents"[13]. Therefore, the only solution available to Macaulay was to discard all of them and frame a system convenient to his knowledge and understanding.

Another factor that necessitated the reformation was that the British found both Hindu and Mohamedan laws hard to understand. Two reasons may explain their difficulties or well-intentioned misunderstanding as Professor Richard Lariviere precisely puts it. The first reason could be obvious and known that there was a lack of specific knowledge of India[14]. The judges in the courts were barristers with five years of experience in English law and were not in an imperative position to pay any attention to the existing system of laws. While dealing with the Hindu law, the British paid scant attention to the state of Sanskrit learning. Eventually, this made the British heavily rely on the Pundits whose attitude towards the interpretation of the Hindu laws was mistrusted by them due to the instances of their partiality and act of evading clear statements[15]. Second, the theoretical coherence upon which the indigenous laws have been created. Both English and Indian indigenous principles are emanations of two unique philosophies and they prescribe different theoretical frameworks and systems of laws. The former was found in Bentham's utilitarianism representing a universal standard of right and wrong, whereas the latter reflects, as the British supposed, a primitive legal system characterized by custom-based regulations[16]. For the British, these Indigenous traditions have not been resuscitated by the pundits and Moulavies and hence, they deserve a complete elimination. The strict distinct philosophies prove the point that the two systems of law can never coexist and they are incompatible.

Having explained the need to replace the old administration of justice with the invention of, a fundamentally, different system in India, the further question as to its nature naturally arises. The answer can be found in Macaulay's own description of the qualities of good law - precision, comprehensibility, accessibility, and legislative law-making power[17]. Bearing these qualities in mind would facilitate determining whether or not Macaulay's system of law has achieved them. Many of the critics of the IPC concentrated their assessment on its organisational structure and

[13] Smith, K.J.M. (1988) 'India and The Imperial Ethic', In James Fitzjames Stephen: Portrait of a Victorian Rationalist. Cambridge: Cambridge University Press, Pp. 123–159.
[14] Skuy, David, (1998),
[15] Lariviere, R. W. (1989).
[16] Skuy, David, (1998),
[17] T.B. Macaulay, J.M. Macleod, G.W. Anderson and F. Millett, A Penal Code Prepared by the Indian Law Commissioners (London: Pelham Richardson, 1838) (reprinted by the Lawbook Exchange, Ltd, 2002).

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punishments. Therefore, the debates, intentionally or inadvertently, are confined within these categories. No doubt that these categories posed immense challenges for lawyers, judges, and even legislators, but what has been hardly remembered was the philosophical backing of the law. Any meaningful discussion about the legal philosophy in prevalence must offer convenient access to Benthamite's theory of punishment.

Before launching into our field of enquiry, it is better to advise ourselves regarding the theory of utilitarianism in the first place. To review this theory is of great importance for our purpose. I will, therefore, draw upon a few of the best expositions of the subject. Jeremy Bentham and John Stuart Mill are the precursors of the classical approach to the utilitarian theory. Largely influenced by Thomas Hobbes and David Hume's works, Bentham propounded his own version of moral philosophy. According to him, "every action performed by a sentient creature was motivated by a desire either to experience some pleasure or to avoid some pain – the principle of utility"[18]. For Bentham, the right course of action is one that promotes the most pleasure in the most people. In a nutshell, "the greatest happiness of the greatest numbers"[19]. The bottom line is the attention to the idea of pleasure and pain as governing elements of our lives. With regard to this point, it may be said that it is indeed by all means true in one sense. However, conflict arises in Bentham's thought when he tries to reconcile with Hobbes's theory of psychological egoism. Hobbes famously held that humans are self-interested individuals and would act to promote nothing but their own welfare. It is beyond the bounds of the possibilities for a psychological egoist to promote overall happiness.

David Hume, on the other hand, rejects the theory of egoism and bases his ethical and political philosophy on the empiricist theory of mind. Hume argued that the action is the evidence of the character, yet, Bentham moved towards an act-evaluation. He concluded, thus, that the consequences of an action are the sole determinant of whether that action is morally right or wrong. In legal jargon, a law is said to be good when it produces the best consequences, that is, it reduces the pain and maximizes the happiness in people. This high-flown and ingenious sophistry, however, attracts criticisms worthy of our attention. For critics of the utilitarian theory, the problem remains with the fact that it uses the individual as a means to end and sacrifice an individual's interests for the supposed good of a community. In other words, the theory provides every possible way to promote sinister interest, instead of general public

[18] Schofield, P. (2014) 'A Defence of Jeremy Bentham's Critique of Natural Rights', in X. Zhai and M. Quinn (eds.) Bentham's Theory of Law and Public Opinion. Cambridge: Cambridge University Press, pp. 208–230.
[19] Bentham, An Introduction to the Principles of Morals and Legislation (henceforth IPML (CW)), eds. J.H. Burns and H.L.A. Hart (Oxford: Clarendon Press, 1970 (CW)), 11–16.

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interest.

Macaulay has actually deliberated a process of transplantation of the English legal principles to the Indian soil. The study of the transplantation process must furnish us with an answer to the question – who will benefit from these laws? The significance of the Indian Penal Code predominantly reflected England's needs, and India was just an experimental platform to test the contents and forms of the IPC[20]. If I have understood the utilitarian theory properly under the colonial sphere, these substantive and procedural laws of the IPC will be seen as something that produced consequences conducive to the needs and interests of the English, and certainly not the Indians. As I said earlier, it was the only principle and system that Macaulay understood and relegated all other indigenous systems to the domain of un-understandable. With what he understood from the English legal principles, he believed like most of the English law reformers that laws made out of such a principle would produce the best consequences and maximize pleasure and happiness in most people. It is not an exaggeration to note that the "most people" simply represented the interest of the majority. And by 'majority', I mean here, are not the large numbers of individuals in India, but those bare minimums who were in the government.

A pertinent example of the influence of utilitarian theoretical frameworks on the judiciary is provided by the Supreme Court's ruling, which affirmed the constitutionality of the death penalty. With the growth of constitutionalism, judicial activism, and human rights jurisprudence, the debates around the abolition of the death penalty have gained momentum and have been in the public discussion for a long period. I am not purporting to explicate the abolition of the death penalty but to analyse the influence of the utilitarian position in the analytical jurisprudence, which governs the views of the courts in India. Many proponents of the utilitarian theory claim that capital punishment is an effective exercise to deter the commission of the crime and hold that it is totally proportionate to the offence. In the CrPC, 1898, the courts maintained that the death penalty was the rule and imprisonment for life an exception[21]. This was overturned in the Amendment Act of 1973, where the courts are mandated to specify the reason for imposing the death penalty under section 354(3) in exceptional cases where heinous crimes are involved. Since then, capital punishment has been subjected to immense challenges by the chronic acceleration of the Indian Constitutional framework.

[20] Skuy, David, (1998),

[21] Bindal, Amit, and C Raj Kumar, 'Abolition of the Death Penalty in India: Legal, Constitutional, and Human Rights Dimensions', in Roger Hood, and Surya Deva (eds), Confronting Capital Punishment in Asia: Human Rights, Politics and Public Opinion (Oxford, 2013; online edn, Oxford Academic, 23 Jan. 2014).

Reliance can be placed upon *Maneka Gandhi*[22], *Rajendra Prasad*[23] to *Bachan Singh*[24], where the judicial conscience is often called upon to raise the issue of the death penalty. It assumed a significant and meaningful, yet unsatisfied conclusion, resulting in upholding the constitutionality of the punishment as a last resort for judges to impose it in the rarest of rare cases. The idea of the death penalty has its theoretical basis in the utilitarian concept. A rational man would deliberate all possible actions to reduce the likelihood of the commission of crimes by attaching it to a punishment proportionate to the gravity of the offence. The IPC and the case laws, to this day, have adduced in support of this proposition.

Whether or not the IPC produced the best consequences should be tested on the touchstone of the criminal administration system that the principle has created. Because, at all times, it is the institution that is most important and the philosophy growing around is an effective tool to justify the existence of that institution and give it moral support. We must also bear in mind that the institution problem is a vast one, both theoretically and practically, and it is not just a local problem exclusive to India alone but rather capable of creating a wider mischief in all commonwealth countries. Such being the case, I cannot treat the problem in its entirety. Time and space, I am afraid, would all fail me. Therefore, I restrict myself to a few of the most significant issues with the institution and will dwell on extraneous matters only when it is necessary to support or clarify in my paper. With these caveats in mind, we shall proceed to observe how the institution has been formed and its inherent problems. For a comprehensive study of the institution, it is a must to understand the characteristics of the IPC drafted under utilitarian premises.

The drafting process of the Indian Penal Code started in 1835 and Macaulay clearly outlines the core objective of his project as follows; (1) It should be more than a mere digest of existing laws, cover all contingencies and ‘nothing that is not in the Code ought to be law, (2) It should suppress crime with the least infliction of suffering and allow for the ascertaining of the truth at the smallest possible cost of time and money, (3) Its language should be clear, unequivocal and concise. Every criminal act should be separately defined, its language followed precisely in indictment and conduct found to fall clearly within the definition, (4) Uniformity was to be the chief end and special definitions, procedures or other exceptions to account for different races or sects should not be included without clear and strong reasons[25].

[22] [1978] 2 SCR 621
[23] [1979] 3 SCR 78
[24] [1983] 1 SCR 145
[25] Lady Trevelyan, 1880,

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Regarding the quality of precision, most of the provisions in the IPC are known for their usage of articulated words. However, Stanley Yeo and Barry Wright argue that "while much of the Code remains understandable to the present-day citizen, there are many words or concepts which are likely to cause puzzlement"[26]. Macaulay too acknowledged and was increasingly concerned about the complexities and ambiguities that the code entailed. In a letter to the Lord Auckland, Macaulay asserts that "in our definitions, we repeatedly found ourselves under the necessity of sacrificing neatness and perspicuity to precision, and of using harsh expressions because we could find no other expression which would convey our whole meaning and no more than our whole meaning"[27]. Nonetheless, he was also remarkably optimistic about his work, believing that it would someday achieve the intended purpose.

It is quite a common belief among legal scholars that when a law aims at accuracy, it might face such perplexing and complicating definitions. Therefore, it would be unfair to cast the entire blame on Macaulay and, as it seems, he was the first person to acknowledge "that his creation was not perfect and that there were bound to be deficiencies in its interpretation and application which would require fixing"[28]. This is not to assume that the British did the best they could for India. Macaulay's self-proclamation about his code to be a novel is no more than an illusion. Indeed, the Code mirrored the English laws with little changes in the substance, but mostly similar in form. After a comparison, the first report on the Indian Penal Code found that "there were no acceptable differences" and "departed very little from the substantial principle of English law"[29]. For example, Macaulay adopted the English's long-standing traditions of respecting religious manifestations and church properties and destruction of these properties was treated as a criminal offence[30]. Likewise, in the Indian Penal Code, there were some weird provisions related to religion and caste. An intentional act causing someone to lose caste was punishable by a prison term of six months, a fine of rupees 2,000 or both[31].

The real problem started when too much pressure was placed on the Judges to interpret the laws. There were many words in the code that necessitated the interference of the court to clarify the puzzlement. Barry Wright lists out a couple of words that are likely to cause confusion for those who are not familiar with the language, for example, 'wantonly'[32], 'maliciously'[33],

[26] Chan, W.C., Wright, B. and Yeo, S.M.H. (2011).
[27] Lady Trevelyan, 1880,
[28] Chan, W.C., Wright, B. and Yeo, S.M.H. (2011).
[29] First Royal Commission, First Report, p.98.
[30] Clive, J.L. (1973) Thomas Babington Macaulay - the shaping of the historian. London: Secker and Warburg.
[31] Parliamentary Papers, 'Penal Code,' 1837-38', XL1, s. 284.
[32] Sec, 153 of the IPC, 1860.
[33] Sec, 219 of the IPC, 1860

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'malignantly'[34], 'common intention'[35], 'unsoundness of mind'[36], 'sufficient in the ordinary course of nature'[37]. Although these words are known to many native speakers of the language, the thinking about criminal responsibility and relevant policies change according to time and space, making such words to be interpreted in a way that is appropriate to those particular circumstances. As Macaulay anticipated a loose-worded criminal law will resign the power of making law to the courts of justice[38]. An example of this sort is section 304A where the Courts were called upon to exercise law-making power and take the correct approach to resolve the word "rash". Holloway. J held that:-

> *"Culpable rashness is acting with the consciousness that the mischievous and illegal consequences may follow, but with the hope that they will not, and often with the belief that the actor has taken sufficient precautions to prevent their happening[39]"*

Wright raises concern about the similarity between the interpretation above and "the mental state for the offence of culpable homicide of knowledge that one's conduct is likely to cause death"[40].

It may also be not out of place to emphasise that the Supreme Court of India had upheld the constitutionalism and, in the event, it did not hesitate to strike down an offence such as homosexuality under section 377 of the IPC. The clash between the evolvement of the IPC and the development of liberal philosophy in many ways has led to novel judicial interpretations. While decriminalising the offence of adultery, the Supreme Court of India held that:-

> *What might be acceptable at one point of time may melt into total insignificance at another point of time. However, it is worthy to note that the change perceived should not be in a sphere of fancy or individual fascination, but should be founded on the solid bedrock of change that the society has perceived, the spheres in which the legislature has responded and the rights that have been accentuated by the constitutional courts[41].*

One more problem with the evolution of the IPC, and it may be easy to anticipate, was the proliferation of offences that fall outside the code. With the growth of the state in all aspects, particularly economic, there might be usually offences that may not be covered under the IPC.

[34] Sec, 270 of the IPC, 1860.
[35] Sec, 24 of the IPC, 1860.
[36] Sec, 84 of the IPC, 1860.
[37] Sec, 300 of the IPC, 1860.
[38] Lady Trevelyan, 1880.
[39] Re Nidamarti Nagabhushanam (1872) 7 MHC 119, See also, H.W. Smith vs Emperor on 26 August 1925, 91IND. CAS.889, Empress of India v. Idu Beg 3 A. 776 at p. 779: A.W.N. (1881) 132,
[40] Chan, W.C., Wright, B. and Yeo, S.M.H. (2011)
[41] Joseph Shine V The Union of India, [2018] 11 S.C.R. 765

This seemed to have left the legislature with two options; (1) to enact a special statute consolidating laws relating to those offences, or (2) move an amendment to the existing provisions in the IPC so as to include those offences. Both, in the eyes of the legislature, are desirable options. But exhausting both options in parallel will follow repercussions. For example, the Santhanam Committee on the Prevention of Corruption in 1964 recommended that it would be desirable to add a new chapter in the Indian Penal Code bringing together all the offences in such special enactments and supplementing them with new provisions so that all social offences will find a prominent place in the general criminal law of the country[42]. However, this recommendation was rejected on the grounds that the transferring special provisions would have a converse effect to the extent that these provisions themselves would become incomplete and unintelligible, as they would then have to be read without reference to the main provisions of the special enactments. Moreover, their transfer will not only increase the number of sections in the penal code and add to its bulk but also mar its structure[43].

For the judiciary, the issue will more be difficult and even a small mishandling of a case will eventually put the courts in a position with the bitterest and unwelcome criticisms and may portend tremendous consequences. For example, section 295A of the IPC, where deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs will be punished with imprisonment of either description for a term which may extend to three years, or with a fine, or with both. A controversy stirred around the judgement of the Karnataka High Court when it held that shouting 'Jai Sree Ram' inside the mosque did not outrage the religious sentiments of any class. The Court observed that:-

> *it is un-understandable as to how if someone shouts 'Jai Sriram' it would outrage the religious feeling of any class. When the complainant himself states that Hindu – Muslims are living in harmony in the area the incident by no stretch of imagination can result in antimony.*

The whole tenor of the judgement was premised on the question of whether an act of shouting "Jai Sri Ram" would be tantamount to insults or an attempt to insult the religious feelings of any class under section 295A of the IPC. The Courts answered in negative. Of course, there is no doubt that chanting the slogans of a particular religion in a public place would not insult the religious feelings of others and therefore, section 295A will not be attracted. Rephrasing the question – Whether an act of chanting religious slogans inside the place of worship of another

[42] The Santhanam Committee Report.
[43] The Criminal Report, 1966

religion would be tantamount to insult or attempt to insult religious feelings – makes it even more difficult because we might not know whether or not such an act is morally wrong in the first place. Determining whether an act is morally wrong or not is not a technical issue but rather ethical. It is simply morally wrong to chant one's religious slogan inside another religious place of worship. Now we have a legal principle that does not hold an individual liable for this act. Because the doctrinal approach of the English jurisprudence ignores to conceptualize 'wrong' from a moral attitude[44]. This emphasis on such cases had a more lasting effect on the judiciary. The courts are heavily burdened with the task of resolving the problem of such sort on their own. Judges may resort to any type of approaches that are deemed appropriate for them, but all those approaches would go in vain if the legislature fails to perform this task. As Macaulay asserts it is the duty of the legislature to draft a good code for an ideal social arrangement, and certainly not of the judiciary. If the legislature makes no attempts to reflect morality in law, then the ethical questions, as I discussed above, may continue to itch the judiciary and likely cause mounting complexities in the future. Because they are at the core issues of moral principles, not legal facts or strategy.

II. THE NEW CRIMINAL LAW; A FALSE INTENTION

We now pass on to the third part of my research. Whether the new criminal laws have really sorted out the old challenges? This question may seem too inquisitorial, but it is pertinent and the answer to this will serve us to elucidate the supposed consequences of the new criminal laws. Unfortunately, there is no direct answer to this question, because, it is obvious that the new system of criminal laws must survive at least a decade or two in order to evaluate their consequences. However, this barrier will not prevent us from appreciating the assessment of their philosophical stance. The assessment therefore involves an examination of the reason that led the government to overhaul the existing criminal justice administration and introduce new laws. A comparative study of the old and new criminal laws may be left as an employment for another occasion. Some of the readers might be confused as to why I regard the philosophical foundation as a key to my assessment of the new criminal laws. Not to strain much, I will proceed to give you my reasons for it.

The committee on reforms of the criminal justice system chaired by Dr. Justice V. S. Malimath examined the fundamental principles of criminal jurisprudence including the constitutional provisions. The object of the committee is to suggest ways in which it can revamp the criminal justice system in India, which, the committee took two reasons before it proceeds to scrutinize

[44] Dworkin, R. (2013) Taking Rights Seriously. London: Bloomsbury Publishing PLC.

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and scan the anatomy of the criminal justice administration. Of the two reasons, one was institutional and another was consequential problems. The committee held that "the two major problems besieging the Criminal Justice System are huge pendency of criminal cases and the inordinate delay in disposal of criminal cases on the one hand and the very low rate of conviction in cases involving serious crimes on the other. This has encouraged crime. Violent and organised crimes have become the order of the day"[45].

Although these two reasons found by the committee merit consideration, the true intention that has led to the reformation can be found in the parliamentary speech by the Home Minister of the Union. I venture to quote from it the following extract. Mr Amit Shah said: "free people from colonial mindset'. The question that may be asked in this connection is What purpose do new criminal laws have? If the purpose is to simply free people from the colonial mindset, then there is no point in retaining almost most of the provisions of the IPC that have resembled, as it seems to the government, the imperial framework. I must admit that little change has occurred in the structure and organization of the sections, but the contents of the new criminal laws, including the illustrations are as same as they were in the IPC. It shows us no special distinctions have been made between Macaulay's method of transplanting English laws and the new laws.

To whom we can give the credit for inspiring the new criminal laws? This is another disturbing question that many of us would fail to notice. Eric Stokes, an admirer of Bentham and Macaulay's work credited the Utilitarians with inspiring the Code's structure[46]. In fact, many subtler minds and abler pens who have done much in the field of this subject emphasise more on the forms and structure of the IPC as they believed the code to be truly inspired by the utilitarian theory. In the context of India as a colonized state, it would be totally unreasonable to treat the utilitarian theory as fundamental for the creation of new laws, because the theory itself was founded on colonial premises. British colonizers believed that the colonized states needed "paternal intervention from more civilised, progressive societies in order to stimulate growth in that spontaneous human development"[47]. This system of thought legitimized the British interventionists' ideas. It is common and habitual for conquerors to impose their laws, methods of ruling, and administrations on their conquering countries. They do so on the pretext that they are inherently superior and forward in all aspects, and the rest of the world is primitive, in spite of the advance of time and civilization. It is a universal fact, and the British could not have been an exception to this rule, and, as a matter of fact, we know it was not. Because, as I

[45] The Malimath Criminal Report, 2003.
[46] Stokes, E. (1959) The English utilitarians and India. Oxford: Clarendon Press.
[47] Campbell, C. G. (2010) ''Mill's Liberal Project and Defence of Colonialism from a Post-Colonial Perspective'', South African Journal of Philosophy, 29(2), pp. 63–73.

asserted before, no conquerors would attempt to put themselves in a predicament to comprehend the laws of the conquered state. They will choose to ignore them in their entirety without a second thought.

John Stuart Mill, a pioneer of Modern Western Philosophy, argued that colonialism was a good cause to advance and promote civilization and the welfare of the colonized population. He also contended that Indian Society largely benefitted from British rule, especially with regard to the system of laws, to the extent that he even advocated the actions of the East Indian Company in the British parliament, claiming them to be a good result and have produced happiness in large. So sensible was he of the importance of colonialism. It may not be out of place to exaggerate that the new criminal laws have been inspired by the IPC in the same way the IPC was inspired by the English legal principles. This is because the English legal principles and their inherent system of laws are the only ones that the makers of both criminal laws have understood. Thus, the new codes cannot be regarded as completely original. They are not a revolutionary departure from the colonial frameworks. In this sense, we cannot reason this legislative action to the level of revolution when all it does is just an inspiration and a different systematic exposition with changes in the title of the codes.

III. CONCLUSION

Now to summarize the main points of my research. In my opinion, there have been attempts to limit the debate of new codes within the categories of their form and structure. But nothing can be far from the truth. The difficulties that the new codes involve would be tremendous. It is true that the philosophical aspect of law comes to be the starting point of discussion before it can even deal with anything else. My study of the theoretical foundation of the new codes involves three main points: (1) the utilitarian concept itself was founded on colonial premises; (2) this concept was based as the foundation for framing the Indian Penal Code by Lord Macaulay; (3) Eliminating colonial remnants is only achievable by resorting to an alternative theoretical framework.

It is, therefore, unlikely from a system enclosed in orthodox English tradition to display an ingenuity in arguing against the utilitarian theory. Persistent efforts have been made by legal experts, former judges, and lawyers to do away with the new Sanhithas. Such attempts, however, have not aroused a great deal of emphasis regarding their foundation as to whether these laws have certainly possessed the elements to free the society from the colonial mindset or are an unconscious reconstruction to replicate the old codes. Those who hold the latter view will find some food for thought in the standpoint adopted in this paper. Theoretical foundations

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have pushed me to put some of the conclusions, which seemed to me well-founded and the grounds upon which they may be supported. I am not too presumptuous to think of this research as any way final. It is just a contribution to a discussion of the subject.

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