

# MARXIST AND PATRILINEAL CRITIQUE OF THE INDIAN PENAL CODE, 1860

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## ABSTRACT:

The post-enlightenment period in England is characterized by the coming up of the era of capitalism. This era is characterized by the growing of individualism and protection of individual rights and property. The Indian Penal Code was drafted by Lord Macaulay in 1860 and the drafting was influenced by British ideology. The IPC is the product of a particular time and place, cultural and intellectual context, and an expression of British imperial policies. As it is based on the principles and rules of Capitalism, in this paper I am going to present a Marxist critique on capitalism in reference to the Penal Code. Acc. To Marxists, all dependence upon a juridical system was to define private property, contract and the rights of men. Theory of Marxist follow the social theories based on two conflicting classes in society, the bourgeoisie and the proletariat, I am going to argue how the criminal code has been drafted to favor the bourgeoisie class in India. The power of bourgeoisie was used to regulate authority through regulating the law. The coming up of individual property rights has further led to classification of crimes with the sole motive of protection of property. For conflict theorists, the law is not a neutral system of dispute settlement designed to protect everyone, but rather the tool of the privileged who criminalize acts that are contrary to their interests. Everything was conceptualized in terms of property and the power was shifted in the hands of male in the society. Women were oppressed both by gender inequality due to their social position in a sexist culture and by class inequality due to their economic position in a capitalist society.

This paper will highlight all those sections which prove that Indian Penal Code was drafted strictly to protect the property of the men. However several amendments have been made to improve this

situation but not to eradicate the problem as a whole. The paper is divided into three sections, the first section talks about the relation between capitalism and drafting of Indian Penal Code, the second section talks about the regulation of power and property in relation to disadvantages by Indian Penal Code, the third section talks about the patriarchal dominance and origin of family in Indian Penal Code.

Indian Penal Code was drafted in 1860, to understand its codification one must look into the ideology and time-period in England during 18thc. The codification of Indian Penal Code by Thomas Babington Macaulay was most directly influenced by the ideologies of the British philosopher Jeremy Bentham.<sup>1</sup> The attitude of English ideologies in clear and most representative form, both in England and India, was Lord Macaulay who also acted as a strong utilitarian “enlightened despotic” legislator.<sup>2</sup> The need to codify the law was felt by the British to capitalize and regulate their Indian subject as India was economically and materialistically affluent but there were no definitive standardized property rights in India, and to gain the economic benefits out of it the need for a definitive law was felt, consequently the possible deviance and exceptions to the law were then specified in the Indian Penal Code. Therefore, Indian Penal Code was an economic and political priority, not a social requisite. The drafting of IPC aimed at minimizing discretion in legal status and to make the imperial authority more effective and legitimate.<sup>3</sup> The basic principle underlying IPC was to ensure a singular standard of justice and to displace arbitrary forms of discretionary authority with a more credible rule of law-based authority.<sup>4</sup> The means used while drafting IPC can therefore be said “to define property and individual rights” to achieve the ends of “regulation and uniformity” in the Indian subcontinent. It was a quasi-constitutional initiative with the projection of a British rule that aimed to regulate the relations between the colonizers and colonized.<sup>5</sup> Thereupon, IPC was codified to define crimes which cause harm prohibited by the law. IPC was profoundly influenced by the idea and principles of capitalism, which defines and protects

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<sup>1</sup><http://www.carleton.ca/history/wp-content/uploads/Extract-from-Wright-for-Mar-11-talk.pdf>

<sup>2</sup>Barry Wright, Macaulay’s Indian Penal Code: Historical Context and Originating principles, pg 20, in Codification, Macaulay and the Indian Penal Code (ed. By Wing Cheong Chan, Barry wright and Stanley Yeo)

<sup>3</sup> supra 1

<sup>4</sup>Supra 2, pg 28

<sup>5</sup> Supra 1

individual property rights. Marxists critiqued to view capitalism as the only cause of crime. Therefore, Lord Macaulay's premises were informed by the limits of his experience, outlook and the intellectual milieu of British capitalism and European Enlightenment Rationalism.<sup>6</sup>

The phase out of feudalism, which was marked by collective and social security in the community, and the advent of capitalism led to a shift between the power sharing relations of the society. As the notion of private property was encouraged instead of collective sharing, a stark difference between the rich and the poor came up. In accordance to Marxist theory, capitalism has led this class division to a conflict in the society between the powerful owners of the means of production called "bourgeois" and the powerless that are oppressed by the former call "proletariats". The main cause of crime is the division between these two classes as it generates dehumanizing conditions in capitalism.<sup>7</sup> The law in the capitalist society is perceived as a tool in the hands of the bourgeois to criminalize those activities of the proletariat which are against their interests. This division between powerful and powerless occurs due to the authority of a person over his/her property as all individuals are infected with egoism in capitalist societies.<sup>8</sup> Only wage labor and right to property are regarded as the driving force of an economy in such societies. As a result, the power has been legitimately given to the property holders and has thus provided the rulers the knowledge on how to solidify their power over the disadvantaged.<sup>9</sup> Therefore, the sole purpose behind the ideology of capitalism can be said to gain economic benefits from individual private property with the help of regulations in law.

My argument here is that Indian Penal Code has several sections which are drafted highly to favor the bourgeois class. After the codification of IPC, certain classes of people were disadvantaged and faced obstacles in performing their livelihood. This class has been termed by Marxist as "lumpen-proletariat". Lumpen-proletariat is that section of the working class that lives by indulging in deviant activities and is subjected to the ruling class exploitation.<sup>10</sup> One such example can be presented by

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<sup>6</sup> Supra 2, page 24

<sup>7</sup> [http://www.sagepub.com/upm-data/43449\\_6.pdf](http://www.sagepub.com/upm-data/43449_6.pdf)

<sup>8</sup> Supra 7

<sup>9</sup> B.B Pande, chapter 15, Criminality of the marginalized sections, Human Rights, Justice and Constitutional Empowerment (ed. By C. Raj Kumar and K. Chockalingam), pg 391

<sup>10</sup> Supra 9, pg 394

the implementation of the Thuggee act of 1836: The act performed by thugees in India was believed to have a historical conterminous and was believed to serve as a source of livelihood for many. The fact that the element of robbers and thugees was “interwoven in the society” and was never challenged before by the local population, because the looted or robbed amount was shared collectively in the society. This factor can be seen as a challenge to the implementation of capitalist society as the thugees did not participate with the British in economic profit maximizing because they escape from paying the revenues and tax on land. Therefore, the enactment of law on the lives of thugees can be seen as a “paramount of authoritarian liberal reform”.<sup>11</sup> As before codification of IPC, these people used to practice their profession of being a thug/robber freely, the law has thus deprived them from their profession and has made them the victim of capitalism. As Engels, Karl Marx (1887, Vol.1) have also noted:

*“The ‘free’ proletariat created by the breaking up of the bands of feudal retainers were turned enmasse into beggars, robbers and vagabonds. The fathers of the present working class were chastised for their enforced transformation into vagabonds and paupers”.*<sup>12</sup>

Also it is important to note that even in the present Indian Penal Code, the same definition of a thug has been presented in Section 310<sup>13</sup> along with its punishment in Section 311<sup>14</sup>. The decision to criminalize such acts is usually approached through *malum prohibition* conflict approach in which the bourgeois class has the power to regulate and form the law and come to a conclusion. On the same principal, the whole chapter in the IPC of offences against property can be said to be implemented to protect the interest and revenue collection strategies of the British. The power of bourgeois is regulated by forming the law and the introduction of private property has further led to several classifications of offences against property like specified from Section 378-462.

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<sup>11</sup>Radhika Singha, “ ‘Providential’ Circumstances: The Thuggee Campaign of the 1830s and Legal Innovation”, in *Modern Asian Studies*, 27:1, pp83-146

<sup>12</sup> Supra 9, Pg 395

<sup>13</sup>Thug.—Whoever, at any time after the passing of this Act, shall have been habitually associated with any other or others for the purpose of committing robbery or child-stealing by means of or accompanied with murder, is a thug.

<sup>14</sup>Punishment.—Whoever is a thug, shall be punished with 1[imprisonment for life], and shall also be liable to fine

To evaluate the section of theft<sup>15</sup>, it is important to note the definition of thieves as given by Marxists: “The dangerous class, the social scum, that rotting mass thrown off by the lowest layers of the old society. These folks came from a third class in society—the lumpenproletariat—who would play no decisive role in the expected revolution”.<sup>16</sup> Offences of these categories mainly depend upon the value judgment of the dominant political group in the society and are enacted solely to protect the right of individual property, especially of the bourgeois class.<sup>17</sup> Section 378 of IPC has also deprived certain group of people from freely performing their livelihood, namely forest-dwellers, who used to earn their livelihood by cutting and burning forests, which is accounted as a movable property, but now the demarcation of forest as government property in India has labelled them as intruders and criminalized their acts under the section of theft, therefore it has unduly favored the interests of forest and land owners.<sup>18</sup> An article by B.B Pande has focused on the question that how lives of ordinary and innocent working class are affected by the enactment of law against their means of earning livelihood. He has focused on the “anti-beggary legislation that tended to turn, the once innocuous, destitution and alms-seeking into a new form of deviance”.<sup>19</sup> He has also included the expanding net of crimes like vagrancy, beggary, squatting, prostitution, dancing and singing in public places in the similar context.

According to me the root cause for all this injustice is the granting of the power to regulate the means of production and law in the hands of bourgeois. The IPC is formed on contractual and property terms as the sections related to property rights seem to have no ambiguity in comparison to other offences and sections. Property is defined under Section 22<sup>20</sup> and a completely different chapter is provided for defining the punishment and offences against property.<sup>21</sup> Also it is only Dacoity as defined under Section 391, which is punished in all stages of crime and no other offence

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<sup>15</sup> Theft.—Whoever, intending to take dishonestly any moveable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

<sup>16</sup> Supra 7

<sup>17</sup> Supra 9, pg 400

<sup>18</sup> Supra 9, page 401

<sup>19</sup> Supra 9, Pg 403

<sup>20</sup> “Movable property”.—The words “movable property” are intended to include corporeal property of every description, except land and things attached to the earth or permanently fastened to anything which is attached to the earth.

<sup>21</sup> Chapter 17 of the Indian Penal Code, 1860 : of offences against property.



related to hurting the body or any sexual offence is punished in its all stages. This shows the sole motive behind the drafting of the Indian Penal Code was to safeguard individual private property rights in the capitalist society. The basis of classification of crimes is done in a self-interest safeguard of property manner. As the criminologist David Gordon (1971) has also stated:

*“Nearly all crimes in capitalist societies represent perfectly rational responses to the structure of institutions upon which capitalist societies are based. Crimes of different varieties constitute functionally similar responses to the organization of capitalist constitutions. For those crimes help provide means of survival in a society within which survival is never assured”.*<sup>22</sup>

Capitalism in India was not only marked with the generation of a bourgeois class but also with a patrilineal shift in familial relations due to which marriage became dependent on economic considerations. The 18<sup>th</sup> c. saw remarkable efforts being taken by the British to change all the matrilineal societies to patrilineal societies, especially in the north-west India. This was done to show that matrilineal relations are unnatural and not efficiently enforceable.<sup>23</sup> The mere fact that a capitalist society can be most perfectly regularized only if the rules of inheritance were in favor of the male was made the norm to be followed for all Indian communities in mid-18<sup>th</sup> c. The idea behind this is that the sanctity of a marriage will lead to further production of property in future. Perhaps this can also be seen as the reason behind criminalizing of Section 377 by the IPC.<sup>24</sup> Because when a family is treated as a heterogeneous unit, only then the future generation can be produced, which would also act as the savior of the power of male-dominance in the society. This clearly shows the influence about capitalist production creating class as well as gender divide on the drafting of Indian Penal Code. The patrilineal society was established with a new rule of “monogamy”. As wealth increased, it gave the man important status in the family than the woman and used this to strengthen that position in order to overthrow the matrilineal pattern and adopt the

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<sup>22</sup>Supra 9, Page 397

<sup>23</sup>Janaki Nair, Chapter 6: Nationalist Patriarchy and the Regulation of Sexuality” in Women and the Law in Colonial India: A Social History, pg 145-179

<sup>24</sup>Unnatural offences.—Whoever voluntarily has carnal inter-course against the order of nature with any man, woman or animal, shall be punished with 1[imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

patrilineal pattern simply to regulate and legitimize the inheritance of his children only.<sup>25</sup> The main aim of bigamy is therefore the procreation of the destined heirs of the man's wealth who would in future safeguard his private property. Monogamy is referred to as "the victory of private property over originally, naturally developed common ownership" by Marxists.<sup>26</sup>

Historical context of the origin of monogamy can clearly be traced in terms of property only as earlier there used to be no defined relationship between a man and a woman but as the notion of individual property came up, the need for a future protector of that property also propped up. Due to which a man was made limited to a single women so that there could be defined hereditary rules and bigamy and adultery were made an offence. Here also the practices which were merely practiced before were regulated and criminalized. Section 494 of the IPC<sup>27</sup> specifies that bigamy is banned in India. Therefore monogamy was established in order to guarantee the fidelity of the wife that is the paternity of the children, the women hence were placed in man's absolute power, that is if he kills her, he is but exercising his right. The women was degraded, enthralled as the slave of man's lust and regarded as a mere instrument of bearing child.<sup>28</sup> This dominance in the marriage makes the husband a bourgeois and the wife a proletariat in the family. The establishment of monogamy makes marriage a private relation as earlier when bigamy was practiced it was more of a public affair. That being so, some brutality towards women becomes firmly rooted with the establishment of monogamy.<sup>29</sup> Despite this, the Indian Penal Code fails to appreciate any provision for marital rape. The criminal law is regarded more as a public law, but when it works for criminalizing of offences relating to marriage it enters the private sphere and still fails to acknowledge the most evil form of crime of marital rape. The privatizing of family relations had inadvertently given the right to a man to exploit his wife and further categorize them as "their

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<sup>25</sup>Friedrich Engels, the origin of the family, private property and the state, The Marx-Engels reader (ed. By Robert C Tucker), pg 735

<sup>26</sup>Supra 25, pg 739

<sup>27</sup>Marrying again during lifetime of husband or wife.—Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

<sup>28</sup>Supra 25, pg 740

<sup>29</sup>Supra 25, Pg 742 and 744

property”. Even the Section 497 which defines adultery<sup>30</sup>, gives the absolute power of authority to the husband over his wife as it clearly specifies that wife is the property of her husband only. This section was codified in the Indian Penal Code as it assured the paternities of children were based on the moral conviction in the hands of the women.<sup>31</sup> In India the term of women being equal to the “mother of the nation” was used to show the responsibility bestowed on them to protect and regulate the future of the nation and to indirectly control the sexuality of the women.<sup>32</sup> This clearly shows that the IPC was male-dominated legislation at all levels, from the highest reach of the government to the family.

Similarly, in a patrilineal society the daughters are defined as the property of their fathers too. Thereupon, women are always regarded as a property of the male in the family and the highest form of invasion of this property is defined in Section 375 of IPC<sup>33</sup>, Therefore, the shift of power in the hands of male in the capitalist society have degraded the position of women and have made them vulnerable to exploitation. The chapter of offences relating to marriages demarcates the patriarchal dominance over the Indian Penal Code. Even the basic section which defines gender in Section 8 as “the pronoun ‘he’ and its derivatives are used for any person, whether male or female” is suggestive of the male dominance in the Indian Penal Code. Therefore, it is proved that Indian Penal Code was a product of capitalist society interplay of the elements of property and power.

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<sup>30</sup>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. In such case the wife shall not be punishable as an abettor.

<sup>31</sup>Supra 28

<sup>32</sup>Supra 23

<sup>33</sup> This section defines rape