COLONIAL LAW, WOMEN AND THE STATE : A GENDER PERSPECTIVE ON SOCIAL REFORM IN MAHARASHTRA IN THE LATE NINETEENTH CENTURY

Dissertation submitted to the Jawaharlal Nehru University
in partial fulfilment of the requirements
for the award of the Degree of

MASTER OF PHILOSOPHY

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1992

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CERTIFICATE

Certified that the dissertation entitled "Colonial Law, Women and the State : A Gender Perspective on Social Reform in Maharashtra in the late Nineteenth Century" submitted by MINAKSHI P. THORAT, in partial fulfilment of the Degree of Masters in Philosophy (M.Phil.) in Jawaharlal Nehru University, has not been previously submitted for any other degree of this or any other University. To the best of our knowledge this is an original work.

We recommend that this dissertation be placed before the examiners for evaluation.

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THIS WORK IS DEDICATED TO

MY DADDY AND AAI

C O N T E N T S

ACKNOWLEDGEMENT

I am really thankful to all those people without whose help it would have been very difficult for me to complete this Dissertation. I am grateful to Dr Mrs Patricia Uberoi for her guidance. Her incessant encouragement to me was a great help. I believe, I would not have been able to complete this Dissertation, without her kind cooperation. I express my deep gratitude to her.

I am grateful to Dr Mrs Uma Chakravarti for her timely guidance.

I also thank the excellent teachers in the Centre for the Study of Social Systems, JNU.

My special thanks are due to the Librarian and staff of Nehru Memorial Museum and Library, New Delhi.

I would like to thank the Librarian of the Jaykar Library, University of Poona, Pune, for allowing me to use the library whenever I needed.

I am equally grateful to Mr Gabar Singh for his utmost sincerety in typing my Dissertation.

I am thankful to my friends, Farah and Abhay for their cooperation and help.

The blessings of my most revered father, saved me from the unseen, unnoticed troubles. I put this Dissertation at his feet.

I am indebted to my mother for her continuous encouragement and moral support. I express my gratitude to my mother, Shaileja Tai and Viren who bore with my long absence during the Dissertation work.

MINAKSHI THORAT

CHAPTER - I

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INTRODUCTION

Women constituted nearly half of the total population in India and yet they lived an invisible existence. Men dominated all spheres of their lives. In the later nineteenth century, the educated women and the social reformers asserted women's right to live respectfully. The British colonial law was equally oppressive by way of following the Hindu law and patriarchal social structure. Their justification lay in not interfering in the social and religious matters of the Indians.

The life a Hindu women from birth to death was completely decided. They were debarred from education. Their world was confined in the four walls of their house. They silently suffered at the hands of their husband or his family. Their lives were shattered when their husbands deserted them for no rational reason. They were left at the mercy of their parents or in-laws. The life of a widow was the worst as a widow is considered a bad omen and hence shunned. She led the rest of her life as a slave. Child marriage was a common practice, where a girl child was even married to a adult male.

After marriage a girl was the property of her husband. The husband was her lord and master and she a dedicated loyal wife. For her the wedding knot was irrevocable but not for him. The woman and her person was the property of her husband. He could assert for his conjugal rights but a woman could not.

The social reform movement had taken up the cause of women as it had reached a critical stage. The problems focused by the reformers were Suttee, child marriage, widow remarriage

and education.

This study concentrates on the sacrament of marriage and question of conjugality. The only objective of a Hindu girl was marriage. In many cases it ended with the husband deserting her or becoming a widow. She became a destitute. It is surprising to note here that even her immediate family began ill-treating her. The social structure was such that the destitutes and widows had absolutely no status in the society. The society was created by men who thought women to be an object of use and discarded her once it was over. On the other hand, a widower did not undergo any such trauma. He could conveniently marry another woman.

The status accorded to women was very low. Women were not treated as having any intellect or capabilities not to talk of being at par with men. The social reform movement brought to light that women were as capable as men and hence the status accorded to them should not be lower vis-a-vis the men.

Marriage was central to the life a woman. It determined her whole life span. In the Hindu law, marriage is a sacrament but it was irrevocable for a woman and revocable for a man. The British Indian legal system did not make any changes in the marriage law. With the result the women remained without any redress to their grievances due to marriage. Equally strange was the custom of child marriage where the girl child was married off without her consent. One such marriage resulted in a court case called Dadaji Vs Rukhmabai. It was a case of Restitution of Conjugal Rights filed by the husband, Dadaji. This case received lot of popularity as it brought out the in-

herent contradiction of British Indian law. At the first instance the court gave a ruling favouring Rukhmabai as her consent for marriage was not asked. Later on, under the pressure of the orthodox male Hindus they did not find it profitable to jeopardize their control over India. So they ordered Rukhmabai to go to live with her lawful husband within a period of one month or else face imprisonment. They thus permitted Dadaji to posses her and her person as his property. She was one of the rare women who could withstand and go through a court case and tolerated the wrath of the male dominated Indian society. She was said to have insulted the Hindu womanhood. This brings out the strong gender bias in Hindu law as well as in British Indian law.

The literature pertaining to the study of this research constitutes Biographies, books on Reform Movement and the Colonial Law. The biographies on the social reformers concentrated more on the whole life of the reformers and devoted one or two chapters on women. The biography of Behramji Malabari written by Dayaram Gidumal is exception in that it has dealt in detail with the status of women and their subordination. Education and post-pubertal marriage was central to the issue of upliftment of women. The biography of Bal Gangadhar Tilak authored by Ram Gopal emphasises Tilak more as a nationalist than a reformist. Tilak was in the lime-light as a reformist more in opposition to the approach taken by Justice M.G. Ranade towards reform movement. Tilak viewed the question of women's upliftment along with the nationalist question of India's development and freedom. Tilak believed that women were homemakers and hence all their

education should assist in enhancing their skills in domestic work. From this view he opposed professional and higher education to girls.

The biography of Pandita Ramabai Saraswati written by Nichol Macnicol talks of Pandita Ramabai as an educated lady who worked relentlessly for the education and betterment of Indian women in general and the destitutes in particular. Pandita Ramabai came down equally on the British colonial law and the patriarchal construct of Indian society. Pandita Ramabai's efforts on behalf of women and her own life can be seen as a challenge to patriarchy. Ramabai's thrust was self-reliance for women which was in direct contradiction to the patriarchal system which insisted on women's dependence on men in all things and on their seclusion at home.

Justice M.G. Ranade's writings and speeches are compiled by his wife Mrs Ramabai Ranade. His writings reveal a deep concern for women. He finds the solution for the oppressive state of women in education. He calls for Legislations regarding, prohibition of child marriage and propagates widow re-marriage. He does not notice the intricacies of the marriage law keeping in view women's position. Regarding widow re-marriage he refers only to virgin widows and not to the widow whose marriages have consummated. Remember, a widower could remarry and no social stigma was attached to it.

Women's perceptions about themselves was largely governed by Saubhagya "marital blessedness" which is duty and loyalty towards the husband. Ramabai Ranade, wife of Justice M.G. Ranade was educated after her marriage by her husband. She

believed that women's true commitment in never causing hurt to her husband ever is the woman's true "marital blessedness". Anandibai Joshi (1865-1887) was the first Maharashtrian lady Doctor and received her medical degree in USA. Her biography was written in 1912 by Kashibai Kanitkar. She admits of the rough treatment metted to her when she was ten to twelve years of age by her husband. Yet she dreaded the thought of hurting her husband ever. Mostly women who had been educated by their husbands, after marriage had faith in the patriarchal frame-work of the society.

Among those who did not defend the patriarchal system was Rukhmabai (she was the defendent in the Dadaji Vs Rukhmabai case) who later became a Doctor. She wrote critically in a letter to the Times of India, 1885 under the pseudonym of 'A Hindu Lady'. She opined that Hindu women were treated worst than beasts. Women are regarded as objects of enjoyment who are simply discarded when the temporary use is over. The dictum of the Shastras and the degrading attitude of man for ages have resulted in women looking down upon themselves.

Many books have concentrated on the Hindu law and the positionit accorded to the women. Among them are Julia Leslie's book - The Perfect Wife: The Orthodox Hindu Women according to Stridharmapaddati of Tryambakyajvan, Duncan Derrett's Lingat: Classical law of India and P. Thomas' Hindu Religion, Customs and Manners. They elaborated on the role of a traditional Hindu woman mainly as a wife and mother. Dwarkanath Mitter wrote a book titled The Position of Women in Hindu Law. He has made a

comparative study of the status of women as understood by the Hindu law and later by the British Indian law. None have critically focussed on the inadequacies of the marriage law from the point of view of women. Most of them seem to have taken for granted the subordinate status of women which brings out their acceptance of patriarchal system and so have not observed the male bias.

Feminists see the question of low status of women and so also the then existent unfavourable marriage law in terms of the objective attitude of men towards women. Women were required to perpetuate the lineage and if a woman failed to bear a male child she was discarded.

Lata Mani in her writings is critical of both the Colonial Government and the Indian men. The religious texts overrode the customs. The complete dependence of women seen in the act of Suttee was attributed to the religious texts and traditions. The reform movement too debated on the 'traditional' and 'legal' status of women than on the actual inhumane conditions of a widow.

The English Government thought that there would be one religious text which would lay out the religious laws and customs. But the Hindu law was more inclined towards following the local customs than the religious texts. Rather the Hindu law varied according to local customs. The English Government in an effort to make the law uniform, combined the texts and the interpretations given by the local priests. Thus the law became a mixture of traditional Hindu law and the imported British law. In the Hindu law there was neither a provision for a divorce nor Resti-

tution of Conjugal Rights. Dadaji Vs. Rukhmabai case hence led to a severe controversy. The British Government too realised the consequences of passing such a law. They were sandwiched between their aim of possessing the colonial India and pleasing the dominant male society on the one hand and the picture they potrayed of an impartial Government following the dictum of equality before law.

There has a lot of study been done on the focal points taken by the social reform movements and the British Indian law as applied during the colonial period. The social reform movements focused on issues of Suttee, child-marriage, enforced widowhood, widow remarriage and education of women. But not much research has been done on these issues in the light of gender perspective. The study of the status of women from the point of equality between the sexes has largely been neglected. Many have spoken of upliftment of women from their suppressed state and the emancipation of women which is a very broad, ambiguous term; they have not talked of women at par with men. This research concentrates on the Marriage law and the case of Restitution of Conjugal Rights from a gender perspective. The social structure and the values contained in the society largely influence the individual. In the patriarchal society which is created by the males are obviously dominated by the values carried by them. These values are conveniently manipulated to suit their interests and keep the women in a subordinate position. This particular case of Dadaji Vs Rukhmabai brought out the gender bias inherent in the British Indian law. As this case had come up in the Bombay High Court, it was but natural

to focus the study to the region of Bombay Presidency or Maharashtra.

The other data sources used in this research were Newspapers. Behramji Malabari edited Indian Spectator which was quite critical of the oppressive traditional Hindu law. It talked about the morality taught by the Christian religion vis-a-vis the Hindu religion. B. Malabari fearlessly condemned the Hindu law and also the new British-Indian legal system. It supported the reform movement. It carried the approach of changing the attitude of the masses along with passing the required legislations.

Mahratta, edited by B.G. Tilak had long since opposed Government legislation. But it took a very different stand when the case of Dadaji Vs Rukhmabai came up. He wanted the Government's intervention so that the law could force Rukhmabai into submission. They viewed Rukhmabai's case as a threat to Hindu religion. Tilak's writings suggests approval of humane treatment of women, but also of keeping them to the subordinate position within the home. But the idea of equality of sexes did not surface.

Chapter II of this Dissertation serves the purpose of a backgrounder for the study of court case which came up in 1884 in the Bombay High Court. It covers the traditional Hindu law regarding marriage which helps in the understanding of socio-religious context. Hindu religion and law, are covered by Manu's 'Manusmiriti'. It infact spells out the code of conduct of a woman such that she is made incapable of any independent decision. The Colonial Government made changes in the tradi-

tional institution of law. It aimed at replacing the Panchayats by modern civil courts. The result was a strange concoction of British law super-imposed on the traditional law. The orthodox community tried to oppose it but in vain. The subsequent court cases brought out the disabilities of the British Indian legal system, but the stage had reached where there was no possibility of return to the previous situation. It perpetuated the patriarchal construct of law and society.

Chapter III describes how social reformers tackled the question of social reform. The colonial Government wanted to strictly keep aloof from the socio-religious issues of the Indian society. However, some reformers felt that the passing of social legislation would speed up the social reform movement. Justice Ranade proposed such an approach. On the other hand, B.G. Tilak was strictly against State interference as he believed that such a measure would in no way help the social reform movement. The Indian masses and the society should be able to judge for themselves the evils of traditional customs and rise to abolish them themselves. Behsamji Malabari took the concrete first step when he proposed the minimum age of marriage for girls. Much debate had taken place on the 'Age of Consent Bill' at the initiation of B. Malabari. Pandita Ramabai Saraswati criticized the colonial Government for taking a unjustifiable stand favouring Dadaji in the case of Restitution of Conjugal Rights as they did not want to displease the men folk of Indian society. She expected the English Government to be impartial and humanitarian in their approach.

Chapter IV is the study of the court case "Dadaji Vs

Rukhmabai". The husband Dadaji had filed the suit against his wife for the "Restitution of Conjugal Rights". This case is an example of how the British Indian law succumbed to the patriarchal Hindu law. At the first instance they had said that the suit is not maintainable because the "institution" of conjugal rights had never taken place. The marriage was never consumated. But later due to the pressure of the orthodox supporters of Dadaji, the suit was said to be maintainable. It highlighted the problematic nature of British Indian law and the gender bias it contained.

CHAPTER - II

CHAPTER - II

THE CONCEPT OF MARRIAGE IN HINDU LAW AND BRITISH - INDIAN LAW

Three distinctive, though over-lapping, stages can be discerned in the development of the modern British-Indian Legal system.

The first stage can be traced back to Warren Hastings' organisation in 1772 of a system of courts for the hinterland of Bengal. There was a general expansion of Government's judicial functions and a gradual diminution of other tribunals. The authoritative sources of law to be used in governmental courts were side-tracked and legislation initiated.

The second stage began roughly from 1860 and was marked by extensive codification of the law and rationalization of the system of courts, while the sources of law became more fixed and legislation became the dominant mode of modifying the law. This period lasted till Independence and marked the beginning of the third stage.

After Independence there was further consolidation and rationalization of the law (Third stage). The development of a unified judicial system over the whole of India also followed.

The law as applied in the courts during the first stage was in no way uniform. Parliamentary Charters, Acts,

Indian Legislation (after 1833), Company Regulations, English common law, Ecclesiastical and admiralty law, Hindu law, Muslim law, and many bodies of customary law were combined in a bewildering array. The British policy, in matters of family law, inheritance, caste and religion, did not permit the Indians to be subjected to a single general territorial law. Hindus and Muslims were to be governed by their Personal law. The cases of other religions were to be decided "according to justice, equity, and good conscience"; the meaning of which remains ambiguous. Hence, it was conveniently used for the uneven application of some indigenous law and for the importation of a great deal of English law. After the Crown took over the governing of India from the East India Company in 1858, the approach began to change.

India was formally accepted as a colony after the British Crown took over. Efforts were made by the British Government towards simplifying and systematizing the law. This period was marked by codification of law and consolidation of the court system. A series of Codes, based more or less on English law, with minor exceptions were enacted throughout British India. By 1882, there was virtually complete codification of all fields of commercial, criminal and procedural law. Only the Personal laws of Hindus and Muslims were exempted. Their Personal law was now confined, with minor exceptions to Personal law matters such as family law, inheritance, succession, caste, and religious

endowments.

I. The Transformation of Indigenous Law

Modern legal system replaced Indigenous law. The administration of Indigenous law moved from "informal" tribunals into the Government Courts. Secondly, the applicability of Indigenous law was curtailed. Thirdly, the Indigenous law was transformed in the course of being administered by the government's courts.

The common law courts dealt with the merits of a single transaction or offense, isolated from relative disputes among the parties and their supporters. Following the principle of "equality before law", the status and ties of the parties, matters of moments to an indigenous tribunal, were deliberately ignored unlike in Indigenous law where compromise or face-saving solutions, acceptable to all parties were sought. Decrees were enforced by extra-local force and were not subject to the delays and protracted negotiations.

The British worked on the assumption that there was some body of law similar to their own, based on authoritative textual materials to be applied by officials according to specified procedure to reach unambiguous results. However, there was no single system in use, but a multiplicity of systems, and within these there was often no fixed authoritative body of law, no set of binding precedents,

no single legitimate way of applying or changing the law. In search of authoritative bodies of law, the British translated ancient texts and recent commentaries.

The British while applying the (available) Indian rules, transformed them. The British insisted upon clarity, certainty and definiteness which was difficult in Hindu tradition. Custom was unwritten and therefore difficult to prove in court. It was accepted that where there was a conflict between custom and Sastra, the custom overrode the written text; nevertheless, the texts were elevated to a new supremacy over custom. To prevail over a written law a custom must be 'proved to be immemorial or ancient, uniform, unvariable, continuous, certain, notorious, reasonable, peaceful, obligatory and it must not be immoral nor opposed to an express enactment ... or to public policy.'[1]

Judicial enforcement of custom rigidified it. It no longer had a quasi-legislative character. The courts appointed law officers - Muslim Moulavis and Brahmin pundits - to select and interpret the relevant portions of the Hindu and Muslim law for the English Judges. When the British felt that all that was needed has been translated, these intermediaries were eliminated.

II. The Traditional Hindu Law

Society in pre-British India was governed by innume-

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1 P.V. Kane, Hindu Customs and Modern Law (22-26), (Bombay: University of Bombay, 1950).

rable, overlapping local jurisdictions. Many institutions - the family, the religious community, the caste panchayat, etc. - enjoyed varying degrees of autonomy in administering law to themselves. If appeal was made to the Royal Courts, the ruler's judgement was taken as final. The existence of Dharmasastra, a refined and respected system of written law, did not serve to unify the system in the way that national law did in the West. Neither were the local laws absorbed into a Civil Code promulgated by state authorities. Hindu law did not enjoy the political conditions of unification. Often even local unification seemed difficult due to the relative absence of written records and of professional pleaders.

Hinduism does not have one authentic and popular text which could be accepted as the authoritative religious text throughout India's length and breadth and at all periods of time. As in other traditional societies, in India also a distinct line cannot be drawn between religion and law. They are intertwined to a great extent.

The four Vedas consisting of the Samhitas, Brahmanas and Upanishads, which are believed by the Hindus to have been directly revealed by God to man, give us nothing about positive laws. They deal with religious rites and duties, making an elaborate system of rules and regulations, rites and ceremonies, theology and metaphysics, for the conduct of human life.

The Hindus believe in the transmigration and immortality of soul as also in the doctrine of Karma until it attains Moksha. Attainment of Moksha is possible through Bhakti, Karma and Gyana. In the attainment of Moksha and in the Doctrine of Karma, a Hindu male is incompetent unless assisted by his wife. A wife is believed to be the Ardhangini (the other half of the body) of her husband.

The principles of the Hindu religion are the enternity of the soul, adrishta and Moksha or liberation of the soul. The Doctrines of Karma and re-birth are deeply inculcated in the Hindus. The goal for women, as spelt by the ancient Hindu legislator was "Pativrata Dharma" (devotion to husband). Sati was committed to fulfil this Dharma. Ideally, such a woman dies before her husband; if by some mischance she does not, the wrong may be put right by taking her own life on her husband's pyre. Colebrook's account of Sati brings out the mystique of the Hindu women who voluntarily and 'cheerfully' mounts the pyre of her husband.[1]

There is also a tendency in the Dharma Shastras to reduce women of the three 'twice born' classes[2] to the level of Shudras in respect of legal rights and duties. Shudras have no initiation ceremony; neither have women.

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1 Uma Chakravarti, "Whatever happened to the vedic dasi?" in Sangari and Vaid, Recasting women (Delhi, Kali for women, 1989), p. 31.

2 Brahmanas, Kshatriyas, Vaisyas.

The initiation of both takes place at the time of their marriage. One of the Sanskaras or ceremonies which was compulsory for the males of all three[1] classes was the right to be initiated (invested with the sacred thread).

The spiritual significance of the initiation lies in the right to study the Vedas by those who have gone through the ceremony. Hence Shudras had no right to study the Vedas. The difference amongst persons, their personal rights and duties, with reference to difference in sex was founded on the incompetency of women to be instructed in the Vedas.

Manu, while talking of eternal laws for a husband and his wife, who keep to the path of duty, whether they be united or separate, says:

> Her father protects[2] (her) in childhood,
> her husband protects (her) in youth and
> her sons protect (her) in old age; a
> woman is never fit for independence.[3]

It was this principle that has been zealously supported and carried to such an extent that high status Indian women hardly faced the outside world without Purda (veil over the face).

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1 According to some texts, only the upper two castes can have the initiation ceremony.

2 In many texts the Sanskrit word has been translated variously, as "support", "control", "govern".

3 Manu V., 148.

(i) Marriage

Marriage means union between man and woman for certain social and religious purposes. It is looked upon as a Samskara or a religious ceremony by virtue of the holy knot which, when once tied, becomes indissoluble. Hindu marriage is a sacred union, indissoluble, irrevocable, a union for a life time, it is the most auspicious Samskara. The sacred conception of marriage in India can be traced back to the age of the Vedas. The Satapatha Brahmana declares that a man is complete only when in union with a woman through marriage. Manu states that "without house, without home, without progency [a wife] makes him, he becomes without succession, he is destroyed."[1] According to Manu, procreation is a male's duty. Procreation is the purpose of marriage so immortality can be achieved.

Marriage is regarded as one of the Ten Samskaras necessary for regeneration of the men of the twice born classes, but the only sacrament for the women and the Sudras. Consequently, there is no room for divorce, or for dissolution of marriage, except among the Sudras.

Marriage is entered into and performed to ensure the immortality, continuity and purity of the male descent line and of the social group for which the line is the organising principle. Lineage is perpetuated through the

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1 "Laws of Manu" quoted in K.M. Kapadia, Marriage and Family in India, (Bombay, Oxford University Press, 1947 , p. 87.

passage of male blood. Women, are the only means through which a man can continue his line and transmit his ancestral male blood. It is the indigenous construction of blood that links him to previous and succeeding generations of males: F, FF and FS, SS.[1] This immortality of the line is made possible by the birth of male children through a wife. Brides are regarded as vessels, and grooms as the ones who install or contain the vessels.

Marriage is vital to the maintenance of one's caste status, defined as one's standing among the smaller segmentary subdivisions within the caste. The principles of marriage practice are therefore inseparable from the principles of hierarchy at the very core of Indian society.

Marriage alters a woman's status, group affiliations and also her future actions. The rituals not only express these realities but define, construct and interpret them for the actors themselves. A newly married woman begins a new style of life, observing her in-laws' customs and norms of action. Most important, she adopts her in-laws' house's observance of purity and pollution in regard to the major life cycle and other sacred rituals.

Marriage consists of two major elements: the gift of a virgin and the payment of a dowry. The gift of a virgin is a ritual of purely sacred connotation. Dowry precedes

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1 L.M. Fruzzetti, The gift of a virgin, (New Jersey, Rutgers University Press, 1982), p. 24.

the marriage ritual itself and is an activity which can be understood in economic terms alone. Much more is given as dowry among the higher than the lower castes.

Krishna's Prembhakti is the relation between the devotee and a (personal) God which can be explained as a combination of worship and love. This is taken as a model for the relationship between husband and wife in marriage. Wife is the devotee and husband is her Lord. Marriage is a relationship of prem and bhog (acceptance, referring to both suffering and enjoyment); it is hierarchal and reciprocal at the same time. The husband should love and respect his wife, for he is Lord and the wife should be devoted to her 'God like husband.'

It should be noted that there is no clear cut division between men and the Gods in Hindu ideologies. Deities, incarnate Gods, God-kings and ancestors are all sacred, divine beings, related respectively to different levels of action in society.[1] They are all worthy of worship. This is also true of Brahmans, Gurus, family priests and fathers, who are on the continuum between Gods and mere persons. Similarly, the husband should be addressed with devotion by his wife. For example, a wife is not expected to ever pronounce her husband's name, she calls him symbolically. The husband is both a lord and a

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1 Ibid., p. 13.

male companion from whom children are conceived in order to continue the lineage which is the aim of marriage.

Tryambakayajvan's[1] Stridharmapaddhati[2] or Guide to the Religious Status and Duties of Women was a text written in Sanskrit by an orthodox Pandit in eighteenth century Thanjavur (Tanjore)[3] in South India. It is not in the same class as the great Digests of Sanskrit religious law (Dharmashastra) such as the Smriticandrika or the Parasara madhaviya but its importance lies in the fact that it is the only extant work of its kind. Following is the quote of I. Julia Leslie's summary of its viewpoint:

> "Tryambakayajvan assumes the orthodox view of swadharma: good conduct produces auspicious birth, evil conduct inferior birth, and good conduct is defined as that appropriate to one's birth and station in this life. Birth as a woman is itself a mark of bad conduct in a previous life, the assiduous performance of the conduct appropriate to woman (stridharma) the only way to erase it. Since women are denied access to Vedic education, they cannot purify themselves with mantras or offer sacrifice in their own right."

According to the rigid orthodoxy professed by such as Triyambaka, they cannot perform any religious act inde-

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1 I. Julia Lesile, The perfect wife: The orthodox Hindu woman according to the stridharmapaddhati of Tryambakayajvan (New Delhi: Oxford University Press, 1989).

2 Tryambakayajvan was the pupil of Yajnesa.

3 Tanjore was then ruled by Maratha Rajas.

pendently of their husband, they cannot even worship any God other than their husbands. Their only hope for salvation, and thus their only worthwhile goal, is the pursuit of stridharma. The two poles of woman's existence are thus represented by two radically opposed concepts: the essentially wicked nature of women as evidenced by their female birth (strisvabhava) and the role model of the virtuous and self effacing wife as only sure path to salvation (stridharma).

Women are forbidden to perform all manner of religious rituals and observances. The six things that cause women to fall into hell include the recitation of sacred text (japa), the performance of austerities (tapas), going on pilgrimages, renunciation, the chanting of mantras and worship of deities (including temple worship).

In the Hindu understanding the objective of marriage is, first, to enable a man to become a householder with the spiritual capacity to make offerings to the gods and his patrilineal ancestors (the "fathers") and second, to perpetuate the lineage and its rites through the procreation of sons of similar capacity.[1] A twice born male is regarded as incomplete until his marriage. For the man, marriage marks the boundary between studentship and the status of householder, he assimilates rather "incorporates" to himself a wife who becomes his "other half", aparardha

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1 P.V. Kane, History of Dharmashastra, vol. 2, (Bombay, University of Bombay, 1962), p. 482.

rendering her an extension of himself in which capacity she assists him in the rites. He is thus rendered complete and capable of becoming a sacrificer yajamana.

For the women, marriage is an initiation in two senses, it marks the transition between childhood and adulthood in that serves her from the family into which she was born, by the act of gift and incorporates her to her husband and his family.[1] His patrilineal ancestors become hers and, in the course of time, she is cut off from her natal ancestors and kin. This dyadic movement is accomplished by the marriage rite: severence by the act of gift, incorporation by the efficacy of fire and mantra; sacramental marriage alone is certain to create a wife capable of participating in her husband's sacrifices.[2] The Gods and the ancestral "fathers" can only be fed by the offerings of their own patrilineal descendants. Thus they depend on the sacrifices performed by men of the unbroken continuity of their patrilineage. This is secured through the procreation of sons who are themselves capable of becoming sacrificers.

(ii) Child marriage

R.C. Dutt, in a positive defence of Hindu (child) marriage in his novel Sangsar or The Lake of Palms[3] wrote

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1 T.R. Trautmann, Dravidian kinship (Cambridge, Cambridge University Press, 1981), p. 271.

2 Ibid., p. 272.

3 P. 220.

that:

> Love springs in India after the marriage,
> when the young
> bride blooms into womanhood
> and becomes the mistress
> of the household, and when to all
> the devotion of a dutiful
> girl she adds the more tender
> and deeper love of a woman.
> The love so born lasts through
> life. The wife never forgets
> the duty she learnt in her
> tender years towards her lord,
> and the husband cherishes her who
> came to him as a girl,
> whose life he shaped to his
> until she bloomed,
> a loving woman, in his arms.

Some of the Western educated people defended the practice of child marriage on the ideal of mutual growth in marriage. This was condemned by the British. Leading Hindu Bhadralok intellectuals such as Bankim Chandra Chatterjee and Bhudeb Mukherjee advocated this position.[1]

Early marriage was the greatest evil of our social structure. The arguments that the orthodox persons gave in order to support their contention was that it has come from antiquity and has got the sanction of the ancient sages.

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2 Sulab Samachar, 3 Kartik 1282 (1875) in M. Borthwick, The changing role of women in Bengal 1849-1905, (Princeton, New Jersey: Princeton University Press, 1984), pp. 125-126.

Brihaspathi[1] stated, "A girl should be given in marriage before puberty" - "the gift of a Gowree (when the girl is below eight years of age) secures the celestial region, 'naka', the gift of a Rohinee (when the girl is below nine years of age) secures the heaven, 'Vaikunta', the gift of a Kanya (when the girl is ten years old) secures the region of Brahma, while the gift of Rajaswala (more than ten years of age) entails an abode in hell'. Sage Parasara says, 'the father, the mother and the eldest brother, all the three go to hell by allowing a girl's puberty to supervene before marriage'. Gautama, Parasara, Brihaspathi and others are cited by the orthodox persons. At such important junctures they seem to forget Rama and Sita, Krishna and Rukhmini, Arjuna and Draupadi, Nala and Damayanti and so many other instances of post-puberty marriage. There are other ancient authorities such as Hiranya, Kasin, Jaimani, Gobhila, Aswalayana and others, in whose books we find references to post-puberty marriages. The mantras that the smrithis prescribe to be chanted during marriage ceremonies clearly indicate that the bride should be a woman and not an infant.

Other causes that favour early marriage are the joint family system among the Hindus, under which the joint family resources are available for the newly wedded couple for an indefinite period. Also, because the girls do not

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1 Brihaspathi was a sage. He too had interpreted the traditional Hindu Law.

support the family, the responsibility in respect of them is transferred to another family as early as possible. Another reason given for early marriage is to enable the proper adjustment of girls in their conjugal family.

Early marriage and the lack of education of girls constituted a vicious circle. Lack of education prevented them to delink onset of puberty with preparedness for maternity.

The crucial objection to the age of twelve was that puberty nearly always occurred before that. Hindus were bound by scripture to have intercourse with their wives immediately after their first menstruation, which constituted the ritual of garbhadhan. This was known as the 'second marriage'. Hence increase in age would force millions of Hindus to sin. This was an argument put forth to oppose the Age of Consent Bill, 1891.

Another fanciful theory in support of early marriage, is that women are marriageable at an earlier age in hot countries than in cold countries. Eminent doctors deny this dogma.

Pre-puberty marriages were preferred as it charged that each menstrural cycle of the daughter burdened the father with the sin of infanticide. The notion that a girl can be married with proper rites only when she is a virgin is also an important factor behind early marriage. Thus,

for those whose girls cannot be confined to the house as they have to share in the work outside, early marriage is necessary in order to ensure their reputation and protect them from motherhood before marriage. Among the Sudras it is related to their helplessness in protecting their women from the lust of men of the upper class who have social and economic power over them.[1]

This system of child marriage never extended to the Malabar Coast. It was not so prevalent in the extreme south along the East Coast or in the North. On the other hand, it was much prevalent in western India, in Bengal and in Deccan. It was deep rooted in the central provinces.

(iii) Widowhood

Marriage is a fusion which becomes complete and irrevocable by the wife changing the 'Gotra' and the husband uttering some religious mantras. In Hindu law, marriage has always been looked upon as a sacrament; but taking this view as the basis for arguing the indissolubility of marriage is not sound; because the idea that marriage was a sacrament and hence it created an indissoluble tie came in only at a later stage of Hindu social development. Hence, Hindu marriage is considered to be for the life of the wife, leading to perpetual widowhood in the event of the death of

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1 Government of India, Towards equality: Report of the committee on the status of women in India, December 1974.

her husband before the wife. But for a widower, the sacrament of marriage is dissolved with the death of his wife and he can remarry.

In the Indian society women are considered inferior but widows are the worst. They are considered as a bad-omen and hence shunned. Even her family which once cared for her becomes alien and ruthless as soon as her husband dies. Here, we will briefly analyse the status of widows. Widowhood is directly linked with infant marriages.

Throughout India, widowhood was regarded as the punishment for a horrible crime or crimes committed by the woman in her former existence upon earth. Disobedience and disloyalty to the husband or murdering him in an earlier existence are the chief crimes punished in the present birth by widowhood. The duties of a widow described in the code of Manu[1] are

> "Until death let her be patient with hardships, self-controlled, and chaste, and strive to fulfil that most excellant duty which is prescribed for wives who have one husband only"
>
> - MANU,V. 157, 158.

> "... Nor is a second husband anywhere prescribed for virtuous woman" - MANU, V, 162.

> "A virtuous wife who after the death of her husband constantly remains chaste, reaches heaven, ..." - MANU, V, 160.

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1 Quoted from Pandita Ramabai Saraswati, The High Caste Hindu Women, (Maharashtra State Board for Literature and Culture, 1981), Reprint of 1887 edn.

The rules prescribed for a widower are

> "A twice-born man, versed in the sacred law, shall burn a wife of equal caste who conducts herself thus and dies before him with the sacred fire used for the Agnihotra, and with the sacrificial implements."
>
> "Having thus at the funeral, given the sacred fires to his wife who dies before him, he may marry again, and again kindle the (nuptial) fires."

The women were expected to be faithful to their husbands even after their death but a man was lawfully allowed to take another wife after the death of his previous wife. Thus a woman was never independent of him. The only place she could be independent of him was in hell. The law itself made severe discriminations amongst men and women.

Tryambaka[1] describes the conduct of a widow which would ensure the widow's virtue safe. She is expected to live the subdued and restricted life of the celibate student as opposed to the life of the married woman with all its outward signs of happiness and ornamentation. She should willingly mortify her body, living on flowers, roots and fruits or alternatively on fruits, vegetables and barley. She should eat only once a day, and in addition she should perform regular severe fasts. She should wear undyed garments, no bodice, no perfumes or unguents. If she binds

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1 I. Julia Leslie, The Perfect Wife: The orthodox Hindu Women according to the Stridharmapaddati of Tryambakyajvan, (New Delhi: Oxford University Press, 1989), p. 299.

her hair on top of her head, she causes her husband to be bound in other world. She should sleep on the ground, never on a 'high bed'. She should not even mention the name of another man nor have any sort of contact with him.

A widow should never leave home as a true renunciate, forsaking sons, brothers and other (male relatives) after her husband dies and living independently, incurs condemnation. Her dependence is simply transferred from husband to sons. Devotion to one's husband, even after his death, thus remains the key point of the widow's life.

Towards the end of 18th century, the Sati rite suddenly came to acquire the popularity of a legitimate orgy. In Bombay and Madras the practice of this rite was restricted. But Calcutta and the regions around it the districts of Burdwan, Hoogly, Nadia and 24-Parganas provided 57 per cent of the Sati or 'virtuous wives' who burned themselves on the funeral pyres of their husbands between 1815 and 1826.[1] It was the Babu culture which made a sadistic sport out of Sati, to demonstrate their ritual purity and allegiance to traditional high culture ! Brahmin women were permitted only Sahamarna, burning with the husband's corpse. Non-Brahmin women could burn through Sahamarna or Anoomarna, burning with an article belonging to the husband's this generally took place if the husband's

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1 A.D, Bhattacharya, Role and Status of Women in Indian Society, (Calcutta, Firma KLM, 1978), p. 62.

cremation took place in some other region. A menstruating women could burn herself on the fourth day after her ritual bath.

It was also enjoined that on the death of her husband her obligation was to ascend the funeral pyre of her husband, for by such an act she would be exalted to heaven, and also this would secure her residence in another world in a region of joy for 35 million of years and would expiate the sins of her husband's family.

Widow remarriage was in practice in Vedic period. In Atharva-Veda, it is mentioned that when a woman who has had a husband before, marries another, after his death, they are never separated from each other if they perform the rite of 'Aja Panchandana'. In 'Aitareya Brahmana' it is propounded that one man may have many wives, but one woman cannot have many husbands at one and the same time. This implies that she can have many at different times. The remarried woman was called Punarbhu. The children of Punarbhu were conferred the status of legitimacy. The so-called orthodox persons conveniently side-tracked this whole concept to suit their convenience.

(iv) Widow Remarriage

The problem of widow remarriage is of peculiar interest to India. Nowhere else in the world has this problem assumed so much gravity and importance as in India. Until

1856 legal disabilities prevailed in the way of widow remarriage as it was not legalised. But this was removed by the "Widow Remarriage Act 15" of 1856. But the sad fact remained that it did not produce that change in outlook which the reformers contemplated, the reason being that the bondage of past ideas still persisted.

Though widow remarriage was sanctioned by the authoritative texts, somehow the opinion gained ground, possibly as a result of either the wrong interpretation of the ancient writings or of interpolation made in some of the books to meet their exigencies, that widow remarriage was condemned by the Shastras. Another school of thought began saying that remarriage of widows, though allowed generally, was forbidden in Kaliyuga. Some others interpret it to mean that the passage applies in case of betrothed girls and not to the marriage of widows.

(v) Niyoga System

Niyog was a practice of levirate marriage. In Maharashtra, Niyog came to signify cohabitation by the wife with men other than her husband under certain specific conditions like impotency of the husband and the "moral" and "religious duty" to beget sons to continue the family line.[1]

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1 Prem Choudhry, "Customs in a peasant economy : Women in colonial Haryana" in Sangari and Vaid Recasting Women, (New Delhi: Kali for Women, 1987), p. 332.

Here, arises a conflict of rulings. On the one hand, a widow should not even mention the name of another man, let alone have intercourse with him. On the other hand, a woman is at fault if she does not bear a son, as a man without a son is barred from heaven. Manu says on failure of issue by the husband, if he be of the servile class, the desired offspring may be procreated either by his brother or some other sapinda, on the wife who has been duly authorised.[1] The brother-in-law was the person to be appointed, and on his failure, a Sapinda, or a Sagotra, or a Samana-pravana.

The custom of widow remarriage as followed in Haryana had certain special features. It was known as "Karewa", "Karav" or "Chaddar andagi" which was similar to the old Rig Vedic niyog (levirate marriage) and was geographically associated with the early Vedic Aryan settlements.

In Karewa, in Haryana a white sheet, coloured at the corners, was thrown by the man over the widow's head, signifying his acceptance of her as his wife. This form of remarriage was not accompanied by any kind of religious ceremony, as no woman could customarily be married twice i.e. could go through the ceremony of biah (religious wedding). As a rule Karewa, was a levirate marriage in which the widow was accepted as wife by one of the younger brothers of the deceased husband; failing him the husband's

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1 Manu, Chapter IX, p. 59.

older brother; failing him his agnatic first cousin. This ensured the control of the property of the widow, of her sexuality and also her options regarding marriage partners. Therefore, the widow's right as to whom she could marry was not only severely restricted, it could be settled only by her late husband's family. The widow could not be compelled to remarry but she was not free to marry without their consent, which in other words implies that she had to yield to their wishes. Her independent choice was of no consequence.

This system of Niyog is closely related to the economy of this region i.e., agriculture. Women are required to do the most tedious jobs especially in fields like sowing, taking out weeds, plucking etc. Hence each woman of the household was indispensable. Niyog was hence convenient. It was said:

> Land and wife can only be held through the use of force, when this fails, they become another's.[1]

This system was perpetuated by the British. "This low level of civilization as signified by Karewa had to be retained because the British concern lay in strengthening the hold of the existing peasant society over land, its breakup was inevitable if the widow was allowed to have her way."[2] Breaking up of land would have meant loss of

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1 Prem Choudhry, "Customs in a peasant economy: Women in Colonial Haryana" in Sangari and Vaid, Recasting Women, (New Delhi, Kali for Women, 1987), p. 315.

2 Ibid., p. 317.

revenue to the British government and if she was allowed to have her way she would not have remarried but instead asserted her right to share of land and property. This would pay for her own maintenance and some would go to her son or daughter; she might have even married an outsider which would mean spliting of family.

A woman's resistance to the peasant culture of remarriage which was designed to retain her within the family of her deceased husband was not allowed to surface. Petitions were made but to no avail. Widows vehemently denied that Karewa had taken place but the court remained passive because any action for the benefit of widow would ultimately lead to decrease in revenue, as it would perpetuate uneconomic holding. This resistance shows that many peasant women perceived the Karewa custom to be a repressive one. They were unable to prove it because even cohabitation was recognised as Karewa. Once marriage or remarriage was done, on no account could a Hindu woman claim release from it. There was no limit to the number of wives a man could have either through Shadi (a caste marriage) or by Karewa. He could also expel his wife for unchastity through a practice called tyag (renunciation) which practically amounted to divorce.

The Arya Samaj founded by Dayanand Saraswati justified this system on the basis of ancient Hindu texts and even offered protection to those who accepted it. It was

looked down upon with great horror by other upper caste Hindus who under the Brahminical code prohibited widow remarriage completely and considered the children of such a marriage as illegitimate.[1] Instead they condemned widows to a living hell. This had led to wide scale social reform in Bengal, Maharashtra and the South when Widow Remarriage Act was passed in 1856.

(vi) Polygamy

The 18th century with its "intellectual stagnation" which was evident in decay of knowledge and learning coupled with social degeneration, worsened the conditions of Indian women.

Polygamy among the Kulins and wealthier sections, early marriage, female infanticide, throwing of the first child into the holy water were customs known to exist. Indian women, though theoretically assigned to a dignified position in the joint family life, embodying all the femine qualities, practically had to submit before all the inhuman restrictions imposed on them by their "lawful masters". In the name of Kulinism, hundreds and thousands of girls lives were totally ruined and their conditions were no better than household animals. Due to Kulin polygamy many women were either widowed from childhood or were only nominally married to men with whom they never cohabited.

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1 Ibid., p. 319.

Marriage to a Kulin Brahmin by a non-Kulin girl brought honour and rank to her family; hence Kulin bridgroom were in great demand. A Kulin Brahmin would marry between ten to fifty wives, visiting each only occasionaly. Whatever their age, on his death the customary prohibition on widow remarriage sealed their future fate. The life of a widow was socially endorsed misery.[1] The treatment of widows revealed the worse of society's attitude towards women. The Widow Remarriage Bill passed in 1856 carried little weight. It was not until the Brahmos took up widow remarriage as part of their social reform platform that there was a large enough community to sustain and support couples who defied convention in this way. Vidyasagar's attempt to legislate against kulin polygamy was unsuccessful, although the opposition in this case did not defend polygamy but argued that it was rapidly dying out of its own accord.

A Hindu widow who committed suicide in 1875 wrote a note explaining that nothing was as miserable as the life of a widow. She consumed opium to kill herself.[2]

III. Disabilities of British Indian Law

Many legislations and reform movement agitated for a better status for women and a more equitable state of

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1 M. Borthwick, The changing role of women in Bengal 1849-1905, (Princeton: Princeton University Press, 1984), p. 142.

2 Sulab Samachar, 3 Kartik 1282 (1875) in Ibid., p. 144.

things and social conditions. But unfortunately whatever changes that took place had very little positive impact and hence for the mass of the people the same old social rules remained. The provisions of the Indian Penal Code with reference to abduction, kidnapping and adultery was inadequate in certain cases specially where women were involved. In case of a wife committing adultery, law permitted the husband to desert her. But if the case was vice-versa, the woman could not find any redressal for her grievances in the British Indian law courts.

Along with it existed an inelastic system of administration where post cases decided the fate of the future problems, with the result there was almost no way by which women could find justice in the court. The following case[1] illustrate this point. A woman was the cause of conviction of three men and the circumstances speak volumes for themselves. The women aged 35 years and mother of four children was alleged to have been enticed away from the lawful custody of her husband. The truth of the matter was that she could not pull on with her husband, but she could not escape from his clutches as the law did not permit separation between the couple and there was no custom to override the law; so she desparately appealed to her friends in the village and their only crime was that they helped her out of a hopeless situation. They were moved by humane

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1 Kamladevi Chattopadhyaya, Awakening of Indian Women, (Madras, Evermans Press, 1939), p. 67.

considerations and it was evident that there was no other motive behind their help. Let the law had to be fulfilled. Thus, they stood convicted of a criminal offence ! The Judge in the appellate court was a man with imagination and he released the accused after rewarding a technical punishment, but it is a strange fact of the Penal Code that there was no option left to the Judge but to convict. It is evident that the position assigned to women in the laws of the country were very one-sided.

The laws concerning marriage, divorce and bigamy had their own drawbacks. The Civil Marriage Act had nothing to say regarding the mixed marriages. This law can be seen as made only for the benefit of Brahma Samaj that believed in neither Hinduism, Islam, Buddhism or Zoras-trianism. The result being that where parties belong to different religions other than Hinduism, Jainism, Buddhism or Sikhism, they must declare that they do not profess their respective religions. In one case the parties were religious minded and believed in their respective religions, with the result that they contracted a marriage completely invalid in the eyes of the law; in the hope that such examples as their would help in the creation of a purely Civil Marriage Act. Also that Act would not take into consideration the religions of the respective parties.

Another cause for a great deal of hardship was the absence of Divorce law in Hindu legislation except where

it is customary among the lower classes. Hindu and Muslim marriages were polygamous and hence were not recognized as valid marriages in English Law, which recognizes only monogamous unions. The result was a regular crop of cases in which Hindu and Muslim young men of middle class families have coolly abondoned their first wives and contracted civil marriages with European women abroad.[1] In some cases the 'discarded wife' had been married as a child and never seen her husband afterwards. The discarded wives had no redress in law. Such young girls were thus relegated to the miserable life of a child widow and her parents were helpless.

The traditional Hindu law did not contain any law by which a wife could get a divorce and remarry. A Hindu woman could marry only once in her lifetime. A man did not have any restriction on any number of marriages. The British Indian law perpetuated it. The English Government did not wish to make any change in the Hindu matrimonial law because it was dreadfully afraid of offending the men's feelings or else its profit and rule in India be endangered.

Such cases only ascertain the one sided system of law. It inflicted a great deal of hardships on women. The British Government responded to only those social issues which had reached the peak of severe implications.

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1 Ibid., p. 69.

VI . Nature of British Indian Law

A significant aspect of Hindu law is 'caste'. In the jurisprudance of England, modern private law places all persons irrespective of their birth or order on the same footing in respect of legal right or duty. It does not take account of incapacities unless the weakness is very much marked and hence may fall in the category of infancy or idiocy. Also it makes no distinction between men and women in enforcing rights and enjoying duties according to whether they belong to a superior or a inferior class on the social scale. But it is otherwise with Hindu law under which every individual has ascribed to him or her, at his or her birth the state or condition by which he or she becomes the possessor of a particular caste and as such, subject to the rights and obligations peculiar to the members of that caste.[1] The caste to which a person belongs, influences his or her legal position.

The Hindu law had firstly the caste gradation and then the sex differentiation in the application of any law. Women were treated at par with the Shudras (the lowest of the four castes) even if she belonged to the higher caste. A crime committed by a woman or a Shudra carried a severe punitive award than if committed by a

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1 D. Mitter, The Position of Women in Hindu Law (New Delhi, Inter-India Publication, 1984), Reprint of 1913 ed., p. 102.

Brahmin. A murder of a woman by a Brahmin was not awarded by a death sentence but in case a woman or Shudra killed a Brahmin, death sentence was awarded.

A woman was considered too inferior to be capable of taking any independent decision. The Hindu law had this inherent bias towards the men. A husband could divorce and desert his wife. He was lawfully permitted to have another wife in the presence of his previous wife. But a wife could not desert her ruthless husband leave aside asking for divorce. She had to tolerate the sufferings through out her life as the law too unrationally favoured the men. It was the men who had created the law. Pandita Ramabai Saraswati talks of the only way left open for the oppressed women to save herself from the clutches of her in-laws family and the oppressive law -

> "Whatever may be said of the epidemics that yearly assail our country, they are not unwelcome among the unfortunate women who are thus prosecuted by social, religious and state laws. Many women put an end to their earthly sufferings by committing suicide."[1]

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1 Pandita Ramabai Saraswati, The High Caste Hindu Women, (New York, Fleming H-Revell Company, 1901), Reprint of 1887 ed., p. 90.

The traditional concept and the Hindu law on marriage was carried forward by the British-Indian law. It was inherent with its bias towards the men and the patriarchal social structure. The women's grievances remained largely unattended till the fag end of the nineteenth century when the reformers finally pressurised the Government for introducing certain laws. It had till then remained a vague combination of British law implanted on the Indian society. British law was superimposed on the Indian social structure which perpetuated patriarchy.

CHAPTER - III

CHAPTER - III

SOCIAL REFORMERS AND THE ISSUE OF EARLY MARRIAGE

The preceeding chapter gave an insight into the traditional Hindu law and also the traditional values and customs prevalent in the Indian society then. With the advent of the British it gradually changed. The traditional Hindu law which was instituted by the customs and the Panchayat was replaced by a law combining the traditional Hindu law and British law. It became the British Indian legal system. Certain laws specially those regarding marriage were unfavourable to women.

In such a society, eminent personalities with high intellectual calibre came up,who possessed rationalistic views. They did not preach anti-Hindu religious and ritual views but they advocated refraining from blindly following the superstitious rituals inherent in the social structure. Marriage is central to the life of a traditional Hindu women. Many harsh customs existed in the Indian society. The traditional Hindu marriage law did not safeguard the interests of women. This was central to the social reform taken up by certain reformists like Justice Mahadev Govind Ranade (1842-1901), Kashinath Trimbak Telang (1850-1893), Ramakrishna Gopal Bhandarkar (1837-1925), Pandita Ramabai Saraswati (1858-1922), Behramji Malabari (1853-1912), and Bal Gangadhar Tilak (1956-1920). This chapter concentrates on the views of Behramji Malabari, Justice M.G. Ranade,

B.G. Tilak and Pandita Ramabai Saraswati. Their approach towards social reform varied from changing the attitude of masses to the extent to which Government legislation should be permitted.

In the Bombay province, apart from women's education the social reform movement had been quiescent since the death of Vishnu Shastri Pandit in 1875. After his death the leadership had passed into the hands of Justice M.G. Ranade who was not too fond of public confrontations.

By 1880s the public debate was shifting from the problem of enforced widowhood to that of child marriage, the major cause of widowhood. In many parts of India there was a custom among the upper castes to get the girls married before they reached puberty.

The British had long been committed not to interfere in the essential religious and social practices of their subjects. Also, there was a general agreement in the Indian society that Hindu society must reform itself in order to prevent governmental interference in matters intimately touching family life. But on certain occasions they had set aside this general principle in the name of an overriding dedication to principles of common morality. The famous precedent for this had been the official abolition of Sati in 1829.

Raja Ram Mohan Roy had initiated a campaign to

arouse massive indignation against the practice of widow's self-immolation on their husband's funeral pyres. Malabari's was in some regards a repitition to Raja Ram Mohan Roy's campaign. It was regarding the early age of marriage for girls. This time too, the campaign to secure governmental aid succeeded, but it provoked the orthodox Brahmins. These Brahmins organised a counter organization of their own to disapprove the alien intrusion into spheres which they considered legitimately their own.

A drift between Ranade's moderates and Tilak's extremists developed in 1880s over issues of social reform. Faced with the alternative guidelines for social development which Indian tradition and Western education offered, the leading public figures of Western India gravitated into different factions, each of which presented its own formula for action. The moderates under the leadership of Ranade favoured state legislation along with influencing the attitude of the masses. On the other hand Tilak and his associates were strongly against State legislation.

I. The Two Hostile Camps

Malabari's argument for social reform rested on a sense of moral outrage; he appealed to the public conscience rather than to legal principles or traditions. Potraying child brides as brutally exploited by their husbands' families, he said -

> "The country cannot rise unless its millions are lifted to a higher moral atmosphere and social responsibility. And this will not happen until we have a system of heart-education side by side with head education."[1]

He demanded immediate government intervention to end child marriage.

As soon as Malabari announced his demand for new legislation, two hostile camps emerged. Opposition to Government intervention in Hindu religious practices was led by a coalition of westernised nationalists and conservative Shastris. The Shastris could compel the reformers to debate the traditional question, whether any reform of marriage age was acceptable; and also debate on traditional grounds, the authority of Sanskrit texts. The Shastris emphasised that the Hindu law books commanded that a girl be married before reaching puberty so that at the time of her mensuration the garbhadharana or ceremonial impregnation by her husband could take place. Thus if the Government were to establish the age limit of twelve, it would be attempting to regulate a enthusiastically cherished religious rite and not a social custom. Religion was made the 'trump' card by the orthodox men.

At this point Ranade was reluctant to engage in a debate on Dharmashastra, because he felt that severe con-

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1 Dayaram Gidumal, The Life and Life Work of Behramji M. Malabari, (Bombay: Fort Printing Press, 1888), pp. 191-192.

fusion would result by quoting irreconciable texts.

> "The confusion caused by inconsistent Smiriti texts and judicial authorities on ancient Hindu law and custom furnishes the strongest argument for a definite improvement based on ancient lines by way of codification on the subject by the legislative. There is not a custom, however absurd, and cannot be defended by some strong text of ancient law. The usual practice of reconciling text, intended for different ages and countries and the loss of the spirit of true criticism have benumbered the power of judgement."[1]

Ranade and other reformers preferred to follow the more ancient Vedas so as to demonstrate that they were infact more orthodox than the Shastris. At this time the social reformers were getting isolated and were even called "nastika", atheists.

The Shastris professed veneration for the past, but their allegience is given not to the venerated Vedic past, but to the more modern transformations represented by the developments of the Puranic period and owing to a false rule of exegesis, they try to distort the old texts so as

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1 M.G. Ranade, 'State Interference in Social Matters' in Religious and Social Reform: A Collection of Essays and Speeches, compiled by M.B. Kolaskar (Bombay, Fort Printing Press, 1902), p. 109.

to make them fit with what is hopelessly irreconciable with them.[1]

Ranade believed that the Vedic period had been one of social flexibility and he specifically praised the early period for its liberal attitude toward women's rights. Women's individuality was respected.

> "The Aryan society of the Vedic period presents the institution of marriage in a form which recognised female liberty and the dignity of womenhood in full, very slight traces of which are seen in the existing order of things.[2]

But he could not always resist refering to Dharma-shastra quotation where they might prove useful. In 1885, he quoted texts which favoured the age of twelve for the marriage of girls; and further suggested twelve for girls and eighteen or twenty for boys' marriage age which might well gain consensual support. A year later in 1886, he

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1 M.G. Ranade, "The Sutra and Smiriti Dicta on the Age of the Hindu marriage" in Religious and Social Reform: A collection of Essays and Speeches, compiled by M.B. Kolaskar (Bombay, 1902), p. 28. This article was a revision of an earlier draft, published in 1885 as the introduction to collection containing the proceedings which led to the passing of Act XV of 1856 ed. N.K. Vaidya (Bombay, 1885). The earlier version discussed the historical rise and fall of women's rights and the liberation arguments for and against state action in greater detail than the later version.

2 Ibid., p. 29.

misused that consummation of marriage might well be left even to the ages of sixteen and twenty-five respectively.[1]

At this stage Tilak stood up as a defender of Hinduism against intrusions by an alien, despotic power. In 1884, he had also published a detailed defence against outside interference. He referred to Ranade's second marriage and made a plea for more dedicated reformers who would bring forth social changes by their own courageous examples. This point was quite valid because men like Ranade who failed to embody the marriage ideals had no right to lead society. Also the reformers' claim to speak for the public was invalid since the majority of Hindus did not even understand Ranade's position. Infact majority were not yet prepared for reform.

> "They are in the fullest conviction that when they marry their children at an early age they perform one of their solemn duties, enjoined by custom and by religion; and that there could arise no evil from such performance."[2]

In 1888, Malabari adopted a new tactic. One of Ranade's close associates in the administrative work of the Social Conference was Malabari's friend and biographer, Dayaram Gidumal. It was Gidumal who proposed that the

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1 Ibid., p. 49.

2 Mahratta, December 14, 1884, pp. 1-2.

marriage age be changed by a simple revision of the Penal Code making twelve not ten, the minimal legal age for consummation.[1] Gidumal saw this tactic as a means of limiting the field of argument to a legal technicality and accomplishing the desired reform by side stepping the orthodox opposition.

When Malabari's position started gaining support, Tilak too broadened his opposition to legislation. One of Tilak's associates wrote to Ranade opposing legislation on the basis of Mill's principle that the Government should never interfere where individuals could work more effectively, a principle which Ranade had invoked in other contexts. Ranade replied that in this case the principle did not apply for

> "Society with us has not passed through the stage of authority and command. The individual is not as strong to help himself and others [as in Europe]..... We are not barbarians certainly, but we are priest-ridden - we are caste ridden. Authority is supreme in setting the smallest details of our life in all departments. In such a state of society the expectation that each individual will posses sufficient independence to work out his destiny by the highest law within us is of course anticipating events by decades. In the meanwhile we cannot afford to wait. The

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1 Charles Heimsath, Indian Nationalism and Hindu Social Reform (Bombay, Oxford University Press, 1964), p. 161.

> fringe of society may be able to help itself but it is, after all a fringe - and the mass is inert and spellbound."[1]

But by now Tilak had gained initiative and support in Maharashtra. Throughout the second half of 1890 he attacked Malabari, paving the way for the first mass meeting in Pune against the Bill, on October 26. In a speech that day, he warned that the people would not accept any reform in which they could not follow their social leaders and he proposed that no legal change be accepted which did not conform to popular practice.[2]

This made Ranade waver and hence he suggested that perhaps the law should honour orthodox sentiment by making puberty, the legal minimum, even that would be a step forward from the retrograde limit of age ten.

II. B.M. Malabari and the Age of Consent Bill

In 1884, a Parsi from Bombay, Behramji M. Malabari picked up one issue: the need for legislation controlling the age of marriage of Hindu girls.

His newspaper, Indian Spectator, was a major organ for the spread of social reform ideas. On August 15, 1884,

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1 G.A. Mankar, A Sketch of the Life and Works of the Late Mr Justice M.G. Ranade, 2 vols. (Bombay, Canton, 1902), p. 212.

2 N.C. Kelkar, Life and Times of Lokmanya Tilak. A translation and abridgement by D.V. Divekar of Tilak yanchecaritra, Vol. I, (Madras, S. Ganesan, 1928), p. 191.

he published "Notes" on "Infant Marriage in India" and "Enforced Widowhood". These "Notes" which were circulated among officials and private persons, British and Indian, marked the beginning of the all-India Social Reform movement. These two documents were not based on substantial facts, available in Census Report and in court records.[1]

His chief proposals to check infant marriages[2] were:

(i) that after five years, Universities prohibit married students from taking examinations;

(ii) that heads of Government Departments give preference in hiring to unmarried men;

(iii) and that education departments insert material in school books describing the evils of early marriage.

To improve the life conditions of widows[3] he asked the Government to:

(i) assure that all widows learn of their rights to remarry under the Widow Remarriage Act of 1856,

(ii) use its authority to protect widows from involuntary seclusion and "social ill-usage",

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1 Charles Heimsath, Indian Nationalism and Hindu Social Reform (Bombay, Oxford University Press, 1964), p.151.

2 Ibid., p. 159.

3 Ibid., p. 152.

(iii) prohibit priests from excommunicating anyone who assisted in a widow remarriage ceremony.

The 1881 Census[1] revealed a high proportion of widows in the total female population. In Bengal 14 per cent of all Hindu girls under the age of ten were either married or widowed; in Bombay the comparable figure was 10 per cent; in Madras it was only 4.5 per cent. Widowhood was enforced through sentiments and sanctions against remarriage chiefly among high caste Hindus. The custom of early marriage varied according to region and caste. The general custom among Brahmins was to marry girls before they reached puberty. The competition for suitable marriage partners for their children forced parents to arrange alliances while their children were young. Later fewer suitable partners would be available. Other reasons which strengthened the marriage for females were -

(i) the desire of the groom's family to have a young daughter-in-law who could easily adjust to her new domestic surroundings;

(ii) occasional 'sale' of brides to old men or unsuitable men who demanded a very young girl and were willing to pay a large "bride price"; and

(iii) the Shastric injunction (especially in Bengal) that girls must be married so that intercourse

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1 Dayaram Gidumal, The Status of Women in India (Bombay, Fort Printing Press, 1889), p. 18.

might take place with the first sign of puberty.[1]

It could be understood here that younger the girl when she is married, the greater her chance of becoming a widow; so early marriage and widowhood were related. Most reformers felt that consensus could be reached easily on decreasing early marriages, rather than on removal of sanctions against widow remarriage.

Malabari argued that early marriage was sapping the vigor of the Hindu "race".[2] Many reformers agreed with him and argued that national progress rested in fact on a biological strengthening which should include prohibition on child marriage. The Jessore Indian Association (Bengal) wrote: "We hold that early marriage weakens the physical strength of the nation; it stunts its full growth and development, it affects the courage and energy of the individuals, and brings forth a race of people weak in strength and wanting in hardihood." This view was supported by evidence of the weakening affects of child - bearing

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1 To re-enforce the injunction about pre-puberty marriage, the Shastras held that a father whose daughter menstruated before being married was guilty of procuring an abortion, worse than certain kinds of murder. Perhaps the most understandable reason for early marriages was to assure that a girl had every possible chance of bearing a child.

2 Dayaram Gidumal, The Status of Women in India or A Hand-book for Hindu Social Reformer (Bombay: Fort Printing Press, 1889), p. 35.

on young mothers and by the observation that young mothers were more likely than fully mature women to produce and rear sickly children. Another school of thought felt that the male population whose marriages were postponed possessed more vigour which could be associated with the traditional notion that ascerticism brings rewards of greater physical endurance and mental keenness. There were some others who felt that spiritual welfare, achieved by adhering to the Shastras, was more important than biological fitness.

Malabari felt that Indian Government could be influenced by gaining the support of British voter. Hence, he took the crusade to England. There, by speeches and writings, he reinforced the concern about Indian society already present in circles such as the National Indian Association in Aid of Social Progress and Female Education. This Association had been founded in 1871 by Mary Carpenter to support primary and secondary education in India.

By means of the Age of Consent Bill controversy the Social Reform movement achieved national recognition. This agitation had a side effect - while it unified and "nationalized" the social reform movement, it also publicized the anti-reformers and the revivalist nationalists and aroused great public support for orthodoxy. Though opponents of the Bill were unable to sway the official position; they did register an effective protest against any kind of

government interference in social and religious life and had made that protest a great public concern. They had stimulated popular distrust and ridicule of the social reformers, who were thereafter regarded by many Indians as meddlesome, intolerant, insincere, and unpatriotic.[1]

After the Bill was passed on March 19, 1891, Tilak, through the Mahratta, called for "a grand Central Organisation" based on "self-preservation, self-protection, and self-support," whose main purpose would be to counteract the reformers' propaganda in England. Mahratta wrote -

> "We have been mischievously and shamelessly represented as a nation of savages and the sudharaks [reformers] have shamelessly testified to it. Let these sudharaks therefore form themselves into a separate nationality .... We ought no longer to allow to be amongst us those of our fellow-countrymen who are really our enemies but who pose as our friends. The time has come when we should divide."[2]

But this call of Tilak did not arose any public response.

It could be dearly understood that the Government did not wish to raise new problems of opposition by any substantial groups of Indians at that time. One of the reason understood by some nationalist reformers was that if they

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1 Charles Heimsath, "Indian Nationalism and Hindu Social Reform" (Bombay: Oxford University Press, 1964), p. 174.

2 Mahratta, Bombay, March 22, 1891.

satisfied the demands of the social reformers, it would free those some Indians to pursue more vigorously the agitation for political reforms.

III. Response to Malabari's "Notes"

As a response to Malabari's "Notes", many vigorously condemned those practices. On the other hand, Bhandarkar and Ranade felt that Malabari had exaggerated the extent and ill-effects of infant marriages and enforced widowhood. The response Malabari reviewed for his "Notes" was cheering but no consensus could be reached on what steps, if at all, the government should be asked to take. Some pointed out the ineffectiveness of Malabari's proposal to restrict college education to unmarried boys, others to the injustices of penalizing a boy for what his parents had arranged. Some reformers wanted to make early marriages illegal; others for a law against premature consummation of the marriage. A suggestion was made to encourage intermarriage among castes of equal social standing so that pressure for early marriages would reduce by making more partners available. Almost none felt that government should pass legislations which would materially assist widow remarriages.

Most British observers were doubtful of whether any real favourable social change could come from the reformers'

propaganda. Mr H.H. Risley, in an official note[1] dated March 22, 1886, wrote that "at one end of Hindu society Mr Malabari and a handful of reformers brought up on a foreign system of education [are] proposing to government to legislate for the purpose of carrying out domestic reforms of a more searching character, while at the other end thousands of people are every year abondoning the very practices which Mr Malabari wishes to introduce. For one convert that Mr Malabari may make, at the cost of much social obloquy, among the highly educated classes, Hinduism sweeps whole tribes into its net." The masses were not yet ready to understand and accept the ills of the Indian traditions and customs. The traditional values had taken deep roots in them and hence it was more difficult for the reformers to alienate their ills from their understanding.

Lord Rippon, before his retirement in 1884 had written to Malabari saying "I shall rejoice if the results of your enquires should show that there exists an opening for the government to mark in some public manner the view which it entertains of the great importance of reform in these matters...".[2]

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1 Government of India, Home Department, Public Proc., November 1886, Nos. 131-138E, p. 28. Reproduced from Heimsath "Indian Nationalism and Hindu Social Reforms", (Bombay, Oxford University Press, 1964), p. 156.

2 Dayaram Gidumal, The Life and Life Work of Behramji M. Malabari (Bombay, Fort Printing Press, 1888), p.cxii.

The official enquiry under Lord Dufferin's administration to determine whether legislation should be introduced led to publication in 1886 of the official replies to the "Notes" and an attendent Resolution of His Excellency in Council on the matter. The Resolution stated the government's view that no administrative or legislative action should be taken. The reasoning behind the decision not to act was that the "evils" which Malabari described did not fall under existing civil or criminal law, nor were the courts being asked to enforce the social customs productive of those "evils." Therefore, nothing could be done within the "ordinary machinery" at the government's disposal. The British Government did not see the life of a widow as harrassed and tortured. They did not think it to be a civil matter. Women were not seen as comprising nearly half of the population and having a significant role to play. The disfigurement of widows was not seen as a crime. All these "evils" did not fit in their defination of civil and criminal law. Also the legislature should not enact new laws and thereby "place itself in direct antagonism to social opinion." Instead, Malabari's reforms "must be left to the improving influences of time, and to the gradual operation of the mental and moral development of the people by the spread of education."

K.T. Telang, a reformer and later Bombay High Court Judge in reply to the "Notes" in 1884 argued that reform is

more urgently called for in regard to the time of consummation rather than in regard to the time of marriage. Telang was trying to please those who opposed government intervention. He said that delayed consummation of marriage would be a "reform from within" Hindu society and not imposed from without. Dayaram Gidumal, Malabari's chief propagandist carried Telang's prescription to its logical conclusion which became the Age of Consent Bill. Gidumal published a pamphlet which concentrated attention on the Indian Penal Code instead of on caste and family customs. Gidumal proposed an amendment to the Penal Code raising the age of consent to twelve, for married and unmarried girls. This meant that they were not seeking new government intervention but working within existing statutes. This might have helped in curtailing the opposition.

The opposition felt that Government intervention would cause great spiritual suffering, even misuse of police investigating powers, and a breakdown in the moral fiber of Hindu women. Many felt genuinely afraid that postponement of marriage consummation - it was generally assumed that puberty was reached before twelve - would lead Hindu girls into the allegedly loose life of European women. Sir T. Madhava Rao, a noted administrator of Indian States had much earlier urged the government to raise the

age of marriage to ten for girls. He lead the opposition and organised protest meetings. Dewan Bahadur R. Raghunatha Rao, General Secretary of the National Social Conference, led the supporters of the Bill.

In the Viceroy's Legislative Council in 1891, the Government explained that only the minimum in legislative reform of marriage customs was being contemplated, keeping in view the orthodox sentiments. Several proposals for more sweeping marriage reforms had been made. One such proposal rose out of the famous Restitution of Conjugal Rights case raised by the husband of a Hindu girl, Rukhmabai.[1] The English permanent committee supporting Hindu marriage reform had urged the Secretary of State to include in the legislation a prohibition of imprisonment in cases like that of Rukhmabai, but the Government decided against that step. Another proposal on which the Government did not act was to allow a remarried widow to retain an inheritance received from her first husband's estate, which was not permitted under the 1856 Widow Remarriage Act.

IV. Views of M.G. Ranade

Ranade had seen during widow remarriage campaign that there was no short cut to reform of Brahmin traditions as direct attacks on orthodox thought, would put reformers in an unfavourable position.

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1 This case, Dadaji Vs Rukhmabai has been dealt within detail in Chapter IV of this Dissertation.

Ranade and a few Hindus gave Malabari their full support. Some other social reformers opposed official action and called it a self-defeating strategy. Infact, after the publication of "State Legislation in Social Matters" in 1885, Ranade joined Malabari in the front rank of militant reformers. He said that the evils of child marriage were widespread and insidious. Child marriage was indirectly responsible for the sorrows of widowhood and other social evils. Child brides and widows could hardly speak for themselves, as they were completely confined within the four walls of their house. Only the liberal reformers truly represented them in the public debate; hence the reformers must be accepted as the true representative of the Hindu community.[1]

It could be noted that the reformers felt that they spoke on behalf of child-brides and child-widows. They worked towards their betterment. But they did not put forth the grievances of either, the other young widows who practically led the life of a slave or destitutes who were deserted by their lawful husbands on the pretex of not liking, producing female children or being barren. The grievances of a girl child did come in focus but the adult woman were left to fend for themselves.

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1 M.G. Ranade, "State Interference in Social Matters" in "Religious and Social Reform", A collection of Essays and Speeches (compiled by M.B. Kolaskar), Bombay, Fort Printing Press, 1902), p. 92.

Ranade asserted, that the State was already interfering in society in numerous ways (especially in civil administration) and if properly guided, it would help in the modernization process. He pointed out, the legal abolition of Sati had originally been based on moral principles, not majority demands, but later it gained popular support. In such situation, "the State in its collective capacity represents the power, the wisdom, the mercy and charity, of its best citizens," and follows their initiative. Under such circumstances it is useless to distinguish alien from self rule. The alternative to Government action would be to "let us remain as we are, disorganised and demoralised, stunted and deformed, with the curse of folly and wickedness paralying all the healthy activities and vital energies of our social body.[1]

Since 1887, Ranade was the dominant figure in the all-India Social Reform movement. He was disappointed that the Congress refused to take direct responsibility for liberalizing Indian society. Through the National Social Conference, Ranade made efforts to coordinate and encourage a loose alliance of the many diverse organizations which were attempting some sort of social liberalization. The organisation which were most responsive were the voluntary intercaste reform groups. Even the various

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1 M.G. Ranade, "State Interference in Social Matter", in Religious and Social Reform: A Collection of Essays and Speeches, compiled by M.B. Kolaskar (Bombay: Fort Printing Press, 1902), pp. 105-106.

"caste associations" were active and he felt that if they worked together, it would definitely better the social conditions of our country. The third ally were the more progressive native princes. Ranade had been trying to gain their support since 1870s. The fourth ally were the Shastras themselves.

Through careful negotiations with the leaders of the orthodox camp, Ranade was trying to gain their support for certain issues in the reform agenda. By 1890, the campaign to curtail marriage expenses were being organised. Some Pundits from Delhi too supported him. In 1893, the Shankaracharya of Sankeswar had pledged his support for the campaign to end ill matched marriages between old men and young girls, and temple prostitution.

Two methods of reform were unacceptable. The first was hollow lip service - those who agreed verbally that reforms were desired but took no positive action. Indirectly, referring to Tilak and his followers, Ranade described these men as saying that "they should preach reform but that they should in practice only drift into reform but that they should close our eyes, shut our mouths, tie down our hands and feet .... Things should be allowed to take their own course."[1] He added that they were not true reformers, because without hard work no reforms can take place.

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1 Mrs Ramabai Ranade, The Miscellaneous Writings of the Late Hon'ble Mr Justice M.G. Ranade, (Bombay: The Monoranjan Press, 1915), pp. 111-112.

Second method of reform was by rebellion, which the Brahmo Samaj and Maharashtrian reformers like Agarkar, Ranade stated that the conference did not sanction this approach, since it meant a sharp rupture with Hindu society.[1]

This signified Ranade's limits to be willing to challenge, Hindu traditionalists. This would avoid, his own social isolation. He hence preferred short term goals rather than militant principles.

Ranade, though a champion of women's cause did not speak of developing women's own independent thoughts. He spoke against enforced widowhood of child-widows, not of women who attained majority and education to all women. But, he believed in the patriarchal image of the Hindu women as the ideal wife and mother. The duty of wife still remained the same - to serve her husband and be completely devoted to his interests.

V. Views of B.G. Tilak

Tilak understood the Age of Consent as a religious issue. He was the editor of two newspapers - Kesari and Mahratta. Tilak's opposition to the social reformers started with the age of consent issue. He led the Western educated opposition group to the proposed legislation. He wrote in his newspaper a reply to Dayaram Gidumal's suggestion of amending the Code; the tone was of an outraged

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1 Ibid., p. 114.

orthodox and also the spirit of nationalism being insulted by the threats of Government intervention in Hindu social practices. Their targets were Bhandarkar, Telang, and Agarkar, (after M.G. Ranade withdrew from the struggle) and their arguments rested chiefly on religious grounds, that is, the requirement of the garbhadhana ceremony.

Tilak also brought out a logical point which the reformers had difficulty facing. He was of the view that people who were prepared and anxious to liberate themselves from foreign domination should refrain from seeking help from the alien rulers, and least of all in solving their private domestic problems. Tilak urged that it was humiliating, morally wrong, and socially weakening to ask for legislation to curb a domestic social evil. He agreed on the need to control consummation of marriages below the age of puberty but he assisted that "education and not legislation is the proper method for eradicating the evil."[1] Tilak wanted a new movement, in his terms truly nationalist as it would rest on independence of spirit and deny reliance on Western guidance and example. Nobody could talk about nationalistic principles with Tilak; they argued with him on the interpretations of the Shastras. In an editorial Tilak wrote:

> "If we want that we should be proficient in the art of self-government, the first quali-

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1 D.V. Tahmankar, Lokmanya Tilak (London, Oxford University Press, 1956), p. 46.

> fication we should show is the ability to manage our own business which will be better regulated by ourselves than by the passing of an act or resolution .... Let our people, therefore, form associations, frame rules, and restraints for themselves and do all they can to check... this evil custom [of child marriage]."[1]

Bhandarkar and Tilak were at the heads of the opposing camps in Poona. Bhandarkar and his associate reformers took the position that the bulk of the Shastras sanctioned delaying marriages, or at least their consummation, until girls reached full womanhood, some time after attainment of puberty. A great many citations from scriptural authorities, including Manu, and from literary accounts of Hindu heroes were brought out in support of their stand. According to Shastras, certain ceremonies constituting the consummation of marriage must be performed immediately after a young woman attains puberty. A girl might have sexual intercourse with her husband before she became twelve years as she had attained puberty. The new amendment would make this a crime for the husband, punishable as rape.

In Tilaks writings and speeches, he has brought out a point whether the reform should be forced on the people with the help of law or if it should result from an under-

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1 Mahratta, May 29, 1881.

standing that early marriage is harmful. Tilak had a strong group of men backing him in resenting Government interference in social affairs of the community. Some even felt that the proposed law would be an attack on the Hindu religion and Hindu culture.

The Poona leaders called a meeting on October 26, 1890, in order to assess public opinion. While the resolutions for the public meeting was being drafted. Tilak wanted his own proposals to be incorporated in the resolution. The proposals[1] were -

(1) The lower age-limit for marriage should be 16 for girls and 20 for boys.

(2) Men above 40 should ordinarily not marry, and should they marry at all, they should marry widows.

(3) The use of liquor at marriage functions should be prohibited.

(4) The custom of dowry should be abandoned.

(5) Disfigurement of widows should be stopped.

(6) One-tenth of the monthly income of every reformer should be devoted to public purposes.

He added that those proposals should not be achieved through the implementation of law, but by gradual change of

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1 Ram Gopal, Lokmanya Tilak - a biography (Bombay: Asia Publishing House, 1956), p. 61.

social attitude which the educated people had acquired, and the others had not. Education had imparted a rational view of things and hence discarded many superstitious rituals as being inhumane and totally unworthy. Therefore, he suggested that those who were at the top of the social ladder preaching reform should set a personal example to the rest. The reformers should first convert themselves and their families without any reservation and without the fear of the punitive measures taken by the caste and kinsmen. This point was of special relevance because some important reformers had not lived up to what they preached. One was Justice M.G. Ranade and another was Keshab Chandra Sen, a reformer of Bengal. He got his daughter married at the age of twelve years to the Prince of Cooch Bihar. Such acts had a very negative impact and it violently shook the people's faith in reformers.

Tilak repeatedly advised the reformers to do some constructive work for the society and create public opinion in favour of the reform by educative propaganda. In other words, it involved strenuous work, while the law provided a short cut.

The orthodox Brahmin group was irrational in its attack on the reformers but Tilak helped them to find a logic in opposing reforms. Tilaks views were so strong and properly supported that even those among the educated who were swayed by the reformers' reasoning were now favouring Tilak's viewpoint. Many leading men of India,

like Sir Romesh Chandra Mitra, Woomesh Chandra Bonnerjea, Sir T. Madhavrao, Surendranath Bannerjea, Chimanlal Setalvad, were opposed to the society being reformed by law.[1] They opposed the Bill partly on religious grounds and partly because they questioned the very authority of a legal enactment to bring changes in the society.

The government was hence quite hard pressed by the different opinions carried by the native Indians. On humanitarian grounds and rational thinking, they decided to go ahead with the Age of Consent Bill which was what the reformers wanted.

Tilak with his national ability to command and convince, public support grew steadily. Eminent lawers, landlords, businessmen were all with him, and all regarded him as a national leader of men. This obviously had adverse effect on the morale of the reformers and their enthusism was dampened.

After the Bill become law, among others some reformers too were circumventing it. Tilak remained firm and he performed the marriage of his daughters after they had attained the age of sixteen. He was well ahead of the provisions of the Bill. He had a deep understanding of Indian society as well as politics. He wanted some changes in both, administration of the country and the

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1 Ibid., p. 62.

structure of society. Indian society had deep roots and hence a mere legislation would not prove a deterrent to the masses.

In the Nagpur session of the Social Conference in 1891, he offered a practical amendment to the resolution on widow re-marriage. He proposed that it should be made the duty of the social reformers to not only attend a widow re-marriage ceremony, but to take part in the marriage feast also. He said that mere lip service will not solve any purpose. It should be conveyed to the people that those going in for widow re-marriage would not be looked down upon. This was only possible when the reformers themselves displayed a courage of conviction.

In 1889, when there was little hope of Government taking up a measure like the Age of Consent Bill, the social reformers under the leadership of Ranade, issued a circular calling upon the people to avoid child marriage, and asked them to sign a pledge to this effect. Tilak readily signed the pledge and associated himself with the movement. That method exactly fitted in with his own, and he liked the reformers' direct appeal to the people. But when the Government came out with a legislative proposal, the reformers abondoned this cumbersome method and retired in favour of the Bill.

In the Bombay Provincial Conference held in May 1891, he successfully passed a resolution regretting that the

Government did not respect the public opinion on the Bill. Reformers present at the Conference remained neutral. Tilak had the majority on his side.

The Age of Consent Act (1891) and the Child Marriage Restraint Act/Sharda Bill (1929) which was passed almost four decades later, remained practically ineffective till the middle of 20th century. Child marriage continued as if these laws did not exist on the Statute Book. Education became widespread and public opinion gradually tendered towards late marriage and now child marriage is a rare phenomena.

Tilak spoke about imparting education to girls but he was strictly against higher education of girls. He emphasised that the woman was primarily the home-maker and the education imparted to her should necessarily be to enhance her ability to do so. A woman's goal is to become an ideal house-wife. He also held only men responsible for social uplift and political achievements while women were merely a help in family life. Tilak advocated restraint on the part of widowers, and a ban on their remarrying after a certain age. He does not much talk of widow remarriage.

> "The general tenor of Tilak's writings suggests approval of humane treatment of women, but also of keeping them to

> the subordinate position within the home; the idea of equality of sexes is not broached."[1]

VI. Views of Pandita Ramabai Saraswati

Pandita Ramabai Saraswati devoted her life for the upliftment of widows and destitutes. Her main stress area was education. She opined that economic independence would go a long way in helping women to assert their rights. Her own life was full of struggles and hardships. Even as a girl child she was taught the religious texts in Sanskrit. Her parents and a sister died of starvation in the famine of 1877, her brother died in 1880. At the age of 24, in 1882 she lost her husband and was left with a baby girl of ten months.

In 1889 she founded the Sharda Sadan (Home of Wisdom) in Bombay for the education of women in general and widows in particular. In 1890, the Sadan was transferred to Kedgaon near Pune.

According to Pandita Ramabai[2] Manu had dictated that twenty four years was the age for a boy to marry, but this

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1 Meera Kosambi, Women Emancipation and Equality: Pandita Ramabai's Contribution to Women's Cause, in Economic and Political Weekly, October 29, 1988, p. WS 46.

2 Padmini Sengupta, Pandita Ramabai Saraswati: Her Life and Work, (Bombay: Asia Publishing House, 1970), p.168.

rule had been forgotten and boys of ten were given in marriage to girls far younger. Boys and girls had no choice of their future partners, but a man's second wife could be chosen. A woman could also never be free of a husband under any circumstance, whereas a man had the right to leave his wife. The woman had to serve her husband as a God, though he may prove to be destitute of virtue.

Pandita Ramabai had read the Hindu religious texts and many other books. She saw the status of women of her contemporary times with regard to traditional law and the new British Indian Legal system. She criticized the British Indian legal system.for being silent (on the pre-text of their policy of non-interference) on the issues of social reforms in general and women in particular. Their policy of non-intervention was in regard to social and religious issues. But they did intervene if it was unfavourable for them. Like in the case of Dadaji Vs Rukhmabai; they intervened only when the verdict was passed favouring Rukhmabai and the then orthodox supporters of Dadaji had threatened the Government with unpleasant consequences. Pandita Ramabai points out that though the woman was entirely in a man's position in ancient India,

> "now under the so-called Christian British rule, the woman is in no better condition than of old. Now there was the right to go to court however; but suits of law between the husband and wife were remarkable for

> rarity in the British Courts in India, owing to the ever-submissive conduct of women who suffer silently, knowing that the Gods and justice always favour men."[1] This point was highlighted in Dadaji Vs Rukhmabai case.[2]

Pandita Ramabai wrote in a letter[3] to Miss Dorothea Beale, Cheltenham from USA saying that the punishment awarded to Rukhmabai would not end the case. The punishment awarded was imprisonment for six months. She had read an extract from a paper published in the Indian Magazine for May. It read -

> "The Government will not use its power to interfere with social customs... The law will give Rukhmabai no help against private prosecution. But the resolution which tells her this, tells her also that when caste or custom lays down a rule which does not need the aid of the Civil or Criminal Courts for its enforcement, State interference is not thought to be expedient."

But the Government did interfere Ramabai writes further regarding the Government interference :

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1 Pandita Ramabai, The High Caste Hindu Woman (Maharashtra State Board of Literature and Culture, 1981, reprint of 1887 ed.), p. 90.

2 Dadaji Vs. Rukhmabai case has been discussed in Chapter IV of this dissertation.

3 A.B. Shah, The Letters and Correspondence of Pandita Ramabai, ed. (Maharashtra State Board for Literature and Culture, 1977), p. 176.

> "Just so, yet the Civil Court has been allowed in this case to interfere, ... and to give its sanction to an injustice revolting to every right thinking mind. What makes the matter more grievous is that even after suffering the six months' imprisonment awarded by the Court, Rukhmabai is, it is feared, liable to a fresh prosecution and a fresh term of imprisonment; and this sort of prosecution may be repeated again and again, until either her spirit is broken into submission, or death comes to end her sorrows.[1]

Pandita Ramabai embraced Christianity because she felt it propagated humanitarianism. But she had lost faith in the British Government who did not take into consideration the bad state of women in India. They turned a blind eye to the woes of women. She wrote about the attitude of the British Government towards women in her letter.[2] It read -

> "It is false to accept any justice for India's daughters from the English Government, for instead of befriending her the Government has proved to be a worse tyrant to her than the native society and religion. It advocates on [the] one hand the education and emancipation of the Hindu woman, and

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1 Ibid., p. 176.

2 Ibid., p. 78.

> then, when the woman is educated and refuses to be a slave in soul and body to the man against whom her whole nature revolts, the English Government comes to break her spirit allowing its law to become an instrument for rivetting her chains.

Pandita Ramabai wrote and published a book titled The High Caste Hindu Women in 1887. In this book she had described the life from birth to death of a high caste Hindu woman. She did not include in it the lower caste women and their life pattern. She has described the life of a high caste woman through child marriage, widowhood, role of wife, and her status compared to men.

In the last pages of her book she makes itclear that it was written for the benefit of English women readers. She makes a careful analysis of the chief needs of high caste Hindu women. Their chief needs were self-reliance, education and native women teachers.

She wrote that "the state of complete dependence in which men are required by the law given to keep women from birth to the end of their lives make it impossible for them to have self-reliance without which a human being becomes a pitiful parasite.[1] Women of the working classes were better off than their sisters of high castes in India, because in many cases they are obliged to depend upon them-

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1 Pandita Ramabai Saraswati, The High Caste Hindu Woman (Maharashtra State Board for Literature and Culture, 1981), Reprint of 1887 ed., p. 125.

selves. This gives them an opportunity for cultivating self-reliance by which they largely profit. But high caste women, unless their families are actually destitute of means to keep them, are shut up within the four walls of their house. In aftertime, if they are left without a protector, i.e., a male relative to support and care for them, they literally do not know what to do with themselves. They have been so cruelly cropped in their early days that self-reliance and energy are dead within them; helpless victims of indolence and false timidity they are easily frightened out of their wits and have little or no strength to withstand the trials and difficulties which must be encountered by a person on her way toward progress.[1] Ramabai questioned whether it is not the duty of Western women (referring to English women) to teach them how they may become self-reliant.

Pandita Ramabai says that even the so called educated cannot comprehend even simple texts:

> "Of the ninetynine million seven hundred thousand women and girls directly under British rule, ninetynine and one half returned as unable to read and write; the remaining two hundred thousand who are able either to read or write, cannot all be reckoned as educated, for the school-going period of a girl is generally between seven to nine years of age; within that short time she acquires little more

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1 Ibid., p. 125.

> than ability to read the second or the third vernacular reading book, and a little knowledge of arithmetic which usually comprehends no more than the four simple rules."[1]

The girls were married immediately after nine years of age. There was a popular belief among high caste woman that their husbands would die if they should read or hold a pen in their fingers. This put an end to their education.

Pandita Ramabai felt that central to the social reform of women was education. Therefore a body of persons among themselves are required to teach by percept and example their fellow country women. Diffusion of education hence is essential.[2]

For Pandita Ramabai, self-reliance was the key to women's upliftment. This was in direct contradiction to the patriarchal system which insisted on women's dependence on men in all things and on their seclusion to the home.

The traditional Hindu law was structured in accordance with the patriarchal ideals. Women were socially

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1 Ibid., p. 129.

2 Ibid., p. 130.

as well as legally relegated to a subordinate position. Marriage was an irrevocable sacrament for a woman unlike for men. Men could desert a wife but a wife had to follow the Pativrata Dharma, complete devotion towards the husband. The British Indian legal system perpetuated the same inequality of sexes after the Crown took over. They did not want to displease the men by changing the marriage and family laws as it could have jeopardised their political rule. Also they claimed to follow the policy of non-intervention in social and religious matters. In 1884, the Age of Consent Bill controversy brought to the limelight the approaches of two main reform groups. The extent of the patriarchal values carried by the reformers is traceable in their idea of the role of a woman in society and home. M.G. Ranade and B.G. Tilak both believed that education of women was basically to enhance their skills regarding home work. Pandita Ramabai defied the patriarchal system. She said self-reliance was the key to women's independent thought and action. The society basically followed a patriarchal system which placed the women in a subordinate position vis-a-vis the men. It had a considerable influence on the British Indian legal system also.

CHAPTER - IV

CHAPTER - IV

A CASE STUDY OF RESTITUTION OF CONJUGAL RIGHTS : DADAJI VS RUKHMABAI

I. The Case

In the 19th century, the Court was seen as an avoidable institution by the average Indian. It was considered the domain of the rich and educated elite class. Infact a court case brought disgrace to the family. Only in extremely rare cases did the native Indian make use of the court. Marriage and family matters excepting property disputes rarely came up for hearing. A suit such as the Restitution of Conjugal Rights was seen as an ultimate insult to the parties concerned. Another factor contributing to the "fear of the court" was the monetary aspect, since lawyers' fees were high. The third major factor was the long time the court took to give a verdict. Fears would be wasted in fighting a court case. The Panchayats were quick to reach a decision and the accused was punished immediately.

One of the most controversial cases came up before the court in 1884. It was a case of Restitution of Conjugal Rights known as Dadaji Vs Rukhmabai which came up for hearing in the Bombay High Court. This case caused a turmoil in the Indian society. It resulted in a clear division of the society into orthodox and reformers. Reformers were

supposed to be Westernized in their thought and to have little respect for the Hindu religion. They were attacked by the orthodox on the grounds that they were being non-religious and hence not faithful to Hinduism. It became a platform from where the reformers, the orthodox, the English argued on the Hindu marriage laws and law status of Indian women. Queen Victoria too had given her views.[1]

The reformers who took interest in this case were Mr Malabari, Pandit Ramabai Saraswati,[2] Mr Justice M.G. Ranade and Mr Telang. Mr Justice Pinhey before whom the case came up for hearing showed interest in the upliftment of women. He gave his judgement in favour of Rukhmabai. He too was an exponent of women's welfare. Mr Malabari was accused of interfering with the Hindu Law mainly because he was a Parsee by religion. But he undauntedly committed himself wholeheartedly for the cause of women and he also put forth the demand for raising the age of marriage, and denouncing the custom of infant marriages. He took a very firm stand in this case. He supported Rukhmabai on the grounds that she was married without her consent.

This brings us to a discussion of how the British Government favoured the patriarchal structure of Indian society and how the patriarchal structure was thereby enabled to continue in existence.

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1 Madras Mail, Madras, 15 April 1887.

2 Refer to Chapter III of this Dissertation.

Orthodox Indian and the supporters of Dadaji who had opposed the interference of British Indian law in religious matters, were now glad because the sentence was passed against Rukhmabai. The English people took interest as they felt it a humanitarian cause; in their view Hindu women were oppressed by the social structure which was blatently patriarchal, but the British Government was complicit with patriarchal interests as they passed the verdict that the defenceless Rukhmabai should submit herself to her lawful husband Dadaji Bhikaji, just because - as Pandita Ramabai put it - they wanted to keep the males of this country happy. "They have promised to please the males of our country at the cost of women's right and happiness";[1] under the garb of their policy of non-interference in religious and social matters.

At the time of Dadaji Bhikaji's marriage with Rukhmabai, Dadaji was twenty years of age and she was thirteen years of age. Mr Junardhan Pandurang was the natural father of Rukhmabai. After his death in 1867, his widow, Jaentibai, married Dr Sakharam Arjun. Remarriage in their caste was permitted. They belonged to the carpenter caste called Sutar or Pachkalshi. Dadaji Bhikaji was a distant relative of Dr Sakharam Arjun. Their marriage took place sometime

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1 Letter from Pandita Ramabai, USA, to Miss Dorothea Beale, Cheltenhom, May 22, 1887 in Shah A.B., "The Letters and Correspondence of Pandita Ramabai", (ed.), Pune Maharashtra State Board of Literature and Culture, 1977.

around 1873 with the full consent and approval of her parents and the maternal grandfather, Mr Harichandra Jadavji. The marriage was not consummated immediately.

In 1884, after 11 years of marriage, Dadaji Bhikaji asked Dr Sakharam if his wife might be allowed to come and live with him. Rukhmabai refused to go with him for the following reasons:

> "(1) The entire inability of the plaintiff to provide for the proper residence and maintenance of himself and the wife, the defendant;
>
> (2) the state of plaintiff's health, in consequence of his suffering frequently from asthama and other symptoms of consumption and
>
> (3) the character of the person under whose protection he was living in the house in which he called on the defendant to join him."[1]

Rukhmabai, put it most simply and straightforwardly when she said she disliked him. Dadaji claimed that she was being manipulated by her grandfather. This prompted Dadaji to file a suit for Restitution of Conjugal Rights .... The case came up for hearing before Mr Justice Pinhey who gave his judgement on 21st September 1885 in favour

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1 Refer to Appendix I.

of Rukhmabai. He held that the suit was not maintainable.

Dadaji was then advised by his supporters to appeal against Pinhey's judgement to the Bombay High Court. The case came under Chief Justice Sir Charles Sargent and Mr Justice Bayley. In March 1886, they held that the suit was maintainable. During the same time Mr Justice Pinhey retired and the case came up before Mr Justice Farren. In March 1887 Farren ordered Rukhmabai to go and live with Dadaji within a month or else face imprisonment for six months. Rukhmabai told she would rather serve her term in prison than live with Dadaji. Efforts were initiated to avoid Rukhmabai's imprisonment. Finally, in July 1888 Dadaji agreed to relinquish his claim over Rukhmabai for a payment of two thousand rupees, a very sizeable sum for those days.

II. Stand Taken by the Supporters of Rukhmabai and Dadaji

Rukhmabai was ready to bear the consequences rather than stay with Dadaji. This served as shock waves through out Indian society and also in Britain. Desparate attempts were made to avoid Rukhmabai's imprisonment. The orthodox community said that it could be replaced by fine or property attachment. Dadaji's supporters too wanted to avoid it. At this time the supporters of Rukhmabai came together and

formed an influential committee called Rukhmabai Defence Committee. It was chaired by Principal Wordsworth and its members consisted of the educated elite who had liberal and western outlook. This Committee intended to raise funds and take necessary steps on her behalf.

The objectives[1] of Rukhmabai Defence Committee as told by John Fleming and M.M. Bhownaggree included:

(a) the protection of Rukhmabai against the injustice and hardship which would be involved in her being imprisoned in execution of a decree pronounced by the High Court of Bombay in a suit brought against her by her husband for the Restitution of Conjugal Rights, the case being one in which those "Rights" as a matter of fact have never yet been exercised.

(b) the removal of the anomaly involved in punishing disobedience to a decree based on Hindoo Matrimonial Law by the penalty of imprisonment - it being a penalty which is entirely unknown to that law and is created by a British rule of Civil Procedure.

Telang was tilted towards reform although he was not in favour of radical reforms. "The change of law required is not in the case of Hindus only, but also in Mahomedans, Parcees and Christians; it is required not merely in cases of infant or early marriage but also of adult marriage; it

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1 Indian Spectator, Bombay, 10 April, 1887.

is required not only in cases of marriage without consent, but of the marriage where fullest consent has been given and it is required not merely in cases of 'restitution' inaccurately so called, but also in cases of what is properly called restitution."[1]

Though he was regarded as a reformer, and was well-educated, Telang wrote that :

> "I do not see why we should endeavour in the slightest degree to upset or alter the law as thus established."

The only aspect he thought objectionable was the punishment given to Rukhmabai. He did not favour the stand taken by the Rukhmabai Defence Committee. He said - "The Committee should not say - that the marriage is not binding or ought not to be enforced because,

(a) the parties to it were infants or children when it took place;

(b) the parties to it did not consent to it; and

(c) the parties have never completed by living together."[2]

The Committee should say assuming the marriage to be binding at law, as it is by the custom and usages of the community to which the parties belong; assuming further

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1 Mahratta, Bombay, 5 June, 1887.

2 Teland, "The Hindoo Marriage Law", in Mahratta, Bombay, 29 May, 1887.

that such a marriage should be enforced in certain ways, it ought not to be enforced by the penalty of imprisonment."

It was alleged by the orthodox Hindus that the Rukhmabai Defence Committee was working directly to upset the social institutions amongst the Hindus. Some Committee members asserted that the law as applied to Rukhmabai's case was directly contrary to the old written and unwritten laws of the Hindus and their moral feelings; also when they contended that no case for the Restitution of Conjugal Rights could be made before consummation; and lastly, when one of them, the Dewan Bahadur, went to the length of saying that no marriage amongst the Hindus was complete without consent.

The orthodox hence contended that all these ideals of reform were throughly impractical, that some of the statements made in their support had no warrant in the old Hindu law written or unwritten.[1] Also, the case for the abolition of imprisonment for disobeying the decree of the Court ordering a wife to go to her husband, must be made to rest on grounds similar to those for the abolition of imprisonment for debt.

The supporters of Dadaji told the Committee to base their demand for the abolition of imprisonment, on the ground that it is hard and inefficacious in as much as it

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1 Mahratta, Bombay, 5 June, 1887.

does not secure the performance of the order of the Court.

They made three points most explicit. Firstly, that the whole question should be looked at from the same point of view as imprisonment for debt and it is useless if not cruel, to send a woman to jail for refusing to acknowledge the marital rights of her husband. They were ready to support the movement of Mr Wordsworth's Committee on this point and grounds. But they further made it clear that imprisonment is abolished, it ought to be substituted by fine or attachment on property to show that the courts would enforce the law though not to the personal inconvenience of the woman.

Secondly, they should not base their case on the consummation or otherwise of the marriage, because hardship and inefficacy of the punishment is the only ground on which relief can be asked. It is the same whether the marriage was consummated or not and any distinction made on this ground will raise unnecessary questions and doubts. It has traditionally been accepted that the marriage is complete according to the Hindu law after the ceremony is performed and it is an irrevocable sacrament.

Thirdly, as far as the maintenance by the husband is concerned, he should be exempted from the burden of maintaining the wife who refuses to live with him without sufficient cause.

In short, where a perverse woman refuses to live with her husband for no good reason, the Courts ought to have power to enforce their order or punish the woman by attachment on her property or fine for disobeying it, and exempt the husband from the burden of maintenance charges.

III. Public Opinion

The High Court, on appeal, reversed the decision and agreed with Dadaji that Hindu marriage law made no provisions for the wife's consent.[1] Many respectable writers did not approve of enforcing the English Restitution of Conjugal Rights clause upon a Hindu victim of infant marriage.

There was a stiff opposition to the stand taken by Rukhmabai. Many orthodox Hindus felt grateful to British Indian law for condemning Rukhmabai. Many of them had otherwise opposed the interference of British Indian law in their religious matters. Those interested in preventing legislative interference with Hindu law could have averted this situation of compulsory interference of the British Indian law. "The more coercive measures are applied against Rukhmabai, the more clearly is it established that her repudiation of her husband has not been unnatural or extra-ordinary."[2] Infact, the profess affection for a wife

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1 N.C. Kelkar, Life and Times of Lokamanya Tilak, (Madras, S. Ganesan, 1928), p. 188.

2 Malabari in Indian Spectator, Bombay, 17 April 1887.

and to send her to jail is a strange example of marital feeling.

The Hindu law was not responsible for Rukhmabai's grievances. The Hindu law does not recognize suits for the Restitution of Conjugal Rights. The right to bring such suits had been imported from English law. Hindu law sanctions child marriage and English law justifies enforcement of marital rights by legal action. When Hindu law and English law were jointly applied the result was that a husband could compel, by legal proceedings, a wife to come and live with him; though the marriage may have taken place when both the parties were infants and did not know what the marriage was about. Therefore, it was not Hindu law but a medley of Hindu law and English law, which resulted in a decision against Rukhmabai. This point was clearly highlighted by Mr Justice Pinhey's judgement.[1]

Behramji Malabari tried to rationalise Rukhmabai's action for the benefit of her husband and his supporters.

> "It must be remembered that she herself has little to gain from the contest. So far as that goes, her life has been a losing game from the beginning. She would be a loser still even if she were to gain all."[2]

In one of his previous references to her he had

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1 Indian Nation, Calcutta, 11 April, 1887.

2 Malabari, Indian Spectator, 20 March, 1887.

talked about her "martyrdom" to which the orthodox reacted most critically. He explains the use of that word (i.e. martyrdom) "Hence I ventured to call her a martyr - and I trust that after this explanation, our offended critics - offended because a mere woman, a thing to be trampled under foot, was raised to martyrdom."

But with Dadaji it was quite different. Malabari puts it explicitly "He is a man and may marry any number of "wives", even if he loses the suit. He has the sympathy of his caste fellows, the noble guild of carpenters and of a section of the enlightened Indian Press."[1]

According to Malabari, Rukhmabai was merely asserting her right as a human being even though she was aware of the fact that she had a disadvantageous position. A Hindu woman has been traditionally assigned a subordinate position. She did not have any chance of remarriage existing; so her refusal to accept Dadaji as her husband was synonymous with the fact that she would remain a spinster her entire life. Yet she remained firm on her stand which in other words confirmed her intense dislike towards her so-called legally wedded husband.

The orthodox come down heavily on Rukhmabai and her supporters. They said she was not being a normal Hindu girl by going against the wishes of her parents and not

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1 Ibid.

accepting Dadaji as her husband for the mere reason that she disliked him. They felt she had disregarded the Shastras and insulted the Hindu religion. Hence she was in no way a lady to be looked upon with regards. Partially they blamed her education which alienated her from her own religion and people.

Bal Gangadhar Tilak said that it is believed that education expands and purifies the mind but what has happened in Dadaji vs Rukhmabai case is quite different. He explains that "God has so made the females that they are quite unworthy either of liberty or of enlightenment and where this has been neglected the result has been most deplorable."[1] There are a few exceptional women who are well educated and the literary world is proud of them but their character is not at all what it should be.

Tilak had been vehemently opposed to the interference of law and British legislations. This was the main point on which B.G. Tilak and Justice Ranade had severe differences of opinion. Tilak even opposed all non-Hindus who opined on Dadaji vs Rukhmabai case. He disapproved of Rukhmabai's English supporters on the ground that it is beyond their province to discuss this matter. He opines that their culture and religion does not teach them the sacredness of a 'family'. Tilak admitted the evils of early marriage but

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1 B.G. Tilak, Mahratta, Bombay, 10 April, 1887.

saw certain advantages of early marriage also, mainly that the husband does not get a "contaminated" wife. He attributes the high rate of divorce in Britain and the numerous cases of elopement to this. It results in shattered homes and disrupted family life. Rukhmabai did not want to live with her husband Dadaji for the reason that he did not posses the same academic qualifications as she had. The Shastras clearly say that "All she has to do is to worship her husband and thus she will become famous in heaven."[1]

A leading newspaper, The Hindoo Patriot[2] wrote saying that it is of no account if Rukhmabai's husband is a coolie. He is nevertheless her husband, and any action which would in the slightest degree interfere with his conjugal rights should be repudiated. A couple of days earlier the same newspaper had denounced the British Indian law as "The Slavery Law" because the law agreed that individual freedom of coolies in Assam planters should be curbed. This they called inhuman, but Rukhmabai's is fair because "what right has a woman to consideration."

One significant point to be noted here is that there were many jubilant cries raised over the High Court's decree against Rukhmabai. It was raised by those who, just

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1 Ibid.

2 The Hindoo Patriot, Banaras, 18 March, 1887.

a couple of months earlier had protested that the government should have nothing to do with their social practices. These same people now think that the High Court has saved the Hindu society and has prevented a revolution. The orthodox had felt threatened by the unexpected verdict given by Justice Pinhey - they questioned that - "if wife may be (legally) allowed to refuse to live with her husband then is the husband to be left powerless."[1]

Rukhmabai had based her opposition to her husband among other criteria, on her dislike for him. This, the orthodox felt was not a valid reason and not a rational excuse for breaking ties. Conveniently they overlooked the validity of a husband deserting his wife because she has either not produced a male heir or produced only girls. Shastras spoke about the importance of a male child but not at the cost of the lives of the wives who did not produce any male child. Rukhmabai went a step ahead by prefering to go through the punishment of imprisonment than to live with him.

Tilak opined that the whole question should be looked at from the same point of view as imprisonment for debt and viewed in that light it will be once clear that it is useless if not cruel to send a woman to jail for refusing to acknowledge the marital rights of her husband. Only on

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1 B.G. Tilak, Mahratta, Bombay, 27 March, 1887.

this ground they were ready to support Rukhmabai; but in case imprisonment is abolished it ought to be subsituted by fine or attachment on property to show that the courts will enforce the law though not to the personal inconvenience of the woman. Tilak repeatedly stressed that they should not base their case on the consummation or otherwise of the marriage. It is accepted that the marriage is complete by the Hindu law after the ceremony is performed, and that it is a sacrament.

IV. The Concept of Reform

The real question at issue was not between reform or no reform but between the various ways of introducing reform. The older generation of educated men had the tendency of committing the same error which Government did when they destroyed old political institutions of the land such as village communities, panchayats etc., and replaced them by modern machinery. Such as creating new Churches, new social institutions, new laws to regulate them and they do not hesitate to employ any kind of sophistry.[1] The younger generation maintained that if reformers wished to do any good - they must first practice what they preach and that the time had not yet come "when legislation gives a powerful support to the highest moral feelings of a community and great stimulus to practical improvement."[2]

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1 Mahratta, Bombay, 5 June, 1887.

2 Ibid.

The reform could not be affected in the half-hearted way in which it was then being carried.

Behramji Malabari came down heavily on both the Hindu marriage law as well as on the colonial British Government. Malabari was desparately trying to awaken the humane feelings through his writings. He even addressed himself to the English people and expected them to rise to the occasion. He wrote in the Indian Spectator: "Thirty days hence Rukhmabai must complete her martyrdom. We call upon the women of England to witness this new form of Suttee, set up by British Law and Christian morality".[1] Behramji Malabari was a Parsee by religion. This was also the reason why many orthodox Hindus made derogatory remarks about him. He brought out many loopholes as well as the shortcomings of the Hindu Marriage Law:

> "Caste enforces on this Hindu girl a marriage to which she was as much a party as any of the Judges of the High Court. And the Judges countenance this outrage infact offer to serve as constable and jailor. What could they do ? poor men - such is supposed to be the laws of Hindus. And what could the British Government do ? poor Government - their mission is to perpetuate inequalities. So Rukhmabai must either go to jail or live under the protection of her so-called husband's protectors.

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1 Behramji Malabari, Indian Spectator, Bombay, 6 March, 1887.

> Perhaps the husband who loves her so, may one day bring another 'wife' to keep her company. What ever then ? The High Court will go on grinding the deadbones of law, and the Government of India will go on whistling in sympathy with the process which is grinding the womanhood out of the women of Hindustan."[1]

The English law of marriage, which was imperfect in England itself, and which had nothing to do with infant marriages, undertook to enforce Restitution of Conjugal Rights where a real marriage had not taken place and certainly nor been consummated. Malabari did not approve of the British law being transplanted and the careless attitude towards the legal problems faced by Indian women. He said:

> "Henceforth we are to understand that Hindu parents may go on perpetuating infant marriage and that in case of dispute the benevolent British Government will aid and abet them, in the triple capacity of marriage brokers, policeman and jailor."[2]

Many people who otherwise favoured Rukhmabai felt that she infact did not have a very convincing reason for not accepting Dadaji as her husband. Her basic reason was

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1 Ibid.

2 Ibid., 20 March 1887.

her dislike for him. This they felt was not a truly valid reason for not consummating the marriage. But they favoured her on the most rational humane grounds of personal liberty. Mr Vaman Abaji Modak, Principal of Elphinston High School Bombay addressed a letter to the Bombay Gazette which said:

> "But the claim for personal freedom in the matter of the fulfilment of the moral obligation of marriage on the ground of utter want of consent on her own part, is one so entirely lost sight of in our country that it is deserving of sympathetic considerations from all who hold personal liberty to be the most sacred and inalienable right of every human being under normal conditions."

There was an anonymous letter signed " A Hindu" to the Bombay Gazette of 22nd March 1887. The writer opposes the reasoning of the orthodox Hindus. He writes of the absurdity of the position that an eternal contract (i.e. marriage) should not be based on consent while a temporary one is and must be. He further says that the Government too should do its duty and have a welfare attitude towards the Indian community as a whole. Even while meeting their own selfish economic ends they should not exploit the already disadvantaged people.

> "Government should be bound to see that their own power is not used to enforce harsh and one-sided arrangements, to encroach on personal liberty, which with education is the most precious boon it has given to this unfortunate land. It is therefore for Government to say how long they will use their might to perpetuate such inequities in the name of religious neutrality."

The opinion of sound lawyers on this case was that the Hindu law in itself does not expressly provide for Restitution of Conjugal Rights. The provisions of the Procedure Code which make such a suit admissible have been grafted from the English law and are consequently based on the implication of the marriage being a contract entered into by mutual consent of the contracting parties, who are fully sensible at the time of the nature of the obligations that it imposes on them. This jumbling of two distinct principles in the law as it stands is the cause of Rukhmabai's case which took this unfortunate turn. 'A Hindu' further writes that this case is likely to prove a source of even greater hardship hereafter in individual cases where the unfortunate girls concerned may have even more indisputable grievances than those complained of in the present case, and yet they would either be compelled to fulfil the marriage engagement, though wholly against their will, or be sent to jail for no crime of theirs.

Mahratta, the newspaper edited by Tilak wrote that the High Court has done right by giving the decree against Rukhmabai. The Law Courts had left very little real power to the castes and the religious organisations. Tilak said if they are allowed to be swayed by personal considerations like these, there would be no law at all. The question before the Court was not how to change the law so as to relieve a particular individual but rather to ascertain what the law of the land is.... The Court had to decide whether the Hindu marriage is a sacrament or a contract. From the days of our Rishis to the present, marriage has always been regarded as a sacrament by Hindu law and the ceremony of "seven steps" makes it complete binding on both sides. Consummation of marriage is a distinct and a separate ceremony after that of marriage and has nothing to do with the validity or otherwise of the latter. Orthodox felt that the sacredness of the marriage lie was in danger if Rukhmabai succeeded.

Tilak argued that not only are Hindu marriages a sacrament but marriages in European countries are too. Why is otherwise the necessity of appearing before the priest ? These marriages are distinguished from purely civil marriages - those which are affected by the parties agreeing to marry before a magistrate. Sacrifices performed in the Hindu marriages give it the sacredness. Vows

are taken in the presence of a sacred deity like Fire. These vows ought not to be broken by one's will. Of course Tilak overlooks the innumerable wives who are abondoned by their husband. The wives did not even have the right to ask their husbands for a reason, filing a suit for Restitution of Conjugal Rights was unimaginable.

They took recourse to religion in justifying their stand. The discipline of Hindu religion is so strict that even under cruel treatment wives pull on with their husbands, simply because they consider that it is their duty to do so. The orthodox alleged that in the place of this noble sentiment our reformers would like to substitute the idea of a commercial bargain, both parties living together for mutual profit and dissolving partnership as soon as either of them feels disinclined to continue.

Dadaji's supporters even claimed that Rukhmabai was the cause of her own suffering and even the solution lay with her. When Rukhmabai made an appeal against the Judgement delivered by Mr Justice Farren to be imprisoned for six months in case of her failure to return to her husband; the supporters opined that the remedy lay in her own hands (i.e., return to her husband) - this way she will be more than a modern Savitri and will thus immortalise her name.[1]

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1 Deen Bandu, Bombay, 27 March, 1887.

Another newspaper[1] published from Banaras blatantly condemned Rukhmabai. They were blind supporters of Indian tradition and Hindu Law.

> "As a woman she is not her own master. She could never be so in any stage of her existence. The law may be a barbarous law, but it is the law of the land and it is not in the power of our present legislature to change it. It is immutable. The husband and wife might refuse to live together, but must continue to be husband and wife still. There is no law to untie the marriage knot once tied. Rukhmabai's position would not at all improve by her recusancy , and her martyrdom would not cause her to be worshiped as a saint by her sisters, but would cause her to be scorned."

With ease these men spoke such words and with equal ease they would talk of remarriage in case the wife failed to beget a male heir or a child; incase wife did not comply with their demands of dowry; and even incase of any fanciful wish of the husband.

V. Response of Queen Victoria

This case had generated a lot of interest in the minds of English people living in India and Britain. There was a wide coverage given to this case in the newspapers

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1 Indian Courier, Banaras, 26 March, 1887.

abroad. It had even caught the eye of Queen Victoria who personally followed up the case with interest. She wrote a letter to the newspaper under the title "The Hondoo Lady". She was perturbed by the whole case and even more by the attitude and the stand taken by the British Government who worked directly under the Crown's name. Though she was aware that British women did not have such a degraded social status as that of an Indian woman and enjoyed the protection of British Marriage Law; no serious negative point had been brought to the notice regarding the British Law. But this case did much more. Firstly, the British Law was transplanted on the Hindu Law irrespective of its feasibility. Secondly, the British Law shed its duty of protecting the womenfolk under the pretence of their policy of non-intervention in social and religious matters. Thirdly, they were perpetuating the degenerate attitude of the majority of Indian men towards their womenfolk. Because a large number of orthodox men had threatened the British Government with unpleasant circumstances if she was not punished.

Excerpts from the letter:

"It may be asked indignantly, why does not the British Government put an end to a marriage law so unjust in its nature, so demoralising in its tendency ? The answer is that it is supported by the voice of the people. Proceed-

ings against the religious feelings of a nation which in this case have been held and acted on for a thousand years before the Christian Era - is an act that no sane statesman would contemplate. The remedy would be thousand times worse than the disease.

The mere surmise that the Government intended to modify the law produced an agitation that was supported by the great bulk of the community. That the advanced Hindoos who advocate science and political progress should remain silent respecting the marriage customs of their race is in itself a proof of the tenacious hold they have in the minds of the people."

This case brought out in a very distinct manner the attitude towards women. Reformers were poles apart in their views and approaches. One group refused to budge from the traditional stronghold; the other felt western education was developed and progressive. The former supported Dadaji and later supported Rukhmabai. The Government too was taking the stand of a truly colonial Government; not looking into the welfare of the citizens. It in no way opposed the patriarchal social structure

which accorded a low status to women. The conservative orthodox who had opposed the British Indian law in the past, thanked it for protecting the Hindu law by condemning Rukhmabai.

Rukhmabai was projected as a champion of social reform by the reformers in India and the well-wishers in England. But for the general public she became a target of intense righteous wrath. The overtone of the patriarchal argument is highlighted by the orthodox opposition. Their main points were:

(i) Interference of an English Judge in the social and religious system of the Hindus by deciding the case in contradiction to the traditional Hindu law.

(ii) Consent was not necessary as the wedding ceremony itself was an eternal binding; irrespective of consummation.

(iii) A man had complete rights over his wife according to Hindu religious law. She is at par with property and cattle.

(iv) This case would have adverse impact on women's education since an educated wife was likely to embrass her husband in court.

(v) Compatability was not required in terms of

education for a workable marriage.[1]

The Rukhmabai case brought out the force of social pressure against reform. The colonial government too perpetuated the same by applying a combination of traditional Hindu law and the British law.

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1 Meera Kosambi, 'Women, Emancipation and Equality: Pandita Ramabai's Contribution to Women's Cause', Economic and Political Weekly, October 29, 1988, p. WS 45.

CHAPTER - V

CHAPTER - V

CONCLUSION

Hindu women in the nineteenth century were totally governed by the patriarchal system. A woman's aim in life was marriage and Saubhagya, marital blessedness. Religious texts like Manusmiriti speak of the conduct of girl from childhood till death. Central to a woman's life is marriage and hence the marriage laws which subordinate the women completely. Women are relegated to the low position with the reason that they are inherently evil and weak. Hence are incapable of taking any independent decision in life. The only time a woman could be independent was when she was widowed and forced into the life of a destitute by her family and friends. According to religious texts the only time a woman could be independent of men was in hell. She was forced into submission and dependence of men in all stages of life.

The Hindu law varied according to the local Hindu customs and the different interpretations of the religious text. There was no single uniform law which could be applied to the whole of India. The British Government had expected the existence of one religious text followed throughout India without the local variations. They attempted to consolidate the various interpretations on the Personal laws. The British Indian law thus created,

suffered from many inadequacies which placed women in a more vulnerable position. They did not want to change the Hindu law to the benefit of both men and women of Indian society because it would have hurt the men in that their power to dominate over the women would deminish. The orthodox men had not favoured the interference of British Government in the socio-religious matters of India.

Under the Colonial law Indian women suffered hardships due to its inadequacies. The British Indian law had become a strange combination of British law almost super-imposed on the traditional Hindu law.

Women were debarred from taking education which only increased their dependence on men and subordination to the patriarchal social structure.

Lack of education led them away from any kind of development. They were unaware of the laws which existed through which they could assert their rights. In fact, the laws too were biased towards men. The traditional law was a supporting pillar to the patriarchal structure. It did not give any right to women. A husband could desert his wife any time without spelling out a reason. He was not condemned. He could get another wife even if his first wife was alive and staying with him. On the other hand, a woman could marry only once in her lifetime,

even if her husband died. After her husband's death she could either ascend the funeral pyre (sati) or lead a life devoid of pleasures, totally devoted to her deseased husband. Here lies a contradiction. In case a male child was not born during the lifetime of her husband, then some kinsmen, usually the husband's brother was authorised from whom she would beget a child.

There were innumerable cases of infant marriages. In most cases, the child wife saw her husband only during the wedding after which he never turned up. Here again, she was forbidden to remarry and led the life of a widow, full of harsh treatment and misery.

The British Indian law never reached such needy women. The traditional law gave no redressal to the grievances of the oppressed Indian woman. The British Indian law was a strange combination of traditional law (derived from religious texts and manusmriti) and the British law super imposed on it.

It hence developed a patriarchal nature. It lacked justice to women. The women suffered for no fault of their own which was most evident in the practice of infant marriages and also 'Kulinism' of Bengal. They were made to understand that their fate was such and no one could help them. They submitted to it and led a miserable life.

The colonial Government made an attempt to safeguard women's interest by passing certain laws. Unfortunately most of them contained serious inadequacies and hence complete justice could not be given to women. For example, a man could very easily desert his wife and even take another and yet no social stigma was attached to his reputation. On the other hand, a woman under no circumstances could think of leaving her husband even if he ill-treated her, not to talk of marrying another man. If at all she dared to leave her ruthless husband she was looked down upon by her kinsmen and had to lead a stigmatised life throughout.

The life of a woman revolved around her marriage and 'Pati-Vrata' dharma (loyalty and devotion towards her husband). Her duty was to serve him relentlessly and expect no appreciation for her work. Her duty lied being devoted to her husband irrespective of his vices and incapabilities.

The colonial Government time and again asserted that their policies did not permit them to interfere with the social and religious matters of the country. They were ruling over India politically and economically because it was profitable as well as convenient to them. They took a different stand in the case of Dadaji and Rukhmabai with which we will deal a little later.

The gradual spread of Western Education led to the rise of new class of intelligentsia. Some of them vehemently opposed the Western values, while the others thought that it was the vanguard for development. In the Bombay Province among others Justice Mahadeo Govind Ranade, Bal Gangadhar Tilak, Behramji Malabari and Pandita Ramabai were very vocal of their opinion.

Behramji Malabari, a Parsi by religion worked undauntedly for the upliftment of women. He was criticised many a times specially on the grounds that, being a non-Hindu, he was critical of Hindu traditional law. He edited a daily Indian Spectator from Bombay in which he critically analysed the traditional law. The columns would carry the critical analysis of the traditional law and also the British Indian law. He highlighted the patriarchal bais it contained specially in marriage and divorce laws.

The main issue which brought Behramji Malabari in the limelight was the Age of Consent Bill which was finally passed in 1891. B. Malabari proposed the need for legislation controlling the age of marriage of Hindu girls. In 1884, he published his "Notes" on "Infant Marriage in India" and "Enforced Widowhood" which led the English as well as the Indians to think in retrospect of the low status accorded to women. He believed that social reform

must precede political advancement. Also, that if the gulf between the intellectuals and masses perpetuate,then social reform would be a remote possibility.

Justice M.G. Ranade was an advocate of widow remarriage but he suffered a setback when he married a thirteen year old virgin girl within three months of the death of his first wife. He was then thirty-two years of age. M.G. Ranade too worked towards the education of women. He opened the first girls' school,"Huzurpak," for the high caste women in Pune. M.G. Ranade felt that law would quicken the pace of social development. Hence he was keen that legislation are passed to that effect. Ranade propagated for women's education but never did he talk about women developing their independent views and analysing their own position. He advocated widow remarriage for virgin child widows but not of a young widow whose marriage was consummated.

Bal Gangadhar Tilak felt that basic education was essential for the betterment of women to enhance their skill for doing domestic work. He did not subscribe for higher education. Also, the minimum age of marriage of girls should be raised to sixteen years so that the instances of child widows would reduce. He strongly opposed the interference of British Indian laws in the social matters. He carried the view that a change in the social attitude would bring change in the social status of women. Imple-

mentation of law would hardly have any effect. More over it is the hearts and minds of the men that have to be changed for which the social reformers should set an example. A mere legislation of law would not change the status of women in India. Kesari and Mahratta were the two dailies through which Tilak reached the masses and propagated his view.

Pandita Ramabai Saraswati devoted her entire life in improving the lives of her sisters in India. She opened the "Sharda-Sadan" initially in Bombay which was later shifted to Pune. It admitted destitutes and widows. By the age of twenty-four she had lost her parents, sisters, brother and her husband and was left alone to bring up an infant girl child. Even as a child, she could recite religious texts flawlessly due to which she was bestowed with the title of 'Saraswati' in Bengal. Though circumstances had forced her to adopt Christianity she did not alienate herself from the Hindu style of life. This helped her to maintain good rapport with the members of "Sharda-Sadan". She propagated that education is the only means that would help the individual woman to be independent, self-reliant and assert her right as a human being.

In 1887, she published a book titled "High Caste Hindu Women" which described the life of a high caste Hindu women in Indian society. They led a more difficult life

compared to the low caste Hindu women. She also appealed to the English women time and again to raise their voice against the oppressive customs of Indian society and also the British Indian legal system which perpetuated it. She followed up Rukhmabai case. She denounced the stand taken by the court. The court succumbed to the pressures of orthodox men and said, the suit was maintainable contrary to their earlier statement. The orthodox supporters had threatened to create unpleasantness. The Government too wanted to close the case at the earliest as it was becoming a major issue.

In 1884, a very controversial case came up before the court. It was the case of "Restitution of Conjugal Rights" filed by the husband. It was called Dadaji Vs Rukhmabai. Justice Pinhey stated that the suit was not maintainable on the grounds that the marriage had taken place without the consent of Rukhmabai. Dadaji was prompted by his orthodox supporters to appeal in the Bombay High Court. Here the suit was declared maintainable. Rukhmabai was ordered to go to her husband's house within one month or else face six months' imprisonment. The government could not afford to displease the orthodox.

This case brought out the inherent contradiction present in the British Government. The British Indian law like the traditional Hindu law perpetuated the patriar-

chal ideology of male superiority over the women. Over the ages the women too had started looking down upon themselves and unquestioningly submitted to their male masters. The colonial Government too could not think differently, in support of women. They overtly supported men of Hindu society and women were left with no redress to their grievances. Only a strong case like that of Dadaji Vs Rukhmabai could challenge the patriarchal ideology alongwith bringing out the gender bias contained in the British Indian legal system.

APPENDIX

APPENDIX

ORIGINAL CIVIL

Before Sir Charles Sargent, Kt., Chief Justice, and Mr Justice Bayley.

Dadaji Bhikaji, (original Plaintiff), Appellant, Vs Rukhmabai (original defendant), Respondent.*

Husband and wife - Restitution of conjugal rights among Hindus - Suit by a husband - Marriage during wife's infancy - Non-consummation of marriage prior to suit.

A., a Hindu aged 19 years, was married by one of the approved forms of marriage to B., then of the age of 11 years, with the consent of B's guardians. After marriage B. lived at the house of her step-father, where A. visited from time to time. The marriage was not consummated. 11 years after the marriage, viz., in 1884, the husband called upon the wife to go to his house and live with him, and she refused. He thereupon brought the present suit, praying for restitution of conjugal rights, and that the defendant might be ordered to take up her residence with him. The Court at first instance held that the suit was not maintainable.

Held, in appeal, reversing the decree, that the suit was maintainable, and that the case should be remanded for a decision on the merits.

Appeal from a decree made by Pinhey, J., on the 21st

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* Suit No. 139 of 1884.

September, 1885, whereby he passed judgement for the defendant with costs.

The suit was brought by the plaintiff, who was a Hindu, against his wife for restitution of conjugal rights. The parties had been married about 10 years previously, the plaintiff being then 19 years of age and the defendant 13. They had never lived together, and the marriage had never been consummated.

The defendant admitted the marriage. In her written statement she alleged the following reasons for refusing to live with her husband:

"(1) The entire inability of the plaintiff to provide for the proper residence and maintenance of himself and the wife, the defendant;

(2) the state of plaintiff's health, in consequence of his suffering frequently from asthama and other symptoms of consumption; and

(3) the character of the person under whose protection he was living in the house in which he called on the defendant to join him."

At the hearing before Pinhey, J., the defendant was not called upon to go into her case. At the close of the plaintiff's case the Judge gave judgement for the defendant.

The plaintiff appealed.

Macpherson, Vicaji and Mankar for the appellant:-

The marriage is admitted. The rights of the parties are complete when the marriage ceremony is performed. The wife becomes a member of her husband's family, and ought to reside with him. Consummation is not necessary to effectuate marriage. The husband has a right to the society of his wife, and the court is bound to enforce that right. It is to be enforced, although consummation has not taken place. The Civil Procedure Code (XIV of 1882), Sec. 260, recognizes the right, and provides a means of enforcing it. In England by Sat. 47 & 48 Vic., cap. 68, sec. 2, the means of enforcing the right have been abolished, but by the above section of the Civil Code (XIV of 1882), the right can still be enforced in India.

Latham (Adv. General) and Telang for the respondent:-

Latham: - We support the judgement of the court below on two grounds:

(i) We say that a suit for the restitution of conjugal rights does not lie between Hindus.

(ii) We support it on the ground taken by Pinhey J. viz. that the present case in one without precedent, being a suit to enforce rights not yet enjoyed. There is no English authority for enforcing the commencement of cohabitation and we submit that the court below was right in refusing to go beyond previous decisions.

As to the first point, I admit that we are asking the

court to decide contrary to a series of cases between Hindus, which appear in the Indian reports. The earliest of them, however, is only ten years old: they all seem to have followed, as authorities, two cases decided by the Privy Council - Ardaseer Cursetjee Vs Perozcbye and Moonshee Buzloor Ruheem Vs. Shumsoonissa Begum, the first of which was a Parsi case and the latter a case between Mahomedans. In none of them do the Court appear to have considered what the Hindu law is upon the subject.

A suit for restitution of conjugal rights was not part of English Common Law or English Equity. It was peculiar to the Ecclesiastical Courts. The former Courts only interfered on information that a party was incontempt of the Ecclesiastical Courts, these Courts being compelled to have recourse to the Courts of law and equity to enforce their process for contempt which the Ecclesiastical Courts could only enforce by excommunication. The English authorities cited by the other side are cases in Ecclesiastical Courts. Now, the Privy Council have declared in Ardaseer Cursetjee Vs. Perozebye that ecclesiastical law has no application in India, that we are to have regard only to the law and usages of the people of this country. If the principles of ecclesiastical law are to be applied at all, they should be applied in their integrity, and then it would be necessary for the plaintiff to prove marriage by free consent, which he must necessarily fail to do.

Suits of this kind are repulsive to civilized notions, and we ask that they should not be extended to Hindus, unless shown to be known to Hindu Law.

Since the decision, in 1867, of Moonshee Buzloor Ruheem Vs. Shumsoonissa Begum by the Privy Council it has been assumed by the Courts in India that a suit for restitution of conjugal rights lies between Hindus. That case was a suit between Mahomedans, and the observations made in the judgement were not intended to apply to cases between Hindus.

The case of Kateeram Dokanee Vs. Mussumut Gendhence has been relied on, but in that suit there was no decree against the wife. She was a minor, and was not sued through her guardian. She was not really a party.

In the case of Gatha Ram Mistree Vs. Moohita Kochin Atteah no decree was made. The decree that Markby , J., was prepared to make was apparently not a declaration for restitution of conjugal rights, but a declaration that conjugal rights existed: so that case is no authority for the decree asked for in the present suit. The cases of Yamunabai Vs. Narayan Mareshwar and Jogendronundini Dossee Vs. Hurry Doss Ghosh merely proceeded upon the authority of Moonshee Buzloor Ruhmeen Vs. Shumsoonissa Begum and Gatha Ram Mistree Vs. Moohita Kochin Atteah. I submit that was a mistake. It does not follow that such a suit

lies between Hindus according to their law, because it lies between Mahomedans according to Mahomedan Law.

No inference can be drawn from the provisions of Section 260 of the Civil Procedure Code (XIV of 1882). Those provisions may be requisite for the enforcement of decrees in suits of this nature, where such suits are maintainable as they are, no doubt, between Christians, Mahomedans and others in India; but they do not show that such suits are maintainable between Hindus.

We submit that the question of consummation is of material importance. The very title of the suit in England shows that it lies only where wife has already granted conjugal rights. The provisions of Section 18 of Act XXI of 1886 show that the Indian Legislature regard consummation as a material circumstance.

Again, this suit may be looked at as one for specific performance, and all the circumstances of the case must be considered before the Court will grant a decree - Umed Kika Vs. Nagindas Narotamdas.

We submit that, in such a case as the present, the Court has a discretion. It has been argued that the Court is bound to make a decree, and Scott Vs. Scott has been relied on. That case, however, was in an English Court administering ecclesiastical law, and does not apply. Even

however, in ecclesiastical cases the rule in more recent times has been less rigid - Moloney Vs. Moloney. In Marshall V. Marshall a plea by the wife on equitable grounds was allowed, which would never have been permitted in the Ecclesiastical Courts. The present case should be regarded as a suit for specific performance, not of marriage contract, but of the obligation arising out of that contract. If this be a suit for specific performance, the Section 22 of the Specific Relief Act (I of 1877), clause 2, enables the Court to consider the question of hardship. One of the illustrations of section 21 says that a contract of marriage cannot be enforced. That is an aid to the Court in exercising its discretion under Section 22: see also clause (b) of section 21. Here the Court is asked as against the wife to enforce one detail of the contract. But others, equally imperative, must be left untouched.

/Sargent, C.J.: - What are the circumstances of the case which ought to influence us in exercising our discretion in refusing the relief asked for ?/

One circumstance is the fact of the marriage taken place when the wife was incapable of giving a reasonable consent, the complete absence of consent on her part. Also the poverty of the husband and his social position.

/Sargent, C.J.: - No evidence has been taken as yet

upon these points, as the defence was not gone into. The case before us appears to be simply this, that the defendant when she arrives at puberty refuses to go to her husband, because she does not like him./

That is so, no doubt. If the defendant must go into the points raised in her defence, the evidence must be taken before the Court can be asked to say that these facts constitute a defence. The case of Jogendronundini Dossee V. Hurry Doss shows the large discretion the Courts will exercise even when granting a decree.

Telang on the same side:- The Hindu Law books prescribe duties of husband and wife, but say little as to the mode of enforcing their performance. Their duties are religious, and are enforced by religious machinery. Placetum 3 of sec.(1)of Chap.I of the Mayukha mentions the duties of man and wife as a specific head of law, but the only mode of enforcing those duties is by fine to the king: see Vyavahar Mayukha, Chap. XX, Strokes Hindu Law Book, p. 164. The only case contemplated by the law is that of a husband abandoning his wife, and that only results in a fine to the king. There is no provision at all for the case of a wife separating from her husband, and in the absence of such provision we must assume that the same remedy or punishment would be applied. There is no suggestion of what is known as restitution. No doubt

the caste might always have ordered the wife to go to her husband, but the caste may do that still. The caste can enforce social duties. The Civil Courts will not. The Civil Courts now exercise the authority which belonged to the king when the Hindu law books were written: so that the functions of the Court are to be ascertained by references to what are laid down as the duties of the king : see Khetramani Dasi Vs. Kashinath Das. The Privy Council in Moonshee Buzloor Ruheem Vs. Shumsoonissa Begum say that in India the rights and duties resulting from the contract of marriage can only be ascertained by reference to the particular law of the contracting parties. Acting on that principle, they base their decision on Mahomedan law. That case is, therefore, no authority here, and as the Hindu law does not provide for such a suit as the present, we contend that it does not lie.

Macpherson in reply :- It has been argued that a suit for restitution is a discredited suit. That, however, is a matter for the legislature, and not for this Court. It is, at all events, a suit recognized both in England and in India. As to the provisions of Hindu law, while admitting there may be no direct authority for the suit in Hindu law we deny that the suit is inconsistent with Hindu law. That law contains nothing forbidding it. The principles laid down in Moonshee Buzloor Ruheem Vs. Shumsoonisa Begum are

applicable to Hindus. The plaintiff here has a right which has been denied to him.

2nd March Sargent, C.J.:- This is an appeal from the decision of Mr. Justice Pinhey rejecting the plaintiff's claim for a decree of "institution or restitution of conjugal rights" arising out of the following circumstances, which are not in dispute between the parties.

The plaintiff, Dadaji Bhikaji was married, according to an approved form, to the defendant, Rukhmabai, about 10 years ago, when he was 19 or 20 and she was of the age of 11 or 12 years. The defendant was daughter of the late Janardhan Pandurang, whose widow was married to Dr Sakharam Arjoon at the time of marriage in question. After the marriage the defendant continued to live with her mother and Dr Sakharam Arjoon until March 1884, when the plaintiff, being desirous that she should come and live with him as his wife, sent his uncle and elder brother to fetch her, and on her refusal to accompany them instituted the present suit. The defendant by her written statement alleged as the reason for her refusal to live with the plaintiff. 1- The entire inability of the plaintiff to provide for a proper residence and maintenance of himself and his wife. 2- The state of the plaintiff's health, in consequence of asthama and other symptoms of consumption. 3- The character of the person under whose protection the plaintiff was and is living in the house in which he called on her to join

him. After hearing the evidence for the plaintiff, the learned Judge, in the Division Court, delivered judgement, and passed a decree for the defendant with costs.

The grounds of the decision are thus stated by the learned Judge. He says: "It seems to me that it would be a barbarous, a cruel, a revolting thing to do to compel a young lady under the circumstances to go to a man, whom she dislikes, in order that he may cohabit with her against her will, and I am of opinion that neither the law nor the practice of our Court either justifies my making such an order, or even justifies the plaintiff in maintaining the present suit. Whilst admitting that suits for restitution of conjugal rights had been maintained in the Courts of this country, the learned Judge was of opinion that there was no authority for a suit to compel a woman, who has gone through the religious ceremony of marriage with a man, to allow that man to consummate the marriage against her will; and that being so, he was not bound to carry the practice further than he found it supported by the English authorities. The immediate question, therefore, which present itself for our determination is, whether a suit for institution or restitution of conjugal rights will lie under the circumstances alleged in the plaint.

It was not attempted to be denied that, since the expression of opinion by the Privy Council in Ardaseer

Cursetjee V. Peerozebye, the Civil Courts of this country "should afford remedies for the evils incidental to married life," suits for the restitution of conjugal rights had frequently been entertained by the Civil Courts in the case of natives, whether Hindus or Mahomedans. The cases of Moonshee Buzloor Ruheem V. Shumsoonissa Begum as regards Mahomedans and those of Gatha Ram Mistree V. Moohita Kochin Atteah, Kateeram Dokanee V. Mussumit Gendhenee, Jogendronundini Dosee V. Hurry Doss Ghose, Yamunabai V. Narayan Moreshvar, Bapalal Tarachand V. Bai Amrati and Motiram Markisan V. Bai Manchai, as regards Hindus, can leave no doubt that the jurisdiction is well established, and we, therefore, entirely agree with the remarks of Mr Justice Melvill in the last case, that "so long as that jurisdiction is not taken away by legislation our Courts have no discretion in the matter." We could not, therefore, with propriety entertain any objective which goes to the root of the jurisdiction, such as that urged by Mr Telang, viz., that the Hindu law books do not recognize a compulsory discharge of marital duties, but treat them as duties of imperfect obligation to be enforced by religious sanction. We may, however, remark that although no text may be found in the Hindu law books which provides for the King ordering a husband or wife to return, no text was cited forbidding or deprecating compulsion, and that it was admitted that the duties appertaining to the relationship of husband and

wife have always been the subject of caste discipline, and, therefore, that with the establishment of a systematic administration of justice the Civil Courts would properly and almost necessarily assume to themselves the jurisdiction over conjugal rights as determined by Hindu law, and enforce them according to their own modes of procedure.

But it was contended that a decree for restitution of conjugal rights implies that the marriage has been consummated, and also that there is no authority for a decree for "institution" of conjugal rights. This distinction, however, appears to be based on a misapprehension as to the principles which the Ecclesiastical Courts in England exercised this jurisdiction. In Weldon V. Weldon Sir J. Hannen says: "The principle derived from the law on which the Ecclesiastical Court proceeded was, that it is the duty of married persons to live together, and that this duty should be enforced by the decree of the Court, unless it be shown that the complaining party had been guilty of some matrimonial offence for which a judgement authorising living apart might have been obtained by the other." In support of this proposition the learned Judge cites the words of Blackstone: "The suit for restitution of conjugal rights is brought whenever either the husband or the wife is guilty of the injury of substraction, or lives separate from the other without any sufficient reason,

in which case they will be compelled to come together again." It thus appears that the gist of the action for restitution of conjugal rights is that married persons are bound to live together, and that one or other has withdrawn himself or herself without lawful cause, as it was not contended that consummation was necessary by Hindu law any more that it is by English law to complete the marriage. It necessarily follows that, whether the withdrawal or "substraction", as Blackstone terms it, be before or after consummation, there has been a violation of conjugal duty which entitles the injured party to the relief prayed. Owing to the practice of infant marriage in this country, it is admitted to be the custom for the infant wife after the celebration of the marriage to return to her own house until she arrives at puberty, it may be that, in view of the above custom, the Court would not order the wife to join her husband until she was of mature age. In the present case, however, the defendant is long past the age of puberty.

It was urged, however, that although there might be no technical objections in the present case to a suit for "institution or restitution" of conjugal rights, still suits of this nature had become discredited, and that to compel the defendant who had had no voice in her marriage with the plaintiff, to join him against her will for the purpose, as it was said, of consummation, would be more

than ordinarily revolting to delicate feelings. The Court should exercise a discretion and refuse the decree sought. Now, doubtless, in England, legislation following upon the case of Weldon V. Weldon has recognized in Stat. 47 & 48 Vic., cap. 68, the propriety or, at any rate, the advisability of abolishing the practice of enforcing a decree for restitution of conjugal rights by imprisonment, and confirming the consequence of disobedience of such a decree to an order for alimony or similar provision in favour of the husband. In this country; on the contrary, not withstanding the wish of Mr Justice Markby, as expressed in 1875 in Gatha Ram Mistree V. Moohita Kochin Atteah, to regard the decree for restitution of conjugal rights as a mere declaration of rights, the Code of Civil Procedure (XIV of 1882) so far from treating the suit as a discredited one, or giving effect to Mr Justice Markby's views, provides in express terms by section 260 for the enforcement of such a decree by imprisonment or attachment of property, or by both. It would be difficult .... to say that the suit for restitution of conjugal rights stands discredited in this country, legislation has, on the contrary, done its best to provide means to enforce the decree, consistently with the general provision contained in section 342 of the Code limiting imprisonment to 6 months.

Lastly, as to the discretion which the Court has been asked to exercise in favour of the defendant, because she

had no voice in the choice of her husband, and has never adopted her guardian's choice, it was not suggested that the marriages of Hindu children are not perfectly valid without the exercise of any volition on their part. It is plain, therefore, that the Court is virtually asked to disregard the precepts of Hindu law, which treats the marriage of daughters as a religious duty imposed on parents and guardians, and to look at the matter from the purely English point of view, which seen in marriage nothing but a contract to which the husband and wife must be consenting parties.

As to the question of delicacy, which was much relied on by the learned Judge in the Division Court, we apprehend that the Civil Courts having assumed the jurisdiction cannot draw fine distinctions between a woman who has never lived with her husband and is averse to joining him and who has lived with him and perhaps acquired a physical or moral loathing for him, objects to returning. It may be advisable that the law should not adopt stringent measures to compel the performance of conjugal duties; but as long as the law remains, as it is, Civil Courts, in our opinion cannot with due regard to consistency and uniformity of practice recognize any plea of justification other than a marital offence by the complaining party, as was held to be the only grounds upon which the Divorce Courts in England would refuse relief in Scott V. Scott.

We must, therefore, reverse the decree of the Division Court, and remand the case for a decision on the merits after leaving the defendant's case. Costs of this appeal to abide the result.

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