COUNCIL OF THE GOVERNOR GENERAL OF INDIA

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Abstract of the Proceedings of the Council of the Governor General of India, assembled for the purpose of making Laws and Regulations under the provisions of the Act of Parliament, 24 & 25 Vic., cap. 67.

The Council met at Government House on Friday, the 27th November 1868.

PRESENT:

His Excellency the Viceroy and Governor General of India, *presiding.*
His Honour the Lieutenant Governor of Bengal.
The Hon'ble G. Noble Taylor.
The Hon'ble H. Sumner Maine.
The Hon'ble Colonel H. W. Norman, C. B.
The Hon'ble F. R. Cockerell.
The Hon'ble Sir George Couper, Bart., C. B.
The Hon'ble Mahárájá Sir Dirg-Bijay Singh, Bahádur, K.C.S.I. of Balrámpúr.
The Hon'ble G. S. Forbes.
The Hon'ble D. Cowie.

The Hon'ble Mahárájá SIR DIRG-BIJAY SINGH made a solemn declaration of allegiance to Her Majesty, and that he would faithfully fulfil the duties of his office.

The Hon'ble MR. FORBES and the Hon'ble MR. COWIE took the oath of allegiance, and the oath that they would faithfully discharge the duties of their office.

NATIVE MARRIAGE BILL.

The Hon'ble MR. MAINE moved that the Bill to legalize marriage between certain Natives of India not professing the Christian religion, be referred to a Select Committee with instructions to report in two months. He said—"Sir, this Bill, after leave to introduce it had been given, was published by your Excellency's permission under a suspension of the Rules, so that public opinion might pronounce upon it. It has elicited a good deal of criticism, and if the Council will allow me, I will proceed to notice briefly some of the observations which have been made upon it. But before I do so, I venture to point out how slight an extension of the existing law is involved in the measure, and that it is only the last of a series of steps which have all been taken in the same direction. I imagine it to be known to the Council that, owing to the language of certain Statutes and Charters regulating the jurisdic-

tion of the Indian Courts, the law of their religion became the law applicable to litigants. There being no fundamental law in India, the doctrine thence prevailed (though I should perhaps surprise the Council if I were to state how much doubt attends the point) that the greatest part of the civil rights of the Natives of India is determined by the religion which they profess. It would appear that, about forty years ago, some alarm was excited by the contention that any act which excluded a man from his religious communion entailed the forfeiture of his civil rights. For remedy of this, section 9 of Regulation VII of 1832 was passed, which provided as follows:—

"Whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindoo and the other of the Mahommedan persuasion: or where one or more of the parties to the suit shall not be either of the Mahommedan or Hindoo persuasions: the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled."

The language of this provision, it will be seen, is somewhat cumbrous and perplexed, and, moreover, it merely applies to Bengal. Accordingly, the legislature of the day passed Act XXI of 1850, of which section 1 is to this effect—

"So much of any law or usage now in force within the territories subject to the Government of the East India Company, as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories."

That is the *lex loci* Act of Lord Dalhousie's Government, which is still the charter of religious liberty in India. I myself do not entertain a particle of doubt, and I venture to think that no member of the Council who has read the discussion which preceded the enactment will doubt, that it was the intention of the framers of that Act to make it complete and to relieve from all civil disabilities all dissidents from Native religions. It was meant to condone all offences against religious rule, whether they were acts of omission or of commission. But probably from mistake, probably from attending too exclusively to the immediate question before them which affected only the first generation of dissidents, they left standing the greatest of all disabilities, the disability to contract a lawful marriage. It is incredible to me that, except by an oversight, they should have expressly provided for the protection of the right of inheritance, but should have omitted to provide for the right of contracting marriage, without which inheritance cannot arise. There has been received a petition from the British Indian Association of Bengal, in

which the Association objects not only to the present measure, but to Act XXI of 1850, which they say was passed against the wishes of the Native community. The Council will no doubt attach to the arguments of that petition such weight as it may think fit, but at present I claim the statement as to the *lex loci* Act as an admission that the principle of one includes the principle of the other, and that he who objects to the present Bill must also object to Lord Dalhousie's measure. There is, however, no doubt a defect of the law which has been brought to notice by a portion of the sect of Hindús known as the Brahmos, who celebrate their marriages according to a ritual which they consider purified. An opinion of the Advocate General given on a case stated by them is to the effect that these marriages are invalid, and the offspring of them accordingly illegitimate. I do not dissent from Mr. Cowie's opinion, and, indeed, I do not see how he could have given any other from a purely legal point of view. But it is impossible to have stated a principle of more formidable application. For example, the civil rights of the Sikhs in the Panjáb depend on the rules of their religion, because the Sikhs are considered to come under the description of Hindús within the meaning of the earlier statutes. But are the marriages of Sikhs celebrated with orthodox regularity?—and, if they are, where does orthodoxy begin and where does it end? I have mentioned the Sikhs, not for the purpose of starting this question, but on account of a fact which has become known to me since the Bill was published, and is doubtless known to your Excellency, that the Sikh religion, in itself a modern religion, has a tendency to throw off sub-sects which adopt considerable novelties of doctrine and practice. And in fact it would seem that the same process goes on all over India and even in provinces little affected by education and by the indirect influence of Christianity. The immobility of Native religions, no doubt, exists, but it exists within shifting limits, and there is much more formation of new creeds and practices than *primâ facie* appears. Now to all these new religious communities the legal doctrine of the Advocate General a[illegible]es. One reason, however, why we should remove the difficulty is that, in my humble judgment, it is entirely of our own creation. It must strike every observant man that, by our introduction of legal ideas and our administration of justice through regular courts, we give a solidity and rigidity to Native usage, which it does not naturally possess. It seems to me that, in order to prevent the monstrous injustice which occasionally results from this process, we must control it by the proper instrument—timely legislation.

Sir, I now proceed to the principal objections which have been raised against the measure. In front of these I place the objection that it does not apply to Christians. Now, Sir, every imputation that this Government intends to establish an inequality between different classes of Her Majesty's subjects

is serious, and therefore I am much indebted to those who have pointed out that this objection rests upon misapprehension. The words which render the Bill inapplicable to persons professing the Christian religion are taken from the Statute 14 & 15 Vic., c. 40, which regulates the civil marriage of Christians in India. It was necessary to keep the two systems of registration apart, since it would generally not be convenient for Native gentlemen and ladies to have recourse to the Registrar appointed under the Statute. But the principle of the present measure is to place Natives as nearly as possible on the same footing as Europeans.

Sir, the next objection—and no doubt this is a more genuine and sincere objection—is that civil marriage is quite modern in Europe, and that India may not be sufficiently advanced to dispense with the necessity of the forms of a religious marriage. The fallacy of the argument does not lie in the misstatement of the fact, but in the application of it, and in the assumption that it has any relevancy to the condition of India. It is true that civil marriage, which was once an universal institution of the Western World, disappeared for several centuries, and was only revived about a hundred years ago by the Emperor Joseph II in the hereditary states of the House of Austria. Probably, the last relics of the absolute obligation of religious marriage are at this moment disappearing in Spain. But the theory which imposed religious marriage in Europe has never had any counterpart in India. In European countries the legislator believed, or professed to believe, that some one religion was true, and could alone impart efficacy to the rites by which marriage was celebrated. That was his justification, whatever it was worth. For the protection of that one religion, and in its interest, he compelled everybody to submit to its ceremonial. But there never has been anything like this in India under the British Government, and whatever were the theory of the Muhammadans, there was nothing like it in their practice. It is a famous saying of a well known French Statesman, that "the law should be atheistic." Well, if the expression be permissible, the law of marriage has in this country always been atheistic, in the sense that it has been perfectly indifferent between several religions of which no two could be true. One may be true, but not two. This peculiarity of Indian law results in the rule that a man may at pleasure desert the religion in which he was born and contract a civil marriage. A Hindú can become a Christian or a Muhammadan, or he may adopt the Fetichism of the Kóls or Sántháls, and he can contract a lawful marriage. But if he stops short of that, as the law stands, marriage is denied to him. Take the case of a Hindú becoming Muhammadan, a kind of conversion which goes on every day of our lives. The convert is compelled by the principles of his new religion to regard the faith of his

ancestors as hateful and contemptible. But if he does not go so far as that, if he retains some tenderness for his old faith, and continues to regard it as not absolutely evil, he is debarred from all share in the fundamental institution of organized civil society. Such a state of the law is unexampled in Europe. Nothing in the Western World has any relevancy towards it or bearing on it.

I now pass to another objection, which is no doubt sincerely advanced. It is said that we are bound to protect the Native religions to the extent of forbidding their adherents to desert them, except for a recognised religion. There is no doubt that there is some sort of indirect protection to Native religions given by this state of the law of marriage in the existing condition of Native society. Now, can we continue this protection? I think we cannot. Take the case of the applicants for the present measure. They say that the ritual to which they must conform, if they wish to contract lawful marriages, is idolatrous. I don't use the word offensively, but merely in the sense in which a lawyer in the High Court is occasionally obliged to speak of the family idol. They say that the existing Hindú ceremonial of marriage implies belief in the existence or power of, and worship addressed to, idols. No doubt there are some of the Brahmos who have as little belief in these beings as the applicants, but still do not object to go through the ritual; and, naturally enough, they exhibit considerable impatience at the scruples of their co-religionists. But that is only a part of the inevitable history of opinion. The first step is to disbelieve; the next to be ashamed of the profession of belief. The applicants allege that their consciences are hurt and injured by joining in a ritual which implies belief in that which they do not believe. Now, can we compel them to submit to this ritual? Sir, nobody can feel more strongly than I do, that we are bound to refrain from interfering with Native religious opinions, simply on the ground that those opinions are not ours, and that we are bound to respect the practices, which are the expression of those opinions, so long as they do not violate decency and public order. That is the condition of our government in this country. I will even go further and say that, where a part of a community come forward and allege that they are the most enlightened members of it, and call on us to forbid a practice which their advanced ideas lead them to think injurious to their civilization, the Government should still be cautious. This is the case of those enlightened gentlemen who ask us to abolish polygamy, both as regards themselves and as regards their less informed co-religionists who do not agree with them. Here the Government of India, acting in concurrence with the Government of his Honour the Lieutenant Governor, has declined to listen to the petition, much as may be said for it. Here, however, we have a very different case. A number of gentlemen come

forward and ask to be relieved from the necessity of submitting to rites against which their own conscience rebels. They do not ask to impose their ideas on others, but to be relieved from a burthen which presses on themselves. Can we refuse the relief? I think we cannot. I think the point is here reached at which it is impossible for us to forget, that we do not ourselves believe in the existence or virtue or power of the beings in whose honour this ritual is constructed. And I say this the more confidently, because I believe that such a doctrine is in the true interest of the sincere believers in Native religions. If we once begin trampling on the rights of conscience, it is very far from certain that the process will continue for the advantage of Native religions. The members of these communities have the strongest reason for maintaining the absolute sacredness of the rights of conscience.

I now pass to a few verbal criticisms, for some of which there is foundation. It is objected that it is doubtful whether, in section 1, clause 2, the word 'unmarried' includes a widow. I do not feel any doubt myself as to the interpretation which a Court would put on the word, but it can be made still clearer in Select Committee. The words "without having been lawfully divorced," in section 8, have also attracted notice, and it has been asked whether the Government is about to propose a law of divorce. The words, I apprehend, must stand, because the measure may possibly apply to sects who have a law of divorce, and, indeed, even among the Brahmos, there are (I am informed) some Muhammadans whom it is not proposed to deprive of any of their privileges, except in so far as they are modified by this measure. So far as concerns the Hindús, there is not, on the part of your Excellency's Government, any intention to propose a law of divorce for them, and I am told that the Brahmos do not consider their sect sufficiently advanced for such a law.

Another objection which requires attention is that the Bill does not compel the Registrar to go to the house of the persons intending to marry. There is nothing to prevent his going, but it is said that he may demand an exorbitant fee as the price of his presence. That may be set right by a provision that he shall attend at the house of the marrying parties, on a fee being paid somewhat in excess of the ordinary fee.

Sir, I now come to a difficulty of which I myself have, from the first, felt the seriousness. When I obtained leave to introduce the Bill, I stated that I was not satisfied with the table of prohibited degrees. It was introduced at the suggestion of the applicants, and represents, I believe, the ideas of educated Hindús of some social position in Bengal. But it does not accord with Muhammadan ideas, and still less with the usage of Hindús beyond Bengal. The petition of the British Indian Association objects to the Bill that it legalizes marriages between members of different castes. The gentlemen

who have joined in that petition have, however, too good legal advice to be ignorant that, though intermarriages between the castes are no doubt improper according to Hindú notions, there has always, and everywhere, been a doubt whether the impropriety amounted to illegality. I am not now speaking of this class of prohibitions, but of the prohibitions in force in large portions of Upper India. These are extremely numerous and complex, and turn not so much on proximity of blood as on tribal relation. The whole subject is one of some interest, and has been lately examined by a member of my own profession, Mr. Maclellan. Reasonable or unreasonable, these prohibitions are tenaciously adhered to by certain of the Natives of Upper India, and would no doubt be enforced by the Courts. The difficulty of constructing a table of prohibited degrees, which would suit all Natives of India, is so enormous, that I am inclined to suggest, for the consideration of the Select Committee, a provision that nobody shall be allowed to marry, under the new law, any man or woman whom she or he might not lawfully have married if the law had not passed. This will enable us to get rid of the schedule altogether. I am the more inclined to recommend this course, because I do not think that the table of prohibited degrees in use in the Western World can be defended on grounds universally applicable. It seems to me that such a table can only be constructed on two sets of principles. Either it may be framed on physiological considerations, or on considerations arising from the feelings, or it may be prejudices, of the community affected. No doubt, our English table is very much more liberal than any that could be framed for India. But it can hardly be said to be constructed on physiological principles, for if it were, I presume a man would be allowed to marry his deceased wife's sister, and it is probable that the marriages of first cousins would be prohibited. Everybody knows that this permission and prohibition are always defended on peculiarities in the social organization of Western society. I will further allege, as a reason for the provision I suggest, that when civil marriage was introduced into England about forty years ago, the area of intermarriage was not enlarged. A man could no more than before marry his deceased wife's sister, nor could a person, ecclesiastically divorced, marry without a special Act of Parliament. European precedents are, therefore, in favour of the course which I am inclined to propose, and which amounts to limiting the measure for the present to the relief of conscience. I do not deny that this change will to some extent diminish the liberality of the Bill, but it removes a very serious difficulty, and I find that the Brahmos themselves do not wish the power of intermarriage to be enlarged, having always confined themselves within the boundaries of the existing laws. I believe too, that our Hon'ble Colleague, the Maháráját of Balrámpúr, will have his only objection to the Bill removed by this alteration. It is necessary, however, for

me to say that the section I suggest must be very carefully framed. The prohibition of marriage which it will recognise, must not be one dependent on the performance of any religious ceremonial, or the whole measure may be defeated.

Sir, I have to state in conclusion that, in my humble opinion, there can be no worse penalty on improper marriages than the disallowance of such marriages. Such a penalty has almost no characteristic which should distinguish a penalty. As regards those persons who directly join in the supposed offence, it falls on the more scrupulous and leaves the less scrupulous untouched. But in fact it hardly falls on the supposed offenders at all. It is really imposed on the children, who are dishonoured through life for an offence in which they could not possibly have participated. If it be really necessary for us to protect the Native religions by forbidding marriages not celebrated with their rites, it is much better that we should effect this by any direct civil penalty or if necessary criminal penalty, rather than by the disallowance of the marriage."

MR. MAINE then said that three petitions had been presented against the Bill, one from the Parsís, which would probably be met by the concession he had proposed. There was another from the British Indian Association, which was in fact a petition against Act XXI of 1850, and which in effect claimed that the majority of the members of every religious community should have absolute power to compel the minority to follow all received ceremonial. A third petition was from certain Native gentlemen at Bombay, who begged that the Bill might not be proceeded with till they had had an opportunity of stating their objections to it. MR. MAINE would cheerfully have complied with this request, and it would be seen that he had proposed a long date for the Report of the Select Committee, in order that Native opinion might declare itself. But MR. MAINE had brought on the measure in order that it might be discussed by the public in connection with the changes which he had proposed to-day.

The Motion was put and agreed to.

ARTICLES OF WAR BILL.

The Hon'ble COLONEL NORMAN moved that the Bill to consolidate and amend the Articles of War for the Government of Her Majesty's Native Indian Forces, which he had the honour to introduce on the 4th instant, be referred to a Select Committee with instructions to report in two months. He said that the objects and reasons of the Bill had already been explained to the Council; he would not therefore occupy the time of the Council any further.

The Motion was put and agreed to.

HIGH COURT (N. W. P.) CRIMINAL PROCEDURE BILL.

The Hon'ble MR. MAINE moved that the Bill further to amend the Criminal Procedure of the High Court of Judicature for the North-Western Provinces, be referred to a Select Committee with instructions to report in a month. He said that, as the law stood, when an European British subject and a Native were jointly charged with an offence, and committed for trial to the High Court for the North-Western Provinces, they must be tried separately, and in each trial a different procedure was followed—the European being tried in exercise of the Court's ordinary, while the Native was tried in exercise of its extraordinary, criminal jurisdiction.

This state of things having been found to cause practical inconvenience, the present Bill had been framed at the desire of the Local Government. The Bill simply enacted that such persons so charged might be tried together and by the same procedure, but gave the Native the option (which it was unlikely he would often exercise) of refusing to be tried by a jury, the majority of which are Europeans or Americans.

The Motion was put and agreed to.

The following Select Committees were named:—

On the Bill to legalize marriages between certain Natives of India not professing the Christian Religion—the Hon'ble Mr. Cockerell, the Hon'ble Sir George Couper, the Hon'ble Mahárájá Sir Dirg-Bijay Singh, and the Hon'ble Messrs. Shaw Stewart, Forbes and the Mover.

On the Bill to consolidate and amend the Articles of War for the Government of Her Majesty's Native Indian Forces—His Excellency the Commander-in-Chief, the Hon'ble Messrs. Maine and Cockerell, the Hon'ble Sir George Couper and the Hon'ble Messrs. Shaw Stewart, Forbes and the Mover.

On the Bill further to amend the Criminal Procedure of the High Court of Judicature for the North-Western Provinces—the Hon'ble Mr. Cockerell, and the Hon'ble Sir George Couper and the Mover.

The Council adjourned till the 4th December 1868.

WHITLEY STOKES,
Asst. Secy. to the Govt. of India,
Home Department (Legislative).

CALCUTTA,
The 27th November 1868.

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