*Gail Pearson**

THE RESIGNATION OF THE THIRD INDIAN LAW COMMISSION: WHO MAKES LAW?

Abstract

Codes of law are meant to provide a coherent whole within a given taxonomy of law. The code is a very old idea; think Justinian. In the English context, Jeremy Bentham revived the idea at the end of the 18th century. The systematisation of law in a code, by high-level principles or rules, contrasts with the organic evolution of law through decisions made on particular disputes by courts. The British worked on the possibility of codes within two frames: codes for Britain and codes for the Empire. This article looks at a particular moment in making the first commercial code for India, the *Indian Contract Act 1872* (India). The resignation of the Law Commissioners who had initially drafted that Act raises a question where there is an intersection of law and history, namely where should authority to make law lie?

I Introduction

In July 1870, the majority of the members of the third Indian Law Commission resigned. Its members had been appointed in England in 1861 by Queen Victoria to draft substantive law for India.[1] Their will had been thwarted by the government of India. The subject of the quarrel was a proposed code of law for India to encompass contracts, sale of moveables, indemnity and guarantee, bailment, agency and

* Professor of Business Law, University of Sydney.

1 The term 'substantive law' is drawn from Jeremy Bentham's distinction between substantive and adjectival law. The proposal to draft a substantive law was made by the second Indian Law Commission set up in 1853. In 1856, the second Indian Law Commission recommended a substantive civil law for India based on English law, to govern all classes of persons (including Hindus and Muslims), and 'prepared as it ought to be with a constant regard to the condition and institutions of India, and the character, religions, and usages of the population': United Kingdom, *Second Report of Her Majesty's Commissioners Appointed to Consider the Reform of the Judicial Establishments, Judicial Procedure, and Laws of India* (Report No 2036, 1856) 8 ('*Second Report*').

partnership. In short, the chief requirements for a modern commercial law.[2] Contract law was part of a bigger private law project.[3]

The resignation signalled a shift in the approach to lawmaking in India. The *Indian Contract Act 1872* (India) ('*Indian Contract Act*') was the first successful codification of private law obligations in the common law world and widely influential as a source of statutory rules for contracts.[4] It was drafted in part by judges and will soon be 150 years old. We inherit many of our law-making processes from the 19th century world. One that we do not, is the practice of judges drafting legislation.[5]

The background to the four Indian Law Commissions (collectively, the 'Commission') tasked with drafting laws, was increasing intensity of British control of India. The first Commission was a British parliamentary response to the East India Company which had taken on a role in the Mughal legal system and courts, and transformed itself from a trading company. It linked to the *Saint Helena Act 1833,*[6] which established the power of the Governor-General to pass legislation for all of British India and reduced the role of the East India Company to be primarily administrative. That Commission ended in 1843, but another was appointed in 1853 when the Parliament again renewed the *East India Company Charter Act 1813*.[7] Unlike the first, this second Commission and later the third Commission, appointed in 1861, met in London, not India. The fourth Commission was appointed in 1875, meeting in India. Not all Commissioners had a judicial background.

---

2 This was the *Indian Contract Act 1872* (India) ('*Indian Contract Act*').

3 In addition to codifying the general law of contract, the *Indian Contract Act* includes special contracts. This is because it was conceived as part of one overarching code for civil law.

4 For instance, the *Contracts Act 1950* (Malaysia) is based on the *Indian Contract Act*. On sales, part of which were governed by the *Indian Contract Act* until 1930, see Gail Pearson, 'Relevance of Mackenzie Chalmers to Australian Law' (2011) 85(2) *Australian Law Journal* 97; Gail Pearson, 'Reading Suitability against Fitness for Purpose: The Evolution of a Rule' (2010) 32(2) *Sydney Law Review* 17.

5 For contemporary judicial comment on judges who drafted statutes, see discussion of the *Statute of Frauds 1677,* 29 Car 2, c 3 and the Lord Chancellor in *Pipikos v Trayans* (2018) 265 CLR 522, 580–2 [152]–[155] (Edelman J). I am grateful to Associate Professor Andrew Godwin for drawing this to my attention.

6 3 & 4 Wm 4, c 85 ('*Saint Helena Act 1833*'). Also titled *Charter Act 1833* and *Government of India Act 1833*, but it maintains the short title of *Saint Helena Act 1833* as per the *Statute Law Revision Act 1948*, 11 & 12 Geo 6, c 62, s 5, sch 2. As this provision has been repealed, the short title is authorised by the *Interpretation Act 1978* (UK) s 19(2). On the significance of the Act see Joshua Ehrlich, 'The Crisis of Liberal Reform in India: Public Opinion, Pyrotechnics, and the Charter Act of 1833' (2018) 52(6) *Modern Asian Studies* 2013

7 53 Geo 3, c 5. Also titled *Charter Act 1813*.

The first Commission was a failure. Though it drafted reports, nothing was enacted.[8] The events of 1857 altered the impetus of government, dislodging the East India Company, and establishing Crown rule.[9] This led to an increase in legislative activity, including the *Code of Civil Procedure 1859* (India), the *Indian Penal Code 1860* (India), *Code of Criminal Procedure 1861* (India) and the *Indian High Courts of Judicature Act 1861*,[10] passed by the British Parliament. They had all been drafted by the first and second Commissions.[11] It was only at this point that attention turned to substantive law, the job of the third Commission. The fourth Commission reviewed and carried forward the work of the third Commission.[12] Scholars have given attention to the first Commission and the Penal and Procedure Codes as a touchstone of legal modernisation and an emblem of imperial relations.[13] There has been less notice of the subsequent Commissions and private law obligations.[14]

Although there are earlier traces of the idea of a code of law for India, it was articulated clearly by Rajah Rammohun Roy and subsequently by Thomas Babington Macaulay in the 1830s.[15] Roy and Macaulay envisioned different things. The aristocratic social reformer, Roy, educated in the classical tradition of India (including

8 The *Indian Penal Code 1860* (India), published in 1837, was not enacted until 1860.

9 The variously termed War of Independence, Rebellion or Mutiny occurred in 1857.

10 24 & 25 Vict, c 104.

11 Mahendra Pal Jain, *Outlines of Indian Legal and Constitutional History* (Universal Law Publishing, 8th ed, 2006); Whitley Stokes, *Anglo-Indian Codes* (Clarendon Press, 1887).

12 See, eg, *Negotiable Instruments Act 1881* (India). The third Commission reported on promissory notes, bills of exchange and cheques. This was also subject to a Select Committee and consultation process, something not welcomed by the Commissioners: see Letter Marked Confidential from William Macpherson, Indian Law Commission, to Mountstuart Elphinstone Grant Duff, 16 January 1869 (BL IOR L/PJ/5/428) ('Letter dated 16 January 1869').

13 See, eg, Elizabeth Kolsky, *Colonial Justice in British India: White Violence and the Rule of Law* (Cambridge University Press, 2010); David Skuy, 'Macaulay and the Indian Penal Code of 1862: The Myth of the Inherent Superiority and Modernity of the English Legal System Compared to India's Legal System in the Nineteenth Century' (1998) 32(3) *Modern Asian Studies* 513.

14 Cf Stelios Tofaris, 'A Historical Study of the Indian Contract Act 1872' (PhD Thesis, University of Cambridge, 2011); Justice JD Heydon, 'The Origins of the Indian Evidence Act' (2010) 10(1) *Oxford University Commonwealth Law Journal* 1.

15 Rajah Rammohun Roy, *Exposition of the Practical Operation of the Judicial and Revenue Systems of India: And of the General Character and Condition of Its Native Inhabitants, as Submitted in Evidence to the Authorities in England* (Smith, Elder and Co, 1832) 43–5; Select Committee on the Affairs of the East India Company, *Report from the Select Committee on the Affairs of the East India Company: With Minutes of Evidence in Six Parts and an Appendix and Index to Each* (House of Commons Paper No 735, Session 1831–32) vol 5 ('*Report from the Select Committee on the Affairs of the East India Company*'); United Kingdom, *Parliamentary Debates*, House of Commons, 10 July 1833, vol 19, col 479–550, 509 (James Buckingham) ('House of Commons *Hansard*').

Persian, the language of Mughal administration), wanted a civil code based on existing Hindu, Muslim and English law to assist judges and improve administration. There were both Indian and English judges in the complex court system. Macaulay, a deputy in the Board of Control which oversaw the East India Company from London, and Member of Parliament, wanted a single code as an adjunct to government and a check on power. He talked himself into a dual appointment on the Governor-General's Council and as first Indian Law Commissioner. Macaulay was soon making grandiose statements that knowledge of the 'Shasters and Hedaya [would] be useless' once his code, which was still to be drafted, was in place.[16] Tension in views about the value, or otherwise, of pre-existing law and norms continued to play out in events leading to the resignation.[17]

The third Indian Law Commissioners resigned for a number of reasons. From the record, we can identify their frustration with the failure and delays in enacting legislation in India,[18] the changes in India to the text of legislation proposed by the Commissioners, and a view that the 'legislators' in India were taking too much notice of 'the native'.[19] From a commercial lawyer's point of view, the dispute was about title or property in goods, and from a jurisprudential perspective, the correct placement of a particular remedy (specific performance) as substantive or adjectival law — the Benthamite descriptors. From a political standpoint, it was about the distribution of powers between different arms of government. For an historian, they resigned for these and other reasons. The context of the resignation raises questions of despotism; who is the competent authority to make law; legal science; universality

16 Thomas Babington Macaulay, 'Minute by the Hon'ble TB Macaulay, dated the 2nd February 1835' (Minute, 2 February 1835) [30] <http://www.columbia.edu/itc/mealac/pritchett/00generallinks/macaulay/txt_minute_education_1835.html>.

17 Gail Pearson, 'Consultation for a Code: Nineteenth-Century Consultation on the Proposed Commercial Laws' in N Jayaram (ed), *Ideas, Institutions, Processes: Essays in Memory of Satish Saberwal* (Orient BlackSwan, 2014) 115.

18 The third Indian Law Commission resigned in 1870: 'File on Resignation of the Indian Law Commission' (Minute, 14–20 July 1870) (BL IOR L/PJ/5/438) ('File on Registration of the Indian Law Commission'). James Fitzjames Stephen attributed the resignation to delay: James Fitzjames Stephen, 'Codification in India and England: Opening Address of the Session 1872–3 of the Law Amendment Society' (1872) 1(11) *Law Magazine and Review* 963, 971.

19 The resignation correspondence appears to have been destroyed or altered. Partially decipherable handwritten letters of July 1870 between Henry Maine, Edward Ryan and H Anderson suggest Maine was in discussion with the Commissioners, that the Commissioners were rash in making a statement about favouring 'the native', and that the India Office was happy to oblige in deleting an offending sentence from the correspondence: File on Registration of the Indian Law Commission (n 18). Historically, Sir John Jervis took offence at having to refer proposals back to India: United Kingdom, *Parliamentary Debates,* House of Commons, 21 July 1856, vol 143, col 1121–71 (Vernon Smith). John Macleod had published a pamphlet in 1857 on the supposed autonomy of the Legislative Council of the Governor-General: EI Carlyle, 'John Macpherson Macleod' in Katherine Prior (ed), *Oxford Dictionary of National Biography* (Oxford University Press, rev ed, 2004).

of law; and whether a proper role for law, as recently put by Commissioner Kenneth Hayne in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, is to meet community expectations, and eliminate legislative complexity ridden with exceptions.[20]

There is a further narrative. At the same time as the Commissioners were drafting codes of law for India, some of their members were involved in preparatory work in digesting laws to prepare codes of law for the United Kingdom ('UK').[21] Success or failure in India would reflect on their work for Britain.

This is a story at the intersection of law and history. This article analyses the authority for lawmaking under four heads: the judges; the UK government; the government of India; and the community.[22] There was a shift in tone from the sweeping statements of the 1830s to the post-1857 statements and action on law for India. The British did not wish to interfere in a way that unsettled the country and they required acceptable law. Consultation within India, not unlike an exposure draft process used today, became standard for commercial laws. Far from being useless, knowledge of Hindu and Muslim law and commercial norms contributed to the usefulness of responses to proposed legal rules. The Benthamite ideal of universal law was one thing; universal acceptance of another's authority to make and control law was another. The resignation marked recognition that commercial law rules could not be foisted onto India without attention to Indian governance and norms.

II The Judges

We can start from two points here: Jeremy Bentham or controlling power in India.

Bentham rejected the common law and the role of judges and judicial decision-making, seen famously in his declaration that judges make the law (as if for a dog).[23]

---

20 *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 456, 494.

21 See below n 35.

22 I am not using community in the sense usually understood in India. See, eg, Surinder S Jodhka, 'Community and Identities: Interrogating Contemporary Discourses on India' (1998) 47(2) *Sociological Bulletin* 254.

23 Jeremy Bentham, *Truth Versus Ashhurst: Or, Law as It Is, Contrasted with What It Is Said to Be* (R Carlile, 1823), cited in HJ Randall, 'Jeremy Bentham' (1906) 22(3) *Law Quarterly Review* 311, 317. A fuller quotation is: '[i]t is the judges that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him. This is the way you make laws for your dog, and this is the way the judges make law for you and me': 'Truth Versus Ashhurst', *Bentham Project* (Web Page, 2020) <https://www.ucl.ac.uk/bentham-project/truth-versus-ashhurst>.

Bentham posited a code as providing certainty and intelligibility as to what a person could or could not do compared with the opaqueness of 'judge-made Law'.[24]

Alternatively, we can start with British attempts to constrain the East India Company in the late 1820s by controlling a small Crown court with limited jurisdiction within Calcutta: the Supreme Court of Judicature at Fort William at Calcutta (Kolkata) ('Supreme Court'). At this point, the Governor-General-in-Council had the power to make law within the territories of the Company in India,[25] but these laws had to be accepted by the judges of the Supreme Court who were also accused of exceeding their jurisdiction. The Supreme Court, established in 1774 by the *Regulating Act of 1773*, 13 Geo 3, c 63, derived its authority from the British Crown. It was distinct from the *Suddar* or *Adalat* courts dating from 1772 which perpetuated Mughal traditions. Lord William Bentinck's proposal was for a Legislative Council subordinated to the English Parliament and also for a code of law, the idea being that a code of law would restrain the judges.[26]

When we get to the later debates on the desirability of codes for India, a common theme to justify codes was the lack of quality judges in all the multitude of courts in India. English judges in India were insufficiently experienced to develop the common law; many were not qualified to practice in the UK.[27] They were individuals exercising some kind of judicial function who had no legal training, with many depending on interpretations of law by Indian lawyers which were said (by Roy) to be inconsistent.[28] Contradictorily, arguments against codification for Britain were led by some judges who strongly resisted changes to the common law and, presumably, did not view themselves as unqualified.[29] So, there were views that because judges could not make law for India but could make or declare law for the UK, that a code

---

24 The Juridical Society, *Papers Read Before the Juridical Society: 1855–1858* (V & R Stevens & GS Norton, 1858) 213.

25 Select Committee on the Affairs of the East India Company, *Appendix to the Report on the Affairs of the East India Company Vol V: Legislative Councils, A New System of Courts of Justice and a Code of Laws, in British India* (House of Commons Paper No 320E, Session 1831) 79, 97 ('*Appendix to the Report on the Affairs of the East India Company*'). There were issues about the English inhabitants.

26 Ibid 54.

27 East India (Judges), *Return of the Judges Now Presiding in All the Law Courts in India: Distinguishing Those Who Were Entitled to Practise at the Bar in England, Ireland, or Scotland, from Those Who Have No Such Legal Qualification* (House of Commons Paper No 556, Session 1867).

28 Roy (n 15); *Report from the Select Committee on the Affairs of the East India Company* (n 15) 726.

29 On judicial opposition to codification in England because it threatened the common law method and the central role of judicial reasoning, see Lindsay Farmer, 'Reconstructing the English Codification Debate: The Criminal Law Commissioners 1833–45' (2000) 18(2) *Law and History Review* 397; Michael Lobban, 'How Benthamic Was the Criminal Law Commission?' (2000) 18(2) *Law and History Review* 427.

of law would be more useful for India than for Britain, and that British judges could draft legislation for India.[30]

Who were the Law Commissioners charged with drafting codes of law for India? The first Commission, initially headed by Macaulay (a friend to both Roy and Bentham), did not include judges.[31] As Macaulay took up the new post as Law Member to the Governor-General-in-Council in 1834, this Commission actually sat in India.[32] Subsequent Commissions included a strong contingent of judges. There was some overlap between the second and third Commissions.[33]

The relevant judges were Sir John Romilly, Sir John Jervis, Sir William Erle, Robert Lush and Sir Edward Ryan. Romilly, later Lord Romilly, was on both the second and third Commissions. He was Master of the Rolls, a senior judge in Chancery, and from

30 But note that English judges in Bombay such as James Mackintosh and Erskine Perry supported legal reform in both the UK and India.

31 The role of Law Member on the Legislative Council of the Governor-General was created with the *Saint Helena Act 1833*. Macaulay had been called to the Bar but did not have a legal career. JM Macleod, also later on the third Law Commission, was an East India Company linguist and civil servant initially in Madras. He was involved in drafting the Penal Code which included illustrations and may have influenced the third Law Commission to adopt illustrations in the *Indian Contract Act* to supplement legislative rules. He was appointed to the Privy Council in 1871. On the purpose of illustrations, see: Lord Macaulay, *Speeches and Poems: With the Report and Notes on the Indian Penal Code* (Houghton, Osgood and Company, 1878) 313–29, 352; TB Macaulay, JM Macleod, GW Anderson and F Millett, *Indian Law: A Copy of the Penal Code Prepared by the Indian Law Commissioners and Published by Command of the Governor-General of India in Council*, 14 October 1837 (House of Commons Paper No 673, Session 1837–38).

32 The position of Law Member and Chair of the Indian Law Commission was originally distinct. Macaulay was in India by the end of 1834. It is suggested Macaulay took up the role in India because it paid well. The Commission was to investigate 'the Nature and Operation of all Laws whether Civil or Criminal, written or customary, prevailing and in force in any Part of the said Territories, and whereto any Inhabitants of the said Territories, whether *Europeans* or others, are now subject': Frederick Arnold, *The Public Life of Lord Macaulay* (Tinsley Brothers, 1863) 176, 177, 180; *Saint Helena Act* (n 6) s 53.

33 The second Commission was appointed in 1853. Its focus was courts and procedure. Better facilities were the reason given for sitting in England. In any case, those appointed were highly unlikely to have agreed to spend any considerable time in India. The Commissioners were Sir John Romilly, Sir John Jervis, Sir Edward Ryan, Charles Hay Cameron, John McPherson McLeod, John Abraham, Francis Hawkins, Thomas Flower Ellis, and Robert Lowe (later Lord Sherbrooke). The third Commission was appointed in 1861, again chaired by Romilly. The other Commissioners were Sir William Erle, Sir Edward Ryan, Robert Lowe, Sir James Shaw Willes and John Macpherson Macleod. WM James and J Henderson became Commissioners later. The Commission Secretary was Sir William Macpherson.

a Benthamite family as his father was Sir Samuel Romilly.[34] Jervis was Chief Justice of the Court of Common Pleas and central to the reform of English local courts. He was on the second Commission. Erle, to become Chief Justice of the Common Pleas and a Privy Councillor, Sir James Shaw Willes also on Common Pleas, and Lush, later Lord Justice Lush, of the Queen's Bench and the Privy Council, were on the third Commission. Ryan, a former Chief Justice in Calcutta, and friend to Macaulay, was on both the second and third Commissions.

The top British judges in law and equity were drafting codes for India. These judges were also closely involved with law reform and codes in the UK.[35] They were invested in a project that could be described as an experimental laboratory or a substitute for what was also proving stubbornly unsuccessful for the UK. In the third Commission, they drafted detailed rules on contract which did not always replicate the law as found in the common law in Britain.[36] Their rules were designed as an improvement, not a vulgarisation of British law.

The third Commission led by the British judges resigned because they did not want anyone, lest of all those in India, to interfere with the rules they drafted. They were arguing for scientifically devised rules.[37] They resigned, alleging that laws in India were being made by an unelected, unrepresentative body: the Executive Council. It is ironic that the first Commission had affirmed the sentiment: '[t]he discretion of a judge is the law of tyrants'.[38]

---

34 The Master of the Rolls presided over the Rolls Court that existed from 1833–81. The office of Master of the Rolls continues in name, though the office is now a presiding member of the England and Wales Court of Appeal: 'History of the Master of the Rolls', *Magna Carta Today* (Web Page) <https://magnacarta800th.com/magna-carta-today/the-magna-carta-trust/history-of-the-master-of-the-rolls/>.

35 Romilly set up the Chancery Commission and the Statute Law Consolidation Commission. Jervis chaired a series of enquiries into procedure in the common law courts. Erle was a Judicature Commissioner. Lush was a member of the English Criminal Code Committee. Ryan was a member of the English Commission on Criminal Procedure. Lowe, Willes and Maine were on the Digest of the Law Commission.

36 They did not replicate the *Statute of Frauds 1677,* 29 Car 2, c 3 requiring contracts to be in writing. They modified the doctrine of consideration, rejected gradations of bailment, proposed a general standard of care, and eliminated the distinction between penalties and liquidated damages. They proposed a controversial rule on passing ownership in goods. As Whitley Stokes points out, some rules, as eventually passed, departed from civil, English, Hindu and Muslim law: Stokes (n 11) 624–5. The bailment rule in s 165 of the *Indian Contract Act* states: '[i]f several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all in the absence of any agreement to the contrary'. They were well aware of European and proposed United States' codes.

37 Letter dated 16 January 1869 (n 12).

38 East India (Indian Law Commission), *Copies of Special Reports of the Indian Law Commissioners* (House of Commons Paper No 272, Session 1845) "On Civil Judicature in the Presidency Towns" 108.

III The UK Government

Constraining tyranny or despotism had been a prime reason for establishing a Commission to make codes of law for India in the first place. The Benthamites had rejected judge-made law in preference for a code, the Sovereign had appointed judges as Commissioners, and the judges tasked with drafting that law had resigned. Should the UK government have had the authority with respect to the details of code — in our case, commercial law rules?

In 1833, Macaulay debated the renewal of the Charter for the East India Company.[39] His conundrum was how to bring good government without bringing free government, and how to provide security against oppression without representative government.[40] How to graft the blessings of the 'natural fruits of liberty' onto 'despotism' and check abuses?[41] For Macaulay, law was the answer and reform would balance the competing interests of the Supreme Court and the Governor-General. And a code was the answer to law:

> Having given to the Government supreme legislative power, we next propose to give to it for a time the assistance of a Commission for the purpose of digesting and reforming the laws of India, so that those laws may, as soon as possible, be formed into a code.[42]

Macaulay was unfazed by absolutist government in India compared with representative government in England. A code made by an absolutist government in India was an answer to arbitrary judge-made law. At the same time, the 'Imperial Parliament' was to be the 'umpire'.[43]

The Crown gained authority after 1857 and in 1861, the *Indian Councils Act 1861* (India) reserved to the Queen the right to disallow any law passed by the Governor-General. In an early skirmish involving law reform, the Secretary of State (a role which replaced the President of the Board of Control) wrote to the Governor-General pointing out that the power 'to control and direct the action of the Government of India' that had once been held by the East India Company, was now held by the Secretary of State — it had not been 'taken away or curtailed'.[44] The Secretary

---

39 House of Commons *Hansard* (n 15) 509.

40 Ibid 512–13.

41 Ibid 513.

42 Ibid 530. Macaulay was not the first to propose codes for India.

43 Ibid 528. Section 41 of the *Saint Helena Act 1833* still gave the Board of Directors of the East India Company power to disallow any Act of the Indian legislature within one year. But the Company was subject to control of the Parliament.

44 Letter from the Secretary of State for India to the Governor-General of India, 31 March 1865, [9], reproduced in House of Commons, *East India (Legislation)* (House of Commons Paper No 243, Session 1876) (BL IOR PP LVI 1876 *East India Legislation*) ('Letter dated 31 March 1865'). This concerned the Civil Procedure Code which had been drafted by the second Commission and was being considered by the Select

of State equated Bills of the Indian government with government Bills in the UK Parliament. He chided the Governor-General for sharing despatches with his Council when it included additional members for making legislation.[45]

When the tussle began with Sir Henry Maine, the Law Member on the Governor-General's or Viceroy's Executive Council, the Law Commissioners believed the UK government should decide whether or not to adopt their reports, with or without modification. They said if the 'local' Legislative Council was the 'fitter body', the Commission could not be 'justified'.[46]

The British Secretary of State for India backed the Law Commissioners. He directed a procedure for code lawmaking. In India, it should involve only the Legislative Council ie, the Governor-General-in-Council, and confidential advice from local judges or administrators. It should not involve a Select Committee.

The following, directed by the Secretary of State, should be the procedure for code lawmaking. The Secretary of State sends a proposed law to the Viceroy. Any local judicial or administrative advice, if required, should be confidential. The proposal should then be considered in Council. Any doubts should be communicated to the Secretary of State. The Secretary of State would consult the Law Commissioners. The law would be returned to the Viceroy in the desired shape. The law would then be introduced into the Council for making laws and regulations. The Viceroy would use all measures to pass the law as a government measure. There was an exception for a 'strong unforeseen objection'.[47]

The sticking point for both Maine and later James Fitzjames Stephen, who succeeded him, was the opportunity to discuss the drafts sent from the Law Commissioners in a Select Committee (which had wider membership than the Legislative Council), circulate a proposed law for comment within India and communicate directly with the Law Commissioners.[48] They did not want the Secretary of State to be legislator and the Council 'a mere instrument'.[49]

Committee of the Governor-General-in-Council: Letter from Governor-General of India to the Secretary of State for India in Council, 15 December 1864 (BL IOR PP LVI 1876 *East India Legislation*) ('Letter dated 15 December 1864').

45 Letter dated 31 March 1865 (n 44).

46 Letter dated 16 January 1869 (n 12).

47 Letter from Argyll, Secretary of State for India to the Governor-General of India, 18 March 1869, [2], reproduced in House of Commons, *East India (Legislation)* (House of Commons Paper No 243, Session 1876) (National Archives of India (NAI) Home Legislative A Department May 1872, No 600) ('Letter dated 18 March 1869').

48 HS Maine, 'Minute by the Honourable HS Maine on the Indian Contract Bill' (NAI Home Legislative A Department May 1872, No 579, 11 September 1868) (BL IOR PP LVI 1876 *East India Legislation*) ('Minute by the Honourable HS Maine on 11 September 1868'); James Fitzjames Stephen, 'Procedure in Making Laws No 5' (Minute, 11 February 1870) 109 (BL IOR /V/27/100/6) ('Procedure in Making Laws No 5').

49 Letter from the Government of India to the Secretary of State for India, 22 March 1870 (NAI Home Legislative A Department May 1872, No 601) (BL IOR PP LVI 1876 *East India Legislation*) ('Letter dated 22 March 1870'). See also below n 64.

By contrast, John Stuart Mill, supporter of the Company and sometime opponent of the Secretary of State, had earlier put the matter differently. He said that the government in England could not hand over its 'sacred trust to a few despots, armed with the whole power of the stronger country'.[50] His solution was for the UK Parliament to legislate for India and then direct the Legislative Council to pass the law or have no role at all.[51] Mill believed the government of India incapable of governing and the Law Commissioners more competent and qualified.

There were three contenders for despot: the Secretary of State, aided by the Law Commissioners; the Governor-General ie, Viceroy; and law. The Secretary of State and Governor-General were accountable. There was 'representation' of a sort in the UK as a check on power — though the Parliament took very little interest in India. Law itself might stand in for the Commissioners. Radhika Singha argued for law as despotism[52] — and unless law is intelligible and knowable, reflects social norms, and is allied to legal reasoning within court systems to properly resolve disputes, it *may* be. The argument for a code as despotism might have been stronger, *but for* the process in India for formulating its rules.

IV The Government in India

The government in India did not want law foisted upon it.[53] Six years before the Commissioners resigned, the Governor-General had warned of embarrassing conflict if the government in India were forced to halt a properly introduced Bill due to 'orders from home'.[54] At this point, the Secretary of State wished for 'harmonious action' and 'the well-being of that vast and important empire'.[55] At the same time, he insisted that his despatches on legislative matters should not go beyond the Governor-General-in-Council to a Select Committee.[56] But the question of whether

50 John Stuart Mill, 'Minute by Mr John Stuart Mill' (Minute), reproduced in House of Commons, *East India (Legislation)* (House of Commons Paper No 243, Session 1876) (BL IOR PP LVI 1876 *East India Legislation*) ('Minute by John Stuart Mill'). This undated Minute was possibly in the context of proposed amendments to the Code of Civil Procedure passed in 1859. See above n 44.

51 Ibid.

52 Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (Oxford University Press, 1998).

53 The UK Parliament had first conferred legislative power on the Governor-General-in-Council in India in 1772 and all legislative power on the Governor-General-in-Council with the *Government of India Act 1833* (*Saint Helena Act 1833*): MD Chalmers, 'The Indian Statute Book' (1897) 2(1) *Journal of the Society of Comparative Legislation* 299, 302, 304.

54 This was in the context of postponing the Civil Procedure Code: Letter dated 15 December 1864 (n 44) [9].

55 Letter dated 31 March 1865 (n 44) [16].

56 Ibid.

the government of India could legislate on its own responsibility or would be forced to adopt legislation did not go away.

The resignation of the third Commission involved a quarrel over the relative powers of the Secretary of State and the Governor-General-in-Council. It was also a quarrel over who could talk directly with whom. Could the Select Committee in India communicate directly with the Commissioners in the UK? Could the government in India canvas those in India (British and Indian), who may have useful opinions on particular rules?

The actual process in India for considering a proposed law did not accord with UK expectations of how this should happen. In India, there was 'real power in the discussion' of the proposed codes, but not until drafts were sent to a Select Committee.[57] A Select Committee included English and Indian business interests in addition to the civil service members.[58] The Select Committee discussed Bills with the aid of comments from the Law Member and opinion from an exhaustive consultation process in India. Mill thought this simply wasted time and resulted in premature criticism.[59]

Maine produced copious commentary for the Indian Contract Bill.[60] He was frustrated by the inability of the Law Member or Select Committee in India to communicate directly with the Commissioners in the UK.[61] If the Select Committee could not communicate directly with the Commissioners as Maine proposed via the Indian Legislative Secretary (who would correspond with the Secretary of the Law Commission), he had a solution. Either the Commissioner's legislation was a draft for the Indian legislature to work on, or the Secretary of State should ask Parliament to declare the Commissioner's proposals to be law at once, possibly subject to amendment by the Council for making laws and regulations.[62] Maine said '[t]he first

57 Letter dated 22 March 1870 (n 49).

58 Minute by the Honourable HS Maine on 11 September 1868 (n 48).

59 Minute by John Stuart Mill (n 50).

60 Notes by Mr Maine (15 July 1867, 23 July 1867, 25 July 1867, 27 July 1867, 14 August 1867), reproduced in House of Commons, *East India (Contract Law): Copies of Papers Showing the Present Position of the Question of a Contract Law for India and of All Reports of the Indian Law Commissioners on the Subject of Contracts* (House of Commons Paper No 239, Session 1867–68) 91, 94, 95, 97, 99 ('*East India* (*Contract Law)*'); Draft Indian Contract Bill 1867 (India) ('Draft Indian Contract Bill'); Sir Henry Maine, 'Statement of Objects and Reasons', *Gazette of India* (New Delhi, 9 July 1867) ('Statement of Objects and Reasons'). During this period of discussion by the Council, there were also comments from the Governor-General and from other members, especially Major-General Sir Henry Marion Durand: Sir Henry Maine, 'Minute by the Honourable HS Maine on 9 April 1868' (NAI Home Legislative A Department May 1872) app S1 ('Minute by the Honourable HS Maine on 9 April 1868').

61 Minute by the Honourable HS Maine on 11 September 1868 (n 48).

62 Ibid.

result will, I am convinced, be ultimately most offensive to the Law Commissioners; the last, I am informed, is viewed with distrust by the authorities most responsible for the good government of India'.[63]

The Commissioners were aggrieved that the authorities in India treated their reports as mere drafts criticised by subordinates, that some rules were 'publicly condemned' and revised by a Committee of the Legislative Council, and that the style and language of the code was ultimately decided by the Council.[64] The Commissioners regarded Maine's views on certain technical matters as unjustified. They criticised those who debated their drafts, believing they should have been treated as government Bills. The Commissioners said the government of India misapprehended its relationship with the Commissioners and issued a challenge at the beginning of 1869: 'If the local Council, acting in its legislative capacity, is the fitter body to decide on these subjects, the existence of the Indian Law Commission cannot be justified.'[65]

Stephen, who replaced Maine as Law Member by the end of 1869, also commented extensively on the process of lawmaking. He rejected the procedure directed by the Secretary of State as it circumvented a Select Committee and gave primacy to the Commissioners. The Select Committee discussed drafts clause by clause — if the Governor-General-in-Council had to do this, it would create a heavy burden and be detrimental to other work.[66] Stephen put the matter succinctly in 1870 prior to the Commissioners' resignation: if there were no legislative discretion in India, he said, the Secretary of State would be invested 'with the character of the legislator for British India, and would convert the Legislative Council into a mere instrument to be used by him for that purpose'.[67]

Stephen raised another problem if proposed legislation was not fully discussed. If matters were not debated in a Select Committee, not only would there be no input from non-officials with knowledge and wide experience of 'every part of the country', they would be unlikely to participate in lawmaking at all.[68] In the end, Stephen was quite blunt in his declaration of March 1870: 'We are responsible for the enactment of those drafts into laws, and that responsibility appears to us to carry with it the right of deciding upon the form in which Acts are to come before your Grace for final approval or rejection.'[69]

The Commissioners then resigned and the Secretary of State continued to assert the subordination of the government of India, noting it was no different from other 'dominions where the authority of the legislating body is derived from the Crown,

63 Ibid.

64 Letter dated 16 January 1869 (n 12).

65 Ibid.

66 Procedure in Making Laws No 5 (n 48).

67 Ibid.

68 Letter dated 22 March 1870 (n 49) [6].

69 Ibid [10].

and is not founded on the principle of popular representation'.[70] Yet, as acknowledged by the Secretary of State, Bills may require modification due to 'local circumstances, the habits or the prejudices of the people'.[71] This was a significant departure from the earlier stance.

Stephen also threatened to resign if any remaining Commissioners or a new Commission was put over his head.[72] The government of India was conciliatory, stating that it had never disputed the principle of 'final control'.[73] The Secretary of State wanted legislation passed quickly to address the issue of delay. Stephen did not want this. He wanted the opportunity to put his stamp on the legislation and in particular take advantage of the hot weather recess in Simla to do this.[74] Stephen indeed made a number of changes to definitions and arrangement of clauses. He wrote another report for the Select Committee, and the *Indian Contract Act* was passed in 1872 and forwarded to the UK.[75] Through this time, Stephen remained in correspondence with the Secretary of State, boosting his own capacity and belittling the Commissioners, but he did not burn any bridges.[76]

V Legislative Design

Through July and August of 1867 in India, Maine, the Law Member on the Council, and the Governor-General disputed the correct place for a set of rules on the remedy of specific performance. Maine said they were not 'substantive law', should not be in the contract law, and as adjectival law should go into the Code for Civil Procedure when it was revised.[77] The report of the Commissioners on contract law

70 Letter from the Secretary of State for India to the Governor-General of India, 24 November 1870, [14] ('Letter dated 24 November 1870').

71 Ibid [15].

72 Letter from James Fitzjames Stephen to George Campbell, Duke of Argyll, 10 January 1871.

73 Letter from the Governor-General of India to the Secretary of State for India, 1 February 1871, [2].

74 James Fitzjames Stephen, 'Recasting of the Earlier Parts of the Indian Contract Bill' (Minute No 32, 29 October 1871) (BL IOR /v/27/100/6) ('Recasting of the Earlier Parts of the Indian Contract Bill').

75 Select Committee on the Bill to Define and Amend the Law Relating to Contracts, Sale of Moveables, Indemnity and Guarantee Bailment, Agency and Partnership, *Report of the Select Committee on the Bill to Define and Amend the Law Relating to Contracts, Sale of Moveables, Indemnity and Guarantee Bailment, Agency and Partnership* (Report No 602, 22 February 1870) ('*Report of the Select Committee on the Bill to Define and Amend the Law Relating to Contracts, Sale of Moveables, Indemnity and Guarantee Bailment, Agency and Partnership*').

76 Letter from James Fitzjames Stephen to George Campbell, Duke of Argyll, 12 October 1871 ('Letter dated 12 October 1871').

77 Statement of Objects and Reasons (n 60); *East India (Contract Law)* (n 60).

was in the form of a code of 'substantive law',[78] and characterised as 'scientific'.[79] Maine believed that in this instance they had it wrong. He rejected the suggestion that placement was merely a 'technical' question, noting that '[s]cientific faults are of great importance in our codes, which are destined, I am sure, to exercise great influence on English jurisprudence'.[80]

Substantive law was the reason for the third Commission. The distinction between substantive and adjectival law, attributed to Bentham,[81] influenced John Austin (and also Romilly and Mill) who later rejected this distinction.[82] The first Commission adopted the terms 'adjective' or procedural law, and substantive law.[83] They borrowed the terms to wrestle with questions of *lex loci* and competing legal systems, and to resolve, for India, the 'intricate, [expensive] and dilatory' approach to justice involved in two sets of courts — law and equity.[84] Although focused on the judicial structure and court procedure, the second Commission explicitly advocated substantive law for all as the law of India, naming contract law in particular.[85]

Maine first omitted the specific performance clauses from the draft Bill.[86] The Governor-General wanted them in the Bill, saying they could be debated. Maine compromised, saying they could go in the Bill but at the end — out of deference to the Commissioners. The result was that the Governor-General agreed to omit them.[87]

---

78 Other laws were also styled as codes, such as the *Indian Penal Code 1860* (India), the *Code of Criminal Procedure 1973* (India) and the *Code of Civil Procedure 1908* (India).

79 Letter from Argyll, Secretary of State for India to Governor-General of India, 24 November 1870 (BL IOR PP LVI 1876 *East India Legislation*).

80 *East India (Contract Law)* (n 60) 98.

81 See, eg, Albert Kocourek, 'Substance and Procedure' (1941) 10(2) *Fordham Law Review* 157, 157; Thomas O Main, 'The Procedural Foundation of Substantive Law' (2010) 87(4) *Washington University Law Review* 801, 804.

82 See generally John Austin, *The Province of Jurisprudence Determined* (John Murray, 1832); Philip Schofield, 'Jeremy Bentham and Nineteenth-Century Jurisprudence' (1991) 12(1) *Journal of Legal History* 58, 68.

83 East India (Indian Law Commission), *Copies of the Special Reports of the Indian Law Commissioners* (House of Commons Paper No 585, Session 1842) 13 ('*Copies of the Special Reports of the Indian Law Commissioners No 585*'). See also a report in this source on substantive law or civil law for all in the mofussil not subject to Hindu or Muslim law, and also a *lex loci* theory: at 439.

84 *Copies of the Special Reports of the Indian Law Commissioners No 585* (n 83) 462–3. The term 'substantive law' is used in the draft *lex loci* legislation: East India (Indian Law Commission), *Copies of the Special Reports of the Indian Law Commissioners* (House of Commons No 14, Session 1847) 699.

85 *Second Report* (n 1) 8.

86 Draft Indian Contract Bill (n 60).

87 The matter was fully discussed in the Legislative Council: Note by His Excellency the Governor-General (NAI Home Legislative A Department No 4, 16 August 1867). See also *East India (Contract Law)* (n 60) 50, 101. The Draft Bill as published in the Gazette did not include them.

For the Governor-General, the question was not a theoretical one of the correct category of law, but a practical one. In addition to substantive or procedural law, the specific performance rules raised another question of legislative design: exceptions to a general rule. They did not apply to cultivation contracts.[88] The circumstances of cultivators forced to grow indigo had already been the subject of a Royal Commission.[89] The Governor-General believed the real objection was not a technical one, but the use of exceptions.[90]

The Commission received the full correspondence on Maine's views on these remedial rules as substantive law, sent first to the Secretary of State.[91] Only a few years earlier, the Commissioners had objected to procedural legislation being postponed.[92] They rejected Maine's view that specific performance was adjectival and should not be in a code of substantive law, and proceeded to devote a whole report to the matter. They were adamant that 'the proper place for the clauses relating to the specific performance of contracts is in the Code of Substantive Law and not in the Code of Procedure'.[93] They said that 'rights and liabilities' and their enforcement were substantive law, and the 'mode' of their enforcement was procedural law.[94] Their argument referred to international authority and works of jurisprudence.[95]

---

88 See *East India (Contract Law)* (n 60) with the *Second Report* (n 1) s 52. See also *East India (Contract Law)* (n 60) 4, 18. Enforcing cultivation of indigo contracts was highly controversial: Minute by the Honourable HS Maine on 9 April 1868 (n 60). Enforcement of cultivation and labour contracts for indigo cultivation had been the subject of a Royal Commission: Imperial Legislative Council of India, *Abstract of the Proceedings of the Council of the Governor-General of India, Assembled for the Purpose of Making Laws and Regulations 1867: With Index* (Office of Superintendent of Government Printing, 1868) vol 6. See also Letter from Governor-General-in-Council to Secretary of State Home Legislative, 9 January 1869 (BL IOR L/PJ/3). This letter refers to a report by the judges of the Small Causes Court of Champaran on the nature of indigo suits in that court.

89 See WS Seton-Karr, *Report of the Indigo Commission Appointed under Act XI of 1860: With the Minutes of Evidence Taken Before Them* (Report, 1860).

90 Note by Mr Maine (27 July 1867), reproduced in *East India (Contract Law)* (n 60) 97. There was a further 'evil' problem involving debt and land set out by Maine whereby unexecuted decrees were hoarded, traded and used for 'monstrous oppression'. Maine had also earlier drafted revisions to the Code of Civil Procedure to address this, which had been rejected by the Secretary of State: at 97–8.

91 *East India (Contract Law)* (n 59) 101–2.

92 See discussion above.

93 Romilly (Law Commissioners), *Fourth Report* (Report, 18 December 1867), reproduced in *East India (Contract Law)* (n 60) 100.

94 Ibid.

95 The references were to the New York Code of David Dudley Field (drafted but not passed), to Austin (see above n 82), and to Mr Justice Story, another American and legal author, specifically to Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* (Hilliard, Gray & Company, 1836) vols 1–2. The Commissioners said they treated specific performance as substantive law: *India (Contract Law)* (n 60) 102.

They believed the omitted sections embodied 'rules of law' based on 'principles of jurisprudence' of 'universal application' which would be 'equitable and beneficial for all classes of the inhabitants of India'.[96] This invoked the intellectual authority of Bentham. The Commissioners led by Romilly were contesting a fundamental tenet of the code lawmaking process with Maine. They did not prevail.[97] In response to the Commissioners' report, Maine wrote a minute analysing both Bentham and Austin on substantive and adjectival law and argued that in Austin's schema, specific performance would also fit into procedural law.[98]

The background to locating the specific performance rules and creating exceptions in a statute was to protect 'ryots' (tenant cultivators), and avoid the risk of inflaming planters, often English, who may have wished to enforce their cultivation contracts for indigo and other crops. This was a matter of social context. Further questions of local knowledge and norms, but not representation, remained.

VI Community Norms

The achievement of the *Indian Contract Act* is that it created a code of civil or commercial, as distinct from criminal, law that is applicable to all persons irrespective of other affiliations — religion, race, region or gender. The Commissioners had drafted rules that could cure confusion of applicable rules in the UK and applicable jurisdiction and rules in India. They were more interested in rules of universal application, not rules suitable for the circumstances of India.

But this is not entirely what happened. Remember, the Law Member was Maine. He had already written the book *Ancient Law*, about how the spread of Roman law in Europe had forestalled the organic development of the law.[99] The common law, which develops through precedent and principle expounded by judges, is viewed as organic. It is said to express the needs of the people and juridify normative values. Could a code drafted in the UK by English jurists and debated in India do this? Mill, who had little interest in Indian debate, thought all that was necessary was knowledge of India from books.[100]

---

96 *East India (Contract Law)* (n 60) 102.

97 Subsequent Select Committees confirmed the omission of specific performance. New legislation was drafted in 1875 and became the *Specific Relief Act 1877* (India).

98 Minute by the Honourable HS Maine on 9 April 1868 (n 60).

99 Henry Sumner Maine, *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas* (John Murray, 1861).

100 Mill stated: 'But legislation, in many of its parts, is to a great degree an affair of general principles; and the local knowledge which it requires is such as can be obtained from books and records, or from a past residence in the country: it is not necessary that the legislators should reside there at the present time; and from the variety of personal endowments, it will occasionally happen that the persons, or some of the persons, best qualified to legislate for India, will be resident in England': Minute by John Stuart Mill (n 50) 17.

In India, universal application meant something more than an aspiration for the whole of civilisation. It involved common jurisdiction and rejecting different laws for different persons. Before Macaulay, when codes were considered, an underlying question was whether they should embrace all inhabitants or inscribe distinctions between Muslims, Hindus and others.[101] The Calcutta judges expressed both views.[102] Though regarding it strategic to omit references to a code, the Governor-General at the time thought one code for all was inevitable and mused on a Legislative Council that was not 'representative' but included the interests of both British merchants and wealthy Indians.[103] Sir Charles Grey, a Judge, and Ryan, also a Judge and later Law Commissioner, believed 'it would *not* be difficult to put … the law of contracts, upon one footing for all descriptions of persons in India'.[104] They did not wish to impose British law but to establish a system of law 'best adapted' to the country.[105] Even so, when the second Commission proposed a complete code of substantive law for India based on English law — yet revised and reframed to accord with 'enlightened jurisprudence' and 'the customs and prejudices of the natives' — two of the Commissioners rejected this as overly ambitious.[106] Still, this is what Maine and Stephen achieved for the *Indian Contract Act*.

Indian norms should be taken into account, according to Maine. The Benthamite Commissioners had provided something that was more than a statement of English law and much less than law infused by Indian practice. Maine believed that people in India would take a greater interest in the *Indian Contract Act* than in the other codes. The view that legislating required input from those impacted by law, not just officials, was not new. This was not at odds with the view that a code would overcome the problems of unqualified or insubordinate judges, clarify and modernise the law, and make that law certain and accessible. It is a partial answer to law as despotism. Maine rejected the utter subordination of the Indian legislative process to Britain.

101 In 1806, a proposal for a 'special code' envisaged three sets of laws: Select Committee on the Affairs of the East India Company, *Minutes of the Evidence Taken before the Select Committee on the Affairs of the East India Company* (House of Commons Paper No 735 (VI), Session 1831–32) 147.

102 *Appendix to the Report on the Affairs of the East India Company* (n 25) 57, 77, 95, 97.

103 Lord WC Bentinck stated in relation to the debate: 'If any addition were made to the existing established authorities, which I consider for the present to be inexpedient, I should infinitely prefer native gentlemen, whose rank in society and great wealth seem to entitle them to the distinction; while the Council itself would derive from their knowledge of the character, manners and feelings of the natives, that information which the most experienced Europeans so imperfectly possess.': *Appendix to the Report on the Affairs of the East India Company* (n 25) 101.

104 *Appendix to the Report on the Affairs of the East India Company* (n 25) 111–12 (emphasis added).

105 Ibid 169, 186.

106 *Second Report* (n 1) 11.

Yet he has been interpreted as providing a mere liberal 'alibi of empire'.[107] His claim for the importance of Indian ideas and practices to the Indian Contract Bill is less a reification of custom and more a recognition of values to the integration of law and to a compact (however imperfect) between the governed and governing.

From September 1867, Maine ensured that the Indian Contract Bill (minus the specific performance clauses) was distributed to official India, with instructions for further circulation, including to businesspeople. Comments arrived throughout 1868. Although most of those who made submissions on the Bill were British, there was a strong showing from Indian commentators. All submissions discussed rules and customs in great detail. There was little consensus among commentators on whether there was a pre-existing contract law, or on details of many rules. The submissions addressed the differences between Muslim, Hindu and English law and drew on relevant texts and treatises, which were often written by Englishmen.[108] Those consulted commented at length, sometimes in contradiction with each other, on synchronicity and divergence of intended rules from English law and from Hindu and Muslim law. There were limits to consultation, but for those who read and chose to comment on the proposals, there was opportunity to provide a detailed account of their expectations of the proposed contract law, state what they approved of, and set out differences of opinion on particular rules.

One issue in particular was important: whether a person in possession of goods (including stolen goods), who was not the owner, could pass property in those goods to another person (the *nemo dat quod non habet* rule).[109] In Bombay, it would have been a scandal if it became necessary to tell a person that their stolen camel, traced to another, was no longer their property.[110] In Madras, the rule was not considered necessary to trade, would encourage theft, and judges warned of 'mere doctrinaire legislation framed without a sufficient knowledge of or regard for the wants of the people'.[111] In Bengal, '[a]ll the Native gentlemen who [FL Beaufort] consulted on

107 Karuna Mantena, *Alibis of Empire: Henry Maine and the Ends of Liberal Imperialism* (Princeton University Press, 2010) 177. Mantena does not discuss the *Indian Contract Act* in any detail.

108 Pearson (n 17).

109 Clause 75 of the Indian Contract Bill read: 'The ownership of goods may be acquired by buying them from any person who is in possession of them: Provided that the buyer acts in good faith, and under circumstances which are not such as to raise a reasonable presumption that the person in possession has no right to sell them.' In the Law Commissioners' original text, prior to the omission of the specific performance rules, this was found in s 81. For a detailed account, see Gail Pearson, 'A Cattle Lifter's Bill: The Nemo Dat Rule and the Indian Contract Act' (2015) 89(1) *Australian Law Journal* 31.

110 Letter from William Wedderburn, Under-Secretary to the Government of Bombay, to the Secretary to the Government of India, 10 May 1868 (NAI Home Legislative A Department May 1872 No 589).

111 Letter from Charles Collett, Judge of the High Court of Judicature at Madras, to the Chief Secretary to Government, 12 June 1868 (NAI Home Legislative A Department No 591).

the subject [were] opposed to the rule'.[112] They considered it 'unsuited to the habits, manners, and customs of the country' and 'likely to do more harm than good'.[113]

Maine linked community norms, law and morality. He highlighted the tension between the legal principles enunciated by English judges as Commissioners and the 'results' in India 'pointed at by personal experiences of this country and its people'.[114] While people might not have had much to say about the earlier codes, he predicted this rule would disturb many:

> For the first time, in preparing a contract law for the whole of … India, the Commissioners address themselves to a subject on which the course of legislation may be strongly affected by Native usage, Native opinion and by the local peculiarities of the country. It is no doubt perfectly true … that there is a scantiness of substantive contract-law in India. There are, in fact, vast gaps in that law which might be filled up by almost any rules … But it does not follow that in respect of certain limited branches of contract-law, there may not exist obstinate prejudices and tenacious customs … It is positively asserted by persons of the highest authority that a rule of great generality proposed by the Commissioners is sure to shock the moral judgment of the Natives.[115]

This question of the *nemo dat* rule — whether a buyer acting in good faith could gain title from any seller in the possession of the goods — illustrates the value of the consultation process to understanding community expectations and values and incorporating these through legal rules. The opposition of local opinion would make it difficult to enact the Commissioners' rule. Maine was not the only person to comment on morality.[116]

The proposals of the Commissioners would have given title to any buyer from any seller, even a thief, and turned India into a giant market overt. The initial Select Committee put forward an entirely opposite rule that favoured the owner, not the buyer.[117] Maine, who was not present for this part of the process, believed this new version would paralyse trade and commerce. His solution was to send all the opinions to the Law Commissioners, who, asserting the importance, substance,

---

112 Letter from FL Beaufort, Judge in 24 Pergunnahs, to the Under-Secretary to the Government of Bengal, 12 June 1868 (NAI Home Legislative A Department No 592).

113 Ibid.

114 Minute by the Honourable HS Maine on 11 September 1868 (n 48).

115 Ibid.

116 Letter from R West, Acting Judge in Canara, to William Wedderburn, Under-Secretary of the Government of Bombay (BL IOR Home Department Proceedings No 730, 27 November 1867).

117 The Select Committee proposed that the rule be that '[t]he ownership of goods [could not] be acquired by buying them from any person who is in possession of them, even though the buyer acts in good faith and under circumstances which are such as to raise a reasonable presumption that the person in possession has a right to sell them': Minute by the Honourable HS Maine on 11 September 1868 (n 48).

and arrangement of their rules, rejected the view that their contentious rule was unsuitable for India, and could not contemplate any revisions.[118] The Secretary of State, wishing to do the impossible and reconcile the 'high authority' of the Commissioners and 'freedom of discussion' in India, directed the lawmaking process.[119] He instructed the government in India to adopt the Commissioners' rule.[120] The result was that nothing happened. Maine left India. Stephen took over, and at first the clause was omitted altogether.[121] Stephen redrafted the Bill.[122] There was to be no giant market overt rule for India where any buyer could gain title, but a rule where a buyer could not gain better title than the seller, with some careful exceptions.[123] Stephen was critical of the technical acumen of the Commissioners.[124] He provided a superior arrangement and definitions for the *Indian Contract Act*.

The Commissioners' proposal and the initial Select Committee's counterproposal had been controversial. They were rejected due to careful consideration of opinions on existing practices and how a proposed rule would work. A better, carefully nuanced rule was crafted for India and became the basis for later English rules. Even the UK government had come around: it was important to trust wisely chosen experts, but it may be 'unwise to apply to … [the people of India] without modification, even the soundest principles of jurisprudence'.[125] But yet the principle of subordination remained.

VII Conclusion

The resignation of the Commissioners cleared the way to legislate the *Indian Contract Act* according to Indian procedures. The Imperial State still imposed norms drawn from a different sphere, and yet these also incorporated norms drawn from India. The State provided rules based on, but not limited to, English law, from which it departed in many instances. In the eventual *nemo dat* rule, the norms of the country

118 Letter dated 16 January 1869 (n 12).

119 Letter dated 18 March 1869 (n 47) [1].

120 Ibid.

121 *Report of the Select Committee on the Bill to Define and Amend the Law Relating to Contracts, Sale of Moveables, Indemnity and Guarantee Bailment, Agency and Partnership* (n 75).

122 Note by Honourable JF Stephen (House of Commons Paper No 608, Session 1871) (NAI Home Legislative A Department No 605); Recasting of the Earlier Parts of the Indian Contract Bill (n 74). Stephen continued to consider the already gathered voluminous local opinion but did not undertake a further consultation. See Imperial Legislative Council of India (n 88) vol 6.

123 Section 108 of the *Indian Contract Act*, repealed in 1930, stated: 'No seller can give to the buyer of goods a better title to those goods than he has himself except in the following cases …'.

124 On the definition of a contract, see Letter dated 12 October 1871 (n 76): 'They copied the definition from Evans on Pothier.'

125 Letter dated 24 November 1870 (n 70).

with its own regulation of commerce had been put ahead of the business interests of London. Yet the *Indian Contract Act* as a whole was closer to Bentham's ideal of universal principles relevant to the whole world than Austin's approach to a code, which was to codify pre-existing law and make codes for the relevant community, in this case, India. Pre-existing law was uncertain. There was no agreed law — despite the immense effort in India that had gone into attempting to describe law. Each of our actors exercised a different type of authority: the judges, positional and intellectual; the Secretary of State, derived ultimately from imperfect 'representation' in a totally different country from India; the government in India, from the UK and 'experience'; and those who commented at length on the Bill, from expression of community or normative expectations. The *Indian Contract Act* applied to all and facilitated transactions within a legal framework anchored with Indian norms. It was arranged to reduce legislative complexity. The *Indian Contract Act* served Imperial and Indian interests. Amended over time, it is India's law today.