SAFEGUARDS OF LIBERTY IN THE INDIAN PENAL CODE: THEORY AND PRACTICE

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ABSTRACT

This thesis is concerned with certain provisions of the Indian Penal Code, viz., the sections on Abduction, Kidnapping, Rape and Slavery. In this thesis we have examined these sections of the Penal Code (Chapter III) and the case law under them, (Chapter IV - V) in order to support the proposition that there is a wide gap between the intention with which law makers frame their laws, and their effect when these laws are actually applied; and that this is so because of various factors, in particular the difference in social attitudes towards certain crimes, the offenders and their victims.

The Penal Code was an ideal choice to illustrate this proposition. It was drafted more than one hundred years ago by the alien rulers of a large country, which sheltered a variety of cultures and ethical codes of conduct, of which they were largely ignorant (Chapters I - II). Secondly, both at home and elsewhere the British were then inclined to assume that the values acceptable to their middle-class were also accepted by the less privileged sections of any society. We have tried to demonstrate the falsity of this premise (Chapters IV - VII), and to show that, when the British attempted to impose their middle-class morality upon India, wherever Indian societies rejected it, the laws based upon this morality were quietly but unmistakably

rendered ineffective. This was the case with laws dealing with sexual offences and laws dealing with slavery.

We have tried to show that it is necessary to do more research into social conditions before passing laws than appears to be done today in India. It is equally necessary to see that people do not reduce these laws to a dead letter, once the government have seen fit to enact them; for passing a law, by itself, achieves nothing.

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INTRODUCTION

This thesis was undertaken with the intention of illustrating the gap which exists between lawmakers and the people for whom they make the laws, and the effects of this gap. The gap itself is the result of many varied and complex factors, and it leads to the making of laws which are often not understood by most people, or which are not relevant to their way of life, or which are not acceptable to them. This is so because the lawmakers depend upon their own background and almost invariably make laws which are relevant to its problems. This principle can be illustrated in various fields, in various ways.

Speaking at a conference of sociologists, Prof. J.H. Skolnick[1] illustrated it with reference to the drug laws in the United States, the majority of which were passed in the 1930s. At that time drug peddling and drug taking were mainly confined to the coloured population of the United States. It is only now, when white, middle class university students have become involved with drugs, that American intellectuals have become critical of their undue severity. So long as a problem is obviously outside the experience of the class to which the lawmakers belong, they are likely to make laws which are too severe, because they themselves never suffer under them. This is a negative illustration of our hypothesis; lawmakers are led astray by the social gap between them and the rest, when they are legislating only for the latter.

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1. In a paper delivered to the British sociological Association in London, on 15.4.1971

The same lack of understanding of the problems of other classes is to be found when the lawmakers assume that their own background and moral code, are those of everybody else. A major assumption which is often false, is that everyone, whatever his (or her) background, has the same attitude towards the nature of law, and that therefore, in all cases, it is sufficient to pass a law to meet a situation and it will be universally known, understood, accepted and obeyed. That such is not the case has been pointed out repeatedly. Prof. Ehrlich made this point at the turn of the century,[2] when he showed the total disregard in which the Austrian Civil Code, which regulated the rights of children, was held in certain areas of that state.[3]

As Prof. Ehrlich has pointed out, our lives are not regulated entirely, or even mainly, by law.[4] A marriage or a partnership, which is governed entirely by the legal rights of the parties, is well beyond redemption. A man's daily conduct is determined by a variety of factors, and most of the time a man does not think about his legal position at all, ~~as~~ if these extra-legal considerations pressurise a man into taking one particular course of action and the laws approve of another, the chances are that the latter will be disregarded.

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2. Ehrlich. E, The Fundamental Principles of Sociology of Law Harvard 1936

3. ibid. pp. 369 - 372

4. Ehrlich op. cit p. 21

It is not enough to make this point. It is necessary to investigate all fields of law, in order to find out if and how the laws we live under fail to be effective, for this failure ultimately means the failure of justice. The lawmakers may live in a paradise of their own making, satisfied that they have done their duty, but this is often far from being the real state of affairs.

In this thesis we have concerned ourselves with certain safeguards of liberty in the Indian Penal Code.[5] The situation in India is interesting for a variety of reasons. There caste, religion, and language, have produced a medly of societies, which are governed by their own distinct and separate codes of behaviour. On this conglomoration the British tried to impose one code of conduct, which would be acceptable to the criminal law of the land. The legal code, as we hope to show, was based either on the Common law, or upon the conceptions of Indian society held by the Administrators in England and India. These were almost entirely drawn from their acquaintance with the Indian upper classes. The great fuss about Suttee made a few decades before the Penal Code was enacted, is a case in point. It was only in the upper castes, and mostly in the upper castes of Bengal, in which this obnoxious custom was practiced. The single petition that was sent up to the Privy Council against the Suttee regulation[6] was signed by citizens of Calcutta, and when the British government paid no attention to it, India took no further notice.

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5. Act XLV of 1860

6. Reg. XVII of 1829

Since the Penal Code was enacted, conditions have changed considerably in India. From being a country under foreign domination, India has risen to be the largest democracy in the world, aad it aims at becoming an egalitarian, socialist state. In order to translate these aims into reality, it has become all the more necessary to see that the laws that are made are meaningful to all; then alone will they become effective. This does not necessarily mean making laws which are acceptable to all. If the aspirations of the Indian republic are opposed by the traditional, non-egalitarian cultures that subsist within it, the objections of the latter must give way. But it is not enough merely to pass laws. It is necessary to make them understood, and also to convince people that the government means to act upon them.

In a country where the majority of the people are illiterate and therefore in awe of the written word, the situation is even more complicated. The construction put upon the laws of the land by the illiterate persons is quite often beyond our imagination, so that there can be no substitute for field-work to ascertain whether or not a particular law works. Taking reasonable care when drafting laws is quite meaningless when the people to whom the law is applied think very differently from the lawmakers. In 1969 I had reason to investigate a case of 'divorce' between Bengali muslims, in a West Bengal village. The husband had gambled away his wife; she did not wish to go with the other man, and when her husband tried to starve her into submission she ran away to her parents, who lived at a distance of ten miles, in another village. She then went to court and signed

an affidavit,[7] declaring that she was divorcing her husband, as he had gambled her away. The police took no action against the husband for his extraordinary behaviour; indeed the official concerned could not find a copy of the affidavit, only two months after it had been filed. The husband had already remarried and everyone in the muslim community including their mullahs or religious leaders, was satisfied that this was a proper divorce! Needless to say, I did not think it prudent to discover their error to them, as it would have exposed the 'divorcee' to her husband's unwelcome attentions.

That the Indian Penal Code has lasted over a century is proof enough of its general excellence. It is only defective in those sections where the social forces have proved stronger than the law's intentions. These sections are few in number, but they affect a large number of people in an important area of their lives, viz., freedom to conduct their lives as they choose. The limited number of these defective sections makes it easier to change them, but it does not make such action any the less urgent. Nothing appears to us to do a government's prestige so much harm as those laws which are held in contemptuous disregard. It would be a great pity, if, for the lack of a little action, a good Code was allowed to contribute to this result.

But the matter does not rest there. It would be a grave error on our part to assume that because India is now a democracy, because

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7. The Registrar's office was in the Court buildings.

power has now passed from a few to many, all will be automatically well in India. Sometimes the power passes only in theory. More important, even where this power is transferred, it is, in reality, still wielded by pressure groups, although their composition may well have changed.[8] Whoever has power still hopes to exercise it for the benefit of his group, and to the exclusion of others,[9] and the weak still go to the wall. By making a few changes in the Indian Penal Code, we shall still not have achieved our objective of making our laws more egalitarian, and more effectively just. Indeed, it is not an objective which can be achieved for once and for all, by making one determined effort. On the contrary, it is a never-ending process. Trite though it may sound, eternal vigilance still remains the only safeguard of liberty.

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8. Dr. A. Beteille 'Caste, Class and Power'. Oxford University Press (India) 1967.

9. J.H. Skolnick. Politics of Protest. A Report of the National Commission on the Causes and Prevention of Violence. 1969. at p.11

CHAPTER I

The British and India in 19th Century

Introduction

It is generally conceded that till early 19th Century the British knew little about India. Indeed little interest was taken in that country; so much so that the announcement of a debate on India was as good as a signal to the members of Parliament to leave the Chamber for their dinner. Yet these were the men who framed laws for India and otherwise controlled her destiny: Englishmen joined the East India Company's service and went out to India as civil servants, army officers and governors, while others in the Parliament debated India's problems.

It is our hypothesis that, as the British did not know much about India, they tended to make laws for that country on the basis of their experience and general ideas gathered in England; and that this experience and these ideas were drawn from their limited upper-middle class background, rather than from the entire nation; and that this was as true of the philosopher recluse Bentham as it was of men of action. This meant that the British legislated for Indians, the majority of whom were not middle class, on the basis of an experience as far removed from them by distance as by class.

In the majority of cases, where laws were made to deal with such crimes as robbery, murder and treason, this gap between the ethos in which the Indians lived and the ethos which the British

brought with them, would not matter. As we hope to show in successive chapters, offences against the person, particularly where they involve concepts of family honour, are defined by reference to social attitudes. What the British might regard as a grave matter might be taken lightly by Indians and vice versa. The other case in which social background mattered was where the law assumed that individuals subject to it would not accept restrictions on their liberty which other individuals would not, so that, if they did not try to escape from such restrictions or complain of them then it must be because they regarded the situation they were in as normal, for example the situation of slaves. It is in these two respects that the gap between British attitudes and Indian social structure would be most important.

If our hypothesis is correct, it will help us to see in what way some of the laws made between 1830 and 1870 were unsuitable to India, and how they are even more undesirable in late 20th Century.

To test our hypothesis we need to answer three questions.

1. What did the middle class educated Englishman know about India?
2. At home, in England, what sort of problems interested him?
3. What were his notions about the nature and function of law?

The last question will involve yet another question: What sort of laws did he live under?

In order to answer these questions, we propose to take a look at two of the learned quarterly magazines of the period. viz. The Edinburgh Review and the Westminster Review. These contain valuable information on the first two questions.

We shall then turn to Parliament and examine the Report of the Select Committee on the Affairs of the East India Company. This will help us to determine what Parliament considered to be the joint interests of India and England. We shall also devote a separate section to the speeches of Thomas Babington Macaulay, as he was to be the chief architect of the first draft of the Indian Penal Code.

The third question, which is about law, is indeed a very wide question and no doubt a whole book could be written about it. Our interest in this question is both limited and specific. We are concerned here with the values the British thought laws should protect, such as life, and property, and how they set about protecting them. To answer these questions we shall look at the political and philosophical ideas current in that period. We shall also examine relevant laws applied in Britain during that period, as they were often the models for further law making, even when they were modified.

SECTION II

The Reviews

The periodicals of an age are a good and reliable guide to the general interests of that time. There were at least half a dozen quarterlies and magazines being published in Britain in the first half of the 19th Century. In these publications books and articles on a wide variety of subjects were reviewed, sometimes shrewdly, sometimes with naiveté. In any case we may safely say that they were a good guide to the general interests of the time as well as a measure of the information the educated Britons had on various subjects.

Of these half dozen publications we shall examine the Edinburgh Review and the Westminster Review over a period of forty years, from 1800 - 1840. One reason for choosing to examine these two Reviews is that Macaulay wrote for the Edinburgh Review and clashed swords with contributors to the Westminster Review over utilitarianism. Again, we have chosen this particular period (1800 - 40) because we wish to know the general intellectual background in England against which Macaulay drafted his Indian Penal Code.

By and large these two journals may be described as moderate and liberal in their opinions. However, both these epithets need to be heavily qualified, in the context of the 19th Century and we shall proceed to do so while discussing the reviews that appeared in these

journals.[1]

None of the reviews carried the names of their authors; this anonymity of the articles further emphasised the fact that most of the reviewers and their readers held remarkably similar views. In both journals the reviews covered a large number of subjects - education of the poor, parliamentary reform, criminal law reform, slavery in the West Indies, and the affairs of the East India Company were only some of the subjects, books on which were reviewed in these two publications. Others were travel, literature, fiction and philosophy.

We shall examine articles on subjects of domestic interest first and then examine articles on the West Indies and India.

One of the things we notice in these articles is the extent to which the reviewers and their readers thought in terms of class and also what a high importance they attached to property.

In 1807 the Edinburgh Review published an article[2] on a book by one Joseph Lancaster. This book was called "An Outline of a Plan for educating ten thousand Poor Children by establishing Schools in Country Towns and Villages, and for Uniting Works of Industry with useful Knowledge". This book, published in 1806, was an account of a plan which had already been applied with success in various parts of the country. The idea was to educate one thousand children at the hands of one master, and at the annual expense of £300.

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1. In order to avoid possible confusion we would like to make one point clear; "review" will refer to an article while "Review" or "Journal" or "Quarterly" will refer to the magazine in which the review appeared.

2. Edinburgh Review vol. II Oct. 1807 p. 61

The older and brighter boys were appointed monitors; they taught the younger children in groups of thirty, whatever they themselves learnt from the master. Prizes were given to pupils who did well, and a monitor got a prize each time one of his charges did so. At no time was a child left to himself. For example, if the master was listening to one boy reading aloud, the other twenty-nine boys wrote to the monitor's dictation. As the reviewer put it, "the beauty of Mr. Lancaster's system is, that nothing is trusted to the boy himself; he does not only repeat[3] the lesson before a superior, but he learns it before a superior". Therefore, no time was wasted in idleness.

The economy was achieved in two ways, by having monitors to teach younger children and by not letting the students have books or writing materials of their own. Sand and slates were used for writing; only a few senior students were allowed paper. Alphabets and arithmetic were taught from large 'cards' or charts, round which the thirty students gathered. When one class finished its lesson, it moved on to learn something else and another group of thirty students used that card. In this way two to three hundred boys learnt their alphabet from one card, a fact the reviewer noted with great satisfaction.

The reviewer felt obliged to defend Lancaster's plan, as the Church of England was opposed to it. The opposition was mainly due to the fact that Lancaster did not belong to the Church organisation for educating poor children. At any rate this was the allegation made by the reviewer, who felt himself constrained to prove that, though

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3. Edinburgh Review Oct. 1807 vol. II p. 68

Lancaster's plan did not meet with the approval of the Church, it was, nevertheless, an efficient and economical plan. The plan had the additional merit of raising industrious poor boys to a better life; the reviewer quoted several examples of boys between twelve to fourteen years of age, who, after being educated in Mr. Lancaster's schools, were already running schools for hundreds of boys, and earning salaries of £30 a year.

From his defence of Lancaster's plan the reviewer went on to defend the principle of education for the poor. The defence which is extremely interesting was that:

Education was good for the poor, for that way a lad might learn "many valuable principles of religion, morals and politics"[4], which otherwise might never come to his notice.

Secondly, the poor were often talented, and education could reveal this talent.

The reviewer then mentioned the uncouth, uncontrollable crowds that indulged in violence and destruction: education would cure all that, "Education raises up in the poor an admiration for something else besides brute strength and brute courage; and probably renders them more tractable and less ferocious."[5]

One of the fears often voiced was that if educated, the poor would cease to work[6]. The reviewer dismissed this fear as groundless.

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4. Edinburgh Review vol. 11 Oct. 1807 p.68

5. Edinburgh Review vol. 11 Oct. 1807 p.69

6. This same argument was generally used by persons against abolition of slavery. It certainly was used in India with great effect. (See infra Chapters 3 and 4)

Either a man worked, or he starved. It was therefore clear that a poor man would continue to work, even though he was given some education.

The other fear was that education would introduce the poor to subversive literature. This fear was evidently strong enough for the reviewer to deal with it at some length. "The standard books among the poor would not encourage disaffection, but the contrary. Seditious pamphlets would sometimes get among the poor, but they would meet with a firmer body of opinion than they do now; and the common average books would be of a very different description". With no trace of irony he went on to add, "What is read by the classes immediately above the poor is neither treason nor impiety. With them, the notions in ordinary circulation, about government and religion, though trite, are, in general, just and respectable".[7]

It is to be noted that neither the method recommended for teaching the children of the poor nor its content were such as the readers of the Edinburgh Review would have inflicted upon their own children. The drastic economy in books and paper was such as befitted"the poor", who were, after all, to be taught to unite "useful knowledge" with "works of industry". What the disingenuous reviewer called "standard books amongst the poor", were certainly not meant for the higher classes. Their education was expected to make their minds lively, independent in thinking, and truly cultured. Hence the emphasis on the classics. None of these things were aimed at when teaching the poor.

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7. Edinburgh Review vol 11 Oct. 1807 p.70

Indeed, the chief merit of Lancaster's plan appears to have been that it gave limited education of a kind that would enable the poor to be better servants, without encouraging them to rise above their station. The examples of talented boys discovered by Lancaster indicated precisely this. All that happened was that, instead of working in factories and sweatshops, the brighter boys taught in school, earned somewhat higher wages, and enjoyed a somewhat better status. Nonetheless, unlike the rich boys, they still went out to work at the age of twelve, and their new status nowhere approached the social position of the middle classes.

The same line of thought was pursued when the reviewer proceeded to discuss the general principle of educating the poor. They were a distinct, separate class, and they could be educated without leaving that class. As we have seen, the argument was that such education was safe - i.e. that there was little danger of sedition - and that it was beneficial to society. The benefit was of two kinds. Education uncovered talent amongst the poor; and, by imparting superior moral values to them, made them more "tractable". This meant that property, always threatened by the mob, would be safer than it had been.

We have seen that the talent this education was expected to release was of a kind that would not threaten the established social order; nor was it envisaged that the talented poor would be so talented as to rise rapidly and become rich or powerful. It was a modest talent which improved the position of the poor, in a manner which gave satisfaction to the genteel, conservative, middle class philanthropist. In short, the benefits which would accrue from education for the poor

were really benefits to be reaped by the middle classes.

One goes away with the distinct impression that the poor were regarded by the reviewer, by Lancaster and by their readers as another nation, and a nation with which they had little contact. They were constantly referred to as "the poor", and without any self-consciousness the reviewer recommended Lancaster's plan for educating the poor because it was so economical.

We have said that one of the merits of education for the poor, as seen by Lancaster's reviewer, was that it would induce in them a greater respect for property. The high value placed on property amongst the English is much more clearly emphasised in Thomas Babington Macaulay's reviews of some of the works of James Mill. In his "Fragment on Government " James Mill had discussed the necessity for extending the existing franchise so as to include all males over the age of forty. He was not in favour of property qualification for enfranchisement, and said that if it was considered absolutely essential to give votes to property holders only, the limit should be as low as possible. James Mill did not consider it necessary to give the franchise to either women or men below the age of forty. In his opinion their interests would be amply represented by their fathers and, in the case of women, by their husbands. Macaulay very sharply pointed out [8] that women were more likely to be exploited than represented by an arrangement such as this. Yet, in spite of his liberal views on female franchise, Macaulay was opposed to universal male suffrage. He was convinced that it would not be safe to give the vote to men who had no property,

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8. Edinburgh Review vol. 49 March 1829 p.159

for, he argued, they would have no interest in preserving it. Universal male suffrage would open the door for a poor majority to turn against the rich minority and deprive them of their property. It is curious that, while Macaulay could see that women needed a vote in order to look after their interests, he was unable to extend the logic to cover the large number of people who owned no property.[9]

A subject that excited great public interest and therefore had a prominent place in the Reviews was the question of West Indian Slavery. The anti-slavery movement in England had been gathering strength for several years at the end of the 18th Century. Led by men like Wilberforce and Zachariah Macaulay, it had had made a tremendous impact on public opinion. From the articles published in the Edinburgh Review and the Westminster Review it is evident that a great deal was known in England about the slave trade and about slavery in the West Indies. The horror and bestiality of the slave trade, which involved seizing men by force and transporting them with great inhumanity, first across the African continent and then across the seas, so that only one man in ten survived the journey, and then working them to death under the whip of the overseer, had aroused public indignation in England. Even after Britain had, in 1807, passed a law abolishing slavery in the West Indies, and making it an offence for a Briton or a British ship to engage in the slave trade, the anti-slavery lobby continued to be active, and

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9. See infra sections 4 and 5 of this chapter for a further discussion of this point.

bodies, such as the Committee of the West African Institution, continued their work of exposing clandestine dealings in slaves. Public interest in slavery continued to be high; in the Edinburgh Review alone, between 1805 and 1812 no less than sixteen reviews of works on this subject were published. The annual Reports of the above-mentioned committee were also reviewed in the Edinburgh Review. Both the Reports and the articles are notable for the intimate knowledge of slavery which they display.

Some of the books published before the passage of the 1807 act were apologies for West Indian slavery. The dissenting reviews are a good indication of how much was known in Britain about this subject. The apologists argued that the abolition of slavery would be economically disastrous to the sugar plantations, that the slaves were better off, happier and more civilised than they had been in Africa. In short, the institution of slavery was beneficial to both master and slave. All these arguments were examined and ruthlessly destroyed. For example, one anonymously published pamphlet argued that slaves in the West Indies were better fed than peasants in England. The reviewer tartly asked where the meat to feed the slaves came from; there were not enough cattle in the West Indies for that purpose and certainly the export-import figures did not disclose an adequate import into the islands.[10]

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10. Edinburgh Review vol. 15 Oct. 1804 p. 212
"A defence of the slave trade on the grounds of Humanity, Policy and Justice."

One of the arguments put forward in a tract entitled "A defence of the slave trade on the grounds of Humanity, Policy and Justice" is specially interesting, because of the refutation it met. The tract argued that, as slavery existed in West Africa, there was no particular harm in West Indian slavery. The reviewer, quoting Mungo Park, retorted that African slavery was benign. No whip was used, no slave driver employed. The master was not of a different race; he worked with slaves, who were treated like members of his family. The master in West Africa, unlike the West Indian Planter, might not sell his slaves, unless they had committed a crime, and then he frequently had to get the permission of the jury to do so. West Indian slavery was certainly harmful. The slaves were so miserable that they rejoiced when one of their numbers died, believing that his spirit would go straight home.

Having succeeded in their objective, the abolitionists met in 1807 and voted that some steps should be taken to repair the wrong done to Africa by the slave trade.[11] This was to be achieved by 1. improving the social condition of Africans and 2. taking trade and commerce to their countries. The second objective was later abandoned, because the critical venture in Sierra Leone was a failure. The Committee proposed to pursue its first objective by the following means:

1. "To collect and diffuse throughout England accurate information regarding the natural products of Africa and its agricultural and

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11. Edinburgh Review Reports of Committee of the West African Institute vols. of 1807 - 10.

commercial potential; aad the intellectual, moral and political conditions of its inhabitants.

2. To educate Africans and befriend them.

3. To teach them to know their interests so that they may substitute commerce for the slave trade.

4. To introduce European innovations, where suitable to their climate.

5. To promote agriculture and introduce European medicine.

6. For the Europeans going to West Africa: reduce the African languages to writing and teach them to the Europeans.

The Committee produced its Reports annually, and thus the facts about the newly abolished West Indian slave trade were continuously brought before the educated British public.

From this account of the interest taken by Britain in West Indian slavery two points emerge. A great deal was known about it in Britain, and British ideas of slavery were generally fashioned by this knowledge. Transportation across the seas and the yoke of an alien master were evidently regarded as essential characteristics of that institution. This is why the reviewer, who could not be hoodwinked into accepting West Indian slavery, excused African slavery.[12] This definition of slavery is of interest to us, because it was to recur whenever the question of dealing with slavery in India came up for discussion, whether in England or in India. The British were prepared to give the same benefit of doubt to Indian slavery as they

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12. See above pp.26-27

did to its African counterpart. The idea that slavery at its best is still not a state to be defended or recommended does not seem to have occurred to them. They seem to have been more concerned with the physical, forcible removal of a man than with the fact that slavery, even in his own village, still rendered him another man's property. There is indeed no defence of a legal status, which makes a man liable to be sold, chastised, starved, or otherwise punished by another man. Yet, whenever slavery did not involve the two above-mentioned characteristics of West Indian slavery, enlightened British opinion was prepared to defend it.

In 1825 the Edinburgh Review[13] published an article examining two speeches made in the House of Commons by a Member called William Hutchinson. Hutchinson argued that imports of Indian sugar should be limited, because otherwise the cheaper Indian sugar would ruin the West Indian Planters. Indian sugar was produced by slave labour, so there was no moral difference between West Indian and Indian sugar. The reviewer, having dealt with the commercial argument, then turned to the ethical position. He had the following comments to make on slavery in the two countries.

1. No slaves were imported into India to cultivate the land, so by buying Indian sugar the slave population in India was not increased.
2. Indian slavery was much milder. Compared with the Negro, the Indian was a freeman. In support of this point the reviewer quoted the opinion of Sir Henry Colebrooke, a servant of the East India Company. "Slavery is not unknown in Bengal.

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13. Edinburgh Review vol. 42 March 1842 p.271

Throughout some districts the labours of husbandry are executed chiefly by bond servants. In certain districts the ploughmen are mostly slaves of the peasants for whom they labour; but treated by their masters more like hereditary servants or emancipated hinds, than like purchased slaves, they labour with cheerful diligence and unforced zeal ... throughout India the relation of master and slave appears to impose the duty of protection and cherishment on the master, as much as that of fidelity and obedience on the slave, and their mutual conduct is consistent with the sense of such an obligation, since it is marked with gentleness and indulgence on one side, and zeal and loyalty on the other."[14]

It was not only slavery in India which the British judged in terms of West Indian slavery. During the first half of the 19th Century they appeared generally to look at Indian affairs in the light of their experience elsewhere, particularly on North America.

For several reasons, little was known about India in England. The East India Company had been very jealous of its rights and had always strenuously opposed attempts to open India to foreigners[15] who were not in the Company's service. The Directors of the Company frequently reminded the English about their American experience, painting lurid pictures of the fate which would befall England, if India were colonised. The suggestion was that, if India was opened to Europeans, they would settle down and colonise

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14. Edinburgh Review vol. 42 March 1825 p.296

15. foreigners in this context means Englishmen and other Europeans who were not natives of India.

that country, their interests would then gradually diverge from those of their mother country. Instead of being a source of revenue, as India was under the Company's monopolistic rule, India would be lost to England altogether. It was the classic story of killing the goose that laid the golden egg.

However, the East India Company had ceased to bring home the large revenues people expected to see: the Indian administrative machinery was extremely expensive and, despite the Company's efforts to curb expenditure by reducing the number of officials and by replacing low-level European servants with natives, it continued to be so. Indeed, the Company was burdened with a very large public debt. The question which the British repeatedly and persistently asked in the early 19th Century was: why did trade with India not pay? Would India's demand for English goods rise if it was colonised by Europeans?[16]

Undoubtedly the East India Company had a great deal to gain by convincing people that India, if colonised, would go the way of America. Thirty years was too brief a period of time for the English to have accepted their loss of the American colonies. The reviewers generally spoke of that event with bitterness and hostility. The possibility of history repeating itself in India was therefore not merely an academic question but a question with emotional overtones. It is not surprising that the East India Company should have used this subtle argument to further its own ends.

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16. Edinburgh Review: vol. 4 July 1804 p.303; vol 10 July 1807 p.334; vol 15 Jan 1810 p.255; vol 16 April 1810 p.127
Westminster Review: vol 11 Oct. 1829 p.326; vol 4 Oct. 1825 p.261

It is a little surprising that this argument was taken seriously in England and that, till the first thirty years of the 19th Century, the possible consequences of colonising India were subjects of constant discussion. It is surprising because in these discussions little attention was paid to India's circumstances, which differed radically from those of the New World. India was much further away and therefore so much less accessible to easy settlement. It was also sufficiently heavily populated for it to be impossible for the British to colonise it on American lines. Moreover, India's cultural patterns were too firmly established for a few settlers to disrupt them on any appreciable scale. Therefore, unless the Europeans could descend upon India in very large numbers, there was little hope of quickly boosting British exports to India. These premises would lead us to conclude that colonisation of India was not a practicable proposition and that there was no way of making the Indian market expand rapidly. In England, however, no notice being taken of the Indian population; it was assumed that, while Indians would not suddenly start demanding British goods, the colonists would, and that the solution to the problem of falling revenues was to colonise India. This argument gave rise to another fear, viz, that if India was opened to settlement, Great Britain would lose almost all her population, as most people would choose to live in a warmer and cheaper country. Ridiculous as this fear might seem to us now, it was evidently regarded as real enough to be mentioned in 1832 before the Select Committee on the Affairs of East India Company.[17]

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17. See Section 3, Chapt I

There is a curious article on the subject of colonisation in the Edinburgh Review of April 1810. This article reviewed four works published between 1808 and 1810, most of them written by men in the Company's service.[18] None of them were discussed separately, nor were their arguments mentioned individually, but it seems that, from his perusal of them, the reviewer felt that the Company's rule over India was not beneficial either to India or to Britain. At the same time, it was not possible to rule India from Westminster. Obviously the only solution was to colonise India. Indeed India was already being colonised[19] by Europeans who settled in the Portuguese or

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18. The publications were: i) Strictures on Present Government, Civil Military and Political, of the British Possessions in India; in a letter from an officer resident on the spot, to his friend in England, 1808.

ii) An accurate and authentic narrative of the Origin and Progress of the Discussions at the Presidency in Madras; founded on original papers and correspondence, 1810.

iii) A letter from an officer at Madras to a friend formerly in that service, now in England; exhibiting the Rise, Progress and actual state of the late unfortunate Insurrection of the Indian Army, 1810.

iv) An account of the Origin, Progress and consequences of the late Discontents of the Army on the Madras Establishment, 1810.

Edinburgh Review April 1810 vol. 16. The Affairs of India. at p.127

19. This point was also made by other reviewers, particularly in Edinburgh Review vol. 4 July 1804 p. 303, in a review of 'Indian Recreations' by Tennant.

French possessions. It was necessary to colonise India officially, because only colonists would share the interests of both countries: as traders Europeans exploited Indians, while the latter were palpably not civilised enough to rule themselves. Colonisation was the only solution to the Indian problem.

"It has occurred to us then, that the only way to escape great evil both to India and to England, is at once to give the latter country a government to itself. Instead of sending out a governor-general, to be recalled in a few years, why should we not constitute one of our Royal Family Emperor of Hindustan, with hereditary succession? The sovereign would then be surrounded by Britons; and the spirit of Britons would animate and direct his government: Europeans of all descriptions would be invited to settle in his country, and to identify their interests with those of the nation. The productive powers of European Industry, under the protecting hand of a British government on the spot would soon give new life and new riches to the state, and the commercial enterprise of Britons would find a field of boundless extent, every year representing a more vast and precious produce from which to call for the commercial aggrandisement of their country."

While the startling notion of sending a British prince to India was apparently exclusively this reviewer's, there were many who devoted serious thought to the question of colonising India. Not all were in favour of the possibility. Writing in 1807, (three years before the review discussed above) another Edinburgh Reviewer had strongly opposed colonisation of India. He felt that the European, being superior in intelligence and knowledge to the natives, would squeeze

them out in a myriad of different ways. The current misrule of the Company was a lesser evil compared with the evils colonisation would bring.

Nor was this discussion confined to the first decade of the 19th Century. As late as 1825[20] the Westminster Review referred to this subject. In an article which reviewed five publications[21] and which discussed the dangers of not allowing the press to criticise the Indian government freely[22], the reviewer took the Company to task for removing all opposition from the scene: the natives were too accustomed to corruption to complain, the English on their part went out expressly to accumulate fortunes. There was no chance of protests against the Company's policies or against any other malpractices, being made, except by the Press. There was nothing treasonable about criticising the Company, or about criticising evil native practices such as suttee. These suppressive measures against the Press were even more serious in a country, entry to which was forbidden to European settlers so that acquisition of new skills and knowledge was denied to natives.

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20. Westminster Review vol. 4 Oct. 1825 p.261

21. Amongst them was 'An Enquiry into the Expediency of applying the Principles of Colonial Policy to the ~~fort~~ Government of India, 1822.

22. In 1823 the Bengal ~~fort~~ Government issued a notification that newspaper licences would be forfeit if they criticised the king, the Company or the Companys servants, or criticised any native institutions of practices.

A few years later the Westminster Review again reverted to this subject.[23] In an article called "Colonisation and Commerce of British India" the reviewer examined four publications, which dealt with the problems of governing India and the possible colonisation of that country. The reviewer expressed himself strongly in favour of colonisation of India. It would be good for trade, and, contrary to fears, it would be good for the natives. European settlers would have interests in common with the natives, instead of being concerned solely with making their stay as short and profitable as possible, before returning to England. The settlers would protect the native from unjust or corrupt government officials. Moreover, English public opinion would be more interested in an India colonised by Europeans and India's grievances would have additional publicity in England. Finally, Indian agriculture and the Indian character would both benefit from contact with Europeans.

We have said that the English were primarily interested in India because they wished to make profits out of their association with that country. We have also said that consequently the British tended to look upon India in the light of their colonial experience elsewhere. They also tended to look upon India as a territory ruled by the East India Company, for the benefit of Britain. Nevertheless interest in India in her own rights was growing. Histories of India, accounts of Indian religions, society, languages, travelogues, all found favour with publishers. Most of them however had little to say.

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23. The Westminster Review vol. 11 Oct. 1829. "Colonisation and Commerce of British India". p.326

Either they had no facts to communicate or their information was confused. Travelogues suffered from this defect, as was to be expected. More disappointing were the various works of History. Reviewing a work on "The Modern History of Hindostan", which commenced with the death of Alexander the Great, the reviewer remarked that, in the first part of the first volume - i.e. about 250 pages - the author had mentioned "seven insulated facts".[24] In the second part he had a few more facts to offer, but they were of little importance. For example Maurice (the author) had this to say of a place called Tattah. "In Tattah there are various fine fruit, and the mangoes are remarkably good. A small kind of melon grows wild. Here are also a great variety of flowers; and their camels are much esteemed".[25]

The reviewer was moved to comment that a man without any knowledge of Indian languages was not equipped to write a history of that land. Indeed, before such a work was undertaken, it was necessary to devote several years to collecting manuscripts, learning languages, writing dissertations and minor works on specific limited subjects such as say irrigation in a particular area. After the ground had been prepared thoroughly, then one had to "wait patiently" for the appearance of an eminent scholar "with the taste or philosophy of a Hume or a Robertson". In other words Histories of India were not to be undertaken lightly.

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24. Edinburgh Review vol. 5 Jan. 1805 p.288

25. ibid. at p.299

The note on which Maurice was kindly but firmly dismissed was typical of reviews on Indian subjects: most of them began by deploring the paucity of information about India, and most of them ended by regretting that the books reviewed had done little to remedy the situation.

Against this background it is not surprising that James Mill's twelve volume History of India was received with great acclaim when it was published in 1817. Less than a hundred years later no one would have regarded it as an authoritative work on India. Yet, when it was published, it was superior to anything previously written on that subject and, whatever its shortcomings, it did help to reduce the general ignorance about India.

Conscious of their ignorance, various individuals and societies were studying numerous aspects of Indian life, such as agriculture, religion and the East India Company's foreign policy. As yet, however, there appeared to be no way of evaluating the information contained in the books which they published. One review flatly dismissed an author who said that the Indian caste system forbade intermarriage. If this were so, the reviewer asked, how should there be so many sub-castes?

By this time, men who had seen several years of distinguished service in India had begun to write about that country. Amongst them were Monstuart Elphinstone and John Malcolm - both of whom retired as governors of Bombay; and James Tod, a military officer in the

Company's Army.[26] All their books received 'good' reviews[27] but it was evident that the reviewer was not in a position to assess these books critically. All that the reviews consisted of were copious quotations from the books. For example "The Annals and Antiquities of Rejasthan" by James Tod was and still is a remarkable book, written after twenty years of close acquaintance with the land and the people of Rejasthan. Yet all that the Edinburgh Reviewer could say was that it filled a large gap in the history and geography of India![28] The Westminster Review[29] gave much less space to Tod than did the Edinburgh Review. The Westminster Review recounts the subjects treated by Tod in vol. 1 of his book, e.g. The history of various tubes of Mewar and an account of his journey to Mewar. He quotes from the Annals and generally sets a seal of approval on the work. It is noticeable that Tod wrote well, and wrote of a people he both knew and loved. Yet 5,000 miles away, all the reviewer could appreciate was a few anecdotes!

At the beginning of this section we referred to the importance attached in 19th Century England to class. The reviews on Indian subjects make this point forcibly. In contrast with the Europeans, Indians were invariably seen as inferior in morals, intelligence,

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26. i) Elphinstone's account of his Mission to Kabul was published in 1815.

ii) John Malcolm on Central India, 1823

iii) James Tod on Rejasthan, Westminster Review 1829, vol. 1; 1831, vol. 2

27. Edinburgh Review, vol. 25 Oct. 1815; vol. 40 July 1824; vol. 52 Oct. 1830; vol. 56 Oct. 1832 Westminster Review vol. 15 July 1831

28. Edinburgh Review, vol. 56 Oct. 1832

29. Westminster Review, vol. 15 July 1831

courage and character. This is why it was argued that colonisation of India would benefit Indians. But when the Indian upper classes were mentioned along with the English working class soldiers or other low grade servant, English sympathies were with the former. The Earl of Lauderdale, writing about the government of India[30] and the necessity of admitting Indians to the administration, said that an exclusively European Administration would mean employing low class Europeans. The natives, he warned, would not like them . As the upper class Hindus and Muslims were "discerning, reserved, temperate and courteous, the manners of the lower classes of our countrymen appear to them coarse, repulsive and savage."[31] They did however respect the "higher classes of the English" for their scientific knowledge and other accomplishments.They also admired the English for possessing far greater probity of character then they themselves even had. The only way to govern India was to employ a few upper class Europeans for the higher posts and fill the rest with educated, wealthy Indians. The mass of Indians was alien and remote from their British rulers, but so were their own island working classes, "the poor". For both the English legislated from their peculiar, privileged citadels.

As we have conceded earlier, information about India was improving in quality and in quantity. But this could only be a slow process. When Macaulay went out to India, there was little by way of books and publications, from which he could inform himself about that country.

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30. Edinburgh Review vol. 15 Jan 1810 p.255

31. ibid at p.262

SECTION III

The Select Committee Report

In the previous section we examined the Edinburgh and Westminster Reviews in order to see how much the average, intelligent, well-read Englishman knew about India. The answer would not be complete without asking what Parliament knew about that country.

In the beginning of 1832, in view of the fact that the East India Company's Charter would expire in 1834, the House of Commons appointed a Select Committee[1] drawn from its members, to look into the Affairs of the East India Company. The Committee's report was prepared in a few month's time and in August 1832 it was published, by command of the House of Commons.[2] The Report of the Select Committee ran into eight volumes, and several thousand pages. The opinions and assessment of the Committee itself occupied only eighty-four pages, for the Select Committee was determined to submit to the House " a general summary of the Evidence". The main body of these eight volumes[3] consisted of the testimony of the numerous witnesses and appendices on related subjects. The appendices consisted of correspondence, tables and administrative reports from India.

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1. Hansard . see infra section
2. Report of the Select Committee on the East India Company's Affairs. H. of C. 1831 - 32. papers 734, 735.
3. volumes 8 - 14 (volume 10 was in two parts, 10A and 10B).

The contents of the eight volumes were the following:

Volume 8

Report

General appendix

Index

Volumes 9 - 14 Evidence

Public and Miscelleneous	Vol. 9
Finance & Accounts - Trade	Vols. 10A and 10B
Revenue	Vol. 11
Judicial	Vol. 12
Military	Vol. 13
Political & Military	Vol. 14

Of interest to us are volumes 8 and 9, especially volume nine. As the Select Committee was anxious not to interpose its opinions between the House of Commons and the minutes of Evidence, the Committee confined itself in its report to enumerating the topics discussed in the later volumes. Those in volume nine, for example, included law, natives, education, civil servants, press, official correspondence with India, and settlement of Europeans.

In its other parts the report was chiefly descriptive; it described various institutions, including the judiciary. This last is of particular interest to us, because it included the opinions of the Committee which were to recur frequently, in the evidence of the

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4. Volumes 1 - 4 of 1832 contained Bills laid before the Commons: vols. 5 - 7 contained Reports of other Committees on domestic questions such as the Charter of the Bank of England, observance of the Sabbath, Public Petitions, Dramatic Literature, etc.

witnesses examined by the Committee.

The judiciary in British India and the laws it administered comprised a dual system. There were the Company's courts and the king's courts. In the Company's courts there were two grades of Europeans judges, the District and Provincial judges, and the judges of the Sudder Court. There were two classes of native judges; munsifs, who were posted in the interior, and Sudder Amins, who were stationed at the same place as the European District judge. The Supreme Courts sat at the Presidency towns of Fort William, Fort St. George, and Bombay. Their jurisdiction extended to Britons everywhere and to everyone within certain limits round the Presidency towns. The jury system was confined to the Supreme Courts. No regulation passed by an Indian government, which affected individuals within the jurisdiction of the Supreme Court was valid, unless it was registered by the Supreme Court. This power had recently been abused by that body, and it was being asked whether the Supreme Courts should not be abolished. There were some objections to such a step being taken, the chief one being that, with the abolition of the Supreme Courts, Britons in India would be brought under the jurisdiction of the Company's Courts, which applied not only Company's regulations but also native laws, the last being considered unsuitable for British citizens. Other solutions were therefore offered to the question posed by the Supreme Court.

1. Accurate and strict definition of the jurisdiction of the Supreme Court.
2. Establishment of a general legislative council.

3. Appointment of local agents with the control of districts.[5]

The committee then proceeded to express the opinion that:

"On a large view of the state of Indian legislation and of the improvements of which it is susceptible, it is recognised as an indisputable principle that the interests of native subjects are to be consulted in preference to those of Europeans, whenever the two come in competition; and that therefore the laws ought to have adopted rather to the feelings and habits of the natives than to those of Europeans. It is also asserted that though the principle of the native law might beneficially be assimilated to British Law in certain points, yet the principle of British Law could never be made the basis of an Indian Code, and finally, that the rights of the natives can never be effectually secured otherwise than by the appointment of an European Judge to every Zillah Court, with native judges as his assistants and assessors; and by the substitution of individual for collective agency."[6]

In other words, the Committee had perceived, after sifting the evidence before it, that the question of the future of the Supreme Courts was linked with the difficult question of a uniform law for the East Indian territories and with the still more difficult

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5. As the Committee does not explain the relevance of the second and third suggestions, one can only conjecture that they were intended, like the first suggestion, to reduce the friction between the two types of courts.

6. Select Committee Report. vol. 8 of 1831 - 2.paper 734 p.21

question of the principles on which such uniform law should be based. Were they to be taken from native or from English law? The Committee also realised that certain improvements in the judicial machinery would have to be made for the laws to be truly effective.

Similarly, the Committee observed that the evidence before it showed that good government of India was intimately concerned with the character and habits of natives, and that the natives were "sufficiently observant" of the merits and defects of the system and resented not being allowed to rise in the service of the Company.[7]

The Committee's report, as well as the subsequent minutes of evidence, show the deep interest taken by the Committee in various problems relating to the natives, such as their education, and the possibilities and consequences of giving them a greater share in the administration, albeit at the lower levels. The Committee was interested to know whether western education and jobs in the administration would a) improve native character and b) increase their attachment to their alien rulers. These questions, which the Committee repeatedly asked of its witnesses in collecting evidence on matters Public and Miscellaneous, remind one of Sir Charles Metcalfe's comment that nothing would ensure permanent rule of India by the British.[8]

This brief report also summarises the Committee's findings on other matters, such as a free Indian (native and English) press,

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7. ibid. at p.21

8. See Chapter II Section 2, p.147

suitable education for civil servants going out to India, the necessity and efficacy of proselytisation of Indians. The report also refers to the Committee's findings in the financial and other aspects of the Company's government of India, but, as they are not relevant to our investigations, we shall not refer to them. Of the subsequent volumes, we shall confine ourselves to volume nine, which contains all the material of interest to us in answering the question we have posed in this chapter. The remaining volumes ask questions of a technical nature and relate to the administrative macninery of the Company's government. Volume nine goes a long way towards revealing British attitudes to India and their conceptions about that country.

The remainder of volume eight is an appendix, consisting of a report written by Charles Grant in 1792 on the state of Indian society. In Grant's opinion Indian society was thoroughly depraved and conversion to Christianity was one way of reclaiming the natives.

In volume nine the Select Committee examined seventeen witnesses, some of them repeatedly. These included Peter Auber and James Mill of East India House, and Indian civilians such as Holt McKenzie; the Principal of Haileybury College and a missionary were also examined by the Committee.

From the answers of Peter Auber, we get a clear picture of the judicial and legal system in British India. In addition to the facts mentioned in the Select Committee's report, we are now told that, as the British could, in most cases, be tried by Supreme Courts alone, almost all cases involving a Briton, which arise in the interior, had to be taken to the Presidency towns, causing tremendous loss of time and money.

Peter Auber was also asked to describe the method by which laws were made in the East Indian Territories.

Each Presidency had a governor and a council of three members. The councillors acted only in an advisory capacity and the governor had the power to reject their advice. Each governor and his council made regulations for his Presidency. All regulations were laid before Parliament for their approval. The regulations were of two kinds; of the first kind were rules and regulations made under the Regulating Act, 1773 (13 Geo c.3), and related to places within the jurisdiction of the Supreme Courts and subordinate to Fort William. These regulations, which were required to be in keeping with English laws, had to be registered in the Supreme Court in order to be valid. They had to be displayed for public notice for twenty days before registration. Then the regulations were sent to England, where they were similarly put up in East India House for general notification. For sixty days people could appeal against the regulations. Finally, the king could set the regulations aside.

The second type of regulations related to mofussil areas and prescribed the duties of civil servants, especially in the judicial and civil branches. These regulations also governed the proceedings of the provincial courts. All these were binding upon the Company's servants and upon the natives. They were formed into a code and promulgated, after being translated into native languages. The promulgation was achieved by distribution amongst the courts of justice, boards of revenue and trade, and offices of collectors of revenue and customs. Copies of these regulations were sent to the Court of Directors and Board of Commissioners for Affairs of India.

Peter Auber had been in the East India Company's service for several years; he had risen from being an established clerk in the secretary's office to being a secretary himself. He was therefore asked exhaustive details about the organisation of East India Company at all levels, from the Court of Directors to the writers (i.e. new recruits to the civil service) who went out to India. Auber was also asked about the mode of appointing and training civil servants. Was the prevailing system too expensive? Equally searching were the questions the Committee asked Auber about correspondence with India. From these it transpired that the time which elapsed between receiving a dispatch from India and answering it, varied between ten days and two years. Auber felt that replies to India should be expedited.

Auber was the first witness before the Select Committee, and by asking him questions about the organisation of the East India Company, the Committee tried to build up a picture of the body, whose affairs they were to examine. Some of these questions were repeated in their examination of other witnesses. Auber had never been to India, nor, unlike James Mill, had he any reputation for knowing anything about that country. Consequently he was not asked any questions about policy. The details supplied by Auber regarding the law making procedure in India and the judiciary in India are important to us, because, without knowing these facts, the discussions about changes in the law making procedures in India will not be intelligible.

The next witness of importance before the Select Committee was James Mill, philosopher, Author of "A History of India", and an

Examiner at India House, where he had served for fifteen years, when the Select Committee examined him. Since 1830 James Mill had been Examiner of Correspondence at India House. An Examiner was the Superintendant of the Office, from which correspondence in the Political, Revenue, Judicial and Miscellaneous branches of correspondence with India was conducted. James Mill was therefore eminently suited to discuss a wide variety of questions. He was asked to describe the method of correspondence with India, and he was also asked his opinions on the defects in the law making procedures in India.

All presidency governments corresponded directly with India House. When their letters were received, they were read to the Court of Directors, either in full or in a shortened form, depending on their importance. Abstracts were made and copies were given to each director. The correspondence enclosed in letters from India was recopied and bound in volumes called "collections". Collections were read by officials, who drafted the replies, (they would be men from the Examiner's office) paragraph by paragraph. Each draft was prepared under the directions of the chairman and deputy chairman, and then submitted to the Committee of Correspondence for any changes. From the Committee the draft went to the Court of Directors, and finally to the Board of Commissioners. The Board had to return the draft within a set time and they had to give reasons for any changes made by them in the draft.

Not surprisingly, this procedure consumed a great deal of time. Mill felt that it would be better for the Bengal government to

supervise the other two Presidencies, and correspond on their behalf with England. This would ensure speedy supervision and it would also reduce the volume of correspondence.

James Mill's years in the Examiner's office had left him with no illusions about the importance of the correspondence. Much of it took place after the events which originated it had long since become irrelevant. This was particularly true of secret dispatches, which dealt with the making of war and peace. Mill felt that, had all the secret dispatches been put in the fire, instead of being sent to India, the result would scarcely have been any different. Mill was also asked for his views on the legal structure in the East Indian territories. He felt very strongly that there should be one law for all in the Company's territories, and that the governor general in Council should pass the laws. Although, he said, he had not thought about the question very clearly, Mill offered a few ideas on this subject. He felt that there should be a legislative council, consisting of the governor general, a high class native, an experienced civil servant, and an English lawyer, to legislate for India. This legislative body should make laws on every subject, and for every person within the Company's territories, but it was to be subject to Parliament's authority. Mill did not think it wise to admit judges to the Legislative Councils. He agreed that the Council should be helped by another small body, similarly composed, from which replacements of Councillors could be made.

James Mill was not particularly enthusiastic about teaching English to natives of India. The language itself was of no importance, and European knowledge could be more quickly imparted

and absorbed, if it was first translated into native languages.

Some of James Mill's ideas about legislation in India might have had some effect on the establishment of a law commission and the introduction of a Law Member into the governor general's council. He might equally have influenced those sections of the charter, which made the governor general-in-council the sole legislative authority in India. The Charter of 1833 incorporated another one of Mill's suggestions: After 1833 the correspondence for Bombay and Madras with England passed through the Governor-general in Bengal.

This impatience with the ineffectual and time-consuming correspondence, shown by Mill and Peter Auber, was fully shared by the Indian civilians, who felt that the Directors asked for too many details.

In their examination of the men who had served in India, the Select Committee concentrated on various aspects of the Company's government in India. From their inquiries it appears that three distinct questions agitated the minds of the Committee's members. Relations with the natives; defects in the legal system; and European settlement in India.

Each one of these questions in turn meant answering several more specific, and limited questions.

For example the problem of relations with natives depended upon the "character" of the natives, their enthusiasm for western education, and the possiblity of absorbing them in the Company's administration. All these questions were inter-dependant.

Western education would make it possible to employ the natives in the Company's offices, provided they had the right sort of character. Again, their characters might be improved by western education, which would impart not only western knowledge but also western morals. Lastly such education and appointments in the public service could possibly have the effect of making natives more loyal to the British. The questions asked by the Committee were ultimately directed to finding an answer to what must have been the most important question: how could the loyalty of the natives be secured?

By and large the civil servants were in favour of western education for natives. Holt McKenzie[9] felt that it would make them identify themselves more with their rulers. He thought that they would make good civil servants, and described them as being "exceedingly acute as men of business and very industrious".[10]

McKenzie was also asked if, in his opinion, English rather than Persian could be used in the law courts. His answer, though it went unnoticed then, is of interest to us. McKenzie replied that this was possible, when enough educated persons knew English. For the majority of the people, Persian was as unintelligible as English. In other words, whenever one talked about natives in the context of education or jobs, one was definitely talking about the

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9. Bengal civil service, Secretary to Government of Bengal in the territorial dept. 1816 - 30

10. Select Committee Report on East Indian Company's Affairs. H. of C. 735 I of 1831 - 2 vol. 9 para 691

native élite. It was this group whose loyalty had to be secured. The majority of the ruled people had always been in a position of isolation from the rulers and, as they accepted it, they constituted no danger.

We do not wish to suggest that McKenzie realised the full impact of his brief remark. But it gives us a glimpse into the nature of government in 19th Century, particularly an alien government. While the business of government was ostensibly conducted for the entire country or nation, in effect it was carried on with an eye upon the groups which wielded power, and which could, therefore, potentially threaten the government.[11] This of course, was not necessarily the result of deliberate policy. Nevertheless it had the same effect as a deliberate policy. The language of the courts could be any language which the élite understood: the rest had never counted. This would also be true of the laws that were passed and the posts that were offered to natives.

Charles Lushington, who had spent twenty-two years as a civilian in India, had been the secretary to general department at Calcutta, for ten of those years. He was also in favour of western education for natives, a cause, he felt, which would be facilitated if the man so educated were to be employed by the Company. As to native character, Lushington replied that if the Indian (Bengalee) was not very trustworthy, it was because, when he was given offices of trust, he was not paid sufficiently well to resist temptation to misappropriate the funds he controlled. His own

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11. cf the introduction to this chapter.

experience of natives had been to the good and on one occasion his Bengali assistant had for a long period, been exposed to temptation to cheat, as Lushington, who signed the books, could not read the native script!

If Lushington and McKenzie refused to be drawn into making rash generalisations about "natives", Campbell, a civil servant in the Madras Presidency had only good words for them. A.D. Campbell had spent eighteen years (1812 - 30) in India. At different stages of his career he had served as a Collector of revenues, a Magistrate, a Superintendant of Police, and a judge of Circuit and Appeal. He was official translator of Telegu to the Madras Government and understood Marathi, Canarese and Tamil. He had served on a three man committee of instruction for improving the education of natives. This is what he had to say about the character of natives: "The lower classes of the natives appear to me as prone to crime as those of a similar description in our own country. The higher classes, except in European science and general information, may vie with those of a similar rank in Europe. Their manner and address are most polished; their conduct as heads of families and masters, kind and endearing; and the chiefs of the Telinga nation are distinguished by so nice a sense of honour, that our want of due regard to their feelings in this respect has occasionally driven some of them to suicide ... But the true character of the people is to be found in that of the middle classes, and of them I can speak in the highest terms, more especially of those connected with the agriculture and trade of the country, especially in the Bellary division of the Ceded Districts,

in which I resided four years."[12] He was not quite so pleased with the Brahmins, accountants whom he found wanting in honesty. The Tamils too, were not as truthful as the men of Bellari, but in every other respect the two people were the same. The people of Tanjore were dishonest and corrupt in the extreme, a state of affairs which Campbell blamed upon the bad system of land revenue management used by the British.

Campbell was then asked whether he thought that the natives, of whom he entertained a high opinion, were fit for public employment. His answer was that the natives of his acquaintance were "capable of holding any situation, and of conducting the duties of it as well as any European. How far it may be expedient to employ them in the highest offices, may be a question of policy."[13]

While, however, Campbell was in favour of bestowing higher offices on the natives, he did not think it wise to raise them to higher offices in the judicial service than those they already occupied, as this would mean "vesting them with that superintendance and control, which I think should continue in the hands of Europeans."[14]

In Campbell's testimony we notice the same bias towards the middle and upper classes, which we had noticed in the Reviews.[15] It is also to be observed that, while Campbell was astute enough to see that raising natives to the highest offices was a matter of policy,

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12. ibid. para 1479

13. ibid. para 1481

14. ibid. para 1484

15. see section 2 of this chapter

rather than dependant on native ability, he was, nevertheless, not in favour of vesting them with "superintendance and control" of judicial offices.

Captain Harkness, who had served twenty-six years in Madras and Bombay, but in a lower capacity than Campbell, Lushington or McKenzie, expressed himself in words which are, perhaps, artless and therefore all the more revealing. He was probably more representative of the average civilian than the other, more distinguished witnesses. Harkness was an interesting man, and apart from serving in the Carnatic, Travancore, Mysore, Khandesh, the Nizam's dominions and the West Coast, he had also written a book on the character and habits of one of the aboriginee tribes in the Nilgiri mountains.

About the natives he said, "I do not know in what particulars they differ from Europeans; there is a want of firmness of character about them; I do not think them in anyway deficient in intellect, and the better classes of them are a moral people. I think there is an erroneous opinion prevailing about the Hindu character; I think they are considered less moral than they really are; there are of course good and bad amongst them, and the bad perhaps predominate, but I think otherwise."[16]

Harkness had his prejudices, and he preferred the Hindu's moral character to that of the Muslim. He went so far as to say that in his opinion the Hindu was "as correct in his notions of the duties of civilised life as the Christian."[17]

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16. Select Committee Report para 1943

17. ibid. para 1944

The Committee went on to ask: "What is your opinion of their fitness for office and places of trust?" "I do not know of any office they are not fit for, under the superintendance of Europeans."[18]

This last remark of Harkness is interesting, because he then proceeded to explain at great length that it was essential to offer the native offices, which not only carried high emoluments, but also carried trust responsibility and therefore honour for the incumbent.[19]

It seems as though, notwithstanding his high opinion of the native character and ability, a deeper prejudice against allowing Indians to wield power proved stronger with Harkness; this is why he was prepared to see Indians in civil service jobs only "under the superintendance of Europeans." If he was as representative of British civilians in India, as we think he was, this prejudice must have prevailed with them, or most of them. It is worth noting this prejudice as it would undoubtedly affect the dealings of the civilians with the natives.

This ambivalence in the British attitudes towards the natives was most clearly reflected by clause 87 of the Charter Act of 1833 and its subsequent history. Clause 87 specified that, henceforward, no man within the company's territories was to be denied a job "only" on the basis of his caste, colour, creed or descent. Macaulay, in his speech during the second reading of the Charter bill, declared himself proud of his connection with the clause.[20] He described it

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18. ibid. para 1945

19. ibid. para 1949

20. Speeches of T.B. Macaulay. p.160

as "that wise, that benevolent, that noble clause." Yet the provisions of that clause were never more than a dead letter. In 1839 the judges of the Madras Sudder Court delivered the opinion that an enactment, which forbade natives to hold a particular office, was not contrary to the provisions of Clause 87 because, they said that when natives were barred, it was not "only" on account of his caste colour or creed.[21]

These civil servants were also asked several questions about the possibility and consequences of European settlement of India.[22] None of them appeared to have regarded it seriously. Holt McKenzie was all in favour of capital investment in India by the British, He said that the natives were not interested in agriculture or commerce, and under these circumstances British investment would benefit both parties.

Charles Lushington did not think that there was much danger of a large influx of needy adventurers to India, should the restrictions on European settlement be lifted. As he pointed out, India was rather a long way off. If they did come, would the English peasant find it possible to make a living in India? Lushington had his doubts. The Indian Ryot lived far more cheaply, at a much lower standard than the English peasant knew. Moreover the latter would

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21. Indian Leg. Consultations, Range 207/15.

22. Rather confusingly the words "European" and "British" or "English" were used interchangeably in these discussions. When talking of settlement, or amenability to courts, the word "European" really meant British.

also find the climate hostile.

The Select Committee persisted in their inquiries and asked Lushington whether, in his opinion, English artisans and craftsmen would find it profitable to settle in India. The answer this time was even more discouraging. Indian craftsmen excelled at their skills and only superior foreign craftsmen could hold their own with them. The inference though not made, is evident. As the superior craftsman would prosper at home, he would not bother to go out to a country five thousand miles away. The bad craftsman, on the other hand, wuuld not survive in competition with the Indian.

Like McKenzie, Charles Lushington thought that foreigners with capital ought to be encouraged to go to India, as it would benefit India. Should they be allowed to buy land? Yes, provided the natives were given proper protection against oppression. How did he expect to give this protection? Lushington answered: "I would make the Europeans in question amenable to the Company's courts and the less that the Supreme Court is allowed to interfere, the better."[23]

McKenzie's language was not so impatient with the Supreme Court, but his sentiments were similar. He thought that the only difficulty in allowing Europeans to settle in mofussil areas was that it complicated the administration of justice. The Company's Courts could try a Briton only for assault; for every other offence any case involving a British citizen had to be sent to the Presidency towns to the Supreme Courts. This meant that all civil cases and almost

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23. ibid. para 1005

all criminal cases involving Britons involved the parties in heavy expense, and much inconvenience. McKenzie thought that Europeans should be subjected to the same courts and same laws as the natives.

Could Europeans be subjected to the same criminal law as the native? McKenzie thought so. The offensive parts[24] of Mohammedan law had been removed, and tiresome technicalities[25] had been set aside; the rest of the criminal law applicable to natives consisted of Regulations passed by the Governors, so the criminal law applied by Company's courts was not only not barbarous; it might well have been milder than the existing English law.

In the opinion that the British in India should be under the same law as the natives, McKenzie and Lushington were supported by James Mill; though the Select Committee may not have shared Holt McKenzie's happy view of the Company's criminal law, the Charter Act of 1833 did provide for the codification of laws for India, to be applicable to all those who resided in the Company's territories.[26]

Holt McKenzie was also asked about the process of legislation in India. He said that, in his opinion, the laws would be better in content, if the Governors appointed some natives and some experienced civil servants as Legislative councillors.

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24. i.e. the barbarous punishments such as stoning and mutilation.

25. These related to evidence, According to Mohammedan law the testimony of a "heathen" was not acceptable; the evidence of two (muslim) women equalled that of one muslim man.

26. Clause 53 of Charter Act of 1833 (Cap. 85 Wil IV 3 and 4)

It is evident that the questions which agitated the minds of the gentlemen who read the learned magazines, and the questions into which the Select Committee inquired were, broadly speaking, the same: European settlement, relations with natives, the best ways of ruling Indian possessions, and, most important, possible means of reaping profits from British connection with India.[27] The information, which the Select Committee, by pertinent and close questioning, collected, was altogether more precise and sophisticated than what was published by the Edinburgh and Westminster Reviews. Yet, when the Select Committee's Report on the Affairs of East India Company was published in August 1832, it received scant attention from a literary world which was always bemoaning its ignorance of India.[28]

One of the appendices[29] to volume nine of the Committee's Report consisted of transcripts of papers and correspondence on slavery in the Indian possessions of the East India Company. In Section two of this chapter we argued that the English knew little about India, and that they tended to view India in the light of their experience in the West Indies and North America. We had illustrated this point by showing that, because Indian slavery was in many ways different from its West Indian counterpart, the former was regarded

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27. The last question occupied the volumes of Trade and Revenue. i.e. Volumes 10A, 10B and 11.

28. The full title of the report was "Report of the Select Committee appointed to inquire into the state of affairs of East India Company, and into the state of trade existing between England, India and China".

29. Appendix K. vol. 9 of 1832

as mild, benevolent, and paternal. The slavery papers examined by the Select Committee are therefore of particular interest to us.

The appendix on Slavery contained some government reports on the subject, and inter-departmental correspondence on the treatment and traffic in slaves in the East Indian territories. It is worth noticing that the slavery papers started accumulating not later than 1793. There was further correspondence on this subject in 1798. Acts to regulate slavery were passed by the Bombay and Madras Presidency legislations in 1811. Eleven years later, in 1822, a report was prepared on Indian slavery, and was laid before Parliament in 1825. There was also plenty of judicial and administrative correspondence on the subject. Between 1825 and 1831 the Commissioners for the Affairs of India circulated a fresh questionnaire on slavery, to be answered by civil servants in India.[30] Five of the answers received were included in Appendix K, Of these, the replies of T.H. Baber and A.D. Campbell were detailed and well-informed. One person, a clergyman, said that though he had spent eight and a half years in Travancore, he had never inquired into the subject and therefore did not know much about the condition of slavery!

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30. There is no date on the questionnaire, but the date can be tentatively fixed by the fact that, as one of the informants quotes from papers of 1825, it could not be of an earlier date. Nor could it have been of date much later than 1830, given the amount of time it required to prepare, and send out questionnaires to India, to have them answered and to receive them back in England, in time to be appended to the Select Committee's Report of August 1832.

The questionnaire, which asked fifteen questions, started off cautiously by inquiring into the opportunities the officials had had of acquiring any knowledge about slavery. It then proceeded to inquire into various aspects of that institution. What was the number of slaves in the territory with which the officer was acquainted? How were persons enslaved? Did native laws sanction domestic and/or agrarian slavery? What was the slave's status and what were his rights? Could he be sold? Could he be manumitted? How was he treated? Had his condition changed under the British, particularly with reference to sale and manumission? Finally, did the officer think that British policy in India should be directed towards abolition of slavery, or only towards ameliorating the condition of slaves?

T.H. Baber had retired after thirty two years of service in Western and South India, in every department of the civil service, to wit the Revenue, Police, Magisterial, Judicial, and Political. His work had brought him into close contact with the condition of slavery, and, he added, he took every opportunity to add to his information by questioning natives from areas such as Mysore and Ceorg, which were outside his jurisdiction.

Baber's assessment of the number of slaves in Canara, is startling, where he said 80 thousand out of a population of one million were slaves. In Malabar the figure for the same total population was even higher, ninety-five thousand. In the Maratha country, however, there were only fifteen thousand slaves in a total population of two million. Returns for Travancore were unreliable, because they were vague.

Baber then turned to the questions on the status and sale of slaves. He referred to a Report of 1793, written by Jonathan Duncan on slavery in Madras. Duncan had said that, though Poliars and Cherumars were not called slaves, they were no different from them in condition; they could be sold with the land, or separately, and members of a family could be sold separately from one another.

Baber could not say where this barbarous practice of breaking up families originated, but he had no doubt that it had derived support from "that impolite measure"[31] of giving Mr. Murdoch Brown, overseer of the Company's plantations in Malabar, the power to purchase slaves wherever he could, to carry on the work of the plantation.

Baber's account of Brown's activities reads like a grisly adventure story. At one point Brown had complained that the tehsildar[32] did not provide him with enough labourers, and that, of the forty-five slaves he had purchased, four had absconded, further reducing his labour force. Brown wanted the government of Madras to give him the power to take one in ten of the inhabitants, so that he could employ two thousand men and eight hundred women. Brown was authorised to purchase slaves, and local authorities were directed to apprehend and return runaway slaves to him. Under this authority, Brown had "imported" free-born persons as slaves, from Travancore. In 1811 Baber eventually put a stop to this practice. At that time

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31. Appendix K. vol. 9 p.550

32. A minor revenue and administrative officer

Brown had seventy-one stolen persons in his possession. This was only a small proportion of the total number of persons he had actually received over the years. Some had absconded, but more than half had died. Assen Ally, Brown's agent, admitted that in 1811 alone four hundred children had been transported to Malabar.

How were the slaves treated? Baber replied that the treatment of slaves depended upon their masters. It was difficult to know what went on in the closely guarded homes of the natives, who used domestic slaves both as menials and for prestige.

As to agrestic slaves "nothing could be more miserable or pitiable".[33] They were slightly better off on the coast than in the interior, as on the coast there were slightly better facilities for working as porters, for cutting and selling grass, and thus making a little extra money. This was of course only possible if the master was kind enough to let his slaves work for themselves, when he did not need their services.

Were the slaves chastised? Baber's answer to this question is most important. It reveals real acquaintance with the condition of slavery, and the attitude of the masters. In forthright terms he said "I have no hesitation in saying that no sort of dependance is to be placed upon those of them that say that, "it is only customary to reprimand or admonish slaves", and that even those who do admit the practice of flogging, imprisoning or putting in the stocks by no means convey a full idea of the severities exercised at the present

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33. Appendix K. p.553

day; because, as Mr. Graeme[34] justly observes, 'these informants are the proprietors of slaves themselves and not disposed to admit that the authority over slaves is exercised with any extraordinary severity!'[35]"

In his years in the judicial service in India, Mr. Baber found that at every sessions there were cases of wounding or murdering slaves brought to light by the police, though most cases were not discovered, and yet the slaves were the "most-enduring, unresisting and unoffending class of people"[36] and therefore unlikely to incite violence against their persons.

A slave owner in Malabar was accountable to no one for his slave's life, and could put him to death. The only check on the unrestrained exercise of this power, according to Baber, was the presence and influence of the British resident in the courts of the native states.

This is not to say that in British territories the slaves were well-off. Baber refers to an incident in his career, which shows this only too clearly. He found that the disturbances amongst the people who lived in the Wynad hills were due to the fact that the plainsmen carried off the hill-folk forcibly and made them slaves. Baber promised to put an end to this practice. This was in 1812. In 1820, however, there were fresh disturbances and Baber found that the practice had continued surreptitiously. Baber directed the magistrate to redress the wrong, but the collector justified the

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34. Mr. Graeme quotes from the Slavery Report of 1822. At that time he was a Commissioner in Malabar.

35. Appendix K. p.555

36. Appendices K- p.556

practice and the government supported him.

Baber also mentions the fact that frequently masters forbade their slaves to cohabit with their spouses, when the two belonged to separate masters. Two such cases had occurred in 1825 and the Presiding Judge had recommended thatthe government should make it obligatory upon the masters to allow their slaves to cohabit, but "the government saw no necessity for the enactment of a new Regulation."[37]

Question number seven[38] was: What was the status of the slave before the law? Was he entitled to any legal protection? Baber's answer to this question was clear and emphatic. Whatever anyone might say, slaves were not protected by law. To prove this point Baber quoted from his report on the second session of 1823:

"Adverting to the facts elicited during the foregoing trial, it will no longer be denied that cruelties are practiced upon the slaves of Malabar, and that our courts and cutcherries[39] are no restraints upon their owners or employers, for whatever doubts may exist with regard to the exact period of the death of the Cheruman Koory Nayady,[40] or to the immediate cause of his death, there can be none as to the fact of his nose having been amputated, as well as those of three other slaves belonging to the same owner; and that, although the case had come before the magistrate, no steps had been taken to bring the perpetrators of such horrid barbarities to justice."

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37. Appendix K. p.563

38. There were altogether fifteen questions.

39. Public offices

40. The slave whose death led to this trial.

Most significantly, Baber went on to say in his report "upon the latter head it may be argued that the slaves themselves had preferred no complaint; but if it is to depend upon the slaves themselves to sue for the protection of the laws, their situation must be hopeless indeed, for having no means of subsistence independant of their owners or employers, their repairing to and attending upon a public cutcherry, is a thing physically impossible, and even though those provisions of the Regulations that require all complaints to be preferred in writing, were dispensed with in favour of slaves; and they were exempted from the payment of tolls at the numerous ferries they would have to pass; and though an allowance was made to them by government during their detention at cutcherries and courts,[41] unless forfeiture of the right of property over slaves was the penalty for ill-usage, their situation would only become more intolerable than it was before they complained."[42]

It could hardly be stated any more clearly that declared protection was no protection, unless all possible ways of claiming the protection and benefitting from it were open to the slaves. Government might congratulate itself on its laws, but they remained unenforced.

The Commissioners had also asked whether slaves could be sold at the master's pleasure. In Malabar in 1819, the Board of Revenue had prohibited the sale of slaves to pay for arrears in revenue, but not in execution of decrees. In every other respect the master was free to sell his slaves. In Bombay, also in 1819, sale of slaves

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41. There were no such exemptions, as Baber is quick to point out in his report.

42. Appendix K p.559

was expressly forbidden, and this in express opposition to the opinions of two of the most "able and humane men India has ever produced!" (Monstuart Elphinstone and one Mr. Chaplin). According to these men, any restrictive measures would have been "an innovation upon established customs, and an infringement of private rights;" that is on "what had hitherto been deemed a marketable commodity."[43]

Baber was not only in favour of manumission of slaves; he thought that, contrary to the opinion of Murdoch Brown, whom some persons regarded as an oracle, things were changing; for example the natives were gradually throwing off their superstitions; a climate in which the abolition of slavery was well received could and would be created, albeit gradually. Indeed Baber went further and accused the East India Company of maintaining the status quo. Amongst the slaves in the vicinity of large towns he had observed "a growing spirit of industry and independance, which, but for the countenance their masters have received from us in these their natural acquisitions, would have ripened into an assertion of their liberty long ago; and unhappily, the subject has an appearance of such magnitude as to deter or produce an indisposition,at least in the ruling authorities, from adopting any specific measures to improve their condition or even to extend to them the full protection, which it was the intention of the Legislature that all classes of people should receive from the laws."[44]

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43. Appendix K. p.563

44. Appendix K. p.565

One can only admire Baber for his acute and astute criticism of governmental behaviour. This criticism directly applied to the attitude of Lord Auckland, when the slavery act of 1843 was before his Legislative Council.[45]

The Charter Bill of 1833 had contained a clause which provided that all slavery in India was to cease in five years from the passage of the Charter Act. The Directors lobbied vigorously to get this clause altered, and in this objective they succeeded. In its final form this clause merely enjoined the Directors to remove slavery as soon as it was possible to do so without endangering the Company's position in India. The anti-slavery lobby finally succeeded in exerting enough pressure at home for India House to urge the Indian government to act on this matter. So little was the Indian government willing to act, that, despite the slavery papers, government officials continued to talk of the mildness of Indian slavery. Lord Auckland's characteristic reaction was to ask the Law Commission for yet another report on slavery. That report sounds like an echo of all the previous papers.[46] It was not till 1843 that a very weak and ineffectual Act to regulate the condition of slavery was passed by the Indian government.

At a time when British public opinion was still deeply concerned with West Indian slavery[47], its ignorance of Indian slavery was probably symptomatic of the general apathy towards India. Little was known about that country and yet, when a body, as respectable

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45. see Chapter II section 4

46. See Chapter II Section 6 pp 217, 218

47. See Section 2, Chapter I

as a Select Committee of the House of Commons, published the voluminous result of its labours, not a single Review took any notice of it. Nor does it seem to have exited much interest in Parliament. At a time when debates on India met with the most indifferent response from that institution, the fate of the Report, however unfortunate, was not surprising.

SECTION IV

Macaulay in Parliament (1830-33)

In the previous sections we looked at the state of information about India which prevailed within and without Parliament. In them we dealt with large groups of men; this section is devoted to just one person, Thomas Babington Macaulay. We have several reasons for doing so. First of all, Macaulay was soon to go out to India as the first law member of the Legislative Council, and it is relevant to ask how much he knew about India before he accepted this assignment. Secondly in his speech during the second reading of the East India Company's Charter Bill[1] Macaulay had stated his own views about the Charter, and about India. In this speech Macaulay also gave a general description of the effect Indian debates had on the House: the House had neither the time nor the knowledge, nor the motive to give them any purpose. "A broken head in Cold Bath Fields produces a greater sensation among us than three pitched battles in India,"[2] Macaulay remarked. This description was only too true. Macaulay had probably given more thought to the issues involved in the Charter than most of his colleagues on either side of the House. It would be a safe

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1. On 10th July 1833. "Macaulays Speeches" edited by himself. [1854] "Government of India Bill". (~~1854~~) at p.124

2. ibid. at p.137

assumption that the shortcomings in his approach to India would not be remedied or even noticed by his listeners. In other words Macaulay's speech was a good guide to the information existing in the best minds in Parliament about India.

It is however not enough to ask what Macaulay knew about India. It is equally necessary to ask what sort of a mind Macaulay brought to India. During his three years[3] in Parliament before the Charter Bill was discussed by that body in 1833, Macaulay had made several noteworthy speeches in the House, from which one gets an excellent idea of the questions which interested Macaulay and the manner in which he approached them.

Macaulay's speech on the Charter Bill was preceded by several speeches on domestic matters. Between March and December 1831 Macaulay had spoken no less than five times on Parliamentary Reform. He spoke on the Anatomy Bill[4] and made another speech on Parliamentary Reform in February 1832. He spoke on the Repeal of the Union with Ireland, and on Jewish Disabilities. The last two speeches were delivered in February and April 1833.

Two of these subjects by themselves indicate Macaulay's interests. He did not waste his energies in arguing about tarriff duties or road taxes. He was interested in ideas and principles. Parliamentary

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3. Macaulay was elected to the House of Commons in 1830, by the constituents of Calne. In 1832 he sat in the reformed Parliament as a member for Leeds.

4. February 1832. A bill to check the offence of stealing bodies from graves and selling them to medical schools for dissection.

Reform and Jewish Disabilities were subjects ideally suited to his intellect. They were also subjects which placed the speaker either in the camp of the Whigs or the reformers. This was another reason why they attracted Macaulay, a man with a liberal mind and an urge to reform. Taken together with his speeches on Ireland and India, they show that he was a European by education and an Englishman in his interests. They also show that his liberalism was that of the English middle class.

Macaulay was an exceptionally good speaker; lucidity of mind and felicity of expression combined to make his speeches a remarkable experience for his listneas. He was reputed to be able to draw members back to the Chamber, whenever he chose to speak. This same combination which made his speeches memorable, also served to reveal both the strength and the limitations of his thinking. Macaulay's strength was manifold. He had a close and living acquaintance with history, modern and classical, and with events so recent that they were political events rather than history. Along with this gift, Macaulay had a good grasp of the trends or patterns of history so that he could not only quote from his ample reading, but could also interpret the past and draw lessons for the future. Macaulay's other strong point was the delight he took in examining ideas in the abstract. His mind was easily exercised by questions such as what was meant by "property", or "virtual" representation, or "power". Macaulay argued fluently and forcefully and, once he had devastated his opponent by using the ruthless weapon of what we now call linguistic analysis, he then proceeded to support his

case by drawing upon his endless fund of historical information, to confound the opposition. His greatest strength as an orator and a writer was perhaps his pellucid and harmonious prose. Sentences, which most men would spend hours in polishing, fell from his lips effortlessly. Their effect was to hold the audience spellbound; however long the speech, it did not become tiresome to listen to and it was not tiresome to read. A brief analysis of his speeches will illustrate all these points.

Macaulay's interest in Parliamentary Reform existed before he was elected to the House of Commons. When a bill to reform the House was laid before the House, Macaulay, who was but newly elected, lost no opportunity of defending it. He brought all the powers of his formidable mind to bear upon his opponents and demonstrated that their arguments were illogical, if not nonsensical. Thus when one of the opponents of the Reform Bill protested that redistribution of seats was not necessary, because the new cities were "virtually" represented, Macaulay picked upon the adverb.

"Now sir, I do not understand how a power, which is salutary when exercised virtually, can be noxious when exercised directly. ... A virtual representative is, I presume, a man who acts as a direct representative would act: for surely it would be absurd to say that a man virtually represents the people of Manchester, who is in the habit of saying "No", when a man directly representing the people of Manchester would say "Aye". The utmost that can be expected from virtual representation is that it may be as good as direct representation. If so, why not grant direct representation

to places which, as everybody allows, ought, by some process or other, to be represented?"[5]

Another objection was that some of the ablest members of Parliament had represented rotten boroughs. Macaulay conceded the truth of this statement without conceding the validity of the argument. As he pointed out "if there were a law that the hundred tallest men in England should be members of Parliament, there would probably be some able men among those who would come into the House by virtue of this law."[6]

Macaulay's arguments were given ample support by parallels drawn from history or politics. Thus, when it was objected that the elective franchise was "property" and that to disenfranchise the rotten boroughs of their votes was to rob the voters of their "property", Macaulay was quick to ask - "If the elective franchise is property, if to disenfranchise voters without a crime proved, or a compensation given, be robbery, was there ever such an act of robbery as the disenfranchising of the Irish forty shilling voters? Is it declared in the preamble of the bill, which took away their franchise, that they had been convicted of any offence? Was any judicial inquiry instituted into their conduct? Were they even accused of any crime? ... If the principle of the honourable and learned member be sound, the franchise of the Irish peasant was property. That franchise the Ministers, under whom the honourable

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5. Macaulay's Speeches. speech on 2nd March 1831, during the first reading of the Parliamentary Reform Bill. p.9

6. ibid. at p.14

and learned Member held office, did not scruple to take away. Will he accuse those Ministers of robbery? If not, how can he bring such an accusation against their successors?"[7]

Macaulay's speeches also showed that he had that valuable asset of a politician, a good grip on trends in history. His speeches on Parliamentary reform were full of sombre warnings of the dire results that could follow upon the neglect of the popular will. In 1827 the Peelites had sworn not to emancipate the Catholics, not to repeal the Test and Corporation Acts, and not to bring in parliamentary reform. They had already been forced to give way on the first two points. Now, in opposition, they were still refusing to learn from experience, and were still fighting against Parliamentary Reform.

"Signs, of which it is impossible to misconceive the import," said Macaulay, "do most clearly indicate that, unless that question also be speedily settled, property, and order, and all the institutions of this great monarchy, will be exposed to fearful peril. Is it possible that gentlemen, long versed in high political affairs, cannot read these signs? Is it possible that they can really believe that the representative system of England, such as it now is, will last till the year 1860? If not, for what would they have us wait? Would they have us wait merely that we may show to all the world how little we have profited by our own experience? Would they have us wait, that we may once again hit the exact point, where we can neither refuse with authority, nor concede with grace?...

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7. ibid at p.15

Would they have us wait till the whole tragi-comedy of 1827 has been acted over again; till they have been brought into office by a cry of "No Reform", to be reformers, as they were once brought into office by a cry of "No Popery" to be emancipators? ... Have they forgotten how we were forced to indulge the Catholics in all the liscence of rebels, merely because we chose to withhold from them the liberties of subjects? ... Do they wait for that last and most dreadful paroxysm of popular rage, for that last and most cruel test of military fidelity? Let them wait, if their past experience shall induce them to think that any high honour or any exquisite pleasure is to be obtained by a policy like this ... But let us know our interest and our duty better. Turn where we may, within, around, the voice of great events is proclaiming to us, 'Reform, that you may preserve'".[8]

A few months later, in a speech on the second reading of the Reform Bill,[9] Macaulay answered another objection in the same manner.

"Your great objection to this bill is that it will not be final. I ask you whether you think that any Reform Bill which you can frame will be final? For my part I do believe that the settlement proposed by His Majesty's Ministers will be final, in the only sense in which a wise man ever uses that word. I believe that it will last during that time for which alone we ought to at present to think of legislating. Another generation may find in the new

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8. ibid p.17

9. ibid at p.20

representative system defects such as we find in the old representative system. Civilisation will proceed. Wealth will increase. Industry and trade will find out new seats. The same causes which have turned so many villages into great towns, which have turned so many thousands of square miles of fir and heath into cornfields and orchards, will continue to operate. Who can say that a hundred years hence there may not be, on the shore of some desolate and silent bay in the Hebrides, another Liverpool, with its docks and warehouses and endless forests of masts? ... For our children we do not pretend to legislate. All that we can do for them is to leave to them a memorable example of the manner in which great reforms ought to be made. In the only sense, therefore, in which a statesman ought to say that anything is final, I pronounce this bill final".[10]

The debate on Jewish Disabilities[11] similarly called forth Macaulay's powers as a thinker and a speaker. In a speech entirely free from irrational prejudice, he asserted the right of the Jewish people to be treated on a par with Christians and heaped ridicule upon every feeble attempt to keep them in their deprived position. Here once again Macaulay asked and answered questions which dealt in abstractions: What was "property"? What was "persecution"? What was "power"?

The member for theUniversity of Oxford had asked where the House would stop, once they admitted Jews. Would they then open

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10. ibid. p.32

11. ibid. p.111

the doors to Muslims, Parsees and even Hindus? Macaulay countered with another question. Where did the honourable member mean to stop? "Is he ready to roast unbelievers at slow fires? If not, let him tell us why: and I will engage to prove that his reason is just as decisive against the intolerance which he thinks a duty as against the intolerance which he thinks a crime. Once admit that we are bound to inflict pain on a man, because he is not of our religion; and where are you to stop? Why stop at the point fixed by my honourable friend, rather than at the point fixed by the honourable member for Oldham, who would make the Jews incapable of holding land? And why stop at the point fixed by the honourable member for Oldham, rather than at the point which would have been fixed by a Spanish Inquisitor of the sixteenth Century? When once you enter on a course of persecution, I defy you to find any reason for making a halt till you have reached the extreme point."[12]

Macaulay then went on to talk about the nature of property. "When my honourable friend[13] tells us that he will allow the Jews to possess "property" to any amount, but that he will not allow them to possess the smallest political power, he holds contradictory language. Property is power. The honourable Member for Oldham reasons better than my honourable friend. The honourable Member for Oldham sees very clearly that it is impossible to deprive a man of political power, if you suffer him to be the proprietor of half a county, and therefore very consistently proposes to confiscate

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12. ibid p.113

13. The member for the University of Oxford

the personal property of the Jews. Yet it is perfectly certain then any Jew, who has a million, may easily make himself very important in the state. By such steps we pass from official power to landed property, and from landed property to personal property, and from property to liberty, and from liberty to life."[14]

Macaulay then closed his speech by refuting all the criticisms of the Jewish people as a mean, sordid, "moneygetting" race.

"Such sir, has in every age been the reasoning of bigots. They never fail to plead in justification of persecution the vices which persecution had engendered. England has been to the Jews less than half a country; and we revile them because they do not feel for England more than half a patriotism. We trust them as slaves, and wonder that they do not regard us as brethren. We drive them to mean occupations, and then reproach them for not embracing honourable professions. We long forbade them to possess land; and we complain that they chiefly occupy themselves in trade. We shut them out from all paths of ambition; and then we despise them for taking refuge in trade. During many ages we have, in all our dealings with them, abused our immense superiority of force; and then we are disgusted because they have recourse to that cunning, which is the natural and universal defence of the weak against the violence of the strong."[15]

We have said that Macaulay was a European and a liberal by education and that he was an Englishman in his interests. The

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14. ibid. p.114

15. ibid. p.121

first point is illustrated by his citations from classical history. The second point is made clear by his speeches on Ireland and India. His starting point in both cases was the preservation of the empire. His position on India was slightly more flexible than his position on Ireland. He admitted that the representative form of government, which was the best kind of government, had not been given to India, because, he said, citing James Mill, India was not yet ready for it. Though India was to have despotic government, - "We have to graft on despotism those blessings, which are the natural fruits of liberty"[16]. In India Macaulay was prepared to admit that the best had to be made of a bad state of affairs. He was not prepared to adopt so important an attitude on the Irish problem.

On 5th February 1833 King William IV, speaking from the throne, asked the newly elected Parliament for such powers as might be necessary for maintaining order in Ireland and for preserving and strengthening the union between Ireland and Great Britain. An Address reassuring the king of the support of the Commons was duly moved by two Members, and it was opposed by the member for Dublin, O'Connell, proposed that the House should resolve itself into a committee to discuss this point. His proposal was defeated, after four nights of discussion, by 408 votes to 40. Macaulay spoke on this occasion in his usual elegant style, but either his arguments were not so convincing, or at any rate they do not carry conviction now.

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16. Macaulay's Speeches. Speech made on 10th July 1833, during the second reading of the Charter before the House of Commons. p.136

~~Thus~~ for example, O'Connell had described the Union of 1800 as the cause of all the problems of Ireland. This of course was not true, and Macaulay was quick to say so; but what he went on to say was totally unwarranted, he refused to admit that the Union was responsible for any of Ireland's troubles. Macaulay even went to the extent of saying that the Repeal of the Union with Ireland would aggravate everyone of that country's afflictions. For this reason, he said, he would oppose the Repeal, and added that no petition from Ireland would make him change his mind.[17] This was indeed strange language from a man, who had given such sombre warnings of the results of denying the country Parliamentary Reform. Other Members, who were not repealers, had said that, as millions of Irish people had set their hearts on repeal, this was a question which needed serious debate. Macaulay avoided answering this point by saying that it was their party, which had refused to discuss the question in the past. This was all very well, but Macaulay was wrong in using mistaken conduct in the past as justifying its repetition. The man who had cried "Reform that you may preserve", who had reminded the Tories that, by refusing Catholics the liberties of subjects, they had forced them to behave with the licence of rebels, and now declared that "men who faced the cry of "No Popery" are not likely to be scared by the cry of 'Repeal'"[18] This was a curious parallel for Macaulay to draw; the men who cried "No Popery" wished to deny Catholics their rights; the Repealers were claiming

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17. ibid. at p.97

18. ibid. at p.109

what they considered to be due to them and not depriving anybody else of their rights. Finally, it was the Tories who had passed the Catholic Emancipation Act, and who had therefore really faced the "No Popery" cry. It was some of them who were now saying, cautiously, that the question or rather the demand for repeal came from a large enough number of the Irish to deserve serious consideration!

If the argument discussed was confused, no argument at all was directed to the point made by the Member for Lincoln. That gentleman had asked the Liberals why, when in the previous year they had been in favour of pacifying England by concession (over Reform), they now wished to pacify Ireland by coercion. It was a pertinent question. Macaulay's uncompromising answer was "The Reform Bill I believe to be a blessing to the nation. Repeal I know to be a mere delusion. I know it to be impracticable: and I know that, if it were practicable, it would be pernicious to every part of the Empire, and utterly ruinous to Ireland. Is it not then absurd to say that, because I wished last year to quiet the English people by giving them that which was beneficial to them, I am therefore bound in consistency to quiet the Irish people this year by giving them that which will be fatal to them?" [19]

The last sentence of Macaulay's speech on Ireland mentioned three subjects dear to his heart. Security of property, maintenance of law and order, and preservation of the integrity of the empire.

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19. ibid at p.106

They led him to utter sentiments on Ireland which he would never have countenanced in relation to affairs in England.

Macaulay spoke at considerable length on the Company's Charter which was to expire early in 1834. The first half of this speech was devoted to certain financial problems involved in the decision to deprive the Company of its ~~part~~ power to participate in trade leaving it only its governmental powers and functions. The rest of the speech dealt with various provisions of the Company's Charter. Macaulay's voice was again heard pronouncing some of his familiar liberal and rational views, on the subjects of codification of laws, the inclusion of clause 87,[20] and the removal of the necessity of registering some of the Regulations in the Supreme Court.[21] This is what he had to say on the last of these subjects.

"Is it not most unjust and ridiculous that, on one side of a ditch, the edict of the governor-general should have the force of law, and that on the other it should be of no effect unless registered by the Judges of the Supreme Court? If the registration be a security for good legislation, we are bound to give that security to all classes of our subjects, If the registration be not a security for good legislation, why give it to any? Is the system good? Extend it. Is it bad? Abolish it. But in the name of commonsense do not leave it as it is."[22]

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20. Clause 87 of the Charter Act of 1833 specified that no person would be barred from a post in the Company's service on account of his colour, race religion or caste.

21. See supra section 3, the testimony of Peter Auber, p.47

22. Macaulay's Speeches (1853) at p.154

On the subject of codification of the laws Macaulay's views are of particular interest, as he was soon to take part in their implementation. He devoted some time to describing the uncertain, unauthoritative state of the laws in India. It was difficult to ascertain what the law was, because the Koran and the Holy Institutes - as he called the Hindu Shastras - only covered a small portion of the cases, which arose daily. The opinions of Pundits and Kazis were not reliable, for they varied greatly. It was therefore very important to give that country a definite code of laws. This was not to say that the Bill intended to make all Indians live under one law. "We know how desirable that object is; but we also know that it is unattainable. We know that respect must be paid to feelings generated by differences of religion, of nation, and of caste. Much, I am persuaded, may be done to assimilate the different systems of law without wounding those feelings. But, whether we assimilate those systems or not, let us ascertain them; let us digest them. We propose no rash innovation, we wish to give no shock to the prejudices of any part of our subjects. Our principle is simply this; uniformity where you can have it; diversity where you must have it; but in all cases certainty.

"As I believe that India stands more in need of a code than any other country in the world, I believe also that there is no country on which that great benefit can more easily be conferred. A code is almost the only blessing, perhaps it is the only blessing which absolute governments are better fitted to confer on a nation than popular governments. The work of digesting a vast and artificial system of unwritten jurisprudence is far more

easily performed, and far better performed, by a few minds than by many..."[23]

Macaulay was also eloquent in his support of what he called "that noble clause", that provision of the Charter, which laid down that no native of India would be barred from holding an office on account of his race religion or colour. He said that he felt that the admission of natives to government service should be a slow, cautious process. If this process finally culminated in an independant India, Macaulay would cheerfully accept that. It was far better to have an independant prosperous India, which bought English goods, than to have an India subjected to the British but too poor to buy from English markets.

Earlier in his speech Macaulay had conceded that alien rule could never be as good as self-government.[24] A little later he declared that he would not deprive Indians of their rights under clause 87 on the grounds that educated Indians might finally get rid of their English masters. This was not to ~~say~~ say that Macaulay felt apologetic about the Company's presence in India. The Company was doing a good job of governing a country that was backward, confused and benighted. It was their duty to lift the veil of ignorance from the Indians' mind. No one could guarantee or even predict what course history might take, in what manner England's rule over India might end, though end it would, for that was the law of history. It was their duty to prepare against

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23. ibid. p.159

24. See supra p.82

that day, and when their political empire ended, leave behind the imperishable empire of European culture and laws.[25]

In the case of Ireland Macaulay was ready to assent to any measure that would keep that country united with Britain and would preserve the integrity of the empire. In the case of India Macaulay was prepared to concede that one day the Indian empire would decay, but he was not in any way dubious about the British right to rule that country at the time when he was speaking.

It is significant that Macaulay's speech contains but one reference to the Select Committee's Report on India. He referred to this report when he referred to the testimony of James Mill before the Committee, that in his opinion, India was not yet ready for representative government. Yet this Report contained a great deal of information about India, which would have been useful to anyone speaking about the East India Company's government in that country. Macaulay also had nothing to say in defence of the clause which was designed to abolish slavery, but which was finally passed in a most attenuated form. Macaulay's omission is remarkable for two reasons. Macaulay had been a great opponent of west Indian slavery; the Select Committee's Report contained a valuable appendix on slavery in the East Indian territories. Macaulay's failure to comment on slavery in India, and on the Select Committee's Report probably meant that he had not read the Report. Doubtless the Report in eight volumes was much too bulky and therefore discouraged any serious perusal. The fact remains that Macaulay, who spoke for the government, showed no close

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25. Macaulay's Speeches p.163

acquaintance with Indian conditions. It is to be remembered that curiosity about India was not among the numerous reasons Macaulay gave for going to India.

This was perhaps one of the noteworthy limitations of Macaulay's mind. He generally avoided any reference to the actual people of whom he was speaking. The broad outline of events, whether in India, or Ireland or indeed in England, were for him an adequate substitute for intimate knowledge of the people. The Irish public, which demanded repeal of the union, was swept aside, while the Indian native was too far away to have an identifiable face. And when Macaulay spoke about parliamentary reform, he dismissed the entire working class as men not deserving of the vote. He was gracious enough to say that the working man's faults - his lack of education and money - were not of his making. Nonetheless they disqualified him from becoming a voter.

- "I say sir, that there are countries in which the condition of the labouring classes is such that they may be safely entrusted with the right of electing members of the legislature. If the labourers of England were in that state, in which I, from my soul, wish to see them, if employment were always plentiful, wages always high, food always cheap, if a large family were considered not as an encumberance but as a blessing, the principal objections to Universal suffrage would, I think, be removed."[26] But since the English working classes were not in this happy position, they could not be trusted with the vote.

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26. ibid. p.3

Finally, all these speeches taken together underline one characteristic of Macaulay's mind. He attached very great importance to property. As he put it, "Property was power". His sentiments led him to give strenuous support to those men, who possessed power in the form of property and who were for one reason or another, denied political power. Whether it was the newly enriched manufacturing class of Manchester or the traditionally wealthy Jew, Macaulay defended their rights arising from possession of property. His liberal views did not urge him to ask for the grant of political power to men without property. During his speeches on reform Macaulay once described the institution of property as that great institution, for the sake of which other institutions existed - "that great institution to which we owe all knowledge, all commerce, all industry, all civilisation, all that makes us to differ from the tattooed savages of the Pacific Ocean ..."[27]

Macaulay was a middle class, liberal Englishman. His liberalism meant that, unlike the conservatives, he was willing to include in his class men who had acquired the key, viz. ownership of property, regardless of their race or of the nature of their wealth. This is why he spoke so eloquently on Jewish disabilities and on Parliamentary Reform. But neither his middle-class background nor his political principles made it possible for him to put himself in the shoes of the deprived or the alien people - or indeed to see the need for doing so. This was the man who soon went out to India. Brilliant, well-read, clear in his thinking,

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27. ibid. p.22

liberal in the 19th Century sense, middle-class and English. A man who believed deeply in preserving law and order, in protecting property and in maintaining the integrity of the empire. While this combination did not prevent him from drafting a very good criminal code, it was not designed to make him legislate well, where legislation meant touching upon the social customs or taboos of a people.

SECTION V

Bentham and James Mill

It is probably always difficult to assess how much influence philosophers exert upon their times and it is not always easy to resist the temptation to over-estimate it. This is especially the case with political philosophers, whose influence, if their ideas were practiced, would be manifest. With Bentham and James Mill the temptation is practically irresistible. James Mill was, after all, an Examiner at India House, and for several years the dispatches to India passed through his hands. He had absorbed many of Jeremy Bentham's ideas and had popularised the philosophy of that grand old man of utilitarianism, which Bentham the recluse, could never have done alone. Of Bentham, it has been said by some critics, that Macaulay's Indian Penal Code could have been written by him.[1] Consequently, we feel fully entitled to ask, how much impact the utilitarian philosophy of Jeremy Bentham and James Mill had on British political thoughts, and on Parliament's legislative policy for India.

In the foregoing sections of this Chapter we have made the charge that, as law-makers,[2] as intelligent readers,[3] and as administrators,[4] the 19th Century Britons assumed that the attitudes

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1. see ~~below~~ pp 109-110 for a full discussion of this point.
2. Section on Macaulay - Section IV Chapter I
3. Section on the learned magazines Section I Chapter I.
4. Section on Select Committee Report on India Section III Chapter I, and Chapter II.

and habits of their class were those of the entire nation. In this section we extend our allegation to the philosophers.

Bentham was a political and legal reformer. At an early age he had not hesitated to question the excellence of the British Constitution and had challenged no less a personage than Blackstone, whose "Commentaries"[5] were held in universal veneration. Bentham had poured scorn[6] on the irrational, tradition-bound, creaking, ancient legal system of England and had lost no opportunity to exhibit the superiority of an alternative rational system of law, based on the principle that all human beings seek pleasure and avoid pain and that the function of law is to "maximise" pleasure, to ensure the greatest happiness of the greatest numbers.

This is not the place to enter into a full discussion of utilitarianism, nor is it necessary to do more than refer briefly to the assumptions and arguments of that philosophy.

To put it baldly, Bentham argued that the sole motive from which human beings acted was the pursuit of pleasure, and avoidance of pain. Whatever name one gave to such motives as honour, affection, patriotism, analysis would reduce them all to the fundamental motive of the pursuit of pleasure. For example, when a soldier chooses to die on the battlefield rather than save his life by running away, that is because to him, the pain of living ignominously is greater than the pain of dying. He is choosing,

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5. Blackstones Commentaries on the Laws of England (1765 - 69)

6. J. Bentham A Comment on the Commentaries (1928) also A Fragment on Government (1776)

if not a greater pleasure, than a lesser pain.[7]

Bentham believed that all pleasure and all pain were qualitatively alike, as his celebrated remark about a pushpin giving as much pleasure as poetry[8] indicates. He also believed that all pleasure and all pain were quantifiable. In his work called "An Introduction to the Principles of Morals and Legislation"[9] Bentham set out elaborate tables of factors, whose presence, in greater or lesser quantity, would determine the quantity of pain or pleasure given by an object or event. These factors were: "intensity" of the sensation of pleasure or pain, its "duration", its "certainty" or "uncertainty" and its "propinquity" or "remoteness"; two other factors were "fecundity" or the possibility of the pleasure (or pain) being repeated and "purity" i.e. the chances there were of the pleasure not being followed by a painful suggestion or vice versa.[10] When one was assessing the pleasure or pain produced by an action or event for more than one person, one would take yet

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7. J. Bentham An Introduction to the Principles of Morals and Legislation (1823) Vol I, Chapters 1 and 2

8. A remark to which John Stuart Mill took exception in his "Utilitarianism". He regarded it and rightly, as one of the shortcomings of that philosophy that it took no account of superior pleasures.

9. Written in 1780, first published in 1789

10. J. Bentham Introduction to the Principles of Morals and Legislation (1823) Chapter IV Section 4

another factor into account viz. its "extent". The greater the number of persons affected, the greater the pain or the pleasure.[11]

Several criticisms of this theory spring to mind. Though Bentham gives a method for measuring the twin sensations of pleasure and pain, he does not tell us exactly how they operate. Exactly how does one determine the degree of intensity or fecundity a particular pleasure has? It is not possible to measure them as one can measure sugar or flour, or even temperature; though in deciding to act in any particular way we do take some account of the factors mentioned by Bentham, it is too rough to be called a precise calculation in the Bethamite sense.

What interests us are some other underlying assumptions of this theory. It appears to have been taken for granted that all human beings freely choose their course of action, and having done so, then proceed to act upon it. This in turn implies that human beings possess all the factors involved in making a choice. If I ought to know one hundred facts, before making a choice in a given situation, and I know only two of them, my choice is so limited as hardly to be a free choice. Again, often "choosing" something implies acting on that choice, and action is in turn often dependent upon other factors such as possessing money, connections, and facility of movement. These factors are inter-dependent. If I have little money, I may be reluctant to risk it on going to a strange and what may perhaps be a hostile place; I might prefer to spend it on feeding my family for a few more weeks or days in

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11. ibid. Chapter IV Section 4

the place where I live. Again, if I have no friends or acquaintances in the new town, or no connections, who would look after my family in the old; the fact that I have little money might weight more with me than it might otherwise have done. If I am illiterate the fact that going away would involve writing a post-card to my family might be an intimidating factor which the educated man would never consider at all.

With so many disadvantages, a man in this situation may not hear of opportunities or alternative, so that he cannot be said to choose. If he chooses, he may be unable or afraid to act on his choice. In neither case can one say that his outward behaviour - not going away to find a job - reflects his choice or his will. If, on the other hand, he had money, contacts, education, ability or skill, information, and still chose not to go elsewhere, one could say that he had 'chosen' and that his behaviour reflected his choice or his will. In other words a man's behaviour taken by itself, is not an infalliable indication that he has acted freely, according to his will. A man who is enslaved may put up with his condition against his will, because he may now know what steps to take; he may be afraid to take them, and indeed he may not even know that he is legally entitled to take these steps.

Leslie Stephen[12] sums up this defect of Bentham's philosophy in the following words: "Bentham's tacit assumption, in fact, is that there is an average man. Different specimens of the race, indeed, may vary widely according to age, sex and so forth; but

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12. Leslie Stephen, The English Utilitarians, Vols. I and II (1900)

for purposes of legislation he may serve as a unit. We can assume that he has, on the average, certain qualities from which his actions in the mass can be determined with sufficient accuracy, and we are tempted to assume that they are mainly the qualities obvious to an inhabitant of Queen's Square Place[13] about the year 1800. Mill[14] defends Bentham against the charge that he assumed his codes to be good for all men everywhere. To that, says Mill, the essay upon "The Influence of Time and Place in Matters of Legislation" is a complete answer. Yet Mill admits in the same breath that Bentham omitted all reference to "National character". In fact, as we have seen, Bentham was ready to legislate for Hindoostan as well as for his own parish; and to make codes not only for England, Spain and Russia, but for Morocco"[15].

Stephen went on to make another, equally acute observation: "Bentham not only admitted but asserted, as energetically as became an empiricist, that we must allow for "circumstances" which include not only climate and so forth, but the varying beliefs and customs of the people under consideration[16]. The real assumption is that all such circumstances are superficial, and can be controlled and altered indefinitely by the "legislator". The Moor, the Hindoo, and the Englishman are all radically identical; and the differences

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13. This was where Bentham lived.

14. James Mill

15. Leslie Stephen, English Utilitarians, Vol I p.299

16. i.e. the assumption which lies behind the assertion and which actually effects the philosophical argument.

which must be taken into account for the moment can be removed by judicious means."[17]

Stephen is quick to concede that for many purposes such an assumption, viz. that the Hindu, the Moor and the Englishman are similar, is justifiable, and guides ordinary commonsense. But it is not for that reason an assumption valid for all purposes. As Stephen remarks wryly: "Only we are not therefore in a position to talk about the 'science of human nature'."[18]

In other words, while it is impracticable to attend to every tiny variation in individual behaviour, it is equally dangerous to ignore the differences completely. If the former leads to a fragmentary perception of human nature, which makes it impossible to legislate at all, the latter leads us to make laws, which fail to achieve their purpose, because they fail to impress people in the appropriate way. For example, what would be the point of imposing fines for gambling in a place where gambling is an honourable way of entertaining one's guests? If the practice must be stopped, some other means must be devised. Because such a law works in England, it would not be wise to assume straightaway that it would work elsewhere.

This was the substantial defect in Bentham's philosophy. Utilitarianism was meant to be an empirical science, which would ensure the best way of maximising happiness for the greatest number.

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17. ibid. at p.300

18. ibid. at p.301

Yet, having asserted the empirical nature of the philosophy, Bentham and his followers went on to treat human nature as a given commodity or a given set of facts, from which (as in geometry or algebra), deductions could be made and laws framed. Observation of facts, which is essential to any empirical branch of knowledge, was on the whole conspicuous by its absence. "The utilitarians took a very short cut to scientific certainty. Though appealing to experience, they reached formulae as absolute as any intuitionist could desire."[19] The utilitarians paid little real attention to national character, class differences or even the effect of history on the people of a country. That is why Bentham was as willing to legislate for Hindustan as for his own parish.

M. Halévy has described the relationship between Bentham and Mill[20] in the following words: "With his need of someone to admire, which made him the ideal disciple for Bentham, with his energetic temperament and despotic character, which made him to all except to Bentham, a dreaded master, with his genius for logical deduction and exposition, which gives a kind of originality to his works, even when they are expressing someone else's ideas, Mill rendered Bentham as much service as Bentham rendered Mill.. Bentham gave Mill a doctrine and Mill gave Bentham a school."[21]

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19. ibid. at p.298

20. In this section whenever we say "Mill" we refer to James Mill. John Stuart did not start publishing except in Reviews till 1858, and it is difficult to assess the impact of his conversation.

21. E. Halévy, The Growth of Philosophical Radicalism (1952) Part II Chapter 3 at p.251

Until Mill accepted the Utilitarian philosophy, Bentham had few followers in England. Most of his writings first saw the light of day in French. M. Dumont, a patient, faithful disciple, struggled with Bentham's tortuous sentences and formed them into more intelligible prose. "The Theory of Legislation", which was published in French in 1830, was translated back into English, and published in 1864. It was probably easier to do that than to do battle with Bentham's style![22] It was left to James Mill to make Bentham's philosophy a political force in England and to make its principles part of current intellectual thought. In the essays Mill wrote for the supplement to the Encyclopaedia Britannica, "Government" and "Jurisprudence" he stated the utilitarian position on the nature and function of Government and of Law. Mill considered direct democracy, where practicable, as the best form of government, for

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22. An Edinburgh Reviewer had this to say of Bentham's style:

"Mr. Bentham is long; Mr. Bentham is occasionally involved and obscure; Mr. Bentham invents new and alarming expressions; Mr. Bentham loves division and sub-division - and he loves method itself, more than consequences. Those only therefore who know his originality, his knowledge, his vigour, , and his boldness; will recur to the works themselves. The great mass of readers will not purchase improvement at so dear a rate; but will choose rather to become acquainted with Mr. Bentham through the medium of Reviews - after that eminent philosopher has been washed, trimmed, shaved and forced into clean linen." - Edinburgh Review Vol 42 August 1825 at p, 367

-And this was a reviewer who otherwise glowed with praise for Bentham!

no man could represent another's interests as well as he himself could. For this same reason James Mill was in favour of universal adult male suffrage. In his essay on Jurisprudence[23] Mill again reiterated Bentham's ideas. The function of the state was to ensure the greatest happiness of the greatest number. It had therefore to impose as few restrictions on behaviour as possible, for all restraints caused pain. Restrictions were to be imposed only to prevent persons from giving even greater pain to other individuals. Therefore restraints or punishments had to be carefully quantified. The pain given by the restraint was to be just sufficient to outweight the pleasure, to the offender, of hurting another.

The purpose of jurisprudence, said Mills, was to protect the rights of persons living in a given society. Rights implied obligations. While rights conferred benefits, obligations created the evil of constraint. Therefore the law-maker had to be careful not to create more evil than good, by imposing unnecessary obligations Both rights and obligations, within a society, were created by Law. Before infringement of rights could be punished, rights had to be defied. This, to Mill, was the task of the Civil Code, the function of a penal code was to lay down the punishment for infringement of rights. Not all injurious acts could be punished. Sometimes the injury was too vague or small while at other times the offender could not, by the very nature of the injury, be traced.

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23. James Mill Jurisprudence, (1828) Supplement to Encyclopaedia Britannica.

"Of injurious acts, those alone, to the commission of which it has been deemed expedient that penalties should be annexed, are considered as the object of the penal code. Of injurious acts so perfect an analysis has been exhibited by Mr. Bentham; so perfectly, too, have the grounds been laid down upon which those acts which are destined for punishment should be selected from the rest; and so accurately have the principles, according to which punishment should be meted out, been established, by that great philosopher, that on this part of the subject, the philosophy of law is not far from complete."[24]

After this fulsome compliment, Mill proceeded to give in his own words, a summary of Bentham's ideas about the grounds on which an act was to be considered to merit punishment. Mill's mind was not as fine, as able to see distinctions as was Bentham's. On the other hand Mill's writing, though far from elegant, was much easier to follow. Mill classified offences as acts which infringed rights directly or indirectly. The infringement was direct where the rights of a person or persons were infringed. It was indirect where it tampered with the government's ability to protect rights. To prevent or to discourage people from infringing the rights of others, directly, or indirectly, punishments had to be created, the purpose of punishment being to give a stronger motive to refrain from acting than the motive to act injuriously. The punishment had to be carefully quantified, in order to deter without punishing excessively. "If we apply a less quantity of evil than is sufficient

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24. ibid. at p.15

for outweighing those motives, the act will still be performed, and the evil will be inflicted to no purpose. ...If we apply a greater quantity of evil than is necessary ... we create a quantity of evil that is absolutely useless. ... As soon, therefore, as the legislator has reached that point, he ought immediately to stop. Every atom of punishment, which goes beyond, is so much uncompensated evil, so much human misery created without any corresponding good. It is pure unmingled mischief".[25]

Having made this pure Benthamite statement, Mill then came down to practicalities, and admitted that there were difficulties in theway of accurately balancing the evil of punishments against the good they created. "It is sometimes necessary to risk going somewhat beyond the mark, in order to make sure of not falling short of it. And in the case of acts, of which the evil is very great; of the higher order of crime in short; it may be expedient to risk a considerable degree of reaching the point of efficiency."[26]

This corollary of course, begs the question, as one would have to start all over again by asking what was the 'higher order of crime', and obtain the answer by a reference to Bentham's criteria!

The application of the utilitarian theory also produced, predictably, the answer that it was wrong to colonise other countries. Jeremy Bentham had exhorted France to 'Emancipate her Colonies'[27] for this very reason. In his essay 'Colony', written

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25. ibid. p. 19
26. ibid. p. 19
27. Jeremy Bentham, Emancipate your Colonies. Address to the National Convention of France (1793).

as a supplement for Encyclopaedia Britannica,[28] James Mill indicated that on no grounds - trade, defence, earning of tribute, was it profitable to colonise a country. Either one spent too much on conquering it, or one could reap the same benefits by trading with it as an independant country. As to defence - and here Mill specifically referred to Britain - her colonies were too far away to contribute men to her navy or army.

It is difficult to say exactly how much the East India Company's policy in India was affected by the fact that one of the Examiners of correspondence in India House was James Mill, a utilitarian. It is however true that it was bitterly alleged that his connection with India House had led Mill to modify his principles and abstain from attacking the Company's presence in India.[29] In 1832, when the Select Committee of the House of Commons on India asked Mill whether, in his opinion, India ought to be given representative government, he replied with a categorical and emphatic negative.[31] And this was the man who had been in favour of universal adult male suffrage at home, and opposed to colonisation abroad!

In 1829 Macaulay reviewed some of James Mill's writings, including 'Government' and 'Jurisprudence' for the Edinburgh Review.[32] The review was a scathing attack on the glaring faults

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28. Reprinted in 1828
29. Eric Stokes, English Utilitarians and India, (1959) cites The Bengal Hukaru p.60
30. There is no footnote to this number. Number omitted in error.
31. See supra. Section 3, Chapter I
32. Edinburgh Review, Vol. 49 March 1829

of the utilitarian theory. Mill had made the extraordinary statement that he had chosen to argue a priori when selecting the ideal form of government, because experience gave no indication or help in this matter. For example, it was difficult to say whether absolute monarchy was good or bad, as experience was "divided" on this matter. On the ~~other~~ one hand there were Nero and Caligula and on the other there were the Danes, who had consciously opted for absolute monarchy.

Macaulay was quick to attack Mill: "Experience can never be divided", he said, "except with reference to some hypothesis. When we say that one fact is inconsistent with another fact, we mean only it is inconsistent with the theory we have founded on that other fact. But, if the fact be certain, the unavoidable conclusion is, that our theory is false; and in order to correct it, we must reason back from our enlarged collection of facts to principles."[33]

Macaulay concluded his attack by saying: "the fact is that when men, in treating of things which cannot be circumscribed by precise definitions, adopt this mode of reasoning, when once they begin to talk of power, happiness, misery, pain, pleasure, motives, objects of desire, as they talk of lines and numbers, there is no end to the contradiction and absurdities into which they fall."[34]

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33. ibid. p.162

34. ibid. p.168

Macaulay also pointed out, that, while it was true that all men acted in their own interests, it was not possible to deduce what this interest was. There was indeed no hard and fast answer to this question. It could only be answered inductively, with constant reference to facts.

Not only would Macaulay have nothing to do with the manner in which Mill (and other utilitarians) made deductions about human nature, but he would have nothing to do with Mill's deductions about the character of representative government. Mill had declared that representative government, at its best, would have to consist of men elected by universal adult male[35] suffrage. Macaulay said that he did not agree with Mill that female suffrage was unnecessary. "If there is a word of truth in history, women have always been, and still are, over the greatest part of the globe, humble companions, playthings, captives, menials, beasts of burden. Except in a few happy and highly civilised communities they are strictly in a state of personal slavery. Even in those countries where they are best treated, the laws are generally unfavourable to them, with respect to almost all the points in which they are most deeply interested."

"Mr. Mill is not legislating for England or for the United States; but for mankind. Is then the interest of a Turk the same with that of the girls who compose his harem?"[36]

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35. i.e. men over forty, who would represent women and younger men.

36. ibid. at p.178

Macaulay clinched the argument by adding, "If Mr. Mill will examine why it is that women are better treated in England than in Persia, he may perhaps find out, in the course of his enquiries, why it is that the Danes are better governed than the subjects of Caligula."

While Macaulay was in favour of giving the vote to women, he was not in favour of universal adult male suffrage; he wanted the property qualifications for the vote to be retained on the grounds that unpropertied men would not respect and preserve property. The poor majority would take away the wealth of the small minority; this might appear to serve the interests of one generation, but the utilitarians were not concerned with the happiness of merely one generation, and in the long run destruction of property would mean the unhappiness of most individuals.

So far we have examined the areas in which James Mill and Macaulay disagreed; even more instructive are the areas of their agreement. When Mill declared himself in favour of suffrage for the poor, working class male, one of the reasons for his doing so was his confidence that the working classes emulated the middle class, of whom Mill said that it was "universally described as both the most wise and the most virtuous part of the community." He went on to say, "The opinions of that class of the people who are below the middle rank, are formed and their minds are directed by that intelligent and virtuous rank, who come the most immediately in contact with them, who are in the constant habit of communication with them, to whom they fly for advice and

assistance in all their numerous difficulties, upon whom they feel an immediate and daily dependance, in health and in sickness, in infancy and old age; to whom their children look up as models for their imitation, whose opinions they hear daily repeated, and account it their honour to adopt. There can be no doubt that the middle rank which gives to science, to arts and to legislation itself their most distinguished ornaments, the chief source of all that has exalted and refined human nature, is that nature of the community which, if the basis of representation were so far extended, the opinion would utlimately decide of the people beneath them, a vast majority would be sure to be guided by their advice and example."[37]

After attributing the turbulence of the new manufacturing towns to the lack of a sufficiently large middle class population in them, Mill went on, "It is altogether futile, with regard to the foundation of good government, to say that this or that portion of the people ... may depart from the wisdom of the middle rank. It is enough that the great majority of the people never cease to be guided by that rank: and we may with some confidence challenge the adversaries of the people to produce a single instance to the contrary in the history of the world."[38]

Indeed, once one has recovered from this astonishing eulogy of the middle class, one may ask, though for different reasons, the same question as Macaulay: if the working class was by and large going to emulate the middle class, why need the former be

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37. James Mill, Government (1828) Chapter X

38. ibid.

given a vote at all? The significant point is that neither Mill nor Macaulay recognised the right of the working class man to have interests, which diverged from those of the middle class. Macaulay feared that this would be the case. Mill was confident that it would not. But they were both sure that the middle classes possessed wisdom, and that their interests were identical with those of the nation.

Finally, we come to the consideration of the question: how much influence, if any, did Bentham have on Macaulay's Penal Code for India? Some political philosophers think that Bentham had an appreciable influence on Macaulay. Writing about Bentham, C.K. Ogden said, "Because Bentham was regarded as a radical, and because he was a life-long adversary of the old colonial system, conservative historians have conveniently overlooked his share in building up the British empire."[39]

For Australia, Bentham had provided a scheme for forming a joint-stock colonisation society; in 1838 Canada's constitution was drafted on Benthamite principles. Thirdly there was India. In 1827 Lord William Bentinck, on the eve of his departure to India as governor general, wrote to Bentham, "It is you who will be Governor general." And Bentham himself had been confident that within twenty years of his death, he would be a despot in India. "... and before thirty years had elapsed, Macaulay, under the direct influence of Bentham, had introduced the Indian Penal Code, almost as Bentham would have drafted it..."[40]

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39. C.K. Ogden, Jeremy Bentham, (1932) at p.15. This was a death centenary lecture.
40. ibid. at p.16

Halévy held a similar opinion. He said that the Indian Penal Code had been drawn up by Macaulay, "under the influence of Bentham's and James Mill's ideas, so that Bentham, who had failed to give legal code to England, did actually become the posthumous legislator of the vastest of her possessions."[41]

Like James Mill, Bentham too had accepted the existence of British colonies. Though he had exhorted the French to emancipate their colonies, he did not say this to England.[42] On the contrary, he wished to make laws for India! Until the French Revolution shattered his beliefs, Bentham had believed that benevolent despotism was the best form of government. Britain could give that to India, and, with no elected representatives to hinder or frustrate the despot, he could govern the country as he thought fit. Needless to say, Bentham saw himself as the despotic law-giver. Such a situation was ideal for regulating all factors involved in making laws, as the despot controlled them all.[43]

It is difficult to say how much Bentham and Mill influenced Macaulay.[44] From his review of Mill's works, it is clear that there was disagreement between Mill and Macaulay. It is also clear that Macaulay was no blind admirer of Bentham's ideas. He

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41. Halévy, Philosophical Radicalism, Part III, Chapter IV p.570

42. A similar exhortation made to Canada was published in 1838.

43. Obviously in real life even a despot cannot control all factors; but in terms of logic, he is not then really a despot!

44. See supra pp.104-105

was quick to point out the defects in the utilitarian philosophy, viz. that its followers tended to apply it deductively. Nor is it clear that Bentham's ideas of codification were faithfully copied by Macaulay. He might have been influenced by Bentham's constant demand for codification of laws for both England and other countries, as the best way of making laws known, and therefore of exacting obedience to them.[45] Macaulay might also have taken from Bentham his belief that a law should be clearly and briefly framed; that it should have two parts; the first part should state that a certain clearly defined action was an offence; the second part of the law should, equally clearly, state the punishment for committing the offence,[46] Macaulay might also have been influenced by Bentham's belief that there should not be one fixed punishment for each offence. The quantity should be adjustable, according to various factors involved, including the character of the wrong-doer. Where a day in prison might be more than enough for a sensitive first offender, a hardened criminal might not be deterred from repeating his offence, by a punishment as mild as this. Macaulay's Code did, in fact specify a minimum and maximum punishment for some of the offences included in the Penal

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45. J. Bentham, Petition for Codification (1829). This idea runs through all of Bentham's works.

46. J. Bentham, Limits of Jurisprudence (1945), Chapter 12 and 13, also Bentham's writings in general.

Code.[47]

In his reviews Macaulay had never been shy of admitting his admiration for Bentham.[48] Yet none of these factors necessarily imply that Macaulay's draft of the Indian Penal Code could easily have been framed by Bentham. For example, unlike Bentham, Macaulay did not prescribe the pillory or stocks, nor does he seem to have thought it advisable to give punishments, which reflected the nature of the offence. Bentham would have had people obliged to wear the letter A to signify that they were adulterers! (In his clumsy language, Bentham said that a punishment should have "characteristicalness").[49] As a practical law giver, Macaulay

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47. e.g. Clause 343. Whoever in attempting to commit murder, assaults any person, shall be punished with transportation for life or rigorous imprisonment for a term which may extend to life, and must not be less than seven years.
Another example is of Clause 357. Whoever kidnaps any person intending or knowing it to be likely that the consequence of such kidnapping may be grievous hurt to that person, or the rape of that person, or the subjecting of that person to unnatural lust, or the slavery of that person, shall be punished with imprisonment of either description for a term which may extend to fourteen years and must not be less than two years and shall also be liable to fine.

48. Edinburgh Review, Vol. 49, June 1829

49. J. Bentham, An Introduction to Principles of Morals and Legislation, (1789) Vol. II, Chapter 15,

must also have seen how impossible it was to adjust the scale of punishment for each individual offender, until none was punished even a trifle more than was strictly necessary.[50]

Macaulay himself, in his Introduction to the Penal Code, or rather in his letter to Lord Auckland, which accompanied the Code and was really in the nature of an introduction, said that he and his law commissioners had not favoured a single existing legal system as their model, and had instead chosen to draft a code based entirely on rational principles. Such a declaration might be taken to be a declaration of allegiance to utilitarian principles. The latter, after all, were based on "rationality". This declaration seemed to make many difficulties when the Code was examined by Indian civilians. And yet later critics, including Sir G.C. Rankin,[51] and Whitley Stokes,[52] have held that Macaulay's Code was in effect, British law, without some of its faults.

Whatever the precise answer to this question Macaulay most probably was influenced by utilitarianism. It is only the exact degree of influence which is difficult to define. In section four of this chapter we said that Macaulay's liberal principles were firmly rooted in his class and his country. In this section we have seen that the utilitarian influence on him came from a

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50. What was necessary was that the punishment should first exceed the pleasure of committing the offence, and no more. See supra p. 103, James Mill.

51. G.C. Rankin, A Background to Indian Law (1946)

52. Whitley Stokes, Anglo-Indian Codes (1898)

background essentially similar to that of his liberalism. It was middle class in its origins, and it could be adopted to suit the country's imperialistic aspirations. Neither the liberal nor the utilitarian principles were likely to encourage a legislator to distinguish between his society and that of others, except in so far as the latter was considered inferior. Nevertheless, it is ironic that Macaulay, who criticised the Benthamites for being too theoretical about human nature, should, in his capacity as a legislator, have shown so little concern about it.[53]

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53. See supra section 4. p 89

SECTION VI

Some English Laws

In this section our field of investigation changes abruptly; in some ways it also becomes narrower and more specific. So far we have been considering the general influences on political thought in 19th Century England, and their relation to India. One such influence on Indian legislation must, for obvious reasons, have been British laws. The laws which had governed Britons for centuries were, not surprisingly, accepted by them as creating the right legal framework. When they themselves made laws, the British were more likely to act on this assumption than they were to question its validity. In the earlier sections we have attempted to show that in 19th Century England the ruling classes were inclined to assume that their values and interests were those of everyone, at home and abroad. This means that they would regard British laws as the model for other countries, however different their social structure from that of England.

We intend to explore only a few English laws in relation to which the social structure was relevant, that is, where social and moral values were relevant in defining the offence, and determining the punishment. In most cases, as we have said

repeatedly, the differences in social structure were not relevant. For example theft, treason, arson or murder could be defined and punished without much doubt about popular reaction. Most societies, if indeed not all, would consider such actions as offending against the very existence of society, and would therefore consider them as eminently deserving of punishment. In crimes which involve the violation of a person's body or of his freedom, social morals are, however, often involved. This is particularly the case where the offence is either a sexual offence, such as rape, or where it might be committed with sexual motives, as in abduction. It is worth noting that, while a man whose car is stolen is nowhere disgraced, a man whose grown-up daughter is abducted, is, in India at any rate, dishonoured. It is assumed that in some way the girl must have "asked" to be abducted, that therefore she must have been a person of disreputable character. This of course is a slur on her family's name and honour.

If the victim is tarred with the same brush as the offender, the laws made to punish that offence would probably have to be of a different nature than they would have to be in a situation where the victim is not so maligned.[1] This appears to have been the case in England and India with respect to the above-mentioned crimes.

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1. This point is difficult to argue purely a priori. In Chapter IV, which deals with Indian Case Law, we shall attempt to prove it, by showing how the social norms affect the attitudes of even the courts.

We shall therefore proceed to examine the British common and statute law on abduction, rape, and kidnapping.

In sections two and four of this chapter we have attempted to show the high importance attached by the British to property. But this was not a characteristic of the 19th Century only. This respect for property is reflected in older laws, including the laws on the above-mentioned offences, though the Indian Penal Code avoided some of their shortcomings. Indian sections on these offences substantially reflected British law. This was an area, where, in our opinion, the superimposition of British values produced results which were neither intended nor foreseen, as the law failed to give effectively the protection they were meant to provide.

Macaulay's draft of the Indian Penal Code dealt with the offences of rape and kidnapping. When the draft was revised, the Indian Law Commissioners included abduction and sale of human beings in the Code. British Common and Statute law dealt with all four of them.[2 ~~55~~]

According to Holdsworth[~~56~~ 3] English Common law started to develop after the Norman Conquest in 1066. (Common law was secular law; till the Conquest ecclesiastical courts and their laws had enjoyed

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[2 ~~55.~~] We shall omit British law on slavery, as the British attitude towards Indian slavery appears to have been fashioned entirely by their knowledge of West Indian slavery, (see Chapters 1 and 2) and not by the history of English feudal serfdom.

[3 ~~56.~~] Holdsworth, A History of English Law, (1923) Vol II, p.358

a very wide jurisdiction, and had dominated the legal scene). The period between 1066 and 1215, when Magna Carta was signed by King John, marked the beginning of the Common Law. It is absolutely impossible to separate English Statute law from Common law. Writing in 1890, J.F. Stephen remarked that the two were mixed in nearly equal proportions in English criminal law. The Statutes were not intelligible without the Common law. The latter was intelligible by itself, but it was lifeless, and without purpose, unless studied together with the statutes.[4] For example, statutes generally did not define offences. The definitions were taken from the Common law. More accurately, it was assumed that their definitions were known to the lawyer, on account of his acquaintance with the Common law.

Discussing the "Offences against the Person Act", which was passed as late as in 1861, Stephen remarked on this fact. He said that this Act could not be understood without reference to the (Common) law, which justified the use of force to the body of another in certain cases and in various degrees. The Act also assumed "an acquaintance with the definitions of murder, manslaughter, accidental homicide, homicide by megligence, which again, presuppose an acquaintance with the law relating to the preservation of life. It also presupposes knowledge of the definition of assault and rape, which last has to be deduced from a number of decisions, some of them not easily reconcilable."[5]

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4. J.F. Stephen, A General View of the Criminal Law (1890) Chapter IV, pp.64-66

5. J.F. Stephen, A General View of the Criminal Law (1890) Chapter IV, pp.64-66

Bracton's "Treatise on English Law" gave many of the definitions of various crimes known in his time. These were evidently definitions taken from the Common law. After enumerating and discussing eight classes of the, Stephen went on to say, "These definitions and classifications are the root ... of English criminal law, but they have less importance in its history than this might be supposed to imply"[6], because most of them had been replaced or altered. The definitions of rape, robbery and arson were "mere names". That is, their definitions emerged from case law, and were not given in any one place.

The relationship between English Common law and Statute law is, to say the least, bewildering, and perhaps the safest way to ascertain the law on the offences with which we are concerned would be to refer to Blackstone's Commentaries, where successive laws on these offences are cited, and, sometimes, examined. Blackstone devoted several pages to the offences of abduction, kidnapping, and rape, starting with "the offence most affecting the female part of this Majesty's subjects; being that of their forcible abduction and marriage, which is vulgarly called 'stealing an heiress'."[7]

It is quite difficult to separate the English law on abduction from the English law on rape, and to separate either from the English concern about property. If the offence of abduction was accurately, albeit, vulgarly (or in common parlance)

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6. ibid. Chapter II pp.23 and 24

7. Blackstone, Commentaries, Vol. IV p.207-19

described as stealing an heiress, Statute 3 Henry VII C2 specified the punishment for kidnapping an heiress and then forcibly marrying or raping her, or causing her to be so married or defiled.

"An inferior degree of the same kind of offence, but not attended with force, is punished by the Statute 4 and 5 Ph. and Mar. C.8, which enacts that, if a person above the age of fourteen unlawfully shall convey or take away any woman, child unmarried, which is held to extend to bastards as well as to legitimate children, within the age of sixteen years, from the possession and against the will of the father, mother, guardians, or governors, he shall be imprisoned for two years, or fined at the discretion of the justices: and if he deflowers such maid or woman child, or, without the consent of parents, contracts matrimony with her, he shall be imprisoned for five years, or fined at the discretion of the justices and she shall forfeit all her lands to her next of kin during the life of her said husband."

Blackstone remarked that as elopements, or "stolen marriages" were generally undertaken with a mercenary view, this act, besides punishing the seducer, removed the temptation altogether, since he was not allowed the enjoyment of his wife's property.[61]

In 1557-58, by 33 Henry VIII C.1 a person who abducted an heiress under the age of sixteen and violated her or married her without parental consent, but with the consent of the heiress, was made liable to additional punishment; a consenting heiress was to forfeit her property, and the profits of her land were to

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61. Blackstone, Commentaries, Vol. IV, pp.207-19

go to her next of kin during her life-time. If she had not given her consent, should she outlive her husband, she recovered her right to her personal property. If she did consent to the marriage or the deflowering, she lost all rights in her lands, even after her husbands death, should he predecease her.[9 62]

The provisions of these statutes were made partially superfluous by 26 Geo. II C.33, which made a forced marriage totally void. Consequently the penalties which deprived the husband and the wife of their enjoyment of the wife's property, became useless. This statute was in turn repealed by 4 Geo. IV C.76,[10 63] under which a marriage contracted after abduction was no longer void. But the Courts of Chancery or Exchequer normally provided means of obtaining an order from these courts to secure the property to the innocent party, and to the children of the marriage. Taylor-Coleridge goes on to add, "all agreements or settlements entered into by the parties in relation to such marriage, which are contrary to such order, are made absolutely void."

While the details of the provisions of the various statutes on abduction varied, they all shared one basic, prominent characteristic. They were all concerned with heiresses. Even where the word "heiress" was not used, the penalties which withheld the woman's property betrayed this concern. In his footnote, written in 1825, the sole comment John Taylor Coleridge was moved

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62. Holdsworth, A History of English Law (1923) Vol. 4 pp.504-5

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63. Footnote by John Taylor Coleridge in Blackstone's Commentaries, (1825) Vol. IV pp. 207-19

to make on 4 Geo. IV C.76 was that the legality of the forced marriage did not give the husband any right to enjoy his wife's property. But an order could be obtained legally securing the property to the innocent party. The reasons for reversing the earlier statute, which allowed the wife to escape from a distasteful marriage, by making it void (26Geo. II C.33) were not discussed at all.

Secondly, notions of family honour were evidently deeply involved in the offence of abduction. No action for abduction appears to have lain if the woman was over the age of sixteen, and therefore no longer a ward. The right of action, if any, appears to have rested with the kinsmen of the woman, not with her. Pollock and Maitland have this to say about the offence of abduction:

"The crime which we call rape had in very old days been hardly severed from that which we call abduction; if it had wronged the woman, it had wronged their kinsmen also, and they would have felt themselves seriously wronged, even if she had given her consent, and had, as we should say, eloped. Traces of this feeling may be found at a later time; but rape in the sense of 'violentus concubitus' is soon treated as a crime, for which the woman and only the woman can bring an appeal."[84]

The law on rape is of interest to us, because in discussing it Blackstone and others mention the circumstances in which the woman's evidence would be admissible. Care had to be taken over this, as the punishment for rape was severe to the point of being

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84. Pollock and Maitland, History of English Law (1968) Vol. II, pp.490 - 1

barbarous. Under Saxon law rape had been punishable by death. Under William the Conqueror the punishment was 'reduced' to blinding and castration.[12 ~~65~~]

"In order to prevent malicious accusations", commented Blackstone, "it was then the practice, it was then[13 ~~66~~] the law, (and, it seems, still continues to be so in appeals of rape) that the woman should immediately after 'dum recens fuerit maleficium' go to the next town, and there make discovery to some credible persons of the injury which she has suffered: and afterwards she should acquaint the high constable of the hundred, the coroners, and the sherriff, with the outrage. This seems to correspond in some degree with the laws of Scotland and Arragon, which require the complaint to be made within twenty-four hours: though afterwards, by Statute Westm. I C.13, the period of limitation in England was extended to forty days. At present there is no limit fixed, for it is usually now punished by indictment at the suit of the king and the maxim of 'nullum tempus occurrit regi' applies, but a jury will rarely give credit to a stale complaint."

Before the passage of the above-mentioned statute, Westm. I C.13, "it was held for law" that the woman, with the consent of the judge and her parents, and if the course was agreeable to the offender, could 'redeem' him by accepting him as her husband. The man's consent was important. He could not be forced into a marriage.

[12 ~~65~~]. Blackstone, Commentaries, Vol. IV, pp.207-19 (1795 ed.)

[13 ~~66~~]. i.e. during the reign of Henry III

This statute, which was passed in 1275, reduced considerably the punishment for rape. The offence of ravishing a girl 'within age', that is under twelve years of age, with or without her consent, and of ravishing any other woman against her will, was reduced to trespass, and had to be prosecuted by appeal within forty days. The punishment for the offence was two years imprisonment and sometimes a fine in addition, if the courts deemed it expedient. "But this lenity, produced the most terrible consequences, so that ten years later the statute of 13 Edward I, made the offence of forcible rape a felony within Westm. 2 C.34."[14 ~~87~~]

Pollock and Maitland have noted that appeals of rape were often brought in the 13th Century, but were mostly "quashed, abandoned or compromised." They go on to say that "an appeal of rape was not unfrequently the prelude to marriage. The judges seemed to have thought that, if the woman was satisfied, public justice might be satisfied."[15 ~~88~~] If the ravished woman prosecuted by appeal, then rape was a felony. If the man was arraigned at the king's suit (the woman having failed to appeal) then imprisonment and fine were regarded to be sufficient punishment.

Obviously the proper compensation for rape was considered to be that the ravisher should marry the woman. Glanvil (XIV 6) had protested that the appeal should not be used to force a man or woman of high birth to marry a person of low rank. Bracton altered Glanvil's text and seemingly - said Pollock and Maitland -

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[14 ~~87~~]. Blackstone, Commentaries, Vol. IV, pp. 207-19, 1795 ed.

[15 ~~88~~]. Pollock and Maitland, History of English Law, Vol II pp.490

allowed the right of a low-born woman to make a man of high birth marry her.[169]

By 18 Eliz. C.7 rape was made a felony without the benefit of clergy. In his footnote to the 1823 edition of Blackstone's Commentaries, John Taylor Coleridge added that this statute was repealed by 1 Geo. IV C.115, which made rape punishable by transportation for life, or for not less than seven years, or imprisonment for not more than seven years, with or without hard labour.[170]

In view of the course adopted by the Indian Law Commissioners, less than seventy years later, Blackstone's comment on the kind of person who should be considered to have been injured by the offence of rape, is instructive. Blackstone said: "the civil law[171] seems to suppose a prostitute or common harlot incapable of any injuries of this kind: not allowing any punishment for violating

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169. There appears to be a discrepancy here, according to Blackstone neither party could be forced into marriage. Perhaps there were social pressures to resolve an appeal of rape by marrying the offender.

170. It seems odd that the more severe punishment of transportation should be required to be of a term longer than seven years, and imprisonment at home should be of a shorter duration. This was probably due to the expense involved in transporting felons half way across the world.

171. i.e. Roman law.

the chastity of her, who hath indeed no chastity at all, or at least hath no regard to it. But the law of England does not judge so hardly of offenders, as to cut off all opportunity of retreat, even from common strumpets, and to treat them as never capable of amendment. It therefore holds it to be a felony to force even a concubine or harlot, because the woman may have forsaken that unlawful course of life."[19]

On this point Coleridge differed from Blackstone.[20] Blackstone had been discussing Bracton's[21] opinion of the state of the Common law on rape. According to Coleridge, in Bracton's opinion, while the Common law did protect the concubine, as it did a woman of good character, from the offence of rape, it varied the punishment for the offence according to the woman's character.

In either case, it appears that the woman's character was considered highly relevant. If Blackstone was right, the Common law was prepared to give the concubine the benefit of the doubt, and to assume that she had given up her sinful ways. If she was proved not to have done so, then, presumably, the Common law would follow the Roman law in thinking that an unchaste woman could not be forced. If Coleridge was right, the victim's character would still be open to enquiry, for its excellence would make the punishment heavier. In the 1840's in India[22] a similar judgement

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19. Blackstone, Commentaries, pp. 207-19, Vol. IV. 1795 ed.

20. ibid, footnotes pp.207-19, Vol. IV, 1823 ed.

21. Bracton lived during the reign of Henry II i.e. during 1216-74.

22. see infra chapter III. Section 4

on the woman's character was made by the Law Commissioners. It was suggested to them that they defined consent , and specified that a woman's consent was no consent if she was led to believe that the man was her husband, the definition should be extended to protect concubines, as they were really wives, according to Indian custom. The Law Commissioners rejected this suggestion. Then, as in Blackstone's Commentaries, the question of rape 76 23 continued to be bound up with the woman's character.

Blackstone declined to discuss the facts required to be proved in an appeal of rape, for they were "highly improper to be publicly discussed, except in a court of justice". Instead he confined himself to a discussion about the competancy and credulity of witnesses, a matter of great relevance to our study of the Indian Penal Code.

"The party ravished may give evidence upon Oath, and is in law a competent witness, but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of the facts that concur in that testimony. For

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76. The fourth Report of English Criminal law Commissioners, published in 1839, does however mention a case to the contrary. In East P.C. 444 it was held that it was rape if the woman, having first been taken with her consent, should then withdraw it. This would not apply to her husband, as the law said that a husband could never be held guilty of raping his wife.

instance if the witness be of good fame, if she presently (i.e. immediately) discovered the offence and made search for the offender, and if the party accused fled for it, these and the like are concurring circumstances, which give greater probability to her evidence".[24] Blackstone reiterated Hale's caution about not accepting the victim's testimony too easily, as accusations of rape were often false, and made with malice.

Blackstone felt that the testimony of children under twelve could be accepted, if they had "sense and understanding" to know the nature and obligation of an Oath", or at least to know that it was wicked to tell lies deliberately. According to Hale, even if the girl was too young to know what an Oath was, she ought to be allowed to testify. Others thought that what the girl had said to her friends ought to be regarded as testimony, "since the nature of the case admits frequently of no better proof". But in Brazier's[25] case it was decided that such unsworn, hearsay evidence was not admissible.

There appear to have been few laws to deal with the offences of kidnapping from English territories, or of childstealing. Blackstone traces the history of the first of these offences, gives their provisions, and with admirable clarity, outlines the motives which inspired them. We are particularly interested in the motives, for they were clearly the same motives which underlay parallel provisions of the Indian Penal Code, even though the Law

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24. Blackstone, Commentaries Vol IV (1795) pp. 207-19

25. P19 Geo. III

Commissioners did not admit them, as Blackstone did.

Kidnapping, said Blackstone, "was the forcible abduction or stealing away of a man, woman or child, from their own country." This had been punishable by death by both Jewish and Roman law. This is unquestionably the most heinous crime, as it robs the king of his subjects, banishes a man from his country and may in its consequences be productive of the most cruel and disagreeable hardships."[26] Common law had punished kidnapping of a person from his country, with pillory, fine and imprisonment. Blackstone added that the Statute 11 and 12 Wm. III C.7, though principally directed against pirates, had a clause which served a similar purpose. This clause sought to prevent "the leaving of such persons abroad, as are thus kidnapped or spirited away; by enacting that, if any captain of a merchant vessel shall, (during his being abroad), force any person on shore, or wilfully leave him behind, or refuse to bring home, all such man as he carried out, if able and desirous to return, he shall suffer three months imprisonment."[27] In other words, even if a man was not taken away by force or if he was left behind against his will, the act was tantamount to kidnapping from a man's country, as it had similar consequences. The punishment for this offence was light by the standards of those days, when maiming, blinding, transportation for life, and the death penalty were still common,

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26. Blackstone, Commentaries, (1795) Vol. IV, pp.207-19

27. Blackstone, Commentaries, Vol. IV, pp.207-19, (1795 ed).

and indeed were the punishments given in cases of rape.

Blackstone does not mention any law, common or statute, on the subject of child stealing. Coleridge mentions one, in his footnotes[288], 54 Geo. III C.101 provided against child stealing and made it a felony, punishable as grand larceny, by force or by fraud, to take away a child under the age of ten years with intent to steal and deprive the parents or guardians of the possession of such child, or with intent to steal any article of value upon the child. It was equally an offence to receive and harbour a child, knowing that it had been so taken or enticed away.

Both these laws were to be echoed by sections of the Indian Penal Code on related subjects[289]. The same concern for preventing subjects from being taken out of their country without sufficient guarantee of their being returned (if they so wished) was also to lead the East India Company's Government to pass several

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288. ibid. ed. 1823. It might seem odd that the page numbers for both the 1795 and 1823 editions should be identical. It has been the practice, however to do so with all editions of the Commentaries. If the size of the page or type varies, thereby varying the number of lines on the page, the original page numbers are given in brackets in the text or in the margin, at the word where the page had begun in the first edition of the Commentaries, 1790-5.

289. See infra, Chapter III Section 2

Regulations, during the 1840's, to control the exodus of Indian labour to Mauritius and West Indies.[30]

We have seen that the considerations previously applicable to crimes against property appear frequently in the laws on abduction. Similarly in the laws on kidnapping, the taking of a person from England was regarded as robbing the king of his subjects, and the taking of a child was regarded as robbing the parents of the child, or of the property in his possession, (if the latter was the motive for taking him away). The notion of children being the property of their parents has begun to lose ground only recently. It was not until after the first world war that, for example, in cases of divorce, a child's welfare was given the first place. Till then parents' rights to the child were of paramount importance. A recent French decision to give the English mother and French father of the child its custody for three months alternately created a mild stir in England, because the consideration of parental rights had been allowed to supercede the baby's need for emotional security. The decision showed that children have not yet ceased to be considered as the possession of their parents.

The other dominant idea behind some of the laws on rape, kidnapping and abduction was to protect the honour of an individual, or of his family. Abduction seems to have been regarded as an injury to the family, and rape as an injury to the woman. This might have been one reason why, in a case of rape,

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30 See infra, Chapters II and III

the woman's character was scrutinised: if she was not "of good fame", she had no honour to lose. It had, however, the unfortunate effect of putting the victim in the dock along with her ravisher. When a woman was abducted, it was the family which suffered the outrage. Consequently, even if she had eloped and willingly married her lover, she was still deprived of her property, Indeed, the punishment was more severe if she had been a willing party than a coerced victim. In the first case she herself lost her property. In the second, the husband alone was prevented from gaining control of it.

Whether the idea was to protect honour or to protect property rights (whether in land or in other human beings), inboth cases social conventions were closely involved in determining legal attitudes to the offences. Where these conventions were different, i.e. where notions of honour were dissimilar, or where property was not held of equal importance, English influence on the laws of that place was likely to produce some unexpected results. This was what happened in India. This was the case even with the Indian sections on abduction, in drafting which the law Commissioners had sensibly omitted all references to property.

CHAPTER II

The British Rulers of India

Introduction

Macaulay came out to India in the summer of 1834. On 15th June 1835[1] Sir Charles Metcalfe, who was officiating as Governor General, until such time as Lord William Bentinck's successor should arrive, directed the law Commissioners, over whom Macaulay had just agreed to preside,[2] to draft a code of criminal law for India. In mid-1837[3] the Code, complete with notes, was presented to Lord Auckland in Council. By October of that year the Military Orphans Press in Calcutta had printed it for distribution amongst civil servants. However, the Code was not to be enacted till 1860.[4] By this time India had seen five governor-generals, and a mutiny. The renewal of the Charter in 1853 had witnessed a change in the seat and composition of the Law Commission; the Code had been revised at least twice and its principal if not sole author, had been dead for several months.[5]

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1. Ind. Leg. Cons. Range 205 Vol.64 Nos. 1-5 of 18.6.1835
2. ibid.
3. Ind. Leg. Cons. Range 206 Vol.89 No. 1 of 5.6.1837
4. Act XLV of 1860
5. Macaulay died in 1859,

Why did the code take so long to become law? In other words, who were the men who were in command of British India from the time that the Charter Act of 1833 paved the way for the code[6] till the time that it was enacted?

To find the answers to these questions, one might be tempted to examine the governor-generalship of Metcalfe and his successors, for Metcalfe commissioned the code and his successors dealt with it, but it will be more useful to start with Lord William Bentinck, under whom Macaulay started his service in India, particularly as Bentinck dealt and, as we shall see, dealt rather differently with problems similar to those which confronted his successors, when they were examining the code or the necessity for various pieces of social legislation.

In this chapter we shall examine briefly the stewardship of Lord William Bentinck and Sir Charles Metcalfe. A separate section will deal with Lords Auckland, Ellenborough, Dalhousie and Canning and Sir Henry Hardinge. Similarly Macaulay's contribution will be examine separately from that of other members of the Law Commission of India. We shall then glance at the civil servants of the East Indian Company in India, as they were the officials closest to the native population in India.

Finally we shall devote a section to the Directors of the

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6. Section 53 of the Charter Act of 1833 empowered the Governor-General in Council to make laws and regulations for all persons, British, native and foreigners, residing within the territory of the East India Company.

East India Company, who were also responsible for the delay in passing the Penal Code, and who, from a distance of several thousand miles sought to control in every particular, the affairs of India.

SECTION II

Bentinck and Metcalfe

The East India Company followed the policy, partly imposed on it by the British Government, of appointing to high Indian offices, men from England who were without previous experience in India. The idea, as expounded by Mr. Canning in 1820,[1] was that they, by coming straight from England, would act as the vital link between that country and India. Consequently, the men who went out to India were on the whole ignorant about Indian affairs. In this matter Bentinck had a great advantage over his successors. He was an old India hand; during 1803-7 he had been the governor of Madras and had been recalled after the Vellore mutiny. As he returned to India in a yet higher office in 1828, it seems that no blame had been attached to him for this mutiny. While the absence of 20 years from India technically made him 'from England', i.e. a representative of English interests, in fact he knew a considerable amount about India. From the letters of Peter Auber, a civil servant in the India House, we find that the Company gave Lord William the judicial and revenue records of Bengal of the 'immediately preceding' years to peruse on his voyage to India.

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1. Bentinck Papers. Nottingham University - PWJF 2719

He was also given other material and books.[2] With his personal experience of India and with fairly recent documentary information on the administration of the country, Bentinck must have arrived in India well equipped to deal with the problems of his office.

Lord William also appears to have had other qualities, which are equally valuable in an administrator. He was capable of weighing up all the factors involved in a given problem, and of taking quick, firm, action. His governorship of India (1828-34) was remarkable for social reform, administrative change, political and diplomatic moves, firm governmental policy on law and order, and investigation into ventures of a purely commercial kind. Within eighteen months of his arrival in India, he had passed Regulation XXVII of 1829 on Suttee. During his six years as the Governor-General of India, he was also responsible for the Press Control Act, a measure which was received with displeasure by many and with joy by others, and several Acts to suppress Thuggee, which had been uncovered by the indefatigable 'Thuggee' Sleeman.[3] He also dealt with the rival claims of oriental and western education to government patronage;[4] looked into the possibilities of growing tea

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2. Bentinck Papers. Nottingham University - PWJF 158-161. August - December 1827, also No. 164 from Bentinck to Auber of October 1827, asking for all relevant papers. Unfortunately Auber's letters do not give a list of these books.

3. Sir F. Tuker, The Yellow Scarf (1961), see Chapter VII passim.

4. Macaulay's famous minute on education was written during these discussions.

in India,[5] established steam navigation on the Indus, and gave a stern warning to the anarchical kingdom of Oudh, from whose territory mauraders attacked British India.[6] Roads, bridges, postal services, botanical gardens - all projects interested his vigorous mind.[7]

From his correspondence, Bentinck appears to have been a man who could win the loyalty, trust and deep friendship of men as able as Sir Charles Metcalfe, Sir John Malcolm, the Governor of Bombay and William MacNaughten, Chief Secretary to the Government of India. They wrote to him with a frankness, which no merely official relationship would have commended. While he was a man with an independent judgment, he could base it on the diverse opinions of such experienced men, without being shackled by them. A good illustration of this is the history of his anti-Suttee legislation. When Lord William embarked on this project, his private secretary, Capt. Benson, sent out a confidential circular to 58 men in various districts of Bengal,[8] asking them whether in their opinion Suttee could be abolished. Their answers were carefully scrutinised and classified. Some of them were for immediate abolition of Suttee; others cautioned

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5. Dispatches to India E/4/752 of 20.9.1837
6. Dispatches to India E/4/741 of 16.7.1834
7. Ind. Leg. Cons. of 1828 - 1834
8. Until the Charter of 1833 the province of Bengal included Bengal, Bihar and what were later called the United Provinces.

the Government against any interference. The intermediate group wanted the Government to effect a gradual eradication of Suttee, through administrative pressures, rather than through legislation.[9] In a separate correspondence, no less a man than Sir John Malcolm declared himself opposed to anything so crude as legislation to prohibit Suttee.[10] In 1829 Malcolm was on the verge of retiring after a distinguished career in India. He was devoted to that country and belonged to the school of civil servants, who believed that the best way to rule India was by retaining her social structure, and by giving the nobility of India their customary privileges.[11] In his correspondence with a learned Brahmin from Poona (which he forwarded to Bentinck) Malcolm requested the Shastri to urge his countrymen to reform. "Pray repeat to all your friends and all men of rank and influence", he wrote, "what I have so often stated, that the continuance of this custom weakens the power of persons like me, who am their friend and advocate, to be useful to them in England, where the practice is held in such abhorrence that all our praises of Brahmins and men of wisdom and piety in India, are slighted, because you do not exert yourselves to abolish this usage.

"If you have no other ground place it upon the necessity of granting or yielding a concession of usage and prejudice, to conciliate the English nation, under whose mild and generous government God in his

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9. British Museum. Suttee 826L27 and Bentinck Papers.

10. Bentinck Papers. PWJF 2624 of 26.11.1829

11. Eric Stokes, English Utilitarians and India (1959), see Chapter I, pp. 1-25

wisdom has placed your native country".

Malcolm urged Lord William to abolish Suttee by exerting on the natives the combined pressure of British officials and elders of native communities who were first to be persuaded to abandon the practice and who, he felt, should not be exposed to the crude insolence of law, which would treat them as it treated the common man of low caste and low class.

The biggest fear of the officials who opposed Suttee legislation was the fear of mutiny. Their other fear was of the possible loss of prestige. If the Government passed anti-Suttee legislation and subsequently had to withdraw, because of the mutinious situation it might create, the Government would lose face. Administrative powers could be withdrawn as discreetly as they were bestowed.[12] Therefore, the argument ran, the way to abolish Suttee was by empowering magistrates to make Suttee more difficult to commit.[13]

In his minute Bentinck considered both these fears, the second of which rested on the first. From the answers received in response to the circular, it is reasonable and safe to assume that the army would not have rebelled; all but three of the fifty-seven men who received the circular were in the army. The average Indian soldier

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12. B.M. Suttee Papers.

13. By this time a woman who wished to perform Suttee had to have the district magistrate's permission. In most cases he had no or little power to refuse it. The suggestion was that magistrates be given greater discretion in refusing permission for a Suttee.

was drawn from the Upper Provinces,[14] where Suttee was not common. He was generally speaking either a Muslim or a Brahmin. Brahmin widows could only burn with their husband's bodies (unlike non-Brahmin widows, who could perform the rite after the husband had been cremated, several days later and miles away). As soldiers invariably left their families in villages, their widows could hardly ever perform Suttee. The troops, who were stationed in the Lower Provinces, (i.e. modern Bengal), where Suttee predominated, would not rebel. Indeed, they often helped magistrates to rescue widows, who were unwilling to be burnt, nor would the civilian population complain when deprived of what was to them more of an entertainment (said some of the replies) than a religious rite. If there was no fear of mutiny, there could be no fear of losing prestige by being compelled to repeal a regulation.

A distinguished man who belonged to the group (which was by far the largest), which favoured immediate abolition of Suttee, was William MacNaughten. He wrote a clear-sighted, firm answer, showing that the practice could not be left to fall into disuse, and that it was politically expedient to abolish it. Of the other two civilians, Mr. Wilson, secretary to a college for natives at Calcutta, cautioned the government against any interference with this practice.[15]

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14. Upper Provinces comprised of what was later to become the United Provinces, now Uttar Pradesh.

15. B.M. Suttee 826L.27

Bentinck based his arguments on these opinions and the figures of Suttee in Bengal. He does not appear to have asked the Directors for their advice in this matter; the whole question was dealt with by him speedily. Some time in 1829 the Hindus of Calcutta learnt of the possible enactment of anti-Suttee legislation. Their petition[16] to Bentinck, saying that they had heard 'rumours' to this effect and that they wished to beg his lordship not to interfere in their religion, had no effect on the Governor-General's resolution. In December 1829 the Legislative Council passed Regulation XXVII of 1829, making it far more difficult for a Suttee to be committed in dubious circumstances than it had previously been.[17] It is significant that when the Hindus appealed to the Privy Council to repeal this regulation, the East India Company supported its Indian Government fully,[18]

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16. Bentinck Papers, PWJF. 2950, 2951.

17. It certainly made it more difficult for women to be burnt forcibly, by imposing heavy penalties on those who 'aided' her. More important, it made people, most of whom had only heard of the Regulation, feel mistakenly that the Government had prohibited Suttee, and this itself was a deterrent.

18. B.M. Suttee Papers 1853d8
In Bengal where the 'Dayabhaga' law of inheritance was followed, the widow was entitled to her husband's full share. Elsewhere under 'Mitakshara' law she was only entitled to maintenance. The Directors figures showed that the number of Suttees was much higher in Bengal.

arguing that Suttee was not clearly sanctioned by the Shastras and that it was often a means of getting rid of the widow, and therefore of her claim to her husband's share of the joint family properly. In May 1836 Lord Auckland refused tomake minor but necessary changes in the Suttee regulations applicable in the Bombay Presidency, on the grounds that it might inspire native discontent.[19] It is perfectly true that Metcalfe had declined to make any such changes in these regulations.[20] His reasons were somewhat different from those of Auckland. Metcalfe who had written a strong minute in favour of the abolition of Suttee[21] said in 1836 that, as the Indian Penal Code was then in the making, and would soon become law, there was no point in making minor changes. He would instead direct the Law Commissioners to take note of this omission and rectify it in their code, which would replace all other criminal laws, when it was passed. Like Auckland, Metcalfe also called it 'a delicate subject', requiring

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19. Ind. Leg. Proceedings, Range 206 Vol. 82 5-10 of 23rd May 1836

20. Ind. Leg. Proceedings, Range 206 Vol. 81 1-4 of 18th January 1836

21. This minute of date 14.11.1829 is quoted by the Directors in B.M. Suttee Papers, 826127 Appendix B. In it Metcalfe argues that Suttee abolition would be appreciated by the natives in the long run. The short term risk of rebellion had to be taken, and if there were disturbances they would be short-lived. In times of disturbance abolition of Suttee would be 'used' as a grievance just as slaughter of Kine by the British was.

careful handling, but one cannot help feeling that, though Metcalfe genuinely expected the Code to be passed soon after it was drafted, to Auckland the delicate nature of the subject was but a welcome excuse for inactivity.

Yet another aspect of Bentinck's personality emerges from his correspondence with Metcalfe. He was acutely aware of two things: his responsibility and duty to give the natives the best possible government and one in which they participated;[22] and the ignorance of India under which the British quite inevitably laboured.

When T.B. Macaulay came out to India as her first Law Member, it was not at all clear whether the Charter empowered him to sit on all meetings of the Council or only those in which, as they were transacting legislative business, he had a vote. In the course of these discussions, when the directors and the Legislative Councillors had expressed their views, Bentinck came out strongly in favour of the first alternative.

"It is this particular point, the exclusion of the fourth member from the ordinary sittings of the Council, to which I wish to advert, as detracting very much from the very important duties confided to him by the Legislature. Mr. Macaulay has never been in India and he and his successors like the greater part of the past and probably of future Governors and Governor Generals is a stranger. As a stranger to the country for which he is to play the principal part in making laws and regulations, he certainly may give most useful advice to the Council in drawing up of their laws, so that they shall contain

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22. Bentinck Papers - PWJF 2643

nothing either repugnant to the laws of the country or at variance with the enlightened spirit of the age - ... But all this is the mere theory of the art which he is come to exercise.

"Where is he to gain his practical knowledge of the state of society, of its manners, its feelings and its customs? ... How is he to discover what there is to remedy, to reform or to preserve? How is he to discover the abuses or the imperfections of our administration in any of its branches, revenue, judicial or police? How is he to become acquainted with the effect of the existing laws and institutions upon these immense populations? He must learn all this somewhere or he must be a poor legislator. From the people themselves, the main objects of his care, he will learn nothing. They are not consulted and hitherto they have had no means of making themselves heard. With them he can have little intercourse and to the greater part of the European residents any correct information is as inaccessible as to himself. He can only learn his lesson in the same way that all governors, who have been strangers, have done before him, by following day by day the reports of all functionaries of the Empire, and by hearing in every weeks consultation, not an insulated opinion which might be gained elsewhere, but the general discussion of all questions and the results of the long experience of the able and responsible men, who compose the council. The proceedings of the Government contain the only real record of the present life and of the actual passing condition of India, although I must admit that these must remain but a very imperfect index either of the feelings of the people or to the effect of our laws and regulations, until the natives themselves can be more mixed in their

own government and become responsible advisers and partners in the administration."[23]

Metcalfe, Bentinck and civil servants like Holt Mckenzie were acutely sensitive to the fact that they knew 'little' about the country they ruled, an awareness which, to all appearances, did not repeat itself in their successors. This minute by Bentinck not only casts a strong light on his own attitudes to the Company's role in India but also highlights the lamentable short-comings of the men who followed him. Unendowed by similar feelings of inadequacy, they made fewer efforts to know India.

In 1829 Bentinck was the Governor General of India. Metcalfe was a member of the Legislative Council and Lord Ellenborough was President of the Board on Indian Affairs. In this capacity he sent a curious letter to Lord William on Indian affairs. Bentinck forwarded it to Sir Charles, saying that perhaps he would like to answer it, for Bentinck was too new to India to be able to do so satisfactorily. However, he did add a few comments on Lord Ellenborough's letter. Metcalfe's remarks on Ellenborough's letter, which were addressed to Bentinck, took account of these comments. On Metcalfe's reply Bentinck once again jotted a few comments in the margin. These letters are particularly important because, at one time or another, all three men

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23. Ind. Leg. Cons. Range 207 Vol. 62, No. 1 of 19th July 1850. The official memorandum prepared on the position of the law member quotes this minute which Lord William Bentinck wrote on 31st July 1834 from Ootacamund.

were to be Governor-Generals of India.

Lord Ellenborough wrote urging the need to reduce taxation both in India and in England, by bringing expenditure within the income of their governments. "India cannot rise under the pressure of present taxation", wrote Ellenborough, "and to make people of that country consumers of the manufactures of England we must first make them rich ... We have a great moral duty to perform to the people of India. We must, if possible, give them a good and permanent government. In doing this we confer a greater benefit upon the people of this country than in sacrificing the interests of India to the apparent present interests of England..."[24]

And this Ellenborough called the expression of his anxiety to give India a good and permanent government!

On the question of 'good government', Bentinck commented (to Metcalfe) that the British were undoubtedly the sovereigns of India and this could not be made too clear. It could be done by minting their own coins instead of using Moghul currency, by having a 'British Code' of law, by encouraging the use of the English language and by having local government - that is government by the British in India and not by remote control exercised by the company from England.[25]

Sir Charles Metcalfe's reply is finer in conception. In a celebrated and moving letter which ran "Empires grow old, decay, and perish. Ours in India can scarcely be called old, but seems destined to be short-lived ..."[26] Metcalfe came out strongly in favour of

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24. Bentinck Papers - PWJF 2634

25. Bentinck Papers - Letter of 16th Sept. 1829 accompanying PWJF 2634

26. Bentinck Papers - PWJF 1522

doing one's duty, whatever the consequences. As these words show, he did not expect the British to rule India for ever; his sense of history must have been too sophisticated for him to cherish this illusion. Nor did he, like Bentinck, think that local government would entrench the British in India. But he was not disturbed by the possibility that one day his countrymen would lose their Indian empire. "... as long as we retain possession, we are bound to do all the good in our power to our subjects. Although the hope of gaining their attachment be utterly vain, we may often mitigate and neutralise their disaffection ... Even however, under a disaffection, our duty towards the governed is the same. We are bound to give them the best government in our power." In the margin is a remark by Bentinck. "Excellent doctrine", he wrote.[27]

From these letters one realises the perfect understanding which existed between Bentinck and Metcalfe. In their interchange of views Ellenborough alone sounds a shallow, uncomprehending, discordant note.

By October 1834, in London the steps were being taken to select

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27. Bentinck's ideas on the duty of the British rulers to the natives were set out in a letter of 1st June 1834, PWJF 2643 where he said that so long as most of Indian Revenue continued to be spent on keeping a lavish and small European establishment, all talk of reforms was so many words. "We do not do as we would be done by. We profess but do not practice Christianity and know that charity bad which begins at home."

Bentinck's successor.[28] Charles Grant, who was a member of the Board on Indian affairs, was anxious to occupy the post himself. He defeated the Court of Directors in their desire to appoint Metcalfe to succeed Bentinck. Grant told the Directors that the British Government would not approve of his nomination, however much Metcalfe might deserve the honour: it was against Government policy to approve nominations to such high offices, unless the men came from England.[29] The Directors had already appointed Metcalfe to be the temporary successor of Bentinck,[30] and this appointment had won the approval of the ministers. (Under the Charter Act provisional appointments were made to various high posts in case the actual occupant of that office suddenly vacated it for any reason whatever). Nothing daunted, Grant replied that provisional appointments were not in the same category as permanent appointments and that nothing required an appointment of a temporary nature to be converted into a permanent one. The Directors went ahead and nominated Metcalfe by 15 votes to two. Equally predictably, the Honourable ministers replied - in a letter signed by Charles Grant! - that this nomination was not acceptable to them.[31] The Directors, who had already rejected Grant as a candidate,[32] wrote back to Grant

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28. Bentinck's letter of resignation reached the Directors in August 1834.

29. Bentinck Papers - PWJF 2719

30. Bentinck Papers - PWJF 296 of 20.12.1833

31. Bentinck Papers, Auber to Bentinck, PWJF 315 of 6.10.1834

32. ibid.

a cold reply regretting the minister's decision and announced their intention "at a proper time of proposing a successor". As a compromise Lord Heytesbury was nominated and the decision was conveyed to India.[33] But before that gentleman left for India, Sir Robert Peel's Government was defeated and the new Ministers asked the Directors to withdraw their appointment. Soon afterwards Lord Auckland was chosen to fill the vacancy.[34] Thus it was that Metcalfe had a full year in office as the acting governor-general of India.

Metcalfe was a distinguished and able civil servant. He had been born in Calcutta in 1785. After leaving Eton at the age of seventeen, he immediately joined the Company's service and indeed, apart from the twelve odd years spent in school, he lived in India till he resigned from the service in 1839. Metcalfe joined the Company as a writer, a modest enough job, but he had made a name for himself by the time he was twenty-one. He rose rapidly and was appointed Resident at the courts of Delhi, Gwalior, Hyderabad. From Hyderabad he went to Calcutta in 1827, when the Directors appointed him a member of the Legislative Council. In 1832, when his term as Councillor expired, his appointment was extended by a further two years, till August 1834. The extension given by the Directors was doubtless at Bentinck's request. In April 1834 when the Charter Act came into operation, Bentinck was at the hill-station, Ootacamund, in the Nilgiri hills.

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33. Bentinck Papers - Auber to Bentinck PWJF 316 of 8.10.1834

34. Dispatches to India E/4/745 of 8.9.1835

He had been there for several months and had been told by his doctors not to descend to the plains till October, after the rains.

The Charter required Bengal to be split up into the lower provinces, that is Eastern U.P., Bihar, Bengal and parts of Orissa; and the upper provinces or British territory in North India, west of Allahabad. The directors had appointed Metcalfe to be governor of Agra or the upper provinces. Had Bentinck been in Calcutta on 22nd April 1834, Metcalfe would have had to take up his governorship of Agra;[35] as he could not do this during February - April 1834,[36] Bentinck and Metcalfe worked out a solution: the division of old Bengal was to be postponed till Lord William could return to Calcutta. The new legislative Council (of which Metcalfe was not a member) was to assemble in Ootacamund, and Sir Charles was to hold the reigns of government during that time. While the council would take the decisions, Metcalfe would be responsible for the day to day administration of the old Bengal. Thus, even while Bentinck was in India, Metcalfe, who already knew what it was to be a legislative councillor, gained the valuable experience of administering that large

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35. These words are used deliberately. Metcalfe preferred being part of the Supreme government to being a governor of a subordinate government, cf Bentinck Papers - Metcalfe to Bentinck PWJF 1678 of 28.2.1834

36. Bentinck Papers - Metcalfe - Bentinck correspondence generally.

area, and when Bentinck left India in 1835, (after a few months in Calcutta, when Metcalfe governed in Agra) Metcalfe was no novice at his job.

One of Metcalfe's first acts as the Governor-General of India was to invite Macaulay to preside over the Law Commission[37]. On the same day he asked the Commissioners to draft a code of criminal law for India. Exactly three months later, on 15th September 1835, he rescinded the Press Control Act, a step which earned him the grave displeasure of the directors. His short term in office seems to have been packed with action. The minutes of legislative business alone on 1st February 1836, for example, disclose that on this day the following measures, some of which had been under consideration for sometime, were discussed: a bill to legalise tax collecting procedures in Bombay; a bill providing for the appointment of judges in sudder dewani and faujdari courts in Bombay; a bill legalising the appointment of sudder ameens and principal sudder ameens, regardless of their place of birth or descent. The 'Black Act' was also discussed for the first time. This act proposed to bring Englishmen in British India under the jurisdiction of sudder and principal sudder ameens; hitherto they were answerable only to the supreme courts in Presidency Towns. The last minute was on a bill for the management of the funds a property of St. Mary's Church at Fort St. George.

When one looks at the extent of the Council's business in

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37. Ind. Leg. Cons. Range 205 Vol. 64 Nos. 1-5 of 15.6.1835

Metcalfe's time, one feels that, when Metcalfe refused to change the anti-Suttee laws of Bombay, he was not procrastinating. He must genuinely have expected the Penal Code to be drafted and passed in a short space of time;[38] naturally he was not willing to add to the burden of the Law Commissioners. As the Indian Penal Code was intended to be universally applicable in British India, Metcalfe did not see any point in adding to the legal mess, which the Code would clear away, by amending a law, which would soon be replaced by another. The only sensible course was the one Metcalfe adopted viz. to inform the Law Commissioners about this problem and to instruct the Bombay Government to carry on with their policy of allowing people to think that Suttee by British subjects was an offence, even though it was performed outside British territory.

The year was soon over[39] and the absence of any other bold measure is not surprising. Rather, it is remarkable that Metcalfe, who, after all, had been turned down for the job, and who was only required to hold the fort till Bentinck's successor should arrive, should have cared enough to act as he did. One cannot envisage Lord Auckland abolishing the Press Act and contemplating a draft of the 'Black' Act, or even, perhaps, directing the law commission to prepare the Indian Penal Code.

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38. Ind. Leg. Cons. Range 206 Vol. 81 Nos. 1-4 of 18.1.1836. See supra p.

39. Metcalfe resigned his Lieut-Governorship of North West Provinces (i.e. Upper Provinces) in January 1838, and left for England. Before his death in that country in 1846 he served as the Governor of Jamaica (1839-42) and Canada (1843-5).

SECTION III

Macaulay in India

In 1834 Thomas Macaulay interrupted a promising career in English politics to go out to India as the first Law Member of the Supreme Council, appointed under the Charter of 1833. He was then 34 years old. After a successful academic career at Trinity College, Cambridge, Macaulay had been called to the bar and had joined the northern circuits. He abandoned his career at the bar sometime in 1828 and spent his time in the House of Commons, as a lively stander by, till his election to the House of Commons in 1830 as member for Calne. He was re-elected in 1832 from Leeds, when the Parliamentary Reforms necessitated a dissolution and fresh elections. He rose rapidly and after re-election was appointed for India a commissioner on the Board of control.

Domestic finances, however, were precarious, as his father, Zachariah, had been so engrossed with the important problem of slavery in the West Indies (and other questions) that he had perforce neglected to provide for his family. In the days when women did not take up professions, any respectable family with unmarried daughters was in a serious position indeed. None of this had in any way affected Macaulay's integrity, and it did not prevent

him from tendering his resignation over West Indian Slavery bill, which he regarded as too narrow in its scope. The financial lack of security weighed considerably with Macaulay. As he wrote to his sister Hannah,[1] he did not wish to be in a position where mammon could make it difficult to abide by his principles. If he was out of office, he would have to live by his pen, but being a good Member of Parliament was a full-time job and, besides, it was one thing to be a minister writing for his pleasure, and quite another to be an impecunious M.P., writing for his living. The papers for which he wrote would immediately treat him differently. It was evident to Macaulay that he must build up a small fortune and become a man of independant means. Five years of exile in India would do exactly that; he expected to return home with thirty thousand pounds in savings.

Whatever the financial considerations behind Macaulay's decision to go to India, the integrity and devotion to duty which he had shown in Parliament were equally evident during his years in India.

As first Law Member in India, Macaulay was undoubtedly the most distinguished. He was endowed with a mind that was as informed as it was lucid and original. At a time when the hopes, aroused by the Charter, of good laws for India were high, Macaulay was a particularly lucky choice as a law member for, with his qualities, he had a very special contribution to make.

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1. Macaulay Papers - O.15.12.B 577-583 of 17.8.1833

In a chapter on Indian criminal law in his book "Background to Indian law", Sir G.C. Rankin[2] describes the confused and confusing state of law in British India; Hindu and Mahommedan law, Company's Regulations, British law (in the Presidency towns, for Britons) overlapped each other. Even the Regulations were not uniform throughout the three Presidencies. Often the native laws were either difficult to ascertain or impossible to apply. Under Hindu law, which was almost impossible to ascertain, punishment for murder depended on the caste of the victim and the killer. Some of these punishments were extremely and unbelievably cruel, ranging from boiling the unlucky person in oil to cutting off his limbs and throwing him on the dungheap outside the town boundaries to die. Under Mahommedan law, the punishment for murder was retaliation; for adultery, stoning; and for theft, mutilation. Murder was not punishable by death, unless it had been committed with an instrument meant to cause death - e.g. a sword or a knife but not a skewer or a grind-stone.

The law of evidence in India was equally confusing. Mahommedan law equated the testimony of one man with the testimony of two women, and the courts had full discretion not to accept the testimony of a disbeliever at all. The Company's District Courts were presided over by English judges, but they had to be aided by Mahommedan and Hindu law officers, who would say what the law was and whether the testimony or proof was acceptable under their law. The judge would then give his judgment in accordance with the 'fatwa' or opinion of the law officers.

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2. G.C. Rankin, Background to Indian Law (1946) Chapters I, X, XI, passim.

This irregular state of law and the judiciary in India had naturally caused quite a few civil servants to feel uneasy. It is interesting however to note that they only contemplated changing the procedures of the courts and the composition of the judiciary. They did not wish to touch the substance of the law.[3] The Advocate general for Madras, Norton, indeed, did see the need for reforming and codifying the substantive law, as it was not uniform and 'nobody knew which English laws applied in India'.[4] This was a difficult task, particularly as due care had to be taken not to hurt native feelings. The Common Law, which was harder to codify, would (for that very reason) be pliant enough to defer to native customs. It was this rather than British statutes which needed to be codified for India. It was difficult to see who could do it. Norton hoped that the Parliament might be persuaded to appoint a committee to investigate the best system for administering British justice in India.

It fell to Macaulay to undertake the Herculean task of providing a code of substantive criminal law for India. This was his major contribution to Indian law. His Penal Code aroused much controversy, some of it bitter. Bethune indeed discarded it and drafted his own. Others, who placed more value on it,[5] nonetheless, wished to make

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3. Bentinck Papers - PWJF 2653. The Advocate General of Bombay, Hammond, was emphatic on this point in 1830.
4. Bentinck Papers - PWJF 2659. Norton to John Malcolm in 1830.
5. In ~~1837~~ 1854 the law commissioners rejected Bethune's Code in favour of Macaulay's and then set about revising it.

changes in it. The fact remains that none of them attacked Macaulay's basic interpretation of the Charter Act, in giving a new comprehensive law universally and uniformly applicable to all persons who resided in British India.

Macaulay's upbringing and education undoubtedly combined to give a certain philosophical bias to all his thinking. It should be fair to say that the utilitarian and liberal influence on him was at least partly responsible for his belief in that human beings were essentially the same all the world over. This belief in the existence of a rational human nature, which could be easily identified, might have been considerably modified, if he had become acquainted with the people for whom he was to draft laws. Such contact would have immediately made him aware of the irrational, cumulative social forces which mould the attitudes of the people at least as much as do the 'rational' common, elements. Before Macaulay left for India, he had arranged to meet Raja Ram Mohun Roy, who unfortunately failed to keep a dinner appointment.[6] From reports about this man, (who enthused over everything he saw from the streets to the moral and political state of England) Macaulay gathered that he was a 'very remarkable' man. When Macaulay was in India, the society he kept was, not unnaturally, exclusively European, and indeed, English. In a letter to his sister Margaret, he mentions his plans to visit an Indian the next day and with his sharp mind he assessed that worthy most accurately.[7] He had been persuaded, he wrote "to go to

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6. Macaulay Papers. Trinity College O.15.12 A pp. 292-3 TBM to Hannah 21.6.1831.

7. Macaulay Papers. O.15.70 letter No. 23 of November 1836

a party at the villa of a very wealthy native, who proposes to entertain us with a show of fireworks, As he is a liberal intelligent man, a friend to education and in opinions an Englishman, though in morals I fear, a Hindu, I have accepted his invitation; the party cannot possibly be so stupid as one of our great formal dinners, which unite all the stiffness of a levee with all the disorder and discomfort of a two shilling ordinary." There is no mention of the party in later letters, or of the man who was the host.

Apart from his servants and a few uneducated ex-Rajahs, pathetic in their dependence on their British masters, and childish in the extreme, Macaulay seems to have met no Indians. The evangelical upbringing which Zachary and Selina gave their son had also made a strong impression on his character. Thus he wrote to his father, "It is my firm belief that if our plans of education are followed up, there will not be a single idolater among the respectable classes in Bengal thirty years hence. And this will be effected without any efforts to proselytise, without the smallest interference with religious liberty, merely by the natural operation of knowledge and reflection." The Hindu religion was so absurd that western knowledge would destroy its hold on its followers; some of them were already professing themselves to be pure Deists, while others had embraced Christianity. The latter result was not to be expected from Mahommedans, as their religion which had 'much in common with Christianity', was superior to Hinduism.[8] It is likely

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8. Macaulay Papers. o.15.12D pp 136-9 of 12.10.1836

that the opinions of Raja Rammohun Roy that in twenty five years caste would be destroyed and all Brahmins would eat beef, which he himself did not do, had been reported to Macaulay and might have influenced him. Nevertheless one wonders whether experienced Indian civil servants would have shared his view. Unlike Macaulay they would know Indian society.

To some extent, and again this is understandable, Christianity was associated in Macaulay's mind with the west, if not with England. In a letter to his sister Margaret, he wrote about the funeral of his half-caste servant Peter Prim, and how odd it felt to see Orientals in their strange robes and strange language, performing 'European' rites.[9]

It seems fair to conclude that, for Macaulay, the rational element in human nature assured changes in a given direction: the impact of western education would, in a few years, make the Hindu abandon his deepest seated habits and even convictions, and opt for Christian and indeed European ways.

This then was the man who came to legislate for India. Talented, intelligent and well-informed about probably everything he needed to know about law-making except the people for whom he was to make the laws.

It is true that the circumstances which made Macaulay the law member in India, particularly his qualification of being

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9. Macaulay Papers. 0.15.12[D] pp. 136-9 of 12.10.1836

straight from England[10] and the eminence of his post, would have made it nearly impossible for Macaulay to acquire any first-hand knowledge of India. The fact remains that, unlike Metcalfe, Holt McKenzie, Bentinck and (in a different sense)[11] Malcolm, Macaulay does not appear to have fretted because of his ignorance of India.

It is not our intention to argue that Macaulay (and his fellow Law Commissioners) drafted a 'bad' code for India. On the contrary, it is an astonishing piece of work, even more so when one realises that it was drafted in two years by a young man without prior experience of drafting, and virtually single-handed.[12] Its merits do not need to be pointed out; the fact that it has operated successfully for over a century is the best proof of its merits. Most of the code continues to work without 'creaking'. It is not even our intention to argue that the Indian Penal Code could have been drafted any better in 1836 by an Englishman, or indeed an Indian. They would inevitably come from the uppermost strata of society and

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10. cf. section II where this matter is discussed in connection with the appointment of Bentinck and Metcalfe. pp148-149

11. In a difference sense because unlike the others Malcolm was no reformist. He wished to preserve the Indian society as it was with its caste and other hierarchies, and rule through its aristocracy.

12. For this there is a great deal of scattered evidence. Leg. Proceedings for 1835-37 indicate that all Law Commissioners save Macaulay spent this period being ill. Macaulay papers indicate that he had to carry this burden almost entirely alone.

while access to the other sections would not have been denied to them by social conditions, it would equally not have occurred to them to seek it.

However, it is still possible to say that, while no one may be blamed for it, the code suffered from certain shortcomings of a serious nature, because of the circumstances in which its authors were placed. It cannot be said too often that this thesis is not an attack on the entire Indian Penal Code; nor is it an attempt to disregard the limitations imposed by his day and age on Macaulay. What we intend to do is to expose certain defects in the Code which are amply demonstrated by the case law, which has accumulated over the years.

A few pages earlier we had referred to Macaulay's belief that human beings were essentially rational, and his belief that generalisations about their conduct were universally applicable, regardless of time and place. If like him or like Bentham one shares this view of human nature, it still remains to be asked what precisely is the rational or universal element in human nature? How does one identify it? Bentham did so in terms of the pleasure principle.[13] All men seek pleasure and avoid pain: this at once gives the rationale of their actions and establishes how they would behave in any given situation.

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13. Jeremy Bentham, Theory of Legislation (1931) and Principles of Morals and Legislation (1823). Bentham does agree that all actions do not give the same pleasure to everyone or indeed any pleasure. The imperfection of this admission is discussed in chapter I.

It is platiludinous to remark that the operations of the pleasure principle do not produce the same results for all men. What is more important for the law maker is that they do not produce the same results in all societies, all the time. The orthodox line of argument fails to take into account the cultural distinctions between different countries or indeed different classes in the same society. In certain societies a man would rather be hanged for killing another who had insulted his honour, than live with that humiliation. Not so long ago in Europe men risked their lives in duels for precisely this reason. Certain social groups in India would far rather incur a debt which cannot be paid off in a lifetime, than be miserly in their hospitality and shame their family.

The eternal dilemma of law makers is the need at once to acknowledge the separate, often conflicting, mores of distinct societies and to reconcile them in order to provide one just equitable law for them all. Inevitably they have to assume that certain attitudes, ideas, morals are held in common by the diverse people under them, and then undertake to legislate for them, as <u>one</u> people, in those spheres. Equally they have to bow to the cultural differences amongst them and leave certain areas to their personal - customary and religious - laws. What this normally means is that criminal offences and offences against the state[14] or government are regarded as the proper sphere of state interference:

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14. And certain aspects of civil law of course,but as their mention will add to the confusion without contributing anything to the distinction we are trying to make, we have omitted to mention them.

family matters - marriage, inheritance, adoption - are governed by law of domestic relations. In the former area, where attitudes towards murder, housebreaking, treason and counterfeiting - to name only a few, are shared by different groups in society, it is not difficult to enact laws and to enforce them. Equally if the sphere of family law is respected by the government, there is or should be, little trouble on that front.

This was the attitude taken by the East India Company in the early 19th Century. The Charter of 1833 empowered the Government to make laws for British India (and created the Law Commission for that purpose) with due respect to native customs and usages.

It is however not easy or indeed possible to divide areas of legislation neatly into categories. Inevitably the categories overlap, and in some matters both the government and the society claim the right to control conduct. The earlier example of crimes, involving family honour, is an excellent illustration of this conflict. It is not rare in a case of crime passionel for the wronged husband, who is also the murderer, to win public sympathy, if not support. In such cases, however, the social taboos against taking life are usually too strong to permit the murderer's acquittal solely because he has been wronged. But notions of honour are not always evoked or involved in circumstances where the choice is equally obvious.

Before the Code was passed, the British had claimed the right to legislate on Suttee and Thuggee, though the protagonists of these practices claimed religious support for them. The outcry against

Thuggee was universal, because no one was free from attack by these murdering robbers, who claimed that their deity required human sacrifices. As we have seen, with Suttee the case was different. The Hindu Establishment did not regard this practice as barbarous and, as we saw in section II, Bentinck had to act in a bold and determined manner to abolish Suttee.

It is clear that, where the government decides to legislate upon matters which are regarded by its subjects as being governed by religious and social sanctions, it is important for the law makers to be acquainted with social practices and attitudes, spoken or otherwise, respecting them. This acquaintance is all the more necessary where the attitudes, though strong, are amorphous, and have not crystallised into maxims. Macaulay's Penal Code did not tackle any problem as definitely formulated (by either party) as Suttee or Thuggee. Apart from a suggestion in Appendix B it did not mention Slavery. It is mostly concerned with matters, which are quite clearly such as the state is obliged to discourage. It is in the Chapter dealing with offences against the human body that the code steps into what could be called the twilight area, where the dividing line between the subject matter of family and general laws becomes blurred.

Offences such as rape, sale of humans and abduction which are either partly or wholly sexual offences, elicit strong moral responses from most societies. In many societies doubts are cast and the degree of guilt related to the victim's character. The law as it obtains in India does not (except in the case of rape) cast the same aspersions on the victim's character. The degree of difference between this

social response and the attitude of law, though important, is small. Therefore there is no violent or defined opposition to these sections of the Penal Code. Unless, however, the law makers are aware of the moral responses, they cannot accept or reject them. This lack of recognition of these responses implies that, should the government happen to take a stand opposed to the social code for assessing guilt, its laws may be unable to prevent existing social ideas from subverting the law.

When Macaulay drafted the Code, he did not make any provision for sale of persons or abduction. He dealt with kidnapping and with rape. The Law Commissioners thought that the penal sections on wrongful confinement would cover cases of abduction. In Chapter III we have tried to show that the punishment so provided was inadequate and that these clauses did not cover the most heinous cases of abduction of women. While there was no provision against sale of persons, there was a minor storm over his suggestion[15] that a law should be passed which would provide that nothing done to a slave would be excused by criminal law, solely on the grounds that he was a slave. The storm arose because senior officials of the Company feared that such a law would amount to a de facto emancipation of slaves, whose masters would be unable to chastise them or confine them as a punishment. These fears and Macaulay's confidence that this provision would liberate the slaves are an excellent gauge of the officials' isolation from the country. It was not realistic to expect a hereditary slave,

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15. The Indian Penal Code (1837) Appendix B pp. 114-115.

whose habits of mind were moulded in an entirely different cast from those of a free person who had no money or contacts or knowledge of the world beyond his doorstep, to know of such a law and to take advantage of it.[16]

During Macaulay's tenure of the office of Law Member, two proposals for legislation came up from the Governments of Madras and Bombay.[17] Macaulay's Law Commissioners were asked to examine both of them. The Bombay Government had asked for an amendment to the Suttee Act to empower its officials to prevent British subjects from leaving the Presidency, with the intention of committing and abetting the commission of Suttee.[18] The Madras Government had requested the enactment of a law empowering the police to warn parents, who for the first time were found to have decked their children with jewelry and who were found wandering on their own, and on the second occasion, to confiscate the jewelry.[19] While the answers of the Law Commission were written by their secretary, they could hardly be said to embody views which were not Macaulay's. These letters said that the Law Commissioners did not favour further legislation on Suttee, which was so delicate a subject[20]

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16. Also see infra Chapter III, Section 5

17. After the Charter of 1833 the Presidency Governments lost their right to legislate for themselves, which now vested in the Supreme Government. The Presidency Governments could send up drafts of bills which the Supreme Government was entitled to reject or alter.

18. See infra Chapter III Section 6

19. See infra Chapter III. Section 3

20. Ind. Leg. Proceedings. Range 206 Vol. 89 No. 7 of 17.7.1837

that it was unwise to legislate upon it. The request from Madras elicited a more detailed answer from the Law Commissioners. Parents ought not to be forbidden by law to bedeck their children with jewels even though such children ran the risk of being murdered for their trinkets, if they strayed away from their guardians, because such a rule was likely to discourage industry of parents, who were forbidden to display its fruit. Such legislation might amount to interference in the religious customs of natives, which was totally undesirable. Further, it did not appear that the number of children murdered for their ornaments was at all high. Finally, in view of the inefficiency of the police force, such legislation might create rather than solve problems.[21]

It is not our intention to suggest that the act requested by the Madras government, or rather by the officials of that Presidency, who saw the bodies of the dead children, was practicable. As the police force was both inefficient and corrupt, deplorable as the existing state of affairs was, the action proposed was not practicable. There was no guarantee that cupidity would not lead the police to decoy the child of warned parents in order to confiscate the jewelry. Nor was there a guarantee that all the jewelry would reach Government coffers. Under these circumstances it really was better not to legislate and to continue to rely on exhortations to parents and publication of reports of such murders, even though these methods had not worked in the past.[22]

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21. Ind. Leg. Consultations. Range 206 Vol. 89 No. 29 of 14.8.1837

22. Ind. Leg. Consultations. Range 206 Vol. 79 No. 5 of 14.12.1835 from Madras.

It was because of the dangers of such legislation that the small number of deaths was relevant; the evil was not serious enough for the Government to incur the risk of the even larger evils of a corrupt police force being given wider powers. The discouragement by such legislation of the industry of natives and its effect on the prosperity and economy of the country constituted a more remote danger to the country than did a bad police force.

Again on Suttee, Metcalfe's reason for refusing to amend the Regulation was more convincing[23] than that offered by the Law Commissioners, viz. the subject was too delicate, because it could effect the religious susceptibilities of natives; after withstanding the initial shock of Suttee legislation, it could hardly be assumed that the amendment would cause unrest.

This correspondence does however add weight to our opinion that Macaulay did not know much about the country. It is difficult to see how decking children in trinkets could have been thought to be an <u>insurmountable</u> religious custom, if Suttee had not proved to be so. The reasons given by the Law Commissioners and Macaulay on these two proposals are conventional reasons, and they betray no knowledge of the region or the people for whom they were to be made. Indeed the argument that too few children were murdered[24] or too few women went

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23. See Section II. Metcalfe had said that as the Penal Code which he expected would be passed shortly afterwards would replace all criminal regulations, there was no point in amending the Suttee legislation for a few months. p153

24. This was said by Macaulay's successors. The letter sent in Macaulay's time pointed out that the number was not given.

outside the Presidency to commit Suttee[25] took no account of the distress felt by officials who saw the mangled children or watched the widow and her abettors leave British territory to commit Suttee.

In this correspondence one gets a feeling of the isolation of the Law Commissioners. In spite of Bentinck's warnings which resulted in the continuous presence of Macaulay at all sittings of the Supreme Council, the Commissioners were not properly acquainted with the country, and as one feels in this case, not even acquainted with its administration. The plight of the Law Commissioners is not difficult to explain; they were not legislative Councillors, as Macaulay was, and they were expected to know little beyond their narrow field. It is a pity that with his incisive, wide-ranging mind and his opportunities, as a Law Member of the Supreme Council, Macaulay should have been in the same position.

That the caution against religious interference weighed heavily with Macaulay is beyond dispute. The Penal Code which he drafted had a separate chapter on offences against religion and caste.[26] One of these provisions - clause 285 laid down that any man who deliberately polluted the food of a Hindu in such a way that the latter could not eat it without breaking his caste-rules, could be fined up to Rs. 50/-. Offending anyone's religious susceptibilities by uttering

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25. Ind. Leg. Cons. Range 206 Vol. 89 No. 7 of 17.7.1837

26. Macaulay's draft of the Indian Penal Code, Chapter XV of offences relating against religion and caste. Clauses 275-286

opinions which criticised his religion was punishable by imprisonment.

When the Code was circulated amongst Company officials, they were almost unanimous in condemning this chapter for sustaining unhealthy distinctions in a severe manner.[27] This protest also illuminated the gap between the officials who knew something of the country and the law makers who did not.

Macaulay's spirited defence of the Black Act[28] was one of his most memorable and noteworthy actions; while making it Macaulay was in his element. His minutes show that he had a clear understanding of the principles underlying the Black Act which were being challenged by a few English traders.

While these debates[29] revealed Macaulay the man of keen intellect, and the man of deep seated convictions, they also, ironically, exposed his limitations. The question in this case - whether a few persons should be allowed special privileges at great cost to the majority, because of their nationality - was one which could have arisen in any part of the world under alien rule. It was a question to be answered not by a reference to facts but by analysis of conflicting principles.

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27. Report of Indian Law Commissioners IPC 1846

28. This was Act XI of 1836, which provided that the English in mofussil towns could be sued in courts of native judges instead of the cases having to be taken to Presidency towns.

29. Ind. Leg. Cons. of 28.3.1836, 9.5.1836 and 3.10.1836

When principles were questioned, no colleague of Macaulay could vie with him in his grasp of essentials. But when the answer to the problem lay in knowing the people, Macaulay was at a loss.

As the Penal Code dealt mainly with offences which did not require a particular understanding of the people who would be subjected to it, the Code did not suffer much from this ignorance. In this section we have tried to show the possible results of legislating in cases which did require such knowledge. We have argued that Macaulay did not know the country and we have attempted to show the effects of his ignorance by looking at two pieces of legislation. The effects of such ignorance on the relevant sections of the Code are discussed in Chapter III where all the drafts of the Code are examined.

SECTION IV

Bentinck's Successors

The British policy of not appointing Indian civil servants to high offices in India ultimately resulted, as we saw in section II, in Auckland's being appointed governor-general of India in succession to Bentinck. After Auckland, Ellenborough, Hardinge, Dalhousie, Canning, went out to India in succession until the mutiny of 1857 put an end to the Company's rule. From the minutes of the Supreme Council, and their correspondence with India House as well as other documents, it appears that none of these gentlemen had Bentinck's vision, or that stern devotion to duty, which he shared with Metcalfe.[1] Unlike him, they appear to have had no continuing or even fleeting awareness of their ignorance of the people of the land they ruled. For better or for worse they were solely administrators.

At any time Lord Auckland would have been a bad choice for the governor-generalship of India. Coming immediately in the wake of Bentinck-and Metcalfe-his shortcomings were even more glaring. He was a withdrawn, reserved man, who appears to have found it difficult to establish rapport even with his senior civil servants.

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1. See Section II p 144

Apart from a few rajahs, including Ranjit Singh, the lion of Punjab whom he met formally to negotiate a treaty, the Earl of Auckland met no Indians. This, as Bentinck had pointed out, was a failure of Europeans in India. But Auckland's inability to build up a relationship with his subordinates deprived him of the only other, albeit inferior, source of information, he learnt nothing and made no improvement as an administrator during his years of service in India.

From his sister's correspondence with their friends in England it is clear that the Edens had very superficial contacts with anybody in India, whether native or English. They found the country too hot and the company too dull. Whether they received Macnaughten or Ranjit Singh's little grandson, they treated them with scant courtesy and a distinct air of superiority. Apart from the Kashmiri shawls, which they acquired for themselves and their friends at home and the political gifts of jewelry, which they received from princes and which much to their chagrin - they were not allowed to keep, India made no impression on them. In their letters 'dear George' emerges as a tired overworked man, who spent the little time he could spare from his duties in the haven of his sister's[2] company. There is no mention of any officials with whom he was on friendly or informal terms.

A weak administrator, who vacillates when he can and acts only when he must is surely one of the greatest misfortunes which can befall a country; one outcome of such weakness is that he is unable to appreciate the hard work involved in a task undertaken by another.

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2. Janet Dunbar, Golden Interlude (1955) pp. 35, 91

By any standards the drafting of a code by a group of men, in two years would be a feat of outstanding ability. When Auckland arrived in India, the Law Commissioners had been working on the Indian Penal Code for only a few months. During this time their number had already been reduced by serious illnesses, which incapacitated most of them - save Macaulay - for several months at a time. Yet Auckland repeatedly urged the Law Commission to complete the code, implying that they had already taken too long over it.[3] Macaulay was offended and replied that drafting a code was no easy matter, that he had made several drafts of each chapter, and that he would not be hurried into producing a shabby piece of work. Macaulay pointed out that, the only other member of the Law Commission who was still fit for duty was Millet, the Secretary of the Law Commission and he had been given some equally important work to do by the Council, in matters of finance.[4]

In spite of all these difficulties, on 2nd May 1837[5] the Indian Penal Code was ready and presented to the Governor-General (Lord Auckland) in Council. By October 1837 printed copies of it were ready for perusal by government servants. Men with stronger determination might well have paled at the prospect of drafting a code that would revolutionise the criminal law of India. Auckland,

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3. Ind. Leg. Cons. Range 206 Vol. 86 No. 3 of 2.1.1837

4. Ind. Leg. Cons. Range 206 Vol. 86 No. 3 of 2.1.1837. Macaulay's answer refers to Auckland's letter in detail.

5. Ind. Leg. Cons. Range 206 Vol. 89 No. 1 of 5.6.1837

eventually decided to circulate the Code amongst the servants of the Company in both judicial and administrative branches, in order to obtain their comments. In itself the decision was irreproachable. It was highly prudent to ask those who would be required to administer it what they thought of a Code which was avowedly based on theory, rather than any existing system of law.[6] But Auckland did not take this course till late 1839,[7] a full two years after the code had left the hands of the Law Commissioners. The opinions of the officials consulted were received by 1840.[8] Auckland again did nothing; the answers were not even forwarded to the Law Commissioners for their counter-comments. In June 1837 the Indian Government had transmitted two copies of the code to England for the Directors' approval. The Law Commissioners had said that, while they had done all in their power to draft a good code, it was imperfect, because the adjective law within which it would function, still remained to be drafted; and because only practitioners could point out the defects in it. The Directors agreed with the law commissioners on these two points. They agreed with the Governor-General that the authorities - the Directors in England and the Supreme Council in India, could scrutinise the code only after it had been examined by 'persons conversant with the subjects of which it treats.' The Directors also agreed that the code should be circulated

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6. Letter from Law Commissioners to Governor-General in Council which accompanied the Code. Indian Penal Code Calcutta 1837.
7. Ind. Leg. Cons. Range 207 Vol. 24 of 2.12.1842
8. ibid.

amongst their servants, and that the time for examination of the Code by the Indian Government had not yet arrived.

It was only after this dispatch reached India that Lord Auckland directed that the Code should be sent to civil servants. This delay, to most people would appear entirely unnecessary; Lord William Bentinck had asked his civil servants to give their opinions on Suttee without awaiting the previous sanction of the Directors.

The only bill of any social import to which Auckland assented was a bill to regulate and clarify the condition of slavery. This bill was really the result of the pressure exerted by the English Anti-Slavery Associations on the British government, to compel the company to fulfil the obligations imposed on it. Moreover, in Appendix B of the Indian Penal Code, the Law Commissioners had avowed themselves in favour of legislation, which would make it impermissible for a man to do such acts (with impunity) to another as would constitute a criminal offence if done to a free man, solely because he was a slave.[9] One wonders why the Law Commissioners did not incorporate this principle in their Code instead of merely recommending its enactment. The Directors were anxious that this suggestion be translated into law. According to their instructions, which were conveyed by the Legislative Council to the Law Commissioners, the latter prepared two drafts of a bill which were calculated to improve the slave's position. Draft A, dated 11th February 1839[10]

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9. See supra Section III p166

10. Ind. Leg. Cons. Range 207 Vol. 1 No. 14 of 11.2.1839

ran as follows:-

"Whoever assaults, imprisons or inflicts any bodily hurt upon any person, being a slave, under circumstances which would not have justified such assaulting, imprisoning or inflicting bodily hurt upon such person, if such person had not been a slave, is liable to be punished by all courts of criminal jurisdiction within the territories subject to the government of the East India Company, as he would be liable to be punished if such person had not been a slave."

Draft B, which was an alternative to draft A, simply said that: "...no act which would be an offence, if done against a free person, shall be exempted from punishment, because it is done against a slave." This draft was modelled on the wording of the Directors' recommendations.

The Indian Government (Supreme Council) objected to draft A, because it was felt that it overstepped the mandate given by the court, and, as J.P. Grant, Secretary to the Government of India[11] said in his letter to the Governments of Madras and Bombay, draft A restricted too closely the slave-owners right to chastise his slave, even slightly.

In forwarding these two drafts, the Government of India solicited the opinion of the subordinate Governments on the following questions:

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11. Ind. Leg. Cons. Range 207 Vol. 2 No. 4 of 27.5.1839. Gives both drafts, draft A was altered slightly by the Legislative Council before being sent to Bombay and Madras Governments for their opinions.

1. Was it expedient to give the slave the same rights as a free man? that is, was it just to do so? Would it infringe the rights of owners, and would it amount to a 'deterioration' of property? Would it place the slave in a better position than the servant? Should the master have right to 'modest chastisement' of his slave?
2. Would the Government be required to compensate slave-owners? If so, what was their estimate of the sum that would be required to compensate these men?
3. Which of these two drafts did the Presidency Governments prefer?

The Bombay Government forwarded - without any comment - the opinion of their Sudder Faujdari Court. The Court said that, in its opinion, no such law was required in Bombay Presidency, where slaves and free men were already given identical treatment by law. Consequently, they did not have to answer any of the questions posed by the Supreme Government.[12]

The Madras Sudder Court said that Mohammedan law, which was applicable in their Presidency, recognised the master's right to moderate chastisement; and that, under the Indian Penal Code, slaves and free men would be equal before the law, in every respect (in this, as we have seen they were mistaken). Therefore, they felt that it was not necessary to pass either draft; the Court was not in a position to answer any of the questions. They felt however that,

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12. Ind Leg. Cons. Range 207 Vol. 5 Nos. 13, 14 of 2.9.1839

if either draft had to be enacted, draft A was preferable to draft B.[13]

Neither of these answers were acceptable to the Indian Government who decided to draft a bill themselves. In late 1841, that is a full two years later, Prinsep, an ordinary member of the Legislative Council, presented his draft to the Legislative Council.[14] This draft was called 'An Act concerning the execution of decrees and the security of Property acquired in certain cases' and was intended to protect the slave's property from being attacked in the execution of any decree against his master. It also provided (Cl. 2) that no slave shall be forbidden to hold property solely because he is a slave. The third and last clause laid down that:

Clause 3 - "... no right of property in any person or right to compulsory labour of any person can or shall be acquired except by lawful contract with such person and except by lawful apprenticeship."

If the Law Commissioners' efforts had exceeded their authority, Prinsep's draft was irrelevant to it and inefficacious. It did not extend to the slave's person the right it conferred upon his (non-existent) property, a right which the directors were anxious to bestow.

It is not surprising that Andrew Amos, the Law Member, discarded Prinsep's draft with little ceremony and substituted for it a draft of his own. At this time Auckland was on tour of the Upper Provinces, engaged in conducting the Afgan War, albeit from a distance. Amos said that his draft embodied three important measures: 1. sale of

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14. Ind. Leg. Cons. Range 207 Vol. 20 No. 2 of 24.1.1842

slaves under decrees. 2. dispossession of a slave's property.
3. sale of children into slavery.

"I incline to think", he wrote, "that these measures, extensive and important as they are, will be found safe and not of a nature affording any reasonable ground for compensation."[15]

The draft itself does not appear to agree with Amos' description. It has three clauses:

Clause 1 - laid down that Revenue and Judicial servants of the Company should, so far as legally possible, avoid recognising the condition of slavery. ("a disposition to recognise as free persons the parties in whom a property may be claimed so far as the strict letter of the law shall permit")

Clause 2 - provided that the Government should not in any way, be involved in private or public sales of slaves.

Clause 3- provided protection for a slave's property. It could not be taken away from him, solely because he was a slave.

Amos had also suggested that this draft should be sent to the Home authorities for their approval, and should also be sent to the Madras Government. Auckland agreed with Amos on all these points. He felt however, that the draft ought not even to be published in India without receiving 'some positive directions from the Honourable Court."

Auckland suggested two additions to Amos' draft:

Clause 1 - "It is hereby enacted that any act, which would be a

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15. Ind. Leg. Cons. Range 207 Vol. 20 Nos. 1 and 3 of 24.1.1842

penal offence, if done ~~by~~ to a free man, shall be equally an offence, if done to any person in any condition of dependence on a master."

Clause 2 - "that no rights gained as arising out of an alleged state of slavery shall be enforced by any Magistrate within the territories of the East India Company."[16]

Auckland's suggested additions at last brought the draft in line with the directors' wishes. On this subject Auckland exhibited unexpected strength as well as a liberal streak.

Amos revised his draft to take Auckland's amendments into consideration. The new version incorporated clause 2 of Auckland's amendment. It also regulated the sale of children;[17] by this clause a minor's person or labour could not be transferred from one person to another, except for apprenticeship, and by deed executed before a magistrate. Amos felt that such an elastic provision would allow the Governments to regulate the sale of children into slavery, while leaving them discretionary powers to take no action on such sales during famine. Amos declined to incorporate the first suggestion of Auckland, as it would virtually abolish slavery, and create claims for compensation. If the Government intended to abolish slavery, they should say so explicitly. The first clause suggested by Auckland was referred to as the 'penal cluase'. This and the clause which provided for apprenticeship of minors - i.e. the 'apprenticeship clause' aroused much controversy in the council.

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16. Ind. Leg. Cons. Range 207 Vol. 20 No. 4 of 24.1.1842

17. Ind. Leg. Cons. Range 207 Vol. 20 No. 5 of 24.1.1842

Bird wanted the Government to abolish slavery in so many words, or leave matters well alone; the measures suggested by Auckland would only produce confusion and discontent. Prinsep naturally thought that the draft was too bold. He was against the apprenticeship clause. He felt that the practice of selling children during famines saved lives, that would otherwise be lost.[18]

Auckland stood firm on both these points. He was not prepared to concede Bird's point. Bird felt that neither criminal liability nor civil 'rights' arising out of slavery should be enforced in British courts. Auckland's suggestion was that magistrates should not enforce rights against slaves. But magistrates were only a class of criminal judges, and Auckland agreed to widen the prohibition so as to include all criminal courts. He was not willing to extend this protection to civil matters. Bird said rather bitterly that the penal clause was contradictory - it provided - "a penalty against the enforcement of rights the existence of which it virtually recognises." However, he defended his penal clause against the attacks on it by Andrew Amos and James Prinsep, who regarded it as a 'virtual abolition of slavery.'

Auckland and Amos agreed upon the necessity for the apprenticeship clause. Auckland did not agree with Prinsep that sale was the only way of saving children during famines. He pointed out that it should be even easier to find persons to take the children if no money

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18. For all these discussion see generally Ind. Leg. Cons. Range 207 Vol. 20 minutes of 24.1.1842

exchanged hands.[19] Amos had argued and Auckland had accepted his argument - that, according to law, sales of children were not binding. Nonetheless, they did take place and the only way to release the children was to regulate their transfer.

Auckland was several hundred miles away from Calcutta. From that distance his opinions could not be expressed with sufficient force to quell all disagreements. He was also occupied with the Afgan wars, which were not proving particularly easy to conduct. Tired by his five years in the enervating climate of India, he had resigned and was planning to leave India in March 1842. One cannot blame him for not enacting this legislation.. One does wonder, however, why it took two years after the Law Commission produced their drafts, for the Supreme Council to act on them.

Auckland was not a man of action. Caution was his by-word and he did not like to take decisions. Even on the slavery drafts Amos, who wanted the draft to be presented to the Directors before action was taken on it, was not averse to its being printed. Auckland was unwilling to do even that. In his book on Auckland Dr. D.P. Sinha[20] has been at some pains to prove that Auckland was a social and administrative reformer. He has discussed the policy of Auckland

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19. This may not have been so, but that would prove that such sales were not transacted to save the child, but to acquire a slave!

20. D.P. Sinha. "Some Aspects of Social and Administrative Policy in India during the Administration of Lord Auckland." (1969)

administration on the following: education; slavery; religion; Black Act; reform in emigration of Indian labour; powers and salaries of judges; and substitution of the vernacular for Persian in judicial proceedings. As Dr. Sinha admits, none of these policies originated with Auckland, with the exception of the slavery bill. Of these the last two are concerned with administrative reform and therefore do not concern us.

We have examined the progress of slavery legislation in India during Auckland's administration. We need only take a quick look at the other measures to evaluate Dr. Sinha's opinion. On general education the Government of India had started discussing their policy on this subject well before Auckland arrived; the choice open to Bentinck was to patronise either oriental or English education to the exclusion of the other, or patronise both of them, with oriental education coming a good second. Bentinck adopted the last course and took care to nominate such persons to the education committee as favoured English education. Anyone with some respect for the traditions of the country and enough prudence to handle native susceptibilities gently, would have done what Bentinck did. In this field Auckland merely continued his policy. In matters of education one must point out that any decision (except perhaps exclusive patronage of oriental education) would have amounted to social reform. The initial bold decision had been taken before Auckland arrived in India: it was Metcalfe and not Auckland who dealt with a petition from thirty thousand Mohammedans, complaining

against the suppression of Islamic studies.[21] Auckland only continued this policy. Neither his passive nature nor the convictions of the education committee would have permitted a complete reversal of policy, in favour of oriental education.

Technical education was a different matter. We do not think it qualifies as social reform. The Directors were excessively anxious to reduce Public Expenditure.[22] Indian civilians cost the company far less than Europeans, and therefore the Directors disapproved of European appointments to the lower grades, whether clerical, judicial or administrative. The original intention was to employ Indian doctors in the Army. When the military authorities objected, Indians were employed in civilian posts, which were no longer reserved for the Englishman. Imparting technical education was essential to any plan for reducing expenditure.

Dr. Sinha also discusses Auckland's policy on the Emigration of Indian Labourers to Mauritius (and other places). We have discussed it at some length in Chapter III. It was perfectly true that the Government acted firmly to prevent recruiting agents from exploiting the illiterate Indian peasant, who was lured abroad by false promises. In that chapter we have also argued that the Government were really anxious to prevent any erosion of their sovereign rights over their subjects. It was not a social reform, but a necessary assertion of the Governments right to prevent its subjects from being transported

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21. See Sinha p.13

22. See infra Section 7

beyond the seas, without its having the power to compel their return.

The controversial Black Act of 1836 was passed after Auckland had assurred office. The bill had been introduced in Metcalfe's council and the councillors had taken a firm line on it.[23] As the minutes of the council show, Auckland had no choice in the matter. The councillors interpreted the public hostility it had aroused as a challenge to the government's authority, and as an attempt to blackmail it by threats of violence.[24] Acquiescence would be fatal, they warned and the bill was passed. Indeed Macaulay not only wrote brilliant minutes stating his position, he also drafted a reply,[25] which his Lordship could make public, as expressing the views of his Council. It was rare for circumstances to be so arranged that Auckland had no choice but to act. Normally he chose to procrastinate.

When Auckland left India in March 1842, he had not passed any important social measure, which he had also initiated.[26] All that he had to show for his five years in India was the Afgan wars which had been disastrous, and which had cost the British a great deal in terms of men, money and prestige. Amongst those who perished was William Macnaughten, who died in the siege of Kabul.

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23. See supra Section III-2, p152, Section 3 p171

24. Ind. Leg. Cons. Range 206 Vols. 81, 82, 83, of 28.3.1836, 9.5.1836, 3.10.1836.

25. Ind. Leg. Cons. Range 206 Vol. 83 of 3.10.1836

26. Ellenborough passed the slavery bill discussed under Auckland. He solved the problem of the apprenticeship clause by omitting it!

If Auckland was withdrawn and unwilling to act, to Ellenborough belongs to distinction of having been the rudest Governor-General of India. He was certainly one of the very few men to be recalled by the Directors. Lord Ellenborough was the Governor-General of India during 1842-44. His years in India were almost entirely occupied by the Afgan wars and by clashes with the Directors. He apparently had no use for law-making or law-makers. While Auckland was Governor-General, Ellenborough, who was the President of the India Board, wrote to him three letters in September-October 1841,[27] after he had been appointed to succeed Auckland. In these letters he discussed the Afgan wars, the possibility of taking action against China, the trade treaty with Persia, and accountancy. As to the last, Ellenborough declared himself dissatisfied with the methods of Indian accountancy, and felt that expenditure could be further curtailed in India, for he did not 'trust' the figures sent in by the Accountant-General of India.

In an interesting letter, dated 19th September 1841, Ellenborough revealed his attitude to the law-making machine in India:

"My idea was, and is, that the general superintendance of the finances would be better entrusted to a person not educated in the company's service but formed to habits of business here and it has occurred to me that the Member of the Council now only authorised to attend the meetings of the Council when Legislative measures are before it, might be permitted to attend when matters of Revenue and Finance are before it and might be made joint financial minister..."

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27. B.M. Auckland Papers 40, 471 ff. 216-225

Ellenborough also inquired whether Andrew Amos, who was then the Law Member, would be either willing or able to undertake these additional duties. Obviously Ellenborough thought that the Law Member was not fully employed and engaged in unimportant work. He thought nothing of changing his function so that the fourth ordinary member would regard his legislative duties, for which his office had been created - as secondary to his fiscal duties.

For good measure Ellenborough added the query: "Will you tell me if there is any limit to the devotion (sic) of the expensive Law commission?"

Ellenborough continued to hold the Law Member and Law Commission in contempt after his arrival in India. It is not surprising that during his administration the question of the Indian Penal Code was not raised. The Law Commission and the Law Member were busy fighting, the one for its survival and the other for his rights,[28] and the Directors of the Company were probably astounded by the extraordinary and totally unnecessary rudeness of the communications they received from their first servant in India!

Ellenborough was recalled by the company in 1844 and, apart from the army, no one regretted his departures. In a book published anonymously a Bengal civilian wrote scathingly of Lords Auckland and Ellenborough.[29] Auckland was criticised for mismanaging their Afgan

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28. See ~~supra~~ infra Section V.

29. Lord Auckland and Lord Ellenborough as Governors of India by a Bengal civilian - 1845 B.M. 1389e46

policy and for making demands on the Ameers of Sind which were bound to lead to war. The Amirs had been asked to give a free passage to Shah Suja, the British candidate for the throne of Kabul, and defray the army's expenses amounting to Rs 20 lacs. In return, as soon as Shah Suja was installed on the Kabul throne, the British would revive his thirty year old claim on Sind for an annual tribute!

The Bengal civilian accused Ellenborough of 'vanity' and of having 'more than the caprice of a woman', of ill-treating his subordinates. "The ex-Governor-General delights to be called the Friend of the Army - and certainly the army did him good service, but even here it is impossible not to trace a womanly foible for a red-coat and a jingling sabre." The author described him as a man 'who thought no more of sacrificing a man or a measure to a good claptrap than he did of sacrificing the decencies of life to the luxury of insulting some helpless object of his wayward antipathies'.

There might have been some exaggeration in the Bengal civilian's description of Lord Ellenborough. But clearly the latter did not have the patience or subtlety of mind necessary in a good administrator. It is not surprising that he should have had such little regard for law-makers, who essentially work slowly and whose labours yield results less spectacular though as far-reaching as wars with China or Afganistan.

Ellenborough was succeeded by Sir Henry Hardinge. The latter was cast in a different mould. Unlike Ellenborough (who, for all his adoration of the red-coat, was a civilian) Hardinge had seen active

service in Portugal, Cadiz and Gibraltar. After his retirement from the army, he had represented first Newport and then Launceton, in the House of Commons from 1830 to 1844, when he went out to India. He was a far quieter man than Ellenborough, and was probably much needed after his hot-tempered predecessor.

Part of Hardinge's time in India was occupied by the Sikh wars. The Punjab administration had become increasingly chaotic after Ranjit Singh's death in 1839, until the British thought it advisable to intervene. After his victory over the Sikhs, Hardinge arrived at a new settlement with them, which gave the British greater control over the affairs of Punjab, though the government still remained in native hands.

Sir Henry Hardinge's administration was, apart from the Sikh wars, quiet and eventful. He tackled various questions of importance, including that of Meriah, a form of human sacrifice, which had been customary in Orissa for very many years. It was committed in the month of January, in the belief that the blood of the victim would make the soil fertile. The Khonds bought children from other tribes (mostly from kidnappers), brought them up till they reached puberty, and then sacrificed them. This practice had been discovered by the British as early as 1837, when one of their officers reported it. The correspondence on this subject between Madras and the Supreme Government began in 1838.[30] During 1843 to 1845 concerted action on this problem began to take shape. But it was Hardinge who was mainly responsible for taking steps against it. Hardinge passed an Act, which placed the Meriah country (hitherto parcelled out amongst Madras, Bengal and South-west

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30. Ind. Leg. Cons. Range 207, Vol. 3, Nos. 10-13 of 24.6.1839

Provinces or Chhota Nagpur) under an agent for the Suppression of Meriah, who was directly controlled by the Supreme Government. As the densely forested, hilly country was difficult of access, Hardinge did not rely entirely or even mainly on the army. A placatory man by nature, he chose to bribe the Khonds with money to give up this practice. He also disagreed on the necessity for a road through the country, in order to make it more accessible, though Millet, a Legislative Councillor, pointed out the possible commercial advantages of such a road. Some of the Meriah officers offered their resignations rather than remain helplessly on the spot. Hardinge, however, continued to believe in the efficacy of gradual change. He also suggested that government doctors should be sent to the Khond country to treat the people for small-pox and other diseases. While tackling the problem of Meriah in British Territory, Hardinge also exerted diplomatic pressure on native chiefs, to abolish Suttee and female infanticide.[31]

During Hardinge's administration the Supreme Council discussed two bills of interest to us, neither of which was passed. The latter of the two, considered in 1848[32] was a bill to punish the kidnapping of a girl of, or under, twelve years of age from her guardian's custody. This was rejected on the grounds that the Indian Penal Code would soon provide this remedy. In 1844 to 1845 the council discussed a

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31. See generally, Ind. Leg. Cons. Range 207, Vol. 36 minutes of 13.9.1845

32. Ind. Leg. Cons. Range 207, Vol. 48, No. 8 of 8.2.1848.

draft Act on adultery. This act was also rejected, partly because it was held that it was unnecessary: the higher classes were too proud to expose a blot on their honour in court and the lower castes settled it by giving monetary compensation. What is interesting is that some people thought that, as the husband was often reluctant to start proceedings, this privilege should be extended to persons other than him, viz. the son!

Hardinge's years in India were remarkable for his interest in railways, which he thought to be of great military and commercial importance. His energetic advocacy of this project bore fruit soon after his departure. Tea plantations in Assam, an engineering college at Roorkee and construction of the Ganges canal were his other contributions to India's prosperity.

While it is difficult to credit Hardinge with being more than a good administrator, he did revive the question of the Indian Penal Code. In 1845 he asked the Law Commissioners to prepare a report on the Indian Penal Code. The Commissioners drafted the report in two parts, published in successive years, 1846, 1847. In 1848, (after Hardinge had left India in January) J.M. McLeod, who had been one of Macaulay's colleagues on the Commission, completed his notes on these reports.

Dalhousie, who succeeded Hardinge spent nearly eight years in India during which many changes occurred. In 1851 the first railway track was laid. Postal services and Telegraphs (which had been introduced by Metcalfe) were improved; irrigation and other public works were removed from military control and placed under engineers.

The education policy was changed to allow more children to be educated. Dalhousie also assented to a Hindu widows Remarriage Act in 1856,[33] as well as an act protecting the rights of a convert, in his family's property.

The Sikh problem once again became urgent and Dalhousie, associated in Indian history with the implementation of the doctrine of lapse, under which he acquired Indian States on failure of a natural born male heir, annexed the Punjab, as he had annexed other princely states. His war with Burma added lower Burma to British territories.

It should be fair to say that Dalhousie's years in India were characterised by his acquisitions of territory and by the major, vigorous measures which were largely responsible for modernising India. But in spite of his Hindu widows Remarriage Act, he cannot be said to have been endowed with Bentinck's ideals. Due to pressures from home, he directed Bethune to revise Macaulay's code. In 1851 Bethune, who had rejected it, produced his own draft. As neither the Indian Government nor the Home authorities were willing to choose between the two drafts, the matter rested there. Meanwhile, Dalhousie, like Ellenborough, tried to abolish the law commission. As this was not possible, he tried to limit the expenses of the commission by other methods.[34] In 1854 the new Charter moved the

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33. This effected only the upper castes; the lower castes had always permitted their widows to remarry. See infra Chapter VI Section 3 pp462-463

34. See infra Section V.

Law Commission to London. New pressures,[35] however, made it essential for the Government to take a decision on the Code. In 1856, after Dalhousie had left India, the Legislative Council discarded Bethune's draft and under the guidance of Sir Barnes Peacock, the Law Member revised the Indian Penal Code. Under Lord Canning, the first vice-roy of India the Indian Penal Code was passed as Act XLV of 1860.

It may be said that we have devoted far more space to Lord Auckland than to all the other Governors-General collectively. We have two reasons for this. The Governors-General were not much involved with the Penal Code. Even the best of them did not show much interest in it. This was but natural; during Auckland's administration the Code was a matter of immediate interest; the men who drafted it were still in India. Successive governments were unlikely to display a burning interest in a matter which did not immediately concern them and when their attention was forced on it, they found it difficult to act speedily. Once Auckland relegated the Code to the government Archives, the issue lost all sense of urgency. It needed an external stimulus, such as it received in 1857, to facilitate its enactment.

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35. See infra Section V, p 212

SECTION V

Macaulay's Successors

After Macaulay's departure from India in 1838, the two offices which he had occupied clearly lost their importance, a loss from which they never recovered.

Lord Auckland allowed the Law Member and the Law Commission to function in more or less the same manner, in which they had functioned during Macaulay's time. Thus the Law Member continued to attend all meetings of the Council, regardless of whether or not the business transacted at them was legislative. The Law Commission continued to be asked for its opinions on various legal matters.[1] They produced the draft of an act to be called the Lex Loci of India in 1840, which shared the fate of the Indian Penal Code; in 1841 they prepared a voluminous report on slavery which had taken them almost two years to complete.

Nevertheless, Lord Auckland was not entirely pleased with the Law Commission. Increasingly the Council preferred to consult the Law

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1. One of them was a repeated request from Madras for an act to deal with Murders of children for ornaments. In his capacity as the President of the Law Commission, Amos replied rather crossly that he saw no reason to change Macaulay's decision on this matter. Ind. Leg. Cons. Range 206 Vol. 96, No. 32 of 22.11.1838

Member rather than the Law Commission,[2] With characteristic indecision Auckland wrote a minute in 1842 in which he recognised the 'valuable' contribution of the Law Commission at the same time as he accused it of being 'equally expensive'. "The labours of the Law Commission have assuredly not yet produced the clear and useful result which all must have desired to see, though I am aware that these labours have been far from light and it is in the character of enquiries so important to be so protracted". The Home authorities would have to decide whether the financial burden of the Law Commission was worth bearing. Having thus delicately implied that it was not, Auckland concluded. "I should only say that even if it be determined to close the Commission, I would hope that this measure will not be taken too abruptly."[3]

Andrew Amos was sent out to India to succeed Macaulay as the Law Member. Charles Hay Cameron, the English barrister who had been the most ailing member of the Law Commission under Macaulay, was appointed its President.[4] Andrew Amos was offered that post but declined on the grounds that he was already over-worked in his first capacity.[5] Auckland supported Amos. However he was eventually persuaded to change his mind[6] and indeed the Directors expressed some surprise that the

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2. See below pp. 200-201

3. Ind. Leg. Cons. Range 207, Vol. 27, No. 17 of 7.4.1843 quotes Auckland on 28.2.1842

4. Ind. Leg. Cons. Range 206, Vol. 91, Nos. 9 & 13 of 22.1.1838

5. Ind. Leg. Cons. Range 206, Vol. 92, No. 5 of 16.4.1838

6. Ind. Leg. Cons. Range 207, Vol. 99, Nos. 15-16 of 28.1.1838 and Directors dispatches of 8.8.1838

two offices should not have been united in the same person.[7] The Director's reaction effected the final decision. Macaulay, it will be remembered, had been eager for the second post, for, he said, there was not enough for him to do as the Law Member to justify the burden placed by him on the Exchequor.[8]

Amos was an active Law Member and appears to have made his influence felt in the Legislative Council.[9] For the purposes of this study it will be remembered that he had drafted the slavery Act - Act V of 1843. Two years earlier, in 1841, the Law Commissioners had finished their second report on slavery in India. In their reports the Commissioners had taken a conservative line on slavery.[10] Indeed, they could even be said to have been excessively optimistic in their views, for they said that Indian slavery was essentially a non-oppressive, benevolent institution. Under these circumstances their adverse remarks against slavery deserved particular attention. Amos, who was completely opposed to the penal clause, which would have protected the slave from assaults by his master, was not disposed to be impressed by the report. He had dismissed the first report on slavery, prepared in 1839, saying that the Law Commissioners did not know enough about the problem;[11] he did not change his mind when the second report was issued. Such a

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7. ibid.

8. See ~~supra Section~~ III Ind Leg Cons Range 205 Vol 64 Nos 1-5 of 15.6.1835

9. See pp. 200-201

10. See particularly Ind. Leg. Cons. Range 206, Vol. 99, No. 68 of 4.2.1839

11. Ind. Leg. Cons. Range 206, Vol. 99, No. 14 of 11.2.1839

criticism raises several questions. If the Law Commissioners knew little about slavery, Amos, fresh from England in 1837, could claim to know even less. So his criticism was particularly unfair for this reason.

More important, such a remark is a clear indication of the lack of co-operation between the Law Commission and its President. It was mainly through their President that the Commissioners could make their opinions carry weight with the Council. Through him, again, they could acquire information about general administration, to which they were otherwise denied access, and which was often relevant to the bill they were drafting. Remarks such as these, made by their President, in his capacity as Law Member, were not likely to enhance the importance of the Commission, nor contribute to the feeling of its usefulness.

In January 1843, a few months before his retirement, Amos wrote several minutes on the possible reconstitution of the Law Commission.[12] He felt that the Commission could be attached to the Legislative Department; such a step would save a great deal of money by making it unnecessary to appoint to the Commission a secretary, an English lawyer and a Bengal civil servant. The Law Member could represent the English legal element and a secretary from the Legislative Department who would belong to the Bengal civil service, could perform the functions of the secretary to the Law Commission and the member for Bengal. The only Commissioners who would need to be appointed, would be members of the Bombay and Madras civil services.

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12. Ind. Leg. Cons. Range 207, Vol. 27 minutes of 7.4.1843

Cameron fought bitterly against this plan, which he described as 'destroying' the Law Commission. He thought that the main trouble lay in the unsatisfactory relationship between the Legislative Council and the Law Commission; the former was too busy to give sufficient attention to the bills drafted by the Law Commissioners. Cameron thought that the two bodies should have joint sittings, so that, while the Law Commission would still draft the bills and the Legislative Council would still take final decisions, the Councillors would be sufficiently conversant with the bills when they finally came up for enactment.[13]

Ellenborough, who did not approve of either ofthese suggestions, thought that the Law Commission should be abolished altogether.

At the same time Amos also argued that the Law Member should not be the President of the Law Commission. He felt that the Law Member was occupied with urgent matters and therefore he could not devote enough attention to the Commission. Besides, the Law Member was judged by his performance in the Council. "How differently would his energies be applied, if he ~~had~~ had no more attractive objects to divert him from it, if his utility in India and consciousness of public service were to be measured solely or even primarily by the reports of the Law Commission".

Amos went on to say that the nature of the business before the

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13. Ind. Leg. Cons. Range 207, Vol. 27 minutes of 7.4.1843. Though filed under this date the minutes were written from January onwards. Also notes from National Archives of Delhi IPC papers.

Law Commission had changed since Macaulay's days. Macaulay had regarded his seat in the Council as a sinecure. "During my time the current legislation of the country has been conducted almost exclusively in Council, which was not the case formerly and the business of the Commission has for the most part been confined to extensive and organic change of system including elaborate reports on the lex loci, the training of civil servants and like matters. The current legislation transacted exclusively by the Council during the last five years has included various subjects of very extensive operation, and requiring elaborate details. In Council, also without reference to the Commission, several important consolidations have been effected and the uniformity of the law throughout the Presidency advanced". In other words, a practice had grown of consulting the Law Member to the exclusion of the Commission.

The apathy, which Amos had shown towards the Law Commission from the very beginning, culminated in this manner. He was more than willing to reduce the Law Commission to a cipher, and was anxious to dissociate the Law Member from all connection with that lowly body. He guarded the Law Member's privileges with a jealousy which was not in evidence when the Law Commission's fate hung in the balance. Amos said that, though it might be felt that the Law Member would have more time in future to devote to the Commission, as Lord Ellenborough had restricted his attendance at the Council to meetings at which legislative business was transacted, the limitation was not wisely imposed: Bentinck and Metcalfe had been opposed to it, and Ellenborough has imposed it without the agreement of the Council. Such limitations reduced the Law Member's acquaintance

with administration and therefore also decreased the value of his contribution to the Council's deliberations.[14]

On 1st March 1843 the question was broached by the Directors of the East India Company. They wished to know the opinion of the Indian Government on 'the constitution of the Legislative Council' and 'the function of the Law Commission, with a view to discontinuance of both'.[15] They felt that, as Amos had completed his term and a new man had to be appointed, this was a suitable opportunity to examine both questions. On 22nd April 1843[16] Lord Ellenborough gave his views in his usual forthright and needlessly offensive manner. He did not see any need for the Law Member or the Law Commission. "If the Advocate-General be a lawyer of knowledge and ability, the Governor-General of India can want no other legal adviser. ...It would be hard if the people of India were compelled to pay a very large salary to a legal member of the Council solely because the Advocate-General had not been selected on account of his competency for the office of legal adviser to the government". In other words the Directors of the Company were guilty of graft and nepotism! Ellenborough then proceeded to deliver himself of the view that "To place in the Council a legal member must have a tendancy to create legislation,

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14. Ind. Leg. Cons. Range 207, Vol. 27 minutes of 7.4.1843

15. The rest of the correspondence is about the Law Member's office being abolished. B.M. Peel Papers - 40, 472ff 310-311

16. B.M. Peel Papers - 40, 472ff 310-311

which, unless absolutely required, is in all countries, especially in this, an evil. The legal member of the Council having hardly anything to do, will look right and left in order to find materials of new Acts of the Legislature."

There might have been some truth in this allegation. Had it come from more sensitive administrators like Bentinck, Metcalfe or even Sir Henry Hardinge, we would have been compelled to examine it carefully. But coming from Ellenborough it sounds only part of his general dislike and scorn for the legislative aspect of any government's business.

In their reply of 28th June 1843, the Directors reacted sharply: after mature consideration of the opinions expressed by other members of the Legislative Council, they had decided that the Law Member could not be dispensed with. It was their 'desire' that the gentleman's presence should not be restricted to meetings at which Legislative business was discussed.[17]

Ellenborough did not receive any support from the members of his Council, who did not wish the office of the Law Member to be abolished, or even circumscribed. After an unsuccessful attempt to empower single members to require the Law Member to leave the chamber when business other than legislative was under consideration, if they so wished, Ellenborough gave in.

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17. Peel Papers - 40, 472, ff 310-311, Letter No. 8 of 29.11.1843

Eventually C.H. Cameron,[18] the new Law Member and President of the Law Commission, was invited to attend meetings at which Revenue and Judicial matters were discussed.[19] It is worth noticing that Ellenborough defined the term 'legislative business' so narrowly that even Judicial business was excluded!

Even while conceding defeat, Ellenborough could not avoid the temptation to insist that he was right.[20] "Considering however, that the Court can only have intended to convey an intimation of their opinion, and of their wish, and not to send a direction, which they are not by law competent to give, we may properly show our respect for the opinion of the Court by carrying into effect their wish that the fourth member of the Council should sit at meetings of the Council not held for the purpose of making laws and regulations in as far as it may appear that his presence may not be injurious to the public service ..."

In June 1844 the Directors once again reacted strongly against Ellenborough's insistence that their 'desire' was of no consequence.

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18. It is significant that Cameron's ten years of service in India did not disqualify him from becoming the Law Member, a position which the Charter of 1833 required to be filled by someone from England. Yet, although no such stipulation was made in the Charter Act about the governor-general of India, Metcalfe had been disqualified because he had served too long in India!

19. Ind. Leg. Cons. Range 207, Vol. 31 Nos. 1-6 of 16.3.1844

20. Peel Papers - Letter of 18.2.1844

However, they took no action perhaps because they had achieved the greater part of their desire. No doubt Ellenborough's conduct during this discussion weighed with the Directors when they recalled him.

Neither the Directors nor Ellenborough had been in favour of retaining the Law Commission or even the Law Member, when the question was first opened by the Directors.[21] It was Ellenborough's high-handed conduct that provoked the Directors' opposition to him. The efforts they might otherwise have made to ask Parliament to amend the Charter by abolishing the offices of Law Member and Law Commission were not made, and they were suffered to exist.

Sir Henry Hardinge, who succeeded Ellenborough a few months after this and other differences between the latter and the Home authorities, apparently had no objection to either the Law Commission or the fourth ordinary Member. Cameron was allowed to complete his term, which came to an end in March 1848 - two months after Hardinge's departure, without being obliged to defend either of them.

In 1845 Hardinge directed the Law Commissioners to draft their report on the Indian Penal Code. This report was in two volumes. Volume one was published[22] in 1846 and Volume two in 1847; the notes on the report were compiled by J.M. McLeod (one of Macaulay's colleagues on the Law Commission) in 1848. By the time the last document was

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21. See supra p. 202

22. These publications were not for the general public, but for circulation amongst government servants, the Directors, Members of Parliament, etc. India Office Library.

published, Hardinge had left India. Dalhousie had succeeded him and the Code was once again allowed to languish in government archives.

The Law Commissioners had been directed to take into consideration the criticisms of the Code made by civil servants in 1839 to 1840. We shall discuss these suggestions, which were concerned with particular clauses of the Code, in Chapter III. One of the major criticisms was levelled against the Code's basic principles. The critics were in serious doubt about the wisdom of enacting a law which declined to draw exclusively upon any one system of law, choosing instead either to borrow from several, or rely on abstract theories of jurisprudence . The then Law Commissioners themselves had admitted that to them the British system seemed as much in need of reform as the Indian and therefore they had not adopted British laws for India.[5]

The Law Commissioners of 1846 did not defend Macaulay. They directed their efforts towards proving that the Code, whatever the avowed purpose of its authors, was, in fact, based on English law. They were at pains to show that this was true of almost every clause in the Code. Where this was not the case, they tried to prove either that particular provision had been recommended by English Criminal Law Commissioners, or that the change had been made in English law after Macaulay had drafted the Indian Code. They went so far as to trace the similarity, not only in the types of offences recognised by the Code, but also, in the length of imprisonment (and other punishments) prescribed by the Indian Code. They did not stand firm on Macaulay's principles, which had led him to disclaim all influences of English

law.[23]

It could be argued that the Law Commissioners, Messrs. Cameron and Eliot, did not agree with Macaulay's ideas. It is also true, and this has been argued by Rankin and Whitley Stokes, that, whatever Macaulay might have said, the Code was very largely based on English law. But Cameron and Eliot did not even justify Macaulay's reasons for wishing to reject the British legal system, reasons, which it must be admitted, had some degree of validity. It must not be forgotten that Cameron had been one of Macaulay's colleagues on the Law Commission. Of him Macaulay had written in glowing terms. Soon after Cameron's arrival in India Macaulay wrote to James Mill: "All that I have seen of him satisfies me that the Home authorities could not possibly have made a better choice. We agree perfectly as to all general principles on which we ought to proceed, and differ less than I could have thought possible as to details. The real work of drawing up the Code will, as far as yet appears, be completely performed by Cameron and myself, under the constant checking of McLeod".[24]

Either Macaulay had been entirely mistaken in his judgment of Cameron,[25] or the latter had changed radically in less than ten years.

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23. Macaulay's disclaimer was based on the reason that British law had grown, it had not been created on rational grounds, and that therefore it suffered from severe handicaps.

24. Macaulay to James Mill - 24.8.1835. Original in possession of Mr Gordon M. Ray in United States.

25. Cameron had stayed with Macaulay while looking for a house so his judgment could not have been based on inadequate evidence.

The third possibility, not to be ignored, is that Cameron, being on the defensive, and aware that his position was weaker than Macaulay's, with an unsympathetic audience (of the Government and the Home authorities) tried to show how the Code did live up to their expectations. There is some justification for accepting this last interpretation of Cameron's stand: by November 1843, that is a few months after Amos' attack on the Law Commission and his departure, Cameron the new Law Member cum President of the Law Commission wrote a minute for his Law Commissioners on an Indian Evidence Act. One of the merits of his drafts he said was that it was based on English law.

"I lose no time in laying before my colleagues a draft of an act founded upon the act of Parliament passed last session for improving the law of evidence ...

"I have thought it advisable to include the mofussil courts in the act because I recollect to have seen it stated in a reference from Madras that the courts of that Presidency consider themselves bound (in some cases at least) by the English Rules of Evidence.

"In other respects the draft is a copy mutadis mutandis from the English statutes. There is however, one great allusion of the principle which, if my colleagues agree with me, should be very glad to introduce here. I have little doubt that it will ere long be adopted in England. I mean the examination of witnesses."[26]

The Law Commission to all appearances had lost its confidence; it felt obliged to defend its bills almost before they were drafted; and

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26. Ind. Leg. Cons. Range 207, Vol. 29, Nos. 18-20 of 23.11.1843

the defence was not that that particular bill was relevant to Indian problems, but that England had adopted it.

It is significant that this defensive report on the Penal Code was prepared under Hardinge, who was not opposed either to the Law Commission or the fourth Ordinary Member.

Lord Dalhousie was not so well disposed towards the Law Commission as his predecessor had been. One of his first moves on his arrival was to suggest that the Commission should be reconstituted. Dalhousie was on a tour of the Upper Provinces when, in mid-1848, John Drinkwater Bethune, the fourth Ordinary Member but lately arrived from England, suggested a plan for re-organising the Law Commission in the interests of economy. The Law Commission was to consist of two members.[27] Eliott had returned to the Madras civil service, before Cameron had resigned his twin posts, and therefore the Law Commission consisted of Bethune alone. This gentleman suggested that another member of the Legislative Council should be appointed member of the Law Commission. As the Law Member was ex-officio President of the Law Commission,[28] Bethune earned only one salary. He suggested that the same arrangement should be

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27. This had already become the case under Hardinge. When Borrodaile resigned he was not replaced, and the Commission consisted of Cameron and Eliott.

28. It had been hoped that Bethune would bring the Directors' instructions on appointments to the Commission. So Eliott had not been replaced. The Directors sent no instructions.

extended to his colleague. The Legislative Council accepted this proposal. It was proposed that the Commission should have J.P. Grant, then Secretary to Government of India, as its Secretary, at an annual salary of Rs 36,000. Millet accepted the additional duties of a Law Commissioner, and all these pleas were communicated to Lord Dalhousie for his approval. The Governor-General, who was pleased with the proposals, stipulated that Grant's appointment should be subject to the approval of the Court of Directors. Lord Dalhousie also stipulated that Millet was not to be expected to do much work on the Law Commission. That was to be the responsibility of Bethune and the secretary of the Commission.[29]

The Directors of the Company withheld their consent to Grant's appointment, on the grounds of additional, unnecessary expense. Grant was therefore asked to hand over charge to Halliday, a Secretary in the Home Department.[30]

Early in 1849 Millet returned to England and the Legislative Council debated whether his successor should be Lewis or Currie, both of whom were members of the Legislative Council.[31] While debating the new appointment, Maddock, President of the Legislative Council, wrote the following minute:

"We shall thus at little or no expense conform to the law which conjoins the maintenance of the Commission and although the Members

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29. Ind. Leg. Cons. Range 207, Vol. 50 minutes of 2.9.1848

30. Ind. Leg. Cons. Range 207, Vol. 52 Nos. 1-2 of 17.2. 1849

31. Lewis was chosen.

and Secretary[32] of the Commission will not be expected to accomplish all that might be performed by officers unincumbered with other important public duties, I have no doubt that their labour will be so directed as to afford essential aid to legislation of the Council of India in the manner originally designed in the Act of Parliament."[33] His words need no comment. The chief and perhaps the only expectation from the Law Commission was that it should cost nothing.

Under these circumstances it is perhaps remarkable that Bethune should have completed his own draft of a criminal law for India. Under continuous pressure from the Home authorities, Dalhousie had requested Bethune to examine the Penal Code in order to determine its applicability to India.[34] Bethune rejected it and produced his own draft. The authorities had not expected this complication and as neither the Government nor the Directors wished to be responsible for choosing between the two drafts, the issue was once again shelved.

In 1853 the Company's Charter came up for renewal. The Law Commission which had dwindled in size and importance, which had been considered superfluous almost continuously since 1842, when Auckland wrote his minute, was at last shifted from India. The new Indian Law Commissioners were to sit in London,

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32. It was suggested that Halliday should do this job.

33. Ind. Leg. Cons. Range 207, Vol. 52, Nos. 3 & 4 of 17.2.1849

34. Ind. Leg. Cons. Range 207, Vol. 67, No. 1 of 5.9.1851

In this manner the Law Commission, always remote from the actual business of government, and from life in that country, was removed from the Indian scene.

One of the advantages of the change of seat was togive the new Law Commissioners renewed importance. When they were invited to draft a code of criminal procedure, they inquired to which substantive laws it was to apply. This inquiry set off a chain of reactions, which culminated in yet another, and this time final examination of the question.

In 1853 Bethune had been succeeded by Sir Barnes Peacock, who shepherded the Indian Penal Code through its revisions and readings in the Legislature, having first preferred Macaulay's Code to Bethune's draft. This task occupied Peacock from 1853 to 1860.

It was not the function of the Law Commission to press the Government to pass the bills it had drafted. Its only duty was to draft the bills and compile the reports it had been asked by the Government to prepare. It might perhaps have been the Law Member's duty to urge the Government to pass acts. As we have seen, the men who succeeded Macaulay were either unwilling or unable to do so. Curiously, enough, over the years, the Penal Code became identified with the Law Commission. Thus, when the Commission was accused of not working hard enough, they pointed to their code.[35] Amos, who had had no part in the code, obviously felt no interest in it. Cameron, who was

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35. Ind. Leg. Cons. Range 207, Vol. 27, minutes of 7.4.1843.
Also, IPC Papers, National Archives of India, New Delhi.

interested in it, was far too much on the defensive to be willing to urge its enactment. Bethune did not attach any value to it. Indeed, without in anyway doubting the value of Peacock's labour, one wonders how great might have been the likelihood of another postponement, but for the intervention of the Mutiny, which placed the Government of India in the hands of the British Government.

SECTION VI

The Civil Servants

In the previous sections we have argued that the successors of Lord William Bentinck were ignorant about India;[1] we have agreed with Bentinck that, with the best will in the world, they could not have acquired any first hand information about that country, as it was not possible for men in the highest offices to spend much time outside Calcutta or indeed, even outside their official circles. Of necessity such knowledge had to be gleaned from others. The chief source of such information was the civil servant, who spent several years of his service in remote districts,coming into considerable contact with the people, whose complaints he heard and from whom he collected rent; and about whom he made his reports to higher authorities.

Unfortunately, however well informed the civil servant, and however great his willingness and ability to share his experiences with his superiors, nothing can provide an adequate substitute for a firm independant man at the top, who is capable of assessing the information he receives and of acting on it. As we have seen, Bentinck's successors were either unwilling to act in matters of social reform or did not see the need for such action:[2] the great reservoir of official wisdom, accumulated through years of residence in the interior,

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1. See supra Section ~~III~~ 3

2. See supra Section ~~IV~~ 4

remained untapped.

We do not wish to suggest that the civil servants were comprehensively informed on every subject. We intend to show that they were often far from well-informed, and they said so.[3] But even this admission was important and should have been treated as such. At the same time we would like to point out that the civil servants' collective experience was not put to good use. In order to do so, we shall begin with the Suttee papers,[4] to see how information furnished by them could be properly utilised.

In November 1828 Bentinck required his private secretary, Captain Benson, to send out a confidential circular to fifty-eight men, asking them whether, in their opinion, Suttee could be abolished, without inciting the army or the civilians to mutiny. By the end of that year all replies had been received. Of these fifty-eight men, all but three were army officers. The three civilians were a surgeon, the secretary of college for natives in Calcutta, and William Macnaughten.[5]

The first two civilians were reluctant to advise the direct abolition of Suttee, whether immediate or gradual. The majority of the army officers, who were, by virtue of their employment, brought into close contact with the native troops, said that there was no danger of a mutiny, and that, whenever the army had rescued unwilling victims of Suttee, the civilian spectators had shown no opposition or even hostility. William Macnaughten was also in favour of abolishing

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3. Ind. Leg. Cons. Range 207, Vol. 24 of 2.12.1842

4. British Museum 8261.27

5. Chief Secretary to government of India

Suttee. A practice, he said, which would never die out of its own accord.

We wish to point out that a small number of men were consulted, and they were asked a specific question. The brevity of the question made it possible for the men to answer it clearly; the small number of answers made it possible for each answer to receive close and separate attention. It was of course possible to ask too few men for their opinions to be representative. Colonel William 'Thuggee' Sleeman's remark unwittingly proves this. In 1826 Lord Amherst[6] asked the seven Europeans in charge of seven newly annexed districts in central India whether Suttee should be abolished. "I believe that everyone of them declared that it should not! And yet, when it was put a stop to only a few years after by Lord William, not a complaint or murmur was heard".[7]

Of the Governors-General who succeeded Bentinck only Auckland seems to have resorted to this device of consulting his subordinates.[8]

In 1839, two years after the Law Commissioners had submitted the Penal Code to him, Lord Auckland dispatched copies of the Code to judges, magistrates and other officials, inviting their opinions. It was perhaps not entirely fair to ask administrative officers what they thought of a law which they had not administered. After all they were not trained to examine laws in the abstract. It is not surprising

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6. Lord Amherst was Bentinck's immediate predecessor.

7. Sir Francis Tuker, The Yellow Scarf (1961) p.91

8. We refer strictly to reports on social questions.

that the majority of them wrote back expressing their inability to give their opinion. Judges and others in judicial services, including advocates general of the three Presidencies, sent replies which were generally detailed and which either criticised individual clauses or questioned the principles underlying the code.[9] These replies, most of which were received in 1839 to 1840, were not even filed until 2nd December, 1842, that is, several months after Lord Auckland's departure from India. After inviting these opinions, Auckland did not even glance at them. It was not until 1845 that they were handed over to the Law Commission. It is noticeable that Auckland and, more understandably Hardinge, did not think it necessary to examine the replies to questions, though they had been posed by the Supreme Council and not by the Indian Law Commission.

In 1838 the Law Commission had been asked by Auckland to prepare a report on the condition of slavery in India. The Commissioners started their work by compiling a comprehensive questionnaire[10] to be answered by British officials and native slave-owners. The questions related to all aspects of slavery, the economic condition of the slave, his family circumstances, marriages, rights to children, religion and property. The Commissioners also asked the recepient's opinion on the possible effects of the abolition of slavery. Admittedly

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9. Ind. Leg. Cons. Range 207, Vol. 24 of 2.12.1842. This entire volume is devoted to comments on the Penal Code.

10. Ind. Leg. Cons. Range 206, Vol. 99 No. 68 of 4.2.1839

abolition of slavery was a far wider issue than the abolition of Suttee. Nevertheless, a questionnaire, which ran into several pages, was more than the officials (or anybody else) could be expected to answer conscientiously. When the replies came, they were swallowed up by the machinery of the Law Commission, which started its work of analysing the answers.

In February 1839[11] Lord Auckland interrupted the Law Commission's labours in a manner reminiscent of his demands on Macaulay, and asked the Commission to submit their report in three weeks. The Commissioners professed their inability to do so. They said that they would instead furnish the Government with a copy of their questionnaire and some of the replies which they had received.[12]

When the Government received this preliminary ('first' Amos called it) report, they were debating the two drafts of a slavery act submitted by the Law Commission. In the course of these discussions Andrew Amos, fourth ordinary member and President of the Law Commission, rejected the first report, because the Law Commissioners had said that, at such an early stage of their investigations, they could not claim to know much about slavery. This might well have been so. But the Law Commissioners had only asked the questions; they had not answered them. In their first report the Commissioners had offered no opinions of their

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11. Ind. Leg. Cons. Range 206, Vol. 99, No. 68 of 4.2.1839

12. These replies were from the Old Bengal, i.e. Bengal, Bihar and Orissa. Replies from other parts of the country must have arrived later due to longer distances. They are treated in the 1841 Report.

own. In 1841, when the presented their voluminous report, it received no more attention than the preliminary report had received. After going through the regular channels, the Report on Condition of Slavery in India was consigned to Government archives.[13] Act V of 1843, which was an act for 'declaring and amending the condition of slavery' in British India, was discussed from late 1841 to 7th April 1843 but scant attention was paid to the Report.[14]

This was a blow not only to the Law Commission. It also ignored the testimony of the scores of officials, who could be expected to know something about slavery in the districts they had governed for several years.

As we have said, none of the men who answered the questions could be expected to provide satisfactory information on all the points. But most of them knew something about one or two aspects of slavery. Whether or not the Law Commission knew much about slavery was irrelevant to the proficiency of their correspondents. This was true of even the first report, submitted in 1839. The answers submitted with the 1839 report came from North-east India and they revealed some appalling facts about the domestic life of slaves. There were rules for dividing the offspring of slaves, when the parents belonged to different masters. In such cases the husband had minimal opportunities of access to his wife, so that no family life was possible, or even

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13. E/4/771 - Dispatches to India of 8.8.1842. Note that the Report had been received by the Directors.

14. See generally, Ind. Leg. Cons. Range 207, Vols. 20, 21 of 1842

envisaged by the masters. There was even an institution of 'Byah Korah'[15] slaves. These were male slaves employed by their masters for the purpose of marrying female slaves of other men and begetting children on them. There was a system called Ban-Bikri[16] which permitted the mother or maternal uncle or maternal grandmother of a person to sell him (or her) unbeknown to him. It was up to the buyer to go into the forest where his new slave would be pursuing his daily business of life, and claim possession of him. If the buyer failed to locate him, he was not entitled to have his money back. But the Legislative Council were content to characterise Indian slavery as mild and benevolent, the slave being better treated than a servant.

It might be said in defence that Bentinck had dealt with the answers on Suttee, because he himself had put the questions. In the case of slavery the questions were put by the Law Commission. Even so, this did not justify the government in ignoring the replies. And, as we have seen, the fact that the government had circulated the Indian Penal Code did not earn the replies better attention at its hands. Indeed these answers faired even worse, as they were not examined at all for seven years.

The Charter of 1833 introduced a Law Member into the Legislative Council and established a Law Commission at Calcutta, the seat of the Supreme Government. At the same time as it introduced a law making machinery into India. The Charter took away from the Presidencies their right to legislate for their territories. Henceforward they

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15. Byah Korah literally means, 'one who marries'

16. Ban-Bikri means 'forest sale'

were required to send their requests for legislation to the Supreme Government, which was entitled to reject such requests. In order to convey to the Supreme Government their point of view, Presidency governments often enclosed with their correspondence the opinions of their civil servants on the problem under consideration. On other occasions when no legislation was being requested, the subordinate governments often asked the Supreme Government for advice on problems raised by civil servants in the Presidencies. These letters were few in number and were received separately, so they could not be said to have been lost in the labyrinth of a report. They ought to have received more attention from the Legislative Council. Amongst them was correspondence from Madras, received by the Supreme Government in 1840.[17]

This correspondence[18] centred round the problem of slaves, who ran away from Cannara (part of the Mardras Presidency) into Coorg. Were they to be returned to their masters? What would be the effect on other slaves both in Cannara and in Coorg, if the runaway slaves were allowed to remain free? Would there be total anarchy? In this correspondence was enclosed an earlier series, of 1834 to 1836, from the same area. The same fears of lawlessness and violence by ex-slaves had been voiced then. By 1840 it was clear that freedom of a few slaves did not endanger law and order. The emancipated slaves did not take to crime, become lazy or provoke others to rebel. In 1834 to 1836[18a] the Government of India had contemplated emancipating all slaves in that area and had enquired about the price of slaves, so that it could

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17. Ind. Leg. Cons. Range 207, Vol. 11, Nos. 5-7 of 27.7.1840
18. The chief correspondent was Le Hardinge who favoured emancipation.
18a. i.e. before Auckland replaced Metcalfe.

consider whether it could afford compensating the owners on emancipation; it transpired that the price was Rs 13 to Rs 14 per adult male slave. When the Madras government re-opened the question of slaves in 1840, Auckland councelled caution. This, as we know, meant inaction for Auckland. The Supreme Government evaded all responsibility to take a decision by forwarding these documents to the Law Commission. We have already seen how much attention the Commission's Report on Slavery received.

In 1842, a Mr. Thomas, a magistrate from Malabar, addressed a strong letter to the Government of Madras on the Slavery Report.[19] He said that the Law Commissioners appeared to have drawn their impressions of slavery exclusively from Northern India, they were entirely mistaken in their view that slavery was a benign institution in South India. Southern slavery was not mild. The slaves were kept not for show but for profit. They were treated no better than was essential to keep them at work. Female slaves cost more, because they were used to breed more slaves. This brutally frank letter, duly forwarded to the Legislative Council, received no reply.

In 1834 to 1835 the scope of the question had been restricted to the emancipation of slaves on estates recently acquired by the British, which had belonged to the deposed Rajah of Coorg. The men in charge of the area had been unwilling to emancipate what were called 'government slaves', because of its possible effect on privately owned slaves.

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19. Ind. Leg. Cons. Range 207, Vol. 23 Nos. 10-12 of 18.11.1842

Fraser's report of 1835 put forward an ingenious scheme for quelling the fears of the local gentry. The slaves were to continue to be government property, and were to be hired out to private land-owners. They would receive the same wages as free men, have the same working hours and would 'especially' be allowed 'the entire management and control of their family affairs and settlement of their children's marriage'. William Macnaughten sent an uncompromising declaration. "You will understand that it is the settled determination of government to emancipate those slaves whose persons, as belonging to the state, it has the undoubted right to set at liberty."[20]

The Governments attitudes had certainly changed by the time that the Slavery Act of 1843 waspassed. The Directors asked the Government of India for a report on the working of the act.[21] The answers received were mostly an echo of Le Hardinge's sentiments and the sentiments of Thomas. The officials hastened to assure the Government that they had publicised the act, having taken care 'to repress any extravagant anticipation', and to point out that, so long as they were well treated by their masters, it was 'in their interest as well as their duty' to remain with them.[22] This was the reply of the Collector of Malabar, but the sub-judge and Magistrate of Malabar felt that more positive efforts had to be made to improve the slave's condition and it was for the Government to decide whether they wished to incur the necessary expense. He did not feel that it was in the interests of either the

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20. Ind. Leg. Cons. Range 207, Vol. 11, Nos. 5-7 of 27.7.1840
21. The Government of India forwarded this direction to Presidency governments for action. Ind. Leg. Cons. Range 207, Vol.31, No.7 of 25.5.184
22. Ind. Leg. Cons. Range 207, Vol.31, No.8 of 25.5.1844

slave or the master for one to leave the other. The Act had been widely publicised; many slaves knew of it and they would doubtless pass on this information, to other slaves. But special steps would be necessary for the Chermurs (the untouchable slaves); they could not be encouraged to leave their masters before they were in a position to provide for themselves. Such was the tortuous justification offered for keeping such slaves in the dark about their new rights.[23]

A year later[24] the collector for Malabar (the same person) wrote that he had reason to believe that the contents of Act V of 1843 were generally known, "the excitement which naturally ensued at the first promulgation of the news (sic) has, I think, gradually died away and matters have reverted very much to their usual channel, with the one, and as far as it goes, very important difference - that some of the more intelligent masters have thought it well to receive the fidelity of their slaves by slightly improving their condition".

The Collector, who was as anxious as his colleagues to avoid trouble and unrest in his district, went on to make several shrewd points. Since Act V of 1843 had been passed he had taken two steps to improve the condition of Chermurs in Malabar. First he had started schools for the slave children. This plan had met with a very limited success. The masters, who were jealous of the effect of

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23. Ind. Leg. Cons. Range 207, Vol. 31, No. 8 of 25.5.1844-

24. Ind. Leg. Cons. Range 207, Vol. 35, No. 8-9 of 14.6.1845

education on slaves, had circulated a rumour that the Government's real intention was to send the children to Mauritius. Consequently, the Chermurs were unwilling to send their children to school. However, he intended to open more schools and trust to time to expose the falseness of the rumours. His second step was to remove the ban on Chermurs using public roads. This privilege of being allowed the same use of roads as all other class was felt by the Chermurs to be ('a peculiarly important and tangible benefit". The caste Hindus were about to submit a petition against him to the Madras government[25] The Collector had sent letters to his European subordinates requesting them to find out from the 'more intelligent' Chermurs what their grievances were and to deal with them. He referred once again to his order, which opened all public roads to the Chermurs, as an example of what could be done although "of course I have no wish to interfere with native prejudices on this or other points needlessly."[26]

We do not wish to suggest that the Government of India should have taken it upon itself to make similar rules; this had to be done locally, having regard to local needs. But, a close study of these letters should have shown the Government that, unless it took more effective steps to publicise its legislation, it would remain

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25. Ind. Leg. Cons. Range 207, Vol. 35, Nos. 8-9 of 14.6.1845

26. Papers from Bombay mainly referred to the problem of slaves imported into Bombay or taken out of Bombay overseas. That area was not known for agrerian slavery. Slaves were employed in homes, by the rich. The slave trade was from Hyderabed to Arabia, from Bombay's port.

unknown to the underdog, and therefore rendered useless. The Government was not merely a legislative body; it was responsible for the implementation of its legislated intentions. A government official, who declined to publish the contents of an act as did the sub-judge and magistrate of Malabar,[27] deserved to be reprimanded sharply.

A perusal of these letters would also have shown the Government that the best way of informing the slaves about their rights was to make local changes, which, however insignificant they might appear to the Government, made a material difference to both the slave and his master and convinced them that the Government meant business.

But the replies on the working of Act V of 1843 were as unheeded as the report. As the question had been raised by a direction received from the Court of Directors, presumably the Government thought it had done their duty by forwarding the answers to London!

We have already admitted that the civil servant did not know the answers to all the questions that the government put to him. It is not our case that, had the Government only listened to their civil servants, all would have been well. This was far from the truth. As we have seen in the discussion of the report on the Penal Code,[28] they often had no opinion to offer. The district officers had also been asked to elicit the opinions of distinguished natives on the code. To a man the Commissioners replied that it was not possible for them

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27. See supra pp. 223-224

28. See supra p. 216

to do so, as they did not know any such natives! One or two of them said that the natives did not know English, but added that, even if translations of the Code into native languages had been available, it would have been of no use, as they did not know any distinguished 'respectable' natives! It is more than possible that the natives would have had as little to say as the Commissioners, on the Code, had all the difficulties been overcome. The fact remains that the British officials admitted their lack of contact with even the higher class of natives. This was surely a serious state of affairs. But as the Government paid no attention to the replies, they did not notice this shortcoming either.

Some civil servants were unsympathetic to the underdog. Some of the slavery correspondence from Madras and from Coorg, to indicate this. When this lack of sympathy directly contradicts Government's intentions, the letter should take firm action. In 1835 the government of India did deal sharply with Fraser.[29]

Sometimes, however genuine and deep his sympathy, the civil servant did not know how to tackle the problem In early 1851, the practice of Reet[30] was discovered by the British in Hill states around Simla. Reet was the price fixed for a woman. Either her father or her husband fixed it and after that she changed hands at that price. This practice was discovered, because the Rani of Joobul, a Hill state, had forcibly converted a free woman into a slave, and claimed

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29. See supra pp. 222-223

30. Ind. Leg. Cons. Range 207, Vol. 71, Nos. 45-47 of 20.2.1852

that this was done under Reet. Landlords, whose tenants had not paid their rent, often sold the tenants wives and daughters and kept the Reet-money; they claimed that the women had gone over to the other men of their own wish and that they (the landlords) had appropriated the money to the arrears. There is no record of any woman being asked for her version of the story. Reet was also a ruse adopted to bring village girls to Simla, where they were forced to become prostitutes.

The Superintendant, Mr. Edwards, who established the charge against the Rani of Joobul, stated that, as a result of this and other acts of oppression, the Rani had been deprived of all jurisdiction within that area of Joobul, and he wished to know if this punishment was adequate. He forwarded these papers to the Board of Administration at Lahore. Members of the Board and Edwards were equally indignant at this exploitation of women and at the immoral and callous attitude towards marriage that Reet encouraged in the women. They were particularly worried, because Reet encouraged adultery and attacked the social fabric; the women were as likely to be sold as they were to walk off with a lover. Edwards mentioned a civil case in which the husband sued for Reet. The defendant confessed himself unable to pay the money but offered to return the woman who, he said, had come to him of her own accord. The husband declined the offer and was awarded a decree for Reet!

In the course of their deliberations the Board decided that the Rani's case was too old for any further action, and that she had

been adequately punished. They devised some rules for checking the practice and emphasised that, in order to prevent a moral deterioration of society, cases of Reet should be punished, even when all parties involved were satisfied. They concluded that the responsibility for implementing these rules (for preventing Reet) should be given to local Rajahs and British officials should co-operate with them. But as the Rajahs and landlords were some of the offenders, who stood to lose by implementing the new rules, this was an ill-considered policy. The papers were forwarded to the Governor-General of India, then on tour in Malwa. Lord Dalhousie sent them to the Legislative Council for their consideration on 10th January 1852. On the 20th February of that year the Council decided to take no action, until the Governor-General's return to Fort William. There the matter rested; Mr. Edwards and the Board received no guidance.

What the civil servant did not know was at least as important as what he did know. By consigning his letters to oblivion, the Government ignored his contribution and lost both these kinds of information which his letters offered. In 1829 Holt McKenzie, that distinguished civil servant, warned gloomily "Nothing indeed can be more striking than the contrast between the nominal and actual control exercised by the Government under the present system. If one regarded the trifles in respect to which officers of the highest rank and emoluments are required to furnish formal reports, one might conclude that not a mouse could stir without its knowledge. I need not state

how little it really knows of things most important, affecting the rights and conditions of the people in districts close to Calcutta, to say nothing of the remote Provinces of the West or of regions nominally governed by chiefs, to whom a hint from the local British authority is law".[31]

Bentinck's successors appear to have outdone even McKenzie's gloomy predictions. They did not read even the weighty reports of their civil servants, let alone the reports on 'trifles'.

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31. Bentinck Papers - PWJF 2585 (7-8) McKenzie was a Utilitarian and his principles are said to have prevented him from rising. He was secretary to Bengal government in the Territorial Department during 1817-31, and was considered by his contemporaries to be a brilliant man.

SECTION VII

The Directors of East India Company

From the voluminous correspondence between the Indian Government and the East India Company's Directors it is manifest that the Company wished to be informed about every single detail of Indian administration. Minutes of the Legislative Council, police reports from all subordinate Governments, minutes in financial and military departments, were all forwarded to the Court of Directors, who read all these dispatches and answered every point, even though the answer might have been 'no comment'. The only snag was that the whole operation took two to four years to be completed. This slowed down Indian administration considerably, and in the hands of men like Lord Auckland, had disastrous consequences. Even with the best of men the effect of being burdened with the responsibility for mistakes without being given the right to make decisions was not a happy one. Writing to Peter Auber in 1829 Lord William Bentinck complained of the unpopularity he had incurred by retrenching civil servants. The Court of Directors wanted these retrenchments, but they refused to give the order in so many words. Bentinck said he was prepared to obey all orders from the Court, but the responsibility should rest with them. If they wanted the retrenchments they should say so, and not merely imply it in a way that

left the Government no choice of action!"[1]

The English Government, which occupied the position of an overlord in relation to the company, accentuated the problems of remote control by insisting on the policy of filling high offices in India with men recruited in England. The Charter of 1833 made it mandatory for the Law Member to come from England; but not the Governor-General. Yet, when Metcalfe's nomination was discussed in that year, he was rejected by the Cabinet, because he was not appointed from England;[2] though he was an Englishman, who had seen thirty years service in India. We have already seen the effect of this policy in section IV.

If we were to say that the English went out to India to carry on trade and one day suddenly found themselves ruling that country, it would doubtless be an over-simplification, but it would help us to understand some of the shortcomings of the Directors in the role of rulers.

In 1833 the Charter deprived the East India Company of all right to trade in India, and it was ordered to wind up all its business. This left the Company in the position of being solely administrators of India. While one stroke of the pen altered the Company's position in India, it could not alter its attitudes, and the Directors continued to think in terms of profits, and balanced books.

It is only too true that, until the Keynsian economic theory made its appearance in the 1930's, no economist or politician would have advised a government to incur expenditure in the hopes that increased

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1. Bentinck Papers - PWJF 191, of 10.6.1829

2. See supra Section II, p 149

economic activity would generate demand, which, in its turn, would release the economy from its downward trend. Even now an adverse balance of payments or continuous deficit budgeting is a cause for grave concern. But even in those days governments took financial risks and laid out money on projects, such as telegraphs and roads which were not immediately productive. Again, governments were willing to spend money on zoos, botanical gardens, opera houses, and on pomp on state occasions, even though the monarch's expensive procession from the palace to Westminster for the opening of Parliament was not in the least lucrative. This is because a government formed by politicians - rather than businessmen - was aware that certain expenses paid intangible results, and that economies of state cannot be practiced by the dismissals of a few officials. They were also aware of the value in the public eye of certain kinds of expenditure. The money spent on a zoo (or on a state procession) is well worth the feeling of contentment (or patriotism) it produces in the sightseer, who is, after all, one of the nameless thousands upon whose peaceful co-operation the government relies.

The Directors of the Company lacked this sophistication. They criticised the Indian government as sharply for failing to collect revenues or for failing to reduce massive expenditure on the army, as they did for establishing botanical gardens, or maintaining ceremonially used elephants. Proceeding on these lines, no country would be able to afford to defend itself against the enemy! However reduced its strength, in peace-time, the army is a drain on the country. And during war it devours all the national resources.

The Sowari elephant[3] has been mentioned because it offers a parallel to the state processions in England. Even without any knowledge of India's pageantry-conscious customs, the Directors should have realised the infinite value of impressing the spectator with the Company Government's[4] wealth and prestige.

Expenditure on telegraphs and on bridges merited the same treatment. The telegraph had been introduced in India, probably by Bentinck, and, in one of the minutes, Metcalfe, then a Legislative Councillor, had remarked that expenditure on the telegraph was regrettable, as it was not likely to pay for itself for nearly ten years. "We were of this opinion from the beginning" replied the directors acidly, "and the sooner the establishment is abolished the better".

Similarly Bentinck was repeatedly reproached for undertaking the construction of bridges at a cost which far exceeded the estimates. There was no suspicion of corruption. Nor was it alleged that it was inherently a bad practice for estimates to be so carelessly prepared. The Governor-General's defence was that he would not have sanctioned the bridge at all, had he known the estimates were incorrect. To make matters worse, this bridge, over the River Kali, was totally useless to the British without a bridge over the River Neem (which had to be crossed before the River Kali could be reached). The officer who

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3. Dispatches to India E/4/737 of 7.4.1833

4. This was how the East India Company's government was known in many parts of India - Company Sarkar or government

presented the estimate for a bridge over the Kali was the Magistrate of Aligarh. When asked to explain himself, Mr. Bolders replied that he thought it best to secure the construction of a bridge over Kali, as then the bridge over River Neem would follow as a matter of course! The Directors remarked that "it had followed as a matter of necessity". They thought that Mr. Bolders deserved to be censured for his disingenuous conduct. But not a word was written to show that they were astonished at the Indian Government's ignorance of the geography of their territory, and of course they fully agreed that such an expensive bridge should not have been undertaken at all. They comforted themselves with the hope that this sad experience would teach the Indian Government not to trust its officials so implicitly.[5]

When Sir John Malcolm suggested that better relations with the central Indian states under British suzerainty could be achieved by employing more natives in jobs created by the British offices in those states, the answer again was that economic considerations did not permit this.[6] Whatever the need, the expenditure was judged by the same criterea, the amount, and the gain to be made in financial terms. This, as we have seen, is not necessarily a wise policy for a government to follow. Bridges over rivers and good relations with other states may not yield revenue, but they are often exceedingly valuable to the state's well-being.

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5. Dispatches to India E/4/740 - pp. 344-7 of 5.2.1834

6. Dispatches to India E/4/721 - pp. 481-3 of 21.3.1828

Whatever their shortcomings, we must admit that the Directors had some traditional sound notions of good government. They were genuinely horrified by maladministration, and by corruption, and counselled the Indian Government to investigate such charges and to take action where necessary. Thus on one occasion they noted with approval that a British officer had been removed from his post when the charges of corruption against him were found to be true.[7] They were also most particular about overcrowding in prisons, the high number of deaths in jails and the general lack of hygenic conditions in prisons; they rebuked the Indian Government sharply for their laxness. On one occasion they pointed out that the number of persons arrested during a given period far exceeded the number of persons brought to trial, and disapproved of the fact that so many persons were arrested and kept in custody on suspicion so flimsy that the police could not even frame a charge against them.[8] They were equally insistent that the Government should establish an effective administration in all territories under them, and assure the people that British rule would be a rule of law and not a rule by personal whimsy. It was their anxiety not to be instruments of oppression, which led them, despite their objections to telegraphs and botanical gardens, to argue with Bentinck that peace could be bought at too high a price in moral terms. At the turn of the 19th Century, Britain had entered into Oudh politics. That state was in continuous turmoil and from within its

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7. Dispatches to India - E/4/728 of 2.6.1830

8. Dispatches to India - E/4/728 of 20.7.1830

borders robbers raided British territory to retreat with impunity into Oudh, where they were neither caught nor punished. Indeed the Resident complained that when they were caught and handed over by the British, the Nawab was content to let the robbers go, if they presented him with a large sum of money. In order to secure law and order within British territory, the Indian government entered into an understanding with the Nawab to support his government and undertake the responsibility for law and order within Oudh. But, as the British soon realised, the Nawab had no intention of altering his ways, which had led to the state perpetually on the trembling brink of revolution. The Nawab could recognise no duty to his subjects and he had no intention of cutting down his pleasure palaces, so that the army might be paid and the peasant allowed to eat. The farmers rent was not fixed; the government 'collected' as much as it could and the soldier, who 'collected' the taxes, lined his pockets at the same time. Under these circumstances, the farmers did their best to avoid payment unless the government used superior force. This force after British entry, consisted of the Oudh army, which acted as rent-collectors, re-inforced by the presence of a small British troop. The manner in which the collection was accomplished is illustrated by the following interchange, When a British army officer protested at the behaviour of Oudh troops, his Oudh colleague remarked, in a tone of surprise, that "it was their right to plunder their own country!"[9]

The Resident at Lucknow and Lord William Bentinck felt that the British had no right to lend their support to such a regime, as this

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9. Dispatches to India - E/4/741 of 16.7.1834

support was used to suppress the legitimate demands of the citizens; they felt that the Nawab should be asked to mend his ways or else the British would take over the administration and pay him an annual allowance out of the moneys left over from the revenues after all the expenses of government had been deducted. Such a step was definitely more expensive and more time-consuming than would have been conivance at the existing state of affairs in Oudh. The Directors not only agreed with Bentinck; they expressed their agreement in strong unequivocal words. They had no intention of collaborating with Oudh under these conditions, and they had no intention of allowing their servants in India to be used to oppress Oudh's citizens, even though this situation allowed the Indian government to protect its own citizens.

But, as we have pointed out , this ideal of good government was part of 19th Century political philosophy. So, while the Directors deserve praise for the opinions expressed by them in matters of government their attitude was only a reflection of the accepted public morality of the time. Social reforms and the need for them had not as yet become so accepted, so proposals for social reform were rejected by the directors on the grounds of cost. Thetwin values of life and property were traditionally paramount and, to protect them the directors and the Indian Government were prepared to undertake legislation. Once a person was saved from actual death, other onslaughts on his life did not merit equal concern. No man was allowed to kill his slaves, but whether he should starve or beat them became a question of his right to deal with his property. That this

was the attitude of the Directors to slavery is amply demonstrated by the history of the slavery clause in the 1833 Charter, which originally provided for total abolition of slavery within five years. By persistent lobbying, the Directors succeeded in changing the clause, so that, in its final form, it merely laid down that slavery was to be abolished as soon as possible.[10] The only outcome was Act V of 1843, an act to define the condition of slavery!

If the Indian Government was too remote from its Indian subjects, the Directors were even more so. It was difficult for them to realise that when 500 slave-owners or a thousand champions of Suttee presented petitions, these numbers were a small minority of the Indian population, and that they did not represent India, though they claimed to do so. No one asked the women or the slaves, whether they wished to continue in their present circumstances!

The Directors were anxious to settle the question of the incidence of the Penal Code on these institutions one way or the other, but they were unwilling to indicate their own feelings on the subject. Their anxiety therefore took the form of reminding the Indian government about the Code every two years. When India became part of the British Empire, the ministers of the Crown wrote at least thirteen letters on this subject to India, between late 1857 to 1860. To them, as seasoned rulers and administrators, the advantages of a smooth lucid legal system were far clearer than they were to the Directors of a trading company.

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10. Slavery & Slave Trade (Tract 148) 1841 - India Office Library

It is pointless to blame the Directors for their shortcomings. Nevertheless, the fact remains that they could not appreciate the need for social reform or even a better legal system in a country far removed from their own, whose needs were not necessarily answered by the ideas of good government which were current in England. This inevitably meant that they did not exert pressure where it could have been extremely fruitful to do so. A large portion of the blame for the slow progress of the Indian Penal Code therefore unavoidably attaches to them. It would be unrealistic to expect them to have assessed the merits of the Code's provisions. But it is not unfair to expect of men who rule a country that they should be able to evaluate the basic idea behind such a codification, viz., a uniform and clear criminal law for all subjects of the land. As they were not trained to govern, the Directors failed to see the need for such a code. A letter every two years is no effective way to urge any government to take a decision. This is where the Directors failed; they failed to compel the Indian Government to act because they failed to see that such codification was valuable to India.[11]

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11. This section refers only perfunctorily to the Indian Penal Code. This is so because the material has already been used in previous sections, particularly the sections on the Law Commissioners and the Governors-General; in our opinion it would have been unnecessarily repetitious to trace the history of the Code here. For this reason we have confined ourselves to indicating the attitudes of the court of Directors to their presence in India.

CHAPTER III

The Indian Penal Code

The Enactment

In chapters one and two we have examined the impact of utilitarianism on India and the attitudes of both the British and the Anglo-Indians towards India, as they affected the situation in which the Indian Penal Code was drafted.

In Chapter one we tried to show that the utilitarian philosophy of Bentham and Mill was based - perhaps sub-consciously - on assumptions of human nature drawn from their experience of their own privileged society, and that this philosophy was not meant to be applied to Indians or the Irish, or even to the less privileged, uneducated compatriots.

Chapter two attempted to prove that the British did not know very much about India; as Lord William Bentinck pointed out in a Minute in 1833;[1] whatever they did know

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1. See supra Chapter II, Section II pp. 144-146

consisted mainly of impressions formed by their flimsy contact with the more privileged, educated Indians.

In chapters one and two we tried to prove that in the 19th Century, in England and in India, the British were far more concerned with protecting life and property than they were with protecting the personal liberty of the individual.

In this chapter we intend to examine Chapter XVI of the Indian Penal Code, particularly the provisions against selling of slaves, rape, kidnapping and abduction. The sections on murder and homicide which are undoubtedly the most important in this chapter and therefore most carefully drawn up will be examined only where a comparative study of them is relevant to this thesis. This also applies to other sections of Chapter XVI.

As we have seen in Chapter II, the Penal Code drafted by the Indian Law Commission with Macaulay at its helm was revised by a Select Committee headed by Sir Barnes Peacock, a later Law Member of India, before being passed. In Macaulay's draft the provisions were called 'clauses'. In the form in which the Code was passed, the word used was 'sections'. We have kept both these terms, using the former to refer to Macaulay's draft, and the latter, to the Indian Penal Code as it emerged in 1860.

We have found it more convenient for the sake of lucidity

to call the first draft of the Penal Code, Macaulay's draft. There is also considerable truth in this statement. The Law Commission over which Macaulay presided consisted, besides him, of Messrs. Cameron, Anderson and McLeod. Later Millett was also appointed a Law Commissioner. McLeod, Anderson and Cameron were ill during most of the time that the Penal Code was drafted, and Cameron in fact, spent a great deal of this period outside Calcutta, if not India. Millett who was the only other of the Law Commission who was in good health had been given other equally important work to do by the Government. Consequently, Macaulay did most of the work.[2]

In his draft Macaulay devoted clauses 254 to 362 to Chapter XVIII, 'On Offences Against the Human Body'. Of these the last ten clauses dealt with kidnapping (353-358), rape (359-360) and unnatural lust (361-362). The rest of the chapter was concerned with homicide, murder, assault, wrongful restraint, wrongful confinement, hurt, etc.

In the final version of the Penal Code ss. 359 to 377 dealt with kidnapping, rape, unnatural lust, as well as the additional offences of abduction and sale. Due to rearrangement of the provisions of the Code, the chapters were renumbered

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2. Ind. Leg.Cons. Range 207, Vol. 86, No. 3 of 2.1.1837, Macaulay's private correspondence; also supra Chapter II, Section IV, pp. 175

and the chapters on offences against the Human Body was numbered XVI, and, whenever necessary, it will be referred to as Chapter XVI.

Finally, the speed with which the Indian Penal Code was drafted by Macaulay, and the brilliance of his draughtsmanship are neither disputed nor minimised by us. As we have indicated in Chapters I and II, we are also aware of the historical background against which Macaulay and the other Law Commissioners were functioning. We do not expect them to have acted as we do now, more than a century later. The fact remains, however, that in some of its aspects the Code was defective when it was framed; and some sections of it certainly are ineffective today. We hope to point to some of these defects in the next pages.

SECTION II

Kidnapping

The following are the provisions on kidnapping in Macaulay's code. They retain almost the same form in the Penal Code of 1860.

Clauses 353 and 354 define kidnapping.

Clause 353 - "Kidnapping is of two kinds: kidnapping from the territories of East India Company and kidnapping from lawful guardianship".

Clause 354 - "Whoever conveys beyond the limits of the territories of the East India Company or takes on board of any vessel with intention of conveying any person without the free and intelligent consent of that person, or of some person legally authorised to consent on behalf of such person, or with such consent, but knowing that such consent has been obtained by deception or concealment as to the place of destination or the future treatment of that person is said 'to kidnap that person from the territories of East India Company'.

"Whoever conveys any child under twelve years of age out of the keeping of the lawful guardian or guardians of such a child without the free and intelligent consent of

such guardian or guardians or with such consent but knowing that such consent has been obtained by deception or concealment as to the place of destination or the future treatment of the child or that such consent is the effect of collusion between himself and such guardian or guardians for any purpose of injury to the child, is said to 'kidnap that child from lawful guardianship'".

Clause 355 lays down the punishment for kidnapping. Clauses 356 and 357 define and stipulate the punishment for kidnapping with intent to cause bodily harm or with knowledge that such harm is likely to be caused.

Clause 358 lays down the punishment for any person, who, "being in charge of any vessel, knowingly suffers any person who cannot, without a certain order or permit, legally embark on board such vessel for any place which is not within the territories of East India Company, to embark on board such vessel for any such place".

During the mid 1830's and 1840's the Government of India was occupied to a great extent with the problems of Indian indentured labourers, who went out to Mauritius and the West Indies. These men (referred to in Government papers as 'immigrant labour') were recruited by private agents to work on plantations in Mauritius and West Indies, which were suffering, owing to the abolition of slavery, from labour

shortages. The Indians were lured by promises of much higher wages than they could obtain at home, no mention being made of the equally higher cost of living, or of any other disadvantages. Once in a foreign country the immigrants were totally powerless to prevent their exploitation by their masters, who deducted most of their wages, allegedly to pay for the cost of their board and lodging. The gravity with which the Government of India regarded this problem can be gauged by the fact that an act for controlling emigration of Indian labourers to Mauritius and West Indies, which was read for the first time in the Legislative Council on 6th March 1837, was rapidly passed by the Council on 18th May. This was Act V of 1837.

This act, which was followed by Act XXII of 1837 and acts in 1839, 1844 and several others, stipulated the conditions under which a labourer might be shipped out from the territories of the East India Company. His contract for service had to be registered with a government official appointed for that purpose; the responsibility for registration rested entirely with the recruiting agent, who was liable to fine and/or imprisonment, if he failed to do so. The contract was to be for a maximum period of five years, at the end of the contract, the labourer could choose either to renew his contract for a further five years or he could choose to return. In the latter circumstance the plantation owner,

who had contracted for his services, had to pay his passage back. Other provisions of the act enabled the Government to search for illegal immigrants on board ships and to regulate the facilities for food, water, medicine and space provided for the legal immigrants. It also gave the Government power to ensure due performance of the contract, particularly the provision which required the labourer to be given a free passage to India upon the termination of the contract. In addition to severe penalties for smuggling labourers out of India, the Government also reserved the right to confiscate any vessel in which such labourers were found concealed. There was extensive correspondence between the Governments of India, Bengal and Bombay (who was responsible for Mauritius), about the proviso dealing with free passage to India and it seems clear that clauses 353 - 354 and 358 of Macaulay's code reflected the anxieties of the Government, of whose Legislative Council Macaulay was a member, on behalf of their subjects and their welfare.

During the same period the Government was also discussing the steps to be taken to safeguard the interests of native domestic servants, who were taken out of the country by their European masters on the latter's homeward trip. These servants, it was proposed, should be returned by their masters from Suez, to any post within the territories of

the Government of India. The masters, needless to add, were to be required to pay the passage.

There are good reasons for arguing that these provisions on kidnapping reflected a great concern for the rights of the Company and/or the guardian of the person kidnapped, than a concern for the liberty of that person.

First, the Code doest not provide for adults, who might be forcibly transported within the territories of the East India Company. In his note on this chapter[3] Macaulay specifically said that he thought that forcible carrying away or enslaving of an adult within the Company's territories was sufficiently provided for by the clauses on wrongful restraint and wrongful confinement. As we shall see in the next section, this could not be said to be the case. These clauses provided against restraint and confinement, not for the taking away of a person.

Secondly, there was the government's attitude and policy on slavery within their territories.[4] It was not only unwilling to abolish slavery; much labour was devoted by members of the Legislative Council and others in demonstrating that the

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3. Note M. in the suffix to the Indian Penal Code (1837).

4. This is dealt with more fully in chapter II, with reference to correspondence on the Slavery in Cannara, Malabar, Assam and on Act V of 1843, particularly in Section VI.

Indian slave was better off than the Indian servant that slavery was benign in India and different from the American institution of the same name, an Indian was a slave only in theory, because he could always run away. Yet, and with no feeling of inconsistency, the same men argued that this mild, nominal slavery ought not to be abolished, as it would encourage slaves to abandon their masters and take to outlawry in the forests!

As late as 1838 the Government of India contemplated passing an act to make it a penal offence for domestic servants to leave their masters without notice and thus to cause them inconvenience and discomfort. When they decided against such a proposal, it was because, according to the Law Commissioners, the market conditions were such that masters should have had no difficulty in finding others to replace them. Replying in the same vein a sheristedar from Madras, a native officer of the Company, objected that, while this may be true for Europeans, who employed even untouchables, it was not so for high caste Hindus who were severely restricted in their choice of servants. He concluded by arguing ingeniously that, as masters were better educated and more civilized, they were less likely to be unjust or unfair to the servant than the latter was to them.[5] Neither

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5. Ind. Leg. Cons. Range 207, Vol. 24 of 2.12.1842

party, it is to be noted, mentioned the questionable propriety of preventing a servant from leaving his master, should he wish to do so.

Thus, while slavery and other forms of oppression within the Company's territory were involved, the Government generally showed no anxiety. Where, however, the person exploited was taken out of their territories or out of the keeping of his lawful guardians, the Government did think it necessary to deal with the situation.

In the scores of comments made on the Indian Penal Code between 1838 and 1842 by the Company's servants, there are only two on kidnapping. Col. Sleeman, who headed the department for suppressing thuggee and dacoity suggested that the clauses on kidnapping should be reworded and the taking of children, who were abandoned by their parents to fulfil religious vows, by persons for such purposes as prostitution, should be included in the offence of kidnapping. Under the law, as proposed by the Commissioners, no offence was committed by anyone who took possession of an abandoned child.[6]

The Law Commissioners declined this suggestion. They said that there was no need to make a legal provision of the

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6. Report on the Indian Penal Code, Vol. I, 1846, para 430, hereafter we shall refer to only the paragraph numbers. They are all from Vol. I of the report.

kind suggested by Col. Sleeman, which, they said, was covered by a clause on kidnapping for prostitution, which was already in the Code. The astonishing fact is that there is no such separate clause in Macaulay's draft, and clause 357 which deals with kidnapping for certain purposes does not cover kidnapping for prostitution.[7]

In this opinion we are supported by the North-western Provinces Court, which also commented on the Code during this period. The Sudder Court of North West Provinces at Agra wrote to say,

"The Court ... observe that cases are of common occurrence "in this country in which children are left at fairs and "abandoned in times of famine and distress and provision is "required for the punishment of persons appropriating such "children with evil intentions".[8]

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7. Clause 357, "Whoever kidnaps any person, intending or "knowing it to be likely that the consequence of such "kidnapping may be grievous hurt, or the subjecting of "that person to unnatural lust, or the slavery of that "person, shall be punished with imprisonment of either "description for a term which may extend to 14 years and "must not be less than two years and shall also be liable "to fine".

8. ~~ibid.~~ para 424 of Report on the Indian Penal Code V of I.

To counteract this situation, the Court suggested that the words, "or to dedicating that person to prostitution", should be added to clause 357.[9]

The Law Commissioners dismissed this suggestion with a terse remark, "We are not prepared to advise any alteration of the punishments proposed in the Code".[10]

Apart from securing punishment for a particular kind of exploitation of children, i.e., prostitution, Sleeman's suggestion, if it had been adopted, would have secured a re-definition of the offence of kidnapping itself, which for minors, consisted of taking them from their guardians custody. Had the Law Commissioners been favourable to Sleeman's amendment, kidnapping would additionally have been defined as the taking of a child for certain purposes, whether or not from his guardian's custody. The latter would have been a major change in the definition of kidnapping, and, if the Sudder Court is to be believed on the high incidence of taking of abandoned children for immoral purposes, undoubtedly a salutary one.

In the Indian Penal Code of 1860 there are a few changes

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9. ibid. para 424
10. ibid. para 425

in the sections which define kidnapping (ss 359 - 361).[11]

The changes which the Select Committee made in the sections, which protected immigrant labour to Mauritius and West Indies, were very probably inspired by the fact that the existing legislation on the subject made it unnecessary to repeat those provisions.

The amendment which most concerns us altered the maximum age at which, for purposes of kidnapping, a person was considered a minor. In Macaulay's draft a person, male or female who was not more than twelve years of age could be kidnapped from his guardians custody. In the revised version this protection was extended to males of not more than 14 years of age, and females of not more than 16 years of age.[12]

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11. i) In sections 359-361 the words 'East India Company' are replaced by the words 'British India'. ii) Clause 358 is omitted altogether. iii) part of Section 360 (old clause 354) which made taking of persons on board ships without permits an offence, was omitted. iv) the age of minors was raised.

12. S 361 "Whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, ... out of the keeping of the lawful guardian of such a minor is said to kidnap such minor ... from lawful guardianship".

The basic provisions of both Macaulay's draft and the final Code remained the same. The distinction between kidnapping from either lawful custody or the sovereign's territories on the one hand and taking of an adult within British territories on the other, was maintained. Kidnapping which was an offence against the guardian or the state was viewed far more seriously than abduction, where the offence was solely against the person taken away.

SECTION III

Abduction

In his Notes to the Code (Note M), Macaulay recorded his opinion that the offence of kidnapping adults within the territories of East India Company was amply dealt with by the clause on wrongful restraint and wrongful confinement. The maximum punishment provided under any of these clauses (330-338) was three years imprisonment with or without fine. In some cases the amount of the fine was left to the discretion of the judge. In others a maximum of Rs 1000/- to Rs 500/- was specified.

The Select Committee apparently did not share Macaulay's view, for they considered that abduction should be a separate offence, independently of the offences of wrongful restraint or wrongful confinement. In the Penal Code the same sections of kidnapping and abduction, apart from Sections 362 and 363, which deal with each offence separately the remaining sections (364 - 369) lay down the law for kidnapping and abduction.

Section 362 "Whoever by force compels or by any deceitful means induces, any person to go from any place, is said to abduct that person".

Section 363 "Whoever kidnaps any person from British India, or from lawful guardianship[13] shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine".

Sections 364 to 369 specify the punishments for kidnapping or abduction for particular purposes.

The final draft of the Code dealt with these two offences in greater detail. The Select Committee not only introduced abduction. It also treated more fully the offence of kidnapping, which had already been recognised in Macaulay's Code.[14]

It is unfortunate that neither the papers of the First Law Commissioners nor the discussions of the Select Committee at a much later date, are available to the student. The Select Committee, indeed, noted in connection with the sections on kidnapping and abduction that it did not think it necessary to adduce their reasons for having made any changes or additions

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13. For definition of kidnapping see Sections 359 to 361.
For Section 361 see footnote 12 p.254

14. Sections 365, 368, 369 are entirely new.
Section 366 additionally punishes kidnapping with intent to compel marriage or illicit intercourse. These are quoted further in this section as and when they are discussed.

to these sections, as they were confident that they must be 'obvious' to everyone.[15] More than one hundred years later, this optimism is difficult to maintain.

It is however not necessary to look too far in order to explain Section 369 which was introduced by the Select Committee.

Section 369 specifies that "whoever kidnaps or abducts any child under ten years of age with the intention of taking dishonestly any moveable property from the person of such child, shall be punished with imprisonment of either description which may extend to seven years and shall also be liable to fine".

In 1836 the Government of Fort St. George, Madras Presidency, forwarded to the Government of India at Calcutta letters from civil servants in Madras districts, dealing with the murder of children for the sake of the ornaments they were wearing. The Legislative Council forwarded these letters to the Law Commissioners for their information and comment. These letters stated that children, who were decked out in trinkets, were not always carefully looked after by their guardians. Sometimes, when they strayed, they were taken away and killed, so that their murderers could steal their jewelry. The Madras Government had attempted to discourage

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15. National Archives at Delhi, I.P.C. Papers.

parents from putting ornaments on their children by publicising such cases in all their gruesome details, but their efforts had been unsuccessful. The Madras Government therefore requested that a law should be passed on this matter. The law proposed by them would have entitled a police officer, upon finding a stray child wearing ornaments, to return the child to its parents, on the first occasion with only a warning. If, in spite of the warning, the child was found again in similar circumstances, the officer would be entitled to confiscate the jewelry on behalf of the Government.

Macaulay, who presided over the Law Commission and was then engaged in drafting the Code, rejected this request. The reasons which he gave for this refusal vividly illustrate Macaulay's own priorities. He stated that, if parents were not allowed to display their property in whatever way they chose, they would lose their incentive to be industrious and productive, and that it was therefore undesirable to pass such a law as the Madras Government demanded. He also pointed out that, as only a small number of children were killed in this fashion, it was not justifiable for the Government of India to legislate on this matter. Macaulay concluded with the advice that the Madras Government should continue to discourage parents decking their children with ornaments, by the method the provincial government had already

declared to be unsuccessful, viz. by publicising all instances of such killings.[16]

In his letter the Secretary of the Law Commission[17] gave an additional reason for not passing such a law: the police force was not reliable, and was likely to misuse such a law to line its own pockets. This explanation is much more plausible than the first one. It is significant that parental right to display property was considered a bigger objection than the very real danger of misuse of power by the police. The latter point was made almost as an after-thought at the end of the letter,

In 1838 the Madras Government sent a fresh plea on this subject to the Supreme Government.[18] It met with the same rebuff. On this occasion the Law Commissioners did not include Macaulay, who had just left India. Writing on their behalf to the Legislative Council, Sutherland, the

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16. I.P.C. Papers, National Archives of India.
17. The Secretary of the Law Commission wrote their letters to the Legislative Council, as per their directions. As Macaulay was the President of the Law Commission, it cannot be doubted that he must have approved of the form of this letter. Also see Chapter II, Section III pp. 167-168
18. Ind. Leg. Cons. Range 206, Vol. 96, No. 32 of 22.10.1838.

Secretary of the Law Commission, stated that the Law Commissioners were in complete agreement with Macaulay's views on the subject; they also felt that two hundred and fifty-five murders in three years was not an appreciably large number to require legislation.

Although at no date in the future any reasons were given, and although there was no further correspondence on the subject, Section 369, which was introduced by the Select Committee which was appointed to examine the Indian Penal Code, and which functioned under the chairmanship of Sir Barnes Peacock, does rectify this omission and redress the balance in favour of Madras Government. This section makes it a crime to take away a child under ten years of age in order to rob it of any property on its person.[19]

Our efforts to trace the history of the legislation of the other sections of kidnapping and abduction have not been equally fortunate. In order to understand them, one is completely dependent on the interpretation of the sections themselves; there are no papers which can lend support to the conclusions one may reach from such a study.

There are however a few points which can be made after a preliminary examination of the Code. First of all, although Macaulay had specifically stated[20] that the clauses on wrongful

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19. cf. supra p. 258

20. cf. supra p. 256

restraint and wrongful confinement were sufficient to deal with the taking of adults within British territories, this does not appear to be the case. Clauses[21] 330 to 338 deal with restraint or confinement of a person; they do not deal with abduction which, as it was to be defined by the Select Committee, is compelling a person to go somewhere against his will or inducing him to do so by deceit. The illustrations which Macaulay provides for these clauses give some indication that, when he drafted them, he did not intend them to deal with the taking away of adults within the Company's territories.

Clause 330 reads, "Whoever by any act or any illegal omission voluntarily obstructs a person from proceeding in any direction in which that person has a right to proceed is said 'wrongfully to restrain' that person".

Illustration: "A obstructs a path along which Z has a right to pass, A not believing in good faith that he has a right to stop the path. Z is thereby prevented from passing. A wrongfully restrains Z".

Clause 331 "Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits is said 'wrongfully to confine' that person".

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21. In Macaulay's draft the provisions are called 'clauses' in thefinal form of I.P.C. they are called 'sections'.

Illustrations (a) "A causes Z to go within a walled space and locks Z in. Z is thus prevented from proceeding in any direction beyond the circumscribing wall. A wrongfully confines Z.

(b) "A places men with firearms at the outlets of a building, and tells Z that they will fire at Z if Z attempts to leave the building. A wrongfully confines Z.

It is to be stressed that first, clauses 330 to 331, taken with the illustrations on them, appear to have been framed to deal with the preventing of persons from moving; abduction on the other hand, consists of compelling to move, by fraud or by force.

Secondly, though abduction may be accompanied by wrongful restraint and/or wrongful confinement, the latter are neither necessary nor sufficient to constitute abduction.[22] A person who lies to a girl, saying, "Come with me to the next house/village with me, your father is waiting there for you", and takes her away with him, commits abduction, though there is neither wrongful restraint nor wrongful confinement at the time of taking her. She may of course be additionally confined and restrained, if subsequently she is prevented from leaving

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22. In Section 365 of the Code intent wrongfully and secretly to confine is an offence, but actual confinement is not an ingredient.

the place to which she is so taken.

Thirdly, none of the several clauses on wrongful restraint or wrongful confinement deal with either offence, when committed for the purpose of sale, rape, prostitution compelling to marry, or gratification of unnatural lust. Therefore, even if Macaulay had been right, which he was not, in claiming that the provisions on wrongful confinement and wrongful restraint were sufficient to cover the taking away of an adult, within the Company's territories, they were still incompetent to punish the most heinous purposes for which adults were so taken. Significantly they do provide for the offence of wrongfully confining a person for the purpose of extorting (a) property (b) information leading to the commission of an offence.

As Section 362, which defines abduction, and Sections 359 to 361, which define kidnapping show, abduction and kidnapping are more akin to each other than they are to wrongful restraint or wrongful confinement. Nevertheless, in one respect kidnapping, wrongful restraint and wrongful confinement are similar. In order to obtain a conviction on any of these offences, it is not necessary to prove the motive behind the offence. If such motive is proved, (e.g. kidnapping with intent to murder, or wrongful confinement with intent to extort money: no provisions are made for wrongful restraint with a motive), the punishment for the offence is enhanced. These offences were treated or provided against in Macaulay's code.

In their revised draft, the Select Committee did not merely add the sections on abduction; they also placed that offence on a markedly different basis: in order to obtain a conviction for abduction, it is not sufficient to prove that, in terms of section 362, such abduction was committed. There is no punitive clause to that section.[23] It is necessary to prove the motive behind the abduction. The anomaly therefore exists that, while admitting that the person was abducted, the Court may not have the power to punish the abductor, unless the latter's motive is conclusively proved.

There is no doubt that the Select Committee went a considerable way to fill in the lacuna left by Macaulay, in failing to provide punishment for abduction. As the law stood, it would have been difficult, if not impossible, to combat the evils of prostitution or the white slave traffic, so long as the females were above the specified age and transported within British territory. It is to be noted that the remainder of the provisions on wrongful confinement in neither draft is related to such confinement for sexual offences.

Nevertheless, this gap was not completely closed by the Select Committee. For some unfathomable reason they placed an additional burden on the abducted person, and on him(or her) alone. It is not entirely unlikely that this extra burden was

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23. Section 362 of the Indian Penal Code.

placed as a result of oversight. But when we study that part of Chapter XVI which is headed, 'Kidnapping Abduction, Slavery and Forced Labour', it is difficult to believe this for very long. In this part, Sections 359 to 361 define kidnapping, Section 362 defines abduction. Section 363 specifies the punishment for kidnapping as defined by Sections 359 to 361. Sections 364 to 369 define kidnapping and abduction with specific motives and stipulate the punishment for it. Seen in the context of that whole group of provisions, which provides very legalistic remedies against forced labour and slavery, one cannot but feel that the chief concern displayed by this group of provisions is not with the rights of the person who is exploited, or whose liberty is violated. Rather, their concern was with the other persons, such as the state or the guardian, who had rights to the person so taken away. The attitude of the Law Commissioners to Col. Sleeman's suggestion on kidnapping of abandoned children,[24] amd sale of children[25] by their parents adds force to this view. To put it bluntly, when a person was kidnapped the property rights of the state in its subject or of the guardian in his ward were violated, and severe punishment was devised to meet the situation. When the only rights involved were those of the person

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24. See supra pp. 251

25. See infra Section V

who was deprived of his freedom, the situation was less serious and dealt with more leniently, by making it more difficult to convict the offender. We do not wish to state or even to suggest that the Select Committee or the Law Commissioners had come to an official decision on this matter; i.e., that they had decided in as many words, to defend the rights of the state and of the guardian far more strictly than the rights of the person. But we do wish to point out that in accordance with general opinion of the times in which they were living, they drafted and passed certain laws, which, though often in advance of their times, need to be revised now, one hundred years later.

The difficulties of convicting the abductor will be seen more clearly in the chapter on Case Law.

SECTION IV

Rape

Macaulay devoted clauses 359 and 360 to the offence of rape. The first of these defined the offence and the second specified the punishment for it.

Clause 359 is extremely interesting from our point of view because, as we hope to show in the following pages, the treatment of rape (and unnatural offences) showed more clearly than the sections on kidnapping the moral bias of Macaulay's mind.

Clause 359 reads: A man is said to commit rape who, except in the cases hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions.

First against her will.

Secondly without her consent while she is insensible.

Thirdly with her consent when her consent has been obtained by putting her in fear of death or of hurt.

Fourthly with her consent, when the man knows her consent is given because she believes that he is a different man to whom she is, or believes herself to be married.

Fifthly with or without her own consent when she is under nine years of age.

Exception Sexual intercourse by a man with his wife is in no case rape.

Three provisions of this clause need to be emphasised:

1. The age of consent in the fifth sub-clause was very low.
2. Only a married woman could claim her consent had been given under a false impression.
3. In no circumstances could a husband be said to have raped his wife. This was at a time when child marriage was the norm in India, and the children very often were infants.

Macaulay did not give any reasons for his drafting of clause 359, but it seems reasonable to assume that the grounds on which the first Law Commissioners drafted this exception were similar to the explanations of the exception and the low age of consent which were offered by Eliott and Cameron.[26] The argument which met with little opposition invariably pointed to the low age of marriage in India and the earlier onset of puberty in tropical countries. In the 20th century neither reason would find favour with public opinion; the low age of marriage would indeed be an additional reason for protecting a child-bride, and attainment of puberty at an early age would also not be considered a proof of the individual's ability to give consent.

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26. cf. Report on I.P.C., Vol. I, passim.

From a reading of clause 359, particularly sub-clause 5 and the exception, one arrives at two conclusions. First of all there is an unmistakable preference of the rights of husband over his wife against the wife's rights to herself. This is why the wife was not entitled to accuse her husband of rape, whatever the circumstances. For the same reason none but a married woman could claim that she had given her consent because she was mistaken about the man's identity. If she was not married, she had no right to give her consent to any person whatever. And the fact that she gave it was sufficient to acquit the man.

This in turn leads to the conclusion that Victorian notions of morality were fully recognised in the drafting of the provisions on rape. This is particularly important in the light of Macaulay's claim that he had not adopted British laws, merely because they were British and that his sole concern was to draft a penal law, which would be entirely rational and utilitarian. In the letter to Auckland, which accompanied the Indian Penal Code, Macaulay insisted that he had not imitated any system of law blindly, though he had borrowed ideas from several sources. His drafting of the provisions on rape however shows a distinct influence of English law of this time, particularly on the low age of consent, which in England at this time was ten years.

Clause 359 elicited several comments from the judicial officers of the East India Company. Messrs. Campbell and Pyne, both in the judicial service of the Madras Presidency, objected to sub-clause two, which stipulated that consent obtained by threat of death or of hurt was not a consent. They argued that any woman who submitted to threats of 'trivial' hurt was not reluctant and therefore did not deserve the protection of the law. Greenhill, another civil servant who agreed with them, suggested that 'hurt' should be amended to read 'grievous hurt'.

The Law Commissioners accepted this suggestion. Greenhill's suggestion was given added force by the fact, as the Law Commissioners were quick to point out, in the Digest prepared by the English Criminal Law Commissioners, the words of a parallel provision were grievous harm.[27]

In his notes on the Report of the Law Commissioners on the Penal Code, J.M. Mcleod rejected this amendment.[28] He stated that a woman, whose consent[29] was too easily obtained, would not be protected by the

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27. para 440. I.P.C. Report 1846
28. pages 41-42.
29. There are two clauses on consent in Macaulay's draft:

    Clause 30 "The words 'free consent' denote a consent given to a party who has not obtained that consent by directly or indirectly putting the consenting party in fear of injury".

    Clause 31 "The words 'intelligent consent' denote a consent given by a person who is not, from youth, mental imbecility, derangement intoxication or passion, unable to understand the nature and consequences of that to which he gives his consent.

Courts, which exercised sufficient discretion in these matters. On the other hand, much pain could be inflicted upon a person without constituting 'grievous hurt'. Somewhat wryly McLeod went on to remark that these sections were not intended to protect only 'rigid chastity'. Had such high standards of courage obtained everywhere, there would have been no need to pass laws against rape - the women would be dead before they could be violated.

Mr. J.F. Thomas, who was ~~also~~ a judge in the Madras Presidency criticised the fourth sub-section for being too narrow. He felt that as the custom of keeping concubines was fairly widespread among Muslims, the fourth sub-section should be amended to take this factor into account. The concubines lived with one man all their lives, exactly as though they were married to him. Mr. Thomas therefore suggested that the fourth sub-section, which stipulated that a consent given by a wife under the impression that the man is her husband should be extended to give this protection to concubines.[30]

The Law Commissioners rejected this suggestion. Agreeing with their decision McLeod wrote in his notes, that both the points made by Mr. Thomas had been carefully considered in preparing the Code. "Mr. Thomas's remarks on them are very sensible but contain nothing that has not been seen or weighed.

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30. Para 442 of the Reports on I.P.C., Vol. I.

It was deemed on the whole unadvisable either to extend the fourth description of rape so as to include any class of cases in which the woman is not married, or to narrow the rule that 'sexual intercourse by a man with his own wife is no case rape", by excepting from it the fifth description of that crime. The conclusion still appears to me to have been right. I feel the force of the objections to which the proposed law on these points, as it stands, is liable, but when I reflect on the social condition of India they appear to me to be outweighed by the evils to which the suggested alterations would afford openings; and I feel satisfied of this, which I confess weighs a good deal with me, that the law as it has been framed, if it is faulty, errs on the safe side."[31]

Mr. Thomas also criticised the Code for giving too wide a range of punishments for rape.[32] He argued that, either there was a rape, or there was not. "If the act of forcible violation is fully established, I can perceive no ground, even if the woman is without character, for lessening the security of person". In other words, he was arguing that, once rape was proved, offenders should be given the same or very nearly the same sentences,

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31. McLeod's Notes, p. 42

32. Para 442 of the Report

Clause 360 of Macaulay's Code stipulated that the punishment for rape should not be more than fourteen years, and not less than two years, with or without an additional fine.

regardless of the character of the woman, or any other circumstances.[33]

However, Mr. Thomas did not sustain this argument, when he gave his reasons for holding that the punishment for rape was too light, and that it should be increased to life imprisonment. His reason for so saying that "it would not be rare to find women of caste, by whom death would be considered a lesser evil than violation of their person by some low caste man".[34]

In reply, the Law Commissioners stated that, on his own admission the offence clearly admitted of degrees of culpability. "On the one hand let us take the case of the chaste high class female, who would sacrifice her life to her honour, contaminated by the embrace of a man of low caste, say a Chandala[35] or a Pariah. On the other hand that of a woman without character, or any pretension to purity, who is wont to be easy of access. In the latter case, if the woman from any motive refuses to comply with the solicitations of a man, and is forced by him, the offender

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33. para 448 of the Report on I.P.C., Vol. I

. All this material is also to be found in Ind. Leg. Cons. Range 207, Vol. 24 of 2.12.1842, and in Indian Penal Code Papers, National Archives of India, New Delhi.

34. ibid, para 448

35. Untouchable of the lowest order. Used to be public executioners.

ought to be punished, but surely the injury is infinitely less in this instance than in the former.[36]

As a note from the Law Commissioners this is remarkable for its confusion and its lack of rigorous analysis.

When dealing with cases of rape the Courts are very likely to take into consideration facts about the victim, such as her character, age, and experience, when determining the severity of punishment, and rightly so. No one would wish to maintain that an ignorant sheltered virgin of sixteen does not suffer more than a hardened prostitute of thirty-five, or perhaps more than a chaste married woman. But there is surely a danger in actually making an assumption to this effect when drafting the law, particularly on the grounds of caste and class. This is why we have accused the Law Commissioners of confused thinking. A distinction made on these grounds implies that women of the privileged classes and castes are automatically more sensitive and therefore more offended than their lowly sisters. We would go one step further. Women of low caste in India, whose economic status was as low as their social status, did not find it at all easy to

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36. Report on Indian Penal Code, Vol. I of 1846 para 446.

evade assaults on them by men of the more powerful social groups.[37] Consequently the lower classes learned to live with the distasteful fact that women from their ranks were not safe. If from this we were to conclude that women from their ranks had a reduced sense of honour, we should be putting the seal of legality on a most heinous social practice. It is a cruel mockery of justice to argue that a poor woman is less sensitive because she is less able to protest. Assumptions such as these confirm the most undesirable 'status quo' and produce a non-egalitarian system of justice. Instead of assuring for all equal protection of the law, the Commissioners were only reinforcing the caste system and its rigid hierarchy.

Like most offences against the person, rape is also a crime against society, against the most valued concepts of law and order, and not only a crime against the victim. This is why it is not a compoundable offence, and why it is not a tort for which compensation would be considered to be the satisfactory remedy.

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37. cf. G. Parulekar, Jevha Manus Jaga Hoto, Chapter 4 and Geeta Sane, Chambalchi Dasyubhumi, Chapter 8. Miss Sane mentions the fact that in the Chambal Valley, Chamar women are 'used' by the Rajputs, and adds that wherever upper classes in rural India have fewer women than men, upper class men turn to lower caste women.

Consent is relevant to rape in this way: if the woman's consent be proved, then there is no rape; if the woman is without character, it is easier to infer that her consent was given than otherwise; but what matters more than her status is her actual conduct, and her status can only be a minor component in determining her conduct. It is a mistake to confuse character with status, or to deduce her good character from her high social position. If the evidence is that 'she led him on', the argument is to do with her behaviour rather than with her position in life.

Finally, the fact that a woman's character is relevant in determining whether or not rape was committed should not blind us to the fact that, should the offence be proved, the offence itself is against society and should be punished as such, and the offender should not be allowed to hide behind the woman's character, <u>after</u> his offence has been proved.

It was this confusion in their thinking which led the Law Commissioners to take such a poor view of the modest suggestion of Mr. Thomas about extending the fourth sub-section of consent to protect concubines. A concubine was precisely the kind of person whom they would have classified as 'a woman without character'.

It is noteworthy that even Mr. Thomas did not propose to extend this protection to <u>all</u> women. Therefore, even if this suggestion had been accepted, the plea that the consent had

been given, because the woman mistook the man to be somebody else, would have been afforded to women of certain status, Which at this time of discussion was obviously synonymous with character. It must be remembered however that while the woman had to be married before she could make this plea, the fact that she was married did not automatically entitle her to do so. The case law on this shows that "If there was previous 'intimacy' between the woman and the accused it was to be assumed that this plea was adopted to obviate the consequences of detection".[38]

In other words unless a woman was married she had no right to give her consent. But if she was married she was not automatically entitled to claim the protection of description 4. As we have said above Victorian morality was very much in evidence in clause 359. An unmarried or widowed woman who gave her consent at all was obviously without character and therefore could not be raped by deception. Yet matrimony was no proof that the woman was of good character and that question was open to factual proof!

Finally it is significant that although the Law Commissioners and Mr. Thomas disagreed on the quantum of punishment for rape, they both saw the problem in terms of a high caste woman's violation by low caste men as the most heinous of rapes, requiring the strictest punishment.

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38. Mayne PC 308.

Section 375 of the final version differs a little from Clause 359. The only important amendment was of the exception which now reads:

"Sexual intercourse by a man with his own wife, the wife not being under ten years of age, is not rape".[39]

Unfortunately, the Select Committee did not give their reasons for making this change.

The provisions on rape are followed in both drafts of the Penal Code by provisions against the offences of unnatural lust. We are not directly concerned in these offences; but the comments on them throw a very useful light on the mentality of the framers of the Code.

Clause 360, "Whoever intending to gratify unnatural lust, touches for that purpose any person or any animal or is by his own consent touched by any person for the purpose of gratifying unnatural lust, shall be punished with imprisonment of either description for a term which may extend to fourteen years and must not be less than two years.

Clause 363, stipulates the punishment for the same offence when it is committed or attempted without the other person's consent.

On both these cases Macaulay had the following to offer.[40]

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39. In description 2 the age was raised from nine to ten. At the moment the age stands at fifteen.

40. Note M. to the Indian Penal Code.

"Clauses 361 and 362 relate to offences respecting which it is desirable that as little as possible be said ... we are unwilling to insert either in the text or in the notes anything which could give rise to public discussion on this revolting subject, as we are decidedly of the opinion that the injury, which could be done to the morals of the community by such discussion, would more than compensate for any benefits which might be derived from legislative measures framed with greatest precision".[41]

The comments on the Code contained a suggestion from Col. Sleeman for the complete omission of clauses 361-362. Sleeman said that as this offence was both very common and rarely, if ever, reported, no useful purpose was served by retaining these clauses.[42]

McLeod's answer[43] to this suggestion is as interesting as Macaulay's original comment. McLeod said, " ... in considering Col. Sleeman's advice, to omit these clauses and not to substitute anything for them; the Europeans and descendants of Europeans in India and especially the large number of European soldiers always serving in that country should not be forgotten".

The sections on this offence in the revised Code are more

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41. Macaulay and his colleagues were criticised by the civil servants for this misplaced sense of delicacy; consequently Section 377 was framed with greater precision.

42. para 453 of the Report on I.P.C. Vol I

43. Notes on the Report of the Indian Law Commissioners on I.P.C. (1848) p. 43.

precisely framed but they too carry the same moral judgments. Right from their inception the provisions against unnatural lust stand in sharp contrast to the attitudes of the law makers towards the offences of kidnapping, abduction and rape. For abduction Macaulay made no provision. His successors gave it the status of an offence separate from wrongful restraint or wrongful confinement but they took cognizence of it only if the motives behind abduction were proved. On the question of rape very strong moral judgments were brought to bear upon the victim and her character before she could obtain justice. She was also considered capable of giving her consent at a very young age. On the other hand where sodomy, homosexuality or any other unnatural sexual practices were under consideration mutual consent was no protection and the age of the parties, however old or young, was irrelevant. It seems that the Macaulay and his successors were less concerned with the degree of harm or injury resulting from a practice than with their own detestation of it. It can hardly be said that the utilitarian theory of law required severe punishment of an unnatural sexual practice indulged in by two individuals by their mutual consent. But 19th Century morality however required it. Clauses 361 and 362 therefore are extremely useful in showing the values that influenced the drafting of this part of the Code.

SECTION V

Slavery and Forced Labour

In Macaulay's Code there were no provisions against slavery or sale of human beings. There are however, five sections in the Code of 1860, which deal with this subject.

Under Sections 370 and 371, it is an offence to import, export, remove, buy, sell, hire or otherwise dispose of a human being as a slave. Sections 372 and 373 make it an offence to dispose of or obtain possession of a minor in the manner specified in Sections 370 and 371 for 'any unlawful and immoral purpose', the minor being under sixteen years of age. Section 374 makes it an offence unlawfully to compel a person to labour against his will. The punishment under Section 374 is a maximum of one year and/or fine. Offences committed under Sections 370 to 373 are punishable with imprisonment up to ten years with or without an additional fine.

It is to be noted that these sections do not in any way make existing slavery an offence. They only made it an offence to carry out any transaction in slaves. In other words they did not abolish the institution of slavery.

Sections 372 and 373 depend for their application upon (1) the age of the minor and (2) the purpose for which the minor

is transferred by one party to another. If the person who is transferred is proved to be over sixteen years of age there is no provision in the code to protect him or her unless a charge of enforced slavery (Sections 370 to 372) or enforced labour (Section 374) can be brought against the persons involved in the transaction.

It is relevant to draw attention here to the words, "unlawful and immoral purpose". As Whitley Stokes points out in his footnote to Section 372, which is also applicable to Section 373, "the purpose has to be both unlawful and immoral". Whitley Stokes then goes on to state, "the morality referred to in Sections 372, 373 is that which is generally accepted by the civilised world, not what is moral according to the subjective opinion of the judge". This comment brings out the very weakness of these sections which it is meant to remove. It would seem impossible for a judge to define the morality of the civilised world except in highly subjective terms. It is obvious that to sell a minor for prostitution is both illegal and immoral It may not be equally obvious in other cases. If the purpose is not both unlawful and (in the opinion of the judge) immoral, and if the minor is not sold into slavery or forced to labour, then it appears impossible to convict the persons involved in the transaction for the transaction itself, though they may be tried and convicted for the actual offence - in this example the robbery they commit with the minor's help.

The battle against slavery was fought over several years in the East India Company's supreme and provincial governments, between what can only be called the reactionary champions of slavery and the more timid advocates of its abolition. The reactionaries by and large described Indian slavery as mild, beneficial, and almost non-existent, and pressed for its retention for these reasons as well as on the additional ground that such abolition would incite landowners to rebel. The men who wished to strike a blow at slavery cast doubts on this happy description of slavery in India and generally argued in favour of gradual abolition of slavery, which was to be achieved in such a manner that it would in no way encourage the slaves to leave their masters which last, according to the champions of slavery, would lead to a revolt of landowners against the government.[44]

In February 1840 Col. Sleeman made two suggestions regarding slavery. He suggested firstly that the parents' rights to their children should not include the right of sale and, secondly, importing, buying and selling of persons in the Company's territories should be made an offence.[45]

The Law Commissioners, who were then preparing their Report

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44. Ind. Leg. Cons. These opinions are gathered from correspondence on slavery in Canara, Malabar and Assam. It is more fully discussed in Chapter II.

45. I.P.C. Papers - National Archives, Delhi

on Slavery,[46] rejected these suggestions. When the Law Commissioners commenced their work on the Report on the Penal Code, they referred to these comments. In 1842 Col. Sleeman had again emphasised the need to prevent selling of children in the Company's territories.[47] He pointed out that, under existing regulations, it was an offence to import children into the Company's territory, but not an offence to sell them once they were there. By 1846 the Law Commissioners had moved away from the position they had taken in 1841 on Col. Sleeman's suggestions. They were now prepared to accept his suggestion that the sale of children within the Company's territories should be stopped. They were, however, unwilling to accept the second suggestion, which was that buying and selling of any person within the Company's territories should be made an offence. They argued that under Act V of 1843, which had come into effect since Col. Sleeman had suggested additions to the Code, it was an offence to buy or sell a man against his will and that this protection was required only for children. They were, however, prepared to admit that it was not necessary to permit the sale of children, in order to preserve their lives. Indeed, they went on to say that parents remained at liberty to give away their children and that in fact it would be easier to find

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46. Published in 1841.

47. Ind. Leg. Cons., Range 207, Vol. 21, Nos. 7-11 of 29.5.1842.

someone to take the child gratis than to find a buyer for him.[48]

In his Notes, McLeod commented on the last statement of the Law Commissioners: "The authors of the Report are of the opinion that a further provision with respect to children is requisite; they think that 'it should be made penal to sell or purchase a child under any circumstances', I am inclined to think the safest and wisest course is to abstain from legislating on this subject. Considering the effects of bad seasons in India, it seems to me that more evil than good would be likely to arise from any inter-meddling on the part of authority with the transfers which poor parents may, at such periods, make of their children, to persons able and willing to support them. The legislature, I think may well content itself with taking care that no circumstances connected with any such transfer can place any person in a state of slavery ... While the child passes from its starving parents to persons well able to maintain it, no great harm, that I can see, is done, if a little money pass in return from the affluent to those miserable people..."[49]

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48. Para 438 of the Report on I.P.C., Vol. I. All these arguments had already been advanced before the Legislative Council when Act V of 1843 was under consideration.

49. McLeod's Notes, p. 41.

The Law Commissioners might or might not have been wrong in assuming that it would be easier to give a child away than to sell it. But if they were mistaken, it would point quite clearly to slavery, which emmanated from the sale of children during famines. It would also prove that the motive for buying children was not the benevolent one of saving their lives, but of acquiring slaves.

The change from the position held by the Law Commissioners on the sale of children, in 1841, to the more liberal position taken by them in 1846 is not so dramatic as it appears. These arguments had been advanced by some members of the Legislative Council when Act V of 1843 was under discussion.

In view of the claims made by the Law Commissioners on behalf of Act V (for making sale of a man against his will an offence) we ought to examine the act and the events leading up to its passage.

Act V of 1843 which was passed after several months of deliberation and strong disagreement amongst members of the Council, and after considerable pressure from the Court of Directors, was initially drafted by Prinsep in late 1841, solely to protect the property of slaves from their masters, or from decrees executed upon the latter.[50] This draft, entitled, 'An Act entitled the execution of decrees and the security of property acquired in certain cases' was soon

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50. Ind. Leg. Cons., Range 207, Vol. 20, No. 2 of 24.1.1842.

abandoned and replaced by a draft by Andrew Amos, (another member of the Legislative Council), in which protection of the slave's property was only one of several clauses.[51] The most bitter and protracted controversy raged in the Council over the inclusion of two clauses, which dealt with the slave's liberty. One of them was known as the penal clause; it was suggested by Lord Auckland, and supported by his successor Lord Ellenborough. In its final draft it read:

"Any act which would be a penal act, if done to a free man, shall be equally an offence if done to any person on the pretext of being a slave".

Amos and Prinsep objected to this clause, on the grounds that it would take away from the slave owners the only remaining power they had for extracting work from their slaves, namely the power of moderately chastising them. They also argued that moderate chastisement of slaves by masters was a right recognised in Hindu and Mahommedan law, and that the English were not entitled to interfere with it. No one appears to have seen, or any rate no one pointed out, the inconsistency of an argument, which claimed that Indian slavery was mild and beneficial to the slave and yet at the same time insisted that, for the sake of the continuance of this beneficial institution, the master had to be guaranteed the right of 'moderate' chastisement.

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51. ibid, Ind Leg. Cons., Range 207, Vol. 20, No. 1 of 24.1.1842.

The other equally controversial clause was what may be called the apprenticeship clause, which sought to provide that

"the transfer of the right to the person and labour of a minor, excepting with the sanction of the magistrate of the district in which the transfer may be made or except upon a lawful contract of apprenticeship, shall be a penal offence and void in law, and that all persons concerned in any such transfer shall be punishable on conviction with imprisonment with labour for any period not exceeding two years or by fine not exceeding Rs 1000/-".

The apprenticeship clause owed itself to Amos who included it in his second draft of this act. In this draft he still did not include the penal clause suggested by Auckland, on the grounds that it would amount to a virtual abolition of slavery, which in turn was likely to incite violence and revolt.

Against the apprenticeship clause several old and well-worn arguments were mustered by its opponents, chief of whom was Prinsep. The main argument was that, during famines, children were saved from starving to death by kindly persons, who bought them from their parents; in future, when ignorance of the law had exposed them to criminal prosecution for buying children, they would cease to do so and thus a major avenue for saving children would be closed. Amos pointed out - Lord Auckland agreeing with him - that kindhearted persons did not have to <u>buy</u> the children to serve them. He also insisted that

the apprenticeship clause would be a dead letter without a penal sting being attached to it.

In February 1842 Lord Auckland finished his tenure as Governor-General of India and he was succeeded by Lord Ellenborough, who set out almost immediately on a protracted tour of the North-Western provinces. Both Governor-Generals approved of the apprenticeship clause and supported Amos in his efforts to include it in the Act. However, the fact that Ellenborough was on tour weakened his position in the debate. By the time the Act was actually passed, Amos had joined ranks with Prinsep over the apprenticeship clause. Early in 1843 Lord Ellenborough wrote from his camp to say that, as the Court of Directors were pressing in their demands, he thought that it would be expedient to legislate on this matter without waiting to resolve the deadlock on the apprenticeship clause, which could easily be left for future legislation. Accordingly Act V of 1843, "An Act for declaring and amending the law regarding the conditions of slavery within the territories of East India Company" was passed on 7th April 1843, without the apprenticeship clause, but with the penal clause intact. Contrary to the Law Commissioner's claim (made in answer to Sleeman's suggestions) that this act 'virtually' abolished slavery, Act V had never set out to do so. This was made amply clear in 1856 when the Sudder Court of Bombay informed Elphinstone,

Governor of that Presidency, that under Act V of 1843, slavery was perfectly legal. It was intended to define and not to abolish, slavery.

What is of interest to us here is the unwillingness exhibited by the Law Commissioners and others to give legal sanction to the 'virtual' abolition of slavery, which, it was agreed by them, already existed in the Company's territories. This claim rested on the ground that by Act V it was an offence to sell or buy a man against his will. There is an assumption here which is important to this study, viz., the assumption that the men who are enslaved have at their command the same knowledge of law and of their rights, the same spending power, the same mobility and the same freedom from social pressures as the law makers. Briefly, they assume, perhaps without meaning to do so, that the man, who could not resist being imported into one territory from another, as they themselves would certainly resist, would then suddenly acquire the requisite legal knowledge and develop the ability and the courage, which would enable him to resist being sold into other hands. Therefore, so long as he protested, his sale was an offence. But if he was willing to be bought or sold, no offence was committed by the persons buying or selling him.

Yet, when, during the same period in the 1830's and 1840's, the Government of India passed acts to regulate immigration of

Indian labour, to other countries, they did not make a similar assumption. In the previous case the responsibility for protecting himself lay with the slave; in this matter the responsibility for illegal immigration was laid squarely at the door of the agents who recruited the labourers and the ship owners who transported the labourers; they were penalised by fines, imprisonment and even confiscation of the ship used for illegal transportation. It appears that a piece of paper was sufficient to protect a slave but not to protect the Government's right in its immigrating subjects.

In 1838 one Mr. Scott, a civil servant from Bombay spent his leave in Mauritius; he was asked to produce a report on the immigrant labourers in that island. In his report Scott said that the laws by themselves offered no protection to the immigrants, who were at a disadvantage in a foreign country, where they had no contacts and no money, and whose language they did not speak. He suggested that the Government should pass acts, which would allow the masters to keep his workers only if he treated them well: he suggested short two year contracts, at the end of which the labourer would be free to claim his passage and return home, unless he renewed his contract for two more years. This would mean that any employer, who wished to save on passage expenses, would have to treat his labourers well. Although these suggestions were not accepted - the Government specified a five year contract - they do establish

that civil servants were often aware from experience that laws that protect the privileged do not necessarily protect their less fortunate brethren.

Macaulay himself cannot be said to have been unaware of this fact. In Note B to the Code, Macaulay wrote, "We are far from thinking that by merely framing the law as we framed it we shall produce the effect ... It is of little use to direct the judge to punish unless we can teach the sufferer to complain". Yet the Code is phrased exactly as though the slaves would learn to complain as soon as the right to complain was conferred on them.[52]

Under these circumstances with this particular history, it is not difficult to see why the slavery sections of the Code, which were drafted a bare twelve years after the Act of 1843, should have been inadequate and unsatisfactory. They appear to be an advance of the existing state of affairs, for they do provide some sort of a protection against sale or other

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52. Macaulay made this statement when discussing the chapter on General Explanations, which does not discriminate between slaves and the free-born. Therefore if the law declares it to be an offence to kill a man, it is so, even though the man who was killed was a slave and his killer his master.

transactions involving human beings. Nevertheless, it is significant that the legislators of Act V of 1843 were willing to protect a slave's property - which in the majority of cases must have been non-existent, but not prepared to extend the same protection to his person!

SECTION VI

General Comments

After an examination of the chapters on offences against the human body and the offences against property, it is difficult to resist the conclusion that the framers of the Code were on more familiar grounds when dealing with offences against property than they were when dealing with offences against the human body.

We have several reasons for arriving at this conclusion. First, the authors of neither draft distinguish between different shades of a crime against the body, for example, assault, in the manner in which they distinguish between different shades of offences against property, such as trespass or cheating. Thus twenty-two sections define and deal with the offence of trespass, distinguishing between different ingredients of that offence on grounds of intent, time and place, similarly sixteen sections deal with the offence of mischief.[53]

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53. In making this comparison we have deliberately omitted the offences of robbery, dacoity and thuggee, for they compare in gravity with the offences of dacoity and murder which do not conern this study, except where they illustrate a point.

Secondly, attempts to commit certain offences against property such as theft[54] or mischief[55] are cognizible at law. Section 354 (clause 346) made it an offence to assault or use criminal force on a woman with intent to outrage her modesty. But, until section 511 was introduced, attempts to commit certain offences against the human body escaped punishment. Under Macaulay's draft of the Indian Penal Code no offence was committed, if in a case of attempted rape the man knew that the woman gave her consent because she thought he was her husband; Section 511 has remedied this shortcoming,[56] but only

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54. Many of the clauses on trespass amount to provisions against attempts to commit theft.

55. Of the nineteen clauses on mischief twelve deal with commission and attempt to commit mischief.

56. Section 511 reads: "Whoever attempts to commit an offence, punishable by this Code with transportation or imprisonment, or to cause such an offence to be committed, and in such an attempt does any act towards the commission of such offence, shall, where no express provision is made by this Code for the punishment of such attempt, be punished with transportation or imprisonment of any description provided for the offence, for a term of transportation or imprisonment which may extend to one half of the longest term provided for that offence, or with such fine as is provided for the offence, or with both.

partially. The woman still has to have a husband in order to plead that she mistook the man's identity. She may not plead that she mistook the man to be her lover. In other words, protection was afforded to property before any damage is done to it but the same protection was not extended to the person of the human being.

That the servants of East India Company took threats to life and property seriously is made more obvious by the strict quick and repeated measures the Indian government adopted to curb the evil of Thuggee,[56a] almost every time increasing police and magisterial powers. On other matters, including slavery, they either councelled for patience until public opinion changed, or pointed to the penal code which, they assured, would 'soon' introduce the provisions demanded. No doubt the dynamic personality of Col. Sleeman, who was the Commissioner for the Suppression of Thuggee and Dacoity for the best part of the third and fourth decades of the 19th Century had something to do with the alacrity with which the Government passed the Thuggee acts. But this factor does not completely rebut the presumption that the government were more alarmed by attacks on life and property than they were by attacks on the liberty of an individual. This is probably why the Government made no

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56a. Between 1836-48 alone the Government of India passed eight acts to control Thuggee and Dacoity.

concessions to the religious beliefs of the Thugs[57] who killed and looted on a very large scale. They did however make such concessions where the practices of Suttee and child marriage were concerned. Clause 298 of Macaulay's code lends support to this assumption.

Clause 298 reads, "Voluntary culpable homicide is voluntary culpable homicide by consent when the person whose death is caused being above twelve years of age suffers death or takes the risk of death by his own choice.

Provided

Firstly, that the offender does not induce the person whose death is caused to make that choice by directly or indirectly putting that person in fear of any injury.

Secondly, that the person whose death is caused was not on account of derangement, intoxication, or passion, unable to understand the nature and consequence of his choice.

Thirdly, that the offender does not know that the person whose death is caused was induced to make that choice by any deception or derangement.

Fourthly, that the offender does not conceal from the person whose death is caused anything which the offender knew

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57. The Thugs belonged to the cult of a goddess, who according to them, required human sacrifice. They operated in north and central India, among pilgrims. Their victims were wealthy men whom they robbed after killing them, also see, Sir Francis Tuker, The Yellow Scarf

to be likely to cause that person to change his mind.

Explanation: voluntary culpable homicide committed by inducing a person voluntarily to put himself to death is voluntary culpable homicide by consent except where it is murder.

Illustrations:

a) Z a Hindu widow consents to be burned with the corpse of her husband. A kindles the pyre. Here A has committed voluntary culpable homicide by consent".

Illustration b) relates to a child of less than twelve years of age who is induced to kill himself and illustration c) is about an adult who kills himself after deliberately being misinformed that his family has perished at sea. In both cases the offence is murder.[58]

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58. The punishment for murder - Clause 300 - was death, transportation for life or rigorous imprisonment for life.

The punishment for manslaughter (clause 301) was imprisonment of either description for a term not longer than fourteen years, or fine, or both.

The punishment for voluntary culpable homicide by consent (clause 302) was imprisonment of either description for not more than fourteen years and not less than two years with a liability for fine.

In his comments Campbell, a judge of Madras Sudder Court objected to the minimum age limit of twelve years for giving a valid consent.[59] He argued that in India where girls were married young a widow of less than twelve years of age was capable of giving her free and intelligent consent and that therefore clause 298, under which any person who induced another person of less than twelve years of age to kill himself committed murder, was unjust.

In their Report Eliott and Cameron accepted Campbell's argument.[60] They suggested that the words, "and being above twelve years of age" be substituted for by the words, "capable of making an intelligent choice". This recommendation was however not accepted.

The Law Commissioners also applauded[61] the authors of the Code for clause 298 which they felt would cover the heinous practice of dwelling which was of course by mutual consent and which had hitherto escaped the machinery of law since the existing provisions for killing a human being related to murder only.

Ironically, the Law Commissioners went on to speculate

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59. para 292 of the Report on the Indian Penal Code.

60. ibid. paras 293, 294.

61. ibid. para 290.

on the reasons which may have led Macaulay and his colleagues to distinguish between voluntary culpable homicide and voluntary culpable homicide by consent. The reason, they felt, was likely to have had been the need to allow for the practice of Suttee. While burning of a widow was an offence[62] under British regulations, in ~~one~~ none of the Presidencies was it punished like murder with the death penalty; it was treated as voluntary culpable homicide punishable by imprisonment and fine at the discretion of the judge. In Bombay the maximum term of imprisonment was ten years rigorous imprisonment. In Madras and Bengal the term of imprisonment was also left to the discretion of the judge.

The Commissioners went on to suggest that the authors of the Code "had to consider whether they would rank this offence (of Suttee) as murder ... or reduce it by a special exception to a lower grade of culpable homicide, following the existing law, which had been enacted upon the most careful and solemn consideration. They concluded that it ought not to be treated as murder. They had then to frame an exceptive definition and the question would naturally arise whether the terms of the definition should be limited specifically to cases of Suttee or be made general enough to comprehend other cases, depending upon the same principle. This we presume was the process.

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62. Bengal Regulations, XVII of 1829, Madras Regulations, I of 1830, Bombay Regulations, XVI of 1830.

The result we find in clause 298, the terms of which are general, including all cases in which the person whose death is caused was above twelve years of age and suffers death or takes the risk of death 'by his own choice'".[63]

In Note M to the Penal Code, Macaulay gave his reasons for distinguishing between murder and voluntary culpable homicide (1) under grave provocation[64] and (2) by consent.

"A person who should offer a gross insult to the Mohammedan religion in the presence of a zealous professor of that religion, who should deprive some high born Kazi of his caste, who should rudely thrust his head into the covered palanquin of a woman of high rank, would probably move those whom he insulted to more violent anger than if it had caused them severe bodily hurt. That on these subjects our notions and usages differ from theirs is nothing to the purpose. We are legislating for them ... and it is our duty ... to pay as much respect to those opinions and feelings as though we partook of them".

On the face of it these appear to be extremely noble and tolerant sentiments, entirely liberal in their outlook. A second glance however, reveals the bias of their author in favour of the high born. It is evident that a low born man who was deprived of his caste, or a low caste woman, whose veil

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63. para 291 of the Report on I.P.C., Vol. I

64. cf. clause 297 of Macaulay's Code.

was rudely lifted, would not be equally justified in the eyes of the writer in considering himself to be so deeply insulted as to claim that he had committed voluntary culpable homicide under sudden and grave provocation. It is curious, that for all his concern for the honour of the high born and high ranking Indians, Macaulay should make the slip he makes here. A Kazi, however high born, cannot lose caste. For he is a Muslim and the Hindu caste system with its bewildering taboos does not extend to his religion. Not only is this slip curious, more important, it might even be indicative of the state of the knowledge of India possessed by the British, particularly those in high non-administrative posts.[65]

In the revised Code, Section 300, exception 5 contains the provisions of clause 298. The only change it makes is in the age limit, which is raised from twelve to eighteen years.

Section 300, exception 5 lays down, "culpable homicide is not murder when the person whose death is caused being above eighteen years of age suffers death or takes the risk of death with his own consent".

The notion that inducing a human being to kill himself is not murder was retained presumably on grounds similar to those given by Macaulay or attributed to him, by Cameron and Eliott. The speculations of Cameron and Eliott which must have affected

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65. See supra, Chapters I and II.

the Select Committee in the final revision are interesting for more than one reason. These gentlemen appear to have failed to distinguish between Suttee, in which the woman stood to gain nothing (at any rate in this world!) and duelling, where both parties ran the risk of death, and an operation, where the person who chose to be operated on hoped to regain his health. The spirit of Lord William Bentinck, who had been so active in securing the virtual end of Suttee had failed to move the later law givers of India; they were even thinking of making allowances for the widow-burning religious sentiments of the high-born, highranking Indians! To crown it all, the Law Commissioners who made every effort to bring the Penal Code in line with British Law, had quoted the opinion of the English Criminal Law Commissioners. "... homicide is neither justified nor extenuated by reason of any consent given by the party killed."[66] On this one point however, the Indian Law Commissioners found it more feasible not to adhere to the Common law definition of homicide.

We are aware that in our interpretations of these sections of the Indian Penal Code, which deal with rape, kidnapping, abduction, and sale and slavery, we may appear to be taking extreme positions. In the chapters that follow we hope to produce ample evidence which would support our analysis.

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66. Report on I.P.C., Vol. I, para 283.

CHAPTER IV

Indian Cases

Introduction

In the preceding chapters we have tried to show that in 19th Century, whether they legislated at home[1] or abroad,[2] the English assumed that the interests and ideas of the upper-middle class male, were those of the entire nation. This meant that when administrators like Malcolm or Munro, were concerned with preserving Indian culture, they were thinking of the culture of the higher castes and upper classes, for they saw India almost entirely through the eyes of the men of that strata of society. This was why anti-Suttee legislation was viewed with such apprehension. Yet, as events were to show, the legislation produced no agitation, let alone a revolt; the majority of Indians were low caste Hindus, who did not practise Suttee at all, and amongst the high caste Hindus Suttee was common only in Bengal.[3]

Malcolm and Munro belonged to the old school of civilians, who respected and wished to preserve Indian culture as they saw it. When the new type of civil servant, the "competition wallah rose to positions of power, the administration began to favour the

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1. See supra Chapter I

2. See supra Chapter II

3. See supra Chapter II and Bentinck papers on Suttee, PWJF 2595

introduction of European, or more correctly upper-middle class British ways, and the abolition of the old Indian laws and social customs.[4] In either case, the culture of a minority was assumed to be the culture of all.

Such an assumption, viz. that minority interests are the interests of all is fraught with difficulties, particularly in a foreign country. If the conquerors become acquainted with the culture of the country for which they wish to make laws, they can still choose to preserve it or to reject it. If, however, they do not know much about the indigenous culture, their choice is so drastically limited by their ignorance as to be no choice at all, for the culture they preserve or reject is not the culture of the majority.[5] In a country as large and as varied as India, where there is no one homogenous culture, the absence of awareness of this fact can, and as we hope to show, did have serious results.

We shall illustrate this in two related but somewhat different ways. In section two of this chapter we shall discuss a couple of cases which took place before 1860, i.e., before the Indian Penal Code was passed, in order to show the effect of assuming the minority culture interests to be those of all. The cases in this section were tried under Hindu and Muslim Laws, and therefore illustrate this effect very clearly. In section three, all the cases discussed

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4. Eric Stokes, English Utilitarians and India pp. 1-25

5. For a fuller discussion of "choice" see Chapter I, Section V pp 93-96

fell under the Penal Code. They have deliberately been chosen from 20th Century case law, so as to show how the Code actually came to be interpreted in practice and how far the interpretation differed from the Law Commissioners' intentions. Here our intention is to show that, while the Law Commissioners were in some way transferring English legal attitudes to certain offences against the person, to India, they did not realise that these attitudes did not obtain in India. Therefore, they did not take the precautions they might otherwise have taken to impress their will upon the new legal system they were creating. Consequently it became possible to interpret the Law[6] in such a way that it varies remarkably from the Law Commissions intentions, as one sees them in their reports on the Indian Penal Code[7] and in Macaulay's notes to the first draft of the Code.[8]

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6. Our reference, is of course, strictly limited to cases of rape, kidnapping and abduction.

7. Reports on Indian Penal Code. [1846-8] India Office Library

8. Indian Penal Code (1837). India Office Library

Also see supra Chapter III passim

SECTION II

East Indian Cases

In this section we shall discuss two cases. The first, tried under Mahomedan law, dealt with a 'lease' of minor girls, by their parents, to a prostitute. The other is a case of Suttee, tried under Hindu law. We have deliberately chosen these cases for the following reasons. In neither case were the facts disputed. Secondly, in neither case were the sympathies of the court remotely with the accused. Thirdly, not only were the crimes extremely repulsive, they were also repugnant to the culture of the judges, as slavery, for example, was not. Consequently, in discussing the two judgements we have no cause to apprehend that the judges might have been influenced by the 'human factor' involved in the cases before them. Since the facts were not disputed, there is no possibility that the judges gave the accused the benefit of any doubt about their guilt.

Sometime during the late 1840's a prostitute called Ameerun 'hired' three minor girls from their parents, The leases were to run for 90, 92 and 95 years, respectively. Ameerun and the girls' parents registered the leases in a Kazi's Court. In 1857, the Magistrate of Monghyr, in North Bihar, instituted proceedings against Ameerun, without a written complaint, contending that the leases

were tantamount to sales and that, under Mohammedan law, the sale of free-born persons for immoral purposes was illegal. The Magistrate initiated the proceedings under Act II of 1856. Section two of this act provided that offences against public morals and decency might be brought to court without a written complaint, i.e. they might be brought before the court by the appropriate government authority - in this case the Magistrate of Monghyr.

Proceedings were also instituted against the Registrar who registered the deeds and the Kazi in whose court they were filed. The Magistrate convicted them for being accessories to the crime, and Ameerun was convicted of the offence of buying the girls for prostitution. The parents, it is to be noted, were neither charged nor summoned as witnesses by either party. The case went up in appeal to the Sudder Court, which reversed the decision and acquitted all three accused. The five Sudder Court judges were unanimous about the acquittal of the Kazi and the Registrar. Amerrun was acquitted by a majority of three to two.

The Kazi and the Registrar were acquitted, because the Court held that in registering a deed in their official capacity, and in the execution of their official duties, the two officers of the Court had committed no offence.

Ameerun's case was more complicated. The questions for consideration were:-

1. Had the woman committed a crime in hiring the girls? Sale of children for immoral purposes was an offence under Mohammedan law. In this case did the ninety year leases amount to a sale?

2. Against whom was the offence, if any, committed? Was it committed, as assumed by the Magistrate, against public morals?

On both these points the two dissenting judges upheld Ameerun's conviction. Of the remaining three, Trevor J. thought that the leases were equivalent to sales. He was, however, of the opinion that there was no offence against public morals; in his view the offence had been committed against the parents, and the magistrate had been guilty of a technical irregularity in acting without a written complaint against Ameerun.

It was pointed out by Sconce J. that Act V of 1843 made it an offence to enslave any person against his will. By that Act no master could enforce his 'rights' against his slave in any criminal court". Therefore, the learned judge argued, echoing the Legislative Councillors of Lords Auckland and Ellenborough, if slaves stayed with their masters, it was of their own free will. The magistrate of Monghyr had argued that the lease was really a sale. Sconce J. said that whether or not this was the case, it was irrelevant. For, when the contract was not enforceable by law, it did not matter whether it was a sale or lease, particularly when no violence had been done under the assumed rights in an illegal contract. In other words, the girls remained with the prostitute of their own free will.

It is worth pointing out that two of these girls had been 'hired' by Ameerun when they were between four to seven years of age, and when the case was instituted, the elder of them was about

fourteen years old. The third girl's age was supposed to be between eighteen and twentyfive; she was following Ameerun's calling and had borne an illegitimate child. To the magistrate she said that she (Mohree) had been with Ameerun for several years and that she gave her earnings to Ameerun. In the Sudder Court she retracted her testimony and said that she lived independantly with a man.

Sconce J. said "It seems to me that, whatever may be said of the other acts, or purposes entertained by Ameerun, the fact that she hired the children cannot be charged against her as a crime. No personal violence has been exhibited and no restraint (put) on their personal liberty and I would add that, if the circumstances of duration, which I have already abominated, were restored by the way of aggravation, the hiring would still be no crime. The 90 years contract, as regards the child contracted for, itself is nothing. By that contract no personal restraint would be justified; and by it, towards the child no more criminal violence can be supposed to have been exercised than if she had been tied with the threads of a spider's web. The contracts as against the girls no magistrate could enforce. But on the other hand, while they do not feel shackled by the contracts which Ameerun holds in the control she exercises, it seems to me we cannot treat the reception of the children by Ameerun and the utterly chimerical assertion of her right as a mistress for a near century as a crime."[9]

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9. I.P.C. papers. New Delhi Archives. Report on the Penal Code by Peacock and Harrington, 1860.

This is a good example of the unrealistic, Hobbesian definition of 'restraint'. In his work 'The Leviathan', Hobbes regarded physical restraint alone as restraint. A man who acted under threats or under blackmail, was, to Hobbes, acting of his own free will. To say that a girl of ten years of age, who has been leased to a prostitute for six to seven years, stays with the woman of her own free will is to mock common sense, as well as justice. The girl had known no other home, no other way of life. She had nowhere else to go. She might not have been under duress, but this does not imply that she stayed where she was of her own free will or that Ameerun's hold over her was 'utterly chimerical'. Ameerun's rights might well have been unrecognised by law, but to argue that the assertion of her unrecognised right was therefore non-existent was to fall into grave error. In arguing thus, Sconce, the Presiding Judge, failed to assess the reality of the condition in which the leased girls were. As they had nowhere to go - it is significant that the parents never appeared in the case - they had no real choice offered to them. Secondly, if they had known no other way of life, they were not aware that a choice, even a hypothetical one, existed.[10] The fact that the ~~d~~dest of the three girls had actually been introduced to Ameerun's calling was not taken into account when the court dismissed the contract as having no validity and therefore no practical results.

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10. See supra Chapter I, Section V pp 95-96

Throughout the case the Sudder Court judges[11] made no consideration of the welfare of the children themselves. The offence, if any, was considered to have been committed against the parents. It will be remembered that the parents had leased the children to Ameerun in return for a few rupees. She was to feed and clothe the girls and to employ them in 'any necessary business that might arise'. So the parents can hardly be said to have had any grievance. They were probably willing parties to the transaction.

The offence was also not regarded as one against public morals either, on account of its 'directness or openness'. This intriguing point was unfortunately not discussed further, for it would have been interesting to see how the introduction of minors into a corrupting way of life could be regarded as not inimical to public morals.

As Ameerun was a woman of ill repute, it was unlikely that her conviction would have caused much stir locally, though the Kazi's conviction might have offended influential Muslims. The judicial attitude to her relations with the children illustrates our hypothesis clearly. There could not have been any ulterior motive, such as keeping the peace behind her acquittal. In discussing Ameerun's rights over the children, the presiding judge seems to have assumed that the children had as much intelligence, maturity and independence as himself. In other words, he gave every appearance of having assumed that the way in which he, who belonged to the 'establishment', would act in this situation, was the way in which

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11. The third judge, Money J. was of the opinion that the Magistrate had failed in starting the case under Act II of 1856

everybody, irrespective of social factors and age, would act. He would not have stayed with Ameerun solely on account of an invalid contract. Therefore, if the girls stayed, they did so willingly!

There was an amusing postscript to this case. Having been acquitted by the Sudder Court, Ameerun petitioned that the girls, whom the magistrate of Monghyr had handed over to missionaries, when he first convicted her, should now be returned to her. Though the court had been satisfied that the girls had been staying with Ameerun of their own free will, the Bengal government balked at the idea of returning the girls to a life of prostitution. They argued that, as the contract was illegal, the children's[12] natural guardians, that is, their parents alone, were entitled to their custody. As they had not come forward, the girls could stay in the mission-house. So much for the girls' free will!

Suttee cases demonstrate the Indian Government's anxiety not to offend, just as the case of Ameerun demonstrated the judge's inability to see the difference between his, and the little girls' free will.

In one particularly horrifying case,[13] which was brought to court before Suttee legislation was passed in 1827, the facts of the case were as follows: The girl, who was less than sixteen years of age, repeatedly ran out of the pile and was repeatedly

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12. This decision presumably applied to the two younger girls. The third was at least eighteen and therefore her own mistress according to the law.

13. Suttee papers. British Museum - 826L27

pushed back. She still escaped and, by now quite seriously burned, jumped into a shallow well. From this relatively safe position she pleaded with her male relatives to 'let her off'. She said that she would go away, live by begging, and never offend them by her presence or appearance, if only they would spare her life. Her uncle swore by the holy Ganges that he would do so. When this fourteen year old girl emerged from the well they tied her up in a sheet and cast the bundle upon the fire. The sheet was consumed in a few moments and yet again the hapless girl jumped out. This time, a Muslim, instigated by the others, decepitated her. The man consequently charged with her murder were the two Brahmins, who were relatives, two Rajputs, and two Muslims.

The circuit judge who tried the case in the first instance, was of the opinion that this was a case of murder. When the accused appealed to the Nizamat Adelat, the majority of judges were inclined to agree with him. The verdict, however, was most clearly influenced by the judgment of C. Smith J., who was very strongly in favour of the accused. He said, "I differ entirely from the first judge, being decidedly of the opinion that none of the prisoners should be sentenced capitally, or even to perpetual imprisonment." So far as the evidence indicated the Suttee had been voluntary. "The girl ascended the pyre and laid herself upon it without force and without aid."[14]

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14. In their statement on Suttee to the Privy Council, the Directors of the Company had stated that often the widows were drugged in order to make them submit docilely to the Suttee! 826L27 (1830?) in British Museum, Suttee Papers.

The learned judge conceded that the examination showed that Sheolal, the girl's uncle, had thrown her back on the pyre when she jumped out. But, he went on, "Taking the facts as they are charged, and as the futwas state them to have been proved, I think the uncle, Sheolal (who could have no malice against his niece and who seems to have acted under an impression of the indelible disgrace that would accrue to the family if the Suttee, once begun, should not be completed), is an object of pity rather than that of imprisonment." The Suttee was irregular, admitted the judge, in as much as the police officer was not there, and the widow, a Brahmin, was burnt without her husband's corpse. But such irregularities occurred frequently, and so far as he knew, no one had ever been punished for them. Until the government issued clear instructions people were bound to think that all Suttee, whatever its circumstances, was permitted. So much for the Brahmins.

About the two Rajputs, the learned judge said that while they had not "the plea of relationship and of fear of stigma" which would result from an incomplete Suttee, they might have sympathised with the Brahmins and therefore helped them. "For the musalmans there is less excuse; but even they have the defence of gross ignorance. They may have been brought to think that there was no great harm in furthering a result which appears to be tolerated by the Government throughout the country and with regard to which it is impossible for them to discern the exact bounds which separate what is permitted from what is forbidden. I would sentence Rossa to three

years, and Bhuraichee[15] to five years, with labour, the two Rajputs, with Sheolal and Bhaichook, I would release.

In this judgment Smith ignored every factor in the girl's favour. Hindu scriptures did not permit a Brahmin widow to commit Suttee without her husband's body, and therefore this Suttee was not one allowed by Hindu religion. He also ignored the fact that, given the Hindu ideas of pollution, the presence of Muslims at a Suttee was nothing but sacrilege. Nor could Rajputs assist at a Brahmin's Suttee - so much for the religious violations! As to the Indian government's requirements, that the police had to be informed, and had to be present at a Suttee, they were brushed aside as technical, unimportant, and beyond the grasp of the native mind!

The judge who took the line the girl had been forced because an abortive[16] Suttee 'brings' bad luck to the family, ignored the facts that, first, the decapitation put an end to any pretence of Suttee. Secondly, violating an oath by the Holy Ganges was considered to evoke equally terrible heavenly wrath. Nothing was made of the curious fact that the girl's father was away when this Suttee took place. As the husband's body had already been burnt, there could have been no crying urgency to get on with the Suttee! While the judge made much of the fact that the uncle could not have any malice towards his niece, he completely ignored the fact that the family of a successful Suttee gained much honour from it.

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15. They were both Muslims

16. A Suttee who withdraws after deciding to burn.

The officiating judge Dorin J., in his verdict, denied the claim of Smith J. that natives could not tell or understand nice distinctions and that therefore they would not follow that certain kinds of Suttee was not permitted by the government. Criminal law was usually made known to the people when the persons who broke it were sentenced for their offence. Cases of Suttee had already been punished, and the learned judge had the impression that in this particular case the people present at the Suttee had a feeling that they were doing "something not right".

Nevertheless, the Nizamat Adalat was affected by the arguments put forward by C. Smith J, for they proceeded to give rather an extraordinary judgment. The muslims were sentenced to five and three years with labour. The Rajputs were sentenced to two years each, and the Brahmins got away with one year's imprisonment each!

The important, albeit tricky point, viz., whether this was a case of Suttee or murder was not decided at all. The facts of the case were clearly established, to the full satisfaction of the court. But because some kinds of Suttee was permitted by religion, and as yet Suttee was not expressly forbidden by law, the judges were unwilling to convict.

In the case of the lease of children and in the present case of Suttee, it will be noticed, the facts of the case were not disputed. What was disputed was whether these acts contravened the law. In the matter of the 'lease' of minors for prostitution the government clearly had a bad conscience, which is why they refused,

in a high handed manner, to restore thechildren to the lessee.

In this case of Suttee the Supreme Court of Calcutta was plainly perturbed, but so powerful was the judge's impression of the importance of Suttee to Hindus, that the court avoided deciding the real point at issue, viz., whether it was a case of Suttee at all.

Thus, while the first case illustrates the effect of the Englishman assuming that his reactions were similar to those of less privileged persons, the second case (which was earlier in time by twenty to twenty-five years), shows the effect of assuming that the local upperclass culture is that of the whole country or is acceptable to it. So far was this assumption carried that C. Smyth J. actually argued that evidence against the accused in the Suttee case must be 'bad'. He felt that, unless there was some malice involved, Hindus would not give evidence against other Hindus in a case of Suttee. In other words he insisted that all Hindus must be in favour of Suttee!

Both these cases, in our opinion, constituted serious miscarriages of justice, and each of them was only one of many of its kind. A system that was by and large vigilant in administering justice had failed, because of a total misconception of the values it was upholding. As was to be expected, the under-privileged and the inarticulate lost in an unequal struggle to get their rights.

The civil servants and the law-makers were often motivated by the desire to keep the powerful members of Indian society happy, in order to minimise the possibility of their becoming anti-British.

Indeed, this motive was openly admitted by them.[17] Such a motive was not likely to affect directly a judiciary, whose members were at pains to apply the law as they saw it. Their interpretation of law, however, could be, and as we have tried to show, often was, affected by what they understood to be the local culture - as in the case of Suttee, or the 'normal' pattern of behaviour - as in the case of the girls leased to Ameerun.[18]

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17. See supra Chapter II, Sections III and V, ~~and the Law Commissions~~ also, Chapter I, Section II, and Suttee papers, British Museum, 1853d8, 826L27.

18. By discussing only two cases, we have laid ourselves open to the charge of not having discussed the matter fully, or proved our point conclusively. As however, our main concern is with the Indian Penal Code, we thought it neither necessary nor advisable to linger upon these cases. The intention in this section was to avoid creating the impression that the failure to recognise the variety of Indian cultures started operating only after the Penal Code became law.

SECTION III

The Indian Penal Code: Character and Sexual Ethics

When drafting the sections on rape, kidnapping,[1] abduction and slavery,[2] the Law Commissioners were particularly anxious not to offend Indian sensibilities by violating their moral code. We have said that they had assumed Indian morality to be the principles professed by the upper class male. In addition they sometimes superimposed their own, English notions of morality upon Indians. Thus, though concubines were fairly common amongst upper class Indians, particularly Muslims, the definition of the offence of rape included intercourse with a woman, who consented in the belief that the offender was her husband. But it was not rape to have intercourse with another man's concubine who mistakenly believed the man to be her protector. Thomas, the English magistrate in Malabar, who had suggested that no such distinction should be drawn, had pointed out that many Indians commonly and openly had concubines, who enjoyed the same position as wives in their households, and that

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1. Drafted by Macaulay's commission and revised by his successors. See supra Chapter III, Sections ~~III~~ 4 and 2.

2. Introduced by Macaulay's successors. See supra Chapter III, Sections ~~III~~ 3 and ~~V~~ 5.

they lived with one man all their lives. The short answer was that such a provision would offend Indians. In fact, in face of the magistrate's informed argument[3] it would appear more likely that such a provision would offend the English. The majority of Indians would not have cared at all. A few upper class Indians might have objected, but this had not prevented Lord William Bentinck from legislating against Suttee.

As we have repeatedly argued, if the rulers are aware of the norms in the society for which they legislate, they can then intelligently accept or reject its values, when they make laws. This is particularly important when they wish to reject an indigenous value. It is easy to draft laws which codify socially acceptable ideas but if the legislators wish to reject general notions of right and wrong, they should take steps to ensure that their intentions will not be thwarted, not only by those who break the laws, but also by those who apply them. The persons who apply the law must be assumed to do so in all honesty, and with a sincere wish to uphold it. But their interpretation of it, as we hope to show, can operate contrary to the original intentions of the law-giver.

It is extremely depressing to see how the narrow, authoritarian sexual ethics of Indian society, heavily weighted in favour of the male, have inspired a case law, which renders the Penal Code even more hostile to those who seek justice or protection, than its Victorian framers had already made it.

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3. Reports on the Indian Penal Code, 1846-47. See supra Chapter III, p272

The offence of rape has always been connected with the character of the person against whom it is committed. Because a charge of rape can be made from malice, or to protect the woman from the social disapproval directed at illicit intercourse, English law,[4] Common and Statute, was at pains to impose a heavy burden of proof upon the woman. It was greatly to the advantage of the prosecution to prove that she had led a blameless life. On the other hand, if she was promiscuous, or if she had been known to have had a relationship with the accused, then the charge of rape was suspect. Already, as we can see, the woman's general character comes under the scrutiny of the law. It assumes that a promiscuous woman must have invited the attentions of the accused, and that she would not, on account of her promiscuity, withhold her consent.

As it was unlikely that there would be eye-witnesses to the commission of the offence, the woman's conduct immediately after the offence became important. If she reported the matter as soon as possible and had herself examined by the women of the village, this was regarded as evidence that her charge was genuine, and the woman and the authorities to whom she had made the report were regarded as important witnesses.

The woman's evidence is essential to establish a charge of rape but S.375 of the Penal Code says nothing about corroboration.

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4. The Indian Penal Code, it is generally accepted, derives very heavily from English law. Therefore, the attitude and provisions of English law on these offences is relevant to our study.

But in consequence of judicial rulings[5] it has now become the practice not to convict upon the woman's uncorroborated testimony, unless there are exceptional circumstances. In the case of Surendra Nath v Emperor,[6] Mr. Justice Lort-Williams said in his judgment, "In cases of rape, the judge should, as a matter of practice, warn the jury not to accept the evidence of the girl unless they find it is corroborated by some independant witness in some material particular implicating the accused. But he ought to tell them that if, in spite of his warning, they come to the conclusion that the girl is telling the truth, they have a right to find the accused guilty." This states the judicial position on the woman's evidence very clearly; the judge then went on to add, "the judge must warn the jury, if there is any evidence against the complainants character, because they must be convinced that she is truthful, and if they find that she is a person of bad or loose character, obviously they will be reluctant to accept her testimony."

The words 'bad or loose character' are to be noted: the woman's whole history is put on trial, not merely her possible connection with the accused. It seems that in the opinion of the learned judge only a chaste woman can be offended by unwanted attentions.

It might however be conceivably argued that this judicial practice was more or less in keeping with English law, and therefore with what might have been the Law Commissioners' intentions. But

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5. Surendra Nath v Emperor AIR 1933 Cal 833

6. ibid.

the notion that the woman's general character is relevant to a charge of rape has been allowed to spread till it covers cases of abduction and even kidnapping.[7] In the case of Chammudin Sardar v Emperor, Lort-Williams J. said, "the judge should point out to the jury that they are entitled to convict the accused on the uncorroborated testimony of the girl, but that it is dangerous to do so in cases dealing with sexual offences, and that only in exceptional cases should they convict upon the uncorroborated testimony of the girl." This particular case was one of abduction with intent to force or seduce to sexual intercourse, or to force into marriage.[8]

In another, frequently cited case,[9] it was held that the corroboration of the girl's testimony could not consist of what she had said to other witnesses; there had to be independant evidence to corroborate her testimony. In view of the nature of rape, the only independant evidence would be that of witnesses who had examined the girl's body immediately after she had been ravished. In this particular case the charges were of rape and of abduction.[10] A girl who is abducted is, unless rescued within minutes of being ravished, in no position to have herself examined immediately by other women. She is not even in a position to report the matter until she is recovered. If the evidence she can then produce is to

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7. AIR 1936 Cal 18

8. S.366 I.P.C.

9. Nur Ahmed v. Emperor 38 C.W.N. 108 (1933-34)

10. Ss. 376 and 366 I.P.C.

be discarded, solely on the ground of being uncorroborated, she can hope for no justice. It will be remembered that English Common law did take into account what the woman had said to others about the matter, if she did so as soon as possible.[11]

Because English law was concerned with the kidnapping of heiresses, and therefore with property, the offence of abduction was regarded as being committed, not against the girl, but against her kinsmen. Far from being a mitigating factor, her consent to the elopement was likely to incur a more severe punishment for her and for her lover.[12] The framers of the Indian Penal Code did not visualise abduction as a crime against the woman's family, but against the woman. (In our opinion they were right to do so). Consequently, her consent became relevant. If she had consented, it was not an abduction but an elopement, and therefore, if she was above the age of sixteen, no offence was committed. In both English and Indian law abduction per se is no offence. It has to be committed with a motive which has to be proved to obtain a conviction. Since the Indian law Commissioners were not preoccupied with protecting heiresses, they did not prescribe any punishment for abducting them. They did, however, deal with abduction for sexual intercourse, or forced marriage; for slavery; in order to confine wrongfully; or in order to murder.

In the case of abduction with sexual motives, it becomes necessary to define the words "seduce or coerce", because section 366 of the Penal Code makes it an offence punishable by law to

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11. So does the Indian Evidence Act, 1872. See ill (k) to S. 8

12. See supra Chapter I, Section VI p/23

abduct a woman with the intention that she may be, or with the knowledge of the possibility that she may be, seduced or coerced into sexual intercourse. When can the woman be said to have been coerced or seduced? The answer to this question depends partly upon the definition of 'consent' - when can she be said to have consented? We shall deal with this question in the next section.[13] But the answer, to judge from Indian case law, is also linked closely with the girl's character. What kind of a girl may be seduced or coerced?

Indian decisions on this point have tended to fluctuate a great deal, starting from the extreme position that only a virgin can be seduced. In 1910 it was decided by the King's Bench[14] that 'seduction' meant inducing the girl to surrender her chastity for the first time.

In an earlier case, reported in the Burmese Law Reports[15] in 1903, a contrary view of the phrase 'to seduce to illicit intercourse' had been taken. In delivering his judgment Adamson J. said "It is a monstrous proposition, and one that would strike at the very roots of social and moral rectitude, to hold that, because a man induced a girl, while in the custody of her parents, to surrender her chastity, he committed no further act of seducing to illicit intercourse, when he persuaded her to live in a conditionof concubinage not sanctioned by marriage."

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13. See infra Section IV

14. Rex v. Moon, 1 K.B. 818

15. Emperor v. Nga Ni Ta, (1903) 10 Bur. L.R. 196

As was pointed out in a later case,[16] the Law is not concerned with social and moral rectitudes, and the part of Adamson's judgment cited above was not relevant to other cases. The point made by him was, however, followed in this case, as indeed it had already been in others,[17] where it was held that the word 'seduction' as used in S.366 of the Penal Code was not to be confined to the first connection with an unmarried girl.

Going beyond the Burmese decision, the Sind Chief Court[18] had held in 1927 that "Every time a woman surrenders herself to a lover, whether it is for the first or twentieth time, there is seduction". But in 1933, in a case which came before them after the cases[19] mentioned above had been decided, the Allahhad High Court[20] held that the term 'seduction' could only apply to the first act of illicit intercourse, unless there was proof of the girl's having returned to a life of chastity in the interim, or unless there was proof that the man intended her to be seduced by another man. The learned judge went on to say, "Kidnapping a woman in order that she may be seduced to illicit intercourse is manifestly different from kidnapping a woman

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16. Shaheb Ali and Another v. Emperor, A.I.R. 1933 Cal. 718

17. Emperor v. Prem Narayan, A.I.R. 1929 All. 270
    Emperor v. Krishna Maharaj, A.I.R. 1929 Pat. 651
    Emperor v. Praffulla Kumar Basu, A.I.R. 1930 Cal. 209

18. Emperor v. Persumal, A.I.R. 1927 Sind. 97

19. With the possible exception of A.I.R. 1933 Cal. 718, which followed the precedent set by other cases.

20. Emperor v. Baiji Nath, A.I.R. 1933 All. 409

whom he has already seduced to illicit intercourse."

In the case of Shaheb Ali v. Emperor[21] Lort-Williams J. discussed the meaning of the phrase "to seduce to sexual intercourse" as employed in S.366 of the Penal Code. According to the Oxford English Dictionary 'seduction' means 'to induce a woman to surrender her chastity'- 'chastity' as defined by that dictionary means purity from unlawful intercourse, and it covers virginity as well as faithful matrimony."

The judge then proceeded to hold that the framers of the Code had used the clause "to seduce to illicit intercourse", rather than the single word, 'seduction', because they wished to indicate a state other than that implied by the single word. Consequently the meaning of the clause could not be limited to mean inducing a girl to surrender her chastity for the first time. Therefore, "seduced to illicit intercourse" meant induced to surrender or abandon a condition of purity from unlawful intercourse.

The learned judge went on to say that it was not necessary to prove that the girl had never surrended her condition of purity. It was enough if at the time of her abduction she had returned to it.

The interpretation of the clause "to seduce to illicit intercourse" appears at the moment, to be an amalgam of the decisions arrived at in the two cases of Shaheb Ali v. Emperor, and Emperor v. Baiji Nath, both of which were decided in 1933: while it is not necessary for the girl to have always been chaste, in order to bring the abductor's action within the perview of S. 366 of the I.P.C., it is necessary to

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21 1933 A.I.R. Cal. 718

show that she had returned to a state of purity. If she had not given up her loose ways, her charge of having been abducted with intent to seduce her, would lack credibility. The point made in the Burmese case of the gravity of inducing a girl to leave her parental home and the protection it offers her, does not appear to be taken into account. This was the line followed in a case decided in 1955 by Calcutta High Court [22]. In this case the girl, Baby, was proved to be a minor; she was taken away by one Gopal. She was handed over to Ashwini, who lived with her for six weeks. After that Ashwini's elder brother took her back to a railway station between his home and the girl's home, and she returned to her father. Soon thereafter the girl gave birth to a child. From the facts of the case it was obvious that the girl had been pregnant before she was taken away. In the sessions Court both Gopal and Ashwini were convicted under Section 366, i.e. abducting or kidnapping for sexual intercourse. On appeal the High Court held that the sessions judge had failed to point out to the jury that the girl had had an intrigue with 'someone else' before being kidnapped. Nor had he taken this fact into account when explaining to the jury the meaning of the clause "to seduce to illicit intercourse". Therefore there was material misdirection of the jury. The appeals were allowed and the convictions set aside. However a retrial of both cases was also ordered.

Another motive for abduction specified by the Code is "abducting

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22. Ashwini Roy v. The State of W. Bengal, A.I.R. 1955 Cal. 100

with intent to secretly confine a person". This, one would think, was an offence in which the girl's character was not relevant. The Supreme Court of India[23] however thought otherwise, in the case of Laiq Singh v. The State of Uttar Pradesh. The facts of the case, as presented before the Allahbad High Court[24] were as follows: Shashi Kala was a ward of Laiq Singh, who had been her deceased father's friend. He took advantage of his position, and, when she was not more than sixteen or seventeen years of age, seduced her. She consequently had two abortions, but the third time she insisted upon having the child. She had repeatedly asked Laiq Singh to marry her according to his promise and he had always put her off. After the birth of her son, however, she became very persistent. Laiq Singh was a married man and under the Hindu Marriage Act he could not marry her bigamously. He was at that time a member of the Uttar Pradesh Legislative Assembly. In order to force his hand, Shashi Kala moved into his official quarters along with her son. This, the prosecution alleged before the Allahbed High Court, caused him considerable embarrassment, as his colleagues lived in the same block of flats.

Laiq Singh had never told the girl that he could not marry her, because of the Hindu Marriage Act of 1955. However, he kept introducing her to other men, in the hope that she might marry one of them. Shashi Kala had affairs with two of the, but she refused to marry either. Instead, she persisted in asking Laiq Singh to keep his promise to her. When she moved into his flat, Laiq Singh, said the prosecution, felt that

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23. Ch. Laiq Singh v. The State of Uttar Pradesh, A.I.R. 1970 S.C. 658

24. The State of U.P v. Ch Laiq Singh, A.I.R. 1968 All. 170

he had to act.

One day, when Shashi Kala, her infant son and a sub-inspector of police who was related to Laiq Singh were returning from the cinema, they were met by Laiq Singh, his wife and three others. The sub-inspector got down from the jeep and the others got in. At some stage of their drive (presumably after they left the city) the others gagged Shashi Kala and held her down on the floor of the jeep. Laiq Singh's wife sat by the driver's seat with the baby on her lap. Unfortunately for them the police had set up road blocks to catch some other criminals and were inspecting all vehicles that used that particular road. Laiq Singh refused to stop at the first road block, but was forced to do so at the next stage. Upon flashing their torches inside the jeep, the police found Shashi Kala lying on the floor, gagged. Laiq Singh's wife claimed that she was mad, a claim Shashi Kala denied as soon as she was in a position to do so. Eventually a case was started by Shashi Kala's mother under Ss. 364 and 365. S.364 relates to abducting with intent to murder, and S.365 relates to abducting with intent to confine secretly. The sessions judge of Kanpur acquitted the accused on both counts, but an appeal was filed. The Allahbad High Court set aside the acquittals. Though it did not hold the charge under S. 364, to be proved, it set aside the acquittal on the charge under S.363,[25] and in May 1969 it convicted Laiq Singh to three years rigorous imprisonment[26] and the others to one year's rigorous imprisonment

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25. Rigorous imprisonment is imprisonment with hard labour.

26. The case was not held to be proved under S.364, because the abductors were the girl's relatives and one of them was a woman!

each. The convicted parties appealed to the Supreme Court. Their advocate did not seek to have the conviction set aside, but to have the sentence reduced to the period of imprisonment already undergone by the appellants.

The appellant's case, as summed up by Hidayatullah C.J. was that "the complainant Shashi Kala, who was supposed to have been abducted with a view to her being murdered or confined, was not a person who would have been taken with this purpose". The appellant's advocate argued thus, because Shashi Kala had been on intimate terms with Laiq Singh for about seven years.

We should like to quote the judgment of the Supreme Court of India, as delivered by the Chief Justice, at length, in order to discuss it fully.

"4 The offence would have been serious, but for certain facts which "have emerged in the case, mainly through Shashi Kala herself, We have "already stated that Shashi Kala and the main appellant, Laiq Singh, " were in intimate relations over a long period. In fact Shashi "Kala says that she was seduced when she was only 16 or 17 years of "age. At the time of the prosecution, Shashi Kala's age was about 24 "years, which shows that a period of about seven years had passed "between her first seduction and the complaint, which resulted in this "prosecution. During this time, Shashi Kala herself states that she "became pregnant on three occasions and that finally she had a child, "after two abortions had been practiced upon her. She also admits that

"she was introduced to some persons with a view to marriage with them,
"but declined to marry the persons to whom she was introduced. One such
"person, by name of Khandlekar, lived with her for some months and
"Shashi Kala is candid enough to admit that she was got into close
"intimate relations with him also. Another person, by name Navin, was
"also introduced to Shashi Kala so that she could be married to him.
"Some letters passed between them, although they do not appear to
"have been proved, as they should have been. However, she admitted
"that she was in his company for some time."

To continue with the judgment:

"It appears to us therefore, that Shashi Kala was a girl of easy
"virtue and although she was set on the path of depravity mainly by Laiq
"Singh, she perhaps was not averse to what was happening to her. In
"these circumstances, we think that not much serious notice can be
"taken of the allegation of abduction. We cannot take into account the
"previous relationship between Laiq Singh and the girl. After all we are
"not punishing him for having seduced the innocent girl, although the
"account of the girl reads like Justine of Marquis de Sade. That is not
"the offence for which Laiq Singh is being tried and we must take it away
"from our mind in assessing the punishment for the guilt which has been
"brought home to him. She was being taken away in the jeep forcibly and
"this may have happened on more than one occasion and not much serious
"notice can be taken of this, in view of their relationship. We think
"that, in the circumstances of this case, it is not necessary to impose
"the heavy sentence that has been imposed upon him. The ends of justice

"will be satisfied by reducing the sentence to the period of imprisonment "already undergone by him. In coming to this conclusion we must take "note of the fact that Laiq Singh is a person interested in politics. "He was a member of the Assembly, before and now after his conviction, "he will not have the chance of representing any constituency in the "future. The sentence of the other appellants is also reduced to the "period of imprisonment already undergone by them. With this modification "of the sentence the appeal fails and is dismissed. Bail bonds shall "stand cancelled."

To begin with the argument put forward by the appellant's Counsel, it is not possible to fathom what he meant by saying that Shashi Kala was not the sort of person who would have been taken with the intention of confining or murdering her. Indeed it is impossible to define the kind of person who will be taken away with such an intention, or to confine such intentions to any specific category of person. If, however, this point is to be laboured, one could say that a girl of Shashi Kala's kind, who was becoming an embarrassment to her seducer, was more likely to be abducted with vicious intentions than a girl without a past history. Then again, if Shashi Kala was not the sort of person to be abducted for these purposes, and if, as she was clearly proved to be, she <u>was</u> being abducted, what motive could the appellants suggest, which would absolve them from having broken the law? In this case the girl was being physically compelled, and as the police themselves rescued her in the very act of being taken away, her complaint was made on the spot.

Whatever the definition of 'force' might be, a woman who is gagged and bodily held down on the floor of a vehicle is clearly not going anywhere willingly. Even if she is a 'bad or loose' girl, she is still entitled to refuse to submit to sexual intercourse. Seduction is the only purpose for which the appellants could have been taking her away if, as they maintained, she was not the sort of person who would be taken away to be murdered or wrongfully confined. As we have seen, once a woman is shown to be unchaste, her chances of getting justice in a case of rape, or in a case of abduction for sexual intercourse are practically none. Indeed, counsel's words imply that no assault on her liberty is made, if she is taken away with sexual motives. By accepting this plea, the Supreme Court of India have further taken away the unchaste woman's right to live freely, and perhaps to live at all. If, as the Court rightly said, Laiq Singh was not to be taken to task for seducing his minor ward and for setting her on 'the path of depravity', it is difficult to see why Shashi Kala should, to all intents and purposes, have been punished for having been seduced by him.

The learned Chief Justice of India accepted the High Court's finding that Shashi Kala <u>was</u> being taken away forcibly in a jeep. He added that this might have happened before, and that, in view of their relationship, not much serious notice was to be taken of it!

In our opinion, serious notice <u>should</u> have been taken of it. The fact that Laiq Singh might have treated the girl similarly in the past was not a mitigating factor, but quite the reverse. Shashi Kala was not Laiq Singh's chattel. Had she been a maid-servant in the house, the law would not have permitted Laiq Singh to carry her away forcibly.

The fact that he had seduced the girl did not give Laiq Singh the right to do with her as he liked. And yet this is precisely what the judgment of the Supreme Court seems to have done. A very heavy penalty was extracted from Shashi Kala for her past life.

In a case decided by the Madhya Pradesh High Court[25] in 1960 it had been held that a husband could not be held guilty of abducting his wife.[26] Shashi Kala, albeit for somewhat different reasons, appears to have been put in the same position, as it was held that she was not the kind of person who would be abducted for the purposes alleged by the prosecution. It is ironical to recollect that, while the wife (who has no defence against her husband) might, in a case of rape, claim that she mistook the man to be herhusband, and that her consent, being obtained falsely, was no consent, women in Shashi Kala's position cannot do so. The provisions in the section dealing with rape were drafted with deliberation by the Law Commissioners and they intended to discriminate between the wife and the mistress, the chaste wife and the unchaste, unmarried girl. Whatever their intentions, this decision of the Supreme Court now makes it difficult, if not impossible, for the unchaste woman to claim any protection against abduction, whatever the motive behind it.

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25. Pir Mahommed v. State of M.P., A.I.R. 1960 M.P. 24

26. But in Ghugri v. Emperor, A.I.R. 1935 All. 360, it was held it was no defence that the wife had been abducted at the husband's instance, as she was not her husband's slave.
This was also the decision in F. Khan v. Emperor, A.I.R. 1942 Lah.89

This concern with the grown woman's character, has occasionally even been extended to cover cases of kidnapping for sexual purposes.

In 1949, the Allahbad High Court decided the case of Nura v. Rex[27]. In this case the charges were kidnapping and abduction with intention to coerce to sexual intercourse, and rape. The facts of the case were as follows:-

Hajra, a twelve year old Muslim girl, lived in a village with her father. She was a motherless child, and was in the habit of visiting Sayeeda, her neighbour Najmuddin's wife. Sayeeda, who was kind to her and gave her sweets, suggested to the girl that she should marry Sayeeda's man-servant, Azimuddin, whom she had hired three or four days before Hajra was taken away. Azimuddin was a married man.[28] On 30th March 1947 Hajra went to see Sayeeda during the day and was told to return again in the evening. She did so and found Sayeeda, her husband and Azimuddin, their servant, all present in the house. Sayeeda told her that she (Hajra) would have to go away with Azimuddin. Their servant then went away to the Khaddi,[29] a place where he was working. A little later Najmuddin took Hajra to the Khaddi, where Azimuddin joined them. When it became dark, Azimuddin and Najmuddin took her out of the village and there Najmuddin left them to go to another village, where his sister-in-law had died. The servant took the girl to a third village, where

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27. A.I.R. 1949, All 710

28. But as Muslims are allowed four wives, this did not make Sayeeda's suggestion to the girl nonsensical.

29. This was in the village probably on the outskirts.

a relative of his lived, and raped the girl on the way. This relative, a woman called Nazian Julahin, asked the girl who she was and Hajra replied that she was a Mula Jat[30] from the village of Harsanti. Julahin then informed two Mula Jats in the village, who came and took away the girl and the man Azimuddin with them. There a distant uncle of Hajra, a man of forty years of age, named Mura, and Ibrahim and Karma, were also present. Mura offered to take the girl and the man-servant back to the girl's village; the three above-mentioned men and one of the Mula Jats, who had rescued her, started off towards Harsanti. Soon the Mula Jat of the Julahin's village left them. The remaining men then drove away Azimuddin. After doing so, the girl's uncle and Karma decided to go away too, and asked the girl to go on alone with Ibrahim. When she refused to do so, they threatened to beat her, so she gave in to them. Ibrahim took her to his house, raped her, and left her with his brother, Jumma who also raped her several times. After several inquiries, the girl was finally traced to Jumma's house. The uncle and Jumma both denied all knowledge of the girl, who was then found in Jumma's house by the men who searched it. The girl was twelve years old. Ibrahim was thirty-five; Azimuddin and Jumma were twenty-five.

The Sessions Judge, who tried the case, acquitted the woman Sayeeda and her husband of the charge of kidnapping; the rest of the accused appealed to the High Court against their conviction.

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30. The girl and the man were of different communities. She was a Jat and he a Julaha or weaver. The woman sent for the Jats because the girl belonged to their caste and they would be expected to look after her, although a stranger.

In his judgment Mushtaq Ahmed J. said that the girl was not kidnapped or enticed away by the servant. She was not enticed by him, because there was no proof that he had ever spoken to her till 30th March, the day she was 'taken away'. She was not taken, because she had gone to Sayeeda's house willingly. The learned judge said, "there can be no doubt that so far as the legal position is concerned, if a minor girl voluntarily leaves the roof of her guardian, and when out of his house, comes across another, who treats her with kindness, or at least without employing any force, or practicing any fraud on her, he cannot be held guilty under S.361.[31] The judge added that the girl had gone with Azimuddin in the hopes of getting good clothes and ornaments, so Azimuddin was acquitted of the charge of kidnapping.[32]

The judge then examined the charge of rape against Azimuddin, Ibrahim and Jumma. There was no reason, he said, why Azimuddin, who was a married man, should rape the girl on the way, instead of waiting till he reached the Julahin's house. If, on the other hand, she was so voluptuous, there was no reason why he should not have raped her in the village of Harsanti where she lived. Citing an earlier case[33] the learned judge held that the uncorroborated testimony of the girl alone

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31. S.361 deals with kidnapping, its definition and punishment.

32. However, in Dalchand v. The State, A.I.R. 1969 All.216, this view was dissented from it being held that to take a girl away on the pretext of giving her sweets was to 'take her away' or to entice her, and that her consent was not relevant. But this girl was only 5 years old, and the rape was actually witnessed by the search party sent out for her.

33. Emperor v. Mahadeo Tatya, A.I.R. (2) 1942 Bombay 121

was not sufficient ground for convicting the accused. "The unripe age of the girl, the immaturity of her mind and its amenability to diverse influences are matters that would make it highly impolitic that her testimony, in the absence of some corroborative evidence should be accepted, where the charge is of rape". Azimuddin was therefore not found guilty of rape.

Nura, Karma and Ibrahim had been charged under S.362, for abducting the girl Hajra. The learned judge said that (on the prosecution's own case) the girl was not forced to go anywhere. She had been threatened, but no actual, physical force had been used on her. He held that 'force' as used in S.362, meant actual physical force, and not merely a show or threat of force.[34] Therefore, it was not proved that the girl had been 'by force compelled to go from one place to another', as required by S.362. Secondly, there was only her uncorroborated testimony to prove that she had been so compelled, and it was not sufficient as proof. Therefore, there was no abduction. If the girl had not been abducted, the other offences of abducting her for sexual intercourse,[35] and of secretly confining her,[36] could also not be committed against her.

The learned judge concluded that the girl appeared to be fast. She had no hymen but her body showed no sign of struggle or resistance. She was a 'bad' girl and her case, it appears to him, therefore lacked conviction. The accused were acquitted of all the charges, viz. kidnapping,

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34. His authority was Koya Moidin v. Emperor, 1937 M.W.N. 1198 (1)

35. S.366 I.P.C.

36. S.368 I.P.C.

abduction, wrongful confinement and rape.

This judgment appears to us to be a singularly bad judgment, on several points. If the girl had gone with the man-servant in the hopes of getting ornaments and clothes, then obviously someone had suggested this to her, and this should amount to enticing her away. Her neighbour Sayeeda had suggested that she should marry the man, a suggestion her relationship with the girl did not entitle her to make. Secondly, if to visit an apparently kind neighbour is to leave one's parental home with its protection, then no child on its way to school or the park would be safe, for she will be considered to have left her father's protection. This is too narrow and too unrealistic an interpretation of the notion of parental authority. The girl was visiting Sayeeda, without abandoning her father's protection. When she returned for the last visit to Sayeeda, she had merely been asked to return in the evening. She had not been told that she would, if she came back, have to go with Azimuddin. This part of the plan was unfolded later. The girl was young, and as the judge himself pointed out, amenable to influences. Sayeeda, in our opinion, had deliberately abused the place she occupied in Hajra's life, by suggesting that she should marry someone. This is not the way marriages are arranged in India. In the villages, and where the brides are so young, the matter is handled entirely by the elders. It is not possible to see how Sayeeda can be completely absolved of all responsibility in the matter of the girl's having 'left' her home. Nor is it possible to see how Sayeeda and Azimuddin can be discharged of the guilt of having practiced fraud on the girl, if she was promised clothes, ornaments and matrimony, the last of which, to an immature child, would mean festivity

and good food.

The reason's given by the judge for not believing that Azimuddin had raped the girl are unconvincing and bad. Azimuddin could not have raped the girl in her own village because she was not yet in his power and control. As we have seen, in other cases courts have distinguished between seducing a girl while living with her parents and taking her away from their protection. In the latter position the girl may be too weak and frightened to offer any resistance. The fact that Azimuddin was married was in no way relevant to the spot on which he might ravish the girl, or to his desire to do so.

The reasons given by the judge for dismissing Hajra as a 'fast' girl are not only bad, but also distressing. She was rescued several days after she had been taken away and deflowered, so that her body would not necessarily show signs of any struggle. Furthermore, she had been, to put it bluntly, passed around, in a callous fashion and abused by the three men who, one after another, held her in their control. This was more likely to put her in a listless, unresisting frame of mind, than to make her struggle.

Finally, the definition of 'force' as adopted by the learned judge, was too narrow to be realistic. In another case,[37] which was decided later than the case cited by Mushtaq Ahmed J.[38] the Lahore High Court arrived at a wider interpretation of the term. In a case where seven young men had kidnapped a young girl and taken her away by car, Counsel

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37. Md. Sadique v. Emperor A.I.R. 1938 Lah 474

38. ~~See supra~~ Koya Moidin v. Emperor 1937 M.W.N. 1198 (I)

asked why the girl had not cried for help at the petrol pump where the men had stopped. Blacker J. remarked "Counsel appears to have a very exaggerated opinion of the courage and determination of a young girl in these circumstances, surrounded as she was by seven young men armed with swords. As her statement showed, they threatened her with swords, should she make any attempt to escape or attract attention. It is obvious that in these circumstances the girl could not do anything".

It is to be noted that, as with Hajra, this young girl had only been threatened; no actual force had been used on her. Hajra, in addition, had already been raped by Azimuddin and was, in all probability, in a disturbed state of mind.

It is disturbing to see that in a case of multiple rape, abduction and kidnapping of a minor girl, the judge should allow himself to be prejudiced against her because, as he put it, she had no hymen. This prejudice in a case of rape is itself out of place, for, were she to be still a virgin, there could not be a case of rape made out at all!

It might be argued that this decision, bad though it might be, was given over twenty years ago, and that it was probably the only one of its kind. Laiq Singh's case, which was tried in 1970, however, pours cold water over any hopes we might have had of the decision being outdated in its attitudes. If a court as enlightened and liberal as the Supreme Court of India can, in 1970, deliver such a judgment, lower courts are unlikely to deliver better judgments, even in cases where they are not required, on account of a difference in facts, to follow the precedent laid down in Laiq Singh v. The State of Uttar Pradesh

As we intend to show in a later section, the stigma attached to the victim of a sexual offence is so great that many, particularly middle-class persons prefer to suffer in silence rather than expose themselves to the publicity given to a criminal trial. Many others do not go on appeal to the High Court, if the prosecution fails in the court of original jurisdiction, so they are not reported at all. In other words the two cases discussed here by us may well be the tip of an iceberg, though of course there are what we would call more 'reasonable' decisions. But where the Supreme Court and a High Court, with sophisticated liberal, well-informed judges can make such decisions, the lower courts cannot be expected to do any better.

Thus, the relevance of the woman's character, confined by the Indian Evidence Act, 1872, to rape, has gradually affected offences of kidnapping and abduction, whether with or without a sexual motive. This has inevitably resulted in the question of the woman's possible consent, whether to the rape, or the abduction, or to the kidnapping becoming very important. If she is a 'bad' woman, her consent often seems to be assumed by the courts. Besides, her behaviour is sometimes represented as showing that she had consented, or at least had not been forced, and was therefore a 'bad' woman. What then, constitutes her consent?

SECTION IV

The Definition of Consent

By extending the relevance of character to all sexual offences and some which are not sexual offences [1] the courts have made the possibility of the woman's consent relevant to all of them. Her consent and her character are made interdependant. The woman's consent is taken for granted, if she is proved or suspected to be of loose character; and her loose character is taken to be established, if she has previously consented to an intrigue, not necessarily with the accused.[2] Both her bad character and her consent are regarded as proved, if she shows no outward signs of struggle or resistance.

Section 90 of Indian Penal Code defines consent as free and intelligent consent, given without fear or fraud, and with full

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1. See supra Section III, particularly Laiq Singh v. State of U.P. pp.331-337

2. Aswini Roy v. The State of W. Bengal, A.I.R. 1955, Cal. 100 at p.330
   In this case the High Court said that from the girl's advanced pregnant state it was obvious that she had been pregnant when she was taken away, and that she had been having an intrigue with 'someone else'. It was only alleged that that person was the appellant. Even so the High Court held it to be a misdirection of jury for the Sessions Judge not to have told them that the girl was not in a state of purity.

understanding of the act to which the consent is being given. Whether that consent was freely and intelligently given[3], is a fact which is not proven by the woman's outward behaviour alone. But in deciding cases of offences under the sections dealing with rape, abduction and kidnapping, the courts seem to rely upon that alone, and do not seem to look for any further proof of her consent. This, in our opinion must partly be because they expect the woman, whatever her background, to react as they would. In other words, they presume that the consent, if it is given, must be freely and intelligently given, as nothing would persuade them, under those circumstances, to be coerced![4]

The case of Nur Ahmed v. Emperor[5] which is often cited as a precedent, illustrates this point. In this case the charge of abduction with intent to force to illicit sexual intercourse and rape. The sessions court found the two accused, Nur Ahmed and Ohjauddin,

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3. Section 90 of the Indian Penal Code lays down that: that consent must be given without misconception of fact, or fear of injury. The words used by Macaulay in his draft were that the consent had to be freely (without fear?) and intelligently (without misconception of fact) given.

4. See supra Chapter I, pp95-96 and Chapter IV Section III, pp[illegible]96 p327 et-seq

5. Nur Ahmed v. Emperor, 38 C.W.N. 108 (1933-34)

guilty and convicted them. They then appealed to the High Court, which found that the evidence given by the girl, Kiran Bala Dasi, was unsatisfactory, as she changed and improved upon her first statement. For example, she had said initially that she had recognised the two men, but she subsequently withdrew that statement. The prosecution's case was that she had been taken out of the house by these men and gagged at knife point, at night. But the girl said in evidence that she could not see the knife, and that she had not been gagged, but that her mouth was 'clogged' with fear, because of the knife. But, the High Court judge said, she had already admitted that she could not see the knife. The girl was not asked if she knew in any other way that the knife existed, for example, because they had touched her with it, or shown it to her before taking her out of the house. The witnesses produced by the prosecution said that it was dark and that they could not see the faces, though they recognised the voices of the men who took her away and that the girl was walking quietly with them. The judge asked why the girl had not screamed for help when these men passed her. The only corroboration[6] of her story was given by a witness who had seen her weeping as she left Ohajuddin's house; but the Sessions judge had not mentioned this as corroborative evidence, in his direction to the jury, and he had failed to point out to the

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6. The evidence of the first set of witnesses, who passed the girl at night were altogether dismissed by the High Court. Their evidence was not regarded as corroboration at all.

jury that the uncorroborated testimony of the prosecutrix was to be taken with caution. Because of this misdirection, the case was sent for re-trial. The assumption here is that if the judge, in his summing up, does not mention the corroborative evidence, it must be because he rejects it and he need not specifically say so to the jury. He is, however, bound to tell the jury that the uncorroborated testimony of the prosecutrix is to be taken with caution.[7]

The fact that the woman did not scream is given a great deal of importance by the judge. Althoug she could not <u>see</u> the knife, it was not shown that she had not been threatened either with it, earlier, or in any other way. In other words, the defence had not really overthrown the case made out by the prosecutrix.

In a country with strong tabus on the mingling of the sexes, women, when duly escorted, are not escorted out of a house in close

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7. Dr. Sir H.S. Gaur has this to say about directions to the jury:

> The woman's testimony if either uncorroborated, or where the woman is a co-conspirator, should be treated with extreme caution. <u>Even otherwise</u> her evidence is to be received with caution, although, if it stands the test of cross examination and the judge is favourably impressed, the conviction may be based on it. The testimony must be corroborated independantly, and this must be properly emphasised to the jury. If the girl is loose in character, it is most unlikely that she was misled or enticed away, and this must also be pointed to the jury. Failure to do so in these two cases amounts to a misdirection of jury which vitiates the trial.

proximity to their escort. They walk a modest ten paces behind their menfolk. The fact that Kiran Bala was being taken out was more likely to prove her case than to weaken it. If she was being taken out against her will, she was likely to be too terrified to scream.

Whether the girl was gagged or whether her mouth was clogged by fear, was a point of which the learned judge made an issue, and a point which he took to indicate that the testimony of the prosecutrix was unreliable. This might indeed have been so. But it is worth noting that the evidence was given in Bengali, and translated into English. Kiran Bala might have used the same word in Bengali on both occasions, and on the second occasion, she might have been denying translation of her statement made by the scribe, rather than retracting her statement. To assume, from these facts, viz., the 'variation' in a testimony, and her silence when witnesses went past her, that she was not taken by force, is, in our opinion an error. These facts do not necessarily imply that the girl had consented, much less that her consent was freely and intelligently given.

The question of a woman's consent is also linked with that of her will: Section 366 makes it an offence to kidnap or abduct, a girl or a woman, with the intent that, or the knowledge that, she may be forced to marry against her will.[8] What is the distinction between "without her consent" and "against her will", and how are they to be proved?

In a case which came up before the Rangoon High Court, Page C.J.

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8. See supra Chapter III, section 3.

attempted to distinguish between these two states of the mind. In this case[9] the accused had been convicted under S. 366, of kidnapping a minor girl (who was less than twelve years old) alleged by him to be his daughter, with the intent to or knowledge that she would be compelled to marry against her will. Two months after the girl was kidnapped the accused gave her away in marriage. His defence that he thought the girl was his illegitimate daughter, was not accepted as proved. The accused was found guilty and sentenced to four years rigorous imprisonment. He then appealed to Rangoon High Court.

The prosecution's case was that, as the girl was under twelve, the question of her possible consent was irrelevant, for according to Section 90 of the Penal Code, the consent has to be given freely and intelligently, and it has to be the consent of a person not less than 12 years of age.

In his judgment, Page C.J., said, "The object or effect of Section 90 obviously was not to lay down that a child under twelve years of age is in fact incapable of expressing or withholding his or her consent to an act, but to provide that where the consent of a person may afford a defence to a criminal charge, such consent must be real consent, not vitiated by immaturity, fear or fraud. Further, in the Penal Code, a distinction is drawn between an act which is done "against the will" and an act which done "without the consent " of a person.

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9. Khalil ur Rahman v. King Emperor, A.I.R. 1933 Rangoon 98

"See Section 375,"[10] "Referring to an English case[11] the learned judge continued, "Every act done "against the will" of a person is no doubt done "without his consent" but an act done without the consent of a person is not necessarily "against his will", which expression, I take it, imports that the act is done in spite of the opposition of the person to the doing of it."

Taking into account the fact that the Penal Code distinguishes between these two states, and that S.366 employs the phrase "against her will", Page C.J. said that, in view of the fact that the little girl was married off within two months of being kidnapped, "it would not require a great stretch of imagination for the jury to conclude that the accused, when he kidnapped the little girl, intended to compel her to marry in spite of her opposition. But to hold, as the learned trial judge has done ... that the accused kidnapped the child with intent to compel her, or knowing it to be likely that she will be compelled to marry "against her will", in my opinion, would be to

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10. Section 375 I.P.C. defines rape as sexual intercourse with a woman against her will or without her consent, or in other circumstances not relevant here.

11. Fletcher 8 Cox 131 (in 1859). The prisoner raped an imbecile of 13. The jury said that the act had been done by force and without her consent, as she was incapable of exercising it, but that it was not proved to be against her will. The judge however held that it was sufficient to establish that it was by force or without her consent, for rape was not only against her will. This last finding of course does not apply to abduction for marriage. The jury's finding does.

travel outside the ambit of S.366 ... it is possible to conceive of cases in which grave injustice would be done if the section was so construed". The sentence was altered from four years rigorous imprisonment under S.366 to the same sentence under S.363, of kidnapping.

This judgment seems to be saying that while the men undoubtedly kidnapped the girl in order to marry her off, regardless of her possible opposition this did not amount to an intent to compel her to marry against her will, or to a knowledge that she might be compelled to marry against her will. In our opinion, the accused could not possibly have been bothered by the girl's wishes, in any shape whatever. If he had gone to the trouble of kidnapping her with the intention of giving her in marriage, a small thing like her will was not likely to inconvenience him. It is worth noting that the judge did not think that the accused formulated his plea for marrying off the girl <u>after</u> kidnapping her. He accepted the fact that the little girl had been kidnapped because her kidnapper wished to give her in marriage, regardless of any opposition she might put up.

A fine philosophical distinction might be made between these two states: The accused was probably solely interested in getting the girl married and her will would not have interested him sufficiently for him to have the intention to compel her to marry against her will, or for him to entertain the knowledge that he might be compelling her to marry against her will.

(Such intention or knowledge would really argue that he had given the girl greater thought, then the absence of such intention or knowledge would show!) He was, probably, simply bent upon

achieving his purpose, regardless of the girl's own ideas upon the subject. But, once the court accepts, as it did here, that the man kidnapped the girl in order to get her married, regardless of her opposition, if any. Then there is no other, additional way of proving what his exact intentions, vis-a-vis her will, were, at the time of kidnapping. In our opinion the Court was putting too much emphasis on so fine a linguistic distinction. It is surely not relevant whether he was brutely unconcerned with, or deliberately decided upon flouting, the girl's will.

The decision is further complicated by the distinction the learned judge appears to have drawn between the girl's opposition and her will. Opposition to an act, i.e. express withholding of consent, would surely be regarded as expressing that the act was against the person's will.

If 'consent' is difficult to disprove,[12] 'will' is even more so. It is admitted that an act done without consent is not necessarily done against the will. Therefore to establish the fact that it was done 'against her will' it is not enough to show that it was done 'without her consent'. But this, we feel, means without her express consent. If it was done without her tacit consent, it was probably done against her will. It can also be done against her will, if her consent is inferred, or taken as proved, from her outward behaviour alone.

It is distressing to note that Indian courts are, on the whole, unwilling to put any credence on the case of the prosecution. While the judicial ruling against convicting on the uncorroborated testimony

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12. See supra, Nur Ahmed v. Emperor 38 C.W.N. 108 pp. 347-350

of the prosecutrix in sexual offences has been extended to cases other than rape,[13] where corroboration is forthcoming, it is sometimes rejected on grounds which seem unsatisfactory to us.[14]

In another case,[15] Sarian, a married girl, was abducted from her home by Tasir, whom she had refused to marry, and three other men. Her case was that she woke up to find that her mouth had been tied and that she was being carried aloft. That night, that is on the night of 20th February 1939, she was alone in the house. The men took her to the forest, ravished her and kept her with them, under constant watch. On 12th March 1939, when she was being taken by two of the men, Tasir and Kader, from the jungle to a third person's house, she was recognised by one Asraf Sardar, who informed her husband; that night the girl returned, saying that she had escaped while Kader slept. She told her husband, and others who came to her, that Tasir and Kader had ravished her several times. The sessions judge found them guilty under S.366, whereupon they appealed to the High Court. On appeal the learned judge said that there was no corroboration of her testimony that she had been abducted on the 20th February. Asraf's evidence, the judge said, could only show that she had been abducted on 12th March. Moreover, Asraf's evidence was unreliable, as he had first said that she was being dragged along, and then changed it to say that she was walking along.

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13. See supra Section III pp 331-337

14. See supra Nur Ahmed v. Emperor, 38 C.W.N. 108 p. 347-350

15. Tasir Pramanik and others v. Emperor, 44 C.W.N. 835 p.

In this case the Sessions Judge had cautioned the jury on the "uncorroborated evidence of the prosecutrix". Lort-Williams J. however, held that the sessions judge had failed in his duty, because he had not mentioned anything about the kind of corroboration which was necessary, i.e., whether the prosecutrix or the accused had to be corroborated.

In our opinion, the last objection is not intelligible. If the jury had been cautioned against the uncorroborated testimony of the prosecutrix, they had surely been told, if there was any doubt about the matter, that it was her case which needed corroboration, and not the defence put up by the accused.

The case against Tasir and Kader was dismissed, because Asraf was regarded as an unreliable witness, and he provided the only corroboration of the girl's evidence. The case against the remaining two men was dismissed, because there was no corroboration at all.

In this case it was not even alleged that the girl had gone willingly, but that the evidence was unreliable and that there was a misdirection of the jury. We have examined the question of the misdirection of jury. On Asraf's evidence we would make the same linguistic point we had made about Kiran Bala's testimony in an earlier case,[16] viz. that some of the discrepancies in a testimony may result from bad translation, and that this possibility should be examined. There are two additional points, equally applicable to both cases, we should like to make. Villagers are not sophisticated in their use of language, nor do they have as wide a variety of words

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16. Nur Ahmed v. Emperor, 38 C.W.N. 108 at pp. ~~50-57~~ 347-350

at their command as educated city-dwellers when they alter a statement, it does not necessarily mean that they have changed their description of an act, or that they are prevaricating. They might well not see the difference between the two statements.[17] Secondly, some statements, unless clarified are loosely made in certain languages. In Hindi for example the statement "he pulled me by the hand" can be made both when the speaker wishes to indicate that she was dragged away forcibly, and when she merely wishes to indicate that the man led her out by the hand, with some insistence, but with her full consent, for purpose as innocuous, open, and temporary, such as to eat a meal, or sit out in the evening breeze!

Thirdly, villagers in India are terrified of the courts, where they feel totally out of their element; they fear any governmental instrumentality. And they will agree to almost anything a sharp counsel may put to them in cross-examination. It is unrealistic to expect the same standards of language and of presence of mind from them as we do, and as the courts appear to do, from the sophisticated, educated man of the world.

In parenthesis, the same point can be made about cases involving children: it is quite difficult to gauge the workings of a young child's

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17. It is interesting to note, as I did in conversations, that they have fewer names for colours, and will therefore subsume more colours under one name than we do. Thus, a 'blue' shirt may be any colour, with some blue in it, e.g. a purple.

mind. Even in ordinary day to day life, it is not possible to tell why a reasonably intelligent child should reject the most obvious way of doing something, and choose the devious, useless, inexplicable and stupid course of action. There is not even a culture gap here like that which the courts might experience with villagers. It is a phenomenon commonly known to adults of all classes, who come into contact with the young. Children often do not complain when they should, when a complaint would be the best way out of their troubles, but from this it would be wrong to infer that they had consented to whatever was being done to them.

We hasten to admit that there would probably be chaos, if the courts had to deal with every case involving a villager or a child on the grounds that they used language in a completely different way or that the states of their mind had no comparison with ours. Even so, we think it would have a salutary effect and be productive of more real justice, if the courts were to keep the social and psychological realities before them, rather than apply an abstract and rational standard of (say) consent to all behaviour.

The position taken by the Lahore High Court in the case of Md Sadique v. King Emperor,[18] about the amount of courage a young abducted girl may be expected to display, appears to us to be one which takes proper account of social realities, and therefore bears out the point made in the above paragraph.[19] In that case the learned High Court Judge rejected the submission of the defence that, as the girl

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18. Md Sadique v. King Emperor, A.I.R. 1938 Lah 474

19. for a detailed discussion, see supra, Section III pp 343-344

had not raised an alarm at the petrol pump, she must have been a consenting party, and that therefore, there was no abduction. Blacker, J., said that the Counsel must have an "exaggerated opinion" of the courage of a young girl when she is surrounded by seven men brandishing swords.

In all fairness to the courts, we must point out the curious fact that the prosecution counsel do not seem to make much of what we have called the social realities: thus the facts that the men were carrying swords in broad daylight, or in another case discussed above,[20] the girl was being 'walked out' escorted[21] were not really emphasised by Counsel for the prosecution to add support to their case.

It is interesting to note that, even when the bench is, as in the Lahore case, sympathetic to the woman, or when the case is proved beyond doubt, the judges seem loath to find the accused guilty. In the case of Sunder Singh v. Emperor[22] the appellants had been found guilty of abducting a Mohammedan girl with intent to compel her to marry against her will. Sunder Singh, who was a Hindu (or Sikh) from Punjab had obtained the girl from Din Mohammed and others, who were Muslims, as a bride for his brother. The girl was brought to Lucknow by Din Mohammed, his wife and their son, on the pretext that they were going to a fair. She came with them, because she knew them and they lived in the same village. At Lucknow Sunder Singh joined them, and the

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20. Nur Ahmed v. Emperor 38 C.W.N. 108

21. See supra pp. 347-350

22. Sunder Singh v. Emperor A.I.R. 1925 Oudh ~~O.U.D.H.~~ 328

whole party proceeded towards Bareilly. At a station called Sandila, Din Mohammed, with his family, alighted from the train and told Sunder Singh to take charge of the girl. The girl, who was unwilling to proceed alone with a stranger, also alighted from the train and refused to board it again. Thereupon Sunder Singh grabbed her hand and tried to drag her in. The girl raised an alarm, and a police constable took them both to the railway police-station. The other accused, viz. Din Mohammed and his family were subsequently arrested. The charge against all four accused was clearly established and they were convicted. All of them appealed against the conviction. These appeals were heard by the judicial Commissioner for Oudh, who found the charge against Din Mohammed his wife and their son was established beyond doubt, and he dismissed their appeals. As regards Sunder Singh, Dalal J.C. found that it had been clearly established that "the girl was unwilling to accompany Sunder Singh and that he was compelling her by force to go with him. So it is clear that he abducted the woman as he wanted her to marry his brother, whether she wanted to do so or not."

The judicial commissioner then proceeded to add, "I think however that the sentence of Sunder Singh should be considerably reduced. There is no evidence that he had knowledge of the manner in which the girl was obtained by Din Mohammed and others. Possibly he might have suspected nothing wrong, until the girl refused to accompany him at Sandila.

"The offence was committed by him on the spur of the moment and possibly if he had been introduced to the girl and she had refused

to accompany him, he may have had time to think and would not have tried to force the girl to go along with him. He is an ex-soldier and it is commonly known that there is considerable difficulty in the Punjab in obtaining girls for marriage." Sunder Singh's sentence was therefore reduced to three months rigorous imprisonment, and fine, as levied by the original court!

For several reasons we consider this to be a bad decision. First, village girls were not 'introduced' to men, leave alone to prospective in-laws. So there was no possibility of Sunder Singh changing his mind upon his being introduced to the girl. Secondly, a Hindu or a Sikh, who was prepared to take a Mohammedan girl as a bride for his brother, was not going to change his mind, just because he had been introduced to the girl. Thirdly, it is difficult to see how a man could suspect 'nothing wrong', if the girl was just handed over to him like a package. Thus, on the judicial commissioner's own showing it seems unlikely that Sunder Singh would have relented, had he been 'introduced' to the girl.

The other mitigatory circumstances given by the learned judicial commissioner are not only curious but very revealing indeed. It was commonly known that brides were difficult to obtain in the Punjab. But this was hardly a mitigatory factor; it was in fact quite the reverse, and likely to increase Sunder Singh's determination to get the girl, even by force. It also points to the unlikelihood of Sunder Singh's taking much note of the girl's unwillingness, in the unlikely event of being introduced to her.

The real reason for this leniency was that Sunder Singh was an ex-soldier, a fact mentioned in the decision, and by 1925 the first war had not yet been forgotten in North India.

We have returned repeatedly to the case of Md Sadique v. King Emperor. We are particularly interested in this case, because all the parties involved came from the middle class, and because of the sensitive approach shown by the learned judge, in assessing the girl's behaviour, an approach exemplified by the fact that the judge was unwilling to accept any slur upon the girl's character, stemming from the fact that she had not defied seven armed men. Indeed, the learned judge went so far as to shift the burden of proof from the prosecution to the defence. To quote: "Human nature being what it is, whenever one finds a young man abducting a girl of marriageable age, the first and natural presumption must be that he has abducted her with the intention of having sexual intercourse with her, either forcibly or with her consent, after seduction or after marrying her. If he has any intention other than that suggested by the natural circumstances of the case, the burden lies upon him, under Section 106 of the Evidence Act[23] to prove that intention. Illustration (a) to Section 106 is clearly in point."[24]

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23. S.106 of the Evidence Act of 1872 reads: "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him".

24. Illustration (a) of Section 106 of the Evidence Act of 1872 reads: "When a person does an act with some intention other than that that which the character and circumstances of the act suggest, the burden of proving that intention is upon him".

The girl had said that her abductors told her that she was to be married to Ghulam Mustafa, at Peshawar. Mustafa, who was one of her abductors, was also her cousin. The learned judge said that the crime was a serious one, made more serious by the fact that the girl came from a respectable family. However, he held that the offence of abducting a girl for marriage was less heinous than the offence of abducting her for illicit sexual intercourse. Therefore, he reduced the sentences of all the seven accused to terms of not more than 18 months rigorous imprisonment.

It is indeed a moot point whether one of the two motives is less heinous than the other, and if so, which one. If, as in this case, the girl comes from a 'respectable family', one of the motives (illicit sexual intercourse), if achieved, ruins her reputation. The other (forced marriage) ties her to a man for the rest of her life, whether she will or no!

In both these cases[25] it is easy to see that the judicial authorities were anxious to find mitigatory circumstances because the charges constituted a blot on the man's character. But, we submit, if a woman's character may be torn to bits by the defence, we do not see why the courts should treat the man with special kindness![26]

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25. Md Sadique v. King Emperor, 1938 A.I.R. 474 Lahore, and Sunder Singh v. Emperor, 1925 A.I.R. 328 Oudh

26. We are not concerned with the length of the sentence, but with the fact that mitigating circumstances were sought for this, abovementioned reason. Certainly no notion of 'noblesse oblige' was applied to these educated youths who should have known better!

For the purposes of S.366, the woman has to be abducted or kidnapped, to be either seduced or coerced to illicit sexual intercourse, or for marriage against her will. At the beginning of this section we attempted to show that when it is alleged that the girl was taken away forcibly, the girl's muted behaviour is regarded as sufficient proof of her consent to being taken away. Consent being linked with her bad character, it at once throws doubt upon her testimony. There remain the cases where the allegation may be of seduction. Even here, if it is shown that the girl was of bad character, it is assumed that she could not have been seduced, as she had no virtue to lose. This was even held to be so in the case of a minor.[27] In this connection, it is interesting to note a correspondence which took place in 1856, between Thornbill, officiating secretary to the government of North-West Provinces at Agra, and Dashwood, the Registrar of the Nizamet Adalat, at Agra.[28] Thornbill had asked the court, whether, in their opinion, it would be beneficial in the North-West Provinces to adopt the rules current in the Punjab, regarding adultery and abduction of married women. He had requested the court to consult junior officers in the judicial service before formulating their reply. Dashwood duly wrote back,[29] that the law on abduction, as it existed in the North-West Provinces, was adequate, if properly

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27. Nura v. Rex, A.I.R. 1949 All. 710. See supra Section III p. 341

28. Indian Penal Code papers, Legislative Dept. National Archives, Delhi.

29. ibid, dated 1.9.1856

administered, for the repression of the offence of abduction. The fault lay in the administration of the law. Some magistrates were under the impression that the consent of the abducted woman was a material factor in determining the guilt of the seducer. This impression was erroneous, and they had therefore issued a circular to correct it.[30] The regulation on abduction in the North-West Provinces related to the offence of enticing and taking away, or causing to be enticed or taken away, a married woman. Dashwood went on to say that, in the opinion of the court, it was "obvious that the consent of the woman is implied in the use of the word 'entice', and that the point therefore ought not to be taken into consideration in estimating the guilt or innocence of the seducer."

The Penal Code is no longer concerned with just the abduction of the married woman. Moreover, her consent, if freely and intelligently given, is relevant to determining the guilt of the man,[31] if the case made out by the prosecution should be that she was compelled by the man to go with him. Despite the changes in the two laws, the point made by the Nizamat Adalat is pertinent to the more modern law. From

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30. The circular is of the same date as the letter.

31. Tasir Pramanik and others v. Emperor, 44 C.W.N. 835 but, contra Sir H.S. Gaur, whose commentary upon S.366 says that from the very definition of abduction, as given in this section, it follows that a married woman cannot be taken away with her consent.

the consent it would be wrong to infer that the woman had not been seduced, although from the consent it is legitimate to conclude that she had not been coerced. Yet from the fact that the girl Hajra went with the man Azimuddin in the hopes of getting clothes and ornaments, the learned judge inferred that she had not been seduced, that she had gone of her own accord, and yet he concluded that she was a fast girl!

In almost all the cases referred to above, the defence was quick to allege that the woman had been a consenting party to the abduction. Her consent, except in the Lahore case,[32] was taken by the courts as proved from the outward manifestations of her behaviour.[33] As this established that she was a woman of what the courts call 'loose character' the woman's testimony even if uncorroborated, became suspect. As we have noticed, the corroboration, when produced, was as likely to be rejected as not.[34] In the Lahore case, Blacker J. said that, by the nature of abduction, any evidence of the actual intention of the abductor had to be "inferred from the circumstances". But in the other cases we have examined, no such allowance was made to the prosecution; and in cases of rape, or abduction and rape, where there was no need to infer the intention of the abductor, since he had acted upon it, the woman's evidence was suspect because of her possible bad character! This is a circular argument. At least in part it has

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32. Md Sadique v. Emperor, 1938 A.I.R. Lah. 474

33. See supra Chapter 4 Sections III and IV, passim.

34. Tasir Pramanik v. Emperor, 44 C.W.N. 835, and Nur Ahmed v. Emperor, 38 C.W.N. 108

been caused, we feel, because a more loose interpretation has been put on the word 'consent' than could have been contemplated by the Law Commissioners who, in Section 90 of the Penal Code,defined consent as freely and intelligently given consent. Because of this loose interpretation, it has become very easy for the defence to cast doubts upon the woman's reputation. Sexual purity is too often used in India as the sole measure of a woman's 'goodness'. It is a criterion so rigorous that it is difficult to satisfy. Merely talking to men, or even looking at them is still enough to make people look askance at a girl. Even today, it is as easy to malign a woman's character in India, as it is difficult for her to repudiate the accusation. The result is, that, should she go to court with a case of abduction or rape, given the currently accepted notion of 'consent', the woman is told, in effect, that she got what she deserved.

It is not our case that there is a serious miscarriage of justice in every case of rape, abduction or kidnapping. It is our case that these sections are so drafted that they can be construed to permit a miscarriage of justice in an appreciable number of cases. Thus, while in a number of cases it has been held[35] that a woman may not be taken away by force, even with the intention of restoring her to her husband,[36] in a later case[37] exactly the reverse judgment was given by the High

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35. Ghugri v. Emperor, A.I.R. 1935 All. 360, and Falnaya Khan v. Emperor A.I.R. 1942 Lah. 89, also see footnote 37 of this section.

36. Pir Mohammed v. State of M.P., A.I.R. 1960, M.P. 24

37. Ghugri v. Emperor, A.I.R. 1935 All. 360, and Falnaya Khan v. Emperor, A.I.R. 1942 Lah. 89

Court of Madhya Pradesh. This discrepancy could only have been possible[38] because the wording of the relevant section permitted both interpretations.

In our opinion this miscarriage of justice is the result of two factors. First the English were not aware of the precise nature of Indian attitudes to sexual offences. Secondly, these attitudes are heavily weighted in favour of the male, and very suspicious of the female. This, we hope to have proved, leads the court to adopt a loose definition of what constitutes a woman's 'consent', and to set unrealistic standards of what may be accepted by them as evidence or corroboration of evidence, when offered by the prosecution. It is to be remembered that lower courts are inevitably less sophisticated and less likely to be liberal than the superior courts. The trend set by the Indian High Courts and the Indian Supreme Court is followed by them even in cases where the difference in fact of the case before them does not require them to follow a particular precedent. The judgment of lower courts are more numerous than those of the Superior courts, as not every case goes into appeal. But these judgments are not reported. Therefore, the bad higher court decisions referred to by us are only a fraction of the total, and therefore they constitute some cause for concern, if not alarm.

What the Nizamat Adalat had to say to Thornbill about the regulation concerning adultery, can be quoted here with profit. There, as in this case, the question was, how far was the law effective? That is,

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38. The High Court of Madhya Pradesh was not bound by the judgments of other High Courts.

how far did it provide justice? In his letter to Thornbill, the Registrar said that, so far as the upper classes were concerned, the law of adultery was a dead letter, and, the court felt that however it might be changed, it would remain a dead letter. To them the reasons for this were 'obvious'. As Dashwood put it, "A native of high caste or of a sensitive disposition is averse to publish his own disgrace, much less will he appear in a public court of justice, presided over by one class of officers or another. He will either submit in silence to the dishonour inflicted on him, or revenge it with his own hands. The court apprehend that these feelings are not confined to the natives of India."

Not only were these feelings not confined to the natives of India, they were not, in that subcontinent, at any rate, confined to the 19th Century.[39] Sexual offences, when committed against the woman of a middle-class family, bring deep dishonour and shame upon it. Though people are, perhaps, less likely to take the law into their own hands. They are just as likely as their ancestors were to "submit in silence to the dishonour inflicted" upon them. In all

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39. In this connection it is curious to note that the Court found that charges of abduction were often brought instead of the real charge of adultery, because the former involved less disgrace, for the wife was not party to the offence, and because of the complainants object was "to recover, not to punish, his wife!"

the cases examined above, there was only one case of a middle class girl from a respectable family, a girl whose character was accepted by the courts as unblemished.[40] Shashi Kala[41] was a middle-class girl, but one feels, that her past history had alienated the courts sympathies from her. All the other cases originated in villages, or/and from the lower classes. The women involved in those cases were treated with much less, if any sympathy. So much so that we are left with an uneasy doubt in our minds: how much does the culture-gap operate against the lower-class woman's interests? We have already looked at one aspect of this question and concluded that this gap in understanding leads to unrealistic expectations of conduct from the woman; the villager is expected to follow the same rationale of behaviour as the upper-class woman, who lives in the city, regardless of the fact that she has no education and more tabus. The same is true, in the city,[42] of the lower class women, who has stricter rules, even purdah, imposed upon her, than the woman who comes from the more emancipated middle-class. This question has another facet to it. In the Lahore case, how much did the girl's middle-class origins effect the judge? How far was he prepared and therefore able, to see the girl's case, because she came from a respectable family? This question is somewhat different ~~than~~ from the first one. The first question implied that the law makers and the judicial officers, because of their ignorance of social customs, ask the

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40. Md Sadique v. Emperor A.I.R. 1938 Lah. 474

41. Laiq Singh v. The State of U.P. A.I.R. 1970 S.C. 658

42. In North and North-east India.

impossible from the villager. The second question is perhaps even more disturbing. It implies that, because the girl comes from a background more intelligible to him, the judge is more sympathetic to her, and that therefore he brings a more open mind to her case than he would if the girl's social origins were different. If the first question was difficult to answer, the answer to the second is very nearly impossible to give, for it rests on feelings which are too nebulous to crystalise into hard facts. Nevertheless, it is, we feel, significant, that an examination of case-law of the last forty-five years should throw up a question such as this.

CHAPTER V

Indian Cases: Slavery

In the preceding chapters we have attempted to show the effect of conflicting social, and, in particular, moral values, upon the efficacy of laws. In the last chapter we dealt with this problem specifically in connection with sexual offences. The question of slavery or sale of human beings is on a slightly different footing. Broadly speaking, it is concerned more with misconceptions, which are social in character, rather than with moral value judgments. That is, while there is no implication that the enslaved person (like the abducted woman in the previous chapter), is of bad character it is certainly implied that (like her), he is as free and able to choose as is his lordship on the bench. His social handicaps, which are considerable, are swept aside and the view taken of his choice is so unrealistic, that it is presumed that he chose to be enslaved.

An act to regulate the condition of slavery, Act V of 1843,[1] was passed during the governor-generalship of Lord Ellenborough. Contrary

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1. For a discussion of the act See Chapters II and III

to general belief[2] the act was neither intended to abolish slavery, nor did it do so. It did not abolish slavery. That is to say, it did not say that slavery was abolished. The Legislative Councillors were at great pains to make this clear.[3] On the contrary, they had some argument about the drafting of the act, because in the opinion of some of them, the act effectively (though not legally), abolished slavery, as it no longer recognised a master's right to chastise his slave,[4] nor did it allow him to use legal process to recover a runaway slave.[5] This meant, the dissenting Legislative Councillors thought, that the slaves would leave their masters, unless they themselves wished to stay.

Thus, what Act V of 1843 did was to make it illegal to enslave a man, who was unwilling to be enslaved. In the previous chapter we discussed the connotation of consent, with reference to the women victims of sexual offences. The fallacies of that definition are also

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2. Particularly among the civil servants.
3. See Chapters II and III
4. Section IV of this Act, the celebrated Penal clause, made it an offence to do any act to a slave, which would be an offence, if done to a free person.
5. Section II took away the master's right to go to civil or magisterial courts to enforce his right to theperson or services of any individual.

evident in the case of slavery. The slave's acquiescence to his state does not, as it would, for example in the case of Lord Ellenborough, necessarily imply that he had consented to be enslaved. His acquiescence might be born of fear, ignorance, or poverty, or all of them.

In 1860, the Indian Penal Code was finally passed. It contained several sections, which dealt with buying, selling, importing or exporting human beings as slaves;[6] it also contained a section[7] which made unlawful compulsory labour an offence.[8] Even in 20th Century India, few cases under these sections reached Indian courts, and in some of these cases the state of slavery was defined by the courts.

In the two sections that follow we shall discuss a few cases of slavery, which occurred before the Penal Code was enacted.[9] We shall then examine the cases of slavery reported in law journals,[10] in order to see how the law stands on slavery today.

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6. Ss 270-373. They also deal with trafficing in minors for purposes of prostitution, etc.

7. S. 374

8. 'Unlawful'; so that this section does not apply to compulsory military service or other government levy.

9. See infra Section II

10. See infra Section III

SECTION II

Slavery Under the Company's Rule

In this section we wish to refer to a few cases of slavery, which indicate the state of the laws on slavery in force under the East India Company's rule. Even more important for us are reports and remarks made by government officers on the nature of slavery in British territories.

From the cases and the reports, we can see that, despite the existence of several prohibitory regulations, slavery was widespread in Indian territories. It also seems to us, that while some cases were adequately dealt with, in others the government was either unable or unwilling to do anything.

The existence of slavery was, by and large, known to many government officials in the revenue and police departments, for they kept their ears pretty close to the ground and had to investigate rumours. But it was often impossible to establish the existence of slavery in court, for lack of evidence, as slaves rarely complained. A court could not take cognizance of slavery suo motu. Moreover, the regulations were so framed that often the offenders could not be punished.

In the previous chapter, we discussed the case of the prostitute Ameerun[1], who had been tried on a charge of hiring girls for prostitution

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1. Chapter IV, Section II p 308 et seq

On appeal she had been acquitted for reasons technical and legal, which we have already discussed. During the hearing of the appeal, the judges considered the question whether Ameerun had been guilty under any act or regulation in force. They had quashed the proceedings under Section 2 of Act II of 1856, on the grounds that, as Ameerun's action had not been inimical to public morality or decency, the Magistrate had erred in starting the proceedings without a written complaint. Had Ameerun broken the law, as declared by Act V of 1843?

The Magistrate, Mr. Toogood, had also considered this question; he had held that Ameerun could not be tried under that act, because while it did not recognise slavery, it did not abolish it either.

Toogood then quoted a precedent. In 1841, that is, two years before Act V was passed, in Mst Gulab and others v. the Government[2], the woman Gulab had been charged with detaining and attempting to sell girls for the purposes of prostitution, and she had been sentenced to five years rigorous imprisonment. Unfortunately Toogood did not refer to the regulation under which the conviction had been obtained.

The learned Sessions Judge, however, held that Ameerun could be tried under Act V of 1843. He cited two cases to prove his point. In the case of Gourmanee and others v. the government which occurred in 1853, the accused were convicted on appeal, by the Sudder Court, for the offence of buying and selling a young girl for the purpose of prostitution.

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2. This and other cases are taken from I.P.C. Papers.

Archives of India, New Delhi.

The Sessions Judge also cited the case of Sheikh Shetabdee v. the Government (1853), where the charge was similar, and the conviction of the appellants by the Sessions Judge had been upheld, although the Sudder Court reduced the sentence, because, under Mahommedan law, this offence was a misdemeanour.

All these cases can be distinguished from Ameerun's case on the grounds that they were all cases of sale of girls, while in Ameerun's case there was no sale, only a lease.

When Ameerun's case went up in appeal to the Sudder Court, Money J. discussed the cases referred to above in some detail.

In the case of Mst. Golab v. the Government (1841) Money J. referred to the remarks of the dissenting judge, who had been against her conviction; he had argued that, while sale into prostitution was heinous and objectionable under the existing laws no offence had been committed, for the children had not been taken away from their guardians. One of the other judges sitting with him had asked under which law selling and buying of human beings was punishable; it was not so by the Company's regulations; was there a native law to the point? Thelaw officer's futwa answered the question: the buying and selling of free-born individuals was repugnant to Mohammedan law. The dissenting judge, who held that sale by guardians was not an offence under the existing regulations, went on to say: "If enquiry is made, I believe it will be found that the supply of girls for purposes of prostitution is obtained by purchasing them, when young, from their parents or friends,

not being able to support them, and that they are bought and looked upon as the property of the buyer, and that the profits arising from prostitution or from the sale of the girls is as much considered the right of the owner as it would be if any animal were sold.

In his convicting judgment Smyth. J., deplored this state of affairs and added that, unless a new law was passed, nothing could be done under the existing regulations to suppress this practice. Presumably, the conviction in this case was under Mohammedan law.

In the case of Gourmanee v. the government (1853) the futwa of the law officer said that "the simple sale of a wife was not regarded as an offence. Yet the law did not allow of a sale to a prostitute, which was an offence punishable at discretion". Using his discretion, the learned judge sentenced all the accused to five years rigorous imprisonment. He found them all "equally criminally concerned in the sale of a helpless little girl into a slavery of the most invidious and demoralising kind". On appeal the sentence was upheld by the Sudder Court.

In Sheikh Shetebdee and others v. the government (1853) however, the sentences were reduced by the Sudder Court. It was pointed out by the judge that "the prisoners are not charged with kidnapping the child, or taking it by force or fraud out of the lawful custody of its parents or guardians, but merely with sale and purchase of it for the purposes of prostitution. This crime is not specifically provided for by the regulations. But the Mahommedan law, as declared by the Law Officer of

the court, makes the sale of a child for immoral purposes a misdemeanour by which Tazeer[3] is incurred, and the court must therefore treat it as such. The child was without a protection of any kind, and the prisoner ... does not appear to have used force or any illegal means in obtaining the child; his statement indeed, that it was made over to him by another to sell for that person's benefit is not disproved nor are there any circumstances of aggravation. There is no doubt that the child was sold and bought for the purposes of prostitution and the proof is complete against the prisoners, but the punishment awarded is, with reference to the nature of the offence, as above stated, excessive".

After discussing all these cases, Money J., referred to an older case, which is interesting in its own right. In Mst Chuttroo v. Mst Jussa (1816), the facts were as follows. A prostitute bought a girl when she was an infant, and brought her up to follow her profession. Later the girl got married, and not surprisingly, her husband insisted that she should give up her calling. The older prostitute petitioned the Magistrate of Farruckabad to return the young girl to her, and he granted her the order. On appeal this decision was reversed by the Sudder Court. Both the court and the law officers were unanimous in their opinion that "a child purchased in its infancy

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3. Punishment imposed at the discretion of the court for an offence not coming within the definition of any offence for which the Sharia prescribed a specified penalty.

was at full liberty, when it reached maturity, to act as it suited its inclinations, and it was a duty incumbant upon the magistrate to punish any attempt of compelling adherence to an immoral course of life".

From all these cases it is clear that sale of children by their guardians, even for prostitution, was not an offence under British Regulations. The convictions in these cases were given at discretion under Mahommedan law.

If cases of sale of children by guardians did not come under Act V of 1843, a fortiori cases in which guardians had 'hired' out their daughters did not, Under which regulation, then, did Ameerun's case come?

Money J., said that in his opinion, the case could not be tried under any of the existing regulations, which dealt with sale. It did not come under Regulation X of 1811, which dealt with the importation of slaves from foreign territories and their sale. Nor was this case covered by Regulation III of 1832, which extended the scope of the earlier Regulation, and made it an offence to remove slaves from one part of British territories to another. Regulation VII of 1819 was equally irrelevant, for it rendered liable to punishment persons guilty of enticing away young unmarried females for the purposes of prostitution without the consent of their parents or guardians.

In Ameerun's case the parents had been parties to the lease, and therefore the act had not been done without their consent.

With the exception of one judge, who took the view that, as Ameerun's contract of lease was not legally enforceable, the girls must have been staying with her of their own accord, the judges did not regard Ameerun's conduct lightly. But they could not see how, under the existing regulations, she could be convicted for her actions.

If sale of girls for prostitution was a fact whose existence was accepted and deplored by most judges, (though not punishable by law) administrative correspondence indicates that other types of slavery was not always easy to locate. In the 1850's the Bombay government discussed the question of export of Indian children, from British territories, by Arabs to Arabia. Exporting children from British India was an offence under the existing government regulations.

In 1857, in Bombay, Crawford, Commissioner of Police and Senior Magistrate of Bombay, committed an Arab for trial on a charge of exporting children to Arabia, to be sold as slaves. This case was withdrawn by the prosecution, after examining only three witnesses.

Crawford then wrote a note of protest to Anderson, Secretary to the government of Bombay. In Crawford's opinion, it was an open and shut case. The man had come from Hyderabad with the children, and he was going to Arabia. He had told the man, who was (or subsequently became) the police informer, that he intended to sell some of the children in Arabia, and to keep the others as his own servants. Crawford felt that, had the case been tried and the Arab convicted, the decision would have had two results.

First, it would have laid down the guiding principles to be

followed in the future. Secondly, it "would have struck terror in the hearts" of other offenders. As there was considerable traffic in children from the Nizam's territory to Arabia through British India, Crawford suggested that all Arabs coming from Hyderabad should be stopped and their retinue, including their zenanas, should be inspected.

Crawford went on to emphasise his point that the Arab practice of taking Indian children to territories where the long arm of British justice could not reach them was objectionable, and should have been stopped.

In his reply, Bettington, Judicial Secretary[4] to the government of Bombay, agreed with Crawford that the Arab's guilt was obvious, but, he pointed out, it was impossible to put an effective check on this traffic. The [redacted] frontier between British India and the Nizam's dominions was too long for all of it to be constantly patrolled. The children were often too young to give reliable evidence. It was difficult to ascertain whether the children were bona fide members of the Arab's retinue or whether they were being taken away to be sold. Finally, such a rule could be easily side stepped by the Arabs, who had only to arrange for non-Arabs to take the children from the Nizam's territory to the Bombay Presidency.

On the specific question of the withdrawal of this particular

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4. Presumably Anderson forwarded Crawford's letter to Bettington, as being a matter for his department.

case against the Arab, Syed Cassim bin Ahmed, the opinion of Westropp, the Acting Advocate General was requested. Very pointedly Westropp said that, while it was no part of his duty to take notice of 'any animadversions' on the actions of judicial officers, he would give his opinion out of regard for Crawford, and his 'humane zeal'.

The case against Syed Cassim bin Ahmed had been withdrawn because:

1. The informer was unreliable; he himself had been trying to obtain possession of a child by fraud.
2. He was the sole witness to the intentions of the Arab to sell the children in Arabia.
3. The children's evidence that they had been bought was not entirely satisfactory. One of them said that, when he was three years old, he had seen Syed Cassim's brother (who was a Jamadar in the Nizam's army), pay ten rupees for him. But a three year old child's memory is not reliable. The others were either orphans or abandoned children, who had lived with the Jamadar for several years.
4. They all said that they were well treated and allowed to move about as they chose.
5. The children were going to Arabia, not only with the Arab, but also with the Jamadar's wife and daughter. The Jamadar was to follow them later. Thus, there was no reason to suspect that

this was not an ordinary transfer of a domestic retinue from India to Arabia.

Having made these comments the Advocate General then unbent sufficiently to add that the Government should prohibit Arabs and non-Arabs alike from removing children from India, unless they were related to them or were otherwise properly in their custody. He added that the Government should empower local authorities to detain such children and to send them to foster-homes.

Bettington's own suggestion was that harbour and embarkation control should be tightened.

In other words, Crawford, Westropp and Bettington, felt that a traffic in children was being carried on through British territories although, the latter two felt, there was little which could be done, under existing rules, to check it.

Bettington's suggestion was accepted by the Governor in Council. Crawford was therefore requested, in his capacity as Senior Magistrate, to put forward any ideas he might have, about 'efficient measures' which could be adopted to stop the traffic; the minute added that if necessary the measures would be "legalised by enactment".

In the meanwhile, in his capacity as Commissioner of Police, Crawford was requested to impress upon the police, and in particular the harbour police, the necessity of exercising the strictest vigilence for the prevention of export of children, and also to impress upon them the Government's willingness to reward liberally anyone who assisted them in detecting and bringing to justice anyone

who was engaged in such traffic.

It seems to us that there was a considerable traffic in children through British territories, and that this worried the authorities. Here, differing from the case of sale by parents, there was a law[5] forbidding the export of children for sale. However, as the removal of children by persons not their guardians was not forbidden, and as it was difficult to prove that the children were being taken out in order to be sold, the authorities were helpless. In other words, this was yet another instance of trading in slaves in British territory, which British regulations could not suppress.

If, as in this case, it was sometimes not possible to apply the regulations, which forbade the export of children for sale, in another case which occurred about the same time, the Sudder Adalat of Bombay came to the decision that a sale of a British subject by other British subjects, completed outside British territory could not, under existing regulations, be punished at all.

In 1855, a Hindu girl, a British subject aged eight was sold by her brother, Jetha Roopa, and five others, in the native state of Baroda. All but one of the six sellers were British subjects. There was some dissatisfaction about the division of the sale money, and

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5. None of the correspondents mention the regulation, but as the Advocate General and the Judicial Secretary talk as though its existence was well-known, such must have been the case.

and two of the British subjects complained to the British Political Agent at Baroda about the others. The Agent decided that, as the sale had taken place in Baroda, the matter should be investigated in that territory. The case was accordingly tried, and the girl was ordered to be returned to the Bombay Presidency. The buyer was fined one hundred rupees and the non-British seller was sentenced to one year's imprisonment. The Baroda authorities returned the other five men, being British subjects, to be tried in the East India Company's courts. The Magistrate of Kaird, to whom the case was sent, referred to the following interpretation of section 31 of Regulation XIV of 1827, which had been given by the Sudder Foujdari Adalat in 1839: that court had come to the conclusion that the selling of a slave by a British subject in foreign territory was not punishable by law.

On the basis of this interpretation, the Magistrate declared himself unable to inflict punishment on the accused. The case was then referred to the Sudder Adalat for their comments. The judges of the Adalat upheld the Magistrate's interpretation of the above-mentioned Regulation. However, they saw no need to amend the law, nor grounds to fear that the culprits could escape. They held that the accused could be tried under section 1 of Regulation XIV of 1827, which dealt with robbery. They held that this section was applicable, because, under Hindu law, only a child's parents could sell or barter him away. For any one else to do so was to rob the parents of their property in the child!

In the course of time this case was duly reported to the Court of

Directors. They did not share the optimism of the Sudder Adalat at Bombay. In their dispatch to India dated 6th May 1857 the Directors remarked:

"It is not satisfactory that there should be no legal mode of punishing the crime of slave-dealing, when committed by British subjects, in the territories of the native Princes of India, and the attention of the Legislative Council should be immediately called to the subject".

It is worth noting that many transfers of children were effected by documents.

In November 1858, the Superintendant of Police in Ratnagiri district, Bombay, noted the following case in his police diary. Akeley, wife of Krishna Gowda, made over her daughter, aged two months, to a Kalawant or dancing girl, to be brought up by her, as she, the mother, was too poor to do so. The mother signed a written agreement that "she would have no claim whatever to the child hereafter, and would abstain from interference with it".

The Superintendant of Police asked the Magistrate of Ratnagiri for his opinion of the transaction. The reply was that, while the mother was entitled to hand over her child to anyone she pleased, the agreement she had signed did not nullify her claim to the child, which would have to be returned to the mother, whenever she chose to ask for it. The Magistrate requested the Superintendent to make the mother and the dancing girl sign another document adding this proviso to the transfer.

This case went up all the way to the Governor in Council, and at

one point the Sudder Adalat was asked for its opinion. The court replied that the existing law prohibited the sale of a person, but in this case there appeared to have been no sale. However, the court urged the government to examine the question raised by this case, viz., the sale or donation of children by their parents to dancing girls, Gosawees[6] and others, "who do not adopt as other castes do, but either purchase or receive in gift, children, to bring up to their trade or calling".

The Governor in Council concurred with the view taken by the Magistrate of Ratnagiri, that section 31 of Regulation XIV of 1827 applied to sale of a female for prostitution and not to her transfer.[7] He also agreed with the Sudder Adalat that the whole question deserved to be considered by the Legislative Council. The papers were accordingly sent to the Member of the Legislative Council for Bombay, "so that in the Penal Code being drafted in the Select Committee of the Councils the transfer as well as the sale of a child of tender years may be rendered a penal offence."

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6. Gosawees are a religious sect of wandering mendicants . In those days and even well into this century, devout parents often bequeathed their children to them, to be brought up as Gosawees.

7. This section had been mentioned in the case of Jetha Roopa. Evidently it applied to sale of girls for prostitution within British territory.

However, the Governor in Council was unwilling to interfere with the practice of adoption[8] by the Gosawees. They were a religious sect and there was nothing immoral or prejudicial in this practice. His Lordship in Council had heard no complaints against them. Any interference would be regarded with aversion and suspicion by the populace and in practice it would amount to the extinction of the Gosawees as a sect.

It had been a shrewd move on the part of the Magistrate of Ratnagiri to suggest that Akeley and the dancing girl should sign the second document. This was the only way in which the permanence of the transfer under the first document could have been reduced. The power of the written word over the illiterate mind is indeed great. Its extent was clearly indicated by a memorandum from the other side of India, written by a Judge in the Mymensingh district, Bengal, on the subject of clandestine slavery.

In September 1858 the judge, Mr. Taylor, wrote to the Secretary of the Bengal government, asking him to forward the memorandum to the Supreme Government, if he thought it was necessary.

"The first subject worthy of notice is the continuance of clandestine slavery and the sale of young girls for purposes of prostitution or domestic servitude.

"The practice, notwithstanding the enactment of the law in prohibition of slavery, in undoubtedly prevalent and is carried on under the nose of authorities; the most usual mode of operation is

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8. The Sudder Court had expressly said that the Gosawees did not adopt; so this must be a loose usage of the term 'to adopt'.

the execution of a fictitious bond, in which girls sometimes of ten, twelve or fourteen years of age, profess to have borrowed fifty, sixty or a hundred rupees, sometimes from a Bawd, at others from the person who does her service in the house, the interest of which, it is stated, will be paid out of the wages, which I need not say are fictitious. This bond is held in terrorem over the obligors and the sum named is the price at which they are sold. If the slave absconds or resists the authority of the purchaser, she forfeits the amount. It is to all intents and purposes slavery aggravated by forgery and deceit.

"These bonds, if forfeited, would be brought into our courts and doubtless be served out against the parties. In one instance in a neighbouring district I have been told of a case in which, to render the document more binding, an amicable suit was brought on the bond and the obligor, a girl of fourteen gave in a confession.

"This subject appears to me to demand close and vigorous inquiry; it is commonly reported that these deeds are registered at the Zamindari cutcherries, the Zamindars not only being cognizant of the transaction, but consenting to it, if not 'participe criminis'".[9]

Finally, there were other instances, reported by administrative officers of slavery, in which the higher authorities were unwilling

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9. I.P.C. Papers. Archives of India, New Delhi. Memo enclosed in a letter from a Secretary of the Bengal government to the Member for Bengal on Legislative Council for the persual of Select Committee on the Penal Code. The letter was dated 11.10.1858

to act.

In 1855, the statistical returns of the Revenue department, Bombay Presidency, contained a column marked 'slaves', under the heading of 'Female Inhabitants'. The officers concerned were called upon to explain this particular column.

The acting Superintendant of the Revenue, district of Ratnagiri, said that this category contained concubines and their children.

The Revenue Superintendant of Gujrat, Captain Fanernig, gave a fuller answer; he said that the term 'slaves' was used to denote children, who had been bought from their parents during famines, and who had continued to reside with their purchasers. He added that, while the children were generally bought to prevent them from dying of starvation, female children, not infrequently were bought with 'far less praiseworthy intentions on part of their purchasers'. He observed, using an argument with which we are by now familiar, that the term 'slaves' was wrongly applied to these children, as under British law the condition of slavery could not be enforced in courts. Therefore, of the children who remained with their purchasers "it was to be supposed that they did so of their own free will".

Captain Fanernig suggested that the term 'slave' should be substituted by the following description: "persons for whom money has been given and whose services are rendered gratuitously to those with whom they live"!

The Superintendant of the Revenue department, Southern Maratha country, thought that the term was obsolete, and should not be used

any more. It could only apply to persons, who were slaves before slavery was abolished.

Lt. Cowper, acting Superintendant of the Revenue Survey, Khandesh, replied that the term 'slaves' applied to children bought during famines. He said, however, that the sale was more benevolent than a financial transaction. Lt. Cowper then proceeded to refer to a report made by his subordinate, Lt. Elphinstone,[10] on the subject of slavery. The latter believed, said Cowper, that traffic in human beings was "still carried on to some extent in all Mahratta states; and that rumours, which occasionally reached him, led him to believe that the wealthier British subjects imported slaves from neighbouring princely states, such as Baroda or Hyderabad. Elphinstone had stated his belief that in some of the native states human beings were bought like cattle and fetched about the same price.

The government of Bombay then issued a circular in the Territorial department.[11] In this circular Young, the officiating Chief secretary to the Bombay Government, referred to the replies received from Revenue officials on the use of the word 'slave'. He then proceeded:

"His Lordship in Council has directed that the term 'slaves' be henceforth disused in the statistical Returns referred to above, as it

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10. Not to be confused with Lord Elphinstone, who was then the Governor of Bombay. Lord Elphinstone was the son of the elder brother of Monstuart Elphinstone, who had also been the Governor of Bombay in the beginning of the 19th Century.

11. Dated 19.7.1856 No. 2522 of 1856

implies a condition which cannot exist under British Rule, and that the term 'servants' be substituted"!

The circular ended with a direction to the Revenue department officials to publicise widely the fact that 'dependants', originally purchased, were not obliged to remain with their purchasers longer than they pleased, and that the import of slaves was a criminal offence under Section 30 of Regulation XIV of 1827.

In reply to this circular Reeves, a revenue commissioner (in Souther Maratha Country?) wrote to Young, "I think it right to remind the government that on the Records of the Police Department several reports will be found containing the most conclusive proof that in the Southern Maratha country a traffic in girls, and sometimes in young boys existed only a few years ago, which one at least of the Jagirdars connived at ..."[12]

Reeves said that he would be surprised to know, as was alleged by Lt. Elphinstone, that human beings were bought and sold like cattle within the Presidency, but he had no doubt that girls were kidnapped and sold to prostitutes, and that boys were kidnapped by wandering tribes[13] and sold in distant parts of the country.

Reeves concluded, "This traffic is carried on chiefly in the

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12. This reply is dated 10.7.1856, only one day after the circular was issued. So Reeves must have been in Bombay at that time, or he might have served in Southern Maratha Country at an earlier date, and might have been drawing on his past experience.

13. Reeves mentions the Banjara tribe as an example.

native states and independant villages, where the British laws are not in force, but persons living in British territories directly benefit by it.

"Every establishment of nautch girls[14] is kept up by this traffic, and cannot exist without it."

However when Reeves was asked to suggest how this traffic could be suppressed, he could only suggest that the nautch-girls' establishments should be closed down. This would only have driven the traffic underground, where it would have been even more difficult to locate. Reeves' answer only shows how ingenerate this traffic in young girls was.

Although the Government's decision to delete the term 'slaves' from its statistical returns can hardly be regarded as beneficial to the persons to whom it referred, it was followed by two more commended steps. The first was to ask Lt. Elphinstone to elucidate his comments on slavery. The second, was to ask the Sudder Foujdari Adalat to prepare, if necessary, a bill which would help the Government of Bombay to suppress the traffic in human beings.

Lt. Elphinstone's reply[15] reiterated that there was slavery in British territories, though he admitted that he could not get his informants to give him concrete evidence. His information came from 'labourers and like people'. He found that the more he questioned them, the more vague they became, at times, even retracting their statements,

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14. Nautch girls were dancing girls, and their 'establishments' were brothels. But music and dancing was an important part of their training.

15. Filed on 2.3.1857

"evidently (as it appeared to me), out of fear of perhaps being called upon to make good their statements". Even with the greatest caution, he was unable to elicit from them sufficiently accurate information to establish beyond doubt the importation of slaves into British India.

Lt. Elphinstone gave two instances of such slavery. He was given to understand, he said, that slaves were imported by wealthy residents of Sowda Taluka, from neighbouring states.

He had been told that sales of slaves, both private and public, had been common in Bundelkhand, until the late 1840's and early 1850's. His informant gave him one concrete example. In 1849, one man and two women had been bought for Rs 25, 20 and 15, respectively; they were then taken to Baroda, where, as expected, they had fetched three times that price.

At the beginning of his letter Lt. Elphinstone stressed two points. First, the rumours he had heard left him in no doubt about the importation of slaves into, and the existence of slavery in British territories. Secondly, he had mentioned the rumours with a view to the matter being taken up, should it be thought advisable, "by those, better able than I can be expected to be, to ascertain whether it is indeed true that such things are done, and should it be proved to be the case that slaves are still imported into the British territories, that those who might be found guilty of any such culpable traffic might be duly brought to punishment".

Lt. Cowper, who forwarded this letter, added that in his opinion there was no substance in Elphinstone's charge, based as it was on rumour.

The Governor in Council did not think it necessary to take any action. The rumours were too vague,[16] and the Baroda case too old, for any action to be taken.

As we mentioned earlier, the Government of Bombay had, nevertheless, asked the Sudder Foujdari Adalat whether any laws were necessary to control the traffic in human beings. In early 1857 the court replied that, in its opinion, there was not enough such traffic to warrant a new act being passed. The judges then went on to say: "It would appear from the circular which accompanied your letter that the Government are under the impression that slavery has been abolished by law and that the importation of slaves has been declared illegal, and subjects the purchaser to heavy penalties".

The judges said that the law, as it stood, had been and still was, sufficient to the intentions of the law makers who had framed it. The intention then had not been to abolish slavery. If this was now the intention, it should be recognised as a new intention, and then further legislation would be required.

The last Act on slavery was Act V of 1843. It was entitled "An Act for declaring and amending the law regarding slavery", and it did not abolish slavery. It forbade the sale of a slave in execution of a decree of a court. It provided that no court was to enforce

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16. It is interesting to note that it was only by persistently following equally vague rumours that William Sleeman managed to track down thugs. See Francis Tuker, The Yellow Scarf. passim

the alleged rights of property in the person or services of a slave. It also provided that a slave might own property. It laid down that any act done to the slave would be punishable in the same manner as it would have been if done to a free man.

"As the judges know of only one single instance of the application of this Act in this Presidency, they cannot see that the state of the slave in this part of India has been altered in fact, though it has in law, by this enactment, which, although it may mitigate, does not abolish slavery. Nor does it prohibit the importation of slaves. We fall back then upon the Regulations of 1827, Regulation XIV, Section 30 and the following sections we find to be the law regarding slavery." These prohibited 1) the import of slaves under ten years of age, except in times of famine or immediately after it, without the permission of the Magistrate, and 2) the import for sale of all slaves at all times; they also prohibited the export of slaves without permission, and 4) they declared illegal the retention of all slaves not registered by Magistrates. 5) The sale of a child under ten years of age was prohibited, except in times of famine, when a right of redemption is reserved to the child or parents for ten years after the sale. 6) The sale of a female for common prostitution was also forbidden. But even with these provisions the court found that Regulation XIV of 1827 was a retrograde step; Regulation II of 1813, which had been superseded by the later Regulation, had prohibited the import of slaves, not only for sale but for all purposes. Importation for sale had been prohibited as early as 1805 by Regulation I.

The Foujdari Adalat went on to say that the correspondence before them did not lead them to believe that men, women and children were sold like cattle in the Company's territories, although it was not unlikely that isolated cases of sale of men and women, ignorant of their rights, might occur in those territories.

The Court pointed out that the suggested substitution of the term 'servant' by the term 'slave' would be inadequate. It would only cover concubines, children of kept women, the females purchased[17] before these regulations were passed, and persons purchased during famines. In addition to these, Mr. Reeves had referred to nautch girls, who are purchased and "are slaves to all intents and purposes, but still we never hear any complaints from them of being ill-treated by the Naikeen or others, and we can only wonder at such state of society and the degradation of women, even when the profession is hereditary". These girls would come within the category of servants. But the chellas[18] of Gosawees, who were really slaves, would not be covered by the term.[19]

The other instance where the term 'servants' would not apply was the case of children born to slaves after 1st January 1812. By Regulation I of 1811 all children born to slaves were free,but if they were brought up by their parents' master, they could be compelled to work for him for such number of years as the petty sessions judge

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17. For prostitution, presumably; the court did not clarify this point.

18. Novices or pupils.

19. The judges do not give their reason for thinking that these chellas, though slaves, would not be considered to be 'servants'.

might decide, as being necessary to recompense the master for his expenses in providing for the child. "It would be curious, the judges think, to ascertain while considering this subject, how far that regulation has worked and in how many cases the Petty Sessions have been called to adjudicate within the last forty-four or perhaps thirty-four years, for if the reports are true, there is no part of the country under the Bombay Government in which so many people, ignorant of their rights, live as slaves, as in the Island of Bombay".

Oddly enough, the court did not think it necessary to enquire into the conditions and existence of slavery in the Bombay Presidency, for as the slaves did not complain or otherwise come forward, nothing could be gained from such an inquiry.

For obvious reasons this opinion was sent to the Commissioner for Police, Bombay. He strongly repudiated the suggestion made by the court regarding slavery in the island (rather, the city) of Bombay. He did not agree with them on the existence of such slavery, let alone on the scale surmised by the judges. He said that, while children might be bought and sold, no adult was so unaware of his rights in the city of Bombay as to submit to being forcibly held in slavery against hiw own inclination. On this point Crawford, the Commissioner of Police, might easily have been right.

The sale and purchase of children was another matter. That was common all over India. "At this moment I have in my charge eleven children of Hindu origin, most of whom were sold by their parents to

a Mohammedan Jamedar at Hyderabad.[20] Parents and guardians are known to sell the female children for prostitution, when they have not the means of supporting them or of getting them suitably married. Cases of this nature, I am led to believe, are very rare in Bombay, where it is generally known that such sales are unlawful; and as these children are purchased for a certain purpose, and I presume, not intended to be sold again, the term slave-dealing, in its usual acceptation, does not appear applicable to them.

"In Mohammedan families there are doubtless domestic slaves probably brought here from abroad with their masters or with the members of their families. They are the servants of the house and I am not aware that they are dealt with as slaves by sale or purchase, and I believe that they could not long remain in Bombay as slaves ignorant of their rights. Arab boats frequenting the port[21] are often manned by slaves, who sometimes claim and obtain their freedom.

"Africans, originally slaves, are sometimes brought here from Mozambique and Goa, to be employed as domestic servants in the families of respectable Portuguese, by whom such servants are much prized. But even these soon become acquainted with their rights, and demand, and obtain, their discharge. I am led to believe that the practice is not so prevalent as formerly, owing probably to the

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20. This appears to be a reference to the 'Arab' case. cf. supra p. 381 . The Commissioner was Crawford.

21. Of Bombay.

successful prosecution of a person detected importing Africans into Bombay".

On another point, Lord Elphinstone[22] too did not agree with the Sudder Foujdari Adalat. In a minute the Governor of Bombay said that, contrary to the opinion of the court, Act V of 1843 had abolished slavery, since it forbade slaves to be attached in the execution of a decree against their masters.

Consequently, the matter rested where the circular issued by Chief Secretary Young had brought it. 'Slaves' were to be called 'servants'.

It is too late in the day to discuss in greater detail the merits of the various cases examined earlier in this section. Whether or not the particular culprits could be brought to justice, these cases show that whatever the contents of the Regulations (which did not always cover the matter in hand), their existence did not, by itself, eradicate slavery. Whether or not Act V of 1843 legally abolished slavery, it did not effectively do so.

It is also to be noted that various civil servants, though they might have disagreed about the extent of slavery in Bombay Presidency, did not doubt the fact of its existence. Although Lord Elphinstone dismissed their collective evidence, it would be unwise for us to do so. These were officials who had no cause to

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22. He was the Governor of Bombay; not to be confused with the above-mentioned Lt. Elphinstone, a minor official in the Revenue Department of the Bombay Presidency.

indulge in rumour-mongering for its own sake. The administrative civil servants amongst them were men who had to keep their eyes and ears open, if they were to rule efficiently, and it was no part of their duty to urge that there was cause for concern, if in actual fact there was none. Both the cases which reached the courts and the reports which were made in the due course of administration, therefore, lead us to conclude that up to the eve of the enactment of the Indian Penal Code, there was slavery in British India, certainly in the Bombay and Bengal Presidencies. From the material presented to the House of Commons Select Committee on India[23] in 1833, there is no reason to suspect that slavery, so deeply entrenched in the south, had been eradicated from Madras. The moral to be drawn from the history of the anti-slavery regulations and laws of the East India Company is obvious: unless people are able and willing to claim their rights, laws will seldom protect them in the exercise of their personal liberty. The other moral which should be equally obvious is that mere enactment of laws does not guarantee that the evil they were intended to remedy has been eradicated.

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23. cf. Section III, Chapter I. Moreover, Logan's Manual of Malabar published 1887, sets out of the results of a census taken in 1857 of slaves. Their total number in Malabar was 187,812. See A.I.R. 1918 Mad. 653

SECTION III

Slavery: Some Reported Cases (1871 - 1918)

Our sole purpose in this section is to establish the meaning of the term 'slave', as accepted by the Indian Courts. The word was not defined in the Indian Penal Code, and the definition has only gradually emerged from various cases. The last reported case on slavery to have reached the courts was in 1918, the case of Koroth Mamad and another v. Emperor[1]. In that case all the past decisions[2] in slavery cases appear to have been reviewed, and it seems that the first case involving slavery, decided by a superior court in 1871, was The Queen v. Mirza Sikandar Bhukut.[3]

The following were the facts involved in the case of Queen v. Mirza Sikandar Bhukut. A woman, Parechura, who had been a domestic servant in the house of Mirza Sikandar, kidnapped a girl, Paigya, whose age was between thirteen and eighteen years. Parechura brought the

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1. A.I.R. 1918 Madras 647
2. The decisions after the enactment of the Penal Code became the law of the land.
3. Queen v. Mirza Sikandar Bhukut. No case law was cited or discussed in this case, so it seems probable that this was the first case ~~order of~~ under the Indian Penal Code. This was reported in N.W.P. H.C.R. 1871 at p.146

girl to the house of the appellant Mirza Sikandar Bhukut, and received a small payment in money from his wife, Sooltan Bibi. The girl told the appellant, Mirza Sikandar Bhukut, that she had no parents, but in the trial her mother was produced as a witness. They converted her to Islam and gave her a new name. She was given food and clothes, but she received no wages. She was employed as a domestic servant, and she was not allowed to leave the house. The court was not sure whether her statement, viz., that she had been assigned to Mirza Sikandar's son as a mistress, was true. After living in this household for four years, Paigya, with another girl, escaped from it, and a few days later was found by the police in the company of a procuress, who was taking her to her house to bring her up as a prostitute. The appellant did not inform the police that Paigya had been brought to the house by Parechura, nor did he tell them that she had left the house.

Brodhurst, offg. Sessions Judge, Benares, convicted the appellant, Mirza Sikandar Bhukut, in the alternative of an offence under Section 368, or Section 370, or Section 373, of wrongfully concealing an abducted person, or disposing of a slave, or buying a minor for prostitution. He held that the facts of the case had proved that the appellant could not have been ignorant of the fact that Parechura had kidnapped Paigya, that his failure to inform the police[4] indicated a guilty knowledge of this fact. The learned

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4. Presumably after the girl escaped.

Sessions Judge also found that the appellant must have known that his wife had paid money for the girl. He found the man guilty of wrongfully confining thegirl, treating her as a slave, converting her, and allowing her to be seduced.

The High Court held that the charge was not sufficiently proved under Section 368, but that it was established under Section 370.

In their decision Turner and Turnbull JJ. said, "It is urged that to constitute a person a slave, not only must liberty of action be denied to him, but a right asserted to dispose of his life, his labour and his property. It is true that a condition of absolute slavery would be so defined, but slavery is a condition which admits of degrees. A person is treated as a slave, if another asserts an absolute right to restrain his personal liberty, and to dispose of his labour against his will, unless that right is conferred by law, as in the case of aparent, or guardian, or a jailor. It appears to us that the evidence shows that the appellant asserted a right to restrain the liberty of Musumat Paigya, and to dispose of her labour, and that she was detained in his house as a slave".

In this case therefore, the High Court came to the conclusion that slavery was a condition susceptible of degrees. It was not necessary to establish absolute control over the life, labour, liberty and property of a person. It was still slavery, if a man asserted an absolute right to restrain another's personal liberty and to dispose of his labour against his will.

In the next case on slavery to reach courts was the case of

Empress of India v. Ram Kuar, which was decided nine years later in 1880, the former decision was not followed. The Sessions Judge had followed it and the case had come up in appeal. These were the facts in this case. Ram Kuar obtained possession of a married, eleven year old girl, who was living with her uncle. She told the girl that she, Ram Kuar, would provide well for her and took her 'against her will' to the house of a Jat, Udai Ram. There she sold the girl to Udai Ram's brother, who intended to marry the girl. In return Ram Kuar received a buffaloe and four rupees. She had falsely stated to the man that the girl was also a Jat like him. When Udai Ram discovered that this was not true, he decided to take the girl back to Ram Kuar, and was arrested while doing so.

On these facts the Sessions Judge convicted Ram Kuar. He argued that, "Apparently by this section (370) the traffic in all human beings is prohibited, and when the substance of the transaction is an attempt to give a property in the person and services of a human being, that person is disposed of as a slave within the meaning of this section, whatever force the parties to the transaction may attempt to give it. In the present case it is clear that Ram Kuar took this young girl, who was at the time without protection, and for a consideration disposed of her to a Jat, knowing at the time that the girl was not by caste a Jat but a Gaderia. Her conduct brings her within the meaning of this section".

On appeal, this case was first heard by a single judge, Spankie J., who did not agree with the Session Judge's decision. However, as it was based upon a division bench judgment in an earlier case,

he referred it to a full bench.

Stuart, C.J., said that the learned Sessions Judge had probably been influenced by "What I must call the extraordinary ruling by a bench of this court in the case of the Queen v. Mirza Sikandar Bhukut. He said that, although that had been a stronger case than the present one, it still had been "obviously a case not of slavery but of kidnapping or abduction". The learned chief justice went on to say, "It is exceedingly difficult to understand what is meant by Section 370, Indian Penal Code. That section provides that 'whoever imports, exports, removes, buys, sells or disposes of, any person as a slave, or accepts, receives, or detains against his will any person as a slave, shall be punished with imprisonment of either description for a term which may extend to seven years and shall also be liable to fine". This appears to assume the condition of slavery as a possible fact within the cognizance of the law, but such a condition is as much ignored by the law of this country, as it is by the law of England".

The learned chief justice then proceeded to define the state of slavery. He said, "A slave is a creature without any rights or any status whatsoever, who is or may become the property of another as a mere chattel, the owner having absolute power of disposal by sale, gift, or otherwise, and even of life and death, over the slave, without being responsible to any legal authority. Such is the determinate and fixed condition of the slave, and it is not, as ruled in the above case, a condition capable of degrees".

The passage of Act V of 1843, had however, already repudiated the

status of slavery as he had defined it. Consequently, Section 370 was difficult to follow. It could not have been intended to punish 'the actual accomplishment of placing a human being in the condition of a slave", for that state of a human being had been repudiated by Act V of 1843. "Section 370 therefore can only be understood as directed against attempts to place persons in the position of slaves or to treat them in a way that is inconsistent with the idea of the person so treated being free as to property, services, or conduct, in any respect".

In this particular case the girl Deoki had simply been enticed away for marriage, there was not the 'slightest pretence' for holding that any offence under Section 370 had been committed. Spankie J., who had referred the case to the full bench, continued to adhere to his opinion that no offence had been committed under Section 370 of the Indian Penal Code. In his judgment he referred to some of the anti-slavery legislation in India, viz., Act V of 1843, whose history he traced in some detail.

In the draft Penal Code published in 1837 there had been no provision against slavery. But the law Commissioner's report[5] recognised the fact that slavery existed in India. They said that they were satisfied that there was at that time no law whatever defining the extent of the master's power over his slave. Everything depended upon the disposition and opinions of the particular official in charge of the district and those not only varied from district to district,

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5. i.e. their letter to the Governor-General which accompanied the draft.

but were also sometimes, diametrically opposite. As a consequence of this, the Law Commissioners recommended to the Governor-General in Council that no act falling under the definition of an offence should be exempted from punishment, because it was committed by a master against a slave.

The Law Commissioners added that it might be thought that, by framing[6] the law in this fashion, they were virtually abolishing slavery in British India. Their object was to deprive slavery of those evils which were its essence, and to do so would ensure the speedy and natural extinction of the whole system. "The essence of slavery" quoted the learned judge, "the circumstances which make slavery the worst of all social evils, is not in our opinion this, that the master has a legal right to certain services from the slave, but this, that the master has a legal right to enforce the performance of those services without having recourse to those tribunals".

This recommendation was eventually embodied in Clause 4 of Act V of 1843, which is also known as the Penal clause.

In 1846 the Law Commissioners submitted a report on the Indian Penal Code. In paragraph 435 of this report they referred to Act V of 1843 and observed that the private sale of a free person for the purpose of being dealt with as a slave against his will was not forbidden by law; but, as under the penal clause no person so sold could actually be treated as a slave against his will, it amounted to

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6. i.e. by recommending the manner in which it should be framed.

a virtual prohibition, which might be effectual as regards adults, who could avail themselves of the law, without further provision. As regards children however, the Commissioners suggested that it should be made penal to sell or purchase a child, under any circumstances.[7] This recommendation apparently bore fruit for Sections 370 and 371 were prepared and introduced into the Penal Code.

Looking at Act V of 1843 and particularly at the Penal clause, it appeared to him, said Spankie J., that in this case it would be necessary for the prosecution to show that the prisoner, Ram Kuar, "asserted a right to dispose of the girl's liberty, and, under pretext of her being a slave, sold her as such and to continue such. The case before us does not present any such features. The section therefore does not apply".[8]

Spankie J., observed that the observation of the learned judges in Queen v. Mirza Sikandar Bhukut[9] appeared to him to have gone beyond the scope of Section 370. That section provided for the specific offence of "1) importation and exportation of a person as a slave; II) disposal of a person as slave (and here the presumption is that the act is against the will of the person); III) the acceptation, reception

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7. This was a distinct advance over the judicial opinion expressed in the case of Ameerun (cf. Section II, Chapter IV, p 308 Section II, Chapter V, p 375) where the children's ability to avail themselves of the law was assumed by the court.

8. Empress of India v. Ram Kuar I.L.R. II Allahbad 723 at p. 730

9. N.W.P. H.C.R. 1871 p.146

or detention of any person against his will as a slave, that is it must be shown the act done was done against the will of the person, who cannot be accepted, received or detained as a slave".[10] These conditions were not fulfilled in the case before them, therefore Section 370 did not apply.

Oldfield J., who concurred with Spankie J., and Stuart C.J., in their opinion that Section 370 did not apply to this case, differed from the latter on one point, viz. he held that slavery was a condition capable of degrees. In his opinion, he said the relevant sections of the Penal Code were enacted "for the suppression of slavery, not only in its strict and proper sense, viz. that condition whereby an absolute and unlimited power is given to the master over the life, fortune and liberty of another, but in modified form, where an absolute power is asserted over the liberty of another".[11]

In a later case[12] it was pointed out[13] that there appeared to be a difference between Oldfield J., and Stuart C.J., as to what constituted the offence of slavery; however, the division bench had not considered it necessary to examine it, and that Stuart C.J.'s definition was less narrow and strict. It appears probable to us that the Division bench might not have taken note of this difference

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10. Empress of India v. Ram Kuar at p. 731

11. Empress of India v. Ram Kuar I.L.R. II All at p. 731

12. Koroth Mammed v. The Emperor A.I.R. 1918 MAD. 647 at p.655

13. By Napier J.

for a particular reason: unlike Oldfield J., the learned chief justice had started with a far stricter definition of slavery. Since he considered slavery to be the absence of all status, therefore, perhaps naturally he considered any attempt to impose such a position on another sufficient to constitute an offence under Section 370. Oldfield J., however regarded the state of slavery to be established under less stringent conditions; consequently, perhaps, he held that the state of slavery had to imposed (not merely an attempt to be made to impose it) for the offence to be committed under Section 370. In other words, there was probably not much difference between the two opinions.

Oldfield J., then went on to say why, in his opinion, this case did not come under the purview of Section 370.

"To bring the act of the accused in the case before us within the meaning of Section 370, there must be a selling or disposal of the girl as a slave, that is, a selling or disposal whereby one who claims to have a property in the person as a slave transfers that property to another".

"But the facts in this case do not show anything of the kind; no such right of property in the girl appears to have been set up by the accused. The girl appears to have come under the protection of the accused, when in a state of destitution, and she was given over to Udai Ram in order that she might become his brother's wife, the accused receiving a gratification for her trouble. The facts do not appear to me to constitute an offence under Section 370".[14]

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14. Empress of India v. Ram Kuar I.L.R. Vol II All. 723 at p 731

This case was unanimously dismissed, because no offence had been committed under Section 370.

From this decision it appears to have been established once and for all, that even monetary transactions undertaken for marriage were not to be regarded as a sale of the girl even when the seller was not entitled to her custody.

It is however a little difficult to see why Stuart C.J., should have regarded the decision in the case of Queen v. Mirza Sikandar Bhukut[15] as 'extraordinary'. In that case there was no question of marriage. In this case Stuart C.J., had said that absolute slavery was a condition not countenanced by the law of India, and that any attempt to reduce a person to the position of a slave was sufficient to constitute the offence under Section 370 of the Penal Code. Surely then, in the earlier case the attempt had been made to do so; the girl was converted, given no wages, and not allowed to leave the house. Unfortunately, the remarks of the learned chief justice do not make it clear whether a sale to be a domestic servant did not amount to a sale to be dealt with as a slave.

It is true that in a country where a bride-price is commonly paid by all lower classes and castes, it would be unreasonable, and counter to the facts to consider such payment as a sale of the girl to be slave. But these marriages take place with the consent and in the presence of the families, and they are publicised affairs. The girls are not whisked off and left on the bridegroom's doorstep, as the girl Deoki was, by Ram Kuar. Although Udai Ram did not know

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15. N.W.P. H.C.R. 1871 p. 146

that the girl was not of his caste, Ram Kuar must have known this, having taken her away from her uncle's place, as well as the fact that the girl was married already. Surely then, Ram Kuar's actions do not fall in the same category as say those Deoki's father, when he received the bride-price for her. However the decision taken in this case seems not to have been challenged. No later cases of sale for marriage appear to have been filed under Section 370.

A little earlier we pointed out that, in his strictures on the Queen v. Mirza Sikandar Bhukut[16] the chief justice in Empress of India v. Ram Kuar[17] did not specify whether, in his opinion, sale to be a domestic servant did not constitute the offence of slavery.

This point was again avoided, four years later, in Amina v. The Queen Empress,[18] which was decided in 1884. The following were the facts of the case:-

Bhima, a thirteen year old girl, was enticed away by Supi and Pakir Haji. These men took the girl around the Wynad district, trying to sell her, and they finally sold her to Amina for Rs 25/-

They gave Amina a document acknowledging the payment of Rs 25 by Amina to Supi, in consideration of his transferring all his rights over the girl, his 'vellati' (i.e. slave) whom he had purchased from Pakir Haji. When the complainant discovered Bhima in Amina's house, the latter refused to let the girl go, until her money was refunded to her.

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16. N.W.P. H.C.R. 1871 at p. 146

17. I.L.R. II All. 723

18. I.L.R. VII Mad. 277

Supi and Haji were found guilty of kidnapping the girl, and of selling her as a slave. Amina was convicted of buying the girl as a slave. In the sessions court the assessors told the court that in Malyalam the word 'vellati' meant 'slave'. All the three persons, Amina, Supi and Pakir Haji appealed to the High Court of Madras and their appeals were heard together.

Counsel for the accused put forward three arguments. He said that 1) the word 'vellati' probably meant nothing more than female servant, and that the facts proved by the prosecution in the lower court did not show that Amina had bought the girl for any other purpose than to be a domestic servant.
2) If the offence was held to be proved, it was clear that Amina had acted under a bona fide belief that she was not transgressing the law, and that therefore a nominal punishment was sufficient to meet the case, as there was nothing to show that the girl had not been treated kindly. Finally, it was also argued that in light of the construction placed on slavery by Stuart C.J. in Empress of India v. Ram Kuar[19] the decision of the sessions court was bad in law.

The High Court of Madras upheld the conviction. They merely said that, as the agreement used the word 'vellati' or slave, the

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19. I.L.R. II All. 723. Where the learned chief justice had said that in the Queen v. Mirza Sikandar Bhukut the girl had been kidnapped or abducted, not sold as a slave, when she too had been employed as a domestic servant.

transaction fell within the scope of Section 370. Learned counsel had implied that there was such a thing in law as buying a household servant. This implication was not examined. Nor was the decision of Stuart C.J. in the earlier case distinguished.

In view of the plea that Amina had acted in bona fide belief in the legality of her action, they reduced her punishment to the period of imprisonment she had already undergone (three months). At the time of the hearing Amina was on bail, pending the disposal of her appeal.

This brings us to the last case on this subject. This was the celebrated case of Koroth Mamad v. The Emperor[20], which was decided in 1918. The conviction by the sessions judge was upheld by Napier and Ayling J.J., Abdur Rahim J., dissenting.

The facts of the case were summed up by Abdur Rahim J., thus. Accused No. 2 was found to have sold a Pulayan named Vellan, and accused No. 1 was found to have bought Vellan, as a slave. The case came from North Malabar. The two accused were Mapillas and Vellan was a Cheruman, a caste which, before Act V of 1843, occupied the position of serf, or 'rice slave',[21] in Malabar. The transaction between the two accused was witnessed[22] by a document (Exhibit B) executed by the seller, in favour of the purchaser. Exhibit B. read:

"I execute to you and give to you today, 27th Melam 1088[23] (this)

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20. A.I.R. 1918 Mad. 647

21. i.e. they were paid entirely in paddy for their labour.

22. The learned judge uses the verb 'evidenced'.

23. The date by a local religious calendar.

jenmam deed giving you Vellandi's son, Pulayan Kurungot Parkum Vellan, with his heirs. The sum that I received from you in cash today is Rs 10-0-0. For this sum of rupees ten, you should get work done by you by the aforesaid Vellan and his offspring that may come into being as your jenman, and act as you please."[24]

The word 'jenmam' meant property. Had the word stood alone, said the learned judge, it might have implied that the two accused were dealing with Vellan as a chattel. But the document showed, he continued, that the nature and object of the transaction was that the accused No. 1 was to get work done by Vellan and his offspring. Did this amount to a sale of Vellan to be dealt with as a slave? Abdur Rahim J., said that in answering this question the 'consciousness and conduct' of Vellan himself was relevant; he was an adult at the time of the transaction, and had been born and brought up in British India. The inference drawn by the learned judge was plainly that Vellan would know his rights and would not be forced into something against his will, when the law was on his side.

The word 'slave', said Abdur Rahim J., was not defined by the Indian Penal Code. Webster's dictionary however, defined it as 'one who has no freedom of action, but whose person and services are entirely under the control of another'. Under Roman law the slave had no status, i.e. he had no rights whatever; he was quite simply his master's property. But even under that law, the concept of slavery was gradually modified, and the master's right to destroy

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24. A.I.R. 1918 Mad. 647 at p. 648

his property, was not recognised, if the property in question was a slave; considerable protection to the life of a slave was given by various Roman laws. In Mahommedan law the slave had the same rights to the protection of his person and his life as a free man. His slavery consisted in the fact that he could not own any property at all. All he earned or acquired belonged to his master.

"In my opinion therefore", said the learned judge, "the statement in Empress of India v. Ram Kuar[25] which is cited with approval in Amina v. Queen Empress,[26] that Section 370 and the cognate sections of the Penal Code, were enacted for the suppression of slavery, not only in its strict and proper sense, viz. that condition whereby an absolute and unlimited power is given to the master over the life, fortune and liberty of another"[27] is correct. The minimum requirement of the status of slavery would thus seem to be that absolute power should be asserted over the liberty of the slave, and on his personal services. As observed by Stuart C.J., in Empress of India v. Ram Kuar "the actual accomplishment of placing a human being in the condition of a slave could not have been contemplated ... Section 370 therefore can only be understood as directed against attempts to place persons in the position of slaves, or to treat them in a way

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25. I.L.R. II All. 723 (1880)

26. I.L.R. VII Mad. 277 (1884)

27. Citing Oldfield J., in I.L.R. VII Mad. 277

that is inconsistent with the idea of the person so treated being free as to his property, services or conduct, in any respect."

Abdur Rahim J., then proceeded to say that in his opinion the facts[28] in this case did not prove that such an attempt had been made with Vellan. The evidence showed that Vellan lived with his mother and stepfather on land, which belonged to neither of the two accused, but belonged to a third person. Neither of his parents (this includes his dead father) had ever been treated as slaves. His father had worked for accused No. 2 as well as for others. There was no suggestion that Vellan, who had started working for accused No. 2[29] about three years before the date of Exhibit B, had been bought by him, or in any way received from his (Vellan's) parents[30] or anybody else, as a slave. There was evidence to show that, before the date of Exhibit B, Vellan had sometimes worked for other employers and received daily wages, which he was free to spend as he chose, though during the three years before Exhibit B, he had worked practically exclusively[31] for accused No. 2. Vellan got married, and borrowed money

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28. i.e. the facts which were accepted by the lower court as having been proved, and which he therefore accepted as such.

29. i.e. the man who sold him to accused No. 1.

30. mother and stepfather.

31. This is not clear. A couple of sentences earlier the opinion reads that Vellan had started work for the accused No. 2 three years earlier. This means that all the time the accused was Vellan's principal employer, he employed Vellan almost exclusively. He was less free than this statement implies.

for this and other purposes, which he repaid from his earnings. He admitted that his wages from accused No. 2 were a measure of paddy a day, which was the usual payment for cherumar labourers.

The learned judge held that the following facts proved that Vellan was not treatdd as a slave.

"The payment of prevalent wages to Vellan would in itself indicate that the relation between him and either of the accused was not that of a slave and master. There is the further fact that, just before the execution of Exhibit B., accused No. 1 had agreed to lend Vellan Rs 8. Even after the execution of Exhibit B., Vellan continued to live with his mother and stepfather, and was paid daily wages by his new master, accused No. 1. These facts make it clear that neither of the accused nor Vellan himself ever thought or intended that Vellan was or should be incapable of acquiring property or of entering into contracts, and that both accused No. 1 and accused No. 2 treated Vellan as if he was fully possessed of such capacity. The evidence of Vellan himself shows that he received wages from accused No. 2 only on the days on which he worked and accused No. 2 never made himself responsible for his maintenance for the days that he did not work or could not work owing to sickness. It may also be presumed that this state of things continued when Vellan worked under accused No. 1. All these facts indicate that accused No. 2 and after the date of Exhibit B., accused No. 1, never understood that they were in any way responsible for the lodging and maintenance of Vellan, which would have been the case, if Vellan stood in the

position of a slave".[32]

As to Vellan's liberty of movement, it was understood that, so long as he worked for accused No. 2, or accused No. 1 after the execution of Exhibit B., he was not at liberty to work for another man, without his employer's consent. Both when he worked for accused No. 2 and accused No. 1, Vellan had occasionally obtained their permission and worked for other men. Accused No. 2 had once even permitted him to go to Wynad to work, and there was no suggestion that he had claimed a share in Vellan's earnings.

"The legal relation, which the parties thought subsisted between them, was that of employer and labourer, and I do not think it makes any difference in this respect that, during the time Vellan worked for accused No. 2 or accused No. 1, both Vellan and his employer thought that Vellan was not at liberty to work elsewhere without the consent of accused No. 1 or No. 2".

Abdur Rahim J., pointed out that such contracts for personal service, although not specifically enforceable, were legally valid, and if they were broken without sufficient reason, the promisee

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32. Contra the Report of the Select Committee of the House of Commons, 1832, in which this was a ground of complaint against the slave-owners, not proof of the slave's independance! The Company's officials testified that slavery in Malabar of the agrestic slave was particularly bad; the masters owned them, but did not look after them in their old age or when sick. And they were paid almost nothing - i.e. a measure of paddy - when they did work.

(i.e. the master)would be entitled to sue for damages.

The relationship, being established by Exhibit B between Vellan and accused No. 1 was only one of master and servant. Evidence produced by the prosecution showed that Cherumas hereditarily worked for the same family, and did not leave them for another without prior permission. Domestic servants in India frequently work for the same family for generations, and, as the learned sessions judge had pointed out, it would be ludicious to say that they were slaves.

In other words, Exhibit B., was only a contract for service, and the deed, which mentioned Vellan's children, only sought to establish the traditional relationship between master and servant.

Vellan had put his mark to Exhibit B., and Abdur Rahim J., said that he must have known the nature of the transaction to which he was giving his consent. This transaction, the learned judge was convinced, was intended only to transfer the services of Vellan. It seemed to him 'that nothing more was intended than a transfer of the right to the personal services of Vellan and his children, which accused No. 2 thought or pretended that he had'.

This last sentence is an echo of the line of argument adopted in Ameerun's case, by the Sudder Nizamat Adalat, in 1856, where the non-existence of a right was regarded as implying that no compulsion could be brought to bear on another or no illegal act could be performed.[33] This sentence casts doubts upon the right of accused No. 2 to transfer Vellan's services to another, and at the same time it implies

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33. I.L.R. VII Mad. 277 (1884)

that there was nothing wrong about such a transfer.

In the case of Amina v. The Queen Empress,[34] the word 'vellati' or 'slave' was used in the document. This was not the case here. Abdur Rahim J., said that, in his opinion, the accused evidently never thought of the transaction as a sale, for they started proceedings on the basis of it,[35] and in fact a pleader was found to argue it. Should a labourer or a domestic servant be tied up by his master, the latter would be liable to prosecution for wrongful restraint and wrongful confinement. But such 'high-handed proceedings' did not prove that the master had treated the servant as a slave.

Napier J., who disagreed with Abdur Rahim J., held that Vellan had been treated as a slave. Exhibit B, a jenman deed,[36] gave accused

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34. See supra pp. 414 et seq

35. From cross references it appears that when Vellan refused to work for accused No. 1, he started a case against accused No. 2, the man who had sold Vellan to him. The District Munsif of Quilandi, before whom the case was brought, dismissed it as illegal, immoral and against public policy. Presumably the police then prosecuted the two men under Section 370 I.P.C.

36. "I execute to you and give you this day jenmam deed giving you Velendi's son Vellan with his heirs. The sum that I received from you in cash today is Rs 10. For this sum you should get work done for you by the said Vellan and his offspring that may come into being as your jenmam, and act as you please". A.I.R. 1918 Mad. 647 at p. 651

No. 1 Vellan and his heirs 'offspring that may come into being' as his jenmam, or property.

The operative words in this deed, said the learned judge, were jenmam, heirs, and offspring. The document could only mean the grant of Vellan and his heirs to the grantee and his heirs in absolute ownership. The grant was not of his services, but of the man himself and his heirs. The provision for getting work done was only a secondary clause.

Napier J., did not think that slavery, as contemplated by the Indian Penal Code, meant absolute control over the slave's liberty.

In Act V of 1843, the term 'slave' was not defined. That institution could be seen in operation in the United States and it had only very recently ceased to exist in certain British colonies. It was plain that slavery existed in so many forms, that it was not thought advisable, said Napier J., to include any definition of the word 'slave' in it. This act provided that slaves should have a right 'to hold property and to be protected by law'. It did not make a private sale of a human being an offence.

That is to say, a slave's right to his property was recognised before his right to his liberty. Therefore, if one took away a man's right to property, one dealt with him as a slave, even though one might not have deprived him of his liberty absolutely.[37]

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37. Obviously by depriving a man of his property one deprived him, to some extent, of his liberty as well, although not absolutely.

"It is therefore clear to my mind", said the learned judge, "that the word 'slave' in the Penal Code does not connote anything more than a right to property in the person, a right to retain his services, and a right to dispose of his person and his services. These conditions are dealt with by the Penal Code with the effect that slavery, as then existing in India, was made illegal. That being so, it cannot, I think, be disputed that this document, if taken by itself, offends against the provision of this section and the parties to it would be guilty of the offence".

It had been urged that it was necessary not so much to look to the language of the jenmam deed as to the intention of the parties, which was to be gathered 'from the conditions which prevailed'. From these too, the learned judge came to the conclusion that the transaction was an offence under Section 370. The learned judge then proceeded to examine both the events which led to the execution of Exhibit B., and to scrutinise the general social condition of Cherumas in Malabar.

Vellan had borrowed Rs 8/- from accused No. 1 before he was sold to him by accused No. 2. Exhibit A was a document executed between Vellan and accused No. 1, setting out the terms of the loan. The interest on the loan was to be paid by him by working for accused No. 1, who would give him (Vellan) a measure of paddy a day for his maintenance. Vellan was bound by this document to build himself a hut wherever accused No. 1 might direct him to do so, and do such work as he might be required by the lender to do. As the learned judge put it, the value of one month's wages in paddy was

Rs 1-10 as. "There is obviously no room under this document for his working off the amount of the debt, with the necessary result that, unless he can get a sum of Rs 8 elsewhere, he must remain with his master[38] for the rest of his life". Small wonder, we feel, that accused No. 2 should transfer or sell Vellan to the other man: he himself had no hope of getting any work out of Vellan, unless he paid up the eight rupees himself.

Although Napier J., did not mention Abdur Rahim J.'s opinion that Exhibit A showed that Vellan, like any free person, could borrow money on his own credit, the former proceeded to deal with it. It was significant, the learned judge said, that under Document A Vellan's wages were to consist, solely of a measure of paddy. The word 'Pulayan' in Malyalam meant 'outcastes' and 'caste of rice slaves'. Logan's Manual of Malabar, published in 1887, set out the history of the Pulayans, a subcaste of the Cherumar, who were agrestic slaves, paid solely in paddy. Logan said that in 1887.

"There is reason to think that they are still, even now, with their full consent, bought and sold, and hired out, although of course the transaction must be kept secret, for fear of the penalties in the Penal Code".

Napier J., said that, in his opinion, this is what had happened in this case. Vellan had been sold, albeit with his own consent. That is to say, he did not agree with Abdur Rahim J., that, since Vellan had signed the document, it could not have been a sale of his

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38. i.e. accused No. 1 who lent him the money.

person, but only a transfer of the right to his services.

The other evidence showed that, when Vellan refused to work for accused No. 1 the latter tied him up to the leg of a cot. This was not treating him as a free person. The light in which he saw Vellan's relationship with himself is explained by his remark to a witness that "I tied him up because he does not come and work for me".

The treatment of Vellan, the terms set out in Exhibit A., and the history of the Cherumars in Malabar all showed that there was every reason to suppose that Exhibit B., which sold Vellan and his 'heirs' in a 'jenmam' deed, meant exactly what it said. There was nothing in the social conditions to indicate that, whatever the actual words of the deed, the intent was different.

As the two judges had come to diametrically opposite conclusions, the opinion of a third judge was required. Ayling J., who dealt with it, agreed entirely with Napier J. He said that the appellants had argued that, as Vellan was free to work for others, provided he had his master's consent, he was not a slave. This mildness on the part of the master lasted only so long as it suited the master, for when Vellan executed Exhibit A., with accused No. 1, on terms so stringent that accused No. 2 had no hope of getting any work out of him without first paying off the loan, he straightaway sold him to the man who had lent him the money.

The irony of the whole proceeding, as we see it, was that poor Vellan never even received the eight rupees he had attempted to borrow under Exhibit A., in order to pay off other debts. Those eight

rupees plus an additional two rupees, were given by accused No. 1 to accused No. 2; Vellan was left with his old debt and a new master!

After the deed, Exhibit B., was executed, accused No. 2 said to Vellan, "I have no more right in you". Vellan's evidence showed that accused No. 1 said to him "My fine fellow, I have bought you in jenmam". Vellan said, "I don't understand what you mean." Accused No. 1 said, "You don't understand because you are uneducated".

Ignorance of law is no defence, and the two accused were duly convicted (i.e. their conviction was upheld), by the Madras High Court.

The line of reasoning adopted by Abdur Rahim J., recalls the line taken by the legislators of the East India Company over issues like slavery or Suttee. The fact that a particular state of affairs had existed for a long time was taken to mean that people acquiesced in it and that it constituted no injustice. And the fact that a person was an adult (as Vellan was) was taken to mean that he knew his rights and also that he would defend them.. However, this reasoning was rejected by the other two judges, who preferred to examine things somewhat more closely.

So, the law on slavery in India stands where Koroth Mamad v. Emperor,[39] has brought it. It is an offence under Section 370 to buy and sell a person as a slave even with his consent. Secondly, slavery is not only absolute control over liberty; it connotes a right to property in the person, a right to retain his services, and a right

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39. A.I.R. 1918 Mad. 647

to dispose of his person and his services.

The other question, whether the sale of a woman for marriage amounts to slavery or not, rests where Ram Kuar v. Queen Empress[40] had left it. In that case it had been decided that such a sale did not amount to slavery.

No subsequent cases regarding sale for marriage have been brought under Section 370. Even where money is alleged to have exchanged hands, proceedings have been instituted under Section 366 of the Penal Code.[41]

Finally, we wish to draw attention to a point made by Napier J. He had drawn attention to Logan's statement, made in 1887, that sale of slaves with their consent still took place in Malabar, although in secrecy, in order to avoid the penalties in the Penal Code. At the end of his judgment the learned judge again made the same point when he said that he was satisfied that Exhibit B., "only puts on paper the general practice of dealing with these Pulayans".

In other words, nearly sixty years after the enactment of the Indian Penal Code, adults continued to be brought and sold with their own consent, such was the state of their ignorance, or of their helplessness, or, indeed, of both.

The fact that no cases such as this one, are brought by buyers and sellers of slaves against each other, is therefore, by itself no indication that sale of human beings has ceased in India.

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40. I.L.R. II All 723 (1880)

41. This Section deals with abduction or kidnapping with intent to coerce into marriage.

The strictures passed by Napier J., would, at the very least, have discouraged lawyers from advising their clients to institute more proceedings to enforce documents transferring rights of personal service. He had said, "I have no doubt that accused Nos. 1 and 2 believed that they were exercising their lawful rights. This is indeed proved by the fact that accused No. 1 actually brought a suit against accused No. 2 on this document,[42] and, what is still more extraordinary found a pleader who was prepared to appear for him".

Whether or not slavery still exists in India is not a matter which can be decided merely by reference to law reports for the lawyers would take care of that line of investigation.

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42. Exhibit B., i.e. the jenmam deed, selling Vellan to accused No. 1

CHAPTER VI

SECTION I

Slavery in Modern India

Introduction

In the previous chapter we examined some cases of slavery in India, both before and after the Penal Code was enacted. In our examination of the cases which took place after 1860, we noted the definition of slavery that was arrived at by the Courts, or rather, what the Courts regarded as constituting the offence of trafficking in slaves, or treating human beings as slaves. The decision in the last reported case to reach the Indian Courts[1] shows that it is an offence under Section 370 of the Penal Code to sell a man, even with his consent. Secondly, this decision also shows that slavery is not only absolute control over a man's life and liberty. It connotes a right to property in the person, a right to retain his services, and a right to dispose of his person and his services.

In the following sections we shall try to show that slavery in this sense of the word, is yet to be eradicated from India.

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1. Koroth Mammad v. The Emperor A.I.R. 1918 Mad. 647

SECTION II

Slavery in Bombay

This section draws exclusively upon a book published in Marathi in 1970,[1] by a woman who played a major role in the liberation of these tribal people, who were in a state of virtual slavery. The Varlis are a caste amongst the tribal people, who inhabit certain parts of the district Thana, which is at a distance of approximately sixty miles from the city of Bombay. They live in the talukas[2] of Umbargaon, Dahanu, Palghar and Mokhada. In 1970, they numbered a little more than two hundred and fifty thousand, and constituted fifty per cent of the total tribal population of that region. Although the Varlis were the most active in this liberation movement, they were only a fraction of the people who benefitted from it. This movement occupied the author, her husband and their comrades, from 1945 to 1947.

At the beginning of her book Mrs. Parulekar gives a brief history of the Varlis and other tribal people who lived in this region.

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1. Godavari Parulekar, Jevha Manus Jaga Hoto or When Man Awakes Mauj Publications (1970).
2. A taluka is one of the divisions of a district, made for administrative purposes.

She says that about one hundred years ago[3] the Adivasis or tribesmen owned all the land in this area. After the British opened up the region, the high caste Hindus, the Muslims and the Parsis, who were all traders, entered it to trade. Gradually they took advantage of the illiterate, ignorant and trusting tribesmen, and took possession of their land by fraud and deceit. At times they resorted to violence and torture. Speaking in the Legislative Council of Bombay on 25th September 1939, Mr. Morarji Desai, who was the Home Minister and the Minister for Land Revenue, made the following statement:

"In these tracts like the Bhil tracts in Khandesh district or in the Thana district, ... some years back all the land was held by these people (the Varlis) but in bad times, during the famine or scarcity times, the lands passed from their hands into the hands of the sowcars[4] for triffling amounts. There are instances in which land has been parted (with) - some acres of land - for five pounds of grain and in some cases at the rate of five rupees an acre, or a rupee per acre, or eight annas per acre".[5]

Although the middle class traders seized the land, they still

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3. She does not specifiy whether the hundred years start from 1845 or 1870, but in either case the British were well established in the region in 1845. Moreover, Act V of 1843 had also been passed and applied there.

4. i.e. moneylenders. The moneylenders were also landlords.

5. This speech was in English. Parulekar, op. cit. p. 2

needed the Varlis to cultivate it for them. And, having lost their land, the tribesmen needed wages to live on. "Out of this situation", says the author, "the system of agrestic slavery, forced labour, and inhumanity to the tribesmen was created".[6]

The new land-lord would allow the tribesmen to occupy small, inferior-grade, pieces of land as his tenants, and in return he would extract from them free labour on the land he had kept for himself. In Marathi forced labour is called Veth, and the man from whom it is taken is called Vethya. Such people were generally addressed or referred to by the landlords as Vethyas, not by their names.

In 1939, the Government of India appointed a one man commission, Mr. D. Symmington, a government official to inquire into the condition of the tribesmen. His report called "A Report of the Aboriginal and Hill Tribes" was published in 1939. In this report Mr. Symmington said that Veth was not particularly different from slavery.

Even the produce of the small piece of land allotted to him as a tenant did not belong entirely to the tribesman. When giving him the land, the landlord executed an agreement[7] with him, according to which the tenant had to give the landlord half or a greater, share of the crop. Out of fear of losing his tenancy, which was of course, totally insecure, the Aboriginee accepted

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6. Parulekar, op cit. p. 2 my translation.

7. Called 'Kabulayat'

these terms, in addition to rendering free service on the landlord's land. Not only that they were also made to work in the forests, cutting grass and felling trees!

The forests belonged to the state; but every year the government of Bombay sold to the highest bidders, the right of cutting grass and trees. This meant that the Forest department did not have to worry about hiring labour, or selling of wood or haymaking. Rights in such matters were bought by the landlords.

In many ways the situation of these tribesmen was similar to that of the Cherumas, or rice slaves of North Malabar.[8] In the morning, when a bell was rung, they had to go to work on the landlord's estate, until lunch time. For lunch every individual, man and woman, was given enough paddy for himself. They had to pound it to separate the rice from the husk, cook it, eat it with salt, and return to work, which lasted till sunset. This was their only food. They supplemented it with roots, tamarind leaves, and the flowers of the Mahua tree, when in season, all of which they gathered in the jungle.

During the rains, and before, when the land had to be ploughed the Varlis were forced to spend most of their time working on the landlord's estate, sometimes without a break for a meal or even a drink of water.[9] Their own neglected fields naturally produced

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8. See Section III of this Chapter, and the judgment in the case of Koroth Mammad v. The Emperor A.I.R. 1918 Mad. 647. pp 428 et seq

9. Parulekar op cit. p. 22

little, and after the landlord had claimed the lion's share of that yield, the remainder was too little to maintain a family till the next crop. Consequently they had to borrow rice or paddy from the landlord. Heavy interest was charged on this also; for every sack of paddy borrowed, the tribesman had to return one and a half sacks and sometimes two or even three sacks filled with paddy. Such a loan was known as Khavti, and was yet another fetter which a landlord could impose on these tribesmen.[10]

Day in, day out, they worked on the master's land. They had no holidays, no leisure. Instead, the landlord wielded a whip, which was usually displayed on his verandah.[11] Other, equally brutal methods were used by his henchmen, in the fields[12] and the forests.[13] The adivasis knew of no other existence, no other world. Their lives were totally encompassed by the commands of their master, and by the daily grind in their villages.

In his report Mr. Symmington had this to say about the tribesmen of Thana district, "The conditions under which the jungle tribesmen work and live are wretched in the extreme, and abuses to which they are subjected constitute a blot on the administration".[14]

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10. ibid, p. 71

11. ibid, p. 40

12. ibid, pp. 39, 40, 42

13. ibid, p. 81

14. Parulekar, op cit. p. 4 F.N. 4

Similarly the Adivasi Seva Mandal, an organisation which looked after the welfare of the tribesmen, said in one of its circulars, "The fact that such a big mass of humanity should be rotting in a condition of life more debasing than that of slaves within fifty miles from Bombay and that our citizens should be in complacent ignorance about their hardships and tortures is certainly disgraceful".[15]

Some of the landlords were educated people. The Parsis amongst them, in particular, had been abroad, one of them was a member of and English Inn of Court and was an honorary magistrate. None of them behaved differently, or failed to exploit the tribesmen whom they called Vethya, or forced labourers. The only difference was in their style of living. The Hindus did not eat meat, the others did; those landlords who had been abroad had adopted a more western style of life, the others remained more traditional.[16]

Amongst the Vethyas there were a group of men called marriage-servants.[17] These were men who had taken loans for marriage expenses, of about one hundred to two hundred rupees. In return they had to work for the moneylender. This arrangement was so ordered that a couple could never become free of their debt, which was then, by written agreement, passed on to their children.[18] The

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15. ibid. p. 4 F.N. 5

16. Parulekar, op cit. pp. 32-35

17. The Marathi term was Lagna-gadi.

18. Parulekar, op cit. ib. 7

Thana Gazeteer described their plight in the following words:

"Under the Marathas many of these tribes had been the bondsmen "of the Pandharpeshas or high caste villagers. The name of "bondage ceased with the introduction of British rule. But with "many of the more settled[18a] of the wilder tribes, the reality "of slavery remained and nominal freedom only served to bring "them under new and harder masters. Formerly their masters used "to pay their marriage expenses. Now they had themselves to find "the funds. And as almost none of them had the necessary forty "or fifty rupees, most of them had to pledge their labour for a "term of years. This term of years through sowcars'[19] carelessness "and the lenders' craft often developed into life long and sometimes "into hereditary servitude".[20]

When Mrs. Parulekar entered this field, the amount of loan had increased and the term of servitude had become indefinite. And it still developed into "life long and sometimes hereditary servitude".

The couple received no wages. For a year's work a man would receive a shirt, a loin cloth, and perhaps a turban. His wife was

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18a. i.e. not nomadic

19. i.e. moneylenders

20. The Thana Gazeteer, Parulekar op. cit p. 74

given a brief sari[21] and a blouse. Some moneylenders gave the man a little tobacco. For food they received paddy, occasionally some pulses or lentils. Their possessions - really the husband's - were an earthern pot and a small piece of cloth. The first was for carrying water and for cooking, the cloth was for universal use, and was more like a duster.[22]

The landlords generally had two establishments. One in the town and one on their estates or land. Some landlords separated the marriage-servant from his wife and generally treated the woman as a concubine. The wives of the tenants, i.e. the Vethis with land to their name, were also regarded as the landlord's property. The latter did not think it was wrong to molest or assault these women. The aboriginees told the author that, while they knew what was happening, they were powerless to stop it.

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21. It was never the full nine yards worn in Maharashtra, but anything between 4 to 5 yards. For lack of money the Vethis who had their strip of land and who had to buy their own clothes, also bought as many or as few yards of cloth as they could afford. It often meant that the women were bare above the waist. See Parulekar, op cit p. 30

22. The meaning of the Marathi word phadke approximates to a duster, though under these conditions it is not to be supposed that the cloth was used for dusting, or for any one purpose.

The landlords and the forest contractors, (who were after all the same people; they were also moneylenders, and were commonly referred to as such by the tribesmen) fathered large numbers of children on these hapless women. So much so that the children of non-Hindu Zamindars, born to these women, formed a separate caste. They were known as Vatla. In Marathi the verb for conversion to another religion is Batla. The caste name derives from this verb.[23] The progeny of Hindu Zamindars was, as goes without saying, equally numerous.[24]

In his report Mr. Symmington remarks, "Landlords will not scruple to use their power in fulfilment of other purposes, for instance, in the case of their tenants, womenfolk for the gratification of their lust".[25]

Unlike the Vethis, who worked on the land, the marriage-servants and their wives seem to have been employed exclusively in the houses of the moneylenders.[26] The author gives a list of their duties, which is by no means exhaustive. Cleaning, sweeping,

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23. Batla is the past tense of the verb Batnay
24. Parulekar, op. cit. p. 41
25. Parulekar, op. cit. p. 45
26. This might have been because they were given no land at all. The others were expected to live off their strip of land, the marriage servants did not even have that.

washing clothes and utensils; fetching water from the well; cleaning the cowshed, milking; looking after the lamps; cooking, pounding grain; cleaning lavatories; carrying weights on their heads or backs for as much as ten miles; grooming the horses, and running behind the master's carriage or mount!

The author asked these men why they put up with such inhuman treatment, particularly when their wives were ravished. The answer she received is most illuminating. They replied with a counter-question; where were they to go? 'They beat us up and bring us back! If a marriage servant runs away, he must find work elsewhere and if his new master heard that he had run away, he would send him back, with his mouth tied up,[27] to his first master, who would send men out in search of the runaway. When found he was beaten up, brought back, and would receive another thrashing. Not only that, but his parents and other family members were also punished. They were asked why their son had run away, beaten, and asked to return the money. All in all, it was impossible to run away successfully, or indeed with a clear conscience, if one's parents were going to suffer for it. About this Mr. Symmington said,

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27. During the Maratha rule this was a way of inflicting shame and ignominy on a thief, or a criminal. He would be taken through a public place with a cloth covering up his jaw in such a manner that he could not speak. This is called Muskya Bandhanay.

"If the debtor is slow or recalcitrant in making payments or rendering services, he is threatened, assaulted or beaten up by sowcars' agents who are often Pathans or Bhaiyyas.[28] A man refusing to give his work, for which he has taken a loan, is sometimes improperly prosecuted, and I regret to say that the Magistrates have sometimes taken a strangely perverted view of such prosecutions".[29]

The marriage-servants had learnt by bitter experience that they could not win their freedom individually by making isolated attempts. After the movement of the Vethis or agrestic labourers had gained strength, they resolved to liberate their brethren the marriage servants. They passed a resolution to this effect at a large meeting; they then divided themselves into four companies and went around the district, visiting one landlord's house after another, calling upon the marriage servants to come out and join them. Their cry was, "Take your pot and your duster, come out and be free".[30] For three days these companies scoured the

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28. A Bhaiyya is a north Indian from Uttar Pradesh. Both the Pathan and the Bhaiyya would be outsiders, with no ties or sympathies with the Aboriginees, whose language they would not speak. Consequently they would be quite happy to use force on them. They were often professional gangsters.

29. Parulekar, op cit. p. 77.

30. As we explained on p.439, these were a marriage servant's sole possessions. There is a psychological finality about leaving with one's belongings. It is a way of declaring "now we owe each other nothing".

district and the author says that hundreds of marriage-servants joimed them. The Zamindars hid themselves behind locked doors, so, without violence or force, these men achieved their freedom. The author makes it clear that this resolution and the action the followed upon it was entirely due to the initiative taken by the Varlis. She and her colleagues could take no credit for it. This liberation movement came in 1947.[31]

In 1942 Mrs. Godavari Parulekar and her husband, Mr. Shyamrao Parulekar, who were members of the Communist Party,[32] decided to work amongst the peasants of Bombay. Three years later, in 1945, they felt confident that they could hold a conference of the Maharashtra Kisan Sabha, and they chose Titvala, in Thana district, as the place to hold it. Consequently they went round all the talukas of Thana district, asking people to come to this conference. On this tour they came across the tribesmen, and decided to work amongst them.

A few Varlis had come to the conference, where it was resolved that the Varlis should stop giving Veth, that is forced labour. These delegates returned with the Party's flag and

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31. Parulekar, op cit. Chapter VII, pp. 77-78

32. We are not concerned with the Communist Party or its ideologies, in this thesis. We have mentioned this fact because of later government action against the movement. See infra pp. 454 - 458

refused to work without pay. Immediately the landlords sought to repress them and the Varlis sent for help. Mrs. Parulekar, who was her husband's trusted assistant, went into the area with another comrade, Mr. Dalvi. She was an urban middle-class woman, with no previous experience of the tribesmen; and she had worked amongst the peasantry elsewhere for only three years.

Mrs. Parulekar and her companion Mr. Dalvi went to the village of Talasari.[33] In 1945 there was a ban on meetings in public places, so the meeting was held in a cottage. No sooner did the assembled Varlis pin up the red flag and sit down, than the moneylender's agent, the Bhaiyya, arrived, with a thick stick in his hands. He was accompanied by the Talathi,[34] a minor land officer, who was then staying with the moneylender. These two men walked through the assembly, came right up to the two speakers, and sat down besides them, facing the Varlis. The Bhaiyya banged his stick on the ground and laid it prominently in front of himself.

The significance of this was not lost on the Varlis. They realised that these two men had come to keep an eye on them.

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33. Parulekar, op cit. Chapter II

34. He surveys land and is therefore very powerful in rural areas. In land disputes his testimony is very important, so the cultivators are anxious not to offend him.

Mrs. Parulekar writes, "I told the Talathi that he was a government servant, and he had no right to attend a private meeting without a government order. Upon this the Talathi looked at the Bhaiyya. I then told the Bhaiyya that he could not attend a private meeting in a private house without our permission. I said to them, "I know very well why you've come. Don't stay here. Go about your business; leave us to ours. Why have you brought this stick? Are you frightened or are you trying to frighten us? The days when you could frighten people with a stick are over". No one had ever spoken so bluntly to these men, in the presence of the tribesmen. The henchmen of the landlord were taken aback, and they were as backward as the region they lived in. They said that they had only come to listen, but if they were not wanted, they would go away. The agent picked up his stick, rolled his eyes and left. The Talathi followed him with a bowed head".[35]

This, the author continues, was a novel experience for the Varlis. They were immensely excited, because the landlord's agent and the Talathi had been put to shame. This was the very first time such a thing had happened in their experience. "They realised that there were people in the world who could make them (the Bhaiyya and the Talathi) shut up, show them the law, and make them leave, that these men of the landlord's party had to fear someone".[36] Then they began to talk, and, once again to quote the

35. Parulekar's op. cit. p. 9 my translation here and elsewhere.

36. ibid. p. 10

author. "They hated the landlords, the moneylenders, their agents, and the officers of the Police, the Land Revenue and the Forest Departments, they burnt with this anger and hatred. The Zamindars and the moneylenders oppressed and exploited them with the help of these officials".[37]

After the first outburst, the customary apprehension of the tribesmen returned. What were they to do after the lady's departure? These same men would take revenge upon them. Who would protect them then? So Mrs. Parulekar repeatedly promised that she and her colleagues would return to help, whenever it became necessary to do so.

Mr. Dalvi and Mrs. Parulekar then made a tour of Umbargaon Taluka, talking to the Aboriginees everywhere. Most places were inaccessible by public transport; some could only be reached by a footpath. A village would consist of several groups of cottages, situated at a distance of a mile or even three miles from the next. This meant that a long time was necessary for people to assemble for a meeting. In the village of Dongri the two visitors had to wait for about five hours before they could hold the meeting, for most people were away working on the landlord's lands, and the author had to send them messages that the red flag people from the Titvala conference had come to see them.

When at last the meeting started, Mrs. Parulekar explained that forced labour was illegal, and they ought not to give it.

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37. ibid. p. 10

The Varlis then began to tell her of their ill-treatment; they did not know where to begin and where to stop, for no one had ever asked them about themselves before. After a while one of them said that the moneylender had, that very day, summoned some men with their ox-carts, to do unpaid work. They had already gone. Could she do something about that? Those men had sent this message through a man who could return to hear her.

Mr. Dalvi then took some Varlis and went to the moneylender's estate. The ox-carts had been summoned to take wood - fuel - to his home, which was five miles away. The cart drivers had to load the wood, take it to his house, unload it, and pile it neatly in his woodshed. When Mr. Dalvi reached the spot, the carts had already been loaded, and the Zamindar was in the yard, organising the work. He would not come out to speak to Mr. Dalvi. The latter, on the other hand, had been warned by the Varlis not to walk into the Zamindar's 'parlour'. So he sent a message that the carts would not proceed, unless the men were paid. The landlord sent another message declining to do so. Mr. Dalvi then told the cart drivers to unlaod their carts and return to their homes. Then he and his companions went back to the school building where the meeting was taking place. All the men unlaoded their carts. Some carttdrivers went home. Most of them followed him to the school, to see what would happen next. They were frightened and worried. That was the first time they had ever refused to perform unpaid work. The consequences of such refusal have been described

by Mr. Symmington, in his Report on the Aboriginees and the Hill Tribes. He said: "If they refuse or procrastinate, they are liable to assaults and beatings. These are common occurrences and are usually carried out by the landlord's local agents. I was told on credible authority of men being tied up to posts and whipped. There are also rumours of men in the past having been killed".[38]

Naturally, the Varlis were rather anxious. However, as the author and Mr. Dalvi were going to camp there that night, they felt a little reassured.

While Mr. Dalvi was relating what had happened in the moneylender's yard, a boy came running up to say that the moneylender was coming towards the school in his tonga.[39] Some Varlis began to run. Just as they had been persuaded to stay, the tonga went rushing past the school. The tribesmen had expected the Zamindar[40] to arrive, to beat and abuse them, and they were waiting to see how their visitors would react. But, contrary to their expectations, the moneylender did nothing. This was so new to the tribesmen, that they took sometime to grasp the phenomenon, and then they began to gloat.

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38. Parulekar, op. cit. p. 45

39. A tonga is an Indian horse carriage.

40. These words, Zamindar and moneylender are used interchangeably, because the same men combined both roles in their persons. They were also the forest contractors.

"In one way", said the author, "this was a very ordinary, trivial event. But on the Varlis, whose experience had always taught them that the moneylender was all powerful, it had a tremendous impact. It helped us to gain their confidence. They thought, "this lady has some law in her hands". They did not know that the law was a state law. Nor could they accept this when we told them so. Such was not their experience. All they understood was that the red flag had the power to drive away the moneylender, to teach[41] him the law. This was all they needed. They were neither prepared, nor able, nor accustomed to scrutinise laws."[42]

In her book Mrs. Parulekar describes some of the ways in which the Varlis were punished by their landlords. She mentions two occasions on which the men were threatened with being yoked to the plough, and one in which the threat was carried out. Subsequently, while she was in his village, the man who had been threatened told her repeatedly that he had escaped the actual punishment, because she was in the vicinity. Another punishment was to throw a Varli upon the ground and lay a heavy beam across him, with a man standing on either end, dancing or jumping on it. This puts such unendurable pressure on the man's body that his

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41. Teach: in the sense in which some English people say, "I'll learn you".

42. Parulekar, op. cit. p. 19

opposition or disobedience vanishes quickly. The Symmington Report had mentioned the rumours about men being killed by landlords. The Adivasi Seva Mandal, in its Annual Report for 1945 to 1946, mentioned the following instances.

1. One year earlier some Adivasis, who had been badly treated by the forest contractor, ran away. The Contractor and his men persued them and fired upon them. Five of them were killed and some were injured. There were no signs that the culprits were going to be punished.
2. A forest contractor beat two of his workers to death. He was not punished.[43]

Mrs. Parulekar also mentioned two other cases. One was of a man being burnt alive, and the other was of a man being buried alive. In the second case the man had an attractive wife, whom the landlord wanted. The wife was dragged away by the landlord's men, in her husband's absence, and when the man protested, he was buried alive. His brother Janu was threatened with dire consequences, if the matter became known. Janu and his sister-in-law both ran away. The villagers were shocked into silence. Even so, this incident could not be suppressed, police investigations were ordered, and a case was 'staged'. The Varlis said that the police doctor said in his evidence that the bones found in that hole or grave were those of an ox. The landlord was acquitted.

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43. Parulekar, op. cit. p. 44

The question one naturally asks is, what was the government doing while the landlords were grinding the tribesmen under their heels? Mrs. Parulekar answers this question succintly. "I found that Government machinery is classless and impartial only in given circumstances and up to certain limits".[44]

The moneylenders and the landlords had two instruments to exploit the tribesmen, government officials and their own henchmen. But for the help of the former, says the author, the latter would have been powerless.

When on tour, the police inspectors, forest officers, officials of the revenue department and administrative officers of the lower Cadres always stayed with the landlords. District Commissioners, Police Superintendants and superior Forest officers sometimes stayed in Dak Bungalows or Circuit Houses; in villages, they too often stayed with the landlords. They were given lavish hospitality and transport by the landlords. Under these circumstances the Varlis could hardly expect a fair deal.[45]

Courts and government offices too, sided with the landlords. In Umbergaon, a wealthy influential landlord was also an Honorary Magistrate. Complaints by Varlis of being beaten, locked up, or even of assault on their wives were not even registered, let alone being acted upon.

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44. Parulekar, op. cit. p. 46

45. ibid. Chapter IV, pp. 46-50 passim

The ordinary man did not think that the government officials were meant to help everybody. He thought that they were meant for the rich. The landlords openly said so. "Who will speak for you?" they jeered. "The police, the revenue officials, the Courts, the administrators, they all belong to us. Be quiet and obey us. No one will ask for an explanation, even if we kill you".[46]

As Mr. Symmington's report said, there were rumours of men being killed.[47]

The Forest officers also extracted Veth from the Varlis. According to government regulations, they should have paid the Aboriginees for the work done by them in the forest. The work of clearing the forest and planting seeds and seedlings coincided with the work to be done in the fields before rains.[48] Naturally the Varlis were unwilling to go, leaving their lands untended. If they refused, they were beaten up and false charges were brought against them.. The Varlis were not even aware that they were meant to be paid for their work in the forest. They actually 'informed' the author that it was compulsory by law for them to work free in the jungle! The money allotted by the forest department for payment for their work, it is easy to see, was misappropriated by the forest department officials.

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46. ibid. p. 48

47. See supra p.448

48. In addition they were also summoned to help to put out forest fires - Parulekar, op. cit. p. 49

After the movement in 1945 to 1947, says Mrs. Parulekar, for the first time, the Varlis saw government officials camping in tents and living in dak bungalows.

The movement slowly gathered force. Finally in July 1946, Maharashtra Kisan Sabha called for the payment of a better wage to the Varlis, who cut the grass and wood in the forests for the contracters. They were then paid four annas a day. Mr. Symmington's report said that the daily wage was four annas, and if a group of six or more men undertook to do a piece of work for the contractor, for which they would receive a lump sum in payment, their remuneration came to less than three annas per head, per day.[49]

The Kisan Sabha called for a daily wage of one rupee and four annas, which, the author says, was still not a living wage for a family. The contractors association refused to pay, and the Sabha called a strike. The Varlis were adamant and the contractors, who stood to lose hundreds of thousands of rupees, became uneasy. Finally Mr. Khan, who was the Prant officer[50] intervened to arbitrate. An agreement was reached, put into writing and signed It gave the workers a daily wage of one rupee and four annas. It was also agreed that they should receive compensation for any injuries suffered while working in the forest.

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49. Para 76 of this report quoted in Parulekar, op. cit. p. 94.

50. The 'Prant Officer' was probably the Commissioner; even the ministers in their speeches made in English, referred to him as the Prant Officer.

The Contractors had sunk a total capital of twentyfive million rupees[51] in this business, so they were very anxious to reach a settlement. The size of the capital invested stands in marked contrast to the very low wage of four annas a day which had hitherto been paid to the workers.

This however, was not the end of the affair. It was merely the cue for a bizarre element to enter the drama. At that time the Congress Party which controlled the Bombay government, was most unwilling to allow the Communists to become influential in this region. To prevent it, they took measures, which were not only extraordinary, but also self-defeating, the maxim, 'if you can't lick 'em, join 'em' alone might have worked. If the government had stolen the clothes of the Communists and stood up as better champions of the Varlis, then the Communists had been, by not only granting their demands, but giving them more, the Varlis might have abandoned the Communists and followed the Congress, but this was not the logic adopted by the Bombay government.

Mr. Morarji Desai, the Home Minister, said in a newspaper interview that "he was not aware of any understanding that may

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51. This does look a very large amount. The author mentions the sum of Rs. 2.5. crores, i.e. 25 million. This was the total capital of all the contractors. With the end of the war, building work had started in the cities and wood was in great demand.

"have been arrived at between the Timber Merchants Association "and the Kisan Sabha at the instance of the Prant Officer, who, "wittingly or unwittingly, might have been a party to that "agreement. He is now on leave, and has been transferred. The "Government could not bind itself to any and every act of the "Prant Officer done on his initiative".[52]

Now the Timber Merchants, encouraged by the government, denied ever having signed an agreement. Commenting on the situation the Free Press Journal remarked wryly, that all that remained to be said was that there were no communists, no Varlis, and that the whole thing was totally imaginary.[53]

About the same time Mr. Desai at a press conference which took place the day before the interview[54] quoted on the previous page, said:

"I am not interested in any settlement brought about by the "Communists. Anything which helps (the) Communists in their "nefarious activities will not be tolerated".[55] Another newspaper, the National Standard, said, on the same day, "Shri Desai also made it plain that the, "Government would not countenance any

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52. Free Press Journal of 22.1.1947

53. Free Press Journal of 29.1. 1947

54. i.e. on 21.1.1947

55. The Times of India, dated 21.1.1947

"compromise, which would give full control over the Varlis to "the Communists".

In November 1946, when the agreement was signed, the Government passed an order of externment, forbidding the Communists from entering the district of Thana. They arrested about two hundred Aboriginees. Even so the Varlis continued with their struggle. Leaderless though they were, they refused to work on low wages. The Government's attempts to appease them with a higher wage were rejected by them, for, as their leaders had been arrested or banished, they suspected Government's motives.[56]

The Government resorted to very strong, repressive measures against the Varlis. On several occasions the police fired on them. Proceedings were instituted against hundreds of them. The District Magistrate had used his discretionary power to order that:

1. The Varlis should be asked to furnish a large sum as bail.
2. They should not be given bail, unless they promised that they would not go to any meetings, and have nothing to do with the Communist party.
3. The trial of cases against Varlis should go on from day to day - this gave them no chance to find a lawyer or get

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56. This would not amount to the policy of 'if you can't lick them join them! For that the Communists should have been left in peace!

any assistance. The stipulations about bail, financial and other, ensured that the Varlis would have to stay in jail. This made their defence even more difficult.

Finally, the government decided to send in the army; a regiment of Maratha Light Infantry was stationed at Kalyan, awaiting orders. The advance guard of the regiment did indeed enter the taluka of Dahanu.

At this juncture however most newspapers and many prominent public figures raised their voices in protest. Most of them had no sympathy with the aims of Communism. But they publicly criticised the Congress Government for sending in the army to control the Varlis, whose demands, they said, were entirely just.[57] The Harijan, a Gandhian newspaper devoted to the untouchables and the scheduled tribes, said a little earlier:

"The riots of Adivasis (Varlis) in Dahanu Taluka should be an eye-opener to us. No doubt the police and the military will suppress the riots and peace will be restored. But that does not mean that the problem is solved. Such riots are outward symptoms of serious disease in the body-politic. So long as the root cause of this disease is not removed, a superficial treatment of outward symptoms will not be of any avail. These rioters are known to be extremely timid people. Their poverty and ignorance baffle description. For ages they have been exploited by the rulers of the day, by the landlords, the moneylenders, and a host of other

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57. Parulekar, op. cit. Chater X passim.

parasites. They were the original owners of the land, but today they are forced to labour on that same land as serfs. The new landlords and the moneylenders profit to an unconscionable extent by their labour. At the back of this exploitation there lurks frightful injustice and suppression. So long as the exploitation suppression and injustice are not removed, it is futile to hope for a lasting peace ... Is it any wonder, if they are exasperated and resort to violence[58] out of a feeling of frustration and despair? The spirit of the exploited and the suppressed people has awakened. The point both in time and circumstance has arrived which demands their full deliverance. None will be able to stop that process".[59]

In the face of the strong public sympathy for the Varlis, the Bombay Government had to give in; the army was withdrawn. Even so, the Parulekars were not able to visit the district till 1953, when they received a tremendous ovation from their Varli friends, whose memories were long, and whose patience, to judge from their tribulations, was certainly endless.

In the course of our examination of this book, "Jevha Manus Jaga Hoto", we have noted several things of particular interest to us.

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58. Mrs. Parulekar describes these instances. We have omitted them as they are not relevant to our study.

59. Harijan of 21.1.1947

The Varlis were not aware of the state of the laws regarding enforced labour or slavery.[60] When they tried to runaway, they had nowhere to go.[61] Their acquiescence was plainly born of helplessness and ignorance. It was certainly not indicative of a placid acceptance of this state of affairs. Enactment of laws, though a necessary, was not a sufficient condition of their freedom. Their case proves beyond doubt, that government's complacence in the power of their laws passed in Assemblies automatically to change existing situations was totally misplaced. For the laws to be effective the oppressed people had to be helped.

This should have been nothing new to the government. As early as 1845, commenting on the effect of Act V of 1843, the East Indian Civil Servants had made this point. One of them had said that the Cherumas of Malabar were far more impressed with his administrative order allowing them to use all public roads.[62] The letter of the law is too abstract for people as oppressed as the Varlis or the Cherumas. They have to be shown what it means, in practical terms; only the fact that they were allowed to use roads hitherto open only to the higher castes, or that the feared moneylender could be made to retreat,

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60. Parulekar, op. cit. pp. 9, 19 and 49

61. Parulekar, op. cit. p. 76

62. See above Chapter II p.225

if he was in the wrong, could bring to the minds of such people what the law really was.

Secondly the Communists succeeded for several reasons. They were outsiders, so they were not dependant upon the landlords, for their livelihood. Moreover, being middle class, and educated, they knew the law. Thirdly, as they belonged to an organisation they enjoyed a degree of support not available to isolated individuals. The author describes several months of her struggle, before she was finally externed from Thana, during which she and her colleagues could not get a glass of water, or sleep in temples[63] in the towns in that district.[64] When the government tried to suppress them, the Communists could make themselves heard and newspapers, a powerful media of communication, took up the cudgels on their behalf. By themselves the Varlis could never have got far. Indeed, Mrs. Parulekar says at one point that the position of the Varlis in the area surrounding the town of Mamakwad is still very bad. This is because they lack the help of full-time political workers. Sporadic interference only led to the greater persecution of the Varlis. Writing in 1970, she says

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63. In Maharashtra, travellers commonly sleep in temples, if they have no friends in the town.

64. In the villages they would stay with the Varlis. In the towns, everyone would have a vested interest in the system, or have cause to fear it. Nor could she hide, as she could in the countryside. See Parulekar, op. cit. Chapter V.

that in this area, which is now[65] in Gujrat, both the organisation of the Varlis and the movement for their freedom are weak. It would be of interest to know what action, if any, the Gujrat Government takes on this point.

As we have repeatedly said, it is not enough to pass laws. It is essential to be vigilant to secure their proper enforcement. It is a grave error to assume that because a law is made, it is automatically known to all, invoked by the sufferers, and applied by the government officials. All three assumptions proved to be false in the case of the tribesmen of the Thana district, who lived a bare three hours away by train from the city of Bombay. A city, we might add, which boasted of a labour force most conscious of their rights, and of the least corrupt and most efficient police force in India.

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65. i.e. Since 1960.

SECTION III

Sale of Women: Gwalior

This is a particularly difficult section to write, because of the nature of the information about it and the sources of that information. Most of it was obtained, or rather, was casually given to me because I happened to be a pupil at the Gwalior Bar, and as such, was privileged to receive it. I do not know whether I can confirm any of it, for I have left the Bar and am obviously using the information for purposes not connected with the daily routine of practice. My connections with the Gwalior Bar also helped me to get copies of documents connected with sales of women, but these, of course are more reliable than the other information.

Until 1947 Gwalior was a separate princely state in Central India, with its own legal system. One of its laws dealt with the custom of Dhareecha[1], or remarriage of women. In India generally it was only among the Brahmins and other high castes that remarriage of widows was forbidden. Innumerable low castes have always permitted their widows to remarry. Many of them also permit divorce, and the divorced women may also remarry.

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1. See Appendix I for the history of Dhareecha legislation.

A woman's second marriage, however, had not the same status as her first marriage. Not that it effected her status as a wife and mother, but the ceremonies were often curtailed, and the fact of her having been married before was somehow thought to reduce her value, or importance. Consequently, while a woman's first marriage is called Shadi[2] or Vivaha[3] or Lagna,[4] her second marriage is not so described. In the Punjab it is called Chadar Dalna[5] because the widow-bride and her husband (usually someone from her husband's family) are made to sit down side by side and covered with a sheet. This is the only ceremony required to make them man and wife. In Maharashtra there is some religious ceremony and the woman's second marriage is called Paat[6] or Mhotur[7]. When widow remarriage was accepted by the Brahmins of Maharashtra, they too adopted words to describe it, different from the words they used to describe a man's second (or third!) marriage. If a man married again it was said 'He has married a

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2. In Hindustani or Punjabi
3. In sanscrit-based Hindi, Marathi and other languages.
4. In Marathi.
5. This expression literally means 'to cover with a sheet'. Chadar is sheet and Dalna means 'to cover'.
6. Paat is the term used when a widow remarries.
7. Mhotur is the term used when a divorced woman remarries.

second time' or 'this is his third marriage'. Of a woman it was said that she had remarried. If a man happened to marry a widow, it was said that his wife was 'of a remarriage'[8] Dhareecha came into the same tradition of remarriage for widows as Paat, Mhotur or Chadar Dalna. That is, there was a precedent for it, while with the Brahmins, it was a new custom which had to be introduced by young men with advanced ideas.[9]

In the year 1900 the Gwalior state passed a law taking cognisance of Dhareecha, no doubt for regulating property and inheritance.[10] Under these laws a dhareecha appears to have involved no religious ceremony.[11] A man and a woman living together could be legally declared to have formed a dhareecha, and a document to that effect could be signed and registered. A Dhareecha distinguished a woman from a mistress and gave the children of the union legitimacy and therefore, property rights.

Thus the law was made with a straightforward purpose. It did however, introduce the notion of registering such unions to give them stability or security, an idea, which we hope to show,

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8. Punervivahacha ahet. Punervivaha means remarriage.
9. These were men like Dr. D.D. Karve, Justice M.G. Ranade, and Mr. G.K. Agarkar, who agitated for this reform during late 19th Century. Dr. Karve, who married a child widow, was ostracised for his pains by everyone, including his family, for several years.
10. See infra, Appendix 1
11. See infra, Appendix 2

was abused in later days.

In 1936 Registration of dhareecha was made optional. Soon after 1948 the dhareecha rules were repealed altogether.

During my pupillage at Gwalior, during 1965 to 1966, I came to realise that the sale of women by their menfolk, husbands, fathers, and others, was the concern of civil law.[12]

Knowing my interest in these transactions, my master-at-law, who only appeared in civil cases, and who turned away any men who, not knowing this, brought criminal cases to him, condescended to talk to two men. They came to him because they wished to register a document, because a girl they had met on the train wished to leave her husband! She had a two year old son.

It was a wierd, disturbing experience. From the advocate's[12a] questions, the men tried to gauge the answers he wanted from them, that is to say, to gauge the nature of the document which (they thought) he thought most advisable. In the space of a quarter of

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12. A senior civil practitioner told me that he had rejected criminal practice because of the kind of cases he got and the kind of men who brought them. He vividly remembered a man, well-dressed in western clothes, who came to him, and stated his business briefly and clearly, thus: "Sir, I want to sell my wife".

12a. In India generally we have no solicitors. People go directly to advocates. There are solicitors in the Old Presidency towns and in Delhi, but it is not essential to approach an advocate through them.

an hour, they changed their story in every respect. The girl's age varied from fifteen to twentyone, from being a stranger she became an old acquaintance. Instead of intending to let her go her own way after the document was signed, they now said that the son of one of them would marry her. The two year old boy was finally declared by them to be their son's child. And the son, the prospective husband, from being a batchelor, (who could commend a better wife) became a married man, whose wife had left him.

At this stage of the consultation my master-of-law asked them where the girl was. They replied that she was in their house.

Why had they not brought her? How could he advise them without talking to the girl?

Silence prevailed.

Was it their intention, continued my master-of-law, that the document should be prepared on their evidence and that the girl would merely appear in the court[13] and sign it?

Yes, was the answer.

Would she sign it or would she put a thumb impression?

It would be the latter.

By this time even I knew what these men were about. After all these questions, they felt that the document the lawyer would draft and which would be typed on stamped paper worth about Rs. 2.00 would say this girl had left her husband and wished to live with her

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13. See infra, Appendix 1.

lover, who was the father of her child, It would also say that she was a major, and that she was acting of her own free will.

At this point my master-at-law dismissed them, saying that he did not handle such cases and that he did not want their fees. He said to me later than, from their account, the girl had probably not left her husband, who would indeed get a few hundred rupees out of the transaction.

It is to be noted that the men did not come from castes where dhareecha was customery. They only mentioned marriage under persistent questioning. Finally, if a woman merely wishes to leave her husband, she does not have to register a declaration about it. And strangers, it will be admitted, are rarely foolhardy enough to get involved in other people's marital problems.

This was the only 'consultation' I ever attended. The rest of my evidence, on which this section is based, consists of registered documents. There were literally hundreds of them in the Notary's Office and he very kindly allowed me to make copies of any documents I chose, and also attested them as true copies.

I wish to lay emphasis on the fact that at no stage of my inquiries was it ever denied by the legal practitioners that women were sold, and the documents which were registered, were thinly disguised documents of sale. It was also explained to me that, while some documents were in the form of an agreement between the man and the woman, others were in the form of a

declaration by the woman[14] alone; this gave an advantage to the man to whom she went. He made no promises, and was in no way connected with her action of leaving her husband.

The question that remains to be asked is, why were these transactions registered at all? Surely they had no force in the courts. The answer is difficult for the educated mind to grasp. We are accustomed to scrutinising the written word. And we do not take it to be binding just because it is written. But to the illiterate Indian there still is something mysterious about writing. Just as some literate Indians may take all that is published[15] as gospel truth, the majority of illiterate Indians would regard a written document, particularly one which was executed on a stamped paper and registered, to be binding upon them. So, while such a document might not stand up in the courts, its execution more or less ensures that the parties will not go to court at all. Consequently, when such a sale is completed, unless there is some dissatisfaction about the payment of the woman's price, the seller does not go back upon his word, and claim his wife. It is the classic case of honour amongst thieves. If however he is dissatisfied, the seller normally starts proceedings for abduction. And of course a document in which the woman declares that her husband abandoned her, or that she had left him herself, would be a good defence

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14. that she had left her husband.

15. particularly in newspapers.

in a charge of abduction.

These documents appear to fall into two broad categories. In some the woman states that she is taking up service at the man's house. In others she declares that she is entering into a dhareecha. In all cases, the documents make it clear that she has brought no property or jewelry from either her husband's or her parent's home. The husband in these documents has invariably ill-treated her, or, his family have, after his death. And her parents are either unable or unwilling to support her.

We should like to start with a document, which seems to be a genuine dhareecha document, in order to establish what a dhareecha is.

This document was signed by both the man and the woman, who were both Muslims.[16] The woman Chandobai, said that she had been married to someone else seven years earlier, when she was still a minor. Her husband had, in accordance with the rules of the community, left her, two years after the marriage. She had now reached majority - Chandobai's age is given as twenty-two - and according to the custom of her community she had the right to marry again. She had no ornaments or other property belonging to her married husband.[17]

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16. The man's caste is stated as 'Muslim'. The name of the woman's father sounds like that of a Muslim, so she was probably a Muslim too.

17. This curious phrase is explained by the succeeding contract. The dhareecha was only a contract. There was no ceremony of marriage.

The second man, Nasir, had divorced his wife, who had also remarried, so Nasir too was in need of a wife.

Therefore the two parties had entered into a dhareecha, in accordance with the rules of their community; with the intention of reducing the dhareecha agreement to writing, the parties agreed to the following terms.[18]

The woman promised that she would live all her life with the man as his wife, and obey him in all matters, and would in no way cause him trouble, or cause him to be dishonoured in society.

The man promised that he would keep her all her life as his wife, that he would not give her trouble, and that he would provide her with food, shelter and other necessities.

The children of this arrangement would be considered legitimate and would have all the property rights of legitimate children.

The two parties undertook to look after each other's comforts. They were in full possession of their senses, not drunk or drugged, and they had signed the document of their own free will. This document which carried the man's signature and the woman's thumb mark,[19] is dated ninth September, nineteen sixty six. (9.9.1966)

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18. See Appendix 2 for the translation. Document 1.

19. This is so commonly used that there is even an abbreviated way of referring to it. It is called L.T.I. that is, Left Thumb Impression!

For two reasons this appears to be a genuine document. The woman's rights as a wife are repeatedly assured, and care is taken to make the children legitimate.

Consequently another peculiarity of the document becomes all the more striking. The Muslim religion permits divorcees to marry. There is no Muslim custom (in India) of dhareecha. Yet this document, which would obviously be regarded as binding by everybody, repeatedly uses the phrase "in accordance with the custom of our community". There is no mention of a Nika[20] at all. And yet their Muslim community would evidently consider this arrangement to be valid and binding! In a way this illustrates the status of the written word amongst illiterate people in India.

What we have described as the usual contents of these documents or some of them, make their appearance in the next document we examine. In it the woman, Kaliya, says that she had been married for fifteen years and that she had a two year old son.[21] Her husband wanted her to do 'wrong (or bad) things',[22] he beat her, and also frequently threw her out of the house.

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20. The Muslim word for marriage.

21. This roughly puts her age at 20 to 25 years. In villages children, especially girls, are still married young.

22. This generally implies that he wished to make her a prostitute. In other documents wives have clearly stated this fact, using the word, [illegible]."prostitution".

Fifteen days previously he threw her out and she could not maintain herself by doing menial work. Therefore she was entering into a dhareecha. She was living with the man Hira as his wife and she had brought no jewelry or clothes from her first husband's home.

The man Hira promised to keep her as his wife and the little boy so long as the boy stayed with him. The signatories to this document were both Aborigineds by caste.[23]

In both these documents the man and the woman belonged to the same caste or group, and had the same background. The next one which we will examine was signed by a woman of a lower caste, Maithul, and a Vaish or Baniya man. The man was of a considerably higher caste, and was also much richer.

This document states that the husband of the woman, Phulashree began to beat her only a few days after her marriage. He had no income, he drank and he gambled, and he had, fifteen days earlier, after beating her up, flung her out of his house. She herself had no income. She was thirty years old, and she knew her interests well. She wished to take up a job and support herself

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23. This word 'caste' is often used loosely in India. It is used to mean 'community' or 'group', the Muslims or the Aborigineees in this example. I was often asked for my caste by people, who really wanted to ask what my mother tongue was! For the full translation see Appendix 2, Document 2.

and her children, and live independently. With this intention, she had taken a job with Om Prakash, the other signatory, a job of cooking, cleaning and doing other domestic chores.[24]

In return, Om Prakash would give her food, shelter, clothes and pocket money. Anything belonging to him, which she might have would be in the nature of a loan and she would have to return it, if she ever left him. She had not brought anything from her husband's or parents homes to Om Prakash's house. She had signed this document of her own free will.[25]

This, to our mind, is not a straightforward document, In India one does not enter into contracts with maid-servants. Secondly, the woman has no wages at all. Her unspecified pocket money would not be sufficient to enable her to bring up her children or live on her own. It is curious that no mention is made of the children in the man's promise to give her food, clothing and shelter. Finally, the clause about 'everything in her possession being a loan from Om Prakash' amounts to a life-long restraint upon her liberty. From the terms of the agreement she could never acquire anything. It is not even clear whether her clothes would belong to her. If she were to leave

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24. It is curious that she should have survived the ill-treatment for 10 to 15 years and then found a 'job' so promptly, instead of trying to go back to her husband.

25. See Appendix 2, Document 3.

the man, she would not even have a cooking pot or water pot.

Given his treatment of his wife Phulashree, the discrepancy in the caste and rank of the two signatories, and the absence of any provision about the woman's wages, there is every reason to suppose that the woman's husband received some money from Om Prakash, particularly as there appears to be no time gap between her leaving her husband and finding Om Prakash.

Phulashree's statement that she had not brought anything with her to Om Prakash, covers him against a charge of theft, and her declaration about being in sound mind, and signing the document of her own free will protects him from any possible charge of abduction.[26] In other documents women often specifically declared that they had not been abducted or enticed away.

This document should be compared with the following one,[27] which was an agreement between a Gujar Thakur woman named Kasturi, and a Punjabi,[28] named Mahendra Singh. This again

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26. This is what the lawyers said to me: this implies that whatever the true legal position, this was the effect of these statements, not only upon the parties but even on their counsels.

27. See Appendix 2, Document 4.

28. Punjabi is not a caste. But while local castes are considered relevant, a statement about an outsider's caste is often only a description of his mother tongue. See footnote 23, of this section, p472

was a contract for service. The woman, Kasturi, stated that her husband was given to gambling, and drinking, so that he did not look after her, and that he asked her 'to behave badly with others' and earn money; i.e. he wanted her to earn money by prostitution. He had finally thrown her out and she had been living with her parents for some time, but they could not support her. Consequently, and of her own free will, she had taken up a job with Mahendra Singh as a domestic servant. In return for her services she would get food, clothes and shelter, as well as a monthly salary of Rs. 5. The document ends, "I shall not do anything against my wishes". This document bears the woman's thumb impression. The man did not sign it at all.

The conditions of service offered to Kasturi are superior to those offered to Phulashree. Her parents are in evidence, and she also soundly states that she would not do anything which displeased.[29] This is the kind of document which might conceivably be registered to protect the woman from her obnoxious husband's attentions.[30]

In yet another document[31] the woman, 20 year old Ramadevi, said that her husband had disappeared. Neither her in-laws nor

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29. Actually there is some doubt about this. Literally the document reads, 'will not do anything against wishes". No pronoun.

30. See footnote 26 of this section, p474

31. See Appendix 2, Document 5

her stepmother and father wanted her, so she had taken a job. The girl was described as a Sindhi by caste, and the man, 25 year old, was a Kacchi. She had already been working for him for six months, as a domestic servant. Ramadevi also looked after the man's mother, the only other inmate of the household. She was given food, clothes, shelter and Rs. 10 per month. She worked for her master and was not doing any other work without his consent.

The document ends: "I, Ramadevi, will work according to these conditions in the future, and will not displease the other signatory".

As ordinary servants never sign any documents, it is difficult to see what her promise not to displease her master meant. Looked at from another angle, surely there is no need to make such a promise, in the context of the ordinary master and servant relationship. Obviously, no master would keep a servant who displeased or disobeyed him. Nevertheless, Ramadevi promised to work for Ramswarup on these conditions in the future, and never to displease him. This document, like document No. 4, is executed by the thumb impression of the woman only, although both document No. 4 and document No. 5 mention the men as parties to the agreement.

In another curious document,[32] which was an agreement between a widow of 25, named Chandreshwari, and a 30 year old

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32. cf. Appendix 2, Document 6

man called Nathuram, the woman said that, as she had no relatives to support her, and as she needed some support and protection, she was entering into an agreement with Nathuram, on the following conditions:

She would live in his house, and do everything according to his wishes, and that she would not go anywhere without his consent or permission.

In return, Nathuram would look after her, protect her, and give her Rs. 200 per annum for her services.

This agreement was for three years and could be continued if the parties so wished.

The condition that she was not to go anywhere without his permission is a curious one. No maid-servant would countenance it, nor would she be willing to receive her wages annually. Her statement that she needed protection is, in the context of the agreement, very eloquent.

So far, with one exception,[33] in all the agreements hitherto examined, the women were either to be treated as wives, or they were to receive wages for their services. We have found fault even with these, because in India one does not enter into agreements with one's servants, and therefore we have been suspicious about the real nature of these contracts. Now we would like to examine some documents in which there are increasing grounds for such suspicion.

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33. i.e. the case of the woman who was to receive pocket money. See Appendix 2, Document 3.

In an agreement[34] between a woman called Ramdulari,[35] and a man called Sopatiya, the following facts were recounted. The woman, who was 25 years old, was a resident of the village of Rampura, in the district of Morena. The man, Sopatiya, lived in the city of Gwalior, and he was 35 years old. Ramdulari had been married to one Naktu three years earlier. However, he drank, gambled and beat her up regularly. He had no income and he sold all the things which had been given to her as dowry by her parents. Everytime she asked her husband to give up his bad habits and get a job, he beat her yet again. During these three years she had a child, and she kept both herself and her child by going out to work as a labourer. On day Naktu threw her and her child out of the house, and said that he would have nothing to do with her. So, she took a bus to Gwalior and started working as a labourer. However she though it best to live in the house of someone from her caste, in the position of a domestic servant, and thereby support both herself and her child. Therefore she had taken up service with the man Sopatiya. The agreement was that all her life she would do all the domestic chores. In return Sopatiya would give her and the child food, clothes, and shelter. She also agreed not to behave in a fashion likely to injure his reputation.

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34. cf. Appendix 2, Document 7

35. Though this is the name given at the beginning of the document, elsewhere she is called Ramkuar.

There are two points to be noted: the document gives the names of her husband and her father. But Ramdulari (or Ramkuar) does not say why she did not go to her father. Secondly, it is rather doubtful whether an illiterate and impecunious woman would have the courage, imagination or money to travel alone fifty to sixty miles, and take herself to a large town where she knew no one. Thirdly, the promise to work all her life for bed and board again looks suspicious, particularly when she also promises not to damage Sopatiya's reputation. One could not obtain a genuine maid-servant in Gwalior on either of these conditions! Nor do masters look after the maid's children!

The figure of the husband too, is too familiar; the wife beating, gambling drunkard is too like a type in a play, and the habits ascribed to him are intended to give the wife a reason for leaving him, or for not trying to go back to him.

In yet another document,[36] Parvati, the woman, clearly states that her husband entered into a dhareecha with his dead brother's widow, since when he ill-treated her and wanted to sell her (Parvati). Finally he threw her out, She had lived with her mother for a short time, but her mother was too poor to support her, and therefore, in accordance to the caste rules, and in the presence of the village elders, she had entered into a dhareecha with Hardayal, six months before this document was registered. In their community they were regarded as husband

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36. cf. Appendix 2, Document 8

and wife, entitled to the rights and subject to the duties of a husband and wife.

This appears to us to be a genuine dhareecha. As in a sacramental marriage, her duties and her expectations are neither specified, nor limited. And there is a specific reference to caste rules. The presence of village elders also is a point in favour. It is one thing to deceive a court where one is unknown, and quite another to deceive village elders, who know every person in the village. As this seems to be a real dhareecha, two facts stated by Parvati assume interest. She states that her husband entered into a dhareecha with his sister-in-law, and that he tried to sell her, his first wife. Neither of these two things - bigamy and sale of human beings, are countenanced by Indian Laws. This document is dated 26th September 1968. The Hindu Marriage Act of 1955 has abolished polygamy for Indian Hindus. Sale of human beings has long been forbidden by the Indian Penal Code. Yet, Parvati's lawyer put these statements in the document as though there was nothing abnormal about such a state of affairs. These facts were included to explain her own dhareecha, and in order to protect her from any action which might be taken by her husband. Her own dhareecha, as she had not obtained a divorce, was no more legal than that of her husband! Yet this document was registered.

In another dhareecha, also duly entered into in the presence of the village elders, the woman Bhaggo, who was a widow,

stated[37] that, after her husband's death, her in-laws, who called her unlucky,[38] beat her and her two children, starved them, and generally ill-treated them. She then adds that they tried to sell her. When she protested, they threw her out, with the younger child. She went to live with her brother, who repeatedly sent messages to her in-laws, requesting them to take Bhaggo back. Their response was to send the other child to her as well. As she had nowhere to go, she had formed a dhareecha with Sunderlal. The agreement, which is dated 6th November 1967, gave her the rights of a wife, and housekeeper. Her two sons by her previous marriage were to have an equal share in the property (of her second husband Sunderlal) with any children born of the dhareecha. Sunderlal had, at the dhareecha, given her ornaments worth five hundred and fifty rupees. It was agreed that these belonged to Bhaggo and that Sunderlal would have no right to them. The word used in the document is Stree-dhan. Literally translated it means woman's wealth, but it means a woman's peculium . Traditionally and by Hindu law, any jewelry given to a woman at the time of her marriage,whether by her parents or by her husband's people is hers to do with as she pleases. No one has any claim on it, in any circumstances.[39]

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37. See Appendix 2, Document 9

38. i.e. one who brought bad luck to the family and 'killed' their son.

39. i.e. it cannot be seized, for example, to pay her husband's debts.

Here too, the fact that Bhaggo's husband's relations tried to sell her, is stated casually. From these two references to attempts to sell women, it should be obvious that such attempts were neither rare, nor caused any surprise to onlookers. Thus the idea of selling an unwanted woman, even if she was one's wife or daughter-in-law, seems to call for no disapproval. And indeed the lawyers I talked to were not only fully aware of these transactions, but also accepted them as part of everyday life.

So far, with one exception,[40] we have looked at agreements signed by both parties. There are others in which the woman alone makes a statement. The woman Ramashree, for example, stated that she had taken a job with the man Parma, because her husband had thrown her and her two daughters out of the house. She had tried to keep them all by her own labour, but had failed, and got into debt to the extent of Rs 200/-. Parma had paid off her debt, and in return for her work in the house and in the fields, he would give her and her daughters food, clothes and shelter. She promised to return the two hundred rupees, with interest, should she leave his service.[41]

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40. e.g. Appendix 2, Document 4 p. . But at the beginning of the document both the man and the woman are mentioned as contractors. The woman alone signed it. Also, Document 5, p.

41 See Appendix 2, Document 10.

The interesting question of course is, where would she find the money to pay him? Her service conditions allow her no wages, and between her work on the fields and in the house, give her no time to earn by working for somebody else as well. One also wonders where the two hundred rupees went. The woman is a villager. In rural areas two hundred rupees is a very large sum of money. No man in his senses would advance it to a destitute woman, or allow her to run up an account to that amount. In our opinion this sum of Rs. 200 was mentioned because it was the sale price of the woman and had been paid. It is to be remembered that this document was signed by the woman alone. This was a precaution taken, the lawyers said, when the man did not wish to be in any way implicated in any possible legal tangle.

The same idea of the woman having been sold is suggested by the document executed[42] by the woman Manko and the man Harlal. In return for food, clothing and shelter for herself and her two children, she agreed to do the household chores and any other work. She also promised always to obey him and never to go against his wishes. She would receive Rs 5 per month as wages; and in conclusion the document says that Harlal had given her a lump sum of Rs 180/-, at the commencement of her service.

Again, in a genuine master and servant relationship, no master pays his servant a lump sum, particularly at the

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42. cf. Appendix 2, Document 11.

beginning of his service - What is to prevent the servant from running away? The document also states that Manko's husband, who had flung her out of the house, had said to others that she was no longer his wife. In other words, the husband had announced that he had no longer any claim to Manko. It would not be surprising if this announcement was made in return for Rs 180. Instead of being an advance to her, it was most probably the price of the woman, paid to her husband, mentioned in the document to show that the money had changed hands. In both these cases, it will be noted, the money had already been given by the man for whom the woman 'worked'. There is no question of the money being given at a later stage. The transaction is complete. This document is dated 12th April 1966.

The earliest document we have is dated 16th March 1949. The poor woman Lakkho, whose thumb print it bears, seems to have given away all her rights in return for shelter and protection. Her husband had disowned her, her brother did not want her. So, when she met Chuttan, who was willing to offer her protection, she entered into an agreement with him. It provides that Lakkho would live in Chuttan's house and do all the household work. She would not go anywhere, or do anything, without his permission, or against his wishes. Nor would she accept anyone else's protection. She would satisfy every wish of his, and she would never displease him. In return Chuttan would look after Lakkho, i.e. give her food, clothing and shelter.[43]

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43. cf. Appendix 4, Document 12

Poor Lakkho! The whole document reeks with her misery and helplessness. So, in varying degrees, do the other documents. They present an unhappy picture of these women, without money or support, signing away their lives for a bare pittance.

It is perhaps significant that, with one exception,[44] in all the documents we have examined, where both the man and the woman are signatories[45] the woman always signs first. This might be a precaution taken so that the man could not be trapped by a crafty woman, who would not sign, but who could then use the document against him!

We have also seen how badly these documents are drafted. Even the elementary rules of grammar are not followed. It is interesting that the legal machinery,[46] which is usually so particular as to be fastidious, should register them.

Lastly, these documents are in legal jargon. They are difficult to understand, whether one reads them or has them read out. They appear to be written on the principle that

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44. Appendix 2 Document No. 6 where the man's name comes first at the beginning of the document, but it is incomplete, so we do not know who signed first.
45. Often only the woman signs. cf. Appendix 2, Document Nos. 4, 5, 10.
46. We have deliberately used this phrase. The notary public attests these documents, but his office is probably situated in the Court buildings, and most people, particularly the illiterate ones, think of it as a Court.

where ten words can be put in, one should never make do with five. Moreover their language is either sanskritised Hindi or high Urdu, and generally a mixture of both. It would tax an educated man's mind to understand them. Above the hubub and noise of the 'Court'[47] and its strange, intimidating atmosphere, the document is read out once, to the woman who speaks a village dialect and has a limited vocabulary. Does she understand it? She is asked. Yes, she says. The notary is satisfied and obtains her thumb print.

But does she?

Time and again courts, legislative bodies and civil servants have said that such agreements were not binding and therefore gave no power to one person over another, and that, therefore, if one of the signatories or parties to arrangement stayed and worked for the other, it was from choice. This is what was said during the slavery debates which preceded the enactment of Act V of 1843. It was not necessary to abolish slavery in so many words, it was said, the Act would virtually do it[48]. In his Introduction to the Penal Code[49] Macaulay said something to the same effect.: he recommended the insertion of a provision, which became in fact the 'penal clause' of Act V of 1843, and said that it would virtually abolish slavery.[50]

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47. See supra p.485 footnote 46.

48. cf. Supra, Chapters II (p182) and III, p 287 et seq

49. cf. Supra, Chapters ~~II and~~ III p166

50. Introduction to the draft Penal Code (1837).

One feels inclined to throw back at Macaulay the challenge he had flung only five years earlier, at an Anti-Reform Member of Parliament. "I do not understand", he had said, "how a power, which is salutary when exercised virtually, can be noxious when exercised directly".[51] In this case we would ask, why a right which has been 'virtually' given (the right to personal freedom)should not have been expressly declared. Either there is a difference between the two, in which case it is best to remove it by law, or there is none, in which case as Macaulay would say, one might as well opt for the declaration that makes for greater clarity.

From balking at giving clear expression to the right of personal freedom, it is only a step to allowing contracts to be registered, which have the effect of depriving a party of some of the attributes of freedom. This was what happened in the case of Ameerun[52] the prostitute, who had 'leased' three girls for periods of ninety years and upwards. Here it was argued by the judges of the Sudder Adalat that children could not be bound by agreements made in their infancy, after they reached majority. Therefore, if the girls stayed with the prostitute, it was of their choice, and, as the contract was not legally binding, there was nothing wrong in registering it.

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51. Macaulay's Speeches (1854) at p. 9

52. See Chapter IV, Section 2, p 308 / Chapter V, Section 2, p 375

In all probability this is the line Indian Courts would take over these documents purporting to be written contracts of service. The argument that people who enter into contracts do not do so, knowing them to be worthless, would be ignored today as it was in the 19th Century. The ignorant and the under-privileged, who are also the losers by these contracts, most certainly have no such idea. To them, a piece of paper, stamped, registered, bearing an agreement which they perhaps have not even understood, has a very strong force, as it is registered. They feel compelled to obey the agreement, whatever its contents.

We have mentioned earlier the effect of the written word upon the illiterate mind. There is another factor we should like to mention: the illiterate person is not likely to believe that a government official would register a document which carries no force,[53]

In Chapter II we dealt at some length with the practice of Reet[54] in the Hills of Garhwal. A woman's price was fixed by the bride price initially paid for her to her father. After

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53. Some lawyers told me that one could register any contract, including a contract to murder someone. Whether one would be allowed to act upon it was a different matter! But on murder both taboos and laws are so strong that no one is likely to try to register such an agreement.

54. Chapter II, Section VI, pp. 227-229

that she could be bought and sold by her husband(s), for that amount, which was her Reet, or price. The sale of women is not uncommon in India. In the 19th Century English civilians obtained proof of it, in the foothills of Himalayas. The evidence we have now is of a different kind; but as the Court said in the case of Koroth Mammad v. The Emperor,[55] if one passes a law, people only take greater care in transacting 'business' which the law forbids. The sale of human beings does not stop but the means of effecting it are changed.

We have throughout been encumbered with the argument that these women or children or slaves, who stay with their masters, do so freely. We have therefore, from time to time, attempted to show what such a choice involves, and that few people have the same intellectual and social equipment, as say, Lord Auckland or Jeremy Bentham. We hope that what we have had to say about the Vethis of Bombay[56] and the women of Gwalior, will amply prove our point. Of them at least, one could not say that they knew their rights,[57] that they knew what was decreed by the laws of their country and that they were in a position to act upon

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55. A.I.R. 1918 Madras 647; See Section III of Chapter V at p.426 of that section.

56. See Section II of this chapter.

57. They (women) did not even know that, after 1948, the registration of a dhareecha gave them no rights. cf. Appendix 1

their knowledge. In that section we had quoted Mrs. Parulekar's opinion that the government machinery is impartial only in given circumstances and up to a specified limit. The word she uses is not 'impartial' but 'classless'. Whatever its marxist implications, the observation is a bitter one; it is difficult to swallow, because such is not our own experience of that apparatus. When faced with these documents of sale however, there is no alternative open to us but to accept her conclusion. Even government servants are implicated in her accusation. It is in our opinion a crying scandal that government servants[58] and the lawyers, who should exercise that eternal vigilence which is the safeguard of liberty, should instead be parties to these agreements, and lend their support to contracts which reduce women to mere chattels.

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58. i.e. The Registrars, the notarys public.

CHAPTER VII

The Dacoits of the Chambal Valley

Introduction

In the last chapter we stated the proposition that 'Law serves Power' and we tried to illustrate it by examining the plight of the women in Gwalior, and the tribesmen of Bombay. These illustrations might, to some, appear to be extraordinary cases, and therefore neither representative, nor deserving of particular attention. After all, one might say, the tribesmen are free now, and how many women could be sold in a small area such as the former Gwalior state? Besides, in a country where the caste system is still deeply rooted, and where women are far from equal with men, these may not be illustrations of slavery, but merely of cultural differences.

There are several answers to such criticisms. Once the government has decided not to tolerate such cultural differences and has passed laws intended to eliminate them, they cannot be used as an excuse. The fact that only a few cases of the sale of women have been cited in this thesis does not necessarily imply that their total is small. As for the tribesmen, their recent liberation should not blind us to the

fact that they had endured a lengthy period of servitude, long after the Penal Code had purported to abolish slavery in India. Nor is theirs an isolated case. A government report, published in 1969, has this to say about forced labour in India.

VIII 10. "Forced labour is known by different names in different "parts of the country, e.g., Gothi in Orissa, Mahidari in "Madhya Pradesh, Sagari in Rajasthan, Veth Begar, Salbandi, etc "in Maharashtra, Jana, Manihi, Ijhari in Jammu and Kashmir, "Jeetha in Mysore, Vethis in Tamilnadu[1] etc. Bonded labour "amongst the Koltas residing in the Jaunsar Barwar areas of "Dehradun district of Uttar Pradesh, came to be noticed by the "state government through a Committee appointed to inquire into "their condition. The Committee stressed that this community "should be redeemed from the clutches of usurious moneylenders, "who are the root cause for aggravating this problem.

VIII 11. "All these systems are the creation of caste Hindus, "and the scheduled castes are made slaves under them, because "of their economic dependence and untouchability. If the "scheduled caste people refuse to do any work given to them by "caste Hindus, they would be subjected to all sorts of "persecution, such as, burning their huts; not engaging them "in work, so that they would be unemployed; physical torture, "etc. In short they would be socially boycotted in all respects. "As these poor people economically depend on the landlords,

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1. The state of Madras is now called Tamilnadu.

"their future life in the village will become impossible. There "are instances that in such cases they left their villages".[2]

The Committee noted that, although boycott is an offence under Indian law, the police never took cognisance of it. This Committee consisted of eight members, three of whom were Members of Parliament.

There is a third answer to such objections, which, we think, refutes all of them. In this chapter we shall refer to still other cases in which there can be no doubt that the Law has been flouted by the rich and powerful to serve their own interests, and that they continue to do so. These are instances in which no benefit of doubt can be given on the ground of cultural differences. And, such is their nature, that their numbers cannot be minimised.

By referring to these cases we hope to prove that, while the Gwalior and Bombay cases may appear to be atypical, they only illustrate what prevails generally in India. It simply is not possible for a private individual or a committee of

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2. Report of the Committee on Untouchability, Economic and Educational Development of the Scheduled Castes and Collected Documents. p. 158 This report was published by the Department of Social Welfare, Government of India, in 1969.

private individuals, to go over the whole of India, looking for cases of slavery. Enough has been said in this thesis to make it clear that slavery or quasi-slavery exists throughout India and Mrs. Parulekar's experiences have shown the details of the practice in a particular area. Turn where we will, Law serves Power. Whatever the written word of the Law may be, it can generally be manipulated to serve the interests of the rich and the powerful.

In the present chapter we are dealing with a society which applauds robbery and homicide, and it must be emphasised that though geography assists this society to continue its strange way of life, it is not unique in India. There are many cases in India with poor communications with other parts of India, whose administration functions feebly or not at all.

Throughout this thesis we have repeatedly pointed to the difficulties involved in enforcing laws, which, whether or not the government knows it, either oppose, or differ from the social and moral beliefs of the people. We have already illustrated this by reference to cases of sexual offences, which are dealt with by the Penal Code, and then by reference to cases of slavery. We have also said that the government's task is easy, when the law and the social practice follow the same course. Such, we have said, is obviously the case with murder, looting, and robbery.

It could hardly be disputed that society generally disapproves very strongly of these offences, which strike at its very existence. Therefore the authority of Law is reinforced by the tabus which society imposes against those who commit these offences. Thus a robber or a murderer is not only punished by Law, but unlike the man who sells his wife in Gwalior, he is also shunned by his neighbours. So strong are these tabus, so rigid are their norms, that any departure from them meets with a very hostile reaction.

The difficulties of enforcing laws which penalise socially accepted patterns can be most clearly shown, therefore, by the study of an area where, unlike India generally, murder and robbery <u>are</u> acceptable, even to those who are the victims. These are matters on which one generally assumes that society sides with the law. Therefore, where this assumption fails, the failure is far more noticeable, than when tribesmen are enslaved in a caste ridden, non-egalitarian society. For this, as for the sale of women, or the lenient view of male conduct taken by the judiciary in sexual offences, the argument that these are matters of cultural differences might perhaps be advanced. It is not possible to extend the same justification to murder and robbery. Therefore, when in this naked contest between Law and other social forces, the former is defeated, the defeat is far more obvious.

Finally, murder and robbery will out. Particularly when they are committed on a large scale. Unlike the other cases, they cannot be hidden, so that it cannot be said of them that they are too few in numbers to count. Their number is easily verifiable; secondly no government can afford to think, or at any rate, admit, that cases of murder and robbery, however few, are not a serious matter!

In order therefore to defend ourselves from the possible charge that the cases cited above are too few, atypical, and more a matter of cultural differences, than a successful evasion of law, we shall in the next section examine an area where murder, robbery and plunder are accepted, and where as a consequence the Law fails to keep order; where in fact Law serves Power.

SECTION II

The Robber Barons of Chambal Valley

This section is devoted entirely to the examination of a book by Miss Geeta Sane, called 'Chambalchi Dasyubhumi',[3] which was published in Marathi in 1965. The field work for it was done in 1961. I went to the Valley in 1966, to ascertain certain facts, as I was translating the book. The material taken from the book for this section is therefore supplemented from my own observations. This section is, however, mainly based on Miss Sane's work, and I have always indicated where I have drawn on my own experience.

For several centuries the Chambal Valley has been notorious for its lawlessness. Looting, and pillaging, accompanied by killing, were not only common occurrences continued to take place all through the days of the Moghul Empire, the British Raj, and they continue today. Various governments have tried to crush them, but in vain. In 1960 a novel and interesting method was tried to settle this problem. Unable to subdue the dacoits[4] the Indian Government invited Acharya Vinoba Bhave,

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3. Geeta Sane, Chambalchi Dasyubhumi, Mauj Prakashan, Bombay 1965.

4. 'Dacocity' is robbery by five or more persons.

a disciple of Mahatma Gandhi, to convert the dacoits, to change their hearts, to persuade them to give up this way of life, and surrender to him.

Acharya Bhave had already made his mark on modern India, by launching the Bhoodan movement. In Telangana, which is part of Andhra Pradesh, the Communists had been active, and violently so. Vinoba[5] had gone in, studied the problem and come to the conclusion that behind the agitation lay the hunger of the landless labourer for land. So Vinoba addressed prayer meetings and begged the landowners to give a share of their land to the labourer. He warned them that those who did not heed his words would be defeated, as this cry for land could not be silenced. Time was against the landlords. Vinoba distributed the land he received amongst the landless, and the agitation in Telangana was quelled. The government hoped that Vinoba would be able to perform the same miracle in the Chambal Valley and subdue the forces of violence.

Vinoba went to the Valley and addressed public meetings. At these meetings some twenty-one dacoits surrendered to him. The first demand of these dacoits was that they should not be called by that name. "We are rebels", they said. Vinoba

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5. Acharya Vinoba Bhave is known throughout India as Vinoba. I have therefore referred to him by that name

accepted this demand.[6] Thereafter the whole issue was considered to be one of rebellion by these men against the police.

It seems to us that this change in nomenclature is highly significant. Rebellion, unlike dacoity, carries its own, extra-legal justification. Whether or not it succeeds, it has a certain moral authority which crime does not have. This demand also showed the light in which the dacoits saw themselves. They were not criminals, they were rebels, protesting against an unjust authority.

Vinobaji's experiment finally proved a failure. The police constables began to think of themselves as the sinners and their Inspector-General took the unconstitutional step of giving press conferences. The Police withdrew their co-operation; after a while there was a new upsurge of dacoity. Even thought Vinoba's efforts did not succeed, they did raise several interesting questions. Was collective change of heart possible? Did the men who surrendered do so because they had undergone a change of heart? Had they really been rebels? Would they, after their release, remain law abiding? Miss Sane went to the Valley and studied its problems in order to find the answers to these questions.

In her book Miss Sane gives a detailed description of dacoity in the Valley, and reports the numerous conversations

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6. Geeta Sane, op. cit., p. 10

she had with the inhabitants on this subject.[7] From this, as well as from a historical survey, she came to the conclusion that, to the inhabitants of the Valley, there was nothing objectionable in dacoity.

The Chambal Valley lies about one hundred and fifty miles to the south of Delhi, the capital of India. The river Chambal and its tributaries, the Sindh, and the Kuyri, together form the Valley, which is known by the name of the chief river in this area. The total area of the Chambal Valley is about 2,500 square miles. Agra, Itawah, Jhansi on the periphery, and Gwalior in the centre are the main towns of this region. The Valley, which is divided into several districts, forms part of each of the three states of Uttar Pradesh, Madhya Pradesh and Rajasthan. The area, which is now in Madhya Pradesh was a part of Gwalior state until state for reorganisation in 1956. In the area, which is now in Rajasthan, there used to be about a dozen Rajput states before Independence. The banks of the three rivers are, up to a distance of two miles on either side, divided by ravines, formed by rain-water, which washes away the soil.

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7. In many of her meetings with the inhabitants of the Valley Miss Geeta Sane did not talk about the rights and wrongs of dacoity. She visited families of dacoits and of their victims and talked to them about their experiences, from which she drew her own conclusions.

Miss Sane found this to be an agricultural and backward area, like many others in India. Women observed the strict purdah common in North Indian villages. The people were hospitable, and religious, but their religious feelings bordered upon the superstitious. The percentage of literacy was very low.

The writer found the same fights and factions in the Valley as one finds elsewhere in rural India. The fights took place for the same reasons, disputes over women and land, The only difference was in the weapons used; elsewhere men used sticks, and sometimes knives or spears; in the Chambal Valley rifles were used. Not only were there many unlicenced fire arms, but the number of licences was also on the increase. In the Valley, noted Miss Sane, no one was surprised to see a man strutting about with a rifle in his hand and a cartridge belt round his neck. On the contrary, it was assumed that he must have the support of either the police or the dacoits, and consequently people feared him.

In this society the caste system was rigidly observed. The main castes in the region were, the Brahmins, the Rajputs, and the Chamars, who are untouchables. Rajputs are called Thakurs. Before independence most land belonged to Thakurs and Brahmins. The small farmers tilled their own land; the medium sized landowners cultivated some of their lands and hired out the rest to tenant farmers. The really big land-

owners were mainly absentee landlords. They lived in the big towns, such as Gwalior or Itawah, and their land was entirely cultivated by tenants. The tenants were mainly Chamars. They also had to do unremunerated work for the Zamindars. After independence Zamindari and forced labour were abolished.[8] The abolition of Zamindari gave to the tenants absolutely the lands they had held on lease. This at any rate was the law but throughout India the law has been flouted by landlords, who have used the numerous loopholes in the Zamindari Abolition Acts to defeat the purpose of the law. The situation was, however marginally different in the Chambal Valley. Elsewhere in India the landowners often pretended to be active farmers, but hired 'servants' to help on the land. The Thakurs and the Brahmins in the Valley followed the strict religious injunction, which forbade them to touch the plough. So there was no point in taking away the land from the Chamars. Secondly, the uneducated Thakurs and Rajputs took time to learn the tricks their colleagues elsewhere in India had already learnt. This

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8. Forced labour had been abolished long before by the Penal Code. When Zamindari was abolished, this point was again emphasised the law being more vigorously propogated, and wherever a transfer of property took place from landlord to tenant, the law was brought to the notice of everybody.

is not as illogical a statement as it sounds. It is only if there is a rule of law in the country that it is necessary to discover methods of circumventing the law. If, as in many princely states, the prince governs as his fancy suggests, or where might alone determines right, then the strong man hardly bothers to pay even lip-service to the law. Finally, as the upper castes controlled the area with brute force, they were confident that the law did not matter. Up to a point they have proved their contention. The Chamar in the Valley pays heavy fines to dacoits, not because he is a Chamar, but because his hard work makes him comparitively richer than the upper castes.[9] Part of this income is reputed to come from the exploitation of Chamar women by the upper caste men.[10]

When the Chamars refused to give unpaid labour to the upper castes, some of them also refused to do their traditional jobs as disposers of dead cattle. In certain areas they even refused to do any leather work.

When Miss Sane visited the Valley, she found it so peaceful and free from fear that she wondered why this region should have

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9. In this sort of set up the Chamar does not have to be wealthy; almost any money he may have above the starvation level would be regarded as an excessive amount!

10. Geeta Sane, op. cit. p. 161

been called 'the land of the dacoits'. She writes that the inhabitants, who were intelligent men, were quick to understand her dilemma. They gave her, as they gave everybody else, lurid descriptions of police atrocities, against which they had rebelled. She adds, "Our experience tells us that these descriptions are likely to be true; consequently we come away thinking that the police force in the Valley is grinding the public under its heels. We do not realise that this 'public' consists of Brahmins and Rajputs and they are oppressing the lower castes and the untouchables".[11]

A few decades ago there was a steady traffic in smuggled goods, which flowed from the Valley into Rajput states; now the smuggling is carried on into Pakistan. Cloves, nutmeg, saffron, zip-charms and other luxury goods are smuggled in; silk and cotton cloth, voiles and bidi-leaves are smuggled out.[12] The dacoits, Man Singh and Lakham Singh, were well-to-do smugglers.

On the one hand, we have, in the Valley, the weak untouchable, who has been legally freed from his caste restrictions, and whose hard working ways make for prosperity but who is as yet unable to protect himself. On the other hand, we have the upper castes who are strong, lawless, and resentful

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11. Geeta Sane, op. cit. p. 4

12. Geeta Sane, op. cit.p117. Miss Sane quotes from Amrit Bazar Patrika of 30.4.1963, a newspaper published from Calcutta in English.

of the new wealth and new status of the 'upstart' untouchables. In this one recognises a situation likely to develop into an outburst of crimes.

"These crimes are varied, looting, dacoity or robbery, "kidnapping for ransom, collecting 'fines' from the untouchables, "and killing: killing enemies for revenge, or strangers to "intimidate the surrounding populace. Clever men, with the "gift of leading others, organise their gangs; they commit "crimes and then hide in the impenetrable ravines. Until very "recently, these gangs were formed by Thakurs and Brahmins. "Many of these gangs wore uniform and were given what amounted "to military training. Their henchmen informed them about "police movements, and supplied them with food. The landowners "supported these gangs, keeping in touch with them through the "lower caste men and the untouchables who have always served "as go-betweens, formerly because, as tenant-farmers, they "were afraid they might lose their lands if they disobeyed, "and now because they fear for their lives".[13]

Miss Sane refers again to the feeling one has in the Valley that these men have taken to criminal methods of making their legitimate protests, and that, should we show them other means of complaining about their grievances, they would change and be very useful in making India's democracy work. After all, a

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13. Geeta Sane, op. cit. p. 4

democracy rests upon people, who are vigilent about their rights?

The writer then points out how false such notions are. She gives the case histories of some dacoits of this region. One of them, Man Singh, was killed in 1955.

Man Singh was a resident of Kheda Rathod, a village in Agra District, on the banks of the River Chambal. This village is on the edge of deep ravines. Man Singh's father owned five bighas[14] of land, and he was also a smuggler. He had differences with his Brahmin priest, Talphiram, because they both aimed at the leadership of the village. This difference polarised the village into two groups, and there were several clashes between them. One day they fought a pitched battle in broad daylight; and the house of one of Talphiram's men was burned down. There was a lot of bloodshed and some men were killed. Man Singh was arrested and given a prison sentence. His brother and their sons, however, escaped into the ravines.

Once they went into hiding, they were in need of food, so they started committing thefts and robberies. Other men came

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14. There is a Kaccha bigha and a pakka Bigha. Two Kaccha bighas make one pukka bigha, and five kaccha bighas equal an acre. Both are called bighas; unless one specifically asks which kind, villagers do not say!

and joined them. Their system was to go into a village, take what they wanted, and kill anyone who tried to stop them. If the police were too hot on their trail, they would run away into the neighbouring princely states. Occasionally they would visit their homes in the village of Khāda-Rathod. On one such occasion the police surrounded their house. There was firing on both sides. Man Singh's eldest nephew was killed but the rest of the gang escaped.

In 1939 Man Singh was released from jail. His wife, Rukmini, incited him to avenge their nephew's death. She suspected Talphiram of having informed the police about the gang's presence in their house. In the next eight years Man Singh took his revenge by killing about twelve male relatives of Talphiram, some of them being young boys. Man Singh attacked Talphiram's house repeatedly, and even burnt it down. The police proved totally incapable of protecting that family.

Man Singh impressed the Valley with his criminal ability. He was much feared. No one dared to complain about him to the police. A couple of men who were bold enough to do so were never seen again. Once or twice Man Singh even raided police stations. Thereafter he was known as Raja Man Singh. People paid tribute to him, and brought their disputes to him for decision. His presence at their weddings added to their social status. During the 1942 movement, he harboured political

workers, who were hiding from the British government. The latter, being busy with the Second World War, were forced to ignore him.

On 15th August 1947, Indian Independence Day, Raja Man Singh returned openly to Kheda Rathod. He celebrated the occasion by distributing vast quantities of sweets. He built a large house with the wealth he had looted. Today that house is known as a garhi or Castle. Another way of estimating his ill-gotten wealth is that after the deaths of Man Singh and his lieutant Roopa, the villagers refused to let anyone cultivate Man Singh's lands. In 1960 Vinoba Bhave intervened and the villagers agreed to lift their ban. The land that had lain fallow measured nine hundred bighas. Man Singh's father had owned only five.

After 1947 Man Singh began to live at home openly. He celebrated the wedding of his great-nephew with great pomp. The bridal procession was taken out on an elephant and for the first time in their lives the people in his village saw a motor-car. The dignitaries of the area came with gifts and even some Government officials attended the wedding, so that it appeared that the Indian Government had given unofficial recognition to Raja Man Singh.

But Man Singh had not recognised the Government of India. He carried on with his programme of looting, killing and committing dacoity. When the ordinary, routine efforts to

catch him failed, a top level police conference was called and 'Operation Man Singh' was planned.

Man Singh too made preparations to meet the police. With his gang he moved speedily, looting and killing, throughout the Valley. Everywhere the police had spies to inform them about dacoits. If Man Singh as much as suspected a man of being a spy, he tortured the man to death. Though the police were hot on his heels, for months together Man Singh created havoc in the states of Uttar Pradesh, Madhya Pradesh, Rajasthan, Madhya Bharat and Vindhya Pradesh and the police of these five states failed to catch him.

This man, who cheerfully sent scores of men to their deaths, was extremely religious. He spent about two hours a day praying and reading the scriptures, particularly the Ramayana. After inciting Man Singh to take revenge on Talphiram, his wife said to him that she hoped he would not kill a Brahmin, for that was the greatest sin of all. "Don't be afraid", replied Man Singh, "God will show us the way. After all, Lord Rama killed Ravana, who was a Brahmin!"[15]

Man Singh had no vices, such as drinking and gambling, and he never molested a woman. He gave money to charity and to the poor. He helped brides with dowries and he gave donations to schools. People whom he had never molested,

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15. Geeta Sane, op. cit. p. 6

approved of his way of life. After all the moneylenders had grown rich by robbing the poor, so what was wrong in looting them to give to the poor?

That Man Singh was not such a benefactor of the poor as some people thought is a fact to which young Vishwanath would bear witness. Vishwanath is an Ahir by caste, that is, he is a milkman. Man Singh's son Tehsildar Singh was captured in a village near Itawah in 1954. The village was predominantly an Ahir village. Man Singh harboured a grudge against the villagers, because they had not helped his son to escape. Anticipating his next, wrathful move, the police established men there, to keep watch. So Man Singh took revenge on the relatives of these Ahirs, who lived in the village of Parsona.

One evening, as the Ahirs set outside their houses smoking the hukka and chatting, Man Singh and his men swept down on them. They shot down six men and set fire to the house. Vishwanath, who was then five years old, was lucky to survive. His mother went into the burning house and brought out Vishwanath and his younger sister. Man Singh's nephew snatched the baby from her, threw her on the ground and was about to stamp on her neck with his heavy boot, when he realised that it was a mere girl. Contemptuously he withdrew his foot. As a female she was not worthy of so much

'attention'. It is said in that area that an Ahir boy pursued by Man Singh's men hid in a Rajput house. He begged them to spare him, because he was a Rajput. But the Rajputs denied this and the boy was killed.[17]

Soon afterwards Man Singh launched a campaign to kill all possible prosecution witnesses against his son. In this campaign he took thirty-three lives. A year later he himself was killed in an encounter with the police. But even today many persons around the village of Kheda Rathod respect and honour his memory. Man Singh died in August 1955. The police dossier on him was closed with the words, 'End of the Scarlet Pimpernel of the Underworld'. His police record weighed one ton. He cost the exchequer about ten million rupees, that is about £770,000. In the twenty years of his criminal career, he had killed one hundred and eighty-five persons, committed one thousand one hundred and twelve dacoities, and taken more than five hundred thousand rupees in ransom for kidnapped persons. In loot he collected several hundred thousand more. Between 1954 and 1955 he had eighty encounters with the police, in which he lost fifteen men and the police thirty-two.

During 1950 and 1960 there were sixteen listed gangs in the valley. A listed gang is one of which the police have

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16. Geeta Sane, op. cit. p. 7

17. Geeta Sane, op. cit. p. 167

all the particulars. They know the names of their members and of their leaders and also know other details about them.

These gangs carried on feuds amongst themselves. After Man Singh's death his gang was led by Roopa Maharaj, a Brahmin. Wherever Brahmins and Thakurs quarrelled in the Valley, the Brahmins invited Roopa, and the Thakurs asked the Rajput dacoit Lakhan for help. The two gangs would make a battlefield of the village and the bloodshed would continue till the village was wiped out.

Miss Sane then continues, "We have mentioned earlier "the tensions created in independent India by the liberation "of the untouchables. The Chamar in the valley is hardworking "and his whole family works with him. So, when he became a "landowning farmer, his financial position improved. By "contrast the upper caste Brahmins and Thakurs became poorer.[18] "For this situation the Charmar has to pay. Time and again they "are shot down. They no longer have to give rent to the "Zamindar. But they have to pay 'fines', because they fear "for their lives. They live in their villages but they are utterly demoralised. Our democratic government has failed to

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18. With the abolition of Zamindari, they lost ~~most~~ some of their land. As they were unused to working with their hands, and as their women were in purdah, the land they kept was less productive than the Chamar's lands.

protect them. This is our defeat and the root of our problem."[19]

Dacoity is one way of making money. Kidnapping is another. If the ransom is not paid up, the kidnapped person is killed. Most of these persons are boys.[20] They are easy to kidnap, easy to hide. The technique is simple. Armed dacoits go to the school or the house where the boy or man happens to be. Some keep guard, others go in and fetch the person they want. Anyone who intervenes is threatened, and if necessary, shot. In one case the dacoits kidnapped the schoolboy son of a trader from his school. The father did not have the money to pay the ransom. These demands varied between one hundred thousand to fifty thousand rupees. The child's pathetic letters were sent to the father. His meals were served to him in any shoe that was at hand; he was not given enough to eat. Five months later, as the father still could not pay, the boy's dead body was flung in the main square of the market town of Bhind, which is also the headquarters of the Bhind district.

In the valley there are persistent rumours that the police discriminate between gangs. It is also said that the police shoot down persons on suspicion or because of a personal vendetta, and then try to cover up by declaring the dead

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19. Geeta Sane, op. cit. p. 9

20. Women and girls are never kidnapped, because no man in his senses would pay the ransom for them!

man to be a dacoit.[21] Again, Mukhbirs or police informers are said to exploit their position to get rid of their own enemies.[22] This is very likely to be true. No one in this Valley has a reputation for probity. Where there is trouble in the village, it often happens that one side joins the dacoits and the other begins spying for the police. This is usually the signal for an outbreak of crime. This state of affairs continues until, in the ensuing encounters, pitched battles and raids by both sides, one or the other of the two parties is drastically reduced in strength.[23]

In other words, far from being the servants of the Law, the police have become one of the criminal forces in the valley. In 1966 I visited the Valley. A superintendant of police, who had been posted to one of the dacoity-infested districts, told me frankly that they tortured suspects. Indeed it was his opinion that the police had failed to control

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21. Geeta Sane, op. cit. p. 10 also pp. 41-2. Miss Sane met and old widow, whose husband had been an army pensioner. She said that the police had killed her husband by mistake and then covered up in this manner. So she had lost her widow's pension.

22. Geeta Sane, op. cit. p. 10.

23. Geeta Sane, op. cit. p. 10.

dacoity because they could not torture as cruelly as the dacoits could.

Miss Sane and I were repeatedly told that the police were responsible for the fact that people took to dacoity.[24] Yet, in the Valley, I was also told that a few years ago, men habitually hoped for three sons, one to enter the police force, one to be a dacoit, and the third to look after the joint 'earnings' of his brothers! It is assumed that employment in the police is a license for corruption and oppression. People only object if they are the victims; there is no objection in principle to a corrupt, vicious, police force. Man Singh's family, which is proud of him, also boasts of the fact that one of his nephews (or sons) is a police officer. I hasten to add I have nothing against this gentleman, whom I have never met. But it does appear odd, that a family, which feels that the police were responsible for one of their member's adopting a criminal career should happily allow another member to join that force, and, on their own reckoning, drive more me to dacoity!

As to the government, the inquiry committee appointed by the goverment of Madhya Pradesh had this to say: "We have to observe that in this area the government, established by law and order and deriving its authority from the will of the

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24. Geeta Sane, op. cit. p. 4, p. 21, Appendix, pp. 189-193

people, has been placed in the invidious position of having to compete with dacoits for the prestige, which comes from valid authority. We consider that this is an intolerable situation, which must be put an end to speedily."[25]

In 1960, when Vinoba Bhave came to the Valley, there were 'three and a half' active gangs operating: the rest had been destroyed by the police. The 'half' was the remains of Man Singh's gang. The other three stayed away from Vinoba and were soon finished off by the police. Of the twenty-one dacoits who gave themselves up, the first man who surrendered, Muharman, was actually a police 'nominee'.[26] The police were afraid that no dacoit would come forward so that Vinoba's visit would be a fiasco. They therefore persuaded one dacoit to surrender! Later, when he had stood his trial, and served his sentence, Muharman returned to his village, Kamera, where he was promptly elected a member of the village Panchayat[27] - another position of power!

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25. Geeta Sane, op. cit. p. 129. From the Bhind Morena Crime Inquiry Report of 1953, para 20.
26. This is yet another side light on the dacoit-police relationship! I found this fact out in 1966. It was commonly known to be the case.
27. Heard during my conversations in the Valley.

When Miss Sane was in the Valley in 1963[28] ten of these twenty-one dacoits had already come out of prison, but hardly any of them had taken up any respectable occupation. One of them had taken to money lending, which is an ideal profession for oppressing the poor; another said he was going to make sweets. This cannot serve as a full-time profession in the villages, where people have not enough money to buy sweets. All of them were going to live at home.[29] Miss Sane's natural question was, how were they going to live? A question she does not answer, because she did not meet any of the released men. When I met some of them in 1966, I found that smuggling was not regarded by anybody as a criminal activity. 'Everybody did it, so what was wrong with it?' was the attitude. One of these men said with pride that, although he had given up dacoity, he was just as much respected as before. "Even now I cannot finish what is served to me at a wedding, they press me so much", he said.

None of them, with one notable exception[30] had undergone

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28. This was Miss Sane's second visit. She could not meet those men, because the rains made it impossible to go into the Valley.

29. Geeta Sane, op. cit. p. 176

30. This was Lukka, who wrote to his son from prison, dissuading him from becoming a dacoit.. Geeta Sane, op. cit. pp. 165, 175

a change of heart. Surrender itself was no novelty. In olden days dacoits who had grown tired of their irregular, unsafe, life, occasionally preferred to give themselves up. In 1926 the Maharajah of Gwalior[31] had invited them to do so, and several score of them had answered his call. He had at that time also asked the landlords, who sheltered them, to hand over the dacoits, or face the consequences of disobeying the government. Another writer[32] quotes the story of Lacchi, who had surrendered. He had run away to Bombay; then he had thought it best to surrender and make his way back to a safe life. Mr. Bhatt, who was then in Vinoba's camp, asked him how he had kept himself in Bombay. Mr. Bhatt then reports, "Lacchi was dumbfounded by this question. What had he been a dacoit for, he asked. He lived off the wealth he had acquired then, of course!"

Vinoba established a Chambal Valley Peace Committee. He had, however, as Miss Sane points out, failed to see where the real injustice lay. This committee is, by now, generally regarded as favouring the dacoits. While police influence led to Muharman's election to the panchayat, the Committee gave two of his sons an educational grant of Rs 16.50 each. That is a vast sum of money in rural India, where, as we have

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31. Geeta Sane, op. cit. pp. 122-4

32. S.D. Bhatt, "Chambal Ke Behdo Men".

seen in the last chapter, maidservants can be hired for a wage of five rupees per month.

For two years, that is, in 1960 to 1962, the Valley was peaceful. Then new gangs and new leaders appeared; kidnapping, robberies, and dacoities began again. By 1963 there were twenty-one gangs in the Valley. When, in 1962, the majority of the policemen were withdrawn and sent elsewhere to quell riots, these gangs caused havoc in the Valley. When I went to the Valley in 1966, I visited an area where, one month before my visit, Madho Singh, a new dacoit, had killed eleven men in the space of eight days, in three villages, which were within five miles of one another, and within forty miles of Agra.

We have said earlier that smuggling is not considered a crime in the Valley. I now found that the White Slave Traffic is also acceptable. Madho Singh had been arrested by the police for this particular activity, and had been given bail. Some members of the peace committee, who escorted me to the Valley, told me that they had personally gone to the police officials to ask them to drop the matter, presumably by not producing evidence! They argued that, if Madho Singh was tried and sentenced, he would, upon his release, undoubtedly become a dacoit. The police agreed to let the matter drop. However, Madho Singh had already jumped his bail. Before these events took place, he had been an orderly (a peon) in the Army

Medical Corps. He had probably been discharged after the Indo-Pakistani war of 1965. My hosts in this village,[33] were old Congress workers and were related in some obscure way to one of Vinoba's eminent lieutants on his trip in the Valley. They were also related to Madho Singh and the old lady of the house told me that the men he had killed must have done something to him. "No one kills another person without rhyme or reason", she argued!

In her wanderings round the Valley, Miss Sane noted that no one ever blamed the dacoits.[34] Either, like the daughter of the dead schoolmaster, they said that the men had been killed, because there was a mistake in identity[35] or they blamed the police.[36] The barber's widow, whom I met - he was one of the eleven men shot by Madho Singh's gang - complained bitterly, but only because her husband had done nothing to offend Madho Singh. A complaint of this kind inevitably provokes the retort that he must have done something. Both the complaint and retort are based on the presumption that it is right to kill a man who has offended or insulted one.

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33. Where I stayed while visiting the families of the men killed by Madho Singh.

34. Geeta Sane, op. cit. p. 70

35. Geeta Sane, op. cit. p. 57

36. Geeta Sane, op. cit. pp. 43, 59

The third kind of exculpation I received from my escort was that Madho Singh could not go everywhere. He had to apportion the work. His assistants, who came to this particular village, did not know their victims by sight; they mistook the house, and killed the wrong men! The implication was that Madho Singh was not to blame for a mistake any one might make!

From time to time other efforts - besides sending in the police - are made to eradicate dacoity, or at least to protect villages from dacoits. One such effort was to establish village defence committees and to arm its members.[37] But as one of the inhabitants of the Valley pointed out to Miss Sane, the men who join the gangs, or spy for the police, are the men who sit on the committees. Who is to protect the villagers from them? Whatever steps are taken, invariably the powerful inhabitants of the Valley benefit from them. The Chamar continues to pay the fines.

In the Chambal Valley the dacoit has a recognised status in this society. He is feared, but he is also respected; neither he nor his family are ostracised. As the Crime Inquiry Report mentioned above put it, "Taking to the Ravines,[38] though not so listed in the census tables, is bordering upon a legitimate and recognised profession".[39]

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37. Geeta Sane, op. cit. p. 129

38. The Committee have translated the Hindi phrase which means "to become a dacoit".

39. Geeta Sane, op. cit. p. 27

The police officers I met told me that there is often an elaborate ritual of religious worship and social leave-taking, before the man 'takes to the ravines'. This information was confirmed by independent sources, who added that the would-be dacoit was often given a Khaki uniform and a grand farewell dinner by his family!

The dacoit's family is quite happy with his choice of profession. Miss Sane met the wives and mothers of several of them; their men were either dead or, having surrendered to Vinoba, in jail. Man Singh's family was financially ruined but his widow had no regrets[40] about the bloodstained lives of her husband and their other male relatives. Prabhu's wife[41] and Lacchi's mother[42] were furious with them - they had no business to surrender and leave their families without an income. Lacchi's mother asked why her grandson did not receive a grant, like Muharman's sons. Had not her son surrendered too? She was not interested in the land the Peace Committee had brought back into cultivation. She wanted cash.

On the other hand, Muharman's wife was very pleased.

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40. Geeta Sane, op. cit. p. 61

41. Geeta Sane, op. cit. p. 48

42. Geeta Sane, op. cit. p. 47. The villagers had stopped Prabhu's land being ploughed in revenge.

Her sons received Rs 33 per month![43]

When Prabhu was released from jail, the Peace Committee gave him four acres of good land,[44] and they procured Rs 1,250 from 'War on Want'[45] for him, to buy agricultural implements. No such largesse was forthcoming for the dacoits' victims. It is hardly surprising that this behaviour of the outside world only confirmed the local view that dacoity pays.

As to the victims of the dacoits, they are often given fire-arm licenses[46] by the police, to help them protect themselves in the future. Many of these men gradually start spying for the police and enter a life of crime themselves. They compel people to work for them without payment; they take away other people's cattle, and generally act in a high-handed manner. So they too are impelled to crime.[47]

If the dacoit families are pleased with their men, the number of people who aid and abet them is much larger. There is a large class of men that disposes of the goods stolen by the dacoits,[48] which supplies them with provisions, and with

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43. Geeta Sane, op. cit. p. 45

44. Geeta Sane, op. cit. p. 175

45. Geeta Sane, op. cit. pp. 175-6

46. Geeta Sane, op. cit. pp. 153-4

47. My impression is that these licenses were given to the better off victims of the dacoits, not to poorer families.

48. Geeta Sane, op. cit. p. 116

arms and ammunition.[49] Where do these last come from? Police officers will not say. They are reputed to come from police arsenals as well as from other sources. Indeed, in one statement, the Deputy Inspector General of Police of Uttar Pradesh said that some dacoits were found to be using bullets which had been made in a government arsenal.[50] One of the dacoits, who had surrendered to Vinoba and who had just come out of prison, muttered something in my presence to the effect that arms used in the Indo-Pakistani conflict in 1965 had made their way into the Valley. Members of the Legislative Assembly of Madhya Pradesh, from the government and the opposition benches, said that there were powerful social and political forces behind the dacoits.[51] All this shows that there is a large, powerful class behind the dacoits which profits from their activities.

We would like to give one example of the power these forces wield in the Valley.

In 1952, in the village of Khohri, Uttar Pradesh, the upper caste dacoits killed two Chamars. The upper castes were annoyed with all the Chamars for not doing unpaid work,

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49. Geeta Sane, op. cit. p. 116

50. Geeta Sane, op. cit. p. 116

51. Geeta Sane, op. cit. p. 117

for not disposing of dead cattle, and because they suspected the Chamars of having brought about the defeat of the candidate supported by the Rajputs, in the general elections held in 1952, despite the fact that the Chamars had been directed to vote for the Rajputs' candidate. Apart from this general grievance, some young Chamar children had been impertinent to one of these dacoits. These two Chamars were murdered in 1952, and proceedings were started against the dacoits involved in their murder, for, as they frequently visited Khohri, the dacoits were known to all. The village panchayat apologised to the Chamars and asked them to withdraw their cases! The Chamars complied with this extraordinary request. In 1955 a young Mallah (boatman) was killed by some dacoits. He was supposed to be having an affair with a Brahmin girl, who was related to one of the dacoits, who shot him. In 1958 another boatman was killed by the dacoits. This time a lady member of the Legislative Assembly of Uttar Pradesh came to Khohri and tried to make peace. She asked one faction to protect the village from dacoits, and the other faction, who were police spies, to protect it from the police. Within three days of her visit the dacoits killed three more Chamars and a Rajput. Two of these Chamars had committed the 'offence' of telling other members of their caste not to associate with the dacoits. There was also some problem arising out of the

sale of a cattle shed, to which the Chamars were party.[52]

On each of these four successive occasions the village Panchayat with its upper caste Panchas, apologised to the Chamars, and asked or rather, commanded them to withdraw their cases.[53] Naturally, Miss Sane found this statement hard to understand, as according to the Code of Criminal Procedure, murder is not a compoundable offence. She therefore assumed that the Chamars allowed their cases to go by default by not producing their witnesses. However, I talked with a man who had done a year's field work in the Valley, and who had lived in Khohri. He said that by a highly irregular procedure, these Chamars were allowed to withdraw their First Information Reports to the police. So, officially there had been no murders. No wonder the Chamars bowed to the Panchayat, when even the police would not protect them.

Such as the position in the Valley, in 1961, 1963, 1966 and indeed till 1969. And so, most probably, it remains today. Murder, kidnapping, white-slave traffic, robbery are all explained away, and sometimes regarded as justified.

The Chamars are now beginning to react; in 1962, reports

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52. Some Chamars and some Thakurs were involved in buying and selling a cow-shed. There was some dissatisfaction over the price.

53. Geeta Sane, op. cit. pp. 150-3

Miss Sane, they had a gang of their own operating in the Valley.[54] Their answer to injustice was to perpetrate injustice themselves.

It is obvious that this situation cannot be controlled by ordinary means. How did this situation come about? How did the time-honoured, universal, moral sanctions against these crimes lose their hold over the entire Valley? Miss Sane has answered this question by referring to the history of the Valley.[55]

Miss Sane's historical material is drawn from several historians of India. Roy Choudhary, Majumdar and Datta; V.A. Smith, James Todd, Jawaharlal Nehru and others. As we have taken our material directly from her, we have not thought it necessary to give references to these historians.

By 7th Century A.D. the peace and order, for which travellers had praised India, appears to have gone. In that century the Chinese traveller, Hu-en Tsung, repeatedly recorded that he had been set upon and robbed. This lawlessness was common to all of Northern India and not just the Chambal Valley. During the Buddhist ascendency, i.e. from 2,500 B.C. until 1,000 A.D., Northern India was, for most of the time, divided into small kingdoms. Reigns of Emperors like Ashoka the Great, the Gupta dynasty, and Emperor Harsha covered only a small part of this

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54. Geeta Sane, op. cit. p. 13. The scavengers also had one.

55. Geeta Sane, op. cit. Chapters 4 and 5.

period. The kings of the small kingdoms fought amongst themselves, but without interfering with the daily life of the citizen. The farmer ploughed his land, and the artisan plied his craft, while the army fought. The dense forests of the Chambal Valley and the swift currents of the rivees made it almost impossible to penetrate the valley on foot or by boat. The few tribesmen of the Valley were left in peace and seclusion by the outside world.

This state of affairs began to change, when India had to endure several waves of invaders. One by one tribes from Central Asia advanced into the Indus valley, pushing out the people who were settled there, until they too, in their turn, were pushed out by the next wave of invaders. The displaced people moved southwards and eastwards, until they entered the Chambal Valley. The outsiders pushed the original residents of the Valley even further south and occupied the Valley themselves. The Gonds and the Bhils, who now live in Central India, probably came from the Valley. Gradually, the Valley became densely populated. The invading tribes established small kingdoms in the Valley. In course of time, these invaders, who had not attained the degree of civilisation common among the Indians of the north, were absorbed into indigenous societies.

These changes continued to take place in the Chambal Valley as elsewhere, until the 8th Century A.D. That Century saw a

tremendous Hindu revival in India. Shankaracharya, the leader of the revival almost completely erased Buddhism from the sub-continent, though this involved a blood-bath. He rejuvenated Hinduism with its four-caste system, but this was a difficult task. During the Buddhist era the Vedic Brahminical tradition alone had survived.[56] There were no Kshatriyas. The Vaisyas, i.e., the commercial class, had become jains, and to this day are mostly jains.

While it was feasible to allow Vaisyas to remain jains, it was as necessary as it was difficult to recreate the Kshatriya or warrior class. According to historians these neo-Kshatriyas, now known as Rajputs, were recruited from among the invading tribes who had settled in India and had been absorbed into it.[57] Further south, the Rajputs were people who had been Gonds, Bhils and Bhars, who had been pushed out of the Valley.[58]

The Rajputs did not belong to the Vedic tradition. They were brave but they were not educated, nor did they understand the importance of education, which many an

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56. V.A. Smith, History of Ancient India, p. 408
Geeta Sane, op. cit. p. 75.

57. R.C. Majumdar, H.C. Roy Choudhary, K.K. Datta, Advanced History of India, p. 195, Geeta Sane op. cit. p. 75

58. V.A. Smith, op. cit. p. 414, Geeta Sane, op. cit. p. 75.

uneducated king has done.[59] There was no longer a tradition of teaching the king his duties as there had been in the Vedic times. The Rajguru or the kings teacher no longer existed. Political Economy and state craft were no longer a part of the king's - or anybody's - education. The king's became truly absolute, for there was no one to check them. Brave, courageous, proud, and ambitious as they were, they were also vengeful, uneducated, and without vision. With no one to guide them, the Rajputs expended their energies on feuds and bloodshed, wine and opium. The southern Rajputs did the same.

Though Shankaracharya re-established Hinduism, he could not entirely expunge the Buddhist influence on the Indian people. Idol worship continued, though the names of the gods were now taken from the Hindu pantheon. The institution of Sanyas too could not be removed. Instead it was given a new form. In Buddhism any one, man or woman, could become a Bhikku or a monk,[60] for as long as he chose. He could then return to his worldly life. Hinduism did not permit the Sanyasi to return. Buddhism had created Sanyas for certain valid reasons; a Buddhist monk was free from worldly obligations; he could give his time to others, and he could meditate, without interruptions. He was free to move around

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59. Akbar in India, King Alfred in England were two such kings.

60. A nun was called Bhikkuni.

administering to others. This compassion for others was a basic tenet of the Buddhist religion. Taking vows for however short a time was a way of giving up whatever time one could spare, to the needy. Since these vows could be withdrawn, any man or woman could give expression to the compassion he had been taught to feel for others, and then return to fulfil his own duties.

Hindu Sanyas had no such logical basis. The new Hindus accepted the institution unwillingly. Having lost ~~their~~ this logical basis, Sanyas had to be propped up by blind faith and religious injunctions. Independence of thought or action was shunned, because it was dangerous to the stability of the newly rejuvenated Hindu religion.

The Brahmins were unwilling to part with the knowledge, which was their sole claim to superiority. The Rajput kings were engaged in feuds. The peasants and artisans were over-worked and disregarded. The slaves and the untouchables were even worse off. The common people became ignorant and superstitious. Even after two centuries (8th to 10th), Indian society showed no progress and knew no peace.

This was the situation when the Muslim invasions of India started. India has never been able to repel invaders, except when Chandragupta Maurya defeated Alexander's armies. But Buddhism had absorbed the invaders. Hinduism, with its

caste system, was unable to do so.[61] On the other hand, whatever the reason, the Muslims were unable to convert all India to Islam, as they had converted the fireworshippers of Iran, and other non Muslims in the Middle East.

The Muslims conquered India with their swords, but they too were not interested in matters of the intellect. While they carried away India's wealth, they could not and did not shake the Hindus out of their stagnation. On the contrary, aware of their weakness, when faced with the invaders, the Hindus withdrew more and more into orthodoxy. The four caste system became even harsher, and the modern caste system, based on birth, not on profession, and infinitely more fragmented, made its appearance. The frustrated Hindus emphasised their isolation by introducing more and more rigid, and often senseless rules of behaviour. Each caste, each region introduced its own strict rules about fasts, food, clothes, covering almost every aspect of daily life, so that while each caste or community had its own ethics, no overall morality could emerge. Political anarchy was thus joined by social anarchy.

Enraged by the barbaric Muslims, the Rajputs strove again

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61. This does not seem entirely fair. The Muslims were not anxious to be absorbed either!

and again to defeat them; but their weakened, ultra-rigid religion could not support them, and the castes could not unite against the invaders.

These struggles against the Muslims did not cease, as they had done with the previous invaders, when they had settled down in India. Only under Akbar, that wise and powerful emperor, who showed religious tolerance, did these Rajput princes find peace, but this was not to last long. Akbar's successors lacked his wisdom and under his great-grandson there were fresh uprisings. Aurangzeb, a religious fanatic, reversed Akbar's policies, and went to the length of clamping the hated Jizia tax on the Hindus; every Hindu had to pay simply because he was a Hindu. These policies provoked risings against Aurangzeb by the Sikhs, the Jats, the Bundelas of Bundekhand, the Satnamis of Delhi, and the Marathas.

Of all these, the Marathas were the most powerful. They had come to prominence under Shivaji and after his death, Aurangzeb had trapped and put to death by torture Shivaji's son Sambhaji. He expected this to destroy the Marathas, but although the Marathas were without a prince, they were not demoralised. The life that Shivaji had breathed into them was still there, and they did not long lack for leaders; such was the quality of their leadership and the faith the

common man placed in them, that they fought against Aurangzeb's mighty armies for twenty-five years; far from being destroyed, they permanently weakened the Moghul Empire.

Naturally, when Aurangzeb died in 1707, the Marathas formed the most powerful state in northern and central India. But this time their older leaders had died and the new leaders lacked the vision necessary to establish a viable state. They hired mercenaries now, and used Pindharis as official looters of the Maratha army, who were obliged to surrender only a fixed portion to the Maratha government coffers.[62] The Maratha armies ranged, all over India, and even today in Bengal, Punjab and Orissa, they are remembered as mauraders. Instead of establishing peace, law and order in the territories they conquered, the Marathas, after looting them, returned home.

The Pindharis were Muslims. Their language, Darra Lahbar, was a form of Urdu. They were very fine horsemen, and could easily ride sixty miles a day. They were extremely well organised. After the weakened Marathas had ceased to go out on campaigns, the Pindharis turned their attentions to Maratha territory. They had been given land by Mahadji Sindhiya, in the 18th Century. After his death, his son could not control them and the Pindharis went all over northern and

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62. N.C. Kelkar, Marathe ani Ingraj (The Marathas and the British) Volume II, p. 48 at Geeta Sane, op. cit. p. 90.

central India, committing arson, murder, rape and looting everywhere. They were extremely cruel, and their women, who accompanied them, were no less so. Writing anonymously about their origins, an officer of the East India Company remarked that the direction in which the Pindharis had travelled could be recognised from the smoke rising up from the villages they had set on fire and that the whole area resounded with the groans of men and the wailing of women.[63]

The Rajputs and the Muslims were unable to stand up to them. The Muslim nawabs spent their time in their harems and state business was transacted through slave girls. The nawabs were suspicious of everybody including their own sons. They were totally under the influence of dancing boys, dancing girls and the musicians who accompanied them. It was easy for cunning men to bribe these intermediaries and, through them, conduct the affairs of the state for their own gain. Naturally, in this situation there was no one to protect the subjects, no conception that the state had any duty towards them.

The Rajputs had lost their traditions of bravery. They too hired mercenaries; they became excessively addicted to opium; they were occupied in feuds, petty quarrels, looting and wars. Mercenaries were used by Rajput kings, not only to

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62. An officer of the Company, Origin of the Pindharis, p. 21 at Geeta Sane, op. cit. p. 90

fight outside enemies but also to crush their own noblemen.

We have referred above to the adoption of the Buddhist Sanyas by Hindus. The Sanyasis, who were worshippers of Shiva, were followed by Bairagis, worshippers of Vishnu. Then came the Muslim Fakirs.

It is not known when these Sadhus, who had allegedly renounced the world, started carrying weapons. During Akbar's reign, that is, in late 16th Century, two Sanyasi sects had fought at Kurukshetra in Punjab.[64] In 1740 the Sanyasis and Bairagis had engaged in battle. All sects of Sanyasis, Bairagis and Fakirs had an order of naked monks amongst them, who were supposed to be the strictest order in that sect.[65] In 1760 Naga Sanyasis and Bairagis joined battle at Haridwar. As in 1740, the Bairagis were again killed in large numbers. It was only after British rule was established that the Bairagis dared to visit Haridwar, one of India's majorholy places.

Had the Sadhus[66] - and the Fakirs only fought amongst themselves - as indeed they always did - the ordinary man

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64. Geeta Sane, op. cit. p. 93

65. The Sanyasis were further divided into ten groups. Naked Fakirs were Burhanas. Naked Sadhus were Nagas,

66. The word Sadhus here refers to both Bairagis and Sanyasis.

would not have cared. But later they began to enlist in armies. Almost every Indian prince had companies of Sadhus in his army. The Rajput princes employed them to collect land revenue. They were not averse to committing robberies and dacoities. They also kidnapped children to bring them up in their sect. They were very rich and powerful. In addition, they had the protection of their religions. A king of Nepal once said that admittedly the Fakirs and the Sadhus were extremely cruel. But religion did not permit them to be punished, so he was powerless against them.

The Pathans were equally lawless. But whereas the object of the Pindharis had been universal plunder, the Pathans preyed mainly upon governments and chieftains, from whom they extracted 'protection money' for not molesting them. The Pindharis and the Pathans never tried to establish their own kingdoms. They both operated in central and western India: i.e. around Rajasthan, Uttar Pradesh and Gwalior. Then there were the Thugs.

The Rajput soldier was a fighter by profession. He expected to earn his living by fighting in an army. When the Rajput princes began to hire mercenaries, he became redundant and likely to starve, so he turned his military skills against the very society he was meant to protect. Moreover, petty landowning Rajputs began to avenge themselves upon their princes who had done them injustice. Their vengeance did not consist of waging open warfare but in entering the enemy's

territory to loot to burn and to destroy, until the enemy gave in.

This kind of vengeance was useful in three ways. The avenger got money and provisions; the enemy became impoverished, as he could collect no revenue, and his subjects, having lost faith in him, joined the maurader, increasing his territory and fighting strength.

The desire for justice often provokes a demand durand for vengeance but its effects encourage second thoughts. The behaviour of a young bandit in Oudh, in the 19th Century, was like the behaviour of his Rajput counterparts, a few decades earlier. The bandit killed anyone who tried to cultivate the land, which he felt rightly belonged to him, laid waste villages and crops in the neighbourhood and drove off cattle, all in the hope of enforcing his rights.[67]

From all sides the weak and defenceless were set upon and robbed of their life and property. Many of the princes and their officials did not think it was their duty to protect their subjects. Lieut-Col. William Sleeman wrote that in 1828, in Bhilsa, a town that belonged to Gwalior state, a party of twelve merchants had been wounded and plundered by robbers; they rushed to the Amil, who was the chief of the district, begging him to send his men after the robbers. "Send your own people", said he, "or hire men to send!

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67. Sir Francis Tuker, The Yellow Scarf, p. 29, Geeta Sane, op. cit. p. 88.

Am I here to look after the private affairs of merchants and travellers, or to collect the revenues of the Prince?"[68] Small wonder that Sleeman commented on the government of Gwalior: "As a citizen of the world, I could not help thinking that it would be an immense blessing upon a large portion of the species, if an earthquake were to swallow up this court of Gwalior and the army that surrounded it".[69]

In the 18th Century, in Rajasthan, wealthy landowners began to employ their own guards or Rakhwallis, to protect them and their lands. Soon the Rakhwallis became a separate caste. They also became the masters of their employers and dictated terms to the farmers. Each Rakhwalli had his own territory and he levied a toll upon all goods that passed through his area. The Rakhwallis built their own castles, and engaged in feuds, with other Rakhwallis. These feuds were carried to such extremes that they even went to war with one another. The loser's territory was plundered, and his people were slaughtered even women and children did not escape in this general massacre.[70]

These patterns of behaviour continued to repeat themselves

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68. Sir Francis Tuker, The Yellow Scarf, (1961) p. 101

69. Sir Francis Tuker, The Yellow Scarf, p. 101, Geeta Sane, op. cit. p. 110.

70. J. Tod, Annals and Antiquities of Rajasthan, Vol. II, p. 378, Geeta Sane, op. cit. p. 89.

well into the British period of Indian history. During the 19th Century Gambhir Singh, a robber chief, gave a good deal of trouble to the Gwalior state. Reports of the Indian government[71] about him said that he did not think of himself as an ordinary criminal, but as a warrior, bravely fighting for his rights.[72]

This was precisely the attitude of Dashpat and Nanhe Diwan, two dacoits of Hamirpur, towards the British. This right of revenge is still being exercised in the Chambal Valley. That is why the dacoits insist upon being called 'rebels'.

The British found it more difficult to deal with the Pathans and the Pindharis than they did to defeat the Sindhiyas. Nevertheless, early in the 19th Century they had wiped out these predatory hordes. But the descendants of the Pindharis and the Pathans continued to hold the Jagirs given to them by various princes, until 1947. All through these years, people considered these Jagirs to be the lawful reward of their valour.

After the mutiny of 1857 the British government became less anxious to interfere with the administration of princely states. In British India, with new methods of administration

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71. i.e. British government in India.

72. Geeta Sane, op. cit. p. 90

and justice, and with industrialisation, ideas of respectability gradually changed, but in the princely states the old traditions still held sway. In many states, to plunder one's enemy and to kill him still remained the honourable thing to do. The feudal princes, absolute withing their kingdoms, continued to teach this lesson to their subjects. To bow before the powerful, and rob the weak was not considered wrong or bad, for the idea of 'noblesse oblige' had never taken root. The various princely states in the Chambal Valley followed these very 'rules'. That is why, Miss Sane concludes, till 1947, the dacoits were respected in the Chambal Valley; they were only following the ancient traditions. Only in 1947, when the princely states were annexed to free India, were the winds of change permitted to enter the Valley. The new rulers, to whom the ancient ideas of honour and respectability were alien, now imposed their own laws on the Valley. But the men in the Valley and their ideas of honour had not changed! That is the reason why the dacoit is still respected in the Chambal Valley.

Even today the inhabitants of the Valley do not realise that their traditions of avenging themselves on their enemies belong to the past. Their history in the last two or three centuries has taught them that the man who is merciful, who lays down his weapons, goes to the wall. So they still conduct

their feuds in the old style. To them, all authority is anathema, oppressive by definition. Miss Sane notes that these men do not believe us, if we tell them that the present government, being elected, can not only be thrown out, but that others, like them, have elected it.[73] In an election, if their candidate is defeated, that too is part of the game.

We call the man of the Valley a dacoit, but he is not like dacoits in other parts of India. He does not wear a mask. Details of his family, residence, property, are easily available to the police. He thinks of himself as a rebel, and the fact that often he takes to dacoity or joins a gang after a religious ceremony indicates planning and forethought on his part, and approval on the part of his family.[74] He is a religious man, and though he is often extremely cruel, his cruelty is traditional; it is not a symptom of a diseased mind. It is part of his method of waging war. He is attached to his land, his family, his village and his animals. In his own area he is respected, honoured and celebrated in song by

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73. Geeta Sane, op. cit. p. 70

74. After a man decides to join a gang, its leaders make him commit a murder. Then he cannot change his mind, or inform on them. Miss Sane met the mother of one man, who had been shot by Lacchi, to whom he was a stranger, for this reason.

the local bands, who sing .....

"Shame to theman whose enemies sleep in peace".

His ideas of wealth and hospitality and his style of living are old-fashioned and expensive, to the point of being lavish.

The unrest in the Chambal Valley is about three centuries old. It did not start in the form of dacoity. It started as a rebellion against injustices perpetrated by tyrannical rulers. But, while the rebels were opposed to the rulers, they approved of uncontrolled power, provided they wielded it themselves. Consequently, during the middle ages, one ruler was replaced by another of the same kind. After the establishement of British rule in India, however, it became impossible to unseat a prince in this fashion. But the rebels hoped to get a Jagir or a Zamindari by their activities. They do not understand the righteous indignation of the modern educated Indian, they think that we do not obey the rules of the game. 'Perhaps a Jagir is difficult to give,but why shouldn't I get a pension?' is how the dacoit thinks.[75]

To these men, after independence, the Indian government gave new reasons to rebel. Untouchability was removed by law; Zamindari was abolished. Hindu women were given additional property rights,[76] and polygamy was forbidden.

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75. Geeta Sane, op. cit. p. 114

76. They inherit an equal share in their father's separate estate with their brothers, widows have a son's share in their husband's joint property.

As though all this were not enough, every adult Indian (with a few exceptions) has a vote, irrespective of his or her caste. In the elections held in 1952 throughout India, the lower class and caste voters succeeded in returning their own candidates[77] to the state and central legislatures. This was a jolt to the upper classes. They realised that they were not going to be as powerful as they had been. The Congress candidates had also taken pains to convince the untouchables that, under the new constitution, they had the same rights as everyone else. Everywhere the untouchables began to use these rights. They refused to work without pay or to dispose of dead animals, a task which was traditionally theirs, and which was also considered to demean the doer. In the Valley, such refusals evoked the wrath of the Rajputs and the Chamars. To these men, the Indian government appeared then, as it does now, to be as unjust, as the princes it had supplanted. Why should the untouchables be their equals? Why should polygamy be banned? Farming methods were the same, and the land needed the labour of women[78] and untouchables.

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77. They were mostly congressmen.

78. Although upper caste women do not go to the fields, they look after the cattle at home, clean the grain and store it for the year. That is quite a lot of work.

Again, the lower castes would soon outvote the upper caste voters, who were fewer in number, unless they were put in their place immediately.[79] This is how the Thakurs and the Brahmins reason, and this is why they rebel.

But their rebellion is reactionary and counter-revolutionary.[80] It is therefore against the interests of India, for, within the framework of democracy, the higher castes can not hope to achieve control. Nor, it appears, do they expect to do so. During the Indo-Chinese War of 1962, the political demands for a separate Nagaland, Punjabi Subha and D.M.K. were temporarily withdrawn, for these agitators, who wished to achieve self-expression within the Indian republic, closed ranks in the face of aggression, and put national interests first. By contrast, the dacoits, who had no sympathy whatsoever with the Indian ideals, took advantage of the fact that the government was engaged elsewhere, and created more trouble in the Valley.

We have not yet realised the nature of this rebellion. That is, we have not realised that rebellion can serve the reactionary's cause[81] as well as the cause of the downtrodden.

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79. Geeta Sane, op. cit. p. 144

80. Geeta Sane, op. cit. p. 129

81. Geeta Sane, op. cit. p. 182

We connect the word rebellion with a rising of the oppressed, but the over-favoured can also rebel and the steps necessary to quell the rebellion of the one are different from the steps necessary to deal with the other.

As we have seen, rebellion, or, in instant context, dacoity, is accepted by the people of the Valley, even those who are its victims. The dacoits are only a small part of the population; they are comparable to the visible tip of an iceberg. The inhabitants of the Valley, who accept dacoity, and the middle men[82] who benefit from it, are factors of the problem which do not easily excite notice, but they are all the same there, like the submerged seven-eighth of the iceberg. It is their support which renders the problem of the dacoits so difficult to solve, for because of this silent, acquiescent majority, the dacoit cannot be isolated or weakened. In such a situation it is not surprising that conventional methods of fighting lawlessness and crime have failed.

How is this dacoity to be put down? Miss Sane has considered this question. A blood-bath would be no answer, even if were to be possible; it would kill the existing

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82. These are people who dispose of the loot, and provide dacoits with food and arms.

dacoits, but it will achieve little else. All the campaigns against dacoits in this century, by various governments, have proved this. Reform of the police force, though essential, is not the whole answer. Miss Sane advocates adopting the steps taken against the Thugs by the British, who used the stick and the carrot. While they hunted down Thugs relentlessly, imposing heavy sentences upon them, at the same time they opened a training school for the children of Thugs, who were taught skills, which would enable them to earn a livelihood. In this manner, they discouraged these children from following in their fathers' footsteps. Both the positive and negative incentives were given to Thug families not to let their children lead a Thug's life. In this way, Thuggee was eradicated at its roots.

This policy may not be adequate in the Valley. Since the class that sympathises with dacoits is much-larger than the number of dacoits, it will be necessary to make a much larger class understand how democracy works. It will also be necessary to teach them that the actions they characterise as praiseworthy rebellions are, in fact, criminal, that they are not heroes, but lawbreakers. Thus, only by bringing social thinking, and social morality, in line with our laws, will we be able to make our laws effective.

So long as there is a discrepancy between law and morality,

particularly where this morality serves the interests of the powerful, law is almost certain to be defeated. For, after all, is said and done, they are the establishment who 'enforce' the law. This is why, once again, law bows down before power, a point calling for more consideration than it has received. This is why, for the last three centuries, men living in this Valley, which covers only 2,500 square miles, have defeated the forces of law and order, without possessing extraordinary skills of any kind.

The Penal Code punishes murder, robbery, arson, and dacoity. The last named offence is taken very seriously indeed. In the Indian Penal Code preparation to commit a crime is an offence in only three cases, preparation for war against the Indian government (Section 122), preparation to commit depredation in the territories of foreign powers friendly with India (Section 126) and preparation to commit dacoity (Section 399). Thus, dacoity is, for this purpose, considered to be as serious as treason. Consequently very severe punishment has been prescribed for it. Should a murder be committed in the course of a dacoity each one of the dacoits can be punished with death for it (Section 396). It is not necessary, as it normally is, to prove that that particular dacoit was responsible for the murder, or that he was a party to it. But the effectiveness of these sections, as indeed of

all laws, depends to a large extent on the support they receive from the general public. We have seen what happens when such support is not forthcoming. The failure of law in these situations proves our hypothesis yet again. Law serves power. For where it fails to do so, the powerful forces see that it fails altogether.

CONCLUSION

In the preceding chapters we have tried to show certain defects in the Indian Penal Code; repeatedly we have made the point that law serves power. We would like to emphasise another point, which we hope we have already stressed several times. It is not our opinion that the Indian Penal Code was written with the intention of serving the powerful forces in the society, nor is it our opinion that the whole code is defective or inefficient. But, for the historical reasons which we have examined in the first three chapters, the Indian Law Commissioners were inevitably influenced by the culture and the moral criteria of a few, which they then attempted to apply to the entire sub-continent; this inevitably made parts of the code defective.

Writing in 1912, Prof. Eugen Ehrlich stressed the fact that human beings do not invariably conduct their lives and relationships in accordance with the law. Law is only one of the rules of conduct, and it is not the most powerful. "The rule of human conduct and the rule according to which the judges decide legal disputes may be two quite distinct things; for men do not always act according to the rules that will be applied in settling their disputes."[1]

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1. E. Ehrlich, Fundamental Principles of Sociology of Law. Harvard University Press, 1936. p.10

Prof. Ehrlich shows that law, as a set of legal propositions set down in precise words, is a much later development than the law which lays down the norm, which regulates conduct.

These norms are developed by each association of human beings. Of these, the generic associations, i.e. the family, the clan, and the tribe, were the earliest. The political association we call the state was a later development. Before the rise of the state these generic associations fulfilled many functions - economic, religious, military and legal. When the state came into existence these generic associations did not vanish and their authority did not disappear. As the power of the state grows, the strength of the other associations declined. But, even in advanced western countries, the family remains strong. "Even if the family law were abolished in its entirety, families would not bear an aspect much different from that which they bear today; for fortunately the family law requires state sanction only in rare instances."[2]

But in less advanced societies the state law plays only a minor part in the general conduct of life. "Travellers in backward "countries, in the orient, in parts of eastern and southern Europe, "are struck by the general disorder. This disorder is caused by the "fact that general legal propositions, if there are such, are not "being followed. There is a strange contrast between this lack of "order" in public life and the strictness with which the traditional

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2. Ehrlich. op cit. p.64

"order of the small association, of the household, of the family, "of the clan is followed."[3]

Not only is the law made by the state only one of the rules of conduct; each generic association has its own rules: all families, all clans, all tribes, do not follow the same set of rules, or oders.

" ... if orders in associations of the same kind differ very "little from each other, this must be attributed to the similarity "of the conditions; often to borrowing; but by no means to a uniform "order in some manner prescribed for them from without. In the "language of German scholarships there may possibly be a general law "in these associations, but not a common law."[4]

We have tried to show, in Chapters I and II, that law is mainly drafted by one section of society on the assumption that the rules it recognises are the rules observed by everyone, or that they ought to be so. When the rulers of a subject country do not wish to impose the conquerors' ethics on that country, the set of rules, from which generalisations are made, are the rules followed by the dominant section of the conquered people. But generally, the ethics of the new rulers are also, additionally, imposed on the territory they have conquered. We have tried to make this point in Chapters III and IV.

Therefore, it seems to us that the laws made for a country are generally those which suit the 'establishment' in that country.

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3. Ehrlich op. cit. p. 37

4. Ehrlich op. cit. p.29

These laws, however, are not necessarily acceptable to the rest of the country; the laws which are imposed on a conquered people may not be acceptable to them at all. In such a case, social groups, whose rules of conduct differ from the laws imposed upon them, often endeavour to prevent these laws from becoming effective, or to change the methods of applying them, so that these laws are no longer compatible with the law-givers intentions. We have illustrated this hypothesis in Chapters IV, V, VI and VII.

When laws are made, their makers draw upon the rules of conduct approved by their own section of society, so that law serves power. When other sections successfully violate these enactments, the law is once again subservient to powerful forces, which try to defeat its intentions. In each of these two ways law serves power. With the best of intentions the law makers make laws which are defective in that they are not universally acceptable, and being unaware of this, the establishment does not consider the necessity of providing special means of implementing them. Examples of these defective laws are those which deal with sexual offences, kidnapping, slavery and even murder.

There are other sections of society, whose rules of conduct permit their members to behave in a manner which the laws seek to forbid, and these sections endeavour to ensure that the laws fail. In other words, laws made by one powerful section of a community without considering the attitude to them of other sections, fail, unless they happen to coincide with the rules observed by other powerful sections. This is so because the sanction behind law is

not wholly or even mainly, the support of the machinery of the state; it consists of the acquiesence of the powerful groups in it.

An even more remarkable conclusion is that officialdom often does not care about the sufferings endured or the injustice done to the weak, in total defiance of the laws made to protect them. By 'officialdom' we do not exclusively, or even mainly, mean the judiciary, though we have devoted some space to what we consider to be bad judgments of Indian Courts; judgments which were bad because they were based on Indian sexual ethics, which, sometimes differing from the Penal Code, favours the man most markedly. But the judiciary is only a small part of the machinery of government. For a variety of reasons, of which lack of money is only one,[5] a large majority of cases of injustice do not go to court at all. Of those which do get into court, only a small number goes up in appeal to the higher courts, so that the number of cases reported in law journals can only be a partial indication of the actual state of affairs in the country; to discover that, one has to scrutinise day to day life in towns and villages, and this reveals that a great deal of this injustice is perpetrated by administrators. This is what Mrs. Parulekar and Miss Sane concluded from their studies of two different regions of India, which had very different problems.

This indifference of civil servants to the sufferings of the weak does not appear to be the exclusive characteristic of any one

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5. Ignorance and intimidation by the oppressor are two of the others. See generally, Chapters V, VI and VII, also Chapter II section on Civil Servants.

government in the subcontinent. The East India Company, the British Indian government, and Independent India's government,[6] have all been guilty of such conduct. Their chief concern has often been to preserve an appearance of peace, to retain the approval and the support of the more powerful groups, rather than to secure genuine peace by implementing just laws. It must be conceded that to protect the weak calls for money and personnel, both of which are limited, and both are directed to purposes advocated by groups powerful enough to exert pressure on government.

If it is thought necessary, as it often is, to crush non-egalitarian, powerful forces in the state, then the government must take strong action. It is not enough to pass well intentioned laws.

Given the wide variety of interests existing in any society, particularly in a heterogenous society like India, we feel strongly that it would be advisable to investigate more thoroughly the existing state of society, before undertaking major social legislation. This would prevent three mistakes. The lawmakers would be less prone to impose their own ideas of correct behaviour upon others, under the impression that their criteria of good behaviour were universally accepted. If they did impose their ideas, it would be a deliberate decision and it would be necessary to take steps to prevent other sections of society from making these laws ineffective, by combining strong administrative action to enforce the laws with persuasion of the people by argument

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6. Also most princely states; but they, as Chapter VII shows, did not even believe that the common man had any rights!

to accept the validity of the laws. When the first Parliamentary Reform Bill was enacted in 1832, Robert-Lowe, Viscount Sherbrooke, who was a disciple of Bentham had remarked, "I believe it will be absolutely necessary to compel our future masters to learn their letters." But that is not enough. It is often also necessary to educate our masters to accept the content of the laws which seek to govern them.

As we have seen, it is often equally important to educate public officials in the content and purpose of such laws, for without their active co-operation many laws would remain inoperative. Not only must officials be educated in the nation's laws, but care must be taken to see that they do not misapply these laws. As Prof. Ehrlich wrote, "It "is self evident of course that a direct command of the statute directing "the authorities of the state to proceed in a certain manner is not "always sufficient to bring about such action. The French statute of "the year 1806 relating to the cessation of labour on Sunday was never "enforced.

"Il ne se troubait presque jamais un commissaire de police ou un "garde champêtre qui osât dresser un proces-verbal contre les coupables"[7] "de Rousiers says on this subject.

"So even state law often fails completely. Often the measures "taken by the state for supervision and enforcement are unequal to the "task of converting the rule laid down by the state into a rule of "conduct. Often it fails because of the unwillingness, the weakness "or the incapacity of the authorities; the indictment, which should

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7. "There would hardly ever be found a police superintendant or a rural policeman who would dare to draw up a report against the delinquents" (culprits)

"be brought as a matter of official duty, often awaits notice from the "parties involved. In such cases the other social associations have "proved more powerful than the great social association, which has "created the state as the instrument for carrying out its will."[8]

This is a situation which is all the more dangerous, because the establishment, which is responsible for making the laws, is hardly aware of it. This class is not exclusively composed of Members of Parliament, or persons who are actually in the civil service; it consists of almost the whole middle-class, from whose ranks the officials and members of legislatures come. This class is not aware of the defects in the system under which they live, for the system does not give them much trouble, so that they do not engage in the prolonged heart-searchings which might change the situation.

Independant India is a democratic republic, with distinct socialistic leanings. But her people, as yet, have not fully accepted the new notions of sexual, economic and social equality. The higher the social content of the laws, the greater their interference with various separate, and accepted moralities of the land. Therefore, it seems to us that if, as we have no doubt they do, the lawmakers make their laws in good faith, and with the intention of introducing more egalitarian principles into practice, they should engage in more field-work before passing laws. It is also necessary to improve the means of implementing the laws, once they are passed. And at all times the government should take the people and the officials more into their confidence and convince

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8. Ehrlich, Fundamental Principles of the Sociology of Law, p.372

them of the justice of their laws, because forceful implementation can only be a short-term answer. As Prof. Ehrlich points out, ultimately people obey a law not because they fear state sanctions, but because they have been educated to accept the principle behind that law. To take a most elementary example, most of us do not steal, not because we fear the law, but because from childhood onwards we have been told that "It is not done."

Unless these or similar steps are taken, we fear that many laws will be no more than good intentions, never to be given effect.

Appendix 1

Dhareecha Legislation

In 1900 Dhareecha rules were passed in Gwalior state. Under these rules a fee was charged when a Dhareecha was recorded. These rules were repealed in 1908 by new Dhareecha rules, which provided for the registration of Dhareecha.

Under the Rules of 1908, Rule 4, the lowest judicial officer of the state in the smallest territorial unit of administration, i.e. a pargana was called the Pargana Judicial Officer. This individual was also given the powers and duties of a registrar, and in that capacity he registered Dhareechas. For the cities of Ujjain and Lashkar this power was vested in the Civil Judge of the city, who sat in the Small Causes Court, or to a subordinate judge. Unlike the Pargana Judicial officer, who exercised both civil and criminal powers - the latter under the Indian Penal Code and the Criminal Procedure Code - the Civil judges of Ujjain and Lashkar exercised only civil powers. For some curious reason, the Dhareecha could be registered either under Dhareecha rules of 1908, or under provisions corresponding to the Indian Registration Act of 1908, which were introduced in Gwalior in 1913. Whether the Dhareecha was registered under the Dhareecha rules, or under the Registration Act, the officials

registering it were the same.

This Registration of Dhareecha was done in Gwalior state till 28th May 1948, when Gwalior, Indore and Malwa states were merged in Madhya Bharat.

The Pargana judicial officer as well as the Small Causes Courts are regular courts. In Gwalior the Civil Judge and the Small Causes Court sat, and still sits in the High Court building. Outside Gwalior, these offices were held in separate buildings, mostly near or along with the Collectorate.

Soon after 1948 the dhareecha rules were repealed by the new Madhya Bharat legislature and no dhareechas could be registered thereafter. After the repeal of the Dhareecha Rules of 1908, a practice grew up of executing affidavits, saying mainly that the executant had come away of her own free will, and without any ornaments from her husband, and making a further declaration that she was staying with the new man as a wife. This document was mainly to protect her from criminal prosecution for offences such as theft and abduction, and to create a record of evidence to be used in case the first husband took action.

There is a difference between Dhareecha, as registered until 1948, and an affidavit made thereafter. The issue of a dhareecha formed before 1948 would be legitimate. While the children born after their parents had signed an affidavit were illegitimate. In 1937 an amendment to the Dhareecha rules was passed making the registration optional.

The main purpose of the Dhareecha rules was to reduce, as far as possible, the lawlessness resulting from taking away the women of others and also to reduce the tyrannies of Panchayats who used to make exorbitant demands for village feasts, in consideration of their dealing with matrimonial causes.

This information was given to me by my master-at-law, Mr. P.W. Sahasrabudhe.

Appendix 2

Translation of Gwalior Documents

In this section we shall give the translations of the twelve documents which we have used in the previous section. We have thought it better to surrender elegance or even correctness of language to accuracy of translation; wherever necessary we have put footnotes to explain a quaint or difficult translation, rather than part with the text, while translating.

Document 1 "Shri[1]

"We (1) woman Chando, daughter (of) Babukhan, age 22, resident
" Dal Bazar Lashkar,[2] client No. 1,
" (2) Nasir, son (of) Maulakhan, caste[3] Muslim age 25,
"resident Lakshmanpura, Lashkar, client No. 2,

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1. This is something with which many Hindus begin their correspondence or business letters. The Gwalior court uses it; presumably it is a legacy from the days when Gwalior was ruled by a Hindu family.
2. Lashkar is the main suburb of Gwalior. The courts and the Palace are both in Lashkar.
3. The word 'caste' is very loosely used to indicate religion or community. cf. footnote 23, p.472

"That client No. 1 had in her minority, been married, approximately "seven years earlier, to Hatto, resident of Naya Bazar, Lashkar.

"That the first husband of client No. 1 had, in accordance with "the custom of the community[4] left her approximately five years "earlier, and that he had also married another woman.

" That client No. 1 was a major, and knew her interests well. "According to the custom of her caste she was entitled to marry "again. She had no jewelry or household property belonging to "her husband. She had been separated[5] (from her husband) with "only the clothes she had been wearing.

" That client No. 2 had also divorced his wife and was in "need of a woman. His previous wife had also married someone "else.

" Therefore the two clients had, in accordance with the "rules of the caste made a second marriage (a dhareecha).[6] In "order to give the above (arrangement) written form they had made "the following agreement:

" (1) That client No. 1 promised that she would live all "her[7] life with client No. 2, as his wife, and would always

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4. The word used in the expression is sometimes 'caste', and sometimes 'community'.
5. This is the word used, it means divorced.
6. The original document uses both these words, the latter in brackets.
7. Or his life. The original Hindi is 'all life', no pronoun being necessary.

"obey his commands. That she would not do anything which might "bring him a bad name in society or cause him financial, mental "or physical trouble.

" (2) That client No. 2 promised that he would keep client "No. 1 all her[8] life as his wife, and not give her any kind of "pain. At the same time he would make all and proper "arrangement for her food, drink, shelter, etc., of her life.

" (3) That any issue born during their cohabitation would be "treated as legitimate and it would have property rights.

" (4) That the clients would be mindful of each others "comforts.

" That this agreement had been made by us, the clients, of "our free will, when fully conscious, without the use of any "force, or without being intoxicated,[9] in order that it might "be used in proof (in the future) if necessary.

"So; dated 9.9.1966

"	Thumb Impression	Signature in Hindi
"	Chandobai	Nasir
"	Client No. 1	Client No. 2

N.B. Many of these documents are badly drafted, sometimes the language is ill-chosen; the typist often omitted to note the original document was on stamped paper.

8. or <u>his</u> life. See footnote 7 p.563

9. Drunk or drugged; the Hindi word stands for both.

Document 2 "Shri

"Contract Deed

"We, (1) woman Kaliya, daughter (of) Vasudha, caste Adivasi,
"resident district Gunah, Hal Chiruli, region Dabra, client No.1
" (2) Hira, son (of) Mangaliya, age 36, caste Adivasi,
"resident Chiruli, region Dabra, client No. 2
" (1) That I, client No. 1, was married about five years
"earlier to Hirua, son of Kalua. Soon after my marriage my
"husband used[10] to beat me and put me outside the house, and
"asked me to do bad things, and always kept me unhappy.
" (2) That I, client No. 1 was, fifteen days ago, thrown
"out of the house by my husband. I live in the village and
"try to earn my living as a labourer, which[11] is not enough to
"support me. For the sake of food, clothes and shelter I have
"formed a dhareecha with the man Hira, son of Mangaliya, and I
"am now living with him as his wife. I have not brought any
"jewelry or cash from my husband, I only have the clothes I
"wear. My husband's son,[12] Babua, age two (years) is with me.

---

10. That is, he started beating her, asked her to earn money by prostitution, showed her the door, i.e. ejected her from the house, and generally made her unhappy and miserable.
11. i.e. the wages.
12. i.e. her son by the first husband.

" (3) That we the two clients are agreeable[13] and I client "No. 2 will not give (her) any kind of trouble, I shall make "proper arrangements for her, keep her as my wife, and so long "as the boy stays with me, I shall bring him up.

" Therefore we have written this contract deed of our own "free will, with full understanding, without being misguided "by anybody, as proof[14] and to be useful in time.

Signature[15] of client No. 1

Signature of client No. 2

Witnesses

1. 2.

N.B. This document too is badly drafted. Apart from the looseness of language, it does not mention the girl's age.

13. Agreeable to the dhareecha.

14. Proof that they had formed a dhareecha.

15. This document is so badly drafted that one cannot be sure that signatures rather than thumb impressions were appended to it. Given the parties social background, the latter is more likely to be the case.

Document 3 "Shri

"Contract Deed

" I woman Phulashree daughter (of) [16] caste Maithul,
"resident behind the Kalari[17] Gwalior, age 30, client No. 1
" Om Prakash, son (of) Bholanath, caste Baniya, age 40
"resident behind the Kalari, Gwalior city, client No. 2
" That my husband Chhote, son (of) Saligram beat me severely
"soon after the marriage. He has nothing by the way of income;
"he drinks, gambles, and in this way he has, after beatings,
"cast me out of the house. And at this time I have no means
"of income. My age is thirty years and I am a major, and I
"understand my interests and I wish to live independently and
"by service etc., pass my life and that of my children, and for
"this purpose I have agreed to take a job, with promisor No. 2,
"Om Prakash, of making rotis, cleaning utensils, and doing other
"domestic chores.
" The following are the conditions of service:
" (1) That I party No. 1 will live in the house of party No. 2
"cook for him, clean the utensils, and do other domestic chores,
" (2) That party No. 2 will make arrangements for food, drink,

---

16. Either omitted by typist as illegible, or omitted in the original document itself, which could mean that the woman was not consulted.

17. The off-licence shop, which is a major landmark in that area of Gwalior.

"shelter for me, party No. 1, and give me clothes, etc., and "pocket money[18] in a proper manner.

" (3) That whatever belongings of party No. 2 which may be "in my keeping, will be in the form of a security[19] and whenever "I leave the job, I shall with all honesty, return all his "things to him.

" (4) That I, party No. 1, have not brought any jewelry etc., "from my husband's or my parents home, with me.

" Therefore, this contract deed has been made by us of our "own free will, and with full understanding that it may be a "document[20] and be useful if necessary.

"So; dated 15.10.1963

"Signature of party No. 2 Signature of party No. 1

" Witnesses

" 1. 2. "

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18. i.e., money for incidental expenses.

19. It really means 'loan' but this is the word used.

20. "that the agreement may be documented". The word used is 'license'. The license held by lawyers, allowing them to practice, or the authority given in old days by kings to subjects to hold a piece of land, was called SANAD or license. It is a charter, which permits the holder to do certain things. So, this sanad or charter made this particular arrangement legal and binding.

Document 4 "Shri

" (1) I, Kasturi, daughter (of) Gordhansingh, age 24 years, "caste Gujar Thakur, resident Simariya,[21] district Gunah, client "No. 1

" (2) Mahendra Singh, son (of) Gurudatt Singh, (age) 35 years, "caste Punjabi,[22] resident of Lachmanpura, Tansen Road, Gwalior, "client No. 2

" (1) That I client No. 1, was, approximately eleven years "ago, married to Daryab Singh, resident of Simariya

" (2) That the husband (of me) client No. 1 was in the habit "of gambling and drinking because of which he paid no attention "to food and clothes[23] and asked me to do bad things with others "and earn money.

" (3) That when (I), client No. 1 did not obey my husband, "he would beat me, and not give me anything to eat. Even so "I stayed with my husband, but he started to beat me and treat me "badly all the time.

---

21. She is of a reasonably high caste and unable to enter into a dhareecha. Her parents probably came from Gwalior, though she married into the village of Simariya.

22. There is of course no caste called Punjabi. cf. supra, footnote 23 p.472 , for the uses of this term 'caste'.

23. For her, i.e. he did not look after his wife. The pronouns in brackets in clauses 2 and 3 are omitted in the original.

" (4) That one year ago my husband Daryab Singh ejected me "from the house in the clothes I was wearing, I have not brought "any jewelry, etc., with me. I am living with my parents, I have "no means of support nor are my parents so well off that I could "live with them (i.e. be supported by them).

" (5) That I, client No. 1 am young, and therefore I have of "my own free will taken a job with Mahendra Singh, client No. 2. "I shall do all the household work at (the place of) client No.2, "for which client No. 2 will give me Rs 5 per month, clothes and "food. I shall not do anything against will.[24] Client No. 2 is "willing.

" Therefore this contract deed has been signed that it may "be useful on time.

"End dated 7th June 1968

" Thumb Impression

" Client No. 1

" Witnesses

"1. Mahmood Khan, son of Abdul Rahman

" Resident Lakshmanpura

"2. Kisan, son of Sobharam Pasi,

" Resident of Lakshmanpura

---

24. No pronoun either 'his' or 'my' is used.

Document 5 "Shri

"Contract Deed

" (1) Ramdevi daughter (of) Pokhandas, age 20 years, caste "Sindhi,[25] resident Lakshmiganj, Kunjnewali Gali, Lashkar (M.P.) "client No. 1

" (2) Ramsarup, son (of) Nandram, caste Kacchi age 25 resident "Gaidewali Gali, Teliyoki Bajariya Lashkar (M.P.) client No. 2

" (1) That I, client No. 1 was married about three years ago "to Hariram, Sindhi, resident of Sarafa Bazar, since when I lived "with my husband. He has only a mother.

" (2) That about two years ago my husband left me and went "away and his whereabouts are unknown. My husband's mother does "not wish to keep me. She says 'since your husband has left you "should go away from our house. Don't live here'. And she threw "me out of the house without any property, jewelry or cash.

" (3) That I, client No. 1 had to come from my husband's "house to my parents' home, where I have no means of support, and "my parents are not in a position to maintain me. I earn my "keep by working as a labourer. I have a step-mother. My "father listens to her and makes me unhappy.

---

25. Sindhi is not a caste either. cf. footnote 23 p. 472 to see how this word is variously used in India, to indicate mother tongue, or regional origin.

" (4) That I, client No. 1, am new (young?) I cannot live "in this fashion. Therefore I, client No. 1, have for the past "six months taken a job with client No. 2. In return for my "services client No. 1 gives me Rs 10 per month and clothes "and food. I do all the household work. I do not do anything "against his wishes. Client No. 2 has only a mother, whom I "look after.

" (5) That I, client No. 1 shall, on these conditions and "in the future, work honestly and will not displease client "No. 2.

" This contract deed has been made of (my) free will, "without any pressure, that it might be documented[26] and be "useful on time.

"End dated 15.9.1968

" Thumb Impression

" Client No. 1

" Witnesses

" 1. 2. "

---

26. cf. footnote 20 p.568

Document 6

"Contract Deed

"We 1. Nathuram, son of Lalluram, age 30 years (resident of)
" Tehsil Bahadurpur, near Gwalior, and
" 2. Chandreshwari, widow of Shyambabu, age 25 years of
" Firozabad Uttar Pradesh
" That the husband of Party No. 2 Chandreshwari, Shyambabu,
"has been dead for about six years, and that now there is no one
"in her husband's house who can maintain her, nor is there
"anyone in her father's family to support her, and she herself
"is a major and understands her interests. In these days it is
"impossible for her to live without support.[27] And she has need
"of support and since the last three years Party No. 1, Nathuram
"has given her protection. Therefore now we make the following
"written contract.
" 1. Party No. 2, Chandreshwari will live with Party No. 1,
"Nathuram, in his house and do all chores according to his
"wishes, and without his permission and consent will not go
"anywhere.
" 2. Party No. 1, Nathuram, will give protection to Party No. 2,

---

27. i.e., she could not live alone, and needed protection.

"Chandreshwari, support her[28] and give her Rs 200 per annum for "her services.

" 3. The duration of this contract will be of three years, and "after that too it can be continued if the two parties so "wish it.

" Therefore this contract-deed, both the parties of their ".....".

(The document breaks off here; the last page being lost in the files, But the contents of the document are clear. It is a bit curious that Chandreshwari should have come looking for a 'job' in Gwalior all the way from Ferozabad, a good hundred and fifty miles away.)

---

28. i.e. give her food clothes and shelter.

Document 7

"Contract Deed[29]

" That I, Ramdulari, daughter of Chintu, wife of Naktu age
"25 years, caste Kacchi, resident of village Rampura district
"Morena, client No. 1,

" Sopatiya, son of Gajua, age 35 years, caste Kacchi, resident
"of Sinde Ki Chaoni, Lashkar, client No. 2

" That the woman Ramkuar[30] was married to Naktu about three
"years ago. After the marriage the woman Ramkuar stayed with
"her husband, Naktu, but Naktu's behaviour towards Ramkuar,
"straight-away after the marriage, was never good, and he began
"to beat her very often. The husband of the woman Ramkuar
"gambles and drinks and does not work. Naktu sold the ornaments,
"utensils,[31] etc., given to the woman Ramkuar by her parents and
"wasted the money on gambling and drink. When the woman Ramkuar
"asked her husband to get some work and not to drink or gamble,

---

29. This one is attested by the Notary of Gwalior.

30. This is how she is referred to throughout. The name Ramdulari is not mentioned again; and yet the document was registered!

31. In the lower castes utensils are an important part of a woman's dowry, for they are expensive and most people cannot afford to buy them easily. Earthern pots are more generally used.

"she began to be beaten most severely by her husband, and she "was very often not given anything to eat. During this period "the woman Ramkuar had a child which is an infant and who is "with her.[32] And the woman Ramkuar kept herself and her child "by doing manual labour, but even so Naktu did not give up "gambling and drinking. Then the woman Ramkuar once again "asked her husband Naktu to find a job, so Naktu beat her "very badly and threw her out of the house with the child and "told her to go where she pleased. Therefore the woman Ramkuar, "with her infant child, came by bus to Lashkar, and started to "work there as a labourer. The woman Ramkuar thought it to be "advisable that she should live in the house of a respectable "person from her community as a servant and support herself "and her child (and) has decided to do so. The woman Ramkuar, "of her free will, has decided to stay in the house of Sopatiya, "son of Gajua Kacchi, of Sinde Ki Chaoni, Lashkar, as a servant, "and Sopatiya too is prepared to keep the woman Ramkuar in the "capacity of a servant. In order that Naktu or anybody else "might not start a case against them, we the two clients make "this following contract:

" (1) That the woman Ramkuar client No. 1, will live at

---

32. The expression literally means 'who is in her lap'. It refers to a child who is still suckled by its mother, which puts age at anything up to two years in rural India.

"Sopatiya's, client No. 2 all her life, and do all the house-
"hold work, etc. And Sopatiya client No. 2 will make full
"provision for the food and clothes of the woman Ramkuar,
"client No. 1, and her child.

" (2) That client No. 1, Ramkuar, will not do anything that
"might damage the reputation or honour of client No. 2, Sopatiya.

" (3) That client No. 1, Ramkuar, will look after client
"No. 2, Sopatiya, in every respect, and client No. 2, Sopatiya,
"will look after client No. 1, Ramkuar and her child, in every
"respect, and will not cause them any inconvenience.

" Therefore we the two clients, have made this contract-deed
"after much thought, that it may be documented, and be useful
"when the time comes.

"End 9.4.1969

" Client No. 1 Thumb Impression (Ramkuar)

" Client No. 2 Thumb Impression (Sopatiya)

" Witnesses

" Hindi Signature of

" 1. Baldeva, son of Munni
" Caste Kacchi,
" Resident of Sinde Ki Chaoni
" Lashkar, Profession gardener

Hindi Signature of

2. Bhagwandas, son of
Gopal Barehar
Resident of Sinde Ki Chaoni
Lashkar, Profession, gardening"

Document 8 "Shri

"Contract Deed

"That(1) the woman Parvati, daughter of Daru Jatav, age 22 "years, resident of village Bilhati, region Bhander, district "Gwalior, M.P. and

" (2) Hardayal, son of Kari Jatav, age 26 years, profession "farming, resident of village Chandrol, region Bhander, district "Gwalior

" who will hitherto be referred to as client No. 1 and "client No. 2

" That the previous husband of client No. 1, Asau, son of "Raksu, resident of Katura, region Moth, formed a dhareecha with "his brother Tijva's wife,[33] Asha Rani, about two years ago, and "kept her in his (Asau's) house. Since then Asau has started "giving client No. 1 deep and serious pain, and has been after "selling her. Client No. 1 wished to live in her husband Asau's "house for the rest of her life but last May[34] he beat her up and "put her out without any ornaments or clothes.

" That since then (I) client No. 1 started to live with my "mother,[35] but my mother being poor is not in such a position

---

33. Presumably Tijva was dead. It is customary in some castes in North India for a man to marry his elder brother's widow.

34. The month of Jeth falls between May and June.

35. Bad grammar of the original.

"that I could live with her for the rest of my life. My father
"is dead. Therefore, of my free will, six months ago I formed a
"dhareecha with client No. 2, in the presence of village Panchas,[36]
"and in accordance with the rules of the caste and community,
"and we, clients Nos. 1 and 2 live as husband and wife and are
"accepted as such by the community. And we have the rights and
"duties of a husband and a wife.

" Therefore we have of our free will written this contract
"as proof and so that it might be useful if the time came.

" dated 26.9.1968

" Signature client No. 1

" Signature client No. 2

" Witnesses

" 1. 2. "

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36. Panchas are village elders with powers traditional and statutory. They are responsible for the general well-being of villagers, settle disputes, and generally act as heads of the community. They are elected by the villagers. Together the Panchas, who are headed by the Sirpanch, or chief Panch, form the Panchayat.

Document 9 "Shri

"Contract Deed stamp of the value of Rs 3/- one Kita[37]

"That we (1) Bhaggobai, daughter of Jhandu, wife of Sunderlal,[38]
"age about 22 years

" (2) Sunderlal son of Chuttanlal, age about 25 years,
" are residents of Gudadi Mohalla, Gwalior.

" (1) Who, for the purposes of this document will also be
"called client No. 1 and client No. 2.

" (2) That client No. 1 was, about 10 to 12 years ago[39]
"married to Shobharam, son of Vikram Singh, resident of Gohad.
"Shobharam died about five or six years ago. Client No. 1 has
"two sons by Shobhaam. Dataram, who is about eight years old,
"and Mevaram, who is about five years old.

" (3) That after the death of Shobharam, the husband of
"client No. 1, I, Bhaggobai was badly treated by my in-laws,
"who used to beat her, starve her, and also starve her children
"and used to abuse me day and night, saying 'you are a murderess,
"who came to our house and devoured our son". It had become

---

37. I do not know the meaning of Kita, but I think it is related to Kitab, Urdu for book, and that Kita means page, or sheet, i.e. one sheet of stamped paper. Value Rs 3/-.

38. Note that her husband's name is that of her second husband.

39. Note that she was married when she was less than 12 years old. Since the Sarda Act, passed in 1914, the age of marriage for a Hindu woman has been 14, raised by the Hindu Marriage Act 1955, to 16

"impossible for Bhaggobai to live in her married home.

" (4) That when Bhaggobai's in-laws talked of[40] selling her "elsewhere, Bhaggobai opposed (them) but these people began to "give her more trouble, and beat her even more. Even so "Bhaggobai did not agree. So they beat her up and threw her "out of the house in the clothes she was wearing, without any "ornaments, cash, or property. This was about five years ago.

" (5) That after that Bhaggobai came to her brother Bhagwan "Singh's house in Lashkar, and began to live with him. She "sent many messages to her in-laws to take her back and keep "her properly, but they did not bother; instead they sent "Dataram to me. Mevaram being an infant[41] was already with "me

" (6) For the last four or five years Bhaggobai began to pass "her days in her brother's house. But as my brother's financial "condition is not good, and as I, being young, need protection "and money, I have, in keeping with caste rules, and in the "presence of the Panchas[42] formed a dhareecha with client No. 2, "Sunderlal and since then we have become husband and wife. "At the time of the dhareecha the following conditions were "agreed upon,

---

40. The Hindi phrase could also mean 'opened talks to sell her'.

41. See footnote to Document 7, FN 32

42. See footnote to Document 8. FN 36

" (1) That Bhaggobai is Sunderlal's wife, and that she has "all the rights of a wife, and that she has the responsibility "in her capacity of the mistress of the house, to keep the "house, and to do other things, etc.

" (2) That Sunderlal is Bhaggobai's husband, and that he has "the rights and duties of a husband, which he will fulfil.

" (3)That Sunderlal is responsible for the maintenance and "upbringing of Bhaggobai's two sons by her first husband, and "that he will probide appropriate defence in the case of any "and every legal action taken by Shobharam's family (against "Bhaggobai). Dataram and Mevaram will stay in Bhaggobai's "custody.

" (4) That Sunderlal comes from a village, and Bhaggobai has "bitter experience of village (life) and so she does not wish "to live in a village, and Sunderlal has agreed that he will "not take Bhaggobai to the village, but will live in the city

" (5) That Bhaggobai and Sunderlal's children will have "equal rights to the property of Bhaggobai and Sunderlal, with "Dataram and Mevaram. Sunderlal has no children.

" (6) That if there is any dispute between the two parties "on this point, members of our caste Shri Kacchu, son of "Bhavani, resident of Ahukhana Gwalior, and Shri Prabhu Dayal, "son of Harichand, Gudadi Mohalla Gwalior, will have the right "to settle the quarrel.

" (7) That at the time of the dhareecha Sunderlal had "given Bhaggobai ornaments worth approximately Rs 550. These "are of course, Bhaggobai's Stree Dhan[43] and Sunderlal has no "right to them, nor is he entitled to ask for their return, "Bhaggobai is their sole owner.

"End 6.11.1967

" Signature client No. 1 Signature client No. 2

" Thumb Impression Bhaggobai Thumb Imprint Sunderlal

" Witnesses

" Hindi Signature Chimme Thumb Imprint Rammusingh

"

" I know Bhaggobai and Sunderlal

" Hindi Signature A.S. Chauhan "

---

43. 'Stree Dhan' is the jewelry given to her woman before, or at the time of her marriage. That belongs only to her. No one else may claim it. She can give it away or sell it without asking her husband or anybody else. See also footnote 39, chapter VI p481

Document 10 "Shri

"Contract Deed

"That I, (1) Ramashree, daughter of Manka Kacchi,[44] 22 years, "am resident of Simariya police station Dabra.[45] Who shall "hereafter also be referred to as the party.

"That the party was, in her minority, married to Ramcharan, the "son of Bihari Kacchi resident of Jaganpura, 10 to 12 years ago. "For some time Ramcharan's conduct was all right. But after "that his behaviour became very bad, because Ramcharan did "not work and used to beat me very often. From Ramcharan I "have two daughters, Nivvo, age three years, and Shanti, age "one year. He would give neither me nor the girls any food, "and on all occasions would say to me, 'I have nothing to "do with you, go where you like or die'. Ramcharan used to "lock me up in the house, and because he did not work, used "to starve me and the girls.

" This year before Holi[46] Ramcharan threw me and the girls "out of the house after much beating up and said if you come "to my house again, I shall cut off your nose and beat you

---

44. The caste name is often used as surname.

45. In rural India, specially in the North, villages are often located by reference to the police station under whose jurisdiction they come.

46. This is ~~in April~~ between February and March.

"severely. I shall send you naked from my house.[47] Ramcharan
"threw me and my daughters out in the clothes we were wearing,
"and did not give us any ornaments or cash or any other things.
" I, Ramashree, came from Ramcharan's to my mother's house
"and began to live there, but because my mother's and my
"brother's financial position is not good, as they live by
"labouring in the city, I got into a debt of Rs 200/-
" Therefore I have taken a job in Simariya with Parma, son
"of Hameera, to live in his house itself, and do all the work
"in the fields and the house, in return for food, clothes,
"protection and a place to stay, for myself and my two daughters.
"Parma has paid off my debt, and when I leave his service I
"shall pay him for the debt of Rs 200/- and interest.
" Therefore this contract deed was made of my free will in
"proof and so that it may be useful when the time came.
"Date 17.6.1967
" Signature .....[48]
" Witnesses
" 1. 2. "

---

47. These are the usual threats and abuses used in rural India in the North!

48. Probably a thumb impression, but the document is too carelessly drafted to mention this fact.

Document 11 "Shri

"Contract Deed. Stamp Rs 2/-

"That we

" (1) woman Manko, daughter of Balkisan Kacchi, age "27 years, resident of Mahadik Ki Goth, Lashkar, and

" (2) Harlal, son of Nathuram Kacchi, age 32 years, "resident of Ram Mandir, Ramkuin Lashkar,

" We make the following contract:-

" (1) That the marriage of client No. 1 had taken place, "quite some time back, with Onkar, son of Ganesh Kacchi, "resident of Sikander Kampu, and that she has (by him) one "son, Sonpal age 12 years, daughter Hiro, age nine years, and "daughter Gomati, age three years.

" (2) That Onkar himself does not work, he loafs around. "He has ruined himself by drink and gambling. He keeps client "No. 1 'short' of food and clothes.

" (3) That the behaviour of the husband Onkar with client "No. 1 has been hard, cruel and inhuman.

" (4) That about 2 to 2½ years ago Onkar threw Manko out "of the house in only the clothes she was wearing, without "any ornaments, saying that from today you are no longer "my wife, and kept[49] the boy and sent the girls with Manko.

---

49. The word used is 'snatched'.

" (5)That Onkar made no provision the maintenance[50] of "client No. 1 and Hiro and Gomati, and when she sent messages, "he said 'she is not my wife".

" (6) That in this way, for the last two to two and a half "years Manko has been living upon her parents but her parents "financial condition is not such that they could keep her "any more at their house.

" (7) That for these reasons, Manko, client No. 1 has, of "her own free will, without any force or enticement, taken a "job at (the place of) client No. 2, and client No. 2, Harlal, "has given her a job as a servant.

" (8)That client No. 1 will stay in the house of client No. "2 itself and do the household, and all other work.

" (9) That client No. 1 will not do anything against the "wishes of client No. 2, and will always obey him.

" (10) That client No. 2 will keep client No. 1 and her "children in his house and give them clothes, food, and Rs 5/- "per month, and he has given Manko Rs 180/-[51] in initial "payment.

" (11) That this contract is initially for three years but "if the clients agree, the period can be extended, and in case "of breach of contract damages can be obtained.

---

50. The actual words are food and clothes.

51. That is three years wages, so she will not get a penny!

" Therefore this written deed, the two clients have made "without any intimidation, that it may be a proof, and be "useful when the time comes.

"Dated 12.4.1966

" Signature

" 1.

" 2.

" Witnesses

" 1. 2. "

Document 12 "Shri

"Contract Deed

" (1) woman Lakkho, daughter of Radhe, age 22 years, Teli,[52]
" resident of village Virpur, region Bijaipur, district Morena.
"Party No. 1,
" (2) Chuttan, son of Kaiso, , age 30 years, Kadera, village
"Virpur, region Bijaipur, district Morena, Party No. 2
" That the marriage of party No. 1, Lakkho took place five
"to six years ago, in her necessity,[53] in the village of
"Ranvaksh, region Bijaipur, district Morena, with the son of
"Sona Teli, Kishori. But the above Kishori has not behaved
"properly towards me, Lakkho, because he is not a man,[54] and
"asked me to sleep with others.[55] When Lakkho regused, he
"started starving me, Lakkho, and three or four years ago,
"sent me out of the house, in the sari I was wearing, saying
"that he had nothing to do with me, Lakkho, and that you
"Lakkho are not my wife and I am not your husband. Since then
"he has not inquired after me, nor provided for me.

---

52. 'Teli'is a caste. So, it appears, is Kadera.

53. "In her necessity" that is because it was necessary and proper. It could not mean minority because she was at least 14 then, on her own showing.

54. The word namard could mean either that he was a coward, or impotent. The latter seems more likely.

55. The word sahawas means co-habitation. But he was not asking Lakkho to live with anybody.

" After that I started living in my parental home with my "brother Kishori, but his financial position is not good and "his wife, my sister-in-law did not treat me well, for which "reason I could not stay there very long, and I was sent away "without clothes or ornaments and since then I, Lakkho, have "been wandering,[56] living by working as a labourer. But in "these times it is not possible for a young woman to live alone "and she needs protection.

" That as I, woman Lakkho, need support and protection, I "met Chuttan, party No. 2, and he agreed to give me, woman "Lakkho, the necessary support and protection, the conditions "for which are written below:

" (1) That party No. 1, woman Lakkho, will live in the house "of party No. 2, Chuttan and do all the household work, etc., "and she will neither go anywhere or do anything against his "wishes or without his permission, nor accept the support or "protection of anybody else. The woman Lakkho will fulfil "every wish of Chuttan. She will obey his commands, and never "let him be displeased.

" (2) That party No. 2, Chuttan, will give party No. 1, "Lakkho the necessary support and protection, he will give her "food, drink, clothes and supply all necessities, treat her well,

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56. At this point the first page of the document ends and it bears the thumb impressions of Lakkho and Chuttan.

"and protect and support her.

" Therefore we, the two parties Nos. 1 and 2, woman Lakkho,
"and Chuttan, have written this contract without any force
"being brought to bear on us) and in full possession of our
"faculties, that it may be a proof and be useful if the time
"came.

" Date 16.3.1949

" Party No. 1 woman Lakkho Party No. 2 Chuttan

" Thumb Impression Thumb Impression

" Witnesses

" 1. Signature Hukumchand 2. Signature Buna "

Chapter Six

In the ~~last section~~[57], we referred to the illegality of many of the proceedings referred to in the documents. For example, some women say that their relatives tried to sell them. But no attempt was made by the state to get proof of this accusation and to charge the offenders under the relevant section of the Indian Penal Code. Other women mention that they were married at an age which is under the legal age for marriage for an Indian Hindu woman.[58] Generally, when the marriage has already been solemnised, one can see why the courts would decline to act in the matter, particularly when the woman was on the verge of leaving her husband. But we have here a document in which Khalku, the father of a 13 year old girl, Vaijayanti Bai, states that he had got her married,[59] in accordance with the custom of his caste, to a man called Damu. Damu, who is the other signatory of the document, and with Khalku, the father, make mutual promises to look upon each other as father and son-in-law. Damu also promises to treat Vaijayanti Bai as his wife, and declares that their children will be legitimate. The girl's age is distinctly given as thirteen years. This document was registered on 11th April 1969. So this girl was actually born one year after the Hindu Marriage Act, 1955, which raised the

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57. cf. pp. ~~181-2~~ 480, 481.

58. Not that the women knew it. The fact emerges from their statements.

59. Not a dhareecha, but specifically shadi or marriage.

minimum of a Hindu girl at marriage to 16, had been passed!

If the police are informed they are entitled to prevent such a wedding from taking place, on the grounds that the girl is under the statutory age for marriage. Generally they are too busy to bother about these matters. Nor does the state go to the trouble of suing the bridegroom and the bride's guardians for breaking the law. But surely ignoring such weddings which, after all, take place everyday all over rural India is one thing, and registering documents relating to them is quite another! And yet this document was registered as a matter of course in 1969, as well as attested for me,by the Notary of Gwalior.

We should like to include a translation of another document, also attested by the Notary, because it so clearly shows the helplessness of many illiterate impoverished women in rural India. This document is not a contract deed. It is called literally:

"A Document on Oath"[60]

On 10th April 1969, a 25 year old woman, Gangadei, resident of Morena, Dattapura, daughter of Roshandas, wife of Kashiram, who gave her profession as house work (which could mean housekeeper or domestic servant) swore on oath that:-

"About 12 years ago I was married to my husband Kashiram,
"son of Munni, resident of Dattapura, Morena. After my marriage
"I stayed in the house of my husband Kashiram. My husband has
"been ill with Tuberculosis for a long time. I spent all my

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60. i.e. an affidavit.

"ornaments and money from my parents on his treatment, but he "was not cured and by now he is quite ill. Apart from this "(expenditure) I also acquired quite a large debt. I am unable "to work as a labourer in Morena, because some people wish to "take advantage of my helplessness and wish to ruin my pure "condition. My husband too, who is influenced by others, wants "me to become a prostitute. Consequently, I have had to leave "Morena. I went to Agra to my parental home but there too I "was being compelled to go with another man as his wife.[61] So "I have of my free will, and in order to protect myself come "to Gwalior. No one has influenced me to do so. I am a "major and I know my interests. I make this declaration on "Oath so that no person may file a case against me.

"End 10th April 1969

" Thumb Impression Gangadei

"I Gangadevi swear on Oath that the facts stated in the "above affidavit are true to my knowledge and belief I have "not told any falsehoods, or suppressed any truth.

" Dated 10.4.1969

" Thumb Impression Gangadei

" I know Gangadei. Signed in Hindi, Ayodhya Prasad "

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61. The word used is 'woman' which could mean 'wife' or 'mistress'.

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