THE IDEOLOGICAL ROOTS OF LEGAL PATERNALISM IN INDIA*

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I

PATERNALISM IS the belief that the state needs to protect, help and guide either a part or the whole of the people it governs. This is an idea essentially belonging to the political institution. However, under certain conditions, which will be discussed in this paper, this belief expresses itself through the institution of law. Paternalism which is legally enforced, I wish to call "legal paternalism" so as to distinguish it from other types of paternalisms. Legal paternalism expresses itself in India through the directive principles in the Constitution.

My interest in looking for the ideological roots of legal paternalism in India is not historical, but primarily moral. It is motivated by a certain understanding about the structure and the function of law, the basic amongst which is that law is not the kind of institution through which paternalism can or ought to express itself. It can only do so at the cost of violating some very fundamental principles of the legal system. One of the basic principles of a legal system is that its ontology must be uniform. What this means is that all legal subjects must be equal in status. This has traditionally been expressed through the metaphor that law is blind and impartial.[1] Paternalism essentially involves favouring or disfavouring certain class of people or certain causes; this necessitates defining and distinguishing the required class of people. When the class is defined in law, the above mentioned fundamental legal principle gets violated.

If the end of law is justice or the creation of a just society, then all those legislations which violate basic legal principles must cause only further injustice and disorder. I shall presently argue that this has in fact been the case in India when the fundamental principles of law have been violated in an attempt to be paternalistic.

I must emphasise, however, that my aim in this paper is not to argue against paternalism as such; hence I shall not adduce any additional arguments against paternalism than the one mentioned above. Further, for the purpose of this paper I will concentrate only on that aspect of the directive

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1. I have discussed the question of legal ontology at length in the paper "Ontology of Law" presented at the Sixth International Wittgenstein Symposium in August 1981 in Kirchberg, Austria.

principles which relate to the argument presented here against paternalism, namely, those which affect the schedule concerning the Harijans, tribes and backward classes, and which thus violate the mentioned principle of legal ontology. It must be clear, nonetheless, that I see the schedule concerning the castes, *etc.*, as a particular instance of the general ideology of legal paternalism; my interest, hence, is to get at the roots of the ideology itself rather than one manifestation of it. The task is evidently grounded in the belief that problems can be genuinely solved only when their foundations are recognized.

The immediate problem to which this enterprise addresses itself is the disturbance and the violence caused by the anti-reservation agitations. One direct expression of legal paternalism is the reservation of seats and offices for the legally distinguished class of people. Some time back more violence had taken place in the short period of anti-reservation movement in Gujarat than in the more prolonged agitation in Assam earlier. While in Assam the politicians have capitalized on the possibilities of factions due to the future legal status of some people, in Gujarat the legally differentiated interest groups fought for the availability of certain economic possibilities.

It is perhaps as easy to commend the continuance of the reservation policy as it is to condemn it. Both have been done frequently by the politicians and the political scientists. Those who have strongly commended it, take themselves to be championing the cause of the welfare of the Harijans at the cost of turning a blind eye at the agitators. On the other hand those who have condemned it, have not been able to offer sufficient justification for their views, except for pointing to the fact that there are other people too in need of economic help.[2] The opponents have not accepted this as a counter-argument on the ground that the issue is one of social justice and not of economic justice.[3] Such theorizing of course does not mitigate the national problem; on the contrary it only makes the basis of factions stronger and clearer. Rather than to commend or condemn the reservation policy, what is required is a search for a deeper and more fruitful understanding of the issues which will not only promote the well-being of the Harijans but also at the same time stop the development of factions within society which leads to violence and retardation in development. This paper is a step in the attempt towards such an understanding.

It will be important to briefly mention here what seems to me to be the basic reasons behind the enthusiasm of many politicians to reaffirm the continuance of reservation policies.

As opposed to the legal institution, the political institution exists due to there being divisions amongst people, divisions in terms of interests,

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2. See, for example, S.V. Pande, "The Politicization of the Special Constitutional Provisions and the Perpetuation of Casteism", XIV *Indian Political Science Review* (1980).

3. See the discussions in *The Times of India* (Sunday Review, 21 March 1981).

identity and future prospects. If there are no such divisions there will be no conflicts amongst the divided communities, and if there are no conflicts no political agents will be required to represent those interests or identities. It is, therefore, essential to the very existence of the political institution that it must constantly seek to create divisions amongst the people if it wishes to continue to exist. The clearer and deeper the factions become the more necessary is it to have political agents to negotiate between the factions and to represent them. This is not to say that all factions and differences amongst people are created by the politicians; there are some genuine situations in the history of a society when political agents are required as the middle-men to negotiate between the parties. If the role of the political representative is however, going to be generalized for all times, then so must be the historical conditions for their existence. It is not, therefore, surprising that the politicians are always in the forefront in India and elsewhere to champion the legislations which further the divisions amongst people.[4]

It must be remembered, however, that it is not the present day politicians in India who have set out the legal provisions for defining the differences amongst people and thus separating them. This was done by the makers of the Indian Constitution. The politicians have subsequently only made a capital out of these legislations. If the legal system itself has set out the stage for legal paternalism, one must begin to look at the deeper roots of the legal system itself. What basic ideas, principles and purposes have brought about its structure, and what basic ideas have directed its functions ?

II

Once it is realized, as it has been the case in India, that there is social injustice within the society, three basic questions arise for any policy maker or reformer : Firstly, who should act for the cause of the underprivileged ? Secondly, what substantial measures need to be implemented which will improve the conditions of the socially most disadvantaged ? Thirdly, what criteria should be used to define the class of people who are to receive the benefits of the special measures ?

The answer to these questions will, however, depened upon the content of the very first premise--what one perceives to be the nature of social justice. What is the idea of social justice and how does one distinguish it from that of economic justice ? Although the preamble of the Indian Constitution aims at both social and economic justice, the difference has never been made *explicit* either in theory or in practice for the Indian context. The source of part of the problem which has led to the anti-reservation agitations lies in

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4. I have attempted to discuss some basic issues in this connection in my paper "The Idea of Political Representation", *Philosophia* (1981).

the inability to distinguish between these two ideas of justice. The difference between social justice and economic justice can only be sustained if the concepts can be defined in different terms. If social justice is a matter of social status, and social status is a matter of economic opportunities, then the difference between the ideas of social justice and economic justice is lost because social justice is itself indeed defined in terms of economic opportunities. This was of course not the way the idea of social injustice initially got distinguished. From about the time of Raja Ram Mohun Roy social injustice was perceived to be constituted not by economic disparities but due to there being a hierarchical stratification of social status in which the members of the society did not have a choice about their individual dignity or respectability within the social scheme. If social injustice, as distinguished from the economic injustice, is so constituted, then what was required in making a new *constitution* for India at the time of independence, was simply to repeal or abolish the sources which gave validity to the old social structure, the rules which were enshrined in the old constitution, the *Dharmaśāstras* and the *Smritis*. What was needed was to either repeal all the *varnas* or declare every one to be belonging to the highest *varna*. What the members of the Constituent Assembly did was of course neither of these ; they moved from a four *varna* system and its sub-ramifications to a two *varna* system and its sub-ramifications, the caste and the non-caste citizens. This is progress indeed ; let us hope that we can now move from a two *varna* to a single *varna* constitution.[5]

The fact that the jurists, both during and after independence, did not proceed to rectify the social status by merely changing the old constitution shows that the realization about what constitutes social injustice did not consist in the fact that the injustice was only a question of social status due to the definitions of the old quasi-legal system, but that in the modernized India, as elsewhere, social status is directly related to economic status of the individual within the scheme. That is, they clearly saw that within the individualistic, capitalistic society where the possession of wealth is itself a value which measures a person's social status, the status could not be improved by simply declaring everyone to be a Brahmin or by abolishing all castes legally. Although in ancient India social status was independent of the economic status, in modern India this is not so. Hence, in ancient India social injustice could be corrected without interfering with the economic system, but in modern India since the social status is dependent on the economic status, social justice cannot be obtained without affecting economic justice at the same time.

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5. I have discussed the issue of Hindu and Christian religious influences on the perception of the function of law in India in "Religious Factors in the Indian Legal System : Its Socio-political Implications", paper presented at the Ninth Wisconsin Conference on South Asia, at the University of Wisconsin, Madison, on 7 November, 1980. The paper is available from their proceedings.

It is only on the basis of such an understanding that one can make sense out of the answers to the above-mentioned questions given by the jurists and politicians in India. In answer to the first question—who shall act for the cause of the underprivileged—it was assumed that it is the duty of the political representatives to alleviate the problems of the Harijans. What most likely motivates such a general paternalistic assumption forms the subsequent important part of this analysis.

As to the second question, what substantial measures need to be implemented to improve the conditions of the Harijans, the jurists and the politicians did not recommend legal abolition of the social status of the Harijans, but seeing the issue of social justice as being one of economic justice, as pointed out before, they decided to distribute public offices and educational opportunities in a way that they would be more easily available to the Harijans. What can be the reason behind choosing to distribute the public offices and seats in educational institutions as against various other choices ? The medical and other degrees as well as public offices are sources of economic gains. In the present market system they have a use-value as well as an exchange-value. This can be clearly evidenced from how the matrimonial market is determined by the academic degrees and public offices held by men, and how the public offices control the degree to which unauthorized economic possibilities become available. It will not be wrong to say that most people are interested in such economic possibilities which the educational degrees and the public offices open up, rather than in gaining knowledge or serving the people through the public offices. This is evidently a common knowledge between the jurists, politicians and prospective laymen. The reserving of seats and offices, therefore, amounts to actually reserving and distributing economic benefits and only indirectly affecting the social status. The anti-reservation agitations are thus rooted in the differences about the principles of economic justice and not in the fact that some people are not sympathetic to the social injustice of the traditional caste system.

With regard to the third question relating to the criteria for defining the class of people who are to receive the benefits of paternalism, it was decided that the class would be legally defined in the Constitution ; the definition of these classes has been subsequently developed and refined in common law by taking account of the social status in the customs and traditions and by noting the conditions under which a person is accepted or rejected in a tribe or a caste.[6]

If the politicians and the jurists have taken the cause of social injustice to be directly related to the economic status of people in modern India, as is evident from their practice and policies, why have they defined the beneficiaries of the welfare schemes not in terms of economic status

6. For a discussion of some internal legal difficulties in definitions see, for example, Parmanand Singh, Social Justice for the Harijans : "Some Socio-Legal Problems of Identification, Conversion and Judicial Review", 20 *J.I.L.I.* 355 (1978).

but legally in terms of customs and traditions ? In other words, why does paternalism which is pretentious of helping actual economic subjects through economic measures help only a class of legal subjects ? This is of course part of the general question posed as the central concern of this paper, why does paternalism express itself through law in India. ?

III

Why does any society need a legal system ? The simple and basic answer is twofold : Firstly, to provide a publically acceptable and just means for settling disputes and differences about the ownership and use of goods ; and secondly, to punish those who violate some fundamental principles constitutive for social life, such as the right to live. In many societies where law has internally and naturally evolved these are in fact the ends for which they have required a legal system. In India, however, where the new body of law has been mainly externally imposed on the people, these are not the only aims for which it has been developed. In India, the law has been used to educate and reforom the society (not in the trivial sense that the very presence of a constitution educates the people about their individual rights—a topic on which much has been said. It is doubtful how many people actually ever read the constitution). The education and reform has been carried out in a more profound sense; law has actually enforced social and moral re-structuring of the society. This reformation started with Charles Cornwallis of Marquis and has continued ever since. The end to which law had been put to use by the British in India has become as much a part of the common law tradition as its structure.

Why did the British find it necessary to reform the Indian society through law ? As various movements in India and elsewhere have proved, society can be reformed internally without the use of legal sanctions or ratifications, or the use of force through police and army. One has only to observe the developments within Brahmo Samāj, Arya Sāmaj, Rāmakrishna Mission and the Aurobindo Society, for example, where traditional social and moral practices have been reformed, to see the veracity of the point. Even in ancient India social reforms were brought about by, amongst others, the Buddhist and the Jain movements, all without legal enforcement. Examples are not lacking for modern India. Sarvodaya and Bhudān movements, albeit their social impact is comparatively less, yield important insights into the method by which social structure can be changed. What all such movements point to is that a constructive, progressive and harmonious social reform can only be brought about from within the community, internally by reason, and not by force or sanctions.

It is not difficult to understand why the British needed law to rerform and restructure the society. Unlike Rāja Ram Mohun Roy, Dayānanda Saraswati, Swami Rāmakrishna, Aurobindo Ghose or Mahātma

Gandhi, or before them, Siddhārta Gautam or Mahāvir Vardhamān, the British did not know or care to understand the Indian society from within: they did not know the reasons and beliefs which structured the social reality ; hence they could not use reason to restructure it. This is, however, not to object to all the reforms that the British attempted to bring about, but only to point out the peculiarity and the grounds for the method that they had to adopt, *i.e.*, enforcing social reform through law.

The first conscious movement to introduce English legal principles into India arose out of an attempt of British Parliament to control the excesses of the servants of the East India Company. Lord North's Regulating Act 1773 instituted the Calcutta Supreme Court, the chief purpose of which was, in Edmund Burke's words, "to form a strong and solid security for the natives against the wrongs and oppressions of the British subjects in Bengal."[7] The second wave of anglicization of the society came with Cornwallis, the Governor-General from 1786 to 1793. He had the choice between consolidating British rule on the basis of the Mughal system in keeping with the company's tradition or of adopting an entirely new foreign foundation. The Select Committee on the Affairs of the East India Company in fact suggested both alternatives:

> when brought back to their original state of utility, and improved by such regulations as might be superadded by the British government, [they] would, under a just and vigilant administration, unite the liberal policy of an European state with the strength and energy of an Asiatic monarchy, and altogether be better suited to the genius, experience, and understanding of the natives, than institutions founded on principles, to them wholly new, derived from a state of society with which they were unacquainted....
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> Cornwallis, however chose
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> the introduction of a new order of things, which should have for its foundation, the security of individual property, and the administration of justice, criminal and civil, by rules which were to disregard all conditions of persons, and in their operation, be free of influence or control from the government itself.[8]

Cornwallis sought to reduce the function of the government to the bare task of ensuring the security of persons and property through law; this was a frank attempt to apply the English Whig philosophy of government. He wished to divest the executive of all discretionary authority and subject

7. E. Burke, *Works* Vol. VI at 384 (1852) ; *Ninth Report of the Select Committee on the Indian Affairs* (1783).

8. *Fifth Report of the Select Committee on Affairs of East India Company* 18, Ordered by the House of Commons to be printed, 28 July 1812.

it to the rule of law as framed into formal legislative enactments by the supreme government and enforced by the judiciary. He believed that this could be achieved by permanently limiting the state revenue demand on land, for like all Whigs he was convinced that landed property was the agency which affected the reconciliation of freedom and order. There would flow from a system of landed property, according to Cornwallis, a natural ordering of society into ranks and classes, "no where more necessary than in this country for preserving order in civil society."[9] Cornwallis thus instituted the recognition of the proprietary rights of zamindars, upheld through the western type of legal system. Throughout Cornwallis's minutes one can perceive the tacit echoes of John Locke's classic statements of the Whig theory. The way he interpreted this for India, however, was by removing Indians from all but petty offices, and taking away from the zamindars all political and police power by the Bengal Code of Regulations 1793. He attempted by these reforms to restructure the social system and erect an impersonal government of law, "a system upheld by its inherent principles, and not by men who are to have the occasional conduct of it."

In the post Whigian period the utilitarians and the liberals had powerful influence on the people in control of the Indian affairs. The Liberal current began to assert itself in India at the same time as it did in the English political life, albeit in a radically different way. In England the utilitarians' practical influence languished due to their political failures, but their aspirations of building an administrative state, with a planned judiciary and systematic law codes, found full expression only in India.

It is important to note that many of the ideological movements of the English life tested their validity and many times arose due to disputes over the Indian question. The cause of *laissez faire* and free trade was to a large extent fought out in the struggle for the abolition of the company's commercial function. The "Mercantile system", which Adam Smith hated in fact, represented the company. Evangelicalism, the foundation on which much of the missionary zeal of the nineteenth century Englishmen rested, owed its major impetus to the Indian connection. Two founder members of the Clapham Sect—Charles Grant and John Shore (later Lord Teignmouth), were company's servants who had been Cornwallis's advisers concerning the Bengal Permanent Settlement. The aggresive Christianity of the Clapham sect became a force in public life mostly through the cause of the Indian mission. Because of this close tie with India enjoyed by the Grants, the Stephens, the Thorntons and others, the Clapham and its offshoots were to send forth generations of Indian civil servants stamped with evangelical assurance and earnestness of purpose and religious

9. "Despatch to Court of Directors", 2 August 1789; Charles Ross (Ed.), 1 *Correspondence of Marquis Cornwallis*, Vol. I at 554.

convictions. So many Claphams naturally left a deep impression in India, so much so that evangelicalism instead of being a mission became a way of life, something to be accepted as self-evident. Generations of civil servants and politicians have believed and still believe that the poor and exploited are in need of help, rather than in need of a chance to prove their worth. This basic and radical presupposition in the world-view still governs not only the policies which are made to "save" the poor and the exploited, but also the platforms on which various elections are fought. Helping others personally is a virtue, when one is not responsible for the misery of the other. For making this principle a state policy and claiming it to be virtuous, it would have to be shown how the policies carried on by the state have not been responsible for the misery of the people.

The close family connection with India, which was enjoyed by the Claphams, was repeated in the case of the utilitarians. James Mill's *History of British India* resulted in his employment and after 1819 the employment of his son John Stuart Mill in the East India House, thus firmly establishing the utilitarian influence in the Indian affairs.[10] John Stuart Mill, no doubt, disagreed with some of the important political principles of his father and that of Jeremy Bentham, and went on to produce his own variety of liberalism, but when it came to the actual application of his theory, he thought it could only be applied to certain type of people and societies, amongst which were of course not the Indians. What could be applied to the Indians, as Fitzjames Stephen argued after his return from India, was the Benthamite type of authoritarianism. Fitzjames Stephen's Indian experience resulted in the *Liberty, Equality, Fraternity*. Though not extensively read presently perhaps on account of its negation of modern liberal ideologies, it nonetheless remains, I think, one of the best criticisms of Mill's political philosophy; and it is valuable in so far as it reveals the ideology which was actually applied to India.

It is also important to note in this connection that legal positivism, which John Austin supplied to match Bentham's political ideas, begins to make any practical sense only in the context of the Indian experience; the doctrine that law is what the authority says it is, would, of course, have to be such if one is to run an empire, and specifically, as I have been pointing out, to run it by means of law. For generations now, it must be remembered, Indian jurists and politicians have been educated and brought up in the Benthamite and Austinian tradition; the belief that law is what the legislator says it is, has seemingly become a second nature.[11]

Whereas Robert Clive and Warren Hastings, and to some degree Cornwallis, were interested in maintaining or at least not interfering with

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10. See, for a good discussion of the influence of the utilitarians on India, Eric Stokes, *The English Utilitarians and India* (1959).

11. See, for example, P.K. Tripathi, "Rule of Law, Democracy and the Frontiers of Judicial Activism", 17 *J.I.L.I.* 13 (1975). The view expressed here seems to exemplify the commonly held belief about law amongst the Indian jurists.

the traditional Indian legal customs (such as the *panchāyat* system), the administrators after Cornwallis were clearly and progressively keen to anglicize the Indian society.[12]

The time of Cornwallis was also the time of the industrial revolution. This reversed the economic relationship between Britain and India. While earlier the East India Company had come to find a market for the Indian goods in Europe, after the revolution it became necessary to find a market for the English goods in India. The ideology that inspired the law and the function of the British law in India turned at this point. After 1800, the end of law became the necessary conditions of peace and order by which the potentially vast Indian market could be conquered by the British industry. The change in the legal system after Cornwallis can be better understood in the light of the impact of the revolution.[13]

Before the supply can be made it becomes necessary to create the demand. The creation of a society which would consume the British goods proceeded at two fronts-the transformation of the community through law, and at the same time a transformation of their values through education. The most significant change to this end was achieved by Lord T.B. Macaulay.

Macaulay was appointed to the post of legislative member of the newly constituted government of India, and later he took over the direction of the law commission of India. The important task was outlined at length in the public despatch of 10 December 1834, written by James Mill. The despatch distinguishes between the immediate and prospective changes contemplated by the new Charter Act of 1833, the ultimate prospect of which was that "a general system of justice and police, and code of laws common (as far as may be) to the whole people of India, and having its varieties classified and systematized, shall be established

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12. See "Hastings to Lord Mansfield", 25 August 1774, given in G.R. Gleig, *Life of Warren Hastings*, Vol. I at 401 ; "Hastings to Court of Directors", 3 November 1772, given in G.W. Forest, *Selections from the State Papers of the Governor-General of India : Waren Hastings*, Vol. II, Appendix A at 277 ; "Clive to Verelst and Select Committee", 16 January 1767, given in *Second Report on East India Company* (1772) ; "Clive to Court of Directors", 30 September 1765, given in *Third Report on East India Company* (1773).

13. See, for some important debates concerning economic policies which influenced the change in legal ideology around this time, Evidence of Warren Hastings (before the Parliamentary Committee), 30 March 1813 : P.P. 1812-1813, Vol. VII at 1 ff.; Teignmouth, 9 ff.; Malcolm, 53 ff.; Munro, 121 ff.; Written Evidence of Thomas Bracken, P.P., 1831-2, Vol. X, Appendix. The following documents are also relevant and revealing : John Crawfurd, (India Office Library Tracts), *A View of the Present State and Future Prospects of Free Trade and Colonization of India* (2nd ed. 1829). David Lauire, *Hints Regarding the East India Monopoly-Respectfully Submitted to the British Legislature* (1813); W. Lester, *The Happy Era of One Hundered Millions of the Human Race, or the Merchants, Manufacturers and Englishman's Recognized Right to an Unlimited Trade with India* (1813).

through the country."[14] The immediate consideration for arming the supreme government with new legislative power resulted in lifting all restrictions on the free admission of Europeans into the interior. Although Macaulay did not believe himself to be a Benthamite and was opposed to the idea that the function of law was to reform society, his evangelicalism and belief in superiority showed itself in language and eduction policies. It was Macaulay too who fulfilled one of Bentham's cherished dreams. The confusion of the different legal systems in India, such as the *Mitākshara* and the *Dāyabhāga* amongst others, before the Charter Act, and the practical need for reform which was admitted by even conservative observers, inspired a hope for a great chain of codes for the Indian empire. Bentham had long recognized the opportunity which India presented but it was left to Macaulay to make the reality of a uniform penal code, a matter of practical politics. In his speech on the Charter Bill on 10 July 1833 Macaulay echoed the sentiments which Bentham had expressed half-a-century before, and which James Mill had written in his *History of British India*

> 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.[15]

After 1840s, with the departure of Holt Mackenzie and Bentick and with Metcalfe's lessening influence, a reformed Whigism again took hold of the government, of which, besides Macaulay, Alexander Ross was the main representative.

Ross opposed the *laissez faire* alternative to the attempt to unite the utilitarian programme with the authoritarian paternalism which had developed in Sir Thomas Munro tradition. He took the *laissez faire* doctrine and transformed it like his contemporaries in England into a criterion for radical reform. Although the influence of government in determining the state of a society was acknowledged to be paramount, the new attitude confined the positive intervention of the government to two essential ends : removing the restrictions on the individual and securing to him the fruits of his labour. This did not make the legislator any less important, for if property was the best instrument of happiness, it was itself, as Bentham had argued, born of the security which law alone created. Everything, therefore, rested upon the state of law and its administration.[16]

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14. Quoted in C. Ilbert, *The Government of India* 492 from Kaye, *Administration of the East India Company* 137 n.

15. Vol. V. at 479 (2nd ed. 1820).

16. J. Bentham, "*Principles of Civil Code*", J. Browning (Ed.), *Works*, Vol. 1 at 307-09 (1843).

With Ross the law was, therefore, the sole instrument of social change. The administration of law was not to be understood as the actions of executive officers, but solely as the operation of the judicial process in the courts. The revolution of the Indian society was to be silently and unobtrusively affected. Ross felt less constraint in interfering with the indigenous law than Bentham had shown in his *Eassays on the Influence of Time and Place*. The indigenous laws, Ross deemed objectionable, were the ones most fundamental to Indian way of life and society. He singled out "the Hindoo and Mahomedan Laws of Inheritance", laws which were the basis for the communal ownership and management and which formed the very grounds and reason for the joint and extended family. Ross in fact advocated a rapid and complete transformation of the complex inter-subjective personal relationships between the Indians, replacing it with something like the economic and social structure of the individualist and capitalist England. The instrument to work this transformation was the Benthamite codes of law administered by an efficient judiciary.

While it halted the Benthamite influence, the decade of wars which followed the Afghan Campaign in 1838 did not check the reforming impulse. It only diverted it to other channels. The annexation of Sind in 1843 and finally of the Punjab in 1849 presented an administrative problem of a greater magnitude. In Sind, Sir Charles Napier showed the large measure of success that could be attained by an entirely despotic rule. The Punjab, on the other hand, realized the fondest hopes of the patriarchialists led by John Lawrence and his teacher Metcalfe. It guaranteed a paternal rule, devoted to the reformation of the society by a government in which the executive and the judiciary were united. The Punjab system of administration and social reform later grew up under Lord Dalhousie, the Governor-General from 1848 to 1856.

Dalhousie's most visible achievement was the expansion of the area under direct Britisth rule. He, together with his adviser James Mill, conveniently regarded the Indian states as anachronisms. The partial triumph for utilitarian ideas in the organization of government during his time was matched by a similar progress in the field of law. The Penal Code, the Code of Civil Procedure and the Code of Criminal Procedure were all enacted between 1859 and 1861.

Legal paternalism, or the imperialism that expressed itself through law, took its clear and final shape in the works of J. Fitzjames Stephen. Stephen held office of law member for only two and a half years; yet his influence is most significant and crucial in affecting the development of the Indian legal system. Like Bentham's *Anarchial Falicies*, Stephen attacked the abstract doctrine of liberty and the rights of man in his *Liberty, Equality, Fraternity*. This was also a vehement attack on James Stuart Mill's liberalism. From his theory emerged practical arguments against the denigration of power and force by which John Bright and the Manchester Liberals condemned the very existence of the

British rule in India. He used it against the notion that Britain had a duty to educate India towards self-government, and against the policy of self-effacement and surrender to the abstract moral ideas. Besides having a powerful influence as a law member, which brought about the Evidence Act 1872 among other laws, Stephen had a lasting affect on the mind and personality of Lord Curzon, the Governor-General from 1898 to 1905.

Stephen drew his solutions to the Indian problems mainly from the philosophy of Thomas Hobbes, who according to him was "the greatest of English philosophers". Stephen, like Hobbes, conceived law in authoritarian terms as the will and the command of the sovereign. The state operated by force or a threat of force but it was the whole nature of law to make this operation regular and deliberate. In this sense law was the distinguishing feature of the civilized community. Stephen was as strong and vehement a believer as any of his radical predecessors in the revolution to be brought about by the rule of law. The rule of law not only displaced the rule of personal discretion and despotic power, but according to Stephen it had also displaced the rule of "indistinct, ill-understood and fluctuating customs". The fact that the creation of private rights and the elimination of Indian customs were leading to a decline of village communities should not give rise to any regrets. According to Stephen :

> The fact that the institutions of a village community throw light on the institutions of modern Europe, and the fact that village communities have altered but little for many centuries, prove only that society in India has remained for a great number of centuries in a stagnant condition, unfavourable to the growth of wealth, intelligence, political experience, and the moral and intellectual changes which are implied in these processes. The condition of India for centuries past shows what the village communities are really worth. Nothing that deserves the name of a political institution at all can be ruder or less satisfactory in its results. They are, in fact, a crude form of socialism, paralysing the growth of individual energy and all its consequences. The continuation of such a state of society is radically inconsistent with the fundamental principles of our rule both in theory and in practice.[17]

The Ilbert Bill of 1883, granting Indian magistrates and judges power to try criminal cases against European and British subjects, created a public storm which Stephen employed to voice his differences about Earl Ripon's policy as a whole. Such a policy appeared to Stephen to shift the foundations on which the British government of India rested. In a letter to *The Times*[18] he wrote :

> It is essentially an absolute government, founded, not on consent,

17. Quoted in Hunter, *Life of Mayo*, Vol. II at 165-66 (1875).
18. 1 March 1843.

> but on conquest. It does not represent the native principles of life or of government, and it can never do so until it represents heathenism and barbarism. It represents a belligerent civilization, and no anomaly can be more striking or so dangerous, as its administration by men, who being at the head of a Government founded upon conquest, implying at every point the superiority of the conquering race, of their ideas, their institutions, their opinions and their principles, and having no justification for its existence except that superiority, shrink from the open, uncompromising, straightforward assertion of it, seek to apologize for their own position, and refuse, from whatever cause, to uphold and support it...

Stephen's view and the general English view about the function of law in India in the nineteenth and the early twentieth century can be summarised from the following two quotes from Stephen:

> Can any person look with greater pride or exultation on the machinery by which such a system is maintained than would be afforded by the view of an ingenious gallows or a well-contrived apparatus for flogging garroters? I should reply to such questions that I regard India and the task of the English in India in a very different light from this. The British Power in India is like a vast bridge over which an enormous multitude of human beings are passing, and will (I trust) for ages to come continue to pass, from a dreary land, in which brute violence in its roughest form had worked its will for centuries—a land of cruel wars, ghastly superstitions, wasting plague and famine—on their way to a country of which, not being a prophet, I will not try to draw a picture, but which is at least orderly, peaceful, and industrious, and which, for aught we know to the contrary, may be the cradle of changes comparable to those which have formed the imperishable legacy to mankind of the Roman Empire. The bridge was not built without desperate struggles and costly sacrifices. A mere handful of our countrymen guard the entrance to it and keep order among the crowd. If it should fall, woe to those who guard it, woe to those who are on it, woe to those who would lose with it all hopes of access to a better land. Strike away either of its piers and it will fall, and what are they? One of its piers is military power; the other is justice; by which I mean a firm and constant determination on the part of the English to promote impartially and by all lawful means, what they (the English) regard as the lasting good of the natives of India. Neither force nor justice will suffice by itself. Force without justice is the old scourge of India, wielded by a stronger hand than of old. Justice without force is a weak aspiration after an unattainable end. But so long as the masterful will,

the stout heart, the active brain, the calm nerves and the strong body which make up military force are directed to the object which I have defined as constituting justice, I should have no fear, for even if we fail after doing our best, we fail with honour, and if we succeed we shall have performed the greatest feat of strength, skill, and courage in the whole history of the world. For my own part, I see no reason why we should fail...[19]

...the establishment of a system of law which regulates the most important part of the daily life of the people constitutes in itself a moral conquest more striking, more durable, and far more solid, than the physical conquest which rendered it possible. It exercises an influence over the minds of the people in many ways comparable to that of a new religion....Our law is in fact the sum and substance of what we have to teach them. It is, so to speak, the gospel of the English, and it is a compulsory gospel which admits of no dissent and no disobedience.[20]

IV

The above account presents our British heritage in law. It outlines the English involvement with social reform and maps the basic direction which the development of law took in India, and more significantly it distinguishes and marks out the important ideologies which controlled and created this developement. This account is by no means exhaustive, nor does it mention the many voices in the background which went against the legal philosophy practised by the establishment, but I think it nonetheless captures all the major and consequential jurisprudential developments in British India.

I have given extensive quotes from Stephen because that spells out the end product of the ideas about the nature and function of law which was left by the British in India and which was, and has been, carried on as a tradition, without much reflection, through the works of civil servants, jurists and politicians. This is not to blame the jurists for being unreflective. After Stephen the independence movement became a major factor in which most jurists and lawyers were involved, and the times and the conditions were hardly conducive to deep philosophical thinking about law or politics. Following Stephen came the two world wars too, in which Britain was deeply involved. It is important to note that the only significant work in legal philosophy that has come out of Britain in 1961 after Stephen's *Liberty, Equality, Fraternity* is H.L.A. Hart's *Concept of Law*, with a gap of almost a century. No deep philosophical thinking in law was done in between which could influence

19. *The Times* (4 January 1878).
20. Quoted in Hunter, *supra* note 17 at 169.

the Indian lawyers or civil servants. Even Hart's work is not a reply to Stephen ; it does not make any radical or new proposals ; it remains in the shadows of Austinian and the Benthamite tradition of legal positivism.

It is only in the light of the historical and ideological background as outlined here that one can begin to understand the works and the methods of the members of the Constituent Assembly in India, and also make sense of the behaviour and proposals of some of the sections of the judiciary and the politicians in independent India.

The ideology of legal paternalism, the idea that society needs to be reformed through law, has been deeply entrenched in the Indian legal practice. Hobbes' influence through Stephen and the Benthamite influence through Ross and others still persists.

Since it were mainly the lawyers who brought about the independence movement and who later formed the Constitutent Assembly, evangelicalism and the Hobbesian ideology had their full say in the framing of the Indian Constitution ; firstly it gave birth to the directive principles and then to bring salvation to the "heathen" (outcastes !) it singled them out in various legislations.

It is not a matter of historical contingency that the directive principles were fashioned after the Irish Constitution. Why did the Irish need them in the first place ? Ireland, like India, was another society where British imperialism had left its deep mark on the legal and political ideologies.

The directive principles and other constitutional provisions defining scheduled castes and tribes make the Indian legal system fundamentally different from the English or the American common law system. It is a dogma to believe that the Indian legal system can be compared to the English legal system. Being founded on different ideologies, they were never comparable. The myth that the legal system being built in the colonies was similar to the one at home, was a necessary part of the imperialistic propoganda. The English did not consciously use law in their own country to reform or restructure or bring salvation to the people. Nor did they ever use the law to classify and distinguish between citizens. It is only lately that they seem to be taking such a step, but then the people it is aimed at are once again non-British.

Indian jurists since independence have taken the presence of directive principles and the legal classification of people very lightly. These elements cut through the very basis of a legal system. Law is meant to serve the people, not to be their master and dictator. What India has is not a natural legal system but a system as required by the imperialists who wished to control the people rather than provide a platform for settling disputes and differences. I have already pointed out why it became necessary for the outsiders to adopt law as a means of social reform in their colonies ; this was partly because of the economic reasons and partly because reforming or restructuring by reason requires an understanding of the people, their customs and cultures, which reforming by force does not. Now that such a necessity does not exist there is no reason why the

Indians should continue to use the same methods. The fact that they do so seems to be not because the bourgeoisie wants to exploit the Harijans but because the bourgeoisie was miseducated about the nature and function of law. It grew up with the Hobbesian, Austinian and Benthamite theories, which the British never seriously applied to their own country but apparently produced for the consumption of its colonies.

The directive principles misrepresent and misunderstand the function of law. As I have been pointing out, they are not a part of law at all; they are a part of imperialistic, paternalistic ideology. Further, the classification of people through law violates the very first legal principle, namely, that law should be about legal persons and not social or economic persons, Brāhmin or Sudra or not legal classifications ; in other words social or economic status of people should not figure in the legal ontology. Law should take all citizens to have the same status.

The misuse of law has achieved the end that it naturally should ; it has socially isolated the Harijans and other underprivileged classes, making their class an instrument in the hand of the politicians to create factions and provide consolidated votes. Factions can only be created when the society fragments into smaller communities ; if law itself helps in achieving this, what else can a shrewd politician want.

What I am evidently suggesting is that the directive pinciples and all those legal rules which classify people according to their social status should be repealed from the Indian Constitution by amendments. The roots of the Bihar and Gujarat-type anti-reservation agitations lie in the misunderstandings about the function and structure of law. If this is not done, these agitations, to my understanding, are only preludes to what can follow. As the factions further separate and solidify, the encounter between the separated communities will only turn out to be more violent and damaging.

If the betterment of the underprivileged class cannot be achieved by making it legally necessary, how else can it be achieved? This is a big, although not a difficult question in political economics and needs to be dealt with separately. My aim in this paper has been only to point out that if India needs to better the conditions of the exploited classes, by whatever method it can be done, it cannot be done by dictating policies which violate basic legal principles and hence the social order. There is no historical evidence that this has ever been achieved. India's own experience in the last thirty years should be sufficient to make this clear.

Though the intent of this paper is not to discuss political economics, a few basic points of principle would not be irrelevant. Legal paternalism is eqivalent of telling the Harijans that their own efforts towards autonomy are not worthwhile, and the reservation policies are equivalent of telling them that the work they do or have been traditionally doing is not worth pursuing, that they should change and do what the higher castes have been doing since long. Both of these are wrong in principle. While the former denies them dignity, the latter disrespects

their work. This is totally opposed to what Mahatma Gandhi wanted. If the economic status of the Harijans is to be improved so as to improve their social status, this must be done by paying them justly for their own work rather than by inviting them to do something else. What we need to do is to create an economic system in which manual labour and handicraft is remunerated well and justly so that others will want to do such work too (instead of all wanting to become doctors, engineers and bureaucrats). What is evidently wrong in modern India is not the problem of the caste system but the problem of unjust and irrational distribution of income for same or similar input of labour. For example, there is no reason why the sweepers should not be given the same pay and priviliges as the politicians; neither's work requires any special technical or theoretical qualifications or degrees or skills. The sweeper's work perhaps requires more sincerity. This is not to underestimate the work of politicians or sweepers but only to make a simple point in political economics.