Chapter I

INTRODUCTORY

THIS STUDY is concerned with legislation relating to habitual offenders in India. The regulation and control of habitual offenders has been a baffling subject all over the world. Not being content with the ordinary criminal law of the country, those concerned with the criminal justice system at its policy-making stage have acted on the assumption that for the protection of society from its habitual offenders—sometimes also described as "persistent" offenders—there are needed special legislative measures. Underlying this assumption is the further assumption that such offenders are immune to the effects of ordinary penal processes. The sense of fear and insecurity that their presence in society is believed to generate amongst the members of the community has been regarded as justifying the enactment of special measures. Such measures are known in most civilised countries, but in India, this sense of fear seems to have been felt much more intensively than elsewhere. We now have, for the protection of society against such elements, not one law or a group of laws, but a plethora of laws, sometimes overlapping one another, at other times conflicting with each other and all times creating confusion. To disentangle the threads and to see the significance of each such legislative measure seem to call for a lot of industry, and patience.

Habitual offenders represent, in a sense, the 'end of the line'[1] so far as penal treatments are concerned. They are men who have had so many convictions and punishment that it is felt that nothing is left to do regarding them, except to shut them away in safe custody for a very long time in order to prevent further harm to the community.[2] Whether this is true or not, there is no doubt that the human costs of recidivism are very high.[3] This lends importance to the subject. Society's desire to protect itself against serious crimes and their repetition renders the topic one of immense practical importance.

Norval Morris[4] points out that the various legal systems have christened the habitual offender differently as persistent offender, profes-

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1. D. J. West, *The Habitual Prisoner* ix (1963).
2. *Ibid.*
3. Robert Fishman, Criminal Recidivism, 68 *J. Cr. L & C.* 283, 289 (1977).
4. Norval Morris, *The Habitual Criminal* 5 (1951).

sional criminal, incorrigible offender, dangerous recidivist (Finnish law of 1932) hardened offender, *relegable*, habitual criminal and the like. The various countries resort to take measures, usually involving protracted segregation from society against these groups. However in the Indian context the legislative attempts have been to comprehend the above noted connotations irrespective of the modification implied in the meaning of one or the other term.

It may be noted that the offences, listed in the various legislative enactments, (See Appendix I & II *infra*) are the ones which call for a degree of professionalism in their execution. The legislatures have thus envisaged to contain a type of criminality, which otherwise makes it possible and profitable to engage in the career of crime, correspondingly similar to the lawful vocation of such business activities which merely aim at amassing the profits and gains at the cost of the society at large. The use of the term habitual offender, for purposes of this study, thus brings into fold the professional criminal activity of the nature which calls for the use of skill and smoothness of operations in a manner as may invariably preclude the use of violence except for taking the command of resistance and to control their get away.[5] The threat of violence rather than its actual use characterises the behaviour of these professional men in pursuit of their criminal activity, behaviour and career.

With a view to understanding the socio-legal signification of the statutory attempts to contain the habitual offenders, it would be apt to understand the term by using the three elements which Norval Morris[6] finds ingrained in the status of such an offender. These are :

(a) Criminal qualities inherent or latent in the mental constitution, (b) settled practice, and (c) public danger.

In the developing countries the criminological problems have been subjected to three types of research treatment. In the first place, the descriptive method which gives a narration of the dimensions and modalities of crime. Then, there is the causative method which describes the aetiology of crime. Thirdly, there is the normative method which describes what ought to be done about crime.[7] The first method is concerned with what "is". The second method is concerned with "how it has come about". The third method is concerned with the consequential thoughts and efforts needed for considered opinion and concerted action.

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5. Walter C., Reckless, *The Crime Problem* 165-167 (2nd ed. 1955).
6. Norval Morris, *supra* note 4 at 6.
7. C.H.S. Jaywardene, Control of Crime in Developing Countries, 42 *Ind. Journal of Social Work* 381 (1982).

The present study does purport to deal with the law on the subject from all the aspects mentioned above *i.e.* what is the law, how it has come about and then to posit the efficacy of the law in terms of its need, utility and application to combat the phenomenon caused in the society by the habits and practices of persistent offenders.

Evolution of the law in India

India has been beset with age-old problems of criminal gangs and armed bandits. The criminal gangs which have lived almost solely on crimes of theft and various offences against property over several centuries, have achieved a high level of professional and specialised efficiency in a particular form of crime.[8]

During the British period, this phenomenon was dealt with by passing and enforcing a special statute, namely, the Criminal Tribes Act, 1924. However, with the Independence and the commencement of the Constitution and the incorporation therein of the fundamental rights, emphasising the dignity of the individual, it was realised that such discriminative legislation, labellihg an entire tribe as "criminal" cannot be continued on the statute book. Accordingly, the Act was repealed in 1952.

The problem of habitual offenders was sought to be dealt with by state legislation, addressed not to particular tribes but to habitual offenders generally.

Chronologically, the first All India law on the subject is the Indian Penal Code (1860), section 75 of which operates[9] so as to authorise the courts to award a higher punishment for recidivism. Next is the Code of Criminal Procedure which, in its successive versions, has contained provisions, both preventive and punitive, to deal with habitual offenders.[10] Then there are state Acts specially enacted to deal with such offenders.[11] Mention may, in passing, also be made of the state Acts concerned with *'goondas'* and other bad characters, particularly the provisions for externment.[12] Preventive measures against such offenders are also provided for—directly and indirectly—in the Police Act, 1861 (a central Act) and the Police Acts of certain states.

The Criminal Tribes Act can be said to be the forerunner of the state habitual offenders, laws. Under section 3 of the Criminal Tribes

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8. Note, Crime Trends and Crime Prevention Strategies in Asian Countries, 35 *Int. Rev of Cr. Policy* 24-28. (1979).

9. See *infra*, chapter III.

10. See *infra*, chapter II.

11. See *infra*, chapter VIII.

12. R. Deb and others, Operation of Special Laws Relating to Externtment of Bad Characters, 11 *J.I.L.I.*1 (1969).

Act, 1924 if the provincial government had reason to believe that any tribe, gang or class of persons or any part thereof was addicted to the systematic commission of non-bailable offences, it was empowered to declare by notification that such tribe, gang or class or part thereof was a criminal tribe for the purposes of that Act. Sections 4 to 9 dealt with the registration of members of any criminal tribe or part of a criminal tribe by the district magistrate. The district magistrate had to publish a notice at the place where the registsation was to be made and other places as he thought fit calling upon all the members of the criminal tribe to appear at a time and place specified before the person appointed in that behalf and to give that person such information as may be necessary to enable him to make the register. The district magistrate was given the power of exempting any member from registration. After the preparation of the register, no person's name could be added to the register nor any register cancelled except by or under an order in writing by the district magistrate. Sub-section (2) of section 7 expressly provided that before the name of any person was added to the register the magistrate had to give notice to the person accused. Section 8 was as follows :

> Any person deeming himself aggrieved by any entry made, or proposed to be made, in such register, either when the register is first made or subsequently, may complain to the District Magistrate against such entry, and the Magistrate shall retain such person's name on the register, or enter it therein or erase it therefrom, as he may think fit.

Under section 10, the provincial government could, by notification, issue in respect of any criminal tribe either or both the following directions, namely, that every registered member shall in the prescribed manner (a) report himself at fixed intervals and (b) notify his place of residence and any change or intended change of residence and any absence or intended absence from residence. Section 11 provided that if the provincial government considered it expedient that any criminal tribe or any part or member of such tribe should be restricted in its, or his movements to any specified area or was to be settled in any place of residence,it could declare that such tribe, part of the tribe or member would be restricted in its or his movements to the areas specified in the notification, or would be settled in the place of residence so specified as the case may be. Before making such a declaration the provincial government had to consider certain matters set out in section 11 (2). Power to vary the specified area of restriction was given to the government under section 12. Sections 16 to 19 dealt with the establishment of industrial, agricultural or reformatory settlements and provided for placing members of the tribe in such settlements. There was also provision for establishing schools for children of the criminal tribe. Section

20 conferred on the provincial government the power to make rules. Sections 21 and 22 dealt with the penalties for breach of the provisions of the sections or the rules framed under the Act. Section 24 was a special section providing for punishment even when no actual offence was committed. It was in these terms :

> Whoever, being a registered member of any criminal tribe, is found in any place under such circumstances as to satisfy the court,
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> (a) that he was about to commit, or aid in the commission of, theft or robbery, or
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> (b) that he was waiting for an opportunity to commit theft or robbery, shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine which may extend to one thousand rupees.

The repeal of the Criminal Tribes Act in 1952 simultaneously warranted the need and attention to think of newer modes to tackle the problem of professionalism in criminal behaviour. The forms and extent of habitual criminality have been changing their dimensions too. The emphasis on the laws seeking to incorporate preventive measures by way of detaining pronounced anti-social elements and thus scuttling their designs to engage in the commission of conventional crimes, got gradual consideration.

Indeed, the laws relating to preventive detention got constituional permissibility in 1950. These laws, for preventive detention in the sense used in Indian constitutionl law, however, do not directly or principally aim at dealing with habitual offenders. They are concerned with acts prejudicial to certain social interests—such as, national security, public supplies and services essential to the community,—and (more recently) the conservation of certain economic resources or their proper distribution. These laws are, however, widely framed so as to permit their utilisation against habitual offenders.[13]

Other countries

It may be worthwhile to view cursorily the problem obtaining elsewhere with a view to apprising oneself with the necessary and expedient modes of law enforcement against the habitual offenders.[14] In England, according to the Criminal Justice Act, 1948, *section 21*, offenders convicted on indictment for an offence punishable by two or more years' imprison-

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13. For detailed discussion see *infra* ch· V.
14. D. J. West, *supra* note 1 at 1.

ment were liable to sentences of five to fourteen years' detention if they had reached thirty years of age and had been similarly convicted on at least three previous occasions since the age of seventeen and had already been sentenced at least twice to terms of imprisonment, borstal training, or corrective training. The Prevention of Crime Act of 1908, the Departmental Committee on Persistent Offenders of 1932, the Criminal Justice Act of 1948, represent successive stages in the attempt to come to terms with the obdurate problem of the recidivist. Now, after more than half a century, the Advisory Council on the Treatment of Offenders has been asked to review the whole question again.[15]

Section 28 of the Powers of Criminal Courts Act 1973 now provides that on being satisfied, the court may impose an extended term of imprisonment to an offender who has been convicted for a term of two years or more. The satisfaction of the court rests on the previous conduct of the offender as well as on the likelihood of his committing further offences, together with the discretion of the court, to enable the court to protect the public from him for a substantial time. The power is to be exercised subject to conditions laid down in the Act.[16]

For more than a century, laws in the United States have made provision[17] for increasing the severity of penalties for offenders who have earlier criminal records. Massachusetts enacted an habitual criminal law in 1817, and before 1900, similar laws were passed by nine other states. Thirty-four states have passed habitual criminal laws since 1900. One of these states repealed its law in 1933 and two others changed their mandatory life-imprisonment penalty to a permissive life-imprisonment penalty for repeated offenders. At present, five states make a life sentence mandatory on conviction of a third felony and ten on conviction of a fourth felony.[18]

France, by introducing "relegation" in its law of May 27th, 1885, became the first country to apply legislation adapted specifically to habitual criminals.[19] Norway followed with clause 65 of its Criminal Code of 1902. The next legal system into which laws were incorporated was that of New South Wales, where, on September 20th, 1905, the "Habitual Criminal Act" received the Royal assent. Though this New South Wales legislation had its precursors, it can be regarded

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15. *Id. at* vii.

16. S. 280 of the Powers of Criminal Courts Act, 1973.

17. Sutherland, *Criminology* 563-564 (1965, Indian Reprint).

18. Paul W. Tappan, Habitual Offender Laws in the United States, XIII *Federal Probation* 28-31, Also N. S. Timasheff, The Treatment of Persistent Offenders Outside the United Statests, XXX *J. Cr. L. & C.* (1939) 455-469.

19. Norval Morris, *supra* note 4 at 86.

as the prototype of much European habitual criminal legislation, since it implemented an original scheme for dealing with habitual criminals which served as a model for many other legal systems.

The other Australian states followed the lead given by New South Wales, and Royal assent was given to such legislation for Tasmania, Victoria, South Australia in 1907, for Western Australia in 1913, and for Queensland in 1914.[20]

"Single" & "dual" tracks against habitual offenders

Norval Morris made an extensive study of the modes of law enforcement obtaining in several countries ;[21] and found that the legislative trend in this regard has been that the laws either envisage the aggravation of punishment or the adoption of special measures for treatment of the habitual criminals, which may be other than the traditional punishment.

The foregoing thought in the matter of dealing with the habitual criminals has led to two kinds of legislative measures which have come into existence. One of them has been designated as 'single track system' and the other is called the 'dual track system'.

In the former case a theory is advanced that a prolonged detention even under the mildest penal conditions commensurates with the expiation of sin of the offender so as to restore him his right to live in normalcy. This system has gained popularity in Norway, Switzerland, Hungary and now in England. The extended punishment or an extended detention as a penal sanction characterises the single track system.

The dual track system has been adopted by Belgium, Czechoslovakia, Finland, Germany, Holland, Italy, Latvia, Poland, Spain and Yugoslavia. It is through this system that special measures are adopted to the treatment of habitual criminals after they have undergone a fixed term of imprisonment for the last offence committed.

Denmark, however, has provided for both the "tracks" in as much as the Danish legal system keeps it open for the judge to choose anew either of the systems for each successive offender.

The dual track system is preferred for the reason that there is a need for condign punishment to the offender, as well as it is also necessary to give him a "cooling off" period by putting him in the ordinary prison.

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20. *Ibid*
21. *Ibid.*, generally pp .201-202 and 4

Dangerousness of an offence—or rather the supposed dangerousness of an offender—is the justification for more stringent measures against habitual convicts. Detention of convicts is either as a punishment or to detain so long as it may take to restore him to normalcy is thus a necessary measure. Dangerousness is presumed from recidivism.

Society has devised different methods of rendering itself free from the criminal activities of an individual who shows persistent criminal tendencies. The incorrigible offenders, the habitual offenders and the confirmed recidivists lead to an intellectual conviction in society that special measuses should be devised to deal with them. This intellectual conviction develops into a realisation of the practical necessity of introducing such measures into the criminal law. In course of time, the practical necessity for these measures is felt with such an intensity that "a modern criminal code cannot be conceived without (them)".[22]

As noted earlier there are numerous statutory provisions seeking to confront the problem of habitual criminality. Thus, the position becomes complex. Laws which deal directly with the problem of habitual offenders are those enacted by the states under the title of "habitual offenders", "restriction" Acts and the like. But legal sanctions for checking the criminal tendencies of persistent offenders and dangerous recidivists are, in India, scattered at several places. There has come into being a rather complicated legislative framework. It is proposed to survey in this study that framework. After a general survey covering the various sources of power sought to be used by the police or other appropriate authority for regulating habitual offenders, attention will be more particulary devoted to a few aspects,—particularly, the operation of the state habitual offenders, legislation.

By far the Indian laws have attempted to grapple the issue of combating the habitual criminals in an *ad-hoc* manner. Systematic approach to deal with the problem in a comprehensive way is warranted.

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22. N. S. Timasheff, *supra* note 18.