

criminal cases and their punishments before and during the period of jang bahadur

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Introduction

There is no dependable record of the development of the Nepali legal system prior to the fourteenth century A.D. The laws shown in the inscriptions of the ancient Hindu rulers have not proved to be very important as judicial works which could have influenced the later legal systems of Nepal¹. The first influential proponent of judicial law in Nepal was Jayasthiti Malla. Jayasthiti Malla, as stated in the chronicle (vamsavali), was a wise ruler who made various social and religious laws². He divided the people into castes and made regulations setting out caste behavior and inter-caste relationships. "Such laws" as stated in the vamsavali, "were formally in existence, but having fallen into disuse through lapse of time were again compiled from the Shastras and brought into use"³. He also made significant changes in regards to criminal punishment. The vamsavali mentions that, "In former regions, criminals were allowed to escape with blows and reprimands, but this Raja imposed fines according to the degree of the crimes"⁴. The laws introduced by Jayasthiti Malla were based on the Shastras (religious scriptures) and these laws had great impact on the laws of the later Malla and Shah kings.

Another king credited with introducing social regulations was Ram Shah, the ruler of Gorkha. Twenty-six regulations pronounced by this king have already been found⁵. He was a Hindu ruler, like Jayasthiti Malla and he too followed many of the customary laws which prevailed among the various sections of the population at that time. Even with the political unification of Nepal in 1769 A.D., the basic judicial system of Nepal remained strongly based on the Shashtra save only for a few variations suiting the needs of the time.

Brian Hodgson, the third British Resident in Nepal (1833-1843 A.D.) rendered a service to Nepal by putting the judicial system of the time into written form. His papers, both published and unpublished, provide us with a fairly reliable base for comparing the judicial practices of the period with those of the government of Jang Bahadur. It must be noted that although Hodgson's papers on the legal system were not based on official records, nevertheless they have withstood test and verification through comparison with available orders issued by the central government to district administrators as will be cited below.

Jang Bahadur (1846-1876 A.D.) occupies a unique position in the legal history of Nepal. It was he that gave politically united Nepal its first written legal code (Ain) which covered both civil and criminal cases. His predecessors, Jayasthiti Malla and

Ram Shah, both produced social and judicial legislation meant for their respective tiny states. Jang Bahadur's Ain, on the other hand, was meant to be applied to the whole of Nepal.

The Ain dealt not only with civil and criminal matters, but dealt also with administrative procedures and the conduct of civil servants as well. It contains regulations for the management of revenue administration, land surveys, distribution of land to the landless and relations of landlords to tenants. It includes detailed provisions regarding social conduct such as caste, marriage, relations between husbands and wives, family property and its partition, sati (the immolation of a wife on a husband's funeral pyre), slavery and gambling, to mention a few. Finally, the Ain is a piece of literature which presents a faithful picture of Nepalese life in the nineteenth century.

The Ain came into effect on Pausa Sudi 7, Raj 5, V.S. 1910 (January 5, 1854). It is a handwritten document, which has since been published by the Ministry of Law and Justice, Nepal. The published edition, however, is of a later version containing certain amended provisions dating from 1854 to 1866 A.D.

The published version of the Ain is entitled Sri 5 Surendra Vikram Shah Devko Shasan Kalma Baneko Muluki Ain, but the word muluki does not appear in any of the original copies of the Ain. All of the original copies or amended versions available are simply called Ain. Both in the preamble and on the title page of the original, it is written simply as Ain, not Muluki Ain and this name is maintained in all the amended copies which appeared during the period of Jang Bahadur. The word muluki seems to have been added by his successors. For the purpose of this study, the published version has been consulted, but cited simply as Ain maintaining the original title.

The Ain has three important features. First, unlike previous judicial codes, it was less technical. It facilitated the quick disposal of cases according to its provisions, since everything was clearly laid out and every aspect covered. It was no longer necessary to consult the Shastras (a defect of the earlier systems, which made frequent consultation of those texts necessary whenever a new case involving breach of caste or interest regulation turned up) for clarification on legal points⁶. In the second place, the Ain provided Nepal with a uniform system of administration particularly in relation to revenue and judicial concerns. Finally the Ain became a source for all future legislation. It laid the foundation for the practice of written enactments relevant to the needs of the time. The Ain in spite of some limitations and changes continued to be the chief legal code up until 1962 A.D. Even the present legal code, the Muluki Ain, which has been hailed as the most progressive, has incorporated certain features of the Ain of 1854 A.D. Due to a lack of space here, a comparative study

of the Ain of 1854 and the present Muluki Ain cannot be given⁷, but the dates of the major amendments made since the Ain of 1854 are presented as follows: 1862 (1919 V.S.), 1872 (1929 V.S.), 1888 (1945 V.S.), 1904 (1961 V.S.) 1910 (1967 V.S.), 1918 (1975 V.S.), 1923 (1980 V.S.), 1927-28 (1984-85 V.S.), 1930 (1987 V.S.), 1933 (1990 V.S.), 1942 (1999 V.S.) 1947-48 (2003-4 V.S.) and 1955 (2012 V.S.). The new Muluki Ain was introduced in 1962 A.D.

Several researchers have considered the legal system and judicial administration of Nepal during the last few years. In addition to the work of Brian Hodgson, cited above, several references on the legal system of the Ranas, including Jang Bahadur, can be found in works by European writers, particularly works by British authors. A controversy has developed, since some of these writers attribute certain aspects of the criminal code in the Ain as being due to the modernizing influence of the British legal system on Jang Bahadur as a result of his visit to England prior to the codification of the Ain⁸. According to these writers, the Nepalese penal code had been greatly reformed, differing from the earlier severe and barbarous criminal punishments. Other writers feel that the Ain merely represents a collection of earlier judicial orders dating from the time of Prithwi Narayan Shah. In other words, according to these writers, the Ain was nothing more than the codification of tradition or continued practice⁹. So far as the first point is concerned, British law had no impact on the Ain, although certain reforms of social practices and criminal laws are to be found in the Ain. As to the second point, the Ain in some ways is the codification of earlier tradition. It contains certain provisions which had been in force since the time of Jayasthiti Malla, but there are many novel provisions as well. If one makes a careful and dispassionate study in light of available earlier records, the conclusion must be that the Ain as a whole was partially customary, yet partially written in accordance with the times when it was laid out.

This brief study is not intended to give a detailed comparative account of the Ain with earlier criminal laws. By confining myself to a few available official orders issued before 1846, as well as the published and unpublished papers of B.H. Hodgson, I will try to discuss some of the more important elements of the criminal code belonging to the period preceding Jang Bahadur with the Ain of Jang Bahadur itself. I wish to point out the differences relating to each case in which the reader should note the reforms brought about on the Nepalese legal code prior to 1854 by Jang Bahadur.

I. Murder.

Similarities: The murder of human beings and the killing of cows was punishable by death both before and during Jang Bahadur's time.

Exception: Brahmans and women escaped the death penalty before and after the codification of the Ain.

II. Accidental Murder of a Human Being

Involuntary manslaughter was an offense punishable by death and the confiscation of property before the codification of the Ain¹⁰.

Point of difference: The Ain demanded only that the criminal's share of property be confiscated if he was over twelve years of age¹¹.

III. Incest (Madnatama Karani)

i. Incest committed with a sister or a daughter was punishable by death before the codification of the Ain¹².

Point of difference: The Ain prescribed that one committing incest with his sister or daughter be branded (damal) and that his property be confiscated¹³.

ii. Incest with one's mother-in-law or step-mother was punished by death before the codification of the Ain¹⁴.

Points of difference: In the Ain, this form of incest was punished by the confiscation of property as well as degradation of caste status for all thread-wearing or twice-born castes (tagadhari jat) and liquor consuming castes (matwali jat), those castes not subject to slavery (namasinya jat)¹⁵. The liquor consuming castes subject to slavery (masinya jat) were enslaved as a result of their crime¹⁶. The same punishment (slavery) was prescribed for other lower castes (chhilo halnu naparne jat) whose contamination did not defile the higher castes¹⁷.

iii. Incest with the wife of an elder brother was punished in the following ways both before and after the codification the Ain:

Before the codification of the Ain¹⁸:

1. Brahmans were degraded from their caste standing and were expelled from the country.
2. In the case of Rajputs, Chhetris, Khas, Magars and Gurungs, their genitals (linga) would be cut off.
3. Untouchables like Damai, Kami, Sarki, Sunwars etc. were reduced to slavery.
4. Castes like Balami, Majhi, Danuwar, Murmi, Bhote and Chepang were punished with death.

Points of difference:

1. Under the Ain, Brahmans were degraded from their caste standing and their property was confiscated. They were also expelled from their villages, but not from the country¹⁹.
2. In the case of Rajputs, the amended provision of the Ain (1919 V.S.) provided that adultery with an elder brother's wife was to be punished by degradation from caste and confiscation of property. The elder brother then had the right to kill the adulterer. Before the amendment of this provision, a male of this caste (Rajput) could marry the widow of his elder brother. The Ain abolished this practice. The offender (marrying his elder brother's wife, probably a widow, because the Ain simply mentions bhauju) was imprisoned for one year and was not allowed to serve food to members of his caste²⁰. Chhetris, Magars and Gurungs were punished by branding them and confiscating their property, but they no longer lost their genitals²¹.
3. The same punishments were handed out to the untouchable groups, but the genitals were no longer cut off.
4. The Bhotas, Chepangs, Majhis, Kumals etc. were punished in the same way prescribed for the castes above²². They were no longer subject to capital punishment for this offense.

IV. Adultery (Jare)

The punishment for adultery was the same both before and after Jang Bahadur's time. The aggrieved husband was allowed to cut-down the adulterer. It must be noted that the Ain gave alternatives to the aggrieved husband in many cases, allowing him several ways of punishing the offender. Such detailed provisions (see Ain pp. 602-637) were not available in the earlier codes. It is surprising that under the earlier code relating to adultery, if the aggrieved husband was unable to kill the interloper, and he did not cut-off the nose of his unfaithful wife, the poor husband was not entitled to government service throughout the rest of his life²³. For such a person to expose his cowardliness by not killing the adulterer, caused him to be looked down upon by society and labelled him as napurnsak or lachhe (cowardly or devoid of manly qualities).

V. Intercaste Sexual Offenses

i. Sexual intercourse with a Brahman woman by a lower caste male was punishable by death and maiming before the enactment of the Ain²⁴.

Points of difference: The maximum punishment for the same offense under the Ain was from two to six years in prison for all castes from Rajput to Matwali, not subject to slavery²⁵. Castes subject

to slavery were enslaved after first having served from one and a half to four years in prison²⁶. Untouchables were branded and their property was confiscated²⁷.

ii. A soldier (soldiers were admitted into the army usually from the touchable castes) before the time of Jang Bahadur, was subject to a death sentence for having intercourse with a Chamarni (a woman of the cobbler caste, an untouchable) against her will²⁸.

Point of difference: For such offenses, the Ain prescribed the confiscation of property and one and a half years in prison, along with scratching the offender's caste on his left cheek²⁹.

iii. Before Jang Bahadur's time, a Magar was deprived of his penis for sexual intercourse with a Sarki woman (untouchable)³⁰. A man of the Bhote caste suffered the same fate for sexual intercourse with a Damai (also untouchable)³¹.

Points of difference: i. For the first kind of sexual offense, the Ain prescribed confiscation of property and imprisonment for a year and a half, along with scratching the offender's caste on his left cheek³². ii. In the case of castes like Bhotes, if the husband of the seduced woman was alive, the aggrieved husband had the option of killing the offender. If the woman was a widow, the offender was degraded from his caste and his property was confiscated, but he was not imprisoned. The rest of the punishments were similar to that meted out to the Magar male above³³.

Comment: In many cases of intercaste sexual offenses, the earlier codes (i.e. pre-Jang Bahadur) did not even spare a dead person from punishment, if he was of low caste and if he had committed unlawful sexual intercourse with a Brahman woman before his death. According to one source, the offender's share of property was taken away by the government after setting aside the shares of his rightful heirs³⁴. Such provisions are not to be found in the Ain. Next, it was common practice in the earlier reigns to cut-off the nose of the unfaithful wife. Not only this, but concealment of illicit sexual intercourse was a crime as well and punished by cutting-off the nose of the one who knowingly concealed the information³⁵. Under the Ain, women (having husbands) belonging to castes from Brahman to Matwalis, not subject to slavery were not deprived of their noses³⁶. This provision suggests that the Ain allowed the practice of cutting-off noses of those women subject to slavery. This is a serious defect in the Ain.

VI. Child Destruction and Abortion

i. Before the codification of the Ain, a woman usually lost her nose for killing a new-born baby. She was also subject to caste degradation³⁷.

ii. The punishment for women of high caste for procuring abortion was the loss of caste standing. Women of low caste were enslaved for the same offense³⁸.

Points of difference: i. The Ain prescribed branding for killing a new-born baby, a woman did not suffer degradation from her caste for committing this offense³⁹. ii. The Ain provided that women belonging to the Tagadhari and Matwali castes were to be imprisoned for one year for procuring abortions by any means. The Ain does not mention the loss of caste in such cases⁴⁰.

VII. Counterfeiting of Coins

Before Jang Bahadur, counterfeiting coins was punished by mutilation, that is the hand of the counterfeiter was cut-off⁴¹.

Point of difference: The Ain provided for the confiscation of the offender's share of property. He was also imprisoned for six years. He could be released before that only if he paid double the amount counterfeited in cash at the rate of Rs. 10 per month⁴². This was the maximum punishment meted out for counterfeiting coins.

VIII. Theft and Burglary

The punishment for stealing the gold turban chain of a chief (bharadar) was death before Jang Bahadur⁴³.

Point of difference: The Ain demanded a maximum punishment of eight years imprisonment for the same offense⁴⁴.

According to Hodgson, for the first offense, theft was punished by cutting-off one hand. For the second offense (including petty burglary), the other hand was cut-off. For the third offense, the thief was put to death. For petty thefts, whipping, fines and simple imprisonment were prescribed. For serious thefts, the hands and nose of the offender were cut-off⁴⁵.

Points of difference: The Ain prescribed that a thief above the age of sixteen, if found stealing goods by breaking doors, walls, locks etc. was to be punished for the first time by restitution of the stolen goods and a fine equal to the amount of goods stolen. In addition, for the second offence, he was to be fined double the amount of goods stolen, along with the restitution of the goods. The third offense led to a six year prison term. In this way if he committed thefts for a fourth, fifth and sixth time, he would be branded and his property confiscated⁴⁶.

Comment: In all kinds of thefts and burglaries, the Ain gave details regarding the circumstances of the thefts committed along with a age of the person or persons committing the burglaries or thefts. A thief below the age of twelve was never fined. A thief between the ages of twelve and sixteen was branded and his property confiscated, if he has committed thefts or burglaries repeatedly for seven times or more⁴⁷. As far as the period preceeding Jang

Bahadur was concerned, these particulars were not specified. The death penalty was demanded only when goods belonging to the government were stolen by government officials, if the officials were of the castes punishable by death, otherwise branding and confiscation of property were prescribed⁴⁸. More or less the same punishment was meted out to those offenders who engaged in stealing or mutilating images of gods and goddesses and the statues of private individuals kept in temples or in other philanthropic institutions⁴⁹.

From the study of the above mentioned principle cases, it is clear that in the matter of punishment relating to certain grave offenses, the Ain departed from the earlier administration of severe punishments in criminal cases. The Ain was flexible enough to provide for alternative punishments in many cases which were absent before its enactment. In some cases, the Ain introduced more lenient punishments not found in earlier regimes. The practice of punishing through exile from the country was abolished by the Ain. In the period preceding Jang Bahadur's rule, women and men could be expelled from the country for even offenses like illicit sexual intercourse⁵⁰. Trial by ordeal, which was practiced prior to the time of Jang Bahadur, was abolished by the Ain⁵¹. The Ain partially departed from the practice of punishing women (having husbands) for adultery by cutting-off their noses. Further, the practice of cutting-off the genitals of males for certain kinds of offenses was done away with by the Ain.

FOOTNOTES

1/ For the judicial system of the ancient period, see
i. Dhanabajra Vajracharya, "Lichchhavi Kal Ko Naya Vyavastha Ko Ek Jhalak" in Purnima, year 4, No. 4. Kathmandu: Samshodhan Mandal, Vikram Sambat (V.S.) 2024, pp- 345-55 ii. D.R. Regmi, Ancient Nepal, Calcutta: K.L. Mukhopadhyay, 1969 (3rd edition), pp. 250-260.

2/ Daniel Wright (e.d)., History of Nepal. Calcutta: Ranjan Gupta, 1966, p. 123.

3/ Ibid., p. 124

4/ Ibid., p. 123

5/ Itihas Prakash (ed. Yogi Narahari Nath), Kathmandu: Itihas Prakash Sangh, V.S. 2013, No. 2, Vol. 3, pp. 419-25.

6/ B.H. Hodgson; Miscellaneous Essays Relating to Indian Subjects. London: Trubner and Co., 1880, Vol. II Section. XII "Some Account of the system of Law and Police as recognised in the State of Nepal", Answer to question No. XXVII, p. 231.

7/ For a few similar points borrowed by the present Muluki Ain from the Ain of 1854, see Muluki Ain (Ratna Pustak Bhandar, V.S. 2029, 4th edition, sections (secs.) 24-25, p. 186, sec., 30, p. 16; sec., 5, p. 4; Sec., 11, P. 7 and sec., 4. P. 4.

8/ i. Satiskumar., Rana Polity in Nepal, 1846-1901, Bombay: Asia Publishing House, 1967, p. 114.

ii. Ramakant., Indo-Nepalese Relations, 1817-77, Delhi: S. Chand and Co., 1968, p. 253 and p. 263.

iii. Asad Husain., British India's Relations with the Kingdom of Nepal, 1857-1947. London: George Allen and Unwin Ltd., 1970, p. 53.

9/ i. Rewatiraman Khanal., "Nepal Ko Nyaya Prashasan Ek Sinha valokan" in Nepal Kanun Patrika, Vol. 10, No.11, V.S. 2025, pp. 1-2.

ii. M.S. Jain., The Emergence of a New Aristocracy in Nepal; Agra: Shri Ram Mehra and Co., 1972, pp- 161-184.

10/ B.H. Hodgson., "Judicial System and Police in Nepal". Foreign Political Consultation (P.C.), 4 November, 1831, No. 22, National Archives of India (N.A.I.), New Delhi Punishment for various Crimes", pp. 26-27.

11/ Shri 5 Surendra Vikram Shah Dev Ko Shasan Kalma Bane Ko Muluki Ain., H.M.G. Ministry of Law and Justice, V.S. 2022, sec., 2, p.292. hereafter quoted as Ain.

12/ i. Leonhard Adam., "Criminal Law and Procedure in Nepal A Century Ago: Notes Left by Brian H. Hodgson" in The Far Eastern Quarterly, Vol. I, No. 2, February, 1950, p. 164.

ii. Shamsheer Bahadur Thapa., Ranabir Singh Thapa, Kathmandu: Jagadamba Prakashan, V.S. 2023, p. 132.

13/ Ain., op. cit., pp. 527-554.

Punishment by branding means, according to the Ain (Sec., 2, p. 212), to Scratch the 18th consonant of the Devnagari alphabet (Da) on the left cheek of the criminal.

14/ Adam Leonhard., op. cit., pp. 165-66.

15/ Ain., op. cit., Sec., 2, p. 527, Sec., 10 p. 529; Sec., 3, P. 532; Sec., 12, p. 534, Sec., 14, p. 541., Sec., 3, p. 543 and Sec., 13, pp. 545-46.

16/ Ibid., Sec., 12, p. 550.

17/ Ibid., Sec., 3, P. 551., Sec., 8-9, p. 552., See Sections 3 and 9 pp. 553-54 prescribed for the untouchables.

18/ Chittaranjan Nepali., Bhim Sen Thapa Ra Tatkalin Nepal, Kathmandu: Ratna Pustak Bhandar, V.S. 2022, pp. 203-204.

19/ Ain., op. cit., Sec., 2, p. 527.

20/ Ibid., Secs., 19-20, p. 536.

21/ Ibid., Secs., 2-3 and 7, pp. 538-39., Secs., 2-3 p. 543, and Sec., 7, p. 544.

22/ Ibid., Secs., 2-3 and 6, pp. 553-54.

23/ Chittaranjan Nepali., Shri 5 Rana Bahadur Shah. Kathmandu: Mery Rajbhandari, V.S. 2020, pp. 167-68.

24/ Leonhard Adam., op. cit., pp. 164-65 and pp. 167-68.

25/ Ain., op. cit., Sec., 1. p. 655., Sec., 1. p. 657., Sec., 1, p. 659., Sec., 1, p. 663 and Sec., 1, p. 665.

26/ Ibid., Sec., 1, pp. 667-68.

27/ Ibid., Sec., 1, p. 669.

28/ Leonhard Adam., op. cit., p. 165.

29/ Ain., op. cit., Sec., 11, p. 598 and Sec., 2-3, pp. 670-71.

30/ Leonhard Adam., op. cit., p. 166.

31/ Ibid.

32/ Ain., op. cit., Secs, 2-3 pp. 670-71.

33/ Ibid.

34/ S.B. Thapa., op. cit., pp. 128-132.

35/ Leonhard Adam., op.cit., pp. 165-67.

36/ Ain ., op. cit., Sec., 8, p. 134.

37/ i. P.C. 4 November, 1831, No. 22 (N.A.I.) "Punishment for various crimes", pp. 26-27.

ii. S.B. Thapa., op. cit., p. 121 and p. 128.

38/ P.C. 4 November, 1831, No. 22 (N.A.I) "Punishment for various crimes," pp. 26-26.

39/ Ain., op. cit., Sec., I, p. 640.

40/ Ibid., Secs., 2-3 (p. 640).

41/ Leonhard Adam., op.cit., p. 167.

42/ Ain., op. cit., Sec., 15, p. 152.

43/ Leonhard Adam., op. cit., p. 164.

44/ Ain., op. cit., Sec., 27, p. 308.

45/ B.H. Hodgson., Miscellaneous Essays., op. cit., Answer to Question No. XCV., p. 235.

46/ Ain., op. cit., Sec., 14, p. 305.

47/ Ibid., Sec., 8. p. 303.

48/ Ibid., Sec., 25, p. 308.

49/ Ibid., Sec., 53, p. 314. Dacoity committed by more than five persons by breaking into a house coupled with rape was also punished by death. (Ibid., Sec., 20, p. 306).

50/ i. Leonhard Adam., op. cit., p. 168.

ii. S.B. Thapa., op. cit., p. 128.

51/ Ain., op. cit., Secs., 1-2, p. 234 Trial by ordeal which was practiced before Jang Bahadur especially in civil matters was called Niya or Nyaya in Nepali. For instance, if a person went to the court of law and complained that another person owed him a certain amount of money to which payment had been refused knowing the fact that the person or persons to bear witness had died, the Ditha or the Bichari (judge and his assistant) would urge both the plaintiff and the defendant to reach an agreement. If they failed to reach an agreement, the case would be decided by ordeal which is best explained by B.H. Hodgson in the following:

"The ordeal is called nyaya, and the form of it is as follows: The names of the respective parties are inscribed on two pieces of paper, which are rolled up into balls, and then have puja offered them. From each party a fine or fee of one rupee is taken. The balls are then affixed to staffs of reed, and two more are taken from each party. The reeds are then entrusted to two of the havildars (beadles) of the court to have to the Queen's Tank; and with the havildars, an examining officer of the court, a Brahman, and the parties proceed thither, as also two men of the Chamakhalak (chamar) Caste.

"On arriving at the Tank the examining officer again exhorts the parties to avoid the ordeal by adopting some other mode of settling the business, the merits of which are only known to themselves. If they continue to insist on the ordeal, the two havildars, each holding one of the reeds, go, one to the east and the other to the west side of the tank, entering the water about kneedeep. The Brahman, the parties, and the Chamakhalaks, all at this moment enter the water a little away; and the Brahman performs worship to Varun in the name of the parties, and repeats a secret text, the meaning of which is that mankind knows not what possess in the minds of each other, but that all inward thoughts and past acts are known to the gods Surya, Chandra, Varuna and Yama and that they will do justice between the parties in this cause.

"When the puja is over, the Brahman gives the Tilak to the two Chamakhalaks, and says to them, "Let the champion of truth win, and let the false one's champion lose." this being said, the Brahman of the parties come out of the water and the Chamakhalaks separate, one going to each place where the reed is erected. They then enter the deep water, and at a signal given, both emerge themselves in the water at the same instant. Whichever of them first rises from the water, the reed nearest to him is instantly destroyed, together with the scroll attached to it. The other reed is carried to the court, where the ball of paper is opened, and the name read. If the scroll bears the plaintiff's name, he wins the cause; if it be that of the defendant, the later is victorious".

(See Miscellaneous Essays., op. cit., pp. 220-21.

