AN INTRODUCTION TO

INDIAN LEGAL HISTORY

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PREFACE TO FOURTH EDITION

It is gratifying that three editions of the book, first published in 1966, were well received in legal and other quarters in India and abroad. I have great pleasure in presenting the fourth edition to the readers.

The third edition had been thoroughly revised. A few developments that took place since its publication have been incorporated and obsolete portions deleted. There is practically no increase in the bulk.

I hope the present edition would prove of value to those who are interested in the study of the subject.

I am grateful to the publishers for their co-operation in bringing out the present edition.

Department of Laws,
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J. K. MITTAL
PREFACE TO FIRST EDITION

Seven years back I had produced a short book on Indian Legal History. Ever since I have strongly felt the need for a comprehensive treatment of the subject. The present work is a result of the teaching and research done by me in the past seven years. While the earlier work was meant to help the LL. B. students in their elementary studies of the subject, I hope that the current work will be of immense use to advanced students of law and the practising lawyers as well.

The importance of the subject has increasingly been realized in the past four years. The Bar Council of India has prescribed it as a compulsory subject in the curriculum of the proposed three years’ degree course in law. And, therefore there need not be any excuses for producing a new work on the subject.

I have tried to give an objective and accurate account of the legal developments in the country. Care has been taken to incorporate all available material on the subject including the relevant case law. If this work succeeds in promoting a clear understanding of this comparatively new but important subject, I would consider my responsibility as an academic lawyer to have been somewhat discharged.

I am sincerely grateful to my publishers for their co-operation in bringing out this work.

Allahabad University

J. K. Mittal
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CHAPTER I.

EAST INDIA COMPANY

and

ENGLISH SETTLEMENT AT SURAT

East India Company

Charter of 1600

Foundation.—The Indian laws and courts are closely modelled on the English pattern.1 The history of their introduction and development begins with the foundation of the East India Company under the Crown's Charter of 1600. It conferred corporate character and gave it an exclusive privilege of trade; company might, however, grant trading licence; traders were liable to be punished by forfeiture of their goods and ships and imprisonment.2

Management.—The management of the Company was vested in a Governor and twenty-four committees, who were individuals and predecessors of the later directors, elected annually by the Company. Its affairs were managed on democratic principles.3

Legislative power.—The Company was empowered to make laws and ordinances for its good government, and that of its officers, and for the better advancement of trade and traffic. In order to secure due observance of these laws and ordinances, it was further empowered to punish their violations by imprisonment of body or by fines or by imposing pains. The laws and punishments were to be reasonable and not contrary to the laws, statutes or customs of England.4

Comments.—The legislative power, conferred on the Company by the Crown's Charter of 1600, was based on the power of making bye-laws, recognised as appropriate and adequate for existing municipal and commercial corporations. It was essentially a power to legislate for, and govern, some territory.5 The idea was to equip the Company with so much of power as was sufficient for the proper conduct of its business at home and abroad.

The restricted character of the legislative power is clearly indicated in the earliest copy of laws made by the Company, printed in 1621. They dealt mainly with the management of its meetings and its officers in England, the

2. A.B. Keith, A Constitutional History of India, at pp. 2-4 (1937).
3. Id., at p. 4.
4. C. Ibert, The Government of India, at pp. 5-6 (1898).
administrative arrangements in the East and the employment of shipping. They asserted the illegality of private trade and ordered factors, the Company’s employees in the East, to seize goods so shipped and to send them back to England. They also required that all presents made by foreign dignitaries to members of the Company would be brought into the general account of the Company.7

In spite of its limited character, however, the legislative power is of great historical importance “as the germ out of which the Anglo-Indian codes were ultimately developed.”8

Royal Grants of 1615 and 1624

The legislative and punitive powers, as discussed above, were insufficient to meet certain situations. Accordingly more powers had to be granted.

Royal Commissions to Captains.—At the instance of the Company, the Crown issued a commission to the ‘General’ in command of the vessel for each voyage empowering him to inflict punishment for capital offences, such as murder or mutiny, and to execute martial law.9 This was to maintain discipline on long voyages and punish grave offences.

Grant of 1615.—The above position was maintained till 1615 when the Crown made a Royal Grant authorizing the Company itself to issue such Commissions to its captains of the ships with the proviso that in capital cases, a verdict must be given by a jury.10 This Grant was applicable to voyages only.

Grant of 1624.—By 1624, the problem of indiscipline and disorderliness of the Company’s servants appeared on land also, because by then the English had established several factories in India. Accordingly, the Crown, by another Royal Grant made in 1624, empowered the Company to issue similar commissions to its presidents and other chief officers authorizing them to punish offences committed by the servants of the Company on land. As before, trial by jury was provided in capital cases.11

Both the Grants placed the Company “in the position to provide more or less effectively for the due government of its servants, both on the high seas and in India.”12

Surat

First Settlement

Equipped with these small powers and privileges, the Company started its trading career in India. Surat, then a famous sea-port on her western coast, emerged as the first English settlement in 1612 under the imperial permission. Gradually other settlements followed. Surat factory with a President and Council, appointed by the Company in 1618, became its principal trading station having authority over other factories.13 Surat disappeared from the scene of

7. Ibid.
10. For jury trial, see Chapter V, in infra.
11. Ibid., op. cit., at p. 15.
12. Ibid., op. cit., p. 7.
the British trade in 1687 when the headquarters of the President and Council were shifted to Bombay.

Embassy of Sir Thomas Roe

The English factories in various settlements were within the jurisdiction of the Moghul Emperor, yet the English were allowed to retain their own laws for their own government in these factories and administer justice to themselves accordingly. They were given these privileges under a treaty settlement of 1618 with the Moghul Emperor, which was a result of the visit of Sir Thomas Roe to the Moghul Court, who was deputed by the Crown and the Company as Ambassador in India. The reason of the retention of English law is explained in the following passage:

"The laws and usages of Eastern countries where Christianity does not prevail are so at variance with all the principles, feelings, and habits of European Christians that they have usually been allowed by the indulgence or weakness of the Potentates of those countries to retain the use of their own laws, and their Factories have for many purposes been treated as part of the territory of the Sovereign from whose dominions they come."

Justice at Surat

The Company was already clothed by the Crown with the power to administer justice and constitute judicial authorities in the areas covered by the factories in India. The Indian Emperor had also given liberty to the English to govern themselves according to their own laws. Consequently, the President and members of his Council at Surat, who were the Company's executive officers in India, were constituted a judicial authority. They administered justice to Englishmen both in civil and criminal cases. Cases of capital offences were to be submitted to the verdict of a jury. Being laymen, they decided cases according to their own ideas of justice and fairplay, though English law was supposed to be applied. At this stage the executive was the exclusive judicial authority.

It is noteworthy that chief officers of the Company were essentially adventurers and not gentlemen, traders and not lawyers, and they, therefore, acted in a loose manner rather according to the laws of power and impulses of passion than to the recognised principles of justice and reason. Naturally administration of justice was not of a high order.

The native judiciary suffered from many drawbacks; it was unpopular and corrupt. The English often exploited this situation to their own advantage. Instead of being tried by the local tribunals in cases where natives also formed parties, they took law into their own hands to extract justice from the natives by themselves.

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15. See Setafald, op. cit., at p. 4.
16. See Royal Grant of 1624.
19. Under the treaty settlement with the Moghul, cases of native versus the English or vice versa were to be decided by the local authorities.
CHAPTER II

ENGLISH SETTLEMENT AT MADRAS

Settlement

Madrass is the first and one of the three Presidency towns. Its settlement arose out of a grant made by the local Raja in 1639 who empowered the Company to erect a fortified factory on a strip of land, to mint money and to govern the village of Madraspatnam, on condition that half the customs and revenues of the port should be paid to the Raja. The new trading station was named Fort St. George and an Agent and Council took over its charge in 1641 under the control of Surat Presidency. It acquired the status of Presidency in 1665. The Fort area, inhabited by the English and Europeans, was later designated as white town and the village area of Madraspatnam, inhabited by the natives, as black town. The whole establishment ultimately developed into the modern city of Madras.

Madrass constituted the first territorial acquisition by the English but, for a long time, it was not regarded as an absolute gift conferring sovereign rights on the Company but a fief held under the suzerainty of the native rulers. It appears that in 1752 the English tenure of Madras and the limited area around it became absolute, though the Company did not expressly assert its sovereignty.

The administration of justice in Madras may be conveniently studied in three stages.

Administration of Justice: First Stage

Black town

When first granted to the Company, Madraspatnam had its own system of village administration which was not interfered with by the English for some time to come. There was a village headman known as Adigar, that is, Adhikari, who was responsible for the maintenance of law and order. He administered justice to the natives at the Choultry Court according to long-established usages. It was a Court of petty jurisdiction deciding small matters of civil nature and breaches of peace. The Choultry also served as the Custom House and the Registration Office for the record of sales of immovable property and for the licensing of slaves. There was a jail attached to the Choultry. The Peddanaigne, that is, the senior naik, also called the Watchman, assisted by Constables, arrested culprits and confined them in the jail pending their appearance before the Adigar.

In 1654, for the first time, two English servants of the Company replaced the Adigar and became judges at the Choultry to administer justice during alternate weeks with the help of the Adigar. But in 1663, the English judges

2. Id., at pp. 85-86
3. Id., at pp. 1, 27.
5. Means a hall or shed (Charadi).
ENGLISH SETTLEMENT AT MADRAS

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gave way to the natives, though again and finally in 1665, an English servant of the Company was appointed in their place to administer equal justice to all persons in Madraspatnam without partiality, oppression or arbitrary will. In 1668 two English servants of the Company took over the administration of justice at the Choultry sitting twice a week. Appeals could be taken to the Agent-in-Council.

It is not clear since when but certainly before 1678, the Choultry was being used for taking charge of the concerns of deceased persons and for registering wills and inventories. The judges at Choultry also acted as coroners.

Cases of grave offences committed by the natives were not tried at the Choultry. The Agent-in-Council had no express authority from the Raja to decide them but they got the criminals apprehended, tried them summarily in their own way and then sought directions from the Raja. In 1641 a native woman was murdered by some person of the same caste. Some sort of trial took place and the finding of his being guilty of murder was immediately communicated to the Raja. He expressly commanded that in such cases justice should be done according to English law. Consequently the criminal was hanged. It appears from this case that native criminals were punished by the Agent-in-Council according to English law on the express command of the Raja.

There is some documentary evidence to show that the English gave awards in local caste disputes.

White town

The Agent-in-Council administered civil and criminal justice to Englishmen. They could not, however, decide the cases of capital offences. At times they took counsel from England to dispose of the cases.

Comments

The mode in which justice was administered at this stage is nowhere described. It appears that it was done in a rough and ready way and summarily without following any definite and proper procedure. The judicial powers of the Agent-in-Council were vague. Irregularity and inefficiency prevailed in the administration of justice. The English executive officers, being laymen, decided cases in their own way.

Charter of 1661

In 1661, the Crown granted a Charter to the Company, which gave it 'power and command' over all its ports and factories and empowered it to send

10. Love, op. cit., at pp. 41-44. See also pp. 68 and 272. The is a peculiar case of 1644. An English serjeant inadvertently caused the death of a native. The matter came up before the principal inhabitants of the town who declared it, under native law, to be an accidental death, there being no intention to cause it. Id., at p. 275. It is difficult to infer anything from this case except that the matter was referred to the inhabitants to avoid any conflict because an Englishman had a native.
11. Id., at pp. 116-120. See also pp. 121-125.
12.
13.

p. 45.
out ships of war, men and ammunition, to build fortifications, to provide men for their defence, to govern the forces by martial law and to make peace or war with any non-Christian power.  

The Charter further authorised the Company to appoint governors and other officers for its government in India. It might govern its employees in a legal and reasonable manner and punish them for misdemeanour and fine them for breach of orders. The Governor-in-Council of each place were empowered to judge all persons belonging to them and the Company or who would live under them in all causes, civil or criminal, according to the laws of England and execute judgment accordingly.

Where there was no Governor-in-Council, the Chief Factor-in-Council was empowered to send offenders for punishment either to a place where there was a Governor-in-Council or to England.

The general provision, emanating directly from the Crown and conferring judicial power on each Governor-in-Council, is said to have put judicial power in the sole hands of the executive and restricted the law to be administered to that of England. It imposed no restriction on the nature of punishment; thus death sentence could be awarded. The provision expressly authorized the application of English law in the principal and subordinate factories but only to the English settlers of the Company, the English Crown having no jurisdiction over natives at this time except in the Island of Bombay which was transferred to the Company under the Charter of 1663.

**Presidency of Madras**

The grant of the Charter of 1661 was followed by raising the status of the Agency of Madras to that of Presidency in 1666. The creation of a regular governorship at Fort St. George owes its origin to a murder case. In 1665 an English lady Mrs. Ascenio Dawes was charged with the offence of murder of her slave girl at Madras. Being uncertain of their powers, the Agent-in-Council asked for instruction from England. Thereupon the Company resolved to declare the Agent at Fort St. George to be the Governor, also called President, thus enabling him to exercise judicial powers to try this case and other similar cases under the Charter of 1661. Consequently, sometime during late 1668 or early 1669, the first jury trial took place. An unexpected verdict of not guilty was given by the Jury. As a result, the lady was acquitted. Because of this unexpected verdict, the Court, consisting of laymen, was at a loss in several matters for want of instructions from the Company and also due to the absence of a legal expert who could have guided it in its further address to Jury after they had found the verdict. The Court proceeded, however, according to

15. Ibid.
17. See Advocate-General of Madras to G. B. Rankin, 10 August 1837, 57, that view, Outlines of India of 1661, the Indian residents under judicial authority to be sound at least in theory. See Sunnunam's case.
18. Sometime during 1651-52, Madras was made a Presidency but again reduced to Agency in 1665. Ibid., op cit., at p. 18; Love, op. cit., note 1, at pp. 113, 161, and Fawcett, op. cit., at pp. xvii-xviii.
the best of its judgment, but asked the Company for the direction and assistance of a person skilled in laws and formalities for future cases.  

**Administration of Justice: Second Stage**

**Judicial Plan of 1678**

In 1678 the whole judicial system was reorganized and put on a sound footing.

**Choultry Court**

The number of English Judges was increased from two to three. At least two of them were to administer justice twice a week. They might be assisted by two or more officers of the Company. The Court had to decide petty criminal cases and civil cases up to the valuation of 50 pagodas, and cases of higher value by consent of the parties. Aggrieved parties were allowed to prefer appeal to the Court of Judicature, consisting of the Governor and members of his Council where a jury was employed to give verdicts. All sentences were to be duly registered. Alienations or sales of slaves, houses and other property were to be recorded. Certificates for such sales were to be signed at least by two Judges. Before registration of the sale of property, the seller or conveyer had to prove his title to it under the Company's seal.

**Court of Judicature**

There were complaints of long delays in murder trials. Administration of justice was not efficient and regular. There was an urgent need of a regular superior Court. Therefore, the Governor-in-Council declared themselves to be a Court of Judicature for the trial of civil and criminal cases, except petty ones, with the help of a jury of twelve men according to English law twice a week. The judges of the Choultry and the Constable or officers under them were to execute all orders, writs and summons issued by the Court of Judicature for returning of juries, executions after judgments, apprehension of criminals and the like. A Marshall to take charge of the prisoners, a Clerk of the Court, to act as the Clerk of the Peace also, and one other officer of the Court were appointed. Public notices were given as to the time and place of murder trials. Jurors and witnesses were sworn in the prescribed form. Punishment of forfeiture of "goods and chattels" to the Crown could be awarded. An Englishman, guilty of manslaughter in self-defence was punished in this way.

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20. Love, op. cit., note, at pp. 274-275. The following: The indictment (that is, the

21. Pagoda was a gold coin worth Rs. 3.

In certain cases benefit of clergy could be allowed. An Englishman, convicted of manslaughter, could demand this benefit. Consequently, the sentence was passed to burn his hand. Persons found guilty of murder could prefer appeals to England.

**Charter of 1683**

To deal with unlicensed traders and interlopers and to punish the crime of piracy, the Crown granted to the Company a Charter in 1683 empowering it to establish Courts of Admiralty in India. Each Court was to consist of one person learned in the civil law and two assistants, all to be appointed by the Company. It was to decide cases of forfeiture of ships or goods trading contrary to the terms of the Charter, all mercantile and maritime cases concerning person coming to, or being in, the places reserved for the Company, and cases of trespass in the law and committed on the high seas or reserve place being or coming within the Charter limits, according to the rules of equity and good conscience, and laws and customs of merchants. The Court might settle its own procedure and issue its directions for determination of cases.

The Company was also empowered to make peace and war with non-Christian nations, to raise armed forces and to execute martial law for defence purposes against foreign invasion or domestic rebellion.

**Charter of 1686.**

The Charter of 1686 granted by the Crown empowered the Company to raise naval forces and appoint naval officers, to execute martial law for defence of ships and to coin any species of money in their forts, usually coined by native rulers. The provisions of the Charter of 1683 regarding the Admiralty Court were modified to some extent.

**Administration of Justice: Third Stage.**

**Court of Admiralty**

Under the Charters of 1683 and 1686, a Court of Admiralty was established in Madras in 1686 superseding the Court of Judicature which had temporarily ceased to exist in 1684. Three senior civil servants of the Company were the personnel of the Admiralty Court—one to act as its Judge and the two as his assistants. In 1687 the Court was provided with the services of an Attorney-General and a Registrar. The Court enjoyed a more extensive jurisdiction than what was contemplated by the Charters. It was not confined to deciding admiralty cases proper but it also acted as a General Court of Judicature.

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23. In England benefit of clergy was an immunity of the persons of clergymen in criminal cases tried before secular judges. Subsequently, other persons connected with Church and ultimately laymen of education also were given this privilege. A guilty layman who claimed the benefit, on passing the test of reading Latin, was branded on the hand with a hot iron to prevent him from claiming the immunity second time. Love, op. cit., note 1, at p. 490. See also f. n. 1, ibid. The benefit of clergy was finally abolished in England in 1827.
25. Because Roman law was then the basis of maritime and mercantile law.
27. Ilbert, op. cit., at pp. 21-22.
28. Id., at p. 21.
29. Id., at pp. 22-23.
and the Supreme Court of the settlement. This was certainly the position from July 1687 when Sir John Biggs, a person learned in the civil law, was sworn in as Judge-Advocate of the Court on an annual salary. Sir John presided at the Quarter Sessions of the city and sat an occasional Court-Martial as at its President trying pirates, though the Governor usually presided at Court-Martial. Sir John became Recorder of the Mayor’s Court constituted in 1688 to assist it in its judicial work. The Admiralty Court heard appeal from the Mayor’s Court.

Sir John Biggs expired in 1689. Thereafter the Admiralty Court ceased to operate. In 1690 the Governor-in-Council temporarily established a Court of Judicature consisting of the Governor as Judge-Advocate and two members of the Council as Judges. Two merchants were associated with them. An Armenian merchant was to enquire into cases of Armenians and other foreigners, being well-versed in their languages, laws and customs. Likewise a Hindu merchant was to enquire into the cases of natives, being expert in native languages, laws and customs. An Attorney-General was also attached to the Court. It subsisted till 1692 when a new Judge-Advocate, John Dolben from England, took his seat at the Admiralty, being assisted by two merchants. The Court, though not with Dolben, then continued till 1704, when on the incumbent Judge-Advocate’s return to England, it was decided that this office should remain vacant. It appears that admiralty jurisdiction thereafter was exercised by several Governors-in-Council under Royal Commissions issued in pursuance of the Piracy Act, 1698, and similar Acts. Interlopers were sometimes tried at the Admiralty. The Governor and Council constituted themselves as the Court of Appeal from both the Admiralty and the Mayor’s Courts.

Corporation under Company’s Charter of 1687

In 1688 a Municipal Corporation, a Western institution, was first set up in India in Madras under a Charter of 1687 issued by the Company with the approbation of the King-in-Council. The idea was to associate the natives with Englishmen both exercising certain powers and privileges as Corporation, for municipal purposes of taxation in the town, to provide for “the speedier determination of small controversies of little moment, frequently happening among the unarmed inhabitants”, of the town, and instead of “the constant use of the law martial in trivial concerns”, to govern the inhabitants in a better way and increase the trade. The Corporation consisted of a Mayor, twelve Aldermen and sixty or more Burgess. The Mayor and three senior Aldermen were always to be merchants. Corporation offices, the Mayor, and several of the Aldermen during their lives or residence in Madras. A new Mayor was to be

30. In a trial by a Jury, four persons charged with the offences of felonious robbery were sentenced to death. But only the principal and bold offender was hanged till he was dead. Then his head was severed from his body and fixed upon a conspicuous place so as to deter others from committing notorious crimes. Love, op. cit. note 1, p. 493.

31. Martial law was declared in Madras on November 17, 1687, and the Governor presiding over the Court-Martial tried pirates and sentenced them to be burnt in the forefront with letter “P” and banished. Id., at p. 494.


33. Love, op. cit., note 1, at pp. 494-496; Love, Fawcett, op. cit., at pp. 206-207; J. T. Vol. I, at p. 320 (1861); P. Anderson, The p. 257 (1856). It appears that appeals in civil cases taken to the Court of Appeal from the Mayor’s Court had been heard at the Admiralty. Its decisions were final though th
elected annually by the Aldermen and the Burgesses from amongst the Aldermen. Vacancies among the Aldermen were to be filled by election from amongst the Burgesses, the Mayor, remaining Aldermen and Burgesses voting. The Burgesses were to be elected by the Mayor and Aldermen. The first Mayor, Aldermen and twenty-nine Burgesses were nominated by the Company.  

Mayor's Court

The Mayor and Aldermen were to be a Court of Record with power to decide all civil and criminal cases in a summary way according to justice and good conscience and the laws of the Company. It granted probates of wills and letters of administration of the property of deceased persons. It was to deal with offences by fine, imprisonment or corporal punishment. A right of appeal to the Court of Admiralty was guaranteed in civil cases where the value of the award exceeded 3 Pagodas and in criminal cases if the offender was sentenced to lose life or limb. After the Court of Admiralty ceased to sit regularly in 1704, appeals lay to the Governor-in-Council. Some uncertainty, however, subsisted as to the power of the Mayor's Court to inflict capital punishment. In 1712 the Governor-in-Council conceded that the Mayor's Court could, under the Charter, sentence a criminal to death, and the Court did so in certain cases of murder, but in 1718, the Governor-in-Council expressed the view that the Mayor's Court could not award capital punishment in cases of Englishmen, though it could do so in those of the native-criminals.  

The Mayor and two Aldermen formed the quorum of the Mayor's Court sitting once a fortnight. An English coventanted servant of the Company, skilful in the laws, was to be nominated by the Mayor and Aldermen as the Recorder of the Court, but the first Recorder was by the Charter, to assist it in its judicial work. An senior Aldermen were to be the Justices of the Peace. The power to reprieve execution and grant pardons was reserved to the Governor-in-Council.  

Jury System

The jury system appears to have been followed in the Admiralty and Mayor's Courts in their criminal proceedings.  

Choultrey Court

The Choultrey Court was continued with a diminished jurisdiction. Two of the Aldermen who were Justices of the Peace, the senior Justice being called the Chief Justice, were to sit twice a week at Choultrey to deal with cases of petty offences and small matters of civil nature up to a valuation of 2 Pagodas. Thus the Choultrey became a Court of petty jurisdiction. 

The civil jurisdiction of the Choultrey Court was taken away by the Court of Requests in 1753, but it continued with its criminal jurisdiction till 1800.  

Miscellaneous

It appears that serjeants and bailiffs were attached to the Admiralty Court. There were attorneys and solicitors also.

34. Love, op. cit., note 1, at pp. 497-498.
37. Love, op. cit., note 11, at p. 292;
There was a variety of punishments awarded in those days, for example, whipping, banishment, loss of ears, burning on the shoulders and then banishment, shooting to death, hanging, severing of head, burning on the forehead, nailing of the ears in the pillory any then cutting them off, standing before the pillory with label tied round the neck containing an account of the crimes, and etc. Very often the courts acted against law and reason. Their decisions were very irregular. They were not free from corruption. A few Pagodas could turn the scales of justice to whichever side the Governor pleased without having any respect to equity and good reputation. The power to punish pirates was often misused. Criminals and debtors were confined in jails for indefinite periods without trial.39

The judicial system continued till 1727 when the Charter of 1726 came into force.40


40. See Chapter V.
CHAPTER III
ENGLISH SETTLEMENT AT BOMBAY

Island of Bombay before Company’s Settlement

The Island of Bombay was ceded in full sovereignty to the Crown in 1661 by the Portuguese King under a marriage treaty of that year. By then the Portuguese laws and customs were firmly established. The English took over administration of the Island in 1663, but they did not generally interfere with the existing civil and judicial arrangements, though not satisfactory, till 1670. The Governor continued to govern the Portuguese and other non-English within the framework of the judicial machinery. Justice of the Peace was appointed at Thana, decisions being given by the English Chief. Martial law was also put into execution to punish Englishmen and military offenders as well as natives, accused of capital crimes, in Courts-Martial. Sale of land needed consent of the Governor and registration was done by the notary public.

Charter of 1668

In 1668 the Crown transferred the Island to the Company at a quit-rent of £10 per annum. The Charter, which effected the transfer, empowered the Company to make laws and ordinances for the good government of the Island and its inhabitants. This legislative power was limited not only by requiring these laws to be consonant to reason and not contrary to the English laws but also by prescribing that they should be as near as might be agreeable to English laws. The Company could exercise judicial authority through its Governors and other officers. The Charter contemplated the establishment of Court of Judicature on English lines to judge and determine all actions, suits and causes whatsoever. Their proceedings were to be like those established and used in England. Punishments including death sentences could be awarded according to laws and ordinances of the Company. They were to be consonant to reason and not contrary, but as might be agreeable, to the laws of England.

The Company was given authority of government and command in the Island with power to repel any unwarranted force. It was also empowered to take into its service willing officers and soldiers of the Crown, thus forming ‘the nucleus of the Company’s first European regiment’. The principal Government of the Island was given military powers to be exercised in cases of mutiny or sedition. Later on the Company was authorised to coin money at Bombay.

Comments

In respect of Bombay the “transition of the Company from a trading association to a territorial sovereign invested with powers of civil and military government is very apparent in these provisions.”

1. In 1634 the Port and Island of Bombay were transferred to the Portuguese by the Sultan of Gujarat with full sovereign rights.
2. C. Fawcett, The First Century of British Justice in India, at pp. 1, 3-4, 6, 11-12 (1934).
3. Id., at pp. 6, 13.
Company's Settlement

To start with, the Island was put under the control of the Surat Council. In 1669, a Deputy-Governor and Council were appointed in Bombay under the same authority. This position continued till 1687 when the headquarters of the Governor-in-Council were shifted from Surat to Bombay.

Laws of the Company

In 1669, the Governor General Angier received the Company's laws, framed under the Charter of 1668, for the civil government and equal distribution of justice in the Island, and brought them to Bombay in 1670. The laws granted freedom of religious belief to all persons. Abusive or contemptuous language in respect of any religion was prohibited. Justice was to be administered impartially without favour. No person was to be divested of his property or other rights or suffer corporal punishment for any cause or crime without trial by jury of twelve men except as otherwise provided. No person was to suffer civil or penal imprisonment without a specific warrant for his commitment. The person might be released without bail if no prosecution took place within two court-days after commitment was certified to the Court.

The laws established a method for "due proceedings" by providing for (i) the establishment of a Court of Judicature to decide all suits and criminal matters under a judge to be appointed by the Governor and Council; (ii) trials by a jury of twelve Englishmen, though six members of jury being non-English in case of a party to the dispute being non-English; (iii) the appointment of Justices of the Peace and Constables for the maintenance of order, apprehension of crimes; (iv) sittings of the Court, the recording of evidence and court-fee; and (v) a right of appeal to the Governor-in-Council, to be constituted as the Supreme Court.

The laws also touched the matter of registration of all sales, mortgages or other engagements relating to houses or land or other rights.

The laws provided penalties for drunkenness, fornication, adultery, theft, robbery, house breaking, perjury, forgery, cheating, criminal assault and wounding, murder and opposing an officer in the execution of his duty. Except for drunkenness, conviction by a jury was necessary before punishment could be given. Death was the penalty for murder, but in case of other felonies, servitude of English law, which treated them as capital offences, was not adhered to. Thus in the case of robbery, the extreme sentence given to an offender was limited to putting him in the pillory, whipping, confiscation of his estate and banishment, in addition to the punishment for theft, namely paying back three times the value of the stolen property or labour for its owner till the loss was compensated as estimated by a jury. The same idea of restitution, to the extent decided by the jury, underlay the punishment prescribed in the cases of perjury, forgery, or cheating, though in the latter two cases the offender was also liable to fine and pillory. In the case of unlawful assault or wounding the penalty was imposed in terms of compensation and fine. The offender could be whipped or imprisoned if he assaulted an officer on duty.

An equal leniency could be observed in the laws relating to military except those which dealt with mutiny, sedition, insurrection or rebellion, punishable with death. Because of their inadequacy, the Governor-in-Council permitted the use of "Articles of War" whenever necessary. A noteworthy feature of military laws was that they permitted the trial of offences by a jury or by the Governor-in-Council instead of Court-Martial.

Comments.

"The spirit of even-handed and temperate justice that animated the laws certainly brought a credit to the Company; but the laws suffered from many drawbacks on account of their being new to the people and drafted without taking local circumstances into consideration."

Coming to the administration of justice at Bombay, it may be studied in four stages.

Administration of Justice: First Stage.

Judicial Plan of 1670.

The Aungier's visit to Bombay in 1670 resulted in orders of far-reaching importance; and, therefore, he is said to be the true founder of Bombay. He made judicial arrangements as far as possible according to the laws of the Company.

Courts of Customs Officer.—The Island of Bombay was divided into two parts, each having a Court consisting of four honorary judges—the presiding Judge being the English Customs Officer and the rest being Portuguese Indians who were associated to sweeten the English administration to the natives. The Courts administered justice once a week in minor disputes up to the value of 200 Xeraphins and cases of petty offences, for example, cases of thefts not exceeding the value of 5 Xeraphins. These Courts were inclined to follow Portuguese laws than the Company's, especially when the English Customs Officer was absent.

Court of Deputy Governor-in-Council.—The Deputy Governor-in-Council became a superior Court sitting once a week. It was to hear appeals from the lower Courts and try cases beyond the jurisdiction of the lower Courts or which related to the 'public Government and civil polity of the Island and the Company's interest and estate thereon.' The Court of the Deputy-Governor-in-Council was also the Court as contemplated by the Charter of 1661. In all cases jury trial was provided according to the laws. Cases where the English and Portuguese formed parties were to be tried by a jury of half English and half Portuguese. A record of the Court's proceedings was to be properly maintained. Appeals could be taken to the Governor-in-Council at Surat in cases of absolute necessity.

Punishments.—There is little information about the administration of criminal justice during 1670-72. There is, however, evidence that trial by jury

7. Id., at p. 17.
8. Xeraphin was a Portuguese coin worth about 75 paise.
9. Fawcett, op. cit., at pp. 33-34, 36 and 44.
10. Id., at pp. 33-35.
was resorted to in the cases of crimes like theft, murder and mutiny. The punishment of the wench\(^{11}\) resembling one used by Muslims to humiliate an offender was given in certain cases. This shows that the Bombay Council did not consider itself bound by the penalties as prescribed by the Company’s laws or those of England. Generally it gave punishments prevalent in the country. But there is a case of the trial of a wizard by jury of twelve who found him guilty both of witchcraft and murder. Instead of being hanged, he was burnt. The sentence of burning was authorized by a Statute of 1603, which remained in force till 1735. In fact the mode of executing the sentence of death was left by the Company’s laws to the discretion of the Deputy Governor-in-Council.\(^ {12}\)

Comments.—During the period 1670-72, there was want of persons killed in laws and, therefore, their services could not be secured. But in view of conditions, then prevailing, the arrangements, as discussed above, were the best. The superior Court disposed of the cases with commonsense and no little acumen, though it suffered from the defect of being identified with the executive Government. The difficulty remained about the continuance of Portuguese laws, language and customs in the administration of justice; but this was resolved to some extent by the introduction of the Company’s laws and the presence of the English Customs Officers in the lower Courts.\(^ {13}\)

**Administration of Justice : Second Stage**

**Introduction of English Laws : Judicial Plan of 1672**

In 1672 was turned a glorious page in the history of laws and courts in India. A Governor, named Upton, was appointed to the Island of Bombay from Is Court of Judicature its Judge. Justices of to give free justice was created.

On the inauguration of the Court of Judicature, as required by the Company’s laws, Governor Aungier delivered an excellent speech. He said that the laws in themselves were never so wise and pious but a dead letter, having no force, unless duly and impartially executed. He favoured an impartial administration of justice to all without fear, favour or respect of persons. Aungier exhorted the Judge who would sit on the seat of justice and judgment to look upon the Christians, Hindus and Muslims or religion, all of them being the English were. They all had equal title and right to justice. All and even the meanest person on the Island, and in particular the poor, the orphan, the widow and the stranger, must be done justice in all matters of controversy, common right and disputes about private rights. When law, reason and equity so required, justice must be done even against the Company and its officers. These were the ideals set before the Court.\(^ {14}\)

Commissions were drawn up for the Judge and Justices of the Peace. Oaths as to the due execution of their offices were administered to them and the

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11. In the case of such a punishment, the head of the offender was to be shaven and then he was to be taken on the back of an ass through the town.
12. Fawcett, op. cit., at pp. 42-44.
13. Id., at pp. 34, 35 and 39.
14. Id., at pp. 54-55.
petty custodians of law. The Bombay Government was instructed to give due
countenance and respect to the Judge in execution of his duties and officers
under him. Aungier thus laid truly and well the foundations of British Justice
in India. 15

Court of Judicature

Civil Sldo.—The Court of Judicature sat once a week. Its Judge, later
on styled as the Chief of Justices, exercised both civil, probate and administra-
tion, and criminal jurisdiction. He, as the Registrar, attended to the registra-
tion work also. In his judicial work, the Judge was assisted by the Justices of
the Peace as assessors who became the Court’s full members by the end of its
present existence. 16

Generally, civil justice was administered cheaply and speedily. Only
moderate court-fees were imposed. A person not worth 69 Xeraphins could
bring a suit in forma pauperis on being so certified by two Justices. 17

The form and method were settled for the Court. The procedure followed
in civil cases was that in force in England though with less technicality. The
litigation was of a simple character, mostly upon written contracts. There was
prescribed the form of summons to a defendant in an action giving him notice
of the date fixed for hearing the case and warning him that, in case of his non-
appearance, the Court would decide on evidence of the plaintiff. In that case,
plaintiff had to state his claim and then trial had to take place. Nothing is
known about the written statement. Pleas could be taken and issues joined.
Jury trial was provided. Subpoena 18 could be issued to a witness for entering
judgment and taking out execution. Other ordinary modes of obtaining
execution were imprisonment of the judgment-debtor and a court-sale of his
visible estate. The duration of imprisonment for debt was unlimited. The
position continued till the extension of the Insolvent Debtors Act, 1812, to the
Presidency-towns. The writs for giving possession of lands “condemned in Court
or other execution” and the general writs for executing judgment known as
fines facias 19 were often issued. Thus the English practice appears to have been
adopted in execution work. 20

A person had to be released if proceedings were not started during the
next two court-days after his commitment to prison. In 1677, the inhabitants
of Bombay were exempted from the liability of being sued on bonds by foreig-
ners except with the consent of the Deputy Governor-in-Council. No arrest could
be made for private quarrels or debts unless it was feared that the person
would leave the Island or if he did not appear before the Court after due ser-
vice of the summons. 21

Probate, Administration and Registration Sldo.—The Court granted
probates and letters of administration. Wills were to be registered, and
inventories and accounts filed, by the executors and administrators of the estate

15. Id., at p. 55.
16. Id., at p. 58.
17. Id., at pp. 62-63.
18. In England the writ of Subpoena was issued to call upon a person to appear
the stated penalty.
19. etc., is made. The writ was issued to the
20. defendant’s goods in order to compel
21. Id., at p. 66.
of the deceased Europeans. Sale deeds including those relating to sale of
goods, mortgages and other transfers of immovable property were also to be
registered.22

It appears from the records that till 1677 appeals were taken to the
Deputy Governor-in-Council; thereafter, there might have been other cases
but not recorded.23

Criminal Side.—The Island of Bombay was divided into four parts, each
having an English Justice of the Peace24 and a Constable who was a police
officer. A Justice of the Peace did not constitute a punitive Court, but
acted as a sort of committing Magistrate for his part. On receiving a
complaint he had to issue a warrant stating the crime committed by the
alleged criminal, to hold a preliminary examination of witnesses and
despatch the record to the Clerk of the Peace who was to draw an
indictment.25

The Court of Judicature held monthly Sessions to decide criminal cases
with the help of jury. Justices of the Peace acted as assessors. The proceedings
against persons accused of murder and other felonies or breach of the peace
were started by indictments prepared by the Clerk of the Peace from the above
mentioned record. The indictments were to be read out to obtain from the
accused plea of guilty or not guilty. In cases of culpable homicides, the
Coroner could also commit persons to the Sessions. The Constables,
Church-wardens and other officers including native-headmen might present
sabbath-breakers, common swearers, common drunkards and uncleanness to the
Sessions.26

The sentence of slavery was often imposed on convicts of theft or robbery.
A condemned thief who could not pay monetary compensation in lieu of stolen
property could instead be forced to do physical labour. This was taken as
imposing a sentence of slavery. Till 1677 offence of theft was often punished
with sentence of death, but thereafter only in a very bad case. Capital
punishment was given for the offence of murder. Death sentences were
however, to be confirmed by the Surat Council. A sentence of whipping
to the extent of thirty-nine lashes was the standard form of punishment.
The offences against religion and morality were generally punished with
fines; warnings were also issued. These offences were tried without a
jury except cases of fornication, uncleanness and adultery. In these cases,
a person could be convicted by his own confession or by the verdict of a jury.27

Felonies, not provided for in the Company’s laws, were dealt with
according to the laws of England. The Company’s laws were treated as
containing a provision to the effect that in cases not covered by them, the
English law was to be resorted to so far as properly as applicable to the
circumstances of a particular case. The provision in the Charter of 1668 that
that laws of the Company should be as near as might be agreeable to the laws
of England was meant to introduce the latter in cases not especially provided
for.28 Consequently, witchcraft was treated as punishable with death according
to English law. As said earlier, death sentences were referred to the Surat
Council for confirmation.29

22. Id., at pp. 67-68.
23. Id., at p. 65.
24. The Fort of Bombay had two Justices of the Peace.
25. Fawcett, op. cit., at pp. 50-51.
26. Id., at pp. 69-70.
27. Id., at pp. 70, 73, 77-78.
28. Id., at p. 74. See Also Peraijboyce v. Ardascer, Perri’s Oriental Cases, at p. 63.
29. Fawcett, op. cit., at pp. 74, 140.
Appeal could be preferred to the Deputy Governor-in-Council.

Court of Conscience

In 1672, a Court of Conscience was established to administer free justice to the poor once a week deciding civil cases under 20 Xeraphins. Cases of petty quarrel were also decided in this court. The Justices of the Peace sat with the Judge of the Court of Judicature who presided over the Court of Conscience. The trials were summary and without a jury.\(^{30}\)

Panchayats

Panchayats were established in 1673-74 to decide cases amongst persons of their own castes who agreed to submit their disputes to panchayati arbitration. They were also to look after the estates of orphans belonging to their respective caste or community. The Panchayats were given certain police powers; they could report the names of persons guilty of certain offences to any Justice of the Peace with a certificate of their crimes so that they might be apprehended and punished according to law. The Panchayats, being representative bodies of castes and communities, were mainly useful for bringing grievances to the notice of the authorities, and for consultation. The members of Panchayat were exempted from arrest in law suits. A person publicly confronting them or causing them injury was to be severely chastised.\(^{31}\)

Miscellaneous

The Judge of the Court of Judicature was debarred from carrying on private trade; instead he was given an annual salary. This put the Judge in a position of independence and above the temptation of bribery. The legal profession had already obtained a footing in Bombay. The Court had an Attorney-General. Attorneys and solicitors were also there, though on a restricted scale litigants could themselves plead. Counsels were among the officers of the Court. Professional bond-writers also flourished.\(^{32}\)

Keigwin's Rebellion

Captain Keigwin's rebellion took place in December, 1683; the mutineers held the Island of Bombay till November, 1684, when it was surrendered. During this period, the Company's courts stopped functioning.

Administration of Justice: Third Stage

Admiralty Court.

In November, 1684 a Court of Admiralty was established in Bombay under the Charter of 1683.\(^{33}\) This was the first Court of Admiralty created in India. One John St. John, Doctor of Civil Law, was appointed its Judge on an annual salary. Dr John not only decided admiralty cases as mentioned in the Charter, but he presided over the Courts-Martial and took over the administration of justice in civil and criminal matters as Judge of Bombay. In March 1685 he was, however, divested of the Judgeship of Bombay that he was said to have usurped without any commission therefor. In 1687 Dr. John was dismissed from the service as \textit{persona non grata}, who set up extravagant claims of judicial independence. The Court of Admiralty was, however, allowed to function under other Judges within the limits prescribed by the Charter of 1683.\(^{34}\)

\(^{30}\) Id., at p. 60.
\(^{31}\) Id., at p. 62.
\(^{32}\) Id., at pp. 61-62, 69.
\(^{33}\) See Chapter II, supra.
\(^{34}\) Fawcett, op. cit., at pp. 121-125. See also Keith, op. cit., at pp. 40-41. For asserting his judicial independence, see John Thorburn's case and James King's case at pp. 142, 143 in Fawcett.
Court of Judicature.

The Court of Judicature was again set up in March 1685 on much the same footing as before. In a civil case before it, English Statute of Limitations was referred to as was the usual practice. The laws of the Company were of limited scope and resort to English law was almost necessary in cases not covered by the former unless the Judge was guided by his sense of justice and equity. The Company objected, however, to the application of the Parliamentary Acts in Bombay. It laid emphasis on the most indispensable necessity to make the English nation look like a political governing State in India and keeping increasing British dominions in India, the Englishmen to superior authority was the English law provided. That could be achieved only by coercive laws and power to put them in execution. Therefore, the Surat Council, in the absence of required law that the Company did not make, was empowered to make temporary bye-laws to meet emergencies; which would be binding on all the English and natives in the Crown's Colony until altered or annulled by the Company or the Crown. It was natural to prefer such a direct legislation, but their inclusion in the category of laws of binding nature was an unauthorized departure from the provisions of the Charter of 1668 which prescribed a special procedure in this connection. The Company, however, held the view that the Parliamentary Acts were applicable in England; only the laws of the Crown or the Company and temporary laws of the Surat Council were applicable in Bombay. It directed the Governor-in-Council at Surat to govern the people, being subjected to the Company under the Crown, by the martial law and civil law (that is Roman law as opposed to the English common law) and the customs of merchants as mentioned in the Charters of 1663 and 1666.35

Comments.

G. Fawcett, criticising the Company's above stand, said that the view that the Charter of 1663 extended civil law only, apart from material law to Bombay, overlooked the fact that the civil and criminal jurisdiction of the Admiralty Court was limited, and that the Court of Judicature was a separate Court whose jurisdiction rested on an entirely different foundation. It was primarily to be governed by the Company's laws as framed under the Charter of 1663. "If the Company wanted to substitute 'Civil Law', as modified by the 'Custom of Merchants', as the basis for deciding civil litigation, then the legal mode of carrying this out was to amend the laws accordingly under the procedure laid down by the Charter." In fact the denunciation of English Statutes and Common Law was partly actuated by the desire to avoid the delay and expense, a feature which was then prominent in trial of cases in England. It was expected that the Judge of the Court of Judicature would administer justice according to common equity and good conscience, which was the general rule of the civil law, and in a summary way without delay.36

In the Court of Judicature system of trial of civil and criminal cases by jury continued. This system and presence of attorneys who knew English laws and practice prevented the Court from adopting 'summary way' as favoured by the Company. Besides some Act of Parliament or English common law was resorted to occasionally.37

35. Id., at pp. 128-133.
36. Id., at pp. 133-134.
37. Id., at pp. 135-137.
The judiciary at this stage was subservient to the Governor-in-Council who had power to remove and appoint Judges. Except Dr. St. John, the Judges had no professional training. The interests of the Company were paramount and were safeguarded even at the cost of justice.38

Siddi’s Invasion

Siddi Yakub, a Moghul Admiral, invaded Bombay in February 1690 and stayed there till June. The Courts stopped functioning. The only Court that survived was that of the Governor-in-Council to decide cases in a summary, rough and ready way during the period 1690-1718. This they did under the Charter of 1668. The administration of justice was at a low ebb.39

Administration of Justice: Fourth Stage

Court of Judicature

After a lapse of about thirty years, judicial institutions were revived in 1718.

A Court of Judicature was established in Bombay in March, 1718, for the due and impartial administration of justice. It consisted of an English Chief Justice, five English Justices, and four Indian Justices, known as Black Justices representing the principal Indian communities—Hindu, Mohammedan, Portuguese, Christian and Parsi. The Indians played only a secondary role like that of assessors or assistants. Their inclusion enhanced the efficiency of the Court in dealing with civil and criminal cases of natives. The English Justices were mainly the members of the Governor’s Council, but it is said that judicial independence was not thereby affected. Three English Justices formed the quorum of the Court which usually sat once a week.40

The Court of Judicature was authorized to decide all causes, civil and criminal, in the Island according to law, equity and good conscience, and the rules and ordinances of the Company. It had to pay due regard to caste customs, the principles of common right, the orders of the Company, and the policy and ‘known and established’ law of England, provided the same were in conformity with the ‘Instructions’ given to the Court. All deeds relating to sales of lands, houses, tenements and other conveyances, mortgages and wills were to be registered in the Court; a prior consent of the Governor was needed to give validity to their sales. The Court had to exercise probate and administration jurisdiction also. Moderate court-fees were prescribed.41

A copy of the provisions of the Charter of 1668 was made available to the Court of Judicature but the laws of the Company appear to have been forgotten by then. The Court was not bound by any particular procedure, codes or legal precedence of a binding nature. It had to administer justice in a rough and ready but commonsense way, ensuring cheap, impartial and speedy decision. In fact, generally the Judges “acted on their sense of justice and equity, coupled with the necessity of deterring crime, as well as the principles of English law, so far as they might be applicable.”42

38. See Id., at pp. 144-146.
39. Id., at pp. 157, 164-167 ; Keith, op. cit., at p. 41.
41. Id., at pp. 171-174
42. Id., at pp. 176, 164-165, 192.
There was no definite limit prescribed to the jurisdiction of the Court of Judicature. However, an appeal might be preferred to the Court of Governor-in-Council on a notice being given to the Chief Justice within forty-eight hours of the judgment. In other words, a leave to appeal had to be obtained from the Court. Fee for an appeal was Rs. 5. Appeals in suits of Rs. 100 or more only could be taken, but they were rarely filed.43

The civil work of the Court of Judicature was mainly of a simple kind, though occasionally cases required some legal knowledge for their disposal. Most of the litigation related to the recovery of debts. The suit against a person was to be prosecuted within two court-days next after his confinement to the prison. In case of mortgage-decrees, time was given for making payments before foreclosure. The English practice was followed in recovering decreetal debts by execution. A judgment-debtor, having no visible estate was usually committed to prison till payment was made. Sometimes the Court allowed time to pay or ordered payment in instalments.44

The offences were tried with fairness to the accused. A fair hearing was given to the parties, though sometimes the Court acted on suspicion, as opposed to proof, of a crime. An improper attempt on its part to obtain a confession was not unusual. Perjury and frivolous or malicious complaints were punished in a summary way. The Court severely punished the offences committed by, or relating to, the slaves. It exercised jurisdiction over the soldiers also.45

In addition to the usual punishment given to the thieves, they had to restore the stolen property if they could. Imprisonment with hard labour to be done by condemned convicts either during pleasure or for a definite period was still awarded. Banishment from the Island was resorted to with the permission of the Governor. usual punishment was awarded for unlawful wounding including the payment of damages to the victim. Fines, though moderate, were rarely imposed. Whipping was the main punishment both for men and women. Ordinarily the maximum sentence was thirty-nine lashes. Sometimes, in case of a woman, whipping was continued during pleasure till she revealed where the stolen property was hidden.46

The Court could not pass capital sentences. This power was reserved to the Court of Governor-in-Council.47

Inferior Courts.

Native Courts, like those of Choughulas and Vereadores, who were headmen in villages, were declared as interior Courts to decide caste or communal disputes. Appeals lay to the Court of Judicature which was given general supervisory power over their proceedings. By this time, Panchayats as Courts had ceased to function. Main functions of Vereadores was to inquire into a particular matter and report to the Court. Civil and criminal matters concerning Mohammedans were referred to the Kazi and Choughulas for inquiry and report. Sometimes the Kazi exercised original jurisdiction, confined to disputes of inheritance and similar matters. Appeals lay to the

43. Id., at pp. 176, 199-200.
44. Id., at pp. 173, 194.
45. Id., at pp. 185, 191-193, 196.
46. Id., at p. 195
47. Id., at p. 193.
Court. No other native tribunal existed, not even the Hindu Pandit. Generally the points of Hindu Law were referred to several merchants or headmen of the cases concerned. Another inferior Court was that of the Chief of Mahim. He was the Justice of the Peace for the district and decided all cases between its inhabitants. Appeals lay to the Court of Judicature. 48

Comments.

The Court of Judicature established in 1672 derived its form and jurisdiction from laws of the Company. Its constitution, in providing for jury trial under an English Judge, not necessarily a servant of the Company, "introduced the English ideal of the judiciary before the Government." In this regard as well as inferior to its predecessor. It was its Bench was mainly composed however, some outside element also and this made a distinct improvement on the Court of Governor-in-Council, the sole judicial authority during the period of thirty years that elapsed between the two Courts of Judicature. 49

The Court of Judicature, with its renewed existence functioned till 1728 when the Mayor's Court and other courts were established under the Charter of 1726. 50 "The Court, though its administration of justice was rough and ready and though it fell short of the ideals that attended its establishment in Aungier's time, clearly served a useful purpose"... 51

49. Id., at p. 201; Keith, op. cit., at p. 42.
50. See Chapter V, infra.
CHAPTER IV

ENGLISH SETTLEMENT AT CALCUTTA

Settlement

Calcutta was founded in 1690 when the English first settled themselves at Sutanati on the banks of Hughly, and erected a fortified factory. The Fort was named as Fort William. In 1698 the Company purchased the zamindari of three villages Sutanati, Govindpur and Calcutta, which ultimately developed into the modern city of Calcutta. In 1699, Calcutta was declared a Presidency with the Governor, also called President, and Council to manage its affairs. The Governor-in-Council could exercise judicial powers under the Charter of 1661.1

The acquisition of the zamindari gave the Company for the first time a legal position within the Mughal Empire. It "brought into existence a working theory, in the development of which the acceptance of the Dewani in 1765 is the final logical completion."2

The acquisition of zamindari raised the status of the Company to that of Zamindar who in those days collected revenue and administered justice to the people of his zamindari. Thus the Company acquired judicial powers over the native inhabitants from the Indian suzerain. However, unlike Bombay, it had no sovereign rights in Bengal at this stage.3

Administration of Justice

In 1700, a member of the Governor's Council was appointed the Collector to act as Zamindar on behalf of the Company. He held his Faujdar Court to decide all criminal cases and Court of Cutchery or Adalat to decide all civil cases. The cases were tried in a summary way. The modes of punishment were whipping, fine, work on roads and imprisonment. In all criminal cases, except cases of capital offences as murder, the Collector "proceeded to sentence and punishment" immediately after hearing of the cases. The crime like murder required the lash to be inflicted until death;4 in such a case the Collector suspended execution of the capital sentence until the facts and evidence were laid before the Governor-in-Council and their confirmation of the sentence was obtained. This was a deviation from the ordinary practice in which a Zamindar submitted death sentences to the Nazim at Murshidabad for confirmation. Another deviation took place in the matter of civil appeals which lay to the Governor-in-Council instead of the Nawab's Courts.5

The Collector, as Collector of land revenue, held a Cutchery exercising coercive powers of a Zamindar over the tenants and farmers of land revenue.

1. C. Fawcett, The First Century of British Justice in India, at p. 207 (1934); A. C. Patra, The Administration of Justice under the East India Company in Bengal, Bihar and Orissa, at p. 32 (1932).
4. The sentence of a Criminal by hanging because it was taken as too ignominious a death for a Mohammedan to suffer.
Whipping, a prevalent mode of punishment, was adopted to realize arrears from the defaulters of land revenue. The Collector decided revenue cases in the Cutchery. This resulted in injustice to many as the punishment was given at the discretion of the Collector, an interested party, who acted as judge in his own cause.6

The Collector exercised civil and criminal jurisdiction in cases where Europeans and natives of European descent were parties. This jurisdiction was challenged by the Mayor’s Court7 in 1755-57. As a result, the Company divested the Collector of his whole jurisdiction and established two separate courts in 1758.

**Judicial Plan of 1758**

The first Court had to try all criminal cases by a quorum of three Judges composed of the members of the Governor’s Council sitting in rotation, each sitting for a month in turn as the acting Judge to deal with minor offences, appeals lying to the quorum. The same Court tried cases both of Europeans and Indians; in the case of the former it exercised jurisdiction under the Charter of 1661 and in that of the latter it was called a Zamindari Court. Sentences of whipping to death were submitted by quorum to the Governor-in-Council. However, the quorum of three Judges was not persisted in, and by 1772 the Zamindari Court was to be held by one of the members of the Council of servant of the Company. Serious criminal cases of Europeans were tried under the Charter of 1726.8

The second Court, known as the Court of Cutchery, was created to deal summarily with the civil cases of natives exceeding Rs. 20 in value. It consisted of five servants of the Company of a standing below the Council. Appeals lay to the Governor-in-Council in cases where the valuation of the subject-matter exceeded Rs. 100. The Court decided cases of simple nature. Appeals to the Governor-in-Council were rarely taken because other difficult cases were generally referred to arbitration by Indian merchants, chosen by the parties or with their consent, who sat in the Court as arbitrators. The decree was made according to the award.8

Calcutta, because of its late foundation, did not witness the vigorous judicial activities which had taken place in Madras and Bombay before the introduction of the Mayor’s Courts. A start was given to them only in 1727 when the Mayor’s Court and Court of the Governor-in-Council were established at Calcutta under the Charter of 1726.9

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7. See Chapter V, infra.
9. See Chapter V, infra.
CHAPTER V

THE BEGINNING OF CROWN'S COURTS

AND

LEGISLATIVE AUTHORITIES

(Charters of 1726 and 1753)

Introduction

The year 1726 marked the beginning of an important era in the evolution of laws and courts in India. A Charter of the Crown of that year, established Corporations, and thus the Mayor's Courts, and the Courts of Oyer and Terminer, and constituted subordinate legislative authorities in the Presidency-towns of Madras, Bombay and Calcutta, though then the Crown had no sovereign rights on any part of India except the Island of Bombay. A representation made by the Company to the Crown regarding the state of the general administration of justice is said to be the reason of granting the Charter.1 No doubt the Company complained that in these settlements there was a great want of a proper and competent power and authority for more speedy and effectual administration of civil and criminal justice, but this only indicates its desire for improvement and misses the real reason. On the whole, the existing Courts, though sometimes irregular or oppressive, did their work satisfactorily. Therefore, theory of dissatisfaction with the prevalent system should be discarded. A very important reason for granting the Charter has been pointed out by C. Fawcett according to whom the Charter was granted to avoid civil litigation against the Company in England arising out of the executive meddling with private property of its servants in India. The Mayor's Courts were, therefore, not only given civil and testamentary jurisdiction but they were established under an authority recognised by the English courts.2

Each Corporation consisted of a Mayor and nine Aldermen, out of whom the Mayor and seven Aldermen were to be the natural born subjects of the Crown and two Aldermen might be subjects of friendly Prince or State. The first Mayor and Aldermen were nominated in the Charter itself. Thereafter, the Mayor was to be elected annually by the previous Mayor and Aldermen. An Alderman had to continue for life unless he left the town or was removed by the Governor-in-Council on a reasonable cause, though the latter's decision was subject to an appeal to the King-in-Council. Vacancies among the Aldermen were to be filled by the Mayor and remaining Aldermen from the inhabitants of the town. The Mayor and Aldermen had to take oath of office before the Governor-in-Council.3
Mayor’s Court

The Mayor and Aldermen of each Corporation were constituted a Court of Record, authorized to decide all civil cases within the respective town and subordinate factories. The quorum of the Court was to be three. The Mayor or the Senior Aldermen and two Aldermen sat together for not more than thrice a week. Appeals lay to the Court of Civil Appeals, that is the Governor-in-Council, who were constituted a Court of Record and whose decisions were final in all cases up to the valuation of 1000 Pagodas. In decisions involving larger sums, appeals might be taken to the King-in-Council.

The process of the Court was to be executed by the Sheriff, junior member of the Council, initially nominated but subsequently annually chosen by the Governor-in-Council.

Each Mayor’s Court was given testamentary jurisdiction. Probate of wills and letters of administration in case of intestacy were to be granted by it.

Justices of the Peace

In each town the Governor and five senior members of his Council were appointed as Justices of the Peace.

Sessions Court

The Charter appointed the Governor and five senior members of the Council as Commissioners of Oyer and Terminer and Gaol Delivery to try all offences, except high treason, committed within the town and subordinate factories. All or any three of them were to hold Quarter Sessions] of the Peace four times a year. Grand any petty juries were to be summoned by the Sheriff, and offenders were to be tried and punished in the same manner as in England or as nearly as might be. Thus the technical forms and procedures of the criminal judicature of England were introduced in India.

In England the Commission of Oyer and Terminer was issued to specified persons to hear and determine all cases of grave offences presented by the presenting juries within a defined area. The Commission of Gaol Delivery directed the Commissioners to deliver from jails of an area all persons confined therein and to try the accusations against them. These Commissions are still issued in England.

Jury Trial

Trial by jury is one of England’s cherished institutions. It introduces an element of commonsense into the administration of justice. Generally twelve

4. “A court of record is a court whose acts and proceedings are enrolled for a perpetual memory and testimony. These their truth cannot be questioned in may amend clerical slips and errors.


7. 8. 9.

10. Potter’s Outlines of English Legal History, at p. 57 (1958). See also P. S. James,
ordinary individuals are summoned to answer a question of fact on the basis of the evidence admitted before the Court which also instructs them regarding the law. The Grand Jury, also called presenting Jury, generally consisting of twenty-four persons, proceeded on the strength of evidence tendered by prosecution and presented an indictment only when it believed that there was a *prima facie* case against the accused. Thus their duty was to present criminal cases before the judges so that justice might be done on proof of guilt; they guilt. The institution of Grand Jury was 1865 and in England by the Administration of Justice Act, 1933, and, therefore, is obsolete. Now the magistrates hold preliminary inquiries in criminal cases. The Petty Jury, generally consisting of twelve persons, though in India the number was reduced to nine by Act X of 1875, held and still hold the actual trial. It adjudicates upon the guilt of the accused. This is in fact the trial Jury and jurors are judges of fact. In early days the presenting and trial juries might have been the same, or at least, some of the former joined the latter. But this prejudiced a fair trial and this practice was, therefore, abolished in 1852 in England, though, to some extent, it continued in India.  

The Charter of 1726 allowed the Company to appoint military officers, to repel any force, and to execute martial law in time of war.

**Justice and Right as Rule of Decision and Introduction of English law.**

The Charter did not expressly mention that the law to be applied by the Mayor’s Courts was to be that of England but enabled them to give judgment and sentence according to “justice and right”. This rule of decision was interpreted by the English Judges in India as the rules of the common law and the statute law of England, in so far as applicable in the local conditions. Later decisions of the Privy Council also have regarded the Charter as clearly indicating that the rule of decision was nothing else but the law of England. In fact “it has long been accepted doctrine that this Charter introduced into the Presidency towns the law of England—both common and statute law—as it stood in 1726.”

Along with the Charter the Company had sent to each Presidency a list of the statutes, law books, a book of instructions and multifarious forms as to the method of proceedings in civil suits, criminal trials, and probate and administration work. This tried to keep the Courts “in the straight and narrow path of English law.” “The insistence of this law had of course its weak points. It was in many respects unsuitable for the prompt and satisfactory disposal of civil and criminal cases in which the native inhabitants of the settlements were concerned; and the difference between the conditions of England and those of India, and between the atmosphere of Westminster Hall

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12. See, e.g., trial of Mrs. Arscenia Dawes in Madras, Chapter II, supra.
15. See e.g., 397, at pp. 426-427.
17. Fawcett, op. cit., at pp. 223-224. See also W. K. Firmainger, Historical Introduction to the Bengal Portion of the “Fifth Report” of the Secret Committee of the House of Commons at p. lxxxiv (1917).
and that of the Courts in India, was apt to be overlooked."18 This led eventually to the grant of a new Charter in 1753. However, the Company’s insistence on English law was on account of the fact that the Charter was principally designed for the government and advantage of Europeans, though at the same time it encouraged the continued recognition of peculiar customs of the native inhabitants.19

Another factor that contributed to the introduction of English law was the Company’s supervision of the proceedings of the Mayor’s Courts. They were submitted annually and scrutinized and commented upon by the Company’s Counsel in England. The remarks “impressed on the Courts the fundamental principles of English law, that ensured a fair trial, and gave them useful instructions on many points.”20

Legislative Power

The Governor-in-Council of each Presidency were empowered by the Charter to make bye-laws and ordinances for the Corporation and impose reasonable pains and penalties in case of their contravention. The bye-laws and punishments were to be agreeable to reason and not contrary to the laws and statutes of England. The bye-laws were to be confirmed by the Court of Directors of the Company in England. Thus was created in each Presidency-town for the first time a subordinate power of legislation which ultimately superseded the legislative authority vested in the Company itself. It was desirable also that legislation to suit local conditions should be enacted in India.21

Comparison between the Charters of 1687 and 1726.

While both the Charters of 1687 and 1726 created Corporations and several Courts in India, the former emanated from the Company and the latter from the Crown. Therefore, the former established the Company’s Court and the latter those of the Crown. The earlier Mayor’s Court had civil and criminal jurisdiction, the latter ones civil and testamentary. Only one appeal was provided from the former Mayor’s Court while two appeals were provided from the latter Courts. The Charter of 1726 for the first time provided for appeal to the King-in-Council. A lawyer-Recorder was attached to the old Court while no such provision was made in respect of the new courts which had lay Judges. The number of English Aldermen was more in the new Courts than what it was in the old one. Thus the new Mayor’s Courts were too much English ridden. The former Court was not bound by technicalities and procedural rules of English law; the latter Courts were. In fact they were modelled on the English pattern. Formerly the Mayor’s Court and the Court of Admiralty exercised criminal jurisdiction in Madras; in the new scheme the Governor and five senior members of the Council in each Presidency were given that jurisdiction.

Friction between the Mayor’s Courts and the Governors-in-Council

The Mayor’s Courts, being the Crown’s Courts, started their career with a spirit of judicial independence which ultimately resulted in bitterness between the Courts and Councils. Several cases may be referred to in this connection.

18. Id., at p. 224.
19. Ibid.
20. Id., at p. 223.
Conversion case.

In 1730 in Bombay a Hindu woman of the Shimπi caste became Roman Catholic, whereupon her twelve years' old son left her and went to live with a relative in Bombay. The relative was charged with improperly detaining some jewels. As a sequel the boy was ordered by the Mayor's Court to be delivered to the mother. On a complaint filed by the heads of the caste, the Governor-in-Council held that the Mayor's Court had no authority to decide cases of religious nature or caste disputes of the natives. It issued a warning to the Court not to interfere with such cases. The Court, however, protested saying that the dispute was not religious in nature and it had jurisdiction to entertain it under the Charter; the caste matters were expressly placed within its authority. The Governor-in-Council took a serious view of the action of the Court.

Case of Arab Merchant.

In the same year another conflict arose. An Arab merchant was rescued by some persons from a burning boat. He brought a suit in the Mayor's Court to recover the value of pearls alleged to have been extorted from him by the rescuers. The defendant had been previously tried for piracy regarding the same occurrence and acquitted. The Mayor's Court consulted the Governor-in-Council as to its jurisdiction in view of the said acquittal and the dispute in question. The Governor-in-Council decreed the suit. This decision was casting vote of the Governor.

Oath case of Bombay.

A third dispute arose in 1746 as to the form of oath. The Mayor and Aldermen were usually members of the Grand Jury at Quarter Sessions and made "..." to the Governor and members of: during the course of a dispute be taken by a Hindu witness, the Grand Jury even held up two successive sessions by refusing to make indictments unless the Hindu interpreter and witnesses were sworn upon the cow instead of the Ghee. In the cow-oath the witness was made to hold a cow's tail and swear to speak the truth.

Oath Case of Madras.

A similar dispute as to the form of oath arose earlier in Madras in 1736. Two Hindu merchants were committed to jail by the Mayor's Court for refusing to take the pagoda-oath which they said was contrary to their religion and the rules of the caste. A crowd of Hindu residents lodged a complaint with the Governor, at whose instance the merchants were released on parole. At the same time the Court was directed that regard must be paid to the religious rites and ceremonies of the natives.

Calcutta also was not free from the same kind of strife.
Amendment of Charter

Naturally a tension had developed between the Courts and Councils because of various disputes between them. The Company was aware of this development and expressed its disapproval of independence which had crept in the Mayor's Courts and warned them to keep themselves within the bounds of the Charter. 25 The Madras dispute resulted in a petition of several castes to England and the Company replied that the differences between the natives only should be decided among themselves according to their own customs or by justices or referees appointed by them. If the natives chose to have their cases decided according to English law, then only they were to be pursued according to the directions in the Charter; the same would be the position in cases between natives and the English. 26 However, the grievances of the natives and those of the Councils could only be resolved by amending the Charter of 1726 by that of 1753.

Charter of 1753.

The Crown's Charter of 1753 amended suitably the former Charter. It expressly excepted from the jurisdiction of the Mayor's Courts all suits and actions between the Indians only; henceforth they were to be determined among themselves unless both parties submitted them to the judgment of the Mayor's Courts. This provision is said by Morley to be the first reservation of their own laws and customs to natives. 27

The Charter made the Mayor's Courts subservient to the Governors-in-Council by giving the latter the power to choose Mayors and Aldermen. Each Corporation had to elect annually from the Aldermen two persons and present their names to the Governor-in-Council in whom was vested the final choice of Mayor. The vacancies among Aldermen were to be filled from the inhabitants of the town by the Governor-in-Council. This affected the autonomy of the Mayor's Courts. 28

Courts of Requests — In each Presidency-town, the Charter created a Court of Requests to hear and determine summarily suits up to 5 Pagodas, which henceforth could not be decided by the Mayor's Court. The Commissioners of the Court of Requests were to be appointed by rotation once a week and the remainder to fill vacancies by electing other persons in their places. 29

Justices of the Peace and the Sessions Court — The Charter declared the Governor and all members of his Council in each Presidency as the Justices of the Peace and Commissioners of Oyer and Terminer and Gaol Delivery to hold Quarter Sessions. 30

Miscellaneous

Under both the Charters, provisions were made for the appointment of the Clerks of the Peace and Coroners, Company's Attorneys and Solicitors and Clerks of the Court of Appeal, and Registrars. Besides, the Mayor's Courts

25. Id., at p. 222.
29. Id., at p. 440.
30. Ibid.
made it compulsory for natives to engage Attorneys for the conduct of their cases.\textsuperscript{31}

The Mayor’s Courts issued commissions to respectable officers of the Company to examine witnesses and to take depositions at their business places. They also required Registrars to collect and preserve information to be used in deciding cases about the right and title of the claimants of natives who died intestate.\textsuperscript{32}

Though English rules and procedures were in vogue in the Courts, in some cases they tried to evolve their own procedure after due deliberations. The formulation and statement of broader legal principles were not indispensable.\textsuperscript{33}

The Aldermen as parties did not participate in the Courts as Judges in their own causes.\textsuperscript{34}

The Mayor’s Courts took resort to arbitration in certain cases. Sometimes the parties themselves referred their disputes to arbitration informing the Courts that awards would be submitted to them.\textsuperscript{35}

\textbf{Comments.}

The exemption of the civil litigation of natives without consent from the jurisdiction of the Mayor’s Courts in 1753 did not result in any special hardship to them. The Records clearly indicate that natives continued to resort to these Courts to almost the same extent as they did formerly. It was in fact the Indian litigation which contributed to the bulk of the Courts’ work from their very beginning.\textsuperscript{36} In Bombay the exemption appears to have been ignored in practice even if it were legally binding there,\textsuperscript{37} though in \textit{Perozhboy v. Ardas} the Supreme Court of Bombay went to the extent of holding in 1843 that the exemption had never and that the Mayor’s Courts of Zamindari the natives.\textsuperscript{38} Madras, of its Mayor’s Court had sur

number of native suits. In 1795, however, a special \textit{Cutchery Court} was established there by the Governor-in-Council which was later superseded by the Recorder’s Court in 1798.\textsuperscript{39}

The fact that the Mayor’s Courts had plenty of Indian business to be transacted by them contradicts the view that justice suffered because they knew nothing of jurisprudence. Most of the litigation was of a simple nature, such as claims for debts, and was dealt with in a prompt and satisfactory manner.\textsuperscript{40} Though there were no professional lawyers on their Benches, they decided the cases before them with apparent fairness and in a sensible manner.\textsuperscript{41}

\textsuperscript{31} Id., at pp. 264, 440; Patra, op. cit., at p. 35.
\textsuperscript{32} Id., at pp. 264, 440; Patra, op. cit., at pp. 36, 37.
\textsuperscript{33} Id., at pp. 26, 40.
\textsuperscript{34} Id., at p. 40.
\textsuperscript{35} Id., at p. 38.
\textsuperscript{36} Fawcett, op. cit., at p. 225.
\textsuperscript{37} Keith, op. cit., p. 45; Fawcett, op. cit., at pp. 225-226.
\textsuperscript{38} See Morley’s Digest, op. cit.; Fawcett, op. cit., i. n at p. 226.
\textsuperscript{39} Fawcett, op. cit., at p. 225.
\textsuperscript{40} Id., at pp. 225-226.
\textsuperscript{41} Id., at p. 225. See also p. 226; Patra, op. cit., at pp. 34-37; Alan Gledhill, The Republic of India, at p. 150 (1951).
The Company's supervisory jurisdiction over the Mayor's Courts and provision for two appeals from their judgments in certain circumstances kept them within proper limits of their jurisdiction and ensured a fair administration of justice.

Judicial independence exhibited by the Mayor's Courts at least before 1753 paved the way for the emancipation of justice from excess executive control, though thereby they aroused the Company's displeasure.\textsuperscript{43}

The institution of jury trial for all criminal cases in Sessions Courts largely ensured a fair administration of criminal justice.

There are some weak points of the judiciary under the two Charters. The independence of the Mayor's Courts was later affected by empowering the Governors-in-Council to appoint Mayors and Aldermen from the servants of the Company. Naturally, in cases where the Company stood as a party, the Courts might not have taken an impartial view, though this statement admits certain exceptions.\textsuperscript{44} Moreover, the Governors-in-Council were the Courts of Appeal in civil cases over them. This also affected their independence to some extent.

Civil appellate jurisdiction and administration of criminal justice were entrusted to the Governors-in-Council who were executive Governments of the respective Presidency-towns. They had legislative powers also. Thus were vested in a single authority, namely, the Governors-in-Council, all the powers and functions of different organs of the State. Naturally, this might have led them to the path of despotism.

The servants of the Company had their own commercial interests at this stage. The Aldermen of the Mayor's Courts were mostly junior servants of the Company. There must have been a number of disputes between the English traders and the natives. In such cases the Mayor's Courts might not have taken a detached view. The weakness of the Judicatures of 1726 and 1753 arose from the fact that they tended to be in fact branches of the Company's executive government, and they therefore afforded imperfect means of resistance to the class interests of the Company's servants, at a time when the Company's servants were bidding fair to monopolise the trade of the country.\textsuperscript{45} This was, however, not always true.\textsuperscript{46}

The Judges of all the Courts might have affected the application of justice.\textsuperscript{47}

The exclusion of Indians from sharing the administration of justice along with the English is a disgusting feature of the history of these early Courts, though some native element was associated with the Courts of Customs Officers and the later Court of Judicature in Bombay and the old Mayor's Court and temporary Court of Judicature in Madras. Under the Charters of 1726 and 1753, for a long time. However, the pro-

\textsuperscript{42} op. cit., at p. 223, and Firmsinger.
privilege, restricted to Indian Christians, was their participation as jurors in the Sessions Courts. 48

Whatever the shortcomings of the judicial system established in 1726 and 1753, on the whole it worked well. The Courts, in spite of their defects, made an effective contribution to the development of the high standard of justice. The Mayor's Courts, particularly, resulted in distinct progress in administration of justice and proved to be a useful link in the chain that led to the creation of the improved courts of the next century. 49

The Courts under the Charters of 1726 and 1758 except Courts of Requests were superseded by new judicial establishments in Calcutta in 1774 and in Bombay and Madras in 1798. The Courts of Requests were replaced in 1850 by the Small Cause Courts in all Presidency-towns.

48. Fawcett, op. cit., at p. 227; Keith, op. cit., at pp. 51-52. Indians generally were allowed to serve on petty juries in 1826 by the Wynn's Jury Act.
### COURTS ESTABLISHED DURING 1600—1753

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CHAPTER VI
GRANT OF DIWANI
and
JUDICIAL SYSTEM
UNDER WARREN HASTINGS
Grant of Diwani

Background

Hitherto the Company was principally a trading concern enjoying important mercantile privileges both from the Crown and the native suzerains. By this time, it had, however, acquired large areas of territory around the Presidency-towns under its supervision. They were called Mofussil in contradistinction to these towns. From the beginning of the second half of the eighteenth century, the Company began to combine political aims with the ordinary pursuits of a trading corporation. The battle at Plassey in 1757 and that at Buxar in 1764 earned her the prestige of a great military power in Bengal. The ruin of the Moghul empire, the decline of the French influence and the local conflicts contributed to the Company's growing might. There was, however, political confusion at this stage. The misgovernment of the English was carried to such an extent as was hardly compatible with the very existence of society. The English servants of the Company were anxious to plunder and get rich quickly. They monopolised almost the whole internal trade. They humiliated with impunity the tribunals, the police and the fiscal authorities of the country. The Nawabs were puppets of the English and no resistance was offered by the unhappy natives who were without spirit or means of defence.¹

Grant of Diwani.

In 1765 the Diwani of Bengal, Bihar and Orissa was granted to the Company by Shah Alam, the puppet Moghul Emperor. This was the turning-point in the career of the Company. The year 1765 may be treated as commencing the period of territorial sovereignty by the Company. Though the Diwani functions were to be performed by it as a deputy of the Emperor, its main object which was "to obtain the substance, though not the name, of territorial power, under the fiction of a grant from the Moghul Emperor", was achieved.²

Company as Diwan.

The Diwani, that is, the fiscal administration of the said Provinces meant the collection of revenues and customs and administration of justice in civil and revenue cases. The Company performed these functions through the native officials till 1772. The Nizamat, that is, the administration of criminal justice, was left with the puppet Nawab, though it might be taken over by the Company at any time. The maintenance of the army was, however, the

¹ Macaulay's Essay on Clive, edited by V. A. Smith, at pp. 67-68 (1911).
concern of the Company. This system of dual government did not prove satisfactory, and in 1771 the Company resolved to stand forth as Diwan and to discharge the duties of administration through its servants. The resolution came into actual operation in 1772 when Warren Hastings became the Governor at Calcutta.

State of Administration of Justice before 1772.

Prior to discussing the outcomes of the assumption of direct authority by the Company, a vivid account of the state of law and administration of justice is worth noting. The system of justice existing in Bengal before the Company became responsible was summary and unsatisfactory. The chief criminal court was held by the local zamindar, who had a right to the fines exacted by reason of his tenure; he could pronounce sentence of death, but execution depended on the orders of the [Nawab's] government in Murshidabad. The zamindar was also the judge of the civil court, or adalat, taking a fourth or fifth part of the amount recovered. Naturally, in lieu of litigation in this court, arbitration was often preferred. The law administered was that of the Koran and the commentators; where these afforded no guide, local customs and usages were relied on, but these were so ill-defined that judgment was largely discretionary. Appeal lay to the similar courts at the capital, but in addition the government could interfere in the course of justice, and could give on complaint a remedy or inflict punishment without any judicial sentence. Moreover, in the districts the peasants were hampered even in seeking justice by the lack of local courts. Corrupt judges and a corrupt government added to the defects of the legal system and the absence of any register of judicial proceedings rendered appeals most difficult.

... by the temporal judges without the the kazis and in those affecting Hindus were outcasting might be the result of ordered in inheritance cases a certain security for the observation of justice denied in issues of criminal law.

"In revenue cases the jurisdiction had been originally exercised by the zamindar but sometime before the diwani passed to the Company, jurisdiction had, doubtless in the interest of the government, been transferred to deputes, naib diwans, with appeals to the chief diwan at Murshidabad.

"The forms of justice thus existed, but it is clear that the courts were the instruments of power rather than of justice, useless as means of protection but apt instruments for oppression. It is significant of the position that the servants of the Company, when they had claims against Indians, not residing under the British flag but in the vicinity of the Company's settlements, used simply to seize and hold them prisoners until they consented to pay, without asking the authority of any officer of native government, but with its full approval. The government indeed was so complaisant as to overlook cases of seizure of persons who did not fall within this category, and after the Company's acquisition of the diwani, both the French and the Dutch exercised like rights, the French at least disputing the demand of the president and council that recourse in such cases must be had to the law Courts.

5. Mohammedan Judge.
6. See note II, infra.
"The course of justice was further troubled by the revolution, which placed Mir Kasim in power, for many Englishmen with or without the consent of the Company soon scattered through the interior to seize the trade, and exerted wide influence on the administration of justice, and the overthrow of Mir Kasim led to further encouragements on native authority, the banyans or native agents of the English often controlling the local courts and even acting as judges. The beginnings of better things seem to have followed the appointment of [English] supervisors in 1769, for they were encouraged to observe the maintenance of justice to discourage arbitrary fines, and the retention of a fourth of the value as a perquisite of the court. It seems that capital and other important cases were referred to the [English resident] at Murshidabad in order that the pleasure of the nawab should be taken, which, of course, in practice meant that of the deputy, who was under effective control by the Company." 8

The administration of justice under Warren Hastings may be studied in five stages.

Administration of Justice: First Stage
Judicial Plan of 1772

The Regulations of 1772, thirty seven in number, formed the first Anglo-Indian Code, worked out on the basis of experience and common observation. An endeavour was made to adapt it to the manners and understandings of the people and exigencies of the country, adhering as closely as possible to their oral and oral, to which the people had been accustomed, but recting the defects without destroying the traditions of the local systems. 9 Some of the courts of the Moghul adalat system, 10 which had proved their worth, were preserved and the rest scrapped. A small district with an English Collector as its head, was the main administrative unit in the plan. This ensured an easy access to the seat of justice involving small cost and incurring no risk of the absence of the parties from the district. In order to avoid any overlapping of distinct authorities

7. See note 11, infra.
9. See note 11, supra.
10. An officer of the police and Judge of all crimes, not capital. (6) Kazi was the Judge of all claims of inheritance or succession. He also performed the ceremonies of weddings and funerals etc. (7) Mootassib took cognizance of drunkenness and of the vending of intoxicating liquors and drugs, and the examination of false weights and measures. (8) Mufti was the expounder of the law and wrote the futwa, that is, the hearing the parties and evidences. If either the Kazi or the Mootassib the case was referred to the Nazi in law, to decide the issue sitting of the Kazi, Mufti, Mootas, in the law. They referred to them for decisions, by
11. Kotwal was the peace officer, comments see Archbold, op. cit., at pp. 91-90.
of Faujdar and Diwan and to simplify and reconcile the conflicting jurisdictions of the perversis Courts, plan clearly defined the matters cognizable in different Courts.\textsuperscript{12}

Civil Justice

A Mofussil Diwani Adalat was established in each district to decide civil cases. The Collector, assisted by the Naib Diwan and officers of the Cutchery was to preside over it as its Judge. The Adalat was to decide all disputes concerning property, whether real or personal; all cases of inheritance, marriage and ceste; all claims of debts, disputed accounts, contracts, partnerships, and demands of rent. Its decisions in cases for sums upto Rs. 500 were final. However, the question of right of succession to Zamindaris and talukdaris was to be decided by the Governor-in-Council. The cases were to be heard in the open Court twice a week or oftener if necessary.

The Diwani Adalats had to maintain a proper record of the proceedings, whose copy was to be despatched to the Sadar Diwani Adalat twice a month through the Governor-in-Council.\textsuperscript{13}

A Chief Civil Court, known as the Sadar Diwani Adalat, was established at Calcutta, now the principal seat of Government. It consisted of the Governor and two members of his Council, attended by the Diwan of the Treasury, the Head Kamungos and other officers of the Cutchery. In case of the absence of the Governor, a third member of Council was to sit, that is to say, not less than three Councillors were to sit; the whole Council might also sit if it so chose. The Sadar Diwani Adalat had to hear and determine appeals from the Mofussil Diwani Adalats in cases where the sums involved exceeded Rs. 50.\textsuperscript{14}

In order to administer justice in trivial cases and to relieve the people from burden of long journeys, all disputes of property, not exceeding Rs. 10 were to be decided by the Head Farmer of the Pargana to which the parties belonged and his decisions were to be final.\textsuperscript{15}

Criminal Justice

A Mofussil Faujdar (or Nizamat) Adalat was established in each district for the trial of crimes and misdemeanours. The Kazi and Mufti of the district assisted by two Maulvis expounding the law, were appointed to hold criminal trials in this Court. The Collector of the district was, however, directed to attend to its proceedings and to see that all necessary witnesses were summoned and examined, due weight was allowed to their testimony and the decision passed was fair and impartial. The trials had to take place in the open Court regularly assembled. All cases of murder, robbery and theft, and all other felonies, forgery, perjury, and all sorts of frauds and misdemeanours, assaults, fray, quarrels, adultery, and every other breach of the peace, or violent invasions of property, were to be submitted to the judgment of the Faujdar Adalat. It could inflict corporal punishment, imprisonment, work on the roads and fines of small amount. Persons unsuitable for corporal punishment might be fined but in case fine was over Rs. 100, the sentence was to be confirmed by the Sadar Nizamat Adalat. The authority of the Adalat did not extend to

\textsuperscript{12} Monckton Jones, op. cit., at p. 312.
\textsuperscript{13} Regs. I, II, III, XIII, XIV, XXIV. For the source of these and other Regulations, quoted below, see Archbold, op. cit., at pp. 56-59.
\textsuperscript{14} Regs. V, VI, XXIV.
\textsuperscript{15} Reg. XI.
capital sentences and those of forfeiture and confiscation of property. In such cases its opinion with the evidence was to be sent to the Sadar Nizamat Adalat for confirmation and then referred to the Nazim for sentence; thereafter it was to be immediately carried out. Records were to be maintained and transmitted from the Faujdari Adalats to the Sadar Nizamat Adalat. 16

Sadar Faujdari or Nizamat Adalat, the Chief Criminal Court, was established at Calcutta. It was to be presided over by Daroga Adalat, a Chief Officer of Justice, appointed by the Nazim. He was assisted by the Chief Kazi, the Chief Mufti and three Maulvies. The duty of the Court was to revise proceedings of the Faujdari Adalats, and in capital cases, by signifying their approbation or disapprobation of the proceedings with reasons, to prepare the sentence for the warrant of the Nazim, to be returned into the Molussil for execution. The Governor-in-Council supervised the proceedings of the Sadar Nizamat Adalat for the sake of satisfaction that the decrees of justice were not injured or perverted by the effects of partiality or corruption. 17

Position of law: Reservation of personal laws

The Diwani Adalats were directed to decide all suits regarding inheritance, marriage, caste and other religious usages or institutions according to the laws of the Shastras with respect to Hindus and those of the Koran with respect to Mohammedans. On all such occasions the Brahmans or Maulvies respectively attended the Courts to expound the law applicable to the cases in question, sign the Court's reports and assist them in passing the decrees. 18 In order to complete the scheme as to the above rule of decision, the word 'succession' was added in it 1781 and it was also declared that in the absence of specific directions, the cases were to be decided according to the doctrine of "justice, equity and good conscience", which was generally interpreted as the rules of English law applicable to local circumstances. 19 It may be added that Warren Hastings was alive to the need of the due ascertainment of Hindu Law and Mahomedan Law and got compiled Codes of both in 1774. 20

The Mohammedan Criminal Law was allowed to continue to the extent it contained nothing hurtful to the authority of the English Government or to the interest of society. 21 The first interference was, however, made with the law relating to dacoity to suppress the wanton and ruthless depredation of the dacoits by providing for their execution in their villages, making their families the State's slaves and fining their villages. 22

Arbitration

Arbitration by consent was provided in cases of disputed accounts, partnerships, debts, doubtful or contested breaches of contracts and the like, the award becoming final. It appears that the principle of existing

16. Regs. I, II, IV, XXIX, XXVII, XXVIII, XXX, XXXI.
17. Regs. V, VII. Cowell, op. cit., at p. 29, indicates that the Court was removed to Murshidabad in 1775 where it remained for fifteen years under the entire control of the Nazim.
18. Reg. XXIII.
19. C. C. Rankin, Background to Indian Law, at p. 2 (1946); Waghela Rajsanj v. Sheikh Mustudin, 14 A. 69, at p. 95 (1837).
22. Reg. XXXV. This provision appears to have ceased to operate in 1785. Banerjee, op. cit., at p. 69.
23. Reg. XXII.
circumstances and it was retained only as an aid to the decision of disputes regarding landed property.  

Miscellaneous

There were Regulations securing free access to the Collector and consideration of all complaints, providing procedure in the Mofussil Diwani Adalats and limitation of suits as to time, abolishing heavy arbitrary fees and also levying fees and commissions on the account of money recovered or on decision given, prohibiting the Company from raising revenue by small collections in the Courts and officials from taking fees, providing rate of interest on old debts, dealing with proceedings in cases as to real property, awarding costs, effecting police reforms, and providing for execution of bonds in the presence of two witnesses.  

The courts might inflict slight punishments at their discretion in case of trivial and groundless complaints. Persons preferring groundless appeals might be punished by advanced costs to compensate the respondents.

The practice of exercising judicial authority by individuals over their debtors was forbidden. It was not only unlawful and oppressive because a man thereby became the judge in his own cause, but it was a direct infringement of the prerogative and powers of the regular Government. All persons were directed to file their suits before the duly established Courts.

The Collectors were empowered to make subsidiary regulations, subject to confirmation by the Council, for the due course of justice and welfare of the people as local circumstances required.

Revenue Administration.

Under the Moghuls, it was the main function of the Diwan to collect revenue. The Treasury was at Murshidabad. In 1765 English supervision first began to be exercised over the collection of revenue. In 1769 English Supervisors were appointed in the districts of the Diwani area. In 1770 Boards of Control of the Revenue were created at Murshidabad and Patna. They took cognizance of both judicial as well as revenue cases. In 1771, the Governor-in-Council became the supreme committee of Revenue. In spite of these arrangements, there was a grave need for reform. Arrears of revenue and complaints of extortion and injustice led Warren Hastings to appoint in 1772 Supervisors as Collectors of Revenue and also native Naib Diwans as heads of the native executive in districts. He was also led to abolish the functions on the same subject under the control of the Board, were independent of one another and each set served as a check upon the other.

Comments.

It is obvious that the provisions of the Judicial Plan of 1772 and those relating in addition to what pointed out that the Hindu law

25. Regs. IX, X, XII, XV, XVI, XVII, XIX, XXI, XXV, XXXII, XXXIII, XXXVI.
26. Regs. XVII, XXVI.
27. Reg. XX.
28. Reg. XXXVII.
and Mohammedan Law were treated equally, notwithstanding centuries of Moghul rule. Both these features were the result of pursuing an enlightened policy by Warren Hastings. There is, however, a negative feature of this scheme of civil justice, that is, its limited character. The rule of decision laid down in the Regulation dealing with the application of the personal laws was not complete. It applied to certain enumerated matters only. A grave defect in the Plan was that the Collector acted as the administrator, the Judge and the Magistrate in the district. It was manifestly too extensive a trust reposed in a single person. It was, therefore, both natural and unavoidable that the collection of revenue on which the credit and promotion of the Collector depended was his primary consideration, and his duties as Judge and Magistrate were regarded as subordinate to the former. The making of all complaints of execution or oppression in the collection of revenue and land rents, exclusively cognizable by the Collector of the revenue must also in frequent instances have stopped the course of justice, and in others have subjected the Collector's judgment, however just, to suspicion of its impartiality from the known interest he had in realizing the revenue under his charge, and consequently in supporting the landholders and farmers from whom it was to be received, in the enforcement of their demands upon their under-renters and tenants. Moreover, the Collectors could not be properly controlled by the Calcutta Council because of slow means of communication. This facilitated their carrying on private trade and monopolizing it because they traded with the amount of their perquisites, obviously an oppression on the people and an obstruction of the revenue. In fact, the collectorships were more lucrative than any posts in the Company's service at that stage. With these defects, however, the newly established Courts worked well with speed and regularity, though changes had to be made subsequently in 1774.

Administration of Justice: Second Stage

Judicial Plan of 1774

On account of the fall in the revenue, the Court of Directors directed the Council at Calcutta to withdraw the Collectors from the districts. It was, however, felt that their immediate removal would endanger the revenue and bring immediately a greater weight of business on the members of the Council. The Council, therefore, retained their services till the termination of their current business and gave a plan for immediate operation, introducing the system of the Provincial Councils in 1774. It was merely a temporary experiment.

Revenue

The whole diwani area was formed into six Divisions with the Headquarters at Calcutta, Burdwan, Murshidabad, Dinajpore, Dacca and Patna. Each Division except Calcutta had a Provincial Council consisting of a Chief and four senior servants of the Company, all English. An Indian Diwan was also attached to each Council. A Committee of Revenue was instituted at Calcutta for superintending that Division, consisting of two members of the Council and three senior servants, assisted by a Diwan and others. The

30. Rankin, op. cit., at pp. 2, 5.
31. See Moreton Jones, op. cit., at p. 316.
33. Ibid.
34. W. B. H. E. The Bengal Section of "The Fifth An Account of the Affairs of the
35. I.
36.
Councils and the Committee were to supervise the collection of revenue in their Divisions. Indian Naib Diwans were appointed in the districts under each Provincial Council to look after the same work. Complaints against the Head Farmers, Naib Diwans, Zamindars and other principal officers of the Government, relating to their conduct in the revenue, were to be decided by the Provincial Councils. Aggrieved parties might ultimately go to the Board of Revenue at Calcutta.

Civil Justice.

The Naib Diwan of each district was to hold the Mofussil Diwani Adalat in place of the Collector in the usual way and transmit its proceedings to the Provincial Council. In all cases appeals could be taken to the Provincial Council, which, while exercising appellate jurisdiction, came to be known as Provincial Court of Appeal, to be superintended in rotation by the members of the Council at Fort William. Its decisions were final in cases not exceeding Rs. 1,000; beyond that sum an appeal was allowed to the Sadar Diwani Adalat at Calcutta. The whole Provincial Council might revise the decisions of the superintending member.

At the Divisional Headquarters, the Provincial Courts of Appeal also acted as the Courts of first instance in civil matters.

Criminal Reforms.

The Officers of the Faujdari Adalats were forbidden to hold farms or other offices in the Mofussil and were obliged to reside in their districts on pain of forfeiting their employments. Complaints against them were to be lodged with the Governor-General who would refer them to the Sadar Nizamat Adalat for inquiry and determination.

Comments.

It appears that the changes made in 1774 in the Judicial and Revenue Plans of 1772 did not serve any useful purpose. In the meantime in 1773, the English Parliament had passed the Regulating Act creating Governor Generalship of Bengal in place of Governorship and empowering the Crown to establish a Supreme Court at Calcutta; the latter provision came into force in 1774. During the period 1774-1780, certain important developments took place. In the Mofussil by leaving them to the care of the revenue work for themselves, the shadowy character of the Sadar Diwani Adalat and many other drawbacks in the existing system led the Governor-

38. ibid., at p. 64.
39. ibid.
40. ibid.
42. See Chapters VII and VIII, infra.
43. In The Try of Nuncup and the Impeachment of Sir Elijah Impey, Vol. 2, at p. 22 (1839), J. F. Stephen says: "One result of the Patna case (see Chapter V) involved in cases of the discredit of the Curia. They were colourable imitations of courts which had abdicated their functions in favour of their own subordinate officers, and though their decisions were nominally subject to an appeal to the Governor-General and Council, the Appellate Court was an even more shadowy body than the courts of first instance. The court never sat at all, though there are some traces of its having at one time decided appeals on the report of the head of the native exchequer, just as the Provincial Councils decided them or
General-in Council to pass series of Regulations for the administration of justice in 1780.44

Judicial Plan of 1789.

The striking feature of this plan was the separation of judicial functions from those of revenue and vesting the former in persons independent of the Provincial Councils. Each Division was given at its Headquarters a Diwani Adalat, to sit at least thrice a week, superintended by an English covenanted servant of the Company appointed by the Governor General in-Council. His jurisdiction was distinct from, and independent of, the Provincial Council of the Division. The Provincial Councils were thus deprived of their judicial functions; their jurisdiction was confined exclusively to revenue matters. They were to decide all cases relating to revenue, cases of demands of individuals for arrears of rent and complaints from tenants and cultivators of undue exaction of revenue 45

In all civil cases like those of inheritance and mercantile disputes for sums not exceeding Rs. 1,000 in value, the decisions of the Diwani Adalats were final. In cases in which this amount exceeded, appeals could be taken to the Sadar Diwani Adalat composed of the Governor-General and Council through the Chiefs of the Councils.48

The Superintendents of the Diwani Adalats were given power to refer cases not exceeding Rs. 100, to Zamindars or public officers, or arbitrators residing near the place where the cause of action would arise, subject, however, to his revision in cases of manifest injustice, abuse of authority or partiality.47

In order to avoid any conflict between revenue and judicial officers that might affect the collection of revenue, a detailed procedure as to the issue and service of summons was laid down.48

Provisions regarding the oath to be taken by the Superintendents of Diwani Adalats, maintenance of records of proceedings, reservation of personal laws, appointment of native law officers and the like were almost the same as those made in 1772.49

Comments.

The plan of 1780 was certainly a great improvement upon the plan of 1774. Its main merit lay in its effecting the separation of the judicial from the executive functions. It was a welcome change. The plan, however, suffered from defects also. The Superintendents of the Diwani Adalats were not selected from the senior servants of the Company. Some of them were illiterate, ignorant of the Eastern languages and most extravagant, dissipated young men. There was a tendency of the new Adalats to come into conflict with the Provincial Councils. The Governor-General-in-Council had no time to sit as the Sadar Court to hear appeals and supervise the work of these Courts. Without the support and control of some powerful authority, it was impossible for them even to subsist; there was possibility of their sinking into corrupt or becoming instruments of oppression.50 There were only six Diwani Adalats. This

44. One quoted below, see p. cclxxxiv.
45. Rgs XIII, XIV.
46. Fuingter, op cit., at p. cclxxx
47. Id., at pp. cclxxi—cclxxii: Cowell, op cit., at p. 193.
number was very small in a vast area of Bengal, Bihar and Orissa. This resulted into great expense on the part of the suitors, waste of their time and energy and inconveniences they suffered from, on account of long journeys. Even those persons whose cases, not exceeding Rs. 100 in value, were referred to Zamindars or public officers, had to come at least once to the Divisional Headquarters for such reference. The Zamindars or public officers acted as honorary Judges. There was thus a danger of their abusing the authority to their own advantage. Further the paucity of the Courts put a very heavy strain on the Diwani Adalats.51

Elijah Impey as sole Judge of Sadar Diwani Adalats

There was an urgent need of reforming the judicial system under the control and supervision of a powerful authority. From the beginning, the business of the Sadar Diwani Adalats was not only to receive appeals from the interior Courts in all cases exceeding a certain amount but to receive and revise their proceedings, to attend to their conduct, to remedy their defects and to form generally such regulations and checks as experience should prove to be necessary to the purpose of their institution. The Governor-General and Council, who previously constituted the Sadar Diwani Adalat, admitted their incapacity of exercising these powers, expressly stipulated that Chief Justice Sir Elijah Impey should act as the sole Judge of the Sadar Diwani Adalat on a salary at their pleasure. They thought that this would lessen the tension between the Council and the Court,52 would facilitate and give vigour to the course of justice, lessen the burden of the Council and add to its leisure for occupations more urgent and better suited to the genius and principles of Government. The Governor-General and the Councillors were non-lawyers. Impey, being an experienced and trained lawyer, was expected to discharge judicial functions in a far better way and curb out evils from the judicial establishment of the Company.53

Elijah Impey was, therefore, appointed the sole Judge of the Sadar Diwani Adalat in October, 1780. He continued in this office till November, 1782 when he was recalled to England. In fulfilment of his new duties, Impey prepared thirteen articles of Regulations for the guidance of the Civil Courts. They were afterwards incorporated, with additions and amendments, in a revised Code, consisting of ninety-five articles, which was passed in July 1781. This was the first Civil Procedure Code of India. The aims were to explain such rules, orders and regulations as might be ambiguous, to revoke such as might be repugnant or obsolete to frame a consistent Code, to formulate the procedure and jurisdiction of the civil courts, to prescribe a general table of fees to make the law of civil procedure cognizable to the people to provide for arbitrations and appeals to the Sadar Diwani Adalat, to provide for the limitation of suits, giving in most cases a term of twelve years, to protect the litigating people from the extortions or frauds of the unscrupulous officers of the Courts, and so on.54

Administration of Justice: Fourth Stage

Plan of Impey

Impey, in his Plan of 1781, hit at the vices of the existing system. There was a great paucity of Diwani Adalats. Therefore, their number was increased

51. Id., at p. eixxxi.
52. See Chapter VIII, infra.
53. Id., at p. eixxxi.
54. Id., at p. eixxxi.
from six to eighteen, of which only four were presided over by Collectors as Judges but only in their capacity of Civil Judges. Appeals from the decisions of a Diwani Adalat in cases where the disputed amount exceeded Rs. 1,000 were to be taken to the Sadar Diwani Adalat. Impey retained the separation of judicial functions from the executive. As usual the Judges of the Diwani Adalats could refer cases up to Rs 100 in value to some Zamindar, public officer or principal man near the place where the cause of action arose. In such cases reports of awards were to be made to the Judges who could approve, disapprove or amend them.

The provision regarding the application of personal laws in certain categories of cases, viz., inheritance, marriage, caste and other religious usages or institutions was incomplete so far as the rule of decision in other cases was concerned. Besides adding the word 'succession' to the word 'inheritance', Impey filled up the gap by providing that in all cases for which no specific directions were given, the Sadar Diwani Adalat and the Mofussil Diwani Adalats were to act according to justice, equity and good conscience. This was remarkable provision which completed the rule of decision in all civil cases of Hindus and Mohammedans.

In order to check the irregular practices in the administration of justice, Impey provided that no Judge of the Mofussil Diwani Adalat should leave the questions of fact to the determination of native law officers or other persons; they must be settled by the Judge himself. The proper function of these officers was to expound the law on the basis of the facts found by the Judge. This provision was made in view of the Patna case.

Another important feature of the Plan was putting the Sadar Diwani Adalat on a sounder basis. Impey brought the union of the powers of a Board of Superintendence with those of a Court of Appeal. Laziness, laxity, impatience and want of method were the faults of which young, inexperienced Judges, devoid of any legal knowledge and having only an imperfect knowledge of languages of their respective huge districts, were guilty. Superintendence was, therefore, as urgent as appeal. The Sadar Diwani Adalat was, therefore, to perform the following functions: (a) to hear appeals from the lower Courts in cases exceeding Rs. 1,000, (b) to decide any matter of civil nature referred to it by the Governor-General-in-Council, (c) to exercise control and supervision over the lower Courts, firstly, by receiving an original complaint, cognizable by a lower Court which refuses to entertain it, and then referring it to Mofussil Diwani Adalat for expeditious disposal, and secondly, by suspending a Judge of a lower Court on ground of misconduct and reporting the matter to the Governor-General-in-Council for final decision.

Comments

The appointment of Sir Elijah Impey as the sole Judge of the Sadar Diwani Adalat was opposed on various grounds. It was said that the appointment would be illegal as being contrary to the spirit of the Regulating Act; it might introduce English law and English lawyers into country litigation and put Impey in a position which might too much hide the Government from the eye of the natives; it would be a direct contradiction of what the Council did in the case of Raja of Chittagong. It was argued that the
appointment would give the Chief Justice control over the Company's rights because as the sole judge of the Sadar Diwani Adalat, he might submit to the Supreme Court in cases in which the Council would resist. Moreover the appointment would place him in an inconsistent position. He might do some act as Judge of the Sadar Court which would subject him to an action before the Supreme Court, or he might, as the Chief Justice of the latter, be called upon to issue a writ of Habeas Corpus to release some one whom he had committed as Judge of the former. His liability to removal by the Council might make him an instrument of oppression in the hands of a corrupt Council. In spite of these objections, Impey was given the assignment, and this act was later regarded as one of the wisest measures which Warren Hastings carried through. The arrangement was a temporary expedient in the best interest of the administration of justice. A regular and efficient Sadar Diwani Adalat with a trained lawyer as its Judge was an urgency. Moreover an effective Sadar Adalat should make it extremely unlikely that a case would arise in which the Chief Justice would be subject to any embarrassment as aforesaid; the coming up of such a case would be still more improbable when the rules framed for the Sadar Adalat were his work. The action of Hastings was opportune in itself and the future revealed its wisdom. Although, in November 1782, the Governor-General-in-Council resumed the jurisdiction of the Sadar Diwani Adalat under pressure, the wisdom of Hastings was justified in 1861 when the Supreme Court and the Sadar Adalat were united to form the present High Court. 63 "Hastings, in short, foresaw and laid the foundation of the policy in which Indian legislation was put under the direction of the legal Member of the Council, and by which the superintendence of the Muftisul Courts and an appellate jurisdiction over them were vested in the High Court." 64

Though Impey was accused of compromising his judicial independence as a Crown's Judge, and was, therefore, called back, he gave no opportunity to anyone to say that he, as the sole judge of the Sadar Diwani Adalat, acted in a way which compromised his judicial independence as the Chief Justice of the Supreme Court. Whatever the criticism, his Code was an extraordinary contribution giving new directions to Judges of the Diwani Adalats and litigants. Its compilation was the first attempt of its kind in India, and it made the law of civil procedure certain to some extent. Under the judgeship of Impey the whole judicial system definitely became much better. 65

Administration of Justice: Fifth Stage

Under the Plan of 1772, a Sadar Nizamat Adalat was established at Calcutta. In 1775 it was shifted to Murshidabad probably to avoid any interference from, and conflict as to jurisdiction with, the Supreme Court. 66 There it was put under the authority of the Naib-Nazim Reza Khan. In 1776 a plan for criminal justice from Reza Khan was adopted, under which twenty-three Fauzdar Adalats in all were established in the districts. The main feature of the plan was economy, observance of which adversely affected the administration of criminal justice. A weak and ineffective supervision further gave rise to vices in the administration. The Faujdari Adalats turned into instruments of oppression in the hands of unscrupulous officers. There was no machinery to bring the offenders to book. Innocent persons were punished and those who were guilty escaped with impunity. A miserable and pitiable state of affairs prevailed in these Courts. In fact Reza Khan was so circumcised by recommendations of particular persons, and by the protec-

63. Id., at pp 228-231, 238-241; Fiuminger, op. cit., at pp. ccxxxiv-ccxlviii.
64. Stephen, op. cit., at p. 212.
65. Fiuminger, op. cit., at p. ccxlvii; Acharya, op. cit., at p. 55; Keith, op. cit., at pp. 87-89.
66. See Chapter VII infra.
tion given to his officers by Europeans that he was not able to punish them, even when they were convicted of the greatest enormities. 67

In 1781, Warren Hastings paid attention to this sorry state of affairs and introduced some reforms in the criminal judicature.

Reforms in the Criminal Judicature.

In order to devise a machinery to arrest criminals and to bring them to trial, the Judges of the Mofussil Diwani Adalats were appointed as Magistrates also. They were, however, not given for the time being any jurisdiction to try them. They were to apprehend those persons who were suspected of having committed crimes and send them to the nearest Faujdar Aadalats for trial with written accusations. 68

To have an effective supervision over the proceedings of the criminal courts including the Sadar Nizamat Adalat, Warren Hastings created a separate Department at Calcutta to receive monthly reports and returns of proceedings, lists of persons apprehended and sent for trials by Magistrates, details of charges levelled against them, and the lists of persons released, convicted, and put in confinement by the criminal courts. A covenanted servant of the Company was appointed to act under the Governor-General as head of this Department, with the title of the Remembrancer of the Criminal Court. He was in charge of all the reports despatched by various Magistrates and courts. He was to analyse these reports, prepare extracts and arrange them in a proper way. This is how a check was to be maintained on all persons entrusted with the administration of criminal justice. But the control exercised by this officer was very weak and imperfect. The system did not prove to be effective. The Remembrancer depended for information on the reports of various courts and it was not difficult for the latter to manipulate them so as to present a favourable picture of the things and to conceal the real state of affairs from the Government. 69

In 1782, the number of Faujdar Adalats was reduced from twenty three to eighteen. In 1785, for the more speedy and effectual administration of criminal justice, the Magistrates were empowered to try petty offences; but in all cases affecting either the life or limb of the accused persons or subjecting them to imprisonment of more than four days or to corporal punishment exceeding fifteen stripes, the Magistrates could not try the accused themselves but to send them to the Faujdar Adalats. 70

In 1785, Warren Hastings sailed for England. A few words for him will close the Chapter. According to Lord Macaulay, his “internal administration, with all its blemishes, gives him a title to be considered as one of the most remarkable men in history. He dissolved the double Government. He transferred the direction of affairs to English hands. Out of a frightful anarchy, he deduced at least a rude and imperfect order. The whole organization by which justice was dispensed, revenue collected, peace maintained throughout a [vast] territory ... was formed and superintended by him. He boasted that every public office, without exception, which existed when he left Bengal, was his creation. It is quite true that this system ... was at first far more defective than it now is. But whoever seriously considers what it is to construct from the beginning the whole of a machine so vast and complex as a government, will allow that what Hastings effected deserves high admiration.” 71

68. Id., at p. 144.
69. Id., at p. 144.
70. Id., The last provision was made soon after the departure of Warren Hastings to England.
CHAPTER VII
REGULATING ACT
AND
SUPREME COURT AT CALCUTTA
Regulating Act

Background.

The salaries of the Company's servants in India were extremely low, but they earned huge profits by carrying on private trade and resorting to extortions and bribes. The public mind in England was startled by the colossal fortunes which these English Nawabs were bringing home and "the public conscience was disturbed by remours of the unscrupulous modes in which these fortunes had been amassed," This was certainly on account of the Company's mismanagement in India, which was advancing by rapid strides to bankruptcy. In 1773 the Company approached the British Parliament for pecuniary assistance. The Government of Lord North took advantage of this situation to introduce alterations on a large scale into the system of governing the Indian possessions of the Company by passing the Regulating Act in 1773. In fact the establishment of the Company's territorial sovereignty in Bengal, Bihar and Orissa was a direct prelude to Parliament's intervention in its affairs in India and the immediate cause of such intervention was financial. The history of the Company shows that whenever a Chartered Company acquired territorial sovereignty on an extensive scale, the Government was soon compelled to assume direct authority over its actions.

The Regulating Act was passed for the better management of the affairs of the Company in India as well as at home. The aim was to prevent particularly various abuses which cropped up in the government and administration of the affairs of the Company. Several provisions of the Act are pointed out here.

Reorganisation of the Government at Calcutta.

The Act provided for the appointment of a Governor-General and four Councillors for the government of the Presidency of Calcutta. In this body was vested "the whole civil and military government" of the said Presidency, as well as "the ordering, management and government," of all the territorial acquisitions and revenues in the kingdoms of Bengal, Bihar and Orissa. The Presidency of Calcutta was not treated at par with the Mofussil areas because the Crown had de jure authority on the former and de facto on the latter; these areas were not formally annexed by the Crown though reverse was the case with the town of Calcutta. As a matter of legal theory, the inhabitants of this town were regarded the subjects of the Crown, but not those of provinces of

3. Ilbert, op. cit., f. n. 2, at p. 43.
4. S. 7. For the source of this and sections quoted below, see Constitutional Documents, op. cit., at pp. 19-27.
Bengal, Bihar and Orissa, still under the shadow and fiction of the Nawab. The Governor-General-in-Council was bound by the majority decisions. The Governor-General was given a casting vote in case the Council was equally divided on a certain issue because of the absence of any member. The Governor General in Council was given the power of superintending and controlling the Government and management of the Presidencies of Madras and Bombay respectively in matters of war and peace except in cases of imminent necessity or special orders from England. The Government of these subordinate Presidencies had to transmit regularly to the Governor-General-in-Council advice and intelligence of all transactions and matters relating to the Government, revenues or interest of the Company. The Supreme Council, but under the superintendence and control of the Court of Directors in England, had also to adopt the same course.

The Act nominated Warren Hastings as the first Governor-General and John Clavering, George Monson, Richard Barwell and Philips Francis as the first four Councillors for five years subject to their removal earlier by the Crown upon representation made by the Court of Directors. The power of nominating and removing the succeeding Governor-General and Councillors was vested in the said Court.

Supreme Court at Calcutta.

The Act empowered the Crown to establish, by Charter or Letters Patent, a Supreme Court of Judicature at Calcutta on the ground that the Charter of 1755 did not sufficiently provide for the due administration of justice in such manner as the state and condition of the Presidency of Calcutta required. The Court was to consist of a Chief Justice and three puisne Judges, being barristers of not less than five years' standing, to be appointed by the Crown.

The Supreme Court was to have power to exercise all civil, criminal, admiralty and ecclesiastical jurisdiction, to appoint clerks and other ministerial officers on salaries approved by the Governor-General-in-Council, to lay down such rules of practice and for the process of the Court, and to do all such other things as would be necessary for the administration of justice and the due execution of the powers to be given by the Charter.

The Supreme Court was to be a Court of Record, and a Criminal Court in the character of a Court of Oyer and Terminer and Gaol Delivery of England for the town of Calcutta, the factory of Fort William and subordinate factories. As such it was to employ Grand and Petty Juries in criminal trial.

The jurisdiction of the Court was to extend to all British subjects residing in Bengal, Bihar and Orissa. It was empowered to hear and determine all complaints against any of the Crown's subjects in these Provinces for any crimes, misdemeanours or oppressions, and also suits or actions against the same. The Court had also authority to entertain any suit, action or complaint against any of the persons employed by or directly or indirectly in the service of the Company or any of the Crown's subjects.

8. S. 10.
9. S. 11.
It was further empowered to decide any suit or action by any of the Crown’s subjects against any inhabitant of India residing in the Provinces if there was a written agreement between the opposite parties and the latter agreed therein that in case of a dispute, the matter should be settled by the Supreme Court, provided the cause of action exceeds Rs. 500. Such suit might be brought either originally or by way of appeal.\(^{11}\)

The Court, however, was declared incompetent to hear and determine any indictment or information against the Governor-General or a Councillor for any offence, not treason or felony, alleged to have been committed by him in any of the Provinces. The Governor-General, Councillors, Chief Justice and Judges of the Court were not liable to arrest or imprisonment upon any action, suit or proceeding in the Court.\(^{12}\)

The Governor-General, the Councillors and the Judges were to act as Justices of the Peace and to hold Quarter Sessions.\(^{13}\)

The Act directed the Crown to make provision for appeals to the King-in-Council from the decisions, judgments or determinations of the Supreme Court under prescribed conditions and circumstances.\(^ {14}\)

Legislative Authority.

The Act authorised the Governor-in-Council to frame rules, ordinances and regulations for the settlement at Calcutta, other than to be just, reasonable and not repugnant to the laws of England. The Council was also empowered to impose and inflict reasonable fines and forfeitures for the breach or non-observance of such ordinances and regulations. The rules, ordinances and regulations were not to be valid unless they were duly registered and published in the Supreme Court with its consent and approbation. Registry was to be made at the expiration of twenty days of the open publication of the same. Even after registration it was lawful for a person in India to appeal therefrom to the King-in-Council which was empowered to set aside and repeal such laws. The appeal, however, was to be lodged in the Supreme Court within sixty days of their registration. Such an appeal was also permissible in England within sixty days of their publication there by a person residing in that country.\(^ {15}\)

Besides, the Governor-General-in-Council was required to transmit copies of all such laws to England where the King-in-Council might disallow them within a period of two years of their passage in India. Such disapprobation was to be duly registered and published in the Supreme Court at Calcutta. Thereupon the laws had to become null and void.\(^ {16}\)

Miscellaneous.

If any Governor-General, Councillor, Chief Justice or Judge of the Company’s settlements in India, or any person in the employment of the Company, or any of the Crown’s subjects residing in India committed any offence

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12. Ss. 15, 17.
13. S. 38.
15. S. 36.
against the Act or any of the Crown's subjects or any of the inhabitants of India, he might be tried for such offence in the Court of King's Bench in England, and, on conviction, should be liable to such fine or corporal punishment as the Court thought fit; moreover he should be liable, at the Court's discretion, to be adjudged incapable of serving the Company. 17

The Governor-General, the Councillors, the Chief Justice of the Supreme Court and its Judges were prohibited from accepting presents or engaging themselves in private trade. A person, holding civil or military office under the Crown or the Company, could not accept from native powers any present, with the exception of councillors-at-law, doctors or chaplains in the way of their professions. The Collectors, Supervisors or the Crown's subjects, employed in the collection of revenue or the administration of justice in Bengal, Bihar, or Orissa, or their agents could not enter into business transactions except on behalf of the Company. The Crown's subjects, however, might trade in Calcutta. 18

Supreme Court under the Crown's Charter of 1774

In pursuance of the power given by the Regulating Act the Crown issued a Charter on March 26, 1774, establishing the Supreme Court of Judicature at Calcutta. The Charter settled, as had already been foreshadowed in the Act, the various details relating to the Court, and abolished the legal provisions of the Charter of 1753; the latter fact meant the supersession of the Mayor's Court and the Court of Oyer and Terminer and Gaol Delivery.

Constitution and Authority etc.

The Supreme Court was constituted to be a Court of Record. 19 Then it was to consist of a Chief Justice and three Puisne Judges 20 to be appointed by the Crown to act during the pleasure of the Crown. The Charter appointed Sir Elijah Impey as the Chief Justice, and Robert Chambers, S. G. Le Maistre and John Hyde as the three Puisne Judges. They were Barristers of England of not less than five years' standing. All the Judges were declared to be Justices of the Peace and Coroners within Bengal, Bihar and Orissa. In authority and jurisdiction, they were to be in the position of judges of the King's Bench 21 in England. The Chief Justice was given a casting vote. Writs, summons, rules, orders and other mandatory process issued by the Court were to run in the Crown's name. The Chief Justice and Judges were to nominate three persons yearly to the Governor-General-in-Council for it to select one as Sheriff whose duty was to execute the orders and process of the Court and to detain in prison persons committed to him by the Court. They were to appoint necessary subordinate officers but their salaries were to be approved by the Governor-General-in-Council. They were to admit and enrol Advocates and Attorneys at law and to settle the court-fee subject to the approval of the Council. The

17. S. 39.
20. Subsequently the number was reduced to two. See 37 Geo. III, c. 142, Sec 1.
21. The Court of King's Bench at Calcutta 1249. See Legal History, at pp. 129, 133, 141-142 (1949).
sittings of the Court were regulated and the rules of practice and standing orders were to be sent to the King-in-Council for approval.  

Jurisdiction.

The Charter gave a very wide jurisdiction to the Supreme Court and defined it on the lines laid down in the Regulating Act as follows:

Original Jurisdiction.—The Court was authorized to hear, examine, try and determine all civil causes, suits and actions against (i) the Company, (ii) the Mayor and Aldermen of Calcutta, (iii) the Crown's subjects who were residents within Bengal, Bihar and Orissa or who should have resided there or who should have any debts, effects or estate, real or personal, within the same, (iv) any person who was employed by, or was directly or indirectly in the service of the Company, or the Mayor and Alderman or any of the Crown's subjects, and (v) any inhabitant of India residing in the said Provinces if he entered into an agreement in writing with the company in case of dispute between them, the matter at law to be tried by the Court, provided the cause of action exceeded half a rupee and could be decided by the Court either in the first instance or by way of appeal from the Company's Courts according to right and justice.

The Supreme Court, however, was not competent to try and determine any suit or action against a person who had never been resident in Bengal, Bihar and Orissa or against anyone resident in Great Britain or Ireland unless the suit was commenced within two years of the time when the cause of action arose and the sum to be recovered was not of greater value than Rs. 30,000.

A detailed method of procedure was laid down. That was related to the plaint filed by the aggrieved party, the precept issued to the Sheriff commanding him to summon the defendant to answer, the return of the Sheriff, the appearance or plea of the defendant, the hearing of the case with evidence, the judgment, the execution. The Supreme Court was given exclusive jurisdiction over the subject matter. The method by which the Company could be sued under the Charter of 1753 was improved by requiring the appointment of an attorney to represent the Company instead of the Governor-General.

As Court of Equity.—The Supreme Court was to be a Court of Equity in the English legal sense of the word. It was given full power to administer justice in a summary manner as nearly as might be according to the rules and proceedings of the High Court of Chancery in Great Britain. It could issue Subpoena and other process to compel the appearance and answer upon oath of the opposite party, as well as to compel obedience to the decree and order

23. Viz., trespasses or injuries; debts; duties; demands, interests or concerns; rights, titles, claims or demands relating to houses, lands or things, real or personal, the possession or interest in or mixed.
of the Court in such manner and form and to such effect as the High
Chancellor of Great Britain did.27

As Criminal Court.—The Supreme Court was to be a Court of Oyer
and Terminus and Gaol Delivery in and for the town of Calcutta, the factory
of Fort William and subordinate factories. In this capacity its authority was
like that of the Justices of Oyer and Terminus and Gaol Delivery in England.
It had to administer criminal justice in all cases of grave offences and misde-
meanours28 in such manner and form, or as nearly as the conditions and
circumstances of the place and persons admitted of, as the Courts of Oyer and
Terminus and Gaol Delivery did in England. The Charter provided for the
employment of Grand Jury and Petty Jury, summoned by the Sheriff, composed
of the subjects of Great Britain residing in Calcutta. The Court had further
authority to hear, determine and judge all crimes, misdemeanours or oppres-
sions, committed in Bengal, Bihar and Orissa by any of the Crown’s subjects
and any person employed by or being directly or indirectly in the service of
the Company or in that of any of the Crown’s subjects.29

As Ecclesiastical Court.—The Supreme Court was given ecclesiastical
jurisdiction over British subjects residing in Bengal, Bihar and Orissa. It was
to administer and execute ecclesiastical law as used and exercised in the
diocece30 of London so far as the local circumstances required. The Court
might grant probates of wills and testaments of the deceased British subjects
and letters of administration in regard to their effects if they died intestate or
without appointing executors of their wills.31

27. Constitutional Documents, op. cit. at p. 37. Equity in the legal sense means the

28. Council. His office, known as the Chancery, was closely connected with the

29. Gaol Delivery, see Chapter V, supra.

30. The lowest Consistory Courts or the Diocesan Courts of the bishops and above these the Provincial

31. The suppression of wills of personal property and granting of probate of such wills, (v) the administration of the

personal property of Intestates, and (vi) matters affecting Church property. This
An additional power was given to the Court to appoint guardians and keepers of infants and insane persons and their estates.  

As Admiralty Court. — The Supreme Court was declared to be a Court of Admiralty for Bengal, Bihar and Orissa to hear and try all cases, civil and maritime, in the same manner as the High Court of Admiralty did in England. It was given power to try, with the help of a Petty Jury of British subjects residents in the town of Calcutta, and punish all treasons, murders, piracies and other crimes maritime, committed on the high-seas, in accordance with the laws and customs of the High Court of Admiralty in England. As an Admiralty Court, the jurisdiction of the Supreme Court was extended to the Crown's subjects in the said Provinces and persons directly or indirectly in the service of the Company or any of the Crown's subjects.  

Supervision over inferior Courts.  

The Court of Requests, as established in 1753, the Courts of the Quarter Sessions to be held by the Justices of the Peace, Sheriffs, and other Magistrates were put under the control and supervision of the Supreme Court in the same manner and form as the inferior courts and Magistrates in England were under the order and control of the Court of King's Bench. This provision was made to ensure their proper functioning in conformity with law and justice. In order to achieve this object, the Court was empowered to issue writs of Mandamus, Certiorari, Procedendo or error in case of need, directed to these Courts or Magistrates and to punish wilful disobedience.  

Appeals.  

A civil appeal might be taken to the King-in-Council. It was to be filed (continued)  

The medieval system was not much affected by the Reformation. The law administered in the ecclesiastical Courts was ecclesiastical law and its many principles were taken from the 'civil' (Roman) law. P. S. James, Introduction to English Law, at  

32.  

33.  

34. In England in early times, first "Knights to keep the Peace", and then "Custodians of the Peace" to receive presentments of breaches of the peace, were appointed. In 1327 came the "Conservators of the Peace" who later came to be known as  

35.  

modern way of appeal. The writ could only be brought when there was some error apparent on the face of the record. Windeyer, op. cit., at p. 141.  

36. Archbold, op. cit, at p. 70.
within a period of six months of the delivery of judgment and the matter in
dispute was to be over 1,000 Pagodas in value. Criminal appeals might also
be preferred to the King-in-Council, but in respect of them the Supreme Court
was given full power and absolute discretion to allow or deny such appeals.
The right to refuse or admit an appeal upon terms and conditions prescribed
by the King-in-Council was reserved to it.\textsuperscript{37}

Power to suspend execution of sentence.

The Supreme Court was empowered to reprieve and suspend the execution
of any capital sentence in hard cases which presented a proper occasion
for mercy and wherein it might be proper to remit the general severity of the
law. The records of the cases with the reasons for recommending the crimina-
ls to mercy were to be transmitted to the King-in-Council for considera-
tion.\textsuperscript{38}

Immunity to Councillors and Judges.

The Governor-General, the Councillors, the Chief Justice and the Judges
of the Supreme Court were not liable to be arrested or imprisoned in any ac-
tion, suit or proceeding except in cases of treason or felony. The Supreme
Court could not hear, try and determine any indictment or information against
these persons for an offence, not being treason or felony, with which they
might be charged with having committed in Bengal, Bihar and Orissa. But
in all such cases wherein writ of capias or mesne process\textsuperscript{39} for arrest was pro-
vided, the Court might order the goods and estate of such persons to be seized
and sequestered until they appeared and yielded obedience to its judgment,
order or rule.\textsuperscript{40}

Comments.

The Mayor’s Court and the Court of Oyer and Terminer and Gaol Deli-
very, established under the Charter of 1726, suffered from many drawbacks.
They were composed of the functionaries of the Company appointed in Calcutta,
and, therefore, proved to be insufficient deterrent to wrongdoing on the part of
the Company’s officials, the Mayor’s Court was given authority to try cases
in which the Company itself was a party but its Judges, who were the junior
servants of the Company, might be removed by the Governor-in-Council at
their pleasure. They were expected to act under the English law, though
they had no knowledge of its principles. It was their duty to decide, without
any professional knowledge of the law, all the cases which affected the prop-
erty, liberty and lives of British subjects and their native dependants. From
time to time the Mayor’s Court referred complicated questions of law to Eng-
land for the opinion of the Counsel. This resulted into delaying the course of
justice. The process of an appeal from the Court to the King-in-Council was
extremely tedious and it was only rarely resorted to. In view of these defects
and the provisions of the Regulating Act and the Charter made to remove
them, the institution of the Supreme Court could be viewed as an act of
reformation rather than of innovation. The policy was to improve the
existing administration of justice. The Court was not intended to supersede
or to trespass upon the judicature deriving its sanction from the Moghul, or
to decide the question of the Moghul sovereignty by practically edging it
into limb.” It was looked upon as an instrument to terrorise the servants of
the Company. Its establishment enabled the directors of the Company “to take
the trial of alleged offences of its servants out of the hands of a complacent
Council Board, and have such cases determined by the awe-inspiring pulse

\textsuperscript{37} Constitutional Documents, op. cit., at pp. 38-39; Archbold, op. cit., pp. 70-71.
\textsuperscript{38} Constitutional Documents, op. cit., at p. 37.
\textsuperscript{39} See Chapter VIII, infra.
\textsuperscript{40} Constitutional Documents, op. cit., at p. 39.
Justice of the Crown.” What the Act achieved was, first, a change in the personnel of the Council by which the deeds of the servants of the Company would be controlled by men having no personal interest to serve by cloaking misgovernment in the districts of Bengal, Bihar and Orissa and being free from the class prejudices of the said servants; a composition of the servants of the Company.\(^{41}\)

The Supreme Court was made an effective instrument of justice by giving to its Judges the status of the Judges of the King’s Bench of England who could issue prerogative writs. This was a distinct improvement upon the former system. Moreover the Court was invested with common law, equity, admiralty and ecclesiastical jurisdictions which were exercised in England by various courts. Thus the institution of the Supreme Court can be regarded as an improvement even upon the judicial system of England where this object was achieved after one hundred years in 1873 by the Judicature Act. In fact, the Regulating Act was a precursor of the Judicature Act.\(^{42}\)

Whatever the merits of the Regulating Act and the Charter establishing the Supreme Court, both of them suffered from manifold defects, vagueness and omissions which resulted in grave consequences.

The provisions in the Act by which a majority of the Council could defeat the policy of the Governor-General was bound to result in difficulty as indeed various events soon showed. In 1766, therefore, the right to overrule the Council was easily conceded to Lord Cornwallis. The administration of Warren Hastings was distracted by dissensions between himself and his colleagues on the Councils. Three of the four Councillors usually opposed him, thwarted his policy and overruled his decision.\(^{43}\)

The Act gave very limited legislative powers to the Governor-General-in-Council which could frame regulations and bye-laws for certain areas with the consent and approval of the Supreme Court. Thus the Court had a complete control over legislation.\(^{44}\)

In the Supreme Court, not only the powers of the Mayor’s Court and the Court of Oyer and Terminer and Gaol Delivery were observed, but it also took the place of the Sadar Nizamat Adalat. The Sadar Diwani Adalat also temporarily ceased to function. However, in 1775, the seat of Sadar Nizamat Adalat was shifted to Murshidabad, and the Sadar Diwani Adalat, which was put in abeyance, began to function only on the appointment of Sir Elijah Impey, the Chief Justice of the Supreme Court, as its sole Judge in 1780.\(^{45}\)

As to the difficulties between the Governor-General-in-Council and the Supreme Court, it may be said that the provisions of the Regulating Act were obscure and defective as to the nature and extent of the authority exercisable by the Council, the jurisdiction of the Court, and the relation between the two.

41. W. K. Ferminger, Historical Introduction to the Bengal Portion of “the Fifth Report” from the Select Committee of the House of Commons on the affairs of the East India Company, at pp. ccxvi (1917).
42. In England, multiplicity of Courts caused delay, expense and hardship. Therefore, in 1873, the Judicature Act was passed to amalgamate the existing Courts of various jurisdictions into one Supreme Court of Judicature. For details see Potier, op. cit., at pp. 114-118.
43. Ferminger, op. cit., at pp. ccxv; Archbold, op. cit., at p. 71; Ilbert, op. cit., at pp. 52-53; Cowell, op. cit., at p. 43.
44. Ferminger, op. cit., at p. ccxvi; Archbold, op. cit., at pp. 73-74.
45. Ferminger, op. cit., at p. ccix; Archbold, op. cit., at p. 74.
"The ambiguities of the Act arose partly from the necessities of the case, partly from a deliberate avoidance of new and difficult questions on constitutional law. The situation created in Bengal by the grant of the Duwani in 1765, recognized by the legislation of 1773, resembled what in the language of modern international law is called a protectorate. The country had not been definitely annexed; the authority of the Delhi Emperor and of his native viceregent was still formally recognized; and the attributes of sovereignty had been divided between them and the Company in such proportions that whilst the substance had passed to the latter, a shadow only remained with the former. But it was a shadow with which potent conjuring tricks could be performed. Whenever the Company found it convenient, they could play off the authority derived from the Moghuls against the authority derived from the British law, and justify under the one proceeding which it would have been difficult to justify under the other. In the one capacity the Company were the all powerful agents of an irresponsible despot; in the other they were tied and bound by the provisions of Charters and Acts of Parliament. It was natural that the Company’s servants should prefer to act in the former capacity. It was also natural that their Oriental principles of government should be regarded with dislike and suspicion by English statesmen, and should be found unintelligible and unworkable by English lawyers steeped in the traditions of Westminster Hall."

In the latter half of the nineteenth century, the English had become familiar with such situations and, therefore, devised appropriate formulae to cope with them, but in 1773 both the theory and the experience were lacking, which are requisite for adopting English institutions to new and foreign circumstances... The Regulating Act provided insufficient guidance as to points on which both the Company and the Supreme Court were likely to go astray; and the Charter by which it was supplemented did not go far to supply its deficiencies. The language of both instruments was vague and inaccurate. They left unsettled questions of the gravest importance. The Company was vested with supreme administrative and military authority. The Court was vested with supreme judicial authority. Which of the two authorities was to be paramount? The Court was avowedly established for the purpose of controlling the actions of the Company’s servants, and preventing the exercise of oppression against natives of the country. How far could it extend its controlling power without sapping the foundations of civil authority? The members of the Supreme Council were personally exempt from the coercive jurisdiction of the Court. But how far could the Court question and determine the legality of their orders?

The express provisions of the Regulating Act as well as the omissions it suffered from, afforded basis for unfortunate arguments and differences of opinion. The Act was silent. The technical, formless, temperamental, and obstinate quibbles of judges and the obstinacy of juries, capable of being an instrument of the most monstrous injustice when administered in an atmosphere different from that in which it had grown up.

To whom was this law to be administered? To British subjects and to persons in the employment of the Company. But whom did the class include? Probably only the class now known as European British subjects, and probably not the native inhabitants of India, residing in the three provinces, except such

46. Ilbert, op. cit., at pp. 53-54
47. Id., at pp. 55-56.
of them as were residents in the town of Calcutta. But the point was by no means clear.

"What constituted employment by the Company? Was a native landowner farming revenues so employed? And in doubtful cases on whom lay the burden of proving exemption from or subjection to the jurisdiction?"

These were certain questions raised by the Act and the Charter, and they inevitably led to grave conflicts between the Supreme Council and the Supreme Court.

48. See In re Ameer Khan, 6 Berg. L. R. 972, at p. 447 (1870).
49. Ibid., op cit., at p. 56.
CHAPTER VIII

DISSENSIONS AND ACT OF SETTLEMENT

Three issues

In the controversies between the Supreme Council and the Supreme Court which arose on account of the indefinite terms of the Regulating Act and the Charter of 1774, there were three main issues at various times.

First issue.

The first issue was as to the jurisdiction of the Supreme Court over the English and Indian officers of the Company employed in collection of revenue in respect of corrupt or oppressive acts done by them in their official capacity. The Supreme Council maintained the position that their officers were exempt from the Court's jurisdiction in regard to any acts done by them in connection with the collection of revenue. The Court, on the other hand, took the position that it was competent to entertain actions brought against the said officers for their irregular or oppressive acts with which they might be charged in the execution of their duty. It was one of the main objects of the Regulating Act that such acts must be punished by the Supreme Court. This view of the Court was clearly in accordance with the policy of the Act, which was to protect the Indians from oppression in the collection of revenue.

Case of Kamal-ud-din.—The case of Kamal-ud-din of 1775 is worth nothing here. This man, having been committed to prison, in execution by the Calcutta Revenue Council for arrears of revenue due from him asfarmer of the revenue, which he disputed, obtained Habeas Corpus from the Supreme Court to set him at liberty on bail. This was taken by the Supreme Council as a usurpation on the rights of the Company as Diwan. It held the opinion that the Court had no authority to take cognizance of any matter relating to the revenue, and that the Court's proceedings in the release of Kamal-ud-din exceeded its jurisdiction and were against law. This opinion of the Council made it, and not the Court, to be the true interpreter of the Act and obviously was an outrageous assertion of military power against law.

1. J F. Stephen says: "Like many later statutes the Regulating Act used language involving problems, the solution of which was left to those who had to work it, because Parliament, either from ignorance or from timidity, did not choose itself to solve, or even to study the n" The Story of Nuncomar and the Impeachment of Sir Elijah Impey, Vol. II, at p. 125 (1885).


3. Stephen, op. cit., at pp. 131-135, 140-149; W. K. Firminier Historical Introduction to the Bengal Partition of the Fifth Report from the Select Committee of the House of Commons on the Affairs of the East India Company at pp. 61-62, where he says that the revenue debtors to bail for revenue payment in the East India Company and that they had no right to imprison a man without bail on mere suspicion. In other words, the Supreme Court did not allow the Revenue Courts to imprison a man without bail on mere suspicion. As far as I can discover, this was all that had been done in the course of the first four years of the Court's existence, though much jealousy, much apprehension and much bad feeling had been aroused."
Second issue

The second issue was as to the right of the Supreme Court to try actions against the judicial officers of the Company for acts done by them in the execution of their legal duty. This question arose in a famous case known as the Patna Case.4

Patna Case.—The facts of the case are as follows: Shahbaz Beg Khan, a native of Kabul, came to India to seek his fortune as a soldier and became very rich. He settled at Patna after his marriage with Naderah Begum. He died in December 17/6 leaving behind him considerable property in possession of the widow. Sometime before his death he had called from Kabul a nephew Bahadur Beg, the son of his brother. It was alleged, though not proved, that Shahbaz Beg Khan had expressed his desire to make Bahadur Beg his heir. Within three weeks of his death, Bahadur Beg filed a petition before the Patna Provincial Council. It was stated in the petition that he was the adopted son of the deceased and that the widow of the deceased had embezzled some of the goods. It was, therefore, prayed that guards might be set to protect the property and that the Kazi and Muftis, the Mohammedan Law Officers of the Council might be instructed to ascertain the petitioner's right and give information to the Council that the petitioner might obtain his right. No definite or distinct claim was made. The Council thereupon issued an order to the Kazi and Muftis to prepare an inventory of the property, to secure its title to the time of decision and its division, and to make a written report to the Council according to ascertained facts and legal justice. By way of comment, it may be pointed out here that the ex parte proceedings without notice to the widow were “proof of the looseness with which business of this kind was then conducted.”

The Kazi and Muftis went to the house of the deceased and after a good deal of difficulty entered the house, locked it up and sealed some of the doors. After a few days they prepared an inventory of the property. On this occasion Naderah Begum was ill-treated and taken as an object of rapine and plunder; she therefore fled from the house and retired into a Dargah, a holy place. There also she remained under constant restraint for about three months.

In the meantime, the Kazi and Muftis held an inquiry and then submitted a report to the Patna Council. The report stated for the first time the nature of the dispute. It was said that Bahadur Beg claimed the property as the adopted son of Shahbaz Beg, that the widow claimed it under a will and a deed of gift made by the deceased, and that the will and the deed of gift were both forged. The report recommended that the property should be divided into four parts, of which three should go to Bahadur Beg because his father was the legal heir of the deceased, and the fourth part should be given to the widow.

The Patna Council accepted the report and ordered the Kazi and Muftis to divide the inheritance accordingly. Some sort of division was made but the widow refused to accept the share allotted to her. Ultimately she brought an action in the Supreme Court against Bahadur Beg, the Kazi and Muftis for assault, battery and imprisonment during a period of six months, and also for breaking and entering her house and carrying off her property to the value of rupees six lacs. The Supreme Court issued a writ of Capias which meant a warrant of the arrest of defendants liable to be released on giving bail. All of them were arrested, brought to Calcutta and placed in the jail on not furnishing bail.

The first question which arose was as to the jurisdiction of the Supreme Court over Bahadur Beg. Evidence showed that he was the farmer of the revenue of a certain village. The Court, therefore, held that he was subject to its jurisdiction as being directly or indirectly in the service of the East India Company.

The defence of Bahadur Beg was that he was only a suitor and that all he did was to take what the ministers and officers of a Court of Justice gave him.

The substance of the justification of the Kazi and Muftis was that the Provincial Councils were Courts of Justice before the Regulating Act and were attended by Kazis and Muftis to whom suits between Mohammedans were referred. Thereupon, the Kazis and Muftis heard the parties and the evidence on both sides and made a report to the Court which on its basis passed a decree, which... This arrangement was sanctioned by... had requisite power for that purpose... cause between Mohammedans and it was referred to them as Kazis and Muftis. The acts complained of were done by them as ministers and officers of the Court of Justice.

The whole case was tried before the Supreme Court for ten days. The Court found that the report submitted by the Kazis and Muftis was a testimony to the fact that there law officers did not even possess the most elementary notions of what was required for the investigation of the questions of fact. They did not hold any proceedings in the nature of a trial. Several most important facts were ascertained by them in casual conversation, not on oath, and even by writing notes to which verbal answers were sent back by those persons who were regarded as witnesses. The bare statement of Bahadur Beg was accepted as proof of his claim because it was clear and explicit though no evidence was taken about it. The Court observed that the Patna Council had no authority to make over to the native law officers the actual decision of the case itself. This was obviously and radically illegal and amounted to gross desertion of its duty. Later on even Warren Hastings himself spoke critically of great irregularity in the proceedings of the law officers whose sole business was to have declared the laws, not to become the judges of facts; it was the Diwani Court which was to decide the questions of facts. To examine witnesses was entirely foreign to the duty of the Kazis and Muftis; they should have been examined by the Court itself.

The Court then examined the report of the law officers and the evidence given at the trial before it as to the forgery of the deeds under which the widow claimed the property. It concluded that they were genuine and the report submitted by the Kazi and Muftis was unjust and absurd, some most important statements made in it being vitally false. The Court assessed the damages to the extent of three lacs of rupees on the ground that the widow was deprived of property in her possession to which she was not entitled, by acts corrupt and oppressive in essence and done in a cruelly brutal and offensive way. The defendants were unable to pay these huge damages and were, therefore, lodged in Jail.

5. A farmer of land revenue stipulated with the Government to pay a fixed sum of money as revenue and indemnified himself by the surplus he could collect from those persons whom he leased the land.

Comments.—The Patna Case is a sad commentary on the administration of justice by the courts of the Company. The Sadar Diwani Adalat was at least discontinued since 1775 by the Governor-General-in-Council in the apprehension that the legality of its jurisdiction might be disputed by the Supreme Court. Thus there was no check on the proceedings of the lower courts. The so-called Provincial Courts were really and substantially not courts at all; they had given up their powers to native judges from whom there was no appeal. An adverse comment on their proceedings by Warren Hastings has already been mentioned. In fact the Provincial Councils had neither the men nor the time, neither the knowledge nor education, necessary for their efficient functioning.

It appears that the decision of the Supreme Court that farmers of revenue, indirectly engaged in the collection of revenue, were amenable to its jurisdiction, caused some panic among the renters of Bihar who made a petition to the Patna Council for their being relieved of the farms they held. The Supreme Court, however, justified its stand on the basis of the terms of the Regulating Act whose one object was to protect the cultivators against the oppressions at the hands of the Collectors of revenue. The faults, in fact, lay in the legislation, made in a rash peremptory way, and not with the Supreme Court, by which it was established.7

Third issue.

The third issue was as to the claim of the Supreme Court to exercise jurisdiction over the whole native population to the extent of making them plead to its jurisdiction if a writ was served on them. The dispute on this point culminated in Cossijurah case.8

Cossijurah case.—The Patna case whose proceedings took place in 1777-79 was followed by Cossijurah case in 1779. The latter case brought the quarrel between the Supreme Council and the Supreme Court to a state of crisis by the beginning of 1780. The facts of the case are as follows: One Cossinaut Baboo had lent a large sum of money to the Zamindar or Raja of Cossijurah. He had tried in vain to obtain this money through the Board of Revenue at Calcutta. He, therefore, sued the Raja in the Supreme Court and filed an affidavit in August 1779 which stated that the Raja was employed in the collection of revenue and was, therefore, amenable to the Court's jurisdiction. The Collector of Midnapore, in whose district the Raja resided, informed the Governor-General-in-Council about this development and said that the Raja was hiding himself in order to avoid service of the writ to a great loss of the revenue. The Council, after having obtained the opinion of the Advocate-General of them that they were not the Court unless they served by their own consent to the jurisdiction of the Court. A special direction to the same effect was issued to the Raja of Cossijurah, who thereupon took notice of the further process of the Court. Its people drove away the Saer and his officers when they tried to arrest him under the writ of Capias.

The Supreme Court, thereupon, issued another writ to resequestrate the property of the Raja to compel his appearance. The Sheriff with a small armed force of men marched to Cossijurah in order to execute the writ, seized

7 Stephen, op cit., at pp 133-137. See also pp 195-197.
8 Id., at p 141; Hillton, op cit., at pp 56-57; Archib. Id., op cit., at pp. 74-75.
the person of the Raja violently, outraged the sanctity of the family idol and broke into the zanzis. In the meanwhile, the English Commander of troops at Midnapore marched with a force of sepoys against the Sheriff's party and arrested them in execution of the orders of the Governor-General-in-Council. The process to arrest the Commander for contempt was also prevented by military force.

Finally Cossinaut Baboo brought an action for trespass against Warren Hastings and members of the Council individually. At first they entered appearances but when they found that they were sued for acts done by them in their official capacity, they withdrew and would not admit to any process of the Court against them. The Council made an announcement to all persons in Bengal out of Calcutta that they were not to take any notice of the process of the Court; if the Court attempted to enforce its process, the Council would prevent it by military force.  

Comments.—The action of the Council has been criticized as haughty, quite illegal and most violent without any justification, but it is natural and intelligible. The councillors hated the Supreme Court. It represented an authority which the servants of the Company practically repudiated. It represented English law which again they hated both for its defects and merits. It was a matter of great grievance to them that the Zamindars should be interfered with if, in order to pay the revenue punctually, they squeezed their ryots in a way which would not be considered as oppressive or extortionate. Though not subject to the jurisdiction of the Court by an appeal to the King-in-Council. But they adopted a simpler course; they had the military force in their hands as well as the public feeling and preferred to use that force. It would have been contrary to the nature of the English law to interfere with the Court because the Court, as such, the Court only held subject to its jurisdiction to the extent of appearing to plead to a suit sued in the Court. The Council, on the other hand, contended that this was not so, and if a person, not being an Englishman or in the employment of the Company, was sued in the Court, he was justified in taking no notice of its process. In other words, except the residents of Calcutta, every defendant was to judge in his own case whether he was amenable to the jurisdiction of the Court or not. This was a wrong position according to certain historians such as J. F. Stephen.

Other aspects.

These were the three main heads of the conflicts between the Supreme Council and the Supreme Court. It appears from the above discussion that the Court was not much at fault. Though it is difficult to give a historical verdict against the Court, there are some weak points of the institution apart from those mentioned in the previous chapter, which are worthy of consideration.

Oppression through law and procedure.—The procedure of the Supreme Court in the Motussil was a slightly modified ordinary English procedure in civil actions at common law. A writ of Capias was to be issued and served on the defendant. It was not an ordinary summons but a warrant

of arrest, issued to ensure the defendant's appearance before the Court. On the issue of the writ, if the defendant did not furnish bail to answer the action, he was arrested 'on mesne process' and lodged in jail till his case was heard. This took a long time. The writ, however, was issued only after the plaintiff had filed an affidavit stating the fact to make the defendant liable to the jurisdiction of the Court and a prima facie case had been made out for its issue to the satisfaction of the Court. In spite of this redeeming feature, the law of arrest on mesne process, as pointed out by J. F. Stephen, 'was beyond all questions one of the worst and most oppressive points of the law of England as it stood, down almost to our own [i.e., English people's] times. Its introduction into India was indefensible.'

The effect of the procedure was that a man, on the basis of an affidavit sworn in his absence, might be arrested at some distant place in the Mofussil and brought to Calcutta to be committed to prison at a great distance from his hometown, unless he could put in bail for an action, perhaps brought against him without any just cause. Even if the person against whom the writ was issued, pleaded to the jurisdiction of the Court and his plea was allowed, he was put to a lot of inconvenience and he had to engage some English attorney and counsel at a great expense.

James Mill adds that persons confined by the Courts of Diwani Adalat were collusively arrested by process of the Court or removed by the writ of Hebeas Corpus where the language was as unknown as the authority of the Court. Its process was abused to frighten the people in the Mofussil. Arrests were frequently made for the same cause. A purchaser of a zamindari was ruined by suits started by paupers, based on claims before the purchase. The natives of all rank refrained from the collection of revenue out of fear. The renters and even hereditary Zamindars were driven away or arrested at the time of collection and the crops embezzled. If a farm was sold in default of payment, the new farmer was sued, ruined and disgraced. Ejectments were brought for land which was decreed in the Diwani Adalat. In an action where Rs. 400 were recovered, the cost exceeded Rs. 1,600. "When to these abuses incident to the institution of the Court itself, and derived from distance and the invincible ignorance of the Natives respecting the laws and practice of the Court, we add the disgrace brought on the higher orders, it will not perhaps be rash to affirm that confusion in the provinces and a prodigious loss of revenue must be the inevitable consequence of upholding this jurisdiction."

H. Cowell points out that the action of the Governor-General and Council declared that, by the acts and declarations of the Judges, the Company's office of diwan was annihilated; the country government subverted; and they and their officers, acting under their authority, were threatened with the pains and penalties of high treason. The Judges asserted that their power derived directly from the Crown was greater than that of the Council which was derived from the Company, and that their duty was by the inherent force and vigour of English law to restrain the Executive, and to protect the Natives.

11. Id., at pp. 141-145.
12. Id., at p. 145.
Gowell further says that the Supreme Court, "vested with such extraordinary powers, and so ludicrously unsuited to the social and political condition of Bengal, was not merely to exercise a civil and criminal jurisdiction, wholly strange and repugnant to the Indian people; it might sit one day on its common law side and give judgment to a suitor, and on the next day might sit on its equity side, and restrain that suitor from proceeding to execution. It might on one side adjudge a man to be the absolute owner of property, and on the other side consign him to perpetual imprisonment if he did not, in his character of trustee, forthwith give it up to those beneficially entitled. In short, the whole system of English law and equity, with its rules and customs and process, handed down from feudal times, moulded during struggles between secular and ecclesiastical powers, between church and commonalty, between common law and civil jurisprudence; while time alone had rendered endurable to the people amongst whom it had grown up, a people widely different in habits, character, and form of civilization from any to be found in the East, was introduced into India..."

Lord Macaulay describes the rule of the Supreme Court as a reign of terror, "of terror heightened by mystery; for even that which was endured was less horrible than that which was anticipated. No man knew what was next to be expected from this strange tribunal. It came from beyond the black water, as the people of India, with mysterious horror, called the sea. It consisted of judges not one of whom was familiar with the usages of the millions over whom they claimed boundless authority. Its records were kept in unknown charactery; its sentences were pronounced in unknown sounds." It may be noted here that these extensive quotations from authors of repute, though probably exaggerations, overlook the other side of the picture. The oppressions and extortions of the English servants of the Company, high and low, and those of the local puppets were no less horrible, and as appears from the work of J. F. Stephen, the Supreme Court in a way proved to be a powerful deterrent to their uncalled for designs and vested interests. The Court was created to further certain cause and for that purpose it was vested with wide powers. It resolutely exerted those powers to extend the principles of the only law which it thought capable of protecting the interest of society.

Supreme Court and Europeans.—In 1778, Sir Elijah Impey wrote that servants of the Company were in fact the sovereigns of Bengal, Bihar and Orissa and their interest lay in weakening as much as possible the administration of justice. They considered the institution of the Crown's Court as an usurpation on their right of sovereignty. They thought that it weakened their authority by which they could protect from prosecutions their agents and dependants and by which they were kept amenable to no justice. Natives had been protected from their acts of oppression and misdeeds by the Court. They in g... but the servants of the Company. State of affairs in 1778 when act... Greatly by two natives for putting them in confinement for a night, beating them with a cane, and causing his servants to beat them with a view to compelling them to

15. Id., at p. 39.
17. See also id., at pp. 59-60.
leave one service for another. Gressy demanded Jury trial. This claim being in direct contravention of the Charter, counsels refused to argue his case. He, therefore, pleaded his own cause. The Court decided against him and awarded damages to the plaintiffs amounting to Rs. 200.\textsuperscript{19}

In 1779 led to a petition for it was also proposed in the could be empowered to hear appeals from the Supreme Court. The Calcutta Europeans objected to the Court as it put a strong restraint on their oppressive activities they were so much addicted to. The petition, however, led to the appointment of a Parliamentary Committee which, in 1781, published a voluminous report on the history of the controversy between the Supreme Court and the Council.\textsuperscript{20} Earlier Warren Hastings had appointed Sir Elijah Impey as the sole Judge of the Sadar Diwani Adalat at Calcutta to improve relations between the Council and the Court. This, however, was wrecked owing to Impey's having accepted the job without proper authority and compromising his judicial independence.\textsuperscript{21}

Ultimately the Act of Settlement, 1781, was passed to resolve disputes and difficulties, discussed so far, which arose on account of the ill-advised and ignorant policy of the framers of the Regulating Act.

**Act of Settlement, 1781**

The Act was passed to explain and amend the Regulating Act. Its preamble spoke of the doubts and difficulties with regard to the meaning of the provisions of the Act of 1773 and the Charter of 1774, of dissensions between the Judges of the Supreme Court and the Governor-General and members of the Council, of fears and apprehensions which quieted the minds of inhabitants subject to the Government of Bengal. It spoke of further mischief which might possibly ensue from the said misunderstandings and discontents in the absence of a reasonable and suitable remedy. It then stated that it was expedient that the lawful Government of Bengal, Bihar and Orissa should be supported, that revenues should be collected with certainty, and that the inhabitants should be maintained and protected in the enjoyment of all their ancient laws, usages, rights and privileges. The Act, therefore, provided as follows:\textsuperscript{22}

**Immunity to Governor-General and Council**

The Governor-General and Council, acting as such, were not to be subject, jointly or severally, to the jurisdiction of the Supreme Court. No person was to be held responsible by the Court, either civilly or criminally, for acts done by him under an order of the Governor-General and Council in writing, but with respect to such an order as extended to a British subject, the immunity clause had no force and the Court was given complete jurisdiction. The Governor-General and Council, jointly or severally, and anyone acting under their orders were to remain liable to complaint, suit or process before any competent Court in England.\textsuperscript{23}

19. Id., at p. 205.
20. Id., at pp. 205-206.
22. Archbold, op cit., at pp. 74-80; Constitutional Documents, op. cit., at pp. 60-61; Cowell, op cit., at pp. 51-57.
23. Ss 1-4. See also Ss. 5-7. For sources of these and the sections quoted below, see Constitutional Documents, op. cit., at pp. 60-61; Archbold, op. cit., at pp. 74-80; Cowell, op. cit., at pp. 51-57.
Restrictions on the jurisdiction of the Supreme Court.

The Supreme Court was not to exercise any jurisdiction in any matter concerning the revenue or acts ordered or done in its collection according to the use or practice of the country or the Regulations of the Governor-General in Council. This provision removed one of the causes of friction between the Council and the Court.

In order to remove all doubts concerning the persons subject to the Supreme Court, provided that no person was to be subject to such a person was to be set aside so much of the courts in the Patna case as made the farmer of land revenue, being in the indirect service of the Company, amenable to its jurisdiction. The exclusion of the persons possessing any interest in, or authority over lands or rents in these Provinces hit at another source of friction between the Council and the Court.

No person, by reason of his being employed by the Company or the Governor General and Council, was subject to the jurisdiction of the Supreme Court in any matter of inheritance or succession to lands or goods, or in any matter of dealing or contract between parties, except in actions for wrongs or trespasses and also except in any civil suit by agreement of parties in writing to submit the same to the decision of the Court. This provision was a great relief particularly to those natives who were employed in the above manner but were residing beyond Calcutta.

In order to render judicial officers more safe in the execution of their office, the Act provided that no action for wrong or injury was to be entertained by the Supreme Court against any person holding a judicial office, in the country courts for any of his judicial decisions nor against any person acting thereunder. This provision was an outcome of the Patna Case. In order to bring an action against judicial officers for corruption; a written notice was to be served on the person concerned, stating fully the cause of complaint. No such person was to be arrested or admitted to bail in such a case until he declined to appear before the Court and answer the charge after the said notice was duly served.

Law applicable to natives.

Keeping in view the inconveniences which had arisen from the application of English law to the natives, the Act empowered the Supreme Court to decide all actions and suits against the inhabitants of Calcutta, provided that their succession and inheritance to lands, rents and goods, and all matters of contract and dealing between parties and party should be determined in the case of Hindus by the laws and usages of Hindus, and in the case of Mohammedian by the laws and usages of Mohammedian; and where only one of the parties should be a Hindu or Mohammedian by the laws, and usages of the defendant. This provision constituted the first express recognition of Warren's doctrine.

27. S. 24.
29. S. 17.
Hastings’ rule, laid down in 1772, in the English statute law. “But two ways of giving expression to the same principle could hardly show more variety. ‘Marriage, caste and other religious usages and institutions’ are not mentioned in the Act of 1781; ‘matters of contract and dealing’ were not mentioned in the Regulation of 1772. The Act where one party only is a Hindu or a Mohammedan introduces for the first time the law of the defendant: the Regulation had left such a case to justice, equity and good conscience—that is, to the good sense of the Court. And between the two provisions there was an underlying difference—namely, that within Calcutta the residual law, the law to be applied, was the law of England—not jus naturale nor the unfettered discretion of any judge.”

In order that regard should be had to the civil and religious usages of the natives, it was provided that the rights and authorities of fathers and masters of families, according as the same might have been exercised by the Hindu or Mohammedan law, should be preserved to them within their families, nor should any acts done in consequence of the rule of law of caste respecting the members of the said families only be held and adjudged a crime, although the same might not be held justifiable by English laws. The Supreme Court was empowered to frame such forms of process and make such rules and orders for the execution in suits, civil or criminal, against the natives as might accommodate the same to their religion and manners. They were, however, to be transmitted to the Secretary of State for the royal approbation, correction or refusal.

Recognition of the Company’s courts.

A important part of the Act which completely reversed the policy of the Act of 1773 was the Parliamentary recognition of the Company’s courts, existing independently of the Crown’s Court. Sadar Diwani Adalat, as it entertained civil cases in appeals from the country courts, should lawfully hold such cases and appeals in the usual manner and with usual powers, and should be final and conclusive suits of the value of to hear and determine cases of all offences, abuses and extortions committed in the collection of revenue, and cases of severities used beyond what appeared to the Court customary or necessary to the cases, and to punish the same according to sound discretion, punishment not extending to death, maiming or perpetual imprisonment.

Power of legislation.

The Regulating Act had conferred a limited legislative power on the Governor-General-in-Council in regard to Calcutta only, subject to the control of the Supreme Court. The said Council framed Regulations for the Provinces in exercise of the powers available to the Company as Diwan. For the first time this authority was recognised by the Act of 1781. It empowered the Governor-General-in-Council to frame Regulations for the Provincial Courts and Councils. Their copies were to be dispatched to the Court of Directors and the Secretary of State within six months of their passage. The King-in-Council might disallow or amend them within two years.

30. G. C. Rankin, Background to Indian Law, at p. 9 (1946).
31. S. 18.
32. Ss. 19, 20.
33. Ss. 21, 22.
34. S. 25.
Court had no controlling power in regard to these Regulations, but it was not bound by them. This provision was of great significance in the history of Indian legislation as it was under this enactment that most of the Regulation law was passed.55

Indemnity.

The defendants in the Patna case were to be released from prison on security being given by the Governor-General in-Council for payment of the damages awarded, which was in fact done; they were free to file an appeal before the King-in-Council against the judgment of the Supreme Court although the time under Charter had expired.56 The Governor-General and Council, Advocate-General and all persons acting under their orders were indemnified, discharged and saved harmless from any action, suit or prosecution whatsoever on account of the disobedience and resistance to the execution of the orders of the Supreme Court during January 1779.—January 1780.57

Comments.

The legislative decision in the form of the Act of Settlement was substantially in favour of the Governor-General in-Council and against the Supreme Court on all counts. J. F. Stephen says that the passage of the Act clearly shows that the Court correctly interpreted the law as it stood.58 But according to G. Ilbert 'this construction seems to go too far. A legislative reversal of a judicial decision shows that, in the opinion of the legislature, the decision is not substantially just, but must not necessarily be construed as an admission that the decision is technically correct. It is often more convenient to cut a knot by legislation than to attempt its solution by the dilatory and expensive way of appeal."59

The controversy that arose on account of a careless omission by the authors of the Regulating Act to define the limits of two independent powers established by them was set at rest in 1781. The Supreme Court continued to exist, and even with its diminished jurisdiction, powers and pretensions, ultimately earned greater prestige, authority and regard than before. It was hailed as a great institution both by Europeans and Indians. The English lawyers laid the foundation of a complete system of Anglo-Indian jurisprudence during the next eighty years of the existence of the Court.60

The Parliamentary recognition of the Company's courts, the grant of legislative authority without veto of the Supreme Court, the limits set on the latter's powers, the declaration of the right of Hindus and Mohammedans to the enjoyment of their own laws and usages, and so on, brought a complete settlement to form the foundation of the Indian polity for coming generations.61

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36. S. 27.
37. S. 28.
40. Cowell, op. cit., at pp. 57, 58.
41. Id., at pp. 58-59.
jurisdiction with the Supreme Court, or an exclusive one; if the latter, then under what restrictions. The phrase "British subjects" was used in both the enactments in such a manner as necessarily excluding from its meaning the Hindus and Mohammedans, but it was so used that as regards at least the subjects, not being natives of Great Britain or India, subsequent explanations made it almost impossible to assign any clear and definite meaning to it. Secondly, the Act of 1781 perpetuated the distinction between Presidency towns and Mofussil which had originated in the distinction between the factories of the Company and the Moghul territories.

**Pitt's Act**

At the close of this Chapter, it may be relevant to mention, in brief, some provisions of the Pitt's Act, passed by British Parliament in 1784. This Act established a Board of Control to superintend the affairs of British territorial possessions in the East Indies. The number of members of the Council of Governor-General was reduced to three, of whom the Commander-in-Chief of the Company's forces in India was to be one. The control of the Governor-General-in-Council over the subordinate Presidencies was enlarged. The Act required that the servants of the Company, under heavy penalties, must declare truly on oath the amount of property they brought from India.

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42. Id., at pp. 57-58.  
43. ibid., op. cit., at pp. 65-68. For other provisions see pp. 69-70.
Chapter IX

TRIAL OF NANDKUMAR

The trial of Nandkumar that took place in 1775 appears to be the result of some sort of collusion between Warren Hastings and Elijah Impey. In this case, the Supreme Court did not act with clean hands. Maharaja Nandkumar, a great Hindu of Bengal, was not on good terms with Warren Hastings. He accused Hastings of corrupt practices before his Council. The charges were written, minute and specific. The Governor-General maintained that the Council room was not a proper forum for investigation into the charges, that he could not expect the fairness of judges from the Council as it was then constituted, and that he could not submit to be confronted with a man like Nandkumar without betraying the dignity of his post. The majority, however, resolved to go into the accusations. Hastings, thereupon, dissolved the Council and left the room. Three Councillors voted themselves a Council, put Clavering, a Councillor, in the chair, ordered Nandkumar to be called in and heard him about the charges. The Council declared Hastings guilty of the charges and resolved that large sums by way of bribery taken by Hastings must be deposited in the treasury of the Company by taking proper measures for their recovery.

Nandkumar, in a way, was triumphant. He, however, played a perilous game. He drove to despair a man of resources and determination. With all his understanding and acuteness Nandkumar was unaware of the nature of the institutions under which he was living. He saw only a favourable majoritv of the Council, which was, somehow, very powerful, and outvoted Hastings so often. He had no idea of the separation between political and judicial functions. It never came to his mind that there was an independent authority in Bengal other than the Council—an authority which could protect one whom the Council wanted to destroy and execute one whom it wished to protect. In its own sphere, the Supreme Court was quite independent of the Government. The Judges, especially the Chief Justice, of the Supreme Court, were hostile to the majority of the Council. With his usual sagacity, Hastings could see this and acted to exploit this authority to his own advantage.

Suddenly, Nandkumar was arrested on the charge of committing a felony and thrown in the common prison. The crime imputed to him was that he had forged a bond five years before. The ostensible prosecutor was a native, Maulin Persad, but it was the opinion of everybody that the real prosecutor was Hastings. The rage of the majority of the Council was high. They demanded that Nandkumar should be admitted to bail, but the Supreme Court returned only haughty and resolute answers. Upon a prima facie case made out against him, he was brought and tried before the Court and a Jury composed of twelve Englishmen. The trial was protracted to a most unusual length. A verdict of guilty was returned and the Court sentenced him to death under an Act of British Parliament, passed in 1728; the death-sentence was duly executed. The Court refused to grant leave to appeal to the King-in-Council and also to grant a respite.

Lord Macaulay, James Mill and other historians are critical of the trial, conviction and execution of Nandkumar, and point out some sort of conspiracy between Hastings and Chief Justice Impey to put Nandkumar out of the former’s way.² It is not without basis in view of the political situation of Bengal at that time. There are historians like J. F. Stephen who are opposed to these critics.³ Stephen says that it was not only Impey who tried Nandkumar but all the Judges with the help of the Jury.⁴ Whatever the justification given for the conduct of the Supreme Court in the trial, there are matters which show that the Court did not act fairly. First, it is doubtful if the Supreme Court had jurisdiction over Nandkumar, who was not a resident of Calcutta, and that also in a case which was started at the instance of another native Mohun Pershad.⁵ Second, two of the Judges of the Supreme Court were committing Magistrates also. This must have affected the trial. It was the weakness of the Regulating Act that the Judges were to act as Justices of the Peace. This arrangement was defective because the functions of a committing Magistrate and a Judge are essentially different and to some extent opposed to each other. A Judge before whom a person has to stand a trial is not expected to be as wholly unprejudiced as a Judge who has try a case.⁶ Third, the witnesses of Nandkumar were cross-examined not once but many times by all the Judges. Indian witnesses were not accustomed to English law and procedure and the ways of the English courts. They met with a different treatment. The result was that they got confused under a severe and repeated cross-examination by White Judges and the whole defence of the accused collapsed.⁷ Fourth, the offence of forgery with which Nandkumar was charged and for which he was ultimately convicted was alleged to have been committed under the Supreme Court under post facto law as the prosecution was brought after the spirit of English practice of all rational societies.⁸ Fifth, the Statute which made forgery a capital offence and under which Nandkumar was punished was passed in England in 1728, suitable in conditions of that country only, without any reference to the state of society in India. The law was unknown to the natives and was never formally promulgated in Calcutta. The Supreme Court had, however, held that the Statute was applicable even in the circumstances of Calcutta, one Judge dissenting.⁹ Sixth, the Indian law did not punish forgery as capital.¹⁰ It was most unjust to hang a Hindu for this offence. Seventh, under the Regulating Act and the Charter, the Supreme Court had power to grant leave to appeal to the King-in-Council. This was refused to Nandkumar by the Court. Was his not a good case for appeal? The Court would not listen to any plea.¹¹ Eighth, the Supreme Court had also

² See e. g., ibid. It may be noted that Impey and Hastings were close friends.
³ See e. g., J. F. Stephen, The Story of Nuncum and the Impeachment of Sir John Gillies, 1885. But Stephen, at one place, says that “whatever connection Hastings and Impey, or either of them, may have had with the prosecution of Nuncum, it originated in the usual way.” Id., at p. 96. This does not rule out the possibility of some conspiracy between Hastings and Impey. But see also ibid. at pp. 164, 190 and J. F. Stephen, The Story of Nuncum, 1885, at pp. 42-43 (1885).
⁴ See ibid., at p. 190.
⁵ See ibid., at p. 190.
⁶ See ibid., at pp. 220-221.
⁷ See ibid., at pp. 220-221.
⁸ See ibid., at p. 77 (1897).
⁹ See ibid., at p. 43.
¹⁰ See ibid., at p. 43.
¹¹ See ibid., at p. 58.
power to reprieve and suspend the execution of a capital sentence in a hard case, remit the record with reasons to England and await decision therefrom. Nandkumar's was a fit case for the exercise of this power, but the Court would not grant reprieve. It would not hear of mercy or delay.

Lord Macaulay has said that Impey "acted unjustly in refusing to respite Nandkumar. No rational man can doubt that he took this course in order to gratify the Governor-General...Hastings, three or four years later, described Impey as the man "to whose support he was at one time indebted for the safety of his fortune, honour and reputation." These strong words can refer only to the case of Nandkumar; and they must mean that Impey hanged Nandkumar in order to support Hastings. It is, therefore, our deliberate opinion that Impey, sitting as a judge, but a man unjustly to death in order to serve a political purpose. Stephen is critical of Macaulay and tries his best to justify the action of the Supreme Court, but it appears from a careful study of his work that he is not wholly true in his analysis and unreasonably supports the Court and its Chief Justice Impey. "No writer cites any second instance of forgery being punished with death. In Calcutta in 1802, the Chief Justice expressly lamented that the crime was not yet capital." It is worth noting that execution of Nandkumar under the decree of the Supreme Court excited the feelings of everybody and this institution went down in the estimation of the natives.

Here may be pointed out in brief the views of the Supreme Court, expressed in Nand Kumar's case, as to the introduction of English law in India.

The Judges of the Supreme Court agreed that English criminal law had been introduced into Calcutta. But the point as to the time when it was introduced, whether in 1726 or 1753 or 1774, was not raised in the Court. The Mayor's Court established under the Charter of 1726 was a Court of English law and, therefore, the common law of England, both civil and criminal, as

12. Ibid. Keel
13. Macaulay, made a petition to the Council, and the Governor, knowing Mohun Persad to be a notorious liar, turned him out of his house, and themselves becoming his riders and abettors and Lord Impey and the other justices have tried me by the English laws, which are contrary to the customs of this country, in which there was never any such administration of justice before, and taking the evidence of my enemies in proof of my crime, have condemned me to death. But by my death the king's justice will let the actions of no person remain concealed; and now that the hour of death approaches I shall not for the sake of this world be regardless of the truth to the gentlemen of the Council. The forgery of the bond of which I am accused never proceeded from me... If I am unjustly put to death, I will with my family demand justice in the next life. They put me to death out of envy, and from partiality to the gentlemen who have betrayed their trust; and in this case the thread of life being cut I in my last moment again request that you gentlemen will write my case particularly to the Supreme Court." Quoted in Stephen, op cit., Vol. II, at pp. 94-95.
15. Thompson and Garis, Rise and Fulfilment of British Rule in India, at p. 125 (1939) Not Chief Justice Impey, but whoever was the Chief Justice in 1802.
well as her statutory law, both civil and criminal, became applicable to Calcutta. As regard Charters of 1753 and 1774 it appears that the Supreme Court, though not specifically deciding the issue, thought that English Law was reintroduced by them also; this is because the Court held that the Statute of 1724, passed after the Charter of 1726, was applicable to Calcutta, the town having the same state of civilization as England had, and therefore, convicted Nandkumar under it. The supposition of the Court that English Law was reintroduced by the Charters of 1753 and 1774, was questioned later on, and the English law came to be regarded as having been introduced finally in 1726 and not thereafter, unless expressly made applicable.

Thus according to later view, the conviction of Nandkumar was illegal as being made under the Statute of 1728, not expressly extended to Calcutta. A. B. Keith also holds the opinion that the English statute of 1728 making forgery a capital offence was not legally in force in India. Apart from the tentative terms of the charter of 1661, English Law was introduced by the charter of 1726. The subsequent charter of 1753 and the Act of 1773 could not possibly be regarded...as substantive reintroductions of English law up to their date, and in any case to apply literally an English law was a mere miscarriage of justice.”

CHAPTER X
JUDICIAL SYSTEM UNDER LORD CORNWALLIS

Introduction

Warren Hastings' departure was followed by a lamentable rule of John Macpherson, which lasted for twenty months. His system of mean jobbing and peculation, his duplicity and low intrigues gave a great set back to the British reputation in this country. Lord Cornwallis, who had already established his reputation as a man of honesty and integrity, reached India in the beginning of September 1786 to investigate into the corrupt practices which had disgraced the former Governments, to root them out of the administration and reinstate the British prestige. He was directed to establish permanent rules for the settlement and collection of the land revenue, and for the administration of justice, founded on the ancient laws and local usages of the country. In order to function smoothly as Governor General, he was given far greater powers than those enjoyed by Hastings. He could override his Council in case of necessity.

The administration of justice under Lord Cornwallis may be studied in three stages.

Administration of Justice: First Stage
Plan of 1787

Reunion of revenue and judicial functions

In 1781, under the regime of Warren Hastings, a distinct separation between revenue and judicial functions had taken place. But the Court of Directors now demanded simplicity, economy and purification and as an essential part of these ideals instructed the Governor-General to reunite the revenue and judicial functions. The object of reverting to the system which was discontinued in 1780 was to accustom the natives to look to one master. It was considered impossible, after the experience of seven years, to draw a line between the revenue and judicial departments in such a manner as to prevent their clashing. Therefore, in compliance with the instruction of Directors, Cornwallis directed the re-union of the functions of civil and criminal justice with those of the collection and management of revenue. Accordingly, an English Collector in each district was vested with the powers of Collector of Revenue, Judge of Diwani Adalat and Magistrate to arrest criminals. Although the functions of administration of civil justice and

1. Edward Thompson and G T. Garratt, Rite and Fulfilment of British Rule in India, at pp. 153, 155 (1939)
2. Id., at p. 155; H. Cowell, The History and Constitution of the Courts and Laws of India, 2nd ed. (1903)
3. A. B. Keith, A Constitutional History
4. Id., op. cit., at p. 181; Judicial Regulation VIII and Revenue Regulation XXX. For these and other Regulations quoted below, see W. H. Martley, The Administration of Justice in British India, at pp. 53-54 (1858).
revenue collection were re-united in the person of the Collectors, the Courts over which they had to preside were to be kept distinct.6

Justice in revenue cases.

The member of district was reduced from thirty-six to twenty-three to effect economy in the administration. The Collector in each district was to collect land revenue and decide revenue cases in his Mal Adalat or Revenue Court. This Court was quite distinct from the Diwani Adalat. The decisions of this Court were appealable first to the Board of Revenue at Calcutta and then to the Governor-General-in-Council.7

Justice in civil cases.

The Collector became the Judge of the Mofussil Diwani Adalat in the district to decide civil cases. Appeals in cases exceeding Rs. 1,000 in value were allowed to the Sadar Diwani Adalat.8 This consisted of the Governor-General and members of the Council who were assisted as usual by native Law officers for the exposition of personal laws. Decisions of the Sadar Adalat were appealable to the King-in-Council in all cases of £5,000 or more in value under the provisions of the Act of Settlement, 1784. For the administration of justice in the cities of Murshidabad, Dacca and Patna, District Courts were established, superintended by Judges and Magistrates who were not Collectors, that office being unnecessary, as their jurisdiction was circumscribed by the limits of those cities.9

Justice in criminal cases.

The Collector was also appointed to act as Magistrate in his district for apprehending offenders against the public peace; but with the exception of punishing petty offences, he had no power of trial or punishment and was directed to deliver up the prisoners for that purpose to the nearest Mofussil Nizamat Adalat. The power to try persons accused of certain petty offences was given to relieve the serious congestion of this Adalat. In such cases the Collector could inflict corporal punishment to the extent of fifteen strokes or a fine upto Rs. 200 or impose a sentence of fifteen days' imprisonment. The Nizamat Adalat was still held by Mohammendan Criminal Officers who were not to be interfered with except by way of recommending to them by the British Government the mitigation of punishments of unnecessary cruelty.10

Appointment of Registrar.

A subordinate officer, known as the Registrar, was appointed to assist the Collector in the administration of civil justice. The Collector as Judge of Diwani Adalat could authorize him to decide civil cases upto Rs. 200 in value. His decrees were to be countersigned by the Collector to avoid any miscarriage of justice.11

Comments

The main defect of the plan of 1797 was the combination of so many powers in the hands of Collectors. It was too extensive a trust to be reposed in

7. Rev. Reg. XXXI.
8. Jud. Reg. VIII.
9. Rev. Reg. XX.
one person. Though they were given liberal salaries, they did not lose the opportunity of abusing these powers to their own advantage. There was no effective control from above because of long distances and slow means of communication in those days. Thus the Collectors were despots in their districts. In fact the plan of 1787 was a retrograde step in view of the progressive step taken in 1781 when there was effected a separation between judicial and revenue functions. The situation was, however, improved in 1793 when Cornwallis restored the earlier position.12

Administration of Justice : Second Stage
Scheme of 1790

Background.

The administration of criminal justice was still vested in the Naib Nazim or the Deputy of the Nawab. Mohammad Raza Khan as Deputy of the Nawab, controlled the Sadar Nizamat Adalat at Murshidabad. The Mofussil Nizamat Adalats were staffed by Mohammedan Criminal Officers. The whole administration consisted in the sale of judicial places to uneducated and depraved persons who looked upon these Courts as secure dens for extortion. These Officers were paid low and inadequate salaries. This resulted in the recruitment of unqualified and incapable persons chosen from the dregs of the people—ignorant, artful and unprincipled. They accepted bribes because of the insecurity of their tenure.13 Whatever the reasons of the non-recruitment of able and honest persons, serious crimes went unpunished because of the presence of corrupt Judges. The prevailing system was dubbed as a mere system of rapine and plunder. It was pointed out that nothing had perhaps more contributed to the continuance of the offence of dacoity than the belief entertained by the inhabitants of the corruption prevalent in the Mofussil Nizamat Adalats chiefly owing to the scantiness of the salary. Nothing was of so much consequence as to remove such an opinion because dacoits would certainly continue their depredations as long as they believed that with a part of their plunder they could procure their exemption from punishment and no witness would ever appear against them when, from the corruption of the Judges, they believed that their evidence, instead of bringing the offenders to punishment, would only expose themselves to their resentment and to the risk of losing their lives or property.14

The system of administration of criminal justice was exceedingly and notoriously defective. Offenders were tried by the Mofussil Nizamat Adalats far away from Murshidabad, the seat of Sadar Nizamat Adalat to which trials were referred only for final sentence. From the time of their commitment by the Magistrates, the suspected persons remained in custody of the Judges of these Adalats till the time of their conviction or acquittal, and in certain cases till its final approval by the Sadar Nizamat Adalat. The Judges of the lower Courts were the sole authority to determine the date of trial, to select the witnesses who were to be summoned, to make out the points of examination and also to settle the way in which evidence was to be taken. The English Magistrates did not interfere with these trials. Thus the native judges had the full privilege to frame the proceedings in any manner they pleased, and actually framed them in a way which would ultimately lead to the acquittal of

12. See Keith, op. cit., at p. 106; Banerjee, op. cit., at p. 145.
the accused persons in the Sadar Nizamat Adalat. They could also by procrastinating the trial compel the prosecutors to abandon the prosecution or agree to a compromise, whatever the gravity of the case. 15

Inordinate delay was caused in disposal of cases by the Mofussil Nizamat Adalats and Sadar Nizamat Adalats. Sometimes, of course, it was on account of accumulation of cases or difficulty in procuring the attendance of witnesses, but more often it was the result of negligence and venality of the judges themselves. 16 The numerous robberies, murders and other enormities were committed daily with impunity particularly on account of the great delay which occurred in bringing offenders to punishment. 17

It appeared in many cases that punishments awarded to criminals bore no relation at all to the nature of crimes committed by them. Their severity or leniency much depended on the character of the Judges concerned. "They could be atrociously severe or ridiculously light. The merit of the case were very often but little considered in the determination of a sentence. 18"

Cornwallis was convinced that the prevailing system for the administration of criminal justice was entirely useless, futile and rotten to the core, and that life and property were not safe in the existing conditions. He found that the evils proceeded from the gross defects of the Mohammedan Law of Crimes which in its many aspects was contrary to natural justice, and the defective constitution of the Criminal Courts. He observed that measures should be taken to prevent the cruel punishments of mutilation, frequently inflicted by the Mohammedan Law, and to restrain the spirit of corruption, prevailing in native Courts, by which wealthy offenders were generally enabled to purchase immunity for the most atrocious crimes. He was somehow convinced that the reform of the department of criminal administration would be useless and nugatory so long as their execution depended upon any native whatever. In his opinion it was improper to leave the future control of so important a branch of government to the sole discretion of an Indian. It was indispensable for the good government of the country that there should be general gazetted servants of the Company once or twice a year and the two or three respectable servants of the Company should be selected to act as superintendents of the Criminal Courts which might be conducted, under their inspection, by native Judges, with the assistance of learned Maulvis and Pandits, in strict conformity with the local laws and customs. 19

With a view, therefore, to ensuring a prompt and impartial administration of criminal justice, and in order that all ranks of people might enjoy security of person and property, Governor-General in-Council resolved, in 1790, to assume the superintendence of the administration of criminal justice throughout Bengal, Bihar and Orissa, and formulated the following scheme:

The Collectors in the districts were to act as Magistrates. They were required to apprehend murderers, robbers, thieves and other disturbers of the peace of the country, and in order that all ranks of people might enjoy security of person and property, the Governor-General in-Council, as appended to the Secret Committee on the Affairs of the East India Company, appended to W. K. Firminger's Introduction to the Report, at pp. 22-23 (1817); Speeches and Documents on Indian Policy (1799-1914), edited by A. H. Keith, at pp. 163-164

17. Lowel, op. cit., at p. 150.
19. Banerjee, op. cit., at p. 115; Cowell, op. cit., at pp. 133-151; Fifth Report from the Select Committee on the Affairs of the East India Company, as appended to W. K. Firminger's Introduction to the Report, at pp. 22-23 (1817); Speeches and Documents on Indian Policy (1799-1914), edited by A. H. Keith, at pp. 163-164.
peace. Upon a complaint made in writing and sworn to be the party making it, the Magistrate had to issue a warrant, specifying the nature of the charge, for the apprehension of the accused person. On his arrest, he was to examine him without oath and reduce what he deposed into writing. He was also to examine the complainant and the witnesses on oath and write down their deposition. If the charge, after this inquiry, proved groundless, he was to acquit the person arrested. If the offence was proved on evidence, but was a petty one like assault, abuse, calumny or affray, he could try and punish it by fifteen or a lesser number of strokes or imprisoning fifteen days or inflicting upon him a fine not

If the crime proved was of a serious nature, the accused person could be admitted to bail of appropriate amount except in cases of murder, theft, burglary or robbery which were non-bailable offences. In such cases and those in which he could not give bail, he was to be committed to prison. All the accused persons, either committed or held to bail, against whom a prima facie case was made out, had to stand their trial before the Court of Circuit. It was the duty of the Magistrate of a district to give a public notice of the arrival of the Court of Circuit so as to arrange for the attendance of all parties and witnesses. On the arrival of the Court, he was to submit to it a calendar of accused persons committed to prison or admitted to bail with a statement of the charges against them, and names of the witnesses for prosecution and defence. Necessary documents and the record of proceedings previously held were to accompany the calendar. The Magistrate was also required to submit to the Court a second calendar of the persons apprehended on charges cognizable by the Court, but discharged for want of evidence. He was also to present a third calendar of persons tried for crimes and misdemeanours cognizable by him with a short statement of the charge and the sentence.

The Magistrate of every district had to despatch monthly reports to the Sadar Nizamat Adalat of persons apprehended specifying the charges and the orders passed for punishment, committed for trial before the Court of Circuit, or released; of casualties by death or escapes of prisoners sentenced by the Court; of prisoners whose trials were under reference to the Sadar Adalat; of sentences received from the Sadar Adalat; of prisoners under his charge to be tried by the Circuit Court. Half-yearly reports were also to be made to the Sadar Adalat of convicts in confinement under sentences within twenty days after termination of the session by the Court of Circuit.

All persons, Europeans as well as Indians, not being British subjects, were put under the jurisdiction of the Magistrates and the Courts of Circuit. The European British subjects were, however, amenable to the jurisdiction of the Supreme Court at Calcutta, but the Magistrates could apprehend them on the information lodged on oath and, on being satisfied of the truth of the charge; after holding a preliminary inquiry, they could despatch them to Calcutta for trial in the Supreme Court. For apprehending any European British subjects, the Magistrates were required to qualify themselves by oath taken before a Judge of the Supreme Court to act as Justices of the Peace.

Courts of Circuit.

The Mofussil Nizamat Adalats were abolished. The whole Diwani area

20. Jud Reg. XXVI. See Morley, op. cit., at p. 55; Banerjee, op. cit., at pp. 236-

21.

22.
was divided into four Divisions of Calcutta, Murshidabad, Dacca and Patna, each comprising a few districts. In each Division was established a Court of Circuit, superintended by two English Judges who were to be covenanted servants of the Company, assisted by the Kazi and Muftis, who were to be nominated by the Governor-General-in-Council. The native law officers were given a security of tenure and were removable only by the Council on the ground of incapacity or misconduct. Each Court of Circuit was a mobile Court and was required to hold two goal-deliveries every year by undertaking tours throughout the districts of its Division. It had to try all persons committed to prison or held to bail by the Magistrate at each District Head Quarter where he resided. After finishing the work there, it proceeded to another district and so on. All the Circuit Courts except that of Calcutta were to try accused persons at their Divisional Head Quarters also.

The procedure in the Courts of Circuit was as follows: The charge against the prisoner, his confession, if he pleaded guilty, the evidence for prosecution in case he did not plead guilty, and the evidence which he might have to adduce including his defence, were to be heard and gone through in his presence and in that of the Kazi or Mufti. Then the Kazi or Mufti whoever was present was to write the *futwa* or exposition of the law at the bottom of the record of the trial and to attest it with his seal and signature. Thereafter, the Judges of the Court had to attentively consider the *futwa*. It appeared to them that it was consonant to natural justice and was in conformity with the modified Mohammedan Law, they were to approve it and pass the sentence to be executed by the Magistrate. In capital cases and those of imprisonment for *i.e.*, the Circuit Courts had to send their proceedings to the Sadar Nizamat Adalat for confirmation. In 1791, they were required to transmit to the Sadar Adalat the proceedings of those trials in which they disapproved the *futwa* of the Law Officers for final disposal.

A complete record of the proceedings of the Courts of Circuit was to be transmitted to the Sadar Nizamat Adalat. These Courts were to report the cases of neglect of misconduct of the Magistrates and Indian Law Officers to the Sadar Adalat for proper action.

**Sadar Nizamat Adalat.**

The Sadar Nizamat Adalat was once again shifted from Murshidabad to Calcutta and was to consist of the Governor-General and members of his Council, assisted by the Chief Kazi and two Muftis. It sat at least once a week and maintained a proper record of its proceedings. The Sadar Adalat was at once a Court of Criminal Appeal and a Board of Police; it took cognizance not only of all judicial matters but of the general state of the Police throughout the country. Thus the Governor-General-in-Council became directly responsible for the administration of criminal justice as well.

Neither the parties nor their counsel were to be present before the Sadar Adalat. The proceedings of the committing Magistrates and those before the Circuit Courts were to be reviewed by the Chief Kazi and Mufti. Then they had to submit the record with a statement of their opinion to the Judges of the Sadar Adalat who, after due consideration, were to pass the final orders. They

23. J d Reg XXVI, Benerjee, op cit., at pp. 146-147
25. Benerjee, op cit., at p. 240. See also Fifth Report, op cit., at p. 75.
might always overrule the opinion of these Law Officers. There was a Registrar attached to the administrative side of the Court, who recorded its orders in English.27

The Sadar Nizamat Adalat was to forward to the Council the reports made by the Circuit Courts about the general state of the administration of criminal justice in their Divisions, accompanied by its own remarks. It was also to submit to the Council its observations on all matters in this connection.28

Law.

All Nizamat Adalats were to decide cases according to Mohammedan Law of Crimes as modified by the Government. Cornwallis provided in 1790 that in determining the punishment to be inflicted for the crime of murder, the intention of the party rather than the manner or instrument employed, should be considered. Secondly, the relations of a murdered person could not pardon the offender.29 In 1791, the punishment of mutilation was abolished. Imprisonment and hard labour for fourteen years and seven years were substituted for the loss of two limbs and that of one limb respectively. The Sadar Nizamat Adalat was empowered to pass sentence of death instead of granting blood-money to the heir.30 In 1792, the rule that the refusal by relatives of a deceased to prosecute a murderer would operate as a bar to his trial was abrogated.31 Sometimes during this period, it was also provided that the crimes of forgery, perjury or subornation of perjury should be punished by branding on the forehead, in addition to the ordinary punishment.32

Miscellaneous.

Liberal salaries and allowances were allowed to Judges and officers engaged in the administration of criminal justice. In 1791 and 1792, police reforms were also introduced.33

Comments.

Evidently, the plan of 1790 was a great improvement upon the prevailing system. It was based on the principle of "check and balance", Sadar Nizamat Adalat controlling the Courts of Circuit and the latter the Magistrates. Thus the plan aimed at an efficient and impartial administration of justice. A provision for liberal salaries aimed at attracting men of ability, honesty and integrity thus bringing purity in the administration. Needless to say that the scheme put the whole system on a sounder footing and ensured to some extent the security of life and property.34

Administration of Justice: Third Stage
Plan of 1793

Introduction.

Lord Cornwallis was a devotee of the doctrine of separation of powers. He, therefore, effected a complete reversal of the policy hitherto dictated by

28. ——, op. cit., at p. 71; Fifth Report, op. cit.,
29. ——, op. cit., at p. 71; Fifth Report, op. cit., First Marquis Cornwallis, edited by
30. ——, op. cit., at p. 201.
31. ——, op. cit., at p. 71; Fifth Report, op. cit., at p. 201.
32. ——, op. cit., at p. 71; Fifth Report, op. cit., at p. 201.
33. ——, op. cit., at p. 71; Fifth Report, op. cit., at p. 201.
34. See Banerjee, op. cit., at pp. 147-143.
the Court of Directors and followed by him, under which economy and sim-
plification had resulted in the concentration of excessive powers in the hands of Collectors. This he did by separating the judicial functions from those of revenue.35 Cornwallis wrote to the Court of Directors in March 1793 that certain powers and functions could never be vested in the same officers without destroying the confidence in the protection of the laws. This remark was particularly applicable to the various functions performed by the Collectors. All causes relating to the rights of several descriptions of landholders and cultivators, and all claims arising between them and their securities, were excepted from the jurisdiction of the regular Courts of Justice, and were exclusively cognizable by the Collectors. They were allowed a commission upon the collections. At all times they considered the revenue collection as their most important duty. Any failure in this matter subjected them to dismissal from their office. Under such circumstances, it was quite natural that they deemed the collection of revenue as the most important of their duties and that all considerations of right would be made subservient to it. Where the power to redress oppressions, and functions that must always have a tendency to promote or screen their commission, were united in the same persons, a strict adherence to the principles of justice could not be expected; still less could it be hoped that the people would feel a confidence of obtaining justice. Upon these grounds, the separation of judicial from revenue functions was effected.36

This was the main and essential change of 1793. But many other important reforms were introduced in the same year. In fact on May 1, 1793, the famous Code of forty-eight Regulations, known as the Cornwallis Code, was passed, introducing the system of regulation and policy for the internal government of the provinces of Bengal, Bihar and Orissa.37 Some of these Regulations made the following provisions:

Separation of fiscal and judicial systems.

The Revenue Courts were abolished; revenue cases were henceforth to be decided by the Civil Courts in which Revenue Officers could not sit. The reasons for this separation were thus explained: All questions between Government and the Landholders regarding the assessment and collection of revenue, and disputed claims between the latter and their ryots, or other persons concerned in the collection of their rents, were cognizable in Mal-Adalais or Revenue Courts, presided over by the Collectors. An appeal lay from their decision to the Board of Revenue and from that of the Board of the Governor-General-in-Council. Theproprietors could never consider the privileges conferred upon them, as secure while the Revenue Officers were vested with judicial powers. Exclusive of the objections arising to these Courts from their irregular, summary and often ex parte proceedings, and from the Collectors being obliged to suspend the performance of their judicial functions whenever they interfered with their financial duties, it was obvious that, if the Regulations for assessing and collecting the revenue were infringed, the Revenue Officers themselves must be aggressors and that individuals wronged by them in one capacity could never hope to obtain redress from them in another. Their financial occupations equally disqualified them for administering the laws between the proprietors of land and their tenants.

37. G. C. Rankin, Background to Indian Law, at p. 171 (1946).
It was, therefore, stated that some other security must be given to landed property and to the rights appurtenant thereto before the desired improvements in agriculture could be expected to be effected. Government must deprive itself of the power of inflicting, in its executive capacity, the rights and privileges which it conferred on the landholders in its legislative capacity. The Revenue Officers must be divested of their judicial powers. All financial claims of the public when disputed under the Regulations, must be subjected to the jurisdiction of Courts of Judicature, superintended by Judges who, from their official situations and the nature of their trusts, would not only be wholly uninterested in the result of their decisions, but bound to decide impartially between the public and the proprietors of land, and also between the proprietors of land and their tenants. The Collectors must not only be divested of the power of adjudicating upon their own acts, but subjected to the jurisdiction of the Courts of Judicature; they must collect the public dues subject to a personal prosecution for every exaction exceeding the amount they could legitimately demand and for every deviation from the Regulations prescribed for their collection.4

In this way was laid down "a sound and reasonable policy, founded upon strict justice necessary for the due preservation and security of what are called landed interests."9

Revenue Administration.

The Collectors were only entrusted with the collection of revenue as Executive Officers subordinate to the Board of Revenue. Ample powers were given to them for enforcing demands of arrears of land revenue, by attachment and sale of the defaulter's property and by imprisonment of his person where the property should prove inadequate to answer the demand. The Zamindar was provided with the means of obtaining redress by a suit for damages against a Collector for acts of unauthorized severity or for the enforcement of an unjust demand or for some other unauthorized proceeding taken in his official capacity whereby the party might sustain damage. The Collector had to transmit periodical reports to the Board of Revenue. Native Collectors, subordinate to the Collectors, known as Tehsildars, were also appointed in certain districts. They were to assist the Collectors in their collection of revenue. The Board was situated at Calcutta, vested with the control over the Collectors, with authority to superintend their proceedings, and to suspend them from their offices on the ground of negligence. The proceedings of the Board of Revenue were, in like manner, subject to the superintendence of the Government. The orders of the Government were circulated to the Collectors through the Board. The Board was constituted a Court of Wards with powers to control the conduct and inspect the accounts of those persons who were responsible for the management of the estates of persons, disqualified by minority, sex or natural infirmity for the administration of their own affairs. It had to submit periodical reports to the Government on the state of revenue. Its proceedings were sent to the Court of Directors through the Government.40

Administration of Civil Justice.

The Government divested itself of the power of interference with the administration of the laws and Regulations in the first instance, reserving

to itself, as a Court of Appeal or Review, the decision of certain cases in
the last resort, and lodged its judicial authority in an elaborate system of
Civil Courts, reorganised in a way as to render it efficient and independent.
This was to ensure to the people the uninterrupted enjoyment of the inestimable
benefit of good laws to be duly and impartially administered by the Judges
of these Courts with diligence and uprightness.\(^{41}\)

Courts of Native Commissioners.—The lowest grade of the civil
courts consisted of the Courts of the Native Commissioners who were of
three denominations, termed as Ameens or Referees, Salisan or Arbitrators,
and Musifs or Native Justices. They were selected out of tehsildars,
landholders or farmers etc., and were not removable during the period
of their commission except by the Sadar Diwani Adalat on the basis of
some sufficient cause. They might be punished by the Sadar Adalat for corrupt
or oppressive acts. They were honorary Judges getting some commission on the
sums litigated before them.

The Native Commissioners were to hear and determine suits in the
first instance, where the cause of action did not exceed Rs. 50. They could
not execute their own orders or decrees which were to be submitted to the Zila
or City Diwani Adalat for this purpose in order to avoid any miscarriage of
justice or abuse of power. An appeal from the decisions of Commissioners lay
to the Zila or City Judge. They could be set aside on merits only because their
authors were laymen.\(^{42}\)

The creation of this subordinate judicial agency was motivated by a
desire to provide relief to the Zila and City Diwani Adalats from the trial
of petty suits and thus save their time for the decision of more important
cases, to save the parties and their witnesses from incurring a great expenditure
and inconvenience, and to promote the speedy administration of civil
justice.\(^{43}\)

Courts of Registrar.—Each Diwani Adalat was allowed a competent
establishment of ministerial officers. A Registrar and one or more assistants were
also appointed for each Court from the junior branch of the European conven-
anted servants. To prevent the time of the Judge of a Diwani Adalat from being
occupied with the trial of petty cases, and thereby to enable him to decide cases
of importance and magnitude with greater expedition, he was empowered to
authorize his Registrar to decide cases of a value not exceeding Rs. 200. His
decisions were to be countersigned by the Judge and were also subject to revi-
sion by him.\(^{44}\)

Diwani Adalats.—Next in order were twenty-three Zila Diwani Adalats
and three City Diwani Adalats. Each of them was to be presided over by an
English convenanted servant of the Company, who was to subscribe to a prescri-
bled oath. He was assisted by the Hindu and Mohammedan Law Officers
All natives as well as European and other persons, not being British subjects.
residing out of Calcutta, were amenable to the jurisdiction of these Courts. In order to enable the natives to procure redress against British subjects, the jurisdiction of Diwani Adalats was extended over them also. All British subjects, not in a public employment, if allowed to reside ten miles beyond the limits of the jurisdiction of the Supreme Court at Calcutta, were required to subject themselves under penal obligations to the authority of the Diwani Adalats in civil suits upto Rs. 500 in value, which might be instituted against them by the natives. This was a remarkable provision for the advantage of the natives in view of the fact that formerly only the British subjects were enabled to obtain redress against the natives, and not vice versa.

The jurisdiction of the Diwani Adalats was extended to all Executive Officers of the Government including those employed in the collection of revenue for acts done by them in their official capacity in opposition to the Regulations. This was enacted with a view to prevent the tyranny and oppression practised by these officers and to compel them to adhere strictly to the Regulations and instructions of the Government prescribed for their guidance. It was further provided that in order that the Government itself, in exercising the several branches of the resources of property, the claims and demands on it, or the liability of the Government, might be attended to in the most expeditious and authoritative manner, the jurisdiction of the Courts according to the same manner as the rights of individuals. Individuals might institute suits against the Government if injured and aggrieved under the Regulations made by the Government. These provisions established the Rule of Law in the administration of justice by allowing free access to the Courts of Justice for redress, not only from grievances arising from the violation of rights by individuals, but from the abuse of authority in the officers of Government and the acts of the Government itself.

The decisions of the Diwani Adalats in all cases were appealable to the Provincial Courts of Appeal.

Provincial Courts of Appeal.—In a well regulated system of Government, it has always been deemed expedient to provide against the possibility of unjust or erroneous judgment of the courts of primary jurisdiction by constituting Courts of Review or Appeal. In order to render them efficient, they should be made easily accessible to all. But before 1733, the only Courts of Appeal were at Calcutta. In suits of rent or revenue which were excluded from the jurisdiction of the Diwani Adalats and cognizable in the first instance by the Collectors, an appeal lay to the Board of Revenue and then to the Governor-General-in-Council. In cases of certain valuation only, decided by the Mofussil Diwani Adalats, appeals were taken to the Sadar Diwani Adalat, consisting of the Governor-General and the members of the Council, who were otherwise busy with many affairs of the State. But it was found that, under the pecuniary restriction, a large number of cases were not appealable. In addition to this bar of monetary jurisdiction, the distance and expense of travelling in many cases operated as an exclusion from the Court of Appeal. Moreover, it was very expensive to engage lawyers at Calcutta. To remedy these defects found in the former judicial system, Cornwallis established four Provincial Courts of Appeal, one in the neighbourhood of Calcutta and one each at Patna, Dacca and Murshidabad respectively. Each of these Courts was superintended by three Judges who were the nominated servants of the Company. A Registrar with one or more assistants, selected from European civil

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servants, and three native Law Officers—Kazi, Mufī and Pandit, with a number of native ministerial officers were attached to the Court. 48

Appeals lay to the Provincial Courts of Appeal in all cases whatsoever from the decisions of the Zila and City Divani Adalats within their respective jurisdictions it preferred within a period of three months. The power of admitting special appeals in all cases was also given to these Courts. Calcutta being under the jurisdiction of the Supreme Court, these Courts had no authority to take cognizance of any civil or criminal cases arising in that city. The decrees of the Provincial Courts were to be final in all suits where the disputed amount did not exceed the sum of Rs. 1,000; above that sum, an appeal lay to the Sadar Divani Adalat. These Courts were further empowered to try cases sent to them by the Government and the Sadar Divani Adalat, to direct the Zila and City Courts to hear cases which they might have refused to proceed in and to supervise their performance of duty, and to receive charges of corruption against the Judges of the subordinate Courts and forward them to the Sadar Divani Adalat which would issue a special commission to any Provincial Court to make necessary inquiry. 49

Sadar Divani Adalat.—The Sadar Divani Adalat was re-established at Calcutta, consisting of the Governor-General and members of his Council, assisted by the Chief Kazi, two Muftis, two Pandits, a Registrar, some assistants and other ministerial officers. This was the highest Court in the judicial hierarchy in India. The Sadar Adalat took cognizance of appeals from the Provincial Courts of Appeal in all cases where the subject-matter involved exceeded Rs. 1,000; a further appeal lay to the King-in-Council where the amount in dispute was £1,000 or more. The power of admitting special appeals in cases was also vested in it. The Sadar Court was further empowered to admit appeals from the decisions of the Provincial Councils and the Board of Revenue. 50 The Sadar Adalat was also empowered to receive any original suit cognizable in any Zila or City Court, provided its Judge refused or omitted to proceed in it and the Provincial Court also omitted or refused to give any relief to the party, to receive an appeal from the Zila or City Court, cognizable in any Provincial Court, and direct the latter to proceed in it provided the Sadar Court was satisfied that the Provincial Court omitted or refused to proceed in it, and to receive charges of corruption against the Judges of the Zila and City Provincial Courts. The Sadar Court might itself try the charge. If it was levelled against the Judge of a Zila or City Court, it might require the Provincial Court to try it; if it was against the Judge of a Provincial Court, it might appoint a special Commission consisting of several Judges of other Provincial Courts to try the charge, or request the Governor-General in Council to prosecute him in the Supreme Court. In case the charge was proved, the Council might dismiss or suspend such Judge from the service or pass some other suitable order. 51

Miscellaneous.—It may be noted here that procedural rules and other necessary provisions in respect of trying and deciding cases were laid down for all the courts of civil jurisdiction. Their records were to be preser-

48. Reg. VII. Fifth Report, op. cit., at p. 102-103; Cornwallis Correspondence, Outlines of Indian Constitutional History, at pp. 140-142.

49. F at pp. 177, 178; Fifth Report, op. cit., 107-109; Cornwallis Correspondence.


ved. The Zila and City Courts were required to furnish to the Sadar Diwani Adalat monthly reports of the cases decided by them, their Registrars and Native Commissioners. Another remarkable feature of the plan of 1793 was the abolition of Court fees imposed in 1787. No expense whatsoever beyond the fee of the pleader and the actual charge of summoning the witnesses was to be incurred in the prosecution of a civil suit or in the appeal. 52

Administration of Criminal Justice

The provisions of 1790, made for the administration of criminal justice, were re-enacted in 1793 with minor modifications and adjustments. The Collectors were deprived of their magisterial powers which were henceforth to be exercised by the Judges of the Zila and City Diwani Adalats. Thus their jurisdiction as Magistrates became co-extensive with their jurisdiction as Judges. The Judges had to exercise these powers in the same manner as they were exercised in 1790. The Judges of the four Provincial Courts of Appeal were given criminal jurisdiction as defined in the plan of 1790. Thus they became the Judges of the four Courts of Circuit. The integrated Courts were now called Provincial Courts of Appeal and Circuit. The Sadar Nizamat Adalat was left untouched. 53

It was provided that religious persuasions of witnesses would not operate as a bar to the conviction of an accused person. The Governor-General in-Council, being the chief executive authority, was empowered to grant pardon or commute the punishment awarded to a convict. 54

Police Reforms

The landholders and farmers of land were required to discharge their police establishments and were restrained from entertaining them in future. The new scheme of Police divided each district into police jurisdictions of twenty miles square, each division being guarded by a Daroga with an armed constabulary. The Daroga was to be appointed by the Magistrate, but could be removed by the Governor-General-in-Council on the ground of misconduct. The cities of Patna, Dacca and Murshidabad were divided into wards, guarded by Darogas and armed parties. The Darogas were put under the immediate authority of a Kotwal who could be removed only with the sanction of the Governor-General-in-Council. The Darogas and Kotwals were to maintain the peace, to prevent, as far as possible, the commission of crimes, to apprehend criminals, to execute the processes and obey the orders of the Magistrates, and to perform other miscellaneous duties. 55

The Legal profession

Formerly the suitors either appeared in person to plead their cases or through their agents. The parties and their agents were generally illiterate and laymen having no knowledge of the substantive and procedural laws. Many times they were exposed to the intrigues of ministerial officers of the courts who extorted money from some, a few lawyers, but they were dishonest as for the convenience of litigants in the civil courts and to secure to them the assistance

52. Fifth Report, op. cit., at pp. 63, 64, 66.
53. Reg. IX. Merly, op. cit., at pp. 51-69; Fenerjee, op. cit., at pp. 148-149.
of natives of character, integrity and education, better qualified and more competent than their agents formerly employed, a Regulation was passed for the selection and appointment of native pleaders in the civil courts of all grades under the certificates of the Sadar Diwani Adalat. Rules and restrictions were laid down to obtain for their clients a diligent and faithful discharge of their trust. They were required to take an oath for an honest and faithful execution of their duties. A pleader was to be engaged by a small retaining fee and ultimately rewarded by a percentage on the amount sued for as determined by the decree.54

Law and Indian Law Officers

The usual provision regarding the application of personal laws in civil cases was adopted in the plan of 1794. The Mohadmedan Law of Crimes, as modified by the Government, was to be applied in deciding criminal cases.57 Native Law Officers were employed for the exposition of the law. As they played a very important role in the administration of justice, it was necessary to recruit men of ability and integrity and to punish them in certain cases. It was, therefore, provided that the Governor-General-in-Council would be the appointing and dismissing authority of such persons. They had to take an oath on appointment. Their tenure of office was secured. They could be dismissed only on the ground of misconduct or incapacity, or for any act of flagrant profanity in their personal conduct.65

Method and Form of Legislation

Prior to 1793, the territorial possessions of the Company had no general Code of English laws and regulations. Many rules and regulations were passed by the Government for the administration of justice, collection of revenue and for other purposes. Some of them were printed with regulations in native languages but others remained in manuscript. The printed ones were mostly on detached papers or on any prescribed form or order. Consequently they could not be easily referred to, even by the Government officers, much less by the people at large who were without means to procure them in a collective state or to become acquainted with those which were not promulgated in the current languages.65

It was essential to the future property of the British possessions in India that all regulations of the Government affecting the rights, persons or property of the people should be formed into a regular Code and printed with translations in the current languages, that the grounds on which each regulation might be enacted should be prefixed to it, and that the courts should be bound to regulate their decisions by these regulations. A Code of regulations framed on the basis of these principles would enable individuals to get themselves acquainted with the laws upon which the security of many inestimable privileges and immunities granted to them by the Government depended, and also with the mode of obtaining speedy redress against their violations. Moreover, it would enable the courts to apply the regulations according to their true intent and import. Future administrations would also have the means of judging how far the regulations proved to be productive.

57. Id., at pp. 64-65, 76-77.
55. Reg. XII. Jain, op. cit., at pp. 188-89.
of the desired effect, and when necessary could modify or alter them as from experience might be found advisable. New regulations would not be passed nor existing ones repealed without due deliberation. The reasons of the future decline or prosperity of the British possessions would always be traceable in the Code to their source.  

This is how the preambles of the Regulations for 1793 ran, and was given effect to by the Act that every Regulation was to contain a table of prices, that the regulations passed every year to be numbered, printed and bound up in volumes, and despatched to different functionaries and that for the information of people at large, they were to be translated into current native languages. Thus was started the process of compilation of the regulations into a Code, and inaugurated the era of the system of regulation law.

Comments.

Though the entire period of the governor-generalship of Lord Cornwallis is a highly constructive period, his plan of 1793 "is a standing testimony to the maturity of judgment, the breadth of outlook and the liberality of vision and conception with which Cornwallis approached the task of judicial reconstruction in the last year of his governor-generalship in India. This scheme forms the high water mark in the whole of the Indian Legal History". Though its implementation involved a huge expenditure, Cornwallis went ahead with it even without having permission of the Court of Directors who formerly insisted on economy and simplification. He wrote to the Court that the arrangements of this plan were important for the prosperity and happiness of the millions of people of Bengal, Bihar and Orissa, and also for the stability and continuance of the British Government. It would have been a culpable and even a criminal species of economy and inconsistent with the humane and liberal spirit with which the British nation was actuated in regard to India, to have withheld from the people from whom the Company realized huge revenue, such a portion of the public income as was indispensably necessary for the good government of this country for which these arrangements were essential.

It has been said that the administrative reforms which signalized the rule of Lord Cornwallis were more important than territorial acquisitions and political changes, which had taken place earlier. The authority of the Nawab of Bengal was avowedly replaced by that of the English in 1772; but duties of the English Collectors were yet mainly directed to the collection of revenue, and the administration of justice was carried on by the native agency under an imperfect supervision by Europeans. The native agency was, in the estimation of Cornwallis, notoriously inefficient and corrupt. He substituted for it a system of administration directly by Europeans which was maintained for a long time. He established definite laws and procedure for the guidance of the Courts of Justice and the information of general public. He created these Courts with their defined graduated powers and provisions for the conduct of appeals. He established the hierarchy of district and controlling officers—the Magistrate, Collector and Judge, and the superior Boards for the general management of the revenues. The whole system was based on the principles of 'check and balance' and 'separation of the powers'.

60. See B. K. Acharya, Codification in British India, at p. 75 (1914).
63. See Id., at p. 194.
64. George Chesney, Indian Polity, at pp. 46-47 (1894).
The best commentary on the reforms introduced by Cornwallis may be found in their stability. The systems later on introduced into Madras and Bombay, and other parts of the country, subsequently acquired, were based on his plan of 1794, and every branch of the administration bore the impress of his remarkable policy and ingenuity. 65

The greatest of his reforms was that introduced in the character of the Indian public service which, when Lord Cornwallis left India, was already well advanced on the road to reputation for integrity and efficiency, it ever since maintained. "This great and rapid reform was effected partly by the example of his own pure character, but mainly by the establishment of a highly liberal system of remuneration, in lieu of the pittances in the way of pay heretofore allowed to all classes, and which afforded the recipients no alternative between poverty and dishonesty. This great measure, without which decent government of India was impossible, was carried out in the space of a few month." 66

The revenue settlement established by Cornwallis, though might have been proved faulty later on, replaced the loose and crude system that prevailed at that time. The regulation certainly erred "on the side of over-complexity, in prescribing too tedious and refined a procedure of the Courts of law, their introduction constituted an improvement of exceeding value on the chaotic state of confusion, and the total absence of method and defined responsibility, which marked the course of Indian administration before his advent." 67

In working out his plan, Cornwallis was aware of the fact that the welfare of the people would, in a certain degree, depend on the choice of functionaries, but he was not solely concerned with their personal qualifications and qualities. He preferred to introduce a system which might be upheld by its own inherent principles and not by the personal qualities of those who would be entrusted with its superintendence. He was "in favour of "a system under which it would no longer be necessary for the people to count the patronage of individuals, or to look beyond the laws for security to their persons and property." In conformity to these principles, various Regulations passed by him provided for the free access to the courts of justice for redress, not only from grievances arising from the violation of rights by individuals themselves, but from the abuse of authority by the Government officers; and they pointed out the mode whereby the Government might be brought to account and compelled to answer for any injury caused to the meanest of its subjects, by the authorized conduct of its officers or by its own acts in the shape of rules injurious to the rights of individuals. 68 Thus the Cornwallis Code, with all its imperfections and weaknesses, "deserves to be commemorated for establishing in an Oriental land the supremacy of the law and of the law Courts over all persons whatever, the foundation of all civil liberty." 69

The gravest defect of the policy established by Cornwallis was the systematic exclusion of Indians from all share in the administration. It cannot be said whether he took it as hopeless to make an attempt to purify the native agency; but while the inadequate emoluments of the European officers

65. Id., at p. 47.
67. Id., at p. 48.
68. Fifth Report, op. cit., at pp. 53-54.
69. Quoted in Banerjee, op. cit., at p. 159.
were enormously raised to put them beyond the reach of any temptation. The remedy adopted in regard to the insufficiency of the Indians was, as far as possible, to dispense with their services altogether in important offices. Besides, no effort was made to elevate the condition of the classes retained for inferior positions either by increased salary or prospects of promotion, nor any pay was prescribed for Native Commissioners. This part of the reforms of Cornwallis was unfortunately only too resolutely persisted in. It was on account of erroneous belief that Indians were unworthy of trust to be repugned in men holding high positions. In fact, Europeans were no less corrupt and dishonest as the history of those days shows. Moreover, almost all the English Judges and other officers including the Governor-General himself were ignorant of the manners, usage and languages of the country. This affected adversely a just and efficient administration of justice. It was only after a considerable number of years that the insolvency and injustice of thus excluding the Indians from all but the humblest share in the administration were recognised and partly remedied. 79

It is a surprising fact that reforms of Cornwallis led to a very severe outbreak of litigation, on account of the abolition of court-fee, the existence of professional informers and witnesses, perjury, litigiousness of Zamindars and the limited powers of Magistrates to try and punish criminals. 80 The commission of crimes could not be checked to an appreciable extent. Reading through a mass of evidence given before various parliamentary committees, one gains the impression that the Cornwallis reforms in civil and criminal laws were effective in checking the tyranny of the revenue collectors and preventing violence, but that they encouraged the more subtle oppression of the money-lender and the lawyer; and from their insistence upon formal evidence they increased the difficulty of suppressing organised dacoity. 81

It may be pointed out in the last that Cornwallis made no attempt to codify Indian Law. This was a great omission in his plan.

In late 1793 Lord Cornwallis left India after establishing the rule of Law in this sub-continent.

Act of 1793

Before closing this Chapter, several provisions of an Act of British Parliament passed in 1793 may be pointed out. The Commander-in-Chief of the armed forces was not to be a member of the Supreme Council unless especially appointed by the Court of Directors. The power to overrule the majority of their Councils was extended to Governors of Madras and Bombay. The controlling powers of Governor-General were emphasized and explained. The admiralty jurisdiction of the Supreme Court at Calcutta was expressly extended to the high seas, and power was given to appoint covenanted servants of the Company or other British inhabitants as justices of the Peace. 82

70. Chesney, op. cit., at pp. 40-42; Banerjee, op. cit., at pp. 149-150.
71. Thompson and Garrett, op. cit., at p. 17; Banerjee, op. cit., at p. 150.
CHAPTER XI

JUDICIAL SYSTEM UNDER SIR JOHN SHORE, LORD WELLESLEY AND LORD CORNWALLIS

Sir John Shore (1793-1797)

Introduction

Sir John Shore, a member of the Indian service, succeeded Lord Cornwallis in 1793. He had a great respect for the system introduced by Cornwallis which "was based on the permanent settlement of the revenue, the separation of revenue administration and the judiciary, and the employment of Europeans in the higher offices, subjecting them to the control of a complex system of regulations designed to check any misdemeanours. Unquestionably his motive were excellent." However, the permanent settlement did not work well; litigation choked the courts, and sales of estates became very frequent. The reasons were obvious. Cornwallis wanted to abolish under penalty, the power previously exercised by the landholders over their tenants and cultivators of land, and by the Collectors over the landholders, and to refer cases of personal coercion and those of disputed claims to the Diwani Adalats. The Regulation framed in pursuance of these principles provided that the arrears of revenue could be realized by the Government by selling the defaulters' lands. This was quite brief and efficient, but the rules for the distraint of the crop and other property and those intended for the Zamindars to realize their own rents were not of easy practice. In the civil courts, the accumulation of undecided revenue cases reached such an extent as almost to put a stop to the course of justice, or, at least, to leave a Zamindar little prospects of the decision of a suit started by him to recover payment of his rent, before his own land was liable to be brought to sale in realization of an outstanding balance of revenue by the more expeditious mode of procedure. Thus the delay incidental to decisions in the civil courts upon revenue suits resulted into great inconvenience in the collection of the public revenue.

The Government, however, was not willing to admit that there was any defect in the Regulation. It ascribed the difficulty felt by the Zamindars in the collection of revenue mainly to the mismanagement which had long marked the conduct of many of them. After the enforcement of the plan of 1783, the great body of the people, employed in the cultivation of the lands, experienced ample protection from the laws and were no longer subject to arbitrary exactions. It did not affect the cultivators adversely. The Zamindars, of course, suffered oppression from the malpractices of the former and from the incompetence of the Courts to afford them speedy redress. Keeping this in view, the Government introduced some minor changes in the existing system.

It has been mentioned that the civil courts were overburdened with revenue cases. In 1793 court-fee was abolished. But "this indulgence, arising from

2. Ibid.
3. "Report of the Select Committee of the House of Commons on the Affairs of the Nizam of the Deccan," at pp. 99-100, 114 (1917); Vol 14 of the
motives of humanity, misapplied to a community peculiarly disposed to litigation, was soon found to be productive of such an inundation of suits, as was likely, by overwhelming the Adalats with business, to put a stop to the course of justice altogether. This led the Government to effect a change in this respect also.

The Government was not in favour of simplifying the procedure and increasing the number of courts. The possibility of any major reshuffle was ruled out. It observed that prior to the introduction of the plan of 1793, there was one Court in each district, its Judge was the Collector of revenue also and the greater part of his time was necessarily consumed in the work or revenue collection which admitted of no protraction, and also in making the settlements. Under the new system, the Judges had no concern with revenues; the administration of laws was their sole duty. Then there were Courts of Registrars and some local tribunals of petty jurisdiction to relieve the Judges of Diwani Adalats of the bulk of their business and thus enable them to decide with expedition, the cases of magnitude. The impact of these courts of small jurisdiction was somehow not felt, but was only a temporary phase. The Government had no hesitation in declaring that whatever delay might have been caused in the decision of cases in the years that followed the introduction of the plan, keeping in view the arrears of the cases of previous years, it could not be ascribed to the want of some necessary provisions to expedite their determination. The delay might be on account of ample provisions, already made, not having yet had time to operate. As the expeditious determination of suits tended to prevent litigation in the same proportion as it was encouraged by delay in administering the laws, there could be no doubt that when all the courts would be established in the full exercise of their powers, the suits then pending would soon be brought to a decision, and in future also, the cases would be determined with necessary expedition to give full force to the Regulations of 1793.

With a view, however, to providing to the proprietors and farmers of land a relief if rents lying against their under-renters, who owed good rents to embarrass them in making their renders more efficient the powers of distraint that were vested in persons entitled to collect rents or revenues, and further to lessen the burden of the courts, the Government made certain minor alterations in the system created in 1793.

Alterations made in 1794.

Power of Registrar increased.—A final power of decision was given to the Registrars in suits not exceeding Rs. 25 in value. Beyond that amount an appeal lay to the Provincial Courts of Appeal. This provision was obviously made to relieve the Judges of Diwani Adalats from the obligation of revising the decrees of the Registrars and counter-signing them before they were considered to be valid. This work was as large as that of trying the case in the first instance.

Limited Judicial Power to Collectors.—A further relief was given to the Judges by reinvesting the Collectors with some of the powers they had lost earlier. The Judges of Diwani Adalats might refer to them for

scrutiny and report the revenue cases formerly cognizable by them and which involved the adjustments of account for their final disposal. The Judges might confirm, set aside or alter the reports submitted by the Collectors. The system of 1793, to all appearance, had finally severed the function of administering justice from that of collecting revenue. But again in 1794 provision was made commencing a re-transfer of judicial functions to the Collectors though to some extent only. This was done in compliance with the requirement of an increased authority as it was urged to enable the Collectors to obtain payments of the public revenue.7

Alterations made in 1795.

Coercive powers to Zamindars.—Coercive powers were given to the Zamindars over their tenants and cultivators to enforce payment from the latter. This was done by modifying and rescinding the relevant Regulations of 1793 and instead introducing fresh provisions8.

Appeals from Registrars and Native Commissions.—The appeals from decisions of the Registrars immediately to the provincial Courts of Appeal interfered considerably with the latter’s more important duties. The provision of 1794 to the extent of allowing such appeals, was repealed, and it was provided that henceforth appeals from the decisions of Registrars would lie to the Zila and City Diwani Adalats in all cases exceeding Rs. 25 in value. The decrees of the Adalats in these appeals were to be final.9

Under the plan of 1793, two appeals were provided from decision of the Native Commissioners in petty suits up to a valuation of Rs. 510, first to the Zila or City Courts and the second to the Provincial Court. The advantages expected to result from this arrangement were more than counterbalanced by the delay caused in the decision of cases of greater magnitude and expense and inconvenience to which the parties were put. It was, therefore, provided that only one appeal would lie from decisions of the Native Commissioners, and the decrees of the Zila and City Adalats in these appeals would be final.10

Reimposition of Court-Fee.—In 1793, Cornwallis had abolished the court-fee. This step to facilitate, if not to encourage, litigation by affording law proceedings at small or no expense was found to defeat its purpose. It resulted into producing such an accumulation of cases as threatened to put a stop to the course of justice. In a certain district the number of pending cases was thirty thousand, and the probability of decision in any suit was estimated to exceed the ordinary duration of human life.11 There was no dearth of groundless and litigious suits, and superfluous exhibits and worthless witnesses. This was all due to absence of the court-fee and ultimate moderate expense. Consequently, the business in many courts had increased so as to prevent them from deciding the cases with that expedition which was essential “for deterring individuals from instituting vexatious claims, or refusing to satisfy just demands, and for giving full effect to the principles of the regulations.”12

10. Ibid.
12. Quoted in H. P. Jain, Outlines of Indian Legal History, at p. 213 (1852).
The Government, therefore, revived the institution of court-fee and rendered the proceedings costly to suppress litigation in future. Most of the cases already filed were got rid of by requiring the court-fee to be paid on them within a limited time. Many suitors residing in the interior of the country were not informed of this requisition and the time prescribed for depositing the fee had expired; others had no confidence in their cases or were indifferent to them. Poverty was also a factor. Thus the re-imposition of court fee got the number of cases, pending decision, considerably reduced and helped in checking the future litigation.\footnote{Reg. XXXVIII, Fifth Report, Vol. I, op. cit., at p. 114.}

Alteration made in 1796.

The Registrars of the Zila and City Courts were empowered to officiate in the absence of their Judges.\footnote{Op. cit., at p. 115}

Alterations made in 1797.

Court fee increased.—The court-fee was considerably augmented, and it was further required that all proceedings should be written on stamped papers especially provided for.\footnote{Reg. V, 1d., at p. 115.}

Appeals—To expedite the course of justice, the jurisdiction of the Provincial Courts of Appeal was extended to their taking cognizance of, and deciding finally, all suits except those relating to real property upto a valuation of Rs. 5,000.\footnote{This pecuniary limit was placed on the suits of real property in 1790 by Reg. V.} Beyond that amount, their decisions were appealable to the Sadar Diwani Adalat.\footnote{Reg. XII, Morley, op. cit., at p. 61.} Rules were also framed to govern the conduct of appeals to the King-in-Council from the Sadar Adalat. They required that the petition of appeal should be filed within a period of six months and that the decree appealed against should amount to £5,000 sterling or more in value.\footnote{Reg. XVI, ibid.}

Limited Judicial Power to Assistant of Magistrates.—With a view to expedite the trial of criminals, the Assistants to the Magistrates were granted a limited occasional exercise of judicial powers, as required by the Magistrates.\footnote{Reg. XVIII, 1d., at p. 70.}

Changes in Mohammedan Law of Crimes.—In 1796, various modes of punishments were prescribed for evasion of processes of Zila and City Magistrates with a view to maintain their just authority and to prevent such evasion.\footnote{Reg. XI, T. K. Banerjee, Background to Indian Criminal Law, at p. 75 (1933).} In 1797, the Law Officers were required to give their\footnote{The Judges were to commute punishment to imprisonment, even for life.} fataw in cases of willful murder on the assumption that retaliation was claimed, even if it was not, and death sentence might be awarded. In cases where Mohammedan Law prescribed the payment of blood money, the Judges were to commute punishment to imprisonment, even for life. The Judges were required to uphold the application of Mohammedan Law to certain cases, though repugnant to justice, if it operated in favour of the accused person; if it went against him, they had to refer the case to the Governor-General-in-Council for final disposal with the recommendation either for mitigation or pardon of the punishment. Transportation beyond
the seas and godena were authorized. Dharma was made a punishable offence. Imprisonment for indefinite period was prohibited in cases where convicted persons could not pay fine; only a definite term of imprisonment was to be prescribed in its place. Perjury was to be severely dealt with.

Introduction of the Bengal System in the Province of Benares.

In 1795, the Governor-General-in-Council at Calcutta extended the Cornwallis Code with necessary alteration to the Province of Benares. This was done with the concurrence of the Raja of Benares. In all, fifteen regulations were passed, under which the City of Benares with some territory around it was formed into a judicial division known as district; the rest of the province was divided into three other divisions or districts—Ghazipur, Jaunpur and Mirzapur. An English covenanted servant of the Company was appointed to each division as Judge and Magistrate with similar power and ministerial establishment as were installed for judges and magistrates in Bengal Provinces. The institution of Registrars and Native Commissioners was also introduced on the Bengal pattern. A Provincial Court of Appeal and Circuit was established at Benares for hearing civil appeals from District Judges and for the administration of criminal justice throughout the province. This Court was given the similar powers and jurisdiction as were possessed by the Provincial Courts of Bengal Provinces. Its Chief Judge was made the Agent to the Governor-General in political matters. The jurisdiction of Sadar Diwani Adalat and Sadar Nazamat Adalat at Calcutta was extended to the province of Benares also.

As regards the Police establishment, a deviation was allowed in the Province of Benares from the Bengal system. The Zamindars and Tehsildars were vested with the functions of Police Officers under the same responsibility for robberies or thefts committed within their respective limits, which they were subjected to under the Government of the Raja. Rules were framed for their guidance similar to those established for the Darogas in Bengal Provinces.

The land revenue of the entire Province was placed under the superintendence of one Collector, subject to the control of the Revenue Department at Calcutta.

The civil and criminal laws of Bengal Provinces were extended to the Province of Benares. However, in consideration of the high regard paid by the Hindu inhabitants to their character, the Brahmans of Benares had reserved the right to try certain classes of criminal proceedings at all cases where death, the sentence for Nizamat Adalat, or otherwise mitigated at the discretion of the Government. On

28. Id., at p 83.
the other hand, the Government provided for the suppression of certain ill practices on the part of Brahmins and some Hindus of high caste. The Brahmins held out the threats of obtaining spiritual vengeance on their adversaries by suicide, the exposure of the life, or the actual sacrifices of one of their own children or close relations. Some Hindus of high caste were used to destroy their female infants in consequence of the difficulty experienced in getting equally suitable matches for them in marriage. Such occurrences were henceforth to be taken cognizance of by the Magistrates and punished in the usual course of criminal law. 29

Subsequently, the judicial establishment at Ghazipur was withdrawn, and the Province was divided into the jurisdictions of the Court at Jaunpur and Mirzapur and the City Court at Benaras. The police powers were taken away from the Zamindars and Tehsildars and given to the Darogas as in the Bengal Provinces. 30

Comments.

The vital change made by Sir John Shore in the system of 1793 was the levy of court-fee. This was not a welcome change though made with a view to get rid of the arrears of cases and discourage vexatious litigation. There is evidence that the "increased expense of law suits has never been found to check litigiousness. On the contrary, it has been generally observed that litigiousness is encouraged thereby, in the hope that the certainty of the expense, added to the uncertainty of the result, might deter parties from defending, even just rights". 31 Thus opined the Provincial Court of Appeal and Circuit at Murshidabad in 1802 which found in its Division that since the imposition of the fee paid to the Government on the institution of suits, of the fee paid on exhibits in the Courts and of the stamp duties, the number of suits did not differ much from their previous number during the same length of period. 32 The Judge and Magistrate of Midnapore, whose views were almost similar, observed that when the business of the civil courts became too heavy for the Judge, instead of appointing more Judges, it was resolved that, in order to prevent the accumulation of cases, it was necessary to check the spirit of litigiousness which was considered to produce it. Therefore, heavy taxes were imposed upon prosecution; but it was found that out of one hundred suits, perhaps five at the most, might be fairly pronounced litigious, and these five were started by those persons who could well bear the expenses. 33 The reverse was, however, the opinion of the Judge of Burdwan who observed that the levy of court-fee and other fees had considerably checked the litigation. 34 In 1856, the Second Law Commission had criticized this imposition of court fee. 35 On the whole, it may be said that this step of Sir John Shore did not serve the purpose for which it was taken to the extent it should have.

The imposition of certain restrictions in the matter of appeals with a view to expedite the final disposal of cases and the extension of the Bengal system to the Province of Benares were, of course, commendable acts of Sir John Shore.

30. Id., at p. 16.
32. Ibid.
33. Id., at p. 592.
34. Id., at p. 623.
Act of 1797.

Before closing the discussion on Adalat system under Governor-General Shore, some provisions of an Act of British Parliament passed in 1797 may be given here. It reduced the number of Judges of the Supreme Court at Calcutta to three—a Chief Justice and two puisne Judges. It reserved laws and customs of natives in terms similar to those as contained in the Act of 1781. It also made an important provision giving an additional and express sanction to the exercise of a local legislative power in the Presidency of Bengal. Regulation XLI of 1793 had provided for a regular Code of all Regulations, enacted for the internal Government of the Bengal Provinces. This ‘wise and salutary provision’ was recognized and confirmed by the Act of 1797 which directed that all regulations made by the Governor-General-in-Council, affecting the rights, person or property of the natives or other persons amenable to the jurisdiction of the courts, should be registered in the judicial department and formed into a regular Code and printed with translations in the country languages, and that all the grounds of each regulation should be prefixed to it. The courts were to be bound by them and their copies of each year were to be despatched to the Court of Directors and Board of Control in England.56

Lord Wellesley

Lord Wellesley succeeded to Sir John Shore in 1798 as Governor-General. He introduced certain important reforms in the existing system, which may be studied under several heads.

Coercive powers of landholders and Collectors increased (1799).

In 1799 it was acknowledged that the powers given to the landholders for enforcing payment of rents were, in some cases, found insufficient, that frequent and successive sales of land had produced many ill consequences, and that considerable delay was caused in payment of public revenue. With a view to improve the situation, the means allowed to the landholders of realizing rents were rendered more brief and efficient, and the sales of their lands for the realization of arrears of Government revenue were to be postponed until the close of the current year. Thus the landed proprietors were enabled to realize their rents speedily so as to make payment of revenue to the Government punctually. The power of the Collectors over defaulting landholders was also strengthened by the discretion given to him to arrest and imprison them for a limited period without any reference to the judicial authority. The observance of the rule that the civil courts were required to give priority to rent and revenue cases was made more strict.37

Change in the constitution of Sadar Adalata (1801).

In spite of the alterations in the rules for restricting appeals, the accumulation of undecided civil cases further increased requiring more time for decision than that could be spared conveniently from various other duties which the Governor-General-in-Council had to perform. The same was true with respect to the criminal proceedings which the said Council had to attend to. Besides, it was in the interest of an impartial, prompt and efficient administration of justice and the permanent security of the...
persons and properties of the native inhabitants of British territorial possessions that the Governor-General-in-Council, exercising the supreme legislative and executive authority of the State, should not perform the judicial functions of the State, which should be administered through courts, distinct from the legislative and executive authority.

The Governor-General-in-Council wrote to the Court of Directors in 1800 that while the British political security in India demanded that the entire legislative and executive authority should remain vested exclusively in them, there were no circumstances connected with British political situation demanding the exercise of judicial authority by them. It was essentially necessary that the security of private rights and property should be rendered altogether independent of the characters of individuals given the highest positions in India possessions. This could never be achieved unless in-Council, who made the law and acted in executive capacity along with an army of subordinate executive officers, constituted the chief courts to control the general administration of justice. No inconvenience could arise from depriving them of all immediate interference with the administration of laws, while they would continue possessing the power of altering the laws at pleasure. The Governor-General-in-Council further said:

"The administration of justice in open court is one of the principal securities for its due administration.

"The constant appearance of the Governor-General-in-Council in an open court of justice would be incompatible with that dignity which, to render him competent to the conduct of the government, it is essentially necessary that the person invested with the supreme executive and legislative power should maintain, not only in the estimation of the people immediately subject to his government, but also of the foreign powers.

"The presence of the Governor-General-in-Council in open court would prevent the pleading of causes with becoming freedom. No native pleader would venture to contest his opinions, and the will of the Governor-General, and not the law, would be considered as the rule of decision.

"As the Governor-General must necessarily be often unacquainted with the languages of the country, this circumstance alone would render it impracticable for him to preside at trials in open court, unless it should be determined that the trials should be conducted in English, and by English pleaders.

"In consequence of these circumstances, the Court of Sadar Diwani Adalat and Nizamat Adalat are held in the council chamber. Neither the parties nor their pleaders are in any cases present. The proceedings are translated into English, and read to the members of the Court who pass their decision, which the register records.

"The necessity of making these translations constitutes the chief cause of the delay in the decision of the causes which are brought before the civil and criminal courts.

"A conscientious discharge of the duties of the Sadar Diwani Adalat, and the Nizamat Adalat, would of itself occupy the whole time of the Governor-General-in-Council.

31. Id., at pp. 60-61.
32. I. e., Registrar
"The proper duties of these Courts are not confined to the determination of the causes which are brought before them. It is also their duty to superintend the conduct of all the other courts, to watch over the general policy of the country, and to frame for the consideration of the Governor-General-in-Council, new laws as cases may arise demanding further legislative provision.

"When your Honourable Court shall advert to the extent of your dominions, to their population, to their growing prosperity, and to the consequent multiplied concerns of individuals, it will at once be evident that it is physically impossible that the Governor-General-in-Council can ever dedicate that time and attention to the duties of these courts, which must necessarily be requisite for their due discharge."

In view of these considerations, the Governor-General-in-Council relinquished the jurisdiction of the Sadar Adalats and placed it in especially constituted courts known by the usual names, that is, Sadar Diwani Adalat and Sadar Nizamat Adalat, having the same persons as Judges, three in number. The Chief Judge was to be a junior member of the Council and the other two were to be selected from among the covenanted civil servants, having experience of the judicial work in the provincial Courts. They were not to be the members of the Council. The appointments were to be made by the Governor-General.

Provision for Summary Appeal (1801).

In 1801, a summary appeal, whatever the value of its subject-matter, was directed to be entertained by the Sadar Diwani Adalat, the Provincial Courts or the Zila or City Courts, where the courts immediately below such courts respectively refused to admit a regular appeal on the ground of informality, delay or some other default in filing it.

Reforms in Civil Judicature (1803).

Background.—In spite of the measures adopted earlier with a view, principally, to check litigation, to reduce the number of the arrears of cases and to provide an early decision in the genuine suits, in 1801 the number of undecided cases was again so great as to attract the attention of the Court of Directors who desired early steps to reduce the number. It appears that the greatest difficulty was created by the suits pending before the Zila and City Courts and Courts of Registrars and Native Comissioners. The number of petty claims excited surprise and evinced the magnitude and difficulty of the undertaking that proposed to administer justice by the formal procedure to so large and litigious a population. The difficulty of keeping down the number of pending cases was at no stage diminished and the means adopted for that purpose did not prove of much success, as was expected. In 1803, the Government of Wellesley admitted in a letter that in some of the courts, the arrears of cases had considerably increased. In the same year, the Court of Directors, after having noticed the almost incredible number of undecided cases, observed that "to judge by analogy of the courts in Europe, they would be induced to think so great

an arrear would scarcely ever come to a hearing." with a view to expedite
the decision of civil suits, Wellesley adopted the following measures:

New cadres of Head Native Commissioners and Assistant
Judges.—Provision was made for the appointment of Head Native Commissi-
oners, also known as Sadar Ameens, in zilas and cities wherein such
appointments were required with a view to expedite an early decision.
They were empowered to decide cases up to a value of Rs. 100 referred
to them by the Judges of Zila and City Courts. The Sadar Ameens were
to be nominated by such Judges with the approval of the Sadar Adalat
from among the persons of character, ability, education and past experience.
They were allowed commission on the suits decided by them and sometime
extra allowance sanctioned by the Governor-General-in-Council.

The Government thought that the accumulation of cases mainly
proceeded from accidental circumstances, the effect of which might be
nullified by making a temporary arrangement. It, therefore, provided for
the appointment of Assistant Judges in zilas and cities where the state
of the Judge’s files might render it necessary to resort to that measure.
Such appointments were to cease when the arrears of cases would be
reduced considerably. The Assistant Judges were required to decide
appeals from the Court of Registrars of Native Commissioners and
original suits, as referred to them by the Judges of Zila and City Courts.

Jurisdiction of Registrars enlarged.—The pecuniary jurisdiction
of the Courts of Registrars was extended to Rs. 500. At the same time,
their power of final decision was abolished.

Appeals.—The decisions of the Zila and City Courts were rendered
final in all appeals from the Native Commissioners. Appeals were allowed
to Provincial Courts from their decisions delivered in the first instance.
The Provincial Courts were also empowered to admit a second or special
appeal from the decisions of the Zila or City Courts given in appealed
cases from the decisions of the Courts of the Native Commissioners or Regis-
trars in those cases where a regular appeal did not lie, if such decisions
would appear erroneous or unjust or the nature of the cases was of such
importance as needed further investigation.

Mode of appointing Munsifs.—The Munsifs were to be nominated
by the Judges of Zila and City Courts with the approval of the Sadar
Diwani Adalat. Their choice was no longer confined to Tehsildars or
Zamindars; persons of character, ability and education might also be
appointed.

Further Reforms as to Appeals (1805).—The Sadar Diwani Adalat
was given the power to receive special appeals from the decisions of the
Provincial Courts in cases not open to a regular appeal. The Provincial
Courts were also empowered to admit a summary appeal in cases in which
the Zila and City Courts refused to hear original suits on the ground of
delay, default or other informality.

44. Reg. XVI. Morley, op cit., at p 62.
at p. 116
47. Ibid.
Changes in Mohammedan Law of Crimes.

In 1799 escaping from jail was made punishable by transportation to some place beyond seas, and provision was made for penalizing the offence of treason. In the same year as well as in 1801, homicides justified by Mohammedan Law were declared capital offences. In 1802, infanticide committed either due to economic reasons or belief in its being efficacious as a stimulant to the fertility of the mother, was made capital offence. In 1803, scope of discretionary punishment was restricted and maximum punishment was provided, and laws for the conviction of the offence of robbery were simplified. In 1804, hostility to Government was made liable to punishment of death and forfeiture of property.

Extension of Adalat System to Ceded and Conquered Provinces.

Ceded Provinces.

In 1801, the Nawab Vizier ceded to the Company, in perpetual sovereignty, an extensive and populous tract of the country in the Subedarai of Oudh. This territory was officially designated as the Ceded Districts of Oudh. A temporary scheme of internal administration and revenue settlement was implemented under a Lieutenant-Governor and a Board of Commissioners. European civil servants were placed in several districts into which the whole area was divided. They possessed individually the entire civil authority, officiating as Collectors, Judges and Magistrates within their respective jurisdictions. The Board of Commissioners assisted the Governor General-in-Council and the Lieutenant-Governor in the making of laws and regulations adapted to the state and condition of the Ceded Districts. As a Court of Appeal and Circuit, the Board superintended the administration of the laws over the territory and people, not accustomed to any regular system of order or law. The affairs of the Ceded Districts thus continued to be managed till 1803 when strong encomiums which had been uniformly bestowed on the institutions of Lord Cornwallis influenced the determination to introduce them with necessary modifications in these Districts.

The Ceded Provinces were divided into seven districts—Gorakhpur, Allahabad, Kanpur, Farrukhabad, Etawah, Bareilly and Moradabad. In each district, a civil servant of the Company was appointed as Judge and Magistrate and another civil servant as Collector, as in Bengal, Registrars, Sadar Ameens and Munisifs were appointed to decide civil cases up to a valuation of Rs. 200, Rs. 100 and Rs. 50 respectively. Native law and ministerial officers were also attached to the Courts. A Court of Appeal and Circuit was established at the town of Bareilly on the pattern of its counterpart in Bengal. The jurisdiction of the Sadar Adalats at Calcutta was also extended to the Ceded Districts. The police system of Benares was adopted for this area, accordingly the Tahsildars and landholders were vested with powers for apprehending all robbers and other disturbers of the

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51. Reg. IV. ibid.
53. Reg. VI. Id., at p. 79.
54. Reg. LIII. Id., at p. 81.
55. Id., at pp. 81-82.
56. Reg. X. Id., at p. 83.
public peace under obligation of either producing the criminal or of making good the loss.  

Conquered Provinces.

The Company conquered vast territory from the Mahrattas, Scindia and Raja of Bsar; besides the Peshwa ceded to it some other territory in commutation of subsidy. In 1805, the Conquered Provinces along with that ceded by the Peshwa were divided into five districts—Agra, Aligarh, Saharanpur North, Saharanpur South and Bundelkhand. These districts were placed under the administration of judicial and revenue officers, subject to control of superior authorities at Calcutta, in the same manner as the Ceded Districts of Oudh.

Comments.

The most remarkable reform introduced by Lord Wellesley was divesting the Governor-General-in-Council of the exercise of any judicial authority. The process of separating the judiciary from the executive was initiated by Lord Cornwallis, but it was taken to its logical conclusions only by Lord Wellesley. Introduction of suitable changes as to the jurisdiction of the existing courts, creation of new courts, particularly those of Sadar Ameens, insistence on recruiting men of calibre as Judges, and extension of the Bengal system with modification to Ceded and Conquered provinces, were his other commendable reforms.

Lord Cornwallis

Lord Cornwallis succeeded to Lord Wellesley as Governor-General in July 1805. This time he came to India, never to go back; he died in the following October. Only one significant change that he made in the constitution of Sadar Adalats may be noted here. No member of the Supreme Council was to be Chief Judge of these Adalats. Any covenanted civil servant of the Company, distinct from the Council, could be appointed to this office. This provision was made with a view to carry out the general principle of separation and to enable the members of the Council to devote more time to other Government duties which were very much then increased on account of the new additions in the territorial possessions of the Company.

58 Regs II, IV, V, VI, VII, XII, XXXV, Id., at pp. 90-91.
59. Regs VIII, IX, Id., at pp. 91-93.
61. Archbold, op. cit., at p. 132.
CHAPTER XII
JUDICIAL SYSTEM UNDER LORD MINTO, LORD HASTINGS AND LORD AMHERST

Lord Minto

Sir George Barlow succeeded to the office of Governor-General which, vacated by the death of Lord Cornwallis, devolved, as a matter of course, upon him as senior member of the Council until a fresh appointment could be made. In July 1807 Lord Minto assumed the reins of Bengal Government and Sir George resumed his position as senior member in the Council. The character of Lord Minto was of "a smooth and cautious rather than of a bold and enterprising cast"; he did not, therefore, introduce drastic changes in the existing system. Some of the minor changes made by him are given below.

Modification in the Constitution of Sadar Adalats.

Probably from motives of economy, it was required, in 1807, that the Chief Judge of Sadar Adalats was to be a member of the Council, other than the Governor-General and Commander-in-Chief. The number of puisne Judges was also increased from two to three, to be selected from the members of the covenanted civil service. In 1811, it was laid down that the Governor-General-in-Council might augment the number of puisne Judges as need arose, and that it was necessary that the Chief Judge should be a member of the Council.

Reforms in Magistracy.

In 1807, the jurisdiction of Magistrates was extended; they were empowered to punish offenders with imprisonment for a term not exceeding six months, corporal punishment not exceeding thirty stripes, and fine up to Rs. 200 which could be committed to additional imprisonment up to six months. This power could not be exercised by Assistant Magistrates; they were, however, authorised under certain circumstances, to punish offenders by inflicting imprisonment for a term of one month with or without corporal punishment. In 1810, a provision was made, empowering the Governor-General-in-Council to appoint persons other than Judges of Zila or City-Courts to the office of Joint Magistrates. Assistant Judges were to be also appointed with limited powers for Police and other purposes. The superintendence of the Police was, however, continued to vest in the Zila and City Magistrates, when not placed under an immediate authority of the Joint or Assistant Magistrates.

1. T.K. Panerjee, Background to Indian Criminal Law, at p. 195; Panerjee, op. cit., at p. 154.
2. G.C. Pinto, Constitutional History, at p. 57.
3. G.C. Pinto, op. cit., at p. 70.
4. British India, at p. 70.
Certain cases of robbery to be referred to Sadar Nizamat Adalat.

In 1808, all trials of persons charged with the offence of robbery with open violence, and liable to the punishment of transportation for life, were required, on conviction, to be referred to the Sadar Nizamat Adalat.  

Appointment of Superintendent of Police.

In 1808, provision was made for the appointment of a Superintendent of Police for Bengal and Orissa to act in concert with the Zila and City Magistrates or independently of them, for the detection and apprehension of persons charged with or suspected of dacoity and other offences. His warrant or other process was to be executed either by his own officers or through those of the local authorities. In 1810, his jurisdiction was extended to Bihar. A second Superintendent was also appointed for ceded and conquered areas.

Original Jurisdiction of Provincial Courts of Appeal.

In 1804, with a view to expedite an early decision and to reduce the arrears of undecided cases in the Zila and City Courts, their original jurisdiction was restricted to suits where the disputed amount was not over Rs. 500; the suits of higher value were to be originally cognizable by the Provincial Courts.

Collector's power to try rent cases.

In 182, certain summary remedies were provided to the ryots against landlords in all cases in which they were aggrieved by distress for rent. The cognizance of such cases was practically vested in the Collectors to whom they were directed for decision.

Changes in Mohammedan Law of Crimes.

During the Governor-Generalship of Lord Minto, laws against perjury, dacoity and burglary were made more stringent. Traffic in slaves was prohibited and rendered punishable.

Comments.

The vestings of some judicial powers in the Collectors in rent cases tended to confuse the executive and judicial functions. This was not a welcome change. However, other judicial and police reforms of Minto are worth noting.

Lord Hastings

Lord Hastings took up the charge of Bengal Government in 1813 at the exit of Lord Minto. Hastings was "shrewd, patient, independent, holding
his opinions modestly and under continual revision." He adopted a more liberal and sympathetic policy towards Indians and introduced certain important reforms in the administration of justice. Prior to coming to the discussion of his reforms, some provisions of the Charter Act of 1813 may be mentioned here.

Charter Act, 1813

The Charter Act continued the Company in the possession of its territorial acquisitions in India and their revenues "without prejudice to the undoubted sovereignty of the Crown of the United Kingdom of Great Britain and Ireland in and over the same." The Governments in India were empowered to make laws, regulations and articles of war for its native armed forces and authorized the holding of Courts-Martial. They were also empowered to impose taxes on persons subject to the jurisdiction of the Supreme Courts and to punish for failure to pay. Justices of the Peace were given jurisdiction in cases of assaults or trespass committed by British subjects on natives, and also in cases of small debts due to natives from British subjects. British subjects residing, trading or occupying immovable property more than ten miles from the Presidency towns were made amenable to the jurisdiction of the Diwani Adalats; an appeal, however, lay to the Supreme Courts. They had to get them registered with the Zila or City Courts; besides special provision was made for the exercise of jurisdiction in criminal matters over British subjects residing at a distance of more than ten miles from these towns; their convictions were, however, removable by Certiorari to the Supreme Courts. Special penalties were provided for theft, forgery, perjury and coinage offences, as existing provisions of common or statute law were inadequate for dealing with these offences.  

Reforms of Hastings

Background.

During the period of twenty years (1793-1813) of its implementation, the basis of the Cornwellis' Plan of 1793, that is, the separation of judicial functions from executive, was not touched, though minor alterations were made in it as needed from time to time. During the regime of Hastings, effective steps were, however, taken, inter alia, to modify the basis of Cornwellis' system. This was unfortunate because the defect was not in the system itself but in its application. The plea was that the Judges of Diwani Adalats were overburdened with the work because of their exercising magisterial powers also; this resulted into arrears of undecided civil cases and accumulation of untransacted criminal work, and necessitated the change to expedite the course of justice. A vast accumulation of undecided cases in other Courts held by European Judges as well as Courts of Native Commissioners was responsible for other measures of Hastings. He did not favour the idea of increasing the number of Courts presided over by Europeans on economic grounds; he, however, approved the suggestion of employing more Indians in the administration of justice and augmenting their judicial powers.  

The state of criminal justice was very unsatisfactory. The offences which chiefly prevailed were burglaries, committed by breaking through the walls of houses, murders from various motives, robberies attended with murder and manslaughter, dacoity or gan; robbery, attended often with murder, perjury and subornation of perjury, practised for the most atrocious purposes. Several Circuit Judges seldom returned to their stations in time because of conducting the trials of persons charged with these capital crimes. The perplexities they met with and the intricacies they had to unravel were such as arose partly out of the simplicity of character prevailing among some classes of the natives and partly out of their peculiar habits of depravity. A Circuit Judge reported thus:

"In the course of trials, the guilty very often...escape conviction. Sometimes an atrocious robbery or murder is sworn to and in all appearance clearly established, by the evidence on the part of the prosecution; but when we come to the defence, an alibi is set up, and though we are inclined to disbelieve it, if two or three witnesses swear consistently to such alibi, and allude every attempt to catch them in perjury or contradiction, we are thrown into doubt, and the prisoners escape.

Very frequently the witnesses on the part of the prosecution, swear to facts, in themselves utterly incredible, for the purpose of fully convicing the accused; when if they had simply stated what they saw and knew, their testimony would have been sufficient. They frequently, under an idea that the proof may be thought defective, by those who judge according to the regulations, and that the accused will escape, wreak their vengeance upon the witnesses who appear against them, and exaggerate the facts in such a manner, that their credit is utterly destroyed.

Witnesses have generally, each, a long story to tell; they are seldom few in number, and often differ widely in character, castes, habits and education. Thrice over, viz., to the darogah, the magistrate, and the court of circuit, they relate tediously and minutely, but not accurately, a variety of things done and said. Numerous variations and contradictions occur, and are regarded with cautious jealousy, though in reality they seldom furnish a reasonable presumption of falsehood.

I have no doubt that previously to their examination as witnesses, they frequently compare notes together, and consult upon the best mode of making their story appear probable to the gentleman, whose wisdom it cannot be expected should be satisfied with an unrelable tale; whose sagacity is so apt to imagine snares of deception, in the most perfect candour and simplicity.

We cannot but observe, that a story, long before it reaches us, often acquires the strongest features of artifice and fabrication. There is almost always something kept back, as unfit for us to hear, lest we should form an opinion, unfavourable to the veracity of the witness. It is most painful to reflect how very often witnesses are afraid to speak the truth, in our cat-cheries.

We cannot study the genius of the people, in its own sphere of action. We know little of their domestic life, their knowledge, conversation, amuse-

15. Fifth Report, op. cit., at pp. 120-121.
ments their trades, castes or any of those national and individual characteristics, which are essential to a complete knowledge of them. Every day affords us examples of something new and surprising; and we have no principle to guide us in the investigation of facts, except an extreme difficulty of our opinion; a consciousness of inability to judge of what is probable or improbable.

"Sometimes we see the most unfair means taken by informers and thief-takers, to detect and apprehend the accused. We find confessions extorted and witnesses suborned; at the same time, we think the accused guilty; and the prosecution fails, merely because the unfair play used against them, leads us to suspect more.

"When we recollect the extreme uncertainty to us, of every fact which depends on the credit of the natives, to support it, who can wonder, that a very slight circumstance should turn the scale in the prisoner's favour, and that while we think innocence possible, we hesitate to condemn to death or transportation?

"...If the mind is not convinced of guilt, an acquittal must follow; and we have nothing left to do, but to lament that a robbery, or a murder, took place, and that justice has failed to overtake the offenders.

"The evil is irreparable. The want of connection and intercourse with them; to the peculiarity of their manners and habits; their excessive ignorance of our character; and our almost equal ignorance of theirs."

This report clearly shows that administration of criminal justice suffered, to a great extent, due to exclusive employment of Europeans as Judges to hold criminal trials. They also consumed a lot of time in reaching a decision because of their ignorance of Indian people, their habits and traditions, laws and usages. This was also a factor which contributed to the vast accumulation of undecided criminal cases.

The Select Committee of the House of Commons observed "that on certain trials, and more particularly in cases of dacoity or gang robbery, the same evidence may serve to convict or acquit all the persons, of whom there may be many concerned, in the same offence; and that the fate of more than one person is thus determined by the same process, and at the same time. But even on this ground, though the remark be applied in every case, and the business be thereby considerably reduced, enough will remain, in addition to what has besides been remarked, to evince the unremitting attention that is required in a judge of Circuit for the performance of the duties of his office, and the requirements which an European civil servant must possess to qualify him for the same.

"The uncertainty of the evidence arising from the depravity of the people, among whom perjury is reckoned a light offence, and attended with less obloquy than the most trifling violations of oath, renders the duty of the judges on criminal trials, particularly arduous. The selection for this important office are probably made, from among the most able and experienced of the civil servants, who have served long enough to be acquainted with the language and
habits of the people. Of the integrity of the persons thus employed, there can be no reason to entertain any doubt; and when it is recollected that they have the assistance of natives learned in the laws, and experienced in the manners of the people, who attend them officially on the circuit, it may perhaps be fair to assume that the criminal laws are as well administered as could have been expected when the new system of government was introduced.

"With respect to the delay experienced in bringing persons charged with crimes to appear still to occur, in a degree an object with the government, to remove.

"The gaol delivery is made once in six months;...the commitment of offenders for the purpose of investigating the charges against them, at a future period, is productive of inconvenience to the natives, and of expense to the Government in India, from the necessity it imposes of summoning the witnesses, and maintaining them, while in attendance a second time. But the greatest objection noticed by some of the judges of Circuit to this delay, is the advantage it gives for conspiracy, either to involve the innocent, or to shelter the guilty, by artifices, in the practice of which some of the depraved classes of the natives...have acquired a proficiency, that threatens to turn the administration of justice into a scourge to the rest of the inhabitants.

"But the Committee have to notice the delay in the administration of criminal justice...arising from another cause, which is of more pernicious tendency than that experienced by these committed for trial; inasmuch as it affects those against whom no evidence has yet been taken, and may therefore involve the innocent as well as the guilty. The delay here alluded to, is that which frequently occurs at the office of the magistrate, where from press of business or other causes, months are represented to elapse, before the person apprehended can be brought to a hearing, during which time, he is lodged in a crowded prison, where takes the prisoner before the causes of his to the evil seems to arise, from the European stations, having more business on his hands, than it is possible for one person to transact. If as judge, he is impressed with the necessity of making an exertion for the reduction of the civil suits on his file, the business of the magistrate’s office, is in danger of falling in arrear; and if he employs himself sufficiently in the latter, to prevent the detention of witnesses on criminal charges continually coming before him and to commit or discharge the persons accused, the file of civil causes must of course increase. Expedients have been resorted to, for the purpose of relieving the judge, by enlarging the limits of cases referable from him, to his registrar and to the native commissioners, and by limiting the term for appeal to his decision. Something however is yet wanting, to complete that system of speedy justice, both civil and criminal, which Lord Cornwallis was so desirous of introducing, but which has not yet attained to that degree of excellence, of which it may still be hoped it is susceptible.”

In this background the reforms of Lord Hastings and his successors may be studied.

17. Id., at pp. 125-127.
Reforms in Civil Judicature.

Significant changes and reforms were introduced in Civil Judicature, the following of which are worth noting.

Courts of Munsifs and Sadar Ameens.—It was the desire of the Court of Directors that as regards the suits of small amount, the number of the Native Commissioners should be indefinitely increased; this would involve no expenditure to the State. They were opposed to augmenting the number of European Judges on the ground of effecting economy in the administration. This opposition was, however, not desirable on the ground of economy in view of the fact that huge revenues were realized by the Government from the natives of this country, who were, therefore, entitled to a proper maintenance of the administration of justice.

In 1814, only the pecuniary jurisdiction of Munsifs was increased from Rs. 50 to Rs. 64. An appeal lay to the Zila and City Courts whose decision was final. Rules of procedure were laid down for the Courts of Munsifs. In 1821, their number was increased and jurisdiction was extended to suits up to Rs. 150 in value.

In 1814, the pecuniary jurisdiction of Sadar Ameens was increased from Rs. 100 to Rs. 150 in original suits referred to them by Zila and City Judges. An appeal lay to the latter whose decision was final. They were empowered to try appeals from the Courts of Munsifs, referred to them by Zila and City Judges; in all such appeals, their decisions were final. Neither Munsifs nor Sadar Ameens could entertain any suits in which a British subject or some European or American was a party. In 1821, the Sadar Ameens were, on being especially empowered to take cognizance of suits, either originally or on reference from the Zila and City Judges up to a valuation of Rs. 500. An appeal lay to the latter in referred suits beyond Rs. 150 in value.

Courts of Registrars.—In 1814, the Registrars were authorized to decide original suits referred to them by the Zila and City Judges up to a value of Rs. 500; appeals might be preferred to the latter. The Registrars were, on being especially empowered, to decide suits referred to them by the Zila and City Judges beyond the said amount; such suits were, however, appealable to the Provincial Courts. They could also, when especially empowered, try appeals from decisions of Munsifs and Sadar Ameens referred to them by Zila and City Judges; their decision in such appeals was final.

Zila, City... Diwani Adalat.—In 1814, the office of Assistant Zila and City Courts were formally empowered institutted, not exceeding Rs. 5,000 in value. More definite rules were made as regards the admission

18. Id., at p. 118.
19. Reg. XXIII of 1814; Reg. II of 1821. Morley, op. cit., at pp. 61, 63. See also the heading relating to Zila, City, Provincial and Sadar Courts.
20. Ibid.
21. Reg. XXIV. Morley, op. cit., at pp. 61–64. See also the next heading.
of special appeals which were directed to be taken to the superior Courts only when the decision would appear to be inconsistent with precedent or some regulation or Hindu or Mohammedan Law or some other law or usage which might be applicable in the given circumstances, or it involved some important point, not formerly decided. Summary appeals might also lie from the Courts of Sadar Ameens and Registrars to the Zila and City Courts, from the Zila and City Courts to the Provincial Courts, and from the Provincial Courts to the Sadar Diwani Adalat in cases where the Courts below respectively refused to admit or investigate any suit, either originally or in appeal, regularly cognizable by them, on the ground of delay, informality or some other default.22

In the same year, the number of Judges of each Provincial Court was increased from three to four, exercising civil and criminal jurisdiction. All their decisions were rendered appealable to the Sadar Diwani Adalat. The Sadar Diwani Adalat was empowered to transfer a case of at least Rs. 1,000 in value to the Provincial Court from a Zila or City Court if some advantage would ensue. It was itself given an original jurisdiction in suits up to a valuation of, at least, Rs. 500.0.0, when they could not be conveniently decided in the Provincial Courts.23

In 1817, an option was given to the plaintiff to commence cases involving a sum between Rs. 5,000 and Rs. 10,000, either in the Zila or City Courts or in Provincial Courts. Thus the original jurisdiction of Zila and City Courts was extended to Rs. 10,000. An appeal could lie to the Provincial Courts from their decisions in all cases, whether original or appealed from the Courts or Registrars. Special appeals were allowed where decrees of one or more Courts were inconsistent with each other.24

In 1819, the Provincial Courts and the Sadar Diwani Adalat were made competent to admit second or special appeal whenever, on a perusal of the decree of a lower Court from which the special appeal was desired, it appeared that there was strong probable ground to presume a failure of justice.25 This provision was, however, given up in 1825.

Reforms in Criminal Judicature.

Lord Hastings introduced important changes and reforms in the Criminal Judicature also which are as follows:

Native Law Officers and Sadar Ameens given criminal jurisdiction.—In 1814, the Court of Directors desired the employment of Indians in the administration of criminal justice. This was given effect to in 1821 when the magistrates were empowered to refer to Native Law Officers and Sadar Ameens cases of petty offences for trial, who could sentence the offenders to imprisonment for a term not exceeding fifteen days, and a fine up to Rs. 50, commutable to a further period of fifteen days' imprisonment. For cases of petty thefts, offenders might be sentenced to thirty stripes and one month's imprisonment.26

22. Reg. XXIV. Id., p 64.
23. Regs. V, XXV. Id., at pp. 64 65.
Collectors to act as Magistrates.—In 1814, the Court of Directors had proposed to the Government to give magisterial powers to the Collectors of revenue. It was argued that “the duties of a judge were incompatible with the more active functions of a magistrate, that the Collector should be vested with magisterial as well as fiscal powers, because the Collector in person, or through his revenue officers, was brought more than any other functionary ‘into approximation with the people’. On the other hand, the combination of magisterial with revenue functions was also strongly objected to, not only upon the principles already laid down, but upon the ground that the Collectors were already fully occupied, and would not be able to undertake the labours of the magistracy without neglecting their own duties. It was also urged that although the Collectors might not be guilty of any abuse of their magisterial powers, yet it might reasonably be doubted whether the Indian officers acting under them, would not pervert the authority vested in them for public purposes to promoting their private advantage, or at least to facilitating the collection of rents and revenues by modes of coercion, other than those sanctioned by the Regulations.”

Whatever the objections, the desire of the Court of Directors was executed in 1821 when the Government decided to vest Collectors of revenue with magisterial powers and the Magistrates with the power of collecting revenue, whenever it was necessary.

Jurisdiction of Magistrates, Joint Magistrates and Assistant Magistrates.—With a view to expedite an early decision, to relieve the Circuit Judges from pressure of business and to avoid inconvenience, the prosecutors and witnesses had to suffer from because of repeated attendance, the jurisdiction of the Magistrates and Joint Magistrates was enlarged in 1818. They were empowered to try persons charged with the offences of burglary or attempt to commit it, and theft. If these offences were not attended with murder or violence, they could punish offenders with imprisonment with hard labour for a term not exceeding two years and thirty stripes. Cases of more than six months’ imprisonment were to be revised by the Circuit Court. The Magistrates and Joint Magistrates were also empowered to punish, in certain cases, persons convicted by them of receiving or buying stolen property or of escaping from jail. In 1819, they were further given authority to try offenders for woman stealing and desertion of their wives and families. Their sentences were put under the control of the Courts of Circuit. In 1820, they were empowered to give effect to the sentences of Courts-Martial. In all cases of theft, in which the value of stolen property was more than Rs. 300, the accused persons were to be committed to the Court of Circuit.

To remedy congestion in the Courts, the jurisdiction of Assistant Magistrates was somewhat enlarged. Whenever on account of the accumulations of work in a district, the Magistrate could not act promptly, it was provided in 1821 that the Governor-General in-Council might invest the Assistant Magistrate with special power to try cases referred to him by the Magistrate and to punish offenders by imprisonment for a term not exceeding six months.
six months, thirty stripes and fine up to Rs. 200, commutable to a further term of six months' imprisonment.32

In 1822, the Magistrates were empowered to try cases of affrays and to award such punishment as was prescribed under the general regulations. Aggravated cases were, however, to be referred to the Circuit Judge.53

Miscellaneous.

In 1814, it was provided that no person could be appointed as a Judge of the Sadar Adalats unless he had acted for three years as a Judge of a provincial Court or discharged judicial function for nine years altogether.34 This provision was, however, rescinded in 1823. In the same year, powers of Courts of Circuit and Sadar Nizamat Adalat were increased.55 In 1816, the office of the Superintendent and Remembrancer of Legal Affairs was constituted, to be held by a covenanted civil servant of the Company. The Government was to refer to him questions of fact or law for opinion before authorizing recourse to legal process. This office was, however, abolished in 1829.36

Hastings undertook a general revision of the whole system of Police, defined and enlarged the powers of the Superintendents of Police and other authorities.37

Changes in Mohammedan Law of Crimes.

In order to remove the defects still existing in Mohammedan Law of Crimes, various changes were made in 1817 and 1819, in punishments for offences like rape, adultery, murder and burglary, enticing away females for prostitution, etc. In 1818, requisition of security for good behaviour was restricted to certain types of cases. In the same year, for the first time provision was made for preventive detention for security purposes. In 1820, begari was prohibited under penalty, and dharna was explained and new punishment was prescribed for its commission.38

Comments.

The most objectionable part of the reforms and changes introduced by

Lord Amherst

John Adam took over charge of governor-generalship only in the officiating capacity from Lord Hastings in January 1823. In following August, Lord Amherst became the regular Governor-General and continued in this office till 1828. Some reforms and changes introduced by him in the existing systems are given below.

32. Reg. III. Ibid.
33. Ibid.
34. Ibid.
35. Morley, op. cit., at pp. 77-78.
36.
37.
38.
Courts of Sadar Ameens.

In 1824, it was resolved that Sadar Ameens would be given regular salaries instead of commission. This was to attract able persons for the recruitment of Sadar Ameens and to raise the status of those already employed. In 1827 Sadar Ameens, on being duly empowered by the Sadar Diwani Adalat, could decide original suits upto Rs. 1,000 in value, and any suits referred to them by the Zila and City Judges not exceeding this amount. Appeals from them in such referred cases exceeding Rs. 500 in value were not to lie to Registrars but to the Zila and City Courts whose decision was to be final except on special leave.

Magistrates and Superintendents of Police to grant pardon in some cases.

In 1824, the Magistrates and Superintendents of Police were empowered to grant pardon to persons, not principals, but directly or indirectly related to the commission of certain offences, provided there were prospects of obtaining, that way, evidence other than the deposition of an accomplice or an accessory.

Courts of Circuit.

In 1825, the Circuit Courts were empowered to pass final sentences and execute them without reference to the Sadar Nizamat Adalat on the ground of their want of power to impose sufficient punishment in all cases of culpable homicide not amounting to willful murder. This power could also be exercised in cases of persons convicted of robbery by open violence, not attended with murder or attempt to commit murder; the punishment was, however, confined to thirty-nine stripes and imprisonment with hard labour for fourteen years. Females were exempted from flogging. Punishments for affrays with homicide and contempt of Court were also prescribed. In 1826, the Governor-General-in-Council was empowered to appoint any number of Judges in the Provincial Courts of Appeal and Circuit according to the need.

Collector’s jurisdiction in rent cases enlarged.

In 1824, it was found that earlier provisions empowering the Judges of the Zila and City Courts to refer accounts and summary suits to Collectors for report were not sufficient to expedite trials. It was, therefore, laid down that the Collectors should be vested with authority to investigate and decide by a summary process, and subject to a regular suit in the Civil Court, all rent suits, referred to them by the Judges. Rules were framed for their guidance and same powers were allowed to them as were given to the Civil Courts for the purpose of compelling the attendance and examination of witnesses and, generally, for all process confined to the civil courts except execution of their decrees.

40. cc, op. cit., at pp. 102, 103.
41. cc, op. cit., at pp. 102, 103.
42. cc, op. cit., at pp. 102, 103.
43. cc, op. cit., at pp. 102, 103.
44. cc, op. cit., at pp. 102, 103.
Comments.

An objectionable feature of the changes made by Lord Amherst is the augmentation of judicial powers of the Collectors. Besides some reforms in punishments to be imposed by the courts in criminal cases, a noteworthy reform was the giving of a regular salary to native Judges, viz., Sadar Ameens in the place of commission on cases, and enlarging their pecuniary jurisdiction.

Acts of Parliament

Before closing this chapter, certain provisions of some Acts of Parliament passed in 1823, 1825 and 1826 may be mentioned. Act of 1823 regulated the salaries and pensions of the Judges of the Supreme Courts, and consolidated and amended the laws for the purpose of punishing mutiny and desertion of officers and soldiers in the service of the Company Acts of 1825 and 1826 further regulated the salaries of the Judges and regulated the appointment of juries in the Presidency-towns.46

46. Ilbert, op. cit., at p. 83.
to each division a Commissioner of Revenue and Circuit was appointed. Invested with the powers and authority of the Courts of Circuit, the Commissioners were to hold sessions of goal-delivery in Zilas and Cities at least twice a year. The employment of the Mohammedan Law Officers was made optional. Thus the Commissioners became the Criminal Judges in all cases of importance.

Appeals from and extension of jurisdiction of Magistrates.—In 1829, appeal from the decisions of Magistrates were directed to lie to the Commissioners of Circuit, if preferred within one month. Their power to punish with rigorous imprisonment was extended up to a term of two years.

Practice of Sati declared an offence.—The inhuman and impious rite of the practice of sati, which put year after year hundreds of innocent Hindu widows to a cruel and untimely end, was made illegal in 1829; any more practice of sati was declared an offence, to be considered as culpable homicide and punished accordingly. Abetment of the offence was also made punishable.

Government to appoint any person as Law Officer.—In 1830, it was decided that the Government might appoint any able person as a Law Officer; the trials held with his assistance were to be considered legal.

Investigation of criminal cases by Sadar Ameens.—In 1831, the Magistrates were authorized to refer criminal cases to Principal Sadar Ameens or Sadar Ameens for investigation although such Ameens were not to make any commitment.

District and City Judges to hold sessions.—In 1829, the burden cast upon the Commissioners was too heavy. "The judicial functions proved incompatible with fiscal duties, and 'to make a tax gatherer a judge' was found to be impolitic. In fact, the scheme of 1829 was neither sufficiently simple, nor sufficiently comprehensive, and the powers of the Commissioners were hampered by conflicting and independent authorities. Too much detail was assigned to them, to leave them adequate leisure for the duty of superintendence and the extent of their jurisdiction was found to be too wide to admit of minute and frequent visitation."

Therefore, with a view to enable them to devote enough time for the execution of their revenue duties and to provide for speedier trials, it was laid down in 1831 that whenever the pressure of work on the Commissioners should render it necessary, the Governor-General-in-Council might empower any Zilla and City Judges, not being Magistrates, to hold criminal sessions. The Judges, thus empowered, were to try all commitments made by Magistrates in their respective jurisdictions and to hold gaol-deliveries at least once a month. They were, however, given no authority over the Magistrates or power of interference with police matters; they might only make any requisitions to the Magistrates for the due conduct of pending trials; in case of misconduct of Police Officer to the

4. Regs. II and IV. Id., at pp. 163-164.  
7. Reg. V. Ibid.  
8. Id., at pp. 164-165.
CHAPTER XIII

JUDICIAL SYSTEM UNDER LORD BENTINCK AND AFTER

Lord William Bentinck

Lord William Bentinck succeeded to the office of Governor-General in July 1828 and held it till 1835. His arrival "marked the beginning of a new era in numerous ways. His seven years' rule proved a peaceful interlude between two periods of severe and costly campaigning, and thus made it possible to achieve reforms which were long overdue." He consolidated and reorganised the whole administration and introduced immense reforms in moral and social practices. From the point of view of the Legal History, the following measures of Bentinck are important.

Criminal Judicature.

Cornwallis' plan for the administration of criminal justice, as adopted in 1793, did not work well, whatever may be the reasons. It needed radical changes and not minor adjustments, made so far. Bentinck took the initiative and reconstructed the whole fabric of the criminal judicature, as explained below.

Abolition of Courts of Circuit: Appointment of Commissioners of Revenue and Circuit.—It was found that the system of Provincial Courts was defective. They failed in many cases to afford a prompt administration of justice because of their wide territorial jurisdiction and authority to decide both civil and criminal cases. The gaol-deliveries were delayed in some instances beyond the term prescribed by law. A great arrear of cases under appeal had accrued in all the Courts to the detriment of many individuals and to the encouragement of crime and litigation. The Circuit Judges, when employed singly in the districts under their authority, did not possess sufficient powers nor the opportunity of acquiring sufficient local knowledge to enable them to control adequately the Police or protect the people. Similarly, the vast territorial jurisdiction of each Board of Revenue operated to impede it in the execution of its duties. In order to curb out these evils, it was found necessary to place the Magistracy, Police, Collectors and other executive revenue officers under the superintendence and control of the Commissioners of Revenue and Circuit, each having the control of small territory so as to make him easily accessible to the people and facilitate his frequent visits to different parts of his jurisdiction, to give to them the powers vested in the Courts of Circuit and Board of Revenue, to be exercised with modifications, the former under the authority of the Nizamat Adalat and the latter under the control of a Chief Board of Revenue, and to separate the functions of the Courts of Circuit from those of the Courts of Appeal.¹

Accordingly, in 1829, the Courts of Circuit were abolished. The Provinces of Bengal, Bihar and Orissa were divided into twenty divisions;

¹. Edward Thompson and G. T. Garratt, Rise and Fulfilment of British Rule in India, at pp. 283-284 (1953). See also pp. 269-270
to each division a Commissioner of Revenue and Circuit was appointed. Invested with the powers and authority of the Courts of Circuit, the Commissioners were to hold sessions of goal-delivery in Zilas and Cities at least twice a year. The employment of the Mohammedan Law Officers was made optional. Thus the Commissioners became the Criminal Judges in all cases of importance. 3

Appeals from and extension of jurisdiction of Magistrates.—In 1829, appeal from the decisions of Magistrates were directed to lie to the Commissioners of Circuit, if preferred within one month. Their power to punish with rigorous imprisonment was extended up to a term of two years. 4

Practice of Sati declared an offence.—The inhuman and impious rite of the practice of sati, which put year after year hundreds of innocent Hindu widows to a cruel and untimely end, was made illegal in 1829; any more practice of sati was declared an offence, to be considered as culpable homicide and punished accordingly. Abetment of the offence was also made punishable. 5

Government to appoint any person as Law Officer.—In 1830, it was decided that the Government might appoint any able person as a Law Officer; the trials held with his assistance were to be considered legal. 6

Investigation of criminal cases by Sadar Ameens.—In 1831, the Magistrates were authorized to refer criminal cases to Principal Sadar Ameens or Sadar Ameens for investigation although such Ameens were not to make any commitment. 7

District and City Judges to hold sessions.—In 1829, the burden cast upon the Commissioners was too heavy. "The judicial functions proved incompatible with fiscal duties, and 'to make a tax gatherer a judge' was found to be impolitic. In fact, the scheme of 1829 was neither sufficiently simple, nor sufficiently comprehensive, and the powers of the Commissioners were hampered by conflicting and independent authorities. Too much detail was assigned to them, to leave them adequate leisure for the duty of superintendence and the extent of their jurisdiction was found to be too wide to admit of minute and frequent visitation."

Therefore, with a view to enable them to devote enough time for the execution of their revenue duties and to provide for speedier trials, it was laid down in 1831 that whenever the pressure of work on the Commissioners should render it necessary, the Governor-General-in-Council might empower any Zila and City Judges, not being Magistrates, to hold criminal sessions. The Judges, thus empowered, were to try all commitments made by Magistrates in their respective jurisdictions and to hold gaol-deliveries at least once a month. They were, however, given no authority over the Magistrates or power of interference with police matters; they might only make any requisitions to the Magistrates, necessary for the due conduct of pending trials; in case of disobedience, a representation might be made to the Sadar Nizamat Adalat; they might also report a case of misconduct of Police Officer to the

7. Reg. V. Ibid.
8. Id., at pp. 164-165.
same authority. It may be noted that the provision of 1831 did not deprive the Commissioners of their powers to conduct sessions. The provision, to start with, was merely of a transitory nature; only in exceptional cases it was to be executed; but soon the exception became the rule. In course of time, the sessions work began to be invariably transferred to the District Judges who came to be known as the District and Sessions Judges.10

Sadar Nizamat Adalat at Allahabad.—In 1831, a Sadar Nizamat Adalat, possessing the same powers as vested in that at Calcutta, was established at Allahabad for the North-Western Provinces,11 because it was no more possible for the Calcutta Sadar Court to supervise properly the administration of criminal justice in the Provinces and further to avoid much expense, trouble and delay.

Indians as Judges and Assessors: Dispensation of Futwa.—The policy of Lord Cornwallis to exclude Indians from holding judicial offices of importance suffered a set-back at the hands of Bentinck who favoured the suggestion of the Court of Directors to employ Indians extensively in the army and efficiency. He disconfidence in their capacity. sadar Ameens, Sadar Ameens and Law Officers to sentence persons of the offence of theft to labour in addition to imprisonment and corporal punishment. The Commissioners of Circuit and Sessions Judges were empowered to take the assistance of respectable natives in criminal trials either by referring some matter to them as Panchayat for investigation and report, or by calling them in the Court as assessors, or by employing them more nearly as a Jury.12 In these trials, the futwa was rendered unnecessary and might be dispensed with by the Court. In case futwa was dispensed with and the crime in question was not punishable under the Regulations, sentence was not to be passed and the case was sent to Sadar Adalat. Under all these modes of procedure, the decision vested exclusively in the presiding Judge. Non-Muslims were allowed to claim exemption from trial according to the Mohammedan Law; in such a case the trial was to be conducted with the assistance of natives, as explained above, and futwa was to be dispensed with. The Sadar Adalat was given full discretion as to requiring a futwa from its Law Officers.13

It is clear from the above discussion that the Mohammedan Law of Crimes ceased to be the general law applicable to all Indians alike; but what law was to be substituted is not clear.14

Additional Judges.—In 1833, it was provided that Additional Judges might be appointed in districts and cities, whenever necessary.15

Punishments.—Corporal punishment was totally abolished in 1834 except in cases where moderate chastisement was needed for the due maintenance of jail discipline and imprisonment was ordered to be substituted. In place of corporal punishment, a convicted person was to suffer from an additional term of imprisonment. The Sadar Nizamat Adalat and Courts of

12. See also infra.
Circuit Commissioners or Sessions might award an additional term of imprisonment extending up to two years, the Magistrates or Joint Magistrates up to one year, and Assistants, Principal and other Sadar Ameens up to one month. A sentence to labour could also be commuted to a fine in cases punishable with less than five years' imprisonment.  

Civil Judicature

Lord Bentinck introduced far-reaching reforms in the Civil Judicature also, as discussed below.

Indians in Civil Judicature.—As has been observed earlier, the Court of Directors had earnestly and repeatedly urged a more extended recourse to native agency for the disposal of judicial business; Bentinck concurred most cordially in the wisdom and justice of this sound policy. He was convinced that native probity and talent could be found immediately if due caution was observed in the selection of personnel. Bentinck said: "I should have deemed myself criminal had I any longer delayed to concede to the people of this country a measure so solemnly calculated to facilitate their access to justice; to conciliate their attachment, and to raise the standard of the moral character." Not only, therefore, in the sphere of criminal justice, but in that or civil justice also which rendered it desirable to employ respectable Indians in more important trusts connected with Indian administration, Bentinck provided, in 1831, for enlarging the jurisdiction of Indian Judges and for more and more employment of natives of any class or religious persuasion on monthly allowances in the administration of justice.

Accordingly, the pecuniary jurisdiction of the Munsifs was extended to Rs. 300; the Sadar Ameens were authorized to decide original suits up to a valuation of Rs. 1,000 referred to them by the Zila and City Judges; appeals from Munsifs and Sadar Ameens lay to the Zila and City Courts, whose decisions were final. A higher class of native Judges, known as Principal Sadar Ameens, was also created. The Governor-General-in-Council was empowered to appoint to any district or city one or more Principal Sadar Ameens. They were empowered to decide original suits, referred as above, not exceeding Rs. 5,000 in value; a regular appeal lay from their decisions to the Zila and City Courts, and a special leave to the Sadar Diwani Adalat. Whenever there was a good number of appeals from Munsifs and Sadar Ameens, the Zila and City Judges could secure permission from the Sadar Diwani Adalat to refer a specified number of cases to the Principal Sadar Ameens for decision. Special and summary appeals from their decisions, either in original suits or in appeals, were to be preferred according to existing rules in this connection. The Courts of Registrars were abolished and all pending cases therein were directed to be referred to the Principal Sadar Ameens or Sadar Ameens according to the value of their subject-matter.

Provincial Courts of Appeal gradually superseded and jurisdiction of Zila and City Courts enlarged.—In 1831, the Provincial Courts of Appeal were gradually superseded and, instead, the Zila and City Judges were to exercise original jurisdiction in all suits exceeding Rs. 5,000 in value; an appeal could lie to the Sadar Diwani Adalat.

17. Quoted in Jain, op. cit., at p. 270.
19. Id., at p. 67.
Sadar Diwani Adalat at Allahabad.—In the same year, a Sadar Diwani Adalat was established at Allahabad for the North-West Provinces, with same powers as were vested in the Sadar Diwani Adalat at Calcutta.20

Indians as assessors etc.—In 1832, the Governor-General-In-Council was empowered to vest in European functionaries presiding over the civil courts the power of availing themselves of the assistance of respectable natives in deciding civil suits, either originally or in appeal, in any of the following ways: first, by referring a suit or some point in it to a Panchayat of such persons for investigation and report; secondly, by constituting two or more of them as assessors of the Court with a view to derive advantage from their observations, particularly in the examination of witnesses; or thirdly, by employing them like a jury to attend the Court during the trial of the suit, suggest some points of inquiry as might have occurred to them and, after consultation, give their verdict. The decision was exclusively vested in the presiding Judge in all these cases.21

Final abolition of Provincial Courts of Appeal.—Earlier, reasons have been given for the abolition of Provincial Courts of Circuit in 1829. The Provincial Courts of Appeal had also ‘become proverbial for their dilatoriness and uncertainty of decision’22. They had outlived their utility and become resting places for the destitute and incapacible persons.23 In 1833, therefore, they were finally abolished; all original suits, pending in these courts, were directed to be referred to the Zila and City Courts; all appeals—regular, special or summary—were to be transferred to the Sadar Diwani Adalat.24

Additional Zila and City Judges.—In 1833, it was laid down that additional Zila and City Judges could be appointed.25

Further re-union of civil and revenue jurisdiction.

In 1831, the civil courts were completely deprived of their jurisdiction to decide summary suits of rent and transferred them to the exclusive cognizance of the Collectors of revenue; their decisions were to be final subject to a regular suit, to be instituted in the civil courts. The Commissioners of Revenue could, however, revise them on the sole ground of the cases not being of a nature cognizable as summary suits. The re-transfer of rent and revenue cases to the Collectors was made with a view to facilitate the collection of Government revenue.26

Police reforms.

In 1829, the office of the Superintendant of Police was abolished, and the duties pertaining to this office were to be discharged by the Commissioners of Circuit under the authority of the Sadar Nizamat Adalat.27 In 1831, the Tehsildars in the Ceded and Conquered Provinces were empowered

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20. Reg VI. Ibid.
21. Ibid.
23. Id., at p. 286.
25. Ibid., at pp. 67-69.
26. Ibid., at pp. 67-69.
27. Ibid., at pp. 67-69.
to exercise the same powers as were vested in the Darogas in Bengal provinces."

Comments.

It has been rightly observed that from the point of view of Legal History, "Bentinck’s administration figures second only to that of Cornwallis". 28 The abolition of the practice of sati and breaking through the illiberal policy of excluding the natives were his most notable contributions apart from his other judicial and police reforms. The Indianisation of certain judicial services brought efficiency and expedition in the administration of justice. Many of the innovations of Bentinck are continuing even to day. An objectionable feature of his plan as to revenue cases was that in view of the fact that no rules were ever laid down for conducting the summary inquiry either before the civil courts or before the Collectors, "considerable oppression resulted from this state of things, the tenants not being sufficiently protected from the landlord; and the landlord not being sufficiently protected from the Collectors". 29

Before closing this part of the Chapter, it is important to mention here relevant provisions of the Acts of 1828 and 1832 and the Charter Act of 1833, passed by the British Parliament.

Acts of 1828 and 1832

The Act of 1828 provided that within the jurisdiction of the Supr.
their debts. Another Act extended to I Law of Crimes. An Act of 1832
other than covenanted civilians as justices of the Peace, and, under it, it was no more necessary that jurors should be Christians. 30

Charter Act of 1833.

The Charter Act allowed the Company to retain its territorial possessions under its government for a term of twenty years but in trust for the Crown. The Company was ordered to close its commercial business and to wind up its affairs with all convenient speed. While it was deprived of its commercial functions, it retained its administrative and political powers under the existing system of double Government and continued to exercise its patronage over Indian appointments. The superintendence, direction and control of the whole civil and military government of the Indian territories and their revenue were vested in the Governor-General of India in Council. 31 The strength of the Council was increased by the addition of a fourth ordinary member, not a servant of the Company, who was to sit exclusively for legislative purposes. The Act vested the legislative power of the Government of India exclusively in the Council. This created an All India Legislature with a General and wide legislative power. Provision was made for the appointment of an Indian Law Commission. 32 A general system of judicial establishments and police was also contemplated. No

32. Governor-General at Calcutta was made the Governor-General of India.
33. See Chapter XXIX, infra.
native, nor any natural born subject of His Majesty would be disabled from holding any office or employment under the Company only on the grounds of religion, place of birth, descent, colour or any of them. Thus was made a broad and emphatic enunciation of the policy of freely admitting natives to a share in the Indian administration on the basis of merit. The Governor-General-in-Council was directed to consider the means of mitigating the state of slavery in India and of ameliorating the condition of slaves and to propose measures for the abolition of slavery. The Act removed all restrictions on European immigration, intercourse and acquisition of landed property in India, and at the same time require the Governor-General-in-Council to adopt measures to protect the natives from insult and outrage in their persons, religions and opinions, that might result from the above freedom given to Europeans.34

Judicial System after Bentinck

The major changes made and reforms introduced in the judicial, revenue and police systems after Lord William Bentinck till the passage of the Indian High Courts Act in 1861 are given below.

Civil Judicature.

In 1836, the right of appeal from the Company’s Courts to the Supreme Courts given to British subjects residing in the Provinces was taken away; it was provided that no person on the ground of birth or descent would be exempt from the jurisdiction of the former or incapable of being appointed as a Principal Sadar Ameen, Sadar Ameen or Munif.35 In 1837, the powers of these Officers were augmented and they were authorized to set aside summary judgments of Collectors. The Principal Sadar Ameens were to decide suits of any value referred by the Zila or City Courts and original suits, so referred, instituted by proprietors, farmers or talukdars for the revenue of land held free from assessment or claiming to possess lands exempted from revenue. An appeal from such suits in suits of an amount beyond Rs. 5,000 could lie directly to the Sadar Diwani Adalat. The decisions of these Ameens in suits, referred as above, within the competence of Munifs to decide, were appealable to Zila or City Courts whose decisions were final. The Zila and City Courts were authorized to transfer any civil proceeding to a Principal Sadar Ameer whose order was appealable, in the first instance, to the Zila or City Court, and especially to Sadar Adalat.36

In 1838, the Zila Courts were empowered to receive summary appeals from the decrees and orders of subordinate Munifs.37 In 1843, special appeals were directed to lie to the Sadar Diwani Adalat from decisions given in regular appeals in subordinate civil courts on the ground that such decisions were not consistent with law or usage, or practice of the court, or involved doubtful questions of law, usage or such practice.38 This provision was repealed in 1853 and it was provided that special appeals could be preferred to the Sadar Adalat from decisions given in regular appeals by lower courts on the following grounds: a failure to decide all material points in a case or if the decision was contrary to law, misconstruction of a

36. Act XXV Ibid.
38. Act XIII, Id., at p. 11.
document; ambiguous decision; and substantial error or defect in procedure or investigation of the case. No special appeal lay on a matter of fact.\textsuperscript{39}

In 1841, all suits within the competence of the Principal Sadar Ameens or Sadar Ameens to decide were directed to be instituted ordinarily in their Courts, but the Zilla or City Courts were empowered to withdraw them and decide themselves or refer them to some other subordinate competent court. They might also admit summary appeals from the orders of Principal Sadar Ameens and Sadar Ameens rejecting suits, originally cognizable in their Courts.\textsuperscript{40}

In 1810, the Court of Requests\textsuperscript{41} at Calcutta was abolished, and in its place a Small Cause Court was established. It was a Court of Record with jurisdiction coterminous with that of its predecessor. The Judges, not exceeding three in number, were to be appointed by the Governor-General in Council, one of them being a professional lawyer. Its jurisdiction covered all suits not exceeding Rs. 500 in value. Judges of the Supreme Court might exercise the powers of Judge of the Small Cause Court, and suits might be tried by their sitting in the Supreme Court as if they were Judges of the Small Cause Court. The suits were to be decided by the Small Cause Court in a summary way, and every defence which would be held good in the Supreme Court, sitting as a Court of Equity, was declared to be a bar to any legal demand in the Small Cause Court. The Judges of this Court were authorized to make rules of practice and procedure, subject to the approval of the Supreme Court. No case could be removed from this Court to the Supreme Court by any writ or process unless the disputed amount exceeded Rs. 1,000 and leave of a Judge of the Supreme Court was obtained.\textsuperscript{42}

In 1860, the Small Cause Courts were established in the Mofussil also.\textsuperscript{43}

Criminal Judicature and Law.

In 1835, it was provided that all or some of the duties and powers of the Commissioners of Circuit could be transferred by the Government

\textsuperscript{39} Act XVI. Ibid.

\textsuperscript{40} Act IX. Ibid. The Courts of Principal Sadar Ameens and Sadar Ameens were abolished sometime after 1861. See Cowell, op. cit., at pp. 182-183. In 1871, the Bengal Civil Courts Act was passed which consolidated and amended the law relating to the District and Subordinate Civil Courts in Bengal Provinces and North-Western Provinces Act XII of 1871 was subsequently passed to consolidate the law relating to these Courts and the Courts of Assam. See, for details, Cowell, op. cit., at pp. 179-185, and Chapter XIX.

\textsuperscript{41} This Court was created under the Crown's Charters of 1753 to decide civil suits up to five pagodas in value. In 1797 its pecuniary jurisdiction was extended to Rs. 80. In 1804, the Parliament empowered the Government at Calcutta to extend his jurisdiction to Rs. 400 and to reform its constitution and practice. Accordingly, Commissioners were appointed for the recovery of small debts and, in 1819, its jurisdiction was extended to the said limit. The Court of Requests was placed under the control of the Supreme Court. See Cowell, op. cit., at p. 164.

\textsuperscript{42} Act IX. Morley, op. cit., at p. 28. In 1861, Act XXVI extended the jurisdiction of the Court to Rs. 1,000 if the cause of action should arise or the defendant should reside or carry on business or personally work for gain within its territorial jurisdiction. By consent of parties, the Court might decide cases of higher value. Doubtful questions of law or equity in cases exceeding Rs. 500 in value were to be reserved for the opinion of the High Court. Id., at p. 193. In 1884, Act XV was passed which repealed the former enactments and constituted the present Small Cause Courts. See id., at pp. 185-186, and Chapter XIX.

\textsuperscript{43} Act XLII, id., at p. 186. In 1865, the law relating to them was amended and consolidated by Act XI. Act IX of 1887 reconstituted them and is still the source of their constitution and authority. See id., at p. 186 and Chapter XIX.
to the Sessions Judges.\textsuperscript{44} In 1836, \textit{Thagi} Act was passed.\textsuperscript{45} Alternative punishments were prescribed in 1839 for non-payment of fines.\textsuperscript{46} In 1840, the Magistrates were given some civil powers in cases of affrays relating to the possession of the land.\textsuperscript{47} In 1841, the ordinary courts were directed to try crimes against the State and the Government was empowered to issue a commission to the Judges for their trial. The sentences and proceedings were to be sent to the Sadar Nizamat Adalat which had to sumit their sentences to the Government for confirmation. It was also provided that from sentences and orders of the Assistant Magistrates, Sadar Ameens or Law Officers, within existing limitations, one appeal should lie within one month to the Magistrates or Joint Magistrates; from sentences or orders, beyond such limitations, of Magistrates, Joint Magistrates or Assistant Magistrates, vested with special powers, one appeal should lie within one month to the Sessions Judges; and from the sentences or orders of the Sessions Judges, one appeal should lie within three months to the Sadar Nizamat Adalat; the sentences or orders passed in such appeals were to be final. The Sadar Nizamat Adalat might call for the complete record of any criminal trial in a subordinate court and pass necessary orders, but not so as to enhance the punishment given, or punish a person acquitted by the lower court.\textsuperscript{48}

In 1843, slavery was declared illegal, and more drastic provision was made for the suppression of dacoity.\textsuperscript{49} It was also provided that in cases of conviction of British subjects by Magistrates or Justices of the Peace in the Mofussil, an appeal would lie from their sentences according to the rules made in respect of cases of sentences passed by Magistrates in the exercise of their ordinary jurisdiction; such cases were not afterwards liable to revision by \textit{certiorari}. Unconvenanted Deputy Magistrates capable of being employed as Judicial Officers could be appointed by the Government with limited powers, under certain former regulations, in cases referred to them by the Magistrates, or with full powers of a Magistrate, or as Police Officers.\textsuperscript{50}

In 1844, corporal punishment was again introduced in certain cases.\textsuperscript{51} In 1845, the Assistant Magistrates with special powers were made competent to exercise certain civil powers in cases of affrays relating to the possession of land, referred to them by the Magistrates.\textsuperscript{52} In 1849, marking of prisoners was abolished; provisions were made for insane criminals; and mutinous practice was made punishable.\textsuperscript{53} In 1850, breach of trust was declared a felony; offences against property were rendered punishment with fine also in addition to other punishment; and severe punishment was provided for the offence of administering poisonous drugs.\textsuperscript{54} In 1852, additional punishment was prescribed for certain indictable misdemeanours.\textsuperscript{55} In 1854, the Assistant and Deputy Magistrates were authorized to

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 decid cases without reference by the Magistrates, and Deputy Magistrates with special powers were given certain civil powers in cases of affrays relating to the possession of land. In 1856, sale or exposure of obscene books was made punishable. In 1857 and 1858, punishments were provided for waging war against the State, and mutiny or sedition in the Army.

Revenue Jurisdiction.

In 1839 an Act was passed to enlarge and define the jurisdiction of the Collectors as regards summary suits for arrears or exactions of rent and generally in regard to the law regulating the relations of landlords and tenants. The Collector was taken as the person "most deeply interested in promoting this branch of the administration of civil justice, being best acquainted with the fiscal state of the district, with the tenures prevailing in it, and with the character of the landlords." The Act assigned to the Collectors exclusively the original jurisdiction in all cases of ejectment, cession of leases for arrears of rent, enhancement of rent and right of demanding khuluss and pattas. Previously the civil courts only had jurisdiction to try these suits.

Under the same Act, the Collectors and Deputy Collectors, the latter as far as vested with powers by the Act, were put under the general direction and control of the Commissioners and the Boards of Revenue; the Deputy Collectors were placed under that of the Collectors. Appeals could be in certain cases from the Deputy Collector to the Collector and from the latter to the Commissioner. The order of the Commissioner or Collector in appeal was not further appealable but the Board of the Commissioner might call for a case and pass suitable orders. The decree of a Collector was not appealable if for an amount below Rs. 100, unless his decision involved some questions of right to increase rents or that of title to lands.

The consequence of the Act of 1839 was found to be that cases involving difficult and intricate points of law, and concerning important interests in land, came on for adjudication before Collectors and their subordinates, and it soon appeared that such officers were thereby entrusted with work of more difficulty and responsibility than was suited to their official knowledge and experience. Certain changes in this respect were, however, made in 1869 and thereafter.

55. Act X. Morley, op. cit., at p. 76.
57. Acts XI and XIV of 1837, Acts V and XXVI of 1838. Id., at pp. 125-128. In 1830, Indian Penal Code was enacted. In 1861, the first Criminal Procedure Code was passed. Then followed certain amending Acts, consolidated by Act VIII of 1869. In 1874, the Criminal Procedure Code was again passed, repealing the previous enactments on the subject, entirely re-arranging the procedural law and also restructuring the criminal courts. Then followed amending Acts and new Code of 1872, repealing the previous one. Finally came the present Code in 1898. See Cowell, op. cit., at pp. 185-197. See also Chapter XXIX.
58. Act X. Cowell, op. cit., at pp. 119-120.
59. Act X. I., at pp. 120-121.
60. Id., at pp. 121-122.
61. Act VIII of 1839 transferred the jurisdiction of the Collectors to try suits under Act of 1839 to the civil courts in Bengal. In 1833, the Bengal Tenancy Act was passed repealing the former Acts. Under it, the civil courts were given jurisdiction in the matters between landlords and tenants and it regulated the procedure and appeal in all rent suits. Act XVIII of 1873, passed for the North-West Province, though repealing the Act of 1851, consolidated and amended that and its amending Acts, and preserved exclusive jurisdiction to the revenue courts. Act XII of 1891 followed the same course. Settlement Officers were vested with civil jurisdiction in cases of rent to the exclusion of the courts of civil jurisdiction. Id., at pp. 122-123.
Police System.

In 1837, a provision was made for the re-apportionment of the Superintendents of Police to exercise all the powers of the Commissioners of Circuit in this respect; the latter were to cease to act as Superintendents of Police. In 1854 Tulsidas, having police jurisdiction, were granted control over all Darogas. In 1861, an Act was passed laying down the structure of the Police system throughout India.

Certain Acts of Parliament

At the close of this Chapter, it is relevant to point out important provisions of certain Acts of British Parliament.

Acts of 1840 and 1843.

An Act of 1840 amended and consolidated the Indian Mutiny Acts; the Governor General in Council was empowered to frame regulations for the Indian Navy. An Act of 1843 enacted a law of insolveney for India.

Charter Act of 1853.

The Indian territories were allowed to remain under the Government of the Company in trust for the Crown until otherwise directed. Several changes were made in the legislative machinery. The legislative member of the Council was allowed to sit and vote at its executive meetings also. The Council was enlarged for legislative purposes. Provision was made for the appointment of a Law Commission. The right of patronage to appointments in Indian administration was taken away and was to be exercised according to the regulations made by the Board of Control.

Government of India Act, 1858.

The so-called mutiny of 1857 gave the death-blow to the system of double government with its division of powers, responsibilities and obligations. Consequently, the Government of India Act, 1858 was passed. This Act transferred the Government of India to the Crown acting through a Secretary of State-in-Council. The patronage of the important appointments in India was vested either in the Crown or in this Council. Admission to the covenanted civil service was open to all natural-born subjects of Her Majesty and was to be given on the basis of competitive examination. The property of the Company was transferred to the Crown. The Board of Control was formally abolished. As regards the contracts and legal proceedings, the Secretary of State in Council was accorded a quasi corporate character so as to enable him to assert the rights and discharge the liabilities devolving upon him as successor to the Company. The naval and military forces of the Company were transferred to the Crown.

62. Act XVI. Ibid.
63. Act V. See Banerjee, op. cit., at pp. 211-220
64. Ibid., op. cit., at pp. 91-91.
65. See Chapter XXIX.
66. Ibid., op. cit., at pp. 53-53.
67. Id., at pp. 97-100.
CHAPTER XIV

RECORDER’S COURTS AND SUPREME COURTS AT MADRAS AND BOMBAY

Recorder’s Courts

Background.

The Mayor’s Courts exercising civil jurisdiction and the Courts of Governor in Council exercising criminal jurisdiction were re-established at Madras and Bombay under the Charter of 1753. In course of time these Courts proved their inadequacy to discharge their judicial functions more effectively. Their personnel were laymen having no knowledge of law and procedure. This factor was a great handicap in their dealing with more technical and complicated cases pouring in their Courts since 1753 because of a spectacular growth of the Presidency-towns in the later half of the eighteenth century. “Non-lawyers as Judges in the Courts appeared to be an anachronism in view of the changed context.”

Establishment, Constitution and Jurisdiction.

In 1797, therefore, the Parliament passed an Act authorizing the Crown to supersede the existing judicial arrangements at Madras and Bombay and instead establish the Recorder’s Courts.

Each Recorder’s Court was declared to be a Court of Record consisting of the Mayor, three Aldermen and a Recorder, as President of the Court, who was to be appointed by the Crown from among the lawyers of at least five years standing. Their jurisdiction was extended to civil, criminal, ecclesiastical and admiralty cases. They were given power to establish rules of practice and were constituted the Courts of Oyer and Terminer and Gaol Delivery. Their jurisdiction was extended over the British subjects residing within the British territories subject to the Governments of Madras and Bombay respectively as well as those residing in the territories of native princes in alliance with these Governments. The jurisdiction of these Courts was brought within the restrictions of Act of Settlement, 1781, imposed on that of the Supreme Court at Calcutta. The personal laws of Hindus and Mohammedians were reserved as usual. Appeals could be taken from their decision to the King-in-Council.

In 1798, the Crown issued the Charters establishing the Recorder’s Courts superseding the Mayor’s Courts and those of the Governor in Council, at Madras and Bombay. The Charters gave effect to the above provisions of the Act of 1797.

Comments.

The Recorder’s Courts were more effective instruments of justice than their predecessors. The presence of professional lawyers made them the true Courts

of law. Formerly, civil cases were to be decided by the Mayor’s Courts and the criminal cases by the Courts of the Governor in Council. The new Courts were given both civil and criminal jurisdiction. They tried the cases of natives also, residing in the Presidency towns. The Mayor’s Courts were debarred from trying such cases unless submitted to their decision by both the parties. Previously the Courts of the Governor in Council intervened in appeals from the Mayor’s Courts to the King in Council. An appeal from the decisions of the Recorder’s Courts, however, lay directly to the King in Council. Evidently, the new Courts were a distinct improvement upon their predecessors.

Supreme Courts

The Recorder’s Courts did not last long. The Madras Court was abolished in 1801 and the Bombay Court in 1823. The Supreme Courts were created in their places.

Supreme Court at Madras.

An Act of Parliament, passed in 1800, provided for the establishment of a Supreme Court at Madras; the Recorder’s Court was to be superseded. The Supreme Court was to be a Court of Record consisting of a Chief Justice and two puisne Judges, being English barristers of at least five years’ standing. The powers vested in the Recorder’s Court were transferred to, and to be exercised by the Supreme Court which was directed to exercise the same jurisdiction and powers, subject to the same restrictions, as the Supreme Court at Calcutta. The Crown’s Charter establishing the Supreme Court was granted in 1801.

Supreme Court at Bombay.

In 1823, an Act of Parliament authorised the Crown to abolish the Recorder’s Court and establish the Supreme Court at Bombay in its place. The Crown’s Charter was issued late in the year.

The Supreme Court was declared to be a Court of Record consisting of the same number of Judges as the Supreme Court at Calcutta. The Judges were to be barristers of at least five years’ standing. The Court was to be invested with the same powers and authorities, to have a similar jurisdiction and the same powers, and to be subject to the same limitations, restrictions and control, as the Supreme Court at Calcutta.

Miscellaneous aspects.

The powers of the Madras and Bombay Supreme Courts were placed explicitly by the Acts upon an equal footing with those of the Calcutta Supreme Court. It was laid down that it was lawful for the former within their respective territorial jurisdictions to do, execute, perform and fulfill all such acts, authorities, duties, matters and things, whatsoever, as the latter was or might be authorized or directed to do so within its territorial jurisdiction.

There were, however, some variations in the Charters of several Courts, which gave rise to doubt and difficulties. First, the Supreme Court at Bombay was prohibited from interfering in any matter of revenue even within the town of Bombay. This was in direct contravention of the Charter Act of 1515 which authorized all persons to prefer, prosecute and maintain in all the Supreme

6. Id., at p. 15.
Courts, all types of indictments, informations and suits whatsoever for enforcing the laws and regulations of the Governor-General-in-Council and Governors-in-Council, or for any matter arising out of the same. The Advocate-Generals were also authorised to exhibit informations in these Courts against any persons for breach of the revenue-laws or regulations or for fines, penalties, forfeitures, debts or sums of money, committed, incurred or due by any persons in respect of such laws or regulations. Secondly, natives were also exempted from appearing in the Supreme Courts at Madras and Bombay unless the circumstances compelled their appearance in the same manner as in a native court; this was a provision which placed the authority of these Courts in such cases at the discretion of the Government which regulated the courts of the Company as they pleased. This appeared inconsistent with the duties assigned to the Courts by the Statutes. Thirdly, there was a difficulty with regard to crimes maritime; in this matter, the Charter of the Bombay Supreme Court restricted its powers to such persons as would be subject to its ordinary jurisdiction; this was at variance with the Charter Act of 1813 which empowered the Supreme Courts to take cognizance of all such crimes committed by any person if the ordinary jurisdiction was limited to British subjects. 6

Conflict between Supreme Court and Bombay Government.

Soon after the establishment of the Supreme Court at Bombay, dissensions arose between the Court and the Bombay Government similar in character, but on a smaller scale, to those which had produced so much agitation in Bengal Provinces. The Judges of the Court issued writs of Habeas Corpus to certain persons beyond the town of Bombay. One writ was issued, in August 1828, to bring a native boy, Moro Raghunath, detained by his grandfather, Pandurang, at Poona, against his will under circumstances attended with great hardship and cruelty, under the orders of the Magistrate at Poona. It was made returnable to the Court in September. While issuing the writ on the petition of a relation of the boy, the Supreme Court had overruled the objection of the Advocate-General that neither Raghunath and Pandurang nor Poona were within the jurisdiction of the Court. Another writ was issued, in September 1828, to a jailor to produce a prisoner, Bappoo Gunness, detained under the orders of the Company’s Court of Conan. It was also made returnable in the same month.

The Governor-in-Council forbade a return being made to any of the writs on the ground that the Supreme Court had no authority to discharge persons imprisoned under the orders of a native court. This opposition to the process of the Court annoyed it and consequently, in April 1829, it declared that it had ceased functioning on all its sides, and that it would not perform any of its functions until it received an assurance that its authority would be respected and its process would be obeyed and rendered effective by the Governor in Council. Sir Peter Grant, the only surviving Judge, sent a petition to His Majesty against this interference by the Government and prayed for issuing proper commands for the due vindication and protection of the dignity and lawful authority of His Majesty’s Supreme Court at Bombay. The petition came up before the Privy Council for discussion and consideration. The report of the Privy Council affirmed by His Majesty, which went against the Supreme Court, contained, inter alia, the following points:

Firstly, the writs of Habeas Corpus were improperly issued in the above two cases referred to in the petition.

Secondly, the Supreme Court had no authority to issue a writ of Habeas Corpus except when directed either to a person resident within those local limits wherein it had a general jurisdiction, or to a person out of such local limits, who was personally subject to its jurisdiction.

Thirdly, the Supreme Court had no power to issue the writ to the jailor or officer of a native court as such officer, it having no power to discharge persons imprisoned under the authority of a native court.

Fourthly, the Supreme Court was bound to notice the jurisdiction of the native court without having it especially set forth in the return to a writ of Habeas Corpus.

This Chapter, along with Chapters VII and VIII, concludes our discussion on the Supreme Courts. Below is given a summary of their jurisdiction exercised, and law administered, by them before the passage of the Indian High Courts Act in 1861.

**Jurisdiction**

The Supreme Courts were vested with five distinct jurisdiction—civil, criminal, equity, ecclesiastical, and admiralty. Their jurisdiction was extended over the following categories of persons:

1. All persons, residing within the local territorial limits of the Supreme Courts, were subject to their jurisdiction in all matters, civil and criminal; ecclesiastical jurisdiction, however, was not applied to Hindus and Mohammedans beyond granting probates of wills; the Bombay Supreme Court was prohibited from interfering in any matter concerning the revenue, even within the town of Bombay.

2. All British-born subjects and their descendants including members of the covenanted services, civil and military, excluding those of the Queen's troops, residing in the Provinces under the Presidencies of Calcutta, Madras and Bombay, were subject to the jurisdiction of the Supreme Courts in all matters.

3. All persons residing at places within the Provinces, who possessed a dwelling-house and servants in the Presidency-towns, or a place of business there, where they carried on trade through their agents or servants, were considered to be constructively inhabitants of these towns for the purpose of liability to the common law and equity jurisdictions of the Supreme Courts.

4. Natives residing in the Provinces, who had bound themselves by written agreement with any British subject to submit to the jurisdiction of the Supreme Courts in disputes not exceeding Rs. 500 in a value relating to the said agreement, were amenable to the jurisdiction of the Supreme Courts.

5. Persons who availed themselves of the Supreme Court's jurisdiction for any purpose, were liable to it in the same matter, even on other sides of the Courts than that of which they had availed themselves, for example, persons who had applied for and obtained probates of wills, were liable to their equity jurisdiction for the proper administration of the estate.

6. All persons who, at the time of action started or cause of action accrued, were or had been employed by, or directly or indirectly in the service of, the Company or any British subject, were liable to the civil jurisdiction of the Supreme Courts in actions for wrongs or trespasses and also in any civil suit by written agreement of parties to submit to their jurisdiction; and all persons who, at the time of committing any crime, misdemeanour or oppression, were or had been employed by, or directly or indirectly in the service of, the Company or any British subject, were liable to the criminal jurisdiction of the Courts.

7. The admiralty jurisdiction of the Supreme Courts extended over the Provinces and other dependent territories and islands, and comprehended all cases, civil and maritime, and all matters and contracts relating to freights, extortions, trespasses, injuries and demands between merchants or owners of ships used within the above jurisdiction, and the similar matters within the Provinces. Their criminal jurisdiction was extended to all crimes committed on the high-seas by any persons whatsoever.

In respect of the Bombay Supreme Court, however, it has been pointed out that its Charter restricted its powers to such persons as would be amenable to it in its ordinary jurisdiction, which was at variance with the Charter Act of 1813, if the ordinary jurisdiction was limited to British subjects only.

8. The criminal jurisdiction of the Supreme Courts was extended over all British subjects for crimes committed at any place within the limits of the Charter of the Company or within the territories of native Princes, in the same way as if they were committed within Indian territories under the British Government.

Law.

The law administered by the Supreme Courts may be classified under eight distinct heads:

1. The common law as prevailed in England in 1726 and which was not subsequently altered by Statutes especially extending to India or by the Acts of the Governor-General in Council.
2. The Statute law as prevailed in England in 1726, and which was not subsequently altered, as discussed above.
3. The Statute law expressly extending to India which had been enacted since 1726 and had not been since repealed, and the Statute which were extended to India by the Acts of the Governor-General-in-Council.
7. The Hindu law and usages in actions regarding inheritance and succession to lands, rents, and goods, and all matters of contract and dealing between party and party in which a Hindu was a defendant.
8. The Mohammadan Law and usages in actions regarding inheritance and succession to lands, rents and goods, and all matters of contract and dealing between party and party in which a Mohammadan was a defendant.

8. Morley, op. cit., at pp. 18, 19 22.
CHAPTER XV

JUDICIAL SYSTEM IN MADRAS AND BOMBAY PROVINCES

The Company had acquired extensive territories not only under the control of the Bengal Government but under the Governments of Madras and Bombay also. To administer the latter properly, it was decided after mature deliberations that the Bengal arrangements must be extended with equal promise of general advantage to the territories under the control of Madras and Bombay Governments by such degrees and in such manner and at such times as local circumstances might require.¹ Prior to coming, however, to these systems, an important provision of the Parliamentary Act of 1807 may be pointed out here.

Act of 1807

The Act of 1807 vested in the Governor-in-Council of Madras the same powers of framing regulations, subject to the approval and registration by the Supreme Court at Madras, and of appointing Justices of the Peace, as were previously given to the Governor-General-in-Council of Bengal. The same Act authorized the Governor-in-Council of Bombay also to exercise the same powers, but his regulations were to be approved by, and registered in, the Recorder's Court till 1823 and afterwards the Supreme Court.²

Judicial System in Madras

The origin of the Adalat System in Madras can be traced to the year 1802 when judicial plan, as discussed below, based upon that of the humane and liberal plan of Lord Cornwallis was adopted there.

A significant feature of the plan was that the offices of Judge and Magistrate and of the Collector or revenue were to be held by distinct persons.

Civil Judicature.

A hierarchy of civil courts was introduced in the Mofussil areas.

Courts of Native Commissioners and Registrars.—Native Commissioners were appointed to try suits up to a valuation of Rs. 80; appeals from their decisions lay to the Zila Courts. The Registrars of the Zila Courts had jurisdiction to try suits either originally or in appeal from the Native Commissioners, referred to them by the Judges of the Zila Courts. Their pecuniary jurisdiction extended up to Rs. 200; their decisions were final in cases not exceeding Rs. 25 in value beyond which an appeal lay to the Zila Courts. A summary appeal was also provided to these Courts in cases where the Registrars refused to admit or investigate appeals from the decisions of the Native Commissioners on the ground of delay or informality.³

1. For Madras see Fifth Report from the Select Committee of the House of Commons on the Judicial System in India, 1833.
2. C. Ilbert, History of British India, 1828.
3. Regs. XII,
Zila Courts.—The Zila Courts were established in various districts to try civil suits. Each Court was presided over by a Judge, assisted by native Law Officers. The decisions of the Zila Courts were final in suits under a valuation of Rs. 1,000; beyond that amount, appeals could be taken to the Provincial Courts of Appeal.  

Provincial Courts of Appeal.—There were four Provincial Courts to hear appeals from the Zila Courts and also the original suits referred to them by the Sadar Adalat. Their decisions were final in all cases not exceeding Rs. 5,000 in value; beyond that sum, an appeal lay to the Sadar Diwani Adalat. In cases where they refused to admit regular appeals from the Zila Courts for delay or other informality, an appeal was provided again to the Sadar Adalat. The Provincial Courts could entertain appeals which the Zila Courts refused to admit or dismissed without investigation on the basis of delay, informality or other default.  

Sadar Diwani Adalat.—A Sadar Diwani Adalat, consisting of the Governor and members of his Council, was established at Madras to hear appeals from the lower courts. Appeals from its decisions in civil suits of the value of Rs. 45,000 and upwards lay to the Governor-General-in-Council; in cases of lesser value, its decisions were final.  

Criminal Judicature

Likewise a system of criminal courts, much the same as that in Bengal Provinces, was established.  

Magistrates and Assistant Magistrates.—Magistrates and Assistant Magistrates were appointed to apprehend persons charged with crimes and to bring them to trial. They were empowered to inflict punishment in cases of abuse, assault and petty theft by imprisonment, corporal punishment or fine not exceeding Rs. 200. British subjects residing in the Mofussil and charged with offences were to be apprehended by the Magistrates and sent for trial before the Supreme Court at Madras.  

Courts of Circuit.—Four Courts of Circuit, with the same judges as were on the Provincial Courts of Appeal, were established to try criminal cases. The Judges were to hold goal-deliveries twice a year; the sentences in capital cases, passed by them, were to be confirmed by the Faujdar Adalat or the Chief Criminal Court at Madras.  

Chief Criminal Court.—The Chief Criminal Court consisted of the Governor and members of his Council and was empowered to take cognizance of all matters relating to the administration of criminal justice and the Police; it had power to pass final sentence in capital cases.  

Miscellaneous.—The Governor in Council was authorized to pardon convicts or commute their punishment. The Criminal Courts were to decide criminal cases according to the Mohammedan Law of crimes as modified by the regulations. Personal laws applied in civil cases. There were native Law Officers to assist the Courts. No general system of Police

4. Regs. II, IV. Ibid.  
5. Regs. IV, V. Ibid., at pp. 79-80.  
7. Reg. VI. Ibid.  
8. Reg. VII. Ibid.  
was introduced. It was much the same as under the native Government. There were Village Watchers under the superintendence of the Head Men of the villages. In one district, however, more efficient system of the Police was established. Police Darogas, Thanadors and Watchers were appointed to apprehend the persons charged with crimes. The Darogas had to present them before the Magistrates.  

Later Changes in the Madras System.—Considerable changes and reforms were later introduced in the Madras system.

Alterations and reforms in Civil Judicature.—In 1806, the constitution of the Sadar Diwani Adalat was altered with a view to further the policy of separating judicial functions from the executive and legislative, and to expedite an early decision. Two puisne Judges, not being the members of the Council, were appointed. The Governor continued as the Chief Judge. In 1807, the Governor ceased to be the Judge of the Court. Some other member of the Council was to be the Chief Judge. The number of puisne Judges was increased to three, who were selected from the covenanted servants of the Company. In 1825, the Court was declared to consist of such number of Judges as the Governor-in-Council might decide in the interest of justice.  

In order to avoid delay in the decision of cases, a provision was made in 1809 for the occasional appointment of Assistant Judges and for altering and extending the jurisdiction of the Registrars whose power of final decision was, however, taken away. The decision of a Zila Court, confirming the decrees of the Registrar in appeal, was final, but a further appeal lay to the Provincial Court in case the decree of the Registrar was reversed or the Zila Court disallowed a sum beyond Rs. 100. Head Native Commissioners or Sadar Ameens could be appointed to try cases, referred by the Zila Courts up to a valuation of Rs. 100. The decrees of the Zila Courts were declared final in appeal from the decisions of the Native Commissioners. An appeal, however, lay from the Zila Courts to the Provincial Courts in suits tried by them in the exercise of their original jurisdiction. Summary appeals lay to the Provincial Courts from the orders of the Zila Courts refusing to admit or investigate original suits on the basis of delay, informality or other default. A special appeal also lay in cases where a regular appeal was not provided from the decrees of the Zila Courts to the Provincial Courts if they appeared erroneous or unjust or if the cause was of sufficient importance to merit further investigation. The Provincial Courts were also given original jurisdiction in suits beyond Rs. 5,000 in value, which were previously cognizable by the Zila Courts. The powers as to special appeals, as mentioned above, were given to the Sadar Diwani Adalat also in respect of the decrees of the Provincial Courts, not open to a regular appeal.  

In 1816, the Heads of Villages were appointed as the Village Munsifs to try and finally decide suits up to Rs. 10 in value; they were also empowered to assemble Village Panchayats to decide suits of any value within their village jurisdictions; the Munsifs were further empowered, as arbitrators, to decide suits for money or other personal property not exceeding Rs. 100 in value, when both the parties voluntarily submitted to such arbitration. The District Munsifs were empowered to determine suits for land

10. Id., at pp. 61-62, 120-121.
12. Regs. VII, XII. Id., at pp. 82-83.
and personal property up to Rs. 200 in value, except in certain cases. In suits up to Rs. 200 in value, their decisions were final; beyond that amount an appeal lay to the Zila Courts. In cases of inheritance or succession to landed property between Hindu or Mohammendan parties, the District Munisifs were directed to have the law expounded by the Law Officers of the Zila Courts. They were empowered to assemble District Panchayats and to act as arbitrators in certain cases, as the Village Munisifs. The pecuniary jurisdiction of the Sadar Ameens was extended to Rs. 300; an appeal lay to the Zila Court. The Sadar Diwani Adalat was empowered to call up from the Provincial Court and decide originally suits of the value of Rs. 45,000 or more. It was also authorized to admit a summary appeal from the Provincial Courts in cases where they refused to admit or investigate suits, original or in appeal, on the ground of delay, informality or other default. Similarly, the Provincial and Zila Courts respectively were declared competent to admit summary appeals from the orders of the Zila Courts or the Registrars and Sadar Ameens. The Provincial Courts were debarred from admitting regular appeals from decisions of Zila Courts, delivered in cases where their jurisdiction might, however, admit special

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regular appeals from original

Munisifs. All original suits decided to the Sadar Adalat.¹³

In 1818, the Governor-General-in-Council relinquished his authority to hear appeals from the Sadar Diwani Adalat at Madras; an appeal was instead provided to the King-in-Council.¹⁴ No restriction as to appealable amount was fixed; in many cases, the appeals were for sums below £ 5,000 sterling.¹⁵

In 1829, a part of the Charter Act of 1813 was promulgated in Madras also. Thus the Company's courts were empowered to decide civil suits between British subjects residing by natives against British subjects residing in property in the Mohunisif. An appeal in such suits could not be heard at the Court or to the Sadar Diwani Adalat.¹⁶

In 1821, the pecuniary jurisdiction of the Registrars, Sadar Ameens and District Munisifs was extended respectively to Rs. 1,000, Rs. 750 and Rs. 500. In 1825, all decisions of the District Munisifs in suits for property in land were declared open to an appeal to the Zila Courts.¹⁷

In 1827, the Auxiliary Zila Courts were established; they were superintended by Assistant Judges and Subordinate Judges. Sadar Ameens, by District Munisifs, were regular appeals from decisions of Zila Courts, delivered in cases where their jurisdiction might, however, admit special

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Munisifs. An appeal from their decisions in cases where their decisions giving Rs. 1,000 in value, and beyond that amount to the Provincial Courts. Appeals from the original decisions of the Sadar Ameens and special appeals from their decisions in appeals from Munisifs were to lie to the Assistant Judges. Native Judges were appointed to try suits referred to them by the Assistant Judges, without having, however, any jurisdiction over Europeans or Americans. Special appeals could be admitted

¹⁴. Reg. VII. Id., at p. 85.
¹⁵. Id., at p. 142.
¹⁶. Reg. II. Id., at p. 85.
from the decrees of the Assistant or Native Judges to the Provincial Courts; from those of the latter in appeals from the former, to the Sadar Diwani Adalat.\textsuperscript{18}

In 1833, the pecuniary jurisdiction of Registrars, Sadar Ameens and District Munsifs was extended to Rs 3,000, Rs 2,500 and Rs 1,000 respectively.\textsuperscript{19}

In 1836, an Act of the Indian Legislature declared that the provision of the Charter Act of 1813 which gave to British subjects in the Provinces a right of appeal from the Mofussil courts to the Supreme Court should cease to have effect in India. It was further declared by another Act that no person by reason of birth or descent should be exempted from the jurisdiction of the Company’s courts or be incapable of being a native Judge. Summary appeals were made admissible from the orders of the District Munsifs refusing to admit or investigate suits cognizable by them, on the basis of delay, informality or other default, by the Zila Courts, Assistant Judges of Auxiliary Courts and Principal Sadar Ameens.\textsuperscript{20}

In 1843, special appeals were directed to lie to the Sadar Diwani Adalat for all decisions given in regular appeals by all subordinate civil courts, provided they were inconsistent with law or usage or the practice of the courts or involved doubtful questions of law, usage or practice. A most important change also took place to the effect that all the Provincial Courts of Appeal were abolished and new Zila Courts were established to discharge their functions and to replace the then existing Zila Courts. The original jurisdiction of the Provincial Courts to try suits of lesser value than Rs. 10,000 was transferred to the subordinate Judges and the Principal Sadar Ameens; they were given jurisdiction over Europeans, Americans and natives. The new Zila Courts were to hear appeals from the decisions of the Subordinate Judges, Principal Sadar Ameens, Sadar Ameens and District Munsifs. They could also refer appeals from the decisions of District Munsifs to the Subordinate Judges or Principal Sadar Ameens. The Government was empowered to appoint Assistant Judges to the new Zila Courts to whom the latter might refer appeals pending before them, except the appeals from the Subordinate Judges and Principal Sadar Ameens. Appeals from the decisions of the new Zila Courts could be taken to the Sadar Diwani Adalat. No Registrars were attached to the new Zila Courts, and, therefore, there were no Registrars’ Courts. Summary appeals lay to the new Zila Courts from the Subordinate Judges and Principal Sadar Ameens, and from the former to the Sadar Adalat.\textsuperscript{21}

In 1844, it was provided that all suits within the jurisdiction of the Principal Sadar Ameens and Sadar Ameens should be ordinarily instituted in their Courts, but they might be withdrawn if so desired by the Zila Courts which might try themselves or refer them to any other competent subordinate Court. The Zila Courts could admit summary appeals from the orders of the Principal Sadar Ameens and Sadar Ameens rejecting original suits cognizable by them on the basis of any default.\textsuperscript{22}

\textsuperscript{18} Regs. I, VII, XI. Id., at pp, 83-86.
\textsuperscript{19} Reg. II. Id., at p. 86.
\textsuperscript{20} Acts XI, XXIV, XVII, Id., at pp. 86-87.
\textsuperscript{21} Acts III, YFF. Id., at pp. 87-93.
\textsuperscript{22} Act IX. Id., at p. 89.
In 1850, a Small Cause Court was established at Bombay, as at Calcutta in lieu of the Court of Requests.23

In 1858, the grounds of special appeals provided in 1843 were replaced by new grounds. It was provided that the Sadar Diwani Adalat might entertain special appeals from the decisions given in regular appeals by any of the lower courts on the following grounds: first, a failure to decide all the material points in the case, or a decision contrary to law; secondly, misconstruction of any document; thirdly ambiguity in the decision itself; and fourthly, substantial error or defect in procedure or investigation of the case. No special appeals lay on a question of fact.24

Alterations and reforms in Criminal Judicature.—The constitution of the Chief Criminal Court was changed in 1806 and 1807, in the same way as that of the Sadar Diwani Adalat.25

In 1801, the Magistrates were allowed an enlarged jurisdiction; they could punish persons convicted by them by imprisonment up to one year with corporal punishment up to thirty stripes, or by fine up to Rs. 200.26

In 1816, the officers of the Magistrates and Assistant Magistrates were transferred to the Collectors and their Assistants. The Magistrates were authorized to apprehend offenders, and to punish persons guilty of petty thefts and other minor offences by eighteen stripes, imprisonment up to fifteen days, or fine up to Rs. 50; in other cases, they had to send prisoners to the Criminal Judges of the Zillas for trial. In their respective Zillas, the Judges of the Zila Courts were appointed as Criminal Judges with power to punish offenders, in certain cases, with thirty stripes; in cases of theft with additional punishment of imprisonment up to six months; and in other cases with fine up to Rs. 200. The cases of serious offences were to be committed to the Courts of Circuit.27

In 1818, the Magistrates were authorized to delegate their authority to their Assistants.28 In 1820, a provision of the Charter Act of 1813 was enforced under which the Court of Vice-Admiralty were given jurisdiction over suits and trespass against notaries by Certiorari to the Supreme Court.29

In 1822, the Criminal Judges were authorized to punish offenders for burglary if not attended with violence, for theft exceeding Rs. 50 and not attended with attempt to murder or wounding, and in certain cases for receiving or purchasing stolen goods, and also to punish convicts escaping

23. For details, see supra. For Court of Requests see s. 41 of Chapter XIII, supra. The same applies to the Court of Requests at Madras, but its pecuniary jurisdiction was never extended to Rs. 400, though the Madras Government was authorized to the same by that subsequently, with 1873 to establish a system of Courts and Legislative Authorities in India, at p. 181 (1905) and Chapter XIX, infra.
25. Reg. IV, Ibid.
27. Reg. IX, Id., at p. 90.
from jail. In 1825, however, thefts exceeding Rs. 300 were declared not to be cognizable by the Criminal Judges.

In 1827, the Assistant Judges were constituted Joint Criminal Judges of their Zilas, and the designation of the Subordinate Collectors exercising magisterial powers was changed to Joint Magistrates. The Native Judges were also constituted Native Criminal Judges; they were to be guided by the same rules as Criminal Judges and invested with the same powers as Magistrates, but they had no jurisdiction over Europeans or Americans. In 1836, they were designated as Principal Sadar Ameens.

In 1827, a provision was made for the gradual introduction of the trial by jury, it was not necessary for either the Judge of Circuit or the Chief Court to require a jutwa from their Law Officers as to the guilt of the prisoner that was to be established by the verdict of the jury.

In 1828 and 1830, certain kinds of whip were substituted by some milder whip, and in 1833, females were exempted from punishment by flogging.

In 1833, Criminal, Joint Criminal and Native Criminal Judges were empowered to employ the Sadar Ameens in the investigation and decision of criminal cases except in cases to be tried by the Courts of Circuit. The Judges could overrule the decisions of the Sadar Ameens, who, moreover, had no jurisdiction over Europeans or Americans. In 1837, the Magistrates were empowered to send persons, not being Europeans or Americans, for trial, commitment or confinement to the Principal Sadar Ameens.

In 1840, the Chief Court was empowered to dispense with jutwa but not with the Mohammedan Law.

In 1841, it was declared that State offences could be punished by ordinary criminal courts, subject to confirmation by the Chief Court and further by the Government.

In 1843, sentences passed by Justices of the Peace in the Mofussil, or Magistrates, on British subjects residing in the Mofussil, for assaults and trespasses against natives of India under the Charter Act of 1813, were made appealable in the regular course, according to the regulations and Acts of Government, in the same way as ordinary sentences passed by a Magistrate in the ordinary exercise of his jurisdiction; when so appealed, the sentences could no longer be revised by Certiorari. The Courts were abolished and the Judges of the new Zila Courts were given their jurisdiction and powers. The Judges were empowered to take the assistance of respectable natives or other persons by constituting them assessors, or by employing them more nearly as a jury. The final decision was vested in the Judges but if it went against the opinion of the assessors or jury, it was to be referred to the Chief Court. The Judges were empowered to overrule criminal sentences of Sadar Ameens. The criminal jurisdiction of the

30 Reg. VI. Ibid.
31 Reg. I Ibid.
32 Regs. II., VIII, X of 1827, Reg. XXIV of 1836. Id. at pp. 90-91.
33 Reg. VIII of 1828, Reg. II of 1830, Reg. II of 1833. Id. at p. 91.
34 Reg III Ibid.
35 Act XXXIV. Ibid.
36 Act I. Id., at p. 92.
37 Act V. Ibid.
former Zila Courts was transferred to the Subordinate Criminal Courts established in 1827. The Assistant Judges of 1827 were called Subordinate Judges. The Magistrates were authorized to exercise the powers vested in Criminal Judges in 1816 concurrently with the Subordinate Criminal Courts; an appeal, however, could be taken from them to the new Zila Judges.  

In 1854, the District Munsifs were given a criminal jurisdiction in cases of petty offences and petty thefts.  

Alterations and reforms in Police System.—In 1816, a general system of Police was organized throughout the territories under the Government of Madras. The prevailing system was superseded. The Heads of Villages, aided by Village Watchers, were to apprehend offenders and send them to the District Police Officers except in trivial cases of abuse and assault which they could punish by confinement up to twelve hours. The Tahsildars were the Heads of the Police of their districts. Their function was to apprehend persons charged with grave offences and, after investigation, send them to the Criminal Judges. They could punish trivial cases of abuse or assault by fine up to Re. 1 or confinement for twenty-four hours. The Magistrates might invest Zamindars with police authority and appoint Ameens of Police. The Magistrate and their Assistants were generally charged with maintenance of the peace.  

In 1821, the Magistrates were empowered to select subordinate officers for investigation and for the performance of other police duties. The Heads of District Police were authorized to decide cases of petty theft and to inflict punishment up to six stripes or to send offenders to the Magistrates. The Tahsildars were empowered to impose fine up to Rs. 3. The Heads of Villages could punish cases of petty thefts and other trivial offences by imprisonment up to twelve hours.  

In 1832, the Heads of District Police were empowered to punish offenders by imprisonment up to ten days with labour; their power to inflict corporal punishment was taken away. In 1837, they were authorized to send offenders convicted by them to the Magistrates for punishment.  

Judicial System in Bombay

First System

The origin of the first introduction of the judicial system in territories under the Government of Bombay can be traced to the year 1799. A regular Code of regulations was framed to establish and guide a series of courts for the administration of justice. The system was based on that of Lord Cornwallis, but the local conditions were kept in view. An important distinction which is worth noting here was that whereas in Bengal Provinces,

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38 Act IV, VII. Id. at pp. 92-93.
39 Act XII. Id., at p. 91. Subsequently Indian Penal Code and Criminal Procedure Code were passed dealing with substantive and procedural criminal law and constitutions of the criminal courts respectively. See f. n. 55 of Chapter XIII, supra.
40 Reg. XII. Id., at pp. 93-94.
41 Reg. IV. Id., at p. 94.
42 Reg. XIII. Id., at p. 94.
43 Act XXXII. Id., at pp. 94-95. It may be pointed out that in 1861, Act V provided for the reorganization and regulation of Police throughout India. See Gowell, op. cit., at p. 143.
the Mohammedan Law of Crimes was alone applicable in the administration of criminal justice, in Bombay the Hindus were tried according to their own law and Christians and Parsis had the advantage of the English law in criminal cases.\textsuperscript{44}

Plan of 1827

The system of 1799 existed with modifications and reforms till 1827 when all the existing regulations in this respect were rescinded, and the system of judicature was entirely re-modelled in the Code by which they were superseded. The groundwork was still the same and the new Code was also based on the Bengal Regulations of 1793. It may be pointed out that the plan operating before 1827 was formed under many difficulties arising from local circumstances, and was both complicated and insufficient. The new Code, therefore, introduced by Mountstuart Elphinstone, the Governor of Bombay, was almost the closing act of his talented and efficient Government, and must be regarded as giving rise to an important era in the history of Bombay.\textsuperscript{45} The system introduced was as follows:

Civil Judicature.

A hierarchy of civil courts was established throughout the territories under the Bombay Government.

Courts of Native Commissioners.—Native Commissioners were appointed in each Zila to try and decide suits between the valuation of Rs. 500 and Rs. 5,000 where the parties were neither Europeans nor Americans. The Zila Judges were empowered to refer original suits to them according to the disputed amount. In all cases, appeal could be taken to Judges whose decisions were final; but the Judges might refer the appeals to Senior Assistant Judges whose decisions were final if the decisions appealed against were affirmed; otherwise appeals lay to the Zila Judges.\textsuperscript{46}

Courts of Assistant Judges.—The Senior Assistant Zila Judges were appointed to try suits, either originally or in appeal, referred to them by the Zila Judges, up to Rs. 5,000 in value, and the Junior Assistant Zila Judges up to Rs. 500. Appeals from these Courts lay to the Zila Judges whose decisions were final, with the exception that in case of appeals from original decisions of Senior Assistant Judges, further appeals were provided, subject to certain limitations, to the Sadar Diwani Adalat if the Zila Judges differed in opinion. The cases in appeal before the Senior Assistant Judges could further be taken in appeal before the Zila Judges as discussed above. The Zila Judges could admit special appeals from decrees passed in appeal by Senior Assistant Judges.\textsuperscript{47}

Zila Courts.—Zila Courts were established, each being presided over by one Judge, to decide original suits of any value, and appeals, as discussed above. An appeal lay from their decisions in original suits to the Sadar Diwani Adalat, but if suits in Zila Courts were against British-born subjects, residing, trading or occupying immovable property in Zilas, they might appeal to the Supreme Court, instead of the Sadar Adalat as provided in the Charter Act of 1813. Special appeals could be taken from the Zila

\textsuperscript{44} See Morley, op. cit., at pp 95-102.
\textsuperscript{45} Id., at pp. 102-103.
\textsuperscript{46} Regs. II, IV. Id., at p 103.
\textsuperscript{47} Id., at p. 104.
Courts to the Sadar Adalat when their decrees were contrary to the regulations or inconsistent with usage or the Hindu or Mohammedan Law, or when they involved points of general interest, not already decided. Summary appeals could be admitted by the Sadar Adalat from the decrees of the Zila Courts and also from the decrees of the inferior courts rejected by the Zila Courts on the ground of late presentation or on some other ground. 48

Sadar Diwani Adalat.—A Sadar Diwani Adalat, consisting of three or more Judges, assisted by Registrars and Law Officers, was established to hear appeals from the Zila Courts; it could also call for all proceedings of the lower civil courts. Provisions as to all appeals from the courts below have been given above. An appeal lay from the Sadar Adalat to the King-in-Council. No restriction as to the value of the matter in dispute was laid down. 49

Natives as Assessors and Jurors.—It was provided that in a court presided over by a European, assistance of respectable natives might be obtained in their capacity as Panchayat, as assessors or more nearly as a jury. The final decision was, however, vested in the Judge. 50

Criminal Judicature.

The system of criminal judicature and that of police were so interwoven with each other that it would be difficult to draw a line of separation between them. Both of them, therefore, are discussed together.

Police System and Courts of Magistrates and other Police Officers.—The duties of the Police were directed to be conducted by the Judge and Collector of each Zila as Criminal Judge and Zila Magistrate respectively, and by the District Police Officers and the Heads of Villages. The Heads of Villages were under the control of District Police Officers and Magistrates; they were empowered to apprehend offenders and send them to the District Police Officers to hold inquests and to punish offenders for abuse or assault by imprisonment up to twenty-four hours. The District Police Officers were under the immediate control of the Zila Magistrates; they were to apprehend offenders and, if they could punish offenders themselves, could punish offenders fine up to Rs. 5, and confinement up to eight days. The Magistrates and their Assistants were authorized to apprehend persons charged with crimes or offences; if these persons happened to be British subjects residing in the Mofussil, they were to be forwarded to Bombay for trial before the Supreme Court; if they were offenders against the State, they were to be kept in custody and their cases were reported to the Governor-in-Council; they could punish all other persons by fine, imprisonment without labour for two months or flogging up to thirty stripes, or send them to the Criminal Judges. The Criminal Judges were vested in the Zila Courts in their respective Zilas to try

48. Id., at p. 103.
49. Id., at p. 104.
50. Reg. IV, Ibid.
persons charged with offences of a less heinous nature, sent by the Police Magistrates, and punish by solitary imprisonment for six months, or imprisonment with hard labour for seven years, and fifty stripes, or disgrace, fine, or personal restraint. Sentences of more than two years' imprisonment were to be referred to the Sadar Adalat. Assistant Zila Judges were made Assistant Criminal Judges; Seniors could punish by imprisonment with hard labour for two years and thirty stripes, fines, disgrace and personal restraint; they might be vested with the powers of Criminal Judges; Juniors could punish by imprisonment, without hard labour, for two months, and fine and personal restraint. The Criminal Judges might try cases referred to their Assistants and mitigate or annul the sentences, and also employ their Assistants in preparing the cases for trial by themselves.52

Courts of Circuit.—A Court of Circuit was established to be held by one of the Judges of the Sadar Faujdari Adalat or Chief Criminal Court in rotation, at each District Headquarter, for the trial of grave offences excluding the offences against the State. The Court had to conduct half-yearly sessions and pass final sentences except those of death, transportation or perpetual imprisonment, which needed confirmation of the Sadar Adalat.53

Special Court.—A Special Court was created to try political offences. It consisted of three Judges selected from the Judges of the Sadar Faujdari Adalat and the Zila Courts. The proceedings of the Court were to be forwarded to the Governor-in-Council.54

Sadar Faujdari Adalat.—A Sadar Faujdari Adalat was established, consisting of the same Judges as the Sadar Diwani Adalat. It was empowered to superintend the administration of criminal justice and the system of police, to revise trials and to pass final sentences of death, transportation and perpetual imprisonment.55

Miscellaneous.—All the criminal courts might avail themselves of the assistance of natives as in the case of civil courts. The law which they were to administer was given in the regulation defining crimes and offences and specifying the punishment to be imposed for the same.56

Later Changes in the Bombay System.

Important changes and reforms were later introduced in the Bombay system.

Alterations and reforms in Civil Judicature.—In 1828, the Sadar Adalats were shifted from Surat to Bombay.57

In 1830, the Native Commissioners were empowered to take cognizance of all original suits and suits referred to them by the Judges and Assistant Judges at detached stations, except the cases where public officers or Europeans or Americans were parties. In such a situation, they were to be decided in the first instance by the Judges, or they might be referred to the Assistant Judges. Senior Assistant Judges at detached stations were

52. Reg. XIII. Id., at p. 105.
53. Id., at pp. 104-105.
54. Id., at p. 105.
55. Ibid.
56. Reg. XIV. Ibid.
authorized to decide appeals from their decisions in suits upto Rs. 5,000 in value. The same power could be given to such Judges at central stations in case of need. Decrees of various Judges in appeal from the Native Commissioners were made appealable to the Sadar Diwani Adalat where the value exceeded Rs. 3,000 if the decrees of the Native Commissioners were confirmed, or the sum exceeded Rs. 1,000 if the decrees were modified or reversed. Special appeals could also be referred to the Sadar Adalat.  

In 1831, some important changes were made in respect of appeals. Further, the Office of Native Commissioner was made to comprise three gradations; the persons holding them were to be called Native Judges, Principal Native Commissioners and Junior Native Commissioners. The Native Judges were empowered to decide, in addition to original suits of any value, appeals referred to them from original decisions of the two classes of Native Commissioners in suits not exceeding Rs. 100 in value. The jurisdiction of the latter was confined to original suits of Rs. 10,000 in value or those of Rs. 5,000 in value referred to them.

In 1836, the British subjects were deprived of their right of appeal from the Mofussil courts to the Supreme Court, given under Charter Act of 1813. It was provided that no person, by reason of birth or descent, should be exempt from the jurisdiction of the Company's courts, or be incapable of being a Native Judge, and Principal and Junior Native Commissioner.  

In 1838, the revenue courts were deprived of their jurisdiction to take cognizance of all suits in regard to tenures and right to possession of lands etc., which were directed to be instituted in the civil courts.  

In 1843, special appeals were directed to lie to the Sadar Diwani Adalat from decisions of subordinate civil courts, delivered in regular appeals, if their decisions were inconsistent with law or usage or the practice of such courts, or involved doubtful questions of law, usage or practice.  

In 1844, it was provided that all suits within the competence of Native Judges or Principal Native Commissioners to decide should ordinarily be started in their Courts, but they might be withdrawn at the discretion of the Zila Judges for trial by themselves or for reference to some other competent subordinate courts. Summary appeals from the orders of Native Judges or Principal Native Commissioners, rejecting original suits, might be admitted by the Zila Judges.  

The Joint Zila Judges were appointed in 1845 to exercise the same powers and concurrent jurisdiction with the Zila Judges in all cases referred to them by the latter.  

In 1850, a Small Cause Court was established at Bombay, as at Calcutta, in lieu of the Court of Requests.  

60. Act XXIV. Id., at p. 110.  
61. Act XVI. Ibid.  
62. Act III. Ibid.  
63. Act IX. Id., at pp. 110-111.  
64. Act XXIX. Id., at p. 111.  
65. For Court of Requests, see § n. 4 of Chapter XII, supra. The same applies to the Court of Requests at Bombay also. Its pecuniary jurisdiction was never extended to Rs. 110 as the Bombay Government was not authorized to do so.
In 1853, the grounds of special appeals to the Sadar Diwani Adalat, laid down in 1843, were substituted by the following: first, a failure to decide all material points in a case, or a decision contrary to law; secondly, misconstruction of any document; thirdly, ambiguity in the decision itself; and fourthly, substantial error or defect in procedure or investigation of a case. Special appeals were not permitted on questions of fact. 66

Alterations and reforms in Criminal Judicature.—In 1830, the powers of Sessions Judges and Court of Circuit were given to the Criminal Judges, and their Assistants became Assistant Sessions Judges. Visiting Commissioners of Circuit were appointed to hold State trials and trials of a peculiar aggravated nature, exercising all the powers of the Court of Circuit and Special Court. The Criminal Judges were styled as Sessions Judges. 67 An Additional Judicial Commissioner of Circuit was appointed in 1833. 68 In 1837, appeals in cases of political offences were directed to lie to the Sadar Faujdar Adalat whose sentence was to be confirmed by the Governor-in-Council. 69 In 1839, sentences of more than two years' imprisonment, passed by Assistant Sessions Judges, were ordered to be confirmed by the Sessions Judges; reference to the Sadar Adalat was not necessary. 70

In 1841, crimes against the State were directed to be tried by the ordinary courts; their proceedings were, however, to be referred to the Sadar Adalat which was required to refer them to the Governor-in-Council for confirmation. 71 In 1845, it was provided that a person convicted of adultery should be punished by fine or imprisonment; a woman was not to be prosecuted for this offence except by her husband; and no person could prosecute any man but the husband of the woman with whom such man was alleged to have committed the offence. 72

In 1845, Joint Sessions Judges were appointed to exercise the same powers and concurrent jurisdiction with the Sessions Judges in matters referred to the former by the latter. 73 In 1852, the Governor-in-Council was made competent to authorize a Judge of the Sadar Adalat to exercise all the powers of a Judge on Circuit or of a Visiting or Judicial Commissioner, and all or some of the powers or duties of the Sadar Adalat. 74

Alterations and reforms in Police System.—In 1828, the Assistant Criminal Judges, not placed at central stations, were given Police powers and Zila Magistrates were directed to refer cases to them instead of the Criminal Judges 75.

66. Act XVI. Morley, op. cit., at p. 111. It is noteworthy that subsequently, with reference to Bombay system, Act XIV was passed in 1869 to establish a system of civil courts. The Act was amended by Act IX of 1870 and other later Acts. In lieu of Native Judges, Principal and Junior Native Commissioners, two grades 76.

67. 111-112.

68. 111.

69. 110.

70. 110.

71. 110.

72. 110.

73. 110.

74. 110.

75. 110.
In 1830, the Police powers of the Criminal Judges were transferred to the Magistrates. The penal jurisdiction of the Magistrates and their Assistants was extended to fine and imprisonment with hard labour for one year. Sentences of the Assistants could be revised by the Magistrates, and sentences of more than three months' imprisonment were to be confirmed by the same. The District Police Officers were authorised to punish petty offenders by fine up to Rs. 15 and imprisonment up to twenty days. Sub-Collectors were given the same magisterial powers and penal jurisdiction as Collectors; in 1831, they were directed to be entitled in such capacity as Joint Magistrates. In 1831, the Zila Magistrates were empowered to punish by solitary imprisonment for one month. The Visiting Judicial Commissioners were authorised to annul sentences passed by the Zila Magistrates.\(^7^6\)

In 1833, Joint Police Officers were appointed in big towns. In 1835, the Governor was empowered to appoint a military officer as a Magistrate in one or more Zilas, and to confer on an Assistant Magistrate any of the powers of a Magistrate. The latter power was taken away in 1851; the Governor was, however, empowered to appoint Deputy Magistrates.\(^7^7\)

In 1843, sentences passed by Magistrates on British subjects residing in the Mofussil for assaults and trespasses against natives were declared open to appeal, as was the case of sentences passed in the exercise of their ordinary jurisdiction. If so appealed, they could not be removed by Certiorari to the Supreme Court.\(^7^8\)

In 1852, the Governor-in-Council was empowered to authorize Patels and other Heads of Villages to try cases of petty offences. The Sadar Faujdari Adalat was relieved from its powers of superintendence of the Police, which was vested in the Governor-in-Council. In 1857, the Governor-in-Council was empowered to appoint Joint Police Officers in any district.\(^7^9\)

This Chapter along with some previous Chapters concludes our discussion on Adalat system. Below is given a summary of the laws administered in the courts of the Company.

Laws Administered in the Company's Courts

The Laws administered in the Company's courts prior to 1861, may be classified under seven distinct heads:

1. The Regulations made by the Governments prior to the passage of the Charter Act of 1833.


3. The Hindu Civil Law in all suits between Hindu parties as regards succession, inheritance, marriage, caste and all religious usages and institutions.

\(^{76}\) Regs. IV and V of 1830, Reg. VIII of 1831. Id., at pp. 113-114.


\(^{78}\) Act IV. Id., at p. 114.

\(^{79}\) Acts XXVII and XXVIII of 1852, Act XV of 1855. Id., at p. 115. For subsequent development, see f. n. 43, supra.
4. The Mohammedan Civil Law in all suits between Mohammedan parties as regards succession, inheritance, marriage, caste, and all religious usages and institutions.

5. The Laws and Customs, so far as ascertainable, of other natives, not being Hindus or Mohammedans, in similar suits where such other natives were parties.

6. In cases where no specific rule of decision might exist, the Judges were to act according to justice, equity and good conscience.

7. The Mohammedan Law of Crimes as modified by the regulations. This law was confined to the criminal courts in Bengal and Madras, being superseded in Bombay by a regular Code. In Bengal, too, persons not professing Muslim faith were, on claiming exemption, excepted from trial under the Mohammedan Law for offences cognizable under the general regulations of the Government.

Courts in Bengal Provinces before Indian High Courts Act, 1861

<table>
<thead>
<tr>
<th>Civil</th>
<th>Criminal</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Courts of Sadar Ameens</td>
<td>2. Courts of Law Officers of City Courts</td>
</tr>
<tr>
<td>3. Courts of Principal Sadar Ameens</td>
<td>3. Courts of Sadar Ameens</td>
</tr>
<tr>
<td>5. City Courts</td>
<td>5. Courts of Deputy Magistrates</td>
</tr>
<tr>
<td></td>
<td>7. Courts of Zila Magistrates</td>
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<tr>
<td></td>
<td>8. Courts of City Magistrates</td>
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<tr>
<td></td>
<td>9. Courts of Joint Magistrates</td>
</tr>
<tr>
<td></td>
<td>10. Courts of Sessions Judges</td>
</tr>
<tr>
<td></td>
<td>11. Sadar Nizamat Adalat</td>
</tr>
</tbody>
</table>

Note.—Appeals from Sadar Diwani Adalat lay to Privy Council. Superintendents of Police endowed with the same powers of punishment as vested in Zila and City Courts.

Courts in Madras before Indian High Courts Act, 1861

<table>
<thead>
<tr>
<th>Civil</th>
<th>Criminal</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Courts of District Munsifs</td>
<td>2. Courts of Sadar Ameens</td>
</tr>
<tr>
<td>3. Courts of Sadar Ameens</td>
<td>3. Courts of Principal Sadar Ameens</td>
</tr>
<tr>
<td>5. Courts of Subordinate Judges</td>
<td>5. Courts of Joint Magistrates</td>
</tr>
<tr>
<td>7. Zila Courts</td>
<td>7. Courts of Subordinate Judges</td>
</tr>
<tr>
<td></td>
<td>9. Sadar Faujdari Adalat</td>
</tr>
</tbody>
</table>

Note.—Appeals from Sadar Diwani Adalat lay to Privy Council. Heads of Villages, Heads of District Police and Tahsildars had jurisdiction to try cases of petty offences.

Courts in Bombay before Indian High Courts Act, 1861

<table>
<thead>
<tr>
<th>Civil</th>
<th>Criminal</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Courts of Munsifs (also called Junior Native Commissioners)</td>
<td>1. Courts of Assistant Sessions Judges</td>
</tr>
<tr>
<td>2. Courts of Sadar Ameens (also called Principal Native Commissioners)</td>
<td>2. Courts of Joint Judges in certain Zilas</td>
</tr>
<tr>
<td>3. Courts of Principal Sadar Ameens (also called Native Judges)</td>
<td>3. Courts of Sessions Judges</td>
</tr>
<tr>
<td>5. Zila Courts</td>
<td>5. Sadar Faujdari Adalat</td>
</tr>
<tr>
<td>6. Sadar Diwani Adalat</td>
<td></td>
</tr>
</tbody>
</table>

Note.—Appeals from Sadar Diwani Adalat lay to Privy Council. Heads of Villages, District Police Officers and Joint Police Officers had powers to try cases of petty offences. Assistant Magistrates, Joint Magistrates, Magistrates and Zila Magistrates had powers to try cases of offences, not very serious.
CHAPTER XVI

INSOLVENCY AND VICE-ADMIRALTY COURTS AND JUSTICES OF THE PEACE

Insolvency Courts

Following is the description of the Insolvency Courts before the passage of the Indian High Courts Act in 1861.

Background-Establishment-Jurisdiction.

Presidency-towns.—Courts for the relief of insolvent debtors, known as the Insolvency Courts, were first established at Presidency towns by an Act of Parliament passed in 1829. Previous to the establishment of these Courts, an Act of Parliament passed in 1800 was the basis of jurisdiction to grant relief to the insolvent debtors. It had empowered the Supreme Courts at Calcutta and Madras and the Recorder’s Court at Bombay to make rules and orders, extending the relief contemplated by an Act of Parliament passed in 1759 to insolvent debtors in India. It had also ratified all rules and orders previously issued by these Courts for such relief and confirmed the acts done under such rules and orders. Under the Act of 1829, the Insolvency Courts were separate and distinct from the Supreme Courts but were to be severally held and presided over by one of the Judges of the respective Supreme Courts at least once a month. These Courts were empowered to administer oaths, and to examine witnesses on oath or affirmation, issue commissions to take evidence, or to force the attendance of witnesses and to examine debtors and parties competent to give information as to their debts and estates. They were given authority to inflict fines in a summary way, and to commit to prison for contempt of Court. An appeal was to lie from the Insolvency Courts to the Supreme Courts which were also empowered to enact rules to facilitate the relief of insolvent debtors in cases for which sufficient provision had not been made in the Act.

In 1848, an Act of Parliament was passed to consolidate and amend the law relating to insolvent debtors in India. All the previous enactments in this respect were repealed. The Insolvency Courts, established in 1829, were continued with the same powers as before.

Their jurisdictions severally were extended to disposal of all petitions made by persons imprisoned within the Presidency towns upon any proceeding whatever, or who resided within the jurisdiction of any Supreme Court and happened to be in insolvent circumstances.

An appeal was to lie, as before, to the Supreme Courts which were empowered to make rules and regulations and to alter and amend the same subject to Her Majesty’s approval.\(^1\)

Mofussil.—In the Mofussil, the civil courts, under an Act of Indian Legislature, effected some of the purposes of insolvency law. S. 271 of Act VIII provided: "If, after the claim of the person on whose application the property was attached has been satisfied in full from the proceeds of the sale, any surplus remain, such surplus shall be distributed rateably amongst any other persons who, prior to the order for such distribution, may have taken out execution of decrees against the same defendant, and not obtained satisfaction thereof. Provided that when any property is sold subject to a mortgage, the mortgagee shall not be entitled to share in any surplus arising from such sale."

Vice-admiralty Courts

Following is the description of the Vice-Admiralty Courts before the passage of the Indian High Courts Act, 1861.

In 1800, an Act of Parliament empowered the Crown to issue a Commission from the High Court of Admiralty in England for the trial and adjudication of prize causes and other maritime questions arising in India, and to nominate all or any of the Judges of the Crown's courts at the respective Presidency-towns, either alone or jointly with any other person named in such commission, to be Commissioners for the purpose of carrying out such commission into execution. In 1831, an Act of Parliament directed an appeal from such cases of costs, damages to a ship by collision, salvage, and contempt in breach of the Crown's service at sea, etc., irrespective of the local limits of such Courts. It appears to have been created at Cal-

Justices of the Peace

The Justices of the Peace were of two descriptions: first, those who, by virtue of their office, were empowered to act in that capacity under the immediate authority of Parliament, and second, those who were appointed by the Government in India under commissions issued in the name of the Crown. The law relating to both the descriptions of the Justices of the Peace, prior to the passage of the Indian High Courts Act, 1861, was as follows:

The Justices of the Peace were first established in the Presidency-towns by the Crown's Charter of 1726, which appointed the Governors and members of their Councils in these places to act as Justices of the Peace with power to hold Quarter Sessions. The object was to introduce a purely English system for the advantage of English and other servants of the Company.

2. Cowell, op. cit., at p. 169. Act X of 1877 and afterwards Act XIV of 1882 conferred insolvency jurisdiction on the District Court generally. See id., at p. 170. For other developments, see Chapters XIX and XX infra.

3. Id., at p. 170. See also Chapters XIX and XX infra.
In 1773, the Regulating Act declared the Governor-General and members of his Council and the Judges of the Supreme Court at Calcutta, to be appointed by the Crown's Charter to be the Justices of the Peace for the settlement of Fort William and subordinate settlements and factories. The Governor-General and members of his Council were directed to hold Quarter Sessions within the settlement; such Court of Quarter Sessions was to be a Court of Record. The Crown's Charter, establishing the Supreme Court, authorized it to exercise the supervision and control over the Court of Quarter Sessions and the Justices in the same manner and form as the Court of King's Bench in England did; it was empowered to issue to them writs of Mandamus, Certiorari, Procedendo and Error. The Charter made the Judges of the Supreme Court the justices and Conservators of the Peace, and Coroners respectively, within Bengal, Bihar and Orissa with such jurisdiction and authority as Justices of the Court of King's Bench possessed within England under common law.

In 1793, an Act of Parliament empowered the Governor-General-in-Council to appoint Justices of the Peace from the covenanted servants of the Company or other British inhabitants, to act within and for the above three Provinces and Presidencies and subordinate places respectively, by commissions to be issued by the Supreme Court at Calcutta on warrant from the Governor-General-in-Council. Such Justices were not to hold or sit in any Court of Oyer and Terminer and Gaol-Delivery unless called upon by the Judges of the Supreme Court and specially authorized in this behalf by order in Council. All convictions, judgments, orders and other proceedings before Justices of the Peace were removable by Certiorari into the Court of Oyer and Terminer which was empowered to decide the matter of such proceedings like manner as the Court of King's Bench in England. In the same year, the Governor-General at Calcutta and Governors at Madras and Bombay were empowered to appoint Coroners.

An Act of Parliament, passed in 1800, and the Crown's Charter, granted under its authority in 1801, establishing a Supreme Court at Madras, appointed its Judges to be Justices of the Peace and Coroners within and for the settlement of Fort St. George and the town of Madras, and the subordinate factories, and all territories under the Government of Madras. The Charter vested in the Madras Supreme Court the same control over the Courts of Quarter Sessions and the Justices at Madras as that exercised by the Calcutta Supreme Court. The Act further provided that the Justices of the Peace in India might convict offenders for breach of rules or regulations passed under the Regulating Act, and order corporal punishment; such conviction was not to be reviewed or brought into a superior court by Certiorari or appeal.

In 1807, an Act of Parliament empowered the Governors and members of the Councils of Madras and Bombay to act as Justices of the Peace for those towns and the subordinate settlements and factories respectively, and to hold Quarter Sessions. They were further empowered to issue commissions under the seals of the Crown's courts to appoint covenanted servants of the Company or other British subjects, Justices of the Peace within the Provinces and subordinate places respectively; these Justices were made liable and subject to the rules made and restrictions placed in regard to the Justices appointed by the Governor-General at Calcutta. His power of appointing Justices for Madras and Bombay was taken away.
It may be pointed out that under the Regulating Act, the Government of Bengal, and under the Act of 1807, the Governments of Madras and Bombay made, from time to time, Regulations empowering the Justices of the Peace to take cognizance of, and to punish cases of certain offences.

In 1813, the Charter Act authorized the Magistrates in the Provinces to act as Justices of the Peace and to exercise jurisdiction in cases of assault, forcible entry, or other injury accompanied by force, not being felony committed by British subjects residing beyond the limits of Presidency-towns, on natives. Their convictions were, however, removable by Certiorari into the Courts of Oyer and Terminer and Goal-Delivery. These Magistrates were given authority to decide cases of small debts due to natives from British subjects.

In 1823, an Act of Parliament, and the Crown's Charter granted under its authority, establishing the Supreme Court at Bombay, appointed its Judges as Justices and Conservators of the Peace, and Coroners, within and throughout the settlement of Bombay and the subordinate factories, and the territories under the Government of Bombay. The Charter vested in the Supreme Court the same control over the Court of Quarter Sessions and Justices as that exercised by the Calcutta Supreme Court.

It may be noted that the jurisdiction of Madras and Bombay Supreme Courts was generally restricted to British subjects; this appeared to limit the power of their Judges to act in the provinces as Conservators of the Peace.

In 1832, by an Act of Parliament, the Governor-General-in-Council at Calcutta and the Governors-in-Council at Madras and Bombay respectively were empowered to appoint, in the name of His Majesty, any persons residing within the territories under the Company, not being subjects of a foreign State, to act as Justices of the Peace within and for the towns of Calcutta, Madras and Bombay respectively.

In exercise of all these powers vested in three Governments by various Acts, they appointed Justices of the Peace and Magistrates for the respective Presidency-towns, whose powers and jurisdiction were defined by Parliament Acts and by the duly registered rules and regulations of the Governments. This continued till the passage of the Charter Act of 1833. This Act gave the legislative power for the whole country to the Governor-General-in-Council. Registration of laws was no more necessary. Since then the Acts of this Indian Legislature regulated the jurisdiction and powers of Justices of the Peace for the respective Presidency-towns.

The powers to punish, given to Justices of the Peace at Calcutta by rules and regulations passed prior to the Charter Act of 1833, were, for the most part, exercised by two Justices. In 1835, the Indian Legislature provided that such powers should be exercised by one Justice. In 1837, it was declared lawful for one Justice of the Peace to issue a warrant of distress for the recovery of arrears of assessment accruing under Parliamentary Act of

4. Act IV.
1793. In 1838, some provisions were made in respect of Justices of the Peace in the Mofussil; the same were extended to Madras in 1849.\(^5\)

In addition to the Magistrates’ Courts for the town of Bombay, there was a Court of Petty Sessions. In 1834, provision was made for the appointment by the Governor-in-Council of Bombay of two Magistrates, being Justices of the Peace, and for assembling the Court of Petty Sessions once a week. The Court was to consist of at least three Justices of the Peace, one of them being a Magistrate, one an European, and one a native, to be attended by a Barrister as assessor, being a Justice of the Peace, an Advocate of the Supreme Court, and appointed by the Governor-in-Council. The Court was given power of summary conviction and punishment according to the course followed by two Justices of the Peace in certain cases under statutory authority, and the same jurisdiction generally in respect of all acts done in contravention of the rules and regulations of the Governor-in-Council, for which no other exclusive jurisdiction was provided. It was also empowered to impose pecuniary forfeitures and penalties as inflicted by the justices by distress and sale of goods and chattels, if not otherwise provided.\(^6\)

In 1843, an appeal from sentences passed by any Justice of the Peace, acting beyond the local limits of the Supreme Courts, and from sentences passed by any Magistrate exercising jurisdiction under the Charter Act of 1813, was directed to lie to the same authority and subject to the same rules as were provided by Indian regulation and Acts in the case of sentences passed by Magistrates in the exercise of their ordinary jurisdiction. Cases subject to such appeal were not to be subject to revision by Certiorari.\(^7\)

In 1845, each Supreme Court was empowered, upon the order of the Government of the Presidencies concerned, to issue separate commissions to any persons, not named in the last general commission of the Peace, to be appointed as Justices of the Peace for the Presidency. Such commissions were to be issued in the Queen’s name and tested by the Chief Justice of the Supreme Court.\(^8\)

In 1838, the relevant provision of the Charter Act of 1813 and that of the Act of 1843, as discussed above, were extended to cases of assault, forcible entry, or other injury, accompanied with force, not being felony, which might be committed in any part of the territories of the Company, not being within the towns of Calcutta or Madras or the island of Bombay, by any British subject or other person, against the person or property of any person whatever. The powers previously exercised by the Zila Magistrate in such cases were given to Joint Magistrates or other persons lawfully exercising the powers of a Magistrate.\(^9\)

Magistrates of Police for the Presidency-towns were first appointed in 1856. It was required that they should be previously appointed justices

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5. Act I of 1837; Act XXXII of 1838; Act IX of 1849.
6. Reg. I.
7. Act IV.
8. Act VI.
9. Act VII.
of the Peace, and each of them was given all the powers and jurisdiction which were, by law, vested in two Justices of the Peace.\textsuperscript{10}

The jurisdiction of the Justices of the Peace was extended over the whole Presidency for which they were appointed. The classes of persons subject to their jurisdiction were:

1. All persons whatever, whether British subjects or natives, in regard to offences committed within the limits of the ordinary jurisdiction of the respective Supreme Courts.

2. All British officers residing in the seat of Government; they were not called upon to interfere, cases of such crimes and offences being cognizable by the Court-Martial.

3. Persons who committed crimes or offences at sea.

4. All persons whatever, residing beyond the jurisdiction of the Supreme Courts, were subject to the jurisdiction of Magistrates and Joint Magistrates acting as Justices of the Peace in certain cases.\textsuperscript{11}

The functions of Justices of the Peace were threefold:

1. The trial and punishment of offences by summary conviction and without a Jury.

2. The investigation of charges in view of the committal or discharge of the accused persons.

3. The prevention of crime and breaches of the peace.\textsuperscript{12}

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10. Act XIII. The law regulating the appointment and powers of Justices of the Peace was later provided by Act II of 1869 and afterwards by the Code of Criminal Procedure. See Cowell, op. cit., at p. 99. See also Chapters XIX and XXV.


CHAPTER XVII

JUDICIAL SYSTEM IN NON-REGULATION PROVINCES

Introduction

In the foregoing chapters, the judicial system described was that obtaining in what were termed the Regulation Provinces—Bengal, Bihar, Orissa, North Western Provinces, Madras and Bombay. The laws therein were passed by the Government while the body of public law. Statutory powers were... Act, 1773, amended by the Act of Settlement, in Council to frame and issue rules, ordinances government of the settlement. "It appears to have been tacitly assumed that the Act of 1773 gave also... year, but the matter was... Government annulled all... and began a new series of... most part re-enacting in new form what had gone before, were passed on the same day of that year." These regulations passed subsequently were extended to the North-Western Provinces in 1801.

The Acts of Parliament, passed in 1797, 1800 and 1807 gave to the Governments of Madras and Bombay the same statutory powers as the Regulating Act to the Government of Bengal, and accordingly a similar system of regulations was introduced by them in their respective territories. These powers were, however, withdrawn in 1833 when the Government of Bengal was declared the Government of India which was empowered to legislate for all parts of India, its laws being henceforth termed Acts.

The regulations and Acts of the Government of India, having the same statutory force in this country as the Acts of Parliament in the United Kingdom, provided, inter alia, for the establishment of courts; while laying down their composition and jurisdiction and functions of various departments of the administration, they also prescribed the course of procedure to be applied in the prosecution of suits. No Code of laws was promulgated in the beginning. The course of justice was to be made conformable to the customs of the country, and to the precepts of Mohammedan and Hindu law, so far as they could...

and elsewhere has been slo... by the accumulated pedantries of...

1. G. Chesney, Indian Polity, at p. 104 (1894).
ages, and, under which the issue of an Indian law-suit came to depend as much on the observance of nice and tedious formalities, as on the merits of the case.

"But whatever might be the opinion held by the framers of these Regulations, of the benefits conferred by them on the body of the people, it was seen that for some at least of the races of India, so technical and complicated a procedure was unsuitable and pernicious. And accordingly many territories acquired from time to time were never brought under the Regulations, while others...removed from their operation and placed under a more simple system. But the Acts of Parliament dealing with India all assumed the British portion of the country to be distributed among the Presidencies, within one or other of which all British territory was comprised, and were silent as regards any other territory not allocated to a Presidency, the administration of which, therefore, fell to be undertaken by the Government in virtue of the act of conquest or cession." The territories not so allocated were those of Central Provinces, Panjab, Oudh and Sindh etc. For these additional Provinces, simple Codes were made in view of the circumstances of each, and the regulations were applied to them only in regard to such particular localities and such special regulations as appeared necessary and suitable in each case.

Thus the Provinces of British India came to be divided into Regulation and Non Regulation Provinces, the procedure of the courts of the former being a highly elaborate and technical one, and that of the latter a simple and summary one, but not necessarily less definite and precise; the former also differed from the latter both in regard to the system of law under which they were governed and the form and constitution of the administrative agency. The Non-Regulation Provinces were not given any statutory recognition for a long time. It appears that the Charter Act of 1833 did not cover these territories. Their first explicit recognition is contained in a Parliamentary Act of 1854 which empowered the Governor-General-in-Council to take any part of the territories in the possession of the Company under his direct control and administration. The first specific statutory recognition of the Non-Regulation Provinces was made by Section 25 of the Indian Councils Act, 1861, which also gave retrospective validity to all previous legislation in respect of them. Thus they came to occupy a recognised and definite position as parts of British India along with the Regulation Provinces.

The Indian Legislature, as constituted, under the Act of 1861, took up in hand the task of re-organising the judicial systems in the Non Regulation Provinces and passed various laws in that respect as discussed below.

Central Provinces.

Act XIV of 1855 established eight grades of Courts in the Central Provinces.

2. Id., at pp. 185-186.
Court of Tahsildar of Second Class.

The Court of Tahsildar of the Second Class was the lowest Court with jurisdiction to try suits up to Rs. 100 in value.

Court of Tahsildar of First Class.

The Court of Tahsildar of the First Class was competent to decide suits up to Rs. 300 in value.

Court of Assistant Commissioner of Third Class.

The Court of Assistant Commissioner of the Third Class had jurisdiction to decide suits not exceeding Rs. 500 in value.

Court of Assistant Commissioner of Second Class.

The Court of Assistant Commissioner of the Second Class was given power to decide suits up to a valuation of Rs. 1,000.

Court of Assistant Commissioner of First Class.

The Court of Assistant Commissioner of the First Class was assigned jurisdiction to decide suits not exceeding Rs. 5,000 in value.

Courts of Deputy Commissioners.

The Court of Deputy Commissioner had original jurisdiction to try every suit without any pecuniary limit. It could entertain appeals from the decisions and orders of the subordinate courts.

Court of Commissioner.

The Court of Commissioner had original jurisdiction to decide suits without any pecuniary limit and also appellate jurisdiction over the Courts of Assistant Commissioner of the First Class and Deputy Commissioner.

Court of Judicial Commissioner.

The Court of Judicial Commissioner was the highest Court with jurisdiction to try appeals from the orders and decisions of the Court of Commissioner. It might try special appeals from the decisions passed in appeal by the Courts of the Deputy Commissioners and Commissioners. 5

Oudh

Act XIV of 1865 also established similar grades of Courts in Oudh as in the Central Provinces. The Act was, however, found incomplete and inconvenient as regards Oudh, and therefore, the Oudh Civil Courts Act, 1874, was passed. It constituted five grades of Courts, namely, those of the Tahsildar, the Assistant or Extra-Assistant Commissioner, the Deputy Commissioner or the Civil Judge of Lucknow, the Commissioners and the Judicial Commissioner. 6

Punjab

Act XIX of 1865 established seven grades of Civil Courts in the Punjab.

6. Id., at pp. 176-77. The Act of 1871 was repealed by the Oudh Civil Courts Act, 1879. For details of the Act of 1879, see Trevelyan, op. cit., at pp. 235-242.
Court of Tahsildar

The Court of Tahsildar was the lowest Court and had jurisdiction to try suits upto Rs. 300 in value.

Court of Assistant Commissioner with ordinary powers.

The Court of Assistant Commissioner was empowered to try suits not exceeding Rs. 100 in value.

Court of Assistant Commissioner with special powers.

The Court of Assistant Commissioner was given jurisdiction to try suits upto Rs. 500 in value.

Court of Assistant Commissioner with full powers.

The Court of Assistant Commissioner was empowered to try suits not exceeding Rs. 10,000 in value.

Court of Deputy Commissioner.

The Court of Deputy Commissioner had jurisdiction to decide suits without any pecuniary limit. Appeals from the first three Courts also lay to this Court.

Court of Commissioner.

The Court of Commissioner was empowered to try suits of any value. It could entertain appeals from the orders and decisions of the Courts of Assistant Commissioner with full powers and Deputy Commissioner.

Court of Judicial Commissioner.

The Court of Judicial Commissioner was the highest Court of Appeal. By Act IV of 1866, this Court was constituted to be the Chief Court.7

Sindh

Courts were also established in Sindh by Act XII of 1866.8

Comments

The judicial system introduced in Non-Regulation Provinces constituted an anachronism which had many drawbacks and defects. The officer entrusted with the responsibility to execute it often found themselves overburdened with work. Consequently, the less interesting work of administering justice suffered. The judicial work was often discharged by these Executive Officers in an irregular, summary and executive fashion. The pressure of work on the officers was responsible for their discharging the judicial work inefficiently. Such a system might have been tolerated in the initial stages when a rough and ready kind of justice was accepted as sufficient for the requirements of the people. But then, conceptions underwent a radical change. The quality of judicial work done by the Executive Officers was often poor because they had no leisure to consult law books and

7. Cowell, op. cit., at p. 176. Act XVII of 1877 was then passed combining all the courts under one Act. Subsequently Act XVIII of 1884 and finally Punjab Courts Act, 1913, were passed. See Cowell, op. cit., at p. 176; Trevelyan, op. cit., at pp. 243-249.
examine the precedents of the Chief Court and the High Courts... This kind of justice no longer satisfied either the people or the authorities. The two Codes of Procedure had come into operation. The Chief Court and the Judicial Commissioner's Courts began to demand more regularity and strict conformity with law and procedure from the Executive Officers in the discharge of their judicial work. All this gave rise to a demand for abolishing the Non-Regulation system. In 1872 Sir James Stephen said that "the complete amalgamation through every grade of the service of judicial and executive functions was inconsistent with the proper administration of a regular system of law and especially, of Codes of Civil and Criminal Procedure." It took, however, sometime to do away with the Non-Regulation system of doing justice in the executive fashion and assimilate it to the judicial system. Oudh was first to do it in 1917. The Punjab scrapped it in 1918 when the Punjab Courts Act was passed.

10. Id., at p. 296.
11. See ibid.
CHAPTER XVIII

RACIAL DISCRIMINATION IN ADMINISTRATION OF JUSTICE

The jurisdiction of the Courts of the Company was not extended, in the beginning, to all persons residing in the Mofussil. There was discrimination in favour of certain class of persons both in the field of civil justice and that of criminal justice: in the former it was allowed to continue till 1850 and in the latter it lasted longer.

Civil Jurisdiction.

Originally the civil jurisdiction of the Company’s courts was extended over natives only: In the beginning, British subjects did not reside in the Provinces ordinarily except in their official capacity. In 1787, in Bengal, it was declared that whenever any person including a British subject, not amenable to the jurisdiction of the Company’s civil courts, should bring a suit in such courts against any person, amenable to their jurisdiction, he should make a bond rendering him subject to their authority in respect of such a suit and binding him to abide by their decree or award. This was the first interference with the exemption of Europeans from the jurisdiction of the civil courts.

It was subsequently laid down that the jurisdiction of the civil courts should extend over all natives, and persons, not being British subjects, and over such British subjects (except the King’s officers, covenanting civil servants of the Company and military personnel) as resided at a distance of more than ten miles from the Presidency-towns, on executing a bond declaring them not to attend the Company’s civil courts in suits up to Rs. 500 in natives or others, not being British subjects.

In 1819, the Charter Act provided that British subjects residing, trading or holding immovable property at a distance of more than ten miles from

In 1827, the Government in Bengal empowered Indian judges to decide cases in which Europeans were parties. But, in 1831, this jurisdiction was withdrawn. Thus Europeans were not subject to the authority of Indian Judges in civil suits; they were amenable to the jurisdiction of the Company’s courts presided over by European Judges only.

In 1833 India was thrown open to Europeans who would freely settle and acquire property in the Mofussil. Because of this step, the Government had to provide adequate protection to the natives from insult and outrages.

in their persons, properties, religions and opinions. In this connection, it
despatch to the Government of India in 1834, the Directors of the Compa-
said that though the English settlers, if governed by an enlightened re-
of their own interests, would see the significance of winning the confidence of
their Indian neighbours by a just and conciliatory course of conduct, some
of them might yield to the influence of worse motives. "Eagerness for some
temporary advantages, the consciousness of power, the pride of a fancied
superiority of race, the absence of any adequate check from public opinion,
the absence also in many cases of the habitual check supplied by the stated
and public recurrence of religious observances—these and other causes may
occasionally lead even the settled resident to be less guarded in his treatment
of the people than would accord with a just view in his situation." But
the provisions to be made with the just and humane design of protecting the
natives from ill-treatment must not be so much as to harass the European with
any unnecessary restraints or to give him uneasiness by the display of improper
distrust and suspicion. Laws passed in such a spirit tend to produce the
very michiefs which they aim at preventing. To the evil-minded they
suggest evil; they furnish the discontented with materials or pretexts for
clamour, and they irritate the peaceably disposed into hostility." The
Government was restrained from making, without the previous sanction of
the Court of Directors, any provision empowering courts other than the
Crown's courts to sentence British subjects or their children to death or
abolishing the Crown's courts. But the Government had power to subject
them in all other criminal and civil respects to the ordinary courts of the
country. All British-born subjects throughout India should forthwith be
subjected to the same courts with the natives. Thus they would be amenable
to the mofussil courts. "So long as Europeans, penetrating into the interior,
held their places purely by the tenure of sufferance, and bore in some sense
for exempting them from the authority of those judicatures to which the great
body of the inhabitants were subservient." But on becoming inhabitants of
India, they must share in the judicial liabilities as well as in the civil rights
relating to that capacity. Participation in both should commence at the
same moment. Besides, the Charter Act, 1833, after reciting that the removal
of restriction on the intercourse of Europeans with the country would make it
directed to provide against any michiefs or dangers that might then arise,
and outrage—an obligation which could not possibly be fulfilled unless both
natives and Europeans were rendered to the same judicial control. There could
be no equality of protection where justice was not equally and on equal terms
accessible to all.

But though an Englishman would be rendered subject to the same court
with the native, and though his rights would be placed under the same super-
vision and protection, it did follow that these rights would be determined
by the same rule. For example, Indian law of succession might not neces-
sarily be applied to the devolution of property of an Englishman, that might

4. Despatch dated December 10, 1854, on Charter Act of, 1839 from Court of Direc-
tors to the Government of India, Indian Constitutional Documents, Vol. I,
5. Id., at pp. 272-273.
7. 1834 Despatch, Constitutional Documents, op. cit., at p. 274.
8. Id., at pp. 274-275.
might be subject to English law. In cases of marriage, the same court might observe one principle in regard to the Englishman and others in respect of Hindus and Mohammedans. Even in criminal cases, when such differences were least desirable, sometimes they might yet be necessary because what might operate as a severe punishment to a Hindu, might not be felt so by an Englishman. But such variances did not affect the main principle, that is, justice was to be administered to persons of every race, creed and colour, according to its essence, and with as little diversity of circumstance as possible.\textsuperscript{3}

In view of these directions, the Government in India had to define the jurisdiction of moffussil courts over English settlers.

Lord T. B. Macaulay, the first Law Member of the Governor General-in-Council appointed under the Charter Act of 1833, was opposed to any semblance of partiality in the dispensation of justice. He observed that the system of administration of justice, as far as possible, should be uniform and no distinction should be maintained between one class of people and another except in cases of necessity. He pleaded for abolishing special privilege of the English in matter of appeals to the Crown’s courts, granted under the Charter Act of 1813. He said, “That distinction seems to indicate a notion that the natives of India may well put up with something less than justice or that Englishmen in India have a title to something more than justice. If we give our countrymen an appeal to the King’s courts in cases in which all others are forced to be content with the Company’s courts, we do in fact cry down the Company’s courts. We proclaim to the Indian people that there are two sorts of justice, a coarse one which we think good enough for them, and another of superior quality which we keep for ourselves. If we take pains to show that we distrust our highest courts, how can we expect that the natives of the country will place confidence in them.”\textsuperscript{10}

Thus Macaulay was of the view that natives should be placed on a basis of equality along with Europeans in the matter of administration of justice.

In 1836, all judicial concessions in the administration of civil justice, therefore, withdrawn. British subjects, who were declared to be subject to the jurisdiction of the Company’s civil courts for acts done by them as such, and liable to the same proceedings as if they were not of British birth or descent. All the British subjects were also deprived of their right to take appeals from the Company’s courts to the Supreme Courts, granted under the Charter of 1813, it was further enacted that no person whatever should, by reason of place of birth or descent, be excepted from the jurisdiction of any of the whatever.\textsuperscript{12} This latter provision was fully the Courts of Munsifs and in Madras, Courts Munsifs were excepted from its operation; in 1843, however, the former and in 1850, the latter were also covered.\textsuperscript{13}

\textsuperscript{9} Id., at p. 275.
\textsuperscript{10} See J. K. Mittal “Practices of Inequality and Indian Reaction during Colonial Era,” University of Allahabad Studies, at pp. 63-64 (1963).
\textsuperscript{11} See Id., at p. 64.
\textsuperscript{12} Act XI
\textsuperscript{13} Act VI of 1813; III of 1859. See F. n. 5, Morley, op. cit., at pp. 117-118, and M. p. Jain, Outlines of Indian Legal History, at pp. 303-301 (1932).
In 1839, it was declared that no person whatever would be exempt from the jurisdiction of the revenue courts of Musulms in proceedings connected with arrears or exaction of rents on the ground of place of birth or descent.  

At that time, these measures caused great dissatisfaction among the British subjects, but the justice and good policy of these provisions would hardly be questioned by any person except those who were actuated by selfish motives.

In 1850, it was, however, provided that on Judge, Magistrate, Justice of the Peace, Collector or other person acting judicially, and persons acting by them in their official capacity.

The jurisdiction of the criminal courts of the Company was originally limited to natives and Europeans, not being British subjects. It was, however, provided that when British subjects committed or were charged with committing offences beyond the Presidency-towns, the Magistrates were authorized to apprehend them and, after having enquired into the circumstances, to send them to the Crown's courts at Presidency-towns for trial. They had no power to punish them. The system did not afford to impose upon the native complainant and witness the obligation of repairing many hundred miles to obtain redress was to subject them to delay, fatigue, and expense, which would be most intolerable than the injury they had suffered.

Under the Act of 1793, the Government of Bengal, and under the Act of 1807, the Governments of Madras and Bombay were empowered to appoint other British inhabitants as Justices of the Peace within the Provinces. An important provision was, however, made by the Charter Act of 1813 which made some advance towards equality in the administration of criminal justice. The Act empowered the Magistrates in the Provinces to act as Justices of the Peace and to exercise jurisdiction in cases of assault, forcible entry or other injury accompanied with force not being a felony, committed by British subjects, residing outside the Presidency-towns, or natives. In such cases, the Magistrates were empowered to punish the offenders by fine not exceeding Rs. 500 or two months' imprisonment if fine was not paid. The convictions were, however, made removable by Certiorari into the Crown's courts at Presidency-towns as Courts of Oyer and Terminer and Gaol Delivery.

An Act of 1833 authorized the appointment of persons other than covenantants servants of the Company as Justices of the Peace for Presidency-towns only; the mofussil areas were not covered by this Act and therefore, the Charter contemplated Indians against Europeans. If it has been observed that in 1853 India was in the English settlers protection to Directors in
their despatch of 1834 to the Government of India had said that though the Government could not empower the mofussil courts to sentence British subjects to death, it could empower them to try their all other criminal cases in the same manner they tried the criminal cases of Indians. Of course, there might be variations in awards of punishment. The Directors had further asked the Government to consider whether or not the use of juries in criminal trials of the criminal offence to be content with such justice as administered to natives. But in view of their well-known attachment to the institution of jury, the prospect of an increased residence of Englishmen in the interior was an additional reason for considering the expediency of adopting it generally. If it was so adopted, it was neither necessary nor expedient that it should be an exact copy of that which existed in England. The Directors were strongly opposed to the transfer to India of all the peculiarities of English criminal judicature, not necessarily being virtues whatever might be the prejudices of Englishmen. While legislating for Indians, the Government should be apt to seek the precedents in their ancient usages rather than the modern practices of the English. The system of criminal judicature to be adopted should be designed with a special regard to the benefit of natives rather than the new settlers, not because the latter were less worthy of consideration but because they were comparatively few, and laws and institutions existed for the advantage not of the few but many.21

The Government of India was, however, slow in putting the English and natives on an equal basis in criminal proceedings. In 1835 Macaulay and again in 1841 the Directors desired the Government to remove the defect from the administration of criminal justice. In 1843, the First Law Commission also pleaded for equality in criminal matters except capital cases.22

As a result some change took place in 1843. An Act of the Indian Legislature restricted the use of Certiorari to cases in which no appeal could be preferred from the sentences of the Magistrates to the superior courts of the Company. In other cases appeals were to be preferred to the same authority as in the cases of sentences by them in the exercise of their ordinary jurisdiction.23

The Indian Judges, however, could not try Europeans in criminal cases. The English Magistrates could punish them for minor offences. Serious cases were to be decided by the Crown’s Courts only. The Europeans continued to enjoy a privileged position for a long time.

It may be pointed out that even after the Government of India was taken over by the Crown in 1858, the Europeans enjoyed a general exemption from the criminal jurisdiction of the courts presided over by the Indians. There was one set of courts for the governor and another for the governed. In 1872 the revised Criminal Procedure Code provided that the European British subjects in the mofussil were entitled to be tried exclusively by judges of their own race, they being the Sessions Judges and Magistrates of the first class working also as Justices of the Peace. The Magistrates could pass sentences of imprisonment up to three months or fine up to Rs. 1,000 or both.

21. 1854 Despatch, Constitutional Documents, op. cit., at pp. 275-76.
23. Act IV.
The Sessions Judges could pass sentences of imprisonment up to one year or fine or both. The High Courts could award more severe punishments. The European British subjects enjoyed other privileges also. Thus the Code preserved, to a great extent, the privileges enjoyed by Europeans. Though substantive law and appellate authority were the same for all, for purposes of commitment and trial, they were amenable to different courts. The mofussil courts, having Indian Judges could not try Europeans in criminal cases. In 1884 the Ilbert Act provided for mixed jury (consisting of Indians and Europeans or Americans) for the trial of European British subjects. Some of the concessions granted to the Europeans were taken away by the Criminal Law (Amendment) Act, passed in 1923, when Chapter XXXIII of the Code of Criminal Procedure, re-enacted in 1898 dealing with Special proceedings, was recast. The purpose was to reduce the differences in the cases of trial of Europeans and Indians under the Code. A compromise was effected "between the interest, concerned under the existing circumstances and the various racial considerations between Europeans and Indians that must be recognized as existing facts in spite of theoretical considerations based on pure justice." Thus complete equality was not aimed at. Normally in a Court of Sessions, trial by jury of mixed nationality was provided, the majority of the jurors being either Indians or Europeans and Americans according to the accused person being an Indian or a European subject of His Majesty. Europeans could be tried by Indian Judges.24

Section 108 (1) (c) and section 108 (2) (d) of the Government of India Act, 1935 prohibited the Federal Legislature and the Provincial Legislatures from altering the procedure for trials without the previous sanction of the Governor-General.

In 1949, the judicial concessions, enjoyed by Europeans, not only those provided in the Criminal Procedure Code but in other enactments also, were completely abolished by the Criminal Law (Removal of Racial Discriminations) Act, 1949.

CHAPTER XIX
MODERN JUDICIARY—SUBORDINATE COURTS

The existing system of subordinate courts of civil and criminal jurisdiction is based on the system already discussed in the preceding chapters.

Subordinate Civil Courts in States

The State-wise description of subordinate civil courts is as follows:

Andhra Pradesh

The State of Andhra Pradesh, consisting of the Andhra and Telangana regions, emerged as a result of the States Reorganisation Act, 1956, which added the Telangana region of the erstwhile State of Hyderabad to the already existing Andhra State, formed of Andhra region of the State of Madras under the Andhra State Act, 1953.

The law dealing with the constitution and jurisdiction of the subordinate civil courts in the State of Andhra Pradesh is the Madras Civil Courts Act, 1873, adapted by the Andhra Adaptation of Laws Order, 1953.

In Telangana region, the District Judges have jurisdiction to decide suits of any value in the first instance; their jurisdiction extends to suits up to a valuation of Rs. 5,000, and to small cause suits limited to Rs. 300. The small cause suits are confined to Rs. 20,000 in value in the exercise of their ordinary original jurisdiction. The pecuniary jurisdiction in small cause suits is limited to Rs. 50.

In both the regions, the District Judges have been given jurisdiction to hear appeals from the decrees or orders of the Subordinate Judges and Munsifs. In Andhra region only, the Subordinate Judges have jurisdiction to hear appeals from the decrees or orders of the Munsifs. Appeals from decrees or orders of the District Judges lie to the High Court. In certain cases, appeals lie from the Courts of the Subordinate Judges to the High Court.

In Andhra region, all the courts have special jurisdiction to decide cases under certain Acts, but in Telangana region, only the District Courts have that jurisdiction.

1. Central Act III as amended by, e.g., the Madras Act (Act XXI of 1885), the Decentralisation Act (Act IV of 1914), and the Madras Act XVI of 1951.
Subject to the control of the High Court, the general control over all the civil courts in any district is vested in the District Judge.\footnote{2}

Assam.

The constitution and jurisdiction of the subordinate civil courts in the State of Assam, except tribal are as are contained in the Bengal, Agra and Assam Civil Courts Act, 1887\footnote{3}. In this State, except tribal areas, there are District Judges, Additional Judges, Assistant District Judges and Munsifs. District and Assistant District Judges have ordinary original jurisdiction to try suits of any value. The ordinary original jurisdiction of the Munsif is limited to suits, the value of which does not exceed Rs. 3,000. An Additional Judge discharges functions assigned to him by the District Judge, and while doing so, he exercises the powers of the District Judge.

Any Assistant District Judge or Munsif may be empowered to take cognizance of, or any District Judge to transfer to an Assistant District Judge or Munsif under his administrative control, any of the specified proceedings arising under certain Acts. Such a proceeding has to be disposed of subject to the rules applicable to like proceeding when disposed of by the District Judge.

Appeals from the Courts of Munsifs lie to the District Judges. Any Assistant District Judge may be empowered to hear appeals from the Courts of Munsifs. A District Judge may transfer to Assistant District Judge appeals from the decrees or orders of Munsifs. Appeals from the Courts of the Assistant District Judges lie to the District Judges in cases where the value of the original suits did not exceed Rs. 7,000, and to the High Court in other cases. Appeals from the original decrees or orders of the District Judges or Additional District Judges lie to the High Court. An appeal from an order of the Munsif in a specified proceeding arising under certain Acts, as discussed above, lies to the District Judge. An appeal from the order of the District Judge on appeal from the order of the Munsif lies to the High Court if a further appeal from the order of the District Judge is allowed by some law in force.

The Assistant District Judge and Munsif may be invested with Small Cause Court jurisdiction for the trial of suits up to Rs. 500 and Rs. 250 respectively.

Subject to the superintendence of the High Court, the District Judge has administrative control over all the civil courts within the local limits of his jurisdiction.\footnote{4}

The administration of justice in the tribal areas is regulated by the provisions of the Sixth Schedule of the Indian Constitution.\footnote{5} These areas constitute autonomous districts and regions. The administration of each

2. E. J. Trevelyan, The Constitution and Jurisdiction of Courts of Civil Justice in British India, at pp. 205-210 (1923) ; Law Commission of India, 16th Report, \footnote{6}

3. .... For extension to See also the Shillong districts and regions in the State of Assam (Art. 246, 247 and 248, Sixth Schedule of the Constitution of India). Paragraph 4 of the Sixth Schedule deals with the administration of justice in these areas, as explained in the text.


5. See Arts. 244 (7) and 273 (1).
autonomous district and autonomous region is vested in a District Council and a Regional Council respectively. Under paragraph 4 (1) of the Sixth Schedule, these Councils have the power to constitute Village Councils or courts for the trial of suits and cases between the parties belonging to Scheduled Tribes in such areas, other than suits and cases to which the provisions of paragraph 5 (1) apply to the exclusion of any court in the State. They have also the power to appoint suitable persons to be members of such Councils or presiding officers of such courts. Under paragraph 4 (2) the appellate jurisdiction is vested in the District or Regional Councils, and no other court except the High Court and the Supreme Court has jurisdiction over such suits or cases. Paragraph 4 (3) empowers the High Court to exercise jurisdiction over the suits and cases to which the provisions of paragraph 4 (2) apply as the Governor may, from time to time, by order, specify.

Under paragraph 5 (1), the Governor may, for the trial of suits or cases arising out of any law in force in any autonomous district or region, being a law specified in that behalf by the Governor, or for the trial of offences punishable with death, transportation for life, or imprisonment for a term of not less than five years under the Indian Penal Code or under any other law applicable to such district or region, confer on the District Councils or Regional Councils or on courts constituted by such Councils or any officer appointed in that behalf by the Governor, such powers under the Civil Procedure Code or the Criminal Procedure Code, as the case may be, as he deems appropriate and, thereupon, the said Council, Court or Officer has to try the suits, cases or offences in exercise of the powers so conferred. Paragraph 5 (2) empowers the Governor to withdraw or modify any of these powers. Under paragraph 5 (3), the application of the Civil Procedure Code and Criminal Procedure Code to any autonomous district or region is excluded except as discussed above.

It appears that there are twenty-five Councils presided over by hereditary chieftains to decide cases, which they are empowered to try, according to their tribal and local customs having the force of law. The litigation in the tribal courts generally relates to land disputes, succession to hereditary rights, customary rights, and boundary disputes. There are cases of murders and dacoities often committed because of drunkenness. It seems that the services of judicial officers in the non-tribal areas are lent to the tribal areas for the trial of cases as referred to in paragraph 5 (1).

Bihar,

Originally the State of Bihar was a part of the Bengal Province. In 1912, Bihar and Orissa were constituted as a separate unit. The present State of Bihar came into existence in 1936 when Orissa was made a separate Province.

The Bengal Agra and Assam Civil Courts Act, 1887, deals with the constitution and jurisdiction of the subordinate civil courts in the State of Bihar. There are four classes of Courts, namely, the Court of District Judge, the Court of Additional Judge, the Court of Subordinate Judge and the Court of Munsif. The ordinary original jurisdiction of a District Judge and Subordinate Judge extends to all original suits for the time being cognizable by civil courts. The jurisdiction of a Munsif is extended to

7. As amended by Acts including Bihar Act V of 1939 and Bihar Act XII of 1930.
Subject to the control of the High Court, the general control over all the civil courts in any district is vested in the District Judge.\textsuperscript{2} Assam.

The constitution and jurisdiction of the subordinate civil courts in the State of Assam, except tribal areas, are contained in the Bengal, Agra and Assam Civil Courts Act, 1887\textsuperscript{3}. In this State, except tribal areas, there are District Judges, Additional Judges, Assistant District Judges and Munsifs. District and Assistant District Judges have ordinary original jurisdiction to try suits of any value. The ordinary original jurisdiction of the Munsifs is limited to suits, the value of which does not exceed Rs. 3,000. An Additional Judge discharges functions assigned to him by the District Judge, and while doing so, he exercises the powers of the District Judge.

Any Assistant District Judge or Munsif may be empowered to take cognizance of, or any District Judge to transfer to an Assistant District Judge or Munsif under his administration, any of the specified proceedings or matters arising under the said Act, which has to be disposed of subject to the rules. Appeals have to be disposed of by the District Judge.

Appeals from the Courts of Munsifs lie to the District Judges. Any Assistant District Judge may be empowered to hear appeals from the Courts of Munsifs. A District Judge may transfer to Assistant District Judge appeals from the decrees or orders of Munsifs. Appeals from the Courts of the Assistant District Judges lie to the District Judges in cases where the value of the original suits did not exceed Rs. 7,000, and to the High Court in other cases. Appeals from the original decrees or orders of the District Judges or Additional District Judges lie to the High Court. An appeal from an order of the Munsif in a specified proceeding arising under certain Acts, as discussed above, lies to the District Judge. An appeal from the order of the District Judge on appeal from the order of the Munsif lies to the High Court if a further appeal from the order of the District Judge is allowed by some law in force.

The Assistant District Judge and Munsif may be invested with Small Cause Court jurisdiction for the trial of suits up to Rs. 500 and Rs. 250 respectively.

Subject to the superintendence of the High Court, the District Judge has administrative control over all the civil courts within the local limits of his jurisdiction.\textsuperscript{4}

The administration of justice in the tribal areas is regulated by the provisions of the Sixth Schedule of the Indian Constitution.\textsuperscript{5} These areas constitute autonomous districts and regions. The administration of each

\textsuperscript{2} For the Civil Justice in the State of Assam. (Arts. 244 (2), 275 and Sixth Schedule of the Constitution of India). Paragraph 4 of the Sixth Schedule deals with the administration of justice in these areas, as explained in the text.


\textsuperscript{4} See Arts. 244 (2) and 275 (1).
autonomous district and autonomous region is vested in a District Council and a Regional Council respectively. Under paragraph 4 (1) of the Sixth Schedule, these Councils have the power to constitute Village Councils or courts for the trial of suits and cases between the parties belonging to Scheduled Tribes in such areas, other than suits and cases to which the provisions of paragraph 5 (1) apply to the exclusion of any court in the State. They have also the power to appoint suitable persons to be members of such Councils or presiding officers of such courts. Under paragraph 4 (2) the appellate jurisdiction is vested in the District or Regional Councils, and no other court except the High Court and the Supreme Court has jurisdiction over such suits or cases. Paragraph 4 (3) empowers the High Court to exercise jurisdiction over the suits and cases to which the provisions of paragraph 4 (2) apply as the Governor may, from time to time, by order, specify.

Under paragraph 5 (1), the Governor may, for the trial of suits or cases arising out of any law in force in any autonomous district or region, being a law specified in that behalf by the Governor, or for the trial of offences punishable with death, transportation for life, or imprisonment for a term of not less than five years under the Indian Penal Code or under any other law applicable to such district or region, confer on the District Councils or Regional Councils or on courts constituted by such Councils or any officer appointed in that behalf by the Governor, such powers under the Civil Procedure Code or the Criminal Procedure Code, as the case may be, as he deems appropriate, and, thereupon, the said Council, Court or Officer has to try the suits, cases or offences in exercise of the powers so conferred, Governor to withdraw or modify any of these powers in the application of the Civil Procedure Code to any autonomous district or region is excluded except as discussed above.

It appears that there are twenty-five Councils presided over by hereditary chieftains to decide cases, which they are empowered to try, according to their tribal and local customs having the force of law. The litigation in the tribal courts generally relates to land disputes, succession to hereditary rights, customary rights, and boundary disputes. There are cases of murders and dacoities often committed because of drunkenness. It seems that the services of judicial officers in the non-tribal areas are lent to the tribal areas for the trial of cases as referred to in paragraph 5 (1).6

Bihar.

Originally the State of Bihar was a part of the Bengal Province. In 1912, Bihar and Orissa were constituted as a separate unit. The present State of Bihar came into existence in 1936 when Orissa was made a separate Province.

The Bengal, Agra and Assam Civil Courts Act, 1887, deals with the constitution and jurisdiction of the subordinate civil courts in the State of Bihar. There are four classes of Courts, namely, the Court of District Judge, the Court of Additional Judge, the Court of Subordinate Judge and the Court of Munsif. The ordinary original jurisdiction of a District Judge and Subordinate Judge extends to all original suits for the time being cognizable by civil courts. The jurisdiction of a Munsif is extended to

powers of a District Judge within a particular part of a district. The jurisdiction of such Assistant Judge *pro tanto* excludes the jurisdiction of the District Judge from within the said limits.

In each district, several Civil Judges subordinate to the District Judge are appointed. Joint Civil Judges may be appointed to assist the Civil Judges. A Joint Civil Judge has to dispose of such civil business within the limits of his pecuniary jurisdiction as may, subject to the control of the District Judge, be referred to him by the Civil Judge. He may also dispose of the civil business of his Court at the place of his deputation subject to the orders of the High Court. The provisions of the Act, as are applicable to the Civil Judges, apply to the Joint Civil Judges also. There are two classes of the Civil Judges. The jurisdiction of a Civil Judge (Senior Division) extends to all original suits and proceedings of a civil nature. The jurisdiction of a Civil Judge (Junior Division) extends to all original suits and civil proceedings wherein the subject-matter does not exceed Rs. 10,000 in amount or value. This limit may be increased to Rs. 15,000 in the cases of a Civil Judge (Junior Division) of not less than ten years' standing and especially recommended in this behalf by the High Court. A Civil Judge (Senior Division) also exercises a special jurisdiction in respect of such suits and civil proceedings as may arise within the local jurisdiction of the Court in the district presided over by Civil Judges (Junior Division) and the subject-matter of which exceeds the pecuniary jurisdiction of the Civil Judge (Junior Division). A Civil Judge may be invested with the jurisdiction of a Small Cause Court for the trial of suits cognizable by such Courts upto such amount as the High Court deems proper, not exceeding in the case of a Civil Judge (Senior Division) Rs. 1,500 and in the case of a Civil Judge (Junior Division) Rs. 500. The Civil Judges may be invested with jurisdiction under certain Acts.

The District Court is the Court of appeal from all decrees and orders passed by the subordinate courts from which an appeal lies under any law for the time being in force, except in certain cases. Where the decrees and orders of an Assistant Judge in suits, applications or references, as mentioned above are appealable, the appeal lies to the District Judge or to the High Court according as the amount or value of the subject-matter does not exceed or exceeds Rs. 10,000. An Assistant Judge has jurisdiction to try such appeals from the decrees and orders of the subordinate courts as would lie to the District Judge and as may be referred by him to the Assistant Judge. Decrees and orders so passed in appeals have the same force and are subject to the same rules of procedure and appeals as are decrees and orders passed by the District Judge. In all suits decided by a Civil Judge in which the amount or value of the subject-matter exceeds Rs. 10,000, the appeal from his decision lies directly to the High Court. A Civil Judge (Senior Division) or the Judge of a Provincial Small Cause Court may be invested with power to hear appeals from such decrees and orders of subordinate courts as may be referred to him by the District Judge. Decrees and orders so passed in appeals have the same force as the decrees and orders of a District Judge. Every order passed by a Civil Judge in exercise of his jurisdiction under certain Acts is subject to appeal to the High Court or the District Court according as the amount or value of the subject-matter exceeds or does not exceed Rs. 10,000. Every order of the District Judge passed in such an appeal from the order of a Civil Judge is subject to an appeal to the High Court under the rules contained in the Civil Procedure Code applicable to appeals from appellate decrees.
all like suits of which the value does not exceed Rs. 2,000. Any Munsif may, however, be empowered to decide like suits up to a valuation of Rs. 5,000. An Additional Judge has to discharge the functions of the District Judge and while doing so, he exercises the powers of the District Judge.

Any Subordinate Judge or Munsif may be empowered to take cognizance of, or any District Judge to transfer to a Subordinate Judge or Munsif under his administrative Control, any of the specified proceeding arising under certain Acts. The Subordinate Judge or Munsif has to dispose of such proceeding subject to the rules applicable to like proceeding when disposed of by the District Judge.

An appeal from a decree or order of a Munsif lies to the District Judge or to the Subordinate Judge, if especially empowered. A District Judge may transfer to any Subordinate Judge appeals pending before him from the decrees or orders of Munsifs. An appeal from the decree or order of a Subordinate Judge lies to the District Judge where the value of the original suit in which the decree or order was passed was less than Rs. 10,000, and to the High Court in any other case. An appeal from an order of the Munsif in a specified proceeding arising under certain Acts, as discussed above, lies to the District Judge. An appeal from the order of the District Judge on appeal from the order of the Munsif lies to the High Court if a further appeal from the order of the District Judge is allowed by some law in force.

Any Subordinate Judge or Munsif may by invested with Small Cause Court jurisdiction for trial of suits, cognizable by small Cause Courts, up to a valuation of Rs. 750 and Rs. 300 respectively.

Subject to the superintendence of the High Court, the District Judge has administrative control over all the civil courts within the local limits of his jurisdiction.\(^8\)

Gujarat and Maharashtra.

The Bombay Reorganisation Act, 1960, divided the State of Bombay into two separate States, namely State of Gujarat and State of Maharashtra. The law dealing with the constitution and jurisdiction of subordinate civil courts in these States is the Bombay Civil Courts Act, 1869.\(^9\) In each district there is a District Court presided over by a Judge, called the District Judge. This is the principal Court of original civil jurisdiction in the district. In any district, a Joint Judge, invested with co-extensive powers and a concurrent jurisdiction with the District Judge, may be appointed to transact such civil business as he may receive from the District Judge or as may have been referred to him by order of the High Court. One or more Assistants to a District Judge are appointed. The District Judge may refer to any Assistant Judge under his jurisdiction to try such suits and to dispose of such applications or references. An Assistant Judge may be invested with all or any of the

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powers of a District Judge within a particular part of a district. The jurisdiction of such Assistant Judge *pro tanto* excludes the jurisdiction of the District Judge from within the said limits.

In each district, several Civil Judges subordinate to the District Judge are appointed. Joint Civil Judges may be appointed to assist the Civil Judges. A Joint Civil Judge has to dispose of such civil business within the limits of his pecuniary jurisdiction as may, subject to the control of the District Judge, be referred to him by the Civil Judge. He may also dispose of the civil business of his Court at the place of his deputation subject to the orders of the High Court. The provisions of the Act, as are applicable to the Civil Judges, apply to the Joint Civil Judges also. There are two classes of the Civil Judges. The jurisdiction of a Civil Judge (Senior Division) extends to all original suits and proceedings of a civil nature. The jurisdiction of a Civil Judge (Junior Division) extends to all original suits and civil proceedings wherein the subject-matter does not exceed Rs. 10,000 in amount or value. This limit may be increased to Rs. 15,000 in the cases of a Civil Judge (Junior Division) of not less than ten years' standing and especially recommended in this behalf by the High Court. A Civil Judge (Senior Division) also exercises a special jurisdiction in respect of such suits and civil proceedings as may arise within the local jurisdiction of the Court in the district presided over by Civil Judges (Junior Division) and the subject-matter of which exceeds the pecuniary jurisdiction of the Civil Judge (Junior Division). A Civil Judge may be invested with the jurisdiction of a Small Cause Court for the trial of suits cognizable by such Courts up to such amount as the High Court deems proper, not exceeding in the case of a Civil Judge (Senior Division) Rs. 1,500 and in the case of a Civil Judge (Junior Division) Rs. 500. The Civil Judges may be invested with jurisdiction under certain Acts.

The District Court is the Court of appeal from all decrees and orders passed by the subordinate courts from which an appeal lies under any law for the time being in force, except in certain cases. Where the decrees and orders of an Assistant Judge in suits, applications or references, as mentioned above are appealable, the appeal lies to the District Judge or to the High Court according as the amount or value of the subject-matter does not exceed or exceeds Rs. 10,000. An Assistant Judge has jurisdiction to try such appeals from the decrees and orders of the subordinate courts as would lie to the District Judge and as may be referred by him to the Assistant Judge. Decrees and orders so passed in appeals have the same force and are subject to the same rules of procedure and appeals as are decrees and orders passed by the District Judge. In all suits decided by a Civil Judge in which the amount or value of the subject-matter exceeds Rs. 10,000, the appeal from his decision lies directly to the High Court. A Civil Judge (Senior Division) or the Judge of a Provincial Small Cause Court may be invested with power to hear appeals from such decrees and orders of subordinate courts as may be referred to him by the District Judge. Decrees and orders so passed in appeals have the same force as the decrees and orders of a District Judge. Every order passed by a Civil Judge in exercise of his jurisdiction under certain Acts is subject to appeal to the High Court or the District Court according as the amount or value of the subject-matter exceeds or does not exceed Rs. 10,000. Every order of the District Judge passed in such an appeal from the order of a Civil Judge is subject to an appeal to the High Court under the rules contained in the Civil Procedure Code applicable to appeals from appellate decrees.
The District Judge has general control over all the civil courts within the district.¹⁰

Kerala

The State of Kerala came into existence under the States Reorganisation Act, 1956. Formerly, it was the State of Travancore-Cochin. The Kerala Civil Courts Act, 1957, deals with the constitution and jurisdiction of subordinate civil courts. In this State, there are Courts of District Judges, Additional District Judges, Subordinate Judges and Munsifs. The first three Courts have ordinary original jurisdiction to try suits valued up to Rs. 7,000. Beyond that amount, appeals lie to the High Court.¹¹

Madhya Pradesh

The State of Madhya Pradesh, as emerged out of the reorganisation of States in 1956, has different integrating units; there were separate laws¹² in force in these units in regard to the constitution and powers of the subordinate civil courts. This state of affairs was not desirable and it was necessary to have complete uniformity in whole of the new State in regard to the structure, jurisdiction and classification of these courts. It was all the more necessary for securing an efficient judicial administration in the State. Therefore, the Madhya Pradesh Civil Courts Act, 1958, was passed.

The Act of 1958 establishes four classes of civil courts, namely, the Court of District Judge, the Court of Additional District Judge, the Court of Civil Judge (Class I), and the Court of Civil Judge (Class II). For the purposes of the Act, the whole State has been divided into civil districts. In each district, there is one Court of the District Judge and several Courts of Additional District Judges, Civil Judges (Class I) and Civil Judges (Class II). The Civil Judge (Class II) has jurisdiction to hear and determine any suit or original proceeding of a value not exceeding Rs. 5,000; the Civil Judge (Class I) has jurisdiction in such cases up to a value of Rs. 10,000; the District Judge and the Additional District Judge have jurisdiction to hear and determine any suit or original proceeding without restriction as regards value. The Court of the District Judge is the principal Court of original jurisdiction in the civil district. An Additional District Judge has to discharge any of the functions of a District Judge including the functions of the Principal Civil Court of original jurisdiction, which the District Judge may assign to him; in the discharge of such functions he exercises the same powers as the District Judge. Additional Civil Judges may be appointed whenever it appears necessary or expedient.

Any Court of a District Judge or an Additional District Judge or a Civil Judge (Class I) or a Civil Judge (Class II) may be invested with the powers of Small Cases Court to decide suits of small cause nature up to a valuation of Rs. 1,000, Rs. 1,000, Rs. 500 and Rs. 200 respectively.

¹² See, e.g., the C. P. & Berar Courts Act 1917, the Madhya Bharat Civil Courts Act, 1919, the Bhopal and Vindhyas Pradesh (Courts, Act, 1950, which have since been repealed.
Any Civil Judge (Class I) may be empowered to take cognizance of and any District Judge to transfer to a Civil Judge (Class I) under his control any of the specified proceedings arising under certain Acts. Such proceeding is to be disposed of by him according to the law and rules applicable to like proceedings in the Court of the District Judge.

The Court of the District Judge and the Court of the Additional District Judge has jurisdiction to hear and determine any original proceeding under the Indian Divorce Act, 1869.

Appeals from decrees or orders of the Civil Judge (Class I) or the Civil Judge (Class II) in original suits or proceedings lie to the Court of the District Judge, and from those of the District Judge or Additional District Judge in such cases to the High Court.

Subject to the general superintendence and control of the High Court, the District Judge has to superintend and control all other civil courts in the local area within his jurisdiction.  

Tamil Nadu (Madras)

The Madras Civil Courts Act 1873, deals with the constitution and jurisdiction of subordinate civil courts in the State of Tamil Nadu. In this State there are Courts of the District Judges (Zilla Courts), Subordinate Judges and District Munsifs. Additional District Judges may also be appointed. The jurisdiction of the District and Subordinate Judges extends to all original suits or proceedings of a civil nature. They also try suits under certain special enactments. The ordinary original jurisdiction of the District Munsifs is confined to suits up to a valuation of Rs. 5,000.

The appellate pecuniary jurisdiction of the District Judges is confined to Rs. 10,000. They hear appeals from the Courts of the Subordinate Judges and District Munsifs. Beyond Rs. 10,000, appeals are filed before the High Court. A Subordinate Judge may be empowered to hear appeals from the Courts of District Munsifs.

Any District Subordinate Judge may be invested with the jurisdiction of a Judge of a Court of Small Causes for the trial of suits cognizable by such Courts up to Rs. 2,000, and a District Munsif up to Rs. 500.

Subject to the power of the High Court in this regard, the control over all the civil courts in a district is vested in the District Judge.  

Mysore

The administration of Justice as prevailed in the old State of Mysore was as follows: The relevant Act was the Mysore Civil Courts Act, 1883. There were four classes of civil courts, namely, the Courts of District Judges, Civil Judges, Subordinate Judges and Munsifs. The Court of a District Judge was the principal Civil Court of original jurisdiction in the district and has jurisdiction to try suits valued beyond Rs. 20,000. The Civil Judge exercised

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14. This was amended by the Madras Act XXI of 1895, the Decentralisation Act (IV) of 1910 etc. See also Madras Act XVI of 1951 and the Madras Act I of 1955.
ruled up to Rs. 20,000 which might be raised up to Rs. 50,000. The Judges had original jurisdiction up to Rs. 10,000, and the Munsifs exercised pecuniary small cause jurisdiction was confined to Rs. 10,000, and that of the Civil Judges to Rs. 3,000.\textsuperscript{17}

As a result of the reorganisation of States in 1956, certain areas from Bombay, Hyderabad and Madras and the entire State of Coorg were transferred to the old State of Mysore and thus all the territories formed the new State of Mysore. The constitution and jurisdiction of the subordinate civil courts in the State have been provided by the Mysore Civil Courts Act, 1961. There are three classes of civil courts, namely, Court of the District Judge, Court of the Civil Judge and the Court of the Munsif. Additional District Judges may be appointed.

A District Court is the principal Civil Court of original jurisdiction. The jurisdiction of the Court of a Civil Judge extends to all original suits of a civil nature. The jurisdiction of a Munsif’s Court extends to civil cases up to Rs. 10,000.

Appeals from the District Courts lie to the High Court. Appeals from the Courts of Civil Judge can be taken to the District Courts in suits whose valuation is less than Rs. 20,000 and to the High Court in other cases. Appeals from the Courts of Munsifs lie to the Courts of Civil Judge. A Judge of Small Cause Court may be empowered to hear appeals from the Courts of Munsifs.

Small cause jurisdiction may be conferred on a Civil Judge and Munsif in suits up to a valuation of Rs. 2,000 and Rs. 500 respectively.

Civil Judges may be invested with the powers of a District Judge under certain Acts. Their orders are appealable to District Judges in matters of less than Rs. 20,000, and to the High Court in other matters. Every order of a District Judge passed on appeal is appealable to the High Court as provided in the Code of Civil Procedure.\textsuperscript{18}

Orissa

Formerly, Orissa was a part of Bihar. It became a separate Province in 1936. The Bengal, Agra and Assam Civil Courts Act, 1887\textsuperscript{19} deals with subordinate civil courts in the State of Orissa, namely, the Court of District Judge, Court of Munsif. Additional District Judges may be appointed. The jurisdiction of a District Judge or Subordinate Judge extends to all original suits for the time being cognizable by civil courts. The jurisdiction of a Munsif extends to all like suits of which the value does not exceed Rs. 1,000. The jurisdiction of any Munsif may be extended to all like suits up to a value not exceeding Rs. 4,000. Additional Judges discharge functions of a District Judge which he may assign to them, exercising the same powers as the District Judge.

\textsuperscript{19} As amended by later Acts including Bihar and Orissa Act IV of 1922, Orissa Act IV of 1950.
Appeals from the Munsifs lie to the District Judges. Any Subordinate Judge may be empowered to hear such appeals. A District Judge may also assign appeals to a Subordinate Judge under his administrative control. Appeals from the Subordinate Judges lie to the District Judges in cases in which the value of the original suits did not exceed Rs. 5,000, and to the High Court in other cases. Appeals from the District Judges or Additional Judges lie to the High Court.

Any Subordinate Judge or Munsif may be empowered to take cognizance of, or any District Judge to transfer to a Subordinate Judge or Munsif under his control, any of the specified proceedings under certain Acts. Such proceedings are deemed to be subject to the rules applicable to like proceeding for transfer by a Judge. An appeal from an order of the District Judge. An appeal from the order of a Munsif in any such proceeding lies to the High Court if a further appeal from the order of the District Judge is allowed by the law in force.

Any Subordinate Judge or Munsif may be invested with the jurisdiction of a Judge of a Court of Small Causes for the trial of suits, cognizable by Small Cause Courts, up to a value not exceeding Rs. 500 in the case of Subordinate Judge or Rs. 250 in the case of a Munsif.

Subject to the general superintendence of the High Court, the District Judge has administrative control over all the civil courts, within the local limits of his jurisdiction.20

Punjab and Haryana

The Punjab Reorganisation Act, 1966, divided the State of Punjab into two separate States, namely, State of Punjab and State of Haryana. The Punjab Courts Act, 1918, deals with the establishment of subordinate civil courts in both the States. There are three classes of Courts namely, the Courts of District Judges and the Courts of the Subordinate Judges, Additional District Judges may be appointed. The ordinary original jurisdiction of the District and Additional District Judges and that of the Subordinate Judges (Class I) is exercisable in regular suits of any value. The like jurisdiction of the Subordinate Judges (Class II) and Subordinate Judges (Class III) is confined to suits up to a valuation of Rs. 10,000 and Rs. 3,000 respectively. The Subordinate Judges may be invested with jurisdiction in small causes up to a valuation of Rs. 2,000.

The District Courts are the principal civil Courts of original jurisdiction in the districts, and their appellate jurisdiction is confined to Rs. 10,000. Beyond that amount appeals may be preferred to the High Court.

Subject to the control and superintendence of the High Court, the power of controlling the civil courts of each district is vested in the District Judge.21

Rajasthan

The establishment of the subordinate civil courts in the State of Rajasthan is dealt with by the Rajasthan Civil Courts Ordinance, 1950. In

original jurisdiction in suit valued upto Rs. 20,000 which might be raised upto Rs. 50,000. The Subordinate Judges had original jurisdiction upto Rs. 10,000 and a small cause jurisdiction upto Rs. 500. The Munsifs exercised pecuniary jurisdiction upto Rs. 3,000, and their small cause jurisdiction was confined to Rs. 10,000, and that of the Civil Judges to Rs. 3,000.\(^{17}\)

As a result of the reorganisation of States in 1956, certain areas from Bombay, Hyderabad and Madras and the entire State of Coorg were transferred to the old State of Mysore and thus all the territories formed the State of Mysore. The constitution and jurisdiction of the subordinate courts in the State have been provided by the Mysore Civil Courts Act. There are three classes of civil courts, namely, Court of the District Judge, Court of the Civil Judge and the Court of the Munsif. Additional District Judges may be appointed.

A District Court is the principal Civil Court of original jurisdiction. The jurisdiction of the Court of a Civil Judge extends to all original suits of civil nature. The jurisdiction of a Munsif’s Court extends to civil cases of Rs. 10,000.

Appeals from the District Courts lie to the High Court. Appeals from the Courts of Civil Judge can be taken to the District Courts in suits, whose valuation is less than Rs. 20,000 and to the High Court in other cases. Appeals from the Courts of Munsifs lie to the Courts of Civil Judge. A Small Cause Court may be empowered to hear appeals from the Munsifs.

Small cause jurisdiction may be conferred on a Civil Judge in suits upto a valuation of Rs. 2,000 and Rs. 500 respectively.

Civil Judges may be invested with the powers of a District Judge under certain Acts. Their orders are appealable to District Judges, whose valuation is less than Rs. 20,000, and to the High Court in other matters. Appeals from the Orders of a District Judge passed on appeal are appealable to the High Court under the Code of Civil Procedure.\(^{18}\)

**Orissa**

Formerly, Orissa was a part of Bihar. It became a separate province in 1936. The Bengal, Agra and Assam Civil Courts Act, 1905, provides for the constitution and jurisdiction of subordinate civil courts in Orissa. There are four classes of civil courts, namely, the Court of the District Judge, the Court of Subordinate Judge and the Court of Munsif. Additional District Judges and Munsifs may be appointed. The jurisdiction of a District Judge or Subordinate Judge extends to all civil suits of which the value does not exceed Rs. 1,000. The jurisdiction of any Munsif may be extended to all civil suits upto a valuation of Rs. 4,000. Additional Judges discharge functions of the District Judges and Munsifs.

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17. Law Commission Report, op. cit., at pp. 266. 1070-1086
from the order of the District Judge in appeal from the order of the Munsif lies to the High Court if a further appeal from the order of the District Judge is allowed by the law in force.

Any Civil Judge or Munsif may be invested with the jurisdiction of a Judge of a Court of Small Causes for the trial of suits cognizable by such a Court up to specified value not exceeding Rs. 1,000 in the case of a Civil Judge or Rs. 500 in the case of a Munsif.

Subject to the superintendence of the High Court, the District Judge has administrative control over all the civil courts within the local limits of his jurisdiction.\(^{24}\)

West Bengal

The Bengal, Agra and Assam Civil Courts Act, 1887,\(^{25}\) deals with the constitution and jurisdiction of the subordinate civil courts in the State of West Bengal. There are four classes of courts, namely, the Court of District Judge, the Court of Additional Judge, the Court of Subordinate Judge and the Court of Munsif. The jurisdiction of a District Judge or Subordinate judge extends to all original suits for the time being cognizable by civil courts. The jurisdiction of a Munsif extends to all like suits of which the value does not exceed Rs. 2,000. The jurisdiction of any Munsif may be extended to all like suits of specified value not exceeding Rs. 5,000. An Additional Judge has to discharge any of the functions of a District Judge which the latter may assign to him; in discharge of those functions, he exercises the same powers as the District Judge.

An appeal from a decree or order of a Munsif lies to the District Judge. Such an appeal may lie to any Subordinate Judge if especially empowered in this regard. A District Judge may transfer to any Subordinate Judge under his administrative control any appeal pending before him from the decrees or orders of Munsifs. An appeal from a decree or order of a Subordinate Judge lies to the District Judge where the value of the original suit did not exceed Rs. 10,000, and to the High Court in any other case. An appeal from a decree or order of a District Judge or Additional Judge lies to the High Court.

Any Subordinate Judge or Munsif may be empowered to take cognizance of, or any District Judge to transfer to a Subordinate Judge or Munsif under his administrative control any of the specified proceedings under certain enactments. They are to be disposed of by him subject to the rules applicable to like proceedings when disposed of by the District Judge. An appeal from an order of the Munsif in any such proceedings lies to the District Judge. An appeal from the order of the District Judge on appeal from the order of a Munsif in such a proceeding lies to the High Court if a further appeal from the order of the District Judge is allowed by the law in force.

Any Subordinate Judge or Munsif may be invested with the jurisdiction of a Judge of a Court of Small Causes for the trial of suits, cognizable by


this State there are Courts of District Judges, Civil Judges and Munsifs. Additional District and Civil Judges and Munsifs may be appointed. The District Court is the principal civil Court of original jurisdiction deciding suits of any value. The Court of Civil Judge has jurisdiction to try regular and small cause suits valued upto Rs. 10,000 and Rs. 500 respectively. The Court of Munsif has jurisdiction to try regular suits valued upto Rs. 2,000 and small cause suits valued upto Rs. 100. Any Munsif may be empowered to decide regular suits upto Rs. 5,000 in value.

The appellate jurisdiction of the District Judges is confined to cases in which original valuation did not exceed Rs. 10,000. Beyond this amount, appeal lies to the High Court. Civil Judges may be empowered to hear appeals from Munsifs. A District Judge may transfer to any Civil Judge under his control any appeal pending before him against a decree or order of a Munsif. A Civil Judge may be empowered to take cognizance of proceedings under certain Acts.

Subject to the administrative control of the High Court, a District Judge has control over all civil courts within his jurisdiction. 22

Uttar Pradesh

The Bengal, Agra and Assam Civil Courts Act, 1887, 23 deals with the constitution and jurisdiction of the subordinate civil courts in the State of Uttar Pradesh. In this State, there are four classes of civil courts, namely, the Court of District Judge, the Court of Additional Judge, the Court of Civil Judge and the Court of Munsif. The jurisdiction of a District Judge or Civil Judge extends to all original suits for the time being cognizable by civil courts. The jurisdiction of a Munsif extends to all like suits of which the value does not exceed Rs. 2,000. This jurisdiction of any Munsif may be extended to suits upto Rs. 5,000 in value. An Additional Judge may be assigned the functions of the District Judge, and in their discharge, he exercises the same powers as the District Judge.

An appeal from a decree or order of a Munsif lies to the District Judge. Any Civil Judge may be empowered to hear appeals from the decree or order of any Munsif. A District Judge may transfer to any Civil Judge under his administrative control any appeals pending before him from the decrees or orders of Munsifs for disposal, subject to the rules applicable to like appeals when disposed of by the District Judge. An appeal from a decree or order of a Civil Judge lies to the District Judge where the value of the original suit did not exceed Rs. 20,000 and to the High Court in any other case.

Power may be given to any Civil Judge or Munsif to take cognizance of, or any District Judge to transfer to a Civil Judge or Munsif under his control, any specified proceedings under certain enactments. Such proceedings are to be disposed of by him subject to the rules applicable to like proceedings when disposed of by the District Judge. An appeal from an order of the Munsif in any such proceedings lies to the District Judge. An appeal

22 See also Law P. Act IV of 1935. 23 P. Act IV of 1936.
from the order of the District Judge in appeal from the order of the Munsif lies to the High Court if a further appeal from the order of the District Judge is allowed by the law in force.

Any Civil Judge or Munsif may be invested with the jurisdiction of a Judge of a Court of Small Causes for the trial of suits cognizable by such a Court up to specified value not exceeding Rs. 1,000 in the case of a Civil Judge or Rs. 500 in the case of a Munsif.

Subject to the superintendence of the High Court, the District Judge has administrative control over all the civil courts within the local limits of his jurisdiction.\(^2\)

West Bengal

The Bengal, Agra and Assam Civil Courts Act, 1887,\(^2\) deals with the constitution and jurisdiction of the subordinate civil courts in the State of West Bengal. There are four classes of courts, namely, the Court of District Judge, the Court of Additional Judge, the Court of Subordinate Judge and the Court of Munsif. The jurisdiction of a District Judge or Subordinate judge extends to all original suits for the time being cognizable by civil courts. The jurisdiction of a Munsif extends to all like suits of which the value does not exceed Rs. 2,000. The jurisdiction of any Munsif may be extended to all like suits of specified value not exceeding Rs. 5,000. An Additional Judge has to discharge any of the functions of a District Judge which the latter may assign to him; in discharge of those functions, he exercises the same powers as the District Judge.

An appeal from a decree or order of a Munsif lies to the District Judge. Such an appeal may lie to any Subordinate Judge if especially empowered in this regard. A District Judge may transfer to any Subordinate Judge under his administrative control any appeal pending before him from the decrees or orders of Munsifs. An appeal from a decree or order of a Subordinate Judge lies to the District Judge where the value of the original suit did not exceed Rs. 10,000, and to the High Court in any other case. An appeal from a decree or order of a District Judge or Additional Judge lies to the High Court.

Any Subordinate Judge or Munsif may be empowered to take cognizance of, or any District Judge to transfer to a Subordinate Judge or Munsif under his administrative control any of the specified proceedings under certain enactments. They are to be disposed of by him subject to the rules applicable to like proceedings when disposed of by the District Judge. An appeal from an order of the Munsif in any such proceedings lies to the District Judge. An appeal from the order of the District Judge on appeal from the order of a Munsif in such a proceeding lies to the High Court if a further appeal from the order of the District Judge is allowed by the law in force.

Any Subordinate Judge or Munsif may be invested with the jurisdiction of a Judge of a Court of Small Causes for the trial of suits, cognizable by


\(^2\) As amended by later Acts including Bengal Act XIX of 1925, W. B. Act LIX of 1930, W. B. Act XVI of 1937.
Small Cause Courts upto a specified value not exceeding Rs. 750 in the case of a Subordinate Judge or Rs. 300 in the case of a Munsif.

Subject to the superintendence of the High Court, the District Judge has administrative control over all the civil courts within the local limits of his jurisdiction.26

Jammu and Kashmir

In the State of Jammu and Kashmir, the Jammu and Kashmir Civil Courts Act, 46 of 1877 Svt. regulates the constitution and jurisdiction of the subordinate civil courts.

Manipur

In the State of Manipur, the Manipur (Courts) Act, 1955, deals with the constitution and jurisdiction of the subordinate civil courts. The following are the classes of courts. (i) the Court of a Subordinate Judge. Distinct Judges may be appointed.

Certain decisions to be according to native law

The Bengal, Agra and Assam Civil Courts Act, 1887, applicable to several States, as discussed above, and the Madras Civil Courts Act, 1873, provide that where in any suit or other proceeding, it is necessary for a civil court to decide any question regarding succession, inheritance, marriage or caste, or any religious usage or institution, the Mohammedan law in cases where the parties are Mohammedans, and the Hindu law in cases where the parties are Hindus, form the rule of decision except in so far as such law has, by legislative enactment, been altered or abolished. In cases not so provided for or by any other law, the court has to act according to justice, equity and good conscience.

The Manipur (Courts) Act, 1955, provides that where in any suit or proceeding it is necessary for any court to decide any question regarding succession, inheritance, marriage or caste or any custom (if such there be) having the force of law, the parties, or the property of the parties form the rule of decision except in so far as such custom or personal law has been altered or abolished by legislative enactment. In case not so, or by any law, provided for, the court would decide the suit or proceeding according to justice, equity and good conscience.

Provincial Small Cause Courts

The Provincial Small Cause Courts were first established by Act XLIII of 1860 which was repealed by Act XI of 1865. The latter Act was superseded by the existing Provincial Small Cause Courts Act, 1887. This Act, as amended, deals with the present Courts of Small Causes established beyond the Presidency-towns. It extends to the whole of India except the territories which, immediately before 1st November, 1956, were comprised in part B States, namely, Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Punjab, Rajasthan, Saurashtra and Travancore-Cochin. However, on the commencement of the Provincial Small Cause Courts (Bombay Unification and

Amendment) Act, 1958, it is extended to the Saurashtra and Hyderabad areas of the State of Bombay. This provision applies both to the States of Gujarat and Maharashtra.

The Act of 1887 empowers the State Government to establish a Court of Small Causes at any place within the territory under its administration beyond the local limits for the time being of the ordinary original civil jurisdiction of a High Court established in a Presidency-town. On the establishment of a Small Cause Court, a Judge of the Court has to be appointed. The same person may be Judge of more than one such Court. Additional Judges may also be appointed to discharge such of the functions, as the Judge may assign to him and in the discharge of those functions, they exercise the same powers as the Judge. Two Judges may be required to sit as a bench for the trial of specified suits or applications. If the Judges differ as to a question of law, a reference of the statement of the facts of the case and of the point on which they differ has to be made to the High Court. If there is a difference on any other matter, the opinion of the senior Judge or the Judge if the other Judge is an Additional Judge prevails.

A Registrar is attached to a Court of Small Causes; he is the chief ministerial officer. He may be given the jurisdiction of a Judge of the Court for the trial of suits of which the value does not exceed Rs. 20. He tries such suits cognizable by him as the Judge may direct.

A Court of Small Causes does not take cognizance of the suits specified in the Second Schedule to the Act. All suits of a civil nature, not so excepted from its jurisdiction or not excepted by any other law, are decided by the Court if their value does not exceed Rs. 500. The State Government may, however, direct that all suits of a civil nature of which the value does not exceed Rs. 1,000 shall be cognizable by a Court of Small Causes mentioned in the order. In the State of Maharashtra, this amount has been increased to Rs. 2,000 by an amendment. Except as otherwise provided, a suit cognizable by a Court of Small Causes is not tried by any other Court.

Where an order specified in clause (f) or clause (h) of S. 104 (1) of the Code of Civil Procedure is passed by a Court of Small Causes, an appeal from it lies to the District Court on any ground on which an appeal from such order lies under that section. The High Court may call for a case and pass necessary order for the purpose of satisfying itself that a decree or order made in that case by a Court of Small Causes was according to law.

Except as otherwise provided a decree or order made by a Court of Small Causes is final.

A Court of Small Causes is subject to the administrative control of the District Court and to the superintendence of the High Court.

The Courts of Small Causes are very much appreciated in the country. Their working has been highly conducive to the good of the people who have

27. Cl (f) refers to an order under S. 35-A which deals with the compensatory costs in respect of false or vexatious claims or defences. Cl. (h) refers to an order under any of the provisions of the Code imposing a fine or directing the arrest or detention in the civil prison of any person except where such arrest or detention is in execution of a decree.

thereby been able to get speedy, cheap and substantial justice in petty litigation. No class of officers have done so much to render legal redress easy, speedy and cheap in ordinary transactions between man and man as the Judges of these Courts. The Calcutta High Court has observed that if there is any value in the work of the Small Cause Courts, it is that speedy justice is done and the parties get an early decision on the matter in dispute between them so that a petty litigation is not prolonged and carried to an undue extent.

**Provincial Insolvency Courts**

The Provincial Insolvency Act, 1920, which repealed the earlier legislation on the subject, deals with the law relating to insolvency as administered by courts having jurisdiction outside the Presidency-towns. It extends to the whole of India except the territories which were comprised in Part B States and the Scheduled Districts before 1st November, 1956.

The Act declares the District Courts as the Courts having jurisdiction in insolvency matters. The State Government may, however, invest any court subordinate to the District Court, including a Court of Small Causes, with jurisdiction in any class of cases; any court so invested has to exercise concurrent jurisdiction with the District Court under the Act.

A person aggrieved by a decision or an order made in the exercise of insolvency jurisdiction by a subordinate court may appeal to the District Court whose order upon such appeal is final. But the High Court may call for the case and pass necessary order for the purpose of satisfying itself that the order made by the District Court upon appeal was according to law. Further, any such person aggrieved by a decision of the District Court on appeal from a decision of a Subordinate Court under section 4 of the Act may appeal to the High Court on any of the grounds mentioned in S. 100 (1) of the Code of Civil Procedure. A person aggrieved by such a decision or order of a District Court as is specified in Schedule I of the Act, passed otherwise than in appeal from an order passed by a subordinate court may appeal to the High Court. A person aggrieved by any other order passed by a District Court otherwise than in appeal from an order passed by a subordinate court may appeal to the High Court by leave of the District Court or the High Court.

**Subordinate Civil Courts in Presidency-towns**

The Presidency-towns of Calcutta, Madras and Bombay have a somewhat different system of subordinate civil judicature. Besides the Presidency High Courts, exercising ordinary original civil jurisdiction within respective

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32. S. 4. of the Insolvency Act deals with the power of court to decide all questions arising in insolvency. The grounds mentioned in S. 100 (1) of the Insolvency Act are: (a) the decision being contrary to law or to some usage having the force of law; (b) the decision having failed to determine some material issue of law or usage having the force of law; (c) a substantial error or defect in the procedure provided by the C. P. O. or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon the merits.
limits of these towns in all matters irrespective of value, except those cognizable exclusively by the Presidency Courts of Small Causes and also exercising original jurisdiction in admiralty, matrimonial, testamentary matters and intestate succession, there are City Civil Courts and Courts of Small Causes in all the three towns, as discussed below.

City Civil Courts.

With a view to provide relief to the Presidency High Courts and to reduce the expenses of trials in these Courts, inroads were made upon their ordinary original civil jurisdiction by establishing City Civil Courts in the three towns at different times. The town of Madras took the lead by having a City Civil Court in 1892 under the Madras City Civil Court Act of that year. To start with, the pecuniary jurisdiction of this Court with civil nature was confined to Rs. 2,500, but in 1950-51, the Court was raised to Rs. 50,000 so as to confer the jurisdiction of this Court to matters exceeding Rs. 50,000 in value. The Court lies to the High Court. In Bombay, the City Civil Court was created by the Bombay City Civil Court Act, 1943. The pecuniary jurisdiction of this Court was initially Rs. 10,000, but in 1950 it was raised to Rs. 25,000. In Calcutta, a City Civil Court was established in 1957 under the Calcutta City Civil Court Act of 1953. The pecuniary jurisdiction of this Court is confined to suits and proceedings of a civil nature not exceeding Rs. 10,000 in value, except certain types of suits described as 'commercial causes' in regard to which its jurisdiction is confined to suits and proceedings not exceeding Rs. 5,000 in value. The Court, however, has no jurisdiction to entertain suits and proceedings relating to or arising out of mortgages or charges or liens on immovable property or endowments.

Small Cause Courts.

The Courts known as the Presidency Courts of Small Causes were initially established as Courts of Requests by the Crown's Charter of 1753, and they are, therefore, the oldest Courts at present existing in India. They have, from time to time, undergone many changes, their constitution having been remodelled, jurisdiction enlarged and procedure amended by various enactments, particularly by Act IX of 1830, which for the first time styled them as the Courts of Small Causes, and Act XXVI of 1861: both the Acts placed them on a footing closely resembling that of the English County Courts; but they were left to a great extent untouched by the important legislation by which the procedure of other civil courts in India had been reformed. The result was that they had become somewhat antiquated and did not fit in with the rest of the Indian judicial system; that their powers and procedure were, in many particulars, defective, and that though, owing to the efficient manner in which they worked, they gave satisfaction, questions were often to be discussed in them which were totally foreign to the people who resorted to them, and some of which had only a historic interest even in England. However, the need of completely revising the

34. The source Courts Act, Law Comm established
35. Ahmedabad under the Ahmedabad City Civil Courts Act, 1964.
law relating to these Courts was felt by the Government only in 1882,
and it enacted the existing Act—the Presidency Small Cause Courts Act—in
that year. 36

The Act established in each of the towns of Calcutta, Madras and
Bombay a Court of Small Causes subject to the superintendence of and
subordinate to the respective High Court. Each Court has a Chief Judge and
as many other Judges as appointed by the State Government.

The High Court may lay down rules prescribing the procedure and
practice for the Small Cause Court. It may also empower the Registrar of the
Court to hear and dispose of undefended suits and interlocutory applications
or matters.

When two or more of the Judges sitting together differ on any question,
the opinion of the majority prevails; and if the Court is equally divided,
the Chief Judge, if he is one of the Judges so differing or, in his absence,
the Judge first in rank and precedence of the Judges so differing has the
casting vote.

The Registrar may be invested by the State Government with the
powers of a Judge of Small Cause Court for the trial of suits in which
the amount or value of the subject matter does not exceed Rs. 20. Any
Judge may transfer from his own file to the file of the Registrar any suit
which the latter is competent to try; this is, however, subject to the order
of the Chief Judge.

All questions, other than questions relating to procedure and practice,
which arise before the Small Cause Court are to be dealt with and deter-
mined according to the law for the time being administered by the High
Court in the exercise of its ordinary original civil jurisdiction.

The local limits of the jurisdiction of each of the Small Cause Courts
are the local limits of the ordinary original civil jurisdiction of the High
Court. The Small Cause Court has jurisdiction to decide all civil suits
except those mentioned in section 19 of the Act 37 and those in which am-
ount or value of the subject-matter exceeds Rs. 2,000. In Bombay this
amount is Rs. 3,000. The Court may try suits beyond pecuniary limits of
jurisdiction provided the parties to them have entered into a written agree-
ment that the Court would have jurisdiction to try them. In such cases the
parties would be bound by its decisions. This provision does not apply to
Calcutta.

Except as otherwise provided, every decree and order of the Small
Cause Court in a suit is final and conclusive.

In a suit instituted in the Small Cause Court at Madras in which
the amount or value of the subject-matter exceeds Rs. 1,000, the defendant
may apply ex parte on an affidavit setting forth the facts on which he
relies for his defence to the High Court for an order removing the cause
from that Court. The High Court may either remove the suit to its own

36. The Gazette of India, 1890, Part V, at p. 376.
37. E.g., suits for the recovery of immovable property, suits to enforce a trust, suits
to obtain an injunction, etc.
file or transfer the same to the Madras City Civil Court. The suit so removed is to be heard and disposed of by the Court in the exercise of its original jurisdiction; but in the case of Civil Civil Court, the limit of its pecuniary jurisdiction has to be taken into consideration. 88

Subordinate Criminal Courts

The Code of Criminal Procedure, 1898, deals with the constitution and powers of criminal courts. The first Code on this subject was the Code of Criminal Procedure, enacted in 1861. This was repealed by the Code of Criminal Procedure of 1872. This Code was in turn replaced by the Code of Criminal Procedure, 1882, which was repealed by the present Code.

The following information is subject to that contained under the heading 'Separation of Judicial and Executive Functions.'

Classes of Criminal Courts.

According to the Code of Criminal Procedure, 1898, besides the High Courts and Courts constituted under other laws, there are five classes of Criminal Courts in this country, namely Courts of Session, Presidency Magistrates, Magistrates of the First Class, Magistrates of the Second Class and Magistrates of the Third Class.

Sessions Courts.—Every State has to be either a sessions division or has to consist of several sessions divisions. Every sessions division is a district or consists of several districts. Every Presidency-town is deemed to be a district. Any district outside Presidency-towns may by divided into subdivisions. In each sessions division, there is a Court of Session presided over by a Judge known as Sessions Judge. Additional Sessions Judges and Assistant Sessions Judges may also be appointed. A Sessions Judge of one sessions division may also be appointed an Additional Sessions Judge of another division.

Courts of Magistrates.—In each district, outside the Presidency-towns, there is a Magistrate who is called the District Magistrate. Any Magistrate of the First Class may be appointed to be an Additional District Magistrate to exercise all or any of the purposes of certain sections of the Magistrate is deemed to be subordinate to the District Magistrate. 89

In districts, outside the Presidency-towns, there are Magistrates of the First, Second and Third Class. They are called Subordinate Magistrates. Any Magistrate of the First or Second Class may be given charge of a sub-division. Such a Magistrate is then called Subdivisional Magistrate.

Special Magistrates may be appointed to deal with particular cases or class or classes of cases or cases generally in any local area outside the Presidency-towns.

In all the States, outside the Presidency-towns, Benches of Magistrates may be constituted.

89. In the State of Mahrashtra and Gujrast, sections are 192 (3), 435-B, 528 (8), 529 (3-A). In other States, sections are 192 (1), 528 (2), 528 (3).
Magistrate or Magistrate of the First Class may be invested with power to try as a Magistrate all offences not punishable with death or imprisonment for life or for a term exceeding seven years. However, a Magistrate, for the purpose of exercising this power, must have a qualification of having exercised as a Magistrate powers not inferior to those of a Magistrate of the First Class for at least ten years. Such a Magistrate is generally called Section 30 Magistrate.

Sentences which may be passed by Courts of various classes.—A High Court may pass any sentence authorized by law. A Sessions Judge or Additional Sessions Judge may pass any sentence authorized by law, but a sentence of death passed by him is subject to confirmation by the High Court. An Assistant Sessions Judge may pass any sentence authorized by law, except a sentence of death or imprisonment for life or for a term exceeding ten years. The Courts of Presidency Magistrates and of Magistrates of the First Class may pass the sentence of imprisonment for a term not exceeding two years, including such solitary confinement as is authorized by law; they may also impose a fine not exceeding Rs. 2,000. The Courts of Magistrates of the Second Class may pass the sentence of imprisonment for a term not exceeding six months, including such solitary confinement as is authorized by law; they may also impose fine not exceeding Rs. 500. The Courts of Magistrates of the Third Class may pass the sentence of imprisonment for a term not exceeding one month; they may also impose fine not exceeding Rs. 100. The Court of any Magistrate may pass any lawful sentence, combining any of the sentences which it is authorized by law to pass. The Court of any Magistrate may award such terms of imprisonment in default of payment of fine as is authorized by law in case of such default, provided that (1) the term is not in excess of the magistrate’s powers under the Code of Criminal Procedure; (2) in any case decided by a Magistrate where imprisonment has been awarded as part of the substantive sentence, the period of imprisonment awarded in default of payment of the fine should not exceed one-fourth of the period of imprisonment which such Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine; (3) the imprisonment awarded may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under the preceding provision. The Court of a Section 30 Magistrate may pass any sentence authorized by law, except a sentence of death or imprisonment for life or a term exceeding seven years.

When a person is convicted at one trial of two or more offences, the Court may sentence him for such offences to the several punishments prescribed for them which such Court can lawfully inflict, subject, however, to section 71 of the Indian Penal Code, which deals with the limit of punishment of offence made up of several offences; punishments, when consisting of imprisonment, are to commence the one after the expiration of the other in such order as the Court may direct unless it directs that they should run concurrently. In the case of executive sentences, it is not necessary for the Court to send the offender for trial before a higher Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it can lawfully inflict on conviction of a single offence, provided that (1) such person cannot be sentenced to imprisonment for more than fourteen years; (2) if the case is tried by a Magistrate other than Section 30 Magistrate, the aggregate punishment should not exceed twice the amount of punishment which he can lawfully inflict in the exercise of his ordinary
All Magistrates and their Benches are subordinate to their respective District Magistrates who make rules or give special orders as to the distribution of business among such Magistrates and Benches. Every Magistrate, other than a Sub-Divisional Magistrate, and every Bench exercising powers in a sub-division are subordinate to the Sub-Divisional Magistrate, subject, however, to the general control of the District Magistrate. All Assistant Sessions Judges are subordinate to the Sessions Judge in whose Court they exercise jurisdiction; he may make rules as to the distribution of business among such Assistant Sessions Judges. Neither the District Magistrate nor the Magistrates nor Benches are subordinate to the Sessions Judge except as otherwise provided. Courts of Session and Courts of Magistrates including Courts of Presidency Magistrates are Criminal Courts inferior to the High Courts and Court of Magistrates outside Greater Bombay are Criminal Courts inferior to the Court of Session.

There are a number of Presidency Magistrates in each of the Presidency-towns, one of them being Chief Presidency Magistrate for each such town. An Additional Chief Presidency Magistrate in such town may also be constituted. Any of the powers of a Chief Presidency Magistrates may be constituted. Every apart from exercising powers under the Code other laws, may make rules to regulate the conduct and distribution of business and the practice in the Courts of the Magistrates of the town, the constitution of Benches and their times and places at which they would sit, the mode of settling differences of opinion between Magistrates in session, and any other matter that might be dealt with by a District Magistrate under the general powers of control over the subordinates. Government may declare that Presidency Magistrates are subordinates to the Chief Presidency Magistrate and may define the extent of their subordination.

Powers of Criminal Courts

These powers may be studied under the following two heads.

Offences cognizable by each Court. —Subject to other provisions of the Code of Criminal Procedure, (1) any offence under the Indian Penal Code may be tried by the High Court or the Court of Session or any other Court by which such offences is shown to be triable in the eighth column of the Second Schedule to the Code of Criminal Procedure; (2) any offence under any other law is tried by the Court mentioned in such law; if the Court is not mentioned, it may be tried by the High Court or any Court constituted under the Code by which such offence is shown to be triable in the eighth column of the Second Schedule to the Code. Any offence, other than that punishable with death or imprisonment for life, committed by a juvenile, a person under the age of fifteen years may be tried by a District Magistrate or a Chief Presidency Magistrate or by a Judge especially empowered to exercise the powers conferred by S. 8 (1) of the Reformatory Schools Act, 1897, or in any area in which this Act has been wholly or partly repealed by any other law providing for the custody, trial or punishment of youthful offenders by any Magistrate especially empowered to exercise all or any of the powers conferred by it. Notwithstanding the above provisions dealing with the offences under the Indian Penal Code or any other law, any District Magistrate, Presidency
Magistrate or Magistrate of the First Class may be invested with power to try as a Magistrate all offences not punishable with death or imprisonment for life or for a term exceeding seven years. However, a Magistrate, for the purpose of exercising this power, must have a qualification of having exercised as a Magistrate powers not inferior to those of a Magistrate of the First Class for at least ten years. Such a Magistrate is generally called Section 30 Magistrate.

Sentences which may be passed by Courts of various classes.—A High Court may pass any sentence authorized by law. A Sessions Judge or Additional Sessions Judge may pass any sentence authorized by law, but a sentence of death passed by him is subject to confirmation by the High Court. An Assistant Sessions Judge may pass any sentence authorized by law, except a sentence of death or imprisonment for life or for a term exceeding ten years. The Courts of Presidency Magistrates and of Magistrates of the First Class may pass the sentence of imprisonment for a term not exceeding two years, including such solitary confinement as is authorized by law; they may also impose a fine not exceeding Rs. 2,000. The Courts of Magistrates of the Second Class may pass the sentence of imprisonment for a term not exceeding six months, including such solitary confinement as is authorized by law; they may also impose fine not exceeding Rs. 500. The Courts of Magistrates of the Third Class may pass the sentence of imprisonment for a term not exceeding one month; they may also impose fine not exceeding Rs. 100. The Court of any Magistrate may pass any lawful sentence, combining any of the sentences which it is authorized by law to pass. The Court of any Magistrate may award such terms of imprisonment in default of payment of fine as is authorized by law in case of such default, provided that (1) the term is not in excess of the magistrate's powers under the Code of Criminal Procedure; (2) in any case decided by a Magistrate where imprisonment has been awarded as part of the substantive sentence, the period of imprisonment awarded in default of payment of the fine should not exceed one-fourth of the period of imprisonment which such Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine; (3) the imprisonment awarded may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under the preceding provision. The Court of a Section 30 Magistrate may pass any sentence authorized by law, except a sentence of death or imprisonment for life or a term exceeding seven years.

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Offences cognizable by each Court. — Subject to other provisions of the Code of Criminal Procedure, (1) any offence under the Indian Penal Code may be tried by the High Court or the Court of Session or any other Court by which such offences is shown to be triable in the eighth column of the Second Schedule to the Code of Criminal Procedure; (2) any offence under any other law is tried by the Court mentioned in such law; if the Court is not mentioned, it may be tried by the High Court or any Court constituted under the Code by which such offence is shown to be triable in the eighth column of the Second Schedule to the Code. Any offence, other than one punishable with death or imprisonment; for life, committed by a juvenile, a person under the age of fifteen years may be tried by a District Magistrate or a Chief Presidency Magistrate or by a Magistrate especially empowered to exercise the powers conferred by S. 8 (1) of the Reformatory Schools Act, 1897, or in any area in which this Act has been wholly or partly repealed by any other law providing for the custody, trial or punishment of juvenile offenders by any Magistrate empowered to exercise all or any of the powers conferred by it. Notwithstanding the above provisions dealing with the offences under the Indian Penal Code or any other law, any District Magistrate, Presidency
Magistrate or Magistrate of the First Class may be invested with power to try as a Magistrate all offences not punishable with death or imprisonment for life or for a term exceeding seven years. However, a Magistrate, for the purpose of exercising this power, must have a qualification of having exercised as a Magistrate powers not inferior to those of a Magistrate of the First Class for at least ten years. Such a Magistrate is generally called Section 30 Magistrate.

Sentences which may be passed by Courts of various classes.—A High Court may pass any sentence authorized by law. A Sessions Judge or Additional Sessions Judge may pass any sentence authorized by law, but a sentence of death passed by him is subject to confirmation by the High Court. An Assistant Sessions Judge may pass any sentence authorized by law, except a sentence of death or imprisonment for life or for a term exceeding ten years. The Courts of Presidency Magistrates and of Magistrates of the First Class may pass the sentence of imprisonment for a term not exceeding two years, including such solitary confinement as is authorized by law; they may also impose a fine not exceeding Rs. 2,000. The Courts of Magistrates of the Second Class may pass the sentence of imprisonment for six months, including such solitary confinement, may also impose fine not exceeding Rs. 500. The Courts of Magistrates of the Third Class may pass the sentence of imprisonment for a term not exceeding one month; they may also impose fine not exceeding Rs. 100. The Court of any Magistrate may pass any lawful sentence, combining any of the sentences which it is authorized by law to pass. The Court of any Magistrate may award such terms of imprisonment in default of payment of fine as is authorized by law in case of such default, provided that (1) the term is not in excess of the magistrate's powers under the Code of Criminal Procedure; (2) in any case decided by a Magistrate where imprisonment has been awarded as part of the substantive sentence, the period of imprisonment awarded in default of payment of the fine should not exceed one-fourth of the period of imprisonment which such Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine; (3) the imprisonment awarded may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under the preceding provision. The Court of a Section 30 Magistrate may pass any sentence authorized by law, except a sentence of death or imprisonment for life or a term exceeding seven years.

When a person is convicted at one trial of two or more offences, the Court may sentence him for such offences to the several punishments prescribed for them which such Court can lawfully inflict, subject, however, to section 71 of the Indian Penal Code, which deals with the limit of punishment of offence made up of several offences; punishments, when consisting of imprisonment, are to commence the one after the expiration of the other in such order as the Court may direct unless it directs that they should run concurrently. In the case of executive sentences, it is not necessary for the Court to send the offender for trial before a higher Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it can lawfully inflict on conviction of a single offence, provided that (1) such person cannot be sentenced to imprisonment for more than twice the amount of imprisonment for all the offences in excess of the limit prescribed by law, other than Section 30
jurisdiction. For the purpose of appeal, the aggregate of consecutive sentences passed in case of convictions for several offences at one trial is deemed to be a single sentence.

Ordinary and additional powers.—All District Magistrate, Sub-Divisional Magistrates and Magistrates of the First, Second and Third Classes, have the powers respectively conferred upon them by the Code of Criminal Procedure and specified in its Third Schedule. Such powers are called their ordinary powers. In addition to the ordinary powers, any Sub-Divisional Magistrate or any Magistrate of the First, Second or Third Class may be given additional powers as specified in the Fourth Schedule to the Act.40

Appeals

An appeal from the order of a court rejecting application for restoration of attached property lies to the court to which appeals ordinarily lie from the sentences of the former court. An appeal from order requiring security for keeping the peace or for good behaviour, if made by a Presidency Magistrate, lies to the High Court, and if made by any other Magistrate, lies to the Court of Session.41 An appeal from order refusing to accept, or rejecting a surety, if made by a Presidency Magistrate, lies to the High Court, if made by a District Magistrate, lies to the Court of Session or if made by any other Magistrate, lies to the District Magistrate.

An appeal from sentence of Assistant Sessions Judge or a Magistrate including a District Magistrate lies to the Court of Session, provided that (1) when in any case an Assistant Sessions Judge or a Section 30 Magistrate passes a sentence of imprisonment for a term exceeding four years, appeal lies to the High Court; and (2) when a person is convicted by a Magistrate of the offence of sedition, the appeal lies to the High Court. An appeal to the Court of Session or Sessions Judge is heard by the Sessions Judge or an Additional Sessions Judge or an Assistant Sessions Judge provided that no such appeal is heard by an Assistant Sessions Judge unless the appeal is from the sentence of a Magistrate of Second or Third Class. An Additional or an Assistant Sessions Judge hears only such appeals as are directed by the Government or the Sessions Judge.

A person convicted on a trial held by a Sessions Judge or an Additional Sessions Judge may appeal to the High Court. A person convicted by a Presidency Magistrate may appeal to the High Court if he is sentenced to imprisonment for a term exceeding six months or to a fine exceeding Rs. 200.42 Appeals from orders of acquittal passed by courts other than a High Court may be taken to the High Court.


41. This provision does not apply to persons against whom proceedings are laid before a Sessions Judge according to P. 123 (2) and 123 (3-A) of the Criminal Procedure Code. These sections deal with imprisonment in default of security, and proceedings when to be laid before High Court or Court of Session.

42. For appeals from sentences of High Court passed in the exercise of its original criminal jurisdiction, see s. 411-A.
An appeal may lie on a matter of fact as well as a matter of law except where the trial was by jury in which case the appeal lies on a matter of law only; but when in the case of a trial by jury, a person is sentenced to death, any other person convicted in the same trial with the person so sentenced may appeal on a matter of fact as well as a matter of law.  

Justices of the Peace

Every State Government may appoint suitable persons resident within India, not being the subjects of any foreign State, to be Justices of the Peace within and for the local area mentioned in its notification. In the State of West Bengal, however, the State Government may appoint any person, who is an Indian citizen and as to whose integrity and suitability it is satisfied, to be a Justice of the Peace for a local area mentioned in its notification. In virtue of their respective offices, the Judges of the High Courts are Justices of the Peace within and for the whole of India; Sessions Judges and District Magistrates are Justices of the Peace within and for the whole territory administered by the State Government under which they are serving, and the Presidency Magistrates are Justices of the Peace within and for the towns of which they are respectively Magistrates. They are ex-officio Justices of the Peace.

There is no provision in the Criminal Procedure Code defining the powers and duties of Justices of the Peace. Their powers are prescribed by various special and local enactments and also by the terms of their appointments. Thus the Justices appointed in 1726 and 1753 by the Crown’s Charters of those years possessed the same powers as the Justices in any country, city or towns corporate in England and could hold quarter sessions. In fact, the power of a Justice of the Peace in India was never placed on a clear footing. He may still possibly exercise the powers vested in Justices in 1726 but as regards any further powers, he has to exercise only such powers as are conferred by Act of Parliament or other competent authority.

The West Bengal Act 30 of 1955 lays down the powers and duties of Justices of the Peace as follows: A Justice of the Peace has all the

43. A. I. R. Manual, Vol. 5, at pp. 5155-5176. For reference and revision, see Ss. 432-442, Cr. P. C.
44. Manual, Vol. 4, op cit., at pp. 4261-4263. A Justice of the Peace has been described as an inferior Magistrate to preserve the peace in his jurisdiction. As has been discussed certain persons are Justices of the Peace by virtue of being appointed as such and others by virtue of their office. Justices of the Peace were first appointed in 1726. Under several subsequent Acts of Parliament, e.g., Regulating Act and Act of 1793, various persons were appointed Justices. In 1859, the power to appoint Justices was given to the Governor-General-in-Council and the Governor-in-Council; a distinction was, however, made in regard to appointments to be made for areas outside the Presidency-towns and those to be made for these towns. In respect of the areas outside the Presidency-towns, originally, only covenanted civil servants and other British subjects and, later on, local persons, were appointed. In respect of the

powers of a police officer referred to in Section 54 of the Code of Criminal Procedure and of an officer in charge of a police station referred to in its Section 5 for the purpose of making arrest. A Justice of the Peace making an arrest forthwith takes or causes to be taken the person arrested before the officer in charge of the nearest police station and furnish such officer with a report as to the circumstances of the arrest. Such officer thereupon rearrests the person. A Justice of the Peace has power to call upon any member of the police force on duty or any volunteer to aid him (a) in taking or preventing the escape of any person who has participated in the commission of any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or reasonable suspicion exists of his having so participated; (b) in the prevention of crime in general and, in particular, in the prevention of breach of the peace or a disturbance of the public tranquillity. A Justice of the Peace may issue a certificate as to the identity of any person or verify a document brought before him by any such person or attest any such document required by or under any law in force to be attested by a Magistrate, and until the contrary is proved, any certificate so issued is presumed to be correct and any document so verified is deemed to be duly verified and any document so attested is deemed to have been as fully attested as if he had been a Magistrate.

A Justice of the Peace (a) on receipt of information of the occurrence of any incident involving a breach of the peace, or of the commission of any offence, forthwith makes inquiries into the matter and reports in writing the result of his inquiries to the nearest Magistrate and to the officer in charge of the nearest police station; (b) if the offence is cognizable, also prevents the removal of anything from or the interference in any way with the place of occurrence of the offence; (c) when so requested in writing by a police officer making an investigation under Chapter XIV of the Code of Criminal Procedure (which deals with the subject of information to the police and their powers to investigate) in respect of any offence, (a) renders all assistance to the police officer in making an investigation; (b) records any statement made under expectation of death by a person in respect of whom a crime is believed to have been committed.

Coroners

The Coroners Act, 1871, deals with the topic of Coroners. Under this Act, there is a Coroner within the local limits of the ordinary original civil jurisdiction of each of the High Courts at Calcutta and Bombay. Such Coroners are respectively called the Coroner of Calcutta and the Coroner of Bombay. One or more Additional Coroners may be appointed in Bombay.

When a Coroner has reason to believe that the death of any person has been caused by accident, homicide, suicide or suddenly by means unknown, or that any person being a prisoner, has died in prison, and that the body is lying within the place for which he is appointed, he has to inquire into the cause of death. Such an inquiry is a judicial proceeding within the meaning of the Indian Penal Code. The Coroner has power to order the

46. S. 54 deals with the circumstances when police may arrest without warrant. For ‘officer in charge of a police-station’ see S. 5 (1) (F).
body to be disinterred. On receiving notice of any death, he summons
jurors at a specified place and fixed time, proceeds to that place, opens the
Court by proclamation and administers an oath to each juror; he then
along with the jury views and examines the body. Thereafter, he summons
witnesses to give evidence before him on oath. After each witness has been
examined, the Coroner puts to him the questions, if any, suggested by the
jury. He takes down evidence of each witness in writing, which has to be
signed by the witness and subscribed by him. For the purposes of Section
26 of the Indian Evidence Act, a Coroner is deemed to be a Magistrate.48
He may direct the performance of a post mortem examination of the body.
He may adjourn the inquest from time to time and from place to place.
After all the evidence has been taken down, the Coroner sums it up to the
jury who thereafter deliver their verdict. Thereupon, he draws up the in-
question according to the finding of the jury. If the jury find that the death
is caused by an act amounting to an offence under a law in force, the Coro-
ner sends a copy of the inquisition together with the names and addresses of
the witnesses to the Commissioner of Police. Where the verdict justifies him
in so doing, he may issue warrant for the apprehension of the person who
is found to have caused the death of the deceased person and send him forth-
with to a Magistrate empowered to commit him for trial. When the proceed-
ings are closed or before, if necessary to adjourn the inquest, he gives his
warrant for the disposal of the body. In any case of technical defect, a Judge
of the High Court may order the inquisition to be amended.

It is no longer the duty of the Coroner to inquire whether any person
dying by his own act was or was not felo de se, to inquire of treasure trove or
wrecks, to seize any fugitive's goods, to examine process or to exercise as
Coroner any jurisdiction not given by the Act.49

**Constitution of India and Subordinate Courts**

Article 233 of the Constitution provides for the appointment of a
person to be District Judge50 and his posting and promotion in any State
are to be made by the Governor of the State in consultation with the High
Court. A person from the Bar is eligible to be appointed a District Judge if
he has been for not less than seven years an advocate or a pleader and
recommended by the High Court for appointment. Article 234 provides that
the appointment of persons other than District Judges to the judicial service
of a State are made by the Governor of the State according to, rules made
by him in that behalf after consultation with the State Public Service Com-
mission and the High Court. Art. 235 which relates to the control of the
High Court over all the subordinate Courts provides that the High Court is to
have control over all the Courts subordinate to it including the Courts of
District judges and that such control is to include the posting and promo-
tion of, and the grant of leave to, persons belonging to the judicial

48. S. 26 of the Evidence Act deals with the confession by accused person while in
custody of police.

are some amendments; for them, see Id., at pp. 3757-3770.

50. The expression “District Judge” includes Judge of a City Civil Court, Addi-
tional District Judge, Joint District Judge, Assistant District Judge, Chief Judge
of a Small Cause Court, Chief Presidency Magistrate, Additional Chief Presi-
dency Magistrate, Sessions Judge, Additional Sessions Judge and Assistant
Sessions Judge. Art 236 of the Constitution.
service of a State and holding any post inferior to that of a District Judge. This does not, however, take away from any such person any right of appeal which he may have under the law regulating the conditions of his service or authorise the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed by such law. Article 237 provides that the Governor may direct that the above provisions and rules made under them would apply, from a fixed date, in relation to any class or classes of Magistrates in the State as they apply in relation to persons appointed to the judicial service of the State subject to specified exceptions and modifications.

Regarding the incorporation of these provisions in the Constitution, it has been observed that the "High Court ... appointed by the President and they hold office during ... years of age. Their independence has thus ... on the subordinate judiciary is concerned, appointments are usually in the hands of the Local Executive Government which continues to exercise a certain measure of control over the Judges even after their appointment in such matters as promotion, posting etc. In the absence of any safeguards to protect the interests of the Judicial Officers after appointment, it is possible that some nepotism might creep in the judicial ranks if such questions as of promotion from grade to grade in a judicial hierarchy are left in the hands of a Minister exposed to pressure from members of a popularly elected Legislature. Nothing is more likely to sap the independence of a Judge than the knowledge that his career depends upon the favour of a Minister. It is the subordinate judiciary which comes closest into contact with the people, and it is no less important—perhaps, indeed, even more important—that their independence should be placed beyond question than in the case of a superior judge. For an efficient administration of law and Justice in the country it is necessary to ensure that the subordinate judiciary remains above corruption and nepotism. It is with this in view that the Constitution of India incorporates same provisions covering the subordinate judiciary."  

Comments

The system of subordinate courts, as discussed above, though excellent in many respects, suffers from certain grave defects which need immediate attention. One great defect is the law's delays. Law's delays are proverbial and perhaps as old as law itself, and various methods have been adopted to root out this evil, but with little success. "In an organized society, it is in the interest of the citizens as well as the State that the disputes which go to the law courts for adjudication, should be decided within a reasonable time, so as to give certainty and definiteness to rights and obligations. If the course of trial is inordinately long, the chances of miscarriage of justice and the expenses of litigation increase alike. Delays result in witnesses being unable to testify correctly to events which may have faded in their memory, and sometimes in their being won over by the opponent. Relief granted to an aggrieved party after a lapse of years loses much of its value and sometimes becomes totally inefﬁcient. Such is the basis of the ubiquity of the comment "Justice delayed is justice denied."

"But speedy justice does not mean a hasty or even a summary dispensation of justice by persons not qualified to administer it. What has to be ensured is that the determination of facts in controversy and the application to the facts so determined of the appropriate legal principles should not be unduly delayed. Applying these standards, there is great scope for improvement in the working of our judicial machinery. The root causes of the progressive accumulation of cases, particularly of civil nature, are the inadequate strength of judiciary, inability of the judicial officers to arrange their work methodically and to appreciate and apply the provisions of the Procedural Code, the failure of the two arms of judicial administration—the Bench and the Bar—to follow the prescribed procedure and the adoption by them of unmethodical and dilatory methods of work, inadequate jurisdiction of the Judges, and the like. In order to remove these causes, the Law Commission has made the following recommendations:

(1) The strength of the subordinate judiciary should be made sufficient to enable it to dispose of suits, criminal trials, appeals, revisions and other proceedings within certain limits of time. The cadre strength of the judicial officers should be fixed after making due allowance for their leave, promotion, deputation, vacancies and also for training. No court should be allowed to be without a presiding officer; there should be a reserve to meet unforeseen contingencies. There should be periodical examination of these features so as to keep the attention focused on the adequacy of judicial personnel, which is one of the basic needs of the administration of justice. The High Courts should be empowered to create temporary additional courts wherever necessary without reference to the State Government. The High Courts and District Judges should see that a subordinate court is not overburdened with work. Wherever pendency of suits is high, the District Judge should redistribute the work or ask for an additional hand.

(2) There should be one State Judicial Service divided into two classes—Class I and Class II. In States where the judiciary has been separated from the executive, the civil and criminal judiciary should be unified and made into an integrated cadre. The recruitment should be made on the result of a competitive examination conducted by the Public Service Commission. Improvements should be made in the method of examination. A High Court Judge should be associated with the Public Service Commission for the purpose of interview. Recruited persons should be given intensive training, the details of which should be settled for each State by the Government in consultation with the High Court. A selected District Judge should be entrusted with the duty of imparting the necessary training. An All-India Judicial Service should also be created; for this an all-India competitive examination on the lines of Indian Administrative Service examination should be held. The selected officers should be given an extensive training. It is necessary to continue direct recruitment from the Bar at the level of District Judges. Suitable salaries and allowances should be given to the personnel of subordinate judiciary. Promotions in the judicial service should not be on the basis of mere seniority,

53. Ibid. The problem of inadequacy of strength has received specific attention of the Judicial Reforms Committee set up in Uttar Pradesh, and several High Courts. See id., at pp. 150-154.
54. Id., at p. 161.
55. Id., at p. 280.
56. See id., at p. 264.
57. Id., at pp. 159-160. For all the recommendations consult the Report.
but only on ability and merit. There should be drawn up a phased programme for the building of court-houses. The budget provision for the supply of law books to the subordinate courts should be increased. The State Government should pay special attention to the need of the judicial officers for residential accommodation. The conditions of service of the ministerial staff of the subordinate courts should be improved and their strength should be adequate to cope with the work. They should be trained in law and required to pass a departmental examination in that subject.  

(3) Many of the delays prevailing in the system of judicial administration may be remedied by adequate and effective supervision. All civil suits over a year old should be regarded as old suits and subordinate courts should be asked periodically to explain the delay in their disposal. They should be asked to submit returns showing the pendency of cases according to the year of institution together with their explanation for delay. Suitable time limits should be fixed for the disposal of cases. The returns from subordinate courts should be systematically scrutinised by High Court Judges. The High Court Judges and District Judges should perform their duties of inspection and supervision without any delay on their part. Inspection reports should be promptly delivered in criminal cases.  

(4) Subordinate Judges or senior Civil Judges should be invested in all States with unlimited pecuniary jurisdiction. The pecuniary jurisdiction of junior Civil Judges or Munsifs should not be less than Rs. 5,000. Eventually, the jurisdiction of the High Court, their jurisdiction should be raised. The small cause jurisdiction of subordinate Judges, Munsifs and other Judges should be given. The small cause jurisdiction of subordinate Judges to Rs. 2,000 and of junior Judges or Munsifs to Rs. 1,000. Courts of Calcutta, Madras and Bombay should continue to exercise their ordinary original civil jurisdiction which should extend to all matters exceeding Rs. 10,000 in value. The restrictions upon the jurisdiction of the Calcutta Civil Court as to commercial causes and mortgage suits should be abolished.  

It is noteworthy that these recommendations have partly been met with in certain States.

Another great defect from which the judicial system suffers is the high cost of litigation. In the opinion of the Law Commission, India is perhaps the only country under a modern system of government which deters a person who has been deprived of his property or whose legal rights have been infringed from seeking redress by imposing a tax on the remedy he seeks. Our States provide hospitals which give free treatment to persons who are physically afflicted. But if a person is injured in the matter of his fundamental or other legal rights, we bar his approach to the Courts except on payment of a heavy fee. The fee which we charge is so excessive that the civil litigant seeking to enforce his legal right pays not only the

58. Id., at pp. 225-229. For all the recommendations, consult the Report.
59. Id., at pp. 241-251. For all the recommendations, consult the Report.
60. Id., at pp. 275-277, 293-295, 127-128. For all the recommendations, consult the Report.
entire cost of the administration of civil justice but also the cost incurred by the State in prosecuting and punishing criminals for crimes with which the civil litigant has no concern.”61 The administration of justice is “one of the principal functions of the State in its narrowest concept. Even if the State confined its role only to the maintenance of law and order, the administration of justice would be essential. But the functions of the modern State are far more extensive. A system of administration of justice has to be maintained not only for the maintenance of law and order but also for enabling the citizen to assert his rights against fellow citizens and the State. This is truer today than ever before because of the growing tendency of all States to project themselves into various social and industrial spheres of society in a manner not dreamt of fifty years ago. It is obvious, therefore, that a State which levies an exorbitant tax for making available its machinery for the administration of justice to the ordinary citizen fails to perform one of its elementary functions. A modern welfare State cannot with any justification sell the dispensation of justice at a price. Perhaps a small regulatory fee may be justified; but the present scales of court-fees are wholly indefensible.”62

The Law Commission has, therefore, recommended that the profit-making by the State from the administration of justice is not justified. It is one of its primary duties to provide the machinery for the administration of justice and on principle it is not proper for the State to charge fees from suitors in Courts. Even if they are charged, the revenue derived from them should not exceed the cost of the administration of civil justice. There should be a broad measure of equality in the scales of court-fees all over the country. There should also be a fixed maximum to the fee chargeable. The fees which are now levied at various stages such as the stamp to be affixed on certified copies and exhibits should be abolished. When a case is decided ex parte or is compromised before the actual hearing, half the court-fee should be refunded to the plaintiff. The court-fee payable in an appeal should be reduced to half the amount levied in the trial court.”63

The factor of legal aid may also be mentioned here. The need for legal aid has tremendously increased with the growth of industrialism and urban conditions of life. A large volume of legislation in the modern State with the inevitable technicalities of the law has occasioned a considerable increase in litigation. While in countries like the United States of America and Great Britain, facilities for legal aid are enormous, they are meagre in India. Apart from some voluntary organisations in towns like Bombay, Calcutta and Bangalore, there is not much either governmental or private effort meant to give to the poor the benefit of the law. There can be no dispute as to the general principle that legal aid is a service which the modern welfare States owes to its citizens.64 “It is part of that protection of the citizen’s individuality which, in our modern conception of the relation between the citizen and the State can be claimed by those citizens who are too weak to protect themselves. Just as the modern State tries to protect the poorer classes against the common dangers of life, such as unemployment, disease, old age, social oppression etc., so it should protect them when legal difficulties arise. Indeed, the case for such protection is stronger than the case for any other form of

61. Id., at p. 487.
62. Id., at pp. 489-490.
63. Id., at pp. 509-510.
64. Id., at pp. 593-592.
protection. The State is not responsible for the outbreak of epidemics, for old age, or economic crisis. But the State is responsible for the law. That law again is made for the protection of all citizens, poor and rich alike. It is, therefore, the duty of the State to make its machinery work alike for the rich and the poor.\(^\text{65}\)

The recommendations of the Law Commission in this respect are as follows: Free legal aid to poor persons is a service which the modern welfare State owes to its citizens. The State must accept this obligation and provide funds for legal aid to poor persons. The legal profession must, in the main, if not entirely, accept the responsibility for the working of schemes of legal aid. This profession owes a social and moral duty to poor members of the society which it must perform; every member of the profession must do a certain amount of legal work free of charge for poor persons.\(^\text{66}\)

It may be noted that only a regulatory court-fee and proper legal aid to poor would enhance the prestige of the judicial system and legal profession.

In the last it may be pointed out that the constitutional provisions regarding the subordinate courts suffer from certain defects. First, the language of Article 234 does not clearly indicate whether the consultation with the High Court covers only the framing of the rules or whether it extends to a consideration of the suitability of the appointee also. This article may be interpreted in such a way as to exclude consultation with the High Court in the actual selection of the candidates. Keeping in view the ultimate responsibility of the High Court for the judicial administration in the State, the principal responsibility for the selection of judicial officers should rest with the High Court. The article needs, therefore, modification so as to provide that persons appointed to the subordinate judicial positions may be persons recommended by the High Court as in Article 233 (2). Second, there is some conflict between Articles 233 and 235 because it is not clear whether promotion of a person in the judicial service to the post of District Judge falls within the ambit of Article 233 or Article 235. If it is covered by the former, then the role of the High Court is merely advisory; if it is covered by the latter, then the High Court is fully competent to make the appointment itself. The recommendation of the Law Commission in this respect is that the promotion of a subordinate judicial officer to the post of District Judge should be made on the recommendation of the High Court. Third, the position in regard to the posting and promotion of District Judges also poses similar difficulty. The recommendation of the Law Commission is that the posting and promotion of District Judges should be made on the recommendation of the High Court. In view of these recommendations, the Law Commission has suggested that suitable constitutional amendments should be made for the purpose of giving to the High Courts powers in regard to the posting and promotion of District Judges such as they have in respect of the posting and promotion of subordinate judicial officers. This would increase the efficiency of the administration of justice.\(^\text{67}\)

\(^{65}\) E. J. Cohn, "Legal Aid for the Poor," 59 Law Quarterly Review 250, at p. 256.


\(^{67}\) Id. at pp. 217-229.
Nyaya Panchayats (Village Courts)

The institution of Village Panchayats, one of the functions of which is to administer justice in petty cases, is not new to India; it flourished in old days, but later on, and particularly during the British regime, it met with its decay. The English made a serious inroad into the autonomy of the village. It is only since the advent of freedom in 1947 that the importance of re-organising and strengthening village units as organs of local self-government and for the dispensation of justice has been greatly emphasized and legislation for that purpose passed. The Constitution of India also contains a directive to that effect. Its Article 40 provides that State shall take steps to organise Village Panchayats and endow them with such powers and authority as may be necessary to enable them as units of self-government.

The general pattern of the constitution and powers of Nyaya Panchayats under the existing legislation of various States is not dissimilar. In order to have some idea of that pattern, the Nyaya Panchayats, as constituted under the Uttar Pradesh Panchayat Raj Act, 1947, are dealt with as follows:

Establishment and constitution.

Each district is divided into circles, each circle comprising several areas subject to the jurisdiction of the Gaon Sabha. Each circle has a Nyaya Panchayat with a power to punish for its contempt. Subject to a minimum of ten and a maximum of twenty-five, every Nyaya Panchayat has a prescribed number of members, but it can function notwithstanding any vacancy therein provided the number of Panches therein is not less than two-thirds of the prescribed strength. A prescribed number of Panches is appointed out of the members of a Gaon Panchayat; thereupon they cease to be its members. A person will not be qualified to be appointed a Panch unless he is able to read and write Hindi in Devnagari Script and is thirty years or over in age. The Panches elect from amongst them Sarpanch and Sahayak Sarpanch who should be able to record proceedings. The Sarpanch constitutes Benches, each consisting of five Panches. The State Government may prescribe the constitution of Special Benches for the trial of any class or classes of cases. The Bench chooses one of the members to be its Chairman to conduct the proceedings. If the Sarpanch or Sahayak Sarpanch is a member of the Bench and if both are members of the same Bench, the Sarpanch is to be the Chairman.

Criminal jurisdiction.

Every criminal case triable by a Nyaya Panchayat is instituted before the Sarpanch of the Nyaya Panchayat of the circle in which the offence

63. In certain States, they are called Panchayati Adalats, Adalati Panchayats, Gram Cutcherries, etc.


70. J. N. Dwivedi, Practice and Digest of U. P. Panchayat Raj, at pp. 53-56, 72, 86 (3rd Ed.)
is committed. Whenever a Sarpanch has reason to apprehend that any person is likely to commit a breach of peace, he may ask the person to show cause why he should not execute a bond for an amount not exceeding Rs. 100 with or without sureties for keeping the peace for a period not exceeding fifteen days. After issue of such notice, he refers the matter to a Bench which may either confirm the order or discharge the notice after hearing such person and his witnesses. If the person does not execute the bond, he is liable to pay a penalty upto Rs. 5 for every day.

No Nyaya Panchayat is empowered to inflict a substantive sentence of imprisonment. It may, however, impose a fine not exceeding Rs. 100 but no imprisonment may be awarded in default of payment. A Nyaya Panchayat may dismiss any complaint if after examining the complaint and taking evidence, it is satisfied that the complaint is frivolous, vexatious or untrue. If it appears to a Nyaya Panchayat that it has no jurisdiction to try a pending case, or that the offence is one for which it cannot award adequate punishment, or that the case should otherwise be tried by a court, it has to transfer it to the court of competent jurisdiction.

A Nyaya Panchayat cannot take cognizance of any criminal case against a person (a) who has been previously convicted of an offence punishable with imprisonment for a term of three years or more, (b) has been previously fined for theft by any Nyaya Panchayat, (c) has been bound over to be of good behaviour under the Code of Criminal Procedure, (d) has been previously convicted under the Public Gambling Act, or (e) is a public servant.

In certain cases, compensation may be awarded to complainants and the accused. Offenders may be released on probation under Section 4 of the United Provinces First Offenders Probation Act, 1938. A Magistrate may direct an inquiry referred to in Section 202 of the Criminal Procedure Code to be made by a Nyaya Panchayat in a criminal case and the Nyaya Panchayat has to enquire into the case and submit its report to the Magistrate.

Civil jurisdiction

Every civil case instituted under the Panchayat Act is to be instituted before the Sarpanch of the Nyaya Panchayat of the circle in which the defendants ordinarily reside or carry on business at the time of the institution.

71. Id., at p. 53. The following offences as well as abetments of any attempts to commit such offences are cognizable by Nyaya Panchayats: (a) offences under Ss. 140, 152, 172, 174, 179, 269, 282, 385, 389, 390, 394, 323, 334, 341, 352, 357, 358, 374, 379, 403, 411, (where, the value of the stolen or misappropriated property in cases under Ss. 379, 403, 411 does not exceed Rs. 50); 426, 428, 430, 431, 447, 448, 504, 506, 509, and 510 of the I. P. C. 1871; (b) the Trespass Act, 1871; (c) the Primary Education Act, 1867; (d) the Gambling Act, 1867; (e) the Excise Act, 1867; (f) the Offences against the State Act, 1870; (g) the Motor Vehicles Act, 1939.

72. Id., at pp. 58-68.
of the civil case irrespective of the place where the cause of action arose. A Nyaya Panchayat may take cognizance of any civil case of the following description if its value does not exceed Rs. 500: (1) a civil case for money due on contract, other than a contract in respect of immovable property; (2) a civil case for the recovery of movable property or for its value; (3) a civil case for compensation for wrongfully taking or injuring a movable property; and (4) a civil case for damages caused by cattle trespass. Any Nyaya Panchayat may be directed to decide all such civil cases of the value not exceeding Rs. 500. Subject to these provisions, a Nyaya Panchayat has no jurisdiction to take cognizance of the following civil cases: (1) a civil case for a balance due on partnership account except where the balance has been struck by the parties or their agent; (2) a civil case for a share under an intestacy or for a legacy under a will; (3) a civil case by or against the State Government or the Central Government or a public servant for official acts; (4) a civil case by or against a minor or a person of unsound mind; and (5) a civil case the cognizance of which by a Panchayat established under the U. P. Village Panchayat Act, 1920, is barred by section 25 of the U. P. Debt Redemption Act, 1940. The decision of a Nyaya Panchayat on the question of title, legal character, contract or obligation does not bind the parties except in respect of the suit in which such matter is decided. A Nyaya Panchayat may dismiss any civil case or revenue case if after examining the plaintiff or the applicant, it is satisfied that the civil case or revenue case is frivolous, vexatious or untrue.  

Special jurisdiction.

It is lawful for a Nyaya Panchayat to decide any dispute arising in its local area and not pending in any court in accordance with any settlement, compromise or oath agreed upon in writing by the parties.

Transfer and revision.

On the application of a party or on his own behalf, the Sub-Divisional Magistrate, the Munsif or the Sub-Divisional Officer, according as the case pending before a Nyaya Panchayat is a criminal case, civil case or revenue case, may withdraw the same and (1) try or dispose of the same, or (2) transfer it to another Bench of the Nyaya Panchayat, or (3) transfer the same for trial to any other Magistrate, Munsif or Assistant Collector competent to try the case. In case of a frivolous or vexatious application, the applicant may be fined up to Rs. 50.

A Sub-Divisional Magistrate, Munsif or Sub-Divisional Officer, according as it is a criminal case, civil case or revenue case, may, either on his own motion or on the application of any party made within sixty days from the date of the order complained of or where personal service of summons was not effected on the applicant from the date of the knowledge of the order, call for the record of any case which has been decided by a Nyaya Panchayat, and if it appears to him that injustice or material irregularity has occurred, he may make a suitable order. Failure to exercise a jurisdiction vested by law or exercise of jurisdiction in excess of that vested by law is deemed to be a material irregularity. Without prejudice to the generality of these provisions, the Sub-Divisional Magistrate, Munsif or Sub-Divisional Officer, at the case may be, may (1) quash

73. Id., at pp. 59, 60-70, 72.
74. Id., at p. 76.
the decree or order passed by the Nyaya Panchayat, (2) modify the order, (3) remand the case to the Nyaya Panchayat for retrial with a suitable direction, or (4) try the case himself or transfer it to another court or officer competent to try the same. In case of a frivolous or vexatious application, the authority concerned may award compensation to the opposite party upto Rs, 50.75

Comments

Nyaya Panchayats are a great relief to regular courts in regard to petty civil litigation and criminal cases of the simpler type. They are in a position to dispose of cases more cheaply and expeditiously and with less inconvenience and expense to all concerned than the regular courts. They bring justice nearer to the villager. They educate villagers in the administration of justice and instil in them a growing sense of fairness and responsibility. In view of these observations, the Nyaya Panchayats play a great role in maintaining law and order and administering justice fairly in the village society.76

Revenue Courts

The general pattern of the constitution and powers of revenue courts under the existing laws of various States is not very much dissimilar. In order to have some idea of that pattern, the revenue courts, as constituted under the Uttar Pradesh Land Revenue Act, 1901, are dealt with as follows:

In the State, there is a Board of Revenue. The control of all judicial matters and matters connected with settlement under the Act is vested in the Board. Below the Board, there are Commissioners and Additional Commissioners in the divisions of the State, Collectors and Additional Collectors in the districts of these divisions. Assistant Collectors of the First Class or Second Class 77 in the districts, and Tahsildars and Naib-Tahsildars in the tahsils of these districts. Besides, there are other inferior officers like Record Officers and Assistant Record Officers. These Officers deal with judicial and non-judicial business. They may refer any dispute to arbitration.78

Appeals from orders of any Assistant Record Officer lie to the Record Commissioner. Appeals from orders of Assistant Collector of the First Class or Second Class may be made to the Collector. The Appellate Court may either admit or summarily reject the appeal. If it admits the appeal, it may reverse, vary or confirm the order appealed against, or may direct further investigation to be made or additional evidence to be taken, or may itself take such evidence, or may remand the case for disposal with suitable directions.79

75. Id., at pp. 79-80, 82-83.
77. An Assistant Collector of the First Class may be appointed as incharge of one or more sub-divisions of a district. In that place, he is called a Sub-Divisional Officer. Additional Sub-Divisional Officer may also be appointed.
78. See Sant Prakash, Commentaries on U. P. Land Revenue Act, pp. 37-51, 121.
79. Id., at pp. 144-150. For reference, revision and review see id., at pp. 150-157.
Separation of judicial and executive functions

The British had recognised the importance of the freedom of judiciary from executive control as far back as 1793 through certain Regulations passed by the Bengal Government.\(^6\) Thereafter eminent statesmen, administrators and judges repeatedly advocated this reform. Ever since 1866, the Indian National Congress also pressed for it. In 1899 a body consisting of distinguished persons represented to the Secretary of State for India that there was an urgent need for effecting the separation of judiciary from executive. Thereafter various schemes were prepared to work out this reform, but they were thrown in dust bins. "It was obviously to the interests of the foreign rulers to entrench executive authority by bestowing upon it some judicial functions as well, and naturally, notwithstanding the acceptance of the principle and the insistent demands of various sections of the people, the reform was not carried out till after Independence."\(^7\)

Even after Independence, and before the commencement of the constitution, the separation of judicial and executive functions was insignificant.

Notwithstanding the directive principle contained in article 50 of the Constitution, namely, the State shall take steps to separate the judiciary from the executive in the public service of the State, a large number of States failed to carry out the directive for a considerable time and the combination of judicial and executive powers in the same persons continued as a glaring defect in the judicial system.\(^8\)

It appears that though now almost all the States including Union territories have given effect to the constitutional directive, until a few years back only some of them satisfied the criterion evolved as a working formula in the Central Ministry of Home Affairs, for the separation of the judiciary from the executive. The criterion laid down the following four requisites: (1) a judicial nature, for example, evidence, should be clearly allotted; (2) Magistrates should be left with only the administrative and 'police' functions, such as the issue of fire arms licences and the handling of unlawful assemblies; (3) administrative control over Judicial Magistrates should be vested in the High Courts concerned, and (4) the power of taking cognizance of offences under the Criminal Procedure Code should be vested in Judicial Magistrates.\(^9\)

According to the available information, which is not exhaustive, the position in various States and Union territories is as follows.

Andhra Pradesh

In the State of Andhra Pradesh, the scheme of the separation of judiciary from Executive is based upon Executive Orders of 1949 and 1952.\(^10\) But


\(^7\) Id., at p. 850.

\(^8\) See the Second Edition of this book, at p. 182.

\(^9\) G. O. No. 3106, dated the 9th September 1949 and G. O. No. 2304, dated the 24th September 1952.
it appears that the full effect was given to these orders in April 1958, and separation has been effected throughout the State except in 'agency areas' which are scheduled areas in certain districts.

Functions which are essentially judicial, for example trial of criminal cases, have been transferred to the following Judicial Magistrates: District Magistrate (Judicial), Sub-Divisional Magistrate, Additional First Class Magistrate, and Second Class Magistrate (Sub-Magistrate). Judicial Magistrates function under the administrative control of the High Court. Sessions Judges have no power of superintendence over them, but they, as nominees of the High Court, can inspect their courts.

Some of the powers and functions of the Judicial Magistrates are as follows. In non-cognizable cases, both the Executive and Judicial Magistrates have power to order investigation. The charge-sheet is submitted to Judicial Magistrates. Only the Judicial Magistrates conduct identification and record statements and confessions. They may take security for good behaviour from certain classes of persons, and tender pardon to accompany in certain cases. District Magistrate (Judicial) has certain powers of transferring cases from Executive Magistrates to Judicial Magistrates but not in respect of cases of security for keeping the peace in certain cases.

The powers of police are not affected by the separation scheme. Under the scheme, only the Judicial Magistrates have to exercise certain specified powers under the Code of Criminal Procedure, and they exercise certain other powers, as indicated therein, along with the executive Magistrates. The list is, however, not exhaustive. Principle is that all trials have to be conducted in the Courts of the Judicial Magistrates. In case of any controversy, the order of the High Court has to be obtained and pending that the District Magistrate (Executive) has to order.

In emergency, the Judicial Magistrates may have to act as Executive Magistrates.85

Assam

In Assam, the separation of the Judiciary from the Executive was started on 26th January, 1964, in two districts, namely, Kamrup and Lakhimpur, in accordance with the scheme of separation drawn up by the State Government in consultation with the High Court. The separation was designed within the framework of the Code of Criminal Procedure and was made effective in the above districts by executive orders. Initially the Judicial Magistracy started functioning as a separate wing of the Assam Judicial Service. Ultimately, however, the Judicial Magistracy and the Civil Judiciary would be constituted into one service to be called the Assam Judicial Service. This would enable the interchange of officers between the civil and magisterial sides.

As the scheme for separation was to be introduced in a phased manner, it appears that by now it has been given effect in other districts also.

It has been noted that the scheme was designed within the framework of the Code of Criminal Procedure without resorting to the lengthy process of
amending various Acts or to a special legislation. Functions which are ‘police’ in their nature, for example, dealing with unlawful assemblies and functions of an administrative character, for example, issue of licences for the arms etc., are vested in the Executive Magistracy, and functions which are essentially judicial, for example, trial of criminal cases, are vested in the Judicial Magistracy. The Judicial Magistrates are subordinate to the High Court. All the functions and powers of a Magistrate as defined in the Code of Criminal Procedure and various other Acts have been allotted between Executive and Judicial Magistrates. Some of these powers have been declared to be concurrent.

The allotment of power was done by a purely executive order. The legal position, therefore, is that both sets of Magistrates would have all the powers under the Code of Criminal Procedure and various other Acts. But because of the allocation of powers and functions between them, one category of Magistrates would not perform the functions allotted to the other. Thus if an Executive Magistrate actually tried a criminal case and convicted a person, the conviction would not be illegal. But he would not try any criminal case because by doing so, he would contravene the Government orders. Similarly, a gun licence can legally be issued by a Judicial Magistrate, but he would not do so because the High Court would take action against him for violating instructions.

The Judicial Magistracy consists of Additional District Magistrates (Judicial), Additional Sub-Divisional Magistrates (Judicial) and Magistrates of the First Class, Second Class and Third Class. The Head of the Judicial Magistracy is the Magistrate (Judicial) who supervises the magistrates of the district. It is his responsibility to ensure that all judicial Magistrates are performed properly, and he is the connecting link between the High Court and the Judicial Magistrates in his district.

In the Sub-Division, all these functions are performed by the Additional Sub-Divisional Magistrates (Judicial).

The powers of the police, such as relating to preventive actions of the police (Chapter XIII, Code of Criminal Procedure) are not affected by the scheme. The police continues to have all the powers and to discharge all the functions it had before the separation. Though in regard to administrative and police matters, it addresses the District Magistrate; so far as purely judicial matters, for example, calling for a copy of records of any Judicial Magistrate, are concerned, it addresses the Additional District Magistrate (Judicial).
The list is, however, not exhaustive. In respect of any matter left out of it, the allocation of function is made on the following principles: (i) Matters which involve the appreciation or sifting of evidence and the formulation of a decision which exposes any individual to any punishment or penalty are properly in the province of Judicial Magistrate; (ii) matters which are clearly administrative or executive in nature, such as the grant, suspension or cancellation of a licence, sanctioning a prosecution, withdrawing from a prosecution, and the like, should be in the province of Executive Magistrates; (iii) where any enactment requires that 'information' shall be given to a Magistrate, the public would be deemed to have discharged their duty if they pass on the information to either class of Magistrates; and (iv) the power to issue warrants and various other processes are concurrent.

Allocation of powers under the Code of Criminal Procedure is as follows. Only Judicial Magistrates exercise powers under its sections 16, 17 (4), 29 (8), 106, 200-263, 346 (1), 430, 435-438, 483, 515 and 561 (1). They exercise powers concurrently with Executive Magistrates under its sections 17 (1), 17 (2), 42, 44, 45 (1), 60-65, 68-105, 108-126 A, 153 (2), 155, 156 (3), 158, 159, 164-166, 169, 170, 172, 173, 190, 192, second paragraph of 337 (1), 338, 387, 503, 506, 523 (2), (3) and (4), 549 (2), 552 and 516 (2).

Explanatory notes indicate: (i) All offences under all laws, in force, triable by Magistrates would be tried by the to sections 108-110 of the Code, normally the! to conduct proceedings. (iii) Judicial concurrent powers to direct the police to cases, the Police normally deals with the Executive Magistrates and only at the stage of the submission of the final report, the case goes to the Judicial Magistrate. However, in cases where the Executive Magistrate has directed the Police to investigate, the final report, unless the inquiry results in a charge-sheet, should be submitted to the Executive Magistrate. This will enable him to decide whether there should be further inquiry or not. If the inquiry results in a charge-sheet, the Judicial Magistrate tries the case thus instituted. (v) The District Magistrate and the Additional District Magistrate (Judicial) have to act independently of each other in their respective spheres of work. Neither will interfere in the discharge of work done by the other.85

Bihar

In the State of Bihar, the scheme was introduced in a few districts in the early 'fifties' by an Executive Order, but until now, it has been brought into force in all the districts.

Most of the criminal work is dealt with by Munsif-Magistrates. Temporarily, however, the services of some executive officers are lent to the High

cases according to the Schedule drawn up by the Sessions Judge in this respect. They have nothing to do with a case which has been so transferred. The Executive Magistrates try some petty cases in which the accused persons generally plead guilty and are decided on the spot.

In emergent situations, the District Magistrate has power to allot executive work to the Judicial Magistrates with the prior consent of the District and Sessions Judge.

Certain categories of criminal cases are dealt with by some Subordinate Judges vested with powers of Special Magistrates.87

Gujarat.

The State of Gujarat has adopted the Maharashtra scheme of separation. The Gujarat Adoption of Laws (State and Concurrent Subjects) Order, 1960, has enforced in the State, the Bombay Separation of Judicial and Executive Functions Act, 1951, and the Bombay Separation of Judicial and Executive Functions (Extension) and the Code of Criminal Procedure (Provision for Uniformity) Act, 1958. See details, under ‘Maharashtra’.

Haryana.

It appears that the State of Haryana has adopted the Punjab legislation relating to separation. See details under ‘Punjab’.

Kerala.

In the State of Kerala, the separation has been effected by Executive Order. It is mainly the Madras scheme which has been adopted in that State. The functions which are essentially judicial in nature are discharged by the Judicial Magistrates. The Head of the Judicial Magistrates is the District Magistrate (Judicial) who, administratively and judicially, is subordinate to the High Court. See other details under ‘Madras’.88

Madhya Pradesh.

In the State of Madhya Pradesh, the scheme was introduced by Executive Order in several stages, beginning from January 1962, in thirty-eight out of forty-three districts. It was subsequently introduced in two tahsils of two districts in June 1965. Probably the introduction of the scheme in other areas has also taken place. The Civil Judges exercising magisterial powers have been designated as Judicial Magistrates who try cases under the Indian Penal Code and other special Acts. Civil Judges of the First Class are appointed as Additional District Magistrates (Judicial). Although the Judicial Magistrates are not normally called upon to undertake law and order duties, an arrangement has been arrived at with the High Court whereby their

87. M. P. Jain, Outlines of Indian Legal History, at pp. 393-394 (1965), Second edition of the book; at p. 183; Note of the Home Ministry, op. cit
services could be obtained for law and order duties in cases of extreme emergency with the prior concurrence of the District and Sessions Judge. The Judicial Magistrates are under the administrative control of the High Court through the District and Sessions Judges.

Tamil Nadu (Madras)

In the State of Tamil Nadu, the separation has completely been effected under Executive Orders. Judicial functions have been transferred to the Judicial Magistrates whose Head is the District Magistrate (Judicial). He, administratively and judicially, is under the control of the High Court. Under section 144 of the Code of Criminal Procedure, the Judicial Mrgristates can issue orders at once in urgent cases of nuisance or apprehended danger. In emergencies, they may have to assist the Police and act as Executive Magistrates. Appeals from the decisions of the Second and Third Class Magistrates lie to the District Magistrate (Judicial).

Maharashtra.

In the State of Maharashtra, emerged under the Bombay Reorganisation Act, 1960, the following Acts operate: the Bombay Separation of Judicial and Executive Functions Act, 1951; the Bombay Criminal Procedure (Amendment) Act, 1953; the Bombay Separation of Judicial and Executive Functions (Supplementary) Act, 1954; the Bombay Separation of Judicial and Executive Functions (Extension) and the Code of Criminal Procedure (Provision for uniformity) Act, 1958. The first Act had effected the separation and it was later amended by the second Act. The third Act amended the Central Acts and the Bombay Acts as specified in the first Act. The amendments made it clear that judicial functions would be exercised by Judicial Magistrates and executive functions by Executive Magistrates. The fourth Act, passed on the whole of the State and on to the State and...

The position under the Act of 1951, as amended, is as follows. The classes of Judicial Magistrates are: Presidency Magistrates, Magistrates of the First Class, Magistrates of the Second Class, Magistrates of the Third Class, and Special Judicial Magistrates. The Government may, in consultation with the High Court, confer upon any person power conferable under the Code of Criminal Procedure on a Judicial Magistrate in respect of particular cases or class or classes of cases or in regard to cases generally in any local area. Such Magistrates are to be called Special Judicial Magistrates.

The power of appointment of the Chief Presidency Magistrate and the Additional Chief Presidency Magistrate is exercised in consultation with the High Court and the power of appointment of other Presidency Magistrates is, on the issue of public notification under article 237 of the Constitution, exercised subject to the terms of the notification.

The Judicial Magistrates are to discharge functions which are judicial in nature. They are subordinate to the High Court through the Sessions Judges.

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The ordinary powers of a Judicial Magistrate of the Third Class (Special Magistrate excluded) are: (1) Power to arrest or direct the arrest of, and to commit to custody, a person committing an offence in his presence, s. 64 Cr. P. C. (2) Power to arrest, or direct the arrest, in his presence of an offender, s. 65 Cr. P. C. (3) Power to endorse a warrant, or to order the removal of an accused person arrested under a warrant, ss. 83, 84 and 86, Cr. P. C. (4) Power to issue proclamations in cases judicially before him, s. 87, Cr. P. C. (5) Power to attach and sell property and to dispose of claims to attached property in cases judicially before him. s. 88, Cr. P. C. (6) Power to restore attached property s. 89, Cr. P. C. (7) Power to require search to be made for letters and telegrams, s. 95, Cr. P. C. (8) Power to issue search-warrant, s. 96, Cr. P. C. (9) Power to endorse a search-warrant and order delivery of thing found, s. 99, Cr. P. C. (10) Power to command unlawful assembly to disperse, s. 127, Cr. P. C. (11) Power to use civil force to disperse unlawful assembly, s. 128, Cr. P. C. (12) Power to require military force to be used to disperse unlawful assembly, s. 130, Cr. P. C. (13) Power to authorise detention, not being detention in the custody of the police of a person during a police investigation, s. 167, Cr. P. C. (14) Power to postpone issue of process and inquire into case himself, s. 202, Cr. P. C. (15) Power to detain an offender found in Court, s. 351, Cr. P. C. (16) Power to apply to Sessions Judge to issue commission for examination of witnesses, s. 505 (3), Cr. P. C. (17) Power to recover forfeited bond for appearance before Magistrate's Court, s. 514, Cr. P. C. and to require fresh security, s. 514-A, Cr. P. C. (18) Power to make order as to custody and disposal of property pending inquiry or trial, s. 516 A, Cr. P. C. (19) Power to make order as to disposal of property, s. 517 Cr. P. C. (20) Power to sell property of a suspected character, s. 525 Cr. P. C. (21) Power to require affidavit in support of application, s. 539 A, Cr. P. C. (22) Power to make local inspection, s. 539 B, Cr. P. C.

Ordinary powers of a Judicial Magistrate of the Second Class (Special Magistrate excluded) are: (1) The ordinary powers of a Magistrate of the Second Class. (2) Power to direct warrants to landholders, s. 78. Cr. P. C. (3) Power to issue search-warrant otherwise than in course of an inquiry, s. 98, Cr. P. C. (4) Power to issue search-warrant for discovery of person wrongfully confined, s. 100, Cr. P. C. (5) Power to record statement and confession during a police investigation, s. 164, Cr. P. C. (6) Power to authorise detention of a person in the custody of the police during a police investigation, s. 167, Cr. P. C. (7) Power to commit for trial, s. 206, Cr. P. C. (8) Power to stop proceedings when no complaint, s. 249, Cr. P. C. (9) Power to tend pardon to accomplice during inquiry into case by himself, s. 337 Cr. P. C. (10) Power to make orders of maintenance, ss. 489, 489, Cr. P. C. (11) Power to take evidence on commission, s. 503, Cr. P. C. (12) Power to recover penalty on forfeited bond, s. 514, Cr. P. C. (13) Power to require fresh security, s. 514-A, Cr. P. C. (14) Power to recall case made over by him to another Magistrate, s. 528, Cr. P. C. (15) Power to make order as to first offenders, s. 562, Cr. P. C. (16) Power to order released convicts to notify residence, s. 565, Cr. P. C.

Additional powers which may be invested by the Government (1) Power to issue process for person v
ted an offence outside the local jurisdiction, s. 186, Cr. P. C. (2) Power to take cognizance of offences upon complaint, s. 190, Cr. P. C. (3) Power to take cognizance of offences upon police reports, s. 190, Cr. P. C. (4) Power to take cognizance of offences without complaint, s. 190, Cr. P. C. (5) Power to transfer cases, s. 192, Cr. P. C. (6) Power to try summarily, s. 260, Cr. P. C. (7) Power to pass sentence on proceedings recorded by a Magistrate of the Second and Third Class, s. 349, Cr. P. C. (8) Power to hear appeals from conviction by Magistrate of the Second and Third Class, s. 407, Cr. P. C. (9) Power to try cases under s. 124-A, I. P. C.

Additional powers with which a Judicial Magistrate of the Second Class may be invested by the Government in consultation with the High Court are:
(1) Power to record statements and confessions during a police investigation, s. 164, Cr. P. C. (2) Power to authorize detention of a person in the custody of the police during a police investigation, s. 167, Cr. P. C. (3) Power to take cognizance of offences upon complaint, s. 190, Cr. P. C. (4) Power to take cognizance of offences upon police reports, s. 190, Cr. P. C. (5) Power to take cognizance of offences without complaint, s. 190 Cr. P. C. (6) Power to commit for trial, s. 296, Cr. P. C. (7) Power to stop proceedings instituted otherwise than upon complaint, s. 249, Cr. P. C. (8) Power to make order as to first offenders, 562 Cr. P. C.

Additional powers with which a Judicial Magistrate of the Third Class may be invested by the Government in consultation with the High Court are:
(1) Power to record statement and confession during a police investigation, s. 164, Cr. P. C. (2) Power to take cognizance of offences upon complaint, s. 190, Cr. P. C. (3) Power to take cognizance of offences upon police report, s. 190, Cr. P. C. (4) Power to stop proceedings instituted otherwise than upon complaint, s. 249, Cr. P. C.

Whenever under the Code of Criminal Procedure or any other law relating to any matter specified in List II and III of the Seventh Schedule to the Constitution, any judicial powers are to be conferred on any Judicial Magistrate, the orders conferring such powers would be made by the Government in consultation with the High Court.

Additional powers with which any Judicial Magistrate may be invested by the Sessions Judge are:
(1) Power to take cognizance of offences upon complaint, s. 190 Cr. P. C. (2) Power to take cognizance of offences upon police reports, s. 190 Cr. P. C.

**Mysore**

In the five integrating areas of the State of Mysore except in the Bombay area where the Bombay Act of 1951 was in force, the process of separation of judiciary had been implemented by means of executive orders. The principles in issue were that essentially judicial functions would be performed only by Judicial Officers, executive functions being performed by Executive Magistrates and that the Judicial Officers performing ministerial functions would be subordinate only to the Sessions Judge who himself is a Judicial Officer subordinate to the High Court.

With a view to have legislative sanction for the scheme of separation, the Code of Crim.: Under this Act, J Magistrates are:

91. The Current Indian Statutes, 1952, at pp. 7-26; 1953, at pp. 98-100; 1954, at pp. 48-54, and 1959, at pp. 33-40.
Class; Magistrates of the Third Class; and Special Judicial Magistrates. They are subordinate to the Sessions Judge.

Where a judicial inquiry or decision is required, the matter is dealt with only by Judicial Magistrates. In the matter of law and order, mainly the Executive Magistrates are empowered to exercise the powers. They are primarily responsible for maintaining law and order. Provision has, however, been made that Judicial Magistrates especially empowered in this behalf may also exercise these powers. Reference may be made to sections 107-110, 145 and 147 of the Code of Criminal Procedure. Powers under these provisions have been conferred exclusively on Executive Magistrates in the Bombay area. But in the Madras and Mysore areas of the State, both Judicial and Executive Magistrates were exercising powers under its sections 108-110 and in the Mysore area only. In local conditions, it was considered that the powers under all the above sections should be conferred on both Judicial and Executive Magistrates in the State.

Power under section 167 of the Code is exercisable by a Judicial Magistrate in the Bombay area, by an Executive Magistrate in the Mysore and Hyderabad areas and by both Judicial and Executive Magistrates in the Madras area. The number of Judicial Magistrates in the Mysore area is not large, and long distances have to be traversed to obtain orders from such Magistrates. This should hamper proper investigation of offences. It was, therefore, felt desirable to confer powers under the section on both Executive and Judicial Magistrates.

Power under section 174 of the Code was being exercised by Executive Magistrates in the Mysore and Hyderabad areas and by both Judicial and Executive Magistrates in the Madras area. It was considered desirable to confer powers under the section throughout the State.92

Orissa

In the State of Orissa, the separation was effected from the 1st May, 1960, in the districts of Cuttack, Puri and Balasore. The scheme was brought about not by amendment of the Code of Criminal Procedure but by establishment of conventions in the shape of executive instructions issued by the Government in consultation with the High Court. The scheme was next extended to six more districts in 1961. On 1st May 1967, it was extended to the district of Bolangir and Kalahandi, on 1st June 1967, to the district of Koraput and on 13th April, 1967, to the district of Bondh Phulbani. Thus the scheme of separation is now in force in all the districts of the State.

Under the Code of Criminal Procedure and other relevant statutes, the functions of a Magistrate fall into three broad categories — (i) functions which are 'police' in nature, as for example, the issue of licences for fire arms etc.; (ii) functions which are essentially judicial, as for example, in the trial of criminal cases. Before the scheme was enforced, all these functions were concentrated in the District and other Magistrates. The essential feature

92. Information along with the Letter dated 23rd September, 1969, from the Secretary to the Government of Mysore, Department of Law and Parliamentary Affairs, to the author.
of the scheme was that purely judicial functions coming under category (iii) were transferred from these Magistrates to the new set of officers called the Judicial Magistrates. Functions under (i) and (ii) continue to be discharged by the Executive Magistrates.

The category of Judicial Magistrates consisted of the Additional District Magistrate (Judicial), the Subdivisional Magistrate and the Magistrates of the First, Second and Third Class.

The Additional District Magistrate (Judicial) is invested under section 10 (2) of the Code of Criminal Procedure with all the powers of a District Magistrate, and as such has general administrative superintendence and control over the Courts of the Judicial Magistrates in the district. He has to inspect very frequently all these Courts. It is always his primary responsibility to see to their efficient functioning in general and the quick disposal of cases in the subordinate courts. To this end he should keep a watch over the files of all the subordinate Magistrates and take appropriate steps to deal with the general supervisory functions. He has not to exercise any control a district except to the extent due dealing with allocation of powers.

Administratively and judicially, the Additional District Magistrate (Judicial) is subordinate to the High Court.

In a sub-division, the Sub-divisional Magistrate has to exercise all the ordinary powers of a Sub-divisional Magistrate and such other additional powers as the State Government might confer on him from time to time as necessity arises. He has power to inspect the courts of the other subordinate Judicial Magistrates in his jurisdiction. He has no power to exercise any control over the Executive Magistrates in his sub-division except to the extent indicated against several items in the schedule dealing with allocation of powers.

The broad principles on which the allocation of power is based are the following: (i) powers under the preventive sections of the Code of Criminal Procedure (Chapters VIII to XIII) vest in the Executive Magistrates; (ii) power of taking cognizance of offences under its section 190 (1) (a), (b) and (c) vests in the Judicial Magistrates; and (iii) the power to take cognizance of offences under its section 190 (1) (a) and (c) also vests in the Sub-divisional Officer-cum-First Class Magistrate. This officer cannot normally exercise this power but would do it only on special occasions, such as, when the Judicial Magistrate concerned is not available or, while on tour in mofussil, a complaint regarding the commission of a serious offence is lodged before him and urgent action is deemed necessary. If a complainant approaches the Sub-divisional Officer at a time when the Judicial Magistrate empowered to deal with the Sub-divisional Officer should refer the pa...

but if the complainant insists on filing the complainant act in the way as indicated in the next paragraph or judicial, taking cognizance of a private compl...

initial deposition of the complainant, satisfy himself whether a previous complaint petition on the same facts has previously been filed before any other Magistrate and dismissed by him under section 203 of the Code and in case such a petition has been filed and dismissed, he may call for the record of such a case from the court where it has been previously filed. The court to which such a requisition is sent should comply with it.
The Sub-divisional Officer taking cognizance of any offence under section 190 (1) (a) of the Code should, after holding such inquiry as he may consider necessary under section 202 of the Code, decide whether to dismiss the complaint under section 203 of the Code or to issue process under section 204 against the accused person. If he decides that process should issue, he should intimate this fact to the Additional District Magistrate (Judicial), who, thereafter, should withdraw it to his file under section 528 (2) of the Code and either try it himself or transfer it for disposal to any subordinate Judicial Magistrate. Similarly under section 190 (1) (c) of the Additional District Magistrate indicated above.

Under no circumstances, the Executive Magistrate should try or commit for trial any case of which cognizance has been taken by him under section 190 (1) (a) and (c) of the Code.

Although the general intention is that Executive Magistrates alone should exercise powers under the preventive sections of the Code, yet section 106 of the Code, by its very terms, can be invoked only after Magistrate has tried and convicted an accused person. Hence power under this section should be exercised by the Judicial Magistrate only.

The other proceedings contemplated in Chapters VIII to XIII of the Code have to be dealt with exclusively by Executive Magistrates.

Although the power of taking cognizance under section 190 (1) (b) of the Code is mainly with the Judicial Magistrate, yet with a view to enable the Sub-divisional officers and other Magistrates selected by the Government to control investigation in Police cases, the State Government may vest these Executive Magistrates with powers under section 190 (1) (b) for the sole purposes of sections 157-159, 165 (5) and 167 of the Code. Under this power, the Executive Magistrate so empowered would also be entitled to pass necessary orders on the final reports submitted by the Police in cognizable cases.

In cognizable cases, although the Judicial Magistrate is empowered to take cognizance on Police reports under section 190 (1) (b) of the Code, he has nothing to do with the investigation of the cognizable case till a charge-sheet is submitted before him. The first information report is, no doubt, to be sent by the Police to the Judicial Magistrate empowered to take cognizance as also the list of properties seized or recovered if there be search; but duplicate copies of the same are to be sent to the Executive Magistrate especially empowered by Government under section 190 (1) (b). Such Executive Magistrate has power to direct investigation or to depute a Magistrate to hold a preliminary inquiry under section 159 of the Code. The final report, if any, should be filed before the Judicial Magistrate empowered to take cognizance, and a duplicate copy of the same is to be sent to the Executive Magistrate who has power of directing the Police to further investigate into the case or to submit the charge-sheet, as the case may be. The Judicial Magistrate cannot call for a charge-sheet on final report unless a protest petition is filed before him, in which case, he may exercise the power of calling for a charge-sheet, if necessary.

Under section 167 of the Code, Police may produce the accused arrested in a cognizable case before any Magistrate within twenty four hours of apprehension for remanding him to custody for a period not exceeding fifteen days on the whole. If that Magistrate has no jurisdiction to try the case or to commit it for trial and considers further detention unnecessary, he should
order the accused to be forwarded to the Judicial Magistrate having such jurisdiction. During the stage preceding will be granted to the accused by the Magistrate concerned. Power under may be exercised by the Executive Magistrate, matter is urgent, the confession or statement may be recorded by the Judicial Magistrate.

The power of a Magistrate under section 135 (2) of the Code to direct the Police to investigate non-cognizable cases is ordinarily to be exercised by the Judicial Magistrate before whom complaints of such offences and petitions disclosing such offences are generally expected to be filed. If, however, such complaints and petitions are filed before Executive Magistrates, they may also exercise powers under section 155 (2) and direct the Police to investigate non-cognizable cases, if such a direction is considered necessary. If the Police investigation results in the submission of final report, that report is to be sent to the Magistrate who directed the investigation. If it ends in a submission of the charge-sheet, such charge-sheet is also to be filed before the Executive Magistrate ordering the investigation who after merely pursuing the same has to forward it to the Judicial Magistrate concerned for taking cognizance under section 190 (1) (b) of the Code.

Powers under certain other sections of the Code and other enactments are to be exercised concurrently, for example, the report under section 52 should be sent to both categories of Magistrates. So also the powers under section 100 relating to search for wrongfully confined persons may be exercised by both the categories of Magistrates. The power to tender pardon during the stage of investigation under section 337 (1) (b) of the Code, First paragraph, is allotted exclusively to the Executive District Magistrate.

The District Magistrate (Executive) and the Additional District Magistrate (Judicial) have to act independently of each other in their respective spheres of work. Neither have to interfere with the discharge of work by the other.

Allocation of function has been made under the Criminal Procedure Code, the Police Manual, the Police Act and the Jail Manual. Allocation of functions has also been made under the various Local and Central Acts.

The lists of the allocation of functions are not exhaustive. In respect of any matter left out, the allocation of functions has to be made on the following principles: Matters which involve the appreciation or sifting of evidence and the formulation of a decision on any punishment or penalty or to detentive him up for trial before any court should be with the Judicial Magistrate.

If a question arises whether a matter not included in the lists falls within the province of one class of Magistrates or the other, and the matter is urgent, the Executive Magistrate has to decide the question which has to decide the matter in consultation with the general principles laid down above and

Punjab

In the State of Punjab, the separation was effected on Order 2, 1964 in all the districts except certain scheduled areas. Through legislation, namely, 93.
namely, the Punjab Separation of Judicial and Executive Functions Act, 1964. It appears that the Maharashtra pattern is adopted in this State. The scheme is run by Chief Judicial Magistrate and Judicial Magistrates of the First Class and the Second Class who are responsible for their action to the District and Sessions Judges and through them to the High Court. All the offences under the Indian Penal Code and other Special Acts including the Criminal Procedure Code except those which are in the nature of police functions and executive duties such as sections 13, 144-147 of the Code of Criminal Procedure, are the exclusive concerns of the Judicial Magistrates.94

Ordinary powers of a Judicial Magistrate of the Second Class are the same as those of the Third Class in Maharashtra on commission, s. 503 Cr. P. C.

Ordinary powers of a Judicial Magistrate of the First Class are the same as those of a Judicial Magistrate of the First Class in Maharashtra on commission, s. 503 Cr. P. C.

Cr. P. C. (3) Power to discharge sureties, ss. 126 and 126-A, Cr. P. C.

Ordinary powers of a Chief Judicial Magistrate are: (1) Ordinary powers of a Judicial Magistrate of the First Class. (2) Power to try juvenile offenders, s. 29-B, Cr. P. C. (3) Power to require delivery of letters, telegram etc., s. 95, Cr. P. C. (4) Power to issue search warrants for documents in custody of postal or telegraph authorities, s. 96, Cr. P. C. (5) Power to release persons imprisoned for failing to give security under s. 106, s. 124, Cr. P. C. (6) Power to cancel any bond for keeping the peace under s. 106, s. 125, Cr. P. C. (7) Power to order police investigation into a cognizable case, s. 156, Cr. P. C. (8) Power to issue process for a person within the local jurisdiction who has committed an offence outside the local jurisdiction, s. 186, Cr. P. C. (9) Power to entertain complaints, s. 190, Cr. P. C. (10) Power to receive police reports, s. 190, Cr. P. C. (11) Power to entertain cases without complaint, s. 190, Cr. P. C. (12) Power to transfer cases to a subordinate Magistrate, s. 192 Cr. P. C. (13) Power to order preliminary investigation by a police officer not below the rank of an Inspector in certain cases, s. 196 B Cr. P. C. (14) Power to try summarily, s. 260, Cr. P. C. (15) Power to tender pardon to accomplice at any stage of a case, 337, Cr. P. C. (16) Power to pass sentence on proceedings recorded by a Subordinate Magistrate, s. 249, Cr. P. C. (17) Power to call for records, s. 435, Cr. P. C. (18) Power to order inquiry, s. 436, Cr. P. C. (19) Power to order commitment, s. 437, Cr. P. C. (20) Power to report a case to High Court, s. 438 Cr. P. C. (21) Power to withdraw cases and to try or refer them for trial, s. 528, Cr. P. C. (22) Power to compel restoration of abducted female, s. 552, Cr. P. C.

Additional powers with which a Judicial Magistrate of the First Class may be invested by the High Court are the same as those of a Judicial Magistrate of the First Class in Maharashtra mentioned in (1)-(6) and (9) and the power to try juvenile offenders, s. 29B, Cr. P. C.

Additional powers with which a Judicial Magistrate of the Second Class may be invested by the High Court are the same as those of a Judicial Magis-

trate of the Second Class in Maharashtra given in (1)-(6) and (8) and the power to try juvenile offenders, s. 29B, Cr. P. G.

Additional powers with which a Judicial Magistrate of the First Class may be invested by the Chief Judicial Magistrate are the same as those of any Judicial Magistrate when empowered by the Sessions Judge.

Additional powers with which a Judicial Magistrate of the Second Class may be invested by the Chief Judicial Magistrate are: (1) Power to take cognizance of offences upon complaint, s. 190, Cr. P. C. (2) Power to take cognizance of offences upon police reports, s. 190, Cr. P. C. (3) Power to stop proceedings instituted otherwise than upon complaint, s. 249, Cr. P. C.

Rajasthan

In the State of Rajasthan, executive steps for effecting separation were first taken in April 1962. The separation was effected in twelve out of twenty-six districts. In thirteen districts, the separation was partial. There was no separation in one district. As the process continued thereafter, by now it might have the districts. There is no separate cadre of Iges and Munisfs have been invested with mag to try offences under the Indian Penal Code and the Indian Railways Act only. Trial of offences under other Acts, like the Excise Act, Municipal Act etc., remains with the Executive Magistrates. The Civil Judges and Munisfs functioning as Magistrates fall under the administrative control of the High Court through the District and Sessions Judges.

Uttar Pradesh

In the State of Uttar Pradesh in November 1949, even before the Constitution was enforced, the Government had issued orders dated May 20, 1949 for a separate and independent separation of Executive and judicial functions. The District Magistrate was not under the control of the District Magistrate but under that of the Divisional Commissioner. The Judicial Magistrates were empowered to take direct cognizance of cases under the Indian Penal Code which were to be tried exclusively by them. Cases under the Code of Criminal Procedure and miscellaneous, local and special Acts were, however, to be tried by Sub-Divisional Magistrates and other Executive Magistrates. Similarly, in regard to the revenue case work, it was ordered that all suits and proceedings under the Tenancy Act and other miscellaneous Acts triable by Assistant Collectors would be tried by Judicial Officers who were also invested with powers of an Assistant Collector of the First Class. Suits and proceedings under the Land Revenue Act were, however, to be tried by Sub-Divisional Officers and Assistant Collectors on the executive side. In the beginning the scheme was enforced in some districts only, but thereafter it was progressively extended to many more districts and till 1967 it was in force throughout the State except in the districts constituting Kumaun and Uttarkhand Divisions.

95. Ibid.
The above separation was only partial and did not completely satisfy the requirements of article 50 of the Constitution. One of the shortcomings of the scheme was that although Judicial Magistrates were not under the control of the District Magistrates, they were under the control of the Divisional Commissioner, who was an executive authority, and through him to the Executive. In the opinion of the Law Commission, this separation was only in form; its substance, namely, the freeing of the judicial officers from the executive was not achieved.\textsuperscript{92}

In September, 1967, the Government, therefore, decided to bring about a more complete separation from October 2. It issued an Order\textsuperscript{93}, dated the 29th September, 1967, under Article 237 of the Constitution which made the following provisions:

All members, except some, of the Uttar Pradesh Judicial Officers' Service were placed under the administrative control of the High Court from October 2, 1967. They formed a separate wing under the High Court and were not merged with the cadres of the Uttar Pradesh Civil Service (Judicial Branch) and the Uttar Pradesh Higher Judicial Service. It was clarified that notwithstanding section 17(5), Code of Criminal Procedure, the High Court would exercise its administrative control over Additional District Magistrates (Judicial) and other Magistrates belonging to the said service, under Article 235, through the District and Sessions Judges. The Additional District Magistrates (Judicial), already invested with all the powers of a District Magistrate, would continue to exercise those powers in relation to Judicial Magistrates and Munsif Magistrates, while District Magistrates would continue to exercise similar power in relation to Executive Magistrates and Special Railway Magistrates. In regard to sections 192 (1) and 528 (2) of the Code, occasions might arise when a District Magistrate might have to transfer a case wrongly instituted in the Court of an Executive Magistrate to the Court of a Judicial Magistrate, or in a converse situation, an Additional District Magistrate (Judicial) might have to transfer a case to an Executive Magistrate, but these powers would, as a matter of convention, be exercised by the officers concerned only in consultation with their counterparts. The Police would continue to send cases under the Indian Penal Code (including applications for remand and final reports under section 169, Code of Criminal Procedure in respect of such cases) to the Judicial Magistrates and other cases to Executive Magistrates. The same distribution would be observed in respect of complaint cases and if a complaint case was received in the Court of a Magistrate contrary to this distribution, action should be taken under section 192 or 528 of the Code of Criminal Procedure.

In a district, Judicial Officers are subordinate to the Additional District Magistrate (Judicial) who, in turn, is subordinate to the District and Sessions Judge and through him to the High Court. Promotion of Judicial Officers to the post of Additional District Magistrate (Judicial) is made by the Government in consultation with the High Court.

Under the arrangement that existed before October 2, 1967, all suits and proceedings under the Uttar Pradesh Zamindari Abolition and Land Reforms Act (and allied Acts), the Uttar Pradesh Land Revenue Act and other miscellaneous Acts triable by Collectors or Assistant Collectors, as well as sales of immovable property ordered under section 63 of the Code of Civil Procedure were dealt with by Judicial Officers. The Judicial Officers working as Magistrates

\textsuperscript{92} Law Commission, op. cit.
\textsuperscript{93} G. O. No. F-5690-11-I-C-54/1961.
ceased to try these cases from the said date. The work is now handled by the sub-Divisional Officers and other Deputy Collectors or such Judicial Officers as are had on deputation from the High Court from time to time for the purpose.

The position before October 2, 1967, was that Judicial Officers dealt with all cases under the Indian Penal Code and were also empowered to take cognizance, under section 190 (1)(a) and (b) of the Code of Criminal Procedure, of offences under the Indian Penal Code. On the implementation of the scheme, they continued to deal with all such cases. The Executive Magistrates continued to deal with all cases under the Code of Criminal Procedure, particularly under sections 107/117, 109/110, 145; all cases under other miscellaneous local and special Acts, such as Arms Act, Excise Act, Prevention of Food Adulteration Act, Gambling Act, Essential Commodities Act etc.; and conduct of identification proceedings, recording of dying declarations, confessions and statements under section 164, Code of Criminal Procedure.

On the transfer of Judicial Officers to the control of the High Court, they are no longer available, as before, to the District Magistrates for law and order duties arising from day to day. But in cases of urgent and pressing necessity when the other resources at the disposal of the District Magistrate are, in his view, inadequate, he can avail of the services of the Judicial Officers posted in the district with the approval of the District and Sessions Judge who, in due course, has to report the matter to the High Court for its information. The services of Judicial Officers on deputation for dealing with revenue case work can also be utilised by the District Magistrate in meeting difficult law and order situations. For this purpose, the Magisterial powers of the Judicial Officers are continued. Consultation with the District and Sessions Judge for utilising the services of such Officers in connection with the maintenance of law and order is not necessary.

After October 2, 1967, no further recruitment of Judicial Officers has to be made and the normal wastage in their cadre has to be made good by the recruitment of an equal number of munsifs for the disposal of Criminal case work and Deputy Collectors for the disposal of revenue case work. Thus, in course of time, the cadre of Judicial Officers would disappear and ultimately criminal cases under the Indian Penal Code at the Magisterial level, would all come to be dealt with by Munsif-Magistrates, while revenue case work would gradually be taken over by Deputy Collectors.

The necessary number of Judicial Officers may be obtained from the High Court, from time to time, for deputation to the Railways.

For administrative reasons, the scheme of separation is not applicable to Kumaun and Uttarkhand Divisions except to the extent that the Judicial Officers posted at Nainital and Almora are transferred to the control of the High Court, but in other respects, the status quo for the disposal of revenue and criminal case work in these Divisions is maintained.

Subsequently a Notification dated the 30th September, 1967, was issued, in which the Government directed that the following provisions of Chapter VI of Part VI in relation to such M (Judicial), as belong to the Uttar Pradesh Judicial Officers' Service as

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they apply in relation to person appointed to the Judicial Service subject to the following exceptions and modifications, namely (i) promotion of a Magistrate to be made by the Governor of Prades Judicial Officers' defined in clause (b) of Article 236 and the said Magistrates are not eligible for appointment as District Judges under clause (1) of Article 233; (iii) in relation to such of the said Magistrates as are placed on deputation by the High Court with the State Government for discharging the duties of Assistant Collectors or of Special Railway Magistrates, the control over them, including their posting and the grant of leave to them, while they are so serving on deputation, is vested in the Government alone; (iv) the provisions of the said Chapter of the Constitution cease to apply in relation to any such Magistrate if he is appointed as Additional Commissioner by the Governor provided that in the event of his reversion or reduction from that post as Magistrate, the provisions of the Chapter would again become applicable subject as aforesaid.

It was also provided that appointment of any Magistrate, including Additional District Magistrate (Judicial), belonging to the Uttar Pradesh Judicial Officers' Service to the post of Additional Commissioner is to be made by the Government in consultation with the High Court. In the event of any existing Additional Commissioner belonging to the Uttar Pradesh Judicial Officers' Service being in future reverted or reduced as Magistrate, the provisions of the said Chapter of the Constitution, subject as aforesaid, would be applicable to him as well.

West Bengal.

With a view to give effect to the directive principal in Article 50 of the Constitution to separate the Judiciary from the Executive in the public service of the State of West Bengal, the Governor of the State promulgated the West Bengal Separation of Judicial and Executive Functions Ordinance, 1968 on the 26th January, 1968. Later this Ordinance was replaced by the President Act 8 of 1968, namely, the West Bengal Separation of Judicial and Executive Functions Act, 1968, published in the Gazette of India, dated March 26, 1968. Though the Act is extended to the whole of the State, its provisions would have effect on the date notified by the Government. Different dates may be appointed for different districts.

The Act contemplates two classes of Magistrates, namely, (1) Magistrates appointed by the State Government in consultation with the High Court to be referred to as Judicial Magistrates, and (2) Magistrates appointed by the Government without such consultation to be referred to as Executive Magistrates. Where under any law the functions exercisable by a Magistrate relate to inquiry into, or cognizance, investigation or trial of, an offence, such functions are to be exercised by a Judicial Magistrate. Where such functions relate to matters which are administrative or executive in nature, or relate to prevention of an offence, they are to be exercised by an Executive Magistrate. These provisions do not apply to a Presidency Magistrate who would exercise such functions as are provided in the Code of Criminal Procedure or any other law.

The State Government may, in consultation with the High Court, appoint persons from among the members of the Judicial Service of the State to be Magistrates of the First, Second or Third class in any district outside the Presidency-town, to be referred to as Judicial Magistrates. In the same manner, persons who are or have been members of the West Bengal Civil
Service (Executive) or the West Bengal Junior Civil Service, may be appointed as Judicial Magistrates in any district, outside the Presidency-town. Similarly the Government may define the local areas within which all these Magistrates may exercise all or any of the powers with which they may be invested. In the absence of such provision, jurisdiction of Judicial Magistrates would extend throughout such district. Appointment and control of Judicial Magistrates would be in accordance with the terms of the notification issued under Article 237.

The High Court may place any Judicial Magistrate of the First or Second class in charge of a sub-division. Then he would be called a Sub-Divisional Judicial Magistrate. A Sessions Judge may exercise this power if delegated by the High Court.

The Court, confer upon any person or possess under the Union or a State any of the powers conferred or conferable on a Judicial Magistrate of the First, Second or Third class in regard to a particular case or class of cases, or in regard to cases, generally, in any local area outside the Presidency town. Such Magistrates are to be called Special Judicial Magistrates appointed for a specified period.

All Judicial Magistrates would, subject to the control of the Sessional Judge, be subordinate to the Sub-Divisional Judicial Magistrate who may, from time to time, distribute the business; In certain situations, the Sub-Divisional urgent applications referred to him by subordinate to the latter.

Offences triable under other laws by specified Executive Magistrates would be tried by specified Judicial Magistrates.

The Government may, in consultation with the High Court, invest any Judicial Magistrate of the First class who has been in service for ten years or in that of an Assistant Sessions Judge to all offences not punishable with death or term exceeding seven years.


Ordinary powers of a Judicial Magistrate of the Third class (Presidency Magistrate excluded) are the same as those of a Judicial Magistrate of the Third class in Maharashtra given in (1) — (9), (13) — (15), and (17) — (22), and the following: (1) Power to issue commission for examination of witnesses, s. 503, Cr. P. C. (2) Power to apply to Sub-Divisional Judicial Magistrate to issue commission for examination of witnesses, s. 505 (3), Cr. P. C.
Ordinary powers of a Judicial Magistrate of the Second Class (Presidency Magistrate excluded) are the same as those of a Judicial Magistrate of the First Class. - (3) Power to discharge surety, s. 126-A, Cr. P. C.

Ordinary powers of a Sub-divisional Judicial Magistrate (Presidency Magistrate excluded) are: (1) The ordinary powers of a Judicial Magistrate of the First Class. - (2) Power to try juvenile offenders, s. 29-B, Cr. P. C. - (3) Power to order police investigation into cognizable cases, s. 156, Cr. P. C. - (4) Power to receive report of police officer and pass order, s. 173, Cr. P. C. - (5) Power to issue process for person within local jurisdiction who has committed an offence outside the local jurisdiction, s. 186, Cr. P. C. - (6) Power to entertain complaints, s. 190 (1) (a), Cr. P. C. - (7) Power to receive police reports, s. 190 (1) (b), Cr. P. C. - (8) Power to entertain cases without complaint, s. 190 (1) (c), Cr. P. C. - (9) Power to transfer cases to a Subordinate Magistrate, s. 192, Cr. P. C. - (10) Power to pass commitment, s. 437, Cr. P. C. - (11) Power to report case to High Court, s. 438, Cr. P. C. - (12) Power to sell property alleged or suspected to have been stolen etc., s. 524, Cr. P. C. - (13) Power to withdraw cases and to try or refer to them for trial, s. 528, Cr. P. C. - (14) Power to compel restoration of abducted females, s. 552, Cr. P. C.

Additional powers with which a Judicial Magistrate of the First Class (Presidency Magistrate excluded) may be invested by the Government in consultation with the High Court are the same as those of a Judicial Magistrate of the First Class in Maharashtra mentioned in (1) - (4), (6) and (9) and the following: (1) Power to try juvenile offenders, s. 29-B, Cr. P. C. - (2) Power to sell properties alleged or suspected to have been stolen, s. 524, Cr. P. C.

Additional powers with which a Judicial Magistrate of the Second Class (Presidency Magistrate excluded) may be invested by the Government in consultation with the High Court are the same as those of a Judicial Magistrate of the Second Class in Maharashtra given in (1) - (6) and 8 and the power to try juvenile offenders, s. 29, Cr. P. C.

Additional powers with which a Judicial Magistrate of the Third Class (Presidency Magistrate excluded) may be invested by the Government in consultation with the High Court are the same as those of a Sub-divisional Judicial Magistrate of the Second Class in Maharashtra given in (1) - (6) and 8 and the power to try juvenile offenders, s. 29-B, Cr. P. C.

Additional power with which a Sub-divisional Magistrate (Presidency Magistrate excluded) may be invested by the Government in consultation with the High Court is the Power to call for records, s. 435, Cr. P. C.

Powers with which a Judicial Magistrate of the First Class (Presidency Magistrate excluded) may be invested by the Sessions Judge are: (1) Power to take cognizance of offences upon complaint, s. 190 (1) (a), Cr. P. C. - (2) Power to take cognizance of offences upon police report, s. 190 (1) (b), Cr. P. C. - (3) Power to transfer cases, s. 192, Cr. P. C.
Powers with which a Judicial Magistrate of the Second Class (Presidency Magistrate excluded) may be invested by the Sessions Judge are: (1) Power to take cognizance of offences upon complaint, s. 190 (1) (a) Cr. P. C. (2) Power to take cognizance of offences upon police reports, s. 190 (1) (b), Cr. P. C.

Powers with which a Judicial Magistrate of the Third Class (Presidency Magistrate excluded) may be invested by the Sessions Judge are: (1) Power to take cognizance of offences upon complaint, s. 190 (1) (a) Cr. P. C. (2) Power to take cognizance of offences upon police reports, s. 190 (1) (b) Cr. P. C.

Under these provisions, the Sessions Judge has to exercise the power subject to the control of the High Court and the State Government.

Whenever under the Code of Criminal Procedure or any other law, any judicial power is to be conferred on any Judicial Magistrate, the order conferring such power would be made by the State Government in consultation with the High Court.

A Judicial Magistrate may be empowered to take cognizance of any offence (upon receiving a complaint of facts which constitute such offence or upon a report of such facts made by any police-officer) for which he may try or commit for trial.

Any Presidency Magistrate, Sub-Divisional Judicial Magistrate or Judicial Magistrate of the First Class or any Judicial Magistrate not being a Judicial Magistrate of the Third Class, empowered in this behalf by the Government in consultation with the High Court, may commit any person for trial to the Court of Session or High Court for any offence triable by such court.  

Jammu and Kashmir

It appears that in the State of Jammu and Kashmir, law has been passed for separation of the judiciary from the executive.

Nagaland

It appears that there is no separation or plan for separation in the State of Nagaland.

Union territories

Parliament has passed the Union Territories (Separation of Judicial and Executive Functions) Act, 1969. The Act extends to all Union territories except Chandigarh. They are Delhi, Himachal Pradesh, Manipur, Tripura, Andaman and Nicobar Islands, Laccadive, Minicoy and Aminidi Islands, Dadra and Nagar Haveli, Goa, Daman and Diu and Pondicherry. It would come into force in various territories or their different areas on dates to be notified by the Central Government. The Legislative Assembly of a Union territory may amend this Act in its application to that Union territory.

The Act provides that a Judicial Magistrate has to exercise functions exercisable by a Magistrate under any law, relating to matters which involve

3. Ibid.
the appreciation or sifting of evidence or the formulation of any decision which exposes any person to any punishment, or penalty, or detention in custody pending investigation, inquiry or trial or would have the effect of sending him for trial before any court. These functions are exercisable subject to the provisions of the Act and the Code of Criminal Procedure, as amended by the Act where the functions relate to matters which are administrative or executive in nature, such as the grant of a licence, the suspension or cancellation of a licence, sanctioning a prosecution, or withdrawing from a prosecution. They are exercisable, subject as aforesaid, by an Executive Magistrate.

On the commencement of this Act in the transferred areas in Himachal Pradesh and Punjab Separation of Judicial and Executive Function Act, 1964, and the Code of Criminal Procedure, as in force immediately before such commencement in these areas would stand repealed, and further the Criminal Procedure Code as amended by this Act would extend to, and come into force in, these areas and the provisions of the laws, other than the Code, amended by the Punjab Act, would have effect in these areas as if such provisions had not been amended by the Punjab Act. Transferred areas are the territories added to the Union territory of Himachal Pradesh by the Punjab Reorganisation Act, 1966, except the districts of Lahaul and Spiti.

The Act contemplates two classes of Magistrates: Judicial Magistrates and Executive Magistrates. The Judicial Magistrates are Chief Judicial Magistrates, Judicial Magistrates of the First Class and Judicial Magistrates of the Second Class.

The Government, in consultation with the High Court, would invest a Judicial Magistrate of the First Class with the powers of a Chief Judicial Magistrate under the Code or any other law.

The Government, in consultation with the High Court, may appoint any Judicial Magistrate of the First Class to be an Additional Chief Judicial Magistrate who would exercise such powers of a Chief Judicial Magistrate as given to him.

For the purposes of sections 88 (6c), 192 (1), 406B and 528 (2) and (2A), the Additional Chief Judicial Magistrate would be deemed to be subordinate to the Chief Judicial Magistrate.

The Government, in consultation with the High Court, may confer on a Civil Judge or a member of the Judicial Service of a Union territory, the powers of any class of Judicial Magistrates in any district.

The Government, in consultation with the High Court, may, for a maximum period of three years from the commencement of the Act, appoint members of a Civil Service in any Union territory or in any State and who are or have been exercising the powers of a Magistrate, Judicial Magistrates in any district.

All Judicial Magistrates would, subject to the control of the Sessions Judge, be subordinate to the Chief Judicial Magistrate who would distribute business among them. All Chief Judicial Magistrates would be subordinate to the Sessions Judge.

In certain situations, the Sessions Judge may make provision for the disposal of any urgent application by the Chief Judicial Magistrate.

Offences triable under other laws by specified Executive Magistrates would be tried by specified Judicial Magistrates.
The Government, in consultation with the High Court, may invest any Chief Judicial Magistrate or any other Judicial Magistrate of the First Class, who has served as a First Class Magistrate for ten years, or the Judicial Magistrate of the First Class has acted as an Assistant Sessions Judge, with power to try as a Judicial Magistrate all offences not punishable with death or imprisonment for life or for a term exceeding seven years.

Ordinary powers of a Judicial Magistrate of the Second Class are the same as those of a Judicial Magistrate of the Third Class in Maharashtra mentioned in (1)—(9), (13)—(15) and (17)—(22), and the following: (1) Power to order the police to investigate an offence in cases in which the Magistrate has jurisdiction to try or commit for trial, s. 155, Cr. P. C. (2) Power to issue commission for examination of witness, ss. 503, 506.

Ordinary powers of a Judicial Magistrate of the First Class are the same as those of a Judicial Magistrate of the First Class in Maharashtra given in (2)—(10) and (14)—(16), and the following: (1) Ordinary powers of a Judicial Magistrate of the Second Class, (2) Power to require execution of a bond, s. 106, Cr. P. C. (3) Power to discharge sureties, s. 126A, Cr. P. C.

Ordinary powers of a Chief Judicial Magistrate are the same as those of a Chief Judicial Magistrate mentioned in (1)—(9), (13)—(15) and (17)—(22), and the following: (1) Power to hear appeals from orders rejecting sureties, s. 406A, Cr. P. C.

Additional powers with which a Judicial Magistrate of the First Class may be invested by the Government in consultation with the High Court are the same as those of a Judicial Magistrate of the First Class in Maharashtra mentioned in (1)—(4), (6) and (9) and the power to try juvenile offenders, s. 29B, Cr. P. C.

Additional powers with which a Judicial Magistrate of the Second Class may be invested in the aforesaid way are the same as those of a Judicial Magistrate of the Second Class in Maharashtra mentioned in (1)—(6) and (8) and the power to try juvenile offenders, s. 29B, Cr. P. C.

Additional powers with which a Judicial Magistrate of the First Class may be invested by Chief Judicial Magistrate are the same as those of any Judicial Magistrate where authorised by the Sessions Judge in Maharashtra.

Additional powers with which a Judicial Magistrate of the Second Class may be invested in the aforesaid way are the same as those of a Judicial Magistrate of the Second Class, authorized by the Sessions Judge in Punjab given in (1) and (2).

Under these provisions, the Chief Judicial Magistrate has to exercise his power subject to the control of the High Court.

Whenever under the Code of Criminal Procedure or any other law relating to any of the matters in the State and Concurrent Lists in the Seventh Schedule of the Constitution, any judicial power is to be conferred on a Chief Judicial Magistrate or any other Judicial Magistrate, the order conferring such power would be made by the State Government in consultation with the High Court.

A Chief Judicial Magistrate or any other Judicial Magistrate of the First Class may direct a warrant to any landlord, farmer or manager of
land within his jurisdiction for the arrest of any escaped convict, [proclaimed offender or person who has been accused of a non-bailable offence and who has eluded pursuit.

The Chief Judicial Magistrate may cancel any bond for keeping the peace executed under section 106.

Any Judicial Magistrate of the First Class or of the Second Class, especially empowered, may record any statement or confession made to him in the course of an investigation.

The Chief Judicial Magistrate may call for and examine the record of any proceedings before any Judicial Magistrate under his jurisdiction for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such Magistrate, and may, when calling for such record, direct that the execution of any sentence or order be suspended and if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

The Government, in consultation with the High Court, may authorise the Chief Judicial Magistrate to withdraw from any subordinate Magistrate either such classes of cases as he thinks proper, or particular classes of cases.4

The real purpose of the reform of separation of judiciary from executive of the judiciary freed of all sus- direct or indirect. It incidentally entirely to judicial duties and this fact leads to efficiency in the administration of justice"5 As is obvious from the description given above, it is of great satisfaction that the reform has been carried out in almost all the States and Union territories.

4. The Gazette of India Extraordinary, Part II—Section 1, Monday, June 2, 1969, at pp. 143-177.
5. Law Commission, op. cit., at p. 850.
CHAPTER XX
MODERN JUDICIARY—HIGH COURTS

Introduction

The year 1861 witnessed a very important development in the history of the judicial institutions of India. The Indian High Courts Act was passed in that year to terminate the duplication of jurisdiction as between the courts of the Company and of the Crown, and to establish a unified system of High Courts.

Brief history

The history of the two systems of courts may be briefly traced as follows. The Crown's Charter of 1600 granted to the East India Company the power to make laws for its government and to impose fines such and penalties as might be necessary for enforcing these laws. The Charter of 1661 empowered each Governor-in-Council to judge all persons belonging to the Company or living under them. The Charter of 1683 authorized the establishment of Courts of Admiralty. In 1688, the Company, with the consent of the King-in-Council, established a Mayor Court at Madras. Under the Charter issued in 1726, the Madras Mayor Court was reconstituted and Mayor Courts were established at Calcutta and Bombay. Each Governor-in-Council was also constituted a Court of Record to which an appeal lay from the Mayor Court with a further appeal to the King-in-Council in certain cases. Five senior members of the Council were declared to be Justices of the Peace and were required to hold Quarter Sessions for the trial of criminal cases except those relating to high treason for which the accused persons were to be sent to England. The Charter of 1753 re-established the Mayor Courts, and established a Court of Requests at each Presidency-town to try petty civil suits.

The position in 1765 in the Presidency-towns, therefore, was that civil justice was administered by the Mayor Courts and the Courts of Requests, and criminal justice by the Governors-in-Council. Outside these towns, the rule of the Moghul prevailed. The collection of revenue and the administration of civil justice were comprised in the Diwani. The military government and the administration of criminal justice were comprised in the Nizamat. The functions of the Diwani and the Nizamat were performed by the officers of the Moghul. After the grant of Diwani in 1765, the Company became directly responsible for the administration of civil justice and indirectly responsible for the administration of criminal justice on account of having military power. It established subordinate, diwani and faujdari adalats in the Mofussil. At each Presidency-town superior Courts, styled as Sadar Courts, were established, to exercise appellate jurisdiction. The Sadar Diwani Adalat, presided over by the Governor-in-Council (at Calcutta by Governor-General-in-Council under the Regulating Act of 1773), dealt with civil cases, while the Sadar Nizamat Adalat at Madras and Bombay), presided at Calcutta by the Governor-General-in-Council; from 1790 till then by a Deputy of the Nawab), dealt with criminal matters. From 1801 these Courts were placed in the charge of a Chief Justice and puisne Judges.

In the meantime, the Mayor Court at Calcutta was superseded by the Supreme Court in 1774, and at Madras and Bombay by the Recorder's Courts in 1797. The Recorder's Court at Madras was, in its turn, replaced by the Supreme Court in 1801, and at Bombay in 1823. The establishment
of the Supreme Court at Calcutta and the exercise by it of an unlimited jurisdiction led to a conflict between the Supreme Court on the one hand and the Governor-General-in-Council and the courts of the Company on the other. The conflict was resolved by the Act of Settlement, 1781, which restricted and defined the powers of the Supreme Court, and recognized the jurisdiction of civil and criminal courts of the Company and the appellate powers of the said Council as the Sadar Court. A dual system of courts, therefore, came into existence in this country.\footnote{1}

Before the passing of the Indian High Courts Act, 1861, the jurisdiction of the Supreme Courts at Calcutta, Madras and Bombay was, in the main, limited to these towns respectively. It may be stated briefly to have extended over the following class of persons: (1) British subject\footnote{2} throughout India in all civil and criminal matters; (2) inhabitants of Calcutta, Madras and Bombay within fixed limits, whether natives or others, in all civil and criminal matters; (3) native subjects, servants of the Company or any British subject, for acts committed as such, with limitations in certain civil matters; (4) native subjects in civil matters for transactions by which they had bound themselves by bond to be amenable to the Supreme Courts; and (5) all persons whatsoever for crimes maritime.\footnote{3} As is evident, the jurisdiction of the Supreme Courts was original.

As regards the substantive law administered by the Supreme Courts, it was the law of England, civil and criminal, so far as it was applicable, except in cases of Hindu and Mohammedans, relating to matters like contract, succession and inheritance, where the Hindu or Mohammedan Law was applicable according to the religion of the parties or of the defendant in case their religions were not the same. Until 1834, these Courts, for the most part, were amenable to the legislative authority of the Parliament and to such regulations of the Government as they chose to acknowledge and register, but thereafter also to the Acts of the Governor-General-in-Council.\footnote{4}

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2. Later on called European British subjects. See In re Nataraja Iyer I. L. R. 36 Mad 72, at p. 79 (1912).

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of India, op. cit., p. 382.
As regards procedure, the Supreme Courts, with their common law, equity, ecclesiastical and admiralty sides, had adopted on each side the appropriate English practice, except the oral examination of witnesses was taken down completely in writing. The law of evidence also followed English development. 5

The Judges of the Supreme Courts were barristers of five years' standing sent from England. They were appointed by the Crown and held office during its pleasure.

The Company had also established a regular hierarchy of courts in the Provinces beyond the Presidency-towns with the Sadar Courts, both Civil and Criminal, at the apex. The Sadar Diwani Adalats recognized by the Parliament at different dates, dealt with civil appeals from the provincial courts. The Sadar Nizamat Adalat at Calcutta and the Sadar Faujdari Adalats at Madras and Bombay respectively dealt with appeals in criminal cases from the provincial courts. 6 Thus the Sadar Courts had appellate jurisdiction. They had no original jurisdiction. They, however, supervised the working on the subordinate courts.

The law applied by the Sadar and other courts of the Company was entirely devoid of uniformity and definite system. They were amenable to the regulations of the Government passed before 1834 and thereafter to the Acts of the Governor-General-in-Council. They applied Hindu Law and Mohammedan Law in matters, such as succession, inheritance and marriage where Hindus and Mohammedans were parties respectively, and customary law, so far as ascertainable, in similar cases to which other natives might be parties. In cases for which no law was specifically provided, the courts were to proceed according to justice, equity and good conscience, that is to say, in such cases, the Judges were obliged to exercise the best discretion. This expression was, however, naturally interpreted by English Judges as meaning the English law adapted, as far as might be, to local conditions. 7 In criminal matters, the Mohammedan Law of Crimes, as modified by the regulations, however, that this law was confined to the Provinces of India and Madras Province, being superseded .

In Bengal also, persons not professing Mohammedan faith were, on seeking exemption, excepted from being tried under the Mohammedan Law for offences cognizable under the general regulations. 8

The procedure followed in the Sadar and other courts of the Company was summary with no definite forms and was such as was, from time to time, prescribed by the regulations which, by a constant process of repeal and amendment, at last gave a very indefinite and obscure

5. Cambridge History of India, op. cit., at p. 332; Cowell, op. cit., at p. 159.
7. Cambridge History of India, op. cit., at pp. 383-384; Cowell, op. cit., at pp. 120-121; Cowell, op. cit., at p. 159.
expression to the rules which they laid down. As regards the law of
evidence, these courts followed English law, as far as it was accessible to
them, though they were not bound by it, and also an indefinite customary
law derived from Hedaya and the Mohammedan Law Officers, and there
were certain regulations dealing with a few special points. 9

The Judges of the Sadar and other courts of the Company were the
members of the civil service and they did not necessarily have the legal
knowledge and training. They were appointed by the Government and held
office during its pleasure.

Defects.

The dual system of courts suffered from many defects. A Chief Justice
of Bombay was once critical of the strange anomaly in the jurisprudential
condition of British India which consisted in the three principal cities
having systems of law and courts different from those of the Provinces of
which they were the capitals. 10 The Indians residing beyond the Presidency-
towns were supposed to be immune from the jurisdiction of the Supreme
Courts, but in some cases, they were subjected to their jurisdiction; this
was mainly due to an extended interpretation of the word 'inhabitants.'
While the Supreme Courts were empowered to exercise original jurisdic-
tion over the inhabitants of these towns only, the word 'inhabitants' was
so interpreted as to cover not only the persons actually residing in the
Presidency-towns but those persons also who possessed some property or
shop or had agents for commercial transactions in these towns though
they lived beyond their limits. Such persons were taken as constructive
inhabitants. Thus some Indians were subject to double system of laws
and courts. Apart from this anomaly in the jurisprudence of this country,
another great anomaly was inconsistency of decisions delivered by two
sets of courts in certain similar cases. Sometimes the decrees of the
Crown's courts interfered with the former decrees of the Company's courts.
Sometimes conflicting decisions were given by the Crown's and Company's courts
in respect of different parts of the same estate on similar grounds. 11 Thus
there was utter want of connection between the Supreme Courts and Company's
courts and the two types of legal process employed in them. The exercise
of the powers of one system was viewed with jealousy by those who were
connected with the other. 12

Besides, the inconvenience and delay entitled by the exclusive jurisdic-
tion of the Crown's Courts over Europeans beyond the Presidency-towns,
though mitigated to some extent by the Charter Act of 1813, continued to
affect adversely the administration of justice. Under the Charter Act, the
British subjects residing, trading or holding immovable property beyond
ten miles of the Presidency-towns were made amenable to the Company's
local civil courts although their right of appeal to the Crown's courts was
preserved; and Justices of the Peace were appointed to deal with debts due
by the British subjects not exceeding Rs. 50 and cases of trespass and assault
against them for which a fine upon Rs. 500 was prescribed. But more
serious cases had yet to be instituted in the Crown's courts.

12. Pointed out by Sir Charles Grey, Chief Justice of Bengal in 1822; cited in Cam-
bridge History of India, op. cit., at p. 379.
Attention may also be drawn to the cumbersome structure of the Supreme Courts with their common law, equity, admiralty and ecclesiastical sides, reproducing the separate English jurisdictions, and to the anomaly of the retention in them of the forms of pleading abandoned in England in 1852, and “to the dangers involved in leaving the administration of justice in the districts to judges without professional training, unassisted by any definite or uniform procedure or substantive law.”

In view of these defects, the amalgamation of the Supreme and Sadar Courts and their jurisdictions was clearly necessary; but “the differences in the procedure observed, and in the laws administered by these rival institutions, as well as the existence of a strong party feeling in favour of maintaining tribunals which should exercise exclusive jurisdiction over Europeans, rendered such system extremely difficult to abolish.”

Early steps towards unification.

The unification of the two rival sets of judicial institutions was, however, inevitable and it was finally effected in 1862. Earlier some steps were taken towards its fulfilment. In fact they were absolutely essential “to bridge over the wide gulf which separated the laws which they respectively administered, and the procedure which they respectively observed.” The Charter Act of 1833 enacted that all courts including the Supreme Courts would be bound by the Acts of the Governor-General-in-Council with a Law Member on its legislative side. Previously, the Supreme Courts were bound by only those laws of the Indian legislatures which were acknowledged and registered by them. Thus in the matter of laws of the Supreme Council, the Company’s courts were put at par with the Crown’s courts which were no longer required to register them. The Charter Act also declared that it was expedient to have a general system of judicial establishments and police to which all persons, Europeans as well as natives, might be subject at an early period; and that such laws as might be applicable in common to all classes of the inhabitants of the Company’s territories should be framed, due regard being had to the rights, feelings and peculiar usages of the people. It provided for the appointment of a Law Commission with a view to achieve the object of codification of Indian laws. The Law Commission, thus constituted, produced the draft of a Penal Code in 1837. Subsequently, its task was mainly confined to the periodical issue of reports, containing proposals on which subsequent legislation had since been founded and it became defunct after submitting a draft limitation law in 1842 and a scheme of pleadings and procedure with forms of indictments in 1848. This Law Commission was succeeded by another Law Commission constituted in England under the Charter Act of 1853 to examine and report on its recommendations within three years. The first duty of the Commission was the preparation of a Code of Civil Procedure, pending which the consolidation

13. Id., at pp 379-390.
15. Id., at pp. 159-160.
of the two sets of courts into one was postponed. The Code was passed in 1859; it was, however, not applied to the Crown’s courts. Then was taken up the law of limitation and prescription. In 1859, a Bill drafted by the First Law Commission and revised by the Second Law Commission became law. In 1860, the Penal Code, based on the draft made by the First Law Commission and revised later on, was passed. This was followed in 1861 by the Code of Criminal Procedure meant for the courts other than the Crown’s courts.

The passage of these enactments made a very long stride in the direction of one uniform system for the administration of justice. The next step was to amalgamate the Supreme and Sadar Courts and thus give rise to a unified system of courts. It was no difficult task after the abolition of the Company, the assumption of direct responsibility of the Government of India by the Crown and the consolidation of the Indian empire under the Queen, which took place in 1858. The object of unification was achieved by the Indian High Courts Act, 1861.

Unification by Indian High Courts Act, 1861

The Indian High Courts Act, passed on 16th August, 1861, was an Act for establishing High Courts of Judicature in India. It empowered Her Majesty to erect and establish, by Letters Patent, High Courts of Judicature at Calcutta, Madras and Bombay. The Judges of the High Courts were to hold office during Her Majesty’s pleasure. Upon the establishment of High Courts, the Supreme and Sadar Courts were to be abolished. The records and documents of the Courts so abolished, were to become the records and documents of the High Courts.

It was also lawful for Her Majesty to create a High Court of Judicature for such a territory as was not included within the limits of the local jurisdiction of another High Court.

Other important provisions of the Act may be studied under several heads.

Constitution.

Each High Court was to consist of a Chief Justice and as many puisme Judges, not exceeding fifteen, as Her Majesty might think fit to appoint from time to time. At least one third of these Judges, including the Chief Justice, were to be barristers of not less than five years’ standing; and one third of them were to be from amongst those members of the covenanted civil service of not less than ten years’ standing who had served as Zila Judges for a period of at least three years. The remaining posts were to be filled up from amongst the pleaders of the Sadar or Supreme Courts of at least ten

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17. As far back as 1852-53, a strong opinion was expressed that with a view to secure a better administration of justice, it was desirable to consolidate the Supreme and Sadar Courts into one so as “to unite the legal training of the English lawyers with the intimate knowledge of the customs, habits, and laws of the Natives possessed by the Judges in the country.” In 1853, when Sir Charles Wood

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years’ standing and Subordinate Judges or Judges of the Courts of Small Causes of at least five years’ service. A proviso was, however, attached to these positions. The persons who, at the time of the establishment of such High Court, were Judges of the Supreme Court and permanent Judges of the Sadar Adalat, were to become Judges of such High Court, without further appointment for that purpose, and the Chief Justice of the Supreme Court was to become Chief Justice of the High Court.

Jurisdiction.

Each of the High Courts to be established under the Act was to have and exercise all such civil, criminal, admiralty and vice-admiralty testamentary, intestate and matrimonial jurisdiction, original and appellate, and all such powers and authority for and in relation to the administration of justice in the Presidency for which it was established, as Her Majesty might grant and direct by Letters Patent subject, however, to prescribed directions and limitations as to the exercise of original, civil and criminal jurisdiction beyond the limits of the Presidency-town concerned.

Except as otherwise directed by the Letters Patent and subject and without prejudice to the legislative powers of the Governor-General of India in Council in relation to the above matters, each Presidency High Court was to have and exercise all such jurisdiction, power and authority as were vested in the Supreme and Sadar Courts in the same Presidency at the time of their abolition.

Until otherwise provided by the Crown, all jurisdiction exercised by the Supreme Courts of Calcutta, Madras and Bombay respectively over inhabitants of such parts of India as were not to be comprised within the local limits of the Letters Patent to be issued establishing High Courts at those places was to be exercised by such High Courts respectively.

Each High Court might provide, by its own rules, for the exercise of the original and appellate jurisdiction vested in it by one or more Judges or by Division Courts constituted by two or more Judges of the High Court. The Chief Justice was to determine what Judge in each case was to sit alone and what Judges of the Court, whether with or without the Chief Justice, were to constitute the several Division Courts.

Power of superintendence.

Each High Court was to have superintendence over all Courts subject to its appellate jurisdiction and power to call for returns, and to direct the transfer of any suit or appeal from any such court to any other court of equal or superior jurisdiction. It was also to have power to frame and issue general rules for regulating the practice and proceedings of such courts.

Laws relating to Supreme Courts applicable to High Courts.

Upon the establishment of the High Courts in the Presidencies respectively, all provisions of the Acts of Parliament or orders of Her Majesty in Council or Charters or Acts of Indian Legislature which at the time of the establishment of such High Courts were respectively applicable to the Supreme Courts or to their Judges, were to be taken as applicable to the High Courts and their Judges respectively, so far as might be consistent with the provisions of this Act and the Letters Patent to be issued in its
pursuance and subject to the legislative powers of the Governor-General of India in Council in relation to above matters.\textsuperscript{20}

Comments.

The Indian High Courts Act was a great measure marking the reforming spirit of the new regime, started in 1858. It was a momentous step to improve the administration of law and justice in this country. It made possible the long contemplated fusion of the two rival institutions, viz., Supreme and Sadar Courts and creation of a single superior tribunal to exercise original and appellate jurisdiction over matters arising in the Presidency-towns and appellate jurisdiction over those arising in the Mofussil and thus to curb out the evils of clash of jurisdiction between two parallel judicial systems. The Judges of the Supreme Courts were English lawyers whereas those of the Sadar Courts were covenanted civil servants. In the judiciary of the High Courts, to be established under the Act, both these elements had to combine. The Act thus made it possible to unite the legal training of the English lawyers with the intimate knowledge of the customs, usages, habits and laws of the natives possessed by the Judges of the Company's courts.\textsuperscript{21}

Establishment of Presidency High Courts

By virtue of the authority given by the Indian High Courts Act, 1861, and according to its provisions, the Crown issued Letters Patent dated the 14th May, 1862, creating the High Courts of Judicature at Calcutta and other Letters Patent dated the 26th June, 1862, creating the High Courts of Judicature at Madras and Bombay respectively. As the Letters Patent were found defective in certain respects, fresh Letters Patent were issued on 28th December, 1865, revoking the previous ones. As they were identical in terms, the main provisions of the Letters Patent creating the Calcutta High Court only are given below under several heads.

Jurisdiction.

The High Court at Calcutta was constituted to be a Court of Record\textsuperscript{22} with following jurisdictions.

Civil Jurisdiction.

Ordinary original civil jurisdiction.—The High Court was given ordinary civil jurisdiction within such local limits of the Presidency-town as might be prescribed by a competent legislative authority for India. In the exercise of jurisdiction, it was empowered to try and determine suits of every description, provided (a) in the case of suits for land or other immovable property, such land or property was situated, or (b) in other cases, the cause of action arose, (c) at the commencement of the suit, the defendant resided or carried on business or personally worked for gain, within such local limits; except that no original jurisdiction was


\textsuperscript{22} See Malhotra, op. cit., at p. 288.
given in cases falling within the jurisdiction of the Small Cause Court at Calcutta, in which the debt or damage or value of the property sued for, did not exceed Rs. 100.23

Where a plaintiff was to have several causes of action, not being for land or other immovable property, against a defendant, and the High Court was given original jurisdiction in respect of one of them, it was rendered lawful for the High Court to call on the defendant to show cause why the several causes of action should not be joined together in one suit and to make suitable order for trial of the same.

**Extraordinary original civil jurisdiction.**—The High Court was given power to remove, try and determine any suit being or falling within the jurisdiction of any court subject to its superintendence whenever it thought proper to do so, either on the agreement of the parties to that effect or for purposes of justice.

It may be pointed out here that the expression 'ordinary jurisdiction' embraces all such jurisdiction as is exercised in the ordinary course of law and without any special step being necessary to assume it. It is opposed to extraordinary jurisdiction which the court may assume at its discretion upon special occasions and by special orders.24

**Appellate civil jurisdiction.**—An appeal was provided to the High Court from the judgment of one Judge of the High Court or of one Judge of any Division Court; an appeal also lay from the judgment of two or more Judges of the High Court or of Division Court whenever such Judges were equally divided in opinion and did not amount in number to a majority of the whole of the Judges of the High Court at the time being.25

The High Court was further empowered to hear appeals from the civil courts subject to its superintendence and also to exercise appellate jurisdiction in cases subject to appeal to the High Court by virtue of any laws or regulations in force.

23. The present position in Bombay is that the High Court has ordinary original civil jurisdiction within the areas comprised in Greater Bombay except in certain cases. As regards the exception clause, given in the text, the Bombay High Court does not possess this jurisdiction in cases falling within the competence of the Small Cause Court or the Bombay City Civil Court. See id., at p. 300.

24. Candas Narrodas v. C. A. Turner, I. L. R. 13 Bom. 520, at p. 533 (P C); P. T. Munia Servai v. Hanuman Bank Ltd., A. I. R. 1958 Mad. 418, at 420. In re Kuppuraswami Nayar, I. L. R. 53 Mad. 237, at p. 240 (1929), it was observed that there is distinction between the Original Jurisdiction of the High Court and the Ordinary Original Civil Jurisdiction of the High Court. All applications to the High Court are either civil or criminal. They are Original Civil when matters come for the first time to the High Court, and they are Appellate Civil when they come in the form of appeals.

25. It seems the position was that an appeal lay to the High Court from the judgment of a single Judge of the High Court or Division Court, but the exercise of the power of superintendence of one Judge of the High Court or one Judge of any Division Court, pursuant to the provision dealing with the exercise of jurisdiction by single Judges or Division Courts of the original and appellate jurisdiction, made in the exercise of appellate jurisdiction by a court subject to the superintendence of the High Court where the Judge who passed the judgment declares that the case is not one for appeal. Manual, Vol. 9 op. cit., at p. 515.
Jurisdiction as to infants and lunatics.—The High Court was given the like power and authority in respect of the persons and estates of infants, idiots and lunatics as that which was vested in its predecessor—the Supreme Court.

Jurisdiction in insolvency matters.—One of the Judges of the High Court was empowered to hold the Court for relief on insolvent debtors at the Presidency-town. The High Court and any such Judge were to exercise powers and authorities with respect to original and appellate jurisdiction and otherwise as constituted by the laws relating to insolvent debtors in India.

The existing law relating to insolvency in the Presidency-towns is the Presidency-towns Insolvency Act, 1909, which repealed the Insolvency Act, 1848. Under this Act, the High Courts at Calcutta, Madras and Bombay have jurisdiction in insolvency matters arising in these towns. All matters in respect of which jurisdiction is given by the Act are ordinarily transacted and disposed of by one of the Judges of the High Court. The Chief Justice may delegate certain specified powers of the Insolvency Court under the Act to any

by him in this behalf. An order made or act

exercise of given powers is deemed to be the order

or act of the Court.

The Court may review, rescind or vary any order made by it under its insolvency jurisdiction. An appeal from an order made by an officer of the Court lies to the Judge dealing with insolvency cases; no further appeal lies except by leave of such Judge. Except as otherwise thus provided, an appeal from an order made by a Judge in the exercise of the jurisdiction given by the Act lies in the same way and is subject to the same provisions as an appeal from an order made by a Judge in the exercise of the ordinary original civil jurisdiction of the Court.26

Criminal jurisdiction.

Ordinary original criminal jurisdiction.—The High Court has to have ordinary original criminal jurisdiction within the same local limits as its ordinary original civil jurisdiction. It was also to exercise the said jurisdiction in respect of all such persons beyond such limits over whom the Supreme Court had criminal jurisdiction. In the exercise of the said jurisdiction, it was empowered to try all persons brought before it in due course of law.

Extraordinary original criminal jurisdiction.—The High Court was to have extraordinary original criminal jurisdiction over all persons residing in places within the jurisdiction of any court subject to its superintendence. It was given authority to try, at its discretion, any such persons brought before it on charges preferred by the Advocate-General or by any Magistrate or other officer specially empowered by the Government in that behalf.

Appellate criminal jurisdiction.—The High Court was declared to be a Court of Appeal from the criminal courts subject to its superintendence and it was to exercise appellate jurisdiction in cases subject to appeal to the High Court by virtue of any law in force.

No appeal, however, was to lie to the High Court from any sentence or order passed in any criminal trial before the courts of original

criminal jurisdiction which might be constituted by one or more Judges of the High Court. But it was at the discretion of any such court to reserve a point of law for the opinion of the High Court. On such a point being so reserved or on its being certified by the Advocate-General that there was an error in the decision of a point of law decided by the court of original criminal jurisdiction or that a point of law decided by such court should be further considered, the High Court would have full power and authority to review the case. Finally determine the point of law, thereupon to alter the sentence passed and to pass right judgment and sentence.\textsuperscript{27}

Reference and Revision.—The High Court was made a Court of Reference and Revision from criminal courts subject to its appellate jurisdiction. It was empowered to hear and determine all cases, subject to reference to it, referred to it by the Sessions Judge or some other officer authorized to refer cases to the High Court; and it was further empowered to revise all cases, subject to revision by it, tried by any officer or court possessing criminal jurisdiction.

Power of transfer.—The High Court was authorized to direct the transfer of any criminal case or appeal from any court to any other court of equal or superior jurisdiction, and also to direct the preliminary investigation or trial of any criminal case by any officer or court otherwise competent to investigate to try it though such case belongs to the jurisdiction of some other officer or court in ordinary course.

Admiralty and vice-Admiralty jurisdiction.

The High Court was to have and exercise all such civil, criminal and maritime jurisdiction and also such jurisdiction for the trial and adjudication of prize causes and other maritime questions arising in India as were vested in its predecessor—the Supreme Court as a Court of Admiralty and Vice-Admiralty.\textsuperscript{28}

Testamentary and Intestate jurisdiction.

The High Court was given the like power and authority as exercised by its predecessor—the Supreme Court—in relation to the granting of probates of last wills and testaments, and letters of administration of the goods, chattels, credits and all other effects of persons dying intestate. Provided that there would be no interference with any law passed by a competent legislative authority for India,\textsuperscript{29} giving power to any other court to grant such probates and letters of administration.

\textsuperscript{27} Provisions in this paragraph ceased to have effect by virtue of the Criminal Procedure Amendment Act, 1943.

\textsuperscript{28} The Admiralty Jurisdiction (India) Act, 1950 replaced the Parliament extended the jurisdiction of the High Courts in India, ed by the Manual, also the Colonial Act, 1890.

\textsuperscript{29} See the Indian Succession Act, 1925.
MARRIAGE RELATIONS

The High Court was to have jurisdiction in matrimonial matters concerning persons professing the Christian religion. It was provided that this would not interfere with the exercise of any jurisdiction by any court established by Royal Charter.

Powers of Single Judges and Division Courts.

Any function directed to be performed by the High Court in the exercise of its original or appellate jurisdiction might be performed by any of its judges or by Division Courts appointed or authorized for such purpose. If such Division Court was composed of one or more Judges and it. the Judges were divided in opinion as to the decision to be given on any point, such point was to be decided according to the opinion of the majority of the Judges. When the Judges were equally divided, the opinion of the senior Judge was to prevail.

Law and procedure.

Civil Matters.—While deciding cases in the exercise of its ordinary original civil jurisdiction, the law or equity to be applied by the High Court was to be the same as would have been applied by the Court had the High Court not been created; while deciding cases in the exercise of its extraordinary original civil jurisdiction, the rule of good conscience was to be the same as would have been applied by any local court having jurisdiction in such cases. While deciding cases in the exercise of its appellate jurisdiction, the law or equity and rule of good conscience to be applied by the High Court was to be the same which the Court in which the proceedings in such cases were originally instituted ought to have applied to them.

The High Court was empowered to make rules and orders for the purpose of regulating all proceedings in civil cases which might be brought before it, including proceedings in its admiralty, marine and matrimonial jurisdiction respectively. Rules and orders it was to be guided, as far as possible, by the Code of Civil Procedure, 1859, and the Torte and Matrimonial Code.

Criminal matters.—All persons brought for trial before the High Court, either in the exercise of its jurisdiction as a Court of Appeal, Rehearsal or Revision, charged with any offence provided for by the Indian Penal Code, 1860, or any Act amending or excluding the same, tried before the Division of the High Court, were to be liable to punishment under the Code of the said Acts, and not otherwise.

The proceedings in all criminal cases brought before the High Court, in the exercise of its ordinary original jurisdiction, and also in all other criminal

30. For the law as to matrimonial matters between Christians, see the Indian Divorce Act, 1869, A. L. R. Manual, Vol. 5, at pp. 5922-5923.

31. The later position was that if the Judges were equally divided, they were to state the point upon which they differed and the case had to be heard up to that point by one or more of the other Judges and the point was to be decided according to the opinion of the majority of the Judges who heard the case. Manual, Vol. 9, op. cit., at pp. 179-180,
cases over which the Supreme Court had jurisdiction, were to be regulated by the procedure and practice which was in use in the Supreme Court, subject to any law made in relation thereto by competent legislative authority; the proceedings in all other criminal cases were to be regulated by the Code of Criminal Procedure, 1861, or by other laws in relation to criminal procedure made by the same.

Appeals to Privy Council

In any matter, not being of criminal jurisdiction, an appeal was provided to the Privy Council from any final judgment, decree or order of the High Court made on appeal, or made by its Judges or Division Court in the exercise of original jurisdiction from which an appeal did not lie to the High Court, provided that the sum or matter at issue was of the amount or value of not less than Rs. 10,000 or the High Court certified that the case was a fit one for appeal, and subject to the rules, regulations and limitations made and prescribed in respect of appeals to the Privy Council.

Upon the petition of a party aggrieved by any preliminary or interlocutory judgment, decree, order or sentence of the High Court in a proceeding, not being of criminal jurisdiction, the High Court was given discretion to grant permission to such party to appeal against the same to the Privy Council, subject to the same rules, regulations, and limitations.

An appeal was provided to the Privy Council from any judgment, order or sentence of the High Court made in the exercise of original criminal jurisdiction or in any criminal case where any point of law had been reserved for its opinion by any court which had exercised original jurisdiction, provided the High Court certified that the case was a fit one for appeal and under conditions laid down by it, subject, however, to rules and orders made in that behalf.32

Miscellaneous.

Judges of High Court might be authorized to sit in any places by way of circuit or special commission. The Court was to comply with requisitions made by the Government for records, returns, and statements in form and manner deemed proper by the Government.

The provisions of the Letters Patent were made subject to the legislative powers of the Indian Legislature and might be, in all respects, amended and altered thereby.

The Chief Justice of the High Court was empowered to appoint clerks and other ministerial officers for the administration of justice and the due execution of all the powers and authorities given to the Court. The approval of the Government was, however, necessary.

The High Court was empowered to approve, admit and enrol Advocates, Vakils and Attorneys. It was to make rules for their qualification

32.
and admission. It could remove or suspend them from practice on reasonable cause. 53

Comments.

The object of the High Courts Act was to abolish the dual system of courts and create a unified judiciary so as to get rid of the vices of such a system. The establishment of the High Courts certainly fulfilled the first objective, that is, the fusion of the rival judicial institutions and creation of a single tribunal having original and appellate jurisdiction, the former being derived from the Supreme Courts and the latter from the Sadar Courts; but so far as the policy of this amalgamation was concerned, no great advance was made in the direction of its full implementation. In fact the old Supreme Court survived as a distinct branch of the High Court, viz., in its original side. The local extent of its jurisdiction was, however, confined within the limits of the Presidency-town concerned; "neither the agreement of parties nor the national character of individuals being any longer sufficient to give the Court a power of adjudication." The law or equity which the High Court was to enforce on its original side was the same as would have been applied by its predecessor—the Supreme Court, had it not been created, and such law or equity was distinct from the rules of law, equity and good conscience applied by it on its appellate side which succeeded to the old Sadar Adalat. The criminal, admiralty and vice-admiralty, testamentary and intestate, and matrimonial jurisdictions of the High Court in its original side were precisely the same as possessed and exercised by its predecessor—the Supreme Court. The criminal procedure of the High Court on its original side was distinct from that of its appellate side, the proceedings of which were to be regulated by the Code of Criminal Procedure, 1861. 34 It was only afterwards that the Code was extended to its original side also. Uniformity was achieved only in the substantive criminal law, the civil procedure, and in civil and criminal appellate authority. It was only with the passage of time that of Anglo-Indian law being applic-

Allahabad High Court

Under the authority of the Indian High Courts Act, 1861, the Crown issued the Letters Patent dated the 17th March, 1866, establishing a High Court of Judicature at Agra for the North-Western Provinces. This High Court was shifted to Allahabad in 1875. The North-Western Provinces became the United Provinces in 1901 after the separation of North-West Frontier regions. The provisions of the Letters Patent of 1866 were similar to those of the Letters Patent of 1865 except in the following respects. The Allahabad High Court, as it came to be known, was not given any ordin-


34. It was only later on that the Code was extended to the original side of the Supreme Court. It may be pointed out here that the High Courts were not given any exclusive jurisdiction in serious criminal cases, as provided in 1781, were.

55. Cowell, op. cit., at pp. 165-166.
any original civil jurisdiction, jurisdiction in insolvency matters as given to the Presidency High Courts, and admiralty and vice-admiralty jurisdiction.\textsuperscript{36}

On 26th July, 1948, the United Provinces Courts (Amalgamation) Order Allahabad and the Chief Court in the name of the High-Court of Judic "United Provinces" was changed to Uttar Pradesh.

There is a Bench of the Allahabad High Court at Lucknow.

**Later Indian High Courts Acts**

**High Courts Act, 1865.**

The High Courts Act, 1865, empowered the Governor-General-in-Council to alter the local limits of the jurisdiction of the chartered High Courts, subject to disallowance of the order of the said Council by the Crown.

**High Courts Act, 1911.**

The High Courts Act, 1911, increased the maximum number of Judges of the High Courts to twenty, empowered His Majesty to establish additional High Courts, and also empowered the Governor-General-in-Council to appoint additional Judges for periods of two years.\textsuperscript{38}

**High Courts under Government of India Act, 1915**

The Government of India Act, 1915, repealed all the existing High Courts Acts and contained the following provisions in respect of the High Courts.

**Constitution.**

Each High Court was to consist of a Chief Justice and as many other Judges as His Majesty might think fit to appoint, provided (1) the Governor-General-in-Council might appoint persons to act as Additional Judges of any High Court for two years to exercise all the powers of a Judge appointed by His Majesty; (2) the maximum number of Judges including the Chief Justice and Additional Judges was to be twenty. A Judge was to be (a) a Barrister or Advocate of Great Britain of not less than five years' standing, or (b) a member of the Indian Civil Service of not less than ten years' standing, and having served as, or exercised the powers of, a District Judge for at least three years, (c) a person having held judicial office, not inferior to that of a Small Cause Court, for a period of not less than five years, or (d) a person having been a pleader of a High Court for a period of not less than ten years, provided that not less than one-third of the Judges of a High Court, including the Chief Justice but excluding additional Judges, were to be Barristers or Advocates and that not less


\textsuperscript{37} See Manual, Vol. 9, op. cit., at p. 386.

\textsuperscript{38} Trevelyan, op. cit., at p. 19.
than one-third must be members of the Indian Civil Service. The Judges were to hold their office during His Majesty's pleasure.

Jurisdiction.

The High Courts were declared Courts of Record and given such jurisdiction, original and appellate, including admiralty jurisdiction in respect of offences committed on the high seas, and all such powers and authority in respect of the administration of justice, including power to appoint clerks and other ministerial officers and power to make rules for regulating the practice of the Court, as were vested in them at the commencement of the Act of 1915.

The High Courts were not to exercise any original jurisdiction in any matter concerning the revenue or any act ordered or done in its collection according to the usage and practice of the country or the law in force.

Power of superintendence over subordinate courts.

Each High Court was given superintendence over all courts subject to its appellate jurisdiction, and might, inter alia, call for returns, direct the transfer of any suit or appeal for any such court to any other court of equal or superior jurisdiction, and make rules and prescribe forms for regulating the practice and proceedings of such courts. The rules and forms were to be approved by the respective Governments.

Law to be administered in certain cases.

In the exercise of their original jurisdiction in suits against inhabitants of Calcutta, Madras and Bombay, the High Courts at these places were to decide in matters of inheritance and succession to lands, rents and goods, and in matters of contract and dealing between party and party, when both parties were subject to the same personal law or custom having the force of law, according to that personal law or custom, and when the parties were subject to different personal laws or customs having the force of law, according to the law or custom to which the defendant was subject.

Power to establish additional High Courts.

His Majesty might establish a High Court of Judicature in any territory and confer on it any such jurisdiction, powers and authority, as were vested in, or might be conferred on, any High Court existing at the commencement of the Government of India Act, 1915.

Miscellaneous.

Each High Court might provide, by its rule for the exercise of its original and appellate jurisdiction by one or more Judges or by Division Courts constituted by two or more Judges. The Chief Justice was to decide what Judge in each case was to sit alone and what Judges, whether with or without the Chief Justice, were to constitute the Division Courts.

The Governor-General-in-Council might alter the local limits of jurisdiction of High Courts. His order in this respect was, however, subject to disallowance by His Majesty.

The Governor-General, Governors, Lieutenant-Governors, Chief Commissioners and members of the Executive Councils were not (1) subject
Constitution.

Every High Court was declared to be a Court of Record consisting of a Chief Justice and such other Judges as were appointed by His Majesty from time to time: Provided that the Judges so appointed together with any Additional Judges appointed by the Governor-General was not to exceed in number such maximum number as His Majesty-in-Council might fix in relation to that Court. Previously the maximum number was twenty. That limit was removed by the Act of 1935.

Every Judge of a High Court was to be appointed by His Majesty and was to hold office until the attainment of the age of sixty years: Provided that a Judge might resign or might be removed from his office by His Majesty on the ground of misbehaviour or infirmity of mind or body if on reference made by High Majesty, the Judicial Committee of the Privy Council reported that the Judge ought to be removed on any such ground. Thus a Judge who formerly held his office during His Majesty's pleasure was given a security of service by the Act of 1935 by fixing an age limit unless he was removed earlier as above.

A person was not qualified for appointment as a Judge of a High Court unless, (1) he was a Barrister or Advocate of Great Britain of at least ten years' standing; or (2) he was a member of the Indian Civil Service of at least ten years' standing, who served as, or exercised the powers of, a District Judge for at least three years; or (3) he held a judicial office in India, not inferior to that of a subordinate Judge, or Judge of a Court of Small Causes for at least five years, or (4) was a pleader of any High Court for at least ten years: Provided that a person was not qualified for appointment as Chief Justice of any High Court until he served for not less than three years as a Judge of any High Court, unless he was, or when first appointed to judicial office was, a Barrister, an Advocate or a pleader. It is not-worthy that the Act of 1935 abandoned the rule that at least one third of the Judges of a High Court, including the Chief Justice, were to be Barristers or Advocates and at least one-third members of the Indian Civil Service. The Act also abrogated the rule prescribing that only a person from the Bar could be the Chief Justice of a High Court. Under the Act, a member of the Indian Civil Service who had served as a Judge of any High Court for at least three years was made eligible to hold the office of Chief Justice.

The Governor-General might fill up temporary vacancies of Chief Justices and Judges of the High Courts; he might also appoint additional Judges in any High Court upto a period of two years, if there was such a need by reason of any temporary increase of business or arrears of work in the High Court.

Jurisdiction.

The jurisdiction of any existing High Court, the law administered in it, and the respective powers of its Judges in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and its members sitting alone or in Division Courts, to be the same as immediately before the commencement of the Act of 1935.

The High Courts were not given original jurisdiction in any matter concerning the revenue or act ordered or done in its collection according to the usage and practice of the country or the law in force, unless otherwise provided by an Act of the appropriate legislature.
to the original jurisdiction of the High Courts for what they counselled, ordered or did in their public capacity; (2) subject to the original criminal jurisdiction of the High Courts in respect of any offence not being treason or felony; and (3) liable to be arrested or imprisoned in any suits or proceedings in the High Courts acting in the exercise of their original jurisdiction.59

Patna and Lahore High Courts

By virtue of the power given by the Government of India Act, 1915, High Courts of Judicature were established at Patna and Lahore.

Patna High Court.

In 1912, the Province of Bihar and Orissa was constituted as a separate Province. On 9th February, 1916, Letters Patent establishing a High Court at Patna, the provincial seat of Government, were issued. The jurisdiction, powers and authority of the Patna High Court were similar to those of the Allahabad High Court. In addition to them, however, it was given the same admiralty jurisdiction as was exercised by the Calcutta High Court. On the establishment of the Patna High Court, the Calcutta High Court ceased to have jurisdiction over Bihar and Orissa.40

In 1936, Orissa was carved out as a separate unit but the jurisdiction of the Patna High Court remained intact over it till 1948 when the Orissa High Court was constituted under the Orissa High Court Order.

Lahore High Court.

On 17th March, 1866, Letters Patent were issued establishing the High Court at Lahore for the provinces of the Punjab and Delhi.41 The effect of the issue of such Letters Patent was to supersede the Chief Court of the Punjab which was established in 1866.42 The provisions of the Letters Patent as to jurisdiction, powers and authority of the High Court were similar to those of the Letters Patent of the Allahabad High Court.43

After the partition of the country in 1947, a new High Court for the Punjab (India) was established at Simla. Afterwards it was shifted to Chandigarh.

High Courts under Government of India Act, 1935.

The Government of India Act, 1915, was repealed by the Government of India Act, 1935, which contained the following provisions regarding the High Courts.

39. Id., at pp. 20-33.
41. The Province of Delhi was formed on 17th September, 1912, out of the Province of the Punjab.
42. Cowell, op. cit., p. 176., Trevelyan, op. cit., at p. 84.
Constitution.

Every High Court was declared to be a Court of Record consisting of a Chief Justice and such other Judges as were appointed by His Majesty from time to time: Provided that the Judges so appointed together with any Additional Judges appointed by the Governor-General was not to exceed in number such maximum number as His Majesty-in-Council might fix in relation to that Court. Previously the maximum number was twenty. That limit was removed by the Act of 1935.

Every Judge of a High Court was to be appointed by His Majesty and was to hold office until the attainment of the age of sixty years: Provided that a Judge might resign or might be removed from his office by His Majesty on the ground of misbehaviour or infirmity of mind or body if on reference made by High Majesty, the Judicial Committee of the Privy Council reported that the Judge ought to be removed on any such ground. Thus a Judge who formerly held his office during His Majesty's pleasure was given a security of service by the Act of 1935 by fixing an age limit unless he was removed earlier as above.

A person was not qualified for appointment as a Judge of a High Court unless, (1) he was a Barrister or Advocate of Great Britain of at least ten years’ standing; or (2) he was a member of the Indian Civil Service of at least ten years’ standing, who served as, or exercised the powers of, a District Judge for at least three years; or (3) he held a judicial office in India, not inferior to that of a subordinate Judge, or Judge of a Court of Small Causes for at least five years, or (4) was a pleader of any High Court for at least ten years: Provided that a person was not qualified for appointment as Chief Justice of any High Court until he served for not less than three years as a Judge of any High Court, unless he was, or when first appointed to judicial office was, a Barrister, an Advocate or a pleader. It is not-worthy that the Act of 1935 abandoned the rule that at least one third of the Judges of a High Court, including the Chief Justice, were to be Barristers or Advocates and at least one-third members of the Indian Civil Service. The Act also abrogated the rule prescribing that only a person from the Bar could be the Chief Justice of a High Court. Under the Act, a member of the Indian Civil Service who had served as a Judge of any High Court for at least three years was made eligible to hold the office of Chief Justice.

The Governor-General might fill up temporary vacancies of Chief Justice and Judges of the High Courts; he might also appoint additional judges in any High Court up to a period of two years, if there was such a need by reason of any temporary increase of business or arrears of work in the High Court.

Jurisdiction.

The jurisdiction of any existing High Court, the law administered in it, and the respective powers of its Judges in relation to the administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and its members sitting alone or in Division Courts, to be the same as immediately before the commencement of the Act of 1935.

The High Courts were not given original jurisdiction in any matter concerning the revenue or act ordered or done in its collection according to the usage and practice of the country or the law in force, unless otherwise provided by an Act of the appropriate legislature.
In 1781, the Act of Settlement had specifically laid down that the Supreme Court at Calcutta was not to have jurisdiction in any matter concerning the revenue or acts ordered or done in its collection according to the usage or practice of the country or the regulations of the Government. In 1801, a Supreme Court was created at Madras; it had no jurisdiction in revenue matters as the Calcutta Supreme Court. The Charter Act of 1813 empowered all persons to profess to prefer, prosecute and maintain all indictments, informations and suits for enforcing the laws and regulations of the Governments in the Crown's Courts. The Advocate-General at each Presidency was empowered to exhibit informations in these Courts against any persons, *inter alia*, for breach of the revenue-laws or regulations of the Government. In 1823, a Supreme Court was created at Bombay; it was, however, prohibited from interfering in any matter concerning the revenue, even within the town of Bombay, though this was in direct contravention with the Charter Act of 1813.\(^{44}\) The Indian High Courts Act, 1861, did not specifically deal with revenue jurisdiction but vested all jurisdiction, power and authority of the Supreme Courts in the High Courts. The Letters Patent are silent on this point. It means that the Presidency High Courts excepting the Bombay High Court had both the original as well as appellate jurisdiction in revenue matters. But in 1873, in *re Audhur Chundra Shaw*,\(^{45}\) the Calcutta High Court held that in view of the Act of Settlement it had no jurisdiction in revenue matters; but in 1876, in *Collector of Sea Customs v. Panniar Chilhambaram*,\(^{46}\) the Madras High Court expressed doubt as to the extent to which the Act of Settlement was still in force and, in particular, whether it was not repealed except as to land revenue. According to C. Ilbert, however, the High Court had no original jurisdiction in revenue matters.\(^{47}\) The position is in no way clear.\(^{48}\) In 1915, the Government of India Act provided that the High Courts had not and might not exercise original jurisdiction in any matter concerning the revenue or any act ordered or done in its collection according to the usage and practice of the country or the law in force. This provision was retained by the Act of 1935. Thus the Presidency High Courts could not decide revenue matters on their original side, but they might adjudicate upon them on their appellate side only. This was an absurd anachronism having no justification whatsoever in the changed circumstances and should not have been allowed to continue.\(^{49}\)

His Majesty-in-Council might exercise appellate jurisdiction in any Province to any area beyond been made between the Governments provincial jurisdiction of the High Courts.

**Administrative functions.**

Each High Court was given power of superintendence over all courts subject to its appellate jurisdiction and it might, *inter alia*, call for returns and make general rules and prescribe forms for regulating their practice and proceedings, subject to approval of the Governor. The High Court

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44. W. H. Morlly, *The Administration of Justice in British India*, at pp. 11-12, 14-16 (1828).
45. II Beng. L. R. 250. This was a Calcutta case.
46. I. L. R. 1 Mad 89.
47. Ilbert, op. cit., at p. 249.
49. Id., at p. 348.
could not question any judgment of any inferior court which was not otherwise subject to appeal or revision.

No provision was made in respect of the transfer of cases from one court to another, as was done in the Government of India Act, 1915.

Transfer of cases to High Court.

On presentation of an application, a High Court was to transfer a case to itself, which it had power to transfer to itself for trial, pending in an inferior court, provided it involved the question of the validity of any Federal or Provincial Act. Such an application could only be made in relation to a Federal Act by the Advocate-General for the Federation, and in relation to a Provincial Act by the Advocate-General for the Federation or the Advocate-General for the Province.

Appeals.

An appeal lay to the Federal Court from any judgment, decree or final order of a High Court if the High Court certified that the case involved a substantial question of law as to the interpretation of the Act or any Order-in-Council made under it. It was the duty of every High Court to consider in every case whether or not any such question was involved and of its own motion to give or to withhold a certificate accordingly.

Where such a certificate was given, any party in the case might appeal to the Federal Court on the ground that such a question was wrongly decided, and on any ground on which the party could have appealed without special leave of the Privy Council if no such certificate has been given, and with the leave of the Federal Court, on any other ground, and no direct appeal to the Privy Council was provided for, either without special leave.

The Federal Legislature might provide by law that in specified civil cases an appeal might be taken to the Federal Court from a judgment, decree or final order of a High Court without the above mentioned certificate, but no appeal could be taken unless the dispute in the court of was not less than Rs. 50,000 or such ght be specified by the Act, or the judgment, decree or final order involved directly or indirectly some claim or question respecting property of the like amount or value; or (2) the Federal Court granted special leave to appeal. In case such an Act was to be passed, consequential provisions might also be made by it for the abolition, in whole or in part, of direct appeals in civil cases from High Court to the Privy Council, either with or without special leave.

Power of His Majesty to constitute or reconstitute High Court

On the motion of a Provincial Legislature, His Majesty might constitute by Letters Patent, a High Court, or reconstitute an existing High Court for that Province or a part of it, or if there were two High Courts in that Province, amalgamate them.50

50. For sources of these provisions, see the bare Act and N. Rajagopala Aiyangar’s Commentary of the Government of India Act, 1935, at pp. 230-235, 243-251 (1937).
Comments

As is evident from the above discussion, the Government of India Act, 1935, placed the High Courts on a better footing and adequately safeguarded and assured their independence.

High Court at Nagpur

There was Court of Judicial Commissioner for the Central Provinces. It was replaced by the High Court established at Nagpur by the Letters Patent, dated the 2nd January, 1936, issued by the Crown under the Government of India Act, 1935. The jurisdiction, powers and authority of this High Court were similar to those of the Allahabad High Court. Afterwards Nagpur was merged in Maharashtra and a High Court was established at Jabalpur for the State of Madhya Pradesh comprising areas of the Central Provinces.  

There are Benches of the Madhya Pradesh High Court at Indore and Gwalior.

High Courts for Punjab, Haryana, Assam, Orissa, Rajasthan and Travancore-Cochin

After the Independence in 1947 and before the commencement of the Constitution in 1950, the following High Courts were established for several Provinces.

High Court for Punjab and Haryana.

A High Court was established at Simla (shifted to Chandigarh afterwards) for the Punjab (India) by the High Courts (Punjab) Order dated 11th August, 1947, issued by the Governor-General in exercise of the powers conferred by the Indian Independence Act, 1947. It was given the same status, jurisdiction, powers and authority as were possessed by the Lahore High Court which was lost to India after partition.

Under the Punjab Reorganisation Act, 1966, the State of Punjab has been divided into a new State of Punjab, State of Haryana and Union territory of Chandigarh. All the three have a common High Court at Chandigarh.

High Court for Assam.

On the motion of the Assam Legislature, the Governor-General, in exercise of the powers conferred by the Government of India Act, 1935, as adapted by the Indian Provisional Constitution (Amendment) Order, 1949, issued the Assam High Court Order, dated 1st March, 1948, established a High Court at Guwahati for Assam. Since then the jurisdiction of the Calcutta High Court over this Province ceased to exist except in certain cases for a short duration. The status, jurisdiction, powers and authority of the Assam High Court were like those of the Calcutta High Court.  

53. Id., at pp. 372-374.
the jurisdiction of the Calcutta High Court is confined to West Bengal as the Province of Bengal came to be known after the partition of the country in 1947.

After the formation of the State of Nagaland under the State of Nagaland Act, 1952, the Act constituted the Assam High Court as the common High Court for the State of Assam and the State of Nagaland. Thereafter that High Court came to be called the High Court of Assam and Nagaland. After the establishment of the States of Manipur and Tripura and the formation of the State of Meghalaya under the North-Eastern Areas (Reorganisation) Act 1971, the High Court of Assam and Nagaland was abolished and a common High Court for the States of Assam, Nagaland, Meghalaya, Manipur, and Tripura came to be established. This High Court is known as the Gauhati High Court (the High Court of Assam, Nagaland, Meghalaya, Manipur and Tripura). In respect of the territories comprised in the States of Assam, Nagaland, Meghalaya, Manipur and Tripura, the common High Court has all authority as were exercisable in respect of the Court of Assam and Nagaland or the Court of Judicial Commissioner for Manipur or the Court of Judicial Commissioner of Tripura, as the case might be.

High Court for Orissa.

Likewise the Governor-General issued the Orissa High Court Order, dated the 30th April, 1948, establishing a High Court at Cuttack for Orissa. Since then the Patna High Court ceased to have jurisdiction in respect of Orissa except in certain matters for a short duration. The status, jurisdiction, powers and authority of the Orissa High Court were like those of the Patna High Court. Since then the jurisdiction of the Patna High Court is confined to Bihar only.

High Court for Rajasthan.

The Raj Pramukh of the United States High Court Ordinance, dated the 21st June, 1948, at Jodhpur for Rajasthan. It was given both civil and criminal; appellate jurisdiction, both civil and criminal; powers of review, revision and transfer; power to issue writs; testamentary and intestate jurisdiction; jurisdiction as to infants and persons of unsound mind; matrimonial jurisdiction; jurisdiction to determine the validity of any law; and several other powers and authority being exercised by other High Courts.

High Court for Travancore-Cochin (later designated as Kerala).

A High Court for Travancore-Cochin was established at Ernakulam by an Ordinance issued in 1948. This was repealed by the TravancoreCochin High Court Act, dated the 28th December, 1949. This State was later designated as Kerala. In 1958, the Keral High Court Act was passed for the purpose of regulating the business and the exercise of the power of the High Court.

54. Id., at pp. 384-386.
55. Id., at pp. 356-366.
56. Id., at pp. 366-371.
The Mysore High Court existed even before Independence in 1947. It was established under the Mysore High Court Act, 1864, issued by His Highness the Maharaja of Mysore. Several provisions of this Act were amended by the Mysore High Court Act in 1951. The latter Act passed for the purpose of regulating the business and the exercise of powers of the High Court in relation to the administration of justice, and its jurisdiction.

The High Court of Jammu & Kashmir existed even before Independence in 1947. It was created by Letters Patent dated the 28th August issued by the Maharaja of the State. It was vested with civil and extraordinary original and criminal jurisdiction. Provisions were made in respect of the administration of civil and criminal law by the power of single Judge and Division Courts and its contempt powers. The Court was continued by the Constitution of Jammu and Kashmir which made important provisions in regard to this Court. The Indian Constitution. The places of sitting of the Court were Srinagar.
made by the Chief Justice of that Court with the previous consent of the President. Such Judges are not deemed to be Judges of that High Court though they exercise the jurisdiction, powers and privileges of the High Court.

The Judge of a High Court holds office until he attains the age of sixty-two years. He may, however, resign his office by writing to the President, or he may be removed from his office by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity. Parliament may, by law, regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge. These provisions guarantee a security of tenure to the Judges and enable them to perform their judicial duties without any fear or favour. The office of a Judge is vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court.

A person is qualified for appointment as a Judge of a High Court if he is a citizen of India, and (a) has held a judicial office in India for at least ten years, or (b) has been an Advocate of a High Court or of two or more such Courts in succession for at least ten years.

Power to punish for contempt.

Every High Court is a Court of Record and has all the powers of such a Court including the power to punish for its contempt. The power of a High Court to institute proceedings for contempt of Court and punish where necessary is a special jurisdiction which is inherent in all Courts of Record. The Criminal Procedure Code is not applicable to such contempt proceedings. The High Court can deal with these matters summarily and adopt its own procedure. All that is necessary is that the procedure is fair and that the contemnor is made aware of the charge against him and given a fair and reasonable opportunity to defend himself.\(^{61}\)

Jurisdiction of existing High Courts.

Subject to the provisions of the Constitution and law of the appropriate Legislature, enacted in exercise of the powers conferred by the Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of its Judges in relation to the administration of justice in the Court including any power to make rules of Court and regulate the sittings of the Court and its members sitting alone or in Division Courts, are declared the same as immediately before the commencement of the Constitution. The object of this provision is to preserve all the powers of the High Courts at the commencement of the Constitution, subject to the provisions of the Constitution and laws of the appropriate legislatures. It may be noted here that the ‘law’ administered at the commencement of the Constitution includes ‘case—law’. A decision of the Privy Council\(^{62}\) or the Federal Court,\(^{63}\) therefore, is binding upon the High Courts until the Supreme Court holds to the contrary. A proviso

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High Court for Mysore

The Mysore High Court existed even before Independence in 1947. It was established under the Mysore High Court Act, 1864, issued by His Highness the Maharaja of Mysore. Several provisions of this Act were amended by the Mysore High Court Act in 1951. The latter Act was passed for the purpose of regulating the business and the exercise of powers of the High Court in relation to the administration of justice, and its jurisdiction.

High Court for Jammu & Kashmir

The High Court of Jammu & Kashmir existed even before Independence in 1947. It was created by Letters Patent dated the 28th August, 1943, issued by the Maharaja of the State. It was vested with civil, original and extraordinary original and criminal jurisdiction. Provisions were also made in respect of the administration of civil and criminal law by the High Court, power of single Judge and Division Courts and its contempt etc. The High Court was continued by the Constitution of Jammu and Kashmir, which made important provisions in regard to this Court similar to those made by the Indian Constitution. The places of sitting of the Court are Jammu and Srinagar.

High Courts and Constitution of India

All the existing High Courts were recognized by the Constitution of India which contains important provisions in respect of the High Courts, some of which are given below.

Constitution.

A High Court has to be constituted for each State; but Parliament may by law establish a common High Court for two or more States or for two or more States and a Union territory. Every High Court is to consist of a Chief Justice and such other Judges as the President may appoint from time to time. The appointment of a Judge is made by the President after consultation with the Chief Justice of India, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court. The President may appoint one of the Judges of a High Court to perform the duties of the office of the Chief Justice if it is vacant or when the Chief Justice is unable to perform the duties by reason of absence or otherwise. The President may appoint duly qualified persons to be additional Judges of High Court up to a period of two years if by reason of any temporary increase in the business of the Court or arrears of work in it, it appears to him that the number of the Judges of that Court should be increased for the time being. When a Judge of a High Court, other than the Chief Justice, is unable to perform the duties of his office by reason of absence or any other reason, or he is appointed to act temporarily as Chief Justice, the President may appoint a duly qualified person to act as a Judge of that Court until the permanent Judge has resumed his duties. Appointment of retired Judges of High Courts at sittings of a High Court may be

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made by the Chief Justice of that Court with the previous consent of the President. Such Judges are not deemed to be Judges of that High Court though they exercise the jurisdiction, powers and privileges of the High Court.

The Judge of a High Court holds office until he attains the age of sixty-two years. He may, however, resign his office by writing to the President, or he may be removed from his office by an order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity. Parliament may, by law, regulate the procedure for the presentation of an address and for the investigation and proof of the misbehaviour or incapacity of a Judge. These provisions guarantee a security of tenure to the Judges and enable them to perform their judicial duties without any fear or favour. The office of a Judge is vacated by his being appointed by the President to be a Judge of the Supreme Court or by his being transferred by the President to any other High Court.

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Jurisdiction of existing High Courts.

Subject to the provisions of the Constitution and law of the appropriate Legislature, enacted in exercise of the powers conferred by the Constitution, the jurisdiction of, and the law administered in, any existing High Court, and the respective powers of its Judges in relation to the administration of justice in the Court including any power to make rules of Court and regulate the sittings of the Court and its members sitting alone or in Division Courts, are declared the same as immediately before the commencement of the Constitution. The object of this provision is to preserve all the powers of the High Courts at the commencement of the Constitution, subject to the provisions of the Constitution and laws of the appropriate legislatures. It may be noted here that the 'law' administered at the commencement of the Constitution includes 'case—law'. A decision of the Privy Council 62 or the Federal Court 63 therefore, is binding upon the High Courts until the Supreme Court holds to the contrary. A proviso

is, however, attached to the aforesaid provisions. Any restriction to which the exercise of original jurisdiction by any of the High Courts in respect of any matter concerning the revenue or any act ordered or done in its collection was subject immediately before the commencement of the Constitution is no longer to apply to the exercise of such matters, which was allowed to continue by 1935.

Power to issue writs.

Notwithstanding the power of the Supreme Court of India to issue directions, orders or writs for the enforcement of the fundamental rights, every High Court has been given power to issue directions, orders or writs, including writs of Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiorari, to any person or authority, including any Government in appropriate cases, within the territories in relation to which it exercises jurisdiction, for the enforcement of fundamental rights and for any other purpose. This power may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power notwithstanding that the seat of the Government or authority or the residence of person, all as mentioned above, is not within those territories. The power conferred on the High Courts is not in derogation of the power conferred on the Supreme Court. These provisions constitute a very important addition to the jurisdiction and powers of the High Courts.

Power of superintendence.

Every High Court has power of superintendence over all courts and tribunals, not relating to the Armed Forces, throughout the territories in relation to which it exercises jurisdiction. Without prejudice to the generality of this provision, the High Court may (a) call for returns from such courts, (b) make general rules and prescribe forms for regulating the practice and proceedings of any such courts; (c) prescribe forms in which books, entries and accounts have to be kept by the officers of any such courts. It may also settle tables of fees to be allowed to the sheriff and all clerks and officers of such courts and to attorneys, advocates and pleaders practising in it, provided that the said rules, forms or tables are not to be inconsistent with the provisions of any law in force and require the previous approval of the Governor. In these provisions, the Constitution substantially reproduces the provisions of the Government of India Act, 1915, except that the power of superintendence has been extended to tribunals also. The relevant provisions of the Act of 1915 which were similar in terms to the relevant provisions of the Indian High Courts Act, 1861, had given a power of judicial superintendence to the High Court apart from and independently of the provisions of other laws conferring revisional jurisdiction on the High Court. The Government of India Act, 1935, had taken away the revisional power from the High Court; thus such power was confined to those cases where other laws had conferred it. The Constitution, however, restores to the High Court the power of judicial superintendence it had under the Acts of 1861 and 1915 respectively.
The net position after the commencement of the Constitution is that the High Court has both the power of administrative as well as judicial superintendence. This power is to be exercised most sparingly and in appropriate cases only in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors.67

Power of transfer.

On being satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of the Constitution, the determination of which is necessary for the disposal of the case, the High Court has to withdraw the case and may (a) either dispose of the case itself, or (b) determine the said question of law and return the case to the court together with a copy of its judgment of such question; on its receipt the court has to proceed to dispose of the case in conformity with such judgment. This provision is an improvement upon the corresponding provision in the Government of India Act, 1935, because the former does not specify how the High Court may be satisfied for the purpose of exercise of this power. The object of this provision is to make the High Court the sole interpreter of the Constitution, but it does not make it a forum for academic discussions of constitutional issues.68

Extension of jurisdiction.

Parliament may, by law, extend the jurisdiction of a High Court to, or exclude it from, any Union territory. If the High Court so exercises its jurisdiction, the State Legislature cannot increase, restrict or abolish that jurisdiction, and its rules, and forms made under the power of superintendence for subordinate courts in that territory are to be approved by the President.69

Appeals.

An appeal lies to the Supreme Court of India70 from any judgment, decree or final order of a High Court in a civil, criminal or other proceeding if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution. If the High Court has refused to give such a certificate, the Supreme Court may grant special leave to appeal provided it is satisfied that the case involves a substantial question of law as to the interpretation of the Constitution. Where such a certificate is given or such leave is granted, any party in the case may appeal to the Supreme Court on the ground that the aforesaid question has been wrongly decided and on any other ground with the leave of the Supreme Court.

An appeal lies to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court if the High Court certifies

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69. For the sources of these provisions and other details, see, apart from the bare text of the Constitution of India, Basu, Vol. IV, op. cit., at pp. 24-26.
that (a) the amount or value of the subject-matter of the dispute in the
court of first instance and still in dispute on appeal was and is not less
than Rs. 20,000 or such other sum as may be specified by Parliament by
law; or (b) the judgment, decree or final order involves directly or indirectly
some claim or question in respect of property of like amount or value;
or (c) the case is a fit one for appeal; and where the judgment, decree or
final order appealed from affirms the decision of the court immediately
below in a case other than that referred to in clause (d), if the High Court
further certifies that the appeal involves some substantial question of law.
Any party filing an appeal before the Supreme Court may urge as one
of the grounds in such appeal that a substantial question of law as to
the interpretation of the Constitution has been wrongly decided. No
appeal lies to the Supreme Court from the judgment, decree or final
order of one Judge of a High Court unless Parliament provides otherwise
by law.

An appeal lies to the Supreme Court from any judgment, final order
or sentence in a criminal proceeding of a High Court if the High Court
(a) has, on appeal, reversed an order of acquittal of an accused person
and sentenced him to death, or (b), has withdrawn for trial before itself
any case from any court subordinate to its authority and has, in such
trial, convicted the accused person and sentenced him to death; or (c)
certifies that the case is a fit one for appeal: Provided that an appeal
under clause (d) lies subject to such provision as may be made in that
behalf by the Supreme Court and to such conditions as the High Court
may establish or require.

Parliament has power to confer additional powers on the Supreme
Court in respect of criminal appeals from the High Courts. \[71\]

The Supreme Court may, in its discretion, grant special leave to appeal
from any judgment, decree, determination, sentence or order in any case or
matter, passed or made by any court including a High Court or tribunal, except
those relating to Armed Forces in India.

**High Courts for Andhra Pradesh,**

**Gujarat and Nagaland**

After the commencement of the Constitution, High Courts were estab-
lished for several States as discussed below.

**High Court for Andhra Pradesh.**

In 1953, the State of Andhra (later on designated as Andhra Pradesh)
came into existence under the Andhra State Act, 1953; a High Court
was created for this State at Hyderabad under the Act with effect from 5th
July, 1954. The High Court was to exercise similar jurisdiction and powers
in several matters as the High Court at Madras. \[72\]

**High Court for Gujarat.**

In 1950, the State of Gujarat was carved out of the State of Bombay
under the Bombay Reorganisation Act, 1950. Under the Act a High Court

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71. For application of these provisions, see Basu, Vol. III, op. cit., at pp. 103-157; Dr.

72. For these and other provisions, see A. I. R. Manual, Vol. I, at pp. 225-256
(1959).
was established for the new State at Ahmedabad with effect from 1st May, 1960. The jurisdiction and powers of this Court were similar to those of the Bombay High Court which continued as the High Court for the State of Maharashtra, as the residuary State of Bombay came to be known thereafter.\textsuperscript{73}

High Court for Nagaland.

The State of Nagaland was formed under the State of Nagaland Act, 1962. The Act constituted the Assam High Court as the common High Court for the State of Assam and the State of Nagaland, and thereafter that High Court came to be called the High Court of Assam and Nagaland.\textsuperscript{74}

The common High Court was abolished by the North-Eastern Areas (Reorganisation) Act 1971 which established a common High Court for the States of Assam, Nagaland, Meghalaya, Manipur and Tripura, called the Gauhati High Court (the High Court of Assam, Nagaland, Meghalaya, Manipur and Tripura).

High Court for Himachal Pradesh.

The State of Himachal Pradesh was formed under the State of Himachal Pradesh Act, 1970. The Act established a High Court for the State. The High Court has been given all such jurisdiction, powers and authority as were exercisable by the High Court of Delhi before the establishment of the State.

Formerly the jurisdiction of the Delhi High Court was extended to Himachal Pradesh where the Court of the Judicial Commissioner was abolished. A Bench for Himachal Pradesh was established at Simla. The Delhi High Court exercised all such original, appellate and other jurisdiction as was exercisable by the Court of the Judicial Commissioner before the extension of the jurisdiction of the Delhi High Court. It also exercised ordinary original civil jurisdiction in every suit exceeding Rs. 50,000 in value.

High Court for the States of Meghalaya Manipur and Tripura.

The States of Manipur and Tripura were established and the State of Meghalaya was formed under the North-Eastern Areas (Reorganisation) Act, 1971. The Act abolished the High Court of Assam and Nagaland and established a common High Court for the States of Assam, Nagaland, Meghalaya, Manipur and Tripura, called the Gauhati High Court (the High Court of Assam, Nagaland, Meghalaya, Manipur and Tripura). The Act further abolished the Courts of the Judicial Commissioners for Manipur and Tripura. In respect of the territories comprised in the States of Assam, Manipur, Meghalaya, Nagaland and Tripura, the common High Court has all such jurisdiction, powers and authority as were exercisable in respect of these territories by the High Court of Assam and Nagaland or the Court of the Judicial Commissioner for Manipur or the Court of the Judicial Commissioner for Tripura, as the case might be.

High Courts for Union territories

In Delhi, a High Court has been established under the Delhi High Court Act, 1966. Formerly, Delhi fell within the jurisdiction of the Punjab High Court.

\textsuperscript{73} For these and other provisions, see Manual, Vol. 16, op cit, at pp. 533 555.

The Delhi High Court exercises all such original, appellate and other jurisdiction as, under the law in force immediately before the Court was established, was exercisable in respect of Delhi by the Punjab High Court. It has ordinary original civil jurisdiction in every suit exceeding Rs. 50,000 in value.

The jurisdiction of the Calcutta High Court has been extended to the Andaman and Nicobar Islands by the Calcutta High Court (Extension of Jurisdiction) Act, 1953.

The Kerala High Court has been given jurisdiction over the Laccadive, Minicoy and Amindivi Islands by the States Reorganisation Act, 1956.

The Bombay High Court exercises jurisdiction over the Dadra and Nagar Haveli under the Dadra and Nagar Haveli Act, 1961. It had jurisdiction over Goa, Daman and Diu under the Goa, Daman and Diu (Administration) Act, 1962, but it has been abolished by the Goa, Daman and Diu Judicial Commissioner’s Court (Declaration as High Court) Act, 1964. The Act of 1964 has declared the Judicial Commissioner’s Court as a High Court for the purposes of Articles 132, 133 and 134 of the Constitution.

The Pondicherry (Administration) Act, 1952, has extended the jurisdiction of the Madras High Court to Pondicherry from 6th November, 1952. The High Court has all such jurisdiction as, under the law in force immediately before this date, was exercisable by the Cour de Cassation, the Cour Superieur d’ Arbitrage and the Conseil d’ Etat of France. While deciding appeals from decisions of courts and tribunals in Pondicherry, the High Court has to follow, as far as possible, the same procedure and has the same power to pass any judgment, decree or order on them, as it follows and has made while deciding appeals from decisions of courts in Madras.

There is a common High Court for Punjab, Haryana and Chandigarh under the Punjab Reorganisation Act, 1966. The common High Court has all such jurisdiction, powers and authority over Chandigarh as, under the law in force immediately before the enforcement of the provision, were exercisable by the Punjab High Court.

The Jurisdiction of the Gauhati High Court is extended to the Union territories of Mizoram and Arunachal Pradesh by the North-Eastern Areas (Reorganisation) Act, 1971.

Comments

The Constitution has assigned a very significant role to the High Courts. They are the interpreter and guardian of the Constitution and protector and guarantor of the fundamental rights. Besides, they have many other functions to discharge—not only the traditional functions and those under the Constitution but the functions assigned by various Acts also. This has further increased the importance of their role in the administration of justice. While the High Courts are supposed to be effective instruments of justice, they are paralysed in many ways, as discussed below.

A grave situation has been created by the accumulation of heavy arrears pending in many High Courts. This accumulation can be partly attributed to the increase in the normal work of the High Courts as well as the expansion of their special jurisdiction under various Acts. The enforcement of the Constitution has also greatly added to the work of the High Courts. But there has been no proportionate increase in the strength

of the High Courts to prevent the accumulation of arrears. The delay in filling vacancies has also been partly responsible for the accumulation of arrears. The frequent deputation of Judges for non-judicial work without an adequate provision for a substitute has also added to the pending files of the High Courts. Another factor which has considerably aggravated the situation, caused by such accumulation, is the unsatisfactory appointments of Judges in certain cases made on the basis of political, regional and communal or other considerations, and not on considerations of merit. This has seriously and adversely affected the quantity and quality of the work turned out by such Judges. It is axiomatic that the lowering of judicial standards must have an adverse effect on the efficient administration of justice. An important reason of the fall in the standards of the High Court judiciary, undoubtedly responsible to some extent for the accumulation of arrears, is also the difficulty of inducing competent members of the Bar to accept judgships.\footnote{76}

The decline in the standards of High Court judiciary is also due to decreasing respect in governmental circles for the lawyer and the judicial office. The almost universal view is that this has been the undoubted cause, not only of the refusal of prominent members of the Bar to accept judicial office but also of a demoralisation and a loss of self-respect in the judiciary itself. It is said that there is an insidious and calculated attempt on the part of the executive to damage the prestige of the High Court Judges. Frequently, judicial pronouncements are treated with scant respect and commented upon in public platforms and legislatures. The governmental attitude has also brought the Judges down in the public estimation.\footnote{77}

In the appointment of High Court Judges, the State executive plays a big role. In many cases the recommendation of the Chief Justice is ignored. The prevalence of canvassing for judgeship is also there. This has given rise to a grave state of affairs.\footnote{78}

Judges of the High Court are also responsible for their going down in the eyes of the people. Far from avoiding the precincts of the Government House, some of them have treated invitations from the Government House as commands. The Chief Justices and Judges have been seen waiting for grant of interviews by Ministers. A majority of the Judges feels elevated while mixing with the members of the executive. It has become common for Judges to accept invitations to entertainment not only from representative associations but from individual members of the Bar and even from persons not in the profession.\footnote{79}

In the course of the evidence, some of the High Court Judges take too aggressive a part in the course of trials, sometimes taking upon themselves the task of questioning witnesses and interrupting the arguments of counsel quite frequently. Undue interruption in the arguments of counsels is not unusual. Lord Bacon said "that patience and gravity of bearing is an essential part of justice; and an over-speaking Judge is no well-tuned cymbal."\footnote{80}

The improper distribution and assignment of work to different Judges impairs the efficiency of administration of justice. Sometimes Judges, having no adequate training in criminal work, are required to dispose of criminal

\footnote{76: Law Commission Report, op. cit., at pp. 61-70.}
\footnote{77: Id., at pp. 78-79.}
\footnote{78: Id., at pp. 72-74.}
\footnote{79: Id., at pp. 101-102.}
\footnote{80: Id., at pp. 102-103.}
files, and vice versa. Sometimes matters of a specialised nature like the income-tax and sales-tax references are to be dealt with by those Judges who are unaccustomed to deal with them.\footnote{81}

The creation of Benches of High Courts at different places in the States affects adversely the efficiency of administration.\footnote{82}

The Law Commission has made the following recommendations for improving the situation.

The strength of High Courts should be increased. Any proposals of the Chief Justice of a State in this connection, having the concurrence of the Chief Justice of India, should be accepted without hesitation or delay. While the State executive should be free to express its opinion as to a name proposed for judgeship by the Chief Justice, or to ask the Chief Justice to make a fresh recommendation, it should not be open to it to propose its nominee and forward it to the Centre. It is desirable that the Chief Justice should send a copy of his recommendation direct to the Chief Justice of India to avoid delay. In order to achieve the object of such a procedure, article 217\footnote{83} should be suitably amended to provide that Judge of a High Court should be appointed only on the recommendation of the Chief Justice of that Court and with the concurrence of the Chief Justice of India.

In making appointment of Chief Justices and Judges, of the persons should be the exclusive consideration. It is not necessary that the senior puisne Judge of a High Court should be automatically appointed to be Chief Justice; only the fittest person should be appointed to this office, even from outside if necessary. The appointment of Chief Justice should be made with the concurrence of the Chief Justice of India.

Judgeship may be offered to promising junior members of the Bar at a comparatively early stage; indiscriminate invitations, however, have to be avoided.

The retiring age of High Court Judges should be raised to sixty-five and liberal provisions should be made in respect of their pensions and allowances.

High Court Judges should be debarred from practising in any court and accepting employment anywhere other than the Supreme Court as its Judges after retirement. The Constitution should be suitably amended in this respect.

Article 217 (2) (a) should be amended so as to permit the appointment to the High Court of only those judicial officers who have discharged judicial functions as District Judges for at least three years.

The permanent strength of the High Courts should be revised and fixed again in view of the recent increase of work. The strength to be so fixed should be revised at intervals of two or three years. Additional Judges should be appointed for the only purpose of clearing arrears; they should not be asked to dispose of current work. Only able persons should be invited for this work. For the purpose of such recruitment, the entire country should be treated as one unit. Suitable senior practitioners should be persuaded to accept judgeships for at least a short period as a public duty. An ad hoc body

\footnote{81}{Id., at p. 103.}
\footnote{82}{Id., at pp. 104-105.}
\footnote{83}{This article deals with the appointment and conditions of the office of a Judge of a High Court.}
with the Chief Justice of India should be established to draw up a panel of names of persons suitable for appointment to the High Courts.

First appeals valued below Rs. 10,000, pending in the High Courts, should be transferred to the District Courts. This would enable a quick disposal of arrears.

The available judge-power of the High Courts should be preserved and used economically by increasing the power of Single Judges and resorting to other suitable methods. The judges should be given those branches of work in which they are most competent. The admission work should be done by senior and competent Judges. A careful scrutiny should be made of cases before admission.

The High Courts should work for at least two hundred days in the year. The Judges should transact judicial business for at least five hours on every working day. It is not proper that Judges should retire to their chambers for dictating judgments or doing administrative work during court-hours.

The Judges should always remember that their office demands from them a certain reserve and restraint in their social life. "If the public is to give profound respect to the Judges, the Judges should, by their conduct, try and deserve it. Not by word or deed should they give cause for the belief that they do not deserve the pedestal on which we expect the public to place them. It appears to us that not only in the performance of his duties but outside the Court as well, a Judge has to maintain an aloofness amounting almost to self-imposed isolation." 84

The Judges of the High Courts should not intervene too much and too often in the hearing of case; they are, of course, entitled to control it in a reasonable way. They should also realise that the task of supervision and control of subordinate courts, that is, administrative work is a very important part of their duties.

It is not desirable that branches of the High Courts should be set up at different places in the States. 85

In the last, some very important observations of the Law Commission, made as to general realisation of the role of the judiciary, are worth noting. The Commission said: "It is necessary for all to realise that the role assigned to the judiciary under the Constitution is an essential one and that the high ideals, the attainment of which is aimed at by our Constitution social and economic justice, equality, freedom and dignity of the individual, will be impossible of achievement unless the judiciary fearlessly discharges its duties in every complaint of excess of power by the legislatures or the executive, brought to its notice. A proper realisation of these aspects at the highest level can alone bring about a change in the attitude towards the judiciary. We trust that what we stated will be appreciated and measures taken in all directions so that the judiciary—superior as well as subordinate—may enjoy the dignity and the respect to which it is justly entitled and which alone can be an incentive to a proper discharge of their duties." 86

85. For these recommendations, see id., at pp. 105-109.
86. Id., at p. 81.
CHAPTER XXI

MODERN JUDICIARY—SUPREME COURT

At the inauguration of the Supreme Court of India in 1950, a Federal Court constituted under the Government of India Act, 1935, was the supreme tribunal for this country. Till 1949, however, its decisions were subject to the appellate authority of the Privy Council in England whose jurisdiction over India was abolished in that year. Prior to coming to the Supreme Court of India, a brief introduction of the Federal Court may be given here.

Federal Court

The Government of India Act, 1935, had prescribed a federation, taking the Provinces and the Indian States as units. A Federal Court was, therefore, a necessity and it was established by the Act. It consisted of a Chief Justice of India and such number of other Judges as His Majesty might deem necessary, not exceeding six in any case. Every Judge was appointed by His Majesty to hold office until the age of sixty-five year. He might resign his office or be removed therefrom by His Majesty on the ground of misbehaviour or of infirmity of mind or body if the Judicial Committee of the Privy Council reported, on a reference by His Majesty, that the Judge ought to be removed on any such ground. A person was qualified for appointment as a Judge of the Federal Court, if he had been a Judge of a High Court for five years, or was a Barrister or Advocate of Great Britain of at least ten years' standing, or had been a pleader of a High Court or of two or more such Courts in succession for at least ten years. But a person was not qualified for appointment as Chief Justice unless he was, or when first appointed to judicial office was a Barrister, an Advocate or a pleader, and in relation to the Chief Justice, the period prescribed was fifteen years instead of ten years. It is clear from these provisions that a member of the Indian Civil Service was not eligible for appointment as Chief Justice. The Governor-General might appoint one of the puisne Judges as acting Chief Justice on a temporary basis in case of need.

The Federal Court was given original jurisdiction in certain matters; appellate jurisdiction in appeals from High Courts; and advisory jurisdiction. Where an appeal was allowed, the Federal Court was to remit the case to the Court from which the appeal was brought with a declaration as to the judgment, decree or order which was to be substituted for the judgment, decree or order appealed against, and the Court from which the appeal was brought was to give effect to the decision of the Federal Court. The Federal Legislature was empowered to enlarge the appell-

1. See Chapter XX, supra. Appeals lay to the Federal Court from a High Court in a Federal State on the ground that a question of law was wrongly decided being a question which concerned the interpretation of the Act of 1935 etc. Such an appeal was by way of special case to be stated for the opinion of the Court by the High Court.

2. Never came into existence.
late jurisdiction of the Federal Court. It might confer upon it such supplemental powers as might appear necessary for a more effective exercise of its jurisdiction under the Act.

An appeal might be brought to the Privy Council from a decision of the Federal Court (a) from its judgment given in the exercise of its original jurisdiction, without leave; and (b) in any other case by leave of the Federal Court or the Privy Council.

All civil and judicial authorities throughout the Federation were required to act in aid of the Federal Court. The law declared by the Federal Court and by any judgment of the Privy Council was declared binding on all courts in British India. The Federal Court might frame rules of Court for regulating generally its practice and procedure and for other matters with the approval of the Governor-General in his discretion. 3

In 1948, the jurisdiction of the Federal Court was augmented and that of the Privy Council diminished in certain matters by the Federal Court (Enlargement of Jurisdiction) Act.

It is not necessary here to give a study of the functioning of the Federal Court. It may, however, be pointed out that it was a federal institution established under the Act of 1935 and it was India's first constitutional Court in the sense that its primary function was to interpret that Constitution Act. During the course of its existence it "inspired a high degree of confidence in the mind of the public. As long as India maintained ties with the Privy Council, the Federal Court was regarded by man...". Nevertheless, the Federal Court contributed significantly to the development, and when it yielded to the Supreme Court in 1950, it passed to its successor a tradition of the highest standards of independence, integrity and impartiality." 1

Supreme Court of India

The Supreme Court of India is the creature of the Constitution of India and holds an eminent place in its body. It has the widest and the most varied jurisdiction among the highest courts in the Commonwealth and Anglo-Saxon countries. 5

We have a federal Constitution. "A Federal Court as the Supreme Court is an essential element in a Federal Constitution. It is at once the interpreter and guardian of the Constitution and a tribunal for the Federation." 6 In the Constitution, the powers are divided between the Union and State Governments and it is necessary that there must be some tribunal to decide disputes between the Union and the States or the States inter se and to maintain the distribution of powers. Thus the Supreme Court, apart from guarding the Constitution against any transgression, has to maintain

distribution of powers as against encroachments by the Union and State Governments inter se.\(^7\)

Another important role assigned to the Supreme Court is that of the protector and guarantor of fundamental rights. This is a heavy responsibility laid upon it.\(^8\)

The Supreme Court is the final appellate tribunal of the land. As a final Court of Appeal, it has wide powers. Its appellate jurisdiction is larger in scope than that of the Privy Council or the former Federal Court inasmuch as the jurisdiction of the High Courts to issue writs is a new jurisdiction and appeals lie to the Supreme Court from their decisions in writ-matters. Moreover, the power of the Supreme Court to grant special leave to appeal in any cause or matter or determined by any court or tribunal in India except military tribunals, is unlimited.\(^9\)

The Supreme Court has been given advisory jurisdiction also.

A comparative study shows that the Supreme Court of India has more powers than possessed by Supreme Courts of other countries, combining in a unique manner the original, appellate, revisional and consultative powers and duties.\(^10\)

Now we would study the constitutional provisions regarding the Supreme Court under several heads.

Establishment and Constitution.

The Constitution provides for a Supreme Court of India consisting of a Chief Justice of India and not more than seven other Judges until Parliament prescribes a larger number. This number is now thirteen as prescribed by the Supreme Court (Number of Judges) Act, 1960. Every Judge has to be appointed by the President after consultation with such Judges of the Supreme Court and High Courts in the States as he may deem necessary. In the case of appointment of a Judge other than the Chief Justice, the Chief Justice of India has always to be consulted. The word ‘consultation’ indicates that the President is not bound by the recommendations of these persons;\(^11\) yet he is required to consult persons who are \textit{ex hypothesi} well qualified to give proper advice in matter of appointment of Judges.\(^12\)

A citizen of India is eligible for judgeship if he has been a Judge of a High Court or of two or more High Courts in succession for at least five years, or has been an Advocate of the same for at least ten years, or is a distinguished jurist in the opinion of the President. The last one is a commendable provision made in the Constitution. For the highest Court of the land “a solid foundation of the highest juristic principles is no less important than mature experience of the procedure in Courts.”\(^13\)

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8. Id., at pp. 73-75.
9. Id., at p. 67.
10. Id., at p. 75.
11. Id., at p. 79.
12. Constituent Assembly Debates, Vol. VIII, at p. 239.
A Judge of the Supreme Court holds office until he attains the age of sixty-five years. He may, however, resign his office himself; he may be removed also by the President if an address by each House of Parliament, supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, has been presented to him in the same session for such removal on the ground of proved misbehaviour or incapacity. These provisions ensure security of tenure of the Judges. Once they are appointed, they cannot be removed from their office until the age of sixty-five years except on the ground of misconduct or incapacity and that also by a special majority of the members of Parliament. The executive has thus no hand in the removal of Judges. This enables them to discharge their functions without fear or favour.

A person who has served as a Judge of the Supreme Court cannot plead or act in any court or before any authority anywhere in India. This is to keep intact the dignity and integrity of the highest Court of the land.

In case the office of the Chief Justice is vacant or he is unable to perform his duties by reason of absence or otherwise, the President may appoint one of the other Judges as the Acting Chief Justice.

If at any time there should not be a quorum of the Judges of the Supreme Court to hold or continue any session of the Court, the Chief Justice may invite a sitting Judge of a High Court to act as an ad hoc Judge of the Supreme Court for a temporary period; the previous consent of the President and consultation with the Chief Justice of the High Court are, however, necessary. He may also invite a retired Judge of the Supreme Court or a High Court to act as a Judge of the Supreme Court temporarily; here again the previous consent of the President is necessary.

Jurisdiction and powers.

**Power to punish for contempt.**—The Supreme Court is a Court of Record and has all the powers of such a Court including the power to punish for its contempt. Subject to parliamentary law, it has plenary powers to pass an order for the investigation or punishment of any contempt of itself. Thus the Supreme Court has a summary jurisdiction to punish contempt of its authority. Such a power is necessary for the purpose of preventing interference with the course of justice and for maintaining the authority of law administered in it, and thereby affording protection to public interest in the purity of the administration of justice. This is certainly an extraordinary power which must be sparingly exercised; where, however, the public interest demands it, the Court will not shrink from exercising it and imposing punishment even by way of imprisonment in cases where a mere fine is not adequate.14

**Original jurisdiction.**—The Supreme Court has power to issue directions, orders or writs including writs in the nature of Habeeb Corpus, Mandamus, Prohibition, Quo Warranto and Certiorari15 for the enforce-

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15. See Chapter XXIII. infra.
Before the Constitution (Thirty-ninth Amendment) Act 1972, an appeal lay to the Supreme Court from any judgment, decree or final order in a civil proceeding of a High Court if the High Court certified (a) that the amount or value of the subject-matter of the dispute in the court of first instance and still in dispute on appeal was not less than Rs. 20,000 or a sum prescribed by Parliament by law; (b) that the judgment, decree or final order involved directly or indirectly some claim or question respecting property of the like amount or value; or (c) that the case was a fit one for appeal to the Supreme Court; and where the judgment, decree or final order, against which an appeal was filed, affirmed the decision of the court below in any case except that referred to in sub-clause (c), if the High Court further certified that the appeal involved some substantial question of law. One of the grounds that might be taken here might be that a substantial question of law as to the interpretation of the Constitution had been wrongly decided. Unless Parliament otherwise provides by law, no appeal lies to the Supreme Court from the judgment, decree or final order of one Judge of a High Court.

The Constitution has abolished the test of valuation and provided the Supreme Court from any judgment, decree or final order of a High Court if the High Court certifies (a) that the case involves a substantial question of law of general importance; and (b) that in the opinion of the High Court the said question needs to be decided by the Supreme Court.

An appeal lies to the Supreme Court from any judgment, final order or sentence in a criminal proceeding of a High Court if the High Court (a) has, on appeal, reversed an order of acquittal of an accused person and sentenced him to death; or (b) has withdrawn any case from a subordinate court for trial before it and has convicted the accused person and sentenced him to death; or (c) certifies that the case is a fit one for appeal to the Supreme Court. An appeal under the last sub-clause lies subject to rules made by the Supreme Court and conditions laid down by the High Court. Parliament may, by law, confer on the Supreme Court further powers to receive appeals from a High Court in a criminal proceeding subject to specified conditions and limitations.

Prior to the commencement of the Constitution, there was no criminal appellate court over the High Courts. The Privy Council used to entertain and hear appeals within a limited range by granting special leave to appeal, and it was only in exceptional cases that the Privy Council interfered, in the exercise of the prerogative of the Crown, to review the course of criminal justice. Further, there was no provision for a second appeal in a criminal proceeding. For the first time, the Constitution created a criminal appellate court and also a right of second appeal at least in one case.23

Power to grant special leave to appeal: In spite of these provisions, the Supreme Court may grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed by any court or tribunal, except military tribunals, in India. This power is not subject to any constitutional limitation and is left entirely to the discretion of the Supreme Court. The power is in the nature of special or residuary power exercisable outside the purview of ordinary law, in case where the needs of justice demand interference by the highest Court of the land. The provision conferring the power on the Court is worded in the widest terms possible. It vests in it a plenary jurisdiction in the matter of

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entertaining and hearing appeals, by granting special leave, against any kind of judgment or order made by a court or tribunal in any cause or matter, and the power can be exercised in spite of the specific provisions for appeal contained in the Constitution or other laws. The Constitution, for the best of reasons, did not choose to fetter or circumscribe the power exercisable under the provision in any way. This overriding power is in a sense wider than the prerogative right of entertaining an appeal exercised by the Privy Council in England.\textsuperscript{21}

This wide discretionary power is, however, to be exercised sparingly and in exceptional cases only.\textsuperscript{22} It is implicit in the reserve power that it cannot be exhaustively defined, but decided cases do not permit interference unless by disregard to the forms of legal process or some violation of the principles of natural justice or otherwise, substantial and grave injustice has been done.\textsuperscript{23}

Advisory Jurisdiction.—The President of India may obtain the opinion of the Supreme Court on a question of fact or of law which is of such a nature and public importance that it is expedient to obtain its opinion upon it. The Court may report to the President its opinion after such hearing as it thinks fit. This consultative function of the Supreme Court "is a constitutional function, not in the nature of any jurisdiction though always a proposal and an opposition. It things and problems and does not result in declaratory or executable pronouncements."\textsuperscript{24}

Though the President is competent to refer any question of public importance to the Court, the chief utility of an advisory judicial opinion is to enable the Government to have an authoritative opinion as to the validity of some measure before introducing it in the Legislature, and, therefore, the questions referred to should be quite precise.\textsuperscript{25}

Though "it is not for the Court to judge on the expediency, prematurity, or inefficacy of giving an opinion, it has discretion to give or withhold opinion depending on the nature of the question presented in defence of its own character as an effective and independent tribunal. It is up to the Court to see that it is not made into a legal platform for political controversies or for legalising political situations at the behest of the executive. Also if facts are disputed by parties appearing before the Court in a reference and if no finding may be made of the facts according to the accepted canons of legal procedure, the Court may validly decline to give an opinion."\textsuperscript{26}

The advisory opinion is not binding on the referring authority. There is only a consultation between the executive and judiciary. Conversely, the

\textsuperscript{21} Basu, op. cit., at pp. 199-200.
\textsuperscript{23} Basu, op. cit., at pp. 199-200.
\textsuperscript{25} Basu, op. cit., at pp. 199-200.
opinion cannot prevent the Supreme Court from delivering a contrary decision if the validity of the measure is impeached after its enactment.\textsuperscript{27}

It appears that the advisory opinion of the Supreme Court is not binding upon the courts in India, though they may have a great persuasive force. In fact, in many cases, the High Courts have freely relied upon the principles of law laid down by the Supreme Court in its opinions.\textsuperscript{28}

A dispute arising out of any treaty, agreement or sanad etc., discussed above, may be similarly referred to the Court for opinion and it shall give its opinion after having a proper hearing.

\textbf{Power of review: } Subject to the law made by Parliament for its own rules, the Supreme Court has the power to review its judgment or order.

\textbf{Miscellaneous: } The Supreme Court has jurisdiction and powers in respect of any matter to which the provisions, dealing with its appellate civil and criminal jurisdiction, do not apply, if such jurisdiction and powers were exercisable by the Federal Court before the commencement of the Constitution under any existing law. Taking an example, under the Federal Court Jurisdiction Act, 1948, the Federal Court had jurisdiction to hear appeals from proceedings under laws like the Income-tax Act and the Land Acquisition Act, and, therefore, the Supreme Court has also the same jurisdiction under these laws.\textsuperscript{29}

The Supreme Court may have such additional jurisdiction and powers as Parliament may confer by law in respect of any matter in the Union List. Its jurisdiction and powers may be further enlarged by agreement between the Government of India and the Government of any State with respect to any matter, if Parliament so provides by law.

The Supreme Court may be empowered by Parliament to issue directions, orders and writs including prerogative writs for any purpose other than the enforcement of fundamental rights.

Parliament may confer upon the Supreme Court necessary ancillary powers for the purpose of enabling it to exercise its jurisdiction given by the Constitution more effectively. Under this provision, Parliament has substituted section 527 in the Code of Criminal Procedure in 1952 giving the power to the Supreme Court to transfer a criminal case for appeal from one High Court to another whenever it appears to it that an order under the section is expedient in the ends of justice.

In the exercise of its jurisdiction, the Supreme Court may pass necessary decree or order for doing complete justice in any matter or cause pending before it. The Court has plenary power to make an order for the purpose of securing the attendance of any person, the discovery or production of any document, or the investigation or punishment of its contempt.

Subject to parliamentary law, the Supreme Court may, with the President's approval, make rules for regulating generally the practice and procedure of the Court and for other purposes. Under this provision, it has made the Supreme Court Rules in 1950.

\textsuperscript{27} Basu, op. cit., at p. 193.
\textsuperscript{28} Id., at pp. 200, 201.
Other provisions

All civil and judicial authorities in India have to act in aid of the Supreme Court; and the law declared by the Supreme Court is binding on all courts in India. These provisions secure the supreme position of the Supreme Court in this country.

The provision that the law declared by the Supreme Court is binding on all courts, needs some comment. Because of this provision, it is not open to the courts in India to question any principle enunciated by the Supreme Court although they can very well examine the facts of any case before them to see whether and how far the principle applies to the facts of a particular case. Nor is it open to them to question its decision on any particular issue or fact whether on account of judicial dignity or otherwise. 30

The Supreme Court, however, is not bound by its previous decision.

When a decision of the Supreme Court is binding as precedent, it is not everything in it which binds the courts. It is only its *ratio decidenti* which has binding force. *Ratio* is the proposition of law which was necessary for deciding the actual issue between the parties; this is the underlying principle of a judicial decision which from its authoritative element for the future. *Obiter dicta* are not binding. They are statements made by a Judge in the course of a decision, arising out of the circumstances of the case, but not necessary for the decision; they form that part of the judgment which consists of the expression of the Judge's opinion on the point of law which is not directly raised by the issue between the litigants. 31

Decisions of the Privy Council and Federal Court are binding unless superseded by the decisions of the Supreme Court. 32

Comments

Since its inception, the Supreme Court has repeatedly set before itself great ideals for adequate discharge of its varied and novel responsibilities, and has proved to be a great institution. Yet it suffers from certain drawbacks. "In recognition of the role which the Supreme Court has to play as the highest judicial tribunal of the country, as the Court of last resort in civil and criminal matters and as the protector of the rights and liberties of the citizen, the Constitution provides adequate safeguards to ensure its being manned by an independent and efficient judiciary. Such a judiciary is a *sine qua non* under any system of government because of the inter-relation between the quality and the independence of the Judge and the proper administration of justice. Its importance is far greater under a democratic constitution to determine the legality of the action of executive authorities as between the State and the citizen. Hence of protecting the independence of the judiciary, the Constitution has endeavoured to put the Judges of the Supreme Court above the executive control as is clear from the provisions dealing with appointment and removal of Judges. Obviously the selection of Judges of a Court of such great importance to the progress of the nation,

31. *Bhui, op. cit., at pp. 183, 184, 188*; V. K. *Sarkar,* "Law Declared by the Supreme

32. *Criminal Section, A Y B., 1940-1941.*

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carries a great responsibility that has to be exercised with great care and caution. "The constitution of the Court must command the confidence not only of the people but also the judiciary and the Bar as a whole, sitting as it does in appeal on matters decided by the High Courts in the several States. The Court must consist of Judges who taken as a body are, as lawyers and men of vision, superior to the body of Judges manning the High Courts. Such a result can be achieved and maintained only by the exercise of courage, vision and imagination in the selection of Judges made with an eye solely to their efficiency and capacity."  

It has, however, been widely felt that communal and regional considerations have had upper hand in the selection of the Judges. Still more regrettable is the general impression that executive influence from high circles has been greatly responsible for certain appointments to the Bench. There is no doubt in the statement that the best talent among the Judges of the High Courts has not always had its way to the Supreme Court. Considerations of seniority and experience have, not rarely, weighed more with the appointing authority than those of merit and ability.  

There is the problem of arrears also. In view of the very wide jurisdiction of the Supreme Court, the number of civil appeals, criminal appeals and petitions for the enforcement of fundamental rights is quite large. The Court is not able to dispose of them quickly in view of inadequacy of its strength. The Court has further to face the situation created by a large number of appeals admitted in labour matters. "It has the natural effect of clogging the work of the Supreme Court. Notwithstanding the recent increase in its strength it is not surprising that the disposal by the Court is not equal to the rising institutions with which it is faced. The graver aspect, however, of the matter is that labour matters are being thrust upon a Court which has not the means or materials for adequately informing itself about the different aspects of the questions which arise in these appeals and therefore finds it difficult to do adequate justice. In many of these cases, the Supreme Court has not even the assistance of a properly written judgment such as it would have in appeals from the High Courts. Equally grave are the delays caused by these appeals in the disposal of industrial matters which essentially need speedy disposal."  

Lastly, it may be pointed out that there is no constitutional bar to future employment of, and chamber practice by, Supreme Court Judges after retirement. Some of them have taken employment under the Government while some others have set up chamber practice. This is not consistent with the dignity of these retired Judges and consonant with the high traditions which they are expected to observe. This practice has a tendency to affect adversely their independence and detachment of outlook expected of them.  

In view of these drawbacks, the Law Commission has made certain recommendations. They expect that communal and regional considerations and those relating exclusively to seniority and experience would not come in the way of making appointments of Supreme Court Judges. Merit and

34. Id., at pp. 23-34.  
35. Id., at pp. 34, 37.  
36. Id., at pp. 54-55.  
37. Id., at pp. 50-51.  
38. Id., at pp. 45-46.
ability would be the only basis of selection. Age should not be a dominant consideration. "It must not be forgotten that youth carries a freshness and vigour of mind which have their advantages as much as maturity and experience flowing from age." Distinguished members of the Bar should be recruited directly to the Supreme Court at a time when they can look forward to a fairly long tenure on the Bench of the Court. Each Chief Justice and a Judge of the Supreme Court should have a tenure of at least five to seven years and ten years respectively. This would further the interest of stability of judicial administration. Only the most suitable person, whether from the Supreme Court, the High Courts or the Bar, should be regarded as Chief Justice. The practice of appointing the seniormost puisne as Chief Justice is not desirable unless he is at the time.\(^{39}\)

The provisions dealing with pensions payable to Judges and their leave privileges should be liberalised.

Apart from increasing the strength of the Supreme Court,\(^{40}\) some other adequate measures should be taken in order to dispose of the arrears quickly. For example in labour matters, relief may be given to the Court by enabling parties to make appeals in such matters either to the High Courts or to special tribunals established for this purpose.

The retitled Judges of the Supreme Court should be restrained constitutionally from accepting any employment under the Union or a State other than as \textit{ad hoc} Judges of the Supreme Court, or from starting chamber practice.\(^{41}\)

\(^{39}\) Id., at pp. 37, 55-56.

\(^{40}\) This is the author's suggestion.

\(^{41}\) For all these recommendations, see Law Commission Report, op. cit., at pp. 37, 55-57. See generally id., at pp. 32-63.
CHAPTER XXII

PRIVY COUNCIL

Introduction

Till October 10, 1949, the Privy Council, sitting in England, was the supreme appellate tribunal for India. This tribunal has done a remarkable work in the field of law and justice of this country. Composed of eminent judges, it "powerfully moulded Indian law and even the method of administration of justice in India importing into Indian jurisprudence notions which they had imbibed from their training in English law." Far greater diversity would have cropped up in the common law countries without its guidance. In fact it has proved to be the great unifying agency. It still exercises its ancient jurisdiction to hear appeals from the overseas dependencies.

It is necessary here to trace, in brief, the history of this unique judicial institution and discuss its jurisdiction prior to coming to the subject of Indian appeals and petitions.

History.

The Norman Conquest of England took place in 1066. Its greatest significance lay in the introduction of a strong Central Government. Such a Government was competent to take into its hold all departments of administration—legislative, executive and judicial. The ruling body of the Normans was Curia Regis. It met at regular intervals in different parts of the country. It was primarily a feudal Council consisting of all the tenants-in-chief of the Crown. All important royal officials were counted as tenants-in-chief, but the King could summon anyone he pleased. The Curia Regis was not a Court of law in the modern sense; it was a kind of general governing body for the whole realm.

measures were taken which made the Curia Regis a law Court for all manner of causes. As the work was parcelled out, branches split off to deal with different kinds of business, and from the disintegration the Common Law Courts were born and inherited their peculiar features. This process began with the development of the financial side of the Curia Regis in the reign of Henry I (1100-1135), but it was extended over a period of two centuries more or less until all the Common Law Courts had come into being. The Curia Regis, that under the more modern designation was responsible for yet another broad convenience, All the Royal Courts have the same origin but the date of their birth affected their growth and characteristics."

In course of time, the smaller body came to be known as the Council which continued to meet as the King’s inner and most important body of adviser. It still retained some jurisdiction, though Common Law Courts and Court of Chancery had separated from it.

The fifteenth century England was full of troubles. The Battle of Bosworth Field (1485) placed the Tudors on the English throne. As the Normans ruled through the Curia Regis, the Tudors ruled through the Council. In so ruling, they made use not only of the Council Board which was an inner ring of King’s eminent political advisers, soon to be called the Privy Council, but also of an old institution connected with the Council—called the Court of Star Chamber. In the main this was a judicial organ which the Tudors employed as an instrument to set right the country sadly disrupted during the Wars of the Roses. During their regime, this Court was quite popular but it soon developed into an engine of oppression and tyranny in the earlier period of Stuart monarchy which pressed its claims to absolutism and divine right; it did not, therefore, survive the victory of Parliament over the King and was abolished by an Act of 1641. Thus the Council lost finally all power of judicial review and was reduced to the status of a Court of Record, with power to entertain some matters. It retained, at least, the capacity of hearing appeals from lower courts and Isle of Man.

It was under the Tudors that the Council had acquired the exclusive jurisdiction, which came to be known as the Judicial Committee and was to be exercised on a better footing as will be presently seen.

Nature, extent and importance of jurisdiction

In 1926, Viscount Haldane observed in *Hull v. M’Kenna*: “We are not Ministers in any sense; we are a Committee of Privy Councillors who are

4. Potter, op. cit, at p. 100.
5. Id., at pp. 144-140, 143; James, op. cit., at pp. 50-51, 54; H. Gowell, The History and Constitution of the Courts and Legislative Authorities in India, at pp. 141-149 (1903).
acting in the capacity of Judges, but the peculiarity of the situation is this: It is long-standing constitutional anomaly that we are really a Committee of the Privy Council giving advice to His Majesty, but in a judicial spirit. We have nothing to do with politics or policies, or party considerations; we are really Judges, but in form and in name we are the Committee of the Privy Council. The Sovereign gives the judgment himself, and always acts upon the report which we make. Our report is made public before it is sent up to the Sovereign in Council. It is delivered here in a printed form. It is a report as to what is proper to be done on the principles of justice; and it is acted on by the Sovereign in full Privy Council; so that you see, in substance, what takes place is a strictly judicial proceeding.

"That being so, the next question is: What is the position of the Sovereign sitting in Council in giving formal effect to our advice, and what are our functions in advising him? The Judicial Committee of the Privy Council is not an English body in any exclusive sense. It is no more an English body than it is an Indian body, or a Canadian body or a South African body, or, for the future, an Irish Free State body. There sit among our members Privy Councillors who may be learned Judges of Canada...or from India, or we may have the Chief Justice, and very often have had them from the other Dominions, Australia and South Africa. I mention that for the purpose of bringing out the fact that the Judicial Committee of the Privy Council is not a body, strictly speaking, with any location. The Sovereign is everywhere throughout the Empire in the contemplation of the law. He may as well sit in Dublin, or at Ottawa, or in South Africa, or in Australia, or in India, as he may sit here, and it is only for convenience, and because we have a Court, and because the members of the Privy Council are conveniently here that we do sit here, but the Privy Councillors from the Dominions may be summoned to sit with us, and then we sit as an Imperial Court which represents the Empire, and not any particular part of it. It is necessary to observe what effect that has upon the present situation. The Sovereign, as the Sovereign of the Empire, has retained the prerogative of justices, but by an Imperial Statute to which he assented, that was modified as regards constitutional questions in the case of Australia. That is the only case that I need refer to where there has been any modification.

"In Ireland, under the Constitution Act, by Art. 66, the prerogative is saved, and the prerogative, therefore, exists in Ireland just as it does in Canada, South Africa, India, and right through the Empire, with the single exception that I have mentioned—that it is modified in the case of the Commonwealth of Australia in reference to, but only in reference to, constitutional disputes in Australia. That being so, the Sovereign retains the ancient prerogative of being the supreme tribunal of justice; I need not observe that the growth of the Empire and the growth particularly of the Dominions, has led to a very substantial restriction of the exercise of the prerogative by the Sovereign on the advice of the Judicial Committee. It is obviously proper that the Dominions should more and more dispose of their own cases, and in criminal cases it has been laid down so strictly that it is only in most exceptional cases that the Sovereign is advised to intervene. In other cases the practice which has grown up, or the unwritten usage which has grown up, is that the Judicial Committee is to look closely into the nature of the case, and, if in their Lordships' opinion, the question is one that can best be determined on the spot, then the Sovereign is not, as a rule, advised to intervene, nor is he advised to intervene normally—I am not laying down precise rules now, but I am laying down the general princi-
plies—unless the case is one involving some great principle or is of some very wide public interest. It is also necessary to keep a certain discretion, because when you are dealing with the Dominions you find that they differ very much. For instance, in States that are unitary States—that is to say, States within themselves—questions may arise between the Central Government and the State, which, when an appeal is admitted, give rise very readily to questions which are apparently very small but which may involve serious considerations, and there leave to appeal is given rather freely. In Canada there are a number of cases in which leave to appeal is granted because Canada is not a unitary State, and because it is the desire of Canada itself that the Sovereign should retain the power of exercising his prerogative; but that does not apply to internal disputes not concerned with constitutional questions, but relating to matters of fact. There the rule against giving leave to appeal from the Supreme Court of Canada is strictly observed where no great constitutional question, or question of law, emerges. In the case of South Africa, which is a unitary State, counsel will observe that the practice has become very strict. We are not at all disposed to advise the Sovereign unless there is some exceptional question, such as the magnitude of the question of law involved, or it is a question of public interest in the Dominion to give leave to appeal. It is obvious that the Dominions may differ in a certain sense among themselves. For instance, in India leave to appeal is more freely given than elsewhere, but the genesis of that is the requirements of India, and the desire of the people of India. In South Africa, we take the general sense of that Dominion into account, and restrict the cases in which we advise His Majesty to give leave to appeal. It becomes with the Dominions more and more or less and less as they please. We go upon the principles of autonomy on the question of exercising the discretion as to granting leave to appeal. It is within the Sovereign’s power, but the Sovereign, looking at the matter, exercises this discretion.”

In 1828, Lord Brougham, speaking on Law Reform in England, said that the Privy Councillors “determine not only upon questions of colonial law in plantation cases, but also sit as Judges, in the last resort, of all prize causes. And they hear and decide upon all our plantation appeals. They are thus made the supreme Judges, in the last resort, over every one of our foreign settlements, whether situated in those immense territories which you possess in the East, where you and a trading company rule together over not less than 70,000,000 of subjects—or established among those rich and populous islands which study the Indian Ocean and from the Great Eastern Archipelago—or have their stations in those lands part lying within the tropics, part stretching towards the pole, peopled by various races, differing widely in habits, still more, widely in privileges, great in numbers, abounding in wealth, extremely unsettled in their notions of right, and excessively litigious, as all the children of the new world are supposed to be, both from their physical and political constitution. All this immense jurisdiction over the rights of property and person, over rights political and legal, and over all the questions growing out of so vast and varied a province, is exercised by the Privy Council unaided and alone. It is obvious that, from the mere distance of those colonies and the immense variety of matters arising in them, foreign to our habits and beyond the scope of our knowledge, and judicial tribunal in this country must of necessity be an extremely inadequate Court

7. Id., at pp. 463-463.
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These observations of Viscount Haldane and Lord Brougham explain the nature, extent and importance of the jurisdiction of the Privy Council to hear appeals and petitions from colonies.

The position as to jurisdiction, in brief, is that the appellate jurisdiction of the Privy Council is based on the inherent prerogative right, and on proper occasions, the duty of the King-in-Council to exercise an appellate jurisdiction, with a view not only to ensure, as far as possible, the due administration of justice in the individual case, but also to preserve the due course of procedure generally. An appeal may be heard in the matter, whether civil or criminal, by whichever party to the proceedings the appeal is brought, unless the right has been expressly renounced. The ancient jurisdiction of the King-in-Council to entertain appeals from overseas was given a statutory recognition by the Judicial Committee Act, 1833 as amended. This Act set up a Judicial Committee to receive and determine appeals either under the customary jurisdiction of the Privy Council or under the Act itself. In theory the Judicial Committee does not deliver judgment; it only advises the Sovereign who acts on its report and issues an Order in Council to give effect to its advice. Only its majority view is expressed. It may, however, be mentioned that what takes place before the Judicial Committee is a strictly judicial proceeding. It possesses power to advise the Crown only judicially.

Civil Appeals are either taken without the special leave of the Privy Council or with special leave. Appeals without special leave are regulated by Order in Council or Imperial Act or Local Act. Under such Orders or Acts, the right to appeal is regulated according to the disputed amount, and in addition the local Court may grant leave to appeal in other cases. In cases where appeals lie as of right, application has to be first made to the Court from which the appeal is preferred whether there is a statutory right to do so.

Special leave to appeal may always be granted by the Judicial Committee in cases where any important point is involved, except in cases in which it has been prevented from doing so by statutes. In other words, when no appeal lies to the Judicial Committee as a matter of right, a party may apply for special leave. The petition ought to state succinctly but fully in the frankest manner the circumstances under which the leave is sought and the

9. Paragraph of the observations
11. Anwami v. Mohunri L.
12. Reckah v. Monmohini L.
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7. Id., at pp. 403-405.
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10. "In re Maldon," 10 App. Cas. 555, also the first paragraph of the observations.
legal grounds to show that there is a substantial case on the merits or a substantial point of law is involved in the case.  

The Crown's prerogative to allow an appeal, if so advised, has not been taken away in criminal matters; no doubt, the cases in which the Judicial Committee ought to advise the Crown to exercise prerogative in criminal cases are of a rare and exceptional character. The Committee is not in a position of a court of criminal appeal and does not advise the Crown to intervene in a criminal case, unless there has been a violation of the principles of natural justice, or a gross violation of the rules of procedure, or otherwise substantial and grave injustice has been done. It is proper for the Committee to entertain an appeal when the application for leave to appeal in a criminal case raises questions of great and general importance and is likely to occur often and also where it shows the due and orderly administration of the law interrupted or diverted into a new course which might create an evil precedent for the future and also where there is no other means of preventing these consequences.

Indian Appeals

The history of Indian appeals to the Privy Council may be traced as below.

Appeals from Crown's Courts

Appeals from Mayor's Courts.—In 1726, the Royal Charter, establishing the Mayor's Courts at Presidency towns, gave a right of appeal to the Privy Council from these Courts. An appeal lay, first to the Governor-in-Council, and then to the Privy Council in cases where the amount in dispute exceeded the sum of 1,000 Pagodas. This was the first occasion when a right of appeal to England was granted.

Appeals from Supreme Courts.—In 1773, the Regulation Act empowered the Crown to establish by Charter a Supreme Court at Calcutta and authorized the person aggrieved by the judgment or determination of the Court, on such security as His Majesty should prescribe in the Charter, in superseding the Mayor's Court, and reserved a civil case. An aggrieved party had to present a period of six months from the delivery of the judgment asking for leave to appeal in a case in which the value of the subject-matter in dispute exceeded 1,000 Pagodas.

In criminal matters, the Supreme Court was given full and absolute power and authority to allow or deny appeals, and to regulate the terms upon which such appeals were to be allowed.


In 1797, an Act of Parliament empowered the Crown to supersede by Charters, the judicial arrangements of Madras and Bombay and establish in their place the Recorder’s Courts. In 1798, the required Charters were issued. Provisions analogous to those for Calcutta were also made for regulating appeals from the Recorder’s Courts to the Privy Council.

The Recorder’s Court at Madras gave way to Supreme Court in 1801 by a Charter of the Crown granted under the authority of an Act of Parliament passed in 1800. The Charter of the Madras Supreme Court contained provisions similar to those of the Charter of the Calcutta Supreme Court in respect of appeals. In 1823, the Recorder’s Court at Bombay was replaced by the Supreme Court by a Crown’s Charter granted under the authority of an Act of Parliament of that year. This Charter also reserved a right of appeal to aggrieved parties on similar lines as provided in the case of other Supreme Courts, with the only difference that the value of the disputed matter was to exceed 3,000 Bombay Rupees, instead of 1,000 Pagodas.

In all cases, each Charter of Justice reserved the power of the Privy Council, on petition of an aggrieved party, to refuse or admit the appeal, and to reform, correct or vary such decision according to the Royal pleasure. Thus there were two kinds of appeals: Appeals as a matter of right, when conditions laid down were satisfied, and appeals by the special leave of the Privy Council.

Appeals from Company’s Courts

An appeal from the decisions of the Courts of the Company to the Privy Council was first allowed in 1781 by the Act of Settlement. The Sadar Diwani Adalat heard appeals in civil cases from the lower courts of the Company working in the Bengal Provinces. Till 1781, its decisions were final. In that year, however, the said Act constituted the Sadar Adalat as a Court of Record to hold all such pleas and appeals in the manner and with such powers as it had held before; and gave a right of appeal from its decisions to the Privy Council in civil suits only where the value of the subject-matter in dispute was £ 5,000 and more.

The Act of Settlement had only prescribed the limitation as to amount. No rules were prescribed by His Majesty-in-Council for the conduct of the Indian courts in dealing with the applications of appellants praying for leave to appeal. It was, therefore, necessary to make such rules, as well for the interested parties, as also for the and forwarding the petitions.

In view of this requirement, the Gouvernor-General-in-Council passed a Regulation in 1797 laying down rules for the conduct of appeals to the Privy Council against decisions of the Sadar Adalat. The Regulation limited the right of appeal in point of time to a period of six months from the date of the judgment, and in point of value to suits where the amount of judgment appealed against was to exceed £ 5,030 sterling, equivalent to Rs. 50,000, exclusive of costs.

17. For these provisions, see Chapters V, VII, VIII, XIV and also W. H. Morley, The Administration of Justice in British India, at pp. 139-140 (1838); Cowell, op. cit., at p. 150.
18. Reg. XVI of 1797.
19. Ten current rupees being considered equivalent to £ 1 sterling.
In 1892, a Sādar Diwani Adalat was established at Madras. An appeal lay to the Governor-General-in-Council from its decisions in civil suits of the value of Rs. 45,000 and upwards. In 1818, the Governor-General relinquished this authority of receiving appeals. At the same time, a provision was made authorizing an appeal from the decisions of the Madras Sādar Diwani Adalat to the Privy Council; and rules were framed for the conduct of such appeals similar to those made for Calcutta Sādar Diwani Adalat in 1797. 20 No restriction was, however, fixed as to the appealable amount. Accordingly, in many cases, the appeals from Madras were for sums below £ 5,000 sterling.

As regards Bombay, the right of appeal was first allowed in 1812. A Regulation of that year enacted rules for regulating appeals from the Sādar Diwani Adalat to the Privy Council in suits of the value of £ 5,000 sterling, exclusive of costs. 21 It appears that a Regulation of 1815 rescinded these rules, doubts having been expressed regarding the legal competency of the Bombay Government to admit appeals from the Sādar Diwani Adalat to the Privy Council under the Statutes of the realm. 22 In 1818, provisions were made remedying defect in the legislature caused by the imprudent rescission of the rules, and for the reception and transmission of appeals from the Sādar Diwani Adalat to the Privy Council; certain rules for this purpose, similar to those already noticed, were made. No restriction was fixed as to the appealable amount. In 1827, a new Code of Bombay Regulations was promulgated rescinding the previous Regulations. Similar provisions were made in respect of appeals from the Sādar Diwani Adalat to the Privy Council. Again the restriction as to the value of the disputed matter was omitted. 23 Thus from 1818, there was no restriction as to appealable amount. The consequence was that a large number of appeals were preferred to the Privy Council, involving such trivial amounts as to become a source of great hardship and grievance to the respondents.

In all the Presidencies, the respective regulations reserved the Sovereign’s right to reject or receive all appeals, notwithstanding any provisions in them. Thus there were two kinds of appeals to the Privy Council from the Sādar Diwani Adalats—Appeals as a matter of right, when prescribed conditions were fulfilled, and appeals by special leave of the Privy Council. 24

20. Madras Reg. VIII of 1818. This Regulation arose from the said Reg. IV of 1812.


22. Reg. II of 1813.


24. For all these provisions, see Chapters VIII, XI, XV, and also Morley, op. cit., at pp. 140-143; Cowell, op. cit., at p. 151.
Fate of appeals

So far we have historically dealt with several provisions of the statutes, charters and regulations, dealing with appeals from the Crown's and Company's courts to the Privy Council. It is necessary now to inquire into their efficiency when put into operation. It appears that the relevant provisions were almost completely useless, "not that they were unskilfully framed, or that they were inapplicable to the furtherance of justice, but the ignorance of the natives of the steps necessary to be taken to bring an appeal before the Privy Council, and the very slight intercourse with Europeans enjoyed by many of the appellants, prevented the enactments relating to appeals from being either profitably or extensively applied."25

The persons who filed appeals from the judgments of the Supreme Courts did not labour under the disadvantages and handicaps which came in the way of the parties aggrieved by decrees of the Sadar Diwani Adalats. In the case of Supreme Courts, rules for appeals were laid down in the Charters of Justice which established them, and in the Rules and Orders of the Courts themselves, which were sanctioned by His Majesty-in-Council. In almost all cases to be decided by the Supreme Courts, the native parties were in the habit of close intercourse with Europeans; these Courts were the off-shoots of the English Courts; their proceedings closely resembled those in England; and the suits in them were conducted by English Counsels and Attorneys. In case of appeals, the Attorneys appointed solicitors in England under whose management appeals were carried on in the Privy Council. Thus the native suitors in the Supreme Courts did not have any difficulty in pursuing appeals in England. On the other hand, the appellants from the Sadar Diwani Adalats, who were generally natives of rank and wealth and lived in the Mofussil, had only vague notions of the laws and constitution of England. They had no definite idea of the manner and procedure of pursuing appeals in England. They were more or less conversant with their own respective laws and regulations of the Government only. Until quite late, their legal advisers and practitioners in the Courts were natives and they were no better than them so far as the conduct of appeals in England was concerned. In the case of an appeal from the Supreme Courts, the Attorney who conducted the case obtained papers of appeal from the Court concerned and forwarded them to an agent in England. He thus constituted a link of connection between the appellant and the Privy Council. Such a link was missing in the case of appellants from the Sadar Adalats. In their cases, the transcripts were prepared by the Government and then despatched to England; when once placed in the hands of the Government, the Vakils of the appellants, who conducted their case in India, were of no further use to them as they did not know what steps were to be taken in this connection. In consequence, the appeals stood still. The suitors in India, having complied with the regulations to the best of their ability and having transmitted them to England through the Government, thought that the Privy Council would consider the cases and return decisions on them, without their pursuing them in England. Such expectations were obviously in conformity with the practice obtained in case of appeals from the Madras Sadar Adalat to the Governor-General-in-Council up to 1818. There the procedure was that when properly attested documents were despatched to Calcutta, a decree was returned in due course of time, confirming, reversing or varying the decree of Sadar Adalat at Madras, without anything being re-

25. Morley, op. cit., at pp. 143-144.
quired to be done by the parties in that behalf. Thus, when appeals were sent to England, the parties patiently waited for a decision of the Privy Council, but all in vain. In many cases, the property in dispute was completely eaten up by public and private debts, and the litigants were either ruined or greatly impoverished. In fact the right of appeal at this stage, did harm instead of benefit, inasmuch as the deposits, made by the parties, were not released even when they compromised their suits, because the Courts in India had no knowledge of what was done by the Privy Council in respect of the suits. 26

It appears that in sixty years—that is, from 1773 when the Regulating Act allowed the filing of appeals from the Supreme Court at Calcutta before the Privy Council till 1833 when an Act of Parliament which constituted the Judicial Committee of the Privy Council—only fifty appeals were instituted, the first one being in 1799. The majority of those appeals were from the Supreme Courts.

It was discovered round about 1826 that a large number of Indian appeals, involving questions of native law of great importance and pending before the Privy Council for many years, were not heard because of the ignorance of the parties as to the proceedings necessary to be taken in England. Subsequently, the Court of Directors applied to the Privy Council for permission to bring forward appeals on behalf of suitors. The transcripts of the proceedings taken in India, accumulated in the Office of the Privy Council, were transmitted to the East-India House for examination and report. Accordingly, the Solicitor of the Company submitted a report to the Court of Directors, stating the cause of action, the names of the parties, the amount sued for, and all other necessary particulars respecting each appeal. The report was forwarded to the Board of Control so as to be laid before the Privy Council. It appeared from this report that the earliest appeal was from Bengal from a decision given in 1799. In all, twenty-one appeals from Bengal, ten from Madras and seventeen from Bombay were pending in England. None of the appeals from Madras and Bombay was of an earlier date than 1818.

After this first step was taken in the direction towards remedying the failure of justice, several learned persons were consulted about the best means of pursuing the appeals before the Privy Council. Accordingly, in 1832, the Board of Control requested three of them to make a report on the best course to be adopted in order to cause all the old appeals to be put for decision. A person was engaged to arrange all the papers connected with different appeals. Thereafter, a report was drawn up of all the appeals lying in the Privy Council Office and in which no proceeding were taken by the parties, and then it was submitted to the Court of Directors. 27

—Judicial Committee Act, 1833

Permanent Judicial Committee of the Privy Council.

The attention of the Parliament was now drawn to the inefficiency of the Privy Council, and in 1833, therefore, the Judicial Committee Act was passed for the better administration of justice in the Privy Council. Till this date, its jurisdiction was exercised by a special committee, not

26 Id., at pp 144-145. See also Cowell, op. cit., at pp. 151-152.
27. Morley, op. cit., at pp. 146-147.
permanently constituted, which, during the eighteenth century, was often composed of members with no legal qualifications; as a consequence its functions were not performed satisfactorily. In many cases it worked in the most indecent haste, and in others dealt with the issues rather from the point of general expediency than of strict law. In the beginning, its functions were not considered very important, but with the expansion of the British Empire, its importance also increased. With the constitution it had, it was not possible for it to exercise a vast and varied jurisdiction to entertain appeals and petitions from overseas dependencies effectively and efficiently. It, therefore, needed a reorganization which was brought about by the said Act.28

The Judicial Committee Act created a permanent Judicial Committee of the Privy Council. The Committee was composed of the President of the Council, the Lord High Chancellor, and several of the Judges of highest rank in the kingdom, such as the Lord Chief Justice or Judge of the Court of King's Bench, Master of the Rolls, Vice-Chancellor of England, Lord Chief Justice or Judge of the Court of Common Pleas, Lord Chief Baron or Baron of the Court of Exchequer, etc. The power was given to the Crown to appoint any two other Privy Councillors as members of the Committee.29

Jurisdiction and powers

All appeals, or complaints in the nature of appeals, which might be brought before the Privy Council from the determination, sentence, rule or order of any court, Judge or Judicial Officer by virtue of any law, statute or custom, and all pending or unheard appeals, were to be referred by the Crown to the Judicial Committee. A report or recommendation thereon was to be made to the Sovereign-in-Council for his decision as had been the practice before. The nature of such report or recommendation was always to be stated in open Court. The Crown might refer any other matters to the Committee for advice. The quorum was three members of the Committee exclusive of the Lord President of the Privy Council.

28. See James, op. cit., at p. 34.
29. Judges in certain Dominions not exceeding five (increased to seven by the

General Act, op. cit., at p. 119/.
The Judicial Committee might take evidence \textit{viva voce}, or upon written depositions; order any particular witnesses to be examined and remit causes for rehearing; in certain cases, direct depositions to be read at the trial of the issue; make orders as to the admission of witnesses; and direct new trials of issues, etc. The award of costs was in the discretion of the Committee. The Committee was given power to punish its contempts and to compel attendance. Attendance of witnesses and production of papers might be compelled by subpoena. Decrees on appeals from foreign courts were to be carried into effect as the Sovereign-in-Council should direct. Orders made on appeals were to have effect notwithstanding death of parties. Sovereign-in-Council might make orders for regulating the mode and time of appeals, and was given full powers in respect of enforcing judgments, decrees and orders.\textsuperscript{30}

Indian Appeals under Judicial Committee Act


The Judicial Committee Act specifically dealt with the Indian appeals. As various appeals had been admitted by the Sadar Diwani Adalats and the transcripts of the proceedings had, from time to time, been despatched to the Privy Council Office, but the suitors had not taken the requisite steps to bring them to hearing, Sovereign-in-Council might direct the Company to bring appeals from the Sadar Adalats to a hearing, and to appoint agents and counsels for the different parties to such appeals, and make such orders for the security and payment of costs as Sovereign-in-Council should think fit. Such appeals were to be heard and reported to Sovereign-in-Council and determined in the same manner and the decrees of Sovereign-in-Council were to have the same force and effect, as though the same had been brought to a hearing by the direction of the parties appealing in the usual course of proceeding. It was, however, provided that these powers should not extend to appeals from the Sadar Diwani Adalats other than appeals in which no proceedings had been or should, thereafter, be taken in England, on either side, for a period of two years subsequent to the admission of appeals by the Sadar Adalats.

The Act further \textit{ordred} the Sovereign-in-Council to make rules and orders for the purpose of preferred from the deictes, or other courts in India, and for the prevention of delays in making or hearing such appeals, and as to the expenses and the amount of the property in respect of which the appeal might be taken.
The Act also provided that two members of the Privy Council, who had held the office of Judge in East Indies or any of the Crown's Dominions beyond the seas, might attend sittings of the Judicial Committee as Assesors at a salary of £400 per annum. They could not, however, cast their votes.31

Comments

Thus the Judicial Committee Act ensured a definite and speedy hearing of appeals from Indian courts. It gave efficiency to pre-existing laws and regulations which had, by long experience, been found wholly ineffective and indeed productive of something more than a mere failure of justice. The appointment of retired Indian Judges as Assesors brought an amount of knowledge and experience to bear upon many questions arising in appeals from India, which could not have been rendered so readily and easily available by any other means. It is, however, surprising that the British Government never thought it necessary to appoint retired Judges of the Company's courts as Assesors in Indian appeal cases; only the Judges of the Crown's courts were so appointed. In appeals from the Company's courts the peculiar experience of the Crown's courts Judges was necessarily applicable to such cases only which involved points of Hindu or Mohammedan law. A large number of suits instituted in the Company's courts, including almost all those which related to landed property in the Mofussil, were connected with the revenue; and the Act of Settlement forbade the Supreme Court at Calcutta from having jurisdiction in any matter concerning the revenue or its collection according to the usage and practice of the country or the regulations; similar provisions were made in respect of the Madras and Bombay Supreme Courts. Again, all other questions turning upon the regulation law applicable to persons and things without jurisdiction of the Supreme Court could, obviously, only be determined by the Company's courts. In each of the instances the subject-matter of an appeal from the decision of a court of the Company was necessarily as foreign to Assesors appointed from the retired Judges of the Crown's Courts as to other members of the Judicial Committee. Thus in the interest of justice, it was not fair that the Judges of the Company's courts were not appointed as Assesors. It would have been possible for them to remove, at once, the doubts and difficulties by which such questions were usually surrounded.32

It may, however, be noted that the appointments of Assesors were not made for a long period after the passage of the Act. The position was improved only in 1908 when the Appellate Jurisdiction Act was passed, which provided that if any person who was or had been Chief Justice or Judge of a High Court in British India was a member of the Privy Council, he would be a member of its Judicial Committee if the Crown so directed. The number of such persons was not to exceed two at any one time.33

Disposal of appeals pending in the Privy Council

For the disposal of pending Indian appeals, three Orders in Council were passed in 1833 under the Judicial Committee Act. The first Order, dated the 4th September, directed the Company to bring to a hearing before the Judicial Committee all specified appeals from the Sadar Diwani Adalats

32. Id., at pp. 149-150 and note 1 at p. 150.
The Judicial Committee might take evidence _viva voce_, or upon written depositions; order any particular witnesses to be examined and remit causes for re-hearing; in certain cases, direct depositions to be read at the trial of the issue; make orders as to the admission of witnesses; and direct new trials of issues, etc. The award of costs was in the discretion of the Committee. The Committee was given power to punish its contempts and to compel attendance. Attendance of witnesses and production of papers might be compelled by subpoena. Decrees on appeals from foreign courts were to be carried into effect as the Sovereign-in-Council should direct. Orders made on appeals were to have effect notwithstanding death of parties, Sovereign-in-Council might make orders for regulating the mode and time of appeals, and was given full powers in respect of enforcing judgments, decrees and orders.\(^\text{30}\)

**Indian Appeals under Judicial Committee Act**

**Provisions of the Act.**

The Judicial Committee Act specifically dealt with the Indian appeals. As various appeals had been admitted by the Sadar Diwani Adalats and the transcripts of the proceedings had, from time to time, been despatched to the Privy Council Office, but the suitors had not taken the requisite steps to bring them to hearing, Sovereign-in-Council might direct the Company to bring appeals from the Sadar Adalats to a hearing, and to appoint agents and counsel for the different parties to such appeals, and make such orders for the security and payment of costs as Sovereign-in-Council should think fit. Such appeals were to be heard and reported to Sovereign-in-Council and determined in the same manner and the decrees of Sovereign-in-Council were to have the same force and effect, as though the same had been brought to a hearing by the direction of the parties appealing in the usual course of proceeding. It was, however, provided that these powers should not extend to appeals from the Sadar Diwani Adalats other than those that had been or should, thereafter, be taken in of two years subsequent to the admis-

The Act further empowered Sovereign-in-Council to make rules and orders for the purpose of regulating the mode, form and time of appeal to the preferred from the decisions of the Sadar Diwani Adalats and any other courts in India, and for the prevention of delays in making or hearing such appeals, and as to the expenses and the amount of the property in respect of which the appeal might be taken.
The Act also provided that two members of the Privy Council, who had held the office of Judge in East Indies or any of the Crown's Dominions beyond the seas, might attend sittings of the Judicial Committee as Assessors at a salary of £400 per annum. They could not, however, cast their votes.\textsuperscript{31}

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\textsuperscript{31} Morley, op. cit., at pp. 148-149.

\textsuperscript{32} Id., at pp. 149-150 and note 1 at p. 150.

\textsuperscript{33} See Encyclopaedia of the General Acts, op. cit., at p. 1208.
in which no proceedings were taken in England, on either side, for a period of two years after the admission of these appeals respectively. There were eighteen appeals from Bengal, ten from Madras and fifteen from Bombay. The second Order, dated the 18th November, issued further directions in pursuance of the said Act. It directed the Company to appoint agents and counsel, whenever necessary, for different parties in the specified appeals, to transact and to do all things that the agents and counsel usually did for parties in appeals to the Privy Council from the Colonies. The third Order of the same date provided that the Company was entitled to demand payment of reasonable costs of bringing appeals to hearing by virtue of the said Act, to such an amount and from such parties and would have such lien for these costs upon all monies, lands, goods and property whatsoever, all deposits which might have been made, and all securities which might have been given in respect of such appeals as the Judicial Committee would direct.  

Provisions as to future Indian appeals

An Order in Council, dated the 10th April, 1838, passed under the Act, made certain rules and regulations applicable to Indian appeals. It was provided, inter alia, that with effect from 31st December, 1838, no appeal to the Privy Council would be allowed by any of the Supreme Courts or Sadar Diwani Adalats in India unless the petition for that purpose was presented within six months from the date of the judgment, decree or order complained of, and unless the value of the disputed matter in appeal involved a sum of Rs. 10,000 at least. The existing valuations were wholly done away with, thus putting the Crown's and Company's Courts on the same footing in the matter of valuation. In all cases in which any of such Courts was to admit an appeal, it was to certify especially on the proceedings that the value of the subject-matter in dispute in such appeal amounted to the sum of Rs. 10,000 or upwards; such a certificate was to be deemed conclusive of the fact and could not be questioned in appeal.

Notwithstanding these provisions, the Privy Council had power and authority to admit an appeal from any judgment, decree or order of the superior Court in India, on such terms and subject to such limitations and regulations as the Crown would prescribe in any such special case.  

Parliamentary Act of 1845 and Indian appeals

All the proceedings in respect of Indian appeals were taken in pursuance of the Judicial Committee Act, 1835, and the Order in Council, dated the 10th April, 1838. When the old appeals had been heard for the most part, it was decided to take the matter out of the hands of the Company, and to leave the appellants to appoint agents and counselors in England to pursue their appeals from the Sadar Diwani Adalats admitted by them after 1st January, 1846. In order to fulfil this purpose, an Act was passed by the Parliament in 1845. It was under that Act that appeals began to be instituted thereafter, though, as regards their admission and the procedure, such portions of the previous Statutes and Orders as were not repealed, and related generally or specifically to Indian appeals, were reserved.

34. Morley, op.cit., at 150-151.
35. Id., at pp. 151-152.
The Act was styled as an Act for the better administration of justice in the Privy Council. It repealed certain provisions of the Act of 1831, and provided that any appeal to be admitted by the Sadar Diwani Adalats after 1st January, 1845, was to be taken as abandoned and withdrawn by consent of the parties unless some proceedings were taken in England in the same by one or more of the parties within two years after registration of the arrival of the transcript at the Privy Council Office. Any such appeal was to be held to be abandoned and withdrawn in like manner under any other circumstances which the Sovereign-in-Council might direct to be taken and considered as its withdrawal by any orders or rules in that behalf. The Company was required to ascertain and certify, from time to time, to the proper Courts in India all appeals which might, from time to time, become abandoned and dropped under this Act. Thus under the Act of 1845, the Company was deprived of the management of Indian appeals which was vested in the respective parties thereto.

Indian appeals after 1861

This position continued till 1861 when a major change took place in the judicial establishments of India with the passage of the Indian High Courts Act under which Presidency High Courts and Allahabad High Court were established in this country in 1852 and 1866 respectively. Subsequently, till 1949, many other High Courts were created. Under the Government of India Act, 1935, a Federal Court was also established in this country. Provision as to appeals (a) from the High Courts to the Privy Council, and (b) from the High Courts to the Federal Court and (c) from the Federal Court to the Privy Council, have already been discussed in preceding Chapters.

The Civil Procedure Code had also made provisions in respect of appeals in cases where the value of the subject was more, but where the decree of a High Court affirmed the decision of the Court below it, there must be involved some substantial question of law in the appeal. In other cases, appeals might be taken only on the case being certified to be fit one for appeal. There was, however, no bar to the unqualified exercise of the Crown's pleasure to receive or reject appeals. The Criminal Procedure Code only provided by its Section 411-A (4) that subject to such rules as might, from time to time, be made by the Privy Council in this behalf and to such conditions as the High Court might establish or require, an appeal lay to the Privy Council from any order made on appeal from the judgment passed by the Division Court of the High Court in the exercise of its original criminal jurisdiction, in respect of which order the High Court certified that the case was a fit one for such appeal.

In 1948, after India gained Independence, the jurisdiction of the Privy Council was restricted. The Federal Court (Enlargement of Jurisdiction) Act was passed in that year by the Dominion Legislature enlarging the appellate jurisdiction of the Federal Court in civil cases. Under the Act, an appeal was to lie from any judgment of a High Court (a) without special leave to appeal

36. Provisions of the first paragraph under 'Indian Appeals under Judicial Committee Act' at p. 274, supra, repealed.
of the Federal Court in the same circumstances in which appeals might have been taken to the Privy Council without special leave, and (b) with the special leave of the Federal Court in any other case. No direct appeal could be filed before the Privy Council either with or without special leave from any such judgment. 38

Finally, the jurisdiction of the Privy Council was completely abolished in 1949 by the Abolition of Privy Council Jurisdiction Act which came into force on 10th October. At the time of the passage of the Act, there were pending about seventy civil appeals and ten criminal appeals before the Privy Council from various High Courts in India. It was realized that until the new Indian Constitution would come into force on 26th January 1950, the Privy Council was not likely to dispose of more than twenty appeals. While the flow of criminal appeals were admitted by special leave from time to time. In the Draft Constitution it was proposed that with effect from the date of the commencement of the Constitution all the jurisdiction of the Privy Council would cease to be effective and all appeals and other proceedings pending before it would be transferred to the Supreme Court for disposal. If the position was left to the operation of this provision, there would be as many as sixty appeals, pending before the Privy Council, to be transferred to the Supreme Court and a small number of appeals, mainly criminal, would be instituted before the said Council with little chance of being finally disposed of till the commencement of the new Constitution. It was, therefore, enacted by the said Act that with effect from the 10th October, 1949, the Federal Court was to exercise, as an interim measure, the same jurisdiction to entertain and dispose of appeals and petitions from all High Courts as the Privy Council then had. It abolished the jurisdiction of the Privy Council to entertain any new appeals and petitions and to dispose of any pending appeals except those placed for hearing during the next sittings of the Judicial Committee. All other pending appeals were to be transferred to the Federal Court for disposal. 39

Comments

The system of taking appeals from India to the Privy Council suffered from certain defects. The Judicial Committee was mainly staffed by the English Judges who were practically devoid of any personal knowledge of Indian laws, customs, traditions and habits. The counsels also were mainly English. It was, therefore, difficult for them, at times, to appreciate the Indian point of view. Secondly, as the Judicial Committee was located at a great distance from this country, it was an expensive and slow affair to pursue appeals in England. Thirdly, the existence of the appellate jurisdiction of the Privy Council came to be regarded as a symbol of judicial slavery. This was, of course, a matter of sentiment. 40 Lastly, there are some instances when the Judicial Committee did not take an impartial view of the things and was led by considerations of policy. 41

In spite of these drawbacks, however, the Judicial Committee of the Privy Council proved to be a unique judicial institution. The highest

41. See M. C. Setalvad, War and Civil Liberties, at pp. 66, 67 (1946).
Court of Appeal consisting of distinguished Judges remarkably moulded Indian law and the method of administration of justice in this country importing into its jurisprudence concepts which they had imbibed from their training in English law.42 "In the days when the confusion in the field of substantive law was great, and the legislative activity practically negligible, the Privy Council ascertained the laws, settled them, moulded and shaped them. The Judicial Committee came to be looked upon by the Indians with great respect. Its decisions were always masterly, and they form today the fountain source of law in India. The decisions of the Privy Council enriched the Indian jurisprudence in many respects. It rendered notable judgments in the field of the Statute Law and personal laws. It contributed much to the evolution of the commercial law in India. Its interference in the criminal sphere was very benevolent. Though it interfered very rarely and only under special circumstances, whenever it did, it upheld the principle of natural justice and fostered the administration of impartial justice."43

Much of the jurisdiction of the Privy Council has been outside the domain of common law in hearing appeals from this country where Hindu Law and Mohammedan Law are in force. In the exercise of jurisdiction, it has rendered a great service to the development of these laws. "At a time when there were no Indian Judges in the High Courts, and when the number of Indian lawyers was very limited, the Privy Council unravelled the mysteries of Hindu Law, it enunciated the principles of Mohammedan Law, and formulated with clarity the customs which were prevalent in this country."44

The Privy Council has been a great unifying force in the judicial administration of this country. "Their Lordships of the Privy Council have from time to time elucidated the various Indian Laws with absolutely detached mind. They have laid down the principles on which the judicial administration of the country was based. No doubt, there have been lapses and mistakes, occasionally, but, on the whole, the Privy Council has been a great unifying factor and on many occasions has reminded the courts of the country of those fundamental principles of law on which the administration of justice in criminal matters is based."45

The Privy Council constituted a very important connecting link between India and England; through its decisions, the common law of that country found its way into this country and it forms the basis of many Indian enactments. "Through the Privy Council a common view of many principles of the Common Law and legal issues was enforced throughout the length and breadth of the Empire wherever the Common Law happened to prevail. It enforced a true and uniform interpretation of the Royal prerogative throughout the Empire. Many Acts enacted by the Imperial Parliament were adopted by the Dominions. The Privy Council enforced a uniformity of interpretation of such Acts. This influence of the Board was really of great value for otherwise there would have been inevitably a great divergence between the different parts of the Empire in construing the same Statutes."46

42. Setalvad, Common Law, op. cit., at p. 33.
44. Quoted in Jain, op. cit., at p. 384 from the speech of Dr. Tek Chand.
As the final interpreter of federal constitutions, for example, the Government of India Act, 1935, the Privy Council has been the counterpart of the Supreme Court of the United States; and though "results have been on occasions freely criticised, especially on account of the composition of the Committee on which judges of the United Kingdom unversed in the complexities of federal organisation have normally been the main, if not the exclusive, element", there is no doubt that it has made commendable contributions towards moulding these constitutions remote from the local political background.\(^47\)

The importance of the decisions of Privy Council may be realized from the fact that they still have a great value, and are binding on all the Indians courts except the Supreme Court unless overruled by the Supreme Court.\(^48\)

It may be observed in the last that the Privy Council became the instrument and embodiment of the rule of law, a concept on which we have based our democratic institutions. On 26th January, 1950, our Supreme Court came into existence and joined the family of Supreme Courts of the democratic world of which the Privy Council was the oldest and, perhaps, the greatest. At the time of the abolition of jurisdiction of the Privy Council, it was hoped that "our Supreme Court will carry forward the traditions of the Privy Council, traditions which involve that judicial detachment, that unflinching integrity, that subordination of everything to the rule of law and that conscientious regard for the rights and for justice not only between subjects and subjects but also between the State and the subjects. And no higher tribute can be paid to the Privy Council than my hope that our Supreme Court may be given the strength to maintain the traditions of fearless justice which have prevailed in this country as a result of the supremacy of the Privy Council."\(^49\)

\(^47\) See Wade & Phillips, op. cit., at p. 155.

\(^48\) Constitution of India, Vol. III, at pp. 184-

\(^49\) See, K. M. Munshi.
CHAPTER XXIII

HISTORY OF PREROGATIVE WRITS

Under articles 32 and 226 of the Indian Constitution, the Supreme Court and the High Court respectively have the power to issue writs of Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiorari for certain purposes. The object of the writ of Habeas Corpus is to effect the release of persons improperly detained in public or private custody. Mandamus secures the performance of some particular thing in the nature of a public duty. The object of the writ of Prohibition is to keep an inferior Court within its jurisdiction with which it is not legally vested. Quo Warranto is issued to prevent a person who has wrongfully usurped a public office from continuing in that office. The use of Certiorari is to remove terminated proceedings to quash a decision which is without jurisdiction.1

Prior to coming to the history of these prerogative writs, as they are called, in India, we would study the history of their origin and development in England so as to provide a background to their history in this country.

History of Prerogative Writs in England

According to Professor S. A. de Smith, there is no satisfactory answer to the question: What is a prerogative writ? The name, however, suggests that it is a writ especially associated with the King. It appears that while all writs are, in form, commands issued in the name of the Crown, the only writs conceived as having a special relationship with the Crown came to be called as prerogative writs.2 The Common Law regards the King as the fountain of justice, and certain extra-ordinary remedial processes, known as prerogative writs, have, from the earliest times, been issued by the Court of King's Bench in which the Sovereign is always present in the contemplation of law. These writs are issued only upon some cause shown, as distinguished from the original or judicial writs which commence suits between party and party and which issue as of course.3 The award of the writs usually lies within the discretion of the court. The issue of Mandamus is always a matter of court's discretion; it is a prerogative writ and not a writ of right. While none of the prerogative writs is writ of course, all of them are not discretionary. In certain cases, prohibition issues as of right. Habeas Corpus is a writ of right which issues ex debito justitiae4 when the applicant has satisfied the court that his detention was illegal. Thus in the fullest sense, these two writs are not writs of grace.5

4. Means "From what is due to justice."
The history of the individual writs in England is as follows:

Habeas Corpus.

Habeas Corpus is spoken of as a common law writ bearing upon its face its character as a royal command, and its earliest use was made in 1666. Since this date till 1640, Habeas Corpus was used as a command from King’s Justices to the sheriff to present the accused before them; as the order of arrest on mesne process in civil actions, also to give effect to the judgment pronounced against an unsuccessful litigant by seizing his body; to decide claims of privilege, that is, exemption from jurisdiction. In the meantime in 1620, for the first time, the Habeas Corpus was reported as a prerogative writ, “which concerns the King’s justice to be administered to his subjects; for the King ought to have an account why any of his subjects are imprisoned.” In their sixteenth century struggle for liberty against the Crown, the common lawyers made use of this writ to test the validity of imprisonment by the upholders of the executive; this struggle culminated in the famous Habeas Corpus Act of 1640 which guaranteed to every person imprisoned by an order of some rival court his full right to the writ of Habeas Corpus. Thus this writ, originally designed to further an ordinary step in judicial proceedings, had become one of the most powerful weapons to protect popular liberty by the end of the seventeenth century. By this time, it was not only issued to test the validity of State action but of private authority also. Since the Revolution, “it has been a common place of English Law that any restraint of liberty, whether by the State or by a private person, can be promptly and effectively tested by means of this summary process.” Thus along with Magna Carta and Writ of Habeas Corpus came to be regarded “as the greatest bastion of individual rights” to this Mansfield and Blackstone insisted on the writ.

Mandamus

In early times, many innocuous writs which included the word “mandamus” were issued by the Crown. But these royal mandates were quite different from the well-known writ of Mandamus. The origin of the popular writ may be traced to the famous Bagge’s Case (1615), in which Chief Justice Coke issued a peremptory Mandamus for the restoration of one Bagge to his position because no good cause could be shown for his removal. Thereafter, many such writs were issued to compel restitution to offices and liberties. Thus the writ was often called a writ of restitution in the seventeenth century. By the early eighteenth century, it became more comprehensive and was issued on the petition of an aggrieved party, to compel the performance of a wide range of public or quasi-public duties, performance of which was wrongfully refused. Gradually the rules governing the issue of the writ of Mandamus began to take shape until they were fully stated by Lord Mansfield in a number of cases, in which he persistently referred to Mandamus as a prerogative

7. See also the Habeas Corpus Act of 1679.
8. Thus along with Magna Carta and Writ of Habeas Corpus came to be regarded “as the greatest bastion of individual rights.” Thus along with Magna Carta and Writ of Habeas Corpus came to be regarded “as the greatest bastion of individual rights.”
The writ was called "a command issuing in the King's name from the Court of King's Bench" and "a writ of a most extensively remedial nature."  

**Prohibition**

Prohibition is one of the oldest writs known to the common law, and dates from the thirteenth century. In early days, its primary function was to limit the jurisdiction of the ecclesiastical courts. Later, it was used as a great weapon by common law courts to limit the jurisdiction of the chancery and admiralty courts. In the first half of the sixteenth century, it was said in a comparatively clear language that the King was the indifferent arbiter in all jurisdictions, as well as spiritual and temporal, and it was his right to declare their bounds by writs of Prohibition. As it was the proper power and honour of the King's Bench to limit the jurisdiction of all other courts, prohibition usually issued by the King's Bench, but it could also be issued by the Courts of Chancery and the Common Pleas.

Prohibition is prerogative in the strict sense; its prerogative character has been repeatedly emphasized. In a comparatively modern case, it has been declared that it is only a secondary function of this writ to protect private interests "The ground of decision in considering whether prohibition is or is not to be granted, is not whether the individual suitor has or has not suffered damage, but whether the royal prerogative has been encroached upon by reason of the prescribed order of the administration of justice having been disobeyed."

**Quo Warranto**

Like Prohibition, Quo Warranto also appears to be prerogative in the strict sense and dates from the thirteenth century. It is a statutory writ issued to try the validity of the feudal franchises in those days. It took its rise in the great Statute of Gloucester of 1278, and in 1301 it acquired an established form, "to be awarded as an original out of the Chancery." Originally, Quo Warranto was solely a royal weapon, but eventually, by the process of 'informing' the royal official of an alleged usurpation, private individuals also could use it. By the time of Revolution, such informations were checked, and during the eighteenth century the information in the nature of Quo Warranto took place as a process open to a private individual. At the same time, in order to prevent its abuse, the Court was vested with discretion to grant or refuse leave for filing the information. The result was that the remedy which was a matter of right in the hands of the King became a discretionary one in the hands of his subjects.

12. Quoted in Smith, op. cit., at p. 267 from Blackstone's Commentaries.
14. James' Case (1631) Hob. 17, as given in Smith, op. cit., at p. 263.
15. Case of the Company of Horners in London (1642) 2 Roll R. 471, as given in ibid.
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17. Jenks, op. cit., at p. 527; Smith, op. cit., at p. 263.
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**Habeas Corpus.**

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**Mandamus.**

In early times, many innominate writs which included the word "mandamus" were issued by the Crown. But these royal mandates were quite different from the well-known writ of Mandamus. The origin of the popular writ may be traced to the famous Bagg's Case (1615), in which Chief Justice Coke issued a peremptory Mandamus for the restoration of one Bagg to his position because no good cause could be shown for his removal. Thereafter, many such writs were issued to compel restitution to offices and liberties. Thus the writ was often called a writ of restitution in the seventeenth century. By the early eighteenth century, it became more comprehensive and was issued on the petition of an aggrieved party, to compel the performance of a wide range of public or quasi-public duties, performance of which was wrongfully refused. Gradually the rules governing the issue of the writ of Mandamus began to take shape until they were fully stated by Lord Mansfield in a number of cases, in which he persistently referred to Mandamus as a prerogative

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Prohibition is prerogative in the strict sense, its prerogative character has been repeatedly emphasized. 16 In a comparatively modern case, it has been declared that it is only a secondary function of this writ to protect private interests. "The ground of decision in considering whether prohibition is or is not to be granted, is not whether the individual suitor has or has not suffered damage, but is whether the royal prerogative has been encroached upon by reason of the prescribed order of the administration of justice having been disobeyed." 17

Quo Warranto

Like Prohibition, Quo Warranto also appears to be prerogative in the strict sense and dates from the thirteenth century. It is a statutory writ issued to try the validity of the feudal franchises in those days. It took its rise in the great Statute of Gloucester of 1278, and in 1301 it acquired an established form, "to be awarded as an original out of the Chancery." Originally, Quo Warranto was solely a royal weapon, but eventually, by the process of 'informing' the royal official of an alleged usurpation, private individuals also could use it. By the time of Revolution, such informations were checked, and during the eighteenth century the information in the nature of Quo Warranto took place as a process open to a private individual. At the same time, in order to prevent its abuse, the Court was vested with discretion to grant or refuse leave for filing the information. The result was that the remedy which was a matter of right in the hands of the King became a discretionary one in the hands of his subjects. 18

12. Quoted in Smith, op. cit., at p. 267 from Blackstone's Commentaries.
14. James' Case (1631) Hob. 17, as given in Smith, op. cit., at p. 263.
15. Case of the Company of Horners in London (1542) 2 Roll R. 471, as given in ibid.
16. Smith, op. cit at p. 263.
17. Jenks, op. cit., at p. 527; Smith, op. cit., at p. 263.
19. Jenks, op. cit., at p. 527; Markose, op. cit., at pp. 334-337. See also ibid, op cit., at p. 624.
Certiorari

The earliest use of Certiorari was made in 1252. It was one of the King's own writs used for general governmental purposes. It was essentially a royal demand for some information. Soon after, it was issued to remove the proceedings of inferior courts of record to the King's courts for certain reasons. This was the position round about 1271. From about 1480, the writ was in common use, issued on the application of ordinary suitors, sometimes in the nature of a writ of error; effect general appellate proceedings.20 The theory is that the Sovereign has been subjects who complains of an injustice done to him by an inferior court; whereupon the Sovereign, saying that he wishes to be satisfied—Certiorari—of the matter, orders that the records, etc., be transmitted into a Court in which he is sitting.21 Eventually much of this jurisdiction passed to the Court of Chancery which used Certiorari to have the proceedings of inferior courts of common law before the Chancellor. Later, Chancery confined it to inferior courts of equity. From the fourteenth century until the middle of the seventeenth, the main purposes served by Certiorari were to supervise the proceedings of inferior courts of specialized jurisdiction, to obtain information for administrative purposes, to bring into the Chancery or before the common law courts judicial records and other documents for many purposes; and to remove Coroners' inquisitions and indictments into the Court of King's Bench. After 1660, Certiorari acquired a new importance because of a vast increase in the duties of Justices of the Peace out of Sessions. The Court of King's Bench found in Certiorari an appropriate remedy in cases where some inferior statutory tribunal exceeded its jurisdiction or drawn up a conviction or order which was bad on its face to quash the conviction or order.22 In 1700, Chief Justice Holt generalized that it "is a consequence of all jurisdictions to have their proceedings returned here by Certiorari to be examined here...Where any Court is erected by Statute, a Certiorari lies to it."23 After this generalisation, it became quite frequent for the Court of King's Bench to issue Certiorari to judicial and quasi-judicial bodies. As regards its prerogative characteristic, it is obvious. The writ was historically linked with the King's person and with the court of King's Bench, it was of great significance for the control of inferior tribunals, and it was a writ of course for the King but not for his subjects.24

In the background of this historical survey of the prerogative writs in England, their history in India may now be traced.

Prerogative writs in India before 1950.

In India, the history of the prerogative writs begins with the establishment of the Supreme Court at Calcutta under the Charter of 1774, issued by the Crown in pursuance of the power given by the Regulating Act, 1773. The Charter empowered the Supreme Court to exercise such jurisdiction and

22. Id., at pp. 261-262.
24. Id., at pp. 262, 267. See also Jenks, op. cit., at pp. 515-516.
authority as the Court of King's Bench exercised in England by the common law of that country. The Charter subjected the Court of Requests and Court of Quarter Sessions at Calcutta, Justices of the Peace, Sheriffs and Magistrates to the order and control of the Supreme Court in such manner and from as the inferior courts and Magistrates in England were, by law, subject to the order and control of the King’s Bench, to that end the Supreme Court was empowered to issue writs of Mandamus, Certiorari, Procedendo\textsuperscript{25} and Error\textsuperscript{26} to the said Courts and Magistrates.

In 1781, the Act of Settlement redefined the jurisdiction of the Supreme Court. In 1801 and 1823 Supreme Courts were established at Madras and Bombay respectively and the same power to issue writs was given to them also, as was possessed by the Calcutta Supreme Court under the Charter of 1774, as stood after the Act of Settlement of 1781. Their predecessor—the Recorder’s Courts—also possessed jurisdiction to issue prerogative writs.\textsuperscript{27}

Writs of Habeas Corpus, Prohibition and Quo Warranto were not specifically mentioned in the above provisions, but it is settled that the Supreme Courts had jurisdiction to issue them also under the general provision, as given above, giving the authority and jurisdiction of the Court of King's Bench.\textsuperscript{28}

The Indian High Courts Act, 1861, provided for the abolition of the Supreme and Sadar Courts and for the establishment of High Courts. Under it, the High Courts to be established were to have jurisdiction, power and authority whatsoever in any manner vested in the Supreme and Sadar Courts at the time of their abolition. But the jurisdiction of the High Courts to be established was made expressly subject, legislative powers of the Governor-General of visions were embodied in the Latters Patent, issued in pursuance of the Act, abolishing the Supreme and Sadar Courts and establishing High Courts at Calcutta, Madras and Bombay in 1862. The Latters Patent were reissued in 1865. Thus the writ jurisdiction of the former Supreme Courts was conferred on the High Courts.

Section 106 of the Government of India Act, 1915, and section 223 of the Government of India Act, 1935, continued the existing writ jurisdiction of the High Courts, but the position did not continue to be the same as it was in 1862 in the matter of some of the writs, as discussed below.

Habeas Corpus

A leading case on Habeas Corpus is \textit{In re Ameer Khan}\textsuperscript{29} in which Justice Norman of the Calcutta High Court held that the late Supreme Court had jurisdiction to issue this writ into the Mofussil and that juris-

\textsuperscript{25} The object of the writ of procedendo was to compel inferior courts to proceed to give judgment. The ample powers of superintendence revision and transfer, possessed by the High Courts, rendered it obsolete and seemed to suffice for all cases to which it was applicable. E J. Trevelyan, The Constitution and Jurisdiction of Courts of Civil Justice in British India, at p. 23 (1923).

\textsuperscript{26} Writs of Error also became obsolete, full power being otherwise given for dealing with any error committed by the subordinate courts. Id., p. 26.

\textsuperscript{27} See Markose, op. cit., footnote 15, at p. 128, and pp. 265-267, 345.

\textsuperscript{28} See id., at pp. 128, 265-267, 345.

\textsuperscript{29} (1870) 6 Beng. L. R. 392.
After the introduction of Section 491 of the Criminal Procedure Code, a controversy arose whether the legislature had taken away the power of the Presidency High Courts to issue the prerogative writ of Habeas Corpus, which they had inherited from the Supreme Courts. The Privy Council ultimately settled it in *Matthai v. District Magistrate of Trivandrum*. In this case, the appellant challenged the validity of the warrant issued by the Resident for the Madras States under section 7 of the Indian Extradition Act, 1903, to the Chief Presidency Magistrate of Madras under which he was arrested, and further he asked for his discharge.

The appellant was a Travancore subject and was a director of a certain Bank incorporated in Travancore in 1937 with its head office at Madras. In order to conduct the business, he left Travancore in the same year and resided at Madras. The warrant stated that the appellant was charged with certain offences punishable under the Travancore Penal Code, committed in the Travancore State, and directed the Chief Presidency Magistrate at Madras to apprehend him and surrender him to the frontier police station of the Travancore State for production before the District Magistrate, Trivandrum. Accordingly the appellant was arrested and presented before the Chief Presidency Magistrate. In the meantime, a petition on his behalf was made under section 491 of the Criminal Procedure Code for a writ of Habeas Corpus to Justice Row of the Madras High Court and also a petition for a stay of execution of the warrant. The Judge directed the Magistrate to detain the prisoner in custody in Madras. It was October 21, 1938. On October 26, the Judge issued a writ of Habeas Corpus to the said Magistrate returnable on October 28.

On October 26, the respondent presented a petition to the High Court for quashing the orders of Justice Row as having been made without jurisdiction. Justices Burn and Stodart stayed the execution of the order of Justice Row of October 26, and referred on November 2 certain questions to the Full Bench which on November 4 were answered as follows: The common law writ of Habeas Corpus did not run in British India in a case like the present one covered by section 491 of the Code. Assuming that the Court previously had the power to issue a writ of Habeas Corpus in such a case, that power was taken away and the powers conferred by section 491 of the Code were substituted. Under the Appellate Side Rules of the High Court, jurisdiction under this section could be exercised by a Bench only. The order of Justice Row of October 26 was, therefore, passed without jurisdiction, and was consequently null and void. The position, therefore, was that the application filed by the appellant under section 491 should have been dealt with by the Criminal Bench in pursuance of the Rules.

Accordingly, on November 7, Justices Burn and Stodart set aside the order of Justice Row of October 26. The said Bench then dismissed the petition of the appellant under section 491 after giving a proper hearing.

In appeal before the Privy Council it was argued, *inter alia*, that the jurisdiction to issue the common law writ of Habeas Corpus in a case such as

32. On this issue there was a difference of opinion between the Calcutta High Court (Girendra Nath Banerjee v. Birendra Nath Pal, I. L. R. 54 Cal. 727 (1927) answering the question in the affirmative, and the Madras High Court (In re E. P. Govindan Nair, I. L. R. 45 Mad. 922 (1922) and Bombay High Court (Mahomedali v. Ismailji, I. L. R. 50 Bom. 616 (1920), both answering the question in the negative.

33. 66 I. A. 222.
diction was inherited by the High Court also. The rule nisi in this case was directed against the Superintendent of Alipore Jail, who was a European British subject, residing in the Mofussil.\textsuperscript{30} After this decision, the Criminal Procedure Code was enacted in 1872, section 81 of which gave to the Presidency High Courts the power to issue orders in the nature of Habeas Corpus in the case of detention of European British subjects both within and outside their original jurisdiction; but section 82 of the Act took away their power to issue the writ of Habeas Corpus beyond the Presidency-towns. In 1875, the High Court Criminal Procedure Act was passed. Its section 148 set out various purposes for which an order in the nature of Habeas Corpus might be made and it gave power to the High Court to make such orders in case of persons within the limits of their original jurisdiction. It took away from them the power to issue any writ of Habeas Corpus for any of the purposes mentioned therein. In 1882, the Code of Criminal Procedure repealed the Code of 1872 and Act of 1875 but, according to its section 2, not so as to restore any jurisdiction and form of procedure not existing or followed at the time of its enforcement. Section 491 of the Code of 1882 provided for issuing directions in the nature of Habeas Corpus which were almost the same as those of section 148 of the Act of 1875 with the difference that the power was to be exercised within the limits of the ordinary original civil jurisdiction of the Presidency High Courts, not within their original criminal jurisdiction. This was effected by section 2 of the Code of 1882. This Code was repealed in 1898 by the existing Criminal Procedure Code. This Code, however, reproduced sections 2 and 491 of the Code of 1882 in identical terms. Section 2 was repealed in 1914 by the Amending and Repealing Act; but the prohibition against the issue of the Habeas Corpus by the Presidency High Courts introduced in 1875, continued by virtue of section 7 of the General Clauses Act, 1897, and section 4 of the Amending and Repealing Act. This position was, however, changed in 1923 by the Criminal Law Amendment Act of that year. By amending section 491 of the Code, the Act of 1923 gave to all the High Courts in India power to issue directions in the nature of Habeas Corpus to any person within its appellate criminal jurisdiction; thus the remedy offered by Habeas Corpus was thrown open practically, to the whole population of India.\textsuperscript{31} After 1923 till 1950, this state of affairs continued without any change.

\textsuperscript{30} Id. See also p. 459. In Ryots of Garabandho v. Zamindar of Parlakimedi, 70 I. A. 129, the Privy Council observed at p. 162 that the view of Norman, J. was nisI was respondent why the

\textsuperscript{31} See Girendra Nath Banerjee v. Birendra Nath Pal, I. L. R. 54 Cal. 727 (1927). S 431 before a court-martial or any commissioners acting under the authority of any commission from the Governor-General-in-Council for trial or to be examined touching any matter pending before such court-martial or commissioners respectively: (c) that a prisoner within such limits be removed from one custody to another. See also p. 431.
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33. 66 I. A. 272.
would issue any writ of Mandamus. Thus the common law writ of Mandamus was abolished and a statutory order was substituted. The writ, in fact, had disappeared between 1877 and 1950; in 1950 the Constitution adopted it in articles 32 and 226.\(^\text{36}\) While section 45 of the Specific Relief Act was continued, with slight modifications, the terms of its section 50 were deleted and the new terms were that nothing in Chapter VIII would affect the power of High Courts given by article 226 (1) of the Constitution. In 1963 the Specific Relief Act of 1877 was repealed by the new Specific Relief Act which does not contain provisions as to the enforcement of public duties.

A survey\(^\text{37}\) of the development of Mandamus through cases decided between 1877 and 1950 shows that “it is difficult to say what are the limitations of the apparently all embracing province of this writ.” Ameer Ali, J., pointed out in *In re Lakshmi Moni Dasi*,\(^\text{38}\) that in India we are not concerned directly at any rate with the difference between the prerogative writ of Mandamus and the action for Mandamus. And in India there is no need for it, because Mandamus as it has developed in India covers not only both the writ and action in the nature of the writ of Mandamus but overlaps the writ of certiorari and prohibition to a substantial extent. Over and above all these, it remains the residuary remedy of public law to see that justice is given where a right is denied by a public authority and there is no equally beneficial remedy for it.”\(^\text{39}\)

It may be pointed out that after 1950, “the already delineated province of Mandamus has become almost unlimited.”\(^\text{40}\)

**Prohibition**

After the passage of the Specific Relief Act in 1877, the High Court of Bombay expressed a view in *Mahomedali v. Jafferbhoy*,\(^\text{41}\) that proceedings under section 45 of the Act were in the substitution for proceedings by writ of Mandamus and writ of Prohibition according to English practice. In England the writ of Mandamus commanded a specific act to be done and that of Prohibition required a particular act to be forborne. Both these aspects were incorporated in section 45 and, therefore, it not only absorbed writ of Mandamus but impliedly that of Prohibition also. But later in *Dinbai Dinshaw Petit v. M. S. Noronha*,\(^\text{42}\) the Bombay High Court said that the above observations were obiter and that section 45 did not absorb the writ of Prohibition; in other words this section did not take away the jurisdiction of the courts to issue this writ. The Court observed that in fact the “writ of Prohibition and the writ of Mandamus are two independent writs, to be issued under different circumstances. They are distinct, separate privileges. The writ of Prohibition is limited to prevention of exercise of jurisdiction by a body performing judicial or quasi judicial functions. It has nothing to do with executive acts which may also be controlled by the writ of Mandamus. It must be recognised that the legislature is aware of the distinction between the writ of Man-

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\(^\text{36}\) See *Amer. Bar. Annu. VII*, op. cit., at pp. 440-441.


\(^\text{38}\) *Ibid.*

\(^\text{39}\) \*Ibid.*

\(^\text{40}\) A. L. R. 1926 Bom. 247, at pp. 248-249.

\(^\text{41}\) A. L. R. (1946) Bom. 832.
the present still subsisted and that Justice Row had jurisdiction to order the issue of the writ. Rejecting this argument, the Privy Council held that the High Courts' Act of 1861 authorized the Legislature, if it thought fit, to take away the powers of the High Courts defined as the successors of the Supreme Courts, and Acts of the Legislature lawfully passed in 1875 and subsequent years left no doubt that the Legislature took away the power to issue the prerogative writ of Habeas Corpus in matters contemplated by section 491 of the Code. Accordingly, the petition for the writ must be treated as an application under this section, and the single Judge of the High Court to whom it was made was without jurisdiction by reason of the terms of the Appellate Side Rules of the High Court, which applied to an application for directions under section 491 (1) of the Code and which provided that all applications for a writ of Habeas Corpus should go before a Bench of Judges dealing with criminal work.  

We have discussed above the legislative history of the writ of Habeas Corpus since 1861 and also discussed a relevant case. Regarding this history, it has been observed that it "gives an idea of the possible scope that Habeas Corpus could have had in the hands of the judiciary. In spite of the very restricted territorial limits it had till 1923 and the very limited time the Court had after 1923 to develop the remedy, the Courts in India had strenuously striven to create traditions of vigilant solicitude for the personal liberty of the subject. Even though sometimes overwhelmed by sincere pessimism, the Bench and the Bar have always prided that Habeas Corpus in India was closely related to that in Great Britain and fostered the conviction that the remedy should be worthy of its English counterpart."  

Mandamus  

In 1877, the Specific Relief Act was passed; its Chapter VIII was styled as "Of the Enforcement of Public Duties." Section 45 of the Act dealt with the power to order public servants and others to do or to forbear certain specific acts. It provided that any of the Presidency High Courts might make an order requiring any specific act to be done or forbear, within the local limits of its ordinary original civil jurisdiction, by any person holding a public office, whether of a permanent or a temporary nature, or by any corporation or inferior court. Provided that an application for such order was to be made by some person whose property, franchise or personal right would be injured by the forbearing or doing of the said specific act; such doing or forbearing was, under any law in force, clearly incumbent on such person or court in his or its public character, or on such corporation in its corporate character; in the opinion of the High Court such doing or forbearing was consonant to right and justice; the applicant had no other specific and adequate legal remedy, and the remedy given by the order would be complete. The Secretary of State-in-Council, the Government of India and the local Governments were exempted from the operation of this section. Further no order could be made on any Government servant, as such, merely to enforce the satisfaction of a claim upon the Government, or which was otherwise expressly excluded by a law in force. Section 50 of the Act took away the prerogative writ of Mandamus providing that neither any Presidency High Court nor any of its Judges  

34. Id., at pp. 228-238.  
35. Sarkose, op. cit., at p. 131. See also pp. 131-140 for cases to support the truth of this statement.
would issue any writ of Mandamus. Thus the common law writ of Mandamus was abolished and a statutory order was substituted. The writ, in fact, had disappeared between 1877 and 1950; in 1950 the Constitution adopted it in articles 32 and 226.36 While section 45 of the Specific Relief Act was continued, with slight modifications, the terms of its section 50 were deleted and the new terms were that nothing in Chapter VIII would affect the power of High Courts given by article 226(1) of the Constitution. In 1963 the Specific Relief Act of 1877 was repealed by the new Specific Relief Act which does not contain provisions as to the enforcement of public duties.

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Prohibition

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damus and the writ of Prohibition, and there was nothing to prevent them from taking away the jurisdiction in respect of the writ of Prohibition, if they were so minded, unless the conditions provided in S. 45 of the Specific Relief Act were fulfilled. The jurisdiction of the superior Courts cannot be impliedly taken away by some words found in a section of an Act of the legislature. It has to be taken away, if at all, by express words. This is particularly so when the legislature had deliberately provided in S. 50 that the writ of Mandamus (only) could not be issued there after...To take away the prerogative there must be a statute which must expressly take away the prerogative, and the statute must cover the whole ground which was covered by the prerogative. Unless both these conditions were fulfilled the prerogative right could not be considered as taken away absolutely by a subsequent statute.  

Another case in support of the continuance of the writ of Prohibition after 1877 is Juggilal Kamlapal v. Collector of Bombay, in which a single judge of the Bombay High Court observed that the enactment of some of the provisions of the writ of Prohibition under section 45 of the Specific Relief Act would not take away the right of the subjects or applicants to invoke the jurisdiction of the High Courts to issue the writs of Prohibition even in cases which were covered within the four corners of this section. The subjects or the applicants would be entitled to both the remedies as alternative remedies and would be entitled to invoke the jurisdiction of the courts to grant them the one or the other of these two remedies.

Apart from these two cases, there are many cases in which the writs of Prohibition were issued outside the provision of section 45. In several cases the existence of the jurisdiction of the High Courts to issue writ of Prohibition was asserted, even though this section was in existence long before the dates of the judgments in these cases. Therefore on the basis of precedent also, it may be said that the writ of Prohibition existed after 1877.

In the result it is established that the existence of the writ of Prohibition was not affected by section 45 of the Specific Relief Act.

**Quo Warranto**

The writ of Quo Warranto was not affected by legislation. Out of a very few cases decided on this writ before 1950, Hamid Hassan Nomani v. Banwarilal Roy raised an important point of jurisdiction, which is worth discussing here. The facts of the case are as follows: On June 9, 1944, the Governor of Bengal made an order, under the Defence of India Rules superseding the Commissioners of Howrah Municipality for a period of one year, and directing that the appellant should exercise and perform all the

43. Id., at pp. 847-849.
44. I. L. R. 1946 Bom. 636.
45. Id., at p. 685.
47. See, e. g., In re National Carbon Co., A. I. R. 1934 Cal. 725, at p. 728; In re
   48.
   49.
   50. Id. A. I. R.
powers and duties which might be exercised or performed by the Chairman and the Commissioners during the period of supersession. On June 14, the High Court, on the application of the respondents, issued a *rule nisi* calling on the appellant to show cause why an information in the nature of Quo Warranto should not be exhibited against him "as to by what authority he is exercising and performing or claiming to exercise or perform the powers and duties which may be performed or exercised by the Chairman and the Commissioners of the Howrah Municipality." By an order of July 19, the Court made the *rule nisi* absolute. Thereafter an appeal was filed before the Privy Council. There the only question to be decided was whether the High Court had jurisdiction to pass the order of July 19.

The Privy Council proceeded on the assumption that the old Supreme Court would have had power to grant the information in the nature of Quo Warranto in the present case. It found that "under the relevant provision of the Indian High Courts Act, 1861, the powers of the High Courts were to be conferred by Letters Patent; so far as those powers or any legislative enactments of the Governor-General of India-in-Council did not otherwise provide the High Courts were to exercise all jurisdiction and every power and authority which had been vested in old Supreme Courts; but the words in the relevant provision of the Act: "subject, however, to such directions and limitations as to the exercise of original, civil and criminal jurisdiction beyond the limits of the Presidency Towns as may be prescribed thereby," indicated that the matter of the limits of the original jurisdiction of the courts was to be a matter especially within the ambit of the Letters Patent. The relevant clause of the Letters Patent establishing the Calcutta High Court gave to it ordinary original civil jurisdiction to be exercised within prescribed local limits of such jurisdiction, which limits admittedly were confined to the town of Calcutta. Prerogative writs were not mentioned in the Letters Patent and it may be noted that the writ of Mandamus was superseded by sections 45 and 50 of the Specific Relief Act, 1877, and the writ of Habeas Corpus was superseded by section 491 of the Code of Criminal Procedure. If the power to issue other prerogative writs fell within the ordinary original civil jurisdiction of the High Court, their issue outside the local limits of such jurisdiction was expressly barred by the Letters Patent. It was not disputed that the issue of such writs was a matter of original jurisdiction. The information in the nature of Quo Warranto was in the nature of a civil proceeding. In view of other clauses of the Letters Patent, writ proceedings did not fall within the expression 'extraordinary original civil jurisdiction' which was used in distinction to the expression 'ordinary original civil jurisdiction.'

The clause of the Letters Patent dealing with the said extraordinary jurisdiction empowered the High Court to remove and decide any suit within the jurisdiction of any court, within or without the Bengal Division of the Presidency of Fort William, subject to its superintendence. In the exercise of the rule of good faith the rule of good faith coming before the court on a prerogative writ, having jurisdiction. Any such proceedings clearly did not come within the said extraordinary jurisdiction. Therefore any original civil jurisdiction possessed by the High Court and not expressly conferred by the Letters Patent or subsequent enactments fell within the description of ordinary original
civil jurisdiction. The original civil jurisdiction which the Calcutta Supreme Court possessed over certain classes of persons outside the territorial limits of that jurisdiction was not inherited by the High Court. The power to grant an information in the nature of Quo Warranto arose in the exercise of the ordinary original civil jurisdiction of the High Court. Such jurisdiction was confined to the town of Calcutta. As the appellant did not reside, and the office which he was alleged to have usurped was not situate, within those limits the Court had no power to grant the information in the nature of Quo Warranto in the present case.  

Thus Quo Warranto could not be issued beyond the limits of Presidency towns.

Certiorari

Section 115 of the Code of Civil Procedure empowered each High Court in India to call for the record of any case decided by any court subordinate to it and in which no appeal lay, and if such subordinate court appeared (1) to have exercised a jurisdiction not vested in it by law, or (2) to have failed to exercise a jurisdiction so vested, or (3) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court might make such order in the case as it thought fit. Section 435 of the Criminal Procedure Code empowered each High Court in India to call for and examine the record of any proceeding before any inferior criminal court situate within the local limits of its jurisdiction for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior court. The question to be considered here is whether these provisions of the two Codes of Procedure had completely taken away the power of the Presidency High Courts to issue the writ of Certiorari. The Privy Council answering the question in the negative in Annie Besant v. Advocate-General of Madras observed: “Supposing that this power once existed, has it been taken away by the two Codes of Procedure?” No doubt these codes provide for most cases a much more convenient remedy. But their Lordships are not disposed to think that the provisions of section 435 of the Criminal Procedure Code and section 115 of the Civil Procedure Code of 1908 are exhaustive. Their Lordships can imagine cases, though rare ones, which may not fall under either of those sections. For such cases their Lordships do not think that the powers of the courts which have inherited the ordinary or extraordinary jurisdiction of the Supreme Courts to issue writs of Certiorari, can be said to have been taken away.  

As regards the question of limits within which the writ of Certiorari could be issued, out of several good cases, decided before 1950, Ryots of Garahandho v. Zamindar of Parliakmedh is of great historical and practical

52. 46. I. A. 176.
importance. The facts of this case are as follows. The appellants were ryots of three villages included in the Parlakimedi estate in the district of Ganjam in the Northern Circars. The respondents were the Zamindars of Parlakimedi and the Board of Revenue at Madras. In 1926, the Zamindar applied, under the Madras Estates Land Act, 1908, for the settlement of a fair and equitable rent in respect of these villages. In 1927, the Government of Madras directed the Special Revenue Officer of Ganjam to settle the rent. In 1935 the Officer passed an order doubling the previous rents. On appeal by the Ryots, a single member of the Board of Revenue reversed this order and allowed an increase of rent by 12½ per cent. only. The Zamindar appealed by way of revision to the Collective Board of Revenue from the decision of the single member. In 1936 the Board allowed the enhancement of rent by 37½ per cent. In 1937 the appellants petitioned the Madras High Court for a writ of Certiorari to quash the order of the Collective Board of Revenue. The Court found that the Board had power to enhance the rent and, therefore, dismissed the petition. The question in appeal before the Privy Council was as to the jurisdiction of the High Court to issue Certiorari to the Board of Revenue.

The relevant clause of the Charter of Madras Supreme Court appointed the Judges of the Court to be Justices and Conservators of the Peace, and Coroners within the town of Madras, subordinate factories and the territories subject to the Madras Government, and gave them such jurisdiction and authority as the Justices of King's Bench exercised within England, as far as circumstances would admit. This clause gave, and in general terms defined, an authority which was to be exercised over those persons who by other clauses of the Charter were made subject to it. The words 'as far as circumstances would admit' rendered it impossible to regard the reference to the King's Bench as founding a general jurisdiction outside the Presidency-town independent of and inconsistent with the other provisions of the Charter, which, *inter alia*, subjected to its jurisdiction the inhabitants of the Presidency-town, Justices and Magistrates of the Presidency-town, the Court of Requests and the Court of Quarter Sessions at the Presidency-town, and British subjects. Under the above clause, the Supreme Court did not derive a right to issue prerogative writs to the Company's courts or to a person outside the limits of the Presidency-town who was not personally subject to their civil and criminal jurisdiction. If the Company, in the exercise of the diwani right granted in 1765, chose to appoint an individual or an executing authority such as the Board of Revenue to give a decision between Indians in Ganjam on particular matter under the said clause could have such a decision than in the case of courts. For this purpose, no distinction could be made, as regards the issue of prerogative writs, between a criminal, civil, revenue or any other court of the Company and an officer of the Company authorized to make a decision of a judicial character.

The Privy Council observed that the question of jurisdiction must be regarded as one of substance and it would not have been within the competence of the Supreme Court to claim jurisdiction over such a matter as the present by issuing the writ of Certiorari to the Board of Revenue merely on the basis of its location in Madras or on the basis that the order complained of was made within the town. An opposite view would give jurisdiction to the Supreme Court in the matter of the settlement of rents for ryoti-holdings.
in Ganjam between parties not otherwise subject to its jurisdiction, which it would not have possessed over the Revenue Officer who dealt with the matter at first instance. 56

With reference to this case and that of Nomani, it may be pointed out that the territorial restrictions as to the issue of prerogative writs have become a matter of historical interest only, after the commencement of the present Constitution.

So far we have traced the history of the prerogative writs in England, and in India before 1950. The whole position as it stood immediately before the commencement of the Constitution may be summarised as follows. 57 The Supreme Courts created in Calcutta, Madras and Bombay in 1774, 1801 and 1823 respectively were vested with the powers of the Court of King's Bench, which included the power to issue prerogative writs. The three High Courts established in the Presidency-towns in 1862, inherited this power as successors of the Supreme Courts. Their writ jurisdiction was confined within the local limits of the Presidency-towns and to persons who were subject to the original jurisdiction of the Supreme Courts. Thus High Courts other than Presidency High Courts were not entitled to issue prerogative writs. Subsequently the Legislature took away the power of the Presidency High Courts to issue prerogative writs of Habeas Corpus in matters contemplated in section 491 of the Criminal Procedure Code, and of Mandamus. The order under section 491 was wholly statutory and it was limited to the appellate jurisdiction of the High Courts. The order in the nature of Mandamus substituted in place of the writ by section 45 of the Specific Relief Act, 1877, was limited to requiring anything to be done, or for borne within local limits of the ordinary original civil jurisdiction of the High Courts. The scope of the writ of Certiorari was also curtailed by the two Codes of Procedure and other enactments. The writs of Prohibition and Quo Warranto were not affected by any legislation. 58

**Prerogative writs in India after 1950**

The historical anomalies and limitations in the matter of prerogative writs, as pointed out above, were removed by the present Constitution by laying down that the new Supreme Court as well as all the High Courts shall have full power to issue writs or orders in the nature of common law writs, irrespective of any statutory remedies or the limitations thereof. 59

Prior to January 26, 1950, the Presidency High Courts only had the power to issue writs, but on that date all the High Courts have been given this power, to be exercised by them in their respective territorial jurisdictions. The Constitution has placed them in the same situation as the High Court of England in the matter of writ jurisdiction. 60 The Supreme Court has observed in *Election Commission, India v. Saka Venkata Rao* 61 that "the makers of the Constitution, having decided to provide for certain basic safeguards for the

56. Id. at pp. 172-178.
59. Regarding Prohibition and Certiorari, we have already observed that S. 45 of the Specific Relief Act, 1877, and S. 115 of the Civil Procedure Code did not affect these writs respectively.
people in the new set up, which they called fundamental rights, evidently thought it necessary to provide also a quick and inexpensive remedy for the enforcement of such rights and, finding that the prerogative writs, which the Courts in England had developed and used whenever urgent necessity demanded immediate and decisive interposition, were peculiarly suited for the purpose, they conferred, in the States’ sphere, new and wide powers on the High Courts of issuing directions, orders or writs primarily for the enforcement of fundamental rights, the power to issue such directions, etc., ‘for any other purpose’ being also included with a view apparently to place all the High Courts in this country in somewhat the same position as the Court of King’s Bench in England.’

In certain respects, the writ jurisdiction in this country is even in a better position than in England. First, in England Parliament can repeal or alter the prerogative writs; in India only an amendment of the Constitution can do this. Secondly, in England it is not possible to obtain a writ against an order on the basis that the very law under which it was passed was void; in India it is possible. Thirdly, in England Mandamus cannot be issued to the Crown or a public servant acting as the agent of the Crown unless there is imposed a statutory liability. No such restriction exists in this country. Lastly, in England the superior courts cannot modify the writs; in India they can modify their form and incidents with a view to give appropriate relief to the parties.

In India between the Supreme Court and High Courts, the latter have a wider writ jurisdiction, not territorially but otherwise. Under article 32 of the Constitution the Supreme Court has power to issue prerogative writs only for the enforcement of fundamental rights. Under article 226, notwithstanding this power, every High Court has power to issue prerogative writs to any person or authority, including any Government, within the territories in relation to which it exercises jurisdiction, for the enforcement of fundamental rights and for any other purpose. Obviously the writ jurisdiction of a High Court is more extensive than that of the Supreme Court because the former can issue writs ‘for any other purpose’ in addition to the enforcement of fundamental rights. But while the Supreme Court is competent to give relief against any authority within the Indian territory, the power of a High Court is confined to its territorial jurisdiction. Here again the jurisdiction of a High Court is wider than that of the Supreme Court inasmuch as it can issue writs to ‘any person or authority, including in appropriate cases any Government.’

An unfortunate development in the writ jurisdiction of the High Court had taken place in 1953 because of the decision of the Supreme Court in *Election Commission v. Saka Venkata Rao*, which greatly restricted the utility of this jurisdiction. In this case, the Supreme Court held that the High Court at Madras could not issue any writ under article 226 to Election Commission having its headquarters permanently located at New Delhi. According to the Supreme Court, the authority against whom the writ was sought must be located within the jurisdiction of the High Court. As a result of this ruling, High Courts other than the Punjab High Court could issue writs.

62. Id., at p. 212.
65. Id., at pp. 212-214.
against statutory authorities, tribunals and officials having their headquarters in Delhi. This defeated the very purpose of the writ jurisdiction of the High Courts, which enabled a person to seek a remedy in respect of an act done in violation of his right within the State by applying to the High Court of his own State. It appears that the Supreme Court had modified its view taken in Venkata Rao's case in a later case Thangal Kunju Mudaliar v. M. Venkatachalam Potti 66 but the position was by no means clear. The opinion of the Law Commission 67 was that the hardship imposed by Venkata Rao's case on a person seeking relief under article 226 should be removed, 68 either by amending the Constitution or by judicial pronouncement. The hardship created by Venkata Rao’s case was removed by the Constitution (Fifteenth Amendment) Act 1963 which added a new clause (1-A) in article 226 which provides that the power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court within the territorial jurisdiction of which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within that territorial jurisdiction.

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67. Law Commission of India, 1
68. Ibid.
CHAPTER XXV
APPLICATION OF ENGLISH LAW

Introduction

History is replete with innumerable instances showing "that neither national, nor any analogous sentiment is offended by the adoption of the laws and institutions of other peoples. In so far as a people has no written law, no effective tribunals to enforce law, and no effective legislatures to enact new laws, it will readily absorb foreign laws. This can be demonstrated by the reception of the Roman Law in Continental Europe. When the British first seized the sceptre in India, there were no effective legislatures, the tribunals were inadequate, and there was a dearth of legal principles." Where indigenous legal principles were available in writing, and could be applied to the problems the age set the courts, they were largely enforced in the courts which the British set up. The law of England modified to suit local conditions, was imposed to fill up the gaps; it was accepted because there was no obvious alternative. British policy moved in the direction favoured by the historical law."

Beginning with its application in the seventeenth century to British subjects in the Company's factories in India, the English law with its statutory modifications "has deeply coloured and influenced the laws and the system of judicial administration" of the whole of India. The reasons, of course, are obvious, yet they leave behind a trace of surprise because the English settlements in India were not in an uninhabited or barbarous country to which the settlers "carry with them not only the laws, but the sovereignty of their own State; and those who live amongst them and become members of their community become also partakers of, and subject to, the same laws," but they were "in a very populous and highly civilized country, under the government of a powerful Mohammedan ruler, with whose sovereignty the English Crown never attempted nor pretended to interfere for some centuries afterwards."8

This Chapter is mainly confined to the position of English law till the beginning of the process of codification, both in the principal Settlements of the Company, and in the Mofussil.

1. B. K. Acharyya, Codification in British India, at pp. 78-79 (1914).
2. Alan Gledhill, The Republic of India, at p. 147 (1951). It may be pointed out that the influence of English law in India is "due not so much to a 'reception' as to a process of codification."
3. M. C. Setalvad, The Common Law in India, at p. 1 (1960). It is advised that in this connection this book should be read as a whole.
5. Ibid.
Law in Principal Settlements
(Calcutta, Madras and Bombay)

Before 1726

In 1618, the Moghul Emperor allowed the English people to retain their own laws for their own government in their factories and administer justice to themselves according to these laws. The reason of this retention is explained in the following passage: "The laws and usages of Eastern countries where Christianity does not prevail are so at variance with all the principles, feelings and habits of European Christians that they have usually been allowed by the indulgence or weakness of the Potentates of those countries to retain the use of their own laws, and their Factories have for many purposes been treated as part of the territory of the Sovereign from whose dominions they come."

The Crown's Charter of 1661 empowered Governors-in-Council in India to judge all persons, belonging to them and the Company or who would live under them, in all causes, civil and criminal, according to the laws of England by the Company's servants in India; the administration of law in India to the principal Settlements of the Company and their branches until 1765. The provision expressly authorized the application of English law only to the English settlers, and not to natives except in Bombay over which the Crown had sovereign rights.

The establishment and functioning of different judicial authorities in the principal Settlements of the Company after the grant of the Charter of 1661 and before that of the Charter of 1726 have already been explained in Chapters II, III and IV.

The Company was already invested with the law-making powers under the Charter of 1600, which were confirmed in 1609 and 1661. The laws to be framed under these powers were to be reasonable and not repugnant to English laws. The record of early laws is not available but English law must have been their basis. However, the laws, framed under the Charter of 1668 which had granted the law-making powers to the Company in respect of Bombay, are available and they clearly appear to be based on English law. They were introduced in Bombay in 1672, but later on disappeared, and the Judges acted on their sense of justice and equity, coupled with the necessity of deterring crime, as well as the principles of English law so far as they might be applicable. It may be remembered that Bombay unlike Madras at that time was the Crown's territory, and even the natives there were subject to the English laws.

We reach certain conclusions on the basis of above discussion; first, the English people were governed by their own laws in their factories; second, the English law certainly has its way into India in the seventeenth century, but in theory it was not applicable to the natives except in Bombay.

8. See Chapter II, supra, at p. 5; see also id., at pp. 9-11; Gledhill, op. cit., at p. 149.
9. See Chapter III, supra, at pp. 15-17, 19, 20, 25, 16; See also Gledhill, op. cit., at pp. 149-149.
1726 and after

How, when, and to what extent English law introduced.—Until 1726, no Crown's Court was established in India. In that year the Company, "alarmed by the attitude of the English Courts, which refused to recognise the jurisdiction of its Courts, condemning it in damages for the intermediating by its servants with property, reversed its policy of excluding from India, to the best of its ability, officials holding Royal Commissions, and secured the establishment of Mayor's Courts and Courts of Oyer and Terminer in the Presidency Towns,"¹⁰ which were the Crown Courts to exercise jurisdiction in a land to which the English King had no claim to sovereignty except the Island of Bombay. This involved the regular and authoritative introduction of English law in these towns.¹¹ But the Charter itself did not expressly mention that the law to be applied by the Mayor's Courts was to be that of England but enabled them to give judgment and sentence under the statute applicable in the local conditions.¹² Decision for the courts have regarded the Charter as clearly indicating that the rule of decision was nothing else but the law of England, so far as applicable in Indian conditions.¹³ In fact "it has long been accepted doctrine that this Charter introduced into the Presidency towns the law of England—both common and statute law—as it stood in 1726."¹⁴ It has been observed judicially that a "Charter or Statute, by which Courts of Justice are constituted, does not necessarily determine the law which they are to administer, but in construing the Charter of George I, there can be no doubt that it was intended that the English law should be administered as nearly as the circumstances of the place, and of the inhabitants, should admit. The words give judgment according to justice and right, in suits and pleas between party and party, could have no other reasonable meaning than justice and right according to the laws of England, so far as they regulated private rights between party and party.¹⁵

After the enforcement of the Charter of 1726, there arose a problem in an acute form whether the civil law of England was applicable to Indians.¹⁶ The solution was ultimately provided by the Charter of 1753 which expressly excepted from the jurisdiction of the Mayor's Courts all suits and actions between the Indians only and directed that they should be determined among themselves, unless both parties submitted them to the determination by the Mayor's Courts. This provision is said to be the first reservation of their own laws and customs to Indians, but it does not appear that the native residents of Bombay were ever actually exempted from the jurisdiction of the Bombay Mayor's Court.¹⁷

10. Gledhill, op. cit., at pp. 149-150.
11. Id., at p. 150.
15. From judgment of Sir Barnes Peacock, Chief Justice of the Supreme Court at Calcutta, delivered in Surnooyee's case, as given in the decision of the Privy Council in the same case, op. cit., at p. 399.
in the peculiar circumstances of the Presidency-towns. In fact it was very important and necessary that, while applying English law to natives who were not Christians, and to Hindus, and Mohammedans, it should be treated as subject to such qualification, "without which the execution of the law would have been attended with intolerable injustice and cruelty." 21

A great confusion regarding the applicability of so much of English law as suited the local conditions prevailed for a considerable time. About seven hundred and odd Statutes existed before 1726. It was difficult to decide as to which of them were to be applied in India. Many of them had to be excluded because they were framed with reference to special conditions of England. It was a question of doubt and difficulty whether a particular Statute was applicable in India or not "and could only be decided by the Court, which could not be expected to perform such a function satisfactorily; and thus the whole situation was confusing and chaotic. In the first place, the Judges made such declarations only in the few cases which came before them; in the second place, their decisions were not always reported; thirdly, the rulings differed from Court to Court; in the fourth place, the rulings of one Court were not binding on the other; and lastly, it was not always certain that the rulings and declarations of the Courts in all cases were right. In many cases the rulings of the High Courts came to be reversed by the Privy Council. 22

Further, even if a Statute was held applicable in the Presidency-towns, uncertainty continued as to its applicability to all the inhabitants of these towns, for example, the Statute of Elizabeth relating to fraudulent conveyances. While in Calcutta it was held applicable to all its inhabitants, in Madras it was applied only to those British subjects who were neither Hindus nor Mohammedans. The question whether the English law of maintenance and champerty was introduced into and formed part of the law of India had been for a long period of time in controversy in the Indian courts and was finally settled by the Privy Council in 1876 in *Ram Coomar Coomus v. Chunder Canto Mookerjee* 23 in which it observed that "the English statutes on the subject were passed in early times, mainly to prohibit high judicial officers and officers of state from oppressing the King's subjects by maintaining suits or purchasing rights in litigation. No doubt, by the common law also, it was an offence for these and other persons to act in this manner. Before the acquisition of India by the British Crown, these laws, so far as they may be understood to treat as a specific offence the mere purchase of a share of a property in suit in consideration of advances for carrying it on, without more, had become in great measure inapplicable to the changed state of society and of property. They were, therefore, not applied. In the circumstances prevalent, it may be, in comparative desuetude.

Unless, therefore, they were plainly appropriate to the condition of things in the Presidency towns of India, it ought not to be held that they had been introduced there as specific laws upon the general introduction of British law...It appears to their Lordships that the condition of the Presidency towns, inhabited by various races of people, and the legislative provision directing all matters of contract and dealing between party and party to be determined

21. Ibid.
23. L. R. 41 A. 23.
Subsequent to the Charters of 1726 and 1753, the Charter of 1774 was granted by the Crown under the power given by the Regulating Act. This Charter superseded the Mayor's Court at Calcutta and established a Supreme Court in its place. The three Charters have an important bearing on the question regarding the precise date at which the English criminal law was introduced in the Presidency-towns. The question has been discussed at length by James Stephen with reference to the legality of the trial, conviction and execution of Nandkumar for the offence of forgery.

The point was whether the English Statute of 1728 was in force in Calcutta at the time of the trial of Nandkumar. The opinion of Stephen is that the English act of 26, 1753 and 1774 "must be regarded as a Statute whereby it was reintroduced on three successive occasions, as it stood at the three dates mentioned." It means that the Statute of 1728 was in force in Calcutta in 1770 when Nandkumar was alleged to have committed the offence and in 1775 when he was tried and convicted. According to the high judicial authorities, however, English law was first and last introduced into the Presidency-towns by the Charter of 1726; the English statutes passed after 1726 did not apply to India unless expressly or by necessary implication extended to it.

We have already said that the English law—both common and statute—was introduced into the Presidency-towns in 1726 so far it was applicable in Indian conditions. Thus it was not the whole of the English law that was made applicable to India but only that much which suited the local conditions. Natives, English and other foreigners lived in the Presidency-towns and all were supposed to be guided by English law. But that law was mainly concerned with England and could not be necessarily applied in India to the same extent and with the same force as in that country. To apply the law which punished the marrying a second wife while the first was living, to a people amongst whom polygamy was a recognized institution, would have been monstrous, and accordingly it was not so applied. Likewise the law, which in England most justly punished as a heinous offence, the carnal knowledge of a female under ten years of age, could not with any propriety be applied to a country where puberty commenced at a much earlier age, and where females were not infrequently married at the age of ten years. Therefore, it has been said that only so much of English law was made applicable as was suitable...
in the peculiar circumstances of the Presidency-towns. In fact it was very important and necessary that, while applying English law to natives who were not Christians, and to Hindus, and Mohammedans, it should be treated as subject to such qualification, "without which the execution of the law would have been attended with intolerable injustice and cruelty." 21

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21. Ibid.
22. Jain, op. cit., at pp. 424-42
23. L. R. 41 A. 23,
in the case of Mahomedans and Hindus by their own laws and usages respectively, or where only one of the parties is a Mahomedan or Hindu by the laws and usages of the defendant, furnish reasons for holding that these special laws are inapplicable to these towns."24 The same was the position in the Mofussil.

As regards the Statutes passed after 1726, only those were applicable which were expressly extended to India.

The Acts of Parliament, passed after 1726, amending the Statutes in force before this date, were not applicable to India unless expressly extended to this country.28

The above discussion applies to the Presidency-towns of Madras and Bombay also.

Application of civil law to natives.—Coming to the aspect of the application of civil law to the natives in the Presidency-towns, we have already said that the Charter of 1753 had exempted their civil litigation without consent from the jurisdiction of the Mayor's Courts, which provision was, however, not effective in Bombay. In 1774, a Crown's Charter, issued under the Act of 1773, established a Supreme Court at Calcutta, which superseded the Mayor's Court. The Supreme Court exercised its powers, wide and undifferentiated, under both the Act and the Charter in such a way as to precipitate a crisis.26 An objection was made to "the attempt to extend to the inhabitants of these provinces [i.e., Bengal Provinces] the jurisdiction of the Supreme Court of Judicature and the authority of the English law, and of the forms and fictions of that law which are yet more intolerable because less capable of being understood." In a like manner, protest was made against "giving to the voluminous and intricate laws of England a boundless retrospective power in the midst of Asia."28 Without commenting on the merit of these protests, we would say that regarding civil law at least, there does not appear any reason to attribute to the Supreme Court "any intention to depart from the general principles which the Mayor’s Court had theretofore applied to the ordinary affairs of life in Calcutta."29 There is no evidence to show that the Court was "minded to disregard native customs as to marriage or succession."30 Indeed it granted letters of administration to the goods of Hindus with directions that they should be administered according to Hindu customs.31 It is true that the Regulating Act and the Charter of 1774 were silent as to the law which the Court had to administer and contained nothing effective to restrict its jurisdiction over the natives.32 But its interference with the courts and authorities established by the Company throughout the Provinces, whether it was or was not permitted by the Act

24. Id., at pp. 45-46.
26. See Chapter VIII, supra, at pp. 83-84; see also pp. 85-88.
27. Quoted in Rankin, op. cit., at p. 8. See Chapter VIII, supra, generally.
28. Ibid.
30. Ibid.
31. Ibid.
32. Ibid. See also Chapter VII, supra, at pp. 76-77.
and Charter, "was tolerable neither in method nor in substance." 33 In fact, it was accepted by the Government in England that the Act was not intended "to extend the British laws in their unintelligible state (for so might they appear to the natives of a country in which they never had been promulgated) throughout that vast continent." 34

The Act of Settlement was, therefore, passed in 1781 to set the controversy at rest. "As Parliament's considered judgment upon the applicability of the English law to Indians in Calcutta the Act of 1781 is worth a careful scrutiny, all the more that its provisions were to be extended to the other Presidency-towns of Madras (1800) and Bombay (1823) and have governed all three Presidency-towns to the present time." 35 It gave jurisdiction to the Supreme Court in all manner of actions and suits against all the inhabitants of Calcutta and directed that their inheritance and successions to lands, rents and goods, and all matters of contract and dealing between party and party, should be determined in the case of Hindus by the Hindu laws and usages and in the case of Mohammedans by the Mohammedan laws and usages; and where only one of the parties should be a Hindu or Mohammedan, by the laws and usages of the defendant. It emphatically preserved to the natives their laws and customs, enacting that in order that regard should be had to the civil and religious usages of the natives, the rights and authorities of fathers of families and masters of families, according as the same might have been exercised by the Hindu or Mohammedan law, would be preserved to them respectively within their families; nor would any acts done in consequence of the rule and law of caste, respecting the members of the said families only be held and adjudged a crime, although the same might not be held justifiable by English laws. The Supreme Court was directed to frame such process and make such rules and orders for its execution in civil or criminal suits against the natives of Bengal Provinces as might accommodate the same to their religion and manners, so far as the same might be consistent with the due execution of the laws, and the attainment of justice. Similar provisions were later made with respect to Madras and Bombay. 36

It may be pointed out that the first of these provisions constituted the first express recognition of the rule of Warren Hastings in the English statute law. "But two ways of giving expression to the same principle could hardly show more variety. 'Marriage, caste and other religious usages and institutions' are not mentioned in the Act of 1781: 'matters of contract and dealing' were not mentioned in the Regulation of 1772. The Act where one party only is a Hindu or a Mohammedan introduces for the first time the law of the defendant; the Regulation had left such a case to justice. equity and good conscience—that is, to the good sense of the court. And between the two provisions there was an underlying difference—namely, that within Calcutta the residual law, the law to be applied whenever no express direction required some other law to be applied, was the law of England—not jus naturale nor the unfettered discretion of any judge." 37 In 1726, Calcutta was neither a ceded nor a conquered territory, nor was it a savage or uninhabited territory in which Englishmen had established a plantation; but the

34. Quoted in id., at p. 9.
35. Id., at p. 9.
37. Rankin, op. cit., at p. 9.
Charter of 1726 and principles of Campbell v. Hall operated to render all persons in Calcutta amenable, prima facie, to the English law. Certain important cases, however, "were later to place it beyond controversy that the English law administered in Calcutta, whether to Indians or others, was not the whole English law but so much only as was not inapplicable to the circumstances of the settlement; as was, for example, the rule against aliens owning land, the forfeiture of a suicide's property or the mortmain statutory law."

The expression 'the laws and usages of the defendant', used in the Act of 1781, needs some comment. In Sarkies v. Prosonomoyee Dossee, it has been pointed out that it might not be very easy to define or explain what this expression really meant; but whatever its proper construction might be, it is quite clear that it did not mean this, that where a Hindu purchased land from a European, in which the vendor possessed only a limited interest, the Hindu purchaser was to be in any better position as regards his purchase than a European purchaser would be. But in Azimunnissa Begum v. Clement Dale, it was observed that the expression did not also mean that whenever the defendant in a suit was a European British subject, no law but the law of England should be applied to ascertain the validity of any past transaction which might be brought under consideration in the suit. "It stands to reason that in any court the Hindu Law of succession or inheritance is applied to cases in which the deceased was a Hindu, whatever the race or religion of the defendant and although there might be many defendants of different races and religions. In like manner the law applied to the succession to a Mohammedan is the Mohammedan law, and so as to other "personal laws"." The law of the defendant has no practical significance now. It had a place in the classical days of the 'personal law', and is now of historical interest only.

Application of law to other classes of persons.—There were Jews, Parsis and Anglo-Indians etc., and observance of laws was made in their courts decided their cases according to the English Law, in so far as it was applicable to the circumstances of the place. It was more than once held at Calcutta that with the exception of Hindus and Mohammedans, no suitor in the Supreme Courts was entitled to

38. (1774) 1 Cowper, 204, 209.
39. Mayor of Lyons v. East India Company, 1 M. 1 A. 175; Surnomoyee's case, op. cit.
40. Rankin, op. cit., at pp. 9-10. It has been observed in Sarkies v. Prosonomoyee Dossee (1881) I. L. R. 6 Cal. 794, at p. 805 that "there are certain portions of... very nature were only passed for reasons would not be applicable to India, or any... for instance, the Mortmain Acts, the Law
42. (1881) I. L. R. 6 Cal. 794, at p. 806.
43. (1871) 6 Mad. H. C. 455.
44. Id., at pp. 474-475.
46. Ibid.
47. Id., at p. 23.
the application of any special law.48 The Supreme Court at Bombay once decided that the Portuguese laws in all cases of succession and of personal rights, as those of husband and wife, existed in full force as regards the Portuguese in Bombay; but it was also held that the Portuguese Law could not, of its own force, operate in Bombay, and that the Portuguese were subject to English law alone, with the reservation of certain customs.49 Formerly, questions between Parsi litigants appear to have been decided by the Bombay Supreme Court according to Hindu Law, where there was no custom to the contrary.50 Later on, the same Supreme Court determined that its ecclesiastical jurisdiction extended to Parsis and for that purpose they would be treated as Britons.51 In their cases of marriage, usage of the peculiar non-Christian rites, and with an Act of Legislature,52

At this stage, we would especially refer to two important cases, viz., Mayor of Lyons v. East India Company53 and Advocate-General of Bengal v. Ranee Surnomoyee Dossee.54

Mayor of Lyons' case (1837): A testator, who was an alien, devised his considerable real property in Calcutta and the Mofussil for charitable purposes. The most important question for determination before the Privy Council was whether or not the testator, being an alien, could devise his real property: in other words, whether or not, that portion of the English law which incapacitated aliens from holding real estate to their own use, and transmitting it by descent or devise, extended to Calcutta and the Mofussil. Answering the question in the negative, Lord Brougham observed:

44 A foreign settlement, obtained in an inhabited country, by conquest or cession from another Power, stands in a different relation to the present question, from a settlement made by colonizing, that is, peopling an uninhabited country. In the latter case, the subjects of the Crown carry with them the English laws, there being, of course, no lex loci. In the former case, the law of the country continues until the Crown or the legislature changes it.55 Two limitations are added to this proposition. One of these refers to conquests or cessions. An exception is made of infidel countries. This has been admitted in one case56 as being consonant to reason, and in another,57 treated in terms, as an absurdity. The other limitation refers to new plantations. According to Justice Blackstone, only so much of the English law is carried into them by the settler as is applicable to their situation and to the condition of an infant colony. In a case,58 the same excep-

48 Jebb v. Lefevre, Cl. Ad. R. 1829, 55; Mulesah v. Mulesah, 1 Fulten, 420; both cases given in Morley, op. cit., at p. 188.
49 de Silva v. Tavares, Morley's Digest, Vol. II, at p. 247, as given in Morley, op. cit., at p. 188.
50 Referred in Morley, op. cit., at p. 188.
51 Perozboy v. Ardashier, Morley's Digest, Vol. II, at p. 335, given in Morley, op. cit., at p. 188.
53 1 M. I. A. 175.
54 9 M. I. A. 337. See also The Indian Chief (1800) 3 Rob. Adm. 12; Freeman v. Fairlie, 1 M. I. A. 305.
56 Dutton v. Howell
57 Campbell v. Hall.
58 Attorney-General v. Stuart.
tion is applied even to the case of conquered or ceded territories into which the English law of property has been generally introduced. Upon this ground, it is held that the Statute of Mortmain does not extend to the colonies governed by the English law, unless it has been expressly introduced there; because it had its origin in a policy peculiarly adopted to circumstances of the mother country.

"The settlement of the Company in Bengal was effected by leave of a regularly-established Government exercising sovereign rights over the country. By its permission, Calcutta was founded in a district purchased from the owners of the soil and held under it by the Company as subjects owing obedience, as tenants rendering rent, and even as officers exercising some of its administrative authority by delegation. At what precise time, and by what steps, they exchanged the character of subjects for that of sovereign, or rather, acquired by themselves, or with the help of the Crown, and for the Crown, the rights of sovereignty cannot be ascertained; the sovereignty has long since been vested in the Crown, and though it was at first recognized in term by the legislature, in 1813, the Statute 53 Geo. III, c. 155, s. 95, is declaratory, and refers to the sovereignty, as "undoubted," and as residing in the Crown; but it is equally certain, that for a long period of time after the first acquisition, no such rights were claimed, nor any acts of sovereignty exercised; and during all that time, no English authority existed there, which could affect the land, or bind any but English subjects.

"It follows from above not only that Calcutta was a district acquired in a country peopled, and having a Government of its own, but that, for a long course of time, no such law as that which incapacitates aliens, could be introduced, any more than it could now be introduced into such part of the Asiatic territory as those factories may occupy. But even where the sovereignty rested in the Crown, there is every argument of probability, against a law being introduced, inapplicable to the circumstances of the settlement. At whatever time the sovereignty was acquired, and the power of introducing the alien law became vested in the Crown, the real property in Calcutta must have been held indiscriminately by subjects and foreigners; the sudden application of such a law, is, in the highest degree, improbable, because it would work great inconvenience, and grievous injustice, but, if the sovereignty was gradually acquired, if the transition of the Company from the state of subjects under the Mogul, to an independent authority, was slowly made, by imperceptible steps, the introduction of the alien law became still more improbable; for no act could then be done by the party obtaining the dominion, nor any stipulation made by the party becoming subjects, to secure the rights of the one, or restrain the power of the other.

"The well-known facts are wholly inconsistent with the supposition that this law ever was in operation, and the acts of the sovereign power, the legislative acts of the Crown, and of those to whom its authority is delegated, and the acts of the Parliament itself, plainly proceed upon the footing of this law never having extended to Bengal.

"The distinct recognition by the sovereign, of the capacity of aliens, is itself a strong authority against the position, which affirms the title of the Crown to alien's estate to be inseparable from the sovereignty. At the very least, it shows either that the right in question does not exist, or that it has been waived and removed. It should seem, however, independent of these considerations, that there is no warrant in the nature of the thing for the position that this right is an incident of sovereignty.
"The general introduction of the English law does not draw after or with it that branch which relates to aliens. The acts of the Power which alone would introduce this portion, and which alone introduced the English laws generally, show that it was introduced not in all its branches, but with the exception of this portion at least: this must be admitted, unless it can be maintained that there is no possibility of introducing the English laws at all, without introducing every part of them, which clearly cannot be asserted; for notwithstanding the extent to which the laws have been introduced, it is allowed on all hands that many parts of them are still unknown in our Indian dominions.

"Upon the whole, their Lordships are of opinion that the law, incapacitating aliens from holding real property to their own use, and transmitting it by descent or devise, has never been introduced into Calcutta. There appears still less reason to hold that it has ever obtained a footing in the Mofussil." 59

Ranee Surnomoyee’s case (1863): The question in this case was whether the Crown could claim a portion of the personal estate of a Hindu Raja who destroyed himself in Calcutta in 1844 and was found by inquisition to have been feio de se. The Raja was a British subject. Lord Kingsdown answering the question in the negative observed:

"At what time, then, and in what manner, did the forfeiture attached by the law of England to the personal property of persons committing suicide in that country, become extended to a Hindu committing the same act in Calcutta?

"The sum of the appellant’s argument was this:—that the English Criminal Law was applicable to natives as well as Europeans within Calcutta, at the time when the death of the Raja took place, and the sovereignty of the English Crown was at that time established; that the English settlers when they first went out to the East Indies in the reign of Queen Elizabeth took with them the whole law of England, both civil and criminal, unless so far as the condition; that the law of felo de se, England which was not inapplicable to therefore, became part of the law of the country.

"Where Englishmen established themselves in an uninhabited or barbarous country, they carry with them not only the laws, but the sovereignty of their own State; and those who live amongst them and become members of their community become also partakers of, and subject to, the same laws.

"But this was not the nature of the first settlement made in India—it was a settlement made by a few foreigners for the purpose of trade in a very populous and highly civilized country, under the government of a powerful Mahomedan ruler, with whose sovereignty the English Crown never attempted nor pretended to interfere for some centuries afterwards.

"If the settlement have been made in a Christian country of Europe, the settlers would have become subject to the laws of the country in which

59. 1 M. I. A. 175, at pp. 270-286. The judgment in inverted commas is given almost in the language of Lord Brougham. Only minor changes and adjustments in language and otherwise have been made at certain places. Gaps are not indicated. Readers are advised to read the whole judgment at pp. 270-299.
they settled. It is true that in India they retained their own laws for their own government within the Factories, which they were permitted by the ruling powers of India to establish, but this was not on the ground of general international law, or because the Crown of England or the laws of England had any proper authority in India, but upon the principles explained in the case of The Indian Chief.

"The laws and usages of Eastern countries where Christianity does not prevail are so at variance with all the principles, feelings, and habit of European Christians that they have usually been allowed by the indulgence of weakness of the Potentates of those countries to retain the use of their own laws, and their Factories have for many purpose been treated as part of the territory of the Sovereign from whose dominions they come. But the permission to use their own laws by European settlers does not extend those laws to natives within the same limits, who remain to all intents and purposes subjects of their own Sovereign, and to whom European laws and usages are as little suited as the laws of the Mahomedans and Hindus are suited to Europeans.

"But, if the English laws were not applicable to Hindus on the first settlement of the country, how could the subsequent acquisition of the rights of sovereignty by the English Crown make any alteration? It might enable the Crown by express enactment to alter the laws of the country, but until so altered the laws remained unchanged. The question, therefore, and the sole question in this case is, whether by express enactment the English law of *felo de se*, including the forfeiture attached to it, had been extended in the year 1844 to Hindus destroying themselves in Calcutta.

"The appellant referred to the Charter of Charles II in 1661, as the first, and indeed the only one which in express terms introduces English law into the East Indies. It gave authority to the Company to appoint Governors of the several places where they had or should have Factories, and it authorized such Governors and their Council to judge all persons that should live under them, in all causes, the laws of the Kingdom of England,

"The English Crown, however, at this time clearly had no jurisdiction over native subjects of the Mogul, and the Charter was admitted by the appellant to apply only to the European servants of the Company; at all event it could have no application to the question now under consideration. The English law, civil and criminal, has been usually considered to have been made applicable to natives, within the limits of Calcutta, in the year 1726, by the Charter of George I. Neither that nor the subsequent Charters expressly declare that the English law shall be so applied, but it seems to have been held to be the necessary consequence of the provisions contained in them.

"But none of these Charters contained any forms applicable to the punishment, by forfeiture or otherwise, of the crime of self-murder, and with respect to other offences to which the Charters did extend, the application of the criminal law of England to natives nor Christians, to Mahomedans and Hindus, has been treated as subject to qualifications without which the execution of the law would have been attended with intolerable injustice and cruelty. To apply the law which punishes the marrying a second wife whilst the first is living, to a people amongst whom
polygamy is a recognized institution, would have been monstrous, and accordingly it has not been so applied. In like manner, the law, which in England most justly punishes as a heinous offence, the carnal knowledge of a female under ten years of age, cannot with any propriety be applied to a country where puberty commences at a much earlier age, and where females are not unfrequently married at the age of ten years. Accordingly, in a certain case, the law was held not to apply.

"Is the law of forfeiture for suicide one which can be considered properly applicable to Hindus and Mahomedans? In England, suicide is treated as an offence against nature, against God, and against the King. Against nature, because against the instinct of self-preservation; against God, because against the commandment, 'Thou shalt not kill;' and a felo de se kills his own soul; against the King, in that thereby he loses a subject.

"Can these considerations extend to native Indians, not Christians, not recognizing the authority of the Decalogue, and owing at the time when this law is supposed to have been introduced no allegiance to the King of Great Britain?

"The nature of the punishment also is very little applicable to such persons. A part of it is, that the body of the offender should be deprived of the rites of Christian burial in consecrated ground. The forfeiture extends to chattels real and personal, but not to real estates, these distinctions, at least in the sense in which they are understood in England, not being known or intelligible to Hindus and Mahomedans.

"Self-destruction, though treated by the law of England as murder and spoken of in a case as the worst of all murders, is really, as it affects society, and in a moral and religious point of view, of a character very different not only from all other murders, but from all other felonies. The truth is that the act is one which in countries not influenced by the doctrines of Christianity has been regarded as deriving its moral character altogether from the circumstances in which it is committed — sometimes as blameable, sometimes as justifiable, sometimes as ineripious, or even an act of positive duty.

"In this light suicide seems to have been viewed by the founders of the Hindu Code, who condemn it in ordinary cases as forbidden by their religion; but in others as in the well-known instances of Sati and self-immolation, treat it as an act of great religious merit.

"We think, therefore, the law under consideration inapplicable to Hindus, and it had been introduced by the Charters in question with respect to Europeans, we should think that Hindus would have been excepted from its operation. But it appears that it was not so introduced, and if it were not so introduced, then as regards natives, it never had any existence"*.

60. 9 M. I. A. 387, at pp. 424-429. The judgment in inverted commas is given almost in the language of Lord Kingsdown. Only minor changes and adjustments in language and otherwise have been made at certain places. Gaps are not indicated.
Law in Mofussil

Personal laws saved

The principle of the provision of the Charter of 1753 excluding civil litigation of the natives without their consent from the jurisdiction of the Mayor's courts, was made a basis when in 1772 Warren Hastings set up civil courts for Bengal Provinces. His plan of 1772 directed them to decide all suits regarding inheritance, marriage, caste and other religious usages or institutions according to the laws of the Shastras with respect to Hindus and those of the Koran with respect to Mohammedans. On all such occasions the Brahmans or Maulvis respectively had to attend to courts to expound the law applicable to cases in question and assist them in passing the decrees. The plan gave no specific directions for any suits other than those expressly mentioned. In 1781, in order to complete the scheme as to the above 'rule of decision,' Sir Elijah Impey added the word 'succession' to the word 'inheritance,' and declared that in the absence of specific directions, the cases were to be decided according to the doctrine of justice, equity and good conscience. This is how the scheme was made complete so far as regards the 'rule of decision' which the courts were required to apply to the matters which might be brought before them for decision.\(^{61}\)

In 1793, the Cornwallis Code enacted that in suits regarding succession, inheritance, marriage and caste, and all religious usages and institutions, the Hindu laws with respect to Hindus and Mohammedan Laws with respect to Mohammedans were to be considered as the general rules by which the Judges were to form their decisions. This provision was extended to Benares and the Upper Provinces in 1795 and 1803 respectively. Though after 1793 the regulations provided for the 'law of the defendant' in 1832 the position was changed. In that year it was provided that whenever, in any civil suit, the parties to it might be of different religious persuasions, when one party would be of the Hindu and the other of the Mohammedan persuasion, or where one or more of the parties to such suit would not be either of the Mohammedan or Hindu persuasion, the laws of those religions would not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled. In all such cases, the decision would be governed by the principles of justice, equity and foreign law. This innovation was confined to sectional trials of suit would be applicable to the case; if not, the suits arose; if no usage, the law of the defendant: and in the absence of specific law and usage, justice, equity and good conscience alone.\(^{62}\)

As regards his plan as to the reservation of personal laws, Warren Hastings appreciated, as Cornwallis did afterwards, that the whole plan did not amount to 'a good system of laws,' and there was a great need of 'a

\(^{61}\) See Chapter VI, supra, at pp. 49-50.

well digested code of laws compiled agreeably to the laws and tenets of the Mohammedans and Hindus.' In fact he realized that "a perfect system of jurisprudence was not to be expected" from the inhabitants of Bengal provinces in those days. He, however, claimed that the plan was "adapted to the manners and understandings of the people and exigencies of the country, adhering as closely as possible to their ancient usages and institutions." 68

An important feature of the 'plan' was that it placed the Hindu and the Mohammedan laws upon the same footing, in spite of a very long Muslim rule. But a negative feature of the scheme was its limited character. It did not prescribe any law except for special topics, viz., inheritance, marriage, caste, religious usages and institutions. "The entire scheme was conditioned by the fact that the persons available for appointment as judges knew no law. It was intended that the ordinary run of disputes about contracts and debts should be dealt with by referring them to arbitrators of the parties' own choice, while for cases to which the Mohammedan and Hindu law applied..." 69 to declare the rule of law... that were unavoidable. "It was right to aim not at completeness but at taking due account of the British administrator's ignorance of the habits and character of the people. Certain advantages were secured by the defects. It was a greater service to postpone the problem of a 'common law' than to adopt any of the solutions then available." 69

Another feature of the plan may be noticed. According to it, the laws to be applied to certain specified cases were described as laws of the Shastras with respect to Hindus and those of the Koran with respect to Mohammedans. Though in 1793 they were restated as Hindu and Mohammedan laws "these laws were conceived of as religious laws ascertainable by study of the sacred books". Neither Hastings, nor in a!..." that, while both were religious laws, the part played in each by law and by... it was not easy to ascertain law and... for a long time to come; Law Office relating to personal laws and sometime no reliance could be placed on their answers. 67

English law not introduced

As early as 1772, it was maintained that "to leave the natives to their own laws would be to consign them to anarchy and confusion," because they were divided into two religious groups almost equal in point of numbers and "averse beyond measure to one another." "It is, therefore, absolutely necessary for the peace and prosperity of the country that the laws of England in so far as they do not oppose prejudice and usages which cannot be relinquished by the natives should prevail. The measure besides its equity is calculated to preserve that influence which conquerors must possess to retain their power." 68 Warren Hastings did not accept this view. He thought that

63. Rankin, op. cit., at p. 2.
64. Id., at p. 5.
65. Id., at pp. 5-6.
66. Id., at p. 6.
67. See Id., at pp. 67.
68. Passages in inverted commas quoted in Rankin, op. cit., at p. 3, from E. H. Dow, Enquiry into the State of Bengal.
the law of England had nothing to do with the exercise of the diwani. He was totally opposed to the introduction of English law into the Mofussil. His conviction was that "even the most injudicious or most fanciful customs which ignorance or superstition may have introduced among [the natives], are perhaps preferable to any which could be substituted in their room."  

In fact during a period of next ten years, Hastings had some sad experience of the impact of the English law upon the Mofussil; and before the beginning of the nineteenth century the English administrators in the Provinces entertained the view that the law of England was not suitable to Bengal. J. H. Harington carefully defended this view by stressing the differences in the genius of the peoples and the fact that property was acquired by Hindus and Mohammedans under settled and indeed written laws of their own.  

He said that the "fixed habits, manners and prejudices and the long established customs of the people of India formed under the spirit and administration of arbitrary government, totally opposite in principle and practice to that of England, would not admit of a more general application of British laws to the inhabitants of the country; who are not only ignorant of the language in which those laws are written, but could not possible acquire a knowledge of our complex, though excellent, system of municipal law..."  

According to Sir William Jones, "Nothing could be more obviously just than to determine private contests according to those laws which the parties themselves had ever considered as the rules of their conduct and engagements in civil life; nor could anything be wiser than, by a legislative act, to assure the Hindu and Musalmân subjects of Great Britain that the private laws which they severally hold sacred, and a violation of which they would have thought the most grievous oppression, should not be superseded by a new system, of which they could have no knowledge, and which they must have considered as imposed on them by a spirit of rigour and intolerance."  

Law applicable to persons neither Hindus nor Mohammedans  

Indian Christians, Anglo-Indians, Parsis, Armenians, Portuguese and Jews etc., resided in Mofussil also. Most of their cases were decided according to "Justice, equity and good conscience."  

Comment  

It is evident from the foregoing discussion that uncertainty, lack of uniformity and confusion prevailed in the systems of law as existed in the Presidency-towns and the Mofussil. There were gaps which had to be filled up. The only way to improve the things was codification.  

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69. Quoted in Jain, op. cit., at p. 430. See also Morley, op. cit., at pp. 191-197.  
70. Rankin, op. cit., at p. 3.  
71. Quoted in Jain, op. cit., at p. 431 from J. H. Harington, Analysis of the Laws and Regulations, at pp. II.  
73. See Chapter XXVII dealing with Doctrine of Justice, Equity and Good Conscience.  
74. Acharyya, op. cit., at p. 92.
CHAPTER XXVI

REGULATION LAW

Position till 1793

The system of regulation law owes its real origin to the political wisdom of Lord Cornwallis whose Government had enacted the celebrated Regulation XLI in 1793.¹ Until that time, no general Code of regulations was passed, although long before that date, Warren Hastings and his Council had given a plan for the administration of justice, described by Colebrooke as ‘General Regulation for the Administration of Justice’ containing thirty-seven rules or sections dealing with civil and criminal law, substantive and adjective. There was no preamble prefixed to the Regulation. This Regulation is called the first British Indian Code.²

In 1773, the Regulating Act empowered the Bengal Government to pass just and reasonable regulations, not repugnant to the laws of England, for the good order and civil government of the settlement of Calcutta, and other subordinate factories and places. Such regulations were, however, not to be valid unless duly registered in the Supreme Court with its consent and approbation. An appeal from a registered regulation lay to the King-in-Council without affecting, however, its immediate execution. Besides, the Government was to forward the copies of regulations to England, power being reserved to His Majesty to set them aside at any time within two years of their passage. Very little legislation was effected under the Act of 1773. In 1780 the Supreme Council passed several regulations for the more effectual and regular administration of justice in the provincial civil courts and the collection of the revenue. In the same year Sir Elijah Impey had taken over the charge of the Sadar Diwani Adalat from the Governor-General-in-Council, and passed thirteen sections of regulations for the guidance of the civil courts, which were, afterwards, incorporated with additions and amendments in a revised Code containing ninety-five sections. This revised Regulation was passed in 1781. It amended and consolidated the rules of civil procedure; in other words, it was the earliest Civil Procedure Code of British India. It had a preamble also.³ All these regulations “must be taken to have been passed in pursuance of the legislative power granted by the Regulating Act.”⁴ It does not, however, appear that they were registered in the Supreme Court.⁵

In 1781, the Act of Settlement empowered the Governor-General-in-Council to frame regulations for the Provincial Courts and Councils

2. Morley, op. cit., at pp. 159-160; B. K. Acharyya, Codification in British India, at p. 55 (1914).
4. Cowell, op. cit., at p. 61. Did the Act give that power? This question has been answered by Cowell himself as discussed further in the text.
5. Ibid.

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without referring them to the Supreme Court for registration; they were, however, subject to revision of the executive Government of England. "It was under this authority that the Government preferred to act; but it was unable to enact any Regulation which the Supreme Court was bound to recognize, unless it was previously registered as directed by the Regulating Act."

Thus the Government possessed from the beginning a two-fold power of legislation given by two separate Acts of Parliament. The first power of legislation enabled it to legislate for the good order and civil government of the settlement of Calcutta, and subordinate factories and places; the exercise of the power was subject to the supervision and veto of the Supreme Court. The legislative power, so conferred, was intended to apply only to Calcutta and dependent places into which English law had already been introduced and not to the territorial acquisition of the Bengal Provinces. But it does not appear that the Regulating Act was so understood; the large mass of regulation law, as mentioned above, was passed in pursuance of the power conferred by the Act for the benefit of the Provinces. The second power of legislation, given by the Act of Settlement, enabled the Government to frame regulations for the Provincial Courts and Councils, free from the supervision and veto of the Supreme Court, but subject to the executive control in England. Regulations could be disallowed or amended by the King-in-Council. Insipite of the fact that the power was granted for limited purpose, it was under this Act that most of the regulation law was passed. The Supreme Court had no controlling power in regard to regulations made under the Act, consequently, the Government preferred to legislate under its provisions than under those of the previous Act. But the Supreme Court was neither in terms nor in effect bound by the regulations which were not registered in it.

In view of the precise terms in which the legislative power was granted in 1781, the regulations framed thereunder were far in excess of that power. But Parliament in its Act of 1797 referred to that power "as if it were one of making a regular Code affecting the rights, persons, and property of the Natives and others amenable to the Provincial Courts. That was a Parliamentary recognition of the power which the Indian Council had assumed to exercise."

Prior to 1793, many regulations were passed by the Government. Some of them were printed with translations in the native languages, while others remained only in manuscript. The printed ones were, for the most part, on detached papers and had no prescribed form or order. Consequently, they could not be easily referred to, even by the officers of Government, much less by the common people, who had no means of procuring them in a collective

6. Ibid.
7. Id., at pp. 161-162 As regards the extensive use of legislative power under the Act of 1781, Sir Charles Gray, L. J. observed in 1829: "The exercise of one of them has been extensive beyond what seems to have been at first foreseen by the Legislature, and it is not that in 1773 was designed to be the only one, which has in fact been the most considerable. That which was established by the Regulating Act, has been almost a barren branch; and that which was given in 1781, expressly for the purpose of making limited rules of practice for Provincial Courts, has produced a new and extensive system of laws, for a large portion of the human race." Quoted in Morley, op. cit., at p. 164.
state or of becoming acquainted with such of them as were not promulgated in the native languages. 9

Origin and development (1793-1833)

Bengal Provinces

In 1793, the existing regulations were collected by the Government of Lord Cornwallis, which passed them as a revised Code, known as the Cornwallis Code. The enactment of Regulation XLI of that year inaugurated the system of regulation law. It was a “Regulation for forming into a regular Code all Regulations that may be enacted for the Internal Government of the British Territories in Bengal.” The preamble of this Regulation is very important. It stated that it was essential for the further prosperity of these territories that (1) all regulations which might be passed by Government, affecting in any respect the rights, persons or property of their subjects, should be formed into a regular Code, and printed with translations in the native languages; (2) the grounds on which each regulation might be enacted should be prefixed to it; and (3) the courts should be bound to regulate their decisions, by the rules and ordinances contained in these regulations. The preamble further stated that (1) a Code of regulations enacted on the basis of these principles would enable individuals to render themselves acquainted with (a) the laws on which the security of the many inestimable privileges and immunities granted to them by the British Government depended, and (b) the mode of obtaining speedy redress against their every infringement; (2) the courts would be able to apply regulations according to their true intent and import; (3) further administrations would have the means of judging how far the regulations had been productive of the desired effect, and, whenever as from experience might be found not to be made, the causes these Provinces would always be traceable in the Code to their source. 10

The tenor and mostly the terms of Regulation XLI of 1793 were adopted in an Act of Parliament in 1797 which confirmed the power of passing regulations, vested in the Governor-General-in-Council, and also referred to the fact of the passage of various regulations for the better administration of justice among natives and others within the Bengal Provinces. After stating that so wise and salutary a provision like the said regulation should be strictly observed and should not be neglected, it enacted that all regulations of the Government affecting the rights, persons or property of the natives or other individuals amenable to the Mofussil courts thereby recognizing the full extent of the legislative authority which was assumed and exercised should be registered in the Judicial Department, formed into a regular Code, and printed with translations in the native languages. It further enacted that the grounds of each

9. Acharyya, op. cit., at p. 76.
10. Id., at pp. 56-59, 75.
Government, independently of the Supreme Court and placed it under control. 12 "A formal publication, a written record of reasons for resorting to particular enactments, and official communication of their contents to the authorities in England, were deemed to be necessary expedients for placing a check on any hasty exercise of power." 12

An Act of Parliament, passed in 1800, rendered the Province of Benares, 13 and all provinces or districts to be annexed or made subject to the Bengal Presidency, subject to such regulations as the Government had framed or might frame thereafter. 14

Madras and Bombay.

The legislative power was thus firmly planted in Bengal Presidency. Then came the turn of Madras and Bombay. The same Act of 1800 empowered the Government of Madras to frame regulations for the Mofussil courts and Councils within territories annexed to the Madras Presidency. This legislative power was the same as that vested in the Bengal Government. Regulation I of 1802, framed on the same line as the Bengal Regulation XLI of 1793, directed the formation of a regular Code according to the plan adopted in Bengal. 15

The right of the Bombay Government to frame regulations appears to have been indirectly conferred on it by the Act of 1797; but it was formally given by an Act of Parliament, passed in 1807. Under the indirect authority of the Act of 1797 and on the recommendation and authorisation of the Bengal Government, the Bombay Government passed Regulation I in 1799, based on the Bengal Regulation XLI of 1793, providing for the enactment of a Code of regulations. In 1827, all the existing seventy-nine Bombay regulations were rescinded, and a new Code, known as the Elphinstone Code, based upon the Cornwallis Code of 1793, was introduced. 16

The Act of 1807 further empowered the Governments of Madras and Bombay respectively to frame regulations for the good order and civil government of the settlements of Madras and Bombay and subordinate factories and places as the Bengal Government might make for the settlement of Calcutta and subordinate factories and places. Their registration in the Crown's courts was necessary for their validity. They were also subject to appeal to England and disallowance by the Crown as provided by existing Acts. 17

It is remarked that as the Acts of 1800 and 1807 came after the Act of 1797, it might be reasonably considered that the Madras and Bombay Governments had the powers of making laws conferred on them, not as defined by the Regulating and Settlement Acts but as recognised and confirmed by the Act of 1797. 18

11. Morley, op. cit., at p. 162; Cowell, op. cit., at pp. 63-64.
12. Cowell, op. cit., at p. 64.
13. By then the Province of Benares was ceded to the Company and annexed to the Bengal Presidency.
14. Acharya, op. cit., at p. 57; Cowell, op. cit., at p. 64.
16. Morley, op. cit., at pp. 96, 102, 163; Acharya, op. cit., at p. 57
18. Ibid.
It appears that the Bengal Government had no direct authority over the Madras and Bombay Governments in the matter of legislation; only copies of regulations framed by the latter were sent to the former, but not for approval before being finally passed.\(^{19}\)

**Charter Act of 1813**

The Charter Act of 1813 enlarged the legislative powers of the three Governments and placed them under a more strict control. It empowered them to impose duties and taxes within the Presidency-towns, and to pass regulations in the same manner as other regulations were made for their enforcement. Secondly, it enacted that copies of all regulations framed under several Acts should be laid annually before Parliament.\(^{20}\)

In pursuance of the legislative powers conferred by various Acts of Parliament, the three Governments passed numerous regulations till 1834. It appears that the number of the regulations of the Bengal Code passed till 1834 was 675. Besides, 251 regulations in Madras and 259 regulations in Bombay were passed up to that year.\(^{21}\) In 1834, an All India Legislature came into existence under the Charter Act of 1833 and its enactments were called Acts. Thus the process of legislation by regulation continued till 1834 only.\(^{22}\)

**Comments**

The regulations suffered from various shortcomings. According to G. G. Rankin, they had “many defects in point of substance and few merits in point of form.”\(^{23}\) Another criticism is that the regulations were “frequently ill drawn for they had been drafted by inexperienced persons with little skilled advice; frequently conflicting, in some cases as a result of varying conditions but in others merely by accident; and in all cases enforceable only in the Company’s courts because they had never been submitted to and registered by the King’s court.”\(^{24}\) Some critics say that the regulations made by different legislature “in a very haphazard fashion,”\(^{25}\) “contained widely different provisions, many of which were amazingly unwise,”\(^{26}\) There are critics to whom the regulations appear at first sight to be an “incongruous and indigested mass”; and who condemn them for their uncertainty, obscurity, insufficiency and vagueness.\(^{27}\) They point out that as to the laws which the courts had to administer, the regulations were silent or rather spoke only in vague and general terms.\(^{28}\)

19. Ibid.
20. Id., at p. 66; Morley, op. cit., at p. 163.
22. See Morley, op. cit., at pp. 164-166. For the publication of regulations and various works relating to them, see id., at pp. 169-177; Acharyya, op. cit., at pp. 59-62.
25. Rankin, op. cit., at p. 199, citing Lord Bryce, Studies in History and Jurisprudence, Vol. 1, p. 120.
27. See Morley, op. cit., at p. 153; Acharyya, op. cit., at p. 58.
28. Acharyya, op. cit., at p. 58.
Many of these defects may, however, be explained if a closer examination is made of the conditions in which the regulations were framed. The system of regulation law was started in areas which were annexed to the Presidencies either by cession or conquest. They possessed different laws and customs, and distinct and various rights of property; consequently they presented new facets and created new situations which required the introduction of fresh laws into Codes for their Government. The fresh laws, so introduced were rendered inapplicable, in many instances, by the gradual introduction of civilization and the amelioration of the condition of the natives; naturally in such cases they were abolished accordingly. This is one of the main causes why the Codes of regulations appear to be an incongruous and indigested mass. The Regulations would have to be formed, modified and abrogated according to the peculiar circumstances of time and place, and this was done with ability and moderation keeping in view the wide field of their subject-matter.  

The main subject of the regulations was procedure and "current legislation," that is, measures necessary to meet particular cases and situations; but they also dealt with the substantive law to some extent. They established both civil and criminal courts; dealt with their mode of proceeding; prescribed in details the manner in which the revenue was to be assessed and collected and provided for many subjects of minor and occasional interest. Thus they fulfilled many needs of those times, and one can have in them a glimpse of the then existing conditions. They did not, however, touch the personal laws of Hindus and Mohammedans, nor did they affect the laws of contracts and torts, but they probably could not do.

The gradual "building up of the law" which had then taken place in India, together with the variety of rights to be provided for, the diversity of the people to be governed, and of the laws to be administered, has no doubt made the study of the regulations both intricate and difficult. But on this account, there should be no indiscriminate censure upon that system. Though it could not be pretended that the Codes were perfect, a frank investigator should pause and examine before condemning them for uncertainty, obscurity, insufficiency and vagueness; he should "rather admire how, under such a complication of difficulties, a system of laws could have been formed providing so admirably for contingencies which apparently no human fore-thought could have anticipated, that has worked so well in practice, and that has resulted in the prosperity and good government so eminently conspicuous throughout the vast territories [under English control]."

As regards the factor of "ill-drafting," it should be remembered that probably no better drafting could be done in those days in this country.

After all the Regulation Codes were not Codes in the strict sense of the word, "but their importance lies in the fact that they show how and what attempts were made, from the very beginning of, British rule in this country, to make the law cognoscible and certain. By establishing regular courts of justice, these Codes removed a fruitful source of uncertainty of law, viz., the right of powerful zamindars to administer justice within the bounds of their zamindaries. One of the main objects of Impey's Regulation was that the

31. Morley, op. cit., at p. 158.
inhabitants of these countries may not only know to what courts and on what occasions they may apply for justice, but, seeing the rules, ordinances and regulations, to which the judges are by oath bound invariably to adhere, they may have confidence in the said courts." How fully this object of the framers of the Regulations was attained is clear from the common saying in Bengal. "This is not the territory of the Mugs, but it is the territory of the Company." In fact the object of the regulations was attained by impartial administration of justice and revenue by the servants of the Company according to them. It was neither Plassey nor Buxar which was responsible for the expansion of English influence in India but the growth of a rural administration, in the beginning according to regulations.

In praise of the regulations, Lord Wellesley thus spoke in 1805: "Subject to the common imperfection of every human institutions, this system of laws is approved by practical experience, (the surest test of human legislation,) and contains an active principle of continual revision, which affords the best security for progressive amendment. It is not the effusion of vain theory, issuing from speculative principles, and directed to visionary objects of impracticable perfection; but the solid work of plain, deliberate, practical benevolence; the legitimate offspring of genuine wisdom and pure virtue. The excellence of the general spirit of these laws is attested by the noblest proof of just, wise, and honest government; by the restoration of happiness, tranquillity, and security to an oppressed and suffering people; and by the revival of agriculture, commerce, manufacture, and general opulence, in a declining and impoverished country.

There is no doubt that the system of regulation law was well conceived and well-applied and it made its own contributions to the well-being of the people. Probably no better system could be adopted in those days. According to G. C. Rankin, "the Regulations may be treated as showing the forces of order and of enlightenment taking their time. The tentative amendments, the partial and imperfect solutions, the makeshift devices which constitute a gradual process of improvement were in the circumstances of the time and of the country a true method of progress and in general the only method which would work."

The results of such a process were, however, defective which called for analytical scrutiny and simplification. Moreover the changed conditions of early thirties would not tolerate the inherent weaknesses of the system, like uncertainty, incoherence, lack of uniformity, conflicting and confusing nature and unnecessary bulk. The things began to improve only after the passage of the Charter Act of 1833 which created an All-India Legislature and provided for the appointment of a Law Commission to codify the laws.

32. Acharyya, op. cit., at p. 158.
33. Id., at p. 159.
34. Id., at pp. 158-159.
35. Quoted in Morely, op. cit., at pp. 158, 159.
37. Ibid.
CHAPTER XXVII

DOCTRINE OF JUSTICE, EQUITY AND GOOD CONSCIENCE

Introduction of the doctrine

Neither in the administration of revenue nor in that of justice, the guiding principle of the early English administrators was to interfere with the laws of the country unless they were unjust and unreasonable. It was stated in 1772 by the Governor at Calcutta that though “seven years had elapsed since the Company became possessed of the diwani, yet no regular process had ever been formed for conducting the business of the revenue. Every zamindari and every taluka, was left to its own particular customs. These indeed were not inviolably adhered to; the novelty of the business to those who were appointed to superintend it, the chicanery of the people whom they were obliged to employ as their...” of each district, and not infrequently the “actor” occasioned many changes.” In this “...actor” lies the origin of the doctrine of justice, equity and good conscience in India. “Here we find the ideas of the British Collectors in the Mofussil, ideas based on the rules of English law and sentiments, silently affecting the laws of this country.”

Then in 1774, the Charter of the Calcutta Supreme Court enacted that the Court should be a Court of Equity, having full power and authority to administer justice in a summary manner, as nearly as might be, according to the rules and proceedings of the High Court of Chancery in England. This provision conferred on the Judges of the Supreme Court the power to administer justice and equity. The Calcutta High Court inherited this power from the Supreme Court. Other Chartered High Courts had also got the same power.

The judicial plan of 1772, given by Warren Hastings, did not make any provision as to the application of the doctrine. Such a provision was, however, made in 1781 by Elijah Impey, which provided that in all cases, for which no specific directions were hereby given, the Judges of the Sadar Diwani Adalat were to act according to justice, equity and good conscience. In 1793 similar provisions were made for district and city courts and provincial Courts of Appeal. In 1831, it was enacted that in all cases of inheritance of, or succession to, landed property in which the plaintiff was of different religious persuasion from the defendant, the decision was to be given according to the law of the latter. But in cases in which this rule could not be applied, the Munsifs were to act according to the doctrine of justice, equity and good conscience. Then in 1832, it was provided that where one or more of the parties to civil suits were neither Hindus nor

1. Extract from letter of the Governor in Council to the Court of Directors, dated 3rd November, 1772 quoted in B. K. Acharyya, Codification in British India, at pp. 94-95 (1918).
2. Acharyya, op. cit., at p. 93.
3. See ibid.
Mohammedans, or where on party was Hindu and the other of Mohammedan persuasion, the decision would be regulated by the said doctrine. A similar provision was made in 1852 for Sadar Ameens and Munsifs. In 1837 the Civil Courts Act passed for Bengal Provinces, and Assam gave direction to act according to justice, equity and good conscience in the absence of any specific rule. In Madras, a similar provision was made in 1802. In 1873, the Madras Civil Courts Act also provided for the application of the said doctrine. In 1827, it was laid down for the Mofussil Courts of Bombay that in the absence of specific law and usage, the principles of justice, equity and good conscience were to be applied to cases. Similar provisions were made for the courts in the Central Provinces, Oudh, Punjab and North-West Frontier Provinces.

Introduction of English laws through the doctrine

It appears that, in the beginning, the doctrine of justice, equity and good conscience meant only the discretion of the lay judges, which they could exercise in a way which seemed to them doing substantial justice to the parties. In exercise of their discretion they even applied principles of Hindu and Mohammedan laws and even customary laws in many cases in which they were not obliged to do so.

Gradually and particularly since 1862, the trained judges assigned a new meaning to the doctrine of justice, equity and good conscience. In cases which they had to decide according to this doctrine, they began to apply English law, even though sometimes unsuited to the condition of the people of India. Many technical rules of English law found their way into this country through the doctrine. The Privy Council and the High Court of Judicature also used the doctrine to fill some gaps and interstices in the substantive law by the principles of English laws. The wide door of the doctrine rendered it easy for these principles to become, through the judicial process, the governing law of the country.

In 1862, the Privy Council reversing a decision of the Madras Sadar Diwani Adalat applied the principles of English law dealing with equitable mortgage by deposit of title-deeds. Speaking of the Mofussil courts of the Madras Presidency, the Privy Council said: "There is, properly, no prescribed general law to which their decisions must conform. They are

5. 
6. 
7. 
9. Quoted in ibid.
10. Ibid.
directed to proceed generally, according to justice, equity and good conscience." In 1864, this decision of the Privy Council was regarded as "an authority of the highest court of appeal that although the English law is not obligatory upon the courts in the mofussil, they ought in proceeding according to 'justice, equity and good conscience' to be governed by the principles of the English law applicable to a similar state of circumstances."

In 1868, Sir Barnes Peacock observed: "Now, having to administer justice, equity and good conscience, where are we to look for the principles which have been the growth of ages, and see how the courts act under similar circumstances; and if we find that the rules which they have laid down are in accordance with the true principles of equity, we cannot do wrong in following them."

In 1872, Sir J. F. Stephen said: "Though justice, equity and good conscience are the law which Indian Judges are bound to administer, they do in point of fact resort to English law books for their guidance on questions of this sort, and it is impossible that they should do otherwise, unless they are furnished with some such specific rule as this Act [Contract Act] will supply them with."

In 1887, the Privy Council expressed the view that 'justice, equity and good conscience' could be "generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances."

**Comments**

The doctrine of justice, equity and good conscience allowed a wide discretion to the Judges in deciding various cases, and enabled them to legislate to a great extent. In spite of its own contribution to the development of law, judicial legislation through the application of the doctrine was not hailed in this country. Lord Macaulay was already opposed to legislation by judicial authorities which according to him, "in a country where there is an absolute government and lax morality—where there is no bar and no public—is a curse and scandal not to be endured." A system of law cannot "be said to be in a satisfactory condition which has to depend on case-law for its exposition. A vast number of points will necessarily remain unsettled under such a system until the highest tribunals have had the opportunity of deciding them. Judicial officers again are frequently influenced by their own peculiar idiosyncrasies. The evil of the divergence of views of the Judges has a tendency to increase and not to diminish. With the accumulation of conflicting precedents, the task of ascertaining what law is to govern the parties in a given case becomes more and more difficult, and when a right of appeal to two or more courts is permitted, the amount of uncertainty is pushed to a point which must necessarily produce great embarrassment and cause a

13. Saroop v. Travakohnath, 9 W. R. 230, at p. 232 (1869). See also Brojo v. Rama-
16. Quoted in Acharyya, op. cit., at p. 98.
corresponding depreciation in the value of property, besides enhancing the
attendant evils of expense and delay in litigation.”

In 1872, Sir James Stephen, therefore, said that well-designed legislation
“is the only possible remedy against quibbles and chicanery. All the
evils which are dreaded...from legal practitioners can be averted in this
manner and in no other. To try to avert them by leaving the law unde-
 fined, and by entrusting Judges with a wide discretion, is to try to put
out the fire by pouring oil upon it. Leave a Judge with no rule, or with
one of those leaden rules which can be twisted in any direction, and you at
once open to the advocate every sort of topic by which the discretion of the
Judge can be guided. Shut the lawyer’s mouth, and you fall into the evils of
arbitrary government.”

Again, the Judges in India in deciding cases by the doctrine of justice,
equity and good conscience “decided them by the rules of English law
and thus many rules ill-suited to the habits and institutions of the Indians,
indirectly found their way into India by means of that informal legislation
which was gradually effected by judicial decisions. In course of time it
was found necessary to check the introduction of such technical rules of
English law.” In a despatch of 20th January, 1876, from the Secretary
of State for India to the Government of India it was stated that the
“only way of checking this process of borrowing English rules from the
recognized English authorities is by substituting for those rules a system of
codified law, adjusted to the best Native customs and to the ascertained
interests of the country.”

It is clear from the above comments that codification was the only way
of curbing out the evils of judicial legislation.

Justice, equity and good conscience and persons other than
Hindus and Mohammedans

Codification was equally necessary in the case of persons other than
Hindus and Mohammedans. We have seen that in the case of Indian
Christians, Anglo-Indians, Armenians, Parsis, Portuguese and Jews etc.,
residing in the Presidency-towns, the Crown’s courts generally applied
English law; but in the case of those residing in the Mofussil, there was
no lex loci; the absence of some specific law created a lot of difficulty in
the determination of their cases. The laws of the Armenians in their country
of origin were impossible to ascertain. In fact the Armenians had no trace
of their own law, and no peculiar Code of laws had been administered to
them since they ceased to be a nation. They had no actual laws especially
applicable to them. In 1836, they had expressed their desire of being
governed by English Law. The laws of the Parsis in their country of origin
were difficult to ascertain. It appears that their law, if it deserved the
name, consisted of their national customs, preserved by immemorial usage,
and many others borrowed from the Hindus but ascertainable only by
reference to the Parsi priests or to the head of a panchayat of the caste.
The Jews preserved their laws of succession and marriage. Anglo-Indians
and Indian Christians appear to have been guided by the English law in
many cases.

17. Id., at pp. 100-101.
19. Acharyya, op. cit., at p. 97.
20. Quoted in ibid.
at pp. 395, 394. See also Rankin, op. cit., at pp. 26-27.
The position was in no way clear. As has been observed by Sir Erskine Perry,22 Parisi, Jews, Portuguese and Anglo-Indians in Bombay Province were persons "as to whom there is a somewhat discretable state of doubt as to what the law is."23

Sir C. Ilbert says that the tendency of the courts had been to apply to various classes of persons, as mentioned above, the spirit of Warren Hastings' rule and to leave them in the enjoyment of their family law, except so far as they had shown a disposition to place themselves under English law.24 Actually the courts were guided by the doctrine of justice, equity and good conscience, and acted in a way which appeared to them to be just and reasonable in each case.25 A leading case on this point is Charlotte Abraham v. Francis Abraham26 decided by the Privy Council in 1863. The main question involved in this case was as to the law which governed the succession to the property of one Matthew Abraham, a Protestant native of India, resident in the Madras Presidency, and who died intestate in the year 1842. He left behind his wife, Charlotte Abraham, and two sons out of whom one Daniel Abraham only survived, both being the appellants. He also left behind a brother, Francis Abraham, the respondent. Matthew and Francis, former being elder, were by birth Hindus of pure native blood, being descended from a family of Hindus. Their ancestors for several generations had embraced Christianity, and they were themselves Christians, ultimately becoming members of the Church of England. They belonged to the class known in India as Native Christians. In 1820, Matthew married Charlotte who and her parents were also Christians, father being an Englishman and the mother a Portuguese. They were of the class known in India as East Indians. From the time of his marriage, he and his wife and their children adhered in all respects to the religion, manners and habits of the East Indians.

Upto 1837 Francis had partnership with his brother in some shop-business. Thereafter he worked with him without any agreement till his death. There was some distillery-business also, running in the name of Matthew. The brothers had no ancestral property. The property which Matthew possessed at the time of his death was acquired by him by his own sole unaided exertions and without any use whatever of any common stock. After his death, however, Francis took over the whole business in his hand. Later on, the appellants instituted a suit against him in order to secure the assets of Matthew. The Sadar Divani Adalat at Madras held that the property should be distributed according to Hindu law. The matter then came before the Privy Council in appeal which had to decide the question as

22. He was Chief Justice of the Bombay Supreme Court.
23. Quoted in Rankin, op. cit., at p. 23.
25. Rankin, op. cit., p. 23. See also id., at pp. 14-15. Rankin says at p. 23:
"There were large classes ... and many individuals were cut off by the illegitimacy themselves or of some ancestor from any legal connection with the country from which they had sprung; many also, by reason of mixed ancestry or other causes, were alien to the East, able to trace and according to the appropriate law. Still, no prescribed to the courts outside good conscience was to be their only considered that there was no legal conception cases at least, to the law of the law of their country of origin, a good exercise of the very general discretion given to them by the direction to observe justice, equity and good conscience."
26. 9 M. I. A. 195.
to the application of law. Lord Kingsdown, reversing the decision of the Sadar Adalat, observed as follows:

"The first and most important question raised by this appeal is, by what law the rights of these parties ought to be determined. In considering this question it is material in the first place to observe what was the real point in issue in the cause...the true question at issue in this case is, not who was the heir of the late Matthew Abraham, but whether he and the Respondent formed an undivided family in the sense which those words bear in the Hindu law with reference to the acquisition, improvement, enjoyment, disposition, and devolution of property. It is a question of parincership and not of heirship. Heirship may be governed by the Hindu law, or by any other law to which the ancestor may be subject; but parincership, understood in the sense in which their Lordships here use the term, as expressing the rights and obligations growing out of the statutes of an undivided family, is the creature of, and must be governed by, the Hindu law. Considering the case, then, with reference to parincership, what is the position of a member of a Hindu family who has become a convert to Christianity? He becomes...". He is regarded by them as an outcaste. The tie...as he is concerned, not only loosened...squent upon and connected with the...parincership may be put an end to by a severance effected by partition; it must...equally be put an end to by severance which the Hindu law recognizes and creates. Their Lordships, therefore, are of opinion, that upon the conversion of a Hindu to Christianity, the Hindu law ceases to have any continuing obligatory force upon the convert. He may renounce the old law by which he was bound, as he has renounced his old religion, or if he thinks fit, he may abide by the old law, notwithstanding he has renounced the old religion.

"Such, then, being the state of the case, so far as the Hindu law is concerned we must next consider whether there is any other law which determines the rights over the property of a Hindu becoming a convert to Christianity. The lex loci Act [Caste Disabilities Removal Act, 1850] clearly does not apply, the parties having ceased to be Hindu in religion; and looking to the Regulations, their Lordships think that so far as they prescribe that the Hindu law shall be applied to Hindus and the Mohammedan law to Mohammedans, they must be understood to refer to Hindus and Mohammedans not by birth merely, but by religion also. They think, therefore, that this case fell to be decided according to the Regulations which prescribe that the decision shall be according to equity and good conscience. Applying, then, this rule to the decision of the case, it seems...that the course which appears to have been pursued in India in these cases, and to have been adopted in the present case, of referring decision to the usages of the class to which the convert may have attached himself, and of the family to which he may have belonged, has been most consonant both to equity and good conscience. The profession of Christianity releases the convert from the trammels of the Hindu law, but it does not of necessity involve any change of the rights or relations of the convert in matters with which Christianity has no concern, such as his rights and interests in, and his powers over, property. The convert, though not bound as to such matters, either by the Hindu law or any other positive law, may by his course of conduct after his conversion have shown by what law he intended to be governed as to these matters. He may have done so either by attaching himself to a class which as to these matters has adopted and acted upon some particular law, or by having himself observed some family usage or custom; and nothing can surely be more just than that the rights and interests in his property, and his powers over it, should be governed by
the law which he has adopted, or the rules which he has observed.

"The English law, as such, is not the law of [the Company's] Courts. They have, properly speaking, no obligatory law of the forum, as the Supreme Courts had. The East Indians could not claim the English law as of right, but they were a class most nearly resembling the English, they conformed to them in religion, manners, and customs, and the English law as to the succession of movables was applied by the Courts in the Mofussil to the succession of the property of this class. Their Lordships collect from the evidence that the class known in India as 'native Christians', using that term in its wide and extended sense as embracing all natives converted to Christianity, has subordinate divisions forming again distinct classes, of which some adhere to the Hindu customs and usages as to property; others retain those customs and usages in a modified form; and others retain wholly abandoned these customs and usages, and adopted different rules and laws as to their property.

"Of this latter class are the 'East Indians', a class well defined in India, the members of which follow in all things the usages and customs of the English resident there, and though they cannot claim the exemption from jurisdiction, nor the privilege of a personal law, which the British subjects, in the limited sense of the terms of the jurisdiction of the Charters of the Supreme Courts, enjoy, in other respects, in the common bond of union in religion, customs, and manners, approach the class of British subjects.

"Mathew Abraham [along with his family] adhered in all respects to the religion, manners and habits of the East Indians and] acquired that nucleus of his property himself. No law imposed any fetter upon him as to his mode of dealing with it. It is not even shown, as a fact, how his ancestors after their conversion dealt with such property, as to the use and enjoyment of it. It is plain that no rule as to such use and enjoyment, which the ancestors may voluntarily have imposed on themselves, could be of compulsory obligation on a descendant of theirs acquiring his own wealth. Customs and usages as to dealing with property, unless their continuance be enjoined by law, as they are adopted voluntarily, so they may be changed, or lost by desuetude. Custom implies continuance. If a family of converts retain the customs in part of their unconverted predecessors, is it that election of theirs invariable and inflexible? Can neither they nor their descendants change things in their very nature variable, as dependent on the changeable inclinations, feelings, and obligations of successive generations of the men? If the spirit of an adopted religion improves those who become converts to it, and they reject, from conscience, customs to which their first converted ancestors were submitted, the abandoned usage be treated by a sort of fictio juris as still so as to things which belong

Surely, in things indifferent in themselves, the Tribunals which have a discretion and have no positive lex fori imposed on them should rather proceed on what actually exists than on what has existed, and in forming their own presumptions have regard rather to a man's own way of life than to that of his predecessors. Though race and blood are independent of volition, usage is not.

"The law has not, so far..., prohibited a Christian convert from changing his class... It was competent to Matthew Abraham, though himself both by origin and actually in his youth a 'Native Christian,' following the Hindu laws and customs on matters relating to property, to change his class of Christian, and become of the Christian class to which his wife belonged. This was no light and inconsiderable step, taken up on a whim,
and to be as lightly set aside...The change was deliberate, it was publicly acted upon, and endured through his life for twenty years or more. His family was managed and lived in all respects like an East Indian family. In such a family the undivided family union in the sense before mentioned is unknown. How, then, can it be imposed on that family of which Matthew Abraham formed the head as father? Not by consent, for there was none; not by force of obligatory law for there was none; not by adoption, for they had not adopted any Hindu customs, but on the contrary, had rejected them all. It could only be imposed...by passing over the actual family springing from the marriage, and by absorbing all its members in the original family of which the two brothers were members, by passing over all actual usages, customs, and ways of living; and by supposing, contrary to fact, the prevalence of Hindu customs which had been deliberately abandoned. Their Lordships, therefore, are of opinion, that the undivided family on which the Defendant relies in his answer did not exist in any sense which is material to or assists the decision of the case.27

This is how the question as to the law which governed the succession to the property of a native Christian was determined on the basis of the doctrine of justice, equity and good conscience.

The courts in India decided cases of other classes of persons on the basis of the same doctrine. They, as courts of conscience, adjudicated according to the law of parties not being Hindus or Mohammedans. Thus in Durand v. Boilard,28 the succession was governed by French law. Joanna Fernandez v. Domingo de Silva29 was a case of Portuguese law. The cases of Gregory v. Cachrane,30 Aratoon v. Aratoon31 and Humrus v. Humrus32 related to Armenian Christians. So was the case of Parsis; Modes Hormusjee v. Cooperbhace33 in which the Court found that the Parsis had testamentary power and could devise their property by will,34 and Mithirvanjee v. Awan-Bose.35

The courts, particularly in matters relating to inheritance and succession, and to personal relations, endeavoured to apply the substantive law of the country of the suitor, so far as ascertainable from law books and other sources.36 In order to ascertain customs and usages, wherever applicable, they had to admit evidence.37 Taking the case of Armenians Armenian law was not ascertainable; therefore, their questions of succession were "dealt with by a reference to the customs of the people as they are supposed to have existed in former days [ascertained on the basis of evidence] and by a reference to their priests who advise upon those customs."38

As is clear, there was no uniform and well-defined system of Law of persons'other than Hindus and Mohammedans, residing in the Mofussil. To sum up the whole position, "five men each under a different law may be found walking or sitting together."39 As has been observed earlier, codification was the only answer to the existing vices.

27. Id., at pp. 236-245.
28. 2 Ben. Sud. Dew. Rep., 176. For this case and other cases referred in the same paragraph, see 9 M. I. A. 195, at pp. 224-225
30. 6 M. I. A. 275.
33. 6 M. I. A. 448.
34. Id., at pp. 457-458, 460-461. See also id., at p. 449 for other cases.
36. Rankin, op. cit., at p. 27.
37. Ibid.
39. Quoted in id., at p. 25.
CHAPTER XXVIII
CRIMINAL LAW BEFORE ENACTMENT OF PANAL CODE

Introduction

This Chapter deals with the state of substantive criminal law as existed in the Mofussil during the period 1765—1860. In 1765, the Company got diwani of Bengal, Bihar and Orissa, and in 1860 the Indian Penal Code was enacted. At the time of the grant of diwani, the administration of criminal justice in the greater part of India was guided for more than two centuries by the Mohammedan criminal law which had superseded the criminal law of the Hindus.¹ In the Province of Bombay, however, criminal justice was administered according to the personal laws of Hindus and Mohammedans. Mohammedan criminal law was not the general law in this Province because it was not under Muslim rule at the time of annexation.² We would see in the following pages how the then existing criminal law came to be extensively modified by successive regulations and Acts of the Government till the enactment of the Indian Penal Code in 1860.

We may incidentally refer to the position of criminal law in the Presidency-towns. The criminal law administered in these towns came to be, in practice, the English criminal law. In the town of Bombay, the Portuguese laws were formally replaced by the English laws in 1672. The latter, however, ceased to operate after the Siddi's invasion in 1690; although, theoretically, they continued as the legally promulgated Code. In the towns of Madras and Calcutta, originally the courts, established by the Company as Zamindar, exercised criminal jurisdiction over the Indian inhabitants. "Apparently, English criminal law was applied more and more extensively in these Courts as time went on, though in those towns there was no definite substitution of that law for the Mohammedan criminal law."³ It was only under the Charter of 1726 that the English criminal law, so far as applicable in the local circumstances, began to be authoritatively administered in the Presidency-towns. The Charter had established the Mayor's Courts in these towns, and by the same, in each town, the Governor and the five senior members of his Council were constituted a Court of Oyer and Terminer and Gaol Delivery for the trial of offences. In the next hundred years, all these courts were replaced by the Supreme Courts which were constituted as Courts of Oyer and Terminer and Gaol Delivery having the like power as Commissioners and Justices of Oyer and Terminer and Gaol Delivery possessed in England. The courts were directed to administer criminal justice, in such or the like manner and form, as nearly as the conditions and circumstances of the place and persons might admit of, as was done in "...". Also given power to try offences committed the laws and customs of the Admiralty in

1. B. K. Acharyya, Codification in British India, at pp. 209, 210-211, 372 (1914).
2. See G. C. Rankin, Background to Indian Law, at p. 185 (1946).
inhabitants living in the Presidency-towns came to be governed by English law in criminal matters.  

Coming to the main theme of the Chapter, we have observed that in the Bengal Provinces and the Province of Madras, the English found Mohammedan criminal law as the law of the land. Certain broad features of the system of law are discussed below.

Outlines of Mohammedan Criminal Law

The primary source of the Mohammedan criminal law was the Quran. Then followed the tradition as to the precepts and usages of the Prophet, the consensus of jurists, and analogical deduction. There were four kinds of punishments in the Mohammedan jurisprudence, which disclose the basic principles of the Mohammedan system: Qisas or retaliation; diyut or blood money, hadd or defined punishment (which could not be increased or reduced); tazir and siyasa or discretionary and exemplary punishment.

Qisas (retaliation): Diyut (blood money)

The principle of qisas or retaliation was applied to cases of wilful homicide, and of certain types of grave maiming and wounding. It gave to the injured person or his next of kin or in the case of a slave to his master, the right to cause a like injury to the culprit. Killing by way of retaliation was to be done with a sword or any other similar weapon. The established mode of execution was by decapitation. But by the beginning of the nineteenth century hanging was the general mode of execution in the territories under the control of the Company.

A conviction for murder could be based on a confession, but for this purpose the statement of confession was to declare that the act was wilful, and whatever said by way of explanation was to be considered a part of the confession. Two male eye-witnesses of approved credit were required to establish a charge of murder if there was no confession made by the accused; as against a Mohammedan, the witnesses, were to be of that religion. For less grave homicide, not involving retaliation or defined punishment, the evidence of one man and two women was sufficient.

In certain cases, there was no provision for retaliation, for example, where the person murdered was a descendant of the killer. Moreover, retaliation could be enforced only when all the next of kin were entitled to demand it and actually demanded it. It was considered to be the right of man in contradiction to the right of the public or of God; more specifically it was the private right of the person killed and it devolved on his legal heirs representing him in its execution. In case it was not exacted, blood money was payable. In cases of intentional killing, the fine of blood was to be exacted only from the wrongdoer himself. In other cases, he and his family or associates were liable. The reason for involving others in the fine was that the criminal was supposed to have committed the crime due to the aid or neglect of his associates; because even though they might not have supported him in the commission of the crime, they, if vigilant, might have prevented him from doing so. It appears that these provisions were never

4. Id., at pp. 4-6. See also id., at pp. 6-8. See also Chapters V, VII & XIII, supra.
5. For details see T. K. Banerjee, Background to Indian Criminal Law, at pp. 34-36 (1963).
applied in Bengal. For intentional wounds and maiming, a fine might be accepted in lieu of retaliation, and this was the provision for unintentional injuries. 

Hadd (defined punishment): Tazir and Siyasa (discretionary and exemplary punishment)

Hadd means boundary or limit. The principle of hadd was applied to the fixed and immutable penalties for certain offences, fixed with reference to the right of God or, in other words, to public justice. In other words the quantity and quality of punishments were fixed for certain offences and they could not be altered or modified. In case the offence was proved, the Judge had no alternative than to sentence the convict to the given penalty. There was no discretion in the matter. The aim was to deter criminals from doing criminal acts injurious to the whole community. This being a public right, the authority was exclusively empowered to enforce it. The claim and prosecution of the injured person were not indispensably necessary. Moreover such a person could not remit or compound the given punishment as in cases of gisas.

Under hadd, the punishment for zina, that is illicit intercourse, was stoning or scourging; for falsely accusing a married women of adultery, and for wine drinking, scourging, for theft, cutting off the hands; and for various types of robbery, different punishments including mutilation or death or both. The savagery of the punishments was compensated by difficulty in judgment. hadd was prevented by any doubt or fear of the accused, or, in the case of zina, four males and four females. If the confession had to be made four times before the Judge, the confession could be retracted at any time; if the witnesses did not amount to the required number, they might be held guilty of slander; if the case against the accused was proved, they might have to start stoning.

Under principle of tazir, the kind and amount of punishment were entirely within the discretion of the judge. The punishment might be anything from imprisonment and banishment to public exposure. It might be corporal punishment, reprimand, boxing on the ear or any other humiliating treatment. In fact tazir was defined as an infliction undetermined in its degree by the law on account of the right either of God, or of the individual, or, in other words, for the ends of public justice and private justice.

In cases covered by tazir, the conditions of conviction were not so strict as for hadd. A conviction might be had on the basis of a retracted confession or on the evidence of a man and a woman or on strong presump-

6. Rankin, op. cit., at pp. 164-165; Banerjee, op. cit., at pp. 40-46. The modus operandi as regards the imposition of fine was: "The fine for a member that is single (as the nose) is the whole price of blood as for homicide, for a member of which there are two and not more (as a hand) half the price of blood, for one of which there are ten (a finger or toe) a tenth of the price of blood; but the fine of a man for maiming or injuring a woman is half of that for the same injury inflicting a slave varies according to the living a man of any of his five senses, or disfiguring him for life." The whole price of blood is the whole price of blood.

tion. "This part of the criminal law lent itself to control by the government of any particular place whom ordinances might lay down definite principles to regulate punishment in such cases. Even cases coming under qisas and hadd, if those punishments could not be inflicted owing to some exception, doubt or legal defect, could be dealt with by infliction of a lesser penalty by way of iazir." 7

Under siyasa, exemplary punishment could be inflicted by the sovereign on the wrongdoer for the protection of the public interest. For heinous crimes in a high degree injurious to society and for crimes of special nature, exemplary punishment equal to or even beyond that prescribed under qisas or hadd might be given. Siyasa played a great part under the regulations as a corrective or supplementary doctrine which was well known and admitted in the practice of the courts in Bengal as being acknowledged to be a power vested in the ruler for the time being, whereby a criminal for almost any atrocious act might be lawfully or regularly put to death by the ruler in the exercise of his discretionary coercive authority entrusted to him for the public good. 8

Defects of Mohammedan Criminal Law

We have given above the broad principles of Mohammedan penal law as prevailed in Bengal at the time when Company took over its administration. In practice, however, it could never be known before the pronouncement of sentence as to what was the exact law as regards a particular offence. Though the basic and well-established principles of law as laid down in Hadaya and Fatava-i-Alamgiri were applied to cases in Bengal, Hadaya contained many principles and opinions contrary to those of the Hanafi School; even as regards this school, it may be noted that master and his disciples differed on many points. Regarding case law a number of conflicting and incompatible decisions and opinions were quoted in Fatava-i-Alamgiri on almost every question of law. The result was that the Muslim Judge had sufficient liberty to give a new interpretation to law, being unbound by any commentator or even by his own earlier interpretation. The situation grew worse if he was corrupt because that enabled him to twist law and give decision in favour of the highest bidder. 9

Mohammedan law of crimes suffered from other glaring defects, and was found repugnant and obnoxious to the principles of natural justice and the good of society. It divided crimes into two categories: crimes against God, e.g., adultery and drunkenness, and crimes against man, e.g., murder and robbery. The former type of offences were deemed worthy of the public vengeance; the latter, though equally detrimental to the peace of the society, were left to be taken care of by the individuals. Thus in most of the cases, crime was considered to be a wrong done to the injured person, not to the State. Private satisfaction counted more than public satisfaction and public peace. 10

7. Rankin, op. cit., at p. 165.
8. Last sentence from quotation in Rankin, op. cit., at p. 166, taken from Jonathan Duncan, Observations, para. 64. For description under hads, iazir and siyasa, see Rakein, op. cit., at pp. 163-165; Bacher, op. cit., at pp. 46-52.
10. Id., at pp. 62-63.
The principle that most of the crimes were private wrongs enabled many aggrieved individuals to forgive, or compromise with, the offenders for petty sums of money. The requirement that aggrieved parties had to take the burden of prosecution in many cases led to the escape of a good many offenders from punishment. In many cases, relatives of murdered persons did not prosecute the killers owing either to their ignorance of crime, or fear, or for other reasons. In such cases, the offenders could not be punished and kept in prison for an indefinite time till some one came forward to demand punishment.  

In the matter of retaliation, if the heir of the murdered person was a minor or idiot, and his or her father was living, the latter only could demand retaliation; an appointed guardian, not being the father of the minor or idiot, was not so entitled. In case some of the heirs were minors and some adult, it was the opinion of Abu Hanifa that only the latter, or in conjunction with the ruler, on the part of minors also, might demand retaliation, but his two disciples said that retaliation by death could not be demanded till the minors attained maturity. Where all the heirs were minor, some lawyers maintained that the ruler had the power of enforcing retaliation, on their behalf, and others were of the opinion that it could only be enforced when one or more of the minor heirs became of age.  

Mohammedan law granted an illogical privilege to the sons or nearest of kin to pardon the murderers of their parents or kinsmen. The exercise of this power of life and death placed at disposal of the relatives of a murdered person largely depended on their caprice, venality or indiffercence, and the power could be ill-applied and misused. In a certain case, one brother out of three killed another in order to inherit a bigger share of their paternal property; the third brother pardoned the brother who committed murder either due to affection or consideration of having a larger share himself also. In many cases, offenders were pardoned by the relatives of the deceased persons for negligible monetary compensation, sometime as low as rupees ten. This probability encouraged many potential killers to commit this heinous crime on slight provocation. Thus human life became very cheap. Among Hindus, Brahmin-murderers escaped punishment because the relatives of deceased persons did not like to incur sin by demanding retaliation by death of Brahmins.  

Warren Hastings was opposed to this sort of legal provision and he said that this law "though enacted by the highest authority which the professors of the Mohammedan faith can acknowledge, appears to be of barbarous construction, and contrary to the first principle of civil society by which the state acquires an interest in every member which composes it; and a right in his security. It is a law, which, is rigidly observed, would put the life of every parent in the hands of his son, and by its effect on weak and timid minds...would afford a kind of pre- assurance of impunity in those who were disposed to become obnoxious to it."  

Mohammedan law enjoined the children or nearest of kin to the person deceased to execute the sentence passed on the murderers of their parents of  

11. Ibid.  
12. Id., at p. 41.  
13. Id., at p. 63-64.  
Hastings. The tendency of such a provision was to cause such crimes to pass with impunity. Warren Hastings was opposed to such a law. He said that this law “suggested the same divine origin, is yet more barbarous than the former and in its consequences more impotent. It would be difficult to put a case, in which the absurdity or it should be more strongly illustrated, than in one now before us, of a mother condemned to perish by the hands of her own children for the murder of her husband. Their age is no recorded, but by the circumstances, which appear in the proceedings, they appear to be very young. They have pardoned their mother. They would have deserved death themselves, if they had been so utterly devoid of every feeling of humanity, as to have been able to administer it to her who gave them life. I am of opinion, that the courts of justice should be interdicted from passing so horrid a sentence.”

The whole Mohammedan law of homicide was very complicated, technical and obscure. Justifiable and lawful homicide included cases of retaliation by persons legally entitled to it, although no judicial sentence had been passed; and cases where the killing was done in self-defence, or in preservation of property from theft or robbery, or in prevention of adultery, rape or other heinous offences, or at the express desire or command of the person killed. Illegal homicide was of five kinds: Wilful homicide, quasi-deliberate or wilful-like homicide, erroneous homicide, involuntary homicide, and accidental homicide. The first two are said to be the gravest of the five kinds of homicide. “The school of Abu Hani’a, which had prevailed under the Moguls, did not class the voluntary act of killing as wilful homicide unless it was done with a deadly weapon—one from whose nature intention to kill could be inferred. This excluded many cases of unintentional killing and included some cases where a deadly weapon had been used and death though not intended had been caused. ‘Wilful-like’ homicide covered cases of death voluntarily caused but with a weapon not likely to cause it. As this crime was not punished by retaliation of death but only by the fine of blood, expiation and exclusion from inheritance to the slain, the distinction between these two grades of homicide was of great importance. The question of intention, not being according to the prevailing view, question of fact to be answered upon the circumstances of each particular case, but a question of law to be answered according to the nature of the instrument or weapon used, great nicety of distinction was to be found in text writers of authority. What was the crime when death was voluntarily caused by a sharp instrument, by the iron edge or handle of a hoe, by a small needle or a pinking needle, by fire, by biting, by throwing into an oven or cauldron, by drowning in water, by strangling, by means of a wild beast, by poison? To take the last case as an important illustration, the balance of opinion was that the design to kill is not inferable from the administration of poison because poison is occasionally given as a medicine, and it is possible that the person who gave it may not have known that the quantity was excessive. The fine of blood, as penalty in many of such cases was not so much paid as absent. Nor also in many cases coming under the third head of ‘homicide’ viz., killing by error, e.g., where the killer aiming at one person kills another.”

Warren Hastings was opposed to the distinction made by the Mohammedan law between murder perpetrated with an instrument formed by

15. Quoted in Id., at pp. 276-277 from a letter of Hastings, pp. 111.
16. Banerjee, op. cit., at pp. 36-40; Rankin, op. cit., at p. 167.
17. Rankin, op. cit., at pp. 157-158. See also Banerjee, op. cit., at p. 61.
shedding blood, and death caused by a deliberate act, but not, by means of such an instrument. He said: "If the intention of murder be clearly proved, no distinction should be made with respect to the weapon by which the crime was perpetrated. The murderer should suffer death, and the fine be remitted."

Mohammedan law of crimes allowed punishments of retaliation for murder, mutilation and stoning to death, and the like. From the point of view of sanction it gave to the cruel punishments, the law appeared almost unspeakably cruel and severe. At the same time it appeared to be mild also, but only in allowing escape to the offenders from punishment. We have already said that the execution of hadz could be prevented on slightest doubt and legal defect. Similarly, application of giasas was restricted doubt and legal defect. Similarly, application of giasas was restricted in many ways. It was, therefore, officially claimed that as a system "the Mohammedan criminal law is mild; for though some of the principles it sanctions be barbarous and cruel yet not only is the infliction of them rarely rendered compulsory on the magistrate, but the law seems to have been framed with more care to provide for the escape of criminals than to found conviction on sufficient evidence and to secure the adequate punishment of offenders."

Though the principle of tazir and siyasa was, in theory, just and reasonable, in practice its application proved to be arbitrary and uncertain. The exercise of the wide discretion, allowed by this principle to the Judges resulted into bribery and corruption, and fatal consequences to many persons. In 1802, a Court of Appeal and Circuit in Bengal answered an interrogatory of Lord Wellesley thus: "We are of opinion, that from the discretionary mode in which the Mohammedan criminal law...is administered, the administration of it, admits both of too much lenity, and too much severity—at any rate, of too much uncertainty. An offence, which to one law officer, may appear sufficiently punished by a month's imprisonment, shall from another law officer, incur a sentence of three or more years...The consequences which we suppose to be produced by the operation of this spirit, in which the criminal law is...administered, are contempt of the law itself; and encouragement to offenders. Though every criminal code must leave some discretion of punishment to the Courts, particularly in the smaller offences, and breaches of the peace; yet in crimes

18. Quoted in Acharyya, op. cit., at p. 75 from a letter points out a case to show the absurdity of the under discussion. "A man held the head of suffocated, and made a prise of her clothes an which she wore. It was evident that his object was no more than robbery, and

19. For an example of mutilation of limbs that took place in Bengal a certain case see Acharyya, op. cit., at p. 281.

of enormity...the punishment ought to be specific, at least, that some limit should be fixed to discretion.”

It may also be pointed out that the contents of Mohammedan criminal law were unknown to a vast majority of the people, mostly Hindus.

Besides the defects in substantive criminal law of Mohammedans, their law of criminal procedure and law of evidence were technical and primitive, and suffered from grave defects.

It is thus clear that in the Mohammedan law, there were rules and principles which no civilized government could administer. As pointed out by C. Ilbert, “It was impossible to enforce the law of retaliation for murder, of stoning for sexual immorality, or of mutilation for theft, or to recognize the incapacity of unbelievers to give evidence in cases affecting Mohammedans.”

The Government of the Company, therefore, adopted the process of gradually reforming the Mohammedan criminal law so as to make it a fit instrument of the administration of criminal justice in a growing society. Its most glaring defects were removed by regulations. The process of repealing, amending and supplementing it by enactments—regulations and Acts—based generally on English principles went on until it was wholly superseded by the Penal Code in 1860. A Code of Criminal Procedure followed in 1861, and the process of superseding it completely by European law was, as far as the administration of criminal justice is concerned, completed by the passage of the Evidence Act in 1872. It has been pointed out by G. C. Rankin and as would be presently seen that “the Indian Penal Code has so entirely obliterated the criminal law which preceded it that the efforts of the British to retain and improve the criminal law which they found in India have fallen out of sight. To-day one reflects with some surprise that not until 1862 did the criminal law obtaining over the greater part of British India become detached from its base in Mohammedan jurisprudence. Had it not been extensively amended to adapt it to modern and western notions of policy and behaviour, Mahomedan criminal law could not have lasted so long. Before 1833 all the main topics had been dealt with by the Regulations. In 1832 non-Muslims ceased to be subjected in Bengal to the Mahomedan criminal law and in 1827 Bombay had been given a statutory criminal code. But the Mahomedan criminal law had never been cast aside

23. See generally id., at pp. 221-290. See also R. K. Wilson, Anglo-Mahomedan Law, A Digest, at p. 55 (1912).
25. The Company was entitled to administer criminal justice under a treaty with the Nawab of Bengal made in 1765. Thus the Company could claim to hold the diwani from the Emperor and the not, however, abrogate the Moh
ceded with caution. Though i
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criminal jurisdiction was compl
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of the public law of the land
at pp. 163-164; Acharyya, op. cit., at pp. 163-164.
altogether till the Penal Code of 1860 and the Criminal Procedure of 1861 came into force.\textsuperscript{27}

Reforms and changes under the Company.

Bengal Provinces

The Government of the Company introduced reforms and changes in the Mohammedan criminal law as follows.

First interference by Warren Hastings.—Warren Hastings started with a dual policy of preservation, as far as possible, and improvement where inevitable. In 1772, he touched only that rule of Mohammedan law which dealt with dacoity in order to suppress the wanton and ruthless depredation of dacoits. It was grossly defective. His judicial plan of that year provided that dacoits on conviction should be sentenced to death and executed in their village; the whole village should be fined, and their families made State-slaves. The Maulvies refused to pass sentence of death on dacoits unless the robbery committed by them was attended with murder. Hastings however, maintained that the old rule followed by them in passing sentence in cases of dacoity should be abrogated, and further that the Company as the sovereign authority in Bengal could abrogate rules of Mohammedan law. It was within its power to correct the imperfection of the sentence, to prevent the guilty from escaping with impunity and to strike at the root of such disorders as the law did not reach. There was nothing in Mohammedan law to restrain the sovereign from doing so. It was necessary and conformable to custom for the sovereign power to depart in extraordinary cases from the strict letter of the law. Therefore the punishments decreed by the Company’s Government against professed and notorious robbers should be literally enforced.\textsuperscript{28}

Till 1775, Hastings had complete control of Sadar Nizamat Adalat. He might revise its sentences and also correct the imperfections of the Mohammedan law under warrants of the Nazim. Often sentences passed by the Mofussil courts were revised and changed by the Sadar Nizamat Adalat with a view to bringing them more in conformity with reason and natural Justice. In many cases of homicide, considered as man-slaughter under the existing law, the Sadar Adalat, in pronouncing the final sentence, sentenced the offenders to the punishment of death.\textsuperscript{29} It further appears that Hastings tried to do away with mutilation as a punishment; and that permission was to be obtained from him for execution of sentences of mutilation.\textsuperscript{30}

Such were the beginnings during the regime of Warren Hastings,

Reforms under Lord Cornwallis.—In 1790, Lord Cornwallis remarked that the general state of the administration of criminal justice throughout the Provinces was exceedingly and notoriously defective. He attributed this to two obvious causes: The gross defects in the Mohammedan law; and the defects in the constitution of the courts. A provision against the first defect could not otherwise be made than by correcting such


\textsuperscript{28} Rankin, op. cit., at p. 169. Acharyya, op. cit., at pp. 273-274. See also W. H. Morley, The Administration of Justice in British India, at p. 185 (1855).

\textsuperscript{29} Banerjee, op. cit., at pp. 69-70.

\textsuperscript{30} Rankin, op. cit., at pp. 169, 170.
parts of the law as were most evidently contrary to natural justice and the good of society. There was no doubt that the Company's Government was competent to amend the law, because it was the lawful Government of Bengal, and further because the Regulating Act had vested the ordering, management and government of the Company's territorial acquisitions and their revenues in the Governor-General in Council, and the Act had not taken, in any way, an exception to the punishments prescribed by the Government in 1774 for dacoity, or to the supervision of the criminal courts entrusted to the servants of the Company in that year; in fact, the Act had authorized and sanctioned them. As the Government thus possessed the authority to introduce necessary amendments in the law of the country, it was certainly incumbent on it not to allow any longer the flagrant abuses in the criminal department, or exercise of criminal justice, according to the Mohammedan law.31

Accordingly, in the same year, the Government of Cornwallis divested the Nazim of any authority over nizamat, and introduced important changes in the Mohammedan criminal law. He abrogated the law laid down by Abu Hanifa that a murderer was not liable to capital punishment if he committed the criminal act by strangling, drowning, poisoning, or with a weapon, such as a stick or club, on which there was no iron; or by such an instrument as was not usually adopted to the drawing of blood. The doctrine of his disciples—Yusuf and Mohammed—regarding trial for murder was declared to be the general rule for the officers of the courts to give the fulwas applicable to the circumstances of every case. In other words, the intention of the criminal, either evidently or fairly inferable from the nature and circumstances of the case and not the manner or instrument of perpetration, was to be the rule for pronouncing the punishment. Secondly, it was further declared that the next of kin of the deceased person would have no option to remit the sentences of the law, and pardon the offender.

In 1791, the Government abolished the punishment of mutilation and substituted imprisonment and hard labour in its place. If a prisoner was to lose two limbs, he would be imprisoned and kept to hard labour for fourteen years; and in case of one limb, imprisonment with hard labour for seven years was prescribed.32 In the same year, the Judges were required to transmit to the Sadar Nizamat Adalat the proceedings of those trials in which they disapproved the fulwas of the law officers for final disposal.33

In 1792, it was declared that in a case of murder, (1) the refusal of the heir to prosecute, or (2) non-appearance of the heir, entitled to claim gisas, within a reasonable time or absence of any communication of his intention to pardon the accused, or (3) the legal incompetency of the heir, e. g., minority, to prosecute, was not to bar the trial or condemnation of the offender. In such a case, the court was not to pass any sentence after trial, but to forward its record to the Sadar Nizamat Adalat which was to pronounce such sentence as would have been passed if the heir had been the prosecutor and present at the trial. In this way, Mohammedan law of homicide was freed from the discretion and caprice of the heirs of the deceased. At the same time the crime of murder became a matter for the State to punish. Murder was no more a private wrong; it became a public wrong.

31. Id., at p. 170; Acharrya; op. cit., at pp. 278-279.
33. Reg. XXVI. Banerjee, op. cit., at p. 239.
In the same year, it was resolved that the religious tenets of witnesses would be no longer considered as a bar to the conviction or condemnation of a prisoner. Every such case was to be conducted on a supposition that such witnesses were of Mohammedan persuasion. In such a situation, however, the case was to be sent to the Sadar Nizamat Adalat for its acting upon the evidence, if it thought fit.34

In 1793, Regulation IX of the Cornwallis Code, though in effect it dealt with the criminal procedure, included the necessary amendments of the Mohammedan criminal law, restating the enactments of the last three years in that behalf. This Regulation after certain additions and amendments made by subsequent Regulations, e.g., Regulations IV and XIV of 1797, VIII of 1799 and VII of 1801, “discloses the general principles on which criminal justice was to proceed. The order of proceedings at a trial was to be charge, plea, evidence for the prosecution, defence, evidence for the defence, opinion or fuitwa of the law officer (Kazi or mufti). If the Mohammedan law required the prosecutor to appear in person, he must do so; otherwise he might prosecute by an agent (vakil); though when his evidence was necessary, his attendance could be required. The evidence of witnesses was to be taken down in writing and read to or by the witnesses: leading questions were to be avoided: cross-examination by the parties or, the judge was allowed. An admonition was to be given orally to each witness after he had been sworn, requiring him to speak truly what he personally knew as distinct from what he had heard from others. Confessions were always to be received with circumspection and tenderness.”35

The basis of Regulation IX of 1793 was that “Mohammedan law should determine the elements necessary to constitute the offence charged, the sufficiency of the evidence, and the punishment. The trial judge was ordinarily to pass sentence on the basis of the fuitwa and to grant his warrant for the carrying out of the sentence—that is if the fuitwa seemed to him to be consonant with natural justice as well as with the Mohammedan law though sentences of death or life imprisonment were not to be carried out until the Nizamat Adalat had confirmed them.”36

Cornwallis appreciated that law officers of the courts could not be required knowingly to deliver fuitwas contrary to the accepted doctrines; but he thought that Mohammedan law allowed the ruler “to give effect to a rational preference for the doctrine of the two disciples where they differed from Abu Hanifa,”37 and he, therefore, prescribed intent, not the nature of the weapon, as the test of murder. So also he prescribed that after conviction, the law should take its own course without any reference to the will of the heirs of the deceased; and further substituted imprisonment for mutilation.38 “But the need for reform in the law was more fundamental and the problem more complicated. A procedure was required whereby the fuitwa should be bye-passed or circumvented so as to permit of substantive reform.”39 So was made the provision

34. Bacrejee, op cit, at pp. 72-73.
35. Rankin, op cit., at p. 172. Provision as to the evidence of a non-Mohammedan has already been given above.
36. Id., at pp. 172-173.
37. Id., at p. 179.
38. Ibid.
39. Ibid.
as to the evidence of non-Mohammedans. The *futwa* could be taken in the usual course or on the assumption that the witness was Mohammedan, on the assumption that the heir of the murdered person had prosecuted. The case was then to be referred to the Sadar Nizamat Adalat without sentence being passed by the trial Judge. This gave relief to the law officers and placed the responsibility on the Judges of the Sadar Adalat.  

*Further changes in law of homicide—*This device of by-passing or circumventing the *futwa* was applied to more cases after 1793. In 1797, the law officers were directed to deliver their *futwa* in all cases of wilful murder without any reference to the heirs of the murdered man on the assumption that the heirs entitled to claim *gisas* had claimed it, and the sentence might extend up to death. In other cases, if the Mohammedan law prescribed the payment of blood money, the Judges were to commute the punishment to imprisonment extending up to life-imprisonment. Cases of life imprisonment were, however, to be referred to the Sadar Adalat. Further, persons convicted of putting to death any person as a sorcerer were to be held guilty of murder and punished accordingly.

The Judges of the Sadar Adalat were required to uphold the application of Mohammedan law to certain cases, even though repugnant to justice, if it operated in favour of the accused person; if it went against him, they had to refer the matter to the Governor-General-in-Council for final disposal with the recommendation either for mitigation or pardon of sentence.

As a result of the operation of Mohammedan law, a large number of persons were kept in prison for an indefinite time, because on being convicted of homicide and sentenced to pay blood money, they could never pay it. The Governor-General-in-Council being guided by humanitarian spirit, authorized the Sadar Nizamat Adalat to grant relief in such cases. Criminal courts were prohibited from making orders for payment of fines to individuals except to the Government. In case fines could not be paid, definite terms of imprisonment were to be fixed in their place.

There were certain homicides regarded as justifiable by the Mohammedan law. In 1799, they were rendered liable to capital punishment as being opposed to the principles of public justice. Cases of such homicides were those where *gisas* could not be demanded by reason of relationship between killer and killed, *e.g.*, parent and child, master and slave. The capital sentence was also prescribed in cases of murder at the request of the person murdered.

Apart from wilful homicide, the Mohammedan law recognized certain other types of killing as forms of illegal homicide. In such cases the blood money was payable by the criminal and his family or associates, but no punishment of death was prescribed. These forms of illegal homicide included not only killing by negligence but also erroneous homicide. This covered cases where the error was in the intention *e.g.*, firing at a man in mistake for an animal, also cases where the error was in the act, *e.g.*, firing at an animal and hitting a man. It came to be held that if the

40. Ibid.
41. Reg. IV, Banerjee, op. cit., at pp. 74-75. See also Rankin, op. cit., at p. 174.
42. Reg. XIV, Banerjee, op. cit., at p. 75; Rankin, op. cit., at p. 174.
a much more strict and even justice, less barbarous and more effective.\textsuperscript{49} Therefore, in 1803, a Regulation of the Governor-General-in-Council abolished the conditions as to place of committing the offence. It might be a highway or a nearby place. There was no more question of distance from a city. The network of distinctions as to one of the robbers being a minor or relation of the person robbed, etc., was also given up. The Regulation further abolished "the necessity of having evidence of a special kind and enabled convictions to be based upon confessions, evidence of credible witnesses or strong circumstantial evidence. It detailed a procedure in which the law officer's \textit{fu\text{"u}wa}, the judge's sentence, and the reference to the (Sadar) Nizamat Adalat were assigned their respective parts, so that where robbery had been accompanied by murder all the participants should be sentenced to death, and where it had been accompanied by woundig, arson or other aggravations, to imprisonment and transportation for life, or even to the death penalty in heinous cases, on the well settled principles of \textit{siyasa}. Seven years' imprisonment was provided for simple robbery; in exceptional cases fourteen. All these sentences might be mitigated by the trial court or the Nizamat Adalat, according to the nature of the case, in view of extenuating circumstances, or where, on consideration of the number of prisoners convicted of the same crime, the ends of justice permitted such a course.\textsuperscript{50}

The offences of theft, whether from a person or a house, was, however, left to discretionary punishment; but if attended with acts of violence the offence was to be treated like robbery with violence or dacoity and punished accordingly.\textsuperscript{51}

In 1804, exemplary corporal punishment was added to the existing punishments for the offence of robbery.\textsuperscript{52} In 1808, law against dacoity was made more stringent.\textsuperscript{53} In 1811, offence of burglary was rendered punishable more severely.\textsuperscript{54} In 1813, Act XXIV was passed to secure the better suppression and apprehension of dacoits. Any person proved to have belonged to a gang of dacoits was to be punished with transportation for life or with imprisonment for any shorter term with hard labour.\textsuperscript{55}

Scope of tazir restricted.—The doctrine of \textit{tazir} or discretionary punishment, in its practical operation, often led to lack of uniformity and disparity in judicial decisions, because of this doctrine, each Judge could proceed in his own way in giving punishment, there being no fixed standard to guide him. According to the existing law, the Judges had power to sentence criminals to suffer discretionary punishment in the following three types of cases: Crimes not falling under \textit{qisas} or \textit{hadd}, and not being, for the most part, of a heinous nature; crimes within the specific provisions of \textit{qisas} or \textit{hadd}, but not so treated because of technical insufficiency of proof or because of special exceptions and scrupulous distinctions which were considered as barring a judgment for the specific penalties of the prevalent law; and heinous crimes, in a high degree injurious to society, requiring exemplary punishment beyond the prescribed penalties; in such cases an

\begin{itemize}
  \item \textsuperscript{49} Rankin, op. cit., at p. 176.
  \item \textsuperscript{50} Reg. LIII. Ranking, op. cit., at p 176. See also Banerjee, op. cit., at pp. 81-82.
  \item \textsuperscript{51} Reg. LIII. Banerjee, op. cit., at p. 176; Rankin, op. cit., at p. 176.
  \item \textsuperscript{52} Reg. X. Banerjee, op. cit., at p. 83. See also id., at p. 83.
  \item \textsuperscript{53} See Regs. VIII & IX, Id., at pp. 66-68.
  \item \textsuperscript{54} Reg. I. Id., at pp. 68-69.
  \item \textsuperscript{55} Id., at p. 114.
\end{itemize}
With a view to obviate the evils flowing from the practical operation of the doctrine of tazir its scope was restricted in 1803. It was provided that in cases where a prisoner was found liable to discretionary punishment, the futwa should declare this in general terms, stating the grounds therefor, leaving the punishment to be decided by the trial Judges or the Sadar Nizamat Adalat. There was, however, no difficulty in cases where a Regulation had already prescribed the punishment. No punishment was to be awarded on mere suspicion. If in a particular case, the evidence was short of the legal requirements for qisas or hadd, but was still sufficient to convict the accused person on strong presumptive proof, the Judge was directed to award full punishment, as if the prisoner was convicted on full legal evidence. For offences for which no stated penalty was prescribed by any regulation or Mohammedan law itself, the maximum punishment was fixed at thirty-nine stripes and imprisonment with hard labour for seven years. If this appeared to be insufficient, the Sadar Adalat was empowered to impose higher punishment, but not capital.

Changes in law relating to perjury and forgery.—Offences of perjury and forgery were left to discretionary punishment. According to Abu Hanifa, tush'eer or public exposure with circumstances of ignominy was the proper penalty for perjury. Yusuf and Mohammad however, prescribed corporal punishment and imprisonment. Regulations passed in 1797 and 1803 prescribed respectively that the futwa of law officers should state the penalty according to both the opinions, and that the Judge should pass sentence according to any of the opinions as he should deem fit, or according to both of them in serious cases. The Regulation of 1797 was passed to check, and deter from, the commission of a crime like perjury, so dangerous and prejudicial to society. It authorized the Judges when awarding ‘public exposure’ to direct that the words expressing the crime should be marked on the forehead of the prisoner by the process commonly called ‘godena’. By 1807, it was realized that stricter rules were required to check the increasing mischief of the ‘offences of perjury and forgery. In that year, existing rules were rescinded, and a Regulation giving simple, working definitions of those offences, directed that if the Judge found the prisoner a proper object of corporal and ignominious punishment, he should sentence him to exposure in the public, to be marked by the process of godena, to thirty stripes, and to imprisonment with hard labour for four to seven years. If this sentence was found to be too severe, the Judge was directed to refer the case to Sadar Nizamat Adalat. In 1817, a Regulation abolished the marking by godena in such cases, though retained it for convicts to suffer imprisonment for life. An Act of 1849 abolished both

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57. Reg. LIII. Banerjee, op. cit., at p. 18; Rankin, op. cit., at p. 177.
58. Reg. XVII of 1797; Reg. VIII of 1803.
60. Reg. XVII of 1817.
61. Act II of 1849.
marking by godend and public exposure as punishment throughout British India.\textsuperscript{62}

**Overruling or dispensing with futwa.**—On account of complications produced by various amendments in the Mohammedan law and in the procedure by futwa, it was provided in 1810 that the executive might dispense with the necessity of the attendance of futwa of law officers at any particular trial, that in such case the trial court should not pass any sentence, and that the case should be referred by it to the Sadar Nizamat Adalat with its opinion. Besides these cases, futwa was an essential step though the Judge could refer the case to the Sadar Adalat in case of disagreement with the futwa, thereupon, the law officers of the Sadar Adalat gave their own futwa and then the Adalat passed final sentence in that case.\textsuperscript{63} In 1817, it was provided that two or more judges of the Sadar Adalat might convict a prisoner and pass sentence in spite of the futwa of its own law officers favouring acquittal; they might over-rule any objection of law officers in connection with receiving evidence because the witness was a police officer or on any other ground taken as unreasonable by the trial Judge though valid according to Mohammedan law.\textsuperscript{64}

**Law as to sexual offences changed.**—The offences under the head 'zina' were covered by the principles of hadd and punished by stoning or scourging according as they amounted to adultery or fornication. In cases of adultery, rape, or incest, the Mohammedan law of evidence made it almost impossible to secure a legal conviction, and further the law officers of the Sadar Nizamat Adalat declared that presumptive evidence, e. g., credible testimony and circumstantial evidence was not sufficient for conviction. The evidence of four competent male witnesses was strictly required; if the witnesses were less than four in number, they were liable to be punished for slander; moreover, their uprightness was to be proved by an inquiry. Accordingly it was provided in 1817 that the class of offences under discussion could be punished on the basis of presumptive evidence by corporal punishment, not exceeding thirty-nine stripes, and imprisonment with hard labour for seven years. Married women could be prosecuted on such charges only by their husbands. Cases of rape, on conviction, were to be referred to the Sadar Nizamat Adalat.\textsuperscript{65}

Hitherto many provisions were made to enable the Sadar Adalat to convict a prisoner, notwithstanding the futwa of the law officers acquitting him. But there was no provision empowering the Adalat to acquit a prisoner, notwithstanding his conviction by the futwa. This was taken notice of in 1822 when a Regulation\textsuperscript{66} provided that two or more Judges of the Sadar Adalat, on deliberate consideration, could order acquittal of a prisoner in spite of the futwa to the contrary, if evidence was considered to be insufficient or unsatisfactory. It was further provided that the Court was not to give effect to any plea that a murderer was only liable to pay blood money because the deceased person was found in the act of fornication with the wife or relation of the former—a plea which had been upheld by the futwa of law officers in the Sadar Adalat.\textsuperscript{67}

\textsuperscript{62} A. ..., cit., at pp. 177-178; Banerjee, op. cit., 179.

\textsuperscript{63} A ..., cit., at pp. 101-102; Banerjee, op. cit., at p. 93.

\textsuperscript{64} A ..., cit., at pp. 101-102; Banerjee, op. cit., at pp. 179-180.
This is in brief the description of changes made before 1860 in the Mohammedan law relating to some of the offences only.\textsuperscript{68}

In 1832 Mohammedan law ceased to be the general law of the land. This point is dealt with under the heading given below.

End of Mohammedan criminal law as general law

We have seen that changes made in the Mohammedan criminal law were inevitable in view of its primitive and archaic character. The task was difficult, yet it was fulfilled slowly and with caution. Warren Hastings, of course, had taken the initiative, but it was only from the times of Lord Cornwallis that a regular and systematic process of altering and reforming the Mohammedan law was adopted. We have seen how Cornwallis took the lead in by-passing of circumventing the futilas of the law officers who were conservative in their approach. In doing so, he took aid of fiction. The device of by-passing or circumventing of futila was subsequently applied by his successors also. We have already noted the steps taken in 1810, 1817 and 1822 towards overruling or dispensing with the futila.

In 1832, a very important change took place. A Regulation of that year marked the end of the Mohammedan criminal law as a general system of law applicable to all persons. The Regulation recited that it was offensive to the feelings of many persons, not professing the Mohammedan faith, to be liable to trial and punishment under the provisions of the Mohammedan criminal law, and that the regulations passed from time to time had rendered it unnecessary to maintain for future that form of trial towards such persons. It referred to the power of a single Judge of the Sadar Nizamat Adalat to overrule futila as showing that in such cases, it was not always necessary to require futila. The Regulation, therefore, enacted that non-Muslims, to be tried for offences cognizable under the general regulations passed from time to time, might claim exemption from trial under the Mohammedan criminal law, and that in cases not covered by these regulations, a Judge of the Sadar Adalat was to exercise his discretion in taking or dispensing with a futila.

The Regulation further recited that it was desirable to enable European functionaries, presiding in civil and criminal courts, to avail themselves of the assistance of respectable natives in determining the suits or conducting criminal trials. It, therefore, provided three ways in which this could be done: First, by referring the suit, or any point in it, to a Panchayat of such persons who would carry on their inquiries apart from the court, and make a report of the result to it; second, by constituting two or more of such persons as assessors or members of the court with a view to deriving advantages from their observations, particularly in examining witnesses; or third, by employing them more nearly as a jury to attend during the trial of the suit and suggest such points of inquiry as occurred to them; and after consultation give their verdict. In all cases, the decision was vested exclusively in the presiding judge.\textsuperscript{69} The civil courts could follow any of the courses when especially empowered to do so, but the criminal courts were free to follow them and in that case to dispense with the futila; if the crime was not,

\textsuperscript{68} For details not only in respect of the offences dealt with in the text but in respect of other offences also, see Banerjee, op. cit., at pp. 68-122, 221-363.

\textsuperscript{69} Reg. VI of 1832.
however, one which might be punished under regulations, the case was to be sent to the Sadar Adalat for decision.70

The Regulation of 1832 needs a brief comment. According to George Campbell, "miscellaneous offences, not especially provided for by the Regulations, ought properly to be punished only as being crimes by the Mohammedan law"71 and "this Regulation, while giving exemption to non-Muslims from the operation of that law, did not explain by what law a Hindu or European claiming this exemption was to be tried".72 As regards the practice under the Regulation, Beaufort says that under it "the court now never calls for a futwa except when in a case tried in a sessions court before a law officer the sessions judge recommends a sentence of death or in any special case where a reference is thought necessary."73 That futwa almost disappeared after 1832. Though the system of jury was introduced, its working was hardly satisfactory as is shown by George Campbell: "No one is compelled to serve on the jury; it is alien to the feelings and customs of the country, people cannot be induced voluntarily to sit upon it, and for all practical purposes it is an entire failure. The Panchayat or jury or arbitrators, chosen by two parties to decide between them in civil cases, is a native institution, but to be summoned by Government to decide on the guilt or innocence of a person in whom they take no interest is a hardship and unprofitable responsibility much disliked by all natives. In fact, the judge generally puts into the box some of the pleaders and such people about the court, in order to comply with the law, intimates to them very broadly his opinion, they always agree with him and there is no more trouble. For having taken their opinion he may decide as he chooses."74

Benares and Ceded and Conquered Territories

We have given so far an account of the course of the criminal law in Bengal Provinces. This applies to Benares and Ceded and Conquered provinces also,75 though at the same time, some special laws were enacted for these territories. Two such laws may be mentioned here by way of example. In 1795, it was provided that, in the Province of Benares, in all cases where a Brahmin would be declared to suffer death sentence according to law, the sentence would be commuted to one of transportation by the Sadar Nizamat Adalat, or otherwise mitigated at the discretion of the Government.76 This privilege was, however, abolished in 1817.77 Another provision was that of 1804 which declared the practice of starving female infants to death as murder to be treated according to law.78

71. Opinion in the words of Rankin, op. cit., at p. 181, from Modern India, at pp. 465-466. It may be noted that in such cases, the Regulation gave a discretion to the Judge of Sadar Adalat in having or not having a futwa.
72. Ibid.
73. Quoted in Rankin, op. cit., at p. 181, from Beaufort's Digest, para. 930, note (a) at p. 181.
74. Quoted in Rankin, op. cit., at p. 182, from Campbell, op. cit., at p. 473.
75. See Chapter XI.
76. Reg. XVI of 1795, Rankin, op. cit., at p. 182; Chapter XI.
77. Reg. XVII of 1817, Rankin, op. cit., at p. 182.
78. Reg. III of 1804, Rankin, op. cit., at p. 182. Other Regulations are mentioned in ibid.
Madras

Legislation in the Province of Madras followed a course similar to that in Bengal. In 1802, the relevant Regulation of the Cornwallis Code was closely followed in Madras. In 1805, the Bengal Regulation of the same year was adopted in Madras, which dealt with the doctrine of *tasir* and with robbery with violence. In 1811, offences of perjury and forgery were directed to be treated in a way similar to that in Bengal. In 1808, the Sadar Faujdar Adalat was empowered to convict a prisoner without a *fulwa* in certain cases. In 1825, it was given discretion to remit a severe sentence, *w*.

In 1840, an Act relieved the Sadar to take a *fulwa* from its law officers, but Mohammedan law in a case to which it was to be still applied.

Bombay

Position before Elephinstone Code.—The administration of criminal justice in the Province of Bombay was different from that in Bengal and Madras Provinces. The reason was that large territories, forming part of the Bombay Province, had not been under Muslim rule at the time of annexation. The Mohammedan criminal law was, therefore, not the general criminal law applicable to all the persons alike. The prevailing criminal law was the personal law. The system of criminal law, set up by a Regulation of 1799, was that Christians and Parsees were to be judged according to English law, while in the cases of Hindus and Mohammedans, their own respective laws were to be applied. The Regulation amended the Mohammedan criminal law in the same way as in Bengal and Madras, including a proviso for making a reference to the Governor-in-Council in cases of death sentence or life-imprisonment, or when the trial Judge disagreed with the *fulwa* of law officers. A Regulation of 1802 further modified on culpable homicide and rendering them and Parsees liable to *godsna*. In 1812, a Regulation provided that an approver might be granted pardon with the consent of the Governor-in-Council by order of the Sadar Faujdar Adalat.

In 1822, Elphinstone, the Governor of Bombay, described the Bombay system thus: "We do not as in Bengal profess to adopt the Mohammedan code. We profess to apply that code to Mohammedan persons, the Hindu code to Hindus, who form by far the greatest part of the subjects. The

82. """"""Y, 1800, """"op. cit., at p. 184.
84. """"""Y, 1800, """"op. cit., at p. 184.
85. """"""Y, 1800, """"op. cit., at p. 184.
86. Such as Gujarat, Surat, Malabar, ceded by Tippoo in 1792 but thereafter annexed to the Madras Presidency in 1801, and the Maratha districts of the Deccan annexed to Bombay Province in 1819.
88. Reg. III of 1802.
89. Reg. IX of 1812.
90. Rankin, op. cit., at pp. 185-186.
Mohammendan law is almost as much a dead letter in practice with us as it is in Bengal, and the Hindu law generally gives the Raja on all occasions the choice of all possible punishments...The consequence is that the judge has to make a new law for each case."

Enactment of Elphinstone Code.—Elphinstone was aware of the need for a better and more uniform system of law throughout the extensive Province of Bombay. He was a great admirer of Bentham, and in 1827 he enacted a Code, known as the Elphinstone Code, as a formal and ordered set of regulations, about thirty in number, to provide a uniform system of law. The Code was an improvement, in certain matters, upon the Cornwallis Code of 1793. It is said that it was "the first systematic code of laws attempted in British India known as the Bombay Code of 1827 which was a great advance upon anything previously attempted in India, and served to prove, by thirty years' experience of its working, that there was no difficulty in applying a general code, founded upon European principles, to the mixed populations of India."

The Elphinstone Code contained a Regulation which was itself a logical and self-contained Penal Code. It was described by Fitzjames Stephen as "a body of substantive criminal law which remained in force until it was superseded by the Criminal Code [i.e. Indian Penal Code], and which had very considerable merits, though it would probably not have supported the test of strict professional criticism to which indeed it was not intended to be subjected."

The preamble of the Regulation recited that it had been the practice of the Company's Government in the Bombay Province to apply to its subjects their own respective laws, modified and amended by the regulations according to the requirement; and that the courts ascertained the native law in each case by a reference to the law officer of the religion of the offender. The regulation claimed to be an expression of the "general result of the practice of the courts" which would "secure the more steady observance of the principle of administering to individuals the law of their religion," while it would also "provide a code easy of access for those individuals of the community to whom, as not being subject to any specific national or religious code of criminal law, the English law has with considerable inconvenience been hitherto applied."

The Regulation, though described as a logical and self-contained Penal Code, was not, however, completely self-contained to the extent that it provided that, in addition to the crimes specified in it, offences declared by the religious law of the accused person which constituted a breach of morality, or the peace, or good order of society, were liable to such punishment as prescribed by that law provided it was one of the forms of punishment recognized by the Regulation; if it was not one of such forms, the offences should be visited by an equivalent and appropriate punishment of a recognized type.

91. Quoted in id., at p. 185, from T. E. Colebrooke, Life of Elphinstone, 1882, Vol. II, p. 125. For the sources and main features of the Hindu criminal law, its position before and after the British taking over the administration, see id., at pp. 185-195.
92. Id., at p. 195.
93. Quoted in ibid., from Sir Alexander Arbury in D. N. B.
94. Reg. XV of 1827.
95. Quoted in Rankin, op. cit., at p 195, from Sessional Proceedings of the National Association for the Promotion of Social Service for 1872-3, p. 8, as cited in Cotton's Elphinstone, p 181
96. Rankin, op. cit., at pp. 195-196
Indeed, the Regulation "was a sketchy rather than a thorough performance of which the first Indian Law Commission expressed but a poor opinion. It attempted to deal with everything in forty-one sections, and the roughness of its classification tended to confound minor offences with graver ones." 97 According to the Law Commission, "The penal law of the Bombay Presidency has over the penal law of the other Presidencies no superiority except that of being digested. In framing it the principles according to which crimes ought to be classified and punishments apportioned, have been less regarded than in the legislation of Bengal and Madras." 98

Comments

We have seen above that in the Provinces of Bengal and Madras, the Mohammedan criminal law was allowed to continue as the law applicable to Hindus as well as to Mohammedans, though the former might claim exemption therefrom under Regulation VI of 1832. But it had gradually been distorted to such an extent "as to deprive it of all title to the religious veneration of the Mohammedan," yet it retained "enough of its original peculiarities to perplex and encumber the administration of justice." 99 In the Province of Bombay, an attempt was made to apply to Hindus and Mohammedans their own respective laws. 101 But it appears that in practice they carried out the provisions "to adapt the Mohammedan law and other law to the conditions of India and to make it consonant in some degree with British rule," 102 the law of England continued untouched by any Regulations. 103

Obviously there was not one system of criminal law applicable to the whole country. Moreover the regulation law, enacted in each Province, suffered from many vices, as have been pointed out in Chapter XXV. Here we may give only a few examples to point out the discrepancy in the laws of different Provinces. In Bengal serious forgeries were punishable with double the term of imprisonment for perjury, in Bombay, perjury was punished with double the imprisonment provided for the most aggravated forgeries; and in Madras both the offences were put on the same footing. In Bombay, the escape of a convict could be punished with double the imprison-

97. Id., at p. 196.
98. Quoted in ibid., from the covering letter of October 14, 1837, on the draft Indian Penal Code sent to Governor-General Lord Auckland.
100. Id., at p. 6.
101. See id., at p. 7; Rankin, op. cit., at p. 198.
102. Rankin, op. cit., at p. 199.
103. Ibid.
ment prescribed for it in either of the other two Presidencies; while offence of coining was punished in the former with little more than half what the latter assigned. In Bengal, an unauthorized seller of stamps was punishable with a moderate fine, and in Madras with short imprisonment, purchaser not being punished at all; but in Bombay both were liable to the punishment of imprisonment for five years and flogging. Thus "the criminal law became a patchwork of enactments so confused that it was the first subject which invited codification."
CHAPTER XXIX

LAW COMMISSIONS AND CODIFICATION

Need of codification

In Chapter XX and four preceding Chapters, we have dealt with the state of law as prevailed in British India during a period of about one hundred years after the grant of diwani. We may point out again, in brief, that, when the English came to India, there were many branches of law practically non-existent in the prevailing systems of Hindu and Mohammedan laws. There was hardly any law relating to civil and criminal procedure. There was only a little of the law of torts. Some departments in the law of property, contracts and crimes were either wanting or in a rudimentary state. There was no law dealing with public and constitutional rights because such rights did not exist.¹

The rule of Warren Hastings, reserving the personal laws in certain matters, did not remove the uncertainty of law on the matters specified in the rule because there were different schools of Hindu and Mohammedan laws having conflicting provisions. Moreover, the Hindu and Mohammedan law officers scarcely followed a particular method of interpreting them.²

As said above, the Hindu and Mohammedan law-givers did not deal with certain branches of law, and further, they were silent on certain questions of law. In such cases, the doctrine of justice, equity and good conscience was applied, but this doctrine instead of reducing the evils of uncertainty of law, increased them by resorting to judicial legislation.³

Existence of different tribunals independent of each other further increased the uncertainty. As observed by Lord Macaulay, the decisions of different courts rendered "the law not only bulky, but uncertain and contradictory". Each of the Chief Courts, established by the Crown and the Company, "is perfectly independent of the others. Every one of them is at liberty to put its own construction on the law; and it is not to be expected that they will always adopt the same construction. Under so inconvenient a system there will inevitably be, in the course of a few years, a large collection of decisions diametrically opposed to each other, and all of equal authority."⁴

Then the existence of different statute laws was also a great cause of uncertainty. They were: (i) English statute law as it existed in 1726; (ii) English statute law as expressly extended to India after 1726; (iii) Regulations of the Governor-General-in-Council from 1793 to 1834; (iv) Regulations of the Governor-in-Council of Madras from 1802 to 1834;

1. B. K. Acharyya, Codification in British India, at p. 79 (1914), taking from Bryce’s Studies in History and Jurisprudence, Vol. I, p 120.
2. Id., at p. 79. See also opinion of Sir William Jones as quoted in id., at p. 89, and F. Macnaughten, Considerations on the Hindu law, preface, at p. ix.
3. Id., at pp. 80-81.
4. Quoted in id., at p. 81, from covering letter, dated the 14th October, 1837, on the draft Penal Code, to Governor-General Lord Auckland.
(v) Regulations of the Bombay Code from 1827 to 1834; and (vi) the Acts of the Indian Legislature passed under the authority of the Charter Act of 1833. The complications in the application of the English statute-law and vices of regulation law have already been pointed out in the relevant chapters.

In the field of criminal law, we have already noted as to how the systems of penal law in Bengal, Madras and Bombay Provinces, and in the Presidency-towns, differed from each other. None of the systems could furnish even the rudiments of a good code.

The law relating to evidence also was in a state of great uncertainty. Same was the position of the law of limitation. As regards civil procedure, prior to 1859, there were nine different systems simultaneously in force in Bengal.

Codification, that is, the conversion of all law into a written and systematically arranged code, was the only answer to the vices of, and problems created by, the existence of the heterogeneous laws in this country. That was the only method (i) to make the laws cognizable both to the administrators of justice and the people, (ii) to remove uncertainty of law, (iii) to check the introduction of the technical rules of English law, (iv) to avoid the evils of judicial legislation, and (v) to preserve the customs suited to the people of the country.

Lord T. B. Macaulay was a great admirer of Jeremy Bentham whose theory of legislation and principle of utility had profoundly influenced the course of English legislation in the nineteenth century, and was a staunch supporter of any project to apply the principles of Bentham to the heterogeneous laws of India. On July 10, 1833, Macaulay demonstrated the necessity and practicability of codification during the course of debate on Charter Bill of 1833 and said "that no country ever stood so much in need of a code of laws as India, and...that there never was a country in which the want might so easily be supplied...in India, now there are several systems of law widely differing from each other, but co-existing and co-equal...we have now in our Eastern Empire, Hindu law, Mohammedan law, Parsee law, English Law perpetually mingling with each other and disturbing each other, varying with the person, varying with the place...I asked an able and excellent Judge lately returned from India how one of our Zila Courts would decide several legal questions of great importance—questions not involving considerations of religion or caste—mere questions of commercial law. He told me that it was a mere lottery. He knew how he should himself decide them. But he knew nothing more. Judge made law in a country where there is an absolute government and lax morality,—where there is no bar

7. See, id., at pp. 81-89. For more details as to the existence of different legal systems and their defects, see The Cambridge History of India, Vol. VI, edited by H. H. Dodwell, at pp. 381-384 (1932). See also note 4, Chapter XX, supra.
8. See Acharya, op. cit., at p. 90. Jeremy Bentham introduced the word 'codification' into the English language. For several definitions of this word, see id., at pp. 6-7. See also id., at pp. 2-6 for the meaning of the word 'code' and pp. 8-14 for other things about codification.
10. See G. C Rankin, Background to Indian Law, at p. 136 (1946). See also id., at p. 20.
and no public—is a curse and scandal not to be endured. It is time that we know what law he is to administer, that the subject he is to live...I believe there is no country in more easily be conferred. The work of digesting a vast and artificial system of unwritten jurisprudence is far more easily performed and far batter performed by few minds than by many, by a Government like that of Prussia or Denmark than by a Government like that of England. A quiet knot of two or three veteran jurists is an infinitely better machinery for such a purpose than a large popular assembly divided, as such assemblies almost always are, into adverse factions. This seems to me, therefore, to be precisely that point of time at which the advantage of a complete written code of laws may most easily be conferred on India. It is a work, which cannot be well performed in an age of barbarism, which cannot without great difficulty be performed in an age of freedom. It is the work which especially belongs to a Government like that of India—to an enlightened and paternal despotism.”11

Charter Act of 1833

With a view to achieving the object of a comprehensive consolidation and codification of Indian laws, the Charter Act of 1833, passed by Parliament, established an All India legislature, created the office of Law Member, and provided for the appointment of a Law Commission.12 Its section 53 recited that it was expedient that, subject to such special arrangements as local circumstance might require, a general system of judicial establishments and police, to which all persons whatsoever might be subject, should be established in British India at an early period; that such laws, as might be applicable in common to all classes of her inhabitants, should be enacted, due regard being had to the rights, feelings and peculiar usages of the people; and that all laws and customs having the force of law within the country should be ascertained and consolidated, and, as occasion might require, amended. The Act then directed the Governor-General-in-Council in British India and all existing forms of judicial procedure, and into the nature and operation of all laws, civil or criminal, written or customary, prevailing and in force in any part of British India, to which any inhabitants of this country were then subject. The Commission was to make reports setting forth the results of its inquiries and suggesting alteration in the courts, police establishments, forms of judicial procedure and laws, due regard being had to the distinction of castes, differences of religion, and the manners and opinions prevailing among different races and in different parts of the country.13

Section 53 of the Charter Act has been described as “the legislative


12. For details of this Act, see Chapters XIII and XXIV, supra.

13. See Arthur Mills, India in 1858, at pp. 96-97 (1858).
mainspring of law reform in India so far as regards policy, though principles and ideas were still to seek."\(^{14}\)

Lord Macaulay formulated the principle to be followed in codifying the laws thus: "We must know that respect must be paid to feelings generated by differences of religion, of nation and caste. Much, I am persuaded, may be done to assimilate the different systems of law without wounding those feelings. But whether we assimilate those systems, or not, let us ascertain them, let us digest them. We propose no rash innovation, we wish to give no shock to the prejudices of any part of our subjects...Our principle is simply this uniformity where you can have it—diversity where you must have it—but in all cases certainty.\(^{15}\)

First Law Commission

In pursuance of the provision of the Charter Act of 1833, the First Law Commission was appointed in India in 1834. Lord Macaulay, the Law Member, became its Chairman.


Under instructions from the Government of India, the first task set before the Commission was to prepare a draft Penal Code for India. The Commission prepared the required draft and submitted it to the Government on October 14, 1837, before Macaulay's departure from India. It is also known as Macaulay's Code because it was mainly his work. It did not, however, become law till 1860.

After the return of Lord Macaulay to England, the activity of the Commission declined. It, however, with a changed constitution, confined itself to periodical issue of reports\(^{16}\) containing proposals on which legislation had since been founded. It became defunct after submitting a draft Limitation Bill in 1842 and a scheme of pleading and procedure with forms of criminal indictments in 1848, and also recommending various changes in the procedure in civil suits and drafting a Code of Civil Procedure.\(^{17}\)

Lex Loci Report

By 1840 the population of Mofussil areas could no longer be regarded as consisting for practical purposes, of Hindus and Mohammedans. Much was to be expected from the Charter Act of 1833 which had thrown India

\(^{14}\) Ranking, op. cit., at p. 135. Rankin further says about the section that the "repeated references which it makes to laws and usages peculiar to the Indian peoples are not there because such matters were to be outside the Commission's sphere, but because they would be of assistance to the interpreter of the Code to which they were to be applied.

\(^{15}\) Quoted in Acharyya, op. cit., at p. 92, from Hansard's Debates, op. cit., at p. 533.

\(^{16}\) One such report is Lex Loci Report, discussed in the text.

\(^{17}\) Acharyya, op. cit., at p. 63; Cambridge History of India, op. cit., at p. 334; Mills, op. cit., at p. 93; Morley, op. cit., at pp. 167-168.
open to Englishmen and other Europeans. In 1836 European British subjects were made amenable to the Company's courts in civil cases without any right of appeal to the Supreme Courts, given in 1813. In 1837 they were authorized to hold land. Indeed the Privy Council had decided that even aliens might do so in Calcutta. Indian Christians, East-Indians, Anglo-Indians, Parsis, Armenians, Portuguese and Jews were already residing in the Mofussil. We have pointed out, in Chapters XXIV and XXVI, the difficulty as to the system of law applicable to their civil cases. There was no lex loci or territorial law for persons other than Hindus and Mohammedans in the Mofussil, while within the Presidency-towns, a lex loci prevailed in the absence of personal or other special law.

The attention of the Law Commission was directed to this state of affairs, and it submitted a Report dated October 31, 1840, to the Government. It came to be known as the Lex loci Report. The remedy proposed by the Commission, now headed by Mr. Andrew Amot who had become Law Member after Lord Macaulay, was that an Act should be passed making the substantive law of England the lex loci, i.e., the law of the land, outside the Presidency-towns, applicable to all persons except Hindus and Mohammedans, subject, however, to the following limits and safeguards: (1) So much of the law of England was to be omitted as did not suit the situation of the people; (2) So much of English law as was inconsistent with the local enactments was to be omitted; (3) the general statute law passed in England after 1726, not expressly extended to India, was to be omitted; (4) the English system of land tenures and conveyancing was to be omitted; (5) the English rules relating to inheritance of land were to be omitted so as to render land outside the Presidency-towns inheritable and distributable on the same principles as movables; the rule was to be observed that land should descend in accordance with the law of the place where it was situate and movables in accordance with the law of the domicile; (6) on these terms the courts in the Mofussil were to administer the English law as modified by English equity; (7) English principles of law were not to be applied to persons professing any religion other than the Christian religion in cases of marriage, divorce, and adoption; (8) law or usage immemorially observed by any race or people not known to have been ever stated in any other country than India was to be safeguarded; and (9) there was to be a saving generally for any and lawful custom.

This was the effect of the Lex loci Report of 1840 as elaborated by the Law Commission in the proposed Act drafted by it in 1841 and published in 1845. By this time, it may be noted, it was reduced only to a one man Commission.

Comments

If we look to the views of the First Law Commission "as to be best practicable reform in 1840, we find in their report a fully reasoned exposition of the need of a lex loci. This is only, in other words, what the

10. Rankin, op. cit., at pp. 22-23.
20. See also Rankin, op. cit., at p. 24.
21. Id., at p. 20.
22. Id., at pp. 20, 41.
Charter Act of 1833 by its 53rd section had laid down—that it is expedient...that such laws as may be applicable in common to all classes of the inhabitants...should be enacted.” The proposition advanced by the Commission was that “in every country there ought to be a law which is *prima facie* applicable to every person in it. The number of classes which, in any particular country, should be exempted from this law must always depend upon the circumstances of that country; but, be these classes few or many, small or large, the necessity of a law for persons whose condition cannot be defined beforehand, or who cannot be brought by evidence within any o. the defined classes, is desirable.” One might hesitate to accept this proposition, and “to the Oriental mind a personal law is more familiar and appears more natural than a territorial law”, but a good case was made out by the Commission which showed, on the basis of the facts of 1840, that “though British India may appear on the one hand to have less need of a *lex loci* than any other country, because the great mass of its population consists of two sects whose law is contained in their religion, yet on the other hand there is probably no country in the world which contains so many people who, if there is no law of the place, have no law whatever.”

English law had already found its way into India, and assuming that a body of law could be presented as such to British India, that was an obvious choice. “The Commissions thought that there was nothing in the English substantive law which prevented it from being easily adapted to the condition of all persons in India, not Hindus or Mohammedans...Taking advantage of the hope that in due course codes of substantive law would be prepared, they recommended that during the considerable interval which must elapse before this was down, the law of the mofussil should be assimilated to that of the Presidency-towns, and the English law made applicable to all who were not Hindus or Mohammedans.” Moreover the “limited character of the proposal should perhaps be emphasized. It was restricted to substantive law; it did not apply to take away their personal laws from Hindus or Mohammedans; and it was safeguarded by a number of reservations as already mentioned.”

The introduction of English law was not, however, free from difficulties. “Even when full account is taken of the limits and safeguards stipulated by the Commission, the introduction of the general law of England as applicable in default of special law or custom to everyone and

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23. Id., at p. 34.
24. Quoted in ibid.
26. Quoted in ibid.
27. Id. The law of an *independent*, that is, the law of some *distinct*, or of an independent man, is called the law of a community. The law of an *independent*, is the law of some *distinct*, or of an independent man, is called the law of a community. The law of an *independent*, is the law of some *distinct*, or of an independent man, is called the law of a community. The law of an *independent*, is the law of some *distinct*, or of an independent man, is called the law of a community. The law of an *independent*, is the law of some *distinct*, or of an independent man, is called the law of a community.
28. Id.
everything would have been a bold experiment. It was to do a great deal at one stroke—so much so indeed, that one could only expect to find out what one had done after one had done it. To apply a fusion of law and equity before the English Judicature Acts has worked out such a system, to apply this to a number of different classes of people, many of Oriental origin and having habits and notions which were foreign to the Common Law here was indeed a task for the mofussil courts." It appears that this aspect was not very much taken into consideration by the Commission. The Lex Loci Report was widely circulated to elicit opinions from high executive and judicial personnel. The Chief Justice and a puisne Judge of the Calcutta Supreme Court wrote in a letter of March 25, 1845, to the Governor-General that the Lex Locii Act lacked in precision as to the extent to which the Law of England was to be introduced. The system of English law was so vast and its application was attended with so many difficulties that the Judges in this country not previously trained to its study, would come across almost insurmountable impediments and difficulties, because they would have to administer a law with which they were not acquainted and they would not have the assistance of a bar or other professional agents, or of officers having the knowledge in which the Judges were deficient. This was the main criticism of the Report. But the same critics also suggested the remedy. They said that though it would be a laborious task, at the same time, it would be quite practicable to point out the portion of the common law of England, which was intended to be introduced; as to the statute law, there would not be much difficulty from the record of it being collected and accessible. It would be of immense assistance to the Judges if the draft Lex Locii Act were accompanied by some digest or authoritative exposition of the law intended to be introduced. Thus they favoured the specification and explanation of the law to be introduced. The letter of the critics was taken by C. H. Cameron, the Law Member, as approving the Report of the Commission subject to a digest of the lex locii being prepared, as suggested by them and as "opening the fairest prospect of accomplishing that great object, the enactment of a Code of English substantive law so far as it is applicable to India (both Presidencies and Mofussil) that has ever yet presented itself."

Governor-General Sir Henry Hardinge was nervous lest the Act in question, even if accompanied by the said digest, might increase complication, technicality and uncertainty in the court. On a reference, the Chief Justice said that the "Act, if accompanied by a digest of such parts of the English law as it was deemed expedient to introduce into the mofussil, would introduce no difficulties, subtleties or technicalities whatever. It is indispensable to the success of this experiment that a digest should form a part of it, which might readily be enacted." By 1845, it was, however, clear that the completion of a digest or code of English law as desired to be introduced in India would not be a rapid process and it would

29. Id., at p. 37.
32. See id., at pp. 36-37. Certain arguments employed by the Commission in the Parish proposals have been criticized by Rankin. For that
33. See id..
34. Id., cit., p. 638.
35. Quoted in Ibid., from Parl. Papers, op cit. For further observations of the Chief Justice, see id., at pp. 40-41.
take time. Moreover the difficulty of the Mofussil courts in following and applying the bulk of English law had to continue in spite of the said digest. In fact nothing concrete came out of the deliberations of the Commission and later suggestions immediately. Changes, of course, took place later on, but very much on lines suggested by the Commissioner of the Agra Division in 1843. He said that whatever English substantive law was to become the lex loci in India, "should be introduced gradually by embodiment with all requisite modifications into individual successive Acts of the Indian Government as practical necessity might arise or be foreseen; and in this way the Indian Courts might draw light from English jurisprudence, and a body of law created, than which a greater legislative boon could hardly be given to the country, both immediately as a safeguard to private rights and indirectly in its influence on the character of our Indian courts of justice."  

Caste Disabilities Removal Act, 1850.

A partial compliance of the Lex Loci Act was made in 1850 in the form of Caste Disabilities Removal Act, also known as the Freedom of Religion Act. On the complaints of Christian converts and Missionaries, the Lex Loci Act was also designed to give effect to section 9 of the Bengal Regulation VII of 1832 throughout India, which was not to the effect that renunciation of the Hindu or Mohammedan religion was to entail the loss of rights to property. Legislative effect was given to this principle in 1850 by the Caste Disabilities Removal Act. The Act, which is still in force, provided that "so much of any law or usage now in force within India as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in any court."

The Act of 1850 met with a bitter criticism by W. H. Morley who attributed motives to Government in passing the Act. According to him, it was to impose Christianity on a large number of people, mainly Hindus. The Act was to: - - ; but surely such a name or - - - - ; w which not only implies a vic - - of a Hindu, forbids him to - - his heir shall choose to forsake the faith of his forefathers."

Charter Act, 1858

We have seen above that though the hard and detailed work done by the First Law Commission did not result into anything concrete, foundations on which the future legislators could build were certainly laid down. In a series of reports, the Commission had recommended extensive alterations in the judicial procedure and laws operating in India, and set forth in detail the provisions to give effect to certain of their recommendations. In  


39. Op. cit., at pp. 195-196. By the law of Qoran and infidel cannot succeed to the estate of a Mohammedan. Morley was opposed to any alteration or abrogation of the Hindu or Mohammedan laws in the then existing state of society in this country. See id., at p. 197.

40. Cambridge History of India, op. cit., at p. 8.
1853, the Charter Act\textsuperscript{41} empowered Her Majesty to appoint a Law Commission in England to examine and consider the recommendations of the First Law Commission and enactments proposed by it for the reform of judicial procedure and laws of India, and such other related matters as might be referred to them for their consideration. The Act authorized Her Majesty to direct the Commission to submit reports on these matters, and especially to report from time to time what laws should be made in relation to these matters, but so that every such report should be submitted within a period of three years after the passage of the Act.\textsuperscript{42} "That Indian legislation should be prepared in England was a course recommended to some extent no doubt by the history of the first Commission, which, in spite of a highly auspicious beginning and of prolonged and strenuous labours, had shrunk to a state of ineffectiveness if not of inanition."\textsuperscript{43}

Second Law Commission

In pursuance of the power conferred by the Charter Act of 1853, Her Majesty appointed a Law Commission in England with Sir John Romilly, a distinguished English Judge, as its head, on November 9, 1853. The Commission, in fulfilment of the duties devolved on it, presented four reports, the last one being dated May 20, 1856. The First Report was sent out to India in December, 1855, the Second in February 1856, and the Third and Fourth in June, 1856, for consideration of the Indian Legislature.\textsuperscript{44}

Second Report on substantive civil law

The Second Report of the Commission dealt with the requirements of India in respect of substantive civil law. The Commission agreed with the \textit{Lex Loci} Report of the First Commission that in the Mofussil, there ought to be a \textit{lex loci}—a substantive civil law for persons who had no special laws of their own which the courts were required to enforce. That was a great want which ought to be supplied. It was, however, a want which was merged in another want, larger and equally urgent, and could best be supplied by a measure adapted to meet the whole matter. This further want was the necessity for making the law of British India including the Presidency-towns, law but also as to the terms on which the special laws, \textit{i. e.}, the laws of Hindus and Mohammedans, were to be administered.\textsuperscript{45}

After giving a careful consideration to the whole matter, the "Commission laid down certain governing principles, which served well to correct the over-confident Benthamism of 1833 and the incautious theory of 1840, marking out lines on which law reform might reasonably proceed."\textsuperscript{46} It fully appreciated the need of codification, and prescribed

\textsuperscript{41} For details of the Act, see Chapters XIII and XXIV, supra.
\textsuperscript{42} S. 28, as given in Mills, \textit{op. cit.}, at pp. 99-100.
\textsuperscript{43} Rankin, \textit{op. cit.}, at p. 42.
\textsuperscript{44} See Morley, \textit{op. cit.}, at p. 169; Rankin, \textit{op. cit.}, at p. 149.
\textsuperscript{45} Rankin, \textit{op. cit.}, at p. 44.
the principles contained in the following passage of the Report: "We have arrived at the conclusion that what India wants is a body of substantive Civil Law, in preparing which the law of England should be used as a basis, but which, once enacted, should itself be the law of India on the subjects it embraced. The framing of such a body of law, though a very arduous undertaking, would be less laborious than to make a digest of the law of England on those subjects, as it would not be necessary to go through the mass of reported decisions in which much of English law is contained. And such a body of law prepared as it ought to be with a constant regard to the condition and institutions of India, and the character, religions and usages of the population would, we are convinced, be of great benefit to that country.

"Being designed to be the law of India on the subjects it embraces, this body of law should govern all classes of persons in India, except in cases excluded from the operation of its rules by express provisions of law. Not only must there, however, be large exceptions in respect of amenability to this body of law, but there are important subjects of Civil Law which, we think, it would not be advisable that it should embrace."

"We see no reason, however, why, on very many important subjects of Civil Law...contracts, as an example—such law cannot be prepared and enacted as will no less be applicable to the transactions of Hindus and Mohammedans, by far the most numerous portions of the population, than to the rest of the inhabitants of India.

"If on any subject embraced in the new body of law it should be deemed necessary that for a particular class of persons or for a particular district or place there should be law different from the general law, and if there shall be no particular and cogent objection to the insertion of such special law into the proposed body of law, such special law, we think, ought to be provided in that way. But it is our opinion that no portion either of the Mohammedan or of the Hindu law ought to be enacted as such in any form by a British Legislature..."

Two members of the Commission recommended that the English law should be introduced at once, but it was not practicable. As observed by G. C. Rankin, the requirements, stated above, "show of themselves why a Code was necessary for British India. No other country's law taken as a whole could be introduced...out of pistol; and a digest was not...the same thing as a code. Only by due provision for exceptions and exemptions was a lex loci possible for India. Whether the effect of simplification on English law and equity would be a good working scheme of civil law was in 1855 matter not of empirical knowledge but of faith. The Anglo-Indian Codes were experiments which put it to the test—with different results in different branches of the law."

Other Reports.

Other reports of the Commission contained plans for the amalgamation of Sadar and Supreme Courts, and for uniform Codes of Civil and Criminal

47. Quoted in id., at note 2, at pp. 43-44. For a brief summary of these principles, see id., at pp. 43, 205.
The recommendations of the Commission resulted in important legislation as discussed below.

Civil Procedure Code.

The First Law Commission, which was required to enquire into the existing forms and judicial procedure in force in British India and to suggest necessary alterations, had drafted a Code of Civil Procedure. No action was taken on it till 1853 when the Second Law Commission was entrusted with the duty of revising the Code. This Commission submitted four draft Codes of Procedure for all ordinary civil courts in Bengal Provinces (Presidency Small Cause Court excepted), North-Western Provinces, Madras Province and Bombay Province. In 1857, Sir Barnes Peacock, the Law Member, introduced four Bills founded on the above draft Codes. The Bills were referred to the Select Committee of the House of Commons. The Supreme Courts and Presidency Courts, however, were finally passed as Act VIII of 1861 to the above draft Codes. Letters Patent of 1862 and 1865, however, made its provisions applicable to the High Courts in the exercise of civil, testamentary, intestate and matrimonial jurisdictions. The Code of 1859 together with its amending Acts was repealed by the Code of 1877 (Act X) ; the latter Code was repealed by Code of 1882 (Act XIV). In 1908, the present Code of Civil Procedure (Act V) repealed the Code of 1882. The present Code consolidated and amended the laws relating to the procedure of the courts of Civil Jurisdiction. It now extends to the whole of India except the State of Jammu and Kashmir and certain Tribal and Scheduled Areas.

Limitation Act

In 1842, the First Law Commission had framed a Bill providing a uniform law of limitation for all courts in British India. That Bill, with some amendments, was passed as Act XIV of 1859. In 1871, a more systematic Act (Act IX) was passed. This was superseded by Act XV of 1877. An Act (Act IX) repealed it in 1908. The Act of 1908 consolidated and amended the law relating to the limitation of suits, appeals and certain applications to courts, and provided rules for acquiring by possession the ownership of easements and other property. In 1963, the Act of 1908 was repealed by the Limitation Act of that year. The new Act consolidated and amended the law for the limitation of suits and other proceedings and for purposes connected therewith. It extends to the whole of India except the State of Jammu and Kashmir.

Penal Code

The Penal Code was drafted by the First Law Commission and submitted to the Government in 1837. It was mainly the work of Lord Macaulay. Later
on it was revised by Law Members Mr. Bethune and Sir Barnes Peacock, finally passed in 1860 as Act XLV.56

None of the systems of penal law existing in British India at the time of drafting the Penal Code could furnish the First Law Commission with a groundwork.57 The French Code, of course, was of much valuable assistance as a model and upon many questions of form, and on specific points it provided useful suggestions. Livingstone's Code of Louisiana was also of some use on certain points, particularly upon the subject of offences against the human body. But the Penal Code is substantially English.58 According to Whitely Stokes, as "in the case of the other Codes...its basis is the law of England stripped of technicality and local peculiarities, shortened, simplified, made intelligible and precise."59 The Code has been taken as reproducing "in a concise and even beautiful form the spirit of the law of England; the most technical, the most clumsy, and the most bewildering of all systems of criminal law; though...if its principles are fully understood, it is the most rational."60

It is more than a century now when the Penal Code was enacted; during this period it has proved its worth. "That it has established itself as an eminently successful code of law both in India and elsewhere may now be affirmed without fear of contradiction. It is working as law in so many parts of the world that it may be regarded as having passed the highest objective test,"61 It has been "triumphantly successful"62 and "universally approved"63 and might "serve some day as a model for the criminal law of England."64 The merits of the Code "are acknowledged so ungrudgingly that one would hardly have supposed that a body of rules could have commanded so much admiration for being comprehensible and concise. The praise of its form is due in part to the reasons which make specially acceptable in India a system which guards the liberty of the subject by showing in an exhaustive series of plain statements which acts and omissions are by the law made punishable...In stating the elements of each offence and the punishment provided for it, the Code uses the most ordinary English terms to distinguish the different offences, thus giving point and precision to the English language and making for accuracy of thought in practical affairs."65 Moreover "great attention has been paid in the Code to India's special problems, which arise not merely out of the religions and usages of the people but out of the distances, the contours, the climate of the country and the racial


62. O. M. Buller, The Roman Law and English Justinian, Village Communities in the East and
distinctions among those who in different ages have poured into it from the north. 66

While the Penal Code is one of the much praised Acts and, in spite of its shortcomings, it has served its purpose well, it has been criticised as Draconian in its severity as regards punishments. 67 "Its sentences can hardly be said to be other than monstrous. No civilised country today imposes such heavy sentences as does the Penal Code. Heavy sentences have long gone out of fashion in England and the order of sanctity and perfection attaching to the Penal Code should not deter indigenous legislatures to thoroughly revise the sentences and bring them into conformity with modern civilised standards." 68

In regard to the above criticism, it may be observed that the sentence of transportation has been abandoned by the Code of Criminal Procedure (Amendment) Act, 1955. 69 About the rest, we would agree with G. C. Rankin who says: "Whether a more lenient administration of the law as regards certain crimes would be a successful reform is a question which cannot be answered off hand in the negative, but it may be doubted whether there is much to be gained by restricting the punishments which the Code permits as maxima." 70 This is of course subject to review by a competent committee, but the trend appears to make punishment more severe by maintaining and further prescribing minimum sentences, though it has been criticised by the Fifth Law Commission admitting certain exceptions at the same time. 71

Apart from the factor of punishment, the Penal Code needs some sort of revision in view of the changed circumstances and conceptions. As observed by Dr. Hari Singh Gour, as a Code, it is by far the most important piece of legislation, but it is not free from blemishes and requires a thorough revision. 72

Criminal Procedure Code

The First Law Commission had submitted a scheme of pleading and procedure with forms of criminal indictments in 1841. This scheme was examined and considered by the Second Law Commission. This Commission produced four draft Codes of Criminal Procedure, almost identical, for Bengal, Madras and Bombay Provinces and North-Western Provinces respectively. But later on, instead of having separate Codes, one draft Code was framed and enacted, with variations, as the Code of Criminal Procedure in 1861 (Act XXV) with a view to simplify the procedure of criminal courts, not established by the Crown's Charters. The Code of 1861, after several amendments, was repealed by the Code of 1872 (Act XV), which regulated the procedure of criminal courts other than the Presidency High Courts in the exercise of their original criminal jurisdiction. 73

66. Id., at p. 209.
69. S. 117 and the Schedule.
73. For this jurisdiction, there was the High Court's Criminal Procedure Act, 1875 (Act X) which had replaced the High Court's Criminal Procedure Amendment Act, 1863 (Act XIII).
and the Courts of Presidency Police Magistrates. The Code of 1872 was in turn replaced by the Code of 1882 (Act X), extending to the whole of British India but not affecting any special or local law or jurisdiction or form of procedure etc. Finally came the present Code of Criminal Procedure, passed in 1898 (Act V), superseding the Code of 1882. The Code of 1898 consolidated and amended the law relating to criminal procedure. Now it extends to the whole of India except the State of Jammu and Kashmir and Manipur and does not affect certain special or local laws and jurisdictions.

Third Law Commission

During a short period of three years, the members of the Second Law Commission could not find it possible "to complete such an edifice as they projected or even to lay its foundations, but they did a great work when they laid out the scheme." On December 14, 1861, the Third Law Commission with Sir J. Romilly as its head was appointed for the purpose of preparing a body of substantive law for India, based on the principles laid down by the Second Commission in the Second Report. By appointing the Third Commission, the Government thus accepted the policy laid down by the preceding Commission. The Commission might also be required to consider and report on other matters relating to law reform.

The commissioners were requested to report the result of their labours on one branch of civil law before they took up another branch for consideration, as the plan of successive reports on various departments of law would greatly facilitate the necessary measures which must be adopted for giving effect to their recommendations.

The appointment of the Third Commission "set on foot the work of drafting and may be taken as the end of the discussion on policy and as closing—if not a chapter—at least a paragraph of British Indian history which may be entitled 'The Codes are coming.'"

In all, the Commission submitted seven reports, as discussed below.

First Report on law of succession

The Lex Loci Report and subsequent developments made it clear that there was an urgent need of a law to regulate the devolution of property on death of a person other than a Hindu or a Mohammedan. This was the topic in respect of which the Mofussil courts attempted to ascertain in the best manner they could, the law of the country of the suitors. But this method "was not well established in point of practice or free from doubt in point of principle," and at the best "if the Indian Mofussil Courts were really obliged to be prepared to combine at any moment the law of any given European country with the local law of any given Indian province, these Courts would have a burden

74. Preamble.
75. S. I.
76. Rankin, op. cit., at p. 44.
77. Id., at pp. 44-46, 46; Acharyya, op. cit., at p. 66.
79. Rankin, op. cit., at p. 45.
80. Ibid., at p. 46. See also the statement of the Law Commission at p. 27, id.
imposed on them heavier than that which presses on any set of tribunals in the word." 82

The Commission, therefore, first directed its attention to the preparation of a law of succession and inheritance generally applicable to all persons, not being Hindus and Mohammedans who had their own laws on the subject. In its First Report, submitted on June 23, 1863, the Commission submitted a draft of the rules on the subject.

Succession Act

The draft was introduced into the Legislative Council by Law Member Sir H. S. Maine on November 25, 1864, and, with a little change, enacted into the Succession Act on March 3, 1865. 83 The Act drafted by the Commission "must be adjudged a most valuable and distinguished piece of work, carried out by a body of real experts who devoted their knowledge and abilities to the cause of clearness and simplicity, and took right and bold decisions on major questions of principle. Archaism was rigidly eschewed." 84 It received all the admiration from the Law Member who told the Legislature that "even in England this body of rules has never been put into so intelligible and accessible a shape as it is placed by this law." 85

The Act was drafted on the basis of English law, yet it was free from many of its technicalities, as is shown in the scheme of the Act which is given here: "Marriage by itself was not to have any effect in changing the ownership of property of a party. The distinction made in English law between real and personal property was to have no place in it. That distinction which had in substance resulted in a double law of succession in England and led to technicalities was obviously unsuitable to Indian conditions. The Act had no doubt to make a distinction between movable and immovable property of deceased persons for certain purposes. The same rules were, however, applied to both kinds of property... The Succession Act was to be in writing and signed and attested. The ensuing death of the deceased did not, in strict sense, provide a grant of a probate or letters of administration for the purpose of representation to the estate of a deceased person and as authorising the administration of his property. A duty was laid on the executor to pay the funeral and testamentary expenses of the deceased and all his debts in so far as the assets would permit. The perpetuity limit laid down in the Act was the lifetime of one or more persons living at the testator's death and the minority of some person who was to be in existence at the expiration of that period and to whom if he attained full age the thing bequeathed was to belong. A bequest to a person not in existence at the death of the testator was made void if it was subject to a prior bequest unless it comprised the whole of the remaining interest of the testator in the thing bequeathed. Directions for accumulation were valid only if they operated for one year after death. Bequests to religious and charitable objects could only be made by a will executed not less than a year before a person's death and deposited within six months of its execution with the Registrar, when the deceased person had left near relations.

82. Quoted in ibid., from the Statement of Objects and Reasons of the Indian Succession Act, 1865.
83. Acharya, op. cit., at p. 67; Rankin, op. cit., at p. 46.
84. Rankin, op. cit., at p. 47.
85. Id., at p. 51.
"Thus was enacted a system of succession which was to apply to all who were not expressly exempted from it. Hindus and Mohammedans and Buddhists were in terms excepted from the operation of the Act and authority was given to exclude from its operation other sections of the Indian community. Thus the Act applied only to Europeans, Eurasians, Jews, Armenians and Indian Christians, excluding from its operation the majority of the inhabitants of the land. It was, however, the general law of the land applicable to the devolution of all property in British India and also to all moveables outside British India of persons domiciled in British India."

The Commission had not found a case made out by the Parsis for a special law of their own, but in the same year an Act (Act XXI) was passed to provide them with their own law as to intestate succession.

At the time of passing the Succession Act in 1865, it was hoped that its provisions relating to testamentary dispositions might be extended generally to all persons having the power of making wills. In 1870, came a very short Act—the Hindu Wills Act—bringing certain Hindu wills, executed in the Presidency-towns, within the main sections of the Succession Act. Gradually, the application of these sections was extended to Hindu wills executed in Mofussil areas also. In 1881, the Probate and Administration Act was passed, giving facilities for obtaining probate or letters of administration in respect of the estates of persons, not governed by the Succession Act, e.g., Hindus and Mohammedans. It was a purely permissive measure. Many sections of the Succession Act governing the right to obtain a grant of probate or of letters of administration were repeated in the Act of 1881. In 1889, the Succession Certificate Act was passed. Thereafter, some other enactments followed. In 1925, the present Succession Act (Act XXXIX) was passed to consolidate the law applicable to intestate and testamentary succession, superseding all the previous Acts as mentioned above. Now the Act of 1925 constitutes the general law of succession in India but does not yet apply to those persons who are governed in these matters by their personal laws of succession, such as Hindus, Mohammedans and Parsis. Some of its sections relating to making of testaments apply to Hindus. Its provisions as to representation to the estate of deceased persons are applicable generally. Since 1956, the Hindus are governed by the Hindu Succession Act, 1955, in matters of succession. The Mohammedans are still governed by their uncodified law of succession.

Other Reports

The Second Report of the Commission, submitted on July 28, 1866, contained draft Contract Bill. The Third Report containing draft Negotiable Instruments Bill was submitted on July 24, 1867. On December 18, 1867, an additional report, which was the Fourth Report, on the draft for a law of Contract was made in view of the objections of Indian Government against the inclusion of certain sections dealing with specific performance. The Fifth Report, submitted on August 3, 1868, contained a draft law of Evidence. On May 28, 1870, the Sixth Report containing draft Transfer of Property

67. See Rankin, op. cit., at p. 25.
69. Rankin, op. cit., at pp. 52-56; Setalvad, op. cit., at pp. 67-68.
Bill was made, and the Seventh Report, dated June 11, 1870, dealt with the revision of the Criminal Procedure Code. Besides these drafts, the Commission also prepared a draft law of Insurance dealing with Fire, Life and Marine.  

By 1870, the relations between the Commissioners and the Government of India became strained, and on July 2 of that year they resigned, "complaining that their drafts were not being enacted by the Indian Legislature." The main occasion of this grievance was that Sir Henry Maine, who was Law Member till 1869, when Sir James Fitzjames Stephen succeeded him, had maintained his objections in connection with the Contract Act on the subject of specific performance—a subject which was not codified till 1877 when Sir Arthur Hobhouse was Law Member. But by 1870 the Government of India was "becoming somewhat nervous at the speed and extent of the projects for a civil code and afraid that the distinguished Commissioners might outrun public opinion in India." This is how "expired in a huff the third of the Indian Law Commissions. The Indian Government were allowed to take their own course with the Contract Bill..."

Sir Henry Maine was Law Member during the period 1862-69, and several Acts were passed by the Act (Act I) and Contract Act (Act II).

**Evidence Act**

The English law of evidence was followed in the Supreme Courts in the Presidency-towns. In the middle of the nineteenth century, several Acts were passed by the Indian Legislature to amend this law by introducing reforms taken from English Acts. Outside the Presidency-towns, the courts were not required to follow English law as such, but they might do so whenever they regarded it as equitable. There were regulations providing some rules of evidence. Besides, there was a vague customary law of decisions and the arguments of the Mohammedan law officers, which had appeared in the Mofussil courts in the Presidency-towns since 1835, and which, as such in these courts, certain Acts of the Indian Legislature applied English reforms to all courts in British India. The application of English law of evidence was very much resented by many Judges and Magistrates who considered it unreasonable and unfair that they should be expected to apply a law in which they were not skilled and which were not really available to them.

90. Acharyya, op. cit., at pp. 67-68; Rankin, op. cit., at pp. 46-47.
91. The Commissioners said that the continued, systematic and persistent inaction of the Government was due to the fact that they were laying the honourable to the
   Quoted in Rankin, op. cit., at p. 61.
92. Rankin, op. cit., at p. 47. See also id. 80-87, and Acharyya, op. cit., at p. 68.
93. Quoted in Rankin, op. cit., at p. 65, from C. Ilbert, Legislative Methods and
   Forms, p. 135.
94. For a list of these Acts, see Acharyya, op. cit., at pp. 68-69.
95. Id., at pp. 257-259; Rankin op. cit., at pp. 112-115.
In such a situation, the only course left was that suggested by the Commission and summed up by Sir Henry Maine thus: "The Commissioners would appear to be right in supposing that what was wanted for the greatest part of India was a liberalized version of the English law of evidence enacted with authority and thus excluding cupriss and superseding the use of textbooks by compactness and precision." We have seen that their Fifth Report contained a draft law of evidence consisting of thirty-nine clauses. The draft was introduced into the Legislative Council in October 1868, and referred to the Select Committee. Afterwards it was dropped because it was pronounced by some competent persons to be unsuited to India. It was far from complete; it was ill-arranged; it was not elementary enough for the officers for whose use it was designed; and it assumed an acquaintance with the law of England which would scarcely be expected from them.

A new Bill was then prepared by Sir J. F. Stephen and it was, with some changes, passed as Evidence Act (Act I) in 1872. The Act consolidated, defined and amended the law of evidence. Now it extends to the whole of India except the State of Jammu and Kashmir and applies to all judicial proceedings in all courts except a few.

Sir James Stephen gives his own view of the Act containing 167 sections as follows: "The Evidence Act (I of 1872) compresses into a very short compass the whole of the English and Indian law of evidence. I had charge of this Act, and drew it in its present shape, though in such a manner as to include the provisions of a bill previously drawn by the Indian Law Commissioners. It forms a good illustration of the justice of the charge of over-legislation, and an undue fondness for English law, so often brought against the Government of India. The truth is that the English Law of Evidence was inevitably introduced into India to an uncertain and indefinite extent as soon as English lawyers began to exercise any influence over the administration of justice in India. Nor was this all. In order to avoid refinements which would have been most injurious to India, legislation was necessary which, by declaring that particular parts of the English Law of Evidence should not apply to India, gives an implied sanction to the rest of it. The general result was, that the Law of Evidence before the Evidence Act was passed had a sort of dead-alive existence in India, and was the bugbear of civilian judges, who were placed by it much at the mercy of every English barrister who might appear before them. The Evidence Act reduced the whole subject to a plain, short and explicit form."

The Evidence Act, as enacted in 1872, has stood the test of time. Since its passage, only minor alterations are made in it. Recently the Fifth Law Commission considered the need for the reform and the modernization of the law of evidence with special reference to the relaxation of the rules against

96. Quoted in Rankin, op. cit., at p. 114.
97. Quoted in Acharyya, op. cit., at p. 259, from Whitley Stokes. See also Rankin, op. cit., at pp. 116-119.
99. Preamble.
100. S. I.
101. Quoted in Rankin, op. cit., at p. 123 from Stephen's own view given in the chapter which he contributed to Hunter's Life of the Earl of Mayo, Vol. II, Ch. VIII, p. 201. For a summary of the Act and comments thereon, see id., at pp. 119-134.
the admission of hearsay evidence, the admissibility of secondary evidence
and cognate matters. The only recommendation of the Commission was
that these matters might be taken up at the time of revision of the
Act. 102

Contract Act

The Second Law Commission in its Second Report had said that on
many important subjects of civil law, e.g., contracts, such law could be
prepared and enacted as would be no less applicable to the transactions of Hindus
and Mohammedans than to the rest of the inhabitants of India. The Third
Commission in its Report of 1866, containing a draft law of Contract, said
that the subject of contract afforded the most frequent occasion for litigation
in all parts of the country and that they were satisfied that a law could be
enacted applicable to all persons. 103 Earlier in 1845, the Chief Justice of
Bengal had observed that “the English law as to contracts, the most fruitful
source of litigation, is so much in harmony with the Mohammedan and Hindu
laws as to contracts that it very rarely happens in our courts, which are bound
to administer to Hindus and Mohammedans their respective law as to con-
tracts, that any question arises on the law peculiar to those people in actions
on contracts.” 104 This statement throws light upon the practice of the Su-
preme Courts and explains and supports the recommendation of the Second
Commission. “We need not conclude that the Hindu, Mohammedan and
English laws were found to coalesce into a workable jure gentium upon the
subject” 105

The position was that while in the Presidency-towns, contract suits were
practically governed by the English law, in other places, the Judges were to
a great extent without the guidance of any positive law except the doctrine of
justice, equity and good conscience. They were under no obligation to ad-
minister Hindu and Mohammedan laws in contract suits and, if at all, did so
as a matter of good conscience. But in the Presidency-towns “it is not alto-
gether surprising that the Hindu and Mohammedan laws of contract failed
with a bench and bar banned from England to hold their own against the mo-
dern English law.” 106 These indigenous laws were inadequate in many re-
pects. Moreover, the growth of modern business made it necessary that there
should be a workable common law for all alike. 107

The draft law of Contract submitted by the Commission provided a
common law for all alike. The draft was uniform in style and possessed
“great merit as an elementary statement of the combined effect of common
law equity doctrine as understood about forty years ago.” 108 It “was an
original and expert attempt to present a simplified statement of the English
law of contract with some modification—not a great number, though some
were important and indeed remarkable—indeed to make it suitable for India.
That it swept away the Hindu and Mohammedan law of contract was a
feature which incurred no hostility worth mentioning; of its emendations
many were approved by general opinion, by the Legislative Council, and by
Maine who had introduced the bill with a high encomium in this regard.” 109

102. See p. 368. 103. Id. at p. 368. 104. Frederick Pollock in Frederic Pollock and D. F. Mulla, Indian Contract and
Specific Relief Acts, preface at p. vii (1937). 105. Rankin, op. cit., at p. 94. See also Statement of Objects and Reasons to the Bill,
July 9, 1867, as given in ibid.
The Bill as introduced in the Council contained, however, nine clauses on the law of specific performance which evoked a lot of opposition, both in England and India. Sir Henry Maine, though appreciative of the draft, was critically opposed on this issue. It resulted into the resignation of the Commissioners in 1870. The Contract Bill remained before the Council from 1867 to 1872. During this period the draft appears to have been "revised and in parts elaborated by the Legislative Department of India. The borrowing from the New York draft Code seems to belong to this phase. Lastly, Sir James Stephen made or supervised the final revision, and added the introductory definitions, which are in a wholly different style and not altogether in harmony with the body of the work."110 Notwithstanding these changes, however, it goes mainly to the credit of the Commissioners "that the result, after allowing for all drawbacks, was a generally sound and useful one."111 The draft was finally passed as the Contract Act112 (Act IX) in 1872. It defined and amended certain parts of the law relating to contracts.113 Now it extends to the whole of India except the State of Jammu and Kashmir. It does not affect the provisions of any Statute, Act or regulation, not expressly repealed, nor any usage or custom of trade, nor any incident of any contract not inconsistent with the provisions of the Act.114

A brief account of the scheme of the Act and certain other things may be given here. "The Act deals in its first chapter, headed 'Of the communication, acceptance and revocation of proposals,' with the basic principles underlying the formation of contracts. It proceeds in the next chapter to tell us what agreements are contracts and what persons are competent to contract. The same chapter deals with contracts which are voidable and void agreements. We have next the subject of contingent contracts. Another chapter deals with the performance of contract, laying down among other things by whom contracts must be performed and the time and place of performance. It also deals with contracts which need not be performed. The Code also deals with quasi contracts which it calls 'Certain relations resembling those created by contract.' It provides in a chapter headed, 'The consequences of a breach of contract,' the measure of compensation for loss or damage caused by the breach. It deals also with the law of the sale of goods and partnership but the Indian legislature repealed the sections dealing with these subjects when it enacted the Indian Sale of Goods Act in 1930 and the Indian Partnership Act in 1932. The Act also deals with contracts of indemnity and guarantee, bailment, bailments by way of pledge and agency. It is thus a fairly comprehensive attempt to deal with all aspects of this branch of the law.

"Yet its preamble states that it is an attempt only 'to define and amend certain parts of the law relating to contracts.' The courts have held that the Act is not a complete code dealing with the law of contracts and have in the absence of specific provisions in the Act frequently applied principles of English common and statute law and the decisions of English courts. In cases for which no relevant provision is found in the Contract Act or other enactments relating to contracts the courts have even applied rules of Hindu

110. Pollock, op. cit.
111. Ibid.
112. For subsequent legislation affecting the Act, and cognate Acts and provisions, some being discussed in the text, see A. I. R. Manual, Vol. 5, at p. 3259 (1959); Acharyya, op. cit., at pp. 241-244.
113. Preamble.
114. S. 1.
and Muslim law of contracts to Hindus and Muslims. As an instance may be mentioned the rule of the Hindu law of contract known as *damudapat* which prevents interest exceeding the amount of the principal being recovered at any one time. This rule is still in force in the Bombay Presidency and in the Presidency-Town of Calcutta. Well recognised customs and usages of trade have also been saved by the provisions of the Act and have in the absence of any inconsistent provision in the Act been applied by the Indian courts."\(^{115}\)

Since 1872, many new developments have taken place in the theory of the law of contract. In the nineteenth century, freedom of contract was the governing principle. This is not the position now. Therefore, there was felt a need of revision. In 1958, the Fifth Law Commission submitted a report in this connection.\(^ {116}\)

**Further developments**

Lord Arthur Hobhouse succeeded Sir James Stephen as Law Member. At that time "considerable uneasiness had been caused both in England and in India by the rapidity and amount of recent Indian legislation, and Lord Hobhouse on his departure for India, received strong hints that it would be desirable to slacken the pace of the legislative machine. His own observation and experience after arrival in India satisfied him of the prudence of this advice."\(^ {117}\) For sometime after 1872, only a very little codification had taken place in the true sense of the word. In 1877, the Specific Relief Act (Act I) was passed. During the period when Lord Hobhouse was Law Member, the Legislative Department was busy with consolidating the existing laws and repealing the obsolete ones. An endeavour was made to prepare a digest embodying the judicial law made in India. The procedure prescribed by Sir Stephen's Report was to collect miscellaneous legislation "involved the nearest statutes and of re-enacting in an amended form."\(^ {118}\) This process was carried on actively during the period Lord Hobhouse was in India, and its results were embodied in two volumes of English Statutes relating to India; three volumes of General Indian Acts; and ten volumes of Provincial Codes. This was also the period of development of 'judiciary legislation' as shown by reported cases. Since 1870, the work of preparing and carrying through framing the Acts was mostly done in India.\(^ {119}\)

**Fourth Law Commission**

Many important branches of law had been codified so far; still some remained uncodified. In 1875, Lord Salisbury, the Secretary of State for India, called the attention of the Government of India to the fact that the statutory provision for the appointment of a Law Commission was designedly left in force by the Indian Councils Act, and to the subsequently legislation; and intimated his intention to entrust to a small body of eminent draftsmen, the task of preparing the remaining branches of the Indian Code for the Legislative Council. After some hesitation, the Government of India

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115. Sethlalad, op. cit., at pp. 72-73. For a detailed account, see id., at pp. 73-89; Rankin, op. cit., at pp. 99-110; Acharyya, op. cit., at pp. 130-134, 237-241, 284-285.


117. Quoted in Acharyya, op. cit., at p. 69 from Libert, Legislative Forms, op. cit., p. 118. See also Rankin, op. cit., at p. 73.

118. Quoted in ibid.

119. Ibid.
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proposed, in 1877, that the following branches of substantive law might be codified: Trusts, Easements, Alluvion and Diluvion, Master and Servant, Negotiable Instruments and Transfer of Immovable Property. The Government also suggested that their codification should be carried out in India in the above order. The Secretary of State accepted these proposals in the same year. The work of preparing Bills dealing with private Trusts, Easements, Alluvion and Diluvion, and Master and Servant, was entrusted to Dr. Whitley Stokes, who completed the Bills within two years. Bills dealing with Negotiable Instruments and Transfer of property were remodelled and redrafted. These Bills were referred, for report, to a Law Commission appointed by the Government of India on February 11, 1879. This was the Fourth Law Commission Dr. Whitley Stokes was on the Commission which submitted the following Report, dated November 15, 1871.120

Report

The Report contained the following recommendations:

1. The process of codifying well-marked divisions of substantive law should continue.

2. The eventual combination of those divisions as parts of single and general Code should be borne in mind.

3. The English law should be made the basis in a great measure of future Codes, but its materials should be recast rather than adopted without modification.

4. In recasting those materials, due regard should be had to native habits and modes of thought. The form, which those materials should assume, should, as far as possible, resemble that of rules already accepted. In other words, the propositions of Codes should be broad, simple and readily intelligible.

5. Uniformity in legislation should be aimed at, but special and local customs should be treated considerably.

6. The existing law of persons should not, at present, be expanded by way of codification except that the operation of the European British Minors Act, 1874, should be extended.

7. The laws relating to Negotiable Instruments, to the subjects dealt with by the Transfer of Property Bill, to Trusts, to Alluvion, to Easements, and Master and Servant, should be codified, and the Bills already prepared on these subjects be passed into law, subject to suggested amendments.

8. The law of Actionable Wrongs should then be codified.

9. Concurrently with or after the framing of a law of Actionable Wrongs, the laws relating to Insurance, Carriers and Lien should be codified.

10. The Legislature should then deal with the law of Property in its whole extent.

11. Preparation should be made for a systematic chapter on interpretation.121

120. Id., at pp. 70-71.
121. These points are given here, without any marked change, from id., at pp. 71-72.
According to recommendations, as given above, the Legislative Council passed the Negotiable Instruments Act in 1881, and Trusts Act, Transfer of Property Act and Easements Act in 1882.\textsuperscript{122}

It is exactly after three-quarters of a century that the Fifth Law Commission was appointed in India. During this period various laws were passed which need not be mentioned here.\textsuperscript{123}

The first four Commissions deserve all compliments for their having completed a difficult, though extremely important, task. "The labour of these Commissions, consisting of eminent English jurists, spread over half a century, gave to India a system of codes dealing with important parts of substantive and procedural civil and criminal law."\textsuperscript{124} The Commission and the codes compiled by them "became powerful instruments which injected English common and statute law and equitable principles into the expanding structure of Indian jurisprudence."\textsuperscript{125}

**Fifth Law Commission**

During the pre-Independence era, the need for creating a body designed to bring about revision of law was constantly emphasised, and some attempts were made in that direction.\textsuperscript{126} After Independence, on December 2, 1947, Sir Hari Singh Gour moved a resolution in the Constituent Assembly (Legislative) recommending the establishment of a Statutory Law Revision Committee with a view to clarify, and settle questions of, law which required elucidation. The resolution was, however, withdrawn on an assurance given by the then law Minister, Dr. B. R. Ambedkar, that the Government would try to create some other suitable machinery for law revision. One of the methods for this purpose, proposed by him, was the creation of a permanent Commission entrusted solely with the work of revising and codifying the laws. On June 27, 1952, in the Lok Sabha, Sri N. C. Chatterjee again stressed the need of creating a Law Commission. The then Law Minister, Sri C. C. Biswas, stated during the course of his speech on this point that the Government recognised that the work of keeping the law up-to-date was of great importance, and he assured the member that the

122. See id., at p. 72.
123. For these Acts, see A. I. R. Manual, Vol. 16, at pp. 1009-1021. See also id., at pp. 1006-1009, 1021-1028. Acharyya, op. cit., pp. 72-74, 180-263, may also be referred.
124. Setalvad, op. cit., at p. 28.
125. Id., at p. 29. About the process of the expansion of the common law in India, Sir Frederick Pollock said in 1895: "In British India - the general principles of our law, by a process which we may summarily describe as judicial application confirmed and extended by legislation, have much more rapidly within the last generation.
126. For a detailed discussion on Law Reform and Legislation, see Law Commission 14th Report, op. cit., at pp. 699-713.
Government would examine the matter and take necessary steps. On July 26, 1954, the All India Congress Committee resolved that a Law Commission should be appointed to revise existing laws and to advice on current legislation from time to time.

The genesis of the Law Commission, appointed in 1955, lies in a non-official resolution moved in the Lok Sabha on November 19, 1954, in connection with the appointment of a Law Commission to recommend revision and modernisation of laws, to reduce the quantum of case law and to resolve the conflicts in the decisions of the High Courts on many points with a view to realise that “justice is simple, speedy, cheap, effective and substantial.” During the course of discussion on this resolution in the Lok Sabha on December 3, 1954, the then Prime Minister Sri Jawaharlal Nehru, made a statement accepting the resolution in so far as the appointment of the Law Commission was concerned. On the principle of the resolution being thus accepted, it was withdrawn. On August 5, 1955, Sri C. G. Biswas, the then Law Minister, made a statement in the Lok Sabha announcing the decision of the Government to appoint a Law Commission, its membership and the terms of reference. The Commission was appointed with Sri M. C. Setalvad, the then Attorney General of India, as its Chairman, and eminent persons from the Bench and Bar as its members.

The terms of reference to the Commission were: (1) To review the system of judicial administration in all its aspects and suggest ways and means for improving it and making it speedy and less expensive. (2) To examine the Central Acts of general application and importance, and to recommend the line on which they should be amended, revised, consolidated or otherwise brought up-to-date. With regard to the first term, the inquiry of the Commission into the system of judicial administration was to be comprehensive and thorough including in its scope (a) the operation and effect of laws, substantive as well as procedural, with a view to eliminate unnecessary litigation, speeding up the disposal of cases and making justice less expensive; (b) the organization of courts, both civil and criminal; (c) recruitment of the judiciary; and (d) level of the bar and of legal education. With regard to the second term, the principal objectives of the Commission in the revision of existing legislation were to be (a) to simplify the laws in general, and the procedural laws in particular; (b) to ascertain if any provisions are brought to light by conflicting the necessary alterations or omissions, brought to light by conflicting to consider local variations introduced by State legislation in the concurrent field, with a view to reintroduce and maintain uniformity; (c) to consolidate Acts pertaining to the same subject with necessary technical revision; and (f) to suggest modifications wherever necessary for implementing the directive principles of State policy laid down in the Constitution.

After Shri M. C. Setalvad left the Commission, Shri A. K. Sen was appointed Chairman in this capacity, he signed next eight reports. Shri Aiyar was succeeded by Shri J. L. Kapur under whose chairmanship sixteen reports were submitted to the Government of India. After him, Shri K. V. K. Sundaram was appointed Chairman and in this

capacity he signed next six reports. Shri Sundaram has recently been succeeded by Shri P. B. Gajendragadkar under whose chairmanship two reports, have been submitted to the Government. Thus forty-six reports have been made so far.

The Law Commission under the chairmanship of Shri P. B. Gajendragadkar was constituted in August 1971 with enlarged terms of reference. With a view to giving top priority to the directive principles of state policy, enshrined in the Constitution of India, and make their implementation much more effective, the Government of India enlarged the scope of the commission, asking it to examine the existing laws in this context and consider the advisability of enacting fresh legislation. Its terms of reference are: (1) To simplify the laws in general and the procedural laws in particular. (2) To ascertain if any provisions are inconsistent with the Constitution and suggest necessary alterations or omissions. (3) To remove anomalies and ambiguities brought to light by conflicting decisions of High Courts or otherwise. (4) To consider local variations introduced by state legislation in the concurrent field with a view to reintroducing and maintaining uniformity. (5) To consolidate Acts relating to the same subject with such technical revision as may be found necessary. (6) To examine existing laws in the background of the directive principles and to suggest amendments insofar as these laws are inconsistent with these principles. (7) To suggest a general policy in revising the laws. (8) To consider the advisability or need for any fresh legislation to effectuate the directive principles. (9) To review the working of the Constitution and suggest any amendments from the point of view of enabling different authorities under the Constitution to implement more effectively the directive principles.

A brief account of the Law Commission reports is given below:

First Report—Liability of the State in Tort

The first Report, dated May 11, 1956, dealt with the question whether legislation on the lines of the Crown Proceedings Act, 1947, of England in regard to claims against the Union and the States based on tort was required, and, if so, to what extent. The view of the Commission was that the law on this subject was uncertain, but it was not advisable to adopt the legislation on the lines of the above Act. Law, of course, should be made certain as far as possible, and the old distinction between intersessional and non-intersessional functions or governmental and non-governmental functions be the nature and form of the activity in question. The Commission recommended that legislative sanction should be given to the rule laid down in Secretary of State for India v. Harihansji. It further laid down certain principles on which required legislation should proceed.


The Second Report dated July 2, 1956, laid down the principles to be embodied in parliamentary legislation relating to Sales-tax for determining when a sale of goods takes place (a) outside a particular State, (b) in the course of import or export, or (c) in the course of inter-State trade or commerce.

128. See The Hindustan Times, dated the 2nd September, 1971.
129. Ibid.
Accordingly in December, 1956, the Central Sales Tax Act was passed. It formulates principles for determining when a sale or purchase of goods takes place in the course of inter-State trade or commerce or outside a State or in the course of import into or export from India: it provides for the levy, collection and distribution of taxes on sales of goods in the course of inter-State trade or commerce; it declares certain goods to be of special importance in inter-State trade or commerce and specifies the restrictions and conditions to which State laws imposing taxes on the sale or purchase of such goods of special importance are subject.

Third Report—Limitation Act, 1908

The Third Report, dated July 21, 1956, dealt with the revision of the Limitation Act, 1908. In it, the Commission analysed the provisions of the Act with a view to suggest as to in what manner the Act could be simplified and modernised in the light of judicial decisions. Though it did not propose any substantial change in its structure, it made important suggestions for reform.


Fourth Report—On the proposal that High Courts should sit in benches at different places in a State

In the Fourth Report, dated September 22, 1956, the Commission was of firm opinion that in order to maintain the highest standards of administration of the work being done by the each State should function.

Fifth Report—British statutes applicable to India

In the Fifth Report, dated May 11, 1957, the Commission considered the question whether India should enact her own laws on the subject-matter of a large number of British statutes (applicable or supposed to be applicable) where it was necessary to be so and adopt legislative measure rendering these statutes no longer applicable to India. Answering the question in the affirmative, it said that it was in the fitness of things that the entire legal Code of India should be purely Indian and if the subject-matter of any British statute was found to be still necessary for our purposes, that statute should be replaced by a corresponding Indian law, incorporating the necessary provisions of the British statute. It would, however, be desirable to introduce a specific provision in the repealing Act saving the operation of certain statutes in so far as they conferred privileges on India or her citizens in the United Kingdom.

As a result, the Parliament passed the British Statutes (Application to India) Repeal Act in 1960. Its section 2 repealed 258 British statutes specified in the Schedule in so far as they extended to, and operated as part of the law of, India. Section 3 declared that the repeal of any British statute would not affect the operation of any such statute in relation to India and to persons and things belonging to or connected with India in any country to which the India (Consequential Provision) Act, 1949, is extended.
Sixth Report—Registration Act, 1908

The Sixth Report, dated July 13, 1957, dealt with the revision of the Registration Act, 1908. The Commission examined fully the provisions of the Act, pointed out the problems which arose in its interpretation, and indicated broadly its proposals for their solution.

Seventh Report—Partnership Act, 1932

The Seventh Report, dated July 13, 1957, dealt with the revision of the Partnership Act, 1932. The Commission fully examined the provisions of the Act, and made suggestions for improvement in the light of judicial decisions, suggestions from commercial bodies and individuals and modern requirements. No radical change was, however, suggested.


The Eighth Report, dated March 1, 1958, dealt with the revision of the Sale of Goods Act, 1930. In this Report the Commission examined the provisions of the Act in the light of judicial decisions, relevant law of other countries, suggestions made by various commercial bodies and individuals and modern requirements. It did not, however, suggest any radical change except some minor alterations.

Most of the amendments suggested by the Commission have been introduced in the Act by the Sale of Goods (Amendment) Act, 1963.

Ninth Report—Specific Relief Act, 1877

In the Ninth Report, dated July 14, 1958, the Commission dealt with the revision of the Specific Relief Act, 1877. It examined its provisions, pointed out difficulties which arose in the application of the Act and made its proposals for their solution. The Commission also tried to improve both the language and the substance of the Act. It suggested that the Act should be extended to the whole of India except the State of Jammu and Kashmir. It appears from the Report that some radical changes were suggested by the Commission.

Tenth Report—Law of acquisition and requisitioning of land.

The Tenth Report, dated September 26, 1958, dealt with the consolidation of various laws relating to acquisition and requisitioning of property. The view of the Commission was that there should be uniformity in the matter of this legislation and the rights and liabilities of citizens of one State should not materially differ from those of another in respect of acquisition and requisitioning of property. The Commission, therefore, consolidated various laws on the subject in the proposed draft.

Eleventh Report—Negotiable Instruments Act, 1881

The Eleventh Report dated September 26, 1958, dealt with the revision of the Negotiable Instruments Act, 1881. The Commission suggested certain
drastic changes in the law and put its proposals into the form of draft sections of the Act. In revising the Act, it considered the provisions of relevant Acts in the United Kingdom and the United States, judicial decisions under the English and Indian Acts and the suggestions made by the Chambers of Commerce, Bankers' Associations and members of the public.

Twelfth Report—Income-tax Act, 1922

The Twelfth Report, dated September 26, 1958, dealt with the revision of the Income-tax Act, 1922. The Commission was entrusted with the task of revising the Act so as to make its provisions more intelligible without affecting its basic tax structure. It made an attempt to arrange its provisions in a more logical manner and also to make them simpler and clearer. It also codified some of the principles well established by judicial decisions but not contained in the existing Act. Though the Commission was not expected to change the tax structure, it made minor changes in the substantive parts and a few major changes in the procedural provisions for the sake of simplification. In the revision of Act, due consideration was given to suggestions from various individuals and bodies, relevant Acts of other countries and other taxing statutes enacted in India.

The pattern of the Act, recommended by the Commission, was adopted in the new Income-Tax Act passed by Parliament in 1961.

Thirteenth Report—Contract Act, 1872

In its Thirteenth Report, dated September 26, 1958, the Commission dealt with the revision of the Contract Act, 1872.

This work was done in the light of modern trends, and views advanced from any committee in the Act.

Fourteenth Report—Reform of judicial administration

The Fourteenth Report, dated September 26, 1958, runs into two volumes, covering in all 1282 pages. In it the Commission tried its best to comply with the first term of reference. The Commission indicated in broad outline the changes necessary to make judicial administration speedy and less expensive. It did a huge work of great importance. Even its brief introduction would require several pages and is beyond the scope of this book, though some of the recommendations of the Commission on various phases of judicial administration have been given at appropriate place in the book.

Fifteenth Report—Law relating to marriage and divorce among Christians

The Fifteenth Report, dated August, 19, 1960 presented one comprehensive codification dealing with marriage and divorce, and recommended the repeal of the Divorce Act, 1869, and the Christian Marriage Act, 1872. The Commission submitted a tentative draft Bill, known as the Christian Marriage and Matrimonial Causes Bill, 1960, prepared in the light of the changed
conditions, and suggestions from interested persons, Christian associations, Church, Members of Christian community, Bar Associations, Judicial Officers and some English material on the subject. It was recommended that the Act, when enacted, should apply to the whole of India except Jammu and Kashmir.

Sixteenth Report—Official Trustees Act, 1913

The Sixteenth Report, dated November 18, 1960 dealt with the question of revision of the Official Trustees Act, 1913. The Commission was of the opinion that it was on the whole, a comprehensive and well-drafted piece of legislation and did not require any substantial change, except some minor alterations which it submitted in the Report in the form of draft amendment.

Amendment suggested by the Commission have been introduced in the Act by the Official Trustees (Amendment) Act, 1964.

Seventeenth Report—Trusts Act, 1882

The Seventeenth Report, dated January 6, 1961, dealt with the revision of the Trusts Act, 1882. The Commission was of the view that the Act has proved to be a very successful piece of legislation and needed only some changes. The Commission made proposal as to these changes in the light of the changes which took place in English law, Indian case law and American law on the subject.

Eighteenth Report—Convert's Marriage Dissolution Act, 1866

In the Eighteenth Report, dated February 18, 1961 the Commission recommended the repeal of the Converts' Marriage Dissolution Act, 1866, and presented a tentative draft Bill. Unlike the existing Act, the new Act, whenever enacted, was recommended to be made applicable to all conversions, conferring on a convert a right to have the marriage contracted before conversion dissolved on just and proper terms.

Nineteenth Report—Administrator-Generals Act, 1913

In its Nineteenth Report, dated May 5, 1961, the Commission proposed certain changes of a fundamental character in as much as they modify the basic approach of the Administrator-Generals Act, and a number of changes in many sections. The view of the Commission was that the Act should be replaced by a new Act. It presented a tentative draft Bill also.

As a result, Parliament passed the Administrator-Generals Act in 1963. The Act consolidated and amended the law relating to the office and duties of Administrator-General. It extends to the whole of India except Jammu and Kashmir.

Twentieth Report—Law of hire-purchase

In the Twentieth Report, dated May 5, 1961, the Commission presented a draft Bill to amend the law relating to the hire-purchase of goods. This was done in accordance with the suggestion made in its Eighth Report that it was desirable that separate Act on the lines of English Hire-Purchase Acts of 1938 and 1954 and other similar law should be enacted in India to regulate hire-purchase transactions.
Twenty-first Report—Marine Insurance

In the Twenty-first Report, dated July 29, 1961, the Commission pointed out the need of a law on marine insurance, and presented a tentative draft Bill, framed on the basis of the English Marine Insurance Act, 1906, to codify the law for this country.

As a result, Parliament passed the Marine Insurance Act in 1963.


In its Fifteenth Report, the Commission presented a tentative draft Bill to amend and codify the law relating to marriage and matrimonial causes of Law prepared a formal Bill in Parliament. The Governor should again be invited on the Bill and that this should be done through the Law Commission. That is how the matter was referred again to the Commission. The Commission sent the copies of the Bill to all former persons and bodies, State Governments, High Courts and Bar Associations for their comments. In the light of these comments, it suggested a few modifications in the Bill, as given in its Twenty-second Report, dated December 15, 1961.

Twenty-third Report—Law of foreign marriages

In the Twenty-third Report, dated August 4, 1962, the Commission submitted a tentative draft Bill—the Foreign Marriage Bill, to make provision relating to marriages of citizens of India outside India. The principles on which the English and Australian Acts were framed were adopted in the Bill but with modifications so as to suit Indian conditions. The object of the Bill was to regulate marriages performed outside India when either of the parties thereto would be an Indian citizen, thus filling a gap in the Special Marriage Act, 1954, which applied to marriages between Indian citizens. The Bill further designed to enable the parties to obtain, under its provisions, appropriate matrimonial reliefs, such as dissolution of marriage and so forth.

Twenty-fourth Report—Commissions of Inquiry Act, 1952

The Twenty-fourth Report, dated December 18, 1962, dealt with the revision of the Commissions of Inquiry Act, 1952. The Commission suggested certain important changes in the Act, after having undertaken a comprehensive examination of the entire Act in the light of its working since 1952, the practice in other countries in relation to inquiries and the vast thought-provoking literature on the subject.

Twenty-fifth Report—Evidence of officers about forged stamps, currency notes, etc.

The Twenty-fifth Report, dated September 27, 1963, dealt with the question of admissibility of evidence of officers about forged stamp and currency notes, etc. In this connection, the Commission, after having considered certain judicial decisions and suggestions made by the Ministry of Finance, proposed a new section 509-A to be introduced in the Code of Criminal Procedure, and an amendment in its section 510.
Twenty-sixth Report—Insolvency Laws

The Law Commission had taken up the revision of the law of insolvency on a reference made to it by the Government of India. In its Twenty-sixth Report, dated February 21, 1964, the Commission presented a tentative draft Bill with notes on clauses to consolidate and amend the laws relating to insolvency. This it did to give a concrete shape to its recommendations. The Commission recommended the consolidation of Presidency-towns and Provincial Insolvency Acts so as to have one uniform law of insolvency for the whole of India. It pointed out that apart from combining the two Acts, there was little scope for any substantial change in the law; yet it suggested certain changes incorporated in the model Bill.

Twenty-seventh Report—Code of Civil Procedure

The Twenty-seventh Report, dated December 13, 1964, related to the Code of Civil Procedure. The question of taking up revision of the Code was considered by the Law Commission in March, 1959. As its Fourteenth Report on certain matters, it was then decided as to whether its revision should be covered by and suggested in the matters not covered by it. The matter included those matters also. Accordingly a draft Report was prepared and circulated for suggestions. Thereafter in the light of new material, a revised draft Report was prepared and considered. Finally the present Report and the proposals as shown in the form of tentative draft amendments to the Code emerged. Reason for the proposed changes were provided in the Notes on Clauses. A comparative table was also given showing recommendations made in the Fourteenth Report and the proposed amendments. A summary of related other Acts, namely, Suits Valuation Act, Court Fees Act, 1870; Indian Evidence Act, Trusts, was also given.

Twenty-eighth Report—Indian Oaths Act, 1873

In its Twenty-eighth Report, dated May 22, 1965, the Law Commission presented a tentative draft Oaths Bill containing its proposals. The Bill was intended for the law relating to judicial oaths and for certain and a summary of related matters given.

Twenty-ninth Report—Inclusion of certain Social and Economic Offences in the Indian Penal Code

The Twenty-ninth Report, dated February 11, 1966, dealt with the question of inclusion of certain social and economic offences in the Indian Penal Code. The matter was taken up by the Law Commission on a reference from the Ministry of Home Affairs. A draft Report on the subject was prepared after a study of the relevant laws on the subject, the laws of certain foreign countries and literature on them. The proposals contained in the Report of the Committee on the Prevention of Corruption (1964), known as the Santhanam Committee, were also circulated for comments. Thereafter the draft Report as well as the comments received were considered and the final Report was revised and it finally emerged that Report were intended to laws relevant to the subject-matter, provisions of the laws of other countries,
and similar other material. Some of the Appendices also sought to analyse, in detail, the scope of certain provisions of existing laws, in order to show how far they covered the offences which, according to the Santhanam Committee's Report, ought to be covered. A tentative draft of the amendments proposed in the Indian Penal Code and the Code of Criminal Procedure were given in two of the Appendices.

Thirtieth Report—Section 5 of the Central Sales Tax Act, 1956—Taxation by the States of Sales in the course of import

The Thirtieth Report, dated February 2, 1967, was on section 5 of the Central Sales Tax Act, 1956—Taxation by the States of Sales in the course of Import. In K. G. Khosla & Co. (Private) Ltd. v. Deputy Commissioner of Commercial Tax, Madras, the Supreme Court laid down the boundaries of the ban under article 286 (1) (b) of the Constitution on the imposition of sales tax on import sales. It also determined the extent and meaning of section 5 of the Central Sales Tax Act. As the decision circumscribed the power of State Governments to impose sales tax, the State Government of West Bengal drew the attention of the Government of India (Ministry of Finance) to the consequences of the decision on its revenues derived from sales tax on certain categories of sales and purchases—import export sales and purchases—which, hitherto, the Government had been taking as being outside the ban of the article. The Central Government was requested to look into the matter and to take step to amend the Central Sales Tax Act, 1956, so as to exclude such sales from the purview of section 5 of the Act.

The Government of India, Ministry of Finance, noted that the Act was passed after taking into account the recommendations of the Law Commission in the Second Report and that that Report itself was based on two decisions of the Supreme Court known as the Travancore-Cochin cases—State of Travancore v. Bombay Co., Ltd., and State of Travancore, v. S. V. Cashewnut Factory. It then requested the Ministry of Law (Department of Legal Affairs) to refer the matter to the Law Commission for its consideration in the context of the fact that existing section 5 incorporated the principles recommended by the Law Commission in its Second Report. The Ministry of Finance raised a query whether the decision in Khosla's case, was beyond what was intended by the Law Commission in its Second Report. The Ministry of Law referred the matter to the Law Commission for its consideration. The precise question which was referred was: "Since the provisions of section 5 of the Central Sales Tax Act incorporate verbatim the principles recommended by the Law Commission on the basis of the earlier Supreme Court judgments in Travancore-Cochin cases, the Commission is requested to examine the matter further and consider whether they would recommend any amendments to the Act, so as to exclude certain transactions...from the purview of section 5 of the Central Sales Tax Act."

The conclusion of the Commission was that the propositions emerging from Khosla's case were consistent with the two Travancore cases on which the Second Report of the Commission was based and did not go beyond the intent of those decisions, and, that no change in the law was necessary.

Thirty-first Report—Section 30 (2) of the Indian Registration Act, 1908—Extension to Delhi

In its Thirty-first Report, dated May 20, 1967, the Law Commission recommended the extension of section 30 (2) of the Indian Registration Act, 1908, to Delhi. The section provided that the Registrar of a district including a Presidency-town might receive and register any document referred to in section 28 without regard to the situation in any part of India of the property to which the document related.

As a result Parliament enacted the Indian Registration (Amendment) Act 1969 amending section 30 (2) which now provides that the Registrar of a district in which a Presidency-town is included and the Registrar of the Delhi district may receive and register any document referred to in section 28 without regard to the situation in any part of India of the property to which the document relates.

Thirty-second Report—Section 9 of the Code of Criminal Procedure, 1898—Appointment of Sessions Judges etc.

In its Thirty-second Report, dated May 20, 1967 the Commission considered the suggestion of the Mysore High Court that section 9 of the Code of Criminal Procedure should be amended so as to empower the High Court to appoint a Sessions Judge to a Court of Session. The Commission accepted the suggestion and proposed a draft amendment.

Thirty-third Report—Section 44, Code of Criminal Procedure 1898

In its thirty-third Report, dated September 30, 1967, the Commission considered the desirability of adding a new section 44A in the Criminal Procedure Code, which was to provide that every public servant aware of the commission of offences under sections 161, 162, 163, 164, 165 and 165A of the Indian Penal Code, and sections 5 (2) and 5 (3) of Prevention of Corruption Act, 1947 would, in the absence of reasonable excuse, the burden of proving which would lie upon him, forthwith give information to an authority competent in law to investigate such offences and would, while giving such information, truly disclose all the facts and circumstances of the case within his knowledge. And in the course of any inquiry, investigation or trial into any of the above offences, it would be the duty of every public servant to answer truly and fully all questions relating to such case put to him, other than questions, the answer to which would have a tendency to expose him to a criminal charge. The Commission did not recommend the adoption of this section.

Thirty-fourth Report—Indian Registration Act 1908.

In July 1957, the Law Commission had submitted to the Government of India Sixth Report on the Registration Act 1908. That Report was circulated for comments to State Governments, High Courts and other interested persons and bodies. As the comments revealed disagreement with the recommendations made in the Sixth Report on several points, the matter was again referred to the Commission for its opinion in the light of those comments. The changes recommended by the Commission second time are contained in the thirty-fourth Report, dated September 30, 1967. The changes recommended in the previous Report fell into three categories: (i) changes of substance; (ii) verbal changes; and (iii) changes in the arrangement of clauses. In the later Report the Commission recommended that some of the changes of substance should be dropped. If that was done, the question would be whether the need for revising the whole Act and re-ensacting it would still be there. The Commission felt that if the changes
in substance were to be a few only, it would not be worthwhile to re-enact
the whole Act; and if enactment was to be avoided, changes of the second
category should be minimum, and changes of the third category should be
avoided.

On the above assumption, the Commission annexed to the Report a
draft containing, in the form of amendments to the existing Act, changes
of substance and verbal changes which appeared to be really necessary, after
a consideration of the earlier Report and the comments received on them
and on the basis of its own views expressed in the Report.

Thirty-fifth Report—Capital Punishment

The Thirty-fifth Report, dated September 30, 1967, dealt with capital
punishment. The Commission recommended that capital punishment should
be retained in the present state of the country because it acts as a
deterrent.

Thirty-sixth Report—Sections 497, 498 and 499 of the Code of Crimi-
nal Procedure 1898—Grant of Bail with Conditions

The Thirty-sixth Report, dated December 16, 1967, dealt with the
question whether, under sections 497 and 498 of the Code of Criminal Proce-
dure 1898, bail can be granted with conditions. Answering the question
in the affirmative, the Commission pointed out the conditions and suggested
amendments of the sections under consideration.

Thirty-seventh Report—Sections 1 to 176, Code of Criminal Procedure
1898

The Thirty-seventh Report, dated December 16, 1967, was on the
revision of sections 1 to 176 of the Code of Criminal Procedure.

Thirty-eighth Report—Indian Post Office Act 1898

In its Thirty-eighth Report, dated February 20, 1968, the Commission
dealt with the revision of the Indian Post Office Act 1898. One of the main
points which it considered was the period of limitation for a suit for compen-
sation for an undelivered postal article.

Thirty-ninth Report—The Punishment of Imprisonment for life under
the Indian Penal Code

The Thirty-ninth Report, dated July 4, 1968, dealt with the nature of
the imprisonment called imprisonment for life in the Indian Penal Code and
in particular, with the question whether, when such a sentence is awarded
to an offender, the imprisonment he undergoes has to be rigorous or simple.
The recommendation of the Commission was that imprisonment for life should
be rigorous.

Fortieth Report—Law relating to Attendance of Prisoners in
Courts

The Fortieth Report, dated February 20, 1969, was on revision of the
law relating to the attendance of prisoners in courts. The law on the subject
is found mainly in the Prisoners (Attendance in Courts) Act 1955. Other
provisions are sections 491 and 542 of the Code of Criminal Procedure,
section 29 of the Prisoners Act 1900 and section 3 of the Transfer of Prisoners
Act 1950.

Forty-first Report—Code of Criminal Procedure 1898

In its Forty-first Report, dated September 24, 1969, the Commission
drafted a new Code of Criminal Procedure consisting of 483 sections. At
present there are 565 sections. One of the main recommendations relates to
the reform of separation of the executive and judicial functions in the administration of criminal justice. The new draft Code secures this reform on a uniform basis throughout India. Under the second main recommendation, the time-consuming process before committing magistrates has been done away with.

Forty-second Report—Indian Penal Code

The Forty-second Report, dated June 2, 1971, was on revision of the Indian Penal Code and contained a draft Bill to implement the Commission’s recommendations for the amendment of the Code.

Forty-third Report—Offences against the National Security


Forty-fourth Report—The Appellate Jurisdiction of the Supreme Courts in Civil Matters

The Forty-fourth Report, dated August 30, 1971, was on the appellate jurisdiction of the Supreme Court in civil matters. The Commission recommended that clauses (a) and (b) of article 133 (i) of the Constitution should be deleted and clause (i) amended so as to read as follows: “(i) An appeal shall lie to the Supreme Court from any judgment, decree or order in a civil proce- e High Court certifies that the Court on a Certifi-

cate of Fitness


The Forty-fifth Report, dated October 28, 1971, dealt with the civil a certificate of fitness. The Commission - (a) and (b) of article 133 (1) of the Consti-
t-fourth Report, and further recommended that clause (1) of the article should be amended so as to read as follows: “(1) a High Court in the territory of India if the case involves a substantial question of law which the High Court said question needs to be decided by the Supreme Court.”

The Constitution (Thirty-fifth Amendment) Act 1972 has now given effect to the recommendations contained in the Forty-fifth Report.

Forty-sixth Report—The Constitution (Twenty-fifth Amendment) Bill 1971

In its Forty-sixth Report, dated October 28, 1971, the Commission considered the provisions of the Constitution (Twenty-fifth) Amendment Bill 1971, and recommended that (a) in the new article 31C, instead of article 19, article 19 (1) (f) and (g) should be specified; and (b) the last part of the main paragraph of the same article (which provides that no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy) should be deleted.

The Government of India did not accept the above recommendations and the Bill was enacted into law in the original form.
CHAPTER XXX
HINDU AND MOHAMMEDAN LAWS

This Chapter is confined to the position of civil laws of Hindus and Mohammedans, British period and thereafter. Prior to coming be noted: (1) unlike Hindu law, Mohammedan; which one, however, believed to be of divine respective religions; and (3) during the Moham-Hindu remained intact.

British Period

Under this heading, we would deal with the reservation of civil laws of Hindus and Mohammedans, law officers, works done in respect of these laws by Europeans, and legislation, amending, or directly or indirectly affecting them, or introducing social reforms.

Reservation

The first trace of the reservation of their own laws and customs to Hindus and Mohammedans is found in the Charter of 1753 which expressly excluded all suits and actions between these natives from the jurisdiction of the Mayor’s Courts; such suits and actions were directed to be determined among themselves, unless both parties submitted them to the determination of these Courts. This was, however, merely an exception to their jurisdiction. It does not appear that the natives of Bombay were ever actually exempted from this jurisdiction.

The principle of excluding civil litigation of the natives without their consent from the jurisdiction of the Mayor’s Courts was made a basis complete the scheme as to the above ‘rule of decision’, Sir Elijah Impey added the word ‘succession’ to the word ‘inheritance’ and declared that in the absence of specific directions, the cases were to be decided according to the doctrine of justice, equity and good conscience. This is how the scheme was made complete as regards the rule of decision.

In 1793, the Cornwallis Code enacted that in suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, the Hindu laws with respect to Hindus and Mohammedan laws with respect to Mohammedans, were to be considered to be the general rules by which the Judges were to form their decision. This provision was extended to Benares and the Upper Provinces in 1795 and 1805 respectively. It was also enacted in 1795 that in cases in which the plaintiff was of a different religious persuasion from the defendant, the decision was to be regulated by the law of the defendant, excepting cases where Europeans or persons other than Hindus and Mohammedans were defendants; in such cases the law of the plaintiff was to be made the rule of decision in all cases of a civil nature.
In 1831, the Munsifs generally throughout Bengal Provinces were directed to administer Hindu laws with respect to Hindus and Mohammedan laws with respect to Mohammedans in all cases of inheritance of, or succession to, landed property, and the law administered in such cases was to be the law of the defendant. In 1832, Regulation VII rescinded the provision of 1795, given above, modified that of 1831, and declared that the rule of decision laid down by the professors of Hindu and Mohammedan law to the case, and was design for ever in any civil suit, the parties to it might be of different religious persuasions, when one party would be of the Hindu and the other of the Mohammedan persuasion, or where one or more of the parties to such suit would not be either of the Mohammedan or Hindu persuasion, the laws of those religions would not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled. In all such cases, the decision would be governed by the principle of justice, equity and good conscience. This innovation, however, was not to justify the introduction of the English or any foreign law, and it was confined to the Bengal Provinces only.

In 1802, the provison of the Cornwallis Code of 1799 as to the reservation of laws was adopted for Madras Province also. Native law officers were to expound these laws. In 1799, a similar provision, though more explicit and extensive in application, was made for the Bombay Province. In 1827, the provision of 1799 was rescinded, and the Elphinstone Code provided that the law to be applied in the trial of suits would be Acts of Parliament and regulations of Government applicable to the case; in their absence, the usage of the country in which the suit arose; if none such appeared, the law of the defendant, and in the absence of specific law and usage, the principle of justice, equity and good conscience. Native law officers were to expound their respective laws in respect of such questions as the courts put to them.  

Though the Supreme Court at Calcutta does not appear to have expressly provided in 1781 by the Act of land controversy that in disputes, between their inheritance and succession to lands, usages of Hindus, and in the case of Mohammedans by the laws and usages of Mohammedans; and where only one of the parties happened to be Hindu or Mohammedan, by the laws and usages of the defendant. It preserved to them their laws and customs, enacting that in order that regard should be had to their civil and religious usages, the rights and authorities of fathers of families and masters of families, according as the same might have been exercised by the Hindu or Mohammedan law, would be preserved to them respectively within their families; nor would any acts done in consequence of the rule and law of caste, respecting the members of their families only, be held and adjudged a crime, although the same might not be held justifiable by English laws. The Supreme Court was directed to frame such process and make such rules and orders for their execution in suits, civil or criminal, against the natives of Bengal Provinces, as might accommodate the same to their religion and manners, so far as

the same might be consistent with the due execution of the laws and the
tainment of justice.

In 1797, an Act of Parliament empowering the Crown to establish
Recorder's Courts at Madras and Bombay contained provisions similar
to those given above. The same was the position when the Recorder's Courts
were replaced by the Supreme Courts at Madras and Bombay in 1801 and 1823
respectively. The Acts of 1800 and 1823, empowering the Crown to create
Supreme Courts at these places respectively, had transferred to them all powers
and authorities granted to their predecessors.²

The reservation of the native laws, provided by both the regulations,
and Acts and Charters of the Supreme Courts, was confined to Hindus
and Mohammedans. A broad distinction of the natives was thus made
into two classes. There were Sikhs, Jains and Buddhists also, having some
peculiar laws and usages, many of which being more or less connected
with their religious creeds. They appear, however, to have been excluded
from the benefit of such laws in the Supreme Courts. In Calcutta Supreme
Court, a case appears to have been once decide
but this was by reference to the Pandits, and
by considering the Sikhs as a sect of Hindus, of
branch.³ Actually the position was that the sacred books of the Sikhs con-
tained no systematic exposition of doctrino, but only a few practical rules of
conduct; “being for the most part of a mystical or moral purport. Their laws,
if they may be so termed, are adaptations of the Hindu system, and depend
entirely upon usage, and not upon any written Code.”⁴ About Jain laws, W. H.
Morley said in 1858 that he was not aware that the Jain laws and their legal
writings were ever consulted or examined. In some rare instances, however,
when cases arose involving questions of Jain law, the Hindu law officers of the
courts gave their opinions, professedly founded on a reference to the Jain
Shastras, about which Morley said that he was not aware of them. As
regards the Buddhist laws, an abstract translation of their Code appeared
in 1833. It presented many analogies with the Hindu law. The abstract
was, however, only sufficient to give a general view of the system.⁵ How
far these laws were reserved and followed is not clear. It was, however,
more than once held at Calcutta (one case having Jews as parties), that
with the exception of Hindus and Mohammedans, no suitor in the Supreme
Courts was entitled to have any special law applied to his case.⁶ Whether
this ruling applied to Sikhs, Jains and Buddhists cannot be said.

Questions of Hindu law falling within the specification of the Acts and
Charters, were adjudicated in the Supreme Courts according to the doctrines
of each particular school of law entertained by the parties, or custom clearly
proved to exist among such parties. As regards Mohammedans, however, no
other than the Sunni law was ever administered⁷ in the Calcutta Supreme
Court; but there was no doubt that, in the event of a case arising between
non-Sunni Mohammedans, the law administered was to be according to the
religious persuasion of the suitors. In a case decided by the Bombay
Supreme Court, where the parties held particular tenets, scarcely compatible

² See Chapters VIII, XIV and XXV, supra. See also Morley, op. cit., at pp. 178-
180.
³ Morley, op. cit., at p 189.
⁴ Id., at p 327.
⁵ Id., at pp. 327-328.
⁶ Jubb v. Lefevre Cl. Ad. R. 1829, 56; Musleah v. Musleah, 1 Fultoa 420, as given
in id., at p. 188.
with the Mohammedan law, the Chief Justice remarked that the effect or
the reservation clause was not to adopt the text of the Quran as law, any
further than it had been adopted in the laws and usages of the Mohammedans.
If any class of Mohammedans (Mohammedan dissenters as they might be
called) were found to be in possession of any usage which was otherwise valid
as a legal custom, and which did not conflict with any express law of the
Government, they were just as much entitled to the protection of the
reservation clause as the most orthodox Sunni who could come before the
Court. It appears that the Chief Justice of Bombay was inclined to a much
more liberal interpretation of the law than had prevailed in the Calcutta
Supreme Court.

In the courts of the Company, an extended and liberal interpretation
of the language of the regulations was always given. Cases of Jains were
decided according to their laws so far as such laws could be ascertained.
Cases of Shia Mohammedans were decided according to the tenets of the Shia
sect. In the important case, viz., Razah Deedar Hossein v. Kamee Zuhoor-oon
Nissa, having Shia Mohammedans as parties, the Privy Council upheld the
decision of the Sadar Dwani Adalat which decided it according to the tenets
of the Shia sect. It observed that according to the true construction of the
relevant Bengal Regulation of 1793, in the absence of any judicial decisions
or established practice limiting or controlling its meaning the Mohammedan
law of succession applicable to each sect ought to prevail as to litigants of
that sect. It was not provided by the Regulation that one uniform law should
be adopted in all cases affecting Mohammedans, but that the Mohammedan
law, whatever it was, should be adopted. If each sect had its own rule accord-
ing to the Mohammedan law, that rule should be followed with respect to
litigants of that sect. Such was the natural construction of the Regulation,
and it accorded with the just and equitable principle upon which it was
founded, and gave effect to the usages of each religion, which it was evidently
its object to preserve unchanged. The Regulation ought, therefore, to be
interpreted to adopt the usage or law of each sect unless there was a course of
judicial decision or established practice to the contrary.

In practice, the Hindu usages and customs, and laws relating to gifts and
contracts were recognized, and the Mohammedan law was applied to a variety
of cases relating to inheritance, sale, pre-emption, gift, wills, marriage, dower,
divorce, parentage, guardians and minority, slavery, endowments, debts and
securities, claims and judicial matters.

Such was the state of the personal and customary laws of Hindus and
Mohammedans and the practice of the courts in regard to the admission of
these laws. The policy of non-interference with these laws and their preser-
vation, adopted by the English administrators, was founded on the wisdom
of experience and the dictates of humanity, and was certainly an enlightened
and liberal policy. The policy did not, however, continue for a long time
and some legislation had to be resorted to. Still the provisions as to reser-
vation of personal and customary laws subject to legislation are intact. For
example, section 37 of the Bengal, Agra and Assam Civil Courts Act, 1887,

8. Id., at p. 190.
9. 2 M. I. A. 441.
10. Id at pp. 477-478.
12. Id., at p. 191. See also observation of Warren Hastings and Sir William Jones
in id., at pp. 192, 193.
provides that where in any suit or other proceeding it is necessary for a
civil court to decide any question regarding succession, inheritance, marriage
or caste, or any religious usage or institution, the Hindu law in cases where
the parties are HIndus and Mohammedan law in cases where the parties are
Mohammedans, form the rule of decision except in so far as such law has, by
legislative enactment, been altered or abolished; in cases not so provided for
or by any other law, the court has to act according to the principle of justice,
equity and good conscience.13 The provision does not, however, give fullest
effect to the custom. But section 5 of the Central Provinces Laws Act 1875,
does so. First it reserves the personal laws in certain matters, except, in so
far as they have been altered or abolished by legislative enactments; then
it provides that when among any class or body of persons or among the
members of any family any custom prevails which is inconsistent with the
law applicable between such persons under this section, and which, if not
inconsistent with such law, would have been given effect to as legally bind-
ing, such custom shall be given effect to notwithstanding anything contained
in the section. Section 16 of the Madras Civil Courts Act, 1873, also speaks
to the same effect.14

The result of the omission of any reference to custom in the Bengal
Act of 1887 was that while in the cases of Hindus, custom, whether of family,
district of sect, "will outweigh the written text of the law"15 provided it is
ancient, certain, reasonable and not opposed to morality, public policy or
statute,16 in the cases of Mohammedans, custom could not override the text
of the Mohammedan law in which customs in conflict with its rules could
have no legal force.17 In 1913, the Privy Council, however, held in a case
from Allahabad High Court that custom even in derogation of the Islamic
law, would be given effect to.18

Law Officers

The administration of Hindu and Mohammedan laws carried on with
the help of Indian officers who acted as expert advisers to the courts presided
over by English Judges, the Hindu officers being called Pandits and the
Mohammedan officers Muftis and Maulvis. They began to act as law officers
in 1772 and continued as an official class till 1864 when their office was
abolished by Act XI of that year. In fact by then, they had outlived much of
their utility, because English translations of Hindu and Mohammedan laws,
though not exhaustive, and a vast body of judicial precedents enabled the
English Judges to administer these laws without the assistance of law officers.19
In 1879, in Hari Dasi Debi v. Secretary of State for India,20 Justice Louis Jackson
of the Calcutta High Court observed, "I confess it seems to me to be among

13. See Chapter XIX, supra.
14. See also the Punjab Laws Act, 1872. For other laws, see B. K. Acharyya, Codifi-
cation in British India, at pp 325-124 (1914); and D. P. Mutt, Principles of
Hindu Law, at p. 79 (1919).
15. Collector of Madura v. Muttu Ramalinga, 12 M. I. A. 435. For difference of
opinion amongst the different schools of Hindu law, see Acharyya, op. cit., note
4, at p 312. For a detailed study of customs, see S. Roy, Customs and Customary
Law in British India, (1911).
17. Acharyya, op. cit., at p. 313; G. C. Rankin, Background to Indian Law, at p.
155 (1916).
19. Rankin, op. cit., at pp 133, 141; Abdul Rahim, Muhammadan Jurisprudence at p.
37 (1911).
20. I. L. R. 5 Cal. 228.
the advantages for which the people of this country have in these days to be thankful, that their legal controversies, the determination of their rights and duties, and their status, have passed into the domain of lawyers, instead of Pandits and casuists, and in my opinion, the case before us may very well be decided on the grounds that the authority of cases without following Sreenath, Achyutanand and others through the maze of their speculations on the origin and theory of gift. In 1892, Justice Trevelyan of the same High Court appropriated this passage to the consideration of a question relating to the law of Waqifs which arose in Bikan Mian v. Sukh Lal Poddar, a Full Bench case.

The employment of law officers in the beginning was indispensable. This was so because the English judges had no familiarity with the languages, habits and manners of the natives, they were not conversant with their own languages - Sanskrit and Arabic; these laws, being religious and contained in a vast mass of literature, were still more difficult to be followed and understood by them, and subsequently the Digests of these laws, prepared by Europeans, did very little in the direction of supplying the necessary guidance as to the progress of law during the previous four centuries and indicating the manner in which it was actually being followed and understood. The judges had to put up with the existing institutions, though they bitterly criticized the work done by Pandits, Muftis and Maulvis. Sir William Jones wrote to Lord Cornwallis in 1783 that "if we give judgment only from the opinions of the native lawyers and scholars, we can never be sure that we have not been deceived by them. It would be absurd and unjust to pass an indiscriminate censure on so considerable a body of men, but my experience justifies me in declaring that I could not without an uneasy conscience concur in a decision merely on the written opinion of native lawyers, in any cause in which they could have the remotest interest in misleading the Court, nor how vigilant soever we might be, would it be very difficult for them to mislead us, for a single obscure text, explained by themselves, might be quoted as express authority, though perhaps, in the very book from which it was selected it might be differently explained, or introduced only for the purpose of being exploded." He further wrote "Even if there was no suspicion of corruption on the part of the interpreters of the law, the science which they profess is in such a state of confusion that no reliance can be placed on their answers." Two other critics charged the native law officers with partiality and corruption. T. B. Macaulay also passed strictures on them. Considering, however, "the newness of their judicial office, the smallness of their pay, the get-rich-quick atmosphere which the British adventurer had introduced into India, the character of the question, which arose, the ignorance of the British judges and the difficulties of detection it can hardly be supposed that the suspicion of venality and prejudice was without some foundation."

Whatever the criticism of native law officers, there is no doubt that the part played by them in the determination of suits in the courts by expounding

24. Quoted in Acharyya, op. cit., at p. 80, from a letter of Jones, dated March 19, 1783.
25. Ibid.
26. See Rankin, op. cit., at pp. 140-141, giving opinions of Sir Francis Macauigheen and Strange.
27. Id., at p. 141.
the laws is commendable. According to G. G. Rankin, Mohammedan law officers expounding both civil and criminal law, "for many years played a great part under the British administration in the criminal courts where Mohammedan law was enforced. Their futeas (opinions) were the pivot of the system which was set up by Bengal Regulation IX of 1793—a part of the 'Cornwallis Code'. Amended from time to time by Regulations, the Mohammedan criminal law came to turn less upon the futea of the mufti or hazi associated with the British court and more upon the judge and the courts of appeal. The object of many legislative changes was to by-pass the 'law officer' and his futea in order to clode provisions of the Mohammedan law which were regarded as unsuited to the times and to the country. These law officers played a great part in their country's history and were on the whole conscientious expositors of the law in which they were skilled and stout defenders of its principles in practice."28 As observed by Abdur Rahim, whatever might have been the demerits of the system condemned and abolished in 1864, "it should, in fairness, be admitted that the futeas of the Maulvics so far as they can be found in the pages of old law reports, are a faithful exposition of the Mohammedan law on the points covered by them."29

In the case of Hindu law officers, we are confining our discussions to their role of expounding the civil law, because they played little part in the administration of criminal law except in the Province of Bombay. The opinions of Pandits "were at first followed implicitly in spite of their natural tendency to discourage departure from the authorities, in which they were practically the only experts, even when such departure corresponded, as it must sometimes have done, with established custom or altered social conditions."30 and in spite of the fact that even if there was no suspicion of corruption on their part, the science which they professed was in such a state of confusion that no reliance could be placed on their answers.31 Later the English Judges "began to scrutinize their opinions more closely and to notice discrepancies between them and the authorities cited."32 In fact long before 1864, the judges had become, so to say, "masters in their own house, having been enabled by English textbooks and translations to check and criticize the conclusions of the Pandits and to apply Hindu principles to the fact which came before them."33 In Western and Northern India, "decisions were based also on evidence from the heads of the caste concerned as to its actual usage. In the South, however, where the Mitakshara and the opinions based on it were accepted as conclusive, the result has been aptly described as similar to that which would be reached, 'if a German were to administer English law from the resources of a library furnished with Fleta, Glanville and Bracton and ending with Lord Coke'."34 This may, however, be noted that Pandits whose employment came to an end in 1864, "had been a safeguard against the importation of European notions into the law of the country. But it is possible that their influence generally resulted in too uniform an application of the texts and in disregard of the growth of particular family and local conditions, by means of which social development would naturally proceed."35

31. Opinion of Sir William Jones, expressed in 1788, as given in ibid.
32. Ibid.
33. Rankin, op. cit., at p. 149.
34. Cambridge History, op. cit., at p 390.
35. Ibid. See also id., at pp. 390-394.
written laws whatever, but such as relate to the ceremonious peculiarities of their superstition."44

The Code dealt with both the substantive and adjectival laws. It was divided into twenty chapters, most of which were further subdivided into sections. It is beyond the scope of this book to give details of the Code by its contents were as follows: Chapter I—Division of Inheritable Property; Chapter or Deposit; Chapter V—Selling a Stranger's Property; Chapter VI—Shares; Chapter VII—Gift; Chapter VIII—Servitude; Chapter IX—Wages; Chapter X—Rent and Hire; Chapter XI—Purchase and Sale; Chapter XII—Boundaries and Limits; Chapter XIII—Shares in the Cultivation of Lands; Chapter XIV—Cities and Towns, and the Fines for Damaging a Crop; Chapter XV—Scandalous and Bitter Expressions; Chapter XVI—Assault; Chapter XVII—Theft; Chapter XVIII—Violence; Chapter XIX—Adultery; Chapter XX—What Concerns Women; Chapter XXI—Sundry Articles.

The Code of Gentoos Laws was not complete work and was full of many vices. It did not represent the whole of Hindu civil law. Sir William Jones in his letter of March 19, 1788, wrote to Lord Cornwallis that the Code "consists like the Roman Digest, of authentic texts, with the names of their several authors regularly prefixed to them, and explained where an explanation is requisite, in short notes, taken from commentaries of high authority. It is, as far as it goes, a very excellent work; but though it appears extremely diffuse on subjects rather curious than useful, and though the Chapter on Inheritance be copious and exact, yet the other important branch of jurisprudence, the Law of Contracts, is very succinctly and superficially discussed, and bears an inconsiderable proportion to the rest of the work. But whatever may be the merit of the original, the translation of it has no authority, and is of no other value than--the many dark passages we find in it. Properly call it a translation; for though Mr. Hallhed pr yet the Persian interpreter had supplied him epitome of the original Sanskrit, in which abstract many essential passages are omitted; though several notes of little consequence are interpolated, from a vain idea of elucidating or improving the text."45

As regards the Hindu criminal law, as presented by the Code, G. C. Rankin says that it "is full of impracticable and absurd directions which cannot represent any systematic practice. Over a very large part of India—a part which included Bengal—the Hindu law had for centuries ceased to have any reality so far as crime was concerned, the Mohommedan law being the public law of the land. The Gentoos Code in 1775 represented the notions of a long dead past so far as regards criminal law. It is not easy to see how Hindu society with its multiplicity of independent chiefs each exercising arbitrary power, though influenced more or less by respect for the Brahmin and his learning, could very well give rise to a coherent system deserving to be called a Hindu law of crime. What is put forward by the text writers as a legal rule is often no more than the fanciful suggestion of a Brahmin writer legislating in vacuo. A long catalogue of absurdities could be quoted from the Gentoos Code—in many cases the absurdity consists in a perverted notion of 'making the punishment fit

44. A Code of Gentoos Laws, Preface, at pp. ix-x. See also id., at pp. x-lxxv.
45. Quoted in Morley, op. cit., at pp. 231-232.
the crime; in others in the minute distinctions upon which the tariff of fines is built; in others in the savagery with which crimes are punished when committed against Brahmins or persons of higher caste than the wrongdoer. Thus in Chapter XV which treats of defamation all possible slanders are imagined and a fine attached to each; and in Chapter XVI all the possible types and methods of assault are specified and a fine provided in each case. So too we get provisions...[which] are extravagances even from the standpoint of the Indian Raja at the beginning of the nineteenth century, who was not in general fanatically inclined towards Brahminism. They render very blunt the edge of the warning with which they are accompanied: 'If a

The Code of Gentoo laws "is now only of historical interest as the starting point of research by European and Indian scholars who translated and commented on the Sankrit work which became the literary sources of Hindu law as administered by the courts."[7]

As regards some work on Mohammedan law, Warren Hastings recommended that Hedaya, the most celebrated law treatise, should be translated into English. This treatise was first translated into Persian, and then Charles Hamilton prepared its English version from the Persian translation. This proved to be a most useful book, though it contained much which was unimportant and omitted altogether the law of inheritance.48

The Halhed's Code could not serve the purpose and it was condemned as a defective work particularly by Sir William Jones who proposed to the Government of Cornwallis in 1788 that a new Digest, confined to the laws of contracts and inheritances, should be compiled. The Government accepted the proposal of Sir Jones, and the result was the composition of two works in Sanskrit—Vivada Saranava and Vivada Bhangarnava at the instance of Sir Jones. The latter work was done by Pandit Jagannath. Sir Jones himself undertook a translation of these works, together with an introductory discourse, for which he prepared a mass of extremely curious materials, but soon he died. In early 1794, he got, however, published Institutes of Hindu Law, or the Ordinances of Manu. After his death, Vivada Bhangarnava was translated by H.T. Colebrooke in 1797. It dealt with the law of contracts and successions only, omitting altogether the law of evidence, the rules of pleading, the rights of landlord and tenant, and other topics, which might have been advantageously inserted in order to render a Digest more generally useful in the courts where the English law did not prevail.44

The Digest met with a wide criticism. It consisted of texts selected from writers of authority, and a running commentary by Jagannatha, generally taken from former ones and frequently containing frivolous disquisitions. Its arrangement rendered its use inconvenient in the extreme; and it was not inaptly characterised as "the best book for a counsel and the worst for a judge."50 Colebrooke himself almost disclaimed it. According to him, "the author's methods of discussing together the discordant

46. 47. 48. 49. 50.
opinions maintained by the lawyers of the several schools, without distinguishing, in an intelligible manner, which of them is the received doctrine of each school, but, on the contrary, leaving it uncertain whether any of the opinions stated by him do actually prevail, or which doctrine must now be considered in force, and which obsolete, renders his work of little utility to persons conversant with the law, and still less service to those who are not versed in Indian jurisprudence, especially to the English reader, for whose use, through the medium of a translation, the work was particularly intended.”

Sir Francis Macnaghten presented a severer criticism: “The plan of Sir William Jones may have been excellent but the execution of it fell to the share of Jagannatha. He has given us the contents of all books indiscriminately. That he should have reconciled contradictions or made anomalies consistent, was not to be expected: but we are often the worse for his sophistry and seldom the better for his reasoning. This incessant attempts to display proficience in logic and promptitude in subtlety, he might have spared without the regret of his readers... Of Jagannath’s digest it is enough in this place to say that the labourer might have given a more appropriate appellation to his work.”

Notwithstanding, however, the criticism of the Digest, “there is no doubt...that it contains an immense mass of most valuable information, more especially on the law of contracts, and will be found eminently useful by those who will take the trouble of familiarising themselves with the author’s style and method of arrangement.”

Sir William Jones had made his contribution in Mohammedan law also. In 1762, he published the text of the Bighamat at Bahis, a short treatise on the law of inheritance accompanied by a literal translation, as obscure as the original. The highest authority on the law of inheritance among the Sunnis in India was Sirajiya. In 1792, Sir Jones published the text of the Persian version of Sirajiya and its English translation, known as Al-Sirajiya, or the Mohammedan Law of Inheritance, with a Commentary. The work was done with great ability.

It, however, needs some comment. According to Neil Ballie, “The Sirajiya is very brief and... Commentary, or a living teacher to unfold a... difficulty be understood even by Arabic scholars. It is therefore not a matter of surprise that its translation by Sir William Jones should be almost unknown to English lawyers, and be perhaps never referred to in His Majesty’s Supreme Courts of Judicature in India. With the assistance of the Sureefee, it is brought within the reach of the most ordinary capacity; and if the abstract translation of that Commentary, for which we are also indebted to Sir William Jones, had been more copious, nothing further would have been requisite to give the English reader a complete view of this excellent system of inheritance.” Until, however, the appearance of Baillie’s work on inheritance, Sir Jones’ translation of the Sirajiya was undoubtedly of considerable utility to the English Judges, and supplied to a great extent the omission in the Hedaya.

51. Quoted in ibid., from Colebrookes Two Treatises on the Hindu Law of Inheritance, Preface, p. II (1810).
52. Quoted in Rankin, op. cit., at p. 145.
54. Id., at p. 308.
55. Id., at pp. 304-305.
56. Actually it appears to be Sharifiah, Commentary on Sirajiya.
58. Id., at pp. 305-306.
So far we have discussed to initial attempts on the part of Europeans to prepare English versions of Hindu and Mohammedan laws. The later works of great merit may also be introduced here. In 1810, Colebrooke translated the sixth chapter of Mitakshara on inheritance; "it is impossible to rate too highly the utility of this translation, the learned author having accompanied it by elucidatory annotations and glosses from his own pen, and drawn from those numerous sources to which his peculiar opportunities and immense erudition gave him a ready access."59 Another translation by Colebrooke was that of the Jimuta Vahana's chapter on inheritance, the celebrated Dayabhaga. This was annotated, commented upon, and illustrated with equal ability and learning. Both the translations came to be known as the Treatises on the Hindu Law of Inheritance.60

Sir W. H. Macnaghten proceeded to translation of the Vyavahara Matrika of justice and including the law of the first portion of the second book of Mitakshara, published in 1828. The Vyavahara Mayukha, a great authority in the Maharashtrian School, was translated into English by Harry Borraudaile.64 In the same year, Arthur Sticke published his work Summary of the Law and Customs of Hindu Castes within the Dekhan.65 The English text-books on the Hindu law began to appear from 1824 In this year Sir Francis Macnaghten, the first writer of an original treatise on Hindu law, published his work—Considerations on the Hindu law. He did a valuable work consisting of an enunciation of principles illustrated copiously by arguments and decided cases given in extenso; the first two chapters were translations from the Mitakshara. The preface to this work spoke in the most disparaging terms of the Hindu law, and, yet, at the same time, advocated its preservation. The whole work was however pervaded by a spirit of exaggerated self-estimation and unjust depreciation of everything not consonant with the author's professional prejudices.66

In 1825, Sir Thomas Strange published the first edition of his admirable work on Hindu law; the second came in 1830. The book principally dealt with such portions of it as concerned the administration of justice in India. Strange's work was praised in all the quarters, as "open-minded, balanced, well-informed-dealing reasonably alike with the proper statement of accepted principles and with points of doubt or difficulty."59 According to W. H. Morley, the "excellent work of Sir Thomas Strange leaves little to

59. Id., at p. 218.
60. Id., at p. 221. See also id., note 3, at p. 218.
61. Id., at d. 218; Rankin, op. cit., at p. 144.
63. Id., at p. 229; Rankin, op. cit., p. 144.
64. Morley, op. cit., at p. 227.
65. Rankin, op. cit., at p. 147. See also Morley, op. cit., at pp. 239-240.
66. Formerly Advocate-General at Calcutta, and later Judge of the Madras Supreme Court.
68. The first Chief Justice of the Madras Supreme Court.
69. Rankin, op. cit., at p. 146.
desire, so far as regards the Hindu law of the South of India; whilst the
clearness of arrangement, the aptness of the illustrations, and the elegance of
its diction, well entitle it to a place by the side of the Commentaries of Black-
stone. The cases which the learned author has appended to his work, under
the title of ‘Responsa Prudentum,’ are very valuable, and they are rendered
still more so by the numerous notes and illustrations which are constantly added
by Colebrooke, Sutherland, and Ellis.”

In 1829, Sir W. H. Macnaghten published his great work—Principles
and Precedents of Hindu Law. The ‘principles’ are clear, concise, and lucid
in their order, and the cases given under title of ‘Precedents,’ are of a most
important nature. The latter are entitled to great weight, as having been
selected...with the utmost care and attention. The whole work was composed...
..after collecting all the information that could be procured from every quarter,
and after a careful examination of all the original authorities and of all the
opinions of the Pandits recorded in the Supreme Court at Calcutta for a series
of years. In a judgment...of the Privy Council, Sir W. Macnaghten’s work is
mentioned as by far the most important authority amongst the Hindu law books
by European authors; and it is stated...to be constantly referred to in the
Supreme Court at Calcutta as all but decisive of any point of Hindu law con-
tained in it; and that more respect would be paid to it by the Judges there,
than to the opinions of the Pandits.”

It is said about the works of Sir Thomas and W. Macnaghten that they were “of the greatest practical utility,
real guides to the courts and to the profession,” and further they “were the
earliest attempts to make systematic use of the answers of the ‘law officers’ and
the decisions of the courts thereon”.

In 1856, an excellent manual of Hindu law was published by T. L.
Strange. The work was expressly produced with a view to presenting “the
results of Sir Tomas’ labours in a cheap and compendious form, together
with such additional materials as the working of the courts since his time
have furnished.” It was a satisfactory summary of the Hindu law as applied
in courts in India. Its Chapter 13 contained some curious and interesting
particulars relating to the Malabar law. In 1878 J. D. Mayne published
his work—Hindu Law and Usage. This has proved to be a work of great
merit. The work of Mayne completes our list of important works relating
to the Hindu law done by Europeans.

Coming to the works on Mohammedan law, a general digest of the
Imamiya law in temporal matters was compiled under the superintendence
of Sir William Jones. The first portion of this Digest was translated into Eng-
lish by Colonel John Baillie in 1805, who introduced certain valuable additions.
In 1850, Neil Baillie published a translation of selected portions from two
books of the Fatawa-al-Alamgiri comprising the whole subject of sale, known
from...adopted in making the selections was to
a general proposition, but to reject parti-
cular cases, except when they were considered to involve or illustrate some

71. Morley, op. cit., at p. 239. See also Rankin, op. cit., at p 146.
72. Rankin, op. cit., at p. 146.
73. Son of Sir Thomas, and a Judge of the Madras SadrardDiwani Adalat.
75. For other works and comments etc see id., at pp. 150-156; Morley, op. cit., at
   pp. 240-241.
principle or maxim of law.\textsuperscript{76} Baillie added explanatory notes throughout. The work was a most important addition to the translated treatises on Mohammedan law.\textsuperscript{77}

Sir W. H. Maenaghten’s Principles and Precedents of Mohammedan Law was the first text book on Mohammedan law. It was an accurate work of high authority. It proved to be of the greatest practical utility and a real guide to the courts and to the profession. The Precedents were of the greatest importance, and the original extracts from the Hadaya and other authorities, which were subjoined as an appendix, materially increased the value of the work.\textsuperscript{78} Neil Baillie’s excellent treatise on the law of inheritance, known as the Mohammedan Law of Inheritance according to Aboo Huneefa and his followers, published in 1832 rendered an intricate subject perfectly intelligible. Actually that was little more than a condensation of the Sirajiya and Sharifiya. Excellent and authoritative works on Mohammedan criminal law were produced by Harington, Khichard Clark, Beaufort and Baynes.\textsuperscript{79} Towards the close of the century, R. K. Wilson’s Anglo-Mohammedan Law, A Digest, was published. It was preceded by a historical and descriptive introduction of the special rules applicable to Mohammedans as such by the civil courts of British India, with full references to modern and ancient authorities. This completes our list of some important works relating to the Mohammedan law done by Europeans.

Legislation

The English administrators started with the policy of non-interference with the administration of civil laws of Hindus and Mohammedans; they could not, however, pursue it strictly for a long time because of changing conditions, and had to amend the laws to some extent gradually and slowly. They had also to introduce social reforms by legislation. They, however, avoided codification of Hindu and Mohammedan Laws. In fact, the recommendation of the Second Law Commission that the Hindu and Mohammedan Laws should not be codified was kept in view by the authorities throughout the British regime in this country.

Some of the Acts which amended or affected, directly or indirectly, both the Hindu and Mohammedan laws, or introduced social reforms are as follows: (i) The Caste Disabilities Removal Act, 1850. This Act did away with so much of any law or usage as inflicted on any person forfeiture of rights or property, or might be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the exercise of rights of, or being deprived of caste.\textsuperscript{80} (ii) The Government to divest itself and vest it in committees.\textsuperscript{81} (iii) Legalized, under certain circumstances, converts to Christianity, deserted or husband.\textsuperscript{82} (iv) Contract

\textsuperscript{76} Quoted in Morley, op cit., at p. 311, from Preliminary Remarks, p. xvi, in the said work
\textsuperscript{77} Morley, op cit., at p. 314.
\textsuperscript{78} Id., at p. 318; Rankin, op cit., at p. 146.
\textsuperscript{79} Morley, op. cit., pp. 310-319. For other works up to 1850, see id., at pp. 319-323.
\textsuperscript{80} For details, see A. I. R. Manual, Vol. 1, at pp. 835-839 (1919).
\textsuperscript{81} For details see A. I. R. Manual, Vol. 13, at pp. 974-993 (1962).
Act, 1872, defined and amended certain parts of the law relating to contracts.\(^{53}\) (5) Special Marriage Act, 1872, provided a form of marriage for persons not professing the Christian, Jewish, Hindu, Mohammedan, Parsi, Buddhist, Sikh or Jain religion, and for persons professing the Hindu, Buddhist, Sikh or Jain of doubtful validity.\(^{61}\) (6) Majority \(^{63}\) and effected more uniformity and certainty respecting the age of majority. The Act did not, however, affect the capacity of any person to act in the matters of marriage, dower, divorce and adoption; the religion or religious rites and usages of any class of citizens; and the capacity of any person who had already attained majority under the law applicable to him.\(^{65}\) (7) Probate and Administration Act, 1881, gave facilities for obtaining probate or letters of administration where such grants were desired in regard to the estates of persons not governed by the Succession Act, 1855.\(^{65}\) (8) Succession Certificate Act, 1889, widened the power of an executor to dispose of the deceased’s property.\(^{67}\) (9) Trusts Act, 1882, defined and amended the law relating to private trusts and trustees. The Act did not affect the rules of Mohammedan law as to \(waqf\), or the mutual relations of the members of an undivided family as determined by any customary or personal law, or apply to public or private religious or charitable endowments, or to trusts etc.\(^{66}\) (10) Religious Societies Act, 1880, simplified the manner in which certain bodies of persons associated for the purpose of maintaining religious worship might hold property acquired for such purpose, and provided for the dissolution of such bodies and adjustment of their affairs and for decision of certain questions relating to such bodies.\(^{69}\) (11) Transfer of Property Act, 1882, defined and amended certain parts of the law relating to the transfer of property by act of parties.\(^{90}\) (12) Charitable Endowments Act, 1890, provided for the vesting and administration of property held in trust for charitable purposes, not relating exclusively to religious teaching or worship.\(^{91}\) (13) Guardians and Wards Act, 1890, consolidated and amended the law relating to guardian and ward.\(^{92}\) (14) Marriages Validation Act, 1892, validated marriages solemnized between Indian Christians and persons not being Indian Christians.\(^{93}\) (15) Foreign Marriage Act, 1903.\(^{94}\) (16) Charitable and Religious Trusts Act, 1920, provided for more effectual control over the administration of charitable and religious trusts.\(^{95}\) (17) Succession Act, 1925, consolidated the law applicable to intestate and testamentary succession, and superseded the Succession Act of 1865, Hindu Wills Act of 1870, Probate and Administration Act of 1881, Succession Certificate Act of 1889, and certain other Acts.\(^{96}\) (18) Child Marriage Restraint Act, 1929, restrained the solemnization of child marriages.\(^{97}\)

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83. For details, see id., at pp. 3254-3632. See also Rankin, op. cit., at pp. 83-110.
86. For details, see Rankin, op. cit., at pp. 53-54.
87. Ibid.
89. For details, see Manual, Vol. 13, op. cit., at pp. 993-996.
91. For details, see Manual, Vol. 1, op. cit., at pp. 961-968.
94. Ibid.
95. Ibid.
96. Ibid.
97. Ibid.
if a Hindu governed by the Dayabhaga school of Hindu law died intestate leaving separate property, and if a Hindu governed by any other school of Hindu law or by customary law died intestate, leaving separate property, his widow or widows would be entitled to the same share as a son in the property in respect of which he died intestate. Provided that the widow of a predeceased son would inherit in like manner as a son if there was no son surviving of such predeceased son, and would inherit in like manner as a son's son if there was surviving a son or son's son of such predeceased son. Provided further that the same provision would apply mutatis mutandis to the widow of a predeceased son of a predeceased son. When a Hindu governed by any school of Hindu law other than the Dayabhaga school or by customary law died, having at the time of his death an interest in a Hindu joint family property, his widow would have in the property the same interest as he himself had. But it was provided that any interest devolving on a Hindu widow under this section would be the limited interest known as a Hindu woman's estate, provided, however, that she would have the same right of claiming partition as a male owner. Section 3 was not to apply to an estate which by a customary or other rule of succession or by the terms of the grant applicable to it descended to a single heir or to any property to which the Succession Act, 1925, applied. Section 2 of the Act made it clear that notwithstanding any rule of Hindu law or custom to the contrary, the above provisions would apply where a Hindu died intestate.108 (10) Hindu Marriage Disabilities Removal Act, 1946, removed certain disabilities and doubts under Hindu law in respect of marriages between Hindus.109 (11) Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, gave Hindu married women a right to separate residence and maintenance. Section 2 of the Act provided that notwithstanding any custom or law to the contrary, a Hindu married woman would be entitled to separate residence and maintenance from her husband on one or more of the following grounds: (a) if he was suffering from any loathsome disease not contracted from her; (b) if he was guilty of such cruelty towards her as rendered it unsafe or undesirable for her to live with him; (c) if he was guilty of desertion; (d) if he married again; (e) if he ceased to be Hindu by conversion to another religion; (f) if he kept a concubine in the house or habitually resided with a concubine; (g) for any other justifiable cause. Provided that a Hindu woman would not be entitled to separate residence and maintenance from her husband if she was unchaste or ceased to be a Hindu by change to another religion or failed without sufficient cause to comply with a decree of a competent court for the restitution of conjugal rights.108

Acts which amended or affected, directly or indirectly, Mohammedan law only, or introduced social reforms are as follows: (1) Mussalman Waqt Validating Act, 1913, declared the right of Mohammedans to make settlements of property by way of 'wakf' in favour of their families, children and descendants, and for themselves.109 (2) Mussalman Waqt Act, 1923, made provision for the better management of wakf property and for ensuring the

108. For more details, see Manual, Vol. 5, op. cit., at pp. 4432c-4432f.
109. For more details, see id., at p. 4428.
keeping and publication of proper accounts in respect of such properties.\textsuperscript{110} (3) Mussalman Wakf Validating Act, 1930, gave retrospective effect to the Act of 1913.\textsuperscript{111} (4) Muslim Personal Law (\textit{Shari\'at}) Application Act, 1937, made provision for the application of the Mohammedan Personal Law (\textit{Shari\'at}) to Mohammedans. Section 2 of the Act provided that notwithstanding any custom or usage to the contrary, in all questions (except those relating to agricultural land) regarding intestate succession, special property of females, including personal property interited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of marriage, including talab, ila, zihar, talaq, khula and mubaraq, maintenance, dowry, guardianship, gifts, trust and trust properties and \textit{waks} other than charities and charitable institutions and the rule of decision in cases where the Mohammedan Personal Law is applicable. Marriages Act, 1939, consolidated and clarified the provisions of Mohammedan law relating to suits for dissolution of marriage by women married under Mohammedan law and to remove doubts as to the effect of the renunciation of Islam by a married Muslim woman on her marriage tie.\textsuperscript{119}

\textbf{Post-Independence Era}

Many important Acts in respect of Hindu and Mohammedan laws have been passed after Independence. They are discussed below under two heads, namely, (1) Acts amending or affecting directly or indirectly, Hindu and Mohammedan laws or introducing social reforms, and (2) Acts codifying Hindu law.

\textbf{Acts amending or affecting Hindu and Mohammedan laws or introducing social reforms}

The Acts in respect of both the Hindu and Mohammedan laws are as follows: (1) The Special Marriage Act, 1954, revised and replaced the Act of 1872 and provided a special form of marriage in certain cases. It made provisions for the registration of such and certain other marriages and for divorce.\textsuperscript{114} (2) Miscellaneous Personal Laws (Extension) Act, 1959, amended and repealed certain specified Acts relating to personal laws.

The Acts amending or affecting the Hindu Law or introducing social reforms are the following: (1) Hindu Marriages Validity Act, 1949, made provision for the validity of marriages between Hindus, Sikhs and Jains and their different castes, sub-castes and sects. (2) Dowry Prohibition Act, 1961, prohibited the evil practice of giving and taking of dowry, not including dower or \textit{mahr} in the case of persons to whom \textit{Shari\'at} applies.\textsuperscript{115}

The Act in respect of Mohammedan law is Wakf Act, 1954, passed to provide for the better administration and supervision of wakfs. Section 5 of the Religious Endowments Act, 1863; Charitable Endowments Act, 1890;

\textsuperscript{110} For details, see id., at pp. 606-622.
\textsuperscript{111} For details, see id., at pp. 629-630.
\textsuperscript{112} For more details, see id., at pp. 602-606.
\textsuperscript{113} For details, see Manual, Vol. 5, op. cit., at pp. 5802-5802. For further study, see Asaf A. A. Fyazee, Recent Developments in Mohammed Law in India (1900-1950), in Some Aspects of Indian Law Today, published by the British Institute of International and Comparative Law, at pp 46-50 (1964).
\textsuperscript{115} For details, see Manual, Vol. 16, op. cit., at pp. 721-723.
Charitable and Religious Trusts Act, 1920, and the Mussalmān Wakf Act, 1923, do not apply to any wakf to which the Act of 1954 applies.\(^{116}\)

**Acts codifying Hindu law**

The Hindu Marriage Act, passed in May 1955, has amended and codified the law relating to marriage among Hindus. The Hindu Succession Act passed in June 1956 has amended and codified the law relating to intestate succession among Hindus. The Hindu Minority and Guardianship Act, passed in August 1956, has amended and codified certain parts of the law relating to minority and guardianship among Hindus. The Hindu Adoptions and Maintenance Act, passed in December 1956, has amended and codified the law relating to adoptions and maintenance among Hindus. These Acts have opened a new chapter in the history of Hindu law, and they are viewed with great relief by modern, western-educated Hindus.\(^{117,118}\)

There was certainly a case for codification of certain branches of Hindu law. Many idealists and totalitarians to achieve unity and certainty had to agree that "there existed a large number of anomalies and inequitable rules in the complicated structure of Hindu law which could be dealt with only by legislation. It could no longer be denied that the fast-moving conditions and the social, economic and political transformations in the country had rendered imperative substantial and radical changes in that law. It has to be admitted that far-reaching and fundamental changes had become inevitable for they alone could furnish fair and equitable solutions to some of the most controversial questions relating to the law of marriage and succession."\(^{119}\)

The question of codification of Hindu law has now been debated for about a century both by law reformers strongly believing in the theory of the "natural code of law" and by those expressing the desire of such a code along been spacious and complicated structure was grounded in sentiment and the class of uninformed and orthodox was considerable sentiment born of reverence for an institution which had its roots in hoary antiquity. It was not realised by some dry traditionalists that the venerated authors of the Dharmashastras had themselves been progressive and tried to keep the law in harmony with their environments and in general responded to changing ideas, changing customs and the march of time."\(^{119}\)

In 1941, a Hindu Law Committee was appointed to examine Hindu law. It recommended that "it should be codified in gradual stages beginning with the law of intestate succession and marriage. The Committee ceased to function in 1944. The Committee made recommendations which were accepted by the government and were embodied in the Hindu Succession Act, 1956, and the Hindu Marriage Act, 1955."\(^{119}\)

\(^{116}\) For details, see id., at pp. 207-230.

\(^{117}\) See Gunther-Dietz Sontheimer, Recent Developments in Hindu Law, in Some Aspects of Indian Law Today, op. cit., at p. 32.

\(^{118}\) D. F. Mullis, Principles of Hindu Law, Introduction, at pp. 70-71 (1959). See also Sontheimer, op. cit., at pp. 33-34.

\(^{119}\) Mullis, op. cit., at p. 71. See also Acharyya, op. cit., at pp. 334-400; Raisko, op. cit., at pp. 153-160.
was to evolve a uniform Code of Hindu law which would apply to all Hindus by blending the most progressive elements in the various schools of law which prevailed in different parts of the country. The draft of the Code presented by the Committee was to be regarded as an integral whole so that no part of it would be judged as if it stood by itself. The Hindu Law Bill remained on the anvil for a long time and ultimately those in charge of it decided to split it into certain parts and to move the Parliament after placing each part separately before it. Accordingly the whole Code was broken into four parts which were passed as Acts in the order already given. A brief account of these Acts is given below.

Hindu Marriage Act, 1955.—Except as otherwise expressly provided in the Act, any text, rule or interpretation of Hindu law or any custom or usage as part of that law ceased to have effect with respect to any matter provided for in the Act at its commencement; any other law ceased to have effect in so far as it was inconsistent with the Act. The Act also repealed certain Acts including the Hindu Marriage Disabilities Removal Act, 1946, and the Hindu Marriages Validity Act, 1949.

The Act brought about certain fundamental and salutary changes in the law of marriage, of which the following are worth-noting: "I. A Hindu Marriage, by which is meant a marriage solemnized in accordance with the requirements of the Act, can take place between any two persons who come within the broad connotation given by the Act to the expression 'Hindu' (S. 2). Inter-marriage between persons of different castes—Brahmin, Kshatriya, Vaishya and Sudra—or persons professing the Hindu, Buddhist, Jain or Sikh religion is not prohibited. Section 29 of the Act gives retrospective effect to this rule and lays down that a ceremonial marriage solemnized before the commencement of the Act between persons who come within the broad connotation of the expression 'Hindu' if otherwise valid, shall not be deemed to be or to have been invalid by reason only of the fact that the parties belonged to these different religions or different castes. The division of Hindus formerly made by reference to their castes—Brahmin, Kshatriya, Vaishya and Sudra—has now no bearing on the subject of marriage.

"II. Monogamy which is essentially the voluntary union for life of one man with one woman to the exclusion of all others, is now enforced by legislation (S. 5 (iii)]. Any marriage between two Hindus solemnized after the commencement of the Act is null and void if at the date of such marriage either party had a husband or wife living (S. 17).

"III. Bigamy is rendered punishable as an offence under the Penal Code. (S. 17).

"IV. The conditions and requirements of a valid Hindu marriage are considerably simplified (Ss. 5 and 7).

"V. Reliefs by way of judicial separation, declaration of nullity of marriage and divorce are recognized (Ss. 10 to 13).

"VI. Provision is made for legitimacy of children of void and voidable marriages. (S. 16).

"VII. Provision is made for alimony pendente lite, permanent alimony and maintenance (Ss. 24 and 25).

120. Mulia, op. cit., at p. 71.
“VIII. Wide discretionary powers are conferred on the court in any proceeding under the Act, to pass orders relating to the custody, maintenance and education of minor children of the parties (S. 26).”

Hindu Succession Act, 1956.—Apart from the same provision made as to its over-riding effect as made by the Hindu Marriage Act, the Succession Act repealed the Hindu Law of Inheritance (Amendment) Act, 1929, and the Hindu Women’s Rights to Property Act, 1937.

The Act lays down a uniform and comprehensive system of inheritance, and has a wide application. (S. 2). Section 6 retains the Mitakshara joint family system with coparcenary and survivorship in a modified form. According to section 7, the interest in the joint family property of a Malabar tarwad and tawazi or illom can devolve only by testamentary or intestate succession, thus amounting to a virtual extinction of the legal foundation of the Malabar joint family. The scheme of the Act in the matter of succession to the property of a Hindu dying intestate is to lay down a set of general rules for succession to the property of a male Hindu in sections 8 to 13 including rules relating to ascertainment of the shares and portion of the various heirs which may be described as the Statute of Distribution. Section 17 provides for certain modifications and changes in the general scheme of succession to the property of male and female Hindus in relation to persons hitherto governed by the Malabar and Aliyasantana law. The existence of a system founded on matriarchy in certain parts of Southern India in contradistinction to that in the rest of the country which is patriarchal having the common ancestor as the founder of the family and in which relationships primarily by agnation, has been well established and judicially recognised for a long time. Recently there had found place on the statute-book a number of enactments regulating succession to the property of persons governed by the Marumakkattayam, Aliyasantana and Nambudri Laws. Reference to the rules enacted in Section 17 of the Act will show that the Legislature while aiming at a uniform Code has taken care to provide for suitable modifications having regard to the law of those who favoured the matriarchate. Sections 18 to 28 of the Act are headed “General provisions relating to succession” and lay down rules which are supplementary to the provisions in Sections 5 to 17. The rules laid down in those sections are not merely explanatory of the general rules for succession, some of them enact substantive provisions involving legal principles.”

It may be pointed out that a close study of the Act shows that “the main object of the Act seemed to have been to raise the rights of women to an approximately equal level with men and it has been called the Magna Carta of the rights of women to property.”

Hindu Minority and Guardianship Act, 1956.—This Act is supplemental to the Guardians and Wards Act, 1890. It is of the same wide application and has the same over-riding effect as the former two Acts. Reference to the provisions of this short enactment will show that it is principally intended to crystallize in statutory form as to who are the

121. Id., at pp. 777-778. For details, see id., at pp. 769-907; and Sontheimer, op. cit., at pp. 35-39.
123. Mulla, op. cit., at pp. 913-914. For details, see id., at pp. 911-1017; and Sontheimer, op. cit., at pp. 39-43.
124. Sontheimer, op. cit., at pp. 33-40. See e.g., S. 14, which declares the property of a female as her absolute property.
persons entitled to act as the natural and testamentary guardians of a Hindu minor and particularly to impose certain limitations on the powers of such guardians in the matter of disposal of, and management of the immovable property of the minor. Section 6 declares the status of the father and mother as natural guardians of the minor children in respect of their person as well as property; and of the husband as the natural guardian of the person and property of his minor wife. There is no substantial change in the law on this matter. But material change is effected in the matter of the powers of the natural guardian which are now substantially the same as and subject to the same limitations as are imposed upon the powers of a guardian declared or appointed by the Court under the Guardians and Wards Act. The result is that the natural guardian does not now have in the matter of disposal of the immovable property of the minor, any powers larger than those conferred on a guardian appointed or declared by that Act. The language of Section 8 of the present Act in relation to limitations on the powers of management of immovable property of the minor is in pari materia with that of the provision contained in Section 29 of the Guardians and Wards Act. Section 9 of the present Act rules that Hindu father has the power to appoint a testamentary guardian of his minor legitimate children both in respect of the person and property of such children. A similar power is now recognised in case of the mother where the father has predeceased the mother. A mother is also entitled to appoint a testamentary guardian of her minor illegitimate children. The powers, however, of any testamentary guardian of a minor Hindu in the matter of dealing with and management of the immovable property of the minor are not to be governed by the personal law of the parties but are now subject to the same limitations as are imposed upon the powers of a natural guardian. The result of these principal changes in the law relating to Hindu minors is that neither a natural guardian nor testamentary guardian can now, without the sanction of the Court, mortgage, charge, sell or otherwise alienate any immovable property of the minor or lease any part of such property for a term exceeding five years or for a term extending more than one year beyond the date of attainment of majority by the ward. Any disposal of immovable property by a natural guardian or a testamentary guardian in contravention of the above limitations is voidable at the instance of the minor. The power vested in the Court to sanction any such disposal of the minor's immovable property can only be exercised if there is necessity for such disposal or if the Court is satisfied that the disposal of the property is to the evident advantage of the minor. Another change brought about by the present enactment relates to de facto guardians. The powers of a de facto guardian or a de facto manager of a Hindu minor to bind the minor's state by alienations of immovable property or the minor in case of necessity or for the benefit of the minor's estate have been recognized by the Courts in numerous decisions. Section 11 of the Act now abrogates those powers and lays down in express terms that...no person shall be entitled to dispose of, or deal with, the property of a Hindu minor on the ground of his or her being the de facto guardian of the minor. It may also be pointed out that the Act lays down the salutary rule that in appointing or declaring guardians of the person or property of a Hindu minor, the paramount consideration of the court should be the welfare of the minor.

125. Mulla, op. cit., at pp. 1024-1025. For details, see Id., at pp. 1021-1042; and Sontheimer, op. cit., at pp. 43-44.
126. Id., at p. 1025.
Hindu Adoptions and Maintenance Act, 1956.—This Act is of the same wide application and has the same over-riding effect as the Marriage Act. It repealed the Hindu Married Women’s Right to Separate Residence and Maintenance Act, 1946, and section 30 (2) of the Hindu Succession Act, 1956.

The Act "codifies the law of adoption and contains a fasciculus of rules relating to the capacity and right of male and female Hindu to take in adoption a son or daughter who must be a ‘Hindu,’ an expression to be understood in the wide comprehensive meaning given to it in the Act. It also deals with the subjects of persons who may give in adoption and persons who may be taken in adoption. One principal provision of the Chapter [dealing with adoption] relates to the formal and ceremonial requirements of the act of adoption. Another vital provision lays down the result and effects of a valid adoption. It is made abundantly clear that all adoptions made after the Act came into operation are to be regulated and governed by the provisions contained in the Chapter and that any adoption thereafter made in contravention of any of those provisions would be null and void. An adoption which is void does not affect the status or rights of any of the parties. It creates no rights in favour of the adoptee boy or girl in the adoptive family. Nor does the adoptee lose any rights in the family of his or her birth. Adoptions made prior to the coming into force of the Act... are not affected by the rules relating to the validity and effect of adoptions contained in this Act. Their validity and effect must be determined by the law as it stood before the Act came into operation.

"Chapter III of the Act codifies the law of maintenance applicable to Hindus. A Hindu is under the legal obligation to maintain his wife, his minor sons, his unmarried daughters and his aged parents. The obligation is personal. It arises from the very nature of the relationship and exists whether he possesses any property or not. The Act gives statutory form to that obligation and rules that a female under a legal obligation to maintain aged or infirm parents. In the matter of maintenance under the Act the scheme is to deal in the first place with the right of maintenance of wife from her husband; the right of maintenance of minor children (legitimate and illegitimate) from the father and mother; and the right of maintenance of aged and infirm parents from their sons and daughters. In these cases as also in case of a widowed daughter-in-law the right is against an existing person, husband, father, mother, son, daughter or father-in-law, as the case may be. After stating the right of the wife, the minor children and others the Act proceeds to define dependents of a deceased Hindu and lays down rules relating to the right of maintenance of dependants from heirs of a deceased Hindu or other beneficiaries who might have inherited the estate of such deceased person.”

Comment

"The objects achieved by the new legislation are substantial unification of Hindu law by blending much that was progressive in the various schools

127. Id., at pp. 1047-1048, 1050-1051. For details, see id., at pp. 1045-1059, and Somtheimer, op. cit., at pp. 43-45."
of law which prevailed in different parts of the country and removal of many anomalies and incongruous injunctions. One aim of this legislation was to act; it is submitted rightly, on the principle that where the reason of the rule had ceased to exist there was little justification for insistence upon its preservation: Cessante ratione legis cessa ipsa lex. Renascent India of the post-independence era appreciated the value of a fresh and broadened outlook in matters affecting the rights social, economic and political of the citizen regardless of sex. Adult suffrage and political parity were forerunners to the recognition of all that was implicit in the constitutional directives and fundamental guarantees of equality of status and equality before the law announced in the Constitution. This underscoring of the rights of women to be in equali jura finds concrete shape in the new legislation."

123. Id., at p. 73. See also Sontheimer, op. cit., at p. 45.
CHAPTER XXXI
LAW REPORTING

In England, the gradual development of the art of law reporting reflects the growth of the authority of precedent. A court is bound by the ratio decidendi of every case decided by a higher court, and in the case of the House of Lords and the Court of Appeal, the position has traditionally been that they are bound by their own decisions. But now it appears that the House of Lords is not attached to the doctrine of precedent in all circumstances. It has been observed by Lord Reid in Scruttons Ltd. v. Midland Silicones Ltd. that the House of Lords may question or limit the ratio decidendi of a previous decision in three classes of cases: First, where it is obscure, secondly, where the previous decision itself is out of line with other authorities or established principles; and thirdly, where it is much wider than was necessary for the decision so that it becomes a question of how far it is proper to distinguish the earlier decision. In a later case, Chancery Lane Safe Deposit and Offices Company, Ltd. v. Inland Revenue Commissioners, the opinion of Lord Reid and Lord Upjohn was that the rule of the House of Lords neither to reverse nor to depart from a previous decision of the House applied to the reasoning of the decision but did not bind the House to follow a previous case merely because it was indistinguishable on its fact. As regards the Court of Appeal, it does not appear that there is any departure from the traditional position.

In India, there has been no such development of the art of law reporting and the growth of the authority of precedents as in England. The method of law reporting to preserve judicial decisions and the principle of the authority of precedent have been adopted in this country from England. As in England, a court in this country is bound by the ratio decidendi of every case decided by a higher court; but the Supreme Court and the High Courts are not bound by their own decisions. In Bengal Immunity Company Ltd. v. State of Bihar, the Supreme Court held that it can depart from a previous decision if it is convinced of its error and its baneful effect on the general interests of the public.

1. Harold Potter, An Historical Introduction to English Law and its Institutions, at p. 262 (1918) For history of law reporting in England, see id., at pp. 258-268;
2. (1962) 1 All E. R. 1.
3. Id., at p. 12.
5. Id., at pp. 10, 21.
6. Id., at pp. 10, 21.
7. Art. 141 of the Constitution provides that the law declared by the Supreme Court is binding on all courts in India. S. 212 of the Government of India Act, 1935, had laid down that the decisions of the Privy Council and the Federal Court were binding on all Indian courts. In fact both these provisions merely gave legislative sanction to a long recognised practice of the courts. Though the decisions of the High Courts have not been invested with the authority of Law by any enactment, it is well settled that the courts subordinate to a High Court are bound by its decisions. Thus the binding force of precedents has been firmly established in Indian Jurisprudence. See Law Commission of India, 14th Report, at pp. 665-672 (1958).
The history of law reporting in India may be divided into two parts—the first dealing with early stages of its development roughly a period 1813-1862), and the second dealing with a more regular course which may be said to have commenced with the establishment of Presidency High Courts in 1862.

**Early stages**

In 1813, the necessity of establishing the authority of precedent in India was for the first time emphasized in the following words: "...it should be enacted by a Regulation, that from a given period, the judgments of the Court shall be considered as precedents binding upon itself and on the inferior courts in similar cases which may arise thereafter. This will have the effect of making the superior Courts more cautious, and of introducing something like a system for the other Courts, the want of which is now very much felt." Further, "Hitherto it has not been much the custom to refer to precedent; and for ought the Judges of the Court may know, the same points may have been decided over and over again, and perhaps not always the same way. It is obvious, that having something like a system established would tend to abridge the labours of the Civil Court."

Apart from the necessity of the publication of reports of cases involving questions of native law, the publication of other reports was also of the utmost importance for the guidance both of the Courts themselves, and of the legal practitioners. William Maapherson observed in 1850 that the "practice and doctrines of the Civil Courts must be deduced, in great measure, from an examination of the decisions at large, both those which have been specially adopted and published as precedents, and those which are issued monthly as a record of the ordinary transactions of the Sadar Courts—; for all decisions practically tend to show by what principles the Court is governed ; and they become law, that is to say, they guide men in their private transactions, and they regulate the decisions of the Courts. No one can make the examination to which I have referred without perceiving that there is a large body of living doctrine, which appears to mature itself by degrees in the minds of experienced judicial officers, but which is not to be met with in any definite form. Yet by this test the judgments of the inferior Courts are necessarily tried, and no small portion of them are quashed for erroneous procedure, frequently with great severity of comment upon the part of the highest tribunal."

In this context we refer to the collections of reports on the basis of the work of W. H. Morley.

"Reports of cases decided by Crown’s Courts.—The published collections of reports of Indian Decisions were not many, but they already existed in sufficient numbers to be of the greatest practical utility, and additions were made to them day by day.

The decisions of the Privy Council on appeal from India were originally inserted in their places in the reports of Knapp and Moore. Then they were published separately by latter gentlemen under the title 'Indian Cases' and appeared at intervals. There was also a valuable collection of the printed cases.

11. See id., at pp. 331-334.
12. These monthly collections of decisions are referred below in the text.
in Indian Appeals, with the judgments annexed, prepared and arranged by Lawford, but it was never published.

Morley inserted in the Appendix to his Digest of Indian Cases, a valuable series of notes of cases of the Calcutta Supreme Court by Judge Sir Edward Hyde East. The notes contained many important decisions on native law and questions relating to the jurisdiction of the Court.

Reports of cases were inserted, by way of illustration, by Sir Francis Macnaghten in his Considerations on the Hindu Law, as current in Bengal, published in 1824. These Reports, from the nature of the work from which they were extracted were of course confined to cases involving questions of Hindu law.

Notes of cases were found in Longueville Clarke’s editions of the Rules and Orders of the Calcutta Supreme Court, published in 1829; of the additional Rules and Orders which appeared in the same year; and of the Rules and Orders for 1831-32, published in 1834. These notes of cases were very valuable, many of those in the two latter collections containing the judgments in full, and relating to points of native law of the greatest interest.

Reports of cases determined in the Calcutta Supreme Court were published by Bignell in 1831. A single number of these Reports appeared. The cases were fully and ably reported.

Notes of cases were inserted by Smoulty in his Collection of Orders on the Plea Side of the Calcutta Supreme Court, from 1774 to 1813 inclusive, published in 1834. These notes were succinct, but highly useful, and comprised decisions principally on points of practice, from 1774 to 1798.

A Collection of decisions of the Calcutta Supreme Court was published by Morton in 1841. This Collection was principally compiled from the Manuscript notes of Sir R. Chambers, G. J., Hyde J. and other Judges of the Court, and the cases related almost exclusively to questions altogether peculiar to India. It was a work of great utility and authority.

Fulton published a single volume of reports in 1845. This volume comprised cases decided in the Calcutta Supreme Court between 1842 and 1844.

The example set by Morton and Fulton in publishing the decisions of the Calcutta Supreme Court was worthily followed by other Barristers of the Court. In 1851 Montigny published a volume of Reports comprising the decisions delivered in 1846. In 1851, Taylor continued these Reports comprising the decisions delivered till 1848. Taylor in collaboration with Bell published the subsequent cases.

The only collection of the decisions of the Madras Supreme Court was published by Sir T. Strange, G. J. This work appeared in 1816 and comprised three volumes. The cases were clearly set forth, and the judgments frequently given in entirety, but from the paucity of the materials placed at the disposition of the Judges at that time, the decisions of the Court, relating to questions of native law, must be taken with some reservation.

A valuable collection of the decisions of the Bombay Supreme Court was given by Morley in the Appendix to his Digest of Indian Cases. These decisions were made available by Sir Erskine Perry, G. J. They gained additional authority from the fact of the manuscript having been carefully revised and corrected by the very Chief Justice himself.
Sir Erskine Perry published in 1853, a collection of cases 'illustrative of Oriental life and the application of English law to India,' decided by the Bombay Supreme Court.

Reports of cases decided by Company's Courts.—The first printed Reports of cases decided by the Courts of the Company were published by Sir William Hay Macnaghten, when Registrar of the Calcutta Sadar Diwani Adalat, in which Court the cases were determined. A second edition of the first two volumes appeared in 1827, and the Reports were subsequently continued in the same form. Those contained in the first volume were chiefly prepared by Dorin who afterwards became a Judge of the Court. The notes appended to the cases in this volume were entitled to weight, as having been written or approved by the Judges by whom the cases were decided; and those explanatory of intricate points of Hindu law were most especially valuable, as coming from the pen of Henry Colebrooke. The second, third and part of the fourth volumes were also published by Sir William Macnaghten. The later cases in the fourth volume were selected and prepared by G. Udney his successor in the office of Registrar. The cases contained in fifth volume were reported by J. Sutherland. The cases given in the sixth and seventh volumes had no reporter's name affixed, but they were approved by the Court and were believed to have been prepared by the Registrars.

Since the end of 1844, these Reports, which were later called 'Select Reports', published 'as approved by the Court,' were "but a re-print, accompanied by notes, of such of the decisions, published monthly, as containing constructions of law, or being illustrative of points of practice, are adapted to serve as precedents to the Lower Courts." It was subsequently determined by a resolution of the Court, dated April 27, 1849, that the publication of the Select Cases should be discontinued. The mere reprint of a selection from the monthly publications of decisions was perhaps unnecessary, as the object of pointing out the 'leading cases' might have been more readily accomplished by the addition of a tabular reference and explanatory notes, sanctioned by the Court, and appended to the monthly issue. This was, however, not done and it could not be denied that much inconvenience had arisen from the discontinuance of the Select Reports.

Reports of summary cases determined in the Sadar Diwani Adalat at Calcutta from 1841 to 1846 appended to the seventh volume of the above-mentioned collection. In 1845, a selection of Reports of summary cases was published separately, containing selected decisions from 1834 to 1841, the former year being the period at which the summary and miscellaneous department of the business of the Court was first entrusted to one Judge. These were continued to the end of 1848, and were published as the first volume of Reports of Summary Cases. In the said resolution of the Court, it was stated, in respect of the Reports of Summary Cases, that "the Court are of opinion that their publication may go on, not as 'approved by the Court,' but with the sanction only of the Judge in charge of the Miscellaneous Department, where decisions they are- and who will note such of them as he may think useful for publication".

An Index to all the seven volumes of the Select Reports of the Regular Cases, and to the first volume of the Select Reports of Summary Cases, was published in 1849.

A reprint of the Reports of Summary Cases determined in the Calcutta Sadar Diwani-Adalat comprising reports from 1834 to 1852, was prepared
by Garneau, and published at Calcutta in 1853. This work is said to have been published by authority, under the revision of the Judges.

Another edition of the summary decisions of the Calcutta Sadar Diwani Adalat from 1834 to 1855, alphabetically arranged, was published at Calcutta, in the latter year.

Reports of cases, chiefly in summary appeals, decided in the Sadar Diwani Adalat at Calcutta, were published by Severstall, a Pledger of the Court. First volume of this collection comprised three parts, and was completed in 1842. These reports were exceedingly useful and were further in progress.

The decisions of the Sadar Diwani Adalat at Calcutta, recorded in English, in conformity to Act XII of 1841, then began to be published monthly. This collection was commenced in 1843 by order of the Governor-General. The decisions of each year formed a separate volume. In the volume for 1850, marginal abstracts of the decisions reported were for the first time added.

The monthly publication of the decisions of the Sadar Courts at Agra and Madras, recorded in English under the above Act, commenced respectively in 1846 and 1849.

The former Reports of Cases decided by the Sadar Courts principally related to constructions of the written law and touched only occasionally on points of procedure and practice, so that the publication of the decisions recorded in English, including cases of every description, may be said to have opened an entirely new field for the investigation of the student.

These monthly collections were of great value, and as they were published simultaneously at Calcutta, Agra and Madras, one was enabled to form a comparison between the practice of the several courts of last resort, which could not fail to be of the utmost utility in furthering the attainment of uniformity of procedure throughout the courts in India. Unfortunately, the decisions in these Collections were not easily referred to; the Indices which were appended were insufficient, and the mode in which the cases themselves were reported was often such as to render it difficult to seize their full bearing. It is also regretted that the plan of adding marginal notes to these collections had been so long delayed, and was not even now generally followed. No one, who did not examine them attentively, could form an idea of the labour requisite to master the contents of a single volume.

The propriety of the object of their publication, viz., "to give all possible publicity to the decisions of the Sadar Courts," was unquestionable; but it may be doubted whether the requisite publicity might not have been better attained by adopting a somewhat modified form. There was frequent and needless repetition of similar cases and decisions. This repetition was especially conspicuous with regard to cases involving points of practice, reports constantly recurring in which precisely similar circumstances presented themselves, and the erroneous decisions of the lower courts, passed on the same points, were reversed, or the suits remanded on appeal on identical grounds.

The decisions of the Zila Courts of the Lower Provinces, recorded in English according to the Act of 1843, were printed monthly in the same form of the preceding collections. The decisions of the Zila Courts in the North-Western Provinces also published in similar way and form. They were commenced in 1848. The decisions of the Zila subordinate, and assistant, courts of the Madras Presidency were also published monthly. They began with
the cases for 1851. All these collections of decisions of Zila Courts were, however, comparatively unimportant, since they were never referred to in the superior courts as precedents.

The Reports of cases decided in the courts of the Company at Madras, with the exception of the monthly collections already mentioned, were few in number. A volume was published in 1843 entitled, Decrees in Appeal Suits determined in the Court of Sadar Adalat, Vol. I, containing select|decrees from 1805 to 1826 inclusive. The cases in this collection involving questions of Hindu law were interesting, as illustrative of the prevailing doctrines of the southern schools. These decrees were, however, obscurely reported, and, in some instances, they contained no point of law whatever, being merely decisions for want of proof.

A collection of Decrees in appeal suits decided in the Sadar Adalat at Madras from 1825 to 1847, was published at Madras in 1853.

The first collection of the decisions of the Sadar Diwani Adalat at Bombay was the well-known series of Reports by Borradaile, formerly a Judge of the Court, and the author of the translation of the Mayukha. His work was in two folio volumes, and was published at Bombay in 1825. It was full of cases on points of law peculiar to the Bombay side of the country, which were ably reported.

A small but useful publication appeared in 1843, entitled, Reports of Selected Cases determined in the Sadar Diwani Adalat at Bombay. The Reports contained in this little volume were prepared, with few exceptions, by the Deputy Registrars of the Court, and were arranged according to the dates of decisions, which were scattered over a period extending from 1820 to 1840, the later ones having been noted by the Judges who sat, as proper subjects for publication.

In 1850, Bellasis, late Deputy-Registrar to the Bombay Sadar Diwani Adalat, published a small volume containing decisions of that Court from 1840 to 1848, and intended as a continuation of the Reports of Selected Cases. Bellasis stated that "the cases reported are for the most part the decisions of a full Court of three Judges, such being considered more authoritative as precedents." A few reports in this collection were prepared by Babington while he was the Deputy Registrar to the Sadar Court.

In 1855, Morris commenced the publication of reports of cases disposed of by the the Sadar Diwani Adalat of Bombay. The first volume contained all the decisions for 1854. Each of the subsequent volumes comprised the decisions of a year.

In the branch of criminal judicature, only a few Reports were printed. The first collection that appeared was of the sentences of the Nizamat Adalat at Calcutta. The first two volumes were composed by Sir William Macnaghten. There was no reporter's name in the subsequent volumes.

In 1851, a monthly series of the decisions of the Calcutta Nizamat Adalat was commenced.

At Madras a similar issue of reports of criminal cases decided in the Sadar Faujdari Adalat began in the same year. Marginal abstracts were added in this series.

A valuable collection of reports of cases decided by the Sadar Faujdari Adalat at Bombay, compiled by Bellasis, and comprising decisions from 1827 to
- 1846, appeared in 1849. The cases recorded in this collection were selected to illustrate the application of the Bombay Criminal Code, both in question of evidence and of punishment, and also to settle doubtful points of procedure and practice.

In 1852, the publication of the decisions of the Nizamat Adalat of the North-Western Provinces was begun, commencing with the decisions of 1851.

In 1855, Morris published a collection of reports of cases disposed of by the Sadar Faujdari Adalat of Bombay, the cases commencing with those of 1854. Two volumes were published every year, each containing the decisions of six months.

In the last, Analytical Digest of all the reported cases, prepared by W. H. Morley, may be mentioned. In 1850 he published its first two volumes, accompanying the text by copious notes referring to the original authorities and explanatory of doubtful points. The work was received favourably, and so was further continued. In 1852, Morley published the first volume of a ‘New Series’ comprising the decisions of all the courts to the end of 1850. 14

**Reporting after 1862**

Hitherto law reporting was not regular and systematic. It was only with the establishment of the High Courts in the Presidency-towns that regular law reporting commenced. From that time semi-official and private law reports came to be published regularly and systematically.

Sir James Stephen, while he was Law Member, recorded a minute t the effect that reporting should be regarded as a branch of legislation; his accepted the principle that it was hardly a less important duty of the Government to publish the law enunciated by its tribunals than to promulgate its legislation. On this subject, a circular was issued to various local Governments and the High Courts. Later on Mr. (later Lord) Hobhouse, who succeeded to Sir Stephen as Law Member, became interested in the subject of law reporting and took the initiative in the passing of the Law Reports Act in 1875 for the improvement of Law Reports. Its section 3 gave authority only to authorized reports, by providing that no court would be bound to hear cited, or would receive or treat as an authority binding on it, the report of any case decided by any High Courts, other than a report published under the authority of the Government. After the passing of this Act, Councils of Law Reporting were set up in several High Courts and reports began to be published under the supervision and authority of the Government. 15

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14. This whole description is taken from Morley, op. cit., pp. 335-346, with some changes in the language. Unnecessary portions have been deleted. See also Law Commission Report, op. cit., at p. 63; B. K. Acharya, Codification in British India, at pp. 162-163, 309-310 (1914).
and snuffed out, you give that authority an enormous power over the
superior Courts of the country: you make him, in fact, Judge over the
Judges.  

Notwithstanding the Act, unofficial reports, published in this
country, have been cited before the superior courts and relied upon by
them in their judgments. In fact, the Act has proved to be a dead latter.
In 1927, a non-official Bill, introduced in the Central Legislature, containing
provision to ban the citation of non-official law reports, met with a strong
opposition and ultimately collapsed. Recently the Law Commission also
declared that monopoly of law reporting was not desirable, and suggested the
repeal of the Act of 1875.

Now we have in this country a large number of official and non-official
law reports, as given below.

All India Journals.—(1) All India Reporter. (2) Criminal Law
Journal.

(2) I. L. R. Andhra Pradesh. (3) I. L. R. Assam. (4) I. L. R. Bombay.
Reports. (8) I. L. R. Kerala. (9) I. L. R. Madhya Pradesh (taking the place
Rajasthan. (15) Supreme Court Reports.

(26) Supreme Court Appeals. (27) Supreme Court Cases (in Hindi). (28)
Supreme Court Journal.

Special Law Journals.—(1) Company Cases. (2) Company Cases
Supplement. (3) Factories Journal Reports. (4) Income Tax Reports. (5)

Fifth Law Commission and Law Reporting.

The Fifth Law Commission has dealt, in detail, with the question
of law reporting in India and has made certain valuable suggestions for
improvements which are given here:

"(1) The present system of treating judicial precedents as binding
and citing them in Court serves a very valuable purpose and should be
continued. (2) It is neither feasible nor desirable to restrict the publication
of reports or to confer the monopoly of citation on one set of reports.
(3) The proper selection and reporting of judicial decisions which are
the exposition of the law ex non scripto is a public duty. The State
has failed to discharge this duty properly. (5) This responsibility should,
therefore, be undertaken by the legal profession and a Law Reporting

17. Id., at pp. 632-633, 643.
18. The list of all the Law Journals is taken from Law Commission Report, op. cit.,
at pp. 634-635.
Council should be established for this purpose in each State and also for the Supreme Court [on the pattern of the Council of Law Reporting in England]. (6) The Council should bring out reports which conform to the essentials of a good report and serve as models of good reporting. Short notes of cases may be made available before the regular reports are published. (7) The reports published by the Council should also contain the argument of Counsel. (8) These reports should be printed at private presses and so priced that the Councils function on a no loss and no profit basis. (9) If necessary the State should undertake to subsidise the reports of the Law Reporting Councils for the first few years. (10) The Councils should not undertake the publication of specialised reports at least in early stages. (11) The courts should make a rule that cases reported in the Law Reports published by the Councils of Law Reporting should be cited only from that series. (12) The Judges should have no say in deciding whether a case should or should not be reported.  

As regards the essentials of a good reporting, the Commission observed that the "doctrines of precedents... requires that the law reports should be accurate and full, so that the true principle laid down by the decision may be deduced. The report should contain all essential information like the parties, the nature of the pleadings, the essential facts, the arguments of counsel, the decision and the grounds of the judgment. Not the least important part of the report is its head-note which should be accurate and concise and yet in a sense comprehensive.

"It is obvious that a law report can serve its true purpose if it reports only cases which introduce or appear to introduce a new principle or new rule; or which materially modify an existing principle or rule; or which settle or tend to settle a question on which the law is doubtful; or which for any other reasons are peculiarly instructive."  

"Equally important is the time and form of the publication of the reports. It is desirable that the publication should take place as soon as possible after the judgment but speed should not result in a sacrifice of the accuracy of the judgments reported. In order to ensure the accuracy of the judgments and their being checked by the judges who deliver them, a certain amount of time must elapse before the publication of the report. In the meanwhile the profession and the public should be kept informed from week to week of decisions of importance by the publication of notes of cases.

"The essentials above mentioned need modification in their application to specialised reports. Lawyers and judges are apt to regard law reports from their own professional angle. They, however, sometimes serve a much wider public. This is particularly so in the case of specialised reports. When publish decisions on labour having regard to larger p the decisions they publish so that many decisions which may not be considered fit for publication in a series of general law reports may aptly and well find a place in the special reports."  

The Law Commission has omitted to consider the desirability of undertaking the reprinting of old Law Reports. In the interest of administration of justice it is necessary that this project should be undertaken by either the Government or some private agency under the supervision of the Government.  

20. Id., at p. 646. Some irrelevant matter has been deleted.  
22. Id., at pp. 636-637.  
CHAPTER XXIV
HISTORY OF LEGISLATURES

Early development

The history of the development of Indian legislatures, though now the creatures of the Constitution, may be traced from the three principal settlements of the Company, viz., those of Calcutta, Madras and Bombay. As far back as 1726, a Charter of the Crown granted to the Governor-in-Council of each settlement the power to make, constitute and ordain bylaws, rules and ordinances for the good government and regulation of the Corporation created by the Charter and the inhabitants of the settlement. The byelaws, rules and ordinances were to be agreeable to reason and not contrary to the laws and statutes of England, and were to be approved and confirmed by the Court of Directors of the Company in England before coming into force. "The Crown thus established in India itself a subordinate power of legislation, which was destined to supersede the authority in this regard vested in the Company itself [under the Charter of 1600]. Plainly in the long run it was desirable that legislation for Indian conditions should be enacted in India, subject to the control of the Company, or later the Crown, but it is noteworthy that the Company was destined to lose that power of legislation which it at first appeared to be given, and which corresponded to the power of the Crown to legislate by Order-in-Council for conquered or ceded colonies."2

In 1773, the Regulating Act, which was the first parliamentary Act of India, authorized the Governor-General-in-Council to frame and issue rules, ordinances and regulations for the good order and civil government of the settlement of Calcutta, factories and subordinate places. They were to be just and reasonable, and not repugnant to the laws of England. These rules, ordinances and regulations, in order to be effective, were required to be registered in the Supreme-Court with its consent and approbation. The registration was to be made at the expiration of twenty days of the open publication of the same. After registration it was lawful for a person in India to appeal therefrom to the King-in-Council which was empowered to repeal such laws. The appeal was to be lodged in the Supreme Court within sixty days of their registration. Such an appeal was also permissible in England within sixty days of their publication thereby of a person residing in that country. The pendency of appeal did not affect their coming into operation. The Governor-General-in-Council was required to transmit copies of all such laws to England where the King-in-Council might disallow them within two years of their passage in India. The requirement of registration of the laws in the Supreme Court with its approval constituted an immediate check on hasty legislation and avoided the long delay of obtaining approval of the Court of Directors in England, as required by the previous Charter.

The regulating Act had conferred a limited legislative power on the Governor-General-in-Council and subjected it to the control of the Supreme Court. The said Council framed regulations for the Provinces in exercise of

1. See Chapter I, supra, at pp. 1-2.
2. A. B. Keith, A Constitutional History of India, at p.18 (1937).
the powers available to the Company as Diwan. For the first time this authority was recognised by the Act of Settlement, 1781. It empowered the Governor-General-in-Council to frame regulations for the Provincial Courts and Councils. Their copies were to be despatched to the Court of Directors and the Secretary of State in England within six months of their passage. The King-in-Council might disallow or amend them within two years. The Supreme Court had no controlling power in regard to these regulations, but it was not bound by them.

In 1797, an Act of Parliament confirmed the power of making local laws vested in the Governor-General-in-Council, and directed that all regulations made by this Council should be registered in the judicial department of the Government, formed into a regular Code and printed with translations in the country languages. It also directed that all the grounds of each regulation should be prefixed to it. The courts of the Provinces were to be bound by these regulations. Their copies were deemed to be necessary to the Court of Directors and Board, and their hasty exercise of legislative power, independent of the supervision and veto of the Supreme Court.

In 1800, an Act of Parliament empowered the Governor-in-Council at Madras to frame regulations for the Provincial Courts and Council annexed to that Presidency.

The right of the Governor-in-Council at Bombay to make regulations was inferred from the Act of 1797; but it was more formally conferred by an Act of 1807. This Act empowered the Governors-in-Council to make and issue such rules and regulations for the good order and civil government of the towns of Madras and Bombay and their dependencies respectively as the Governor-General-in-Council might make for the Bengal Presidency. It provided, however, that their registration in the Crown's Courts at Madras and Bombay respectively was necessary to give them validity. They were further rendered subject to appeal as provided by existing Acts.

In view of the Act of 1797, it might reasonably be considered that the Governors-in-Council at Madras and Bombay respectively were given legislative powers under the Acts of 1800 and 1807 not as defined by the Acts of 1773 and 1781 but as recognised and confirmed by the Act of 1797.

Governor-General in Council had no direct authority over exercising their legislative powers, they were not submitted for approval before being passed. The legislative powers of this Council were confined to the Presidency of Bengal by the terms of its constitution and in practice as well.

The Charter Act of 1813 asserted the sovereignty of the Crown over territories held by the Company in India. It extended the legislative powers hitherto conferred on the three Councils and, at the same time, subjected them to a greater control. The Act empowered the Governor-General-in-Council and Governors-in-Council to impose taxes and duties within

their respective Presidency-towns. Regulations were directed to be framed for the enforcement of taxes in the same manner as other regulations were made. It was also provided that such regulations were to apply to all persons who proceeded to the East Indies within the limits of the Company's Government. The Crown's Courts were directed to take notice of them, without being especially pleaded, and all persons were empowered to proceed in these courts for their enforcement. The Act then enacted that the copies of all the laws made by the three Councils should be annually laid before Parliament. This was to ensure a stricter control on the exercise of legislative powers of the Council.  

This is, in brief, the gradual development of legislative powers of the executive Governments of three Presidencies. Hitherto there was no central authority to legislate for the whole of India and there was no differentiation of the legislative function from that of administration. In 1833 and thereafter, the history of Indian legislatures took a momentous turn as discussed below.

Birth of Central and Provincial Legislatures

The Charter Act of 1833 declared the Governor-General and Councillors of Bengal as the Governor-General of India-in-Council, and created "the embryonic All India Legislature" by vesting the legislative power of the Indian Government exclusively in the Council which was reinforced by the addition of a fourth legislative member. The fourth member was not to be a servant of the Company and was not entitled to act as member of the Council except for legislative purposes. Power to legislate by regulation was withdrawn from the Presidencies. The subordinate Governments might submit to the Central Legislature only the drafts or projects of any laws they thought expedient and the Legislature was required to consider them and to communicate its resolutions thereon to the Government proposing them.

Laws made by the Central Legislature were to be known as Acts. They were subject to disallowance by the Court of Directors, sitting under the Board of Control; but when once made they were to have effect as Acts of Parliament. They were not required to be registered or published in any court.

The right of Parliament to legislate for India and to repeal Indian Acts was expressly saved. In order to have an effective control on Indian legislation, all Indian laws were to be laid before Parliament.

The Charter Act of 1833 made certain alterations in the machinery for Indian legislation. The legislative member of the Council was placed on the same footing as other ordinary members by being given a right to sit and vote at executive meetings of the Council. The process of separating the legislature from the Executive was continued by increasing the strength of the Council for legislative purposes. Six more legislative members were added to the Council. They were the Chief Justice of Bengal and one other Supreme Court Judge, and four representatives, from Bengal, Madras, Bombay, the North-Western and Provinces, who were the servants of the Company of ten years' standing.

8. Id., at p. 94.
The "new Legislative Council, which modelled the procedure on the House of Lords [in England], set an example to its successors by becoming so independent and inquisitive as to provoke complaints from a Governor-General and the British Cabinet that it gave itself the airs of a 'petty parliament' and 'grand inquest of the nation'. The Provinces other than Bengal complained that the latter was over-represented in the Council.10

In 1861, therefore, the Indian Councils Act reconstituted the Governor-General's Legislative Council by enlarging its membership to not less than six nor more than twelve additional members for legislative proposes, nominated by the Governor-General. They were to hold office for two years. Of them not less than one-half were to be non-official members. The Lieutenant-Governor of a Province was also to be an additional member whenever the Council held a legislative sitting within his Province. The Act strictly limited the functions of the Council to legislation. It was expressly forbidden to transact any business other than the consideration and enactment of legislative measures, or to entertain any motion unless such motion was for leave to introduce a Bill or had reference to some Bill actually introduced. It was made compulsory to obtain the previous sanction of the Governor-General for the introduction of certain measures. The assent of the Governor-General was required to every Act passed by the Council. He might withhold it or reserve the Act for consideration by the Crown. An Act passed by the Council with assent of the Governor-General might be disallowed by the Crown. The jurisdiction of the Council to make laws was very wide; at the same time reservations were made for certain parliamentary enactments, the general authority of Parliament and any part of the unwritten laws or Constitution of the United Kingdom upon which the allegiance of the subject or the sovereignty of the Crown depended. In cases of emergency, the Governor-General was given an exceptional power to promulgate, without his Council, ordinances which were not to remain in force for more than six months.11

The Act of 1861 gave birth to Provincial Legislatures. Each of the Councils of the Governors of Madras and Bombay was expanded for legislative purposes by the addition of the Advocate General of the Presidency and other persons, not less than four nor more than eight in number, half of them being non-official members, nominated by the Governor. There was no line of demarcation drawn between the subjects reserved for the Central and Provincial Legislatures respectively; but a prior consent of the Governor-General was made necessary for legislation by the Provincial Legislatures in certain cases. All of their Acts required the assent of the Governor-General to become effective. The Acts passed by the Provincial Legislatures with Governor-General's assent might be disallowed by the Crown. Same restrictions were imposed on the proceedings of the Provincial Legislatures as in the case of the Central Legislature.12

12. Id., at pp. 44-45.
The Governor-General-in-Council was directed to establish, by proclamation, a Legislative Council for Bengal and was empowered to establish, in his discretion, similar Councils for the North-Western Provinces and the Punjab. Each proclamation was to specify the number of Councillors to be nominated by the Lieutenant-Governor of the Province concerned, provided that not less than one-third of the Councillors were to be non-official persons. The nomination of the Councillors was subject to the sanction of the Governor-General. The Legislatures for the said Provinces were to be subject to the same provisions as the Legislatures for Madras and Bombay. The Act further empowered the Governor-General to constitute, by proclamation, new Provinces for legislative purposes.13

Accordingly a Legislative Council was established for Bengal by proclamation of January 18, 1852. Another Legislative Council was created for the North-Western Provinces and Oudh together by proclamation of November 26, 1856. On April 9, 1897, a third proclamation was issued constituting a Legislative Council for the Punjab.14

It may be pointed out here that with regard to those matters in respect of which the Legislatures were given power to make laws, except in so far as these powers were circumscribed by parliamentary legislation which conferred them, the Privy Council held in Queen v. Burah15 that the Legislatures possessed plenary powers of legislation, as large, and of the same nature as the Parliament itself; they might be well exercised, either absolutely or conditionally; in the latter case leaving to some external authority the time and manner of carrying their laws into effect, and the areas over which they were to extend.16

Growth of Legislatures

The Indian Councils Act, 18-2, amended the Act of 1861 with a view to increase the size and powers of the Legislatures. In the Central Legislature, the number of additional members was to be not less than ten nor more than sixteen. In the Madras and Bombay Legislatures, the number of additional members, besides the Advocate-General, was not less than eight nor more than twenty. The maximum number of Councillors for the Bengal Legislature and the Legislature for the North-Western Provinces and Oudh was respectively fixed at twenty and fifteen. It was specifically provided that any person resident in India might be nominated as an additional member of the Legislatures. The Governor-General in-Council was empowered to make regulations regarding the nomination of members. Under this provision, he could make arrangements by which certain persons might be chosen by election. Actually nomination of four of the additional members to the Central Legislature was based on election by the non-official members of the Provincial Legislatures, and that of some of the additional members of the latter was based on election by Municipalities, District Boards, Chambers of Commerce and Universities. Thus to a certain extent, this was an introduction of the elective principle in the matter of selecting Councillors for legislative purposes.17

13. Id., at pp. 48-49.
15. (1879) 3 A. G. 889 (P. G.).
16. Ibid.
WHEN in 1800 the limited powers of the Councils, allowed all statements of the Government also empowered each Provincial Legislature to repeal or amend as to its own Province any law passed by any authority in India other than that Legislature, with the previous sanction of the Governor-General.\textsuperscript{18}

The size and powers of the legislatures were further enhanced by the Indian Councils Act, 1909, by amending the previous Acts. The Act provided for the representative element by laying down that the additional members of all the Legislatures should include both nominated and elected members. The maximum number of additional members of the Central Legislature was fixed at sixty, that of each of the Provincial Legislatures\textsuperscript{19} including the Legislature of Eastern Bengal and Assam\textsuperscript{20} at fifty and that of the Punjab Legislature and any other Legislature, to be constituted afterwards, at thirty. According to the regulations framed by the Governor-General-in-Council under the Act, out of sixty additional members of the Central Legislature twenty-seven were elected partly by the non-official members of the Provincial Legislatures and partly by special constituencies of Landholders, Mohammedans, Chambers of Commerce and District Council and Municipal Committees. Out of the thirty-three nominated members, at the most twenty-eight might be officials and three non-official persons; one to be selected from the commercial community, one from the Mohammedan community of the Punjab and one from the landholders of the Punjabs. Similar arrangements were made in respect of the Cent. An official majority was ensured in the Cent. except in the case of the Bengal Legislature. The principle of communal representation and allowed the Mohammedans to have separate representation by members selected by them alone.\textsuperscript{21}

The Act of 1909 empowered all the Legislatures to hold discussions on the annual financial statements of the respective Governments and on such matters as might be referred by the Governor-General-in-Council with the exception of specified topics such as and Foreign Affairs, and to put questions

Legislatures under Government of India Act, 1919.

The Government of India Act, 1919, declared that the policy of parlement was to provide for the increasing association of Indians in every branch of Indian administration and for the gradual development of self-governing institutions with a view to the progressive realization of responsible government in British India as an integral part of the British Empire. The progress in giving effect to this policy could, however, only be achieved by

19. In 1902, the territories of the North-Western Provinces and Oudh were styled as the United Provinces of Agra and Oudh in order to distinguish them from the North-West Frontier Province.
20. In 1905, the territories of Bengal Province, viz., Bengal Bihar, Orissa and Assam were arranged as Western Bengal, Bihar, and Orissa and Eastern Bengal and Assam both under Lieutenant-Governers.
successive stages, though necessary steps in that direction should now be taken. Concurrently with the gradual development of self-governing institutions in the provinces it was found expedient to give to them in provincial matters the largest measure of independence of the Central Government, which was compatible with the due discharge by the latter of its own responsibilities.

The Act created a bi-cameral Central Legislature. It consisted of the Governor-General and two Chambers, viz. the Council of State and the Legislative Assembly. The Council of State was to consist of not more than sixty members, of whom not more than twenty were to be official members. The Legislative Assembly was to consist of one hundred and forty members. The number of non-elected members was fixed at forty, out of whom twenty-six were to be official members. The rules might increase the number of members of the Assembly and vary the proportion which the classes of members bore one to another so that at least five-sevenths of the members should be elected members and at least one third of the rest should be non-official members. Communal representation was continued.

Ordinarily the duration of the Council was five years and that of the Assembly three, but the Governor-General might dissolve the houses earlier or extend their existence if necessary. He was also given the right to address both the Houses.

The Act gave ample powers to the Central Legislature in respect of the annual budget of the Central Government; at the same time, however, special legislative powers in that regard were reserved for the Governor-General. The Legislature was given wide powers to legislate for the whole of British India, for British subjects and servants of the Crown, and for British Indian subjects outside India. A list of central subjects in respect of which only the Central Legislature could legislate was also drawn.

Provision was made for the joint sittings of both the houses in cases of deadlock.

In addition to the measures on specified subjects such as the Public Debt, Armed Forces, Relations with Foreign Powers and Indian States, requiring previous sanction of the Governor-General for their introduction in any House, measures to regulate provincial subjects, to repeal or amend any existing laws of Provincial Legislatures or those made by the Governor-General, also needed such sanction.

The Governor-General was empowered to return to the Legislature any Bill passed by it for further consideration; he might veto it also. In case the Legislature rejected a Bill, he might certify that it was essential for the safety, tranquillity or interest of British India, whenupon the Bill would become law. The power of the Governor-General to legislate by Ordinance in emergency was preserved; such an Ordinance could be operative for six months.23

Elaborate provisions were made in the Act of 1919 for Provincial Legislatures. The presidencies of Madras, Bombay and Bengal, the United

Provinces, the Punjab, Bihar and Orissa, the Central Provinces and Assam became Governor’s Provinces. In 1932, the North-West Frontier Province also became a Governor’s Province. In each of the Governor’s Provinces, a single chamber Legislature, known as the Legislative Council, was established. It was to consist of the members of the Executive Council, and nominated and elected members. In the beginning Madras was given 127 members, Bombay 111, Bengal 139, United Provinces 123, Punjab 93, Bihar and Orissa 103, Central Provinces 70, and Assam 50. Of the members of each Council, not more than twenty per cent were to be official members and at least seventy per cent elected members. The size of the Councils might be further increased. Communal representation was continued. The duration of the Council was fixed at three years, subject to the power of the Governors to dissolve them earlier or extend their tenure.

While maintaining the general supremacy of the Centre, responsibility for certain subjects, known as the provincial subjects was given to the Provinces. These subjects were divided into two categories under the system of dyarchy: ‘reserved subjects’ which were under the administrative control of the Governor-in-Council and ‘transferred subjects’ which were under the control of Ministers, who, though selected by the Governor, were responsible to the Provincial Legislature. In the field of ‘reserved subjects’ the Governor-in-Council was bound to comply with the orders of the Centre. In the field of ‘transferred subjects’ the Legislature had considerable controlling power.

A Provincial Legislature had powers to legislate for the peace and good government of its Province, including the power to repeal or alter any law made by any other authority in British India; but the previous sanction of the Governor-General was necessary in case of making or taking into consideration any law on certain specified subjects.

In the matter of budget, the power of a Provincial Legislature was very much circumscribed by that of Governor. A general power was given to the Governor to check further deliberations on any Bill if he thought that the safety or tranquillity of the Province or another Province was affected. He was further empowered to assent to a Bill, refuse assent to it or to return it for reconsideration with any suggested amendment, or to reserve it for Governor-General’s consideration. In respect of an Act passed by the Provincial Legislature and sent to the Governor-General for his assent, he might withhold his assent or reserve it for the signification of the Crown.

The Governor was empowered to certify a rejected Bill relating to a reserved subject as essential for the discharge of his responsibility for that subject, and sign it, whereupon it would normally be laid before the Parliament before being presented for the assent of the Crown. Such a Bill would, however, become law immediately if the Governor-General assented to it after certifying that a state of emergency existed justifying the enactment.24

Legislatures under Government of India Act, 1935

The Government of India Act, 1935, contemplated a federation including the Provinces and the Indian States. Though the federal part of the Act was not brought into operation and the structure of the Central Legislature under the Act of 1919 was retained, the relation between the Centre and the Provinces were much the same as they would have been had the federation come into existence.

The Act of 1935 provided for a Federal Legislature which was to consist of the Crown, represented by the Governor-General, and two Chambers, to be known respectively as the Council of State and the House of Assembly. The former was to consist of one hundred and fifty-six representatives of British India and not more than one hundred and four representatives of the Indian States; the latter was to consist of two hundred and fifty representatives of British India and not more than one hundred and twenty-five representatives of the Indian States. The Council was to be a permanent body, not subject to dissolution but one-third of its members were to retire in every third year giving way to others. The Assembly, unless sooner dissolved, was to continue for five years. The Federal Legislature was to be summoned to meet once at least in every year. The Governor-General had power to summon and prorogue the Chambers and dissolve the Assembly. He had a right to address and send messages to Chambers.

The Act laid down procedures as to introduction and passing of Bills including Money Bills and also with respect to estimates etc. Provision was also made to resolve a deadlock. The Governor-General might assent to a Bill passed by the Legislature or withhold it or reserve it for the signification of the Crown. He might send the Bill back for reconsideration of the Chambers with his own recommendation if necessary. The Governor-General might prevent discussion in the Legislature and suspend the proceedings in respect of any Bill if he was satisfied that it would affect the discharge of his special responsibility for the prevention of any grave menace to the peace or tranquillity of India. The Crown might disallow an Act already assented to by the Governor-General.

Wide legislative powers were given to the Governor-General. He was empowered to promulgate Ordinances during recess of Legislature, or at any time with respect to certain subjects, if the circumstances so required: Besides, he might enact Acts also to enable him to discharge his functions satisfactorily. He was further empowered to declare by a Proclamation that his functions to specified extent would be exercised by him in his discretion or assume to himself powers of any Federal body or authority, provided that a situation had arisen in which the Government of the Federation could not be carried on in accordance with the Act.

The Act established in each Province a Provincial Legislature consisting of the Crown, represented by the Governor, and two Chambers, viz., the

25. The representatives were to be chosen according to the provisions of the First Schedule.

Legislative Council and the Legislative Assembly, in the Provinces of Madras, Bombay, Bengal, the United Provinces, Bihar and Assam, and one Chamber, viz., Legislative Assembly, in Punjab, Central Provinces and Berar, North-West Frontier Provinces, Orissa and Sind.\textsuperscript{27} The Legislative Assembly, less sooner dissolved, had its existence for\textsuperscript{27} third of its members retired and were replaced by others. The Legislature was to be summoned to meet at least once a year. The Governor had power to summon and prorogue the Chambers and dissolve the Assembly. He had a right to address, and send messages to the Chambers.

The Act laid down procedures as to introduction and passing of Bills including Money Bills and also with respect to estimate, etc. Provision was also made to resolve a deadlock. The Governor might assent to a Bill passed by the Legislature or withhold it, reserve the Bill for the consideration of the Governor-General, or send it back for reconsideration with his recommendations if necessary. The Governor-General might accept the Bill or withhold it, reserve the Bill or send it back for reconsideration. The in the Legislature and suspend the proceedings in regard to any Bill if he was satisfied that it would affect the discharge of his special responsibility for the prevention of any grave menace to the peace or tranquillity of the Provinces. An Act assented to by the Governor or the Governor-General might be disallowed by the Crown.

Legislative powers, similar to those of the Governor-General including the power to issue proclamation, were given to the Governors also.\textsuperscript{28}

In respect of all the Legislatures, the Act broadened the franchise, extended the principle of communal representation to the Upper Chambers and gave weightage to minorities.

The Act divided legislative powers between the Centre and the Provinces. This distribution of powers is the main distinguishing feature of a its defined sphere, a Province was no longer an autonomous unit of administration. In Governor acted, on behalf of the Crown, with responsible to the Legislature. The provincial autonomy was, however, not altogether immune from the influence of the Centre. In certain matters where he was to act in his discretion or in the exercise of his 'individual judgment', without the aid of Ministers, he had to act under the orders of the Governor-General, and through him, of the \textsuperscript{29}

A three-fold division of legislative powers made by the Act was as follows. There was a Federal List containing matters which needed a uniform treatment throughout India and on which the existence of the Federation depended. In respect of those matters, the Federal Legislature was given

\textsuperscript{27} For composition of the Legislatures, see Fifth Schedule.

\textsuperscript{28} Apart from the bare Act, see also Gledhill, op. cit., at pp. 30-32; Keith, op. cit., at pp. 352-357.
exclusive power to legislate. 'There was a Provincial List of matters which did not demand a uniform treatment throughout India, and which were more of a local character. 'In regard to these matters, a Provincial Legislature had exclusive power to make laws. There was a Concurrent List containing matters which 'in the main' resembled those on the Provincial list rather than those on the Central list, i.e., they were mostly of Provincial rather than of all India importance, but while it was desirable that the Provinces should have power to legislate on them, they could not be exclusively allocated to the Provinces, because it was necessary that the Centre should either ensure uniformity in the main principles, or set an example to the Provinces, or prevent action within a Province having repercussions outside.'

Over the matters of the Concurrent List both the Federal and Provincial Legislatures had jurisdiction to legislate. The Federal Legislature was, however, empowered to make laws with respect to matters of the Provincial List provided a Proclamation of Emergency was made by the Governor-General. It had further power to legislate in respect of a provincial subject if the Legislatures of two or more Provinces desired this through their resolutions in their common interest.

In case of inconsistency between a federal law and a provincial law, made on a matter of Concurrent List the former was to prevail to the extent of inconsistency; but if the latter was assented to by the Governor-General or the Crown having been reserved for their consideration it prevailed in spite of the inconsistency.

The residuary power of legislation was neither vested in the Federal Legislature nor in the Provincial Legislatures, but the Governor-General was empowered to allot subjects for legislation, not enumerated in the Lists, to either the Federal Legislature or a Provincial Legislature.

The Act imposed certain restrictions on powers of the Legislatures. No Bill or amendment could be introduced in the Federal Legislature or a Provincial Legislature without the previous sanction of the Governor-General or Governor respectively in regard to certain matters, e.g., if it sought to repeal or amend, or was repugnant to any parliamentary law extended to India or any Governor-General's or Governor's Act or if it sought to affect matters within their discretion.

Indian Independence Act, 1947, and Legislatures

The Government of India Act, 1935, was adapted, with modifications, by the India (Provisional Constitution) Order, 1947, in pursuance of the Indian Independence Act, 1947. Under this Act, the Constituent Assembly of India was also to function as the Central Legislature of the Dominion of India. The sovereignty of this Legislature was complete, and no sanction of the Governor-General was required to make law on any matter. It could repeal or amend any Act of the British Parliament including the Act of 1935. These provisions in the Act of 1925 requiring the Governor General to be deleted. No Bill was to be introduced in the Legislature without the consent of the Governor-General, who

29. Gledhill, op. cit. at p. 36.
30. Apart from the bare Act see also, Gledhill, op. cit. at pp. 28-29, 34-36; Basu op. cit. at pp. 6-8.
was to act on the advice of a Council of Ministers responsible to the Dominion Legislature, had full power to assent to any Act. The Governor-General lost his extraordinary powers of legislation so as to compete with the Dominion Legislature by passing Acts and issuing proclamations and ordinances for ordinary legislative purposes. He also lost the power of certification. In the Provinces also similar changes were made.31

On January 26, 1950, the present Constitution of India came into operation superseding the previous arrangements and creating the existing Legislatures.

31 Apart from the bare Act, see also Gledhill, op. cit., at pp. 42-43; Basu, op. cit., at pp. 8-9.
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