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but secretly harboured the chiefs of dacoits whom they screened from the punishment of law."[62]

(ii) Reforms of Warren Hastings —In 1781, Governor-General Warren Hastings introduced certain changes to improve the administration of criminal justice. The old policy of non interference in the criminal justice was thus changed Warren Hastings first of all empowered the judges of the Mofussil Diwani Adalats also to act as Magistrates in their respective jurisdiction They were authorised to arrest all those persons who were suspected to have committed crimes They exercised a sort of police powers. Their duty was to commit criminals immediately on their own apprehension to the nearest Mofussil Faujdari Adalat and submit written charges on the basis of which they were arrested

A separate department was established at Calcutta to control and supervise the working of the Faujdari Adalats These Adalats were required to submit their monthly reports, return of proceedings, details of charges, lists of persons arrested and sent for trial by the Magistrates to the Adalats Similarly, reports were also sent to this department by the Sadar Nizamat Adalat A covenanted servant of the Company, who presided over the department, was designated as the Remembrancer of the Criminal Courts. He was directly under the Governor-General For all information and necessary action the Remembrancer mainly depended on the information supplied by the criminal courts By this process, in the beginning, many irregularities came to light which were committed in the criminal courts

The Faujdari Adalats were further reduced by Warren Hastings from twenty-three to eighteen[63] in July 1782 with a view to reduce the administrative expenses[64] In 1785, the Magistrates

62. B B. Misra, *Judicial Administration of the East India Company in Bengal*, p 321. See, From Mahomed Reza Khan to the Governor-General, 11, December 1776, *Calendar of Persian Correspondence*, Vol V, No 422

63. Whole area was redistributed in eighteen courts, namely, at Azmerganj, Bakarganj, Bhagalpur, Burdwan, Chitpur, Chitra, Dacca, Islamabad, Midnapur, Murli, Murshidabad, Nator, Rajhat, Rungpur, Tajpur, Darbhanga, Lauriya and Patna

64 See, *Home Miscellaneous Series*, Vol 353, pp 295-323

INDIAN LEGAL AND CONSTITUTIONAL HISTORY

5

The Regulating Act

A The Regulating Act

1 Circumstances before the Act of 1773

(i) Relationship of the British Parliament and the Company—One of the major problems before the British Parliament was to determine its relationship with the Company[1] Earlier, the Company was mainly concerned with trade and commerce in India but its subsequent political involvements and territorial gains created a new situation An established principle of English Constitutional law was that no subject could acquire territories except for the Sovereign As early as 1759, Lord Clive, in his letter to Pitt, suggested that the Crown should take over the territories which were in the possession of the Company At this stage, Parliament took no step as there were three points of view before it for consideration From the subsequent proceedings it appears that Parliament was gradually assisting the British Government to take a final decision in this respect

Out of the three points of view, which were before Parliament[2] for consideration, first was, that the Company's privileges and powers must remain untouched The proposal was not acceptable to the majority in Parliament and the far sighted servants of the Company The second view was that the Crown should take over full sovereignty of the Company's territorial possessions in India It was considered a very complicated view as it involved very vital legal and political questions, which the then British Government was neither willing to disclose nor to discuss Both these proposals suggested extreme steps which the British Government tried to avoid Pitt considered that it was not only a constitutional matter but it involved a major policy decision also The third view was that the Crown may take over

1 There were increasing political demands in England that the Government should take over the Company's possessions in India Because of shifting alignments in British politics this was not done The reports of the two Parliamentary Committees—Select Committee and Secret Committee—drove home the conviction that the independence of the Company must yield to the supremacy of British Parliament

2 Holdsworth *A History of English Law Vol XI* p 162

V D Kulshreshtha's

Landmarks in Indian Legal and Constitutional History

Revised by

VIJAY MALIK

B A , LL.B.

Foreword by

Hon'ble Mr. Justice J C SHAH

Judge Supreme Court of India

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by Letters Patent issued on 26th December, 1800, abolished the Recorder's Court and established the Supreme Court at Madras,[40] which came into being on 4th September, 1801 The powers of the Recorder's Court were transferred to the Supreme Court and it was also directed to exercise similar jurisdiction and to be subject to the same restrictions as the Supreme Court of Judicature at Calcutta Sir Thomas Strange, who was already working as the Recorder, was appointed Chief Justice of the Supreme Court and the two other puisne judges were Henry Gwillim and Benjamin Sullivan The Supreme Court continued its functioning at Madras till the High Court of Judicature was established in its place by the Indian High Courts Act 1861 [41]

(iii) Supreme Court at Bombay —The Recorder's Court continued to function in Bombay up to 1823 when by an Act[42] of the British Parliament the Crown was authorised to abolish the Recorder's Court and in its place to establish a Supreme Court at Bombay [43] The Crown's Charter establishing the Supreme Court was issued on 8th December, 1823 and the Supreme Court was formally inaugurated on 8th May, 1824 It consisted of a Chief Justice Sir E West and two other puisne Judges who were Sir Charles Chambers and Sir Ralph Rice

The Supreme Court at Bombay was invested with full powers and authority as was exercised by the Supreme Court of Judicature at Calcutta subject to one exception By Section 30 of its Charter, the Supreme Court at Bombay was prohibited from interfering in any matter concerning revenue even within the town of Bombay Natives were also exempted from appearing before the Supreme Courts at Madras and Bombay unless the circumstances compelled their appearance in the same manner as in a native Court The jurisdiction of the Supreme Court was strictly limited to the town and Island of Bombay It had no appellate jurisdiction over the Company Courts in the mofassil Regarding maritime crimes, the Charter restricted powers of the Supreme Court at Bombay to such persons as will be subject to its ordinary jurisdiction This was in conflict with the provisions of the Charter Act of 1813 which authorised the Supreme Courts at Calcutta and Madras to take cognizance of all such crimes committed by any person, if the ordinary jurisdiction was limited to British subjects

40 V C Gopalratnam *A Century Completed A History of the Madras High Court* p 88

41 By the Indian High Courts Act 1861 the Queen was empowered to establish by Letters Patent High Courts at Calcutta Madras and Bombay and on their establishment the old Chartered Supreme Courts and the old Sudder Adawlat Courts were abolished The jurisdiction and the powers of the abolished courts were transferred to the new High Courts

42 4 Geo IV c 71

43 P B Vachha *Famous Judges Lawyers and Cases of Bombay A Judicial History of Bombay During British Period* pp 27 30

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Revenue and from the Board of Revenue to the Governor-General-in-Council.

(ii) ***Reorganisation of Civil Courts*** —Cornwallis reorganised the civil courts and appointed twenty eight judges in the districts, and further strengthened the four Courts of Circuit, which now also became civil courts of appeal The four Courts of Circuit were called *Provincial Courts of Appeal* having headquarters at Patna, Dacca, Calcutta and Murshidabad Each of them was to be presided over by three covenanted servants of the Company These Courts were empowered to hear appeals from the District Diwani Adalats In cases involving sums less than Rs 1,000, their decision was final Where the amount exceeded Rs 1,000, a second appeal was allowed to the Sadar Diwani Adalat If the valuation of the suit was £ 5,000 or more, a further appeal was allowed to the King-in-Council

Steps were also taken to establish subordinate civil courts to decide minor cases In each district *Sadar Amins* and Commissioners were appointed to decide cases up to Rs 50 Subsequently, they were known as *Munsiffs* The *Munsiffs* were selected out of the landholders or their agents who were expected to do the job honorarily and were getting some commission on the sums involved in the litigation Indians were allowed to be *Munsiffs* The subordinate judiciary received orders from the Sadar Diwani Adalat It was created in order to save time and expenditure of the parties and also to impart speedy administration of justice

Regulation XIII provided for the establishment of the Registrar's Court to try suits up to Rs 200 in each district It was made compulsory that the Registrar's decisions should be countersigned by a Judge of the District Diwani Adalat and were also made subject to revision by the Judge

(iii) ***Native Law Officers*** —It was provided that the personal laws of Hindus and Mohammadans will be applied in cases relating to marriage, inheritance, caste, religious usages and institutions The Native Law Officers were, therefore, authorised to assist all the Courts by expounding the Hindu and Mohammedan law as the cases required Regulation XII specially provided that all Native Law Officers belonging to various Courts will be appointed by the Governor General-in Council

(iv) Courts authorised to control executive machinery —Section 10 of Regulation III provided that not only Collectors but all other executive officers of the Government will be subject to the Court's jurisdiction for their official acts and it was also stated that they will be personally liable for any violation of the Regulations The object of introducing this provision was to

Foreword

Mr Kulshreshtha has done well in presenting in the form of an essay the constitutional developments in India during the British period, with a brief reference to the judicial systems in ancient and medieval periods To the practising lawyer as well as the academician the subject is of great interest A history of the development of administrative and judicial institutions since the setting up by the East India Company of its settlements in the east, the south and the west coast early in the seventeenth century till 1950 when the authority of the British Rule finally ended is a fascinating study of the evolutionary process by which the people of India reached unity with the rule of law as their guiding force and achieved a modern administrative mechanism, a system of parliamentary democracy and a judicial system independent of executive interference

Mr Kulshreshtha has presented in a readable form the various landmarks in the Indian development—legal as well as constitutional I hope the book will be useful to the students for whom it is primarily meant and to the busy lawyer as a reference book

NEW DELHI
January 1, 1969

J C SHAH
Judge, Supreme Court of India

(e) the provisions of this article,

the amendment shall also require to be ratified by the legislature of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent

(3) Nothing in Article 13 shall apply to any amendment made under this article

(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article (whether before or after the commencement of Section 55 of the Constitution (Forty-Second Amendment) Act 1976) shall be called in question in any court on any ground

(5) For the removal of doubts it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this Article

The Constitution Amending Acts

A brief account of the various Acts, which were passed by the Parliament to amend the Constitution of India, is given, as follows

(i) The Constitution (First Amendment) Act, 1951 was passed to remedy certain flaws which were found during the working of the Constitution The right to freedom of speech and expression as given by Article 19 of the Constitution was held by some courts to be so comprehensive that no action could be taken against any individual who even advocated murder or other violent crimes It was also considered necessary to classify the rights of the citizen to practise any profession or to carry on any occupation, trade or business Moreover, many State Legislatures had passed laws abolishing landlordism but in many cases those laws were declared ultra vires by the courts It was considered necessary to amend the Constitution in such a way that progressive legislation in the agrarian field may not be checked There was also felt the necessity of making special provisions for the educational, economic or social development of the backward classes[48]

Thus the First Amending Act of 1951 amended Articles 15, 19, 31, 85, 87, 174, 176, 341, 342, 372 and 376 It also added a Ninth Schedule to the Constitution

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48 The cases which led to the necessity of the Constitution (First Amendment) Act 1951 were *State of Madras* v *Smt Champakan Dorairajan* AIR 1951 SC 226, *Motilal* v *Government of U P* AIR 1951 All 257, *Chiranjit Lal* v *The Union of India* AIR 1951 SC 41, *Shankari Prasad* v *Union of India*, AIR 1951 SC 458, *State of Bihar* v *Kameshwar Singh*, AIR 1951 SC 252

Opinions

UNIVERSITY OF DELHI
November 15, 1969

The treatment of the subject is comprehensive and uptodate, and is testimony of considerable industry and thought expended by the author The book will prove eminently useful for students and others interested in the subject

DR P K TRIPATHI
Dean, Faculty of Law

NEW DELHI
January 15, 1969

I have perused Mr V D Kulshreshtha s treatise with interest He has by dint of keen research produced a comprehensive work which should be of ready assistance to all interested in the develop ment of the law, constitutional and other, who would otherwise bave to collect the information from a vast number of sourees The material has been arranged systematically and with great care Of particular value is the reference to the work of the Law Com mission and the discussion on codification Mr Kulshreshtha's book should have a valuable addition to the literature on legal his ory

C K DAPHTARY
(Formerly Attorney General of India)

(viii) The Constitution (Eighth Amendment) Act, 1959 amended Article 334 to extend the period of reservation of seats in the Lok Sabha and State Vidhan Sabhas for members of the Scheduled castes and Scheduled tribes and Anglo Indians from ten to twenty years

(ix) The Constitution (Ninth Amendment) Act, 1960 was passed to provide for the transfer of certain territories of India to Pakistan under an agreement between India and Pakistan as a part of a compromise settlement of border disputes between India and Pakistan This was recommended by Supreme Court in the reference [50]

(x) The Constitution (Tenth Amendment) Act 1961 integrated the areas of Dadra and Nagar Haveli with the Union of India and provided for their administration under the regulation making powers of the President These areas were previously under the colonial empire of Portugal

(xi) The Constitution (Eleventh Amendment) Act, 1961 constitutes an electoral college and obviates the necessity of a joint meeting of the two Houses of Parliament (Article 66) by constituting them into an electoral college for the election of the Vice President It also amends Article 71 so as to make it clear that the election of the President or the Vice President shall not be challenged on the ground of any vacancy for whatever reason in the appropriate electoral college

(xii) The Constitution (Twelfth Amendment) Act 1962 integrates Goa, Daman and Diu with the Union of India with effect from December 20, 1961, by adding them to the First Schedule as the eighth Union Territory and by providing for their administration under Article 240

(xiii) The Constitution (Thirteenth Amendment) Act, 1962 provided for certain special protections to the Nagas and created Nagaland as the sixteenth State of the Indian Union under the State of Nagaland Act, 1962 According to these, notwithstanding anything in the Constitution, no Act of Parliament in respect of religious of social practices of the Nagas, Naga Customary Law and procedure administration of civil and criminal justice involving decisions according to Naga Customary Law, and ownership and transfer of land and its resources shall apply to the State of Nagaland unless the Legislative Assembly of Nagaland by a resolution so decides

(xiv) The Constitution (Fourteenth Amendment) Act, 1962 provided for the admission of Pondicherry to the Union, giving it

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50 *In re Berubari Union*, AIR 1960 SC 845 *See* also (1971)3 SCC 265

CONTENTS

A Bar Council was to be constituted for every High Court [3] Every Bar Council was to consist of fifteen members of whom one was to be Advocate-General, four persons to be nominated by the High Court and ten were to be elected by the Advocates of the High Court from amongst themselves [4] Each High Court was to prepare and maintain a roll of advocates of the High Court [5] While the roll was maintained by the High Court, the Bar Council was authorised, with the previous sanction of the High Court, to make rules to regulate the admission of persons to be Advocates of the High Court without effecting in any way the power of the High Court to refuse admission to any person at its discretion [6]

Under the Act, the power of enrolment of advocates virtually continued to remain in the High Court and the function of the Bar Council was merely advisory in nature The Act did not affect the power of the High Courts of Calcutta and Bombay to prescribe qualifications to be possessed by persons applying to practise on the original sides of those High Courts and their power to grant or refuse any such application, or to prescribe the conditions under which such persons were to be entitled to practise or plead The roll of Advocates was to be maintained by the High Court which also had the disciplinary power over the Advocates. The right of the Advocates of the High Court to practise in another High Court was not unfettered but was expressly made subject to rules made by the High Court or the Bar Council Each of the High Courts as well as the Bar Councils of Calcutta and Bombay made rules to the effect that Advocates of other High Courts would be permitted to appear and plead in the respective High Court concerned only after obtaining the permission of the Chief Justice and on several occasions very eminent Advocates of one High Court were refused permission to appear and plead in another High Court

In course of time the Calcutta and Bombay High Courts liberalised their rules so as to permit non Barrister Advocates to practise on their original sides as well which so far had been reserved for Barristers only Thus the distinction between Barristers and Advocates was abolished However, no advocate, whether Barrister or not, could act on the original side but had to appear and plead on the instruction of the Attorney on record

All India Bar Committee, 1951

The Bar was not satisfied with the passing of the Bar Councils Act, 1926 The Act did not bring the Pleaders, Mukhtars and

3 S 3
4 S 4
5 S 8(2)
6 S 9

LANDMARK YEARS IN THE LEGAL AND CONSTITUTIONAL HISTORY OF INDIA

Years	*Particulars*
Before 1100	Ancient Hindu Period
1111	First attack of Muhammad of Ghor
1206 1290	Slave Dynasty
1290 1320	Khilji Dynasty
1320 1399	Tughlaq Dynasty
1414-1444	Tughlaq Dynasty.
1444 and 1451 1526	Lodi Dynasty
1536	Hindu Kingdom of Vijayanagar was founded along river Tungabhadra
1526	Babar defeated Ibrahim Lodi and laid foundation of the Moghul Empire
1540 1545	Sher Shah ruled over India
1556-1605	Moghul Emperor Akbar ruled over India
1600	Queen Elizabeth issued a Charter incorporating The London East India Company
1609	Another Charter was granted to the Company
1612	An English Factory was established at Surat
1623	Charter issued to the Company
1657	Charter issued to the Company
1661	The Charter of Charles II for the first time provided for the exercise of Judicial powers by the East India Company
1666	Madras was raised to the status of Presidency
1669	Bombay was given by Charles II to the Company which he got as dowry from the Portuguese King
1683	The Charter empowered the Company to establish a Mayor's Court at Madras
1693	Company's Charter was reissued by the King of England
1698	Another Company "English East India Company' was incorporated by the Charter's of William III
1708	Lord Godolphin gave his famous award which established one company, by uniting the existing two companies, came to be known as "The United Company of Merchants of England Trading in the East Indies"
1726	The Charter of George I established the Mayor's Courts at three Presidencies of Calcutta, Madras and Bombay as King's Courts
1753	This Charter re established the Mayor's Court at Calcutta, Madras and Bombay
1757	Battle of Plassey
1764	Battle of Buxar

Years	*Particulars*
1765	Moghul Emperor granted 'the rights of Diwani' of Bengal, Bihar and Orissa to the Company Acquisition of Diwani
1772	Warren Hastings prepared the first Judicial Plan
1773	The Regulating Act was passed by the British Parliament
1774	The Supreme Court of Judicature was established at Fort William
1775	Trial and Execution of Raja Nand Kumar
1781	The Act of Settlement
1784	Pitts India Act
1793	The Charter Act granted to the Company
1793	Cornwallis Code and 'Judicial Plan' were introduced in Bengal
1797	Recorder's Courts were established at Madras and Bombay
1800	The Supreme Court was established at Madras in place of the Recorder's Court
1813	The Charter Act granted to the Company
1823	The Supreme Court of Judicature was established at Bombay in place of Recorder's Court
1833	This Act of British Parliament modified the constitution of the Judicial Committee of the Privy Council
1833	The Charter Act was the legislative mainspring of law reform in India
1834	The First law Commission was appointed
1853	The Charter Act provided for the appointment of the Second Law Commission
1857	First War of Indian Independence
1858	The Government of India Act Proclamation by the Queen Indian Government was transferred to the British Crown
1861	Indian Councils Act The Third Law Commission was appointed
1864	Act XI abolished the office of Native Law Officers (Pandits and Maulvies)
1879	The Fourth Law Commission was appointed
1892	Indian Councils Act
1909	*Indian Councils* Act (Morley Minto Reforms)
1919	The Government of India Act (Montagu Chelmsford Reforms)
1927	The Simon Commission
1928	The Nehru Report (Pt Moti Lal Nehru)
1930	The First Round Table Conference
1931	The Second Round Table Conference
1932	Communal Award Third Round Table Conference
1933	White Paper issued by the British Government
1935	The *Government of India Act*
1937	The Federal Court of India established
1949	The August Offer

Years	*Particulars*
1942	The Cripp's Mission
	Quit India Movement
1944	C *Rajagopalachari's Formula*
1945	The Wavell Plan
1946	The Cabinet Mission Plan
1947	Mountbatten Plan
	Indian Independence Act was passed by British Parliament
15 8-47	India granted Independence
1949	The Abolition of (Privy Council Jurisdiction) Act
26 11 49	The Constituent Assembly passed new Constitution of India
26 1-50	*The Constitution of India came into force*
	India became "Sovereign Democratic Republic"
27 1 50	The Supreme Court of India Inaugurated
1951	*The Constitution (First Amendment) Act*
1953	The Constitution (Second Amendment) Act
1954	The Constitution (Third Amendment) Act
1955	Fifth Law Commission was appointed
	The Constitution (Fourth Amendment) Act
	The Constitution (Fifth Amendment) Act
1956	The Constitution (Sixth Amendment) Act
	The Constitution (Seventh Amendment) Act
1960	*The Constitution (Eighth Amendment) Act*
	The Constitution (Ninth Amendment) Act
1961	The Constitution (Tenth Amendment) Act
	The Constitution (Eleventh Amendment) Act
1962	The Constitution (Twelfth Amendment) Act
	The Constitution (Thirteenth Amendment) Act
	The Constitution (Fourteenth Amendment) Act
1963	The Constitution (Fifteenth Amendment) Act
	The Government of Union Territories Act
1964	The Constitution (Sixteenth Amendment) Act
	The Constitution (Seventeenth Amendment) Act
1966	The Constitution (Eighteenth Amendment) Act
	The Constitution (Nineteenth Amendment) Act
	The Constitution (Twentieth Amendment) Act
1967	The Constitution (Twenty first Amendment) Act
1969	The Constitution (Twenty second Amendment) Act
	The Constitution (Twenty-third Amendment) Act
1971	The Constitution (Twenty fourth Amendment) Act
	The Constitution (Twenty-fifth Amendment) Act
	The Constitution (Twenty-sixth Amendment) Act
	The Constitution (Twenty seventh Amendment) Act
1972	The Constitution (Twenty-eighth Amendment) Act
	The Constitution (Twenty ninth Amendment Act
	The Constitution (Thirtieth Amendment) Act

Years	*Particulars*
1973	The Constitution (Thirty first Amendment) Act
1974	The Constitution (Thirty second Amendment) Act
	The Constitution (Thirty third Amendment) Act
	The Constitution (Thirty fourth Amendment) Act
	The Constitution (Thirty fifth Amendment) Act
1975	The Constitution (Thirty-sixth Amendment) Act
	The Constitution (Thirty-seventh Amendment) Act
	The Constitution (Thirty-eighth Amendment) Act
	The Constitution (Thirty-ninth Amendment) Act
1976	The Constitution (Fortieth Amendment) Act
	The Constitution (Forty First Amendment) Act
	The Constitution (Forty-Second Amendment) Act

Table of Cases

1

Judicial System of India : Ancient & Mediaeval Period

Legal history of India can conveniently be studied under four important periods—Hindu period, Muslim period, British period and after Independence Hindu period extends for nearly 1500 years before and after the beginning of the Christian era Muslim period begins with the first major invasion by Muslims in 1100 A D British period begins with the consolidation of the British power in the middle of the eighteenth century and lasts for nearly two hundred years The modern period began with the withdrawal of the British when on 15th August 1947, India was declared independent

A Hindu Period Judicial System in Ancient India

During the Hindu period in ancient India, Hindu society, institutions and beliefs gradually developed and a definite shape was given to them Many important beliefs and doctrines of today are deep-rooted in the ancient Hindu ideology In order to understand properly the ancient judicial system of India it is of vital importance to consider briefly three important factors *First*, the social institutions in ancient India, *secondly*, its political system and institutions and *lastly*, its religion and religious philosophy

1 Ancient Hindu Social Order, Institutions and Religious Philosophy

In determining the social order two important concepts may be stated, namely, the caste system and the joint family system

(i) The caste system —The caste system emerged in ancient India as unique and one of the most rigid social systems ever developed in any part of the world [1] A caste was a social group consisting solely of persons born in it [2] Whole society was divided into four main castes The four castes were precisely and clearly defined and rules pertaining to their lawful activities and functions dominated all social activities The *Brahmins* were considered to be

1 Shama Sastri *Evolution of Indian Polity*, p 73 see also A L Lasham *The Wonder that was India* Ch V pp 147 149 R C Dutt *The Early Hindu Civilisation* pp 53 145 227, *Later Hindu Civilisation* pp 58 82

2 See Ronal Segal *The Crisis of India* Ch II pp 34 37, Irawati Karve *Hindu Society—An Interpretation* pp 90 92

the most superior caste The scholars and priests of the Hindus belonged to this caste They had in law and in fact privileges and prerogatives not held by other sections of Hindu society The *Kshatriyas* were the nobles and warriors and to this caste rulers of various states and kingdoms mostly belonged The *Vaisyas* were the merchants and traders The *Sudras* were the workers and ranked lowest The caste was determined by birth The members of the three upper classes, namely, *Brahmins*, *Kshatriyas* and *Vaisyas* were the elite of Hindu society Caste determined the pattern of life amongst Hindus relating to their status, living, marriage, profession and social obligations Caste consciousness had become a marked feature in social relationship[3] The basis and continuance of caste system depended on the vast net work of sub-castes Sub-caste relationships were based on specialisation of work and economic independence The caste association further diluted political loyalties In later centuries caste exclusiveness became absolute and reached its peak in caste panchayats Each caste panchayat was regarded as a supreme authority for the particular caste in each village It gave stability to Indian society Though the caste system was conservative still it was most needed to suit the requirements of the ancient India[4]

(ii) **Joint family system** —The joint family system was another important institution which determined the social order amongst Hindus in ancient India A family was regarded as a unit of the Hindu social system[5] An ancient family included parents, children, grand children, uncles and their descendants, and their collaterals on the male side Thus social group had common dwelling and enjoyed their estate in common At the head of the family was the patriarch, whose authority was absolute over the members of his family He represented all the members of his family before the law and claimed absolute obedience from them The family group was bound together by *Srardha*[6] ceremony A number of families constituted a *sept*, gram or village which became an administrative unit also The concept of family led to private property which in turn led to disputes and struggles which necessitated law and a controlling authority In later centuries problems concerning the division of land and inheritance came in for special attention Two systems of family law, namely,

3 G S Ghurye *Caste and Class in India* p 47 For Caste distinctions in Law *see* J W Spellman *Political Theory of Ancient India* pp 111 112

4 The caste system is gradually dying out in Modern India *See* also Sir Percival Griffiths *Modern India* (New York 1957) p 31

5 The rite of commemorating the ancestors at which balls of rice called *pinda* were offered *Srardha* defined the family and those who were entitled to participate in the ceremony were co-pindas (*Sapindas*) members of the family group

6 Dr L D Barnett *Antiquities of India* Ch III pp 138 140 *See* also A L Basham *The Wonder that was India* pp 155 158

Mitakshara and Dayabhaga, became the basis of civil law [7] They dealt with property rights in a Hindu joint family and mostly amongst land owning families

The political system and institutions were varied and complex in ancient India India was divided into various independent states—some monarchies and the rest tribal republics [8] Monarchy in various forms was prevailing in ancient Hindu period *Dharma* was the most important concept of the Hindu political thought "In the context of the *Dharmashastras* (or Hindu Political Science) the word *dharma* came to mean 'the privileges, duties and obligations of a man, his standard of conduct as a member of the Aryan community, as a member of one of the castes, as a person in a particular stage of life' [9] Another important concept was *Saptanga* (seven limbs) of the state [10] These were sovereign (*Swamin*), minister (*Amatya*), territory with people (*Rastra*), army (*Danda*) and friends or allies (*Mitra*) The King was the supreme authority of his state [11] His functions involved the protection not only of his kingdom against external aggression but also of life, property and traditional custom against internal foes [12] He protected the purity of class, caste and the family system as well as maintained social order The nucleus of the Mauryan system was the King whose powers increased tremendously Ashoka interpreted these as a paternal despotism In tribal kingdoms which contained tribal units and villages the King was assisted by a court of the elders of the tribe and by the village headman

The form of Hindu religion which prevailed in India previous to the spread of Buddhism is generally known as the Vedic religion,[13] while the form of Hindu religion which succeeded Buddhism is generally known as Puranic religion [14] The Hindu religion and philosophy laid down four great aims of human life *Dharma* (religion and social law) *Artha* (wealth or economic well being), *Karma* (doing work) and *Moksha* (salvation of the soul) The correct balance of the first three was to lead to the fourth

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7 Most families of Bengal and Assam follow the rules of *Dayabhaga* while the rest of India generally follows *Mitakshara*

8 Romila Thapar *A History of India* Ch III pp 50-68

9 K P Mukerji *The State* (1952) p 327 *see* Appendix I (pp 321 346) "The Hindu Conception of Dharma" *See* also Sarvapalli Radhakrishnan *Indian Philosophy* (New York 1922) pp 1 51 Jawahar Lal Nehru *The Discovery of India* p 77 Amaury de Riencourt *The Soul of India* (New York 1960) p 15

10 P V Kane *History of Dharmasastra* Vol III Ch II pp 17 55

11 Throughout the kingdom the administration of justice was done in the name of the King

12 P V Kane *History of Dharmasastra* Vol III Ch III pp 56-103

13 Vedic religion was of elemental Gods of Indra Agni Suryatunaruna *The Asvins and others*

14 Puranic religion dealt with image worship of deities

These concepts played a very important role in Indian thought[11] Amongst all the formal systems of Hindu philosophy the best known are *Nyaya, Vaisheshika, Sankhya, Yoga Mimamsa* and *Vedanta*. They had a great impact on Indian thought[16] and *Yoga* and *Vedanta* are still having a great influence in various ways As Nehru stated, "It is this philosophy which represents the dominant philosophic outlook of Hinduism today" [17]

2 Ancient Kingdoms Administrative Units

In order to understand the ancient judicial system it is necessary to have a short account of the administrative divisions prevailing in the ancient states Ancient India was divided into various independent states and in each state the King was the supreme authority [18] The King, with the assistance of his chief priest (*Purohita*) and military commander (*Senani*), carried on the administration of his kingdom Each state was divided into provinces and these into divisions and districts, which differed in terminology as well as in area For each province or district separate governors, according to their status, were appointed with different designations Most often they were related to the King and in certain places their appointment was hereditary District officers were entrusted with the judicial and administrative functions [19]

At the meeting place of districts (*Janapada-Sandhishu*), cities also existed The City was administered by a separate governor (*Nagaraka, Puropala*) According to Kautilya,[20] each town was under the jurisdiction of a Prefect (*Nagaraka*) At the end of the fourth century B C, Pathliputra was a very flourishing town under the Maurya Emperor Chandragupta Megasthanese, an ambassador of Seleucus Nicator, who resided there for some time, has given a detailed account of the administration of Pathliputra He states that it was under the care of a council of thirty officials who formed six committees of five members each Each committee looked after different spheres of administration

Apart from cities, there were a large number of villages all over India In fact, the village was the unit of government In the North as well as in the South, districts were classified according to the number of villages under their administrative jurisdiction [21] The Village was based upon the bond between the family or the *clan*

Each village consisted of a village headman and village council or village *panchayat* They assisted the district authorities in controlling the village administration The office of the village headman was mostly hereditary In villages he represented the King's administration and, therefore, his appointment was also at the King's pleasure The Pseudo Sukra writing in the late Middle ages, speaks of the village headman as the mother and father of the village, protecting it from robbers, from the King's enemies and from the oppressions of the King's officers [22]

In Kautilya's *Arthashastra*,[23] the realm was divided into four administrative units called (i) *Sthaniya*, (ii) *Dronmukha*, (iii) *Kharvatika*, (iv) *Sangrahana* *Sthaniya* was a fortress established in the centre of eight hundred villages, a *Dronmukha* in the centre of 400 villages, a *kharvatika* in the midst of 200 villages and a *Sangrahana* in the centre of ten villages In each of these places and at the meeting places of districts (*Janapada-Sandhishu*), law courts were established to decide disputes between citizens

3 The Administration of Justice

(i) Constitution of Courts —In ancient India, the King was regarded as the fountain head of justice [24] His foremost duty was to protect his subjects He was respected as the Lord of *Dharma* and was entrusted with the supreme authority of the administration of justice in his kingdom The King's Court was the highest court of appeal as well as an original court in cases of vital importance to the state [25] In the King's Court the King was advised by learned *Brahmins*, the Chief Justice and other judges, ministers, elders and representatives of the trading community Next to the King was the Court of the Chief Justice (*Pradvivaka*) Apart from

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22 *Sukranitisara* edited by Jivananda Ch II p 172 (Tr Sarkar Ch II p 343)

23 Kautilya was the greatest Indian exponent of the art of government the duties of kings ministers and officials and methods of diplomacy *See* Kautilya *Arthasastra* Ch III pp 1 147 Ch XX p 22 *see* also J W Fleet *Introductory Note in Kautilya's Arthasastra* trans by R Shama sastry (4th edition Mysore 1951) p v

24 P V Kane *History of Dharmasastra* Vol III Ch XI deals with *Law and Administration of Justice* pp 242 316 *See* also Justice S S Dhavan *Indian Jurisprudence* (1963) Vol 8 Journal of the National Academy of Administration p 19

25 Regarding the King's judicial jurisdiction Kalidas in his *Abhijana Shakuntalam* has referred to *Dhana Mitra's case* Dhana Mitra was a wealthy merchant who died in a shipwreck The dispute relating to his property came before the King which he transferred to his Minister The Minister passed an order that the entire estate of this merchant be reverted to the King Reversing this decision the King Dushyanta ordered an enquiry to be made—whether any of his widows was expecting a child and he was informed that one of them was pregnant The King directed that the child after birth was entitled to the property of the deceased

the Chief Justice, the Court consisted of a board of judges to assist him All the judges were from the three upper castes preferably Brahmins Sometimes some of these judges constituted separate tribunals having specified territorial jurisdiction Brihaspati[26] has stated that there were four kinds of tribunals, namely, stationary, movable courts held under the royal signet in the absence of the King, and commissions under the King's presidency

In villages, the local village councils or *Kulani*, similar to modern *panchayats*, consisted of a board of five or more members to dispense justice to villagers [27] It was concerned with all matters relating to endowments, irrigation, cultivable land, punishment of crime, *etc* Village councils dealt with simple civil and criminal cases At a higher level in towns and districts the courts were presided over by the Government officers under the authority of the King to administer justice The link between the village assembly and the official administration was the headman of the village In each village a local headman was holding hereditary office and was required to maintain order and administer justice He was also a member of the village council He acted both as the leader of the village and the mediator with the government [28]

In order to deal with the disputes amongst members of various guilds or associations of traders or artisans (*Srenl*), various corporations, trade-guilds were authorised to exercise an effective jurisdiction over their members These tribunals consisting of a president and three or five co adjutors were allowed to decide their civil cases regularly just like the other courts No doubt, it was possible to go in appeal from the tribunal of the guild to a local court, then to royal judges and from then finally to the King, but such a situation rarely arose Due to the prevailing institution of the joint family system, family courts were also established *Puga* assemblies made up of groups of families in the same village decided civil disputes amongst family members According to Brihaspati

> "First come the family arbitrators, the judges are superior to the families, the Chief Justice (*Adhyaksha*) is superior to the judges, the King is superior to all of them and his decision becomes law' [29]

Criminal cases were ordinarily presented before the Central court or the courts held under the Royal authority The smaller judicial assembly at the village level was allowed to hear only minor criminal cases

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26 Brihaspati Ch I pp 1 3
27 *See* S Varadachariar *The Hindu Judicial System* p 88
28 P V Kane *History of Dharmasastra* Vol II p 65 *see* also K P Jayaswal *Hindu Polity* Ch XIII
29 Dr Radhakumud Mukerji *Local Government in Ancient India* pp 29-34 132 143 *See* also Dr P N Sen *Hindu Jurisprudence* p 363

Vachaspati Misra has pointed out that *even in ancient* India the decision of each higher court superseded that of the court below Each lower court showed full respect to the decision of each higher court As such the King's *decision was supreme*

One of the cardinal rules of the administration of justice in ancient India was that justice should not be administered by a single individual A bench of two or more judges was always preferred to administer justice "No decision shall be given by a person singly",[30] is a formula found frequently repeated in the old texts Thus Vasistha says, "Let the King or his ministers (or the King taking counsel with *Brahmins*) transact the business on the Bench" [31] The King sitting in his council heard the cases and administered justice

(ii) Institution of Lawyers—*Smritis* do not refer to the existence of any separate institution of lawyers in the ancient Hindu judicial system According to Kane,[32] "This does not preclude the idea that persons well-versed in the law of the *smritis* and the procedure of the courts were appointed to represent a party and place his case before the court The procedure prescribed by *Narada-smriti*, *Smriti of Brihaspati* and *Smriti of Katyayana* reaches a very high level of technicalities and skilled help must often have been required in litigation" After considering, Kane's observations and other historical material it becomes quite clear that the organisation of the lawyers as it exists today was not in *existence in the ancient Hindu period*

(iii) Judicial Procedure—Judicial procedure was very elaborate According to Brihaspati a suit or trial (*Vyavahara*) consisted of four parts (*i*) the plaint (*poorva paksha*), (*ii*) the reply (*uttar*), (*iii*) the trial and investigation of dispute by the court (*Kriyaa*), and (*iv*) the verdict or decision (*nirnayaya*) [33] Filing of plaint before the court meant that the plaintiff submitted himself to the jurisdiction of the court The court was then entitled to issue an order to the defendant to submit his reply on the basis of allegations made in the plaint If the defendant admitted the allegations levelled against him in the plaint, the business of the court was to decide the case Where the defendant contested the

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30 न ऐकाकी निर्णय कुर्यात् ।

Cited by S Varadachariar, *The Hindu Judicial System* (1946) p 64

31 राजमन्त्रीसद कार्याणि कुर्यात् ।

See ibid p 65 *See* also K P Jayaswal *Hindu Polity* p 313

32 P V Kane *History of Dharmasastra* Vol III Ch XI pp 288 289 *See* also A L Basham *The Wonder that was India* p 117 R N Mehta *Crime and Punishment in the Jatakas* J H O Vol XII No 3 p 438

33 P V Kane *History of Dharmasastra* Vol III Ch XV, pp 379 410 S C Banerjee, *Dharma Sutras A Study in their Origin and Development* pp 99 108

case before the court, it was the duty of the court to provide full opportunity to both the parties to prove their cases After the trial was over final decision was given by the court During the course of proceedings both parties were required to prove their case by producing evidence Ordinarily, evidence was based on any or all the three sources, namely, documents, witnesses[34] and the possession of incriminating objects

In civil cases, the social status and qualification of the witness was always enquired into by the court

In criminal cases, sometimes circumstantial evidence was sufficient to punish the criminal or to acquit him The accused was allowed to produce any witness in his defence before the court, to prove his innocence Witnesses were required to take an oath before the court Ordeal as a means of proof was not only permitted but frequently used In criminal cases, the courts were enjoined to convict only according to the procedure established by law False witnesses were very severely fined by the courts Narada says that they were condemned to go to a horrible hell and stay there for a *Kalpa* [35]

(iv) Trial by Ordeal —Trial by ordeal[36] was a method to determine the guilt of a person The ancient Indian society,[37] which was largely dominated by religion and faith in God, considered the trial by ordeal as a valid method of proof It was very common to swear 'by my troth' or to call upon the Gods to witness the truth of a statement, as is clear from various illustrations of the ordeal given in the Epics [38] *Smriti* writers generally limited its application to cases where any concrete evidence on either side was not available Its greatest drawback was that sometimes a person proved his innocence by death as the ordeal was very painful and dangerous

A detailed account of ordeals, as they existed in ancient India,

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34 P V Kane, *History of Dharmasastra*, Vol III, Ch XIII, pp 330-360 *See* also, *The Sacred Book of the East*, edited by F Max Muller, Vol XXXIII, pp 79, 244

35 Narada *Quotations* Vol V, p 10

36 In England, the trial by ordeal was also very common during the early period. *See* V D Kulshreshtha, *English Legal History*, (Edn 2nd) p 5 For history of Ordeals in India, *see*, P V Kane, *History of Dharmasastra* Vol III Ch XIV, pp 361-378

37 As far back as *Atharva Veda* and the *Upnishads*, ordeal was adopted as a special feature of Indian law *Atharva Veda* passim *Chandogya Upanisad* VI, p 16 *See* also, L D Barnett *Antiquities of India* (Reprint 1964) p 155 , John W Spellman, *Political Theory of Ancient India*, pp 119 121 , S Varadachariar, *The Hindu Judicial System* pp 164 166

38 E W Hopkins, *Journal of the American Oriental Society*, Vol XIII, p 133 *See* also, Vepa P Sarathi, *Law of Evidence in India*, pp 7-8

is given in *Agni Purana* [39] It points out that only in cases of high treason or very serious offences the trial by ordeal was used In other petty matters, it was sufficient to prove the truth by taking an oath Some important types of ordeal, which were, commonly adopted, may be stated as follows

(*a*) *Ordeal of Balance* —According to it, an accused was weighed twice First of all his actual weight was determined by weighing him in a balance Again a weight equal to that of the accused was placed in one arm of the scale and in the other arm the accused person was made to sit He then prayed to God that if he was really guilty his part of the scale may be lowered by his guilts, otherwise his scale may be raised to prove his innocence [40]

(*b*) *Ordeal of Fire* —Hindus regarded fire (*Agni*) as a God having purifying qualities and, therefore, ordeal of fire was used to find out a guilty man In the early literature it is stated that according to the ordeal of fire an accused was required to walk through or stand in fire for some specified time If it was accomplished without any harm to the accused he was held innocent It was used in very severe cases [41] Another way was to wrap leaves over the naked hands of the accused, who was asked to carry a red hot iron ball in his hand and walk a few paces He was declared innocent if his hands had no sign of burns In other alternative tests, the accused was required to pick with his hand a coin out of a pot of boiling liquid or to lick with his tongue a red hot plough share If it did not burn he was deemed innocent [42]

(*c*) *Ordeal by Water* —Hindus always regarded water as a sign of religious purity For all religious purposes the water of certain rivers is even now considered sacred It was natural that Hindus turned to water after fire (*Agni*) to test the guilt of the accused According to one method, the accused was required to stand in waist deep water and then to sit down in water, as an archer shot an arrow He was required to remain under water until a swift runner had brought back the arrow which was shot earlier If he remained under water during this time limit he was declared innocent [43] Another method required the accused person to drink

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39 *Agni Purana* CCLV, p 28 *Manu Smriti* Ch VII pp 114 115 According to *Dharma Sutra* ordeal was classified into five namely (i) *Dhata* (Balance) (ii) *Agni* (iii) *Udaka* (Water) (iv) *Visa* (Poison) (v) *Kosa* (Water of deities) *See* Dr S C Banerjee *Dharma Sutras A Study in their Origin and Development* pp 109 109 *The Sacred Book of the East* edited by F Max Muller Vol XXXIII Part I Narada pp 100 120 Brihaspati pp 315 318

40 *Agni Purana* Vol CCLV pp 32 37 John W Spellman *Political Theory of Ancient India* p 120

41 There is a reference to this ordeal in the Ramayana where Sita had to prove her chastity of her captivity by Ravana by walking through fire

42 L D Barnett *Antiquities of India* (Reprint 1964) p 155

43 John W Spellman *Political Theory of Ancient India* p 120

the water used in bathing the idol He was considered innocent if within the next fourteen days he had no harmful effects

(*d*) *Ordeal of Poison* —It was based on the principle that God protects those who are innocent and no protection is given to the guilty Hindus had faith in this principle According to the ordeal of poison, the accused was required to drink the poison without vomiting it If he survived, it was clear that God had declared him innocent

(*e*) *Ordeal of Lot* —It meant that two lots of the same type representing Right (*Dharma*) and Wrong (*Adharma*) were placed in a jar The accused person was asked to draw a lot If the person drew *Dharma* he was declared innocent [44]

(*f*) *Ordeal of Rice grains* —The accused was required to chew unhusked rice and then was asked to spit it out If traces of blood appeared in his mouth he was found guilty

(*g*) *Ordeal of Fountain-cheese* —Ktesias[45] states that the Kings in ancient India used another type of ordeal which was a remarkable lie detector He mentions a fountain from which water coagulates like cheese If this is mixed with ordinary water and given to the accused person to drink, he becomes delirious and confesses his misdeeds

(v) Trial by Jury —In the ancient judicial system of India trial by jury existed but not in the same form as we understand the term now [46] In the court scene of the *Mrichchhakatika*, which according to Jayaswal is a product of the third century, the jury is mentioned Sukraniti, Brihaspati and Narada defined the functions of the jury This shows that the members of the community assisted in the administration of justice They were merely the examiners of the cause of conflict and placed true facts before the judge But the administration of justice was done by the presiding judge and not by the jury

(vi) Appointment of Judges and Judicial Standard — Caste considerations played an important role in the appointment of the chief judge and other judges Almost all the law books dealing with the ancient judicial system mention that preferably *Brahmin* must be appointed a chief judge or judge [47] In order of preference next came *Kshatriyas* and *Vaisyas* But in no case was a *Sudra* appointed a judge Regarding the qualifications of a judge,

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44 L D Barnett *Antiquities of India* (Reprint 1964) p 155
45 J W McCrindle *Ancient India as Described by Ktesias* pp 17 18
46 See V R Dikshitar *Hindu Administrative Institutions* pp 246-247
K P Jayaswal *Hindu Polity* Part I p 54
47 P V Kane *History of Dharmasastra* Vol III Ch XI pp 272 275

it is stated that persons who are ignorant of the customs of the country, unbelievers in the caste system and God, despisers of sacred books, insane, irate or distressed will not be appointed judges [48] The law books insisted on the appointment of persons, who were highly qualified and learned in law, for the post of a judge Women were not allowed to hold the office of a judge [49]

The standards laid down for judges and magistrates were very high Judges were required to take the oath of impartiality when deciding disputes between citizens [50] Integrity was the first qualification Referring to the integrity of a judge, Brihaspati states, "A judge should decide cases without consideration of personal gain or prejudice or any kind of bias (nowadays the term used is 'without fear or favour') and his decisions should be in accordance with the procedure prescribed by the texts A judge who performs his judicial duties in this manner achieves the same spiritual merit as a person performing a Yajna" [51] Dishonesty in a judge was regarded as the most reprehensible crime

(vii) Crimes and Punishments —In ancient Hindu period punishment was considered to be a sort of expiation which removed impurities from the man of sinful promptings and reformed his character Manu[52] states that men who are guilty of crimes and have been punished by the King go to heaven, becoming pure like those who perform meritorious deeds Ancient *Smriti* writers were also fully aware of various purposes served by punishing the criminals [53] The punishments served four main purposes, namely, to meet the urge of the person who suffered, for revenge or retaliation, as deterrent and preventive measures, and for reformation or redemption of the evil-doer [54]

Manu,[55] Yajnavalkya[56] and Brihaspati[57] state that there were four methods of punishment, namely, by gentle admonition, by

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48 *Brihaspati*, 1, p 33
49 *Anguttara Nikaya* IV VIII, p 80
50 *Narada*, p 1 3 *Vratam Narada* pp 1 34
51 *See* Justice S S Dhavan Indian Jurisprudence (1963) Vol 8 *Journal of the National Academy of Administration* p 22
52 *Manusmriti* VIII p 318
53 Harty Elmer Barnes in his book *The Study of Punishment* (1930 New York) refers to the horrible and revolting methods for punishing criminals which were used in the Western countries But in Ancient India a comparatively human treatment was given to the criminals
54 P V Kane *History of Dharmasastra* Vol III pp 388 390 Where there is no conflict between *Dharmasastra* and *Arthasastra* both should be followed In the case of conflict whatever is stated in *Dharmasastra* should be followed This was the rule of interpretation adopted by the Courts in ancient India
55 *Manusmriti* VIII p 1?)
56 *Yajnavalkyasmriti* I p 367
57 *Brihaspat smriti* see *Sacred Books of the East* Edited by Max Muller Vol XXXIII p 387

severe reproof, by fine and by corporal punishment, and declare that these punishments may be inflicted separately or together according to the nature of offence

Kautilya[58] lays down that the awarding of punishment must be regulated by a consideration of the motive and nature of the offence, time and place, strength, age, conduct (or duties), learning and monetary position of the offender, and by the fact, whether the offence is repeated This means judges always considered the relevant circumstances before deciding the actual punishment The *Dandaviveka*[59] quotes a verse in which the considerations that should weigh in awarding punishment are brought together, namely, the offender's caste,[60] the value of the thing, the extent or measure, use or usefulness of the thing with regard to which an offence is committed, the person against whom an offence is committed (such as an idol or temple or King or *Brahmin*), age, ability (to pay) qualities, time, place, the nature of the offence (whether it was repeated or was a first offence) [61] The severity of punishment depended on caste also [62]

Certain classes of persons were exempt from punishment under the ancient criminal law in India Angiras quoted by the *Mitakshara*[63] states that an old man over eighty, a boy below sixteen, women and persons suffering from diseases are to be given half *prayaschitta* and *Sankha*, a child less than five commits no crime nor sin by any act and is not to suffer any punishment nor to undergo any *prayaschitta* [64]

Certain *Smriti* writers[65] prescribe that as a general rule a *Brahmin* offender was not to be sentenced to death or corporeal punishment for any offence deserving a death sentence, but in such cases other punishments were substituted Katyayana[66] was against exempting *Brahmins* and stated "Even a *Brahmin* deserves to be killed if he be guilty of causing abortion if he be a thief (of gold) or if he kills a *Brahmin* woman with a sharp weapon or if he kills a chaste woman" Similarly, Kautilya provides "a *Brahmin* who aims at the kingdom or who forces entrance into the King's *harem* or who incites wild tribes or enemies (against his King) or

58 *Kautilya's Arthasastra* Vol IV p 10
59 *Dandaviveka of Vardhamana* (Gaikwad Oriental Series) p 76
60 *Manusmriti* VIII pp 337 338 (for theft)
61 *Ibid* p 320
62 *Ibid* p 285
63 *Yajnavalkyasmriti* III p 243
64 *Naradasmriti* Vol IV p 85 Section 42 of *The Indian Penal Code* provides that nothing is an offence which is done by a child under seven years of age
65 *Gautamadharmasutra* Vol XII p 43 *Kautilya Arthasastra* Vol IV p 8 *Manusmriti* Vol VIII pp 125, 380-381, *Yajnavalkyasmriti* Vol II p 270
66 *Smriti of Katyayana* p 806

who foments disaffection (or rebellion) in forts, the country or the army, should be sentenced to death by drowning '[67]

Under the ancient criminal law, criminals were required to pay a fine as well as to undergo corporal punishment for their offences In certain cases, the court was empowered to grant compensation to the aggrieved party in addition to the punishment given to the offender

Gautama[68] and Manu[69] prescribe that the penalty for a theft if committed by *Sudras* should be eight times the value of the stolen goods, while *Vaisyas, Kshatriyas* and *Brahmins* should pay respectively sixteen, thirty two and sixty four times the value of the stolen article Since the people from the upper classes were expected to follow higher standards of life and conduct than the lower, they were required to pay higher fines as their theft was a relatively more heinous crime A curious old law is mentioned which allowed a repentant thief to escape the full penalty of his crime if he came with dishevelled hair before the King and offered him a club inviting him to strike him down [70] On a large scale serious thefts were punished with death In certain cases the whole village was held responsible for theft or lost property The villagers were held liable to make restitution of the lost property if they were unable to prove that the lost property was taken away from their village The King or his local representative was held liable to pay for the missing property or theft, as they were responsible for the police and maintaining law and order

In adultery and rape punishment was awarded on the basis of the caste considerations of the offender and of the woman Yajnavalkya[71] prescribes the amercement,[72] the middling one when the paramour was of a higher caste, but if he was of a lower caste than the woman, the male offender was sentenced to death and the woman had her ears cut off For committing an adultery a *Brahmin* was liable to pay a fine of 500 panas and for rape he was liable to pay a penalty of 100 panas For adultery a *Kshatriya* or a *Vaisya* was required to pay either the same or a larger amount, apart form this the *Vaisya* was also imprisoned and the *Kshatriya s* hair were cut off and urine poured over his head The property of a *Sudra* was confiscated and his genitals were cut off if he seduced the wife of a man of a higher caste If such a woman was

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67 *Kautilya s Arthasastra*, IV p 11
68 *Gautama-dharmasutra* XII pp 15 16
69 *Manusmriti* VIII pp 338 39
70 Dr L D Barnett *Antiquities of I nd a* p 150
71 *Yajnavalkyasmr ti* II p 286
72 Accord ng to *Sanka-Likhita* the first amercement is f ne from 24 panas (a copper coin) to 91 the middling one is from 200 to 500 pa nas and the highest is from six hundred to 1 000 in proport on to the val e of the matter in dispute or the injury caused

kept in a *harem* by a *Sudra* she was put to death It was only in extreme and rare cases that the adultress was executed Ordinarily, her husband or family members were empowered to inflict upon her the necessary punishment

In abuse or contempt cases, every care was taken to see that each higher caste got due respect from persons of the lower caste, Gautama [73] Manu, [74] Yajnavalkya[75] prescribe that a *Kshatriya* or a *Vaishya* abusing or defaming a *Brahman* was to be punished respectively with a fine of 100 panas and 150 panas A *Sudra* was punished by corporal punishment (cutting off the tongue) While a *Brahman* defaming a *Kshatriya* or *Vaisya* was to be fined 50 25 or 12 panas respectively According to Gautama,[76] a *Brahman* could flout a *Sudra* with impunity If a person of a lower caste sat on the same bench a man of a higher caste, the man of the lower caste was branded on the breech

For committing murder, early *Sutras* prescribe that the murderer should pay 1000 cows for killing a *Kshatriya*, 100 for a *Vaisya* and 10 for a *Sudra* These cows were given to the King to be delivered to the relatives of the murdered person A bull was given to the King as a fine for murder The Code of Baudhayana lays down that if a *Brahman* was murdered by a man of a lower caste, the criminal will be put to death and his property will be confiscated If a *Brahman* murdered another *Brahman* he was to be branded and banished If a *Brahman* killed a man of lower caste it was provided that he shall compound for the offence by a fine Other ancient law books lay down that punishment for murder was death with confiscation of the murderer's property The *Arthasastra* prescribes death penalty for the murder, even if it occurred in a quarrel or duel Hanging was the penalty for spreading false rumours, house-breaking and stealing the King's horse and elephants For plotting against the King, forcible entry into the King's *harem*, aiding the King's enemies, creating revolt in the army, murdering one a father and mother or committing serious arson capital punishment was given in varied forms, namely, roasting alive, drowning, trampling by elephants, devouring by dogs cutting into pieces, impalement, *etc* Mutilation, torture, and imprisonment were common penalties for many other crimes [77]

Henry Maine, [78] after examining ancient western legal systems made the generalisation that "Penal law of ancient communities *is not the law of crimes, it is the law of wrongs* or to use the Eng

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73 *Gautama-dharmasutra* XII pp 1 8 1[7]
74 *Manusmriti* VIII pp 267 268
75 *Yajnavalkyasmriti* II pp 206-207
76. *Gautama-dharmasutra*, XII p 13
77 *See* P V Kane *History of Dharmasastra* Vol III pp 391-410
78 Henry Maine *Ancient Law* (1866 Edn 3rd) Ch X at p 370

lish technical word, of Torts " But Dr Priya Nath Sen[79] in his *Tagore Law Lectures* on *Hindu Jurisprudence* has proved that this generalisation is not true for Ancient Hindu Law He points out " the King could of his own motion take cognizance of many wrongs called *chalas, padas* and *aparadhas* and it is clear that in such crimes as theft, assault, adultery, rape and manslaughter the *Smriti* text does not prescribe only *money* compensation to the person wronged but corporal punishment in the first instance and monetary compensation in addition "

Kane points out, "It will be seen from the early *Sutras* like that of *Gautama* and form the *Manusmriti* that the more ancient criminal law in India was very severe and drastic, but that from the times of Yajnavalkya, Narada and Brihaspati the rigour of punishments was lessened and softened and fines came to be the ordinary punishments for many crimes "[80]

Sir S Varadachariar, Judge, Federal Court of India, in his *Radha Kumud Mookerjee Endowments Lectures* on the *Ancient Hindu Judicial System*,[81] states, "Speaking of Ancient India, Lee[82] observes 'the Royal system did not harmonise with the spirit of the day' The villagers had a judicial system of their own at once familiar to and respected by them, the various trades and guilds had a similar system The presiding officer of the popular courts or the guild courts held office either by election or inheritance according to local custom With him were associated three or five men In these apparently private courts were settled the affairs of everyday life In cases of grave crimes or when the condemned party refused to obey the judgment of the local court, the King was concerned with litigation "

But according to Varadachariar this cannot be said to be quite a correct description of the position of the King as stated by the *Sutras* and the *Smritis* He points out, " the administration of justice seems largely to have been the work of Village Assemblies or other popular or communal bodies, whether with or without the authority of the King and whether with or without his presence, or the presence of some public officer There is no trace of an organised criminal justice vested either in the King or in the people There seems to have prevailed the system of Wergild (*Vaira*) which indicates 'that criminal justice remained in the hands of those who were wronged' In the *Sutras*, on the other hand, 'the King's peace is recognised as infringed by crime' "

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79 Dr Priya Nath Sen *Tagore Law Lectures on Hindu Jurisprudence* (1918) Lecture XII at pp 264-266

80 P V Kane, *History of Dharmasastra* Vol III p 390

81 S Varadachariar, *Ancient Hindu Judicial System* (Lucknow 1946) pp 62 63

82 Lee *Historical Jurisprudence*, p 141

From this it can be inferred that the King's power and jurisdiction gradually increased and extended throughout his Kingdom

B The Muslim Period Judicial System in Mediaeval India

Muslim period marks the beginning of a new era in the legal history of India Arabs were the first Muslims who came to India They came in the eighth century and settled down in the Malabar Coast and in Sind but never penetrated further This was most unfortunate, for, if they had done so as they did in Europe, Indian culture and civilization would not have stagnated [83] The synthesis between Islamic and Hindu cultures would have blossomed and Indians would have taken the palm in scientific advancement instead of the Europeans who had the benefit of Arabic culture As it is, the Arabs conquered the Persians, Afghans and Turks, and converted them to Islam, and it was the Afghans and Turks who were let loose on India Though the Prophet prohibited unprovoked attacks, the Ghaznis and Ghoris who were animated by the lust for gold and pretended zeal for Islam had an easy victory over the Hindus who were enfeebled by their comforts, luxuries and internal dissensions Just as the Raman Empire collapsed before the German barbarians—the Huns and Goths—so too the Hindu Kingdoms fell before the Asian barbarians—the Afghans and Turks

But having come to India as rulers, they were politic enough not to antagonise the Hindus completely though now and then they indulged in acts of mere vandalism and brutality If things continued as they were, all would have been well, because in spite of some antagonism the two cultures would have become one in course of time Rulers like Akbar the Great and Saints like Kabir were striving for such a unity, but unfortunately for Indians, the British came on the scene To advance themselves, to establish themselves as traders and acquire power and having acquired power to consolidate themselves as rulers and sit firmly in the Red Fort at Delhi, they fanned into flames the dying embers of antagonism between Hindus and Muslims As long as they stayed in India they kept it up, and even while quitting India they deliberately partitioned the country into India and Pakistan in order to politically weaken the sub Continent The process is being continued by similar so called civilised countries

In this context, it is of some importance to determine briefly the main reasons for the downfall of the Hindu Kingdom and

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83 See, India on the Eve of Muslim Contract by K M Panikkar in *A Survey of Indian History* (1947) Ch XII See also Dr A B M Habibullah *The Foundation of Muslim Rule in India* (1945)

study the Muslim social order, political theory and religious philosophy

1 Causes of the Downfall of Early Hindu Kingdoms

Towards the end of the eleventh and the beginning of the twelfth century, began the downfall of the Hindu period [84] Local Hindu Rajas were attacked and defeated by foreign invaders of Turkish race Gradually, old Hindu kingdoms began to disintegrate Out of the various political, military social and economic factors, some important causes of the downfall of the Hindu period may be stated as follows

The political history of this period is full of constant struggles between a few powerful states for supremacy [85] An atmosphere of great mutual distrust was created amongst the contending states which prevented their political unity against the common enemy [86] It resulted in the frittering away of the economic and military resources of the country at a time when the country faced great danger from foreign invaders A leadership capable of controlling and guiding the political and military talents and uniting Indians against the common foreign enemy was also lacking [87] Indians failed to adapt their time honoured system of warfare to meet the requirements of the new situation The real weakness in Indian administration lay in the influence of the great feudatory families whose power and ambition constituted a perpetual threat to the stability of the central government Hindu kingdoms also suffered from the prevailing caste divisions [88]

Among the contributory causes of the defeat may be mentioned the treachery of local individual chiefs or high officers for the sake of power and money The enemy took full advantage of this weakness

One of the main secrets of the success of the Sultans of Ghazni and Ghor was the use of shock tactics,[89] i e the sudden raid followed by the equally swift victorious return home Indian leadership repeatedly failed to keep proper vigilance and united strength to face the common foreign enemy The greatest drawback was the complete lack of political unity amongst Indian Kings and the absence of the patriotic sense and lack of nationalistic spirit The military superiority of the foreign invaders also

84 U N Ghoshal *Studies in Indian History and Culture* Ch XVII pp 353 373 See also Romesh Chunder Dutt *A History of Civilization in Ancient India* (Calcutta 1890) Vol III Book V pp 476 87 487 88 494 9
85 V A Smith *The Oxford History of India* Edn 4th p 371
86 Dr A L Srivastava *The Sultanate of Delhi* (Edn 2nd 1953) [illegible] Ch III *[illegible] the [illegible] of Ma[illegible] of Ghazni [illegible]*
87 See [illegible] *[illegible] D[illegible] to the M[illegible]* [illegible]
88 Dr R C Majumdar [illegible] (V[illegible]) [illegible] Ch XXI
89 Dr A L Srivastava *The S[illegible] of Delhi* [illegible]

contributed to the downfall of the Hindu Kingdoms The military superiority of the Turks was also due to their enthusiasm which they derived from their plunder of the colossal treasures stored in the Indian temples and palaces as well as from zeal for their newly acquired Muslim religion—a zeal which is always fanatic in the convert

2 Muslim Social Order, Political Theory and Religion

The social system of Muslims was based on their religion Islam which may be described as a reformist version of current seventh-century Arabian practice [90] The Muslims followed the principle of equality for men and they had no faith in the graded or sanctified inequality of caste system Muslim religion places every man on an equality before God, overriding distinctions of class, nationality, race and colour It was in a sense more patriarchal and of necessity, arbitrary i e , not bound by rigid rules Polygamy was restricted by Islam to the taking of four wives The main underlying idea of the Muslim rule in India was its own self preservation and political domination over Hindus In the early days, no doubt the Muslims who came from Persia Turkey and Afghanistan kept themselves aloof from the Indians, but in due course the old barriers were lifted and a process of Indianization began which reached its climax during the Mughal period The Muslims adopted many habits, ways and manners of Hindus and *vice versa*

The political theory of Muslims was governed by their religion, Islam [91] It was based on the teachings of the *Quran*, their religious book, the traditions of the Prophet and precedent The teachings laid down only the fundamental principles on which the Islamic policy was based No well defined political institution was specifically created by the *Quran* The political institutions which were adopted and developed by the Muslims were based on the ideas given by the Greek Philosophers Sovereignty in a Muslim State belonged to God The Muslim Kings in India in general regarded themselves as God's humble servants (*Nyazmande dargah e Ilahi*) The ruler was His delegate, duly elected by the people to perform certain functions according to the *Quran* The Muslim polity was based on the conception of the legal sovereignty of the *Shara* or Islamic law The political theory laid emphasis on the fact that all Muslims formed one congregation of the faithfuls

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90 Islam and Medieval and Modern Societies" by S Maqbul Ahmed in *Transactions of the Indian Institute of Advanced Study* 1965 Vol I pp 132 236

91 Percival Spear *India A Modern History See* Ch VIII at pp 94 101 Islam in India For Islamic Political Theory see *The History and Culture of the Indian People The Delhi Sultanate* Bharatiya Vidya Bhavan Vol VI Ch XIV pp 438-444

and it was necessary for them to unite closely in the form of an organised community Any attempt to break away from the organised community was condemned by the religion [92] All the members of the community elected the Khalifa or Caliph as the Commander of the faithfuls It was made obligatory on all Muslims to owe allegiance to the Caliph who was also their ruler In India the Sultans of Delhi, though absolute realms, claimed to be the representatives of the Caliph [93]

The *Quran* being of absolute authority, all controversy centred round its interpretation, from arose the Muslim law or *Shariat* But the Muslims also proliferated into many sects Two main sects were—the *Sunnis*, to which the Turks and Afghans in India adhered, and the *Shias* who became dominant in Persia The Muslim religion, modified by its Turkish and Afghan influences, was further modified by the Persian culture by which all the invaders were more or less influenced Kulkarni has pointed out, "The Turkish invaders of India presented a political and religious arrangement in the country, the essential injustice and inequity of which could not be wholly removed even by the most enlightened Muslim rulers Religious intolerance and racism were the bed rock of their policy" [94] The policy of intolerance inspired the Sultans to propagate strange doctrines While Ala-ud din Khilji asserted that non-Muslims in the country could claim no rights, Firoz Shah declared with admirable finality that India was a *Musalman* country [95]

3 Historical Introduction

In the late tenth and early eleventh centuries, Mahmud of Ghazni,[96] a Muslim of Turkish race, attacked India from the north-west Subsequently, Mahmud led a series of raids on north west India, plundered, destroyed the temples and each time returned with huge wealth [97] In 1191 Muhammad of Ghor attacked India, but he was defeated by Hindu Rajas led by Prithvi Raj, a Rajput hero Next year in 1192, Muhammad of Ghor defeated Prithvi Raj at Thaneswar and marched to Delhi Thus by the end of twelfth century he established a Muslim Sultanate at Delhi conquering most of northern India A new political factor was introduced into the Indian sub continent as the Sultans of Delhi imitated the rule of Turks and the Afghans From 1206 till 1526 not less than

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92 *Quran* III 192 XLII 38, V 2
93 I H Qureshi *Administration of the Sultanate of Delhi* pp 22 23
94 V B Kulkarni *British Domination in India and After*, p 6
95 *The History and Culture of the Indian People The Delhi Sultanate* Bharatiya Vidya Bhavan Vol VI p 104
96 Ghazni is located between Kabul and Kandhar in modern Afghanistan
97 Mahmud of Ghazni destroyed the great temple of Somnath on the coast of Kathiawar in 1024 25 and plundered huge wealth

thirty three Turkish Kings, belonging to five dynasties,[98] occupied the throne of Delhi In 1398 Tamerlane or Timur, a Mongol conqueror, captured Delhi and ended the Sultanate of Delhi The Sultanate was revived in the middle of fifteenth century The Delhi Sultanate was characterised by dynastic instability and the Sultans were mostly engaged in a series of dynastic blood feuds and Hindu persecution They practised a military despotism, ruthlessly weeding out the incompetent in the perpetual struggle for succession to the throne Earlier, the Sultans certainly envisaged establishing an empire embracing the whole of India Though they conquered northern India, the Deccan proved to be an obstacle In 1336 the Hindu Kingdom of Vijayanagar was founded in the South[99] It protected Southern India from any further Muslim expansion and for the next two centuries it remained as a dominant power in the South

"The sixteenth century", says Romila Thapar, "brought two new factors into Indian history—the Mughals who came by land and began by establishing themselves in the north and the Portuguese who come by sea to establish themselves in the South and the West Both these new factors were to shape the course of Indian history—the Portuguese by striving to win a monopoly of the overseas trade of India, the Mughals by founding an empire Though the Portuguese failed, the Mughals succeeded and between them they carried India into a new age"[1]

In 1526 Babar, a descendant of Tamerlane and Genghis Khan, defeated Ibrahim Lodi at Panipat and captured Delhi Babar founded the Mughal Empire[2] in India and the old period of Delhi Sultanates came to an end After Babar's death[3] his son Humayun ruled, but the constant fighting with rebels kept him engaged From 1540 to 1545 Sher Shah ruled over North India By introducing various reforms during his reign, it is said that he laid the foundation for Akbar's greatness Akbar, son of Humayun was the greatest Mughal ruler He ruled over a large part of India from 1556 to 1605 He consolidated his empire by defeating his enemies and developing friendly relations with the non-Muslim martial races of India He developed an administrative and judicial system in his empire His successors Jehangir,[4] Shah Jahan[5] and

98 Kings of the Slave Dynasty ruled from 1206 to 1290 The Khilji Dynasty ruled from 1290 to 1320 the Tughlaq Dynasty ruled from 1320 to 1399 *the Sayads Dynasty ruled from 1414 to* 1444 *the Lodi Dynasty ruled in* 1444 and again from 1451 to 1526.

99 Hindu Kingdom of Vijyanagar was founded along the river Tungabhadra in 1336 by two brothers from Telengana (in modern Andhra Pradesh) It represented a revival of Hindusim against Islam

1 Romila Thapar *A History of India* p 330

2. They were really Chagtai Turks

3 Emperor Babar died in 1530

4 Emperor Jehangir ruled from 1605 to 1627

5 Emperor Shah Jahan ruled from 1627 to 1658

Aurangzeb[6] lacked the ability, integrity and statesmanship of Akbar After the death of Aurangzeb in 1707, the Mughal empire began to disintegrate due to the rising power of Sikhs and the Marathas Practically, the Mughal empire came to an end but continued theoretically under a series of puppet emperors up to 1862

Thus the Mughal empire which was founded by Babar in 1526 lasted for nearly two centuries until the British took over "The Mughal Empire", Vincent Smith observes, "like all Asian despotisms, had shallow roots Its existence depended mainly on the personal character of the reigning autocrat and on the degree of his military power It lacked popular support, the strength based on patriotic feeling, and on the stability founded upon ancient tradition "[7]

The judicial system of India during the Mediaeva Muslim period, may therefore be divided and studied under two separate periods—the Sultanate of Delhi and the Mughal period The judicial reforms of Sher Shah formed a bridge between the two periods

C The Sultanate of Delhi Judicial System

In order to understand the set up of the judicial machinery during the period covered by the Sultans of Delhi *i e* from 1206 to 1526, it is necessary to have a brief account of the prevailing administrative units

1 Civil Administration Administrative Units

The civil administration of the Sultanate[8] was headed by the Sultan and his Chief Minister (*Wazir*) The Sultanate was divided into administrative divisions from the province to the village level Though the Sultan continued changing, the principle of forming the administrative division remained the same with minor changes in the area of each division The Sultanate was divided into Provinces (*Subahs*) The Province (*Subah*) was composed of Districts (*Sarkars*) Each District (*Sarkar*) was further divided into *Parganahs* A group of villages constituted a Parganah

The Sultan was represented in each Province (*Subah*) by a Governor (*Nazim* or *Muflı*), under whom a number of depart mental heads were appointed The Governor was responsible for maintaining law and order and also to collect revenue in each pro vince In each District (*Sarkar*), the *Fauzdar* was the principal

6 Emperor Aurangzeb ruled from 1658 to 1707

7 Vincent A Smith *The Oxford History of India* (Edn 2nd London 1923) p 465

8 *See*, Bharatiya Vidya Bhavan *The History and Culture of the Indian People The Delhi Sultanate* Vol VI I H Qureshi *Administration of the Sultanate of Delhi*; Dr A L Srivastava *The Sultanate of Delhi*

executive and police officer, who represented the Governor The *Kotwal* was the immediate commanding officer in the cities and *Shiqahdar* was in the *Parganahs* The *Pargarah* was the smallest administrative unit having its own officials—the executive officer, officer recording produce, the treasurer and two registrars *Munsif* was the chief assessment officer and the revenue collector

The village was the smallest unit of administration It was the basic economic unit It was administered by three officials—the village headman, the accountant (*Patwari*) and the registrar (*Chaudhari*) The Village Assemblies or *Pancharats* managed local administration At the village level and to a large extent in the *parganah*, many Hindu officers, belonging to families associated with administration, were still allowed to work

In provincial capitals large markets were also established Cities were divided into sectors and each sector was in the charge of two officials who were responsible to the chief city administrator

2 The Administration of Justice Constitution of Courts

In Mediaeval India the Sultan, being head of the State, was the supreme authority to administer justice in his kingdom The administration of justice was one of the important functions of the Sultan, which was actually done in his name in three capacities. As arbitrator in the disputes of his subjects he dispensed justice through the *Diwan i Qaza*, as head of the bureaucracy, justice was administered through the *Diwan i Mazalim*, as the Commander in Chief of Forces through his military commanders who constituted *Diwan i-Siyasat*[9] to try the rebels and those charged with high treason It was the Sultan's sole prerogative to order the execution of a criminal and the courts were required to seek his prior approval before awarding the capital punishment

The judicial system under the Sultan was organised on the basis of administrative divisions of the kingdom A systematic classification and gradation of the courts existed at the seat of the capital, in Provinces, Districts, *Parganahs* and villages[10] The powers, and jurisdiction of each court was clearly defined

(1) **Central Capital** —Six courts which were established at the capital of the Sultanate, may be stated as follows —

The King's court, *Diwan e Mazalim*, *Diwan-e Risalat*, *Sadr Jehan's* court, Chief Justice's Court and *Diwan-e-Siyasat*

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9 It was created by Sultan Muhammad Tughlaq

10 *See* M B Ahmad *The Administration of Justice in Mediaeval India* pp 104 125

The King s court, presided over by the Sultan, exercised both original and appellate jurisdiction on all kinds of cases It was the highest Court of Appeal in the realm [11] The Sultan was assisted by two reputed *Muftis* highly qualified in law

The Court of *Diwan e Mazalim* was the highest Court of Criminal Appeal and the Court of *Diwan e Risalat* was the highest Court of Civil App al Though the Sultan nominally presided over these two courts, he seldom sat in them The Chief Justice (*Quzi ul Quzat*) was the highest judicial officer next to the Sultan From 1206 to 1240 in the absence of the Sultan, the Chief Justice presided over these Courts In 1240 Sultan Nasir Uddin, being dissatisfied with the then Chief Justice, created a superior post of *Sadre Jahan* and appointed Qazi Minhaj Siraj to his post Since then *Sadre Jahan* became *de facto* head of the judiciary The Court of Ecclesiastical cases, which was under the Chief Justice up to 1240, was also transferred to the *Sadre Jahan* and later on became popular as *Sadre Jahan's Court Sadre Jahan* became more powerful and occasionally presided over the King's Court [13] The offices of the *Sadre Jahan* and Chief Justice remained separate for a long time Ala Uddin amalgamated the two They were again separated by Sultan Firoz Tughlaq The Court of *Diwan e Siyasat* was constituted to deal with the cases of rebels and those charged with high treason Its main purpose was to deal with criminal prosecutions It was established by Muhammad Tughlaq and continued up to 1351

The Chief Justice s Court was established in 1206 It was presided over by the Chief Justice (*Qazi ul Quzat*) It dealt with all kinds of cases Earlier, the Chief Justice or *Qazi ul Quza* was the higher judicial officer but with the creation of a new post of *Sadre Jahan*, its importance was reduced for some time The Chief Justice and Puisne Judges were men of ability (*Afazil-e Razgar*) and were highly respected Many Chief Justices were famous for their impartiality and independent character during the Sultanate period Four officers, namely, *Mufti*,[13] *Pandit*,[14] *Mohtasib*[15] and *Dadbak*,[16] were attached to the Court of the Chief Justice

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11 H Beveridge *History of India* Vol I p 102
12 Badaoni *Muntakhab ut Tawarikh* Bib Ind p 239
13 Mufti was a Lawyer of eminence attached to the Court to expound law and was appointed by the Chief Justice in the name of the Sultan Law as expounded by Mufti was accepted by the Judge as authoritative (Barni p 441)
14 A Brahman lawyer generally known as Pandit was appointed to explain personal law of Hindus in civil cases His status was the same as that of Mufti (Barni p 441)
15 He was incharge of prosecutions on original side and in appeal he answered for the prosecution (Barni p 441)
16 An administrative officer of the Court (Barni p 4)

(ii) **Provinces.**—In each Province (*Subah*) at the Provincial Headquarters five Courts were established, namely, *Adalat Nazim Subah*, *Adalat Qazi-e-Subah*, Governor's Bench (*Nazim-e-Subah's Bench*), *Diwan-e-Subah* and *Sadr Subah*.

Adalat Nazim Subah was the Governor's (*Subahdar*) Court. In the Provinces the Sultan was represented by him and like the Sultan he exercised original and appellate jurisdiction. In original cases he usually sat as a single Judge. From his judgment an appeal lay to the Central Appellate Court at Delhi.

While exercising his appellate jurisdiction, the Governor sat with the *Qazi-e-Subah* constituting a Bench to hear appeals. From the decision of this Bench, a final second appeal was allowed to be filed before the Central Court at Delhi.

Adalat Qazi-e-Subah was presided over by the Chief Provincial *Qazi*. He was empowered to try civil and criminal cases of any description and to hear appeals from the Courts of District *Qazis*. Appeals from this Court were allowed to be made to the *Adalat Nazim Subah*. *Qazi-e-Subah* was also expected to supervise the administration of justice in his *Subah* and also to see that *Qazis* in districts were properly carrying out their functions. He was selected by the Chief Justice or by *Sadr Jahan* and was appointed by the Sultan. Four officers, namely, *Mufti*, *Pandit*, *Muhtasib* and *Dadbak*, were attached to this court also.

The Court of *Diwan-e-Subah* was the final authority in the Province in all cases concerning land revenue.

The *Sadr-e-Subah* was the Chief Ecclesiastical officer in the Province. He represented *Sadr Jahan*, in Subah in matters relating to grant of stipend, lands, etc.

(iii) **Districts.**—In each District (*Sarkar*), at the District Headquarter, six courts were established, namely, *Qazi*, *Dadbak* or *Mir Adls*, *Faujdars*, *Sadr*, *Amils*, *Kotwals*.

The Court of the District *Qazi*[17] was empowered to hear all original civil and criminal cases. Appeals were also filed before this Court from the judgments of the *Pargana Kazis*, *Kotwals* and Village *Panchayats*. The Court was presided over by the District *Qazi* who was appointed on the recommendation of the *Qazi-e-Subah* or directly by *Sadr Jahan*. The same four officers, namely, *Mufti*, *Pandit* the *Mohtasib* and the *Dadbak*, were attached to the Court of District *Qazi*.

The Court of the *Faujdar* tried petty criminal cases concerning

17 Person selected as Qazi usually possessed a good knowledge of Law. Sir M. Elphinstone, *History of India*, p. 451.

security and suspected criminals Appeals were filed to the Court of *Nazim e-Subah* The Court of *Sadr* dealt with cases concerning grant of land and registration of land Appeals were allowed to be filed before the *Sadr e-Subah* Court of *Amils* dealt with Land Revenue cases From the judgment of this Court an appeal was allowed to the Court of *Diwan e-Subah* *Kotwals* were authorised to decide petty criminal cases and police cases

(iv) **Parganah** —At each *Parganah* Headquarter two courts were established, namely, *Qazi e Parganah* and *Kotwal* The Court of *Qazi e Parganah* had all the powers of a District *Qazi* in all civil and criminal cases except hearing appeals Canon law cases were also filed before this court Petty criminal cases were filed before the *Kotwal* He was the principal Executive Officer in towns

(v) **Villages** —A *Parganah* was divided into a group of villages For each group of villages there was a Village Assembly or *Panchayat*, a body of five leading men to look after the executive and judicial affairs The *Sarpanch* or Chairman was appointed by the *Nazim* or the *Faujdar* The Panchayats decided civil and criminal cases of a purely local character [18] Though the decrees given by the *Panchyats* were based on local customs and were not strictly according to the law of the Kingdom still there was no interference in the working of the Panchayats As a general rule, the decison of the Panchayat was binding upon the parties and no appeal was allowed from its decision

3 *Appointment of Judges and Judicial Standard*

During the period of Sultans, Judges were impartially appointed by the Sultan, on the basis of their high standard of learning in law From amongst the most virtuous of the learned men in his kingdom, the Sultan appointed the Chief Justice (*Qazi ul Quzat*) Judges were men of great ability (*Afazil e Rozgar*) and were highly respected in society Many Chief Justices of the Sultanate period were famous for their independence and impartiality in the administration of justice Ibn Batuta[19] has stated that the *Qazis* were occasionally teachers of law who had the ability to give correct judgment Whenever unpopular and corrupt persons were appointed *Qazis*, public resentment was often expressed [20] Persons of doubtful character were removed from their judicial offices Even a Chief Justice was liable to be dismissed or degraded to the post of a *Qazi* of lower rank where the Sultan found him incompetent and corrupt [21] Incompetent and corrupt *Qazis* were ridiculed condemned and dismissed from their offices

18 W Briggs *Rise of the Muhomdan Power in India* Vol III p 420
19 *Ibn Batuta Travels* Elliot III p 56 71
20 It happened during the reign of Sultan Alauddin Khilji and Qutubuddin *See* Ziauddin Barni *Tarikh e Firoz Shahi* Bib Ind p 352
21 Badaon *Muntakhab ut Tawarikh* Bib Ind Vol I p 234

D Judicial Reforms of Sher Shah

In 1540 Sher Shah laid the foundations of Sur Dynasty in India after defeating the Mughal Emperor Humayun, son of Babur During the reign of the Sur Dynasty from 1540 to 1555, when Sher Shah and later on Islam Shah ruled over India, the Mughal Empire remained in abeyance Sultan Sher Shah was famous not only for his heroic deeds in the battle field but also for his administrative and judicial abilities It was said by Sultan Sher Shah that "Stability of Government depended on justice and that it would be his greatest care not to violate it either by oppressing the weak or permitting the strong to infringe the laws with impunity" [22] In spite of the fact that Sher Shah ruled only for five years, he introduced various remarkable reforms in the administrative and judicial system of his kingdom His important judicial reforms, as summarised by M B Ahmad,[23] may be stated as follows—

(i) Sher Shah introduced the system of having in the *Parganahs*, separate courts of first instance for civil and criminal cases At each *Parganah* town he stationed a civil Judge, called *Munsif*, a title which survives to this day, to hear civil disputes and to watch conduct of the *Amils* and the *Moqoddams*[24] (officers connected with revenue collections)

The *Shiqahdars* who had uptil now powers corresponding to those of *Kotwals* were given magisterial powers within the *Parganahs* They continued to be in charge of the local police [25]

(ii) *Moqoddams* or heads of the Village Councils were recognised and were ordered to prevent theft and robberies In cases of robberies they were made to pay for the loss sustained by the victim Police regulations were now drawn up for the first time in India

(iii) When a *Shiqahdar* or a *Munsif* was appointed, his duties were specifically enumerated

(iv) The judicial officers below the Chief Provincial *Qazi* were transferred after every two or three years The practice continued in British India

(v) The duties of Governors and their deputies regarding the preservation of law and order were emphasised [26]

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22. Stewart *History of Bengal* p 178 *See* also W Briggs, *Rise of the Mahomedan Power in India* Vol II p 124
23. M B Ahmad *The Administration of Justice in Medieval India* p 179
24. Henry Elliot and Dowson *History of India* Vol IV p 414
25. W Erskine, *History of India* Vol II p 443
26. Henry Elliot and Dowson *History of India* Vol IV p 420

(vi) The Chief *Qazi* of the Province or the *Qazi ul Quzat* was in some cases authorised to report directly to the Emperor on the conduct of the Governor,[27] especially if the latter made any attempt to override the law

E THE MUGHAL PERIOD JUDICIAL SYSTEM

In India the Mughal period begins with the victory of Babar in 1526 over the last Lodi Sultan of Delhi. His son, Humayun, though he lost his kingdom to Sher Shah in 1540, regained it after defeating the descendants of Sher Shah in July 1555. The Mughal empire continued from 1555 to 1750.

1 Administrative Divisions

The Mughal empire (*Sultanat-e Mughaliah*) was administered on the basis of the same political divisions as existed during the reign of Sher Shah. For the purposes of civil administration the whole empire was divided into the Imperial Capital, Provinces (*Subahs*), Districts (*Sarkars*), *Parganahs* and Villages. Just like the Sultans of Delhi, the Mughal Emperors were also absolute monarchs. The Mughal Emperor was the Supreme authority and in him the entire executive, legislative, judicial and military power resided.

2 The Administration of Justice Constitution of Courts

During the Mughal period, the Emperor was considered the "fountain of Justice". The Emperor created a separate department of Justice (*Mahakma-e-Adalat*) to regulate and see that justice was administered properly. On the basis of the administrative divisions, at the official head quarters in each Province, District, Parganah and Village, separate courts were established to decide civil, criminal and revenue cases.[28] At Delhi, the Imperial capital of India, highest courts of the Empire empowered with original and appellate jurisdictions were established. A systematic gradation of courts, with well defined powers of the presiding Judges, existed all over the empire.

(1) **The Imperial Capital**.—At Delhi, which was the capital (*Dural Saltanat*) of the Mughal Emperors in India, three important courts were established.

The Emperor's Court, presided over by the Emperor, was the highest court of the empire. The Court had jurisdiction to hear original civil and criminal cases. As a court of the first instance generally the Emperor was assisted by a *Daroga e Adalat*, a *Mufti*

27 Stewart, *History of Bengal* p. 143.
28 M. B. Ahmad *The Administration of Justice in Mediaeval India* pp. 143-166.

and a *Mir Adl*.[29] In criminal cases the *Mohtasib-e Mumalik* or the Chief *Mohtasib*, like the Attorney General of India to day, also assisted the Emperor. In order to hear appeals, the Emperor presided over a Bench consisting of the Chief Justice (*Qazi ul Quzat*) and *Qazis* of the Chief Justice's Court. The Bench decided questions both of fact and law. Where the Emperor considered it necessary to obtain authoritative interpretation of law on a particular point, the same was referred to the Bench of the Chief Justice's Court for opinion. The public were allowed to make representations and appeals to the Emperor's court in order to obtain his impartial judgment.

The Chief Court of the Empire was the second important court at Delhi, the seat of the Capital. It was presided over by the Chief Justice (*Qazi ul Quzat*). The Court had the power to try original, civil and criminal cases, to hear appeals from the Provincial Courts. It was also required to supervise the working of the Provincial Courts. In administering justice, the Chief Justice was assisted by one or two *Qazis* of great eminence, who were attached to his court as Puisne Judges. Four officers attached to the Court were—*Daroghas e Adalat*, *Mufti*, *Mohtasib*, *Mir Adl*. The *Mufti* attached to the Chief Justice's Court was known as *Mufti-e Lashkar*.

The Chief Justice was appointed by the Emperor. He was considered the next important person, after the Emperor, holding the highest office in the judiciary. Referring to the qualifications of a Chief Justice, Sir J. Sarkar has observed, "Men of high scholarship and reputed sanctity of character wherever available were chosen."[30] Sometimes a Chief Provincial *Qazi* was promoted to the post of the Chief Justice.

The Chief Revenue Court was the third important court established at Delhi. It was the highest Court of Appeal to decide revenue cases. The Court was presided over by the *Diwan-e-Ala*.

Apart from the above stated three important courts, there were also two lower courts at Delhi to decide local cases. The Court of *Qazi* of Delhi, who enjoyed the status of Chief *Qazi* of a Province, decided local civil and criminal cases. An appeal was allowed to the Court of the Chief Justice. The Court of *Qazi-e Lashkar* was specially constituted to decide cases of the military area in the capital. The Court moved from place to place with the troops.

In each court as stated above, the four officers attached were *Daroghas e Adalat*, a *Mufti*, a *Mohtasib* and a *Mir Adl*.

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29 *Almagir Aurangzeb*, p. 107.

30 Sir Jadunath Sarkar, *Mughal Administration* (1919), p. 9.

(ii) **Provinces** —In each Province (*Subah*) there were three courts, namely, the Governor's own court and the Bench, the Chief Appellate Court, the Chief Revenue Court

The Governor's own court (*Adalat e Nazim e Subah*) had original jurisdiction in all cases arising in the provincial capital It was presided over by the Governor (*Nazim e Subah*) Sometimes the Governor presided over a Bench to hear original, appellate and revisional cases It was known as *Adalat e Nazim e Subah* Further appeals from this Court lay to the Emperor's Court by way of petition and as a matter of routine to the Court of the Chief Justice at Delhi [31] Two officers attached to the Court of the Governor's Bench were—a *Mufti* and a *Darogha e Adalat*

The Provincial Chief Appellate Court was presided over by the *Qazi e Subah* The Court had original civil and criminal jurisdiction It was the chief Court of Appeal in the Provinces for all appeals from the District Courts The *Qazi e Subah* had powers similar to that of the Governor He had a permanent seat on the Bench of the Governor's Court The Governor consulted him whenever the use of the sovereign's prerogative came in for discussion in a case Seven officers attached to this court were—*Mufti*, *Mohtasib*, *Darogha e Adalat e Subah*, *Mir Adl*, *Pandit*, *Sawaneh Nawis*, *Waqae Nigar*

Provincial Chief Revenue Court was presided over by *Diwan e Subah* The Court was granted original and appellate jurisdiction in revenue cases An appeal from this court lay to the *Diwan-e Ala* at the Imperial capital Four officials attached to this court were—*Peshkar*, *Darogha* Treasurer and Cashier

(iii) **Districts (Sarkars)** —In each District (*Sarkar*) there were four courts, namely, the Chief, Civil and Criminal Court of the District, *Faujdari Adalat*, *Kotwali Amalguzari Kachehri*

The Chief Civil and Criminal Court of the District was presided over by the *Qazi e Sarkar* The Court had original and appellate jurisdiction in all civil and criminal cases and in religious matters *Qazi e Sarkar* was the principal judicial officer in a District He was officially known as '*Shariyat Panah*' Six officers attached to his Court, were—*Darogha e Adalat Mir Adl*, *Mufti*, *Pandit* or *Shastri*, *Mohtasib* and *Vakil e Sharai* Appeals from this court lay to *Qazi e Subah* [32]

Faujdari Adalat dealt with criminal cases concerning riots and state security It was presided by the *Faujdar* Appeals lay to the Governor's Court

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31 Henry Elliot and Dowson *History of I I* Vol VII p 171
32 *I I* Vol III pp 172 3

Kotwali Court decided cases similar to those under modern Police Acts and had appellate jurisdiction It was presided by *Kotwal e-Shahar* Appeals lay to the District *Qazi* [33]

The *Amalguzari Kachehri* decided all revenue cases *Amalguzar* presided over this Court An appeal was allowed to the Provincial Diwan

(iv) **Parganah** —In each *Parganah* there were three courts namely, *Adalat-e Parganah, Kotwali and Kachehri*

Adalat e Parganah was presided over by *Qazi-e Parganah* The Court had jurisdiction over all civil and criminal cases arising within its original jurisdiction It included all those villages which were under the *Parganah* court's jurisdiction *Qazi-e-Parganah* had all the powers of a District *Qazi* within the area of his *Parganah* As there was no other lower court so the *Adalat e Parganah* had no appellate jurisdiction. Appeals from this court were made to the Court of District *Qazi* Four officers attached to *Adalat-e-Parganah* were—*Mufti, Mohtasib-e Parganah, Daroghe e Adalat* and *Vakil-e-Shara*

Court of *Kotwali* was presided by *Kotwal-e-Parganah* to decide such cases as are found in the modern Police Act. Appeals were made to the Court of District *Qazi*

Amin was the presiding officer in *Kachehri* which decided revenue cases An appeal lay to the District *Amalguzar*

(v) **Villages** —The village was the smallest administrative unit From ancient times the village council (*Panchayati*) were authorised to administer justice in all petty civil and criminal matters [34] Generally, the *Panchayat* meetings were held in public places It was presided by five *Panchs* elected by the villagers who were expected to give a patient hearing to both the parties and deliver their judgment in the *Panchayat* meeting *Sarpanch* or Village-Headman was generally President of the *Panchayat* No appeal was allowed from the decision of a *Panchayat* Village *Panchayats* were mostly governed by their customary law

3 Institution of Lawyers

Litigants were represented before the Courts by professional legal experts They were popularly known as *Vakils* Thus the legal

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33 Alexander Dow, *History of Hindustan* Vol III p 752.

34 Sir Charles Metcalfe in the *Report of the Select Committee of the House of Commons* Vol. III, App 84 p 331

"The village communities are little republics having nearly everything they want within themselves and almost independent of any foreign relations They seem to last where nothing lasts. Dynasty after dynasty tumbles down, revolution succeeds revolution."

profession flourished during the Mediaeval Muslim period Though there was no institution of lawyers like the "Bar Association" as it exists today, still the lawyers played a prominent role in the administration of justice Two Muslim Indian Codes, namely, *Fiqh e Firoz Shahi* and *Fatwa e Alamgiri*, clearly state the duties of a *Vakil* Ibn Batuta, who was working as a judge during the reign of Mohammad Tughlaq, mention *Vakils* in his book [35] Mawardi,[36] referring to the legal profession, states that specialised knowledge of law was necessary both for acting as a *Qazi* and for the legal practice Moreland[37] appears to be misinformed, where he expresses the view that the legal profession did not exist during the Muslim period in India On the basis of other contemporary material[38] available in India it is clear that the legal profession existed at any rate in the Mughal period

Government advocates were for the first time appointed in the reign of Shah Jahan to defend civil suits against the State During Aurangzeb's reign, wholetime lawyers were appointed in every district, who were known as *Vakil e Sarkar* or *Vakil e Sharai* They were appointed either by the Chief *Qazi* of the Province or sometimes by the Chief Justice (*Qazi ul Quzat*) Sometimes they were appointed to assist the poor litigants by giving them free legal advice *Vakils* had a right of audience in the Court It was expected that the Vakils should maintain a high standard of legal learning and behaviour

4 Judicial Procedure

A systematic judicial procedure was followed by the courts during the Muslim period [39] It was mainly regulated by two Muslim Codes, namely, *Fiqh e Firoz Shahi* and *Fatwa i Alamgiri* The status of the Court was determined by the political divisions of the kingdom

In civil cases, the plaintiff or his duly authorised agent was required to file a plaint for his claim before a court of law having appropriate jurisdiction in the matter The defendant, as stated in the plaint, was called upon the court to accept or deny the claim [40] Where the claim was denied by the defendant, the court framed the issues and the plaintiff was required to produce evidence supporting his claim The defendant was also given an opportunity to prove his case with the assistance of his witnesses

35 Ibn Batuta *Travels* p 194
36 Mawardi Al *Akhamus Sultanyah* (J R A S 1910) p 764
37 W H Moreland *India at the Death of Akbar* p 35
38 For details *see* Kalematul Tayyebat K C C Lawyers who were employed by Litigants (Br Mus M S Add 26238)
39 *See* M B Ahmad *The Administration of Justice in Mediae al India* pp 176-188
40 *Fatwa e Alamgiri* Calcutta Vol IV pp 1 84 87

Witnesses were cross examined After weighing all the evidence the presiding authority delivered judgment in open court

In criminal cases a complaint was presented before the court either personally or through his representative To every criminal court was attached a public prosecutor known as *Mohtasib* [41] He instituted prosecutions against the accused before the court The court was empowered to call the accused at once and to begin hearing of the case Sometimes the court insisted on hearing the complainant s evidence before calling the accused person Ordinarily, the judgment was given in open court In exceptional cases, where either the public trial was against the interest of the State or the accused was dangerously influential, the judgment was not pronounced in the open court

Evidence was classified by the Hanafi law into three categories (*a*) *Tawatur* i e , full corroboration , (*b*) *Ehad* i e , testimony of a single individual , (*c*) *Iqrar* i e admission including confession The Court always preferred *Tawatur* to other kinds of evidence All those who believed in God were competent witnesses The presumption was that believers in God could not be rejected as untruthful unless proved to be so Oaths were administered to all witnesses Women were also competent witnesses but at least two women witnesses were required to prove a fact for which the evidence of one man was sufficient The testimony of one woman was recognised only in those cases where women alone were expected to have special knowledge The principles of *Estoppel* and *Res Judicata* were also recognised by the Muslim law

5 Trial by Ordeal

The Muslim law prohibited the use of trial by ordeal to determine the guilt of a person It was not favoured either by the Sultans or by the Mughal Rulers in India As stated earlier [42] the trial by ordeal was mostly used during the ancient Hindu period In the non Muslim States, which were under the protection of the Sultans and Mughals, however, the old system of trial by ordeal somehow continued The Muslim Rulers neither adopted it nor interfered in the non Muslim States to stop it

Sultan Jalal Uddin Khilji (1290 96) made the earliest attempt during the Muslim period, to adopt the system of trial by ordeal in the case of Sidi Maula when the court declined to convict him for sedition The *Sadre Jahan* and other Judges refused to allow Sultan Jalal Uddin to test the truthfulness of Sidi Maula by Ordeal of Fire [43] Emperor Akbar also tried to encourage the system of

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41 Badao *Mu Al ab T a kl* Bib Ind Vol I 187
42 *Se* Tr l by O l al
43 *Z a* (ld n B rn *T kl e F Sl al* p 11

trial by ordeal, most probably in order to please the Rajputs [44] The Muslim law experts strongly opposed this move to introduce the trial by ordeal and therefore Akbar gave up the idea In his records, Hamilton,[45] who came to India during the reign of Aurangzeb, has mentioned a trial in South India where the accused person was required to put his hand in a pan of boiling oil

It may, therefore, be concluded that though at times even the Muslim Rulers tried to encourage the trial, the system on the whole fell into disuse due to the impact of Muslim law in India

6 Appointment of Judges and Judicial Standard

During the Mughal period, the Chief Justice (*Qazi ul Quzat*) and other judges of higher rank were appointed by the Emperor [46] Sometimes, the Chief Justice and other judges were directly appointed from amongst the eminent lawyers Jadunath Sarkar has pointed out, 'Men of high scholarship and reputed sanctity of character wherever available were chosen' [47] A Chief Provincial *Qazi* having high judicial reputation was also promoted to the office of the Chief Justice [48] Similarly, Provincial and District *Qazis* were also appointed from lawyers The selection of a *Qazi* as a rule was made from amongst the lawyers practising in the courts Lawyers were also appointed as Chief *Mohtasib* of the Province Corrupt judicial officers were punished and dismissed Every possible effort was made to keep up the high standard of the judiciary

Emperor Aurangzeb's order for the appointment of a judicial officer contained the following instructions —

> "Be just, be honest, be impartial Hold the trials in the presence of the parties and at the Court house and the seat of the Government Do not accept presents from the people of the place where you serve, nor attend entertainments given by anybody and everybody know poverty (*Faqr*) to be your glory (*Fakhr*)" [49]

7 Crimes and Punishments

During the Muslim period Islamic law or *Shara* was followed by all the Sultans and Mughal Emperors The *Shara* is based on the principles enunciated by the *Quran* Under the Muslim criminal law, which was mostly based on their religion, any violation of

44 Vincent A Smith *The Oxford History of India* p 345
45 Captain Hamilton *A New Account of East Indies* Vol I p 315
46 *Fatwa e Alamgiri* (Calcutta) Vol III p 387
47 Sir Jadunath Sarkar *Mughal Administration* (1935) p 29
48 Qazi Khan was promoted to the post of the Chief Justice
49 Quotation cited by M B Ahmad *The Administration of Justice in Medieval India* p 155

public rights was an offence against the State Islam provides that the State belongs to God, therefore, it was the primary duty of any Muslim ruler to punish the criminals and maintain law and order Offences against individuals were also punishable as they infringed private rights

Three forms of punishments, as recognised by the Muslim law, were—*Hadd*, *Tazir* and *Qisas*

Hadd provided a fixed punishment as laid down in *Shara*, the Islamic law, for crimes like theft, robbery, whoredom (*Zina*) apostasy (*Irtidad*), defamation (*Iftiraa-e-Zina*) and drunkenness (*Shurb*) It was equally applicable to Muslims and non Muslims The State[50] was under a duty to prosecute all those persons who were guilty under "*Hadd*" No compensation was granted under it

"*Tazir*" was another form of punishment which meant prohibition and it was applicable to all the crimes which were not classified under "*Hadd*" It included crimes like counterfeiting coins, gambling, causing injury, minor theft, *etc* Under '*Tazir*', the courts exercised their discretion in awarding suitable punishment to the criminal The courts were free to invent new methods of punishing the criminals *e g* cutting out the tongue, impalement, *etc*[51]

"*Qisas*" or blood fine was imposed in cases relating to homicide It was a sort of blood money paid by the man who killed another man if the murderer was convicted but not sentenced to death for his offence Muslim Jurists supported *Qises* on the basis that "the right of God's creatures should prevail and only when the aggrieved party had expressed his desire, the State should intervene The court exercised its discretion to compound the homicide cases *Qisas* may be compared with the *Weregild* of the contemporary English period The state was authorised to punish the criminals for grave offences although the injured party might "waive his private claim to compensation or redress"[52]

The Muslim law considered "Treason" (*Ghadr*) as a crime against God and religion and, therefore, against the State Persons held responsible for treason by the court were mostly punished with death No consideration was shown for their rank, religion and caste Only the ruler was empowered to consider a mercy petition

Contempt of the court was considered a serious offence and was severely punished in the Muslim period

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50 *Minhaj-al-Talibin* Vol I pp 292-293
51 *See* M B Ahmad *The Administration of Justice in Medieval India*, p 225
52 Dr M U S Jung, Administration of Justice of Muslim Law, p 102

8 Next Phase

While the great Moghul was ruling in Delhi, there appeared on the Indian scene a phenomenon almost unparalleled in the history of the world After a brief episode of Portuguese domination, a handful of adventurers from the distant island of England in the Atlantic, forming the English East India Company, came to India as a trading body which possessed some sovereign prerogatives for the purpose of trade and became transformed into a sovereign body, 'the trade of which was auxiliary to its sovereignty' Whether their conquest of India was for the good of India it is too early to say We lack knowledge and we are too close to view objectively and knowledge is a matter of perspective Some of those who were sent out from England to guide the destinies of India were actuated by the loftiest of motives, while others were definitely hostile to Indian interests But disinterested as they were in the petty squabbles between individuals, they could evolve an efficient system of administration of justice in which fair play predominated and which we have inherited But English Justice, as we shall see, was always pragmatic even in their own country and necessarily so in India Some of the rules evolved to protect the ruler were certainly not conductive to a proper administration of justice

2

Early Administration of Justice in Bombay, Calcutta & Madras

A The East India Company

1 European Settlements in India

About the end of the fifteenth century some European nations came to India as trading merchants.[1] In 1498, Vasco da Gama, a Portuguese, discovered the passage to India round the Cape of Good Hope. He landed at Calicut on the Malabar coast.[2] During the second half of the sixteenth century the Protestant nations of Western Europe got inspiration from the Reformation movement and defying the Papal allocation of the East to Portugal began to compete for trade with India. The Dutch[3] were the first in the field and English merchants followed them. The Danes came next but they were few in number.[4] Though French made earlier voyages to India, the foundations of French trade were laid by Colbert only in the middle of the seventeenth century.

The power of the Mughal Emperors was at its zenith when the trade centres were first established by the Europeans in India.[5] In the seventeenth century the purely commercial attitude of foreign traders was suited to the conditions then prevailing in India. But with the weakening of the Mughal power in eighteenth century India, nobles and chiefs were establishing separate kingdoms, and the English and French companies, on the basis of their increased strength, began to take sides in the wars amongst the local kingdoms. The English East India Company finally emerged victorious and developed its area of influence and finally established its empire in India.

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1 For details, *see*, V. B. Kulkarni, *British Dominion in India and After*, Vidya Bhavan, Bombay, (1964), pp. 1-17.

2 Vasco da Gama came to the coast of Cochin on the west coast of India on 20th May 1498. *The Cambridge History of India*, Vol. V, Cambridge University Press, (1929), p. 17. *See* also Dr. J. B. Trend, *Portugal*, Ernest Benn (1957), pp. 145-46; R. S. Whiteway, *The Rise of Portuguese Power in India*, Archibald Constable, (1899), p. 21.

3 J. A. Veraat, *Holland*, Macdonald & Co. (1945), pp. 41-45.

4 Trading Company of the Danes was established at Tranquebar on the east coast of India in 1620.

5 *See* W. H. Moreland, *From Akbar to Aurangzeb*, Macmillan (1923).

2 The English East India Company Development of Authority under Charters

English people came to India in 1601 as a "body of *trading* merchants" [6] On 31st December, 1600 Queen Elizabeth I granted a Charter to the Company which incorporated the London East India Company "to trade into and from the East Indies, in the countries and parts of Asia and Africa for a period of fifteen years subject to a power of determination on two years' notice if trade was found unprofitable". Thus the Company became a juristic person with the exclusive privilege of trade with the East Indies The same Charter further granted legislative power to the Company "to make bye-laws, ordinances, *etc* for the good government of the Company and its servants and to punish offences against them by fine or imprisonment according to laws, statutes and customs of the *realm* "

The provisions of the Charter of 1600 were only in connection with the trade and were not intended for acquisition of dominion in India The legislative authority was given to the Company in order to enable it to regulate its own business and maintain discipline amongst its servants Due to subsequent interpretation of these provisions to meet the requirements of controlling and administering territorial expansion of the Company in India, Ilbert stated it as "the germ out of which the Ango-Indian Codes were ultimately developed" [7]

On 31st May, 1609, James I granted a fresh Charter to the Company which continued its privileges in perpetuity, subject to the proviso that they could be withdrawn after three years' notice The Company was also authorised to continue the enjoyment of all its privileges, powers and rights which were earlier granted to it by Queen Elizabeth under the Charter of 1600 [8]

In order to enable the Company to punish its servants for grosser offences on long voyages, the Company secured the first Royal Commission in 1601 Later on 14th December, 1615, the King authorised the Company to issue such Commissions to its Captains subject to one condition that in case of capital offences, *e. g* , wilful murder and mutiny, a jury of twelve servants of the Company will give the verdict The Company was given this power in order to maintain discipline on board during the voyages Some additional powers were given to the Company for enforcing martial law by the Charter of 1623

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6 The first Englishman to set foot on Indian soil was Thomas Stephens He set sail to India from Lisbon on 4th April 1579 and reached Goa in October 1579

7 Ilbert, *Government of India*, p 10

8 *See* J W Kaye *History of Administration of the East India Company*, (1853) p 66

Entrusted with these powers, the English people came to India in the reign of Emperor Jahangir and settled at Surat in 1612 Surat was one of the most important centres of trade and commerce on the Western coast of India [9] With a view to strengthening their power and to secure advantages, the Directors of the Company tried to contact the Mughal Emperor In 1618, Sir Thomas Roe,[10] Ambassador of James I, succeeded in gaining the Emperor's favour and the English Company entered into a treaty with the Mughal Emperor The Mughal Emperor granted the right of self government to the English This treaty proved a turning point in the legal history of India as the English Company secured various privileges from the Mughal Emperor It provided

(i) That the disputes amongst Company's servants will be regulated by their own tribunals

(ii) That the English people will enjoy their own religion and laws in the administration of Company

(iii) That the local native authorities will settle such disputed cases in which Englishmen and Hindus or Muslims were the parties

(iv) That the Mughal Governor or *Kazi* of the relevant place will protect the English people from all sorts of oppression and injury

At this time, therefore, the Englishmen at the Surat factory were living under two different systems of law In some cases they were under the provisions of Indian law while in certain other cases they were governed by English law The President and members of his Council at the Surat factory were working as executive officers of the Company They were also having judicial authority over English people as the Indian Emperor allowed them to be governed by their own laws As the presiding judicial authorities were laymen, they mostly applied their ideas of justice instead of the settled rules of the English law The English people exploited the native judiciary to their own advantage due to the prevailing corrupt practices in local courts

In 1635, Charles I permitted Sir William Courten to establish a new trading body for the purpose of trading with the East Indies under the name of *Courten's Association* The old Company faced competition at the hands of the new Company and many other difficulties were created in England which continued up to 1657 In 1657, Oliver Cromwell granted a new Charter which amalgamated the various joint stocks into one joint stock The Charter

9 William Foster *Introduction to English Factories in India* (1906) pp i & *vii*

10 William Foster *The Embassy of Sir Thomas Roe to the Court of the Great Mughal* (1615 1619) Vol II pp 508-514 *See* also *English Factories in India* 1618 21, Vol I p 23

also ended the old rivalry between the Courten's Association and the old Company by uniting them into one In fact the Charter of 1657 changed the very character of the Company According to Hunter, the new joint Company was now "transformed from a feeble relic of the mediaeval trade guild into a vigorous fore-runner of the modern joint-stock Company"

3 Charter of 1661 and its provisions

In the reign of Charles II, the Company entered into a period of unprecedented prosperity After 1660, the year which proved another turning point in the history of the Company, the Company regained its prosperity and it changed its character from a purely trading concern into a territorial power On 3rd April, 1661, Charles II granted a new Charter to the Company Besides extending the privileges of the Company on new territorial lines, the Charter reorganised its structure

The Charter of 1661 reorganised the Company on a joint stock principle and each member who had a share capital of £ 500 was given the right to one vote in the General Court of the Company In order to meet the existing circumstances more effectively the Company's power and command over its fortresses was strengthened The *Company was authorised to appoint Governors* and other officers for proper administration The Company's power to govern its employees and to punish their disobedience and misdemeanour was enhanced The Charter further authorised the Company to empower the Governor and Council of each one of its factories or trading centres at Madras, Bombay and Calcutta to administer, with respect to the persons employed under them, both civil and criminal justice according *to the English law* Where there was no Governor, the Chief Rector of a trading centre and his counsel was authorised to send a man for trial to a place where there was a Governor

4 Subsequent Charters Transition from Trading Body to a Territorial Power

The Charter of 1668 was a step which further assisted the transition of the trading body into a territorial power Charles II transferred in 1669 the island of Bombay, which he got *as a dowry from Portugal, to the East India Company for an* annual rent of £ 10 The Charter of 1668 authorised the Company to make laws, orders, ordinances and constitutions for the good government of the island of Bombay It was specifically provided that such laws and regulations should not be repugnant or contrary to, but be as near as possible to the laws of England The same Charter also empowered the Company to establish Courts of judicatures *similar to those established in England for the proper* administration of justice

The Charter of 1683, granted by Charles II, was the next step [11] It authorised the Company to raise military forces The Charter provided that a court of judicature should be established at such places as the Company might consider suitable consisting of one person learned in civil laws and two merchants—all to be appointed by the Company—and decide according to equity, good conscience, laws and customs of merchants by such dates as the Crown from time to time directs Thus, under this Charter the East India Company was authorised to establish Admiralty Courts at places of its own choice

James II, by the Charter of 1686 further renewed and added to the various powers and privileges earlier granted to the East India Company The Charter authorised the Company to appoint admirals and other sea-officers in any of their ships with power for these naval officers to raise naval forces and exercise martial law over them in times of war, to coin money in their Forts and to establish Admiralty Courts In 1687 the Company was authorised to establish a municipality and a Mayor's Court at Madras. Under the guidance of Sir Jasiah Child, Governor of the Company and Chairman of the Court of Directors, the Company considered it wise to declare in 1687 in one of its despatches, its determination to ' establish such a polity of civil and military power and create and secure such a large revenue as may be the foundation of a large, well grounded, sure English dominion in India for all time to come' [12] The constitutional government of the Company was thus further extended to the Company's territories in India

The continued progress of the old Company created jealousy in England When the Whigs came to power in England, a new Company was established in 1693 to break the monopoly of the old Company This new Company received statutory recognition in 1698 under the name "General Society" Later it led to serious conflicts and competition between the two companies Certain steps were taken to remove these conflicts Lord Godolphin gave his famous award on 29th September, 1708 equalising the capital of the two companies and settling other related difficulties between them. Godolphin united both the companies in the name of "The United Company of Merchants Trading to the East Indies" On 13th April, 1698 William III granted a Charter to the Company whereby certain changes were made in the existing rules to improve the administration of the Company The Charter created a Court of Directors and authority and control over the affairs of the United Company was entrusted to the Court of Proprietors The constitution of the Company continued till the passing of the famous

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11 *See* Keith *Constitutional History of First British Empire* pp 26-32.
12. Quoted by V B Kulkarni in his book, *British Dominion in India and After*, p 37

Regulation Act in 1773 which completely overhauled the constitution of the Company

5 Organisation of the Company's Factories in India

The English Company was growing in power and strength gradually during all these years After the death of Emperor Aurangzeb in 1707, when the Mughal empire began to disintegrate, the English Company got an opportunity to lay its foundations very strong in England as well as in India In India it was in possession of three factories and settlements at Bombay, Madras and Calcutta Gradually, the Company exercised wider authority at Bombay, Madras and Calcutta, under the changing conditions

English factories and settlements were governed by a President or Governor and Council at the three places Members of the Council were generally taken from senior merchants of the Company The Governor who was executive head with his Council was also looking after the administration of justice in his settlement The Company derived the power and authority which it exercised in its settlements from two different sources—the Crown and the Parliament in England on the one hand and the Mughal Emperor and other native rulers in India on the other At the three settlements of Bombay, Madras and Calcutta the Company had to deal with different local political powers

At Bombay, the Company exercised its powers as the representative of the English Crown The position at Madras was different Madras was granted to the Company by the local Raja in 1639 The Company ruled over both Englishmen and Indians but its authority over the former was derived from the Royal Charters while its power over the latter was derived from the grant of the local Raja or Nabob At Calcutta, the Company purchased the Zemindari of the three villages which later came to be known as Calcutta There the Company exercised its authority under the Mughal Emperor's grant of Zemindari The policy of the Company, therefore, varied according to the principle by which control was to be exercised in all these three settlements

Thus by the end of the seventeenth century, the East India Company was firmly established in India at Surat, Madras, Bombay and Calcutta, though it still declared its mission purely as a trading Company These activities of the Company in fact paved the way for the adoption of a new policy by the British Parliament in the beginning of the eighteenth century regarding its aims and relations with India The gradual passing of various Charters for regulating the Company's acquisition of territory and administration of justice in India, from time to time, may be said to be the gradual but inevitable steps on the road that led up eventually to the setting up of the British Empire in India

B The Administration of Justice in Madras, Bombay and Calcutta

1 Administration of Justice in Madras from 1639 to 1726

In 1639, Francis Day, an Englishman acquired a piece of land from a Hindu Raja of Chandragiri for the East India Company. It was known as Madraspatnam. The consequence of this grant of land was that Francis Day built the Fort St George in 1640 for the Company's factory and also for the residence of English people employed in the service of the Company. This fort was later on known as "White Town", while the village nearby inhabited by native Indians was known as "Black Town". Thus the whole city of Madras was founded by Francis Day. The Raja empowered the Company to mint money and to govern the whole city of Madraspatnam. Due to the initiative of English traders, trade and commerce gradually developed. Certain villages in the neighbourhood also gained importance and progressed. The Hindu Raja further granted certain other privileges to the English Company.

2 The Charters and Courts

First Phase 1639-1678.—The Company's factory at Fort St George was under the administration of an Englishman, who was called Agent. The Agent and the Council were authorised to decide both civil and criminal cases of English people residing at Fort St George. The Agent and Council tried two English people, Thomas Pane and Thomas Morris, found them guilty of sedition and ordered them to receive severe lashes by way of punishment. A broad distinction appears to have been made between cases in which one or both parties were Indians and those in which both parties were Englishmen. Henry Davidson Love, in his great historical work, known as the *Vestiges of Old Madras*,[13] has given a detailed account of the administration of justice at the beginning of the Company's administration of Madras.[14] Few interesting cases referred to by Love may be stated here. It is necessary to point out that the authority to punish offenders conferred by the Charter of Queen Elizabeth and later confirmed by King James I, was so vague that it was not clear whether the Agent and Council could exercise judicial authority over the native Indians. In 1641, a native Indian woman was murdered by another native man. A trial of some sort was held and the accused, who was an Indian, was found guilty. The English authorities immediately reported

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13 Henry Davidson Love *Vestiges of Old Madras* published in four Volumes.

14 For detailed study *see* V. C. Gopalratnam *A Century Completed: A History of the Madras High Court*. *See* also V. N. Srinivasa Rao, "*A Peep into the Past History of Madras Law Courts*" May 1959 *Lawyer* 156.

the matter to the local Naik, who ruled that justice should be done according to *English law* The *offender was* found guilty and was duly hanged [15] In 1642, a British soldier was murdered by Antonio Mirando, a Portuguese The *Agent and Council were hesitating* to punish the offender on the ground that the foreigner was a European subject of a foreign power The local Naik ordered that they must not desist from their duty and accordingly the Portuguese offender was shot dead[16] In 1644, a Sergeant Bradford caused the death of an Indian The Agent and Council referred the matter to some principal Indian residents of Madras The verdict of the jury was that the Indian died because of accident and Sergeant Bradford was acquitted [17]

Though the Raja granted rights to administer justice to the English people, they thought it better to allow old traditional courts to continue to govern natives According to the old native system, a Choultry Court was administering justice in the village area of Madraspatnam This Court was presided over by the village headman known as "Adigar" or a Governor of the Town as he was called An Indian native Kannappa, a Brahmin by caste, was appointed first Adigar and Magistrate of the Town in 1644 to decide petty civil and criminal cases Due to some charges of bribery and corruption against Kannappa, he was arrested and placed behind the bars [18] His downfall encouraged his enemies and a petition was handed over to the higher authorities against him stating certain serious charges [19] The Agent and the Council made enquiry into these charges and held Kannappa guilty,[20] and dismissed him *from the office* dishonourably *One important consequence* of this incident was that European persons were appointed judges to preside over the Choultry Court from 1648 onwards Captain Martin and John Leigh were appointed to sit as magistrates [21] Due to non availability of the old records nothing more can be stated about the early period Thus, during the period from 1639 to 1661, two separate bodies were administering justice at Madras The Agent and Council were acting as supreme judicial authority for English people residing in the Fort St George, known as White Town, and the native people, residing in so called Black Town locality, were under the jurisdiction of the Choultry Court It may be pointed out that in serious cases reference was made to the Raja, who always laid emphasis on the fact that the accused must be *punished according to the provisions of*

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15 Love *Vestiges of Old Madras* Vol I, p 272
16 *Ibid* p 273
17 *Ibid* p 273
18 *Ibid* p 128
19 India Office Records *Original Correspondence*, Series No 2542
20 Love, *Vestiges of Old Madras*, Vol I
21 *Ibid*, p 273

English law No fixed procedure was laid down to decide cases and each case was decided in its own way by the Court

Charles II granted a very important Charter in 1661 It played an important historical role by considerably improving the existing judicial system of the Company's settlement at Madras The Charter empowered the Company to appoint a Governor and Council in each of its settlements in India The Governor and Council were authorised to judge all persons belonging to the Company or living under them in all causes, civil and criminal, according to the laws of England, and to execute judgment in the respective settlements In other words, even the Indian inhabitants who were residing in the Company's settlements were also included in the jurisdiction of the Governor and Council Thus the Charter expressly provided for the application of English law and empowered the Governor and Council to exercise control over both judiciary and executive It was later on realised as a defective provision because the Governor and Council were not legal experts Under the Charter of 1661, the Company appointed Foxcroft as the first Governor of Madras The Company's order stated, "We have thought fit to constitute you Governor of our town and fort as well as agent, and to appoint you a Council under our Seal [22] Foxcroft came into conflict with Sir Edward Winter and finally emerged out victorious against his rivals [23] In 1665 Foxcroft wrote a strong letter to the Company complaining against two magistrates appointed by Sir Edward Winter, his rival Foxcroft utilised this opportunity and appointed William Dawes as magistrate In order to gain favour of the natives as well as English people, Foxcroft invited certain chiefs of the inhabitants to a ceremony and in their presence advised William Dawes, the magistrate, "to be careful without partiality to administer equal justice to all men without oppression or arbitrary will" Further, he declared that "if any person should have just occasion of grievance, I would myself hear the case and give such relief as should be right" [24]

In 1665, the trial of Mrs Ascentia Dawes gained historical importance in the judicial history of Madras It was the first trial by jury in Madras during the Governorship of Foxcroft In this case, one Mrs Ascentia Dawes murdered an Indian slave girl named

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22 India Office Records *Letter Book* Vol IV

23 Before the appointment letter reached Foxcroft one Sir Edward Winter a Royalist seized power and reverted to the judicial system of 1644 and appointed Timmanna and Veeranna as the magistrates for Madras These were two important inhabitants of the town of Madras Foxcroft was a Cromwellian who emerged victorious against a Royalist Sir Edward Winter *See* Love *Vestiges of Old Madras* Vol I p 231

24 Assuring the Company about judicial administration Foxcroft wrote to the Company "These things being new and strange to these enthralled people did marvelously please them *See* India Office Records *Original Correspondence* Series No 3098

Chequa *alias* Francisca She was charged with the *commission* of a capital crime The indictment was drawn out in accordance with a form prescribed by the Company and a Grand Jury was summoned to return to indictment *billa vera* The Jury found her guilty of the offence of murder of the slave girl, but not in the manner and form as stated by the prosecution The members of the Jury asked the Court for further directions In its answer the Court stated that the members of the Jury were bound to bring in a verdict of guilty or not guilty without any reservation or limitation The most surprising part of the whole trial was that the foreman of the Jury Mr Reade gave the verdict not guilty, contrary to all expectation Due to this reason the Court acquitted Mrs Ascentia Dawes *It is not surprising to* note that this typical situation arose because the Court had no person well qualified in law to guide its working The letter from the establishment at Fort St George to the Company expresses its grief, ' We found ourselves at a *loss in several things for want of* instructions, having no man understanding the laws and formalities of them to instruct us as whether anything more had to be said to the Jury when they brought in such an unexpected verdict We proceeded in those and other particulars according to the best of our judgments but if any like case shall occur we shall need the direction and assistance of a person better skilled in the law and formalities of it than any of your servants here are [25]

As a consequence of this trial the ignorance of the Court was ludicrously exposed Necessity of suitable legal assistance to assist the Court was greatly felt The President and Council at Madras realised great difficulty in administering justice As a result of this trial the Agency at Madras was raised to the status of Presidency of Madras The Agent became Governor of Madras Though the Charter of 1661 stipulated administration of justice according to English law steps were not taken to appoint any legal expert to assist the Court in the administration of justice *Surveying the period from* 1639 to 1665 it *may* be stated that the machinery to administer justice was at a very rudimentary stage The Charters of Charles II issued in 1669 and 1674 made it further plain that the King of England actually favoured the establishment of Courts of Judicature to be administered by the East India Company

Second Phase 1678 1693—*With the appointment of Streynsham* Master as Governor in 1678 began the next phase in the early judicial history of Madras He was Governor of Madras *from* 1677 to 1681 The whole judicial system was reorganized under his guidance The Court of Governor and Council was designated as the High Court of Judicature Proper arrangements

25 India Office Records *Original Correspondence* Series No 3171

were made for regular meetings of the Court of Governor and Council It was clearly stated that the Court will meet twice a week and will be authorised to decide all civil and criminal cases with the help of a jury of 12 men The Court of Judicature sat for the first time on April 10, 1678 to try and decide a case between John Trivil (plaintiff) and William Jearsey (defendant) [26] Another important step of the Governor was to reorganise the old Choultry Court According to his scheme the Indian officers of the Court were replaced by the English officers of the Company's service The number of judges was increased to three out of which not less than two were required to preside over the trial of cases and registration of bills of sale of land and other property [27] Justices were directed to sit in the Court for two days in each week, i e every Tuesday and Friday The Judges of the Choultry Court were required to take care that the copyist clerk of the Choultry was duly registering all sentences in Portuguese as before and that proper account was maintained of all alienation or sale of slaves, houses, gardens, *etc* in a separate register [28] The Court was empowered to try civil cases up to 50 Pagodas[29], and petty criminal cases The High Court of Judicature consisting of the Governor and Council were authorised to hear appeals from the Choultry Court Thus a judicial system based on a hierarchy of Courts with well defined jurisdiction, came into existence in Madras

The Governor of Madras, Streynsham Master, made a very important declaration in 1680 by which English language was recognised as the only official language in Madras Till 1680 three languages were used in the Court, namely, Portuguese, Tamil and Malyalam On December 9, 1680 an official order from Fort St George at Madras stated "Whereas it hath been hitherto customary at this place to make sale and alienations of houses in writing in the Portuguese, Gentoo and Malabar languages, from which some inconveniences have arisen, it is, therefore, ordered that all sales and alienations of houses and grounds shall be written in English, and the Choultry Justices shall not license nor register the sale or alienation of any ground unless the seller or conveyor thereof can prove his title to the same under the Hon'ble Company's seal" [30] Thus the English language was firmly planted initially as Court language in Madras and played an important role in moulding the local population of Madras in

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26 V C Gopalratnam *A Century Completed A History of the Madras High Court* p 82.
27 Love *Vestiges of Old Madras* Vol I p 404
28 Fort St George Records *Public Consultations* Vol II
29 A Pagoda was a gold coin equivalent to three Rupees Fifty Pagodas were equal to Rupees one hundred and fifty
30 Ind a Office Records *Factory Records Fort St George* Vol II 1680

favour of political leadership controlled by Englishmen employed by the Company

Third Phase 1683 1726—Gradually the Company realised that its monopoly of trade was being infringed by other foreign and independent traders who were not authorised to trade with India [31] In order to curb the unauthorised activities of these interlopers and to safeguard the trading interests, the Company obtained a Letters Patent from the King Charles II in 1683 The Charter of 1683 marks the beginning of the third phase It empowered the Company to establish Courts of Admiralty in India Its main purpose was to try all traders committing various crimes on the high seas The Court was empowered to hear and determine all cases concerning maritime and mercantile transactions The Court was also authorised to deal with all cases of forfeiture of ships, piracy, trespass, injuries and wrongs It was specifically stated that in its difficult task of administering justice, the Court will be guided by the laws and customs of merchants as well as the rules of equity and good conscience

The provisions of the Charter of 1683 were repeated by James II in a Charter issued on April 12, 1686 On 10th July, 1686 the Court of Admiralty was established at Madras John Grey was appointed Judge of the Court of Admiralty and to assist him two other English people—John Lyttleton and Nethanial Higginson, were also appointed as his assistants Seven months later John Hall was appointed Attorney General of the Admiralty Court [32] On 22nd July, 1687 Sir John Biggs, who was Recorder of Plymouth and a learned lawyer in civil law, was appointed "Judge Advocate", i e, the Chief Judge of the Court of Admiralty at Madras His first duty was to preside at the Quarter Sessions He tried four criminals and convicted them for robbery All of them were sentenced to death [33] The decision created terror amongst the inhabitants and converted the criminals into assets of the company by transforming them into slaves of the Company It also assisted in tackling the difficult task of restoring law and

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31 *Cambridge History of India* Vol V p 102

32 Love, *Vestiges of Old Madras* Vol I p 492 *See* also V C Gopalratnam, *A Century Completed A History of the Madras High Court* p 83

33 The relevant Fort St George Consultation giving details proceeds to state *But the Court considering that justice inclined to mercy* and that these were the first crimes they were charged with and probably instigated thereto by youth the temptation of a notorious rogue their ring leader *upon which consideration it is agreed that the principal and bold offender* Mannangatti Thambi do suffer death on Thursday to deter others from the like crimes and that the other criminals Pandaram, Veeraraghava *and Thannappa be burnt on the shoulder and banished* to Sumatra where they were to remain slaves to the Company during life and never to return hither upon pain of death *See* Fort St George Records *Public Consultations* Vol XIII

order Sir John Biggs with his professional background and legal expertise contributed to the administration of justice During his tenure the Court became famous as "General Court' of the town of Madras Unfortunately, the sudden death in 1689 of Sir John Biggs checked the future progress of the Admiralty Court

A year before the death of Sir John Biggs, the Mayor's Court had come into existence It was realised in 1690 that the powers of the Mayor s Court were limited and therefore the Government considered it suitable to revive the old Cou t of Judicature established by a previous Governor of Madras, Streynsham Master Earlier, the Court of Judicature was superseded by the Judge-Advocate and thus the Court suffered a temporary eclipse [34] The Governor, Judge-Advocate, himself became one of the five Judges of the new Court [35] It is a matter of gratification and interest that the list of Judges of this Court included the name of an Indian, Allingall Pillai Daniel Du Bois was appointed Attorney General Allingall Pillai was the earliest Indian judicial officer appointed to the Bench at Madras

In 1692 John Dolben, an Englishman well-versed in law, was appointed Judge Advocate in the vacancy caused by the death of Sir John Biggs He was independent in his decisions and refused to decide cases under any pressure or be influenced by favouritism He even gave judgment against his employers, the Company, when they sued the ex Governor Elihu Yale The Company officials were not happy at this event and waited for an opportunity to remove him Shortly afterwards Dolben was made the victim of a bribe giver and the order of dismissal followed Though in 1694 the Company again offered him appointment, he declined it [36] In place of Dolben, William Frazer was appointed Judge Advocate In 1696 the members of the Council were directed to serve in succession as the Judge Advocate Accordingly, John Styleman, a senior member of the Council, replaced William Frazer in 1696 The Court of Admiralty was functioning regularly up to 1704 After 1704 it appears that the Company paid more attention to the Mayor's Court and the Court of Admiralty ceased to have its regular sittings which ultimately resulted in its gradual disappearance from the judicial scene Its jurisdiction, including hearing of appeals from the Mayor's Court was transferred to the Governor

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34 V N Srinivasa Rao A Peep into the Past History of Madras Law Courts, Sfax *1959 Lawyer* at p [60]

35 Apart from the Judge-Advocate four other members of the Bench included two m rchants an Armenian and a Hindu

36 After his dismissal Dolben showed his interest in trade and became a free merchant of the town He became prosperous and earned goodwill He was again offered an appointment in 1694 but he refused to accept it on the ground of his being engaged on a voyage to China *See*, Dalton. *The Life of Thomas Pitt*, p 142

and Council It may be concluded that the Governor and Council gradually replaced the Admiralty Court at Madras

The Mayor's Court —The Company issued a Charter in December 1687 which authorised it to create a Corporation of Madras and establish a Mayor's Court The Mayor's Court was a part of the Corporation of Madras It was empowered to carry out judicial functions The Company preferred to establish the Court under its own authority, as it was not willing to invite English officers who were working in the judiciary of England under the Crown The Company officials were afraid of interference by the British Parliament in the Company's matters and, therefore, were not inclined to invite superior officials to its settlements in India In 1688 the Company created a Corporation of Madras consisting of a Mayor, twelve Aldermen and sixty or more Burgesses In the first instance, the Company's Charter nominated the persons who would occupy these positions in the Corporation It provided that an Englishman would be elected every year as Mayor by the Aldermen Aldermen were appointed for their life or during their residence in Madras Out of twelve Aldermen three were required to be Englishmen compulsorily The Mayor and Aldermen were to elect Burgesses from amongst the people who were in the Company's service The Company's Charter also created a Mayor's Court consisting of a Mayor and two Aldermen, which formed its quorum It was a Court of Record for the town of Madras The Mayor's Court exercised its jurisdiction in civil cases where the value of the cases exceeded 3 Pagodas,[37] and in criminal cases with the assistance of juries An appeal was allowed to go to the Court of Admiralty from the decisions of the Mayor's Court in all civil cases exceeding three Pagodas, and in criminal cases where the accused was given death sentence The Charter also provided for the appointment of an expert in law as Recorder, to assist the Mayor s Court in deciding cases Sir John Biggs, the Chief Judge of the Court of Admiralty was also appointed first Recorder of the Mayor's Court

The Choultry Court —As stated above, the creation of the Mayor's Court at Madras left only petty cases to be decided by the Choultry Court The Choultry Court, therefore, decided only petty criminal cases and civil cases amounting to two Pagodas Two Aldermen constituted the quorum of the Choultry Court, who were to sit for two days in every week, to decide petty civil and criminal cases The Choultry Court continued its work in the Madras Presidency till 1726

Before passing to the eighteenth century it will be worth while to state briefly the types of punishment given to the criminals in

37 Pagoda was a gold coin equivalent to three Rupees

the seventeenth century at Madras. Love has given a detailed and interesting account of the Madras Courts He refers to an execution of a criminal whose body was hung in chains on a gibbet near the high road leading to Poonamalli, a standing in the Pillory by a merchant who was driving the trade of stealing children, whipping of peons found asleep at their posts of duty and the branding of the letter "P" on the foreheads of convicted pirates [39] In fact there was no clarity as to what the law was and what were the jurisdictions of the various Courts It may very well be stated that there was only one type of "crime which could be tried at Madras without legal uncertainty" and that was "piracy "[40]

With the dawn of the eighteenth century, there were four different courts working in Madras—First, the Mayor's Court as the Court of Record, secondly, the Court of Admiralty with the Judge Advocate as President to try pirates, thirdly, the Old Choultry Court whose presiding officer was called the Chief Justice of the Choultry, and finally, the Court of the President or Governor in Council, which heard appeals from the decisions of the Admiralty Court as well as from the Mayor's Court These Courts continued up to 1726 when the Charter of George I introduced a uniform set of Courts in all the three Presidency Towns

3 The Administration of Justice in Bombay

The political position of Bombay[40] was quite different from that of Madras From 1534 onwards Bombay was under the political control of the Portuguese The King of Portugal, Alfonsus VI, gave Bombay in dowry to the King of England, Charles II, when the English King married his sister Princess Catherine in 1668 Charles II thought that Bombay being a very backward place, was economically not profitable and as it was difficult to exercise control from England, he transferred Bombay to the Company in 1668 for a very nominal annual rent of £10 The position of Bombay was completely changed with this transfer by the new Charter of 1668 The Charter authorised the Company to legislate and to exercise judicial authority in the Island of Bombay It was further stated that such laws should be consonant to reason and not repugnant or contrary to the laws of England and they were also required to be as near as may be agreeable to the laws of England The system of courts and procedure was to be similar to that established and used in England [41]

The President of Surat, Sir George Oxenden, received the Company's orders in September 1668 to visit the Island of Bombay and establish the executive government under a Deputy Governor

38 Love *Vestiges of Old Madras* Vol I pp 494 496
39 Henry, Dodwell, *The Nabobs of Madras*, p 149
40 *See* for details B M Malabari *Bombay in the Making* (1661 1726)
41 Keith *Constitutional History of First British Empire* pp 127 131

and Council Though Oxenden visited Bombay in January 1669, it was only after the death of Oxenden in July 1669 that the laws enacted by the Company under the Charter of 1668, actually came into force for the government of Bombay [42] Thomas Papillon drafted these laws which were subsequently revised by the Court of Committees and the Solicitor-General Finally, these laws were brought to Bombay by Gerald Aungier, the Governor of Surat, in 1670

Judicial Reforms of 1670 —The first important legislative work of the Company was done by Gerald Aungier in 1670 [43] He reorganised the old judicial set up of Bombay Old laws which were initiated by Oxenden were given a final shape and were classified into six sections First section related to the freedom of worship and religious beliefs granted to all inhabitants The laws prohibited the use of abusive and contemptuous language in respect of the religion of other persons The defaulters were liable to pay fine or imprisonment The second section dealt with the impartial administration of justice The existing rights of persons were confirmed and the principle of fair trial and convictions was recognised It provided for a trial by a jury of twelve persons in cases concerning deprivation of rights, *etc* The third section provided for the establishment of a Court of Judicature to decide all criminal cases The Governor and Council were authorised to appoint a judge All trials were required to be by a jury of twelve Englishmen Where a party to the suit was not English, only six persons were required to be Englishmen and the remaining six were chosen from Indians Right of appeal from the Court to the Governor and Council was also granted It provided for the appointment of Justices of the Peace and Constables to maintain peace and order and to arrest criminals, *etc* the fourth section dealt with the registration of transactions concerning sale of land and houses The fifth section contained miscellaneous provisions dealing with penalties for different crimes In many cases the severity of English law was reduced The last section dealt with military discipline and prevention of disorder and revolt Death penalty was given for mutiny, sedition, insurrection or rebellion

Aungier introduced certain reforms in the old set up of the judicial machinery at Bombay He improved the judicial system gradually, as he was aware that it would not be possible and wise to supersede immediately the old system of the administration of Portuguese law According to the reforms of 1670, the Island of Bombay was divided into two divisions—one division consisted of Bombay, Mazagaon and Girgaon, the other comprised of Mahim, Parel, Sion and Worli A separate Court of Judicature was

42 Fawcett *First Century of British Justice in India* pp 18 28
43 B M Malabari *Bombay in the Making* Ch V, pp 146 182

established for each division at Bombay and Mahim Each Cou consisted of five judges The Customs Officer of each division, a Englishman, was empowered to preside over the respective Court Three judges formed the quorum of the Court As it was no possible for an Englishman to have adequate knowledge of Indian Laws, some Indians were also appointed judges to assist him in the Court of each division The Courts were authorised to hear, try and determine cases of small thefts and all civil actions up to 200 Xeraphins[44] in value An appeal from the Court of each division was allowed to the Court of Deputy Governor and Council Apart from the appellate jurisdiction, the Court also had original jurisdiction in important felonies, which were to be tried with the help of jury and the laws of the Company Englishmen were under the jurisdiction of this Court Further appeal to the President and Council at Surat was discouraged except in rare cases.

It was realised within the next two years that the judicial system of 1670 was defective in various respects Aungier, the Governor, was himself not satisfied with the working of the Courts The judges of the superior and inferior courts had no knowledge even of the elementary principles of law, they were merely traders The judicial and executive powers were exercised by the same persons. As a consequence, the abuse of power created various new problems In order to remove these defects Aungier requested the Company authorities to provide persons who were experts in law Initially, the Company paid no attention to it. After some insistence the Company asked Aungier, the Governor, to select any such experts in law from the existing persons who were in the employment of the Company in India After some time, Aungier selected George Wilcox with whose advice he prepared a new plan in 1672 for the administration of justice in Bombay

New Judicial Plan of 1672 —According to the new plan the Government issued a proclamation on 1st August, 1672 declaring the introduction of English law into Bombay It may be recalled that in the judicial plan of 1670, the Protuguese laws and customs were left untouched They were totally abolished under the new plan, and with this change, the old confusing state of laws also came to an end in Bombay The judicial machinery was again organised A new central court known as the Court of Judicature was established The Court was inaugurated on 8th August 1672 by the then Governor of Bombay, Gerald Aungier, with pomp and ceremony, after a colourful procession which included four attorneys or pleaders had marched through the main thoroughfares of the city of Bombay In his inaugural address the Governor Aungier enunciated the principles which subsequently set the pattern for the administration of justice not only in Bombay but all over

44 It was a Portuguese Coin 20 Xeraphins were equal to nearly Rs. 150.

the Country Aungier said, "The inhabitants of this Island consist of several *nations and religions, to wit*—English, Portuguese and other Christians, Moors and Gentoos, but you, when you sit in this seat of justice and judgment, must look upon them with one single eye as I do, without distinction of nation or religion, for they are all his Majesty's and the Hon'ble Company's subjects as the English are, and all have an equal title and right to justice and you must do them all justice, even the meanest person of the Island, and in particular the poor ..."[45] Thus he laid special emphasis on the principles of independence, impartiality and equality for the future guidance of the judiciary

The Court of Judicature was empowered to exercise its jurisdiction over all civil, criminal and testamentary cases George Wilcox was appointed its Judge, assisted by other Justices The Court sat *once a week to try civil cases with the help of the jury* The Court charged a fee of five per cent of valuation of the suit from the litigants The Judge was prohibited from carrying on private trade or business, and instead he was granted a salary of Rs 2,000 per year to meet his expenses An appeal from the Court of Judicature was allowed to the Deputy Governor and Council Juries were duly employed and paid Attorneys were allowed to practise English procedure, including arrest and imprisonment, was followed As far as possible the English substantive law including statute law was made applicable In framing the new scheme, Aungier was primarily concerned with the speedy and impartial administration of justice

Justices of the Peace were appointed to administer criminal justice For this purpose Bombay was divided into four divisions namely, Bombay, Mahim, Mazagaon and Sion In each division a Justice of the Peace, an Englishman was appointed They acted as *committing magistrate to arrest the* accused and to examine the witnesses The record was then placed before the Court of Judicature which met once a month to decide criminal cases with the assistance of all the Justices of Peace, who acted as assessor in the Court

The scheme of 1672 also created a Court of Conscience to decide petty civil cases Once a week the Court dealt summarily with civil cases under twenty Xeraphins[46] The decision of the Court was *final and no further appeal* was allowed *No court fee was charged from poor persons and* as such, the Court became famous as, "Poorman's Court" George Wilcox, Judge of the Court

45 Governor Aungier said Laws though in themselves never so wise and pious are but a dead letter and of little force except there be a due and impartial execution of them Fawcett *The First Century of the British Justice in India* pp 54-55 *See* also M C Setalvad *The Common Law in India* p 10

46 A Portuguese coin equal to about 1 Sh 6 d

of Judicature, also presided over the Court of Conscience which met only once a week to deal with petty civil cases

George Wilcox, the first Judge of the Court of Judicature died in 1674 [47] James Adams was chosen to succeed Judge Wilcox but he was not well-versed in law After a few months in 1675, his assistant Niccolls was appointed Judge in his place In 1677 Niccolls was suspended and later dismissed by the Council on various charges Regarding "injudicious interference with the Court by the Council," Keith says, "It seems probable that the chief weakness of the Court lay in the fact that the Judge was dependent on the goodwill of the Council, as was seen in the dismissal of Niccolls in 1677, but there is no clear proof "[48] Gary succeeded Niccolls as Judge and remained in the office up to 1683 During his tenure, the salary and rank of a Judge was reduced and the Council became superior in power and position In 1679 the Council reversed a decision of Judge Gary regarding the grant of administration in respect of a widow's piece of land, who died intestate without relatives [49] Keigwin's rebellion, which began in December, 1683, and continued up to November, 1684, gave a death blow to Aungier's judicial system in the Island of Bombay

Admiralty Court and its conflict with Council Period 1684 to 1690 —As stated above, the development of Courts at Bombay was interrupted due to the Keigwin's rebellion After the rebellion was suppressed, efforts were made to set-up a regular judicial system at Bombay The Company found its authority to establish Courts under an earlier Charter of 1683 granted by Charles II The authorities at Bombay were also aware of the judiciary which was set-up at Madras under the Charter of 1683 [50] The Charter provided for the establishment of Courts at such places as the Company might direct for maritime causes of all kinds, including all cases of trespasses, injuries and wrongs done or committed upon the high seas or in Bombay or its adjacent territory, and each Court was to be held by a judge learned in civil law assisted by two persons chosen by the Company Such Courts were required to decide cases according to the rules of equity and good conscience and the laws and customs of merchants Accordingly, an Admiralty Court was established at Bombay in 1684

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47 Judge Wilcox died without drawing even a rupee by way of salary and his poor widow was left destitute in Bombay Later on the widow requested the Government for the amount of her deceased husband's salary *See* Malabari *Bombay in the Making* p 150

48 Keith Arthur Berridale *A Constitutional History of India* p 88

49 Cf *Joanna Fernandez* v *De Silva* (1817) Morley *Digest I* p 214

50 3rd August 1683 Charter of 1683 authorised the establishment of a Maritime and Mercantile Court

Dr St John,[51] a person learned in civil law, was selected by the Company at England to be appointed as Judge-Advocate of the Admiralty Court Dr St John also succeeded in getting authority from the Governor to act as Chief Justice of the Court of Judicature The Court of Judicature was again created, as the authority of the Admiralty Court was not sufficient to cover all other civil business

John Child, Governor of Bombay at Surat, was not in favour of accepting the theory of judicial independence which was adopted by Dr St John in his judicial decisions It gave rise to conflicts between the Governor and the Chief Justice Dr St John's judicial independence was interpreted by the Governor John Child as insubordination towards himself In 1685 the Governor got an opportunity, and the powers of Dr St John to act as Chief Justice of the Court of Judicature were withdrawn Vaux, a member of the Bombay Council was also appointed Judge to preside over this Court, in place of Dr St John These steps further developed the existing conflict between the Governor and the Chief Justice Dr. St John strongly criticised the transferring of his powers to Vaux, a new judge, who according to him was ignorant of civil laws In due course the Governor and Dr St John further came into serious conflict and their relationship became strained which ultimately resulted in the dismissal of Dr St John in 1687 from the Court of Admiralty [52] The incident made the Company all the more reluctant to appoint professional lawyers as judges in India After Dr St John's dismissal, Sir J Wyborne, Deputy Governor of Bombay, was appointed Judge of the Admiralty Court In 1688 Vaux succeeded Sir J Wyborne and remained in the office up to 1690 [53] The Court practically ceased to function independently due to the strong position of the Governor and the President of the Board of Directors in London

Siddi Yakub's invasion and set-back to Judicial Administration —Due to the invasion of Siddi Yakub, Admiral of the Moghul Emperor in 1690, the judicial system of Bombay also came to an end Judge Vaux, who was also in the Company's military service and a member of the Council, was sent back to England in order to gain Aurangzeb's forgiveness After 1690 for a few years the practice of appointing a separate judge was not adopted and the administration of justice was also entrusted to the Governor and his Council From 1690 to 1702 i e for a

51 Despatch from the Court of Directors to the President at Surat on April 7 1684 refers in detail to the appointment of Dr John St John Compbell's *Bombay Gazetteer Materials* xxii, Pt 1, pp 83 84

52 For details see Fawcett, *First Century of British Justice in India* pp 124 142 In 1687 the seat of the Governor and Council was transferred from Surat to Bombay

53 Anderson s, *English in Western India*, p 257

period of twelve years there were no Courts Whenever the Governor and Council wrote to the Directors of the Company to send a qualified lawyer, the Directors expressed their inability to get an honest and qualified lawyer As Vachha remarked, "It was probably the difficulty of getting the right sort of man from the Company s standpoint, which resulted in no judge being sent out [54] Such a state of affairs continued up to 1718 and the machinery to administer justice was almost paralysed in Bombay

Revival of Judicial Machinery Period 1718 to 1728 — A new period in the judicial history of Bombay began with the revival and inauguration of a Court of Judicature on 25th March, 1718 by Governor Charles Boone It was established by the order of Governor and Council which was later on approved by the Company authorities It differed from the earlier Court of Judicature which was established under Aungier s judicial plan of 1672, as it was constituted according to the laws of the Company and not by the Governor and Council The Court of Judicature of 1718 consisted of ten judges in all It was specially provided that the Chief Justice and five judges will be English The remaining four were required to be Indians representing four different communities, namely, Hindus, Mohammedans, Portuguese-Christians and Parsis [55] All English judges were also members of the Governor's Council and enjoyed a status superior to Indian judges Three English judges formed the quorum of the Court The Court met once a week Indian judges, who were also known as "Black Justices", were included mainly to increase the efficiency of the Court and their role was mostly that of assessors or assistants to the English judges

The Court of 1718 was given wide powers It exercised jurisdiction over all civil and criminal cases according to law, equity and good conscience It was also guided by the rules and ordinances issued by the Company from time to time It was necessary for the Court to give due consideration to the customs and usages of the Indians Apart from its jurisdiction over probate and administrative matters, it was further authorised to act as a Registration House for the registry of all sales concerning houses, lands and tenements

An appeal from the decision of the Court of Judicature was allowed to the Court of Governor and Council in cases where the amount involved was Rs 100 or more A notice to file an appeal was to be given within forty eight hours after the judgment was delivered to the Chief Justice of the Court of Judicature

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54 Vachha P B *Famous Judges Lawyers and cases of Bombay* p 10
55 For details, see Fawcett *The First Century of British Justice in India* pp 171 174 Keith *A Constitutional History of India* p 41

Moderate fees were prescribed by the Court for different purposes For filing an appeal a fee of Rs 5 was to be paid

As regards the working of the Court, earlier studies of Fawcett[56] and Malabari[57] state, that in spite of the fact that the Court met only once a week it was famous for its impartiality, speedy justice and also for the cheapness of its process Most of the civil litigation was concerned with the recovery of debts In order to recover debts the Courts generally adopted English practice Where a person was not having any property, he was kept in prison so long as the debt due was not paid In criminal cases, whipping in a public place was the most common punishment given by the Court Banishment from the Island, imprisonment for a period at Court s discretion were other common ways of punishing the criminals For perjury and malicious complaints there were summary trials Laws applied were very vague and mostly uncertain as we find neither reference of any proper code nor any law report or law books in the old records

Fawcett has pointed out certain cases where the Court applied English law and even international law which was vague and underdeveloped at that time This vagueness and uncertainty was bound to lead to injustice and lack of uniformity in punishing the criminals Fawcett has described the famous trial of *Rama Kamti*, who was made the target of a plot based on lies and forgeries in which even the Governor Boone himself was involved Thus grave injustice was done to Rama Kamti by the Court [58] This case shows the poor state of judicial and executive affairs However, there appears to be sufficient truth in Fawcett s concluding remarks '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 during the ten years of its renewed existence [59]

The Court of 1762 by providing for trial by jury, introduced in India a very important English ideal The Court of 1718 abolished the use of the old practice of jury trial in deciding cases Another important factor was that all the members of the court of 1718 were also members of the Governor's Council In appeals the members of the Council constituted the appellate court with the Governor Naturally, the executive was bound to play a vital role in influencing the judges while deciding important cases It appears that the Company s authorities were not

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56 Fawcett *The First Century of British Justice in India*
57 Malabari *Bombay in the Making* (1901)
58 Fawcett *The First Century of British Justice in India* p 179 Vachha *Famous Judges Lawyers and Cases of Bombay* pp 235 239
59 Fawcett *The First Century of British Justice in India* p 200

interested in granting independence to the judiciary and, therefore, the executive always controlled the independence of the judiciary This is also clear from the fact that during the tenure of Governor Boone, two Chief Justices, namely, Parker in 1720 and John Braddy in 1721 were dismissed from their offices This state of affairs continued up to 1728 Under the Charter of 1726 the Mayor's Court was established at Bombay in 1728 which replaced the old Court of 1718

3 Administration of Justice in Calcutta

The English company's settlement at Calcutta was quite different from that of Madras and Bombay As early as 1690 the English East India Company constructed Fort William for its factory, by the side of river Hoogly in Bengal In 1698, Prince Azim Ush Shan, Subedar of Bengal and grandson of the Emperor Aurangzeb, granted Zemindari rights of three villages—Calcutta, Sutanati and Govindpur—to the English company [60] This proved a historical event as the grant of Zemindari rights empowered a foreign company to exercise all those powers which the native Zemindars were authorized to have under the Mughal administrative and judicial system The company took full advantage of this authority and appointed a Collector to control the administration of all the three villages [61] The Collector began regularly to hold Zemindari court for both civil and criminal cases The local council was required in 1698 to send all prisoners to Madras for trial, as the Emperor kept in abeyance certain privileges of the English Company

In 1699, the status of Calcutta was raised to that of a Presidency and its Governor and Council were entrusted with all the necessary administrative and judicial powers The Collector, who was company's officer, was also appointed a member of the Governor's Council at Calcutta

Justice in criminal cases —In order to administer justice in criminal cases, the company decided to adopt the existing Mughal pattern As such a Faujdaree court, presided by an English Collector, was established to decide criminal cases of the natives of three villages, Sutanati, Govindpur and Calcutta The Collector was empowered to decide the criminal cases summarily As the records show, generally the criminals were punished by whipping, imposing fines, imprisonment, banishment or work on roads Capital punishment was not inflicted unless the sentence was confirmed by the Governor or President and Council of Calcutta In those days, death sentence was executed by whipping to death and not by hanging to death as was done later on [62]

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60 W K Firminger, *Affairs of the East India Company* Report V Vol I Ch IV *See* also Wilson *Old Fort William in Bengal* Vol I pp 40–48

61 Wilson *The Early Annals of the English in Bengal* Vol I p 163

62 Long *Selections from Unpublished Records of Government* Vol I pp 224 298 William Bolts *Considerations and etc.* (1771), Vol I p 81

Apart from its jurisdiction on Indians, the Court also took cognizance of petty crimes committed by English people For serious crimes the Governor and Council were authorized to try by the Charter of 1661 [63]

Justice in civil cases—To deal with civil litigation, the Collector presided over a civil court or the court of Cutchery [64] Ordinarily, the civil cases were referred to arbitrators by the Collector The Collector decided cases in a summary way on the basis of the prevailing customs and usages of the country In the absence of such native customs, the case was decided according to natural justice and equity In rare important cases only appeals were allowed to the Governor and Council

The Collector in the capacity of a Zemindar was also responsible for the collection of land revenue from natives of three villages Whipping was the most common punishment given by the Collector for the defaulters of revenue Appeals were made to the Governor and Council [65]

In the judicial system of Calcutta, the office of Collector became a very important office It was dealing with civil, criminal and revenue matters It was also authorized to decide petty civil and criminal cases concerning Europeans in India The Governor and Council were also empowered to decide serious criminal cases and important civil cases All judicial and executive powers were exercised by the Collector and the Governor and Council It created conflict and confusion resulting in dissatisfaction In order to improve the existing system in 1704 a committee of three members was established to decide minor causes but the civil effect of the concentration of power continued up to 1726 The Charter of 1726, introducing new reforms in the judicial system, established a Mayor's Court and the Court of Governor in Council in Calcutta The Charter of 1726 laid down the foundation of an important era in the history of the evolution of the judicial system in Calcutta

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63 W Foster *Letters received by the East India Company* Vol V p lxx

64 W K Firminger *Ibid* p lxx

65 H Sewell *Indian Tracts* p 120 William Bolts Considerations and *etc* Vol I p 80

The Mayors' Courts and the Courts of Requests in the Presidency Towns

A The Mayor's Court

1. Company's Charter of 1687—Early Mayor's Court at Madras

The Company issued a Charter in 1687 which provided for the creation of a Mayor's Court at Fort St George in Madras.[1] The Mayor's Court was a part of the Corporation of Madras established in 1688 by the Company's Charter. the Company preferred to issue a Charter under its own authority rather than that of the Crown It did so as it was afraid that persons appointed under the King's Charter may create trouble by violating Company's orders due to their appointment by higher authority. The Corporation of Madras consisted of a Mayor, twelve Aldermen and sixty or more Burgesses The Mayor and Aldermen were to elect Burgesses who were not to exceed 120 in number. The Mayor was elected by Aldermen annually In the first instance, the Charter nominated the Mayor and Aldermen of the Corporatioo Any vacancy for the post of Alderman was to be filled by the remaining Aldermen and the Mayor from amongst the Burgesses One Mayor and two Aldermen formed quorum of the Mayor's Court. It was a Court of Record for the town of Madras. It exercised its jurisdiction in civil and criminal cases In civil cases where the value exceeded 3 Pagodas and in criminal cases where the accused was given death sentence, appeals from the decision of the Mayor's Court were allowed to go to the Admiralty Court at Madras A provision was made for the appointment of a Recorder to the Mayor's Court as the judges of the Mayor's Court were not fully equipped with legal knowledge. The Charter appointed Sir John Biggs, the Judge-Advocate, as the first Recorder of the Mayor's Court.

Under the Charter of James II, granted on April 12, 1686, the Company was authorised to establish one or more courts at such place or places as it considered suitable. The Company established a Court of Admiralty at Madras on July 10, 1686 John Grey was

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1. Charles II granted a Charter to the Company on August 9, 1683. It authorised the Company to establish one or more Courts at such place or places as it might direct James II on April 12, 1686, repealed the same provisions in the new Charter. The Company issued a Charter dated December 30, 1687, under its authority and not under the Crown

appointed its first judge to preside with the help of his two assistants On July 22, 1687, Sir John Biggs, *former Recorder of* Plymouth was called from England and appointed Judge Advocate to preside over the Court of Admiralty at Madras [2] He was learned in the Civil Law of England His high standard of legal learning and good relations with the Company paved the way for introducing the English Law into India He was also entrusted with the work of the *Quarter Sessions* specially to punish interloper merchants and crimes of piracy on high seas After the death of Sir John Biggs,[3] in 1692 John Dolben was called from England and appointed Judge Advocate to preside *over the* Court John *Dolben* stayed only for a short period in his office as he was charged with the offence of accepting a bribe [4] William Fraser was then appointed Judge-Advocate *in place of John Dolben* *In 1696* John Styleman replaced William Fraser as Judge Advocate From this time onwards the members of the Governor's Council were directed to serve *in succession* as Judge Advocate The Admiralty Court continued to work up to 1704 at Madras

In Madras, therefore, the machinery *to* administer justice consisted of four courts [5] First, the Court of admiralty presided over by the Judge Advocate, second the Mayor's Court presided over by the Mayor, third, for small causes of less than two pagodas, two Aldermen presided over the Choultry Court, and fourth, the Court of the President or Governor in Council to hear appeals from the decisions of the Admiralty Court and the Mayor's Court As regards the working of the Mayor's Court at Madras, it is said that the cases were decided on the basis of justice and good conscience and not on any fixed legal rules of law In later times it was realised that the process was very slow and the result was very uncertain Presiding authority's notions of justice were hardly based on any principles of law and equity As the Mayor's Court and Choultry Courts were presided over by non professional persons personal prejudices and whims were bound to creep into the administration of justice It resulted in the lack of uniformity and consistency in the decisions

The judicial system at Calcutta and Bombay *differed* greatly and the state of the administration of justice was at its lowest ebb Maintenance of law and order even amongst Englishmen, employed by the Company at these presidency towns, *became a serious* problem Decisions of the Courts in India were not recognised by

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2 Wheeler *Madras in the Olden Times* (1882), p 31
3 Indian Office Records *Original Correspondence Series* No 5666
4 John Dolben fearlessly gave judgment against his employers when they sued ex Governor Elihu Yale *See,* Dalton *The Life of Thomas Pitt,* p 142
5 Love *Vestiges of Old Madras,* Vol I, p 498 Vol II, pp 31 173

the Courts in England and its consequence was that in many cases English people were again tried in England for causes which arose in India and settled by the Indian Courts The Directors of the Company realised the growing discontent and weakness of the Company's state of affairs and efforts were made to find out some suitable means to tackle this problem

2 Reasons for Company's desire to have new Charter

The Company was conscious of its increasing political activities in India and its growing dominating role in the field of Indian trade and commerce English people were closely associating with the members of Indian business community safeguarding their own interest With the growth of commerce and trade the Company realised the necessity of a suitable machinery for administering justice in the three presidency towns of India which should be respected and recognised by Courts in England The Company was interested in avoiding litigation[6] against itself and amongst Englishmen in England in various matters concerning probates, administration, legal claimants, testamentary and intestate jurisdiction, *etc* Apart from this, in 1687 a Corporation consisting of a Mayor and Aldermen was established only at Madras No such machinery was set up at Bombay and Calcutta The Company was not willing to submit to the jurisdiction of native Indian Courts Due to the absence of a uniform and well-organised machinery of justice, the Directors of the Company, therefore, presented a petition to George I stating, "That there was a great want at Madras, Fort William and Bombay of a proper and competent power and authority for speedy and effectual administration of justice in civil cases and for trying and punishing of capital and other offences"

While considering the reasons which encouraged the Company to have a new Charter from the King in England, it is interesting to note that historians have stated different reasons According to Fawcett, "It is a false reading of the history to say, as has been said, that the Company complained of the Courts as bad and inefficient" Kaye has pointed out that it does not reveal the real reason for the change as records do not contain any complaints about the administration of justice which led the Company to submit an application to the Crown It is also said that "the Military Refractoriness" was its main reason Fawcett has stated, " one of the main reasons for the Company's change of attitude was to avoid civil litigation against it in England, due to executive intermeddling with private property" On the whole,

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6 Fawcett has pointed out a case of Mr Woolaston who brought several suits against the Company after the death of his son in India and the Courts in England awarded him £300 as damages, Fawcett, *First Century of British Justice in India*, pp 215-6

it may be concluded that after long experience the Company realised the necessity of properly constituted Courts in all the three presidency towns having not only civil and testamentary jurisdiction but also under such authority as was recognised by the Courts in England As stated above, the Mayor's Court at Madras, which was established in 1687, had the inherent defect of emanating *not* from the Crown but from the Company itself

3 Provisions of Charter of 1726

(i) Establishment of Corporations —The Charter of 1726 provided for the establishment of a Corporation in each presidency town *i e*, Bombay, Calcutta, Madras[7] Each consisted of a Mayor and nine Aldermen, seven of whom including the Mayor were required to be natural born British subjects and the remaining two were chosen either from subjects of any princely state or state having friendly relations with Great Britain In the first instance, the Charter stated the names of persons appointed first Mayor and nine Aldermen in Bombay, Calcutta and Madras Corporations It provided that the Mayor will be elected every year by nine Aldermen and the retiring Mayor, from amongst the Aldermen An Alderman was appointed either for life or for the term of his residence in the presidency town The Mayor and the Aldermen were authorised to fill up the vacant post of an Alderman from amongst the inhabitants of that particular presidency town, who fulfilled the preliminary conditions of eligibility, as stated above The Governor and Council was empowered to dismiss or remove the Alderman on reasonable cause The Governor in Council of each presidency town was entrusted with the power to make by laws, rules, ordinances to regulate the working of the Corporations and also for the better administration of the inhabitants of the settlements The Governor and Council was required to obtain in writing prior approval and confirmation of such rules, by-laws *etc* from the Court of Directors of the Company It is, therefore, said that the Charter of 1726 for the first time created a subordinate legislative authority in each of the three presidency towns of India

(ii) Mayor's Court —The Charter of 1726 also constituted a Mayor's Court for each of the presidency towns consisting of a Mayor and nine Aldermen[8] Three of them *i e*, the Mayor or

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7 *The Cambridge History of India*, Vol V, Ch IV, p 113 In Madras, the provisions of the Charter were implemented on August 17, 1727 *See* Wheeler, *Madras in the Olden Times* (1882), p 466 Letters Patent of September 24, 1726 the 13th year of the reign of George I

8 For Mayor's Court at Madras *See* V C Gopalaratnam *A Century Completed A History of Madras High Court* p 84 5 *See also*, *The Cambridge History of India*, Vol V, Ch IV, p 113, M C Setalvad, *The Common Law in India*, p 12 18

senior Alderman together with two other Aldermen were required to be present to form the quorum of the Court The Mayors' Courts were declared to be Courts of Record and were authorised to try, hear and determine all civil actions and pleas between party and party The Court was also granted testamentary jurisdiction and power to issue letters of administration to the legal heir of the deceased person It was authorised to exercise its jurisdiction over all persons living in the presidency town and working in the Company's subordinate factories

The procedure of the Mayor's Court was clearly laid down by the Charter Sheriff, an officer of the Court, was appointed by the Governor and Council every year to serve the processes of the Court On the written complaint of the aggrieved party the Court issued summons directing the Sheriff to order the defendant to appear before the Court on such day and time as fixed by the Court In case the defendant failed to appear on the fixed day, a warrant was issued by the Court asking the Sheriff to arrest the defendant and present him before the Court to face the charges The Court was empowered to release the defendant on such bail or security as it considered suitable During the course of proceedings, the parties were required to take oath, produce and examine witnesses and plead their cases The judgment of the Court was followed by a warrant of execution under the seal of the Court issued to the Sheriff to implement the decision The Sheriff was authorised to arrest and imprison the defendant the whole procedure of the Court was based on the procedure as adopted by Courts in England

By virtue of the same Charter an appeal was allowed to the Governor and Council from the decision of the Mayor's Court in each presidency town A period of fourteen days, from the date of judgment, was prescribed to file an appeal The decision of the Governor and Council was final in all cases involving a sum less than 1000 Pagodas (A Pagoda was a Madras Coin equivalent to 8 Shillings of English coin) In case the sum involved was either 1000 Pagodas or more, a further appeal was allowed to be filed to the King in Council (His Majesty's Privy Council) from the decision of the Governor and Council [9] Thus the Charter introduced a new system of first and second appeals, making the King of England the ultimate fountain of justice for litigants in India

(iii) **Justices of the Peace** —The Charter provided that in each presidency town, the Governor and five senior members of the

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9 The First Indian appeal to the Privy Council in pursuance of the Charter of 1726 appears to have been made as early as 1732 in a case from Madras

Council will have criminal jurisdiction and would be Justices of the Peace They were empowered to arrest and punish persons for petty criminal cases The Justices of Peace in India were also to act as a Court of Oyer, Terminer and Goal Delivery and were empowered to hold Quarter Sessions, four times a year, for the trial of all offences excepting high treason These Courts were entrusted with the same powers as similar Courts in England Regarding procedure, manner and form to be adopted by these Courts, the Charter clearly stated that the English pattern will be followed, " in the like manner and form as near as the circumstances and condition of the place and inhabitants will ad mit " It may, therefore, be concluded that the Charter of 1726 made the beginning of importing English ideas, technical forms and procedure of criminal justice into India

4 *Consequences of the Charter of 1726*

King George I issued a Charter to the Company on the 24th September, 1726 The Charter became an important landmark in the legal history of India due to its various vital provisions having far reaching consequences The year 1726 saw the abolition of the Court of Admiralty at Madras and enlargement of the powers of the Mayor's Court By establishing the Mayors' Courts at the three presidency towns of Bombay, Calcutta and Madras, the Charter introduced a uniform judicial machinery for justice in India The civil and criminal courts established under the Charter derived their authority directly from the King and not from the Company In this respect these courts were superior to the Courts which were established in 1686 by the Company The King in England, in whose name justice was administered in England also became the fountain of justice for Courts in India It added prestige and status to these Courts not only in India but also in England The very fact that the Courts in India derived their authority from the King, gave rise to the introduction of a new system of appeals from Indian Courts to the Privy Council in England The common allegiance to the King, in the field of judical set up paved the way for importing English ideas of law and justice, into India It was through the Privy Council that the principles of English law were gradually applied in deciding Indian cases wherever Indian law was silent or defective according to English judges Apart from this, the deep rooted English tradition of showing respect to the decisions of the highest judiciary was also adopted in India With the adoption of the doctrine of precedent in India, the principles of English law greatly influenced Indian law and legal institutions The Charter of 1726 itself played an important role in introducing English Common and Statute law in India An important stage in the evolution of British Courts of Justice was

reached with this Charter There appears to be great truth and farsightedness in Fawcett's remark " it meant the authoritative introduction of English law in the presidency towns and foreshadowed the parliamentary interference that first took shape in the Regulating Act of 1773 '

5 Distinction between Madras Charter of 1687 and the Charter of 1726

(i) The Charter of 1687 established a Corporation and a Mayor's Court only at Madras The Charter of 1726 established in each presidency town of Bombay, Calcutta and Madras, a Corporation and a Mayor's Court

(ii) The Mayor's Court established in 1687 was a Company's Court Three Mayors' Courts established in 1726 were Royal Courts as they were created by the King's Charter of 1726 Naturally, the status of these Courts was recognised by the Courts in England

(iii) The old Mayor's Court at Madras was empowered to exercise its jurisdiction over all civil and criminal matters and no appeal was allowed to go to the Admiralty Court On the other hand, the Mayors Courts established in 1726 were entrusted with civil jurisdiction only, and from their decision first appeal was allowed to the Governor in Council in the respective presidency town and a further appeal was allowed to go to the King in Council in all cases involving a sum of 1000 pagodas or more

(iv) No specific rules of law and procedure were laid down for the old Mayor's Court at Madras The Mayors' Courts established by the Charter of 1726, were required to follow a well defined procedure based on English law and practice

(v) A lawyer known as Recorder was attached to the old Mayor's Court at Madras in order to advise the Court while no such officer was attached to the new three Mayors' Courts

(vi) In the old Mayor's Court at Madras some Indians were authorised to sit as judges together with English Aldermen The Charter of 1726 specifically provided that out of nine Aldermen seven were required to be natural born British subjects and the remaining two were required to be subjects of any Indian princely state having friendly terms with the King In other words it may be stated that the representation of

Indians under the Charter of 1726 was practically negligible

(*vii*) The Charter of 1726 mixed executive with the judiciary by granting original criminal jurisdiction and appellate civil jurisdiction to the Governor and Council who were already entrusted with all the executive powers in each presidency town Under the Charter of 1687 the administration of justice was entrusted only to the Mayor s Court and the Admiralty Court at Madras and the executive had no power in this respect The Charter of 1687 is considered to be superior than the Charter of 1726 as the modern progressive ideas of separation of judiciary from the executive were deeply rooted in it

6 Critical estimate of the working of the Mayors Courts from 1726 to 1753

After the Charter of 1726 was actually implemented and the Mayors' Courts began their functioning gradually the defects and lacunae in the provisions of the Charter came into limelight It was realised that the Charter was not quite clear in its language The working of the Mayors Courts at Bombay, Calcutta and Madras created many difficulties for native Indians Specially the procedure of the Mayor's Court was quite new and altogether different from the long established traditions manners and habits of Indian litigants Referring to the working of the Mayor s Court at Bombay, Vachha states ' The cumbrous, costly, and intricate law bristling with technicalities fictions and formalities of all sorts was wholly unsuited to speedy and simple disposal of disputes, and the difference between English and Indian conditions and the legal atmospheres of Bombay and of Westminster were apt to be overlooked '[10] For the first time the Mayor s Court administered English law in India The English law contained both common law and the statute law Nearly all the common law and statute law, *as it existed in England in 1726*, was introduced in the three presidency towns of India It completely ignored the Indian customs and traditions and was hardly suitable to Indian conditions in those days The Mayor and Aldermen, who presided over the Mayor's Court were either senior servants of the Company or dependent on the Company s pleasure for their stay in India They had neither any regular legal training nor any judicial experience to their credit When the administration of justice was entrusted to such persons evil consequences were bound to follow Their jurisdiction was primarily confined to the persons employed in the factories of the Company and its branches in each presidency

10 P B Vachha *Famous Judges Lawyers and Cases of Bombay* p 12

town As there was no specific mention about jurisdiction, the Court decided that it was empowered to exercise its jurisdiction even in such cases where both parties were native Indians All these excesses and peculiarities to the name of justice enforced by the English people created great dissatisfaction and unrest amongst the n** ve inhabitants of each presidency town

The Charter of 1726 created a Corporation and a Mayor's Court in each presidency town The Mayor's Court was constituted to work independently but its relationship with the executive, Governor and Council, was not stated clearly In actual practice, the executive machinery expressed its hatred and jealousy against the independent attitude of the Mayor's Court At times, on the basis of major policy matters, the executive tried to dictate its terms to the judiciary On refusing to carry out the wishes of the executive heads, the Mayor and Aldermen came into conflict with the Governor and Council in many cases at Bombay, Calcutta and Madras Instead of the smooth working of these two wings—executive and judiciary—their relations became severely strained in each presidency town The following few cases, as pointed out by Fawcett,[11] will reveal the growing conflict and reflect on the extent to which the relations between the Governor in Council and the Mayors' Courts at Bombay, Madras and Calcutta became strained

As early as 1730, Governor Cowan and the Mayor's Court at Bombay came into conflict on the Court's jurisdiction over natives in matters concerning their caste and religion This situation arose in a case where a Hindu woman of Shimpy caste changed her religion and became Roman Catholic She had a son of twelve years of age After the mother changed her religion, the son left her and decided to stay with his Hindu relatives The mother filed a suit in the Mayor's Court against her Hindu relatives on the ground of unlawfully detaining some jewels and the boy As a consequence of it, the Court ordered the relatives to hand over the boy to his mother The heads of the caste filed a complaint to Governor Cowan and the matter was duly considered by the Governor and Council They held that the Mayor's Court was not authorised to exercise its jurisdiction over "causes of religious nature or dispute concerning caste among the natives" and a separate warning was issued to the Mayor's Court stating that in future the Court should not interfere in such cases The court strongly protested against the stand taken by the Governor and Council on the ground that the matter in dispute was not at all religious and the Court was empowered to decide such cases under the authority of the Charter of 1726 The Mayor retorted by declaring that so long as he presided over the Court, he would take every step to

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11 Fawcett *First Century of British Justice in India* pp 218 20

safeguard the prerogatives of the Court and he would even go to England to file an appeal to the King in Council The Governor removed the Mayor from the post of 'Secretary to the Council, a post which the Mayor occupied together with his main work of the Mayor's Court Ultimately, the conflict was reported to the Court of Directors of the Company The Directors of the Company denounced the rash and extreme attitude of the Bombay Council and issued general orders to prevent repetition of such a conflict

In the same year, in *Arab Merchant's case*, the Council and the Mayor's Court again came into serious conflict An Arab merchant sued a person in the Mayor's Court for recovery of the value of his pearls The merchant stated that the defendant extorted the pearls from him while he was rescued near the coast of Gujarat from a burning boat The Governor and Council suggested to the Mayor's Court that the claim suit filed by the Arab merchant was invalid as the defendant was tried for piracy earlier and was acquitted But the Mayor's Court payed no attention to the Governor's suggestion and decreed the suit in favour of the merchant On appeal before the Governor and Council, the decision was reversed by the casting vote of Governor Cowan Due to the casting vote of the Governor the Mayor's Court expressed great doubt and challenged the legality of the reversal order This added fuel to the fire and the existing tense relations between the Mayor's Court and the Governor further became strained

In Madras, a study of the working of the Mayor's Court during this period reveals that the relations between the Mayor's Court and the Governor and Council were not cordial On many occasions they came into conflict with another Whenever any decision was made either by the Council or the Court asserting independence and superiority of one over the other, conflict arose between the two Whenever the Mayor and Aldermen while acting as grand jury at the quarter sessions failed to show due consideration and respect to the authority of the Governor and Council, there was a clash between them involving a question of prestige The Mayor's Court expressed its indignation when the Corporation tried to utilise money collected by the Court as fines for the purposeof public works The Court always insisted on its independent authority and original jurisdiction in administering justice and made it clear that the Governor and the Council had no power to dictate or interfere in its working After a detailed study of the official records from 1726 onwards Love in his book "Vestiges of Old Madras" has pointed out many instances when the Mayor's Court at Madras came into conflict with the Governor and Council It will be worthwhile to quote and discuss some of them

In a case where Torriano, Secretary to the Government, filed a civil suit against Naish,[12] the Mayor the Mayor's Court held that the Mayor was immune from legal action in the Court.[13] Sometimes later it was also revealed that the relations between Naish, the Mayor, and the Governor became tense due to their personal rivalry jealousy and personal hatred against each other. In 1734 when Naish was re elected as Mayor the Governor of Madras refused to allow him to take the oath of office on the plea that the re election of the Mayor was not permitted by the provisions of the Charter. As a result of this a new Mayor was elected by the Corporation. Though a new Mayor occupied the office, the relations with the Governor did not improve. It shows that the causes of conflict between the two were deep rooted. In 1735, the executive filed a suit against a person, Sunku Rama for a breach of contract before the Mayor's Court. The Court of Appeal i.e. the Council directed the Mayor's Court to issue a warrant of execution. The Mayor's Court displayed a difference towards Sunku Rama.[14] At this, the Council felt insulted and it issued orders to its solicitor to file a complaint to the Council against the Mayor and each of the Aldermen for not obeying the directions of the Court of Appeal. The Mayor's Court raised legal objection to the relevance of the Council's step which was itself a party to the suit. As the Court's records are silent on what happened later in this case, perhaps at that stage, the Directors of the Company intervened and advised both the litigants not to proceed further in that issue. It was surprising to note that both the parties, the Mayor's Court and the Governor in Council justified their claims on the basis of the Charter of 1726.

The Mayor's Court also came into conflict with the local inhabitants of Madras. The Court insisted that the Hindu witnesses must take "*Pagoda*" oath instead of "*Geeta*" oath. The "*Geeta*" or "*Gita*" is a holy book of Hindus. A Gujarati merchant was fined by the Court for refusing to take "*Pagoda*" oath. When the matter came before the Governor and Council, they remitted the fine. Sometime later in 1736 two Hindus were even imprisoned, at the instance of the Mayor's Court, on their refusal to take "*Pagoda*" oath. This incident excited the Hindus emotionally and their expression of great dissatisfaction posed a problem of law and order. The Governor, therefore, intervened and released them on parole under his orders. This incident and the role of the

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12 Torriano and Naish both attended a dinner. Heated by the wines they imbibed they bet against each other on a trivial matter. Torriano the Secretary won and the Mayor Naish lost the bet. Torriano filed a suit against Naish for the recovery of bet amount.

13 Love *Vestiges of Old Madras* Vol II, p 264.

14 Fort St George Records *Public Consultations* Vol LXV

Governor further added to the already tense relations with the Mayor's Court Sometimes intricate questions of law were also referred to England [15]

In financial matters also, the steps taken by the Mayor's Court at Madras were not beyond doubt In January 1744 the Court represented to the Government through its Registrar that as its income was not sufficient to meet its expenditure, it appropriated the money belonging to the Estates which was deposited in the Court [16]

At Calcutta, the Mayor's Court was established in 1728 under the Charter of 1726. In its actual working and dealing with the Governor and Council, the condition was in no way better at Calcutta than Bombay and Madras Similar conflicts arose between the Mayor's Court and the Governor and Council

Company's authorities were worried at the growing discontent, conflict, enmity and rivalry between the Mayor's Court and the Governor and Council at Bombay Madras and Calcutta Therefore, in 1733 the Company expressed its disapproval of the independence which crept in amongst all the presiding officers of the Mayors' Courts The Company also issued timely instructions to the Governor and Council to be restrained and avoid conflicts with the Mayor's Court Fawcett has pointed out, "It was clear that the Company made considerable efforts to keep the courts in the straight and narrow path of English law, but failed to do so"

In all these clashes and conflicts, even English people were divided into two camps and were working against each other The inhabitants of Bombay, Madras and Calcutta were the greatest sufferers due to the constant conflicts between judiciary and the executive It created an atmosphere of great unrest in all the three presidency towns A petition was, therefore sent to the Court of Directors of the Company on behalf of the inhabitants of all the three presidency towns Their unfortunate position was specifically stated, difficulties were explained and request was made

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15 A typical opinion forwarded by the Company to Fort St George is one dated December 31, 1741 It was given by the Attorney General and Solicitor General of England "*Can the senior of Council preside* and hear the appeal? *Answer* In the case of real incapacity the next senior Counsellor cannot preside *Can* the Court of Appeal hear a case which cannot be heard before the Mayor's Court because the Aldermen are interested? *Answer* No, the *Court of Appeal has no* original jurisdiction What should be done with the estates of intestate persons? *Answer* The only method is for the Company's servants not to interfere with such business Dodwell, *A Calendar of the Madras Records (1740-1744)*, p 283-285

16 Love, *Vestiges of Old Madras*, Vol II, p 276

for exemption from the jurisdiction of the Mayors' Courts In their reply to the petition, the Directors of the Company made it quite clear that regarding conflicts and litigation between the natives in which the King's subjects were not involved "this may and should be decided among themselves, according to their own customs or by justices or referees to be appointed by themselves but if they request and choose them to be decided by English laws, those and those only must be pursued and pursued according to the directions of the Charter, and this likewise must be the case when differences happen between the natives and subjects of England where either party is obstinate and determined to go to law"

Under such circumstances Kaye has used no exaggerated language when he said that 'Justice gained little by the establishment of the Mayors' Courts"[17] While Fawcett holds the opinion that "they resulted in the distinct progress in the administration of justice according to the principles and practice of the English Courts of law"[18]

7 Political Changes in Madras and the Charter of 1753

On September 14 1746, the French captured the city of Madras The victory of the French brought Madras under the temporary rule of Pondicherry[19] During the French occupation of Madras, which remained for three years, the Aldermen either ran away from Madras or died and the whole judicial system of 1726, collapsed It gave a death blow to the Mayor's Court at Madras In 1749 the city of Madras was recaptured by the English people from the French On the restoration of Madras, the Mayor's Court was deemed to have been dissolved by the French occupation The English Company realised the necessity of a suitable judicial machinery at Madras It was considered reasonable to revive the Mayor's Court under a new Charter

The Mayor's Court was re established at Madras by a Charter of George II in 1753[20] The existing defective state of judicial affairs was quite clear before the Directors of the Company A petition stating the difficulties and hardships faced by the inhabitants of the presidency towns of Bombay and Calcutta, was already lying with the Directors of the Company for serious consideration The Directors considered it suitable to utilise this opportunity to

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17 J W Kaye *The Administration of the East India Company*, p 321
18 Fawcett *First Century of British Justice in India* p 273
19 French occupied Madras in 1746 and administered it until the Peace of Aix la Chapelle in 1748
20 Dodwell *The Nabobs of Madras* p 156

remove the defects of the Charter of 1726 The Charter of 1753, Royal Charter, was therefore issued by King George II The new Charter re-established the Mayor's Courts at Madras, Calcutta and Bombay It also introduced some reforms in the provisions of the Old Charter of 1726 to tackle the conflicting situation and also to gain favour of the local men residing in the presidency towns by removing their hardships The new Charter excluded from the jurisdiction of the Court all suits and actions between natives only, and directed that these suits and actions should be determined amongst themselves, unless both parties submitted them to the determination of the Mayor's Court It was an important restriction imposed on the jurisdiction of the courts in the presidency towns

The Charter of 1753 made the Mayor's Court subordinate to the Government of the Company by making certain important changes in its constitution The Charter provided that the Aldermen will be appointed by the Governor and Council in each presidency town For the appointment of Mayor, a panel of two names out of Aldermen was presented by the Corporation every year Out of this panel of two names, the Governor and Council were authorised to select one name for the post of Mayor In other words, it meant that the Mayor was Government's nominee The result of these changes in the method of appointment was that the Mayor's Court lost its independence It appears that the underlying policy was to strengthen the hand of the executive Government and its political power

Regarding "taking of oath," the Charter made it clear that the main purpose was to oblige the witness to speak the truth before a court It provided a particular oath for Christians For Hindus, it was stated that the oath must be taken in a manner which is considered most binding on their conscience according to their own castes It was also provided that the Mayor's Court was empowered to hear suits against Mayor and Aldermen But in such cases the interested person was not allowed to preside over the Court The Mayor's Court was authorised to hear and decide cases against the Company In such cases the Government was required to defend its case with the aid of its legal experts

The Charter also created a Court of Request[21] at each presidency town of Bombay, Calcutta and Madras to decide civil cases involving a sum not exceeding 5 Pagodas i e Rs 15 Its chief aim was to give cheap and quick justice to the poor It consisted of Commissioners numbering from 8 to 24 These Commissioners were required to sit in a quorum of three by rotation once a week

21 Love *Vestiges of Old Madras* Vol II, p 440

Thus the Courts established by the Charter of 1753 may be briefly stated as follows

(i) The Court of Requests, to hear civil suits up to 5 Pagodas, one for each presidency town

(ii) The Mayor's Court to hear civil suits for more than 5 Pagodas, one for each presidency town

(iii) The Courts of President and Council It was empowered to act as Justices of the Peace and the Court of Quarter Sessions to hear and decide criminal cases It was also empowered to act as civil appellate Court and in that capacity to hear civil appeals from the Mayors' Courts in the respective presidency towns

(iv) The King in Council (the Privy Council), as the highest Court of appeal heard appeals from the Court of the President and Council in all civil cases involving a sum of 1,000 Pagodas (Rs 3 000/) or more

The new Mayor's Court at Madras found it difficult to escape from its own tradition of conflicts In 1754 one Ephraim Issac accused one of the Aldermen of the Mayor's Court of giving dinners to two others in order to make them support him [22]

8 Criticism of the Charter of 1753

The Charter of 1753 made the judicial machinery more or less a branch of the Company's executive government and it failed to provide for the due administration of justice The Mayor's Court was presided over by persons who were selected from the junior servants of the Company Aldermen in fact meant the junior servants They began their role as judges of the Mayor's Court in India without having any legal training in England How then could justice be expected from such judges who were themselves ignorant of law and untrained in the art of administering justice ? There appears to be sufficient truth in V K Ferminger's observation "The weakness of judicatures of 1726 and 1753 arose from the fact that they tended to be in fact but various branches of the Company's executive Government and therefore afforded imperfect means of resistance to the class interests of the Company's servants at a time when the Company's servants were building fair to monopolise the trade of the country" [23]

Similarly the Governor and Council were quite ignorant about the technicalities of the English criminal law, on the basis of which

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22 Dodwell, *A Calendar of the Madras Despatches* 1744 1755 Introduction, p xiii

23 V K Ferminger, *Fifth Report of Select Committee* p 79

they were expected to decide cases in India Their ignorance and superior position in the executive was bound to prejudice them in the impartial administration of criminal justice in India Some of the political opponents were arrested, charged with committing crimes and ultimately they were given severe punishments

Only the presidency towns were under the jurisdiction of the Mayor's Courts, but the position was not made quite clear about the cases arising beyond such area Even the judicial system as it existed in the presidencies, was very weak There is no doubt that provision was for appeals to the King in Council, but on the basis of the records it can be very well said that for a long period of time hardly any appeal was taken to England It was a difficult and a highly expensive task to go to London for an appeal

The Mayor's Courts practically excluded Indians from having any share in the administration of justice in India They were not appointed to the Bench Under the Charters of 1726 and 1753 the only capacity in which Indians were allowed to participate in the administration of justice was as jurors in the Sessions Court This privilege was restricted to those only who accepted the Christian religion Though there was no specific mention in the Charters excluding Indians, it follows from the form of oath administered to the jurors, which was similar to the oath administered to the Christians

9 Abolition of the Mayors' Court and Constitution of new Courts

At Calcutta, the defective state of judicial affairs continued for some time till the House of Commons appointed a Committee of Secrecy in 1772 Apart from certain inherent defects in the recuitment of persons to preside over the Mayor's Court, the Court also came into conflict on the one hand with the President and Council, and on the other, with the native Zemindar s Court Persons who presided over the Mayor's Court were selected from amongst the junior servants of the Company who were mostly ignorant of law and judicial work [24] As a result of the restrictions imposed by the Charter of 1753, the Mayor s Court was not authorised to hear and decide cases between natives unless both the parties to a suit willingly submitted to its jurisdiction At Calcutta due to the existence of the Zemindar s Court, natives felt no special difficulty and most of them preferred to file their suits before the local Zemindar's Court The Mayor s Court always considered it as an encroachment on its jurisdiction by Zemindar's Court Though because of the provisions of Charter of 1753 the Mayor's Court was helpless in attracting native

24 William H Morley, *Analytical Digest* 1850, Vol I, P xii

litigants still it came into conflict with the Zemindar s Court on issue of jurisdiction [25] In Calcutta many English people were residing in the interior parts which were n t in the territorial jurisdiction of the Mayors Court They were also not governed by the native courts because f their immunity As a result of this unique immunity they indulged in all kinds of objectional activities The Committee of Secrecy also reported that many of His Majesty s subjects residing in Bengal, were neither under the protection or control of the Laws of England nor amenabl to the criminal judicatures of the country [26] In its Seventh report, the Committee of Secrecy severely criticised the working of executive and judicial system in Calcutta and submitted its report to the British Parliament It recommended that immediate steps should be taken to introduce reforms in the judicial system The British Parliament intervened and passed a new Act, known as "The Regulating Act, 1773" The Act of 1773 abolished the Mayor's Court at Calcutta and in its place a Supreme Court was established in 1774 These changes were made at Calcutta only and not at other presidency towns It appears that the British Parliament considered it suitable to introduce the reforms on an experimental basis at Calcutta and assess its working so that if it proves successful, the same may be introduced at Bombay and Madras also at a later stage

At Madras the Mayor s Court continued to function some how or other until 1797 The Charter of 1753 provided that in matters between natives the jurisdiction of the Mayor s Court depended on their submission But in practice it seems to have caused little change and the awkward position of natives to submit to the Mayors' Court arose because the natives of Madras had no very effective substitute for the Mayor's Court as the Zemindar's Court at Calcutta Dealing with the working of the Mayor's Court, a despatch was sent to the Company from Fort St George on April 15, 1791 [27] It stated one defect which required immediate rectification, *viz* that the judges of the Mayor s Court were not skilled in law and this disqualification really produced grave injustice in particular cases It was also pointed out that due to the gradual increase in the jurisdiction of the Court over all places, persons and offences there was a great increase in the work before the Court and therefore in order to deal with it effectively it was necessary

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25 Holwell v Zemindar imprisoned Soodas bdas and refused to release him though the Mayor s Court asked the Zemindar to do so The Court represented the matter to the Company after referring it to the Governor and Council Letter from the Mayor s Court at Calcutta to the Company dated March 1754 *Bengal Past and Present* Vol XIII p 31

26 Seventh Report of the Committee of Secrecy p 333

27 Cited in G Gopalakrishnam *A Century Completed* or *History of the Madras High Court* p 87

to appoint professional judges In order to remove these and other defects, as stated earlier, the Company decided to abolish the Mayor's Court at Madras and under the Charter of 1798 the Recorder's Court was established in its place The constitution of the Recorder's Court at Madras was the same as at Bombay The Recorder was an expert in English law Apart from improving the judicial system, its object was to bring the administration of justice in Madras into line with the machinery of justice in Calcutta

At Bombay, the Mayor's Court was abolished in 1798 and in the same year the Recorder's Court was established in its place The Mayor's Court functioned for nearly 70 years with its inherent defects of principle and personnel The Recorder's Court at Bombay consisted of a Mayor, three Aldermen and a Recorder appointed by the Crown It was provided by the Charter that the Recorder must be a Barrister of not less than 5 years' standing In fact the Recorder was the real judicial authority to enlighten the court with legal provisions applicable in each case In 1798, Sir William Syer was appointed as the first Recorder of Bombay

10 How far justice gained by the establishment of the Mayor's Court under the Charters of 1726 and 1753?

A short account of the working of the Mayor's Court at Bombay, Madras and Calcutta is discussed above under various headings An effort is also made earlier to make a critical assessment of the working of the Mayor's Court and its contribution to the administration of the justice in the presidency towns by referring to the relation of the Mayor's Court with the Governor and Council on the one hand and with the native inhabitants on the other Even after the provisions of the Charter of 1753 which was passed specially to remove defects of the Charter of 1726, the Mayor's Court suffered from certain drawbacks having far reaching consequences

It may be stated briefly that the Charter of 1753 made the Mayor's Court more or less a branch of the Company's executive Government Persons presiding over the Courts were selected from amongst the junior servants of the Company whose appointment and dismissal depended on the sweet will of the Governor and Council Judges became tools in the hands of the executive Judges of the Mayor's Court were primarily experts in trade and commerce They were lacking in professional legal training and in legal knowledge It appears the Court of Directors, as a matter of policy, never stated clearly that they were interested in maintaining independence of judiciary In fact the Company was more interested in safeguarding its trade and commerce and the machinery to

administer justice was mainly to deal with English litigants in India The Judges of the Mayor's Court were always interested in expanding their jurisdiction over natives on some pretext or the other But the persons administering the law were not having any judicial training nor did they know what law was to be applied to the litigants Such a state of affairs was bound to lead to confusion Under such conditions, therefore, a very important question arises — How far had justice gained by the creation of the Mayor s Court?

Before answering the question, posed above it will be worthwhile to consider certain observations made by eminent historians which may assist in properly assessing the entire situation

Referring to the working of the Mayor's Courts, William Bolt has observed "The Mayor's Court has become rather a scourge in the hands of the Governor and Council than an instrument of relief to the injured, and justice in Bengal is made so much a political farce that no one concerned in the administration of it does so much as to hazard the giving offence to any gentleman in power [28]

Appreciating the Judges of the Mayor s Courts and their popularity Alan Gledhill states, "Company s servants without legal experience presided over the Court, most of the cases raised no difficult question of law and were generally, disposed of fairly and efficiently the judges were guided by notes compiled by the Company s lawyers after inspection of their registers in England The popularity of the Courts with Indian litigants was presumably due in past to the efficiency of their executive proceedings" [29]

Gledhill's statement as given above, is criticized on two important points It is difficult to agree with Gledhill where he states that " the judges were guided by notes compiled by the Company's lawyers " There is no material available in the records to prove it In fact legal knowledge of the judges was very poor This proposition may be supported by a quotation of an eminent historian Dodwell who said "A system that could hardly be mastered by the study of a life time had then to be put into force by persons scarcely acquainted with its elements, there was thus fine opening for those who *could persuade others that* they had any legal knowledge—you had to put up with make shift justice " [30]

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28 William Bolts *Considerations of Indian Affairs* Vol I, p 87
29 Alan Gledhill *The Republic of India The Development of its Laws and Constitution* Edn 2nd (1964) p 214
30 Dodwell *Nabobs of Madras* pp 148 157

Regarding "popularity of the courts with Indian litigants" as stated by Gledhill, it will be helpful to study the reaction to the provisions of the Charter of 1753 at Calcutta, Madras and Bombay The Charter of 1753 restricted the power of the Mayor's Court to try cases arising between two native Indians In such cases both parties were required to accept the jurisdiction of the Court. There is enough material on record to prove that at Calcutta the native litigants preferred Zemindar's Courts than to go to the Company's Court after 1753 On the other hand, the Mayor's Court was making constant efforts and taking undue steps to bring natives before it It can be supported by Cowell's observation that within the bounds of the Company's factories natives also built houses and when "the Nawab on that account was about to send a Kazi or Judge to administer justice to the natives, the Company's servants bribed him to abstain from the proceeding" [31] Referring to the litigant at Bombay, Vachha has pointed out another reason, " that in the absence of any other regular law court, the Indian litigant had hardly any alternative but to resort to the Mayor's Court Its justice, rough and ready, was none the worse for being free from legal forms and technicalities [32]

The Mayor's Court failed to exercise its control and administer justice according to English law on all English people though the Charter of 1753 clearly provided that the primary task of the Mayor's Court was to administer justice over His Majesty's subjects This fact can be supported by the observation of the Committee of Secrecy in its Seventh Report, " many of His Majesty's subjects residing in Bengal, were neither under the protection or control of the laws of England, nor amenable to the criminal jurisdiction of the country "[33]

Long, a historian, has pointed out the state of the Mayor's Court in his abbreviated remarks, "Their system has much of Justinian's justice, off hand according to dictates of equity more than law "[34]

Another eminent historian Archbold, while giving a detailed account of the underlying policy of the Company and the imperfections of the law courts has stated, " neither Parliament nor the Charters nor the Company in the early days ever took the trouble to make matters at all definite We know that there was a good deal of difference between the position as it was *de jure*

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31 Cowell, *History and Constitution of Courts and Legislative Authorities of India*, p 16

32 P B Vachha, *Famous Judges, Lawyers and Cases of Bombay A judicial History of Bombay*, p 14

33 *Committee of Secrecy*, Seventh Report, p 333

34 Long *Selections from Unpublished Records*, Vol I, p xxxi

and what it was in reality and this pretence, if so we may call it is reflected in the legal situation Speaking generally, the Company's officers not being lawyers but traders had no wish to pose as judges They were gradually forced to do so and they formed some sort of system which was improved as time went on by Charters and Acts of Parliament They were always conscious of their own imperfections in the matter and they were obviously anxious that English law should not be given too wide an application "[35]

Thus considering all the above stated observations of the eminent historians and also on the basis of other available relevant historical material there appears to be sufficient justification and great truth in J W Kaye's assessment, "Justice gained little by the establishment of the Mayor's Courts "[36] It will also be in the fitness of things to conclude that howsoever ignorant, incompetent, inefficient and influenced by the executive were the judges of the Mayors' Courts, it is quite clear that by establishing the Mayors' Courts under the Charters of 1726 and 1753, a good beginning was made to set up a suitable uniform machinery for the administration of justice in India on the basis of English ideas and pattern

B The Courts of Requests (Small Cause Courts)

The Court of Requests was established for the first time by the Charter of 1753 at Calcutta, Madras and Bombay It was established to decide civil suits of small pecuniary amounts[37] The same Charter re established the Mayors' Court in all the three presidency towns The Court of Requests was authorised to hear all civil suits involving a sum up to 5 Pagodas Where the sum involved was more than 5 Pagodas, the Mayors' Court exercised its jurisdiction The President and Council were empowered to appoint the first Commissioner to preside over the Court of Requests in each presidency town Subsequent appointments were made by the Commissioners themselves

The Charter of 1774 provided for the continuance of the Court of Requests and made it subordinate to the Supreme Court at Calcutta Referring to the effectiveness of the Court of Requests, in his letter to the Earl of Rochford, Impey made some observations "The Judes are very desirous that the Court of Requests in this town should have its jurisdiction extended to Rs 100/ This is a sum for which the Supreme Court cannot [illegible]

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35 W A J Archbold, *Outlines of Indian Constitutional History* p 30.
36 J W Kaye, *The Administration of East India Company* p 371
37 "The Court of Requests is in fact the only court in Calcutta which is of real and essential service to the poor inhabitants ", said Bolts in his book *Considerations on Indian Affairs*, p 8

this country is esteemed very inconsiderable Indeed small suits take up great part of that time which ought to be employed o more important causes "[38]

The Act of 1797 enlarged the monetary jurisdiction of the Courts of Requests They were empowered to decide causes up to Rs 80 Two years later, in 1799 another Act was passed which provided for the appointment of Commissioners for the recovery of small debts [39] In 1802 the jurisdiction of the Court was raised to Rs 100 By another Proclamation dated October 29 1819 its jurisdiction was further extended and the maximum limit was fixed at Rs 400/

As stated earlier, after the abolition of the Mayor's Courts and the Recurder's Courts the Courts of Requests were made subordinate to the Supreme Courts in each presidency town The Supreme Court was authorised to supervise the e Courts in the same manner as the inferior courts in England were made subject to the order and control of the Court of Queen s Bench

In 1850, the Courts of Requests were abolished in the three presidency towns and in its place Small Cause Courts were established The Governor in Council in each presidency was authorised to appoint judges in these Courts These new Courts were given the status of the Court of Record Their jurisdiction was further extended to Rs 500 Though there was a provision to appoint three judges, in actual practice any judge or judges of the Supreme Court who consented to help in the execution of the work were authorised to exercise all the powers of the judge appointed under it and to try suits as if they were Judges of the Small Cause Court It was within the powers of the Small Cause Courts to reserve any question of law or equity for the Supreme Court's opinion The Supreme Court was empowered to call for any cause involving a sum exceeding one hundred rupees which was already lying before the Small Cause Court Practically, the Supreme Court always discharged litigants from coming to it for petty civil cases for which the Small Cause Courts were authorised to administer justice All suits brought before the Small Cause Courts were heard and decided in a summary way The creation of Courts with exclusive jurisdiction over petty causes with power to give a final decision in respect of such causes saved a good deal of public time as well as enabled the higher courts to devote more time for cases involving complicated questions of law and fact

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38 Impey s letter to the Earl of Rochford dated March 25, 1775, *General Appendix No 82 Touchet Report*

39 At Bombay a Small Cause Court was set up in 1799 to hear cases up to Rs 175

In 1864, the Presidency Towns Small Cause Courts Act was passed It extended the jurisdiction of these courts to cases concerning the recovery of any debt, damage or reward involving even more than Rs 500 but not exceeding Rs 1000, provided that the cause of action had arisen or the defendant at the time of bringing the action was dwelling or carrying on business or personally working for gain within the local limits of the Court's jurisdiction In cases exceeding Rs 500 in value the judges were directed to reserve doubtful questions of law for the opinion of the High Court and to deliver judgment on the basis of that opinion

In order to suitably adjust the working of the Small Causes Courts in the then existing judicial system of India and also to remove certain defects which came into limelight in its actual working, a new Presidency Small Cause Courts Act was passed in 1882 The Act of 1882 repealed all prior enactments and constituted the Small Cause Courts at the presidency towns of Bombay, Calcutta and Madras subject to various exceptions as specified in the Act They were subordinate to the respective High Courts and exercised jurisdiction over such areas as was under the original civil jurisdiction of the High Court

Mofussil Small Cause Courts or Provincial Small Cause Courts were established in 1860 The law relating to them was amended in 1865 The Provincial Small Cause Courts Act was passed in 1887 It reconstituted the Courts of Small Causes established beyond the local limits of the ordinary original civil jurisdiction of High Courts of judicature at Bengal, Madras and Bombay The object of the Act of 1887 was to ensure the speedy administration of justice in small suits of pecuniary nature and comparatively simple in character These Courts were entrusted with the power to try in a summary manner simple money suits not exceeding Rs 500 in value The Small Cause Courts are courts of summary jurisdiction from which no appeal is allowed except in certain cases, as specified in the Act to the High Court Since 1887, the Provincial Small Cause Courts Act has received attention of the legislature both Provincial and Central from time to time and has been amended or repealed to meet the growing requirements [40] The value of the contribution of a Court of Small Causes lies in the fact that justice is administered without much delay and the parties get an early decision on the disputed matter with the result that a petty litigation is saved from unduly and unnecessary procrastination

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40 The Provincial Small Cause Courts Act of 1887 was amended by Central Acts VI of 1914 VI of 1915 II of 1922 I of 1929 and IX of 1935 This Act has been extended in its application to the Bombay Presidency by Bombay Act VI of 1930 and Bombay Act IX of 1939 The Act has been amended in its application to U P by the U P Criminal Law (Reforms and Amendment) Act 1954 and U P Act No XVII of 1957

4

Judicial Reforms of Warren Hastings and the Adalat System in Bengal

A Historical Background up to 1772

1 Grant of Diwani

With the battle of Plassey in 1757 the real authority of the Nawabs of Bengal passed to the English Company [1] At the historic battle of Buxar in 1764, unfortunately the combined forces of Mir Kasim, deposed Nawab of Bengal, Shuja ud-daula, Nawab Wazir of Oudh, and the Emperor Shah Alam were defeated by the Company's army under the command of Major Munro The Emperor submitted to the Company's power At Buxar, it was not merely the Nawab of Bengal, as at Plassey, but the Emperor of India who was defeated It had far reaching political consequences. Subsequent political developments which followed the battle of Buxar strengthened the British power in India and gave a death blow to the sovereignty of the Mughal Emperor in India The Court of Proprietors of the Company in England sent Clive to India to deal with the situation and consequences Thus Clive arrived in India as Governor of Bengal and Commander-in-Chief of Company's forces in India, for the third time on May 3, 1765 [2] Clive's first achievement was that he entered into a treaty and prevailed upon the Mughal Emperor Shah Alam to confer momentous power upon the East India Company The Mughal Emperor in August 1765 granted the *Diwani* of Bengal, Bihar and Orissa to the East India Company In exchange the Company

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1 Clive smashed Nawab Siraj-ud daula's army and put an end to his power in Bengal in the Battle of Plassey in 1757 The British appointed a new Subedar of Bengal, Nawab Mir Jafar and obtained all privileges they needed In fact the reality of power had now gravitated into the hands of Clive and Bengal had become virtually a British protectorate as well as a base for the further extension of British power towards the interior of India Amaury Ce Reincourt in *The Soul of India*, at p 201, said, "It was the French, rather than the British who inaugurated the policy of interfering in Indian politics, a new development that has far-reaching consequences" *See* also Thornton *History of British India*, Vol I, pp 410-420, A Mervyn Davis, *Clive of Plassey*, pp 220 224; Forrest, *The Life of Lord Clive*, Vol II, p 120, Gleig, *The Life of Robert First Lord Clive*, pp 142, 194 202

2 For the first time Clive came to India in the Company's service in 1743 and returned in 1753 After two years, in 1753 Clive again returned to India and stayed up to early 1760 In 1765 Clive came to India for the third time On March 8 1765 the Directors appointed Clive to be sole President and Governor of Fort William in Bengal *See* Malcolm *The Life of Robert Clive* pp 126 127

agreed to pay the Emperor[3] a sum of 26 lakhs of rupees and to the Nawab[4] of Bengal a fixed sum of 53 lakhs of rupees annually. The Nawab in return agreed not to keep any military force independently and left it in the hands of the Company's authorities. The Company made the best use of this opportunity to strengthen its position and develop a strong army for itself in the name of the Nawab of Bengal.[5]

2 Dual Government of Bengal Its Consequences

The Nawab, who was Subedar of Bengal, represented the Mughal Emperor of India. While exercising his authority under '*Diwani*' the Nawab performed two main functions—(*i*) *Diwani* i e, collection of revenue and civil justice, and (*ii*) the *Nizamat* i e, military power and criminal justice. The Company obtained *Diwani* rights from the Mughal Emperor and the Nawab gave it *Nizamat* work. The Nawab had lost all real power and was a mere shadow in the background.[6] However, the administration of criminal justice was left with the Nawab who was also responsible to maintain law and order. Though the transfer of *Diwani* to the Company was obtained by Clive, in the actual collection of revenue he utilised the services of the natives. Clive was not interested in taking direct responsibility for the collection of revenue through English people as he realised that they will have to face more difficulties at this stage.[7] The administration of civil

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3 Aitchison, *Treaties, Engagements and Sanads* Vol II, pp 241 44

4 *Ibid* Vol. II, p 245 *See* also D N Banerjee, *Early Land Revenue System in Bengal and Bihar*, Vol I, pp 5-6, Forrest, *The Life of Lord Clive*, Vol II p 279

5 Malleson has pointed out, "A few months later the Prince was relieved his responsibility for the maintenance of the public peace, for the administration of justice and for the enforcing of obedience to law" G B Malleson, *Lord Clive* pp 171 72 According to Prof Misra "The acceptance of the *Diwani*, he (Clive) believed, would add to the political influence of the English, which might be utilised in the elimination of other European nations then engaged in the pursuit of commerce and trade in Bengal" B B Misra *The Judicial Administration of the East India Company in Bengal*, p 23

6 *See* P E Roberts *History of British India*, at p 160, "But Clive could not afford to indulge in counsels of perfection, he had to deal with actual facts. He admitted that the Nawab had only 'the name and shadow of authority,' yet 'this name this shadow is indispensably necessary that we should venerate'"

7 "In the infancy of the acquisition (of the Diwans)", wrote Clive to Directors "we were under the necessity of confiding in the old officers of the Government, from whom we were to derive our knowledge and whom we therefore endeavoured to attract to our service by the ties of interest until experience should render their assistance less necessary. Policy required we should pursue every step likely to conciliate the natives to our Government" *Clive to the Court of Directors*, 28th September 1765 I O Mss Eur E, 12, pp 76-77

justice and collection of revenue were left in the native hands under the supervision of the Company officials Clive therefore, appointed two prominent natives—Mohamed Reza Khan and Raja Shitab Roy, as Company's Diwans at Murshidabad and Patna respectively At both the places two separate English officers were also appointed to supervise the working of these native officers This typical division of power and responsibility—executive, revenue and judicial, between the Nawab and the Company in Bengal, Bihar and Orissa, became famous as the Dual Government introduced by Clive According to Percival Spear ' a better name for it would perhaps have been the Divided Government "[8]

With the introduction of the "dual government" the Company gradually usurped all the powers of administration which reduced the authority of the Nawab and made him completely devoid of any substantial power or function "This act of the Company ', said Cowell, "was the acquisition of sovereignty by the English Lord Clive by obtaining the grant of *Diwani* placed the Government of Bengal on a legal basis and established its relations with the natives on a footing of definitely civil responsibility" [9]

The divorce of power from responsibility under the "dual government" in Bengal further deteriorated the efficiency of the whole administrative machinery The English servants of the Company misused their power and position to meet their selfish ends, which ultimately led to the exploitation of the people of Bengal, Bihar and Orissa and encouraged corruption bribery misappropriation and their evil consequences ruined a prosperous and flourishing Bengal making the inhabitants very poor and miserable [10] As a result of such defective state of affairs the revenue also decreased considerably The system of "dual government" according to the testimony of Kaye, "made confusion more confounded and corruption more corrupt " Percival Spear says, "It was clumsy and it left the door wide open to abuses There was too much power with too little responsibility' [11]

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8 Percival Spear *India A Modern History* p 204

9 H Cowell, *The History and Constitution of the Courts and Legislative Authorities in India*, p 32 Forrest says 'The acquisition of the Diwani was an attempt to combine responsibility with power Forrest *The Life of Lord Clive* Vol II, p 285

10 In *Asia and Western Dominance*, at p, 76, K M Panikkar states, ' It was a robber state that had come into existence and Richard Becher a servant of the Company wrote to his masters in London on May 24, 1769 as follows 'It must give pain to an Englishman to have reason to think that since the accession of the Company to *Diwani* the condition of the people of this country has been worse than it was before This fine country is verging towards ruin

11 Percival Spear *India A Modern History* p 204 *See also*, A B Keith, *A Constitutional History of India*, (Edn 2nd) pp 55 58

3 The Company as Diwan

Clive left India in January 1767 The working of Clive's policy of dyarchy in Bengal created anarchy No body was taking responsibility for the conduct of the government and the deteriorating condition of the natives Governor Verelst succeeded Clive in India In order to improve the conditions, Governor Verelst in 1769 appointed English people as Supervisors in the districts to supervise the collection of revenue and the administration of justice The Supervisors were required to study in detail the main roots of corruption, to investigate all payments made by the ryots to Zemindars or Collectors, to enforce legal justice, to encourage arbitration The Supervisors were given enormous work to do which was not within their capacity and ability [12] But this experiment also failed to improve the deteriorating condition of law and order in Bengal In 1770 two Revenue Councils of Control, with superior authority over Supervisors, were also appointed at Murshidabad and Patna respectively Unfortunately in 1771 Bengal faced a severe famine, which further worsened the condition of the inhabitants

The Directors of the Company suspected and blamed Indian officers for the evils In 1771, therefore, the Company changed its policy and the Directors declared their resolution "to stand forth as '*Diwan*' and by the agency of the Company's servants to take upon themselves the entire care and managment of revenue" [13] In order to implement this changed policy and achieve their aim, the Directors transferred Warren Hastings from Madras to the Governorship of Bengal in 1772

The Company's decision to stand forth as *Diwan* through the agency of their own servants was publicly announced at both Calcutta and Murshidabad by a proclamation issued on May 11, 1772 [14] The charge of the revenue and civil justice was taken over by the Controlling Councils of Revenue and they advised their subordinate agents and officers to deal with them directly on all matters relating to the *Diwani*

The main object of the Company was to bring under the direct control of the Company's servants the revenue collections and civil justice in order to save both the ryots and the government from hardships caused due to the existence of the intermediaries The Nawab's authority over criminal justice was recognized by the

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12 *See* Chatterji, *Verelst's Rule in India*, p 238-278

13 General Letter of the Court of Directors to Bengal dated August 28 1771

14 For Proclamation see *The Proceedings of the Controlling Council at Murshidabad* Vol XI, p 15

Company The new policy of the Company, therefore differed from Clive's system of *double government in the sense that the* collections were wholly taken away from the control of Nawab's government and were given to the European servants of the Company

4 Courts in Bengal under the Mughals

In the later Mughal period from 1750 *onwards the Mughal* empire began to disintegrate The provinces assumed indepen dence under Subedar Nawabs and the executive officers began to try cases themselves In Bengal the courts[15] which were admi nistering civil and criminal justice, in the Districts and at the Provincial Capital, may be stated as follows

At the Provincial headquarter four courts were established namely *Nazim e Subah Darogha e Adalat Diwani, Diwan* and *Darogha-e Adalat Aliah* The Court of *Nazim e Subah* was the highest Court of the Province It dealt with all criminal appeals from district courts, murder cases, revision petitions and cases referred to it by the district courts due to difference of opinion between *Qazi* and *Mufti* The Court of *Darogha e Adalat Diwani* heard all the local civil suits and appeals, including matters relating to real property and land, from the *District Civil Courts The Court of Diwan* had original and appellate jurisdiction in all revenue cases The Court of *Darogha e Adalat Aliah* disposed of all revenue work on behalf of the *Diwan*

In each District, courts were established to hear civil and criminal cases To dispose of civil litigation three courts were established, namely, *Qazi, Zemindar* and *Qanungo* The Court of *Qazi* was empowered to hear all claims of transfer of property and matters relating to inheritance The Court of *Zemindar* was authorised to hear all other civil and common pleas Revenue cases were decided by the Court of *Qanungo* Apart from this in each district, there were four criminal courts, namely, *Faujdar, Zemindar, Qazi* and *Kotwal* The Court of *Faujdar* tried criminal and common law cases The Court of *Zemindar* tried mostly petty criminal cases in a summary manner The Court of *Qazi* was empowered to make full enquiries in murder cases only and was required to submit a report to the Court of *Nazim e Subah* From all these Courts appeal was allowed to the Court of *Nazim e Subah Kotwal* was the "peace officer" and was authorised to decide petty criminal cases

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15 M B Ahmad *The Administration of Justice in Medieval India* pp 173 174

5 Defective state of the Judicial System

In many places influential landlords were authorised to maintain law and order in local areas During the later Mughal period these landlords, commonly known as *Zemindars*, were empowered to try petty civil and criminal cases Thus the *Zemindars* became very powerful and gained importance in all respects James Mill remarked, "The *Zemindar* who was formerly the great fiscal officer of a district, commonly exercised both civil and criminal jurisdiction within the territory over which he was appointed to preside In his *Faujdaree* or Criminal Court he inflicted all sorts of penalties His discretion was guided or restrained by no law, except the *Koran*, its commentaries and the customs of the country, all in the highest degree loose and indeterminate" [16] Naturally, in lieu of litigation before the *Zemindar's* Court, arbitration was often preferred by the parties In the districts the peasants were deprived from the justice even according to the local customary law Corruption amongst judges and the servants of the government further added to the defective state of the local system It became extremely difficult to file an appeal as no register of judicial proceedings was properly maintained Not only in the mofussil but even at the seat of the Government the whole judicial system was degraded into a machine of oppression and exploitation of the poor subjects

The Courts became the instruments of power instead of justice The Company's servants who had claims against Indians, not residing under the British Flag but in the vicinity of the Company's settlements, used to seize simply and hold them prisoners until they consented to pay the claims without seeking permission from any officer of the Nawab's Government Keith has pointed out, "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 encroachments on native authority, the *banyans* or native agents of the English often controlling the local courts and even acting as judges" [17]

To tackle all these problems and to remove corruption from the administration of justice, Warren Hastings was transferred from Madras to the Governorship of Bengal in 1772 [18] Warren

16 James Mill *The History of British India*, III p 467
17 A B Keith *A Constitutional History of India*, pp 63-64
18 In February 1772 Warren Hastings reached Calcutta from Madras and took charge of Government from Cartier on April 14, 1772 Lyall writes "No one can deny that Warren Hastings possessed to a degree rare at that period, the talents of political organization" Lyall *Warren Hastings* p 84

Hastings first of all paid his attention to remove all those evils which were the greatest obstacles in the proper collection of the revenue of Bengal, Bihar and Orissa On May 14, 1772 the President and Council at Fort William adopted a number of regulations for the settlement of revenue The office of *Naib Diwan* and the native agency was replaced by a British agency for the collection and administration of internal government Farms were let for a fixed term of five years The servants of the Company employed in the management of the collections were henceforth to be called Collectors instead of their previous designation of Supervisors Warren Hastings appointed a Committee of Circuit of five members, consisting of the Governor (Warren Hastings) and four members of the Council, to find out all causes of evils in the existing administration of justice and to prepare a proper plan on which the whole civil and criminal justice was to be based [19]

B The Judicial Reforms of Warren Hastings

1 Warren Hastings' Plan of 1772

The Committee of Circuit, under Warren Hastings as its Chairman, prepared the first judicial plan on August 15, 1772 It was the first step to regulate the machinery of administration of justice and the plan being a landmark in the judicial history became famous as "Warren Hastings' Plan of 1772" [20]

Under this plan the whole of Bengal, Bihar and Orissa were divided into districts The "District" was selected as the unit for the collection of revenue and for the administration of civil and criminal justice In each district an English officer, called Collector of the district, was appointed His primary duty was to control the collection of revenue

(i) Civil Justice —As regards the administration of civil justice, the plan provided for the establishment of a Mofussil Diwani Adalat in each district The Collector of the district presided over the Court Provision was also made for a Mofussil Diwani Adalat at Calcutta The difference between the two was that while the District Mofussil Diwani Adalats were presided over by their Collectors, the Court at Calcutta was placed under the charge of a Member of the Council who served in rotation The Mofussil

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19 *Hastings to Jonas Dupre, 6th January, 1773, Cleig, Memoirs of Warren Hastings*, Vol I, p 268

20. See *Committee of Secrecy, Report 7th* (1773), Appendix 11 pp 348 351 Colebrooke *Supplement to the Digest of the Regulations and Laws of Bengal* Vol III, pp 1 8, Peter Auber *Rise and Progress of British Power in India*, Vol 1, pp 425 427, B (B) Misra *Judicial Administration of the East India Company in Bengal*, pp 168 173

Diwani Adalat was empowered to decide all civil cases dealing with real and personal property, inheritance, caste, marriage, debts, disputed accounts, contracts, partnerships and demands of rent [21] Its decision was final in all suits up to the valuation of five hundred rupees At the seat of the Government i e , Calcutta, one Sadar Diwani Adalat, a court of superior jurisdiction, was also established It was the chief court of appeal and was empowered to hear appeals from all district Mofussil Diwani Adalats in such cases where the valuation of the suit was more than five hundred rupees The Sadar Diwani Adalat was presided over by the President and at least two other members of the Council In the absence of the President a third member of the council was required to sit so that not less than three members should decide on all appeals

Besides these courts, the Head Farmers of Parganas were authorised to decide petty disputes relating to property up to the value of ten rupees

(ii) **Criminal Justice** —In the sphere of criminal justice, the plan provided for the establishment of a Mofussil Faujdari Adalat in each district for the trial of all crimes and misdemeanours under the Collector of the district One court like the Mofussil Faujdari Adalat was established at Calcutta to decide local criminal cases and was placed under the charge of a Member of the Council who served in rotation In each district, a *Qazi* and a *Mufti* with the help of two *Maulvies*, who were appointed to expound the law, were to hold trials for all criminal cases The Collector was authorised to supervise the working of the court A Sadar Nizamat Adalat was established at Calcutta to hear appeals from the Mofussil Faujdari Adalats of the districts and to control their working It was presided over by a *Darogha* or Chief Officer appointed by the Nawab A Chief *Qazi*, a Chief *Mufti* and three *Maulvies* were to assist the *Darogah* in performing his duties, The court revised important proceedings of the Mofussil Faujdari Adalats The Mofussil Faujdari Adalats had no power to pass capital sentence without the approval of the Sadar Nizamat Adalat In passing severe sentences for grave offences, the Nawab's signature was a prior condition as the Nawab was considered to be the head of the Nizamat Adalat As the Collector of the district was authorised to supervise the Mofussil Faujdari Adalat so also the President and Council at Fort William were empowered to supervise the proceedings of the Sadar Nizamat Adalat

(iii) **Recognition of Personal Laws** —Article 27 of the plan (1772) of Warren Hastings directed the Diwani Adalats "to decide all cases of inheritance, marriage, caste and other religious

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21 G W Forrest, *Selections from the State Papers of Governor-General Warren Hastings*, Vol II, pp 371-372

usages and institutions according to the laws of the *Koran* with regard to the Mohammedans and the laws of the *Shaster* with respect to Hindus" It was one of the most important provision of the plan, as it safeguarded the personal laws of Hindus and Moham medans It is also clear that under the plan both the Hindu law and the Mohammedan law, were treated on equal basis ignoring the supremacy of Mohammedan law due to Muslim rule in Media veal India Rankin remarked, "To place the Hindu and the Mohammedan laws upon the same footing notwithstanding centuries of Muslim rule, was another act of enlightened policy '[22] Under the Mughals, Mohammedan law was the law of the land while Hindu law was not having that status It may, therefore be concluded that the decision to treat the two laws as co existing and equal was not a matter of course but to borrow Macaulay's phrase, "It was a farsighted policy"

Warren Hastings made constant efforts to convince the Directors that the people of India were not savages, that they had laws of their own, that their customs should be respected[23] He was at pains to dispel the notion then prevalent in England that the people of India had no regular laws of their own Moham medan law was contained in a digest prepared by the order of Aurangzeb and acknowledged by the Indian Courts Hindu law, though of vast antiquity, had not hitherto been systematically codified Warren Hastings, therefore, invited to Calcutta ten of the most learned pundits to the country and commissioned them to prepare a digest[24] for the guidance and convenience of the civil courts Sample portions of the English translation of the digest were transmitted to the Directors to convince them that ' the people of this country do not require a standard for their pro perty" [25] In Warren Hastings's view it was the sacred right of Indians to retain their own system of law and justice Laying special emphasis on respecting the local customs, Warren Hastings stated the reasons for his opinion thus "Even the most injudicious or most fanciful customs which ignorance or superstition may have introduced among them are perhaps preferable to any which could be substituted in their room They are interwoven with their religion, and are therefore revered as of the highest authority They are the conditions on which they hold their place in society, they think them equitable, and it is therefore no hardship to exact their obedience to them I am persuaded they would consider

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22 G C Rankin, *Background to Indian Law*, pp 2 5
23 Philip Woodrooff, *The Men Who Ruled India* Vol I p 124, W A J Archbold, *Outlines of Indian Constitutional History* p 53
24 This Digest Warren Hastings got translated into Persian and English as by that time no Englishman knew Sanskrit
25 Penderel Moon, *Warren Hastings and British India*, p 70 *Sic*

the attempt to free them from the effects of such a power as a severe hardship" [26]

It is, therefore, clear that the provision, "the laws of the Koran with respect to Mohammedan and those of Shaster with respect to Gentoos" shows the far sightedness of Warren Hastings

It appears that Warren Hastings realised beforehand that the personal laws of Mohammedans and Hindus were based on their religious laws which were ascertainable by the study of the sacred books, and that any change in these personal laws would surely raise a hue and cry amongst Indians It is, therefore, clear that by safeguarding the personal laws of the natives of India Warren Hastings showed his far sightedness and the legal historians considered it, "one of the wisest steps ever taken by Warren Hastings"

The plan provided that the Native Law Officers will assist the judges by declaring the rules of law in all such cases where Hindu or Mohammedan law was applicable In course of time it was found that these Native Law Officers were taking the evidence and passing orders themselves. It exposed the defects of the judicial plan of 1772 Galloway remarked, " this, as a judicial system can be approved by no intelligent being" But Rankin answers this criticism against Warren Hastings and states "But on the whole its defects were unavoidable defects"

(iv) Other provisions —The plan prescribed the procedure for the trial of civil suits by framing definite rules [27] Where a defendant was found to have evaded or delayed the giving of reply within a specified time limit, the court was authorised to pass a judgment against him It was provided that no case could be heard except in the open court regularly assembled With a view to ensure free access to justice the Collector was required to be ready at all times to receive petitions of complaint In all cases of disputed accounts, partnership, debt and non performance of contracts, it was provided that the parties should submit such disputes to arbitration, the award of which became the decree of the Diwani Adalat Arbitrators were chosen by both the parties and they were required to decide cases without charging any fee or reward In each district it was declared by the Collector that the exercise of judicial authority by rich creditors over their debtors was illegal Money lenders were required to file their suits in the established courts of the country Proceedings and the decrees passed by the courts were maintained by each Diwani

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26 Penderel Moon *Warren Hastings and British India* p. 71
27 M L. Mon Mon Jones *Warren Hastings in Bengal*, p 317

Adalat of the district and a statement was periodically submitted to the Sadar Diwani Adalat. In order to discourage litigation it was provided that complaints of over twelve years should cease to be actionable. The *Qazis* and *Muftis* were paid a monthly salary. Arbitrary fines of various types which were previously levied in the form of perquisites or commission were totally abolished by the regulations. The Collector was authorised to frame all the necessary regulations with the prior approval of the Board to uproot the evils of bribery and corruption. Referring to the regulations made under the plan of 1772, Warren Hastings wrote to his friend Josias Dupre at Madras that the people were given such laws "as they were capable for receiving, not the best that could be framed".[28]

(v) Some Defects in the Plan.—Though the judicial plan of 1772 was the first of its kind for the administration of justice within the framework of the country,[29] after its working certain major defects came to light. The plan provided for a civil and a criminal court in each district. The head farmers were given power to decide petty cases up to Rs. 10. In fact it was necessary to have more subordinate courts keeping in view the population and the area of each district. Another defect was the concentration of power—administrative, tax collection and judicial, in the hands of the Collector.[30] The Collector was the Civil Judge as well as supervised the criminal courts. It was impossible for the Collector to devote time and energy to regulate all these affairs.[31] Evils of the combination of executive and judicial powers in one person were bound to follow.[32] When the private trade done by Collectors and the misuse of powers by them and their officials came to the notice of Warren Hastings, he gave a second thought to the original plan.

Warren Hastings, therefore, prepared a new judicial plan on November 23, 1773 which was implemented from 1774.

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28 *Hastings to Josias Dupre* 6th Jan. 1773. Gleig *Memoirs of the Life of Warren Hastings*, Vol. I, pp. 268-272.

29 Referring to the Judicial arrangements Hastings stated that "the only material changes which we have made in the ancient constitution of the country are in dividing the jurisdiction in civil and criminal cases by clearer terms ... and in removing the Supreme Courts of Justice Calcutta. There are other trivial innovations ... but the spirit of the constitution we have preserved entire". See Henderel Moon, *Warren Hastings and British India*, p. 70.

30 M. E. Monckton Jones, *Warren Hastings in Bengal*, p. 316.

31 J. H. Harrington, *An Analysis of the Bengal Laws and Regulations*, Vol. I, p. 35.

32 W. K. Firminger, *Select Committee of the House of Commons' Fifth Report*, p. cxxxv.

2 New Plan of 1774

Certain organisational changes were made in the judicial plan of 1772 by the President and council of Bengal on the advice of the Directors of the Company [33] These changes were introduced in 1774 and became known as the "New Plan of 1774' It was planned to bring down all the revenue collections to the Presidency "to be there administered by a committee of the most able and experienced of the convenanted servants of the Company under the immediate inspection and with the opportunity of instant reference for instruction to the President and Council "[34]

In order to execute the underlying purpose and to prevent the evil consequences of the earlier planning, the new plan provided for dividing the provinces into six Divisions consisting of several districts In each of these divisions a small council, consisting of four or five convenanted servants of the Company, was constituted They were called the Provincial Councils In each division i e, Burdwan, Murshidabad, Dinajpur, Dacca and Patna, one Provincial Council was established At the Calcutta Division, a Committee of Revenue composed of two members of the Board of Revenue and three senior servants of the Company, below the rank of the Council, constituted the Provincial Council The Board was established at the headquarters in Calcutta and was authorised to issue instructions to all the six Provincial Councils All Chiefs of the Councils were required to submit their periodical reports to a separate department, the Council of Revenue The Provincial Councils were responsible for the collection of revenue in their respective divisions and were vested with the powers to manage the collections and superintend the administration of justice within the limits of their jurisdiction A Diwan was appointed at the seat of each Provincial Council to maintain accounts of the revenue collections made from the districts

Each division was divided into several districts The English Collectors, who were appointed in 1772, were recalled from the districts[35] and in their places native superintendents of revenue, known as Naibs, were appointed to control the collection of revenue [36] Naibs were appointed by the Supreme Council at Fort

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33 *Letter of April 7, 1773 from the Company to the President and Council of Bengal*, Home Miscellaneous Series Vol 351, p 15

34 *Select Committee Sixth Report* (1782), I O Parliamentary Branch, No 14, p 4

35 Proceedings of the President and Council in the Rev Dept No 23, 1773 *See* also Home Misc Series Vol 206 pp 49 50, and Vol 584, pp 120-121 Regulation XV of 23rd Nov, 1773, Home Misc Series, Vol 351, p 18

36 Harrington *An Analysis of the Laws & Regulations enacted by the Governor-General's Court at Fort William in Bengal* Vol I, p 20 C D Field *The Regulations of the Bengal Code* p 137, Morley *The Administration of Justice in British India* p 49 Cowell, *History of the Constitution of Courts and Legislative Authorities in India*, p 149

William on the recommendation of the Provincial Councils Apart from the revenue work, the Naibs were also vested with the power to hold courts of Diwani Adalats in their districts i e Mofussil Diwani Adalats The Naibs decided civil cases according to the rules laid down under the plan of 1772 They were required to send the proceedings of the civil courts to the respective Provincial Councils

The Provincial Council of each division was also entrusted *with the administration of justice in civil cases* [37] *Its working* was superintended in monthly rotation by one of the Members of the Council The Superintending Member exercised original jurisdiction in all cases arising within the district forming the seat of the Provincial Council For all districts in the division the Provincial Council was also known as the Provincial Sadar Adalat and was authorised to hear appeals from the Mofussil Diwani Adalats of the districts In all cases up to the value of one thousand rupees, the decision of the Provincial Sadar Adalat was final Where the valuation of the suit exceeded one thousand rupees an appeal lay with the Sadar Diwani Adalat at Calcutta The Provincial Council was also authorised to determine the conduct of head farmers, Zemindars and government officers in revenue matters and an appeal was allowed to the Superior Council of Revenue at Calcutta Thus the new plan of 1774 introduced reforms only in the organizational set up of the collections of revenue and the administration of civil justice

Monckton Jones has pointed out that the Collectors remained in their districts as before and that the new plan of 1774 differed from the plan of 1772 only in setting up a Chief and Council to control a group of Collectors [38] Analysing each point in detail, Professor B B Misra has strongly contradicted this contention of Monckton Jones and has proved that the Collectors were recalled and replaced by Naibs in their districts [39] Professor Misra appears to have correctly derived the conclusion, "Thus the contention of Miss Monckton Jones does not bear the testimony of historical facts Her error appears to have arisen from a wrong interpretation of some of Hastings earlier letters which gave rise to a number of misgivings about the English Supervisors, although he did not accept them as the expression of his own views" [40]

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37 *Select Committee Sixth Report* (1783) p 22
38 Monckton Jones *Warren Hastings in Bengal*, p 291
39 B B Misra *The Judicial Administration of the East India Company in Bengal* pp 179 181 See also the *Cambridge History of India* Vol V, p 418, Colebrooke *Supplement, etc* Vol III, p 203 See also *Letter of the President and Council to the Court of Director* Nov 3 1772 *Committee of Secrecy*, Sixth Report (1773) p 302
40 B B Misra, *The Judicial Administration of the East India Company in Bengal*, p 182

In 1775, Warren Hastings shifted the Sadar Nizamat Adalat from Calcutta to Murshidabad and placed it under the authority of the Nawab. A new office of Naib Nazim was created and Mohammed Reza Khan was appointed to this new post. He was controlling the Sadar Nizamat Adalat on behalf of the Nawab. Thus the entire criminal judicature was transferred to the Nawab's supervision from the control of the Governor General and Council.

Warren Hastings considered the plan of 1774 as only a temporary measure to improve the existing state of judicial and revenue affairs. But in the meantime the Regulating Act with its new provisions came to be passed and Warren Hastings had to face a hostile majority in the Council.[41] After gaining six years experience[42] from 1774 to 1780, Warren Hastings got an opportunity in 1780 to reorganise the Adalats and to introduce important changes in the judicial system of Bengal, Bihar and Orissa.

3 The Reorganisation of Adalats in 1780

(i) **Separation of revenue from judiciary.**—A new judicial plan was prepared by Warren Hastings to reorganise the existing Provincial Adalats. One important feature of this plan was the separation of the revenue from the administration of justice. Though the Provincial Councils of revenue continued at six provincial divisions *i. e.*, Calcutta, Murshidabad, Burdwan, Dacca, Dinajpur and Patna, to look after the collection of revenue, their judicial power to hold civil courts was taken away. At each of these six provincial divisions a Provincial Court of Diwani Adalat was established to be presided by a covenanted servant of the Company. They were appointed by the Governor General and Council and were designated as Superintendents of the Diwani Adalats. They were appointed for life and were removed only on the proof of misconduct. The earlier system of monthly rotation was abolished. They became independent of the Provincial Councils of Revenue.

The Provincial Diwani Adalats were empowered to decide all cases of property including those relating to inheritance and succession to Zemindaris and Talukdaries which were previously under the responsibility of the Governor General and Council. These

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41 *See* Ch. V, B. N. Pandey, *Introduction of English Law in India*, Ch. II.

42 From 1774 to 1780 there were conflicts not only amongst the members of the Council but also between the Governor General in Council and the Supreme Court. The famous *Patna Case* threw light on the defective state of the Provincial Courts and Mofussil. While the English who composed the Provincial Councils left the task of declaring cases to the native law officers, they were unable to understand Indian law language and customs.

Adalats were authorised to refer small cases involving one hundred rupees or less to the Zemindar or Public Officer who resided near the residence of the parties In all suits where the valuation of the suit was up to one thousand rupees, the decision of the Provincial Adalats was final Where the amount involved exceeded this value, ao appeal was allowed to the Sadar Diwani Adalat at Calcutta The Governor-General and his Council constituted the Sadar Diwani Adalat

The plan excluded persons, who were entrusted with the collection of public revenue, from the jurisdictioo of the Provincial Diwani Adalats They were under the direct control of the Provincial Councils of their Divisions

Provisions regarding the process of the court work, maintenance of records, appointment of local law officers, taking of oath and evidence continued to be the same as were laid down under the plao of the 1772

(ii) **Defects of the Reorganisation Plan** —Though the scheme of 1780 was well ioteotioned and it introduced a healthy tradition of separation of judiciary from the revenue, the defective state of the administration of justice continued in certain respects As stated earlier six Provincial Diwani Adalats were established for Beogal, Bihar sod Orissa But in fact this number was much less than was required to decide cases of the inhabitants It became very difficult for the litigants to go to the Provincial Diwani Adalats which were located at a far distance in the divisional headquarters The judges who were appointed in Provincial Diwani Adalats and Mofussil Adalats were neither fully acquainted with the law of the land nor were they properly trained in judicial work It was of vital importance to appoint well trained apd well paid judicial officers to administer justice This important aspect of judicial reforms was omitted by the scheme of 1780 Apart from this, Zemindars and Public Officers were appointed to decide petty civil cases up to one hundred rupees But the main defect was that they were expected to do this work honorary and no salary was paid to them From the political point of view this was all right as they became faithful to the East India Company but in administering justice they became corrupt and the poor litigants suffered greatly due to the superior position of Zemindars in the collection of revenue

(iii) **Appointment of Elijah Impey as Chief of the Sadar Diwani Adalat** —In Sadai Diwani Adalat Warren Hastings realised the difficulty in deciding civil cases in appeal To meet this difficulty Warren Hastings appointed Sir Elijah Impey as the Chief

Justice of Sadar Diwani Adalat.[43] Sir Elijah Impey was learned in law and was already Chief Justice of the Supreme Court of Calcutta. Now onwards Impey became Chief Justice of both the superior courts, namely, the Supreme Court and the Sadar Diwani Adalat. It was expected that Impey as the Chief Justice will bring closer the existing two distinct judicial systems In all the administrative and judicial circles his appointment was highly welcomed. It was also done to remove the existing conflicts between the Supreme Court and the Council of the Governor-General The Governor-General and Council were not experts in law and were mostly busy in political matters, as such the appointmeot of Impey was a great relief to them also.

Referring to the new assignment of Chief Justice Impey together with his old assignment, Warren Hastings pointed out, "... it will prove an instrument of conciliation with the court, and it will preclude the necessity of assuming a jurisdiction over persons exempted by our construction of the Act of Parliament from it, it will lessen the care of the Board, and add to their leisure for occupations more urgent and better suited to the genius and principles of Government, nor will it be any accession of power to the Court; where that portion of authority which is proposed to be given only to a single man of the court and may be revoked whenever the Board shall think proper to resume it".[44]

Some members of the Council expressed doubt as to the validity of Chief Justice Impey being so appointed. It was also criticised on the ground that it will be inconsistent with the independence of the Chief Justice of the Supreme Court. It was considered a step towards the introduction of English law in the Mofussil Adalats and therefore also it was opposed.[45]

4. Judicial Reforms of 1781: Initiative of Elijah Impey and Warren Hastings

Soon after his appointment as Chief Justice of the Sadar Diwani Adalat, Chief Justice Impey first of all devoted his time and energy to introduce reforms in the Diwani Adalats. He was aware of the defective state of the Diwani Adalats and the famous *Patna Case*, in which he participated as the Chief Justice of

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43. Warren Hastings moved the proposal in the Council on Sept. 27, 1780 and it was accepted on October 18, 1780. Sir Elijah Impey was formally appointed on October 25, 1780. R. K. Pandey, *Introduction of English Law into India*, Ch. VIII, pp 196 229

44. See, *Minutes of the Governor-General*, Sept 29, 1780; *Select Committee of the House of Commons*, First Report, Appendix No 3, I. O. Parliamentary Branch Collection, No. 114.

45. Mill and Macaulay have criticised the scheme of Warren Hastings, as an attempt to bribe the Chief Justice into submission to the irregularities of the Company's Government.

the Supreme Court, further pointed out the growing power of the native law officers in whose hands even questions of fact were left by the judges of the Diwani Adalats Chief Justice Impey, therefore, prepared a series of regulations to improve the administration of justice in the Diwani Adalats To regulate the procedure of the Diwani Adalats a Regulation was passed on November 3, 1780 It was clearly laid down that only questions of personal law will be referred to the native law officers *i e* Pandits and Maulvies, and the question of fact will be decided by the Mofussil Diwani Adalats In petty civil cases the jurisdiction of the Zemindars was retained but they were required to submit the record of proceedings in each case to the respective Mofussil Court Old regulations were compiled and necessary alterations and modifi cations were made to meet the requirement of the judiciary One of the most remarkable contributions of Sir Elijah Impey was "the preparation of the first Civil Code" for the administration of civil justice in India Subsequently they were incorporated with amendments and additions in a revised code which the Governor-General and Council adopted on July 5, 1781 Thus in the legal history of India the first Civil Code was adopted in 1781 [46]

So far Warren Hastings introduced piecemeal reforms either in civil or in criminal justice from 1772, but after having nine years' experience, he realised the necessity of overhauling the whole system of the administration of justice In performing this difficult task Chief Justice Elijah Impey gave his full support to Warren Hastings

In 1781, the number of Mofussil Diwani Adalats was increased from six to eighteen[47] in order to remove the difficulties of the litigants With the exception of four Courts,[48] namely, Bhagalpur, Chitra, Islamabad and Rangpur, each of these Courts was presided over by a covenanted servant of the Company He was now called Judge instead of previous designation of Superintendent and was entrusted with judicial functions only They were subject to the orders of the Judge of the Sadar Diwani Adalat and the Governor-General in Council Mofussil Diwani Adalats were required to send copies of judicial proceedings to the Sadar Diwani Adalat to which appeals were allowed from their decisions where the valuation of the suit exceeded one thousand rupees

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46 See for details B K Acharya, *Codification in British India*, pp 55-56 A C Patra, *The Administration of Justice under the East India Company in Bengal Bihar and Orissa*, p 56

47 Eighteen Courts were established at these places Azmerigan, Bekarganj, Berdwan Bhagalpur Calcutta, Chitra Dacca, Darbhanga, Islamabad, Laurie Midnapur, Murli Murshdabad Nator Patna, Ragbunathpur, Rangpur and Tajpur (in place of Dinajpur)

48 These four were hilly districts and due to their location on the frontiers of the provinces it was considered necessary to concentrate both judicial and revenue authority under the same person

Elijah Impey favoured the important principal of the separation of judicial and revenue functions and it was retained [49] It was expressly laid down that the judges of the Diwani Adalats will have a jurisdiction completely distinct and separate from the jurisdiction of the person incharge of revenue collection, revenue cases and related matters

The Mofussil Diwani Adalats were authorized to have all power and authority to hear, try and determine all civil suits, arising within the limits of its jurisdiction including those of inheritance or succession to zemindaries and talukdaries The Judge of the Mofussil Diwani Adalat was now vested with powers to summon any zemindar or farmer of revenue to appear in person or by vakil to answer to an action lying in that court

The provision regarding the application of the personal laws of Hindus and Mohammedans which was first of all introduced by Warren Hastings in 1772, was also modified and certain additions were made to remove the difficulties On the recommendation of Sir Elijah Impey the word "succession" was added to the word "inheritance" and it was further stated that "where no specific directions were given the judges of the Sadar Diwani Adalat and the Mofussil Adalats will act according to justice, equity and good conscience" In order to promote speedy and impartial justice the Code provided a specific procedure for Diwani Adalats Under the new scheme the Judges of the Diwani Adalats were directed that they must do the judicial work themselves and under no circumstances it should be delegated to the Native Law Officers The function of the Native Law Officers was also clearly laid down "They were only to expound the law on the facts decided by the Judge" This important provision helped in uprooting corruption as well as avoided conflicting situations like that of the *Patna Case*

The Civil Code specifically laid down the functions of the Sadar Diwani Adalat It was given appellate jurisdiction to hear appeals from the Mofussil Diwani Adalats in cases where the valuation of the suit exceeded one thousand rupees It exercised original jurisdiction in matters of civil nature as were referred to it by the Governor General in Council It was also empowered to exercise control and supervision over the working of all the subordinate Diwani Adalats The Court was authorised to receive original complaints against the subordinate courts and then refer them to the respective Mofussil Diwani Adalat to expedite its disposal It was within its authority to suspend any judge of the Mofussil Courts for misconduct and corruption and also to forward the matter with its recommendations for final orders to the Governor General The Sadar Diwani Adalat was given full

49 W H. Morely, *The Administration of Justice in British India*, pp 50-51

powers to frame rules of practice, make necessary alterations in the existing rules and issue standing orders for the administration of justice

Special importance was attached to the system of keeping record of all the courts Apart from every process or order issued by the court, the complaint, reply or rejoinder and depositions given by the parties were required to be duly entered in the registers of the Court The Mofussil Diwani Adalats were directed to keep a register containing a summary account of the daily proceedings in each case Every month a copy of it was sent to the Sadar Diwani Adalat at Calcutta

The preparation of the first Civil Code, therefore, reflected the great contribution made both by Governor General Warren Hastings and Chief Justice Elijah Impey, to improve the administration of civil justice The Civil Code became a land mark in the legal history of India due to its contribution in three directions of vital importance as follows

To the first place with the establishment of the Sadar Diwani Adalat at Calcutta and entrusting it with full powers, the administration of civil justice was centralised It was only responsible to the Governor-General in Council It controlled and supervised the subordinate courts as well as maintained uniformity in the administration of justice

Second, though the application of the personal laws was recognized as early as 1772, still Chief Justice Impey, through the provisions of the Civil Code devised a better mode of governing the Hindu and Mohammedan laws By laying down a proper process and rules of evidence Chief Justice Impey laid the foundation of a separate institution of legal profession to assist the judges and the litigants, in India, which according to him played an important role in shaping the judicial process of the country

Third, by recognising the principles of separation of judiciary and revenue Elijah Impey as the Chief Justice of the Sadar Diwani Adalat established the independence and impartiality of the judiciary It assisted in introducing the rule of law in the country In order to implement these ideals Chief Justice Impey incorporated certain provisions in the Civil Code which specifically provided that even Zemindars, Talukdars and farmers, employed in the collection of revenue, were also under the jurisdiction of the civil courts

Recall of Chief Justice Impey and Civil Justice —While Chief Justice Impey and Governor General Warren Hastings were making every effort to improve the administration of civil justice, the opponents of Warren Hastings's policies were bent upon finding out faults and influencing their masters in England against Warren Hastings The criticism of Chief Justice Impey for accepting

two appointments gained strength in England [50] So great was that criticism that, unfortunately, the Directors of the Company issued an order from England to remove Sir Elijah Impey from the post of Sadar Diwani Adalat [51] As such, on November 15, 1782, the Governor General and Council decided to resume the duties of the Sadar Diwani Adalat in place of Chief Justice Impey The House of Commons[52] in England on May 3, 1781 resolved to recall Chief Justice Impey to explain his conduct in accepting an office subordinate to the Governor General and Council whose transactions the Supreme Court was intended to control Accordingly, Chief Justice Impey left Bengal and in June 1784 reached England

Though Warreo Hastings' step to appoint Elijah Impey, as Chief Justice of the Supreme Court, and also as the Chief Justice of the Sadar Diwani Adalat was severely criticised in India and England, in fact it was a far sighted policy of Warren Hastings The contemporaries and critics failed to understand the policy It was only subsequent historical development that proved the wisdom of Warren Hastings In 1861 it was decided to unite the Supreme Court and the Sadar Diwani Adalat By an Act of 1861 High Court of Judicature was established at Calcutta It was given all powers and jurisdiction which were previously exercised by the Supreme Court and the Sadar Diwani Adalat Appreciating the far sightedness of Warren Hastings, Stephen remarked, "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 Mofussil court and appellate jurisdiction over them were vested in the High Court" [53]

On the whole it appears that during the period 1780 onwards, the Directors were more concerned with the establishment of British sovereignty in India In carrying out this policy they got full support and assistance from the leaders of the ruling party in the British Parliament According to them it was the proper time to strengthen the political control for further expansion in India rather than to introduce vital reforms in the judiciary of the

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50 The criticism was on the ground that by accepting the new office, Sir Elijah Impey violated the spirit of the Regulating Act The chief object of the Regulating Act was to render the Supreme Court independent of the Executive

51 Letter of Directors to the Governor General dated April 30, 1782 See *Home Miscellaneous Series*, Vol 353, pp 241 242

52 The British Parliament was not satisfied with the opinion of the Law Officers of the Crown, who stated that there was nothing illegal in the appointment The Parliament passed an Act in 1781 exempting the Governor-General and Council from the jurisdiction of the Supreme Court See P E Roberts, *History of British India* (Edn 3rd), p 213

53 J F Stephen *The Story of Nuncomar and the Impeachment of Sir Elijah Impey*, Vol II, p 242

country They were not willing to take any step which may weaken the hands of the executive in implementing their political policy.

5 Reforms in the Administration of Criminal justice

As early as 1772, Warren Hastings was fully aware of the glaring defects in the existing administration of criminal justice, still he preferred to leave it in the hands of the Nawab Under the judicial plan of 1772 Warren Hastings established a Sadar Nizamat Adalat at Calcutta[54] and Mofussil Faujdari Adalats in the districts But the criminal justice was administered in the name and under the seal of the Nawab The Company insisted on this policy in order to allow the independence of the Nizamat Adalat as it was sure that any interference in these courts will adversely affect its political policy In 1774 with the withdrawal of the Collectors from the districts, the control of the Faujdari Adalats also passed to the native judicial officers The scope of the Sadar Nizamat Adalat to control the Provincial Faujdari Adalats was thus reduced

In 1775, the Sadar Nizamat Adalat was shifted to Murshidabad[55] in order to avoid any interference and conflict with the Supreme Court Mahomed Reza Khan was declared innocent and restored to his office of Naib Nazim of the Sadar Nizamat Adalat [56] He was empowered to superintend the administration of criminal justice and police throughout the provinces

(i) Plan of Mahomed Reza Khan —After his reappointment Mahomed Reza Khan prepared a plan to improve the administration of criminal justice The plan was adopted in January, 1776 and continued till April, 1781 According to the plan, twenty-three Faujdari Adalats were established [57] Monthly salary of the judicial officers was fixed There was no change in the constitution of the Sadar Nizamat Adalat except that it now passed under the superintendence of the Naib Subah, who could exercise his powers directly over his subordinates Sadarul Haq Khan was allowed to continue and preside over this court as *Daroga* He was assisted by the Chief *Qazi*, the Chief *Mufti*, three

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54 Sadarul Haq Khan was appointed Daroga of the Court and was also authorised to use the seal of the Nawab Daroga worked under the guidance of the Governor General and Council Mahomed Reza Khan Naib Sabah was dismissed and arrested in April 1772 and the post of Naib Subah was also abolished

55 G W Forrest *Selections From the State Papers of Governor General Warren Hastings*, Vol II, p 436

56 See *Despatches to Bengal*, March 3 1775, Vol 7, pp 413 426

57 The plan provided for criminal courts one in each of these places Burdwan Bhagalpur, Bhitaria, Bhushna, Bishnupur Birbhum, Carrakpur, Chitpur, Chittagong, Dacca Dinajpur Hijli Hugli, Jessore, Kalighat, Krishnagar, Midnapur, Murshidabad, Patna, Purnea, Rajmahal, Rangpur, Sylhet

Moulvies, one *Munshi* and one *Serishtadar* Instead of *Daroga*, the *Naib Subah* was authorised to use the seal of the Nawab Under the new scheme by fixing salary for each judicial official, Mahomed Reza Khan reduced the establishment charges of the Sadar Nizamat Adalat and Mofussil Faujdari Adalats In other matters relating to criminal justice, the plan made it clear that the courts will be guided by the provisions of the judicial plan of 1772 [58]

According to Reza Khan's judicial plan the administration of criminal justice continued from 1776 to 1781 During this period, Reza Khan's supervision over the criminal judicature proved ineffective and the machinery inefficient due to various factors Though crimes continued to be punished according to strict interpretation of Mohammedan law, justice depended on the mercy of individuals rather than the strength of the judicial system In the hands of the unscrupulous judicial officers, the criminal courts became instruments of oppression and torture Inadequacy of police forces[59] and the role of Zemindars[60] further deteriorated the existing miserable state of affairs in these courts Due to the protection of Europeans and recommendations of the high officials, it was becoming very difficult for Reza Khan even to punish the guilty and corrupt officers [61] Professor B B Misra has pointed out "The transfer of political balance in favour of the Company had already shifted loyalty to the British The decree of the Nizamat, therefore, could not be enforced without the assistance of the Company's sepoys who, in their turn, were not enough to be equitably distributed throughout the provinces The Zemindars, therefore, took undue advantage of the helpless state of the Nizamat, and being influenced by the uncertainty of political conditions in the country acted independently of any superior authority They not only withheld their support to the Faujdars

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58. See *Home Miscellaneous Series* Vol 353 pp 185-192
59 See *Calendar of Persian Correspondence*, Vol V, Nos. 238, 270 and 422.
60 *Rangpur District Records* Vol I, p. 38, Vol IV, pp. 161-62
61 T K Banerjee, *Background to Indian Criminal Law* pp. 142 243

were authorised to try petty offences This step was taken specially to have speedy administration of criminal justice

Though the appointment of the Remembrancer and creation of his office was a remarkable step to introduce reforms and co-ordinate the machinery of criminal justice but in actual practice the control exercised by the Remembrancer proved very weak and ineffective In order to conceal the real deteriorating state of affairs and gain special favour from the Remembrancer, the courts began to submit reports to present a favourable picture of the affairs rather than the true position which in fact misled the Remembrancer in taking final decision This system anyhow continued to function until Lord Cornwallis in 1790 completely overhauled the old setup of Mohammedan Criminal Courts and introduced important changes in the Mohammedan Criminal law and procedure

The reforms of Governor General Warren Hastings only touched the fringe of the whole problem of improving the criminal justice Other important factors, namely, the constitution of criminal courts, the defects and severity of Muslim Criminal law, the mode of trial and proceedings in the criminal courts, which mainly required vital reforms and special attention were left untouched subsequently It is not a fact that Warren Hastings never thought of introducing reforms in these directions Warren Hastings's judicial plan of 1772 proved that he had his own constructive ideas and plans to improve the judicial system But he failed to implement his ideas and plans because of certain limitations[65] which were due to his conflict with hostile Members of the Council,[66] wavering support of the Company's Directors in England, antagonistic interests of political parties in England prejudicing his reputation Referring to the lack of power and means equal to his responsibilities, Warren Hastings wrote, "The

65 G W Forrest, *Selections from the State Papers of Governor-General Warren Hastings* Vol II, pp 337 342

66 See Hastings Letter to the Court of Directors, Dec 3, 1774, *Bengal Letters Received* Vol XIII, pp 247 250 See also, S Weitzman, *Warren Hastings and Philip Francis*, Chapters II and III

meanest drudge, who owes his subsistance to daily labour enjoys a condition of happiness compared to mine While I am doomed to share the responsibility of measures which I disapprove, and to be idle spectator of the ruin which I cannot avert" [67]

Appreciating the contribution of Warren Hastings, Lord Macaulay said, " internal administration, with all its blemishes, gives him a title to be considered as one of the most remarkable men in our 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" [68]

In the light of these observations there appears sufficient justification when Professor Penson states that "Cornwallis built on foundations already laid or begun to be laid by his predecessors and especially by Hastings It was the emphasis rather than the principle that was new, but the principles were now clearly stated and the strength of the home government was used to enforce them" [69]

On the whole, Warren Hastings' various reforms are clear testimony to the fact that he was not only a capable administrator but a great inventive genius also He adopted the method of "trial and error" in uprooting the evils of the existing judicial and

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67 Letter of Hastings to Lord North March 1775 quoted in Lyall, *Warren Hastings* p 72

68 Macaulay *Essay on Warren Hastings*, pp 83-84

69 *The Cambridge History of India* Vol V, pp 436 437

executive systems and never hesitated even in taking bold steps to remove such evils In spite of the fact that his role is condemned in connection with certain unfortunate cases,[70] he proved that even in the most critical hours in his life he never lost courage but tackled the situation with the best of his ability As the first Governor General he proved himself one of the most faithful servants of the English East India Company, who played a vital role in further strengthening the foundation, which was earlier laid down by Clive, for the future expansion of the British Empire in India [71]

70 Trial of Raja Nand Kumar the Patna Case the Cossijurah Case *etc See* Chapter V

71 For more details *See* Chapter V of this Book

the Company into partnership, assuming the position of a controlling and dominant partner in all matters It was acceptable to the British Parliament and gradually the British Government made every effort to realise it

The spirit of bargaining with the Company started by an Act of 1767 when the British Government permitted the Company to retain its territorial acquisitions and its powers for two years on condition that a sum of £400,000 per year be paid by the Company in return to the Crown Its total annual receipts from India were estimated at not less than two million "so that the British nation took heavy blackmail upon the Company's gains, however they may have been gotten "[3] The demands of Parliament continued increasing as it was supposed that the Company was making fortunes in India, till it was discovered that the Company instead had fallen into debts In spite of the Company's deteriorating financial condition Parliament derived advantage and asserted its right to the sovereignty of the Indian territories

(ii) Corruption, administrative problems, Company's finances and other calamities —The stories of the unscrupulous way in which the servants of the Company acquired huge fortunes also influenced public opinion in England against the Company's activities in India[4] For their illegal gains and huge wealth,[5] on their return to England, they were nicknamed as "Nawabs". Their luxurious ways of life in England attracted the attention of the ruling class and stimulated the public mind to believe that this was the product of their crimes and oppressions in India[6] After

3 Alfred Lyall, *The Rise and Expansion of the British Dominion in India*, pp 172-3

4 Lucy S Sutherland, *The East Indian Company in 18th Century Politics*, p 147 *See* also, Bolt's *Consideration on Indian Affairs* and Dow's *History of Hindustan*

5 Due to their private trade they collected vast fortunes They were not paying transit duty and tried to displace Indian Officials whosoever resisted them *See*, Mill, *History of British India* Vol III, pp 326-7 English people monopolised trade in essential commodities and sold them after earning huge profits *See*, Lecky, *History of England*, Vol III, p 474 Beatrice Pitney Lamb in *India A World in Transition*, at p 59 said, "having acquired political power, the new Western rulers absorbed many of the autocratic tendencies of the Oriental despots whom they had displaced A horde of retainers and ostentatious luxury became desirable Despotic tempers seemed appropriate to their new status In this sense, Englishmen lived like the Nawabs they had dispossessed"

6 Adolphus *History of England* Vol I pp 345-348 *See* also Malcolm, *Life of Clive*, Vol III, pp 313-16 , Adam Smith, *Wealth of Nations* Vol II Book IV, pp 250-257 P E. Roberts, in *History of British India* at p 179 said, During the fifteen years that followed the battle of Plassey, immense wealth was brought back from India by retired servants of the East India Company, who bought estates and rotten boroughs, and expected to be received on terms of special equality with the old landed aristocracy The 'Nabobs,' with their orientalized ways and ostentatious expenditure, figure largely in the caricature and satire of the age"

acquiring wealth in India, on their return to England, the Company's English servants constituted themselves into a very formidable political power and by purchasing seats in Parliament they assisted the landed aristocracy to meet their own political ends The corruption had, however, developed into a canker for which there was no easy remedy "The portrait of Bengal" wrote Warren Hastings, "falls short of the life Will you believe that the boys of the service are the sovereigns of the country under the unmeaning title of Supervisors, Collectors, of the revenue, *administrators of justice, and rulers, heavy rulers, of the people*"[7]

Certain administrative problems also provided an opportunity to the British Parliament to intervene in the Company's control in India The system of dual government further created many problems There was no proper judicial administration, the police, if there was any, oppressed instead of protecting, the revenue officials were tyrannical, and above all, the diverse controlling interests clashed amongst themselves and made confusion worse confounded There were separate Presidencies in India but no strong central authority to control and guide the affairs of the Company

The Company was in fact running into heavy debt It had to pay large sums of money[8] as tributes and pensions to the Mughal Emperor in India, to the British Government in England, to the military establishments which it maintained and the many wars that it fought In this way its whole revenue was consumed Still, the appetite of the Proprietors for more dividend continued increasing Their dividends were raised in 1766 from 6% to 10% but they were still not satisfied and the dividends were further raised to 12½% in 1767 to satisfy them

Two great calamities further worsened the Company's position The Company's defeat in 1769 at the hands of Haider Ali of Mysore was a shock to certain members of the British Parliament In 1770 a terrible famine in Bengal took place Referring to the pitiable condition of the people in Bengal at this time, Kulkarni has pointed out "The cup of their misery overflowed when an appalling famine overcame them in 1770 At least one fifth of its estimated population of fifteen millions perished without food But the Company's servants were unmoved by the disaster"[9]

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7 A Mervyn Davis *Warren Hastings* pp 76-77 *See also at p 311 where in his letter to Macpherson Warren Hastings made complaints about the conditions in Oudh and stated* Lucknow was a sink of inequity what will you think of clerks in office clamouring for principalities in the confidence of exhaustless resources they gambled away two lakhs of rupees at a sitting and still grumbled that their wants are not attended to'

8 *Annual Register* 1773 p 65

9 V B Kulkarni *British Dominion in India and After*, p 51

It was really a paradox that while the Company was facing great financial difficulties, its servants were becoming richer The Company was declaring high dividends merely for the sake of its Proprietor's benefit. At last in 1772 the Company was forced to apply to the British Government for a loan of one million Pounds to save it from ruin

The British Parliament got an opportunity to tighten its stronghold on the Company's affairs The House of Commons appointed two Parliamentary Committees, namely, a Select Committee of 31 members and a Secret Committee of 13 members, to study in detail the financial position of the Company and related matters and to uproot corruption from the administrative and judicial machinery of the Company The Select Committee presented twelve reports and the Secret Committee presented six reports According to Harrington, the Committee of Secrecy reported with reference to the Courts of Justice, " the despotic principles of the Government rendered them the instruments of power rather than of Justice, not only unavailing to protect the people but often the means of the most grievous oppressions under the cloak of the judicial character "[10]

In March 1773 the Company renewed an appeal for a loan and subsequently in May the House passed a resolution, "That all acquisitions made under the influence of a military force, or by treaty with foreign princes, do of right belong to the State "[11] Though ordinarily a resolution of the House was not considered enough to make law, it clearly indicated the future trend of Parliament's action Lord North said that such a loan could only be granted with the consent of Parliament Ultimately two Acts were passed by Parliament in 1773 The first Act granted to the Company a loan of £ 1,400,000 at 4% interest. Besides this, the Company was also allowed not to pay its annual sum of £ 400,000 to the Exchequer until the new loan had been discharged The Company was forbidden to declare dividends exceeding 6% and it was required to submit accounts after every six months to the Treasury

The second and far more important was the Regulating Act, 1773, which was introduced by Lord North on 18th May, 1773 in the House of Commons as Regulating Bill Its three main objects were to reform the constitution of the Company, to reform the Company's government in India, and to provide remedies against illegalities and oppressions committed by the servants of the Company in India Accordingly, the Regulating Act changed the constitution of the Company at home, altered the structure of the Government of India and provided, though in a very inefficient

10 Harrington's *Analysis* Vol. I p 27
11 *Parliamentary Debates* (*U K.*), Vol XVII Col 903

manner, for the supervision of the Company by a ministry When the Bill was introduced in the House of Commons, it was severly criticised The Directors declared the Bill to be an *attempt to* virtually transfer the Company's powers to the Crown and destroy the Company's very existence Edmund Burke denounced it as "an infringement of national right, national faith and national justice" The Bill was ultimately passed by an overwhelming majority of the House of Commons[12] on the 10th June, 1773 and subsequently by the House of Lords[13] and received the Royal assent on 21st June, 1773

2 Salient Features of the Regulating Act

The Regulating Act, 1773 permitted the Company to retain its Indian possessions, but its management was brought under the definite, if only partial, control of Crown and Parliament The Act may be regarded as Parliament s first attempt to construct a regular Government for India and to intervene in the control of the Company's administration It was mainly intended to impose control over the Company and the servants of the Company in India as well as in England

The Regulating Act introduced vital changes in the Constitution of the Company in England The Directors of the Company were elected for a period of four years, one fourth of them were to retire every year and the retiring Directors were not entitled to be elected again As pointed out by Kaye "The effect of this provision was to secure stability and continuity in the policy of Directors" The voting qualification for the Court of Proprietors was raised from holding a stock of £500 to £1,000 and restricted the franchise to those only who held the qualification for at least twelve preceding months An unfortunate feature of the new provision was that those possessing a stock of £3,000 were given two votes, while those possessing a stock of 10 000 were given four votes each As such, Keith observed, ' the measure failed to improve the quality of the Court of Proprietors or to prevent power being readily purchased by servants of the Company returning with the spoils of the East' [14] In order to assert the Parliament's control over the Company, the Directors were required to place regularly all their correspondence, regarding civil and military affairs with the Indian authorities, before the Secretary of State All correspondence relating to revenues in India was required to be placed before the Treasury in England

(i) Appointment of Governur General and Counell — The Regulating Act made certain important alterations in the

12 In the House of Commons it was passed by 131 votes to 21
13 In the House of Lords by 74 votes to 17
14 A B Keith, *A Constitutional History of India* p 71

structure of the Company's Government in India [15] A Governor-General and four Councillors were appointed for the Presidency of Fort William in Bengal The Governor of Bengal was designated as the Governor General of Bengal They were appointed for five years and their salaries were also fixed A casual vacancy in the office of the Governor General was to be filled by the senior most member of the Council Any vacancy in the Council was to be filled by the Company with the Crown's assent

The Act stated the names of the first Governor General and four Councillors Warren Hastings [16] who was Governor of Bengal, was appointed the first Governor General The other four members of the Council were—Richard Barwell,[17] General Clavering,[18] Phillip Francis[19] and Colonel Monson [20] Out of these four Councillors three were sent from England This step was taken in order to control the servants of the Company as the Councillors were not having any vested interests in India Their term of office was for five years and the King was empowered to remove them even earlier on the recommendation of the Court of Directors In the proceedings of the Council the decisions were to be made by the majority of the members present In the case of division among the members being equal, the Governor-General was allowed a casting vote The Governor-General in Council was given all the powers to govern the Company's territorial acquisitions in India, to administer the revenues of Bengal, Bihar and Orissa and to supervise and control the general civil and military government of the Presidency

The Presidencies of Bombay and Madras were placed under the control and superintendence of the Governor-General in-Council while exercising their powers to make war and peace In matters relating to hostilities and treaties the Presidencies were required to seek prior approval of the Governor General in Council except in cases of imminent necessity They were

15 Sophia Weitzman *Warren Hastings and Phillip Francis* p 15

16 From April 13 1772 to October 19 1774 Warren Hastings was Governor of Bengal and from October 20 1774 to February 8 1785 he remained Governor General of Bengal He was not Governor General of India as there was no such post at that time

17 Probably the Ministry thought it advisable to give another place to a servant of the Company and selected Barwell somewhat at random He was a man of high abilities Penderel Moon *Warren Hastings and British India* p 92

18 Before his appointment to the Council in India Clavering served in Europe and the West Indies as a professional soldier In 1777 he died in India

19 Phillip Francis was a clerk in the War Office in England before his appointment to the Council in India He was very able but from the time of his joining the Indian Council he was a bitter enemy of Hastings and Impey

20 George Monson was a distinguished soldier at Pondicherry in 1760 and later on he was aide-de-camp to George III

required to transmit all necessary information concerning the government, revenues or political position of the Company to the Governor General The Governor General and the Council were to keep the Court of Directors fully informed of all their activities affecting the interests of the Company and they were also to work in entire obedience to the orders and instructions of the Court of Directors

(ii) The Supreme Court of Judicature —Section 13 of the Regulating Act empowered the Crown to establish by Charter a Supreme Court of Judicature at Fort William in Calcutta This provision was specially made to remove the defective state of the judiciary as it existed under the Charter of 1753 The Supreme Court was to consist of a Chief Justice[21] and three Puisne Judges,[22] being barristers of not less then five years' standing to be appointed by His Majesty It was further provided that the Supreme Court will have full power and authority to exercise all civil, criminal, admiralty and ecclesiastical jurisdiction In criminal cases it will act as a Court of Oyer and Terminer and Gaol Delivery for the town of Calcutta and the factories subordinate thereto

The Supreme Court was authorised to form and establish such rules of practice for the subordinate courts as were necessary for the administration of Justice and due execution of all the powers as stated in the Chapter It was recognised as a Court of Record

The jurisdiction of the Supreme Court was also regulated by the provisions of the Regulating Act Its jurisdiction was restricted to certain categories of persons which the Act defined The Supreme Court was given jurisdiction over all British subjects residing in Bengal, Bihar and Orissa It was authorised to hear and determine, in these Provinces, all complaints against any of the Crown's subjects for any sort of crime, misdemeanours or oppressions Where a suit was filed against any person who was directly or indirectly in the service of the Company or employed by any of the Crown's subjects, such litigation was also within the jurisdiction of the Court Apart from this, it was also empowered to exercise its jurisdiction in suits filed by His Majesty s subjects against any native inhabitant of India where the

21 The Charter of 1774 appointed Sir Elijah Impey as Chief Justice of the Supreme Court at Calcutta The appointment was made by Lord Bathurst the Chancellor on the recommendation of Thurlow who was then Attorney General Stephen *Story of Nuncomar* Vol I p 3

22 Letters Patent appointed three other judges namely Robert Chambers of the Middle Temple first called to Bar on 22nd May 1761 John Hyde of Lincoln s Inn called to the Bar on 6th November 1758 and LeMaistre of the Inner Temple called to the Bar on 20th June 1760 *Home Miscellaneous Series* Vol 108 pp 311 29

parties had already agreed under a contract to submit such cases to its jurisdiction Such jurisdiction was exercised by the Court only when the amount involved in the cause of action exceeded Rs 500

The Regulating Act specifically laid down that the Supreme Court will be incompetent to exercise its criminal jurisdiction over the Governor General and any of his Councillors The Court had no power to arrest or imprison them in any action Immunity of the Governor-General and his Councillors was granted in order to safeguard them from unnecessary harassment and also to maintain their prestige as they were head of the executive

Section 38 authorised the Governor General, members of the Council and the Judges of the Supreme Court to act as Justices of the Peace and to hold Quarter Sessions

The Act further empowered the Crown to issue a Charter[23] to make provision for appeals from the judgments of the Supreme Court to the King in Council and also to state the conditions and circumstances under which such appeal was to be allowed

(iii) Legislative power—The Regulating Act granted legislative power to the Company's executive authority in India The Governor General and Council were authorised to make and issue rules, ordinances and regulations for the good order of civil government of Company's settlements at Fort William and other subordinate factories and places This general power was granted subject to certain qualifications[24] They were required to be just and reasonable and not repugnant to the laws of England They were not to be valid or of any force until they were duly registered in the Supreme Court with its consent and approbation[25] The rules and ordinances were registered only after the expiration of twenty days from their open publication Even after their registration, in England any person was legally entitled to file an appeal against such regulation to the King in Council within sixty days after its publication there The King in Council had the power to set aside and repeal such laws if they were considered defective Within a period of sixty days from its registration an appeal was allowed to be made to the Supreme Court at Calcutta challenging the legality of the rules and regulations Copies of such regulations were to be sent to the Secretary of State in

23 W H Morley *Administration of Justice in India*, Charter of 1774 pp 549 87

24 Section 36

25 A parallel may be seen when in the past it was required that corporations should enter by-laws on record with Justices of the Peace and have them examined by the Chancellor or Judges (15 Hen VI c.6 19 Hen VII c.7) Petty J in *Ramoch and Ursamul* v *Glass* (1844) Cr Cas 360.

England The King reserved the power to disapprove them at any time within two years from the date they were passed by the Governor General and Council [26]

It appears that these qualifications, to the rule making powers of the Govenor General and Council, were specially introduced to safeguard not only the interest of the British people but also the imperial policy of the British Government in India According to this procedure the Supreme Court played an important role in checking rules, ordinances and regulations which were passed by the Governor General and his Council Their hasty action was thus checked by entrusting the Supreme Court with superior powers

Apart from the above stated powers, the Regulating Act contained various other provisions which were specially aimed to prevent the abuses and corruption in the Company's administrative machinery in India The Company's officials were prohibited from engaging themselves in private trade and also from accept ing presents in various forms [27] The Courts in England were also empowered to punish English people for their crimes or mis demeanours which were committed during their service under the Company in India [28]

3 Charter of 1774 and the Supreme Court at Calcutta

The Regulating Act, 1773 superseded the provisions of the Charter of 1753 and empowered the Crown to establish a Supreme Court Under Section 13 of the Act, George III issued a Charter on 26th March, 1774 which established the Supreme Court[29] at Calcutta Just like its predecessor, the Mayor's Court, the Supreme Court was also a Crown's Court

The Charter of 1774 constituted the Supreme Court and elaborately defined its jurisdiction and powers [30] Sir Elijah Impey[31] was named as the first Chief Justice while Stephen

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26 Section 37
27 Section 23
28 Section 39
29 The establishment of the Supreme Court made Governor General Warren Hastings a bit disturbed He commented if he was really trusted why was he not granted powers commensurate with his responsibilities ? He foresaw the likelihood of a conflict and disliked the idea of importing into Bengal all the paraphernalia of the English law However there was one consolation that his old school friend Elijah Impey was to be the first Chief Justice *See* Penderel Moon *Warren Hastings and British India* p 94
30 The Charter was drawn by Impey and revised and settled by Thurlow the Attorney General Wedderburn the Solicitor General De Gray Chief Justice of the Common Pleas and Bathurst the Lord Chancellor Hence Impey knew the true intent and purpose of the Charter of 1974 Elijah Impey *Speech* p 26 , Stephen *Story of Nuncomar* Vol I p 3
31 He was having seventeen years standing at the Bar *Home M scellaneous Series* Vol 115, p 17

C LeMaistre,[33] Robert Chambers[33] and John Hyde[34] were named as three Puisne Judges [35] For the subsequent appointment of a judge the Charter stated the qualificatioos as of at least five years' standing as a Barrister of England and Ireland The judges were to hold office at the pleasure of the King Each judge of the Supreme Court was to be a Justice of the Peace and was to have authority and jurisdictuon as the Judges of the King's Bench in England had under the Commoo Law The Court was authorised to establish rules of practice and process It had the power to appoint the necessary subordinate staff and regulate the court fees with the consent of the Governor-General

The Charter granted civil jurisdiction to the Supreme Court. Where the cause of action exceeded Rs 500, the Supreme Court was authorised to hear in the first instaoce It could also hear the matter by way of appeal from the decisioo of a Mofussil Court, a Company's Court Where the valuatioo of a suit exceeded 1000 Pagodas an appeal could lie to the King in-Council within six months from the decision of the Supreme Court

While exercising its criminal jurisdictuon the Supreme Court was to be a Court of Oyer and Terminer and Gaol Delivery in and for the town of Calcutta, the factory and Fort William and the other factories subordinate thereto All offences of which the Supreme Court had cognizance were to be tried by a Jury of British subjects resident in Calcutta

The Supreme Court was empowered to superintend the Court of Collector, Quarter Sessions, and the Court of Requests and was empowered to issue to these Courts the writs of *certiorari*, *mandamus*, error or *procedenda* The Court was also granted full ecclesiastical civil and criminal jurisdictuon over all the British subjects in Bengal, Bihar and Orissa and over all the persons employed directly or indirectly in the service of the Company The powers of a Court of Equity and those of a Court of Admiralty for Bengal, Bihar and Orissa and the other adjacent territories and islands under the jurisdictuon of the Company, were also given to it The judges of the Supreme Court were authorised to admit attorneys and advocates and they nominated three persons for the office of sheriff

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32. *Impey Papers* Vol 16259 *Impey to Dunning* 30th August, 1777 pp 82-83 (British Museum), *Impey to Thurlow* 30th August, 1777, pp 84-85
33 Of the three puisne judges Chambers a Vinerian Professor of Law at Oxford was the most distinguished *Memoirs of William Hickey* Vol. III pp 220-21
34 *Impey Papers* Vol 16259 (B M) *Impey to Thurlow* 30th August, 1777 pp 84-85
35 When Judges of the Supreme Court landed at Chandpal Ghat of Calcutta Hastings officially welcomed them on 19th October 1774 *See* H E A. Cotton *Calcutta Old and New*, p 104, H E Busteed, *Echoes from Old Calcutta*, p 60

when selection was made by the Governor General and Council The Supreme Court was vested with four distinct jurisdictions namely, civil, criminal, acclesiastical and admiralty [36] Thus the Supreme Court at Calcutta was granted the widest jurisdiction and many important powers Keeping in view the jurisdiction of the Court, the population of the three provinces (Calcutta, Bombay and Madras) may be classified into four distinct categories, namely, British subjects the servants of the Company, the inhabitants of Calcutta and the Indians residing in the three provinces

4 Critical estimate of the provisions of the Regulating Act and the Charter of 1774

Though the aims and objects[37] of the framers of the Regulating Act were very good, many defects came to light subsequently They were either due to the inexperience of the policy makers in Indian affairs or due to defective drafting of the provisions of the Act The British Government appeared to be over ambitious to introduce various reforms in the executive and judiciary but there was lack of co ordination between them The framers of the Act probably suffered from certain limitations which affected the very character of the Act It appears that they had no up-to-date knowledge of the Indian affairs The Regulating Act was a half measure and disastrously vague in many points [38] Some very serious omissions were made in the Act and various terms of the Act were left undefined which ultimately resulted in conflict, confusion and criticism On the one hand the Governor General came into conflict with the members of his Council, on the other, the Supreme Court came into conflict with the Governor General and Council A brief account of the conflicting and defective provisions, which led to the failure of the policy of the Regulating Act, may be stated as follows

(1) The Regulating Act appointed a Governor-General and four members of the Council It was expected that this new set up will improve the old defective state of affairs In the first instance, persons, who were to occupy these posts, were also named in the Act Only one Councillor Richard Barwell and the Governor General Warren Hastings were appointed from amongst the Company's servants working in India They were well acquainted

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36 Morley *Administration of Justice in India* pp 549 87

37 Perhaps the main object of the Act was to establish a self acting balance of powers and to prevent abuses by a system of co-ordinate authorities *See* Sir Alfred Lyall *Warren Hastings* p 53

38 P E Roberts, *History of British India* p 102 The Regulating Act in fact accommodated conflicting interests and contradictory principles It was a sort of compromise and a temporary settlement *See* B N Pandey *The Introduction of English Law in India* p 35 C Ilbert *The Government of India* pp 53 54

with the Indian political development and the Company's role in India The British Parliament made the mistake of sending out to India three Councillors, namely Clavering, Monson and Francis, who were altogether new and were ignorant about Indian affairs They came to India at the instance of some politically influential leaders in England and were thoroughly prejudiced against Warren Hastings and the Company's officials in India, as was proved by their role in the subsequent proceedings of the Council with the Governor General Several times Governor-General Warren Hastings found himself out voted by the factious majority of the Council [39] It led to constant conflicts between the Governor-General and Members of his Council on various issues [40] Such frictions were bound to react on the efficient working of the Governor General and Council, which was the highest authority in India for policy making and decision taking regarding the Company

(ii) By empowering the Governor General of the Presidency of Calcutta to have control over the other two Presidencies of Bombay and Madras, the Regulating Act sowed seeds of constant conflict between them The Act made the mistake of giving power and at the same time laying down an exception to it As a result of it the latter nullified the former The exception to the main provision authorised the Presidencies of Bombay and Madras to take independent decisions in the case of "imminent necessity" It proved to be a very vague phrase in actual working Taking full advantage of such emergency powers, Bombay and Madras Governments began to take decisions regarding their relations with other Indian powers without even consulting the Governor General on the plea of emergency They declared wars with the Marathas and Hyder Ali respectively without making any reference to the Governor-General and Council at Calcutta Thus the ambitious Governors of Bombay and Madras came into conflict with the Governor General It created new conflicting situations and problems regarding the Company's relations with Indian and Foreign powers It gradually widened the gulf between the Calcutta and other presidencies and the growing tendency of taking independent decisions stimulated the trend

39 Sir John Strachey does not employ expressions too strong when he characterises the plan of governing an empire by a constantly shifting majority at the Council Board as impossible and folly *See* W K Firminger *Select Committee of the House of Commons on the Affairs of the East India Company, Fifth Report* p cclv

40 Three members of the Council tried to secure powers from Warren Hastings and Barwell and were eager to prove that due to their arrival Bengal was saved from ruin It was also their ambition to remove Warren Hastings and to appoint any one from their group as Governor General Francis was the most ambitious and bitter enemy of Warren Hastings See, *Letter of Col Monson to Rockingham* 3rd August 1775 *Rockingham Papers* R I 1583 *George Vansittart to John Cailaud* 4th January 1775 *European Letter Book* pp. 51 53

towards secession from the central authority of the Company's Government in India Ultimately, it resulted in weakening the British control over Indian territories till steps were taken by the British Parliament to control the abuse of such power

(iii) It was very difficult to gather from the provisions of the Act as to what was the legal position of the Company in India The Company was holding its powers in India *from* the British Crown and the Mughal Emperor The Company s legal position in India was as *Diwan* of the Mughal Emperor Due to this fact the British Parliament hesitated to assume complete sovereignty over India According to law the British Crown could assert its sovereignty only on the rights the Company had secured from British Parliament Parliament also disliked the idea of recognising the sovereignty of the Mughal Emperor in the Regulating Act specially when they knew that Mughal sovereignty in fact was nominal and slowly waning Parliament s effort to assert its sovereign rights on the Company's *Diwani* lands was possible only after the complete extinction of the Mughal sovereignty which it preferred to wait and see Most probably because of this fact the Regulating Act was immediately vague in its terminology on vital issues From the provisions of the Act, it was difficult to maintain in practice the theoretical distinction between the two spheres of the Company's authority, namely, as the agent of the British Crown and as an officer of the Mughal Emperor Neither the Company was asserting its right over the *Diwani* land nor was it expressly keeping quiet on the related issues There appears to be great truth in the observation of J F Stephen that the drafters of the Regulating Act did not wish, ' to face the problem with which they had to deal and to grapple with its real difficulties They wished that the King of England should not act as the sovereign of Bengal, but they did not wish to proclaim him so They wished not to interfere in express terms either with the Mughal Emperor or with the Company which claimed under him [41]

(iv) The Regulating Act provided for the establishment of a Supreme Court In pursuance of these provisions the Crown by issuing the Charter of 1774 established the Supreme Court at Calcutta and appointed eminent Judges to preside over the Court The Governor General and Council were constituted under the same Act by the Crown In actual functioning both of them i e judiciary and executive came into serious conflict[42] amongst

41 J F Stephen *The Story of Nuncomar and the Impeachment of Sir Elijah Impey* Vol II p 129

42. The Charter gave precedence to the Chief Justice after the Governor General over the Members of the Council The Councillors considered this precedence a matter of jealousy and reproach Chief Justice Impey was a school friend of Warren Hastings See *Francis to Ellis* 8th November 1774 Quoted in Weitzman *Hastings and Francis* p 296 Morley *Administration of Justice in India* Charter of 1774 p 553

themselves over certain issues Each claimed their superiority over the other on the basis of their appointment by his Majesty [43] The Regulating Act failed to define their mutual relationship and no procedure was laid down to avoid any future conflict amongst them The Governor General and the Council were exempted from the criminal jurisdiction of the Supreme Court except in cases of treason and felony and they were not liable to be arrested or imprisoned but the provisions were incomplete as many other matters were left untouched by the Act which were very necessary to maintain the prestige of the high office of the Governor General and Council

(*o*) The jurisdiction of the Supreme Court was confined to "British subjects" in certain respects and the native inhabitants were exempted But nowhere, *i e* neither in the Act nor in the Charter of 1774, was it defined as to who were the "British subjects" While defining the "British subjects," Stephen expressed great doubt about its real meaning and pointing out the confusion he stated "That in one sense the whole population of Bengal, Bihar and Orissa were British subjects and in another sense, no one was a British subject who was not an English born and in a third sense, all the inhabitants of Calcutta might be regarded as British subjects [44] Thus the question arose, what did the employment of the Company actually constitute? Whether the zamindars[45] and the farmers were servants of the Company? Due to the use of vague terms in the Act, Judges interpreted it in the widest sense to extend their jurisdiction Judges placed all those directly or indirectly employed by the Company and those employed by British subjects under the jurisdiction of the Court [46]

(*n*) The Regulating Act was not clear regarding the law which was to be administered by the Supreme Court Whether it was to be the law of the plaintiff or that of defendant? Whether the law of Hindus or that of Mohammadans The Judges knew nothing about Hindu or Muslim law, they knew only English law and usages Burke remarked " that no rule was laid down either in the Act or the Charter by which the Court was to judge No description of offenders or species of delinquency were properly

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43 Referring to The Provisions of the Act Punniah in *Constitutional History of India* at pp 16-21 states That they obscured the intention of the authors and lent themselves to more than one interpretation and so brought about serious conflicts between the Supreme Court and the Supreme Council

44 Stephen, *Story of Nuncomar* Vol II p 126

45 *Raja of Kasijurah's case* where the Supreme Court claimed jurisdiction over the Zamindars For details *see* Important cases at p 125 and onwards

46 For imperfections of the jurisdictional definition in the Act *see* Kaye *Administration of the East India Company* p 329 Cowell, *History and Constitution of Court and Legislative Authorities in India* pp 53 54

ascertained, according to the nature of the place or the prevalent mode of the abuse "[47]

James Mill condemns the English law and process, which was adopted by the Supreme Court, as arbitrary and mechanical Criticising the English law, as it existed at that time, James Mill *said* "The *English law*, which in general has neither definition nor words, to guide the discretion or circumscribe the licence or the Judge, presented neither rule nor analogy in cases, totally altered by diversity of ideas, manners and pre existing rights, and the violent efforts which were made to bend the rights of the natives to a conformity with the English laws, for the purpose of extending jurisdiction produced *more injustice and excited* more alarm, than probably was experienced, through the whole of its duration, from the previous imperfection of law and judicature "[48]

(*vii*) The framers of the Regulating Act failed to lay down any provision dealing with the relationship between the Company's Courts and the Supreme Court which was established by the Crown [49] They derived their authority and jurisdiction from two different sources, *namely*, the Company's Adalats were established under the authority of the Mughal Emperor granting *Diwani* to the Company and were governed by the treaties with the Nawabs of Bengal, the Supreme Court of Judicature at Calcutta was a Crown's Court established by a Charter of 1774 under the authority of the Regulating Act of 1773 The Regulating Act made the jurisdiction of the Supreme Court partially concurrent with that of the Adalats without unifying the sources of sovereignty from which each derived authority [50] The Adalats looked only to the Governor General and Council at Calcutta for support and guidance They were two different entities and friction amongst them was bound to arise [51] A series of conflicts between the two

47 *Select Committee* 9th Report (1783) p 6
48 James Mill *History of British India* Vol III pp 502 503
49 In the *Story of Nuncomar and the Impeachment of Sir Elijah Impey* Vol II at p 125 J F Stephen said 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 timidity did not choose itself to solve or even to study them
50 B B Misra *The Judicial Administration of the East India Company in Bengal* Ch IX, pp 214-216
51 *Philip Francis* in his letter to Lord North in February 1775 while admitting this defect advised him that the King s sovereignty over the provinces may be declared He stated Without it there can properly be no government in *this country* The people at present have either two sovereigns or none The jurisdiction of the Supreme Court of Judicature should be made to extend over all the inhabitants who will then know no other sovereign but the King of Great Britain I conceive that this may be done without touching the county courts or departing from the laws and customs of the people *See* Parkes and Merivale *Memoirs of Sir Philip Francis* Vol II p 27

systems of judicature arose Adalats were backed by the Council at Calcutta and, therefore, the conflicts actually developed between the Council and the Supreme Court The majority of the Council stood firm in adopting its extreme views while the Judges of the Supreme Court laid emphasis on their superiority to implement their decisions

(viii) The Regulating Act failed to make it clear whether the management and government of territorial acquisitions and revenues of the kingdoms of Bengal, Bihar and Orissa vested in the Governor General and Council, was or was not, to be exempt from the jurisdiction of the Court It was a matter of great public importance that the collection of the revenues afforded the richest opportunities for oppressions by persons who were employed by the Company On this matter the Council and the Supreme Court came *into severe conflict* The former pleaded exemption for its officers from the Court's jurisdiction for their acts in the collection of revenue On the other hand, the Court stated that it was their primary and most important duty to hear cases in which the complaints were made against the revenue officers for their illegal acts

The post Regulating Act period *i e* from 1774 to 1780, gave rise to a series of conflicting problems and situations Many leading cases, *e g Raja Nand Kumar, Patna case, Raja of Kanjurah, Kamal ud din, Rani of Burdwan, Sukrup Chand, etc* , pointed out the lacunae and the defective provisions of the Regulating Act The conflicts, which were not only amongst the Governor-General and his Councillors but also between the Council and the Supreme Court proved the inefficiency of the machinery created by the Regulating Act as well exposed the vague and defective provisions of the Charter of 1774 Macaulay described the role of the Supreme Court during the period from 1774 to 1780 as a reign of terror, "of terror heightened by mystery, for even that which was endured was less horrible than that which was anticipated "[52]

Referring to the defects in the drafting of the Regulating Act, Mill writes, "On the principal ground, Parliament as usual trod nearly blindfold They saw not that they were establishing two independent and rival powers in India, that of the Supreme Council and that of the Supreme Court, they drew no line to mark the boundary between them, and they foresaw not the consequences which followed, a series of encroachments and disputes which unnerved the powers of Government and threatened their destruction "[53]

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52 Macaulay *Essays on Warren Hastings Edinburg Review* October 1841, pp 109 206.

53 James Mill *History of British India*, cited by W K Firminger *Historical Introduction to the Bengal Portion of the Fifth Report* , from Select Committee of House of Commons p cclx.

In this context, it will be proper to consider the real achievement of the provisions of the Regulating Act Two achievements of the Act may be stated as follows It made changes in the personnel of the Governor's Council by which the doings of the Company's servants would henceforth be controlled by men who have no personal interest to serve by cloaking misgovernments in the districts, and who presumably would be free from the class prejudices of the Company's servants Secondly, it substituted a Court of King's Judges and professional men of the law for a Court composed of Company's servants who were removable by Company's servants

In the light of the two achievements, as stated above, and the various defective provisions of the Act which created serious conflicts, there appears to be a great truth in Cowell's assessment, "Thus the plan of controlling the Company's Government by the King's Court entirely failed The policy which shaped the Regulating Act was no doubt well intentioned but it was rashly and ignorantly executed The anarchy which ensued continued till policy of the Regulating Act was reversed "[54]

B Some Important Cases

It was expected that the Regulating Act, by establishing a Supreme Council and a Supreme Court at Calcutta, will improve the existing state of affairs in India but instead of improving, from 1774 onwards, there was a decline towards anarchy The defective provisions of the Act and the Charter gave rise to controversies and serious grievances The Supreme Court claimed its right to interfere with the Company's servants in their judicial capacity, and more especially in their capacity of Collectors of Revenue Though neither the Charter laid down any law and rules of procedure nor the Judges took any initiative to frame such rules the Judges of the Supreme Court began to exercise those rights On the other hand, the Supreme Council resisted the superior claim of the Supreme Court Actions resulted into reactions, conflicts created controversies, and doubts were cast on their powers and jurisdiction respectively Ambiguity and uncertainty of law and procedure gave rise to unrest and created an atmosphere of tension and terror in the country

Even two years after the opening of the Supreme Court, Phillip Francis, a Member of the Council, pointed out that the great question of sovereignty was even then undetermined "We have", he said, "a Supreme Court of Judicature resident at Calcutta, whose writs run through every part of these provinces in His Magesty's name, indiscriminately addressed to British

54 Cowell *History and Constitution of the Courts and Legislative Authorities in India* p 44

subjects, who are bound by their allegiance, or to the natives, over whom no right of sovereignty, on the part of the King of Great Britain has yet been claimed or declared "[55]

The conflicts between the Executive Government of the Company and the Supreme Court at Calcutta may be illustrated by presenting a critical analysis of some of the important decisions of the Supreme Court which are considered landmarks in the legal history of India due to their far-reaching effects on the future course of the Government's action in India

1 Trial of Raja Nand Kumar (1775)

The trial of Raja Nand Kumar[56] was the first decisive event during the early stage of the growing bitterness between the Supreme Court and the Council Its special significance lies in the fact that the Judges of the Supreme Court introduced English principles of law and procedure into India, laws which were unknown to Indians before With the insistence of the Judges on the independence of judiciary, in spite of interference of the Council, began a new era in the administration of justice in India The trial gained great historical importance as it formed an integral part of the charge on which Warren Hastings and Impey were impeached by the House of Commons after their return to England

(i) **Events before the Trial** —Raja Nand Kumar, who was once Governor of Hugli under Nawab Siraj-ud-daulah in 1756 and later due to his loyalty to the English Company in 1757 was nicknamed as "Black Colonel" during Clive's period, brought several charges of bribery and corruption against Governor General Warren Hastings[57] in 1775

On March 11, 1775, Raja Nand Kumar gave a letter containing complaints against Warren Hastings to Francis, a member

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55 S 4 of the Charter of 1774 makes the Judges Justices and conservators of the peace and coroners within and throughout the said provinces, districts and countries of Bengal, Bihar and Orissa and every part thereof and to have such jurisdiction and authority as our justices of our Court of King's Bench may lawfully exercise within that part of Great Britain called England by the Common law thereof J F Stephen commented "This might have been so construed as to enable the Court to issue writs of *mandamus, prohibition and certiorari* to every court in Bengal and to issue a *habeas corpus* to any native to bring up the women in his Zenana" J F Stephen *The Story of Nuncomar and the Impeachment of Sir Elijah Impey* Vol II pp 125 26

56 For details *see* J F Stephen *The Story of Nuncomar and Impeachment of Sir Elijah Impey* H Beveridge *The Trial of Maharaja Nand Kumar* H E Busteed *Echoes from old Calcutta* B N Pandey *Introduction of English Law into India The Career of Elijah Impey in Bengal*

57 P J Marshall The Personal Fortune of Warren Hastings *Economic History Review*, 2nd Series, xvii (1964-65) pp 292 3

of the Council [58] Francis presented that letter before the Council, at its meeting, the same day In his letter of complaint, Raja Nand Kumar stated that in 1772 Warren Hastings, when he was Governor, accepted from him as bribe a sum of Rs 1,04,105 for appointing Gurudas as Diwan and from Munni Begam Rs 2,50,000 for appointing her guardian of the infant Nawab Mubarak ud daulah

On March 13, 1775, the Council received another letter from Nand Kumar On the same day the Council discussed the subject matter of the complaint In his second letter Raja Nand Kumar offered to produce vouchers supporting his charges of bribery against Warren Hastings In the Council meeting Monson moved a motion to call Nand Kumar before it Warren Hastings, who was presiding at the meeting as Governor General opposed this motion stating that neither will he preside over the meeting of the Council as his character was being discussed, nor will he recognise the authority of the members of the Council to sit as Judges to hear any case against him In spite of Hastings' opposition, Monson's motion was carried by a majority of votes in the Council Warren Hastings dissolved the meeting of the Council and left his seat The majority of the members in the Council expressed the view that Governor General Warren Hastings was not empowered to dissolve the meeting of the Council and in place of Warren Hastings they elected Clavering to occupy the presiding seat at the meeting According to Monson's motion Raja Nand Kumar was called before the Council to prove his allegations against Warren Hastings In order to prove his charges, Raja Nand Kumar produced a letter in Persian, which was written by Munni Begum to him [59] While examining Raja Nand Kumar, the members of the Council asked a leading question Was he ever approached by Warren Hastings or his men for the letter of Munni Begum? In his reply, Raja Nand Kumar disclosed that Kanta Babu, Warren Hastings' *Bania* came to him nearly four months ago to take this letter but the original letter was not given to him Though Kanta Babu was also called by the Council to appear before it, he avoided appearing at the instance of Warren Hastings

The Council by majority dismissed Raja Nand Kumar and found that the charges levelled by him against Governor General Warren Hastings were true They held that Warren Hastings

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58 See *Minutes of the Council* (Secret Dept) dated 11th and 13th March 1775 *See* also G W Forrest *Selections from State Papers of Governor General Warren Hastings* Vol II pp 298 315 and 337 342

59 G W Forrest *Selection from the Letters Despatches and other State Papers* 1772 1785 Vol II Letter of Munni Begum pp 53 54

received a sum of Rs 3,54,105 as bribery [60] By a resolution, therefore, the Council directed Warren Hastings to pay the same amount into the Company's Treasury

(ii) **Facts of the Case**—A few months later, Raja Nand Kumar was arrested with the Fawkes[61] and Radhacharan for conspiracy at the instance of the Governor General and Barwell [62] Warren Hastings and Barwell, his favourite member of the Council, declared their intention before the Judges of the Supreme Court to prosecute Nand Kumar, Fawkes and Radhacharan for conspiracy [63] This event led the people to think that with a retaliatory motive this step was being taken against Nand Kumar to ruin and disgrace him The trial of Nand Kumar for conspiracy continued together with another trial of his for forgery In the conspiracy case, the Supreme Court delivered its judgment in July 1775 Fawke was fined but judgment was reserved against Nand Kumar on account of the forgery case Those who criticised the rule of Impey and Warren Hastings stated that somehow Warren Hastings felt that it will be difficult to involve Nand Kumar directly in the conspiracy case, and therefore, they pooled their resources to prove another charge namely of forgery against Nand Kumar and thus got rid of him under the provisions of the English Act of 1729

The charge of forgery against Nand Kumar, which came before the Supreme Court in May 1775, was with respect to a bond or deed claimed as an acknowledgment of debt from Bulaki Das[64] the Banker, which it is said, was executed by him in 1765 Mohan Prasad brought a charge of forgery on 6th May, 1775

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60 On his return to England Warren Hastings was impeached for bribery before the House of Commons and House of Lords *See* P J Marshall *The Impeachment of Warren Hastings* Chs II III and IV pp 21 87

61 Joseph Fawke and Francis Fawke

62 The trial of Nand Kumar for forgery and that of Joseph Fawke Francis Fawke Radhacharan and Nand Kumar for conspiracy against Hastings and Barwell was first printed in London by Cadell in 1776 under the authority of the Supreme Court of Judicature at Calcutta *See* Cadell *The Trial of Nand Kumar* (1776) The version of the trial as published by Cadell was inserted in the State Trials (*State Trials* Vol 20 Forgery case, pp 923 1078 Conspiracy case pp 1078 1226) In 1906 a verbatim report of the trial was published by P Mitter Mackintosh differs on the point that the trial was first of all published in England (Mackintosh *Travel* Vol II p 198) But it is clear that Elliot acted as an interpreter during trial He left India in 1775 with an authenticated account of the trials and the Judges authorised him to get it printed in London (Letter of Judges to Elliot August 10 1775)

63 For details *see* B N Pandey *Introduction of English Law into India Career of Sir Elijah Impey in Bengal* (1774 1783) pp 57 69

64 In his lifetime Bulaki Das regarded Nand Kumar as a great benefactor and patron of his family Before his death in 1769 Bulaki Das entrusted his wife and daughter to the care and protection of Nand Kumar It is said that after Bulaki Das's death Nand Kumar's attitude completely changed *See* Beveridge *The Trial of Maharaja Nand Kumar* p 131

before the Justices of the Peace for the town of Calcutta Le Maistre and Hyde acted as Magistrates, they heard the case and examined the evidence for the prosecution till late in the night The Magistrates, in the capacity of the Justices of the Peace being satisfied with the evidence of the prosecution witnesses ordered the Sheriff and Keeper of His Majesty's prison at Calcutta to keep Nand Kumar in safe custody until he should be discharged in due course of law

On 7th May, 1775 Mohan Prasad gave a bond to prosecute Nand Kumar in the Supreme Court On the basis of it, the trial of Nand Kumar[65] began before the Chief Justice and three puisne Judges of the Supreme Court on 8th May, 1775 Out of the twelve members of the jury, two were Eurasians and the remaining were Europeans having long residence in the town of Calcutta On the advice of Vansittart Mohan Prasad engaged Durham as his counsel and Alexander Elliott acted as interpreter of the Court Thomas Farrer was appointed defence counsel of Nand Kumar

The trial of Nand Kumar began on 8th June, 1775 and continued for a period of eight days without any adjournment The defence counsel first of all advanced a plea as to the jurisdiction of the Supreme Court The Judges considered that the plea was unsupportable and the defence counsel was allowed to withdraw it due to two reasons According to the law as it existed at that time, if the plea as to the jurisdiction was decided against, the defendant would be precluded from pleading not guilty to the indictment Farrer, the defence counsel also thought that if the judgment went against Nand Kumar, he might use this plea sometime later by a motion to check the effect of the judgment Nand Kumar, therefore, pleaded not guilty and stated that his entire transactions with Bulaki Das were correct and genuine

The Court sat every day from 8 a m and witnesses were examined till late at night Sometimes proceedings were delayed due to ignorance of the Judges about Indian habits and the nature of persons appearing as witnesses Documents, statements and accounts were in different languages which were gradually being translated into English for the benefit of the Judges Busteed stated, "How complicated and perplexing these must have seemed as well as the strange documentary exhibits which, like the

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65 J D M Derrett Nand Kumar s Forgery *English Historical Review* lxxv (1960) pp 223 38 For a different interpretation see N K Sinha "The Trial of Maharaja Nand Kumar *Bengal Past and Present* lxxx i (1959) pp 135 145 J J Stephen in the *Story of Nuncomar and the Impeachment of Sir Elijah Impey* claimed that the prosecution had no connection with political events In the light of evidence in Sutherland *English Historical Review* lxx p 461 this view is no longer tenable B N Pandey *Introduction of English Law into India Career of Sir Elijah Impey in Bengal* 1774 1783 pp 77 98

accounts, were in diverse languages and which, with every word of the evidence had to be filtered to the understanding drop by drop through an interpreter" [66] Another peculiar feature of the trial was that the Judges cross examined the defence witnesses even in minute details and thus they carried out the work of the prosecuting counsel on the plea that the King's Counsel was incapable to do it efficiently It was really very surprising and created serious doubts and suspicions about the impartiality of the Judges The trial continued till the midnight of June 15, 1775 On 16th June, in the morning, Chief Justice Impey summed up the whole case The Judges gave the unanimous verdict of "guilty" and the jury also declared their verdict of "guilty" Rejecting all defence pleas the Chief Justice passed the sentence of death on Nand Kumar under an Act of British Parliament, which was passed in 1729

From 16th June to 4th July, 1775 various efforts were made to save the life of Nand Kumar The defence counsel decided to take an appeal to the King in Council and petitioned the Court to stay the execution of the sentence so long as the Council's decision was not known The Court rejected the petition Efforts were also made to seek the assistance of the Members of the Council but all efforts proved in vain Earlier on 27th June the Council received a letter from the Nawab recommending a suspension of the sentence until the pleasure of His Majesty was known [67] The Council forwarded this letter to the Supreme Court No action was taken on it Raja Nand Kumar was thus hanged on August 5, 1775, at 8 a m at Cooly Bazar near Fort William

(iii) Two important questions raised in the Trial — First, whether Nand Kumar was under the jurisdiction of the Court? Second, whether the English Act of 1729 which made forgery a capital offence and under which Raja Nand Kumar was executed, was extended to India?

Objection regarding the jurisdiction of the Supreme Court over Raja Nand Kumar was based on the ground that before the advent of the Supreme Court, the Indians in Bengal were tried by their own men in their own local criminal courts In this case as the offence was committed before the advent of the Supreme Court, Nand Kumar could be tried only by Faujdari Adalats and not by the Supreme Court

On the second question, regarding applicability of the Act of

66 H F Busteed *Echoes from Old Calcutta* p 77

67 *Secret Consultations* 1775 Range A Vol 29 pp 379 80 On 31st July Nand Kumar wrote to Francis requesting him to interpose with the justices and secure his respite *See* C H Parkes *Memoirs of Sir Philip Francis* (edited by H Merivale) Vol I, Nand Kumar's letter to Francis pp 37 38

1729 to India and the execution of Raja Nand Kumar for forgery, there was a difference of opinion even amongst the Judges [68] Chambers, J , stated that the Act of 1729 was particularly adopted to the local policy of England where for reasons political as well as commercial, it had been found necessary to guard against the falsification of paper currency and credit, by laws the most highly penal, and that he thought the same reasons did not apply to the then State of Bengal Impey, Hyde and Le Maistre regretted to agree with Chambers's view Chief Justice Impey declared his firm belief, first, that the Statute of 1729 did apply to India, second, that the English criminal law in general and the Statute of 1729 in particular had been administered in India by English Courts that functioned before the advent of the Supreme Court ,[69] third, the Judges had no option to try forgery under any different law Regarding the applicability of the Statute of 1729,[70] Chief Justice Impey stated the principle that when the King introduces his law in a conquered dominion, all such laws as are in force in the realm of England, at the time when the laws are so introduced, do become the laws of the dominion Laws made subsequently may not extend to the new dominion except when expressly mentioned in those laws that they shall [71] Impey, therefore, argued that in 1726 King George I granted a Charter of Justice for the town of Calcutta and thereby introduced English law On the surrender of that Charter, a new Charter of Justice was granted by King George II in 1753 It means that all criminal laws in force in England in 1753 became the laws of the town of Calcutta Thus the Statute of 1729 was extended to India by the Charter of 1753 as it was passed before this Charter

(iv) Some peculiar features of the Trial The decision of the Supreme Court in the trial of Raja Nand Kumar became a subject of great controversy and doubts were also expressed regarding certain peculiar features of the trial, which may be given as follows

(*a*) Every Judge of the Supreme Court cross examined the defence witnesses due to which the whole defence of Raja

68 B N Pandey, *The Introduction of English Law into India The Career of Sir Elijah Impey in Bengal* p 78

69 Impey stated that before the Supreme Court, Courts of Oyer, Terminer and Jail delivery had territorial jurisdiction over Calcutta and they administered English Law Impey cited Radha Charan Mittre's case of 1765 to prove that the Statute of 1728 was at least once applied before Radha Charan Mittre was indicted in 1765 for forging the codicil of a will of one Cojah Solomans He was sentenced to death The Court of Directors granted him pardon *Bengal General Consultations* March 11 1765 (India Office Library)

70 2 Geo 2 c 25 (1729) *See* Stephen *Story of Nuncomar and Impeachment of Elijah Impey* Vol 2 p 489 B N Pandey *The Introduction of English Law into India The Career of Elijah Impey in Bengal* 1774 1783 p 107

71 See *Parliament Debates (British)* 1788 Vol 28, Col 1360

Nand Kumar collapsed It was also not legal according to the rules of procedure prevailing at that time Criticising the attitude of the Judges, H E Busteed wrote, "The desire of the judges was to break down Nand Kumar's witnesses, in particular the Chief Justice's manner was bad throughout and that the summing up was unfavourable "[72]

(*b*) After the trial, when Nand Kumar was held guilty by the Court he filed an application before the Supreme Court for granting leave to appeal to the King in Council but the Court rejected this application without giving due consideration

(*c*) Nand Kumar applied for mercy to His Majesty but his case was not forwarded by the Supreme Court The Supreme Court was empowered by the Charter of 1774 to reprieve and suspend such capital punishment and forward the matter for mercy to His Majesty Earlier in 1765, a native, named Radha Charan Mittre was tried in Calcutta for forgery under the Statute made applicable to Nand Kumar and death sentence was passed A petition was sent to Governor Spencer from the native community of Calcutta requesting ' either a reversal of sentence or a respite pending an application to the throne" The prayer was granted and Radha Charan Mittre got a free pardon from the King

(*d*) Nand Kumar committed the offence of forgery nearly five years ago, *i e* much before the establishment of the Supreme Court Nand Kumar was sentenced to death under the English Statute of 1729 on a charge of forgery but this Act was not applicable to India because English law was introduced in India in 1726 and not in 1753 "

(*e*) Neither under Hindu Law nor under Mohammedan Law was forgery regarded a capital crime

In view of the peculiar features of the trial, as stated above, and the events which took place before the trial, the judgment of the Supreme Court in Raja Nand Kumar's case became very controversial The trial and execution of Raja Nand Kumar shocked not only Indians but also foreigners residing in India It was considered most unfortunate and unjust The role of Chief Justice Impey became a target of great criticism On their return to England, Impey and Warren Hastings were impeached by the House of Commons[74] and the execution of Raja Nand Kumar was an important charge levelled against them

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72 H E Busteed *Echoes from Old Calcutta* p 90

73 Macaulay Essays on Warren Hastings *Edinburgh Review* 1841-42, October p 43

74 For details *see* P J Marshall *The Impeachment of Warren Hastings*, Chs II III and IV pp 22 87

(v) Opinion of Macaulay, Mill, Beveridge, Stephen, etc—Many English historians expressed the view that Nand Kumar was tried and executed by Impey at the instance of Warren Hastings "Men will never agree", P E Roberts writes, "as to the meaning of this somewhat mysterious sequence of events, for the key to them lies in the ambiguous and doubtful region of secret motives and desires The incident created an extraordinary impression and it was naturally believed for a long time that Nand Kumar had paid the penalty of death nominally for forgery, but really for having dared to accuse the Governor General "[75] Those who accuse Impey and Warren Hastings allege that Hastings first tried to ruin Nand Kumar on a conspiracy charge, but after realising that it did not implicate Nand Kumar directly, he got him capitally indicted on a charge of forgery preferred ostensibly by Mohan Prasad

J F Stephen had made a detailed study of Nand Kumar's case and justifies the conduct of both Impey and Warren Hastings in the trial of Raja Nand Kumar He states, "Mohan Prasad was the real substantial prosecutor of Nand Kumar and that Hastings had nothing to do with the prosecution and that there was not any sort of conspiracy or understanding between Hastings and Impey in relation to Nand Kumar or in relation to his trial or execution" [76] Criticising Stephen's findings, Macaulay said, "The ostensible prosecutor was a native But it was then, and still is, the opinion of everybody—idiots and biographers excepted—that Hastings was the real mover in the business " [77] Beveridge charged Impey and Hastings with conspiracy on the supposition that no attempt had been made to prosecute Nand Kumar for forgery before May 1775 He claimed that Hastings in order to defeat Nand Kumar's charges, which were pending in the Council, suborned Mohan Prasad to prosecute him in the Supreme Court [78]

For holding the opinion that no conspiracy existed between Impey and Warren Hastings, Stephen states certain reasons He points out that Nand Kumar was tried by the whole Court of four judges and not by Impey alone Apart from the judges, the jury of twelve men was also there All these, the judges and jurors found Raja Nand Kumar guilty But Beveridge alleges that throughout the trial Impey manifested an ardent wish and determined purpose to effect the prisoner's ruin and execution and with

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75 P E Roberts, *History of British India* p 187

76 J F Stephen in *The Story of Nuncomar and Impeachment of Elijah Impey* Vol II at p 37 wrote *My opinion is* that the trial was scrupulously fair that the summing up was perfectly impartial and gave every possible advantage to the prisoner

77 Macaulay Essays on Warren Hastings *Edinburgh Review* 1841-42, October p 189

78 Beveridge *The Trial of Maharaja Nand Kumar*, p 309

this aim in view he summed up the evidence with "gross and scandalous partiality" Beveridge believes, this prejudiced the incompetent juries who were all foreigners, ignorant about Indian customs and conditions, and they held Nand Kumar guilty

The legality of Nand Kumar's trial was questioned in the impeachment proceedings of Impey,[79] before the House of Commons on the scope of the applicability of the Act of 1729 in India During the debate on the impeachment motion Sir Gilbert Elliot argued in detail that the law rendering forgery a capital offence did not extend to India[80] Macaulay, Mill and Beveridge held the same opinion Even Stephen appears to have doubts on the legality of the case being tried under the Act of 1729[81] Keith states, '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 they were by Impey, as substantive reintroductions of English law up to that date and in any case, to apply literally an English law was a mere miscarriage of justice No Indian after him (Nand Kumar) was executed for the crime and in 1802 the Chief Justice (not C J Impey) expressly admitted that it was not capital"[82]

The most grievous charge, that Impey had to answer before the House of Commons was that when Nand Kumar had been convicted and sentenced to death, he corruptly refused to give respite to him pending the submission of his case for the consideration of the Sovereign Stephen, while holding that Impey and other judges acted in good faith, states, "I think that in omitting to respite Nuncomar, the judges exercised their discretion in good faith and on reasonable grounds, which was all that could be required of them"[83]

To Gilbert, Burke, Macaulay, Mill and Beveridge the failure to respite seemed to be motivated by the vilest design to accomplish the death of Hastings's accuser Beveridge, in *the trial of Nand Kumar*, claims to have shown (and given some evidence for his contention) that a private secretary and dependent of Hastings exerted himself to prevent a respite being granted to the condemned man[84] Criticising the role of the Supreme Court Keith remarks, "No more odious crime has ever been committed by a

79 The charges levelled against Elijah Impey covered forty two printed pages. *See* Home Misc Vol 372 pp 343 386

80 Parliament Debates (*U K*) 1788 Vol 27 Cols 416-22.

81 J F Stephen *The Story of Nuncomar and the Impeachment of Sir Elijah Impey*, Vol 2 p 48n

82 Keith *A Constitutional History of India* p 77 Morley *Digest of Indian Cases* Introduction pp xxiii Thompson and Garratt *British Rule in India* pp 125 357 9

83 Stephen *The Story of Nuncomar and Impeachment of Elijah Impey* Vol II p 85

84 *See* A B Keith *A Constitutional History of India*, p 77

British Court, whether or not on the instigation of a British Governor General" Beveridge expresses his resentment in vigorous words, "What I and every honest man who knows the facts blame Impey for, is that he allowed himself to be prejudiced by his partiality for Hastings, and his hatred of the majority and that he hanged Nand Kumar in order that peculators in general, and his friends and patron Warren Hastings in particular might be safe" Macaulay critically observes, "Impey acted unjustly in refusing to respite Nand Kumar 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 Nand Kumar, and they must mean that Impey hanged Nand Kumar in order to support Hastings It is, therefore, our deliberate opinion that Impey, sitting as a judge, put a man unjustly to death in order to serve a political purpose" [85]

Dr B N Pandey, in his book, *"Introduction of English Law into India The Career of Elijah Impey in Bengal, 1774 1783,"* has made a detailed study of the trial of Raja Nand Kumar in England This is the latest work on the subject based on extensive study [86] In his conclusions, Dr Pandey has taken views similar to those of Stephen's and has supported Impey's decision by which the English Act of 1729 was extended to India [87]

His conclusions are, however, not free from serious doubts It is on the records that during the first four years of his administration of Bengal, Hastings remitted £ 122,000 to Europe, a sum which exceeded his officially recognised emoluments by over £ 25,000 [88] From where did this extra income come? Deriving full advantage of his political superiority Warren Hastings used Indians as his tools to meet his political and personal ends So long as they proved useful in his self oriented missions, full

85 Macaulay's 'Essays On Warren Hastings (Edited by V A Smith), *Edinburgh Review*, 1841-42 October pp 45 46

86 Published in 1967 by Asia Publishing House Bombay

87 Dr Pandey's conclusions may be stated as follows That there existed no conspiracy between Impey and Hastings to ruin Nand Kumar The defence story was concocted and Nand Kumar's witnesses were perjurers Impey and the Judges found Nand Kumar guilty of forgery and legally executed him under the English Act of 1729 which was rightly introduced in India It was not in furtherance of any political conspiracy that the judges refused to respite Nand Kumar *See* Dr B N Pandey *The Introduction of English Law into India The Career of Elijah Impey in Bengal* 1774 1783 pp 43 109

88 P J Marshall The Personal Fortune of Warren Hastings *Economic History Review* 2nd Series xvii (1964 5) pp 292 3 *Loudoun Macleane's letter to Sir Lyttelton* 18th January 1774 (Manuscript in the Bodleian Library) Eng His c 271 f 2 *See* also P J Marshall *The Impeachment of Warren Hastings* p 2145

advantage was derived through them On their becoming hostile Warren Hastings was ready to do the needful—either to condemn them or to get rid of them Raja Nand Kumar was one of those unfortunate Indians who were valued very highly once upon a time by Warren Hastings It appears that before the Judges of the Supreme Court were appointed Raja Nand Kumar was in serious conflict with Hastings Warren Hastings wrote, "I was never the personal enemy of any man but Nuncomar whom from my soul I detested, even when I was compelled to countenance him" [89] With this background of events, Warren Hastings, while congratulating Impey on his appointment as Chief Justice of the Supreme Court, wrote, "With respect to my situation I shall say nothing till we meet but that I shall expect from your friendship such assistance as the peculiar circumstances of my new office and connections will enable you effectually to afford me for the prevention and removal of the embarrassments which I feel I am unavoidably to meet with" [90] It is also necessary to remember that Warren Hastings and Impey studied in Westminster and since then they were very close friends

It is submitted that Dr Pandey has not correlated and interpreted the aforementioned facts and has not given full importance to them With this background, if Nand Kumar's charges of bribery and corruption against Warren Hastings are considered, the existence of a serious conflict between Nand Kumar and Hastings becomes quite clear In order to get rid of his enemy (Nand Kumar), Hastings, in the first instance, filed a criminal case of conspiracy against Nand Kumar and simultaneously Nand Kumar was prosecuted for forgery Strong friendly ties between Impey and Hastings impaired the impartiality and independence of judiciary The peculiar features of the trial proceedings were widely condemned by Indians and enlightened critics in England Nand Kumar was found guilty by the Judges and Jury, and an English Act of 1729 was conveniently used for passing death sentence Even the mercy petition was not forwarded to His Majesty and Nand Kumar was executed on 5th August 1775, leaving strong doubts that judicial murder[91] had been committed

P E Roberts said, "But even if we hold it established that there was no judicial murder, there was certainly something

89 G R Gleig *Memoirs of the Life of Warren Hastings*, Vol III, pp 337-338, *see also* Philip Woodruff, *The Men who Ruled India*, Vol I, p 125

90 G R Gleig *Memoirs of the Life of Warren Hastings*, Vol I (Hastings to Impey 24th August 1774) p 453 *See also* Warren Hastings letter to Sulivan where he stated, Nuncomar, whom I have cherished like a serpent till he has stung me is now in close connexion with my adversaries and the prime mover of all their intrigues' *Secret Consult*, R A, Vol 27 p 1478 9 Gleig *Supra* Vol I p 506

91 *See also* H Beveridge *The Trial of Maharaja Nand Kumar*, pp 1 5

equivalent to miscarriage of justice For that, however, the Supreme Court in the first instance, Hastings's opponents on the Council subsequently, were mainly responsible" [92]

2 Case of Kamaluddin (1775)

This case is of historical importance as it reflects on a vital question relating to the jurisdiction of the Supreme Court over the acts of the Company's servants working in the capacity of Collectors of Revenue It is clear from subsequent developments that the Council came into serious conflict with the Court.

Facts and decision —Kamaluddin[93] was an ostensible holder of a salt farm at Hijili[94] on behalf of Kantu Babu,[95] who was the real farmer In 1775 Kamaluddin, as a farmer, was in arrear of revenue On this basis the Revenue Council of Calcutta issued a writ for Kamaluddin's committal without bail Kamaluddin obtained a writ of *Habeas Corpus* from the Supreme Court to set him free on bail The Supreme Court granted him bail It was held by the Supreme Court that the returns submitted by the Council were defective in form as it omitted to "express a power in the Council of Revenue to commit without bail or mainprize, although words to the same effect were inserted Mr Cottrell, the President of the Calcutta Revenue Council, admitted that it was customary in such cases to grant bail and, therefore, the Judges of the Supreme Court held that in a case of disputed account, the defendant should be granted bail till the inquiry regarding his obligation to pay was complete The Judges further stated that Kamaluddin should not be imprisoned again until his under-renter had been called upon to pay the arrears and had proved to be insolvent

At this action of the Judges of the Supreme Court, the Members of the Supreme Council expressed their resentment and stated that the Judges of the Supreme Court were "not empowered to take cognisance of any matter or cause dependent on or belonging to the revenue" According to them the Company was confirmed as Dewan of Bengal by the Regulating Act and the Supreme Council had exclusive jurisdiction The majority of the Supreme Council, therefore, decided to order the Provincial Council to re-imprison Kamaluddin and to pay "no attention to any order of the Supreme Court or any of the judges in matters which solely concern revenue" But Governor General Warren

92 P E Roberts *History of British India* p 188
93 *See*, W K. Firminger *Select Committee of the House of Commons on the Affairs of the East India Company, Fifth Report Introduction* p cclxiii
94 Beveridge *The Trial of Nand Kumar* p 235
95 Kantu Babu was the famous Banian of Warren Hastings He played an important role in the famous trial of Nand Kumar, where he stated that Nand Kumar's signature on the jewel deed was a forgery

Hastings refused to support the proposed steps of the majority of the Supreme Council [96]

In his letter to the Court of Directors, Chief Justice Impey explained that a distinction should be drawn between claiming a jurisdiction over the original cause, which the judges had not done, and an intervention on the part of the Supreme Court to prevent the Company's officers, "under the colour of legal proceedings being guilty of most aggravated injustice" [97] He further stated, "This distinction if attended to, is sufficient to clear away everything that can give the least alarm on account of the interests of the Company, for the Court, allowing the customs and usage of the Collections to be the law of the country, has only compelled the officers of the Government to act conformable to these usages, and not make use of the colour and forms of law to the oppression of the people" [98]

The *case of Kamaluddin*, therefore, was an eye-opener disclosing defective provisions of the Regulating Act due to which not only the Supreme Court and the Supreme Council came into conflict but also the gulf between Governor General Warren Hastings and the three Members of his Council, who constituted the majority, gradually became wider and wider

3 The Patna Case (1777 79)

This case is important as a landmark in the legal history of India Vital issues involved in this case included the jurisdiction of the Supreme Court and the right of the Supreme Court to try actions against the judicial officers of the company for act done in their official capacity Another important issue was, whether the Provincial Diwani Adalats which consisted of the members of the Provincial Council were legally constituted Courts of Justice? The judgment of the Supreme Court not only provoked the members of the Council and developed conflicts but also created panic in the local population of Calcutta.

(1) **Facts** —Shabaz Beg Khan, an Afghan military adventurer, came to India from Kabul He settled at Patna, married Naderah Begum and earned a large amount of money [99] In December 1776 he died at Patna without having any male or female issue He

96 When Kamaluddin participated in the trial of Raja Nand Kumar the majority of the Supreme Council got an opportunity to express its resentment by condemning the role of Kamaluddin

97 19th September 1775

98 J F Stephen *The Story of Nuncomar and the Impeachment of Sir Elijah Impey* Vol II pp 134-135 *Eleventh Report of the House of Commons* 1781 General Appendix III No 14

99 *Touchet Committee Report* pp 10-13 *see* also B N Pandey *The Introduction of English Law into India The Career of Elijah Impey* Ch V pp 131 147

left behind him a large sum of money, valuables and property It is alleged that as Shahaz Beg Khan was not having any issue he called Bahadur Beg, his nephew, to live with him At the time of his death, Bahadur Beg was living with him [99a] After the death of Shabaz Beg Khan in 1776 his widow and nephew came into open conflict and litigation began between them, each claiming the whole property of the deceased Naderah Begum claimed as a widow of the deceased on the basis of a dower deed and gift deed Bahadur Beg, on the other hand, stated that as an adopted son he was living with his deceased uncle and, therefore, being his legal heir received a "Khelaut" (present) from the Governor General

After the death of Shabaz Beg Khan, Bahadur Beg took the first step and presented an application before the Provincial Council at Patna,[1] praying that the Mohammedan law officers of the Council *i e*, Kazi and Muftis, may be directed to ascertain the petitioner's right over the property of the deceased He also pointed out that the widow of the deceased had embezzled some valuables of the deceased and that the same may be recovered from her for him As Ewan Law, the Chief of Patna, stated, the object of Bahadur Beg's petition was to obtain, 'the charge of the widow and the possession of the estate and this is ever the case where the widow has a claim to any considerable inheritance" The Provincial Council, instead of deciding the case itself, passed the case to the Mahommedan Law Officers, *i e* Kazi and Muftis The *Parwana* issued by the Council to the Kazi and Muftis provided, "that an inventory of the property of the deceased in the presence of both the parties was to be made by them and consequently to collect the money and goods and seal them up and provide for their safe custody and to report to the Council as to the rights of the parties according to the ascertained facts and legal justice"

The Mohammedan Law Officers carried out the directions of the Provincial Council very harshly while dealing with the widow Mill gives an account which would lead the reader to suppose that the widow acted throughout with an insane violence, while James Stephen's account gives us the view, which was subsequently taken by the Chief Justice, that in this instance the widow was regarded by "the black officers" as a "proper object of rapine and violence" However, the widow Naderah Begum, being afraid, fled from her house with some of the title deeds and her female slaves and took shelter in a *Dargah* (Muslim holy Shrine) The Law Officers posted a guard even at the gates of the *Dargah* where Naderah Begum was taking shelter

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99a *Home Miscellaneous Series* Vol 422 pp 720-30 *See* also W K Firminger, *Fifth Report of the Select Committee on the Affairs of the East India Company* p cclxxi

1 On 2nd January, 1774 *Law Consultations* (India Office Library) Range 166, Vol 82 pp 679 80

The Kazi and Muftis submitted their report to the Provincial Council on 20th January, 1777 From this report it appears that Bahadur Beg claimed his uncle's property as the adopted son of the deceased, while the widow claimed on the basis of *"Mehar Nama"* (Dower Deed), *"Hiba Nama"* (Gift Deed) and *"Ikrar Nama"* (Acknowledgment) The Mohammedan Law Officers reported that the will and deed of the gift were not genuine and were forged documents Therefore, they recommended that the property excluding *altamagha*, which would not form part of the inheritance, may be divided into four parts Out of which three parts were to be given to Bahadur Beg on the basis of consanguinity to the deceased and also as the heir of the deceased The fourth part was left for the widow [2]

The Provincial Council, accepting the recommendations of the Mohammedan Law Officers, ordered the division of the whole property into four parts It also issued an order for the trial of the agents of the widow and Kojah Zacheriah on the charge of forgery in the Faujdari Adalat The widow, Naderah Begum refused to accept the fourth share and declined to hand over her title deeds She also refused to return to the family house from *Dargah* Under the orders of the Council a regular guard was posted at the gates of *Dargah* This situation continued for a few months

After tolerating continuous harassment for few months the widow Naderah Begum appealed to the Sadar Diwani Adalat against the decision of the Provincial Council The Sadar Diwani Adalat consisted of the Governor General and the Members of the Council Due to their busy routine they found it difficult to consider this matter Governor-General Warren Hastings was also in conflict with the majority of his Council Members Warren Hastings taking the initiative wrote to Evan Law, Chief of Patna Provincial Council, for explanation, which was submitted The matter remained pending for a long time before the Sadar Diwani Adalat without any action Being disappointed, the widow, Naderah Begum, filed a suit before the Supreme Court against Bahadur Beg, Kazi[3] and Muftis[4] for assault, battery, unlawful imprisonment for a period of six months and depriving her of the possession of her property She also claimed damages amounting to six lacs Rupees [5]

The Supreme Court issued orders for the arrest of Bahadur

2 *Touchet Committe Report* 1781 Report of the Qazi Pat App 2 p 230 *See* also W K Firminger *Select Committee of the House of Commons Affairs of the East India Company Fifth Report* Vol I *Introduction* pp cclxxi-cclxxiv
3 Kazi Sadee
4 Two Muftis—Mufti Barackstoolah and Mufti Ghulam Makhdoom
5 *Touchet Committee Report* p 6

Beg, Kazi and Muftis against whom Naderah Begum filed the suit A bailiff was sent from Calcutta to arrest these persons and bring them from Patna for appearance before the Court None of them was granted bail except the Kazi for whom the Provincial Council supplied the bail guarantee The case was tried by the Supreme Court for ten days[6] While delivering judgment, the Chief Justice declared that the assertions of the Kazi and Muftis that the will and deed of gift were forgeries, were unproved "The documents on which the widow based her claim were not forgeries and that the Kazi and Muftis were not acting in good faith" "The circumstances," Sir Elijah Impey, C J , said, "make us shrewdly suspect that this identical report (which was prepared by Kazi and Muftis) never had existence till it was fabricated for the purpose of this cause" The Supreme Court held the Law Officers of the Patna Provincial Council of Revenue as amenable to a charge of assault and false imprisonment in regard to actions taken by them as public officers The Court awarded the damages Rs 3,00 000 for plaintiffs and Rs 9,208 as costs As the defendants were not able to pay damages and cost, they were ordered to be imprisoned The defendants were despatched to Calcutta under a guard of sepoys The unfortunate old Kazi died on the way and the other three persons remained in prison at Calcutta until 1781 when an Act of British Parliament directed that they should be discharged[7] The Council resolved in its meeting of 20th August, 1779 to file an appeal to the Privy Council against the judgment of the Supreme Court The Act of 1781 by its 27th Clause authorised the defendants to appeal to the Privy Council Although an appeal was filed on 28th July, 1784, it was not allowed to be dropped and was finally dismissed in 1789

(ii) Important points raised before the Supreme Court—The first and most important point raised before the Court was—In what sense Bahadur Beg and native law officers were subject to the jurisdiction of the Supreme Court?

It was proved that Bahadur Beg farmed the revenues of certain villages in Behar The Supreme Court, therefore, held that Bahadur Beg was in its jurisdiction as he was found to be a farmer of the revenues of the Company He being *Ijardar* was also directly or indirectly in the service of the Company Similarly, the other three persons were also servants of the Company and, therefore, were within the jurisdiction of the Court This view of the Supreme Court was subsequently criticised on the basis of three

6 The judgment was delivered on 3rd February 1779 During the trial forty witnesses appeared and forty six depositions were made by them See *Law Consultations* (India Office Library) Range 166 Vol 87 pp 319 30

7 The Company executed a bond for the balance of judgment debts in favour of Naderah Begum

factors, which may be stated as follows —No doubt the Charter of 1774 was not clear in laying down the jurisdiction of the Supreme Court but it was also not provided that the Court shall have jurisdiction over Zamindars and over any person by virtue of his interest in or authority over lands or rent within Bengal, Behar and Orissa or by reason of his becoming surety for the payment of such revenues In this case another important fact was that both the parties were Muslims to which the Mohammedan law of inheritance was to apply, and it was purely a matter of personal law to Mohammedans Lastly, there was no written agreement between the parties to submit the case to the Supreme Court for decision

Second important point related to the liability of the judicial officers of the Company who acted under the delegated authority of the Provincial Council On behalf of Kazi and Muftis, judicial officers of the Patna Provincial Council, it was pleaded that they were judicial officers and acted under the delegated authority of the Provincial Council It was also stated that the Provincial Councils of Revenue were acknowledged Courts of Judicature and that it was the established custom of the Provincial Councils to refer cases in which Mohammedans were parties and to which the Mohammedan law of inheritance would apply, to the Kazi and Muftis who would hear the evidence on both sides and report to the Council The Supreme Court, rejecting this plea, held that the proceedings of the Kazi and Muftis in this case were illegal "The Provincial Council," the Judges said, "had but a delegated authority from the President and Council and it is an allowed maxim of the law of England, *delegatus non potest delegare* The Provincial Council had no right to delegate to its law officers the hearing of the suit and to give a decision upon the basis of a mere report."

It was criticised subsequently, on the ground that the Kazi and Muftis discharged their duties as the regular law officers of the Provincial Council for which procedure was laid down by the Governor General and Council at Calcutta It was finally at the discretion of the Judges of Provincial Council either to accept or refuse the opinion of the native law officers while deciding the actual case Thus the Judges of the Provincial Council were in fact responsible and not the native law officers It appears Judges of the Supreme Court rejected this important defence argument Criticising the working of the native law officers, Warren Hastings, Governor General wrote, 'I cannot but take notice of the irregularity in the proceeding of the law officers whose business was solely to have declared the laws The Diwani Court was to judge the facts, their (*i e*, the law officers) taking on themselves to examine witnesses was entirely foreign to their duty,

they should have been examined before the Adalat" [8] In the light of this observation, the decision of the Supreme Court appears to be right James Mill's observations are not correct where he states that it was a "thirst for jurisdiction' or "lust for power" that incited the English judges to interfere with the administration of justice in the Provinces [9] In fact it was the prevailing corruption in the members of the Patna Council, and their utter lack of interest in the administration of justice that induced the judges of the Supreme Court to interfere in this sphere C J, Impey, was opposed to the irregular exercise of the powers by the Provincial Councils

(iii) Effect of the Patna case on the Company s Government in India —The facts of the case and decision of the Supreme Court exposed the weakness of the Company's administrative machinery in India It also pointed out the deteriorating state of the administration of justice in the country In his decision Chief Justice Impey pointed out, "Those gentlemen of Patna who sit in two capacities —in one as a Council of Revenue and State, and the other as a Court of Justice—keep no separate books for their separate departments, nor make any memorandums in their books, in which all their proceedings are confounded when they sit as a Council of Revenue and when as a Court of Justice and their books are the only records of causes I believe we might almost say this is the only cause entered in the book [10] It also proved that the Mofussil Courts under the Company s control failed to impart justice to the Indians

Another important reaction of the Patna case was that the local Zemindars refused to accept the work of revenue collection for the Company They were afraid of the jurisdiction of the Supreme Court It is stated that as many as 40 Zemindars submitted their resignations to the Council after the judgment of the Supreme Court in the Patna case Zemindars and the native law officers of the Company expressed their inability to co operate with the Company's Council in the provinces as well as in Calcutta

The Patna case also pointed out that the administration of justice under the Charter of 1773 was wholly inadequate This case was directly responsible for many provisions of the Act of Settlement which was passed in 1781[11] to remove the evil effects

8 *Touchet Committee Report* 1781 Pat App 7 p 236 *See* also W K Firminger *Fifth Report of the Select Committee of the House of Commons on East India Company Introduct in* p cclxxiii

9 James Mill *History of British India* Vol IV p 33'

10 *See* Stephen op cit Vol II p 181

11 Adquate compensation was granted by Act of 1781 to all those who suffered in the Patna case *Select Committee* 1782 *First Report Minutes of the Court of Directors* 27th June and 7th December 1781 pp 380-81

of the Regulating Act The Preamble of the Act of 1781 provided "That the Act was passed for the relief of certain persons imprisoned at Calcutta under the judgment of the Supreme Court and also for indemnifying the Governor General and Council and all officers who have acted under their orders or authority in the undue resistance made to the process of the Supreme Court." Unfortunately, the Patna case was made the subject of the second article of impeachment against Sir Elijah Impey, the Chief Justice of the Supreme Court

4 The Cossijurah Case (1779 80)

The conflicts, between the Supreme Council and the Supreme Court, which began after the Regulating Act, reached their climax in this case While the Supreme Court issued orders to the Sheriff to use force in order to carry out its orders, the Supreme Council ordered its troops to defend the implementation of its orders The situation became very explosive The Supreme Court also claimed its jurisdiction over the whole native population which was strongly opposed by the Supreme Council Due to these peculiarities this case is considered to be of great historical importance

(i) **Facts**—Raja Sundernarain, Zemindar of Cossijurah (Kasijora) was under a heavy debt to Cossinaut Babu (Kashinath) Though Cossinaut Babu tried to recover the money from the Raja through the Board of Revenue at Calcutta, his efforts proved in vain He, therefore, filed a civil suit against the Raja of Cossijurah[12] in the Supreme Court at Calcutta He also filed an affidavit on 13th August 1777 stating that the Raja, being a Zemindar, was employed in the collection of revenues and was thus within the jurisdiction of the Supreme Court The Supreme Court issued a writ of *capias* for the Raja's arrest Being afraid of this arrest the Raja avoided service of the writ by hiding himself The Collector of Midnapur, in whose district the Raja resided, informed the Council about these developments The Council, after seeking legal advice from its Advocate-General, issued a notification informing all the landholders that they need not pay attention to the process of the Supreme Court unless they were either servants of the Company or had accepted the Court's jurisdiction by their own consent The Raja was also specially informed by the Council and, therefore, his people drove away the Sheriff of the Supreme Court when that official came with a writ to arrest the Raja of Cossijurah

The Supreme Court issued another writ of sequestration on

12. *See* W K Firminger *Select Committee of the House of Commons Affairs of the East India Company, Fifth Report* Vol I *Introduction* p cclxxv B N Pandey *Introduction of English Law in India Career of Elijah Impey* Ch VII pp 176-196

12th November 1779 to seize the property of the Raja's house in order to compel his appearance in the Supreme Court This time the Sheriff of Calcutta, with a force of sixty or seventy armed force men, marched to Cossijurah in order to execute the writ They imprisoned the Raja and it is said that the Englishmen outraged the sanctity of the family idol, and entered into the *Zenana* In the meantime the Governor General and Council directed Colonel Ahmuty, Commander of the armed forces near Midnapur, to detach a sufficient force to intercept and arrest the Sheriff with his party and release the Raja from arrest Colonel Ahmuty sent Lieutenant Bamford with two companies of Sepoys to arrest the Sheriff with his party On 3rd December 1779 Bamford, with the help of William Swainston, arrested the Sheriff and his party while they were returning and kept them in confinement for three days Later on they were sent to Calcutta as prisoners Council released the Sheriff's party and directed Colonel Ahmuty to resist any further writ of the Supreme Court

Cossinaut Babu brought an action for trespass against the Governor General and the members of the Council individually At the first instance, they appeared in the Court but when they found that they were being sued for their acts done by them in their official capacity, they withdrew and refused to submit to any process of the Supreme Court The Council declared that persons in Bengal, out of Calcutta, need not submit to the Court and assured that the Council will safeguard their interests even by the use of armed forces The Supreme Court issued writs against all members of the Council except Governor General Warren Hastings and Barwell Impey, C J , said, "As to the Governor General and Barwell, we will not include them in the Rule because we will not grant a Rule which we cannot enforce' Army officials refused to allow the Supreme Court s officials to serve the writ to the Members of the Council The Judges of the Supreme Court grew angry and felt insulted As the Members of the Council were not served the writ, the Supreme Court took an action against North Naylor, Attorney-General of the Company North Naylor was tried by the Supreme Court on the charge of the Contempt of Court on 3rd March 1780 He was committed to prison and no bail was accepted because in the words of C J , Impey, the punishment was "exemplary"

Chief Justice Impey commented, "It was not within the power of the Governor General and Council or their Attorney to advise anybody on the question whether he was or was not subject to the jurisdiction of the Supreme Court ' Though no action was taken against the Members of the Council, Impey maintained that while the members of the Council were exempt from the criminal process in the Supreme Court, they were not exempt from civil action Referring to the Councillors' plea that

they were not subject to the Court's jurisdiction, Impey said, "That if they thought themselves not amenable to the Court they ought to plead to the jurisdiction, or demur to the plaint, and if they were discontent with our judgments, the Charter had given them a remedy by appeal "[13]

The Councillors further declared and conveyed to the Judges that if they were held answerable to the Supreme Court on the suit of an Indian, the respect for the government in the mind of the Indians would decrease and the administration will be weakened [14] The Supreme Court would not allow the Councillors to withdraw their appearance but it had no force or power to compel their appearance The Councillors were strongly sticking to their own stand They refused to submit to the authority of the Court and were ready to defy all the summons and orders issued by the Court This sort of extraordinary situation created complete deadlock and any move for compromise was being considered impossible At this critical stage, however, on 12th March 1780 the plaintiff, Cossinaut Babu, withdrew his suit against the Governor General, the Members of the Council and the Raja of Cossijurah [15]

(ii) **Observations on certain vital issues** —The Cossijurah case refers to two important questions for due consideration First whether Zemindars were subject to the jurisdiction of the Supreme Court? Second, who was the competent authority to decide this issue? As regards the first question, the Council's policy towards Zemindars may be traced from its attitude in an earlier case, *the case of Futty Singh* [16] The Council was successful in the *Futty Singh's case* as well as in the *Cossijurah case* to evade the judicial inquiry into the rights and status of the Zemindars Having once committed themselves to protect the Raja of Cossijurah, the Councillors could not withdraw their protection without damaging their power and prestige

This policy of the Council was devoid of any principle to protect and safeguard the interests of the Zemindars In fact in the political interest of the Company it was also necessary to keep the Zemindars ignorant about their rights and status There

13 *Impey to Weymouth*, March 12, 1780 p 363
14 *Touchet Committee Report* 1781 App 23 pp 356-59
15 *Impey Papers* Vol 16259 *Impey to Sulton*, 12th March, 1780 pp 431-41
16 In this case a person named Jagmohan, obtained a decree from the Supreme Court against Zemindar Futty Singh for the recovery of his debts. The Sheriffs declared the sale of the Zemindari of Futty Singh in the execution of the decree. The Governor-General and the Councillors applied to the Sheriff to abstain from executing the Court's decree against the judgment debtor In return the Councillors assured the Sheriff that he will be legally defended by the Council against the Court. This assurance was given in order to prevent any inquiry into the status of the Zemindars by the Court

are many instances[17] to prove that the Zemindars and hereditary Rajas and Ranis were at times harassed and humiliated by the Revenue Councils of the Company The Judges of the Supreme Court could not get an opportunity to enquire into the status of the Zemindars Regarding the next question, the Judges of the Supreme Court held that the Court was the competent authority to determine the legal status of the Zemindars and the Council had no such power

It appears to be a paradox that when Warren Hastings, Governor General, and Impey, Chief Justice, were personal friends, the Council used force against the Court to implement its orders It is on the record that after the hostilities began and before January 1780, Hastings and Impey several times met in private and discussed the situation [18] In his letter to John Purling, Warren Hastings wrote, "I sincerely lament our difference with the Judges, but it was unavoidable I think you will support us, if you do not, be assured Bengal, and of course India, will be lost to the British nation" [19] The contents of this letter point out that Warren Hastings considered the interest of the British nation more important than his personal friendship with Impey and took a strong action to safeguard the Council's superior position, though after the death of Monson and Clavering the balance of power in the Council was in his favour When the Force was used by the Council, Impey appeared to have lost hope of Court's victory over the Council, still he declared, "I have no authority to command troops but I can put those who do command them in a situation to answer to his Majesty for the contempt of His Authority" [20]

"At the time when the Cossijurah troubles were at their height", W K Firminger remarked, 'Calcutta was thrown into a state of wild excitement by other matters connected with the Supreme Court and with which the European inhabitants were more immediately concerned" [21] When Warren Hastings ordered the Military to arrest the Sheriff of the Court, he declared, "We are upon the eve of an open war with the Court" Under

17 Rani of Burdwan was interned in her house in 1777 and was insulted and humiliated for the arrears of revenue by the Council of Revenue, Burdwan Seroop Chand who was *Khazanchi* or Cash keeper of the Dacca Council was also harassed for arrears of revenue Seroop Chand filed a writ of *habeas corpus* before the Supreme Court against the Council which imprisoned him *See* Stephen opp cit Vol II p 15 *et seq*

18 *Touchet Committee Report* 1781 App 26 pp 369 374 *See* also Impey's letter to Thurlow dated 11th January 1780, *Letter Book of Impey* Vol 16259 p 313

19 Letter dated 14th March 1780 *see* G R Gleig *Memoirs of the Life of Warren Hastings* Vol II, pp 292-93

20 *Touchet Committee Report* Impey in *Rex* v *Naylor* p 355

21 W K Firminger *Select Committee of the House of Commons on East India Company Fifth Report*, Vol I *Introduction* p cclxxvi

these circumstances in March 1779 a petition, signed by all the prominent British inhabitants of Bengal, servants of the Company and Zemindars, was sent to the British Parliament against the excesses of the Supreme Court in Bengal The Governor General and the Council also submitted their petition to the British Parliament against the Supreme Court's activities in Bengal As a result of this petition, a Parliamentary Committee[22] was appointed The Committee presented a detailed report on the conflict between the Supreme Court and the Council The Parliament, therefore, passed an Act of Settlement in 1781

C Act of Settlement 1781

A survey of the history of seven years from 1774 to 1780 shows that the provisions of the Regulating Act, 1773 and the Charter of 1774 created many problems and conflicts The chain of events and the trial of strength in the Cossijurah case pointed out the serious growth of conflicts between the judiciary and the executive Not only the Governor-General and Council but the inhabitants of Bengal also submitted their petitions to the King in England. A Select Committee was, therefore, appointed under the Chairmanship of Burke to inquire into the administration of justice in Bengal On the basis of its report the British Parliament again intervened and the Act of 1781[23] was passed

1 Salient Features of the Act

The Preamble of the Act of 1781 stated, "Whereas it is expedient the lawful Government of Bengal, Behar and Orissa should be supported" In the collection of revenue, "the inhabitants should be maintained and protected in the enjoyment of all their ancient laws, usages, rights and privileges" The Act was passed in order to remedy "the ruinous mistake" of the Regulating Act of 1773 It was aimed to grant relief to certain persons imprisoned at Calcutta under a judgment of the Supreme Court and also to indemnify the Governor General and Council and all officers who acted under their orders or authority The Act of 1781 was passed in order to explain and amend the provisions of the Regulating Act Some important provisions of the Act of Settlement[24] may be briefly summarised as follows

(i) **Immunity granted to Governor General and Council**—The Act declared that the Governor-General and Council should not be subject jointly or severally to the jurisdiction of the Supreme Court "for or by reason of any act, order, matter counselled, ordered or done by them in their public capacity only

22. *Touchet Committee*
23 21 Geo III c 70
24 *See* W A J Archbold *Outlines of Indian Constitutional History*, p 67

and acting as Governor General and Council" Their written orders were sufficient proof to show that they deserved immunity from the Court's jurisdiction

(ii) **English law not applicable to natives** —Section 17 of the Act empowered the Supreme Court to determine all actions and suits against inhabitants of Calcutta subject to the preservation of the personal laws of Mohammedans and Gentoos (Hindus) in cases relating to their succession and inheritance to lands, rents, goods, in matters of contract and dealings between party and party Thus the English law was not applicable to natives

(iii) **Law of defendant to be applied** —It was provided that where parties were of different religion, their cases should be decided according to the laws and usages of the defendants [25]

(iv) **Restriction on the jurisdiction of the Supreme Court** —The Act expressly set limits to the jurisdiction of the Supreme Court It declared that the Supreme Court should not have any jurisdiction in any matter concerning the revenue or concerning any acts ordered or done in the collection thereof according to the practice of the country or the regulations of the Governor-General and Council

(v) **Exemption of Zemindars and land-holders from Supreme Court's jurisdiction** —It was further declared that the Supreme Court will not have jurisdiction on any person because of his being land-holder, Zemindar, farmer of land or rents, employed by a person who is under the employment of the Company or Governor General, in matters relating to inheritance or succession to lands or goods and dealings or contract between party and parties Certain exceptions were laid down to this general provision Thus the Supreme Court was empowered to have jurisdiction in actions for wrongs to trespass, and in civil cases where parties had agreed in writing to submit their case to the Supreme Court

(vi) **Exemption of Judicial Officers** —It was also provided that the Supreme Court will not entertain cases against any person holding judicial office in any county courts for any wrong or injury done by his judicial decisions Persons working under the authority of such judicial officers were also exempted

(vii) **Recognition of Provincial Courts of Company** — The Parliament recognised, by the Act of 1781, civil and criminal Provincial Courts These Company's Courts were existing independently of the Supreme Court It was one of the most

25 See G C Rankin *Background to Indian Law* p 9

important provisions of the Act of 1781 as it completely reversed the policy of the Regulating Act

(viii) Recognition of Sadar Diwani Adalat (Governor-General and Council) as Chief Appellate Court —The Act provided that the Sadar Diwani Adalat will be the Court of Appeal[26] to hear appeals from the country courts in civil cases It was recognised as Court of Record Its judgment was final and conclusive except upon appeal to the King in Council in civil cases involving Rs 5,000 or more Sadar Diwani Adalat was presided over by the Governor-General and Council It was also empowered to hear and decide cases of revenue and undue force used in the collection of revenue [27]

(ix) Power to frame Regulations —The Act of 1781 authorised the Governor General and Council to frame Regulations for the Provincial Councils and Courts [28] Copies of such Regulations were sent to the Court of Directors and the Secretary of State within six months from the passing of such Regulations This rule making power was independently exercised by the Governor General and Council under the Act of Settlement Earlier, under the Regulating Act, the power of the Governor General and Council was limited by the controlling power (approval) of the Supreme Court

(x) Indemnity —The Act of 1781 provided for the release of all the defendants who were arrested in the Patna Case The Governor General and Council gave security for payment of damages awarded to them They were also allowed to file an appeal to the King in Council against Supreme Court's judgment. The Act also provided that the Governor General and Council, Advocate-General and all persons acting under their orders, so far as the same was related to the resistance of any process of the Supreme Court from 1st January 1770 to 1st January 1780, were to be indemnified and harmless from any action or prosecution due to the said disobedience of the orders of the Supreme Court

On the whole, the British Parliament, by enacting the Act of Settlement 1781 favoured the Governor General and Council as against the Supreme Court It was clearly a policy decision for the British Parliament The Britishers realised that in order to acquire territory in India and to establish the British Empire in India it was important to support the Governor General and Council They refused to allow the Supreme Court to introduce English principles of independence of the judiciary and the rule of law in India Ilbert said, "A legislative reversal of a judicial

26 Section 21
27 Section 22
28 Section 23

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 [29] Cowell has well remarked, "Thus within eight years the main provisions of the Regulating Act were swept away Their attempt to introduce an English superintendence of law and justice on the part of the Crown, and an administration of English rules of law and equity by an English Court, modelled according to English fashion was made rashly and ignorantly, without any scheme or due preparation, without any measures being taken to ensure the co-operation of the local authorities, but on the contrary with every attempt to impose upon them a policy to which they were opposed, and which they were determined to subvert" [30]

2 Criticism of the Act

Though the Act of 1781 succeeded in removing many defects of the Regulating Act, still some of them continued to exist Even after the Act of Settlement, the relationship between the Indian territories and the British Crown was not quite clear There was neither any policy statement to this effect nor any provision was made in the Act It appears the British Parliament intentionally avoided to declare its policy at this state of territorial acquisition by the English Company in India In both the Acts, the term "British Subjects" is used but nowhere is it made clear, whether any Indian natives were to be comprehended under this term It gives an impression that both Hindu and Mohammedan inhabitants were excluded from the meaning of "British Subjects" Referring to one more defect in the Act of 1781, Grey stated, "There was no reply in the Act, on the question, whether the Provincial Courts were to have a concurrent jurisdiction with the Supreme Court or an exclusive one" [31] The distinction between the Presidency Towns and the Mofassil, which originated due to the Mughal Empire and the Company's factories, continued to exist for a long period of time The settlement of problems by the Act of 1781 was, according to Cowell, "crude and unsatisfactory" [32]

D Supreme Courts of Calcutta, Bombay and Madras

1 Supreme Court at Calcutta

The Supreme Court of Judicature was established at Fort

29 C Ilbert *The Government of India* pp 60-61
30 Cowell *History and Constitution of the Courts and Legislative Authorities In India* pp 61 62
31 Sir C Grey's Minute See *5th Appendix to the Third Report of the Select Committee of the House of Commons* p 1145
32 Cowell *History and Constitution of the Courts and Legislative Authorities in India* p 63

William, Calcutta, in 1774 Earlier, it was on the recommendation of a Committee of the House of Commons that the Regulating Act[33] was passed by the British Parliament in 1773 The Regulating Act empowered the King to establish by Charter or Letters Patent, a Supreme Court at Fort William In pursuance of the provisions of the Act of 1773, the King issued a Charter on 26th March, 1774 establishing the Supreme Court at Calcutta The Mayor's Court was abolished and its records and proceedings were delivered to the Supreme Court It was a Court of Record

The Supreme Court consisted of one Chief Justice and three Puisne Judges All of them had to be Barristers and to be appointed by the Crown All the Judges were appointed to be Justices and Conservators of the Peace and Coroners within the provinces of Bengal, Bihar and Orissa They were to have jurisdiction and authority as the Justices of the Court of King's Bench in England All the writs, summons and orders were issued in the King's name and attested by the Chief Justice The Charter of 1774 appointed Elijah Impey as the first Chief Justice and Robert Chambers, Stephen, Ceaser LeMaister and John Hyde as the first Puisne Judges

The Supreme Court was authorised to try and determine all actions and suits that might arise within Bengal, Bihar and Orissa against British subjects and against the inhabitants of India residing, at the said provinces upon an agreement in writing, with British subjects and when such Indian inhabitants agreed in writing that the matters in dispute should be determined in the Supreme Court[34] The Supreme Court was also a Court of Equity, Court of Oyer and Terminer and Gaol Delivery for Calcutta, a Court of Ecclesiastical jurisdiction and a Court of Admiralty

The exercise of wide jurisdiction of the Supreme Court at Calcutta, created many conflicts[35] between the Supreme Court and the Council of the East India Company In order to avoid such conflicts between the Supreme Court and the Council, the British Parliament passed the Act of Settlement in 1781 By this Act it was *inter alia* declared that the Supreme Court, thereafter, should have no jurisdiction over the Governor General and the Council for any act or order made or done by them in their public capacity The Supreme Court was deprived of its jurisdiction in revenue matters It was clearly laid down that no action

33 For details *see* Section A of this Chapter *The Regulating Act*"
34 Morley *Administration of Justice in India* pp 5 22
35 From 1774 to 1780 famous cases were *Trial of Raja Nand Kumar*, *Commal ud-din's case* *Kasjurah case* For details *see* Section B of this Chapter, Some Important Cases'

for wrong or injury should lie in the Supreme Court against any person exercising a judicial office in the Country Courts for any judgment, decree or order of such Courts

The Act of Settlement, 1781 restricted the territorial limits of jurisdiction of the Supreme Court to the town of Calcutta The personal law of the Indians was also directed to be administered in the Supreme Court The powers and the jurisdiction of the Company's Courts and the Supreme Court were thus separated and the independence of each was specially preserved The dual system of Courts continued Since 1781 the Supreme Court at Calcutta enjoyed the confidence of the litigants [36]

In 1784 the Statute of George III provided that all His Majesty's subjects and servants of the Company were amenable to all Courts of justice in India and England for all criminal offences committed in the territories or in the state of any native Prince In 1793, the Admiralty jurisdiction of the Supreme Court was extended and the Court was authorised to try all offences committed on the High Seas by means of juries of British subjects

In 1858, the Act for better Government of India was passed by the British Parliament In September 1858, the Directors of the East India Company transferred the whole of their possession in India to the Crown By a proclamation on 1st November, 1858 the transfer of the Company's Government to the Queen was announced In August 1861 the British Parliament passed an Act for the establishment of High Courts in India In pursuance of the Act, Letters Patent was issued on 14th May, 1862 which defined the jurisdiction and powers of the High Court of Judicature at Fort William in Bengal

The Company's Courts were also taken over by the Crown The District Courts were made subordinate to the High Court Thus, for the first time, all the Courts in Bengal became Crown's Courts and were brought under one unified system of control by the High Court of Judicature at Calcutta

2 Supreme Courts at Madras and Bombay

At Madras and Bombay, the conditions were not similar to those of Calcutta and, therefore, for a long time it was not considered suitable to establish Supreme Court in these provinces The establishment of the Supreme Court at Calcutta was on an experimental basis and the authorities preferred to wait and see its fruitful results before establishing such a court anywhere else In the meantime, when it became necessary to introduce changes

36 Cowell *History and Constitution of Courts and Legislative Authorities in India* p 63

in the existing Mayor's Courts, the Company authorities advised Parliament to establish Recorder's Courts at Madras and Bombay Thus the Supreme Courts were established only after the abolition of the Recorder's Courts

(i) **Recorder's Courts** —The Mayor's Courts, which were re established by the Charter of 1753 at Madras and Bombay, were abolished by an Act[37] of the British Parliament in 1797 and the same Act authorised the Crown to issue a Charter[38] to establish Recorder's Courts in their places The Recorder's Court, which was also declared as a Court of Record, consisted of a Mayor, three Aldermen and a Recorder The Recorder, who was President of the Court, was appointed by His Majesty from amongst the lawyers having at least five years standing at the Bar The Recorder's Court exercised jurisdiction in civil, criminal, ecclesiastical and admiralty cases over the British subjects residing within the British territories, subject to the Madras and Bombay Governments respectively, and also over those residing in the territories of native Princes who were in friendly alliance with the Company They were empowered to frame rules of practice and were authorised to act as Courts of Oyer and Terminer and Gaol Delivery

The jurisdiction of the Recorder's Courts was similar to that of the Supreme Court at Calcutta subject to the restrictions imposed by the Act of 1781 The personal laws of Hindus and Mohammedans were safeguarded and the Governor and Council and officers working under their orders were declared immune from the jurisdiction of the Recorder's Courts From their decisions direct appeals were allowed to the King in Council The Recorder's Courts enjoyed better reputation and were more effective than the Mayor's Courts specially due to the presence of professional legal experts on the Bench Another important feature was that the Court was granted both civil and criminal jurisdictions which were previously entrusted to the Mayor's Court and the Court of Governor in Council respectively Somehow, even the Recorder's Courts could not survive for long due to the growing demand for more reforms in the machinery of the administration of justice and therefore, ultimately they gave way to the Supreme Courts at Madras and Bombay

(ii) **Supreme Court at Madras** —In 1800 the British Parliament passed in Act[39] empowering the Crown to establish a Supreme Court at Madras in place of the Recorder's Court The Crown,

37 George III c 142

38 In 1798 the Crown issued the Charters by which Recorder's Courts were established at Madras and Bombay The first Recorders at Madras and Bombay were Sir Thomas Strange and Sir William Syer respectively

39 39 & 40 Geo III c 79

(iv) Conflicts between the Supreme Court and the Government of Bombay —The Crown by issuing the Charter of 1823 intended that the Supreme Court will act as a check upon the Company's Government, but this object was not achieved due to peculiar conflicting situations which arose, during the period 1828 to 1858, between the Chief Justice Sir E West and Governor Elphinstone [44]

As early as 1826, the Supreme Court at Bombay came into conflict with the Government when the Supreme Court rejected the draft law which was sent by the Bombay Government to it, under the Charter of 1807,[45] for its approval The Government proposed a law prohibiting the publication of any newspaper except by persons holding a licence, which was revocable at will, from the Governor Sir E West, the Chief Justice of the Supreme Court, rejecting the draft law declared that there was nothing in Bombay to justify such a restriction on the liberty of its subjects When the viewpoint of the Chief Justice was criticised by certain newspapers, the Chief Justice condemned the papers as Government papers But the Governor denied that any newspaper was backed by the Government [46]

In 1828 another conflict arose when Moro Raghunath, a boy of 14 years, was detained by his grandfather for over a year at Poona and a relative of the boy moved the Supreme Court for the issue of writ of *Habeas Corpus* The Advocate-General opposed the writ petition on the ground that the boy and his father were not within the Court's jurisdiction as they were natives residing at Poona Ignoring this plea the Court issued the writ In September 1828 in another case of Bappoo Gunness, the Supreme Court issued writ of *Habeas Corpus* to the jailor to produce before it the prisoner Bappoo Gunness who was arrested under the orders of the Company's Court The Governor-in Council directed

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44 *Earlier the Recorder's Court at Bombay punished many highly placed* Government officials, who were found guilty of corruption and other misdemeanours Governor Elphinstone disliked firm steps taken up by the Recorder's Court and expressed his indignation In 1823 Sir E. West, when he was the Recorder of the Recorder's Court at Bombay dismissed Erskine a favourite of Governor Elphinstone from the Company's services on the charges of corruption The Governor felt insulted and subsequently whenever he got an opportunity showed discourtesy towards the Chief Justice Thus the conflicts continued developing between them in future too *See* Drewitt *Bombay in the Days of George II* pp 56 214

45 Charter of Geo III issued in 1807 granted legislative powers to the Governors and Councils of Bombay and Madras subject to the approval of Recorder's Court and the Supreme Courts respectively In Bombay the Supreme Court replaced the Recorder's Court and thereafter it began to exercise its power to approve or reject the draft law referred by the Government for its approval Similar power was granted to the Supreme Court at Calcutta by the Regulating Act
Colebrooke, *Life of M Elphinstone*, Vol II, pp 176-180

the jailor not to send the prisoners to the Supreme Court and stated that the Supreme Court had no authority to discharge a person imprisoned under the orders of the native Court At this attitude of the Government, in April 1829 the Chief Justice Sir John Grant, was embroiled in a violent conflict with the Bombay Government and closed the Court *suo motu* The Chief Justice sent a petition to His Majesty against Government's intervention in the Court's process and prayed for the issue of directions to the Government "for the due vindication and protection of the dignity and lawful authority of His Majesty's Supreme Court at Bombay" The petition was considered by the Privy Council and its report was affirmed by His Majesty The Privy Council reported[47] against the Supreme Court It was stated that the Supreme Court had no authority to issue a writ of *Habeas Corpus* to the jailor or officer of a native Court, 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

Referring to certain instances of conflict between the Supreme Court and the Government of Bombay, the Bombay City Gazetteer stated " In 1830, after the death of Sir J Dewar, the sole Judge on the Bench, the Court was closed for a month, in 1841, a great contempt case occurred just prior to the arrival of Sir Erskine Perry, and at a moment when Sir H Roper was alone on the Bench, while in 1858 the Court was again embroiled with the Bombay Government on the question whether the Police Commissioner had any legal right to remove a prisoner to Thana Jail without the sanction of the Supreme Court The friction which from time to time occurred was to some extent engendered by the fact that the Supreme Court had nothing whatever to do with the ordinary administration of justice in the mofussil" [48]

In spite of all the above stated conflicts, the Supreme Court functioned at Bombay up to 1862 when the High Court of Judicature was established at Bombay under the Indian High Courts Act 1861 Gradually the purity and the prestige of the judicial administration went on increasing in Bombay

3 Law administered in the Supreme Courts

The Supreme Courts of Calcutta, Madras and Bombay were empowered to exercise civil, criminal, equity, ecclesiastical and

47 In re the Justices of the Supreme Court of Judicature 1 Knapp P C 1 *See also Ryot of Garabandho v Zemindar of Parlakimedi* 701A 129 161 For details regarding issue of writs *See* Chapter on *History of Writs in India* in this book

48 Quotation cited by P B Vachha in *Famous Judges Lawyers and Cases of Bombay A Judicial History of Bombay during the British Period at* p 29, for a detailed account of conflicts between executive and judiciary in Bombay, *See*, pp 191 200.

admiralty jurisdictions The laws, which were applied and administered by the Supreme Courts may be classified under the following eight headings[49]

(*i*) The Common law, as it prevailed in England in 1726 and which has not subsequently been altered by Statutes specially extending to India or by the Acts of the Governor-General in Council

(*ii*) The Statute law which prevailed in England in 1726 and which has not been altered by the Legislative Council of India

(*iii*) The Statute law expressly extending to India which had been enacted since 1726, not repealed as yet and Statutes extended to India by Acts of Governor-General-in-Council

(*iv*) The civil law as applied in the Ecclesiastical and Admiralty courts in England

(*v*) Regulations made by Governor-General-in Council and Governors in-Council and registered in Supreme Courts prior to the Charter of 1833

(*vi*) The Acts of Governor-General in-Council passed under the Charter of 1833

(*vii*) The Hindu Law and usages in actions regarding inheritance and succession to lands, rents, goods and all matters of contract and dealing between party and party in which a Hindu was a defendant

(*viii*) The Mohammedan Law and usages in actions regarding inheritance and succession to lands, rents, goods and all matters of contract and dealing between party and party in which a Mohammedan was a defendant

49 W H Morley, *Administration of Justice in British India*, pp 22 24

6

Role of Cornwallis in Judicial Reforms

Lord Cornwallis, who succeeded Warren Hastings,[1] came to India in September, 1786 and continued as Governor General up to 1793 During this period he introduced several important changes in the judicial system of India His rule marks an epoch in the history of British administration in India Reforms were introduced in the administration of civil and criminal justice, and great success was achieved in combating corruption and he was associated with the Permanent Settlement of Bengal, Bihar and Orissa, where the prevailing level of land revenue assessment was made "perpetual" in 1793

A Company's Government before Cornwallis

The Regulating Act had succeeded neither in establishing a clear control of the Directors over the Company's servants, nor in strengthening the powers of Parliament over the Company Apart from this, the combined forces of Parliament and that of the Directors failed to recall Warren Hastings in May, 1782 It was considered a sad commentary on the existing situation[2] In other words, the growing strength of the Governor General as well as the efforts of the Proprietors of the Company to exploit the situation in his favour, came to light

Pitt the Younger, when he became Prime Minister of England, was called upon to deal with the problems not only relating to the administrative machinery of India but also the constitution of the Company and the necessary machinery of the Crown to control it

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1 Warren Hastings departure from India was followed by twenty months rule by John Macpherson a senior member of the Council After Macpherson in 1786 Lord Cornwallis was appointed Governor-General He was sent from England to India in September 1786

2 Three constructive proposals emerged from this period The first was Dunda s Bill 1783 a centralising measure which was rejected by the British Parliament The second was Fox s India Bill 1783 which provided to supersede both the proprietors and directors with seven Commissioners appointed by the Crown The Bill was rejected with the fall of the Fox North Coalition Ministry King George III invited Pitt the Younger to form a new Cabinet Thus the third measure was Pitt s India Bill which actually passed into law in August 1784

1 Pitt's India Act, 1784

In order to strengthen the power of the controlling machinery of the Company's Government in England, the Act introduced vital changes by setting up a Board of Control and recognising the Court of Directors Some important provisions of the Pitt's[3] India Act, 1784,[4] may be stated as follows —

A Board of six Commissioners was set up in England, which was called Board of Control It consisted of a Secretary of State, the Chancellor of Exchequer and four other members from the Privy Council[5] to be appointed by the Crown The Secretary of State was to act as Chairman of the Board having a casting vote The Board was authorised to superintend and control all the revenue and civil activities and the military forces held by the British in the East Indies The Directors of the Company were required to supply to the Board, copies of all communications received from India and of all resolutions, orders and minutes of their proceedings and their despatches to Indian authorities The orders and despatches proposed by the Directors, before they were actually sent to India, had to be approved by the Board which could modify the drafts or substitute new ones in their place and require the Directors to send the same to the authorities in India The Board could also send secret directions to the Secret Committees of the Directors to be conveyed to India

The Court of Proprietors was completely deprived of its power to counter the orders and resolutions of the Directors, which had secured due approval of the Board of Control

The Court of Directors was allowed to retain its full powers in the appointment, reduction and retrenchment of all the civil and military servants of the Company The Act provided for the setting up of a Secret Committee consisting of not more than three Directors to which secret matters would be referred by the Board The Commercial privileges of the Court of Directors were left intact and it was empowered to appeal to the King in Council in case of any encroachment on its rights by the Board

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3 If it is the distinction of Lord Cornwallis to have been the first Governor General to purify successfully the administration of India, it is no less the distinction of Pitt the Younger to have been the first minister to provide for the same high principle such sanctions in an Act of Parliament that the evils ceased altogether and became more matters of history *See* also Sir V Chirol *India Old and New* p 73

4 24 Geo II Sess 2, c. 25 For Pitt's Speech at the first reading *see* P Mukharji *Indian Constitution Indian Constitutional Documents* pp 25 28

5 Subsequently modified to any two Secretaries of State the Chancellors of the Exchequer and two Privy Councillors By the Charter Act of 1793 instead of two Privy Councillors any two persons could be appointed upon the Board

As regards the Central Government of the Company in India, the Act provided that it will consist of three other members besides the Governor General[6] Out of the three members one was to be the Commander in Chief of the British Forces in India More effective, a casting vote was given to the Governor General It was provided that the members of the Council were to be appointed from amongst the covenanted servants of the Company in India In the appointment of the Governor General, the Directors were required to secure prior approval of the Crown The Directors were given full powers in the appointment of the members of the Council and Governors But the Crown was empowered to recall a Governor General or any Governor in case it so desired Resignations of the high officials were required to be in writing[7] The Governor General and Council were not authorised to declare war on another power without the express permission and authority of the Court of Directors or at least of the Committee of Secrecy The control of the Governor General and Council in Bengal was strengthened on the presidencies which were required to work under their supervision and direction in revenue matters, and in matters of war, peace and treaties with the Indian powers In sudden emergency cases the presidencies were allowed to enter into such treaties which were subject to the ratification of the Governor General and Council In the case of specific direct orders from the Directors, the presidencies were allowed not to obey the Governor General and Council But in such cases the presidencies were required to send immediately a copy of such direct orders to the Governor General All the Co npany s possessions in India were, for the first time, stated as the "British Possessions"

The Government of the presidencies was to consist of a Governor and Council of three members One of these was required to be the Commander in Chief of the Company's forces in the presidency Other two members were to be from amongst the covenanted members of the Company The Governor and Councillors were appointed by the Court of Directors The Crown reserved the right to recall or remove any of them The presidencies were completely made subordinate to the Governor General and Council In case of disobedience the Governor of a presidency was liable to be suspended They were required to send copies of papers on all matters to the Governor General

Apart from these vital constitutional changes, the Act also made provision to regulate the presents and to check corruption

6 The Regulating Act provided for four other members of the Council besides the Governor General

7 This provision was specially made in order to obviate the possibility of the repetition of the trouble created at the time of Warren Hastings resignation in 1777

amongst the servants of the Company holding high posts The Act provided that if any officer of the Company demanded or received any present, his act would be considered as extortion On their return to England, the Company's officers could be required to declare on oath the fortunes they possessed If the Company's servant was dismissed by judicial action, he was not entitled to be restored to his office or be released from an internment by any authority of the Company Any bargain for receiving or giving up an office or disobeying the Directors was declared a misdemeanour For the purpose of trying cases of extortion and other misdemeanours, a special Court was to be set up in each session The Court consisted of three judges, four Peers and six members of the House of Commons Though this was a very important provision it was amended in 1786 The Governor-General and Governors were given special powers to arrest a person within the European Settlements in any Native State, who was suspected of having unlawful correspondence with those authorities By another important provision of the Act, all the subjects of His Majesty whether in the service of the Company or not, were brought under the jurisdiction of the Courts in Great Britain and India, for any crime committed in the territories of an Indian State

The most important feature of the Pitt's India Act, 1784, was that it introduced a dual Government for the Company's affairs in England The control of the purely commercial functions was placed entirely into the hands of the Director, while for the control of the Company's political functions the responsibility was given to the Board of Control The Board represented the Crown, while the Directors represented the Company The power of the Court of Proprietors to influence political decisions in India came to an end

2 Appointment and instructions to Lord Cornwallis

Before accepting his appointment as Governor General, Cornwallis laid down two conditions, that the Governor General will have power to override his council and the office of the Governor General and the Commander in Chief will be united under one person The conditions, as laid down by Lord Cornwallis,[8] were accepted and the Governor General became the effective ruler of British India under the authority of the Board of Control and the Court of Directors He was also successful in preventing any

8 Cornwallis came with such advantages as no predecessor ever had He was Commander in Chief as well as Governor-General and his rank set him above the necessity of trucking to anybody He was indifferent to pecuniary gain and adulation a man of sturdy courage honesty *See* Thompson and Garratt *Rise and Fulfilment of British Rule* p 171

repetition of the embarrassments from which Hastings suffered [9] The Governor General and Council now became the Governor-General in Council and this position continued up to 1947

Certain specific instructions were given to Lord Cornwallis in three matters First, to deal with the problem of land revenue, secondly, improvement in the administrative machinery, thirdly, to introduce reforms in the judicial system The instructions contemplated the reuniting of the functions of Revenue Collector, Civil Judge and Magistrate in one and the same person as it would lead to simplicity, justice and economy As a matter of policy civil justice was to be allowed to continue under the European judges Regarding criminal jurisdiction, it was stated that the powers of trial and punishment must, on no account, be exercised by any other than the established officers of the Muslim judiciary European ideas of justice were to be introduced into the judicial system of India The Governor General was specially required to keep a strict watch on the methods by which the servants of the Company became rich [10]

3 Advisers of Lord Cornwallis

Though Cornwallis had little knowledge regarding Indian affairs, he was fully aware of the defects of the Regulation Act, and the Act of Settlement and of the role of Warren Hastings in India It was specially due to this fact that Cornwallis accepted the Governor Generalship only when the Military Command was united with his office and the Governor General was made independent of his Council Sound government in the interest of the inhabitants was henceforth the touchstone of the policy rather than an enlargement of the Company's investment or an increase in territorial revenues The haphazard expansionism of the preceding thirty years was stopped and the change proved to be a stopping-place rather than a change of direction but it was nevertheless effective and significant Due to his inexperience in Indian affairs, Cornwallis largely depended on his advisers [11] Fortunately, he found able persons from the Company's servants in India Sir John Shore,[12] an expert in administration and land

revenue, became his chief lieutenant in revenue matters Cornwallis once wrote, "The abilities of John Shore, his knowledge in every branch of the business of this country and his character in the settlement render his help to me invaluable" [13] Jonathan Duncan, who later became Governor of Bombay, was second in Cornwallis's estimation There were the cousins Charles and James Grant, the former of whom became Chairman of the Directors and the later, his son, a President of the Board of Control, and Charles Stuart the Commercial expert Sir William Jones, an eminent Oriental Scholar and Judge of the Supreme Court, was his chief adviser in the field of judicial reforms and police regulations in India Above all, Lord Cornwallis's own judgment in all these fields was praiseworthy

B Judicial Reforms of Lord Cornwallis

When Lord Cornwallis came to India in 1786, he was greatly dissatisfied with the existing system of the administration of justice Warren Hastings before returning to England separated the work of collecting revenue from administration of justice Civil justice was administered in local civil courts, namely, Mofussil Diwani Adalat and Sadar Diwani Adalat For criminal cases there were separate courts The final authority in civil cases directly and in criminal cases indirectly was with the Supreme Council Lord Cornwallis found that the whole system was complicated, illogical, wasteful and suspected of being corrupt He had already received instructions from the Directors to remove all these abuses Thus Cornwallis was faced with two difficult tasks—to simplify the complicated and expensive machinery of administration of justice and to uproot corruption from the Company's servants in administration

Cornwallis reformed the whole system of civil and criminal justice by a method of trial and error In the judical system Cornwallis introduced reforms in three instalments—in 1787, 1790 and 1793, respectively

1 Judicial Plan of 1787

The Directors gave instructions to Lord Cornwallis to bring simplicity, economy and purity into the judicial system The existing separation of the revenue and judicial functions was removed and both the functions were united [14] The existing 36 districts were reorganised and the number of districts was reduced to 23 Each district was in the charge of a Collector, an Englishman In each district the Collector was responsible for the collection of revenue, to decide cases and matters relating to

13 *See* Philip Woodruff *The Men Who Ruled India* Vol I pp 146-148
14 W H Morley *The Administration of Justice in British India* pp 53 54

revenue He was also to act as the judge in the Mofussil Diwani Adalat of the District and decide civil cases. The Collector was also entrusted with magisterial powers in his district Though the Collector was given all these powers, he was advised to keep his various functions separate from each other, as far as possible His revenue functions in the revenue court were known as *Mal Adalat* From the Collector's revenue court, first appeal was to go to the Board of Revenue at Calcutta and final appeal lay with the Governor General in Council on the executive side

The Collector, in the capacity of a Judge, was to hold the Mofussil Diwani Adalat Apart from civil cases, the Court was also required to decide cases and claims concerning succession and boundary disputes of Zemindars The Collector was instructed to have due consideration of the prevailing local customs or usages while dealing with the succession to Zemindaries *etc* Appeal from the Mofussil Diwani Adalats lay to the Sadar Diwani Adalat in matters involving more than Rs 1,000 Sadar Diwani Adalat consisted of the Governor General and members of his Council They were assisted by the Native Law Officers Where the valuation of the suit was £ 5,000 or more, a further appeal was allowed to the King in-Council in England

In order to assist the Collector in deciding civil cases, an Indian Registrar was also appointed in each district civil court to try petty cases up to Rs 200 Decrees passed by the Registrar were required to be countersigned by the Collector This system was introduced in order to avoid any injustice to litigants

While discharging his duties as a Magistrate in each district, the Collector was empowered to arrest, try and punish the criminals in petty offences In the case of graver offences, where the punishment of imprisonment was expected to be of more than 15 days, the arrested accused was sent to the nearest Mofussil Nizamat Adalat for trial and punishment All Europeans who were not British subjects were placed on the same footing in criminal matters as the Indians and the Mofussil Faujdari Adalats were authorised to try and punish them

Though by the judicial reforms of 1787, Cornwallis united the judicial office and administration in the hands of one English man *i e* Collector, it was considered a better step to suit the then existing conditions than the earlier separation of judiciary and executive

2 Criminal Judicature Reforms in 1790

In 1787 when Cornwallis introduced reforms in the civil and revenue courts he purposely avoided introduction of any major

reforms in the criminal courts It appears that he wanted more time to study the functioning of the criminal judicature and its role in suppressing crimes After gaining sufficient experience from 1786 to 1790, Cornwallis realised that the prevailing system of the administration of criminal justice was very defective and futile [15] Robberies, murders and other crimes relating to life and property of the natives, were increasing He found that these evils were growing due to two main causes First, the defective state of the Mohammadan criminal law secondly, defects in the constitution of the trial courts due to which they failed to deal with criminals Apart from this, he was also convinced that it was necessary to check the prevailing corruption amongst the native courts and officers

In order to improve the law and order situation and punish the criminals severely, Cornwallis introduced vital reforms in 1790 [16] He realised that it will be a blunder to leave the administration of justice in the hands of the natives He was very doubtful about the honesty of the Muslim officers, and therefore, as a matter of principle he decided not to give any important judicial and administrative office of responsibility to any Indian

Cornwallis resolved to abolish the authority of Nawab over criminal judicature Reza Khan, who was so far *Naib Nazim*, was dismissed from his office and the Sadar Nizamat Adalat was again shifted from Murshidabad to Calcutta The Governor General and Members of his Council presided over the Sadar Nizamat Adalat They were assisted by the Chief Kazi of the Province and two Muftis who expounded the law and issued Fatwa Sadar Diwani Adalat was the Court of Appeal It took cognizance not only of judicial matters but also of the general state of Police throughout the country Full record of proceedings of the court was maintained Neither parties nor their lawyers were allowed to plead and present their cases before the Court The Court decided cases in appeal on the basis of the report of the trial magistrate proceedings of the Circuit Court and written pleadings and defence of the parties At this time the Chief Kazi and two Muftis assisted the Appellate Court in deciding the cases

Mofussil Faujdari Adalats were abolished The whole Diwani area was divided into four Divisions of Calcutta, Murshidabad, Dacca and Patna In each Division a criminal Court was established which was called the Court of Circuit Each Court of Circuit

15 *See* Aspinall *Cornwallis in Bengal* Chs II and III

16 In 1790 Lord Cornwallis sent a questionnaire to all magistrates inviting their comments on the existing crimes and ways and means to suppress them and punish the criminals In the light of these findings and his experience Cornwallis introduced reforms on 3rd December 1790 in the law of crimes and the Courts

was presided over by two covenanted servants of the Company, who were Englishmen They were assisted by the Kazi and Mufti The Court of Circuit was not a stationary Court but was a moving or circulating Court going from district to district in its respective circuit division An appeal from Circuit the Court lay to the Sadar Nizamat Adalat at Calcutta

Each circuit was divided into various districts In each district, the Collector was to act as Magistrate The Magistrate's was the lowest criminal Court It tried and punished criminals in petty offences In grave offences the Magistrate was to send the criminal to the Court of Circuit for trial and punishment The Magistrate of every district was required to send 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, *etc* Half yearly reports of the convicts were also sent to the Sadar Nizamat Adalat

(i) Mohammedan Criminal Law —Cornwallis was convinced that the Mohammedan criminal law was in many respects very defective He found that some of its provisions were contrary to natural justice and in certain cases the punishment prescribed was too cruel *e g* , mutilation *etc* It also failed to check corruption amongst the local judicial and administrative officers In 1790 Cornwallis introduced certain very important reforms in the Mohammedan criminal law and all Nizamat Adalats were instructed to decide cases according to the modified rules of Mohammedan law It was now laid down that while determining the punishment to be given for the crime of murder, the intention of the party rather than the manner or instrument employed, should be taken into consideration The relatives of a murdered person were now deprived of their right to pardon the criminal[17] The punishment of mutilation was abolished Imprisonment and hard labour for fourteen years were substituted where the punishment prescribed was the loss of two limbs and that of one limb respectively Evidence of non-muslims was admitted as valid where a Mohammedan committed murder and the Court was empowered to pass death sentence in such cases

It was also provided that the judges and native officers who were engaged in the administration of justice will get liberal salaries and allowances This provision was introduced specially to abolish corruption and remove a state of uncertainty regarding the income of the judicial officers It also assisted in attracting honest, able and learned people to join judicial service

17 Judicial Regulation XXVI T K Banerjee, *Background to Indian Criminal Law* p 71

On the whole in 1790 the judicial reforms of Cornwallis were aimed at improving the criminal courts, criminal law and the persons who were entrusted with the difficult task of administering criminal justice In fact these reforms not only granted security to life and property of the people, but also improved the law and order situation in general

3 Judicial Plan of 1793 Cornwallis Code

After gaining sufficient experience in Indian affairs from 1787 to 1793, Cornwallis realised that the changed conditions required major changes in the civil and revenue set up No doubt, in his reforms of 1787 Lord Cornwallis merged all the civil, criminal and revenue powers in the authority of the Collector of the district It was done so partly due to the instructions given by the Court of Directors and partly due to his initiative to introduce economy, simplicity and uproot corruption It was in 1793 that Cornwallis realised that the time was ripe enough to introduce judicial reforms in Bengal, Bihar and Orissa A set of regulations,[18] which were prepared by Lord Cornwallis, were known as "Cornwallis Code' They dealt with the commercial system with civil and criminal justice, with the police and with the land revenue The regulations were intended to ensure disciplined administration and prevent any return to the chaos and abuses of the past [19] Cornwallis attempted to codify the existing law and procedure into the form of Regulations, a work in which Sir William Jones, a remarkable Orientalist took a leading part It was an honest attempt to establish the rule of law in India [20] A brief account of the Regulations, classified under subject headings, may be given as follows

(a) **Separation of judicial and revenue functions** —The Revenue Officers were deprived of their judicial powers By Regulation II of the Code of 1793, *Mal Adalats* or Revenue Courts were abolished The trial of these suits was transferred to the Mofussil Diwani Adalats The Collector was entrusted only with the collection of revenue [21] All the judicial powers of the Collector were taken away and given to the Diwani Adalats which were reorganised The Collectors thus became merely administrative officers to collect revenue of the districts Ordinary civil courts were empowered to try civil as well as revenue cases An appeal from the civil courts in revenue cases lay to the Board of

18 A set of 48 Regulations was prepared with the assistance of Sir George Barlow

19 V A Smith *The Oxford History of India* p 6)

20 Thompson and Garratt *Rise and Growth of British Rule in India* p 190

21 The Collectors were deprived of the vast powers which were given to them in 1787 *See* also Clarke Ross *The Correspondence of Charles First Marquis Cornwallis* Vol I p 278

observe the rule of law It was really a very courageous and bold step taken by Lord Cornwallis The injured party had a remedy to approach the court against the corruption and excesses of the executive officers Lord Cornwallis expected that the change in the system, will effectually prevent in future the tyranny and oppression which has been so frequently exercised throughout the country by native officers employed in the collections and compel the Collectors to adhere strictly to the Regulations and instructions prescribed for their guidance

(v) **Abolition of Court Fees** —In order to make justice cheap Lord Cornwallis abolished the court fees which were imposed earlier in 1787 It was provided that apart from the pleader's fee and the actual charge of summoning the witnesses no other fees will be charged from the litigants Though this reform was based on good intention, its evil effects came to light after 1793 when there was a great increase in the litigation

(vi) **Reforms in Criminal Courts** —Though in 1790 vital changes were introduced in the administration of criminal justice, in order to keep the whole administration of justice integrated and co-ordinated, certain changes were again introduced in 1793 With this aim in view Regulation IX provided for some modifications in the old set up

The Magisterial powers of the Collectors were taken away and the Judges of the Diwani Adalats were empowered to exercise this jurisdiction The Judges exercised Magisterial powers together with their civil jurisdiction The Collector was left only to look after the collection of revenue in his district The Courts of Circuit which were created in 1790 and the Provincial Courts of Appeal which were proposed in 1793 were united and thus four Provincial Courts of Appeal and Circuit were established to deal with civil and criminal matters The Provincial Courts of Appeal and Circuit were established at Calcutta, Patna, Murshidabad and Dacca respectively

(vii) **Legal Profession**[22] —Cornwallis realised the importance of well-organised and regulated professional lawyers Earlier the parties were appearing before the Courts either in person or through their agents By Regulation VII of 1793, the profession of law was created and organised in India It was given due recognition by the authorities It was a necessity in order to assist the illiterate litigants who were unaware of the technical procedure of the Courts and also the technicalities of the law Steps were suggested to assure the litigants about the integrity, legal qualification and competence of the members of the legal

22 For details see separate Chapter on Legal Profession in this book

profession Those who joined the legal profession were given certificates after they qualified in the prescribed minimum requ re ments of education and honesty It was expected that the learned members of the legal profession will also assist the judges in administering justice according to the laws as laid down by the Regulations from time to time

(viii) Uniform Pattern of Regulations —So far Regula tions were issued without any prescribed uniform system Some of them were in manuscript form, others were printed but no uniform pattern was adopted in drafting them Regulation XLI of the Code of 1793 removed the grave defects in the drafting of the Regulations It provided that henceforth Regulations will contain a preamble which will state the reasons for enacting the Regulation Every Regulation was to have title to express in brief the subject matter of the Regulation Whenever any Regulation was modified full reference to the original Regulation was required to be given It was made necessary to divide each regulation into sections and sections were divided into sub sections and clauses, which were duly numbered in serial order It was made compulsory to keep a complete and regular Code of all the Regulations passed in each year It facilitated their ready refe rence while administering justice It enabled the members of the legal profession and the public to know what the law was on a particular point This process of the collection of Regulations periodically in a set form introduced certainty and uniformity of law

(ix) Permanent Settlement of Land Revenue —The wl ole rural life of the Bengal Presidency was disturbed due to the prevail ing uncertainty about the collection of land revenue Cornwallis took special interest in solving this difficult task In 1789 as a result of Sir John Shore s efforts a settlement for ten years was made In 1793 Cornwallis urged Pitt and Dundas to sanction the per manence of the settlement [23] Sir John Shore opposed it and insisted on ten years settlement The Directors accepted Cornwallis s suggestion and on 22nd March 1793 the Permanent Settlement was sanctioned [24] The Zamindars were regarded as land owners They were required to pay nine tenth of the revenue collection to Government through the Collectors and the Talukdars or those holding less land were required to pay directly through sub Collectors Efforts were also made to protect the cultivators and ryots from oppressions and corruption of Revenue Officers

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23 *See* C H Philips *The East India Company* 1784 1834 p 69
24 Ross *Cornwallis* Vol II pp 182 217 *Cambridge History of India* Vol V pp 450 51

"The Permanent Settlement" said Smith, "restored rural order in Bengal and provided the conditions of agricultural development, but it replaced the organic ties between the two classes of rural society by an impersonal cash nexus The two classes were henceforth unrelated and hostile Order and progress were secured but social justice was not done" [25]

Thus the whole system under the Regulations of 1793 introduced many reforms A single set of 48 Regulations, in drafting which Sir George Barlow assisted Cornwallis, was printed and issued on 1st May 1793, known as "Cornwallis Code". It gained such a great reputation amongst the Anglo-Indian administrators that in 1797-99 it was introduced into Bombay and forced upon Madras in 1802

C. Extent to which Cornwallis built on the Foundations laid by his Predecessors

John Strachy said, "Although much had been done by Warren Hastings to perform and organise branches of the public service, the main foundations of the existing administration of justice in India were laid in the time of Lord Cornwallis" [26] Another view, expressed in the Cambridge History, states, "Although the policy that Cornwallis came to enforce in 1786 was new, it was not wholly new In every direction Cornwallis built on the foundations already laid or begun to be laid by his predecessors and specially by Hastings It was the emphasis rather than the principle that was new Every aspect of reform was foreshadowed in the work or in the projects of Hastings and hence the solidity of the work of Cornwallis".[27]

It will be worthwhile to analyse these opinions in the light of the reforms introduced by Warren Hastings and Cornwallis from time to time In 1772 Warren Hastings prepared a plan to remedy the defects of the Dyarchy which was introduced by Clive in 1765 Under the plan of 1772, Warren Hastings assumed whole responsibility to administer civil justice in Bengal, Bihar and Orissa But he left criminal justice with the Nawab The Collector in each district, was thus Administrator, Judge and Magistrate in 1772 In 1787 Cornwallis gave similar wide powers to the Collector though at the instance of the instructions which he received from the Directors Cornwallis's reforms in 1787 were aimed at three things (i) economy, (ii) modification and (iii) purification Later on in 1790, Cornwallis introduced reforms in the criminal justice, similar to what Warren Hastings did in the administration of civil justice The most important feature of

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25 V A Smith *Oxford History of India* (Edn 3rd) p 536
26 See John Strachy *India*
27 *The Cambridge History of India* p 437

Cornwallis's reforms of 1793 was the separation of revenue from judiciary This feature was foreseen and partially implemented by Warren Hastings in 1780

Even though it may be admitted that Cornwallis gave new emphasis to the scheme of Warren Hastings, still Cornwallis deserves great credit as it was his initiative and judgment which emphasised the need of such reforms at this particular time Cornwallis introduced reforms to meet the existing requirements and also due to the instructions from England which he implemented as commands of superiors It can, therefore, be concluded that Cornwallis, to a great extent, built on the foundations laid by his predecessors, especially by Warren Hastings With this background one can see great truth in Smith's observations, "Taking it all in all, Cornwallis had set the Company's ship of state on a new course, and had brought in justice and integrity to redress corruption and power politics" [28]

28 V A Smith *The Oxford History of India* (Edn 3rd) p 538

7

Evolution of High Courts

A Judicial Reforms from 1793 to 1833

Before the High Courts were established at Calcutta, Bombay and Madras, two sets of courts were existing there The Presidency Towns had their own courts and the mofussil areas were having different courts The Courts of the Presidency Towns derived authority from the British Parliament and the mofussil Courts from the local laws which were initially called Regulations and later on Acts Thus, the Supreme Courts and Recorder's Courts in the Presidency Towns were the Crown's Courts In the mofussil areas the Courts were—the Sadar Diwani Adalats and the Sadar Faujdari Adalats, which represented the authority of the East India Company

During the period 1793 to 1861 several Governor Generals were appointed Though many of them were busy tackling the political problems and strengthening the British Empire in India, some of them showed keen interest in improving the existing Adalats system by introducing certain important reforms A brief account of these judicial reforms is given below

1 Reforms of Sir John Shore

In 1793 Sir John Shore succeeded Lord Cornwallis as Governor General Earlier, even Lord Cornwallis recognised his qualities and his valuable assistance in introducing reforms Sir John Shore being a member of Indian service and having experience under Cornwallis, was fully aware of the existing Indian conditions When the changed circumstances, after Cornwallis left India required reforms, he made his own contribution by altering, modifying the old and by introducing new reforms in the judicial system of India

Sir John Shore realised that the permanent settlement of land revenue was not working well Defects of Cornwallis's plan were gradually becoming noticeable The recourse to the courts was wholly ineffective as a means of protection to the *ryots* against the Zemindars Litigation amongst the richer sections of the society also increased On the whole, litigation choked the courts and the

sales of estates became frequent [1] In civil courts undecided cases of revenue accumulated to such an extent that the administration of justice became a very difficul task Accumulation of cases was also due to the large number of cases filed in the court because of the abolition of court fees and also du to long delay in actually disposing of the cases It also affected the normal routine of the collection of revenue It was wrong on the part of the Governor General in Council to state that the accumulation of work in the courts was merely a temporary phase and will pass away after the system settled down However in 1794, steps were taken to make certain alterations in the existing set up

(i) **Changes Introduced in 1794** —In 1793 the Registrar's Court was empowered to decide civil suits up to Rs 200 It was also provided that the Registrar s decision will be valid only when it was countersigned by the judge of the Diwani Adalat expressing his approval Though the provision of counter-signature was based on good intentions and for the better administration of justice, in actual working it created many difficulties

In 1794, Regulation VIII provided that the decrees of the Registrars were to be final in all civil suits up to the valuation of Rs 25 [2] Where the valuation of the suits was more than Rs 25 an appeal was allowed to the Provincial Courts of Appeal It relieved the judges of the Diwani Adalats from the time consuming task of countersigning the Registrar s judgments

The Regulation also authorised the judges of the Diwani Adalats to refer to the Collectors for scrutiny and report of cases involving adjustment of accounts After receiving the Collector's report it became easy for the Diwani Adalats to give a final decision in cases concerning rent or revenue or other matters The findings of the Collector's report were not binding on Judges and they were free to decide the cases according to law

In 1793 the collection of revenue and administration of justice were separated, but in 1794 judicial functions were again transferred to the Collectors though to a limited extent only It was done so with a view to facilitate the Diwans Adalats to dispose of arrears and current cases at a better speed at the same time, this step was also in compliance with the requirement of giving more powers to Collectors which enabled them to secure collection of revenue with less difficulty

(ii) **Alterations Introduced in 1795** —In 1794 only minor modifications were made by Sir John Shore to deal with the large number of cases which were in arrears In spite of these reforms,

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1 A B Keith *A Constitutional History of India* p 43
2 Regulation VIII of 1794 *See* W H Morley *The Administration of Justice in British India* p 61

there was no improvement in the number of arrears in courts In 1795 by Regulation XXXVI reforms were introduced with a view to readjust the mutual relationship of the civil Courts By the reforms of 1794 the Diwani Adalats were given some relief and the work was shifted to the Court of Appeal to deal with petty cases up to Rs 200 It increased the judicial work of the Courts of Appeal As there were only four Courts of Appeal, the litigant parties faced great inconvenience in coming to the Court from very long distances

Regulation XXXVI of 1795 provided that in petty cases appeals from the Registrars were to go to the District Diwani Adalats and not to the Provincial Courts of Appeal In all such cases the decision of the District Diwani Adalats was made final and no further appeal was allowed The decisions of the Munsiffs were now subject to one appeal only to the District Diwani Adalats Munsiffs decided cases up to Rs 50 This reform reduced the number of appeals in petty civil cases up to Rs 50 The Registrars were empowered to decide civil suits up to the valuation of Rs 200 From their decision an appeal lay to the District Diwani Adalat which was the final appellate authority in such petty cases The District Diwani Adalats were authorised to hear all civil cases in which valuation was more than Rs 200 An appeal in these cases was allowed to the Provincial Courts of Appeal Where the valuation was more than Rs 1,000 a further appeal was allowed to the Sadar Diwani Adalat

In order to enable the Sadar Diwani Adalat to have better control over all the lower Courts and supervision over the quick disposal of cases, it was provided by Regulation XXXVI of 1795 that all the lower Courts will maintain a proper register stating therein full details about the disposal of cases and cases in arrear The Register was presented before each higher Court periodically for supervison

Another important reform, which completely changed the future course of litigation, was the imposition of court fee It made the litigation costly It was a necessary step which the circumstances forced the authorities to take Earlier Cornwallis in 1793 completely abolished the court fee Though this was a bold step to make the litigation cheap, its evil consequences soon followed Due to the abolition of court fee the courts were over burdened with work There was a great increase in the litigation and a large number of cases were filed before courts It became very difficult for the courts to dispose of all cases Long delays in deciding the cases was a natural outcome Pending undecided cases added to the arrears of work It, therefore became necessary to check the filing of an unlimited number of cases before the courts Imposition of court fee was a sort of tax on the administration of

justice but it was a necessary step In order to minimise litigation it was declared that even on pending cases the prescribed court fee must be paid by the parties, otherwise, after a fixed date all such cases will be removed from the Court list, and this was actually done It is on record that due to non payment of prescribed court fee within the prescribed time limit a large number of cases were dismissed Apart from court fees certain other levies were also imposed on calling and summoning of witnesses, on filing exhibits and on interlocutory petitions Though Macaulay[3] [4] had strongly criticised the imposition of court fees, considering the circumstances and the condition of the Courts in 1795, there appears to be sufficient justification for the levy Contrary to Macaulay's opinion it was a wise step taken by Sir John Shore to improve the administration of justice

(iii) **Changes made in 1797** —In 1797, Sir John Shore introduced certain reforms to further improve the administration of justice The court fee was further increased and it was made compulsory to use special stamped papers for filing papers in the court This step was taken to check the litigation before Courts

In order to avoid unnecessary delay in the disposal of cases, Regulation XII provided that the decrees of the Provincial Courts of Appeal were final in cases of money or personal property up to Rs 5,000 in value In all suits involving more than this amount, the decisions of the Provincial Courts of Appeal were made appeal able to the Sadar Diwani Adalat Rules were framed to govern the appeals to be made to the King in Council from the decisions of the Sadar Diwani Adalat It was provided that the petition of such appeals should be filed within a period of six months and the valuation of suit must be £ 5,000 or more

(iv) ***Provisions* of *the Act of 1797*** —The British Parliament introduced certain reforms in the administration of justice in India by passing the Act of 1797 The Act reduced the number of the Judges of the Supreme Court at Calcutta to three i e , a Chief Justice and two Puisne Judges The Act also recognised and confirmed the preparation of a code of Regulations[4] enacted by the Governor General in Council and registered in the Supreme Court The Courts were required to administer justice according to those Regulations

2 Judicial Reforms of Lord Wellesley

In May 1798, Lord Wellesley[5] arrived in India and succeeded Sir John Shore as Governor General Wellesley took keen interest in removing the defects of the existing judicial system He

3-4 Dharkar *Lord Macaulay s Legislative M n utes* pp 220 224
5 *See* P E Roberts *India under W ellesley*

introduced certain major reforms to improve the administration of justice Expressing his views regarding the separation of the Sadar Adalats from the Government, Wellesley wrote, "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 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" [6]

Lord Wellesley was against the concentration of judicial legislative and executive powers in the Governor General in Council It was not possible for the Governor General to devote time to preside over the Sadar Diwani Adalat and Sadar Nizamat Adalat It was, therefore, that Regulation II of 1801 provided that the Sadar Diwani Adalat and the Sadar Nizamat Adalat were to be presided over by three judges selected and appointed by the Governor-General in Council It was laid down that the Chief Judge will be a member of the Council but the Commander-in Chief and the Governor General were not allowed to occupy the judicial post The other two judges were to be covenanted civil servants of the Company having wide experience of judicial work in the Provincial Courts of Appeal It was also declared that the Sadar Adalats will be open courts and two judges will form the quorum of the court to carry out its function

In order to expedite the disposal of the pending judicial work, in Zilas and cities, Head Native Commissioners, also known as Sadar Ameens, were appointed They were authorised to decide cases valuing up to Rs 100, which were referred by the Judges of Zila and City Courts The Judges were authorised to nominate Sadar Ameens with the prior appoval of the Sadar Adalat from amongst persons of ability and past experience In Zilas and Cities, Assistant Judges were also appointed to dispose of the arrears of the judicial work They were required to decide appeals from the Courts of Registrars or Native Commissioners and original suits which the Judges of Zila and City Courts referred to them [7]

During Lord Wellesley's period, the Adalat system was extended to ceded and conquered territories In 1801 the Nawab Vizier ceded the Subedari of Oudh to the Company The Ceded Provinces were divided into seven districts—Gorakhpur, Allahabad Cawnpore Farrukhabad, Etawah, Bareilly and Moradabad In

6. Lord Wellesley's Letter to the Directors dated 9th July 1800 *See* A. B. Keith *Speeches on Indian Policy* Vol I p 179
7. Regulations XVI and XLIX. *See* also Morley *The Administration of Justice in British India* p. 62

each district a civil servant of the Company was appointed judge and Magistrate and another civil servant as Collector Registrars, Sadar Ameens and Munsifs were appointed to decide civil cases up to valuation of Rs 20, Rs 100 and Rs 50 respectively At Bareilly a Court of Appeal and Circuit was established just like in Bengal The jurisdiction of the Sadar Adalats at Calcutta was also extended to the ceded districts In 1805 the conquered Provinces along with the ceded territories were divided into five districts—Agra, Aligarh, Saharanpur North, Saharanpur South and Bundelkhand These districts were placed under the control and administration of judicial and revenue officers just like the ceded districts of Oudh

3 Reforms of Lord Cornwallis

In July 1805 Lord Cornwallis came to India for the second time and succeeded Lord Wellesley In spite of his short term in India, Cornwallis[8] introduced a very important reform in the constitution of the Adalats It was specifically provided that the Chief Judge will not be a member of the Council From this time onwards a covenanted civil servant of the Company was to be appointed Chief Judge Wellesley though he improved the constitution of the Adalats, retained the Chief Judge as a member of the Council Lord Cornwallis's step was a distinct improvement over his predecessor's judicial reforms as his aim was to separate judicial functions from executive and legislative

4 Judicial Reforms of Lord Minto

Lord Minto[9] was appointed Governor General of Bengal Government of the Company in July 1807 He introduced certain changes in the judicial set up to improve the existing condition of the administration of justice By Regulation XV of 1807,[10] Lord Minto increased the number of judges of Sadar Adalats from three to four Out of these four judges, the Chief Judge was appointed a member of the Governor General's Council In this way Lord Minto, following Lord Wellesley's approach, mixed judicial functions with legislative and executive In his defence Lord Minto stated that the Chief Judge was appointed member of the Council in order to achieve economy But in fact it was done so with a view to save any friction between the executive and judiciary The number of the Judges of the Sadar Adalats was

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8 Lord Cornwallis died at Ghazipur in India in October 1805 He was regarded by Pitt as an infallible cure for all ills See *Oxford History of India* p 604 Marshman *History of India* p 279

9 Sir George Barlow succeeded Lord Cornwallis after his death in July 1807 Lord Minto succeeded Sir George Barlow See *Lord Minto in India and Life and Letters* 1751 1806 (three vols) Edited by Countess of Minto

10 23rd July 1807 *See* W A J Archbold *Outlines of Indian Constitutional History* p 132

increased from three to four specially to dispose of the arrears of the judicial work earlier

The Magistrates' powers and jurisdiction were also increased They were authorised to punish offenders with a fine up to Rs 200 and punishment not exceeding six months [11]

Regulation VIII of 1808 provided that the persons who committed the offence of robbery with open violence were liable to the punishment of transportation for life If the charge of robbery was proved, on conviction such case was to be referred to the Sadar Nizamat Adalat In the same year, a Superintendent of Police for Bengal and Orissa was appointed for the detection of the persons charged with or suspected of dacoity and other offences The original jurisdiction of Zila and City Courts was restricted to such cases where the valuation of the suit was not more than Rs 500 The Provincial Courts were empowered to have original jurisdiction in cases involving more than Rs 500 [12]

Due to the great increase in cases before the Sardar Adalats it was considered necessary to increase the number of judges. To deal with such a situation, Regulation XII of 1811 authorised the Governor General to appoint a Chief Judge and such numbers of judges as were considered necessary from time to time to dispose of the cases Now onwards the Chief Judge was not required to be member of the Council Thus the judicial function was separated from the executive and legislative

5 Lord Hastings and the Administration of Justice

After Lord Minto, in 1813, Lord Hastings[13] was appointed Governor-General During his period of ten years' stay in India from 1813 to 1823, Lord Hastings introduced many reforms in the civil and criminal judicature of the country Certain definite steps were also taken to modify the basis of the Cornwallis's system.

(i) Charter Act of 1813—The special importance of the Charter of 1813 lies in the fact that the sovereignty of the Crown over the Company's territorial acquisitions of India was clearly proclaimed The powers of the Board of Control in England were considerably enlarged

The Provincial Governments in India were empowered by the Charter of 1813 to make laws, regulations and articles of war for their native armed forces and authorise the holding of Courts Martial The territories of India were considered as the property of

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11 *See*, T K Banerjee *Background to Indian Criminal Law* p 154
12 Regulation XIII *See* W H Morley, *The Administration of Justice in British India* pp 63-68
13 *See* H T Prinsep *History of the Political and Military Transactions in India during the Administration of Marquess of Hastings*

England and persons entering without licence were to be treated as interlopers For a case of trespass or assault committed by these Europeans on the people of India and for cases of small debts to them, they were placed under the jurisdiction of the Justices of the Peace Those trading, residing or holding movable property at a distance of more than ten miles from a presidency town, were placed, for civil cases under the jurisdiction of Civil Courts, while for criminal matters special arrangements were to be made It was also provided that those Englishmen who had their residence at a distance of more than ten miles from a presidency town, would necessarily register themselves with the District Court. Special penalties were provided for theft forgery, perjury and coinage offences, as the existing provisions of common statute law were considered inadequate to deal with them

(ii) **Reforms in Civil Courts** —In order to discourage the parties from entering into litigation, Lord Hastings increased the court fees Compulsory fee was prescribed for every process and every paper that was filed in Civil Courts [14] In the opinion of the Court of Directors it was necessary to increase the number of Indian judges Munsiffs and Sadar Ameens, to deal with the increasing litigation and court work They considered that this increase in the number of native judges will not involve any extra expenditure to the Government [15] They were not favourable to the augmenting of the number of European Judges as it would not effect economy in the administration of justice In 1814 the jurisdiction of Munsiffs was increased from Rs 50 to Rs 64 and they were authorised to try cases of money and personal property against natives The decisions given by the Munsiffs were not to be final An appeal from them lay to the District Diwani Adalats

The Sadar Ameens were empowered to decide original suits referred by the Zila and City Judges, up to the valuation of Rs 150 Before 1814 their power was limited up to Rs 100 only From decisions of the Sadar Ameens an appeal lay to the Zila and City Judges whose decision was considered final It was specifically provided that neither Sadar Ameens nor Munsiff were authorised to hear any suit in which a British subject or some European or American was a party

The Registrars were authorised to hear and decide original suits up to the valuation of Rs 500 which were referred to them by the Zila and City Judges An appeal from the Registrar's Court was allowed to the Zila and City Judge's Court Sometimes, the Registrars were also given powers to hear appeals from the

14 Regulation XIII of 1814

15 Munsiffs were not yet made salaried officers of the Government They were paid on a commission basis for their judicial work

Munsiffs and Sadar Ameens and their decisions in such appeals was considered final This step was taken in order to quicken the administration of justice and dispose of the arrears of work

In 1814 the Zila and City Courts were empowered to decide civil cases up to the valuation of Rs 5,000 The post of the Assistant Judge was abolished An appeal lay to the provincial Courts and from the decision of the provincial Court to the Sadar Diwani Adalat In each provincial Court the number of Judges was also increased from three to four who were given the powers to exercise civil and criminal jurisdiction From their decisions in all cases an appeal was allowed to the Sadar Diwani Adalat The Sadar Diwani Adalat exercised original civil jurisdiction only in cases involving valuation of Rs 50,000 or more

(iii) Reforms in Criminal Courts—Certain reforms, which were introduced by Lord Hastings with a view to improve the working of Criminal Courts, may be stated as follows

It was realised in 1821 that the reforms of 1814 were not sufficient to improve the machinery of justice It was realised that it was necessary to raise the status of the Indian judges Therefore, Regulation III of 1821 introduced certain changes The Magistrates were given powers to refer to Native Law Officers and Sadar Ameens cases of petty offences for trial, and they were authorised to punish offenders by imprisonment for a term not exceeding fifteen days and a fine up to Rs 50 According to the proposals of the Court of Directors, the Company's Government authorised the Collectors of Revenue to exercise magisterial powers also wherever it was considered necessary

In 1818 the jurisdiction of the Magistrates and the Joint Magistrates was enlarged and they were authorised to try persons who were charged with the offences of theft and burglary and attempt to commit such crimes In criminal cases where the criminal was punished with imprisonment for more than six months, the Circuit Court was empowered to revise such cases Where the theft was of property worth more than Rs 300, the thief was prosecuted before the Court of Circuit

Efforts were also made to deal with the unnecessary delay in the administration of justice and to dispose of the arrears of work By Regulation III of 1821 the Governor General in Council was authorised to give special powers to the Assistant Magistrates to punish criminals in cases which were referred to them for disposal by the Magistrates

In 1823 the Court of Circuit and the Sadar Nizamat Adalat were given more powers In the same year the qualification regarding the appointment of a Judge of the Sadar Adalat was

rescinded In 1814 it was laid down that for the post of a Judge of Sadar Adalats, it was necessary for a person to have three years' experience as a Judge of a Provincial Court or in all nine years judicial experience

Apart from these, Lord Hastings introduced many other reforms He took special interest in reorganising the police force to deal with criminals and to maintain law and order in the country He realised the necessity of removing the defects in the existing Mohammedan Law of Crimes in order to check and control criminal acts and the criminal tendency of people in India In 1820 new penalties were laid down to prevent and punish *begari* and *dharna* It was also provided for arrest of persons on security grounds

6 Reforms of Lord Amherst

In August 1823 Lord Amherst[16] was appointed Governor-General He continued in office up to 1828 Certain important reforms, which he introduced in the judicial sphere, may be briefly stated as below

(i) **Status of Sadar Ameens** —In order to carry out the directives of the company s Directors to improve the administration of justice in India, Lord Amherst introduced vital reforms in 1824 By Regulation XIII, Lord Amherst provided that Sadar Ameens will be paid regular salaries The existing system of paying commission to Sadar Ameens was abolished It raised the status of the office of Sadar Ameens and attracted honest and learned persons ro join the judicial service In 1827 the jurisdiction of the Sadar Ameens was increased and they were given more powers to try civil cases The Sadar Diwani Adalats were authorised by the Governor General to empower the Sadar Ameens to try original cases up to the valuation of Rs 100 They were also authorised to try civil cases in which European British subjects were parties Gradually the court of Sadar Ameens gained importance and status in the judicial machinery

(ii) **Magistrates and Courts of Circuits** —In criminal cases where it was necessary to obtain more information from certain accused persons regarding the main crime, Regulation X of 1824 authorised the Magistrates and Superintendents of Police to pardon such persons It assisted the police in investigating the crimes and punishing the persons who were really responsible for committing the crimes

16 *See* Anne Thackeray Ritchie and Richardson Evans, *Lord Amherst* When Lord Hastings retired in January 1823 John Adam was appointed officiating Governor-General He vacated the post when Lord Amherst was appointed Governor-General in August, 1823

The Courts of Circuit were given more powers to punish criminals in cases of culpable homicide not amounting to wilful murder In 1825 the Circuit Courts were authorised to pass final sentences Earlier, the Circuit Courts were required to refer such cases to the Sadar Nizamat Adalat but after 1825 the Circuit Courts enjoyed full powers The punishment of flogging of women was stopped

(iii) Jurisdiction of Collectors —The Collectors were given powers to investigate and summarily decide cases relating to rent disputes which the judges referred to them Certain rules were framed to guide the Collectors in deciding rent cases In this respect they were also given powers like the Civil Court to call and examine witnesses Lord Amherst's initiative to give judicial power to Collectors became a matter of controversy and criticism subsequently

7 Judicial Reforms of Lord Bentinck

In July 1828, Lord William Bentinck[17] succeeded Lord Amherst as Governor General During his seven years' stay in India *i e* from 1828 to 1835 he introduced several reforms of great importance in various fields [18] He showed keen interest in improving the machinery of the administration of justice With this aim in view he reorganised and consolidated the whole system of civil and criminal courts His contribution is, therefore, considered very important in the legal history of India A short account of his judicial reforms is given below

(1) Abolition of Circuit Courts —Lord Bentinck realised that the existing system of Circuit Courts with very wide territorial jurisdiction was responsible for many defects in the administration of justice in civil and criminal cases Long delays in deciding the cases increased the arrears of cases It became very difficult for the Court to complete the circuit within six months As the Provincial Courts of Appeal, the Circuit Courts were also required to discharge appellate functions in civil cases As criminal courts these courts created more difficulties for the prosecution as well as the witnesses, as it was not possible for them to hold their sessions in each district regularly As a consequence of delay in criminal justice, prisoners suffered in jails without trial for a long time The Circuit Courts said Lord Bentinck, became "the resting place for those members of service who were deemed unfit for higher responsibilities"

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17 Lord William Bentinck was a younger son of the 3rd Duke of Portland Prime Minister of England from 1807 to 1809

18 *See* Thompson and Garratt *Rise and Fulfilment of British Rule in India* pp 280-286 *See* also, T G P Spear Ellenborough and Bentinck" *Proceedings of Indian History Congress* 1939

Lord Bentinck, therefore, decided to abolish the system of Circuit Courts In place of the Circuit Courts Regulation I of 1829 he appointed Commissioners of Revenue and Circuit to control the working of the Magistracy, Police Collectors and other revenue officers Each Commissioner was put in charge of a small territory in order to enable him to visit frequently different places which were under his jurisdiction They were given powers of the Court of Circuit and the Board of Revenue with some modification to suit the requirements The Provinces of Bengal Bihar and Orissa were divided into twenty divisions In each division a Commissioner was appointed They were required to hold sessions of gaol deli very in Zilas and Cities at least twice a year The Regulation provided that the employment of the Mohammedan Law Officers was optional

Regulation II of 1829 provided that the appeals from the Magistrates or Joint Magistrates were to lie to the Commissioner of division The decision of the Commissioner was final and con clusive By Regulation VI of 1829 the powers of the Magistrates were increased and they were authorised to pass a sentence of im prisonment up to two years with labour together with corporal punishment

(ii) **Power of Sadar Ameens, District and City Judges increased** —The Magistrates were authorised to refer criminal cases to Sadar Ameens or Principal Sadar Ameens for investigation Their power was only limited to work as investigating officers and to report to the Magistrates They were not authorised to make any decision

It was realised after the reforms of 1829 that the expected results of speedy trial of criminal cases was not forthcoming It was found that the Commissioners of Revenue and Circuit were given too much work Therefore the Governor General in Council was authorised by Regulation VII of 1831 to empower any Zila and City Judge not being Magistrate to hold criminal sessions whenever it was felt that the pressure of work on the Commis sioners was too much Zila and City Judges were empowered to try all commitments made by Magistrates in their respective juris dictions and to hold gaol deliveries at least once a month Gradu ally due to unexpected increase in the judicial and revenue work it became difficult for the Commissioners to dispose of the whole work in their district adalats It gave rise to the creation of District and Sessions Courts in each district which decided civil and criminal cases

(iii) **Establishment of Sadar Nizamat Adalat and Sadar Diwani Adalat at Allahabad** —In order to avoid unnecessary delay and improve the administration of justice it was considered

necessary to reduce the territorial jurisdiction of the Calcutta Sadar Court. In 1831, therefore, a Sadar Nizamat Adalat was established at Allahabad for the North Western Provinces with the same powers as were given to the Calcutta Sadar Court.[19]

In 1831, a Sadar Diwani Adalat was also established at Allahabad for the North Western Provinces to decide civil cases. It was given the same powers as were vested in the Calcutta Sadar Diwani Adalat.

(iv) Practice of Sati declared an Offence —In 1829 Lord Bentinck took a very bold step to abolish the prevailing inhuman rite of the practice of *Sati*.[20] According to the practice of *Sati* a Hindu widow was forced to burn herself with the dead body of her husband. It was declared an offence and was punished like culpable homicide. Abetment of the offence was also made punishable. Due to the introduction of this important reform Lord Bentinck became very popular amongst educated elite of Hindus in India.

(v) Indians appointed Judicial Officers —Lord Cornwallis declared his policy to exclude Indians from judicial offices. It was severely criticised by Indians and in due course the Directors of the Company also suggested that Indians must be employed as judicial officers. Lord Bentinck disliked the old policy of Lord Cornwallis and favouring the suggestion of the Directors appointed Indians in the civil and criminal courts of the country.[21] This policy resulted in economy as the English Judges were highly paid while Indians were available at a small salary. Apart from this he gained confidence and loyalty of Indians. Indians were gradually appointed to hold judicial offices. In 1832 the Commissioners of Circuit and Sessions Judges were authorised to take the assistance of respectable natives in criminal trials either by referring some matter to them as Panchayat for investigation or by calling them to the Court as assessors or as Jury. The powers of the Principal Sadar Ameens, Sadar Ameens and the Indian Law Officers were extended regarding the passing of sentence in certain cases.

In the sphere of civil justice also, respectable Indians were appointed as judicial officers. After 1831 the powers of the Indian Judges were gradually increased. As such the pecuniary jurisdic-

19 Regulation II. *See* W. H. Morley, *The Administration of Justice in British India*, p. 73.

20 It meant the burning of widows on the funeral pyres of their husbands. This evil custom frowned on by the Marhats, had increased in Bengal under British Administration and its prohibition had been considered by every Governor General since Wellesley. In fact Bentinck acted when others had merely talked. *See* Vincent A. Smith, *The Oxford History of India*, Third Edition, pp. 548, 647-8.

21 Regulation XVII.

tion of the Munsifs was extended to Rs 300, the Sadar Ameens were authorised 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 The Governor General was given power to appoint in any district or city one or more Principal Sadar Ameens to decide original suits up to Rs 5,000 in value The Courts of Registrars were abolished and their cases were transferred to the Principal Sadar Ameens and Sadar Ameens

(vi) **Abolition of Provincial Courts of Appeal** —In order to improve the civil judicature, Lord Bentinck introduced a new scheme in 1831 By Regulation V of 1831 all functions of the Provincial Courts of Appeal[22] were transferred to the District Diwani Adalats Thus the Provincial Courts of Appeal were abolished[23] and the original jurisdiction of the District Diwani Adalats became unlimited By Regulation VIII of 1833 the Governor General was empowered to appoint any number of additional judges in a district on the recommendation of the Sadar Diwani Adalat It is, therefore, clear that by introducing the new scheme, Lord Bentinck intended to simplify the judicial process and reduce the cost and time of the administration of civil justice The appointment of Indian judges further assisted Lord Bentinck in carrying out his scheme

(vii) **Civil and revenue jurisdiction given to Collector** — Suits relating to rent were transferred to the exclusive cognizance of the Collectors of revenue who were empowered to decide summarily Their decision was final subject to a regular suit to be instituted in the civil courts The cases relating to rent and revenue were transferred to the Collector in order to make the Collector's task easier in the collection of revenue

(viii) **Charter Act of 1833** [24]—It was one of the most important charters which played an important role in shaping the future course of the legislative and judicial development of India The charter allowed the company to retain its territorial possessions in India for the next twenty years The Act of 1833 established an All India Legislature with general and wide powers to legislate The Governor General at Calcutta was made the Governor General of India By adding a Law Member to the Governor General's Council and the abolition of the right to legislate by regulation in the Provinces the opportunity for centralisation of law was provided by the Act The Act established the First Law Commission

22 Thompson and Garratt *Rise and Fulfilment of British Rule in India* pp 266-270

23 They became proverbial for the irregularity and uncertainty of decisions *See* Demetrius C Boulger *Lord William Bentick* 61

24 For details *see* Chapter on the Law Commissions in this Book

for India The Law Member was to preside over the Law Commission which was empowered to inquire into existing laws and courts The Act of 1833 stated, "it is expedient that such laws as may be applicable to all classes should be enacted" Necessity of a general system of judicial establishments and police was also referred to the Law Commission Priority was given by Law Member to the needs of the common man who was going to mofassil Courts to get justice

B Judicial set up before High Courts were established 1834—1861

1 Dual System of Courts, Law and Procedure

After Lord William Bentinck minor reforms were introduced in the Company's Courts by Lord Aukland,[24a] Lord Ellenborough,[25] Sir Henry Hardinge[26] and Lord Dalhousie[27] as Governor Generals During the period 1834 to 1861 *i e*, before the High Courts were established two sets of courts were administering justice in India [28] The King's Court and the Company's Courts formed the dual system of courts having their separate jurisdictions

In each Province *i e* Bombay, Calcutta and Madras, a Supreme Court was established which derived its authority from the King in England Their jurisdiction was mainly limited to the Presidency towns respectively The original jurisdiction of the Supreme Courts was extended to five classes of persons, namely, (*i*) British subjects throughout India in all civil and criminal cases, (*ii*) inhabitants of Calcutta, Madras and Bombay within fixed limits, whether natives or others in all civil and criminal cases, (*iii*) native subjects, servants of the company or any British subject for acts committed with limitations in certain civil matters, (*iv*) native subjects in civil matters for transactions by which they had bound themselves by bond to be amenable to the Supreme Courts, and (*v*) all persons for maritime crimes

Apart from the King's Courts, in each Province the company also established a hierarchy of civil and criminal courts These courts were known as Company Courts They exercised their jurisdiction outside the Presidency towns and the Sadar Diwani Adalat and Sadar Nizamat Adalat were the highest Company's Courts in each Province They were given appellate jurisdiction in civil and criminal cases respectively and had *no original juris*

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24 He was Governor General of India from 1836 to 1842.
25 He remained Governor General of India from 1842 1844
26 He was appointed Governor General of India in 1844 and remained in his office up to 1848
27 He was Governor-General of India from 1848 to 1856
28 See *Selected papers of the General Acts and Codes of India*, Vol 9 Edited by T B Sapru pp [illegible] (1947)

diction They were also empowered to supervise the working of the subordinate courts of the company Appeals from Sadar Diwani Adalats lay to the Privy Council The Company's Courts were established in order to meet the requirements of Indians who were residing beyond the Presidency-towns In many respects the Company's Courts differed from the King's Courts The hierarchy of Company's Courts in each Province, i e Calcutta, Bombay and Madras, was as follows

(i) **Courts in Calcutta** —Before the enactment of the High Courts Act 1861 there were six types of civil and eleven types of criminal courts of the company to administer justice in the Province of Calcutta In order of hierarchy the civil courts were Sadar Diwani Adalat, City Courts, Zila Courts, Courts of Principal Sadar Ameens, Courts of Sadar Ameens and Courts of Munsifs Eleven types of criminal courts in order of hierarchy were Sadar Nizamat Adalat, Courts of Sessions Judges, Courts of Joint Magistrates, Courts of City Magistrates, Courts of Zila Magistrates, Courts of Assistant Magistrates, Courts of Deputy Magistrates, Courts of Principal Sadar Ameens, Courts of Sadar Ameens, Courts of Law Officers of City Courts and Courts of Law Officers of Zila Courts

(ii) **Courts in Bombay** —There were six types of civil and five types of criminal courts of the Company in Bombay before the establishment of the High Court In order of hierarchy the civil courts were Sadar Diwani Adalat, Zila Courts, Courts of Assistant Judges, Courts of Principal Sadar Ameens (Native Judges), Courts of Sadar Ameens (Native Commissioners) and Courts of Munsifs The five sets of criminal courts were Sadar Nizamat Adalat, Courts of Judicial Commissioners of Circuit, Courts of Sessions Judges, Courts of Joint Judges in certain Zilas and Courts of Assistant Sessions Judges Apart from these, offences of a petty nature were decided by the Heads of Villages and District Police Officers

(iii) **Courts in Madras** —The Company's judicial machinery in Madras consisted of eight sets of civil courts and nine sets of criminal courts before the High Court of Madras was established In order of hierarchy the civil courts were Sadar Diwani Adalat, Zila Courts Courts of Assistant Judges, Courts of Subordinate Judges, Courts of Principal Sadar Ameens, Courts of Sadar Ameens, Courts of District Munsifs and Courts of Village Munsifs Nine sets of criminal courts, in order of hierarchy, consisted of Sadar Nizawat (*Faujdari*) Adalat, Courts of Sessions Judges, Courts of Subordinate Judges, Courts of Magistrates, Courts of Joint Magistrates, Courts of Assistant Magistrates, Courts of Principal Sadar Ameens, Courts of Sadar Ameens and Courts of District Munsifs Apart from these, petty offences were also tried by the Heads of Villages and the District Police Officers

The King's Courts and the Company's Courts applied different laws The Supreme Courts mostly applied English law, both civil and criminal, with certain exceptions relating to Hindus and Mohammedans In the case of Hindus and Mohammedans, whenever they were parties to a suit, the law of the defendant was always applied English law of procedure governed the procedure of the Supreme Courts They also applied such rules and regulations of the Company's Government which were registered in the Supreme Courts

The Company's Courts in the Moffussil area applied only the Regulations of the Government which were passed before 1834 After 1834 uniform Acts of the Governor General in Council were applied in all the three Provinces English law was not applied by the Company's Courts In matters relating to succession, inheritance and marriage with respect to Hindus and Muslims, the personal laws of Hindus and Muslims were applied respectively In other cases also customary law was ascertained and applied In cases for which there was no ascertainable law or custom, the Judges were required to exercise their discretion according to justice, equity and good conscience [29] English Judges, while applying their discretion, mostly applied English law as far as it suited Indian conditions [30] In criminal cases Mohammedan Law of Crimes, as modified by the Regulations, was applied by the Moffussil Courts in Bengal and Madras Provinces In Bombay a regular code superseded the Muslim law of crime

As regards the procedure, the Supreme Courts adopted the procedure of the English Courts On the other hand, there was no uniform procedure laid down for the Company's Courts Whatever was prescribed by the Provincial Regulations was being followed from time to time. In certain respects the procedure not only differed from Province to Province but also from Court to Court In spite of this diversity the Company's Courts mostly followed English law of evidence as far as it was accessible to them But there was no law binding to adopt the English law of evidence Customary law, as derived from *Hedaya* and Muslim Law Officers, was also followed subject to the provisions of the Regulations

2 Defective state of the System

The existence of the dual system of Courts i e King's Courts and Company's Courts created many difficulties and conflicts The jurisdiction of the Supreme Court was never clearly defined and frequently it came in conflict with the jurisdiction of the

29 Dr J Duncan M Derrett *Justice Equity and Good Conscience in India* 64 Bom LR 129 145

30 Cowell *History and Constitution of the Courts and Legislative Authorities in India* p 224

Moffussil Courts New problems arose regarding concurrent juris dictions of the two sets of Courts Laws applied by the King's Courts and the Company's Courts were different and created conflict embroidered with confusion The Supreme Court claimed superiority and declared that any interference with the execution of its process in the moffussil was contempt of Court [31] In certain cases the Moffussil Courts complained that the decrees of the Supreme Court were interfering with their prior decrees It was, therefore, realised that there was necessity to co ordinate and correlate the functions of the two sets of the Courts As early as 1829 the Chief Justice of the Supreme Court at Calcutta, Sir Charles E Crey stated, "There is an utter want of connection between the Supreme Court and the Presidency Courts, and the two sorts of legal process which are employed by them the exercise of the powers of the one system is viewed with jealousy by those who are connected with other "[32]

Criticising the role of the Supreme Courts, the Court of Directors stated in their despatch thus "A judicature utterly uncontrollable by the Government and on the contrary controll ing the Government recognizing the highest authorities of the State only as private individuals, and the tribunals which admi nister justice in all its forms to the great body of the people only as foreign tribunals, is surely an anomaly in the strictest sense of the word [33]

Growing conflicts between the King's Courts and the Com pany's Courts gradually strengthened the case for amalgamation of the Supreme Courts and Sadar Courts In order to achieve uniformity, certainly and efficiency it was considered necessary to bridge the gap by legislative measures

C Establishment of High Courts High Courts Act, 1861

1 Early efforts to unite Courts

Efforts to unite the two sets of Courts began much earlier than 1861 In fact as a matter of policy it was considered better first of all to introduce basic uniformity in the laws according to which justice was administered When it was achieved, separate sets of the judicial institutions were united in one system in 1861 As early as 1833, the Charter Act of 1833 empowered the Governor General in Council with the help of the Law Member, to legislate for all provinces It is an important land mark in the legal history of India The centralisation of legislative machinery introduced unification in laws and removed conflicts and confusion which were created by the enactment of Regulation Laws by legislature of the

31 *Aga Mohammed Jaffer* v *Mohammed Sadick* ID (O S) IV p 363 *Appendix* p 75 (1832)
32 *Report on the Affairs of the East Indies*
33 Despatch No 44 of 1834 Paras 55 and 56

different provinces Earlier the Supreme Courts were bound only by such Regulation Laws which were passed by the Provincial Legislature and registered in the respective Supreme Courts The Charter Act of 1833 declared that the Acts passed by the Governor General in Council will be binding on all Courts of the country including all the Supreme Courts The Charter also laid special emphasis on the enactment of uniform law in certain important fields to govern all persons without any distinction of caste and religion In order to carry out this policy the Charter Act of 1833 appointed the First Law Commission [34] It prepared a draft Penal Code in 1837 The Charter Act of 1853 appointed the Second Law Commission to examine and report on the recommendations of the First Law Commission The Commission was directed to prepare a draft of Code of Civil Procedure Thus the Civil Procedure Code, the Penal Code and the Criminal Procedure Code were passed by the Governor-General in-Council respectively in the years 1859, 1860 and 1861

In 1858 the East India Company was abolished and the assumption of direct responsibility of the Government of India by the crown made the problem of uniting the two sets of Courts much easier Uniform Codes were passed and the next step to amalgamate the Supreme Courts and Sadar Adalats was to implement uniformity in the administration of justice This object was achieved by the Indian High Courts Act of 1861

2 The Indian High Courts Act, 1861

The British Parliament passed the Indian High Courts Act in August 1861 [35] Earlier while introducing the Bill of 1861, Sir Charles Wood said, "We shall have one Supreme Court, one Sole Court of Appeal instead of two and inasmuch as the administration of justice in the minor Courts depends on the mode in which the appeals sent up from them are treated, the Superior Court thus constituted, will, I hope, improve the administration of justice generally throughout India "[36]

The Act of 1861 empowered the crown to establish, by Letters Patent, High Courts of Judicature at Calcutta (for the Bengal division of the Presidency of Fort William), Madras and Bombay It was provided that thereupon the Supreme Courts and the Courts of Sadar Diwani Adalat and Sadar Nizamat (*Faujdari*) Adalat should be abolished The jurisdiction and powers of the High Courts were to be fixed by Letters Patent The crown was also empowered to establish a High Court in the North Western Provinces

34 For details *see* Chapter XII "Law Commissions in India
35 24 & 25 Vict c 104 Act contained in all 19 Sections
36 Hansard's *Parliamentary Debates* (U K) Vol 163 p 647

It further provided that each High Court will consist of a Chief Justice and as many Puisne Judges, not exceeding fifteen, as the crown might think fit to appoint from time to time [37] It was stated that 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 years standing and Subordinate Judges or Judges of the Courts of Small Causes of at least five years service The Judges of the High Courts were to hold their office during Her Majesty s pleasure [38]

Each High Court was empowered to have supervision over all Courts subject to its appellate jurisdiction The High Court was also given the power to call for returns to transfer any suit or appeal from one Court to another and to make general rules Her Majesty could by grant of Letters Patent[39] enlarge their jurisdictions

3 Letters Patent establishing High Courts

On the basis of the authority given by the Indian High Courts Act of 1861, the crown issued Letters Patent dated the 14th May 1862 establishing the High Court of Judicature at Calcutta The Letters Patent establishing the High Court at Bombay and Madras were issued on 26th June 1862 As the Letters Patent of 1862 were found defective in certain respects, fresh Letters Patent were granted in 1865 which revoked the earlier Letters Patent They were identical in terms and defined the jurisdiction and powers of the three Presidency High Courts

(i) High Court of Judicature at Calcutta —The Letters Patent empowered the High Courts to enrol and remove Advocates, Vakeels and Attorneys at Law It was constituted to be a Court of Record

The High Court of Calcutta was authorised by the Letters Patent to exercise ordinary original civil jurisdiction within the local limits of the Presidency town of Calcutta as might be prescribed by a competent legislative authority for India Such limits were later defined by Act XV of 1919 Within such local limits the High Court was empowered to try and determine suits of every description except those failing within the jurisdiction of

37 Section 2 Indian High Courts Act 1861
38 Section 3
39 Section 9

the Small Causes Court at Calcutta Certain suits for land were also directed to be cognizable with the leave of the Court It was also empowered to try and determine, as a Court of Extra ordinary original jurisdiction, any suit falling within the jurisdiction of any Court within or without Bengal but subject to its superintendence

The Letters Patent also provided for appeal from the Courts of original jurisdiction to the High Court in its appellate jurisdiction and to the Privy Council Jurisdiction was also conferred on the High Court on its original side in respect of persons and estates of infants and lunatics One of the Judges of the Court was constituted the Court for relief of insolvent debtors at Calcutta

The High Court was also given ordinary original criminal jurisdiction within the local limits of its ordinary original civil jurisdiction *i e* within Calcutta Apart from this, Admiralty, Probate and Matrimonial jurisdictions were also conferred on the High Court in the exercise of original jurisdiction As such the High Court in its original side acquired all the jurisdictions possessed by the Supreme Court with some modifications

The Letters Patent constituted the High Court, a Court of Appeal from the Civil and Criminal Courts whether within or without the Bengal Division from which appeal were preferred to the Courts of Sadar Diwani and Sadar Nizamat Adalats at Calcutta In its appellate side, the High Court, therefore, replaced the then Company's Appeal Courts at Calcutta *viz*, the Sadar Diwani Adalat and Sadar Nizamat Adalat

As regards procedure, the High Court was given the power to make rules and orders in order to regulate all proceedings Civil and Criminal which were brought before it An attempt was made to bring uniformity in the rules of procedure of all High Courts and Subordinate Courts In making rules of procedure, the High Court was guided, as far as possible, by the Code of Civil Procedure, 1859 in Civil cases and in Criminal cases by the Code of Criminal Procedure, 1861 The convicted criminals were punished by the High Court according to the provisions of the Indian Penal Code

An appeal in any matter, not being of criminal jurisdiction, from the decision of the High Court was allowed to the Privy Council, provided that the sum or matter in issue was of the value of not less than Rs 10,000 The High Court was also empowered to certify that the case was a fit one for appeal to the Privy Council

(ii) **High Court of Judicature at Bombay** – By virtue of the authority given by the High Courts Act, 1861, the Queen of

England issued Letters Patent on 26th June 1862 establishing the High Court of Judicature at Bombay [40] It abolished the ex sting Supreme Court, Sadar Diwani Adalat and Sadar Nizamat (*Faujdari*) Adalat

The Letters Patent establishing the High Court at Bombay was similar to that which was issued for the High Court of Judicature at Calcutta The Bombay High Court[41] was therefore given all those powers which were given to the Calcutta High Court

The establishment of the Bombay High Court was a land mark in the history of judicial system in Bombay It led to the introduction of a uniform system of law and procedure throughout the Presidency of Bombay and thereby contributed to the growth of judicial system and rule of law in Bombay

(iii) **High Court of Judicature at Madras** —By the Indian High Courts Act, 1861 the Queen was empowered to establish by Letters Patent the High Court of Judicature at Calcutta Bombay and Madras The Letters Patent was issued on 26th June 1862 It established the High Court of Judicature at Madras[42] and on its establishment the chartered Supreme Court and the Sadar Diwani Adalat and Sadar Nizamat (*Faujdari*) Adalat were abolished at Madras Their jurisdiction and powers were transferred to the High Court at Madras [43] The Letters Patent stated the jurisdiction and powers of the Madras High Court to be similar to the jurisdiction and powers of the Calcutta and Bombay High Courts

(iv) **High Court of Judicature at Allahabad** —Under the power given by the Indian High Courts Act 1861 [44] the Crown issued Letters Patent on 17th March 1866 establishing a High Court of Judicature at Agra for the North Western Provinces The Sadar Diwani Adalat and Sadar Nizamat Adalat were both abolished after the establishment of the High Court at Allahabad The provisions of the Letters Patent of 1866 were similar to those of the Letters Patent of 1865 except in certain respects The Allahabad High Court as is well known was not given any ordinary original civil jurisdiction jurisdiction in insolvency

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40 The H'gh Court was installed at Bombay on 14th August 1862 *See* P B Vachha *Famous Judges Lawyers and cases of Bombay A Jud c al History of Bombay* pp 54-56 The High Court of Bombay 64 Bom LJ 33 49

41 In 1899 the High Court of Bombay was removed from Hornby or Admi ralty House to the new H gh Court building

42 *See* V C. Gopalaratnam *A Century Completed A H story of the Madras High Court* 1862 1962 p 10"

43 The High Court at Madras was opened on 16th August 1862

44 Section 16 of the Indian H gh Courts Act 1861

matters as given to the Presidency High Courts, nor admiralty and vice admiralty jurisdiction[45] In 1875 the High Court was shifted from Agra to Allahabad and was known as the High Court of Judicature at Allahabad

The constitution, jurisdiction, powers, and privileges of the Allahabad High Court were similar to those of the Presidency High Courts with the exceptions as stated above

In Oudh a Judicial Commissioner's Court was established in 1865 It was declared the highest Court of Appeal for the territory of Oudh by the Oudh Civil Courts Act 1877 The Oudh Courts Act of 1925 raised the status of the Judicial Commissioner's Court to the status of the Chief Court of Oudh Thus, in the State of United Provinces[46] two separate Courts of Appeal were working, one at Lucknow and the other at Allahabad After the Independence it was considered necessary to amalgamate the two Courts On 20th July 1948 the United Provinces High Courts (Amalgamation) Order, 1948 was issued which amalgamated the Courts of Lucknow and Allahabad and constituted one High Court in the name of the High Court of Judicature at Allahabad Since then a Bench of the Allahabad High Court is working at Lucknow

4 Indian High Courts Acts of 1865 and 1911

(i) **High Courts Act, 1865**—The Governor General in-Council was authorised by the High Courts Act, 1865 to make necessary alterations in the territorial jurisdiction of the chartered High Courts which were established under the High Courts Act of 1861 The power of the Governor General was made subject to the approval of the Crown

(ii) **High Courts Act, 1911**—The Indian High Courts Act, 1911 empowered His Majesty to establish High Courts in any territory within His Majesty's dominions in India Under the Act of 1911 a High Court could be established for any territory whether or not included within the limits of another High Court It was considered that the power to establish new High Courts under Act of 1861 was exhausted after the Allahabad High Court was established and, therefore, the Act of 1911 was passed The Act of 1911 raised the maximum number of Judges in each High Court from sixteen to twenty, which included the Chief Justice also It was also provided that the Judges will be paid a salary out of the revenues of India

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45 E. J Trevelyan *The Constitution and Jurisdiction of Courts of Civil Justice in British India* pp 71-76

46 The name "United Provinces" was changed to "Uttar Pradesh"

D The Constitutional Acts and High Courts 1915-1947

1 The Government of India Act, 1915

The Government of India Act, 1915 was passed by the British Parliament in order to consolidate and re enact the existing statutes concerning the Government of India and the High Courts The provisions of the High Courts Acts of 1861 and 1911 were re enacted

The Act of 1915 provided for the constitution, jurisdiction and powers of the High Courts Each High Court was to consist of a Chief Justice and as many other Judges as were appointed by His Majesty It stated qualifications for the appointment of a Judge of the High Court The High Courts were given original, appellate, including admiralty jurisdiction in respect of offences committed on the high seas They were declared Courts of Record and were given power to make rules for regulating the Court's practice They were not authorised to exercise any original jurisdiction in revenue matters or to set aside any act ordered or done in collecting revenue according to the local usage and custom They had powers of supervision over all subordinate Courts under their respective jurisdictions

While exercising their original jurisdiction in suits against the inhabitants regarding inheritance and succession to land rents and goods, and contracts between party and party the three Presidency High Courts of Calcutta Madras and Bombay were empowered to apply the personal law or custom having the force of law when both parties were subject to the same custom or law The law or custom of the defendant was to be applied only where the parties were subject to different personal laws or custom

The Act of 1915 also empowered His Majesty to establish new High Courts in any territory

(i) High Court at Patna —In exercise of the powers given by the Act of 1915 His Majesty, by Letters Patent dated 9th February 1916 established a separate High Court at Patna Its necessity was realised due to the proclamation of the Governor-General of India to form a separate Province of Bihar and Orissa Earlier, they were under the territorial jurisdiction of the Calcutta High Court The Patna High Court was given the same status as that of the Allahabad High Court and therefore was given the same privileges and powers

Orissa was separated from Bihar as a province in 1936 A separate Orissa High Court was established only after Independence by the Orissa High Court Order, 1948

(ii) High Court at Lahore —As early as 1865 the Indian

Legislature established a Chief Court at Punjab [47] The status of the Chief Court was raised to the High Court in 1919 Georg V, by a charter, under the authority of the Government of India Act, 1915, established a High Court at Punjab on 21st March 1919 It exercised jurisdiction over Punjab and Delhi territories with powers similar to the Allahabad High Court

After Independence, India was partitioned in 1947 and Lahore formed a part of Pakistan Therefore a separate High Court for Punjab was established at Simla with a Bench at Chandigarh

A separate High Court for the Union Territory of Delhi was established on 31st October 1966 The jurisdiction of the Delhi High Court was extended to Himachal Pradesh with effect from 1st May 1967 A permanent Bench of the Delhi High Court has been located at Simla

2 The Government of India Act, 1935

The British Parliament by enacting the Government of India Act, 1935, gave a new constitution to regulate functions of the Legislature, Executive and Judiciary of India The Act contained many provisions regulating the establishment, constitution, jurisdiction and powers of the High Courts Some important provisions of the Act relating to High Courts are briefly stated as follows

Act of 1935 provided that every High Court will be a Court of Record consisting of a Chief Justice and other Judges as appointed by His Majesty from time to time The provision of the Act of 1911, fixing the maximum number of the Judges as twenty, was dropped and the Act of 1935 empowered the King-in Council to fix the number of Judges from time to time for each High Court

Another important provision of the Act of 1935 was regarding the appointment and removal of High Court Judges The Act provided that the Judge of a High Court will be appointed by His Majesty under the Royal Sign Manual The Governor General in Council was empowered to appoint additional Judges The Judge of the High Court was to hold his office up to sixty years of age and he could be removed earlier by His Majesty only on the ground of misbehaviour or on infirmity of mind or body The Judge was likely to be removed if the Privy Council, on a reference made to it by His Majesty, recommended the removal This provision introduced and recognised the principle of independence of judiciary from the executive Before 1935, the Judges of the High Courts were to hold office during His

47 Act No XXIII of 1865

Majesty's pleasure As regards the minimum qualifications of a person to be appointed a Judge, the Act provided that barristers and advocates of ten years' standing were qualified for High Court Judgeship It was also laid down that a member of the Indian Civil Service of ten years' standing was also qualified to be appointed a Judge of any High Court in India If he remained as High Court Judge for three years he was declared qualified for holding the office of the Chief Justice of a High Court

The jurisdiction of the existing High Courts, the law administered in it and the powers of the Judges continued the same under the Act of 1935 as they were before it The prohibition which was imposed on the three Presidency High Courts in 1915 on their original jurisdiction to take cognisance of any matter concerning revenue was allowed to continue

The Act of 1935 made specific provision for the salaries, allowances and pensions of the Judges of the High Courts, that it will be fixed by His Majesty on their appointment It was also provided that none of these will be changed to the disadvantage of a Judge after his appointment This important provision ensured the independence of the judiciary from any executive interference

The administrative control of the High Courts was placed in the Provincial Government by the Act of 1935 [48] Though it was a very controversial issue as the Statutory Commission recommended for the administrative control of the Central Government In order to meet the basic plea of the Statutory Commission, the Act of 1935 took adequate care to safeguard the judicial independence of the Judges and to save them from any political pressures It can, therefore, be concluded that the Government of India Act, 1935 established a strong judiciary and by safeguarding the service matters of the Judges of the High Courts, strengthened the independence of judiciary

Provision was also made for an appeal to the Federal Court from any judgment, decree or final order of a High Court [49]

The Government of India Act, 1935 empowered His Majesty to issue Letters Patent constituting a High Court or reconstituting an existing High Court for that Province or part of it [50] The Nagpur High Court was established under the Act of 1935, a brief account of which is as follows

High Court at Nagpur —The Judicial Commissioner's Court

48 The Government of India Act carried out the suggestion of the Joint Select Committee

49 For Appeals from High Courts see Chapters VII IX and X of this Book

50 See N Rajagopala Aiyangar *Commentary on the Government of India Act*, 1935, pp 230-33, 243 51

for Central Provinces was replaced by the High Court at Nagpur His Majesty established it by Letters Patent dated 2nd January 1936 under the Government of India Act, 1935 Its jurisdiction, and powers were similar to those of the Allahabad High Court After reorganisation of States in India, Nagpur was merged with Maharashtra The Madhya Pradesh High Court which was at Nagpur was shifted to Jabalpur with a Bench at Gwalior

L High Courts established during 1947 to 1950

During the period from 15th August, 1947 to 26th January, 1950, i e , after the Independence to the date when the Constitution of India came into force, seven High Courts were established at different places

1 **High Court for Punjab** —India was partitioned at the time of Independence Lahore High Court remained in the Pakistan territory A High Court for Punjab was, therefore, established at Simla by the Governor General[51] under the Indian Independence Act, 1947 In 1966 upon reorganisation of the State of Punjab, the High Court was designated as the High Court of Punjab and Haryana

2 **High Court for Assam** —In exercise of the powers conferred by the Government of India Act, 1935 as adopted by the India Provisional Constitution (Amendment) Order, 1948 on the motion of the Assam Legislature, the Governor General established a High Court at Gauhati for Assam[52] Accordingly the jurisdiction of the Calcutta High Court was restricted to the territorial limits of West Bengal, as Calcutta was known after the partition of India in 1947 In between it became the High Court for Assam and Nagaland After the N E Areas Reorganisation Act, 1971 it is designated as Gauhati High Court (the High Court for Assam, Nagaland, Meghalaya, Manipur and Tripura)

3 **High Court for Orissa** —Just like the High Court for Assam, the Governor General established a High Court at Cuttack, for Orissa by the Orissa High Court Order dated the 3rd April 1948 Accordingly the jurisdiction of the Patna High Court was reduced to the State of Bihar only The High Court for Orissa was given the same powers as were given to the Patna High Court

4 **High Court for Rajasthan** —The High Court of Rajasthan was established at Jodhpur by the Raj Pramukh of

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51 The Governor General issued the High Courts (Punjab) Order dated 11th August 1947

52 The Governor General issued the Assam High Court Order, dated 1st March 1948

Rajasthan under the Rajasthan High Court Ordinance, dated 21st June, 1949 It was given all powers and jurisdiction just like that of the Allahabad High Court

5 **High Court for Travancore Cochin** —For Travancore-Cochin a High Court was established at Ernakulam by an Ordinace in 1948 which was repealed by the Travancore Cochin High Court Act, 1949 Later on, this State was known as Kerala The Kerala High Courts Act, 1958 laid down the jurisdiction, powers and authority of the Kerala High Court

6. **High Court for Mysore** —Even before Independence, the Mysore High Court existed in Mysore under the Mysore High Court Act, 1884 It was a princely state at that time After the Independence of Indian States and reorganisation of states the Mysore High Court Act, 1961 was passed to regulate jurisdiction and powers of the High Court With the change in the name of the State, it is now the Karnatak High Court

7 **High Court for Jammu and Kashmir** —Even before 1947 there existed the Jammu and Kashmir High Court It was established by the Maharaja of the State by Letters Patent dated 28th August 1943 It was given civil, criminal, original and extra ordinary jurisdiction After the constitution of Jammu and Kashmir came into force, the Jammu and Kashmir High Court continued to do the judicial work The High Court meets at Jammu and Kashmir

Γ The High Courts after the Constitution of India

The Constitution of India 1950 contains many specific provisions regulating the independent working of the High Courts Some important provisions are as follows

1 Constitution, jurisdiction and powers of the High Courts

The Constitution of India recognised all the existing High Courts It provided a High Court for each Province The Parliament was empowered to establish a common High Court for two or more provinces or union territories The President of India appoints the Judges of the High Court after consulting the Chief Justice of India, the Governor of the Province and the Chief Justice of the High Court for which appointment is to be made The President of India also appoints the Chief Justice of the High Courts In 1974 the old tradition of appointing the seniormost Puisne Judge as the Chief Justice was broken in the case of the High Court of Punjab and Haryana The Judge of a High Court retires at the age of 62 years He can retire earlier also by submitting

a written resignation The President of India can remove a Judge by an order 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, on the ground of proved misbehaviour or incapacity These provisions ensure security of service to the Judges and it leads to the independence of judiciary The allowances, leave and pension of a High Court Judge cannot be changed to the disadvantage of a Judge after his appointment It ensures financial security which is of great importance to maintain the impartiality and independence of the judiciary A citizen of India having ten years standing as Advocate or holding a judicial office for at least ten years may be appointed a Judge of the High Court The President of India is empowered to appoint a High Court Judge as a Judge in the Supreme Court on the recommendation of the Chief Justice of the Supreme Court

Each High Court is a Court of record and it can punish persons for contempt of Court In the contempt of Court proceedings the High Court is empowered to decide the matter summarily according to its own procedure and is not bound by the provisions of the Criminal Procedure Code [53] The conduct of a High Court Judge in the discharge of his duties cannot be discussed in any Central or Provincial Legislature except on a motion to remove a Judge as stated above

The jurisdiction of the High Courts, the law administered by them and the power to make rules of the Court are allowed by the Constitution of India to continue the same as were immediately before the commencement of the Constitution This jurisdiction and Power of the High Courts is subject to the provisions of the Constitution of India and provisions of any law of the appropriate legislature [54] The *status quo* is maintained by the Constitution in order to maintain the historical continuity The law administered at the commencement of the Constitution includes "case law" It is, therefore, specifically provided that the law declared by the Supreme Court shall be binding on all Courts within the territory of India [55] A decision of the Privy Council or the Federal Court, therefore, is binding upon the High Courts until the Supreme Court holds to the contrary The constitution removes the bar to the original jurisdiction of the High Courts in revenue matters [56] This restriction was imposed in 1935 by the Government of India Act

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53 *Sukhdeo Singh v. Teja Singh* AIR 1954 SC 186.
54 Art 225 Constitution of India 1950
55 Art 141 *see* also Section 212 of the Government of India Act, 1935
56 Art 225 Proviso

Every High Court is given the power of superintendence over all Courts and tribunals throughout the territories in relation to which it exercises jurisdiction Without prejudice to the generality of the foregoing provision the High Court may—(*a*) call for returns from such Courts, (*b*) make and issue general rules and prescribe forms for regulating the practice and proceedings of such Courts, and (*c*) prescribe forms in which books, entries and accounts shall be kept by the officers of any such Courts [57] The High Courts 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 therein The High Court has, therefore, both powers of administrative as well as judicial superintendence over the subordinate Courts within its jurisdiction [58]

Article 226 of the Constitution empowers the High Courts to issue to any person or authority within their respective jurisdictions, directions, orders or writs including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* or any of them for the enforcement of any of the fundamental rights conferred by Part III of the Constitution and for any other purpose The Constitution (Fifteenth Amendment) Act, 1963 has provided an additional basis of jurisdiction, in relation to territories within which the cause of action wholly or in part arises, notwithstanding that the seat of such Government or authority or the residence of such person is not within the territory of the High Court It shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32 of Constitution

Article 228 gives the High Court power to withdraw to itself any cases pending in a Court subordinate to it on being satisfied that the case involves a substantial question of law as to the interpretation of the Constitution, and to dispose of the case itself or on determining the question of law to return it to the Court from which the case had been withdrawn, to be disposed of in conformity with the judgment of the High Court

Article 229 provides for the appointment of officers and servants of the High Courts The Chief Justice of the High Court is given wide powers in such appointments but in the exercise of such power the executive and legislature has retained sufficient control

Article 230 provides that the Parliament may by law extend the jurisdiction of a High Court or exclude the jurisdiction of a High Court from any Union territory The Parliament is

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57 Art 227

58 *Hari Vishnu Kamath* v *Ahmad Ishaque* AIR 1955 SC 233 *Waryam Singh* v *Amarnath* (1954) SCR 565, *Naba at Chandra Bag* v *Mahend a Nath Ghughi* AIR 1963 SC 1895

empowered by Article 231 to establish by law a common High Court for two or more States or for two or more States and a Union territory

An appeal from any judgment, decree or final order of a High Court in a civil, criminal or other proceedings, lies to the Supreme Court [59] The High Court may certify that the case involves a substantial question of law as to the interpretation of the Constitution Where a High Court refuses to give such a certificate, the Supreme Court, if it is satisfied that the case involves a substantial question of law, may grant special leave to appeal Where such a certificate is given by the High Court or the Supreme Court grants leave, any party may appeal to the Supreme Court against such decision In civil cases an appeal will lie to the Supreme Court if the High Court certifies that the case involves a substantial question of law of general importance and that in the opinion of the High Court the said question needs to be decided by the High Court [60] In criminal matters[61] an appeal to the Supreme Court lies 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 subordinate Court 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

G CHANGES MADE BY CONSTITUTION (FORTY SECOND AMENDMENT) ACT, 1976

Drastic changes in the jurisdiction and powers of the High Courts have been made by the Forty Second Amendment Act, 1976 with effect from Feb 1, 1977 These changes are

(*i*) The bar to the original jurisdiction in respect of revenue matters was removed by proviso to Article 225 This proviso has now been repealed [62]

(*ii*) The High Courts have been deprived of their jurisdiction to adjudge the constitutional validity of any Central Law [63] This matter is now within the exclusive purview of the Supreme Court under new Article 131A Where the constitutionality of a State law is involved a minimum number of five judges shall sit for this purpose and a State law will be struck down only

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59 Art 132
60 Art 133(1) as amended by the Constitution (Thirtieth Amendment) Act, 1972
61 Art 134 For details *see* Chapter on "The Supreme Court of India in this book
62 Section 37 of the Constitution (Forty Second Amendment) Act, 1976
63 Articles 131A and 226 A *added* by Sections 23 and 39 *ibid*

if *two-thirds i e* , 4 out of the 5 judges declare it unconstitutional Where the High Court consists of less than five judges all of them may sit for this purpose and to strike down the law all of them must hold against the validity of the law

(*iii*) Article 226 has been substituted and the writ jurisdiction has been curtailed to the three matters enumerated in clauses (*a*), (*b*) and (*c*) of new Article 226 The remedy will not be available if there is an alternative remedy under the relevant statutory law Power of *High Court to issue injunction* when its writ jurisdiction is invoked has also been restricted and necessary steps have been enumerated

(*iv*) Power of superintendence under Article 227 has now been restricted to courts subject to its appellate jurisdiction The omission of tribunals is significant

(*v*) Power under Article 228 to withdraw cases involving constitutional questions has been made subject to Article 131A

(*vi*) As regards appointment, a distinguished jurist can now be appointed as a High Court judge

The new articles read as under .

226 **Power of High Courts to issue certain writs** —(1) Not withstanding anything in Article 32 but subject to the provisions of Article 131A and *Article 226A, every High Court shall have power, throughout the te ritories* in relation to which it exercises jurisdiction to issue to any person or authority, *including in appropriate cases any* Government, within those territories direc tions, orders or writs including writs in the nature of *habeas corpus, n andamus* prohibition, *quo warranto* and *certiorari,* or any of them,—

(*a*) for the enforcement of any of the rights conferred by the provisions of Part III , *or*

(*b*) for the redress of any injury of a substantial nature by reason of the contravention *of any other provision of the Constitution or any pro*vision of any enactment or Ordinance or any order, rule, regulation *bye-law or other instrument made thereunder* , or

(*c*) for the redress of any injury by reason of any illegality in any proceedings by or before any authority under any *provision referred to* in sub clause (*b*) where such illegality has resulted in substantial failure of *justice*

(2) 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 exercising jurisdiction in relation to the territories within which the cause *of action wholly or in part, arises for the exercise of such power,* notwithstand ing that the seat of such Government or authority or the residence of such person is not within those territories

(3) No petition for the redress of any injury referred to in sub-clause (*b*) or sub-clause (*c*) of clause (1) shall be entertained if any other remedy for such redress is provided for by or under any other law for the time being in force

(4) No interim order (whether by way of injunction or stay or in any other manner) shall be made on, or in any proceedings relating to, a petition under clause (1) unless—

(a) copies of such petition and of all documents in support of the plea for such interim order are furnished to the party against whom such petition is filed or proposed to be filed, and

(b) opportunity is given to such party to be heard in the matter

(5) The High Court may dispense with the requirements of sub-clauses (a) and (b) of clause (4) and make an interim order as an exceptional measure if it is satisfied for reasons to be recorded in writing that it is necessary so to do for preventing any loss being caused to the petitioner which cannot be adequately compensated in money but any such interim order shall if it is not vacated earlier, cease to have effect on the expiry of a period of fourteen days from the date on which it is made unless the said requirements have been complied with before the expiry of that period and the High Court has continued the operation of the interim order

(6) Notwithstanding anything in clause (4) or clause (5), no interim order (whether by way of injunction or stay or in any other manner) shall be made on, or in any proceedings relating to, a petition under clause (1) where such order will have the effect of delaying any inquiry into a matter of public importance or any investigation or inquiry into an offence punishable with imprisonment or any action for the execution of any work or project of public utility, or the acquisition of any property for such execution by the Government or any corporation owned or controlled by the Government

(7) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of Article 32

226A. Constitutional validity of Central laws not to be considered in proceedings under Article 226.—Notwithstanding anything in Article 226, the High Court shall not consider the constitutional validity of any Central law in any proceedings under that article

227. Power of superintendence over all courts by the High Court.—(1) Every High Court shall have superintendence over all courts subject to its appellate jurisdiction

(2) Without prejudice to the generality of the foregoing provision, the High Court may—

(a) call for returns from such courts,

(b) make and issue general rules and prescribe forms for regulating the practice and proceedings of such courts, and

(c) prescribe forms in which books, entries and accounts shall be kept by the officers of any such courts

(3) The High Court 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 therein

Provided that any rules made, forms prescribed or tables settled under clause (2) or clause (3) shall not be inconsistent with the provision of any law for the time being in force, and shall require the previous approval of the Governor

(4) Nothing in this article shall be deemed to confer on a High Court powers of superintendence over any court or tribunal constituted by or under any law relating to the Armed Forces

established at Ahmedabad For the State of Maharashtra the Bombay High Court continued to function The High Court for Gujarat began its work from 1st May, 1960 at Ahmedabad

(iv) **High Court for Nagaland** —The State of Nagaland Act 1962 created a separate State of Nagaland The Act provided that the Assam High Court will also be for the State of Nagaland Thus the High Court of Assam at Gauhati became a common High Court for the State of Assam and the State of Nagaland

(v) **High Court for Delhi** —A separate High Court for the Union territory of Delhi was established with effect from 31st October 1966[64] "

(vi) **Judicial Commissioner s Court for Goa Daman and Diu** —By Act 16 of 1963 the J C s court was declared a High Court for the purposes of Arts 132 133 and 134

(vii) **High Court for Himachal Pradesh** —A separate High Court for the former Union Territory of Himachal Pradesh was established after the establishment of the State of Himachal Pradesh by the State of Himachal Pradesh Act 1970 (53 of 1970)

(viii) **High Court for Manipur, Tripura and Meghalaya** —By the N E Areas Reorganisation Act 1971 High Court of Assam and Nagaland became the common High Court for the States of Assam Nagaland Meghalaya Manipur and Tripura It is now designated the Calcutta High Court

(ix) **High Court for Sikkim** —In the new added State of Sikkim a High Court was established in 1975 at Gangtok

(x) **Permanent Bench of High Court of Patna at Ranchi** —By Act 57 of 1976 the circuit bench of the Patna High Court functioning at Ranchi since March 6 1972 was made permanent by Act of Parliament This Bench is to hear cases arising out of the districts of Hazaribagh, Giridih, Dhanbad, Ranchi, Palamau and Singhbhum

(xi) **Revival of Bench of Rajasthan High Court at Jaipur** —The Bench at Jaipur which was abolished was revived by the High Court of Rajasthan (Establishment of a Permanent Bench at Jaipur) Order, 1976 in January, 1977

(xii) **Extension of Jurisdiction of High Courts** —The Calcutta High Court (Extension of Jurisdiction) Act, 1953 extended the jurisdiction of the Calcutta High Court to the Andaman and Nicobar Islands The States Reorganisation Act,

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64 Government of India Ministry of Home Affairs Report of 1966-67

1956 extended the jurisdiction of the Kerala High Court to Laccadive, Minicoy and Amindivi Islands The Dadra and Nagar Haveli Act, 1961 extended the jurisdiction of the Bombay High Court over the Dadra and Nagar Haveli By the N E Areas Reorganisation Act, 1971 the jurisdiction of the Gauhati High Court was extended to the Union Territories of Mizoram and Arunachal Pradesh

I IMPROVEMENT OF CONDITIONS OF SERVICE OF HIGH COURT JUDGES

By passing the High Court Judges (Conditions of Service) Act, 1976 (Act 35 of 1976) a long overdue measure was undertaken in improving their conditions of service The statement of Objects and Reasons succinctly sums up the situation

"Since the passing of the High Court Judges (Conditions of Service) Act, 1954, there has been no material modification of the conditions of service of the High Court Judges There is now a widespread feeling that in the present day context, the conditions of service are not attractive enough, especially with reference to the Members of the Bar There has also been a persistent demand for improvement of the salary and other conditions of service of Judges Having considered all aspects of the matter, it is proposed to allow the Judges of the High Courts certain ancillary benefits with effect from 1st October, 1974

2 At present there is no provision for grant of family pension and death cum retirement gratuity in the case of Judges who are governed by Part I of the First Schedule to the Act It is proposed to extend the facility of family pension on the same lines as is applicable to Class I officers of the Central Government It is also proposed to give them the facility of death cum retirement gratuity admissible to Class I officers of the Central Government subject to the modifications that the minimum qualifying service for the purpose of entitlement shall be two years and six months and that the gratuity will be calculated at the rate of twenty days' salary for each completed year of service as a Judge

3 It is further proposed to give to the Judges of the High Courts the facility of rent free accommodation Where a Judge does not avail of the official residence, he will be paid an allowance at the rate of twelve and a half per cent of his salary A conveyance allowance at the rate of Rs 300 per mensem to every Judge is also proposed to be given In addition, the Chief Justice of a High Court is also proposed to be given a sumptuary allowance of Rs 300 per mensem

4 While the maximum pension of Government servants on retirement has been increased on the recommendation of the Third Pay Commission, there has been no increase in the pension of

Judges since the commencement of the Constitution It is proposed to increase the pension of the Judges by about 40 per cent and fix the minimum as Rs 28,000 per annum in the case of the Chief Justice and Rs 22,400 per annum in the case of other Judges The minimum will be reached on completion of 14 years of service The maximum pension is also proposed to be increased by 40 per cent from Rs 6,000 per annum to Rs 8,400 per annum

5 It is further considered necessary to given post retirement medical facilities to the same extent as are admissible to retired Central Government servants of Class I and to enable the retired Judges to avail of such medical facilities as the State Government may decide to extend to them "

J Conclusion

The roots of the present lie deep in the past This is also true in the case of the High Courts in India Tracing back its history, first of all only three High Courts in Calcutta, Madras and Bombay, were established under the Indian High Courts Act, 1861 Since then with the gradual expansion of the British rule in India, the number of High Courts also increased gradually Under the Government of India Acts of 1915 and 1935, their powers and jurisdiction were also regulated with a view to achieve impartiality and independence of the judiciary The High Courts earned a goodwill and gained the confidence of the people

After Independence, the Constitution of India came into force on the 26th January, 1950 Its provisions, relating to High Courts, began a new and very remarkable chapter in the history of the Indian High Court There are in all eighteen High Courts in India, namely, Allahabad, Andhra Pradesh, Bombay, Calcutta, Delhi, Gujarat, Gauhati, Himachal Pradesh, Jammu & Kashmir, Karnataka, Kerala, Madhya Pradesh, Madras, Orissa, Patna, Punjab and Haryana (one common High Court), Rajasthan and Sikkim In addition there is the Judicial Commissioner's Court at Goa They are now assigned a very important role under the Constitution Apart from their civil, criminal, appellate jurisdiction, they are the interpreters and the guardians of the Constitution protecting the fundamental right The High Courts are also given other important functions under various Acts During the period from 1950 to 1974, in the changing social, economic and political conditions of India, the High Courts have played a very important role in the administration of justice as well as maintained the impartiality and independence of the judiciary in India It is expected that the same high standard of the judiciary will be maintained by the Indian High Courts in future also and the Government of India will give them all necessary facilities and constant encouragement for the same

8

History of The Privy Council

A The Privy Council in England

1 Origin of the Privy Council

The Norman Conquest in 1066 played a very important role in shaping the English law and the constitution of Courts of Justice in England [1] It introduced a powerful Central Government in England controlling executive, legislative and judicial departments The Normans ruled over England through *Curia Regis*,[2] which was a sort of Supreme Feudal Council of Normans to control the administration of England Out of the *Curia* gradually two distinct bodies, namely, the Magnum Concilium and the *Curia Regis*, emerged The Magnum Concilium was a larger Assembly which was called for consultations on certain fixed occasions by general summons Henry I finding the Magnum concilium too big a body for praotical purposes, formed a small Assembly of selected important officials of the state It was called the *Curia Regis* It was comparatively easy for the small Royal Council to meet frequently and take decisions on important administrative matters The smaller council consisted of some high officials of the State, members of the Royal Household and certain important clerks chosen by the Crown

Gradually, the smaller Council meetings gained special importance in the administrative and judicial fields It was considered to be the most important body of advisers of the King The process of division of work amongst the members of the King's advisory body began and it led to the growth of specialised institutions Potter said, "The *Curia Regis* was so fertile a mother of law courts that, under the more modern description of the King's Council, she was responsible for yet another brood

1 George W Keeton *The Norman Conquest and the Common Law* pp 81 113 201 222

2 In England, after the Norman Conquest, William continued to summon Witan It gradually transformed its character and it became *Curia Regis* the feudal counterpart of the *Curia* Ducis of Normandy *See* William Holdsworth *A History of English Law* Fourth Edition Vol II Ch II V D Kulshreshtha *A Textbook of English Legal History* Second Ed Ch II

conveniently termed the Conciliar Courts All the Royal Courts have *the same origin but the date of their birth affected their* growth and characteristics [3]

In the reign of Henry II as a result of reforms introduced by the King the judicial work of the *Curia* greatly increased Its result was that the justices became a separate professional body Th *Curia Regis* in its judicial manifestation became a distinct body from the *Curia Regis* as a general Administrative Council and eventually evolved into two great Common Law courts the Court of King s Bench and the Court of Common Pleas Sometimes later the Court of Exchequer became distinct from the Exchequer on its fiscal side The separation of these three courts, entrusted with different functions became distinct in the reign of Edward I[4] *In course of time the Privy Council originated from the smaller* council of the King

In the sixteenth century during the Tudors the Council had the exclusive power to adjudicate upon appeals from colonies An Order in Council was issued to regulate appeals from the Channel Islands [5] The sovereign, as the fountain of justice had the inherent prerogative right and duty to ensure the due administration of justice over all British subjects It was the main basis of the jurisdiction of the Privy Council In 1667 a Committee of the Privy Council was appointed known as "The Committee for the Business of Trade" The Privy Council delegated its authority to this committee to hear appeals which came before it from *the colonies of the Crown It is still not quite clear as to how* far the Indians at that time derived advantage of the right to appeal to this committee

In the eighteenth century with the growth of the British Empire the work of the Committee of the Privy Council greatly increased But it was realised that the Councillors, who presided over it, were not competent to deal with its business as they were mostly laymen In those days the Committee of the Privy Council sat on an average of about nine days a year to hear appeals from the colonies of the British Empire This state of affairs of the Privy Council was severally criticised In his famous speech in 1828 of Law Reforms in the House of Commons, Mr (afterwards Lord) Brougham pointed out the defects of the

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3 Harold Potter *An Historical Introduction to English Law and Its Institutions* p 99

4 George W Keeton *The Norman Conquest and the Common Law* pp 107 113

5 Appeals from the channal Islands the Islands of Man and the overseas possessions of the Crown which were outside the jurisdiction of the Courts of Westminster were formerly sent to the Privy Council

6 According to the records of the Privy Council the earliest Indian Appeal to the Privy Council was in 1791

Privy Council as follows

> " the Judges of Appeal are chosen without much more regard to legal aptitude; for you are not to suppose that the business of these nine days upon which they sit is all transacted before lawyer, one lawyer there may be, but the rest are laymen The Master of the Rolls alone is always to be seen there of the lawyers Such, Sir, is the constitution of that lawful Privy Council which sits at Westminster, making up for its distance from the suitors by the regularity of its sittings, and for its ignorance of local laws and usages by the extent and variety of its general law learning, this is the court which determines, without appeal, and in a manner the most summary that can be conceived in this country, all those most important matters which come before it" [7]

2 Acts Establishing Judicial Committee of the Privy Council

Lord Brougham's strong protest against laymen hearing appeals led to the passing of the Judicial Committee Act, 1833[8] by the British Parliament The statute of 1833 established a statutory permanent committee[9] of legal experts to hear appeals from the British Colonies and to dispose of other matters as referred to them by His Majesty according to the provisions of the Act This statutory committee was known as "The Judicial Committee of the Privy Council" There is a great truth in J P Eddy's remark, " the Privy Council was transformed by the Act of 1833 into a great Imperial Court of unimpeachable authority" [10]

Since 1833, the seven Lords of Appeal in Ordinary are members of the judicial committee The first sitting of the newly appointed Judicial Committee of the Privy Council took place on 27th November 1833 It was the "Last Court of Appeal under the Throne"

The Judicial Committee of 1844 provided that instead of four members, three members of the committee will form a quorum, a majority of whom will give their recommendation to the Crown The Appellate Jurisdiction Act of 1908 extended the membership of the Judicial Committee and provided that His Majesty may appoint not exceeding two members in number at a time who were Privy Councillors or were Chief Justice or Judge of any

7 Lord Brougham's speech quoted by J P Eddy in his article India and the Privy Council The Last Appeal in 66 LQR 206 at p 209
8 Statute 3 & 4, William IV
9 The Privy Council was established on the 14th August 1833
10 J P Eddy India and the Privy Council The Last Appeal 66 LQR 206 at p 210

High Court in British India The Appellate Jurisdiction Act, 1929 further authorised the appointment, by Letters Patent, of two additional salaried members of the Committee from amongst specially qualified persons, i e , who being a Privy Councillor has been a Judge of High Court or is a Barrister, Advocate, Vakil of not less than fourteen years' practise

3 Composition, Procedure and Jurisdiction of Privy Council

The Judicial Committee of the Privy Council whose constitution has been modified by the Acts of 1844, 1908, 1929 and other Acts is now composed of the Lord Chancellor, the existing and former Lords President of the Council (who do not attend), Privy Councillors who hold or have held high judicial office including retired English and Scottish Judges), the Lords of Appeal in ordinary and such judges or former judges of the superior courts of the Dominions and colonies as the Crown may appoint Ordinarily the quorum of the Judicial Committee is of three members but in important cases generally five members preside over the committee meeting to hear appeals

The Judicial Committee is not a court of law but it is only an advisory Board whose duty is to report to His Majesty their opinion as a body, and humbly advise him as to the action he should take on appeals submitted to him[11] Every appeal is addressed to 'The King's Most Excellent Majesty in Council" and is sent to the Judicial Committee for their advice under a general order passed in 1909 The advice so submitted is in the form of a judgment which ends with the words "and we humbly advise *etc* " There is only one judgment of the Privy Council[12] and there is no dissenting judgment as in the case of appeals heard by the High Courts Such a judgment of the Privy Council may be the unanimous judgment of the members of the Board hearing the appeal or of the majority But the judgment speaks with one voice for the reason that it would be most embarrassing

11 O Hood Phillips *A First Book of English Law* pp 69 70

12 *British Coal Corporation v Thekkiri* (1935) AC 500 *See* also S G Velinker The First Centenary of the Judicial Committee of the Privy Council" *The Bombay Chronicle* 1933 January

13 Eddy has pointed out The Judicial Committee sits in two rooms at the Downing Street end of the Treasury Building which lies on the West side of Whitehall I should prefer to describe it as a spacious oak panelled room a room which has been a suitable setting for many a historic scene a room in which justice manifestly seems to be done Formerly the judges sat at the sides of an oblong table—not facing the Bar but facing each other At the top there was a vacant place which was theoretically for the King Now-a-days they does sit at a table in shape like a horse-shoe and face the Bar No place is now reserved for the King J P Eddy Indian and Privy Council The Law Appeal 47 LQR 30 at p 211

to His Majesty to decide for himself what course to adopt in an appeal if his learned and trusted advisers differed in their advice It is the duty of every Privy Councillor not to disclose the advice he has given to His Majesty On the advice tendered, a draft Order in Council is prepared and at a meeting of the Privy Council itself, usually in Buckingham Palace it receives His Majesty's approval

The jurisdiction of the Judicial Committee was pointed out by *Lord Brougham in his speech before the House of Commons* on Law reform in 1828 thus 'They determine not only upon questions of colonial law in plantation cases but also sit as Judges, in the last resort of all prize causes 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

All this immense jurisdiction over the rights of property and person, over rights political and legal and over all questions growing out of so vast area is exercised by the Privy Council unaided and alone In our Eastern possessions these variations (of law) are, if possible, greater the English jurisdiction being confined to the handful of British settlers and the inhabitants of the three Presidencies (in India)" [14]

In 1926 Lord Cave, then Chancellor, in the case of *Nadan v The King*[15] described the right of appeal to the Privy Council, as follows

> "The practice of invoking the exercise of the Royal prerogative by way of appeal from any court in His Majesty's Dominions has long obtained throughout the British Empire In its origin such an application may have been no more than a petitory appeal to the sovereign, as the fountain of justice for protection against an unjust administration of law, but, if so, the practice has long since ripened into a privilege belonging to every subject to the King"

In a leading case, *Hull v Mckenna*,[16] Lord Haldane stated the nature of the jurisdiction and constitution of the Privy Council, as given below

> "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 It is a report *as to what is proper* to be done on the principles of justice 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

14 Lord Brougham's *Speeches* Vol II p 356
15 (1926) AC 482
16 *Alexander E Hull & Co v A E McKenna* (1926) IR 402.

body or a Canadian body or a South African body or for the future an Irish Free State body 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

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 The Sovereign is the Sovereign of the Empire has retained the prerogative of justice 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 is that the Judicial Committee is not as a rule advised to intervene unless the case is one involving some great principle or is of some very wide public interest

Rules guiding appeals to Privy Council —There are two rules of practice which guided the Privy Council's appellate jurisdiction The first is that His Majesty's prerogative extends to criminal as well as to civil cases The second that the Judicial Committee will refuse to act as a mere court of criminal Appeal In criminal cases His Majesty is advised to interfere only if it satisfies the rule as laid down by Lord Watson in Dillett's case[17] It provides that His Majesty will not review or interfere with the course of criminal proceedings unless it is shown that by a disregard of the forms of legal process or by some violation of the principle of natural justice or otherwise, substantial and grave injustice has been done

Another rule of practice is that the Judicial Committee will not disturb concurrent findings of fact of the two lower courts In order to prevent the practice there must be some miscarriage of justice or violation of some principle of law or procedure [18]

B Appeals From India to the Privy Council

1 Early Charters and Appeals to Privy Council 1726 1860

(i) Charters of 1726 and 1753 —For the first time in the legal history of India George I by the Charter of 1726 provided for appeals to the Privy Council from India The Charter of 1726

17 Dillett's case (1887) 12 App Cas 459
18 J P Eddy *India and the Privy Council The Last Appeal*", 66 LRQ 206

established three Mayor's Courts at Calcutta, Madras and Bombay respectively It provided that from the decisions of the Mayor's Courts first appeal will he to the Governor-in Council in the respective provinces There was a provision for second appeal in civil cases where the amount in dispute exceeded 100 pagodas In such cases an appeal was, therefore, allowed from the judgment of the Governor-in Council to the Privy Council in England

The Charter of 1753 re-established the Mayor's Courts at the three Presidency towns of Calcutta, Madras and Bombay As regards the provision relating to appeals, the Charter of 1753 followed the Charter of 1726 These provisions continued up to the passing the Regulating Act, 1773

Though the Charters of 1726 and 1753 provided for appeals to the Privy Council, there was not a single case involving an Indian up to 1790 in which an appeal was filed before the Privy Council [19] However the old records of the Privy Council point out that before the Regulating Act, 1773 came into force, there were four appeals filed by Englishmen before the Privy Council from India The first appeal in *Barrington* v *The President and Council of Fort St George,*[20] was filed by Barrington before the Privy Council in 1750 against the order of the Governor and Council removing him from the office of Alderman and directing him to return to England This appeal was withdrawn by Barrington before it was decided by the Council In 1731, *William Mitchell* v *Nathanial Turner,*[21] was the second case in appeal from Fort William regarding a money dispute between them On appeal the Privy Council approving the decision of the Governor-in-Council dismissed the petition of Mitchell Third case of appeal was on 25th July 1731 when *Robert Adams* filed an appeal against *Mathew Wastal,*[22] regarding a money dispute involving a sum more than Rs 8,000 In the fourth case *Moses Francia* filed an appeal to the Privy Council in March 1739 against *James Hope* [23] The dispute was regarding a money transaction between them These disputes were amongst English people and, therefore, cannot be considered as Indian Cases, in appeal to the Privy Council

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19 *Ibid*, p 296 Eddy's observation ' the earliest record which the Privy Council has of an Indian appeal shows that the petition was presented in the year 1791 There is great truth in this statement Here Eddy refers to an appeal filed by an Indian against Indian to the Privy Council He is not saying about Englishmen who came to India and filed appeals to the Privy Council against the Governor *See also*, Dr A T Markose ' *The First Indian Appeal to the Privy Council* ', 1965 *Indian Year book of International Affairs* Vol XIV, pp 242 56

20 P C 2, Vol 91, p 340

21 P C 2 Vol 91, p 619

22 P C 2, Vol 92, pp 482, 504

23 P C 2, Vol 95, p 664

(ii) The Regulating Act and subsequent Charters —The Regulating Act, 1773 empowered the Crown to issue a Charter establishing a Supreme Court at Calcutta The Charter of 1774 was accordingly issued by the Crown which established the Supreme Court at Fort William, Calcutta and the Mayor's Court was abolished Section 30 of the Charter granted the right to appeal from the judgment of the Supreme Court to the King in-Council in civil cases where the amount involved exceeded 1,000 Pagodas Such appeal was allowed within six months' period after the date of the Supreme Court's decision Thus appeals were directly filed before the Judicial Committee from the Calcutta Supreme Court

The Mayor's Courts at Madras and Bombay were abolished in 1798 by the Crown's Charter under an Act of 1797 The Crown was also empowered to establish a Recorder's Court at Madras and Bombay by the Charter Accordingly the Recorder's Courts replaced the Mayor's Courts at Madras and Bombay respectively The Charter provided for direct appeals from the Recorder's Court to the King in Council These appeals were allowed on the same basis as from the Calcutta Supreme Court to the King in-Council

In Madras, the Recorder's Court was replaced by the Supreme Court in 1801 under the Act of 1800 passed by the Parliament Similarly the Recorder's Court at Bombay was replaced by the Supreme Court in 1823 by Crown's Charter under an Act of 1823 passed by the British Parliament The right of appeal at Bombay and Madras was given just like that of Calcutta with one difference regarding the valuation of the suit An appeal from the Madras Supreme Court to the King in Council was allowed if the valuation of the suit was more than 1,000 Pagodas While from the Bombay Supreme Court appeal was allowed where the valuation of the suit exceeded 3,000 Bombay rupees A period of six months was provided for filing an appeal to the King-in-Council

Apart from the Supreme Courts, which were considered as King's Courts, there were also Company's courts in Mofussil areas under the English Company The Act of Settlement, 1781 provided that an appeal will lie from Sadar Diwani Adalat at Calcutta to His Majesty, in Civil suits valuing £ 5,000 or more There was no limitation of time for filing an appeal In 1797, the Governor General in-Council passed a Regulation,[24] limiting the right of appeal to six months period from the date of judgment The valuation of suit for an appeal was laid down as Rs 50,000 or more exclusive of costs

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24 Regulation XVI of 1797

At Madras a Sadar Diwani Adalat was established in 1802 In Civil suits valuing more than Rs 45 000/ an appeal lay to the Governor General in Council from the Sadar Diwani Adalat at Madras In 1818 it was provided that an appeal from the Sadar Diwani Adalat will directly lie to His Majesty The Monetary condition regarding minimum valuation of a suit, was also removed and appeals were allowed in all cases

The right of appeal to His Majesty from the Sadar Diwani Adalat at Bombay was allowed in 1812 in suits valuing £ 5 000 or more excluding the costs These rules were rescinded in 1813 by Regulation II of 1813 due to lack of legal competency of the Bombay Government In 1818 the old defect of the Bombay Government was removed and an appeal was allowed from the Sadar Diwani Adalat to His Majesty without any financial limit on the valuation of the suit In 1827 a new[25] Code of Bombay Regulations was promulgated in place of the old rules but the Code restated the old rule in a systematic manner Regarding appeals from the Sadar Diwani Adalat to His Majesty similar provisions were laid down in the Code and there was no restriction on the valuation of the suit

In 1818 it was found that during the last sixty years only fifty appeals were filed to the Privy Council It was considered that the appeals were not filed due to the fixed limit on the valuation of the suit In order to encourage appeals to the Privy Council, it was decided in 1818 to remove the condition regarding the valuation of the suit in appeal Appeals in all cases were therefore allowed to the Privy Council from the decisions of the Sadar Diwani Adalats of Bombay and Madras Its reaction was very favourable and the later records of the Privy Council showed a great increase in the number of appeals No doubt it was also realised in such appeals that there was a lot of inconvenience to the parties as well as it invoked huge expenditure

In order to regulate the system of appeals to the Privy Council and to define the constitution composition and jurisdiction of the Privy Council, William the Fourth passed the Judicial Committee Act of 1833[26] Under it a permanent body of the Judicial Committee was appointed to dispose of appeals and other matters of the Colonies as referred to it by the King in Council Section 24 of the Act empowered the King in Council to make rules for the regulation of appeals from th Sadar Diwani Adalats Section 30 provided for the appointment of two assessors to help the members of the Privy Council The Act provided for the

25 *Elphinstone Code*
26 For details *see* under the heading The Privy Council in England in *the earlier portion of this Chapter*

appointment of two retired Indian judges as assessors to the Judicial Committee They were to attend the sittings of the Privy Council but they were not authorised to give any vote This provision helped the Privy Council judges in having full knowledge about Indian peculiarities and legal position in detail from the Indian assessors Under this provision appointments were made from the retired judges of the Supreme Courts No retired judge of the Sadar Diwani Adalat was ever appointed on this post An Order in Council was issued on 10th April, 1838 which provided that an appeal could be taken to the Privy Council within six months if the valuation of the suit was more than Rs 10,000 Thus the condition of the valuation of the suit was again imposed It also reduced the number of appeals from the courts in India to the Privy Council

Another important Act was passed by the British Parliament in 1845 [27] It amended the Act of 1833 It provided that the appeals from the various Sadar Diwani Adalats to the Privy Council, which were in pending near about 1833 because of the suitors not having taken the necessary steps to bring them to a hearing due to their ignorance, were all considered to be disposed of by 1845 In all appeals which were filed after 1st January, 1846, the management of appeals in England was taken out of the Company's hands and was given to the respective parties

2 Indian High Courts Act, 1861 and appeals to Privy Council

The Indian High Courts Act, 1861 empowered the Crown to establish High Courts by Charters It also amalgamated the Supreme Court and Sadar Diwani Adalat and Sadar Nizamat Adalat at Calcutta, Madras and Bombay Thus the King's Courts and the Company's Courts were woven into one chain and they were replaced in each Presidency town by a High Court in 1862 The High Court at Allahabad was established in 1866

The Charters establishing the High Courts provided for the circumstances under which an appeal will lie from the High Courts to the Privy Council The Charter recognised the right of parties to file an appeal to the Privy Council in all matters except criminal cases from the final judgment of the High Courts In the proviso it was made clear that in civil cases, valuation of the suit should not be less than that Rs 10,000 An appeal was also allowed from any other judgment of the High Court when the Court certified the case to be a fit case for appeal to the Privy Council

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27 8 and 9 Vict. C 10

The Civil Procedure Code also provided for appeals from the High Courts to the Privy Council under Sections 109 to 112 Rules 2, 3, 4, 7, 8, 10, 13, 14, 15 and 16 of the Civil Procedure Code further clarified the procedure and rules regarding appeals to the Privy Council An appeal was allowed to the Privy Council where the subject matter involved in the case was Rs 10,000 or more An appeal was also allowed where the High Court certified that the case involved an important question of law and that it was a fit case for appeal

Early Charters of the High Courts granted a right of appeal to the Privy Council from any judgment, order or sentence of a High Court made in the exercise of original criminal jurisdiction, if the High Court declared that it was a fit case for appeal But this power was not of general use It is said 'The Judicial Committee is not a revising Court of Criminal appeal, i e it is not prepared to re try a criminal case The Judicial Committee shall only interfere where there has been an infringement of the essential principles of justice'[28] The Criminal Procedure Amendment Act, 1943 by Section 411 A laid down certain conditions regulating appeals to the Privy Council

3 The Government of India Act, 1935

The Government of India Act, 1935 introduced a federal constitution in India in which the powers were distributed between the Centre and the constituent units It also provided for the establishment of a Federal Court The Federal Court of India was inaugurated on 1st October, 1937[29]

The Federal Court was given exclusive original jurisdiction to decide cases between the Centre and the constituent units Its advisory jurisdiction was limited only to those cases which were referred to it by the Governor-General for its advise on any legal question of public importance It also exercised appellate jurisdiction from the decisions of the High Courts but it was a very limited one An appeal was allowed 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 Constitution The Federal Court had jurisdiction to grant special leave to appeal as such for an appeal certificate of the High Court was essential

Section 208 of the Act of 1935 made provision for an appeal to the Privy Council from the Federal Court It provided that an appeal will lie to His Majesty in Council from any judgment of

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28 For appeals in criminal cases, the rule was laid down by Lord Watson in Dillett's case (1887) 12 App case 459

29 The first meeting of the Federal Court was held on 7th December 1937

the Federal Court given by it in the exercise of its original jurisdiction in any case which involves the interpretation of the Act or of an Order in Council made thereunder or any dispute to which a state is a party without leave and in any other case by leave of the Federal Court or of His Majesty in Council

It is therefore, clear that in constitutional matters the Federal Court shared with the Privy Council in deciding cases After 1937 it was only in civil cases exceeding Rs 10,000 that the appeals were allowed to the Privy Council

4 Abolition of the Privy Council Jurisdiction in respect of Indian Cases

The question of abolition of appeals from Indian High Courts to the Judicial Committee of the Privy Council was under consideration since long As early as 1933 a White Paper was issued by the British Government for introducing constitutional reform in India There was a proposal in the White Paper regarding the establishment of a Supreme Court apart from the Federal Court, to hear final appeals from the Indian High Courts The Government of India Act, 1935 established a Federal Court and instead of creating any other higher appellate court it provided for the enlargement of the jurisdiction of the Federal Court in future [30]

(i) **The Federal Court (Enlargement of Jurisdiction) Act, 1948** —The British Parliament declared India as an Independent Dominion on the 15th of August 1947 It was considered essential to make necessary changes in the old system of appeals to the Privy Council The Central Legislature of India passed the Federal Court (Enlargement of Jurisdiction) Act 1948 The Act enlarged the appellate jurisdiction of the Federal Court in all civil cases as was permissible under Section 206 of the Government of India Act, 1935 It abolished the old system of filing direct appeals from the High Courts to the Privy Council either with or without special leave But the provisions of this Act were not applicable to the appeals which were either already pending before the Privy Council or in which special leave was already granted by the Privy Council

(ii) **Abolition of the Privy Council Jurisdiction Act 1949** —It was passed by the Constituent Assembly on 24th September 1949 According to the provisions of Sections 2 and 3, the jurisdiction of the Privy Council to entertain any new appeals and petitions and to dispose of any pending appeals and petitions

30 Section 206 The Government of India Act 1935 *See also* Sir Hari Singh Gour Plea for Abolition of the Privy Council" 1946 AWR 5 Editorial Note Indian Branch of Privy Council 50 CWN 93

except those set down for hearing during the next sitting of the Council, ceased to exist from 10th October, 1949 Thus six appeals which were then pending before the Privy Council were transferred to the Federal Court of India

Under Section 5, the Federal Court was given all the powers and jurisdictions which were given to the Privy Council in connection with the hearing of appeals from Indian High Courts It was recognised as an interim measure as the new Constitution[31] of India was then in the making

The case of *N S Krishnaswami Ayyangar* v *Perimal Goundan*, from Madras, was the last appeal from an Indian High Court which was disposed of by the Privy Council on 15th December, 1949 It was a claim by ryots to a permanent tenancy of their holdings under the Madras Estate Land Act and the appeal was dismissed by the Privy Council

5 Conclusion

During the period 1726 to 1949 and especially from 1833 onwards, the Privy Council played a very important role in making unique contribution to the Indian law and the judicial system as a whole It laid down fundamental principles of law in a lucid manner for the guidance of Indian Courts It was a great unifying force in the judicial administration of India

The law declared by the Privy Council in the pre Constitution period is still binding on the High Courts except in those cases where the Supreme Court of India has declared law in its judgments[32] It shows the amount of respect which the Indian High Courts are still having for the Privy Council judgments In the fields of Hindu law and Mohammdan law, though at times defective law was laid down the contribution of the Privy Council is remarkable

No doubt there were certain defects in the consitution of the Privy Council *e g* for long it was staffed by English Judges only, its location was England, its appellate jurisdiction was considered a symbol of slavery, and in certain cases its view was not

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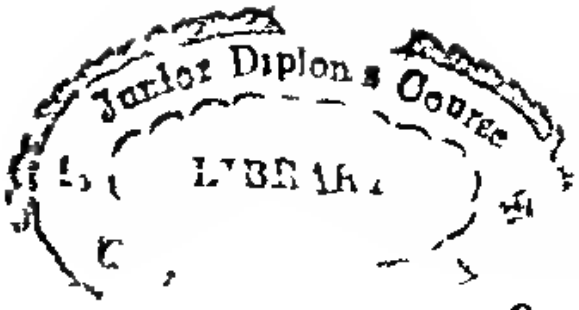
31 The new Constitution of India came into force on 26th January 1950 and India was declared a Sovereign Democratic Republic The Constitution under Art. 124 established a Supreme Court of India

32 The view taken by Nagpur and Bombay High Courts that the pre-constitution *judgments of the Privy Council* are binding on all courts in India except the Supreme Court till the Supreme Court takes a different view is considered to be the correct view See *Punjaba* v *Shanrao* AIR 1955 Nag 293, *State of Bombay* v *Chaganlal* 56 Bo LR 1014 (FB) *See* also *State of Gujarat* v *Vora Fidalli* (1964) 6 SCR 461 590 (Mudholkar J)

impartial [33] Still, the Privy Council commanded great respect amongst lawyers judges and Indian public as the highest judicial institution Its contribution to statute law, personal law, commercial law and criminal law, was of great importance Even in Independent India up to 1949 the Privy Council decided many important cases [34] The principles of integrity, impartiality, independence and the rule of law, which were laid down by the Privy Council are still followed by the Supreme Court of India Till the Supreme Court of India takes a different view, the view taken by the Privy Council is building

33 M C. Setalvad *War and Civil Liberties*, at pp 66-67

34 A remarkable appeal which came before the Privy Council was in 1946 in *Srimati Bibhabati Devi v Kumar Ramendra Narayan Roy and Others* AIR 1947 PC 19 Indian appeals heard by the Privy Council in the last four years were 1946-47 , 1947-48 , 1948 50 , 1949 51 *See* J P Eddy "*India and the Privy Council The Last Appeal*", 66 QR 206 at p 214



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The Federal Court of India

A Public Opinion and Efforts up to 1935

Before the Federal Court of India was established under the Government of India Act, 1935, the British Parliament was seriously considering to tackle the problem of creating a central court of final appeal in India It was partly due to the growing trend of the Indian public opinion in favour of stopping appeals to the Privy Council from Indian High Courts and also partly due to the emerging federal structure of the British Empire in India

As early as 1921, Sir Hari Singh Gour[1] was the first person in the legal history of India, who realised the necessity of establishing an all India court of final appeal in India in place of the Privy Council With this aim in view, he introduced a resolution on 26th March, 1921 in the Central Legislative Assembly, which stated

"This Assembly recommends to the Governor General in Council to be so pleased as to take early steps to establish a Court of Ultimate Appeal in India for the trial of Civil Appeals now determined by the Privy Council in England and as the Court of final appeal against convictions for serious offences occasioning the failure of justice' [2]

While introducing the resolution, Sir Hari Singh Gour laid special emphasis on six important points which were as follows (i) the Judicial Committee of the Privy Council was not a tribunal or a court but merely an advisory body constituted and intended to advise the King in his capacity as the highest tribunal for his Dominions, (ii) since Canada, Australia and South Africa had such a tribunal there was no reason whatever why we should not have a Supreme Court of our own in this country, (iii) the

1 *Sir Hari Singh Gour was the famous Advocate and founder of the Sagar University in Madhya Pradesh* For details regarding his constant efforts in the Central Legislative Assembly the creation of a Central Court in India *see* George H Gadbois Jr *Evolution of the Federal Court of India—Historical Footnote* in (1963) *5 JILI pp 19-45 See also* Legislative Assembly *(India)* Debates 1921 27

2 Legislative Assembly Debates (1921) I p 1606

expense of an appeal to the Privy Council was prohibitive, (*iv*) the distance from India of the Privy Council resulted in unnecessary delay (four to five years in many cases) in the final disposition of cases, (*v*) the Judicial Committee was not equipped to decide cases involving the intricacies of Hindu and Mohammadan laws, and (*vi*) the Privy Council refused to hear criminal appeal unless there had been a gross failure of justice in the Indian Court [3]

It was intended by Sir Hari Singh Gour to follow the examples of Canada and Australia, giving the litigants the option of either filing an appeal to the Supreme Court in India or to the Judicial Committee in England Somehow the debate on Sir Hari Singh Gour s resolution was postponed After eighteen months he again tried to introduce "a Bill to establish a Supreme Court for British India' Though consideration of such a Bill was not allowed but discussion on the resolution was allowed [4] Unfortunately the Gour Resolution was defeated

In 1924, Sir Malcolm Hailey, the Home Member, stated that in the opinion of the Government there was "no identity of opinion between Local Governments, High Courts or legal authorities whether Indian or European, in favour of the early institution of a Supreme Court while the question of its location also involves much difficulty our financial conditions render the institution of a Supreme Court impracticable at the present time serious considerations cannot be given to the proposal on its merits" [5]

In 1925 Sir Hari Singh Gour again introduced his resolution for "Establishment of a Supreme Court in India" [6] Again, he could not gain favour of the majority of members in the Legislative Assembly This proposal was severely criticised by Pandit Motilal Nehru in the following words

"a country where the executive and the judicial functions are combined, where a controversy has been raging for years past over the separation of these two functions without any result, a country where there is racial discrimination in the administration of criminal justice, is not the country to have a Supreme Court within its borders" [7]

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3 Legislative Assembly Debates (1921) pp 1606-9
4 Dr Tej Bahadur Sapru raised the question—whether the Legislative Assembly had the power to establish a court which would be superior in jurisdiction to the High Courts and he concluded that it did not *See* Legislative Assembly Debates (1922) III September 20 1922, p 712
5 Legislative Assembly Debates (1924) IV February 15 1924 p 191
6 *Ibid* (1925) V February 17 1925 p 1160
7 *Ibid* p 1171

Concluding he said,

" there is every reason at the present stage for us not to think of a Supreme Court in India the time for it will be when we are a self governing people and not a day before" [8]

On the other hand M A. Jinnah strongly supported Sir Hari Singh Gour's proposal and observed

"I have no hesitation in saying that the Privy Council have on several occasions absolutely murdered Hindu Law and slaughtered Mohammadan Law [9]"

In 1926 Mahatma Gandhi[10] and Sir Tej Bahadur Sapru[11] also supported Gour's resolution During 1927 though Sir Hari Singh Gour could not persuade his colleagues in the Legislative Assembly but in the same year Sir Sankaran Nair, a former High Court Judge, introduced a resolution regarding "Establishment of a Supreme Court" in the Council of States [12] While the Resolution was under discussion, many of the members agreed with S R Das, who said " from a political point of view we are all anxious to have a Supreme Court but from a practical standpoint the difficulties far outweigh the advantages"[13] Nair's resolution was also defeated in the Council of States

The demand for the creation of a Supreme Court in India was also considered by the Indian Central Committee in its Report of 1928 29[14] and in Paragraph 138 it observed as follows

" the arguments in favour of establishing a Supreme Court for India are, in our opinion, not less cogent than in the cases (Canada and Australia) referred to A great deal of the appellate work of the Privy Council would devolve upon the Supreme Court in India, to the great advantage of litigants both in time and money We are convinced of the necessity for the establishment of a Supreme Court in India as an integral part of the constitution and we recommend that a Supreme Court be so established "

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8 *Ibid*, p 1172
9 *Ibid*, pp 1175 76 in 1926
10 *Mahatma Gandhi observed* ' it has been a painful surprise to me to observe opposition to Sir Hari Singh's very mild and very innocent proposal, *but we have lost all confidence in ourselves*". *Hindustan Times* Aug. 7, 1926
11 Sir Tej Bahadur Sapru *The Indian Constitution* (1926) p 145 He urged 'immediate establishment of such a court
12 *Council of State Debates* (1927) II, August 31, 1927, p 885
13 *Ibid*, p 967
14 *Cmd* 3451, *Parliamentary Papers*, X (1929 30)

In the First Session of the Indian Round Table Conference in London in 1930, the representatives of the Indian States declared that the States were prepared to federate with British India, provided the proposed federation was independent of British control It was one of the remarkable declarations which played an important part in shaping the future administrative structure of India Lord Sankey, the Lord Chancellor, told the delegates to the Conference that "a Federal Court is an essential element", in a federal system of government in India [15]

In 1931, the Federal Structure Committee in its *Third Report*,[16] at the second session of the Round Table Conference, stated

"The necessity for the establishment of a Federal Court was common ground among all members of the Committee It was recognised by all that a Federal Court was required both to interpret the Constitution and safeguard it, to prevent encroachment by one federal organ upon the sphere of another and to guarantee the integrity of the compact between the various federating Units out of which the Federation itself has sprung'

Regarding the establishment of a Supreme Court for British India, the *Third Report* expressed "a strong opinion" in favour of creating a Supreme Court It was further observed that since "the creation of such a court is in the natural course of evolution the Committee adopted the suggestion in principle[17]"

During the period 1931-32 i e between the Second and Third Sessions of the Round Table Conference, the Legislative Assembly of India also considered a resolution for the "establishment of the Supreme Court in India" which was introduced by B R Puri The resolution was the same as was earlier moved by Nair in 1927 Puri's resolution was fortunately passed in the Legislative Assembly

Sir Tej Bahadur Sapru and a majority of British Indian colleagues (including Mr Zafrullah Khan) clearly stated that they wanted both a Federal Court and a Supreme Court, but not two separate courts, for "in the interests both of economy and efficiency there must be only one court which might sit in two divisions for the decision of Federal issues and of appeals from High Courts in India respectively [18]"

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15 Indian Round Table Conference (First Session) Proceedings, Cmd 3778 (1931) XII, p 417
16 *Cmd* 3997 (1932) Paragraph 52, p 27
17 *Ibid* Paragraph 63 p 31
18 *Indian Round Table Conference* (Third Session) *Proceedings* Cmd 4238 (1933) p 71

The Indian Round Table Conference in general agreed that the Federal Court was imperative to interpret the new Constitution and to serve as the forum for the decision of disputes between the Federation and its constituent units It was followed in 1933 by a White Paper which was issued by the British Government stating *proposals for Indian Constitutional Reform* [19] It embodied three major principles forming the basis of the proposed constitutional set up in India, namely, Federation, provincial autonomy, and special responsibilities and safeguards vested in the executive both at the Centre and Provinces It also contained a proposal for the establishment, in addition to Federal Court of a separate Supreme Court to hear appeals from the Provincial High Court in India

The Joint Select Committee of both Houses of Parliament in its report in November 1934 recommended only for the establishment of one Federal Court in India [20] Accordingly the British Parliament passed the Government of India Act in 1935 It also provided for the establishment of a Federal Court of India

B The Federal Court and Government of India Act, 1935

The Government of India Act, 1935 changed the structure of the Indian Government from "Unitary" to that of the "Federal" type [21] It established the foundation for a Federal framework in India Under such circumstances the establishment of a Federal Court was essential and for which the Government of India Act, 1935 made specific provisions Section 200 of the Act provided for the establishment of a Federal Court in India [22]

On 1st October, 1937, the Federal Court was inaugurated at Delhi and the Viceroy administered the oath of allegiance to three Judges of the Court namely, Chief Justice Sir Maurice Gwyer[23], and two puisne judges Sir Shah Muhammad Sulaiman[24] and Mukund Ramrao Jayakar [25] At the time of the inauguration of the Federal Court, the Chief Justice remarked, " there are in India today no longer a number of provinces under the tutelage of a Central Government but eleven autonomous states, for so indeed I may call them, pulsing with a vigorous life of their

19 Cmd 4268 *Parliamentary Papers* 1932 33 XX
20 For details *see* article by George E Gadbois *Evolution of the Federal Court of India An Historical Footnote* (1963) 3 JILI pp 19-44
21 *See* M Ramaswamy *The Law of the Indian Constitution* (1938) pp 85 98
22 For details *see* George H Gadbois Jr *The Federal Court of India* 1937 1950 (1964) 6 JILI pp 253 315 *See also* M V Pylee *The Federal Court of India* (1966) pp 33 100
23 He was an Englishman who had no Indian experience but was associated with the preparation of the Act of 1935 He retired in 1943
24 He was Chief Justice of the Allahabad High Court
25 He was a leading Advocate of Bombay After a year he was promoted and made Privy Councilor due to his unique qualities

own and dividing with the Government of India the legislature and executive powers of Government"[26]

It is worthwhile to mention here that the Federal Court of India fell far short of the demands of Sir Hari Singh Gour and others who advocated for establishing a Central Judicial body in India The Government of India no doubt established a Federal Court but its jurisdiction was very limited and even in those cases appeals were allowed to the Privy Council

The Federal Court was a Court of Record It sat at Delhi and at such other places as the Chief Justice of India may declare, with the approval of the Governor General of India, from time to time.

I Appointment of Judges Their Qualifications and Salaries

Every judge of the Federal Court of India was appointed by His Majesty and was to hold office till the age of sixty five years A judge was authorised to resign even before attaining the age of sixty five years by addressing his resignation to His Majesty His Majesty was empowered to remove a judge from his office on the grounds of misbehaviour or infirmity of mind or body, on the recommendation of the Judicial Committee of the Privy Council

For appointment of a judge in the Federal Court, the Act of 1935 provided that a person having any one out of the three qualifications will be qualified The qualifications were (i) five years experience as judge of the High Court, or (ii) a barrister or an advocate of ten years' standing or (iii) a pleader in a High Court of ten years standing[27] As regards the appointment of the Chief Justice, it was provided that a person should have either fifteen years' experience of standing in a High Court as a barrister, advocate or pleader or have been one when first appointed as a judge Thus preference was given to the professional persons in the appointment of judges

The Judges of the Federal Court were entitled to such salaries and allowances and to such rights in respect of leave and pensions, as were laid down by His Majesty from time to time[28] It was also provided that neither the salary of a judge nor his rights in respect of leave, absence or pension will be changed to their disadvantage when once they were appointed The Federal Court Order in Council of 1937 fixed the salary of the Chief Justice at Rs 7,000 a month and of other judges at Rs 5,000

26. F L J Vol I pp 31 33
27. The Government of India Act, 1935 Sec. 200(3)(a)(b)(c)
28. Section 201

a month They were specially paid high salaries so that they may keep a high standard of living, befitting their high positions

2 Jurisdiction of the Federal Court

Under the Government of India Act, the Federal Court was given three kinds of jurisdictions, namely (i) original, (ii) Appellate, and (iii) Advisory Section 206 empowered the Federal Legislature to pass an Act enlarging the appellate jurisdiction of the Federal Court in Civil cases to the full extent

From 15th August, 1947, two independent Dominions—India and Pakistan—came into existence and they were given full sovereignty by the British Parliament As regards the constitutional law to govern the Dominions, it was laid down that the Act of 1935 should be used with certain necessary changes in it Under the powers given by Section 206 of the Act the Federal Court (Enlargement of Jurisdiction) Act, 1947 and the Abolition of the Privy Council Jurisdiction Act, 1949 were passed in the Indian Dominion to meet the new situation after independence Both these Acts enlarged the jurisdiction of the Federal Court of India which continued its existence up to the establishment of the Supreme Court of India on 26th January, 1950 under the new Constitution of India

(i) **Original jurisdiction** —Section 204 of the Act of 1935 (as subsequently amended) provided that the original jurisdiction of the Federal Court was confined to disputes between Units of the Dominion or between the Dominion and any of the Units In the exercise of the original jurisdiction, the Federal Court had no power to entertain suits brought by private individuals against the Dominion

If an Acceding State happened to be one of the parties in the suit, proviso to Section 204 laid down that the said jurisdiction shall not extend to (a) dispute to which a State is a party, unless the dispute—

1 concerns the interpretation of this Act or of an Order-in Council made thereunder, before the date of the establishment of the Dominion or of an order made thereunder on or after that date or the interpretation of Indian Independence Act, 1947 or the extent of the legislative or executive authority vested in the Dominion by virtue of the Instrument of Accession of that State, or

2 arises under an agreement made under Part VI of this Act in relation to the administration in that State of a law of the Dominion Legislature or otherwise concerned with some matter

with respect to which the Dominion Legislature has power to make laws for that State, or

3 arises under an agreement between the State and the Dominion or a province being an agreement which expressly provided that the said jurisdiction shall extend to such a dispute and in the case of an agreement with a province, had been made with the approval of the Governor General,

(*b*) A dispute arising under any agreement which expressly provided that the said jurisdiction shall not extend to such a dispute

Clause 2 of Section 204 provided that the Federal Court in the exercise of its original jurisdiction[29] shall not pronounce any judgment other than a declaratory judgment The Federal Court was, not authorised to enforce its decision directly Therefore Section 210(1) provided that "All authorities, civil and judicial, throughout the Federation, shall act in aid of the Federal Court

The decisions of the Federal Court under its original jurisdiction were not necessarily final pronouncements in the disputed matter Section 208 provided for a right of appeal to the Privy Council from the judgments of the Federal Court in the exercise of its original jurisdiction, if such decisions involved an interpretation of the Constitution Act or of any Order in Council made thereunder

(ii) **Appellate Jurisdiction** —The Federal Court exercised appellate jurisdiction in Constitutional cases under the Act of 1935, its appellate jurisdiction was extended to civil and criminal cases from 1948

(a) **Appellate Jurisdiction in Constitutional Cases** — Section 205 of the Government of India Act 1935[30] made provision for an appeal to the Federal Court "from any judgment, decree or final order of a High Court if the High Court certifies that the case involves a substantial question of law as to the interpretation of this Act or any Order in-Council made thereunder before the day of establishment of the Dominion or any order made thereunder on or after that date or as to the interpretation of the Indian Independence Act, 1947 or of any order made thereunder and it shall be the duty of every High Court to consider in every case whether or not any such question is involved and of its own motion to give or to withhold a certificate accordingly"

29 The Federal Court exercised its original jurisdiction in three important cases namely *The United Provinces* v *The Governor-General-in Council* (1939) FCR 124 the *Governor-General in-Council* v *The Province of Madras* (1943) FCR 1, *Ramgarh State* v *The Province of Bihar* (1948) FCR 79

30 As amended in 1947

It further laid down that "where such a certificate is given, any party in the case may appeal to the Federal Court on the ground that any such question as aforesaid has been wrongly decided" and with the leave of the Federal Court or any other ground 'and no direct appeal shall lie to His Majesty in Council either with or without special leave

No appeal was allowed to the Federal Court in the absence of a certificate from British Indian High Courts or State High Courts The certificate was a condition precedent to every appeal The Federal Court was not given power to question the refusal of a High Court to grant a certificate or investigate reasons which prompted the refusal [31] In the later years, the Federal Court criticised certain High Courts for granting certificates in instances in which the Federal Court believed none should have been issued In *J K Gas Plant Manufacturing Co (Rampur) Ltd and Others* v *The King Emperor*,[32] it was emphasized by the Federal Court that a certificate should not be issued unless the appeal was in fact from a "judgment decree or final order" *i e* unless the decision of the High Court was a final determination of the rights of the parties [33]

Section 207 of the Act of 1935 empowered the Federal Court to hear appeals from the High Court in Acceding States on questions relating to constitutional matters

The Federal Court (Enlargement of Jurisdiction) Act, 1947, provided that where an appeal to Federal Court was competent and the nature of which was allowed under Section 205, the Federal Court was empowered to consider such appeals

(b) **Appellate Jurisdiction in Civil Cases**—Since 1948 civil appeals which formerly went to the Privy Council, were heard by the Federal Court of India under the Federal Court (Enlargement of Jurisdiction) Act, 1947 Section 3 of the Act of 1947 provided as follows

> "As from the appointed day (*i e* 1st February, 1948), (*a*) an appeal shall lie to the Federal Court from any judgment of a High Court in Civil cases (*i*) without the special leave of the Federal Court if an appeal could have been brought to His Majesty in Council without special leave under the provisions of the Code of Civil Procedure, 1908, or of any other

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31 *Pashupati Bharti* v *The Secretary of State for India in Council* (1939) FCR 13 *Lakhat Ram* v *Beharilal Misir* (1939) FCR 121

32 (1947) FCR 141 *S Kuppuswami Rao* v *The King* (1947) FCR 180 *Rex* v *Abdul Majid* (1949) FCR 29

33 *See also* George H Gadbois Jr *The Federal Court of India* 1937 50 (1964) 6 JILI 262

law in force immediately before the appointed day, (ii) with the leave of the Federal Court in any other case,

(*b*) No direct appeal shall lie to His Majesty-in Council either with or without special leave from any such judgment,

(*c*) In any such appeal as aforesaid it shall be competent for the Federal Court to consider any question of the nature as mentioned in Section 205 of the Government of India Act, 1935 "

(e) **Appellate Jurisdiction in Criminal Matters** —The Federal Court (Enlargement of Jurisdiction) Act, 1947, enlarged the jurisdiction of the Federal Court in India and in 1949 the system of appeals from India to the Privy Council was totally abolished The Federal Court of India as such followed the same principles (after 1948) as were followed by the Privy Council in the exercise of its appellate jurisdiction in criminal matters

There was no provision to appeals to the Privy Council in criminal proceedings as of right, without special leave from the judgments of a High Court In 1943 by an amendment of the Criminal Procedure Code (Section 411 A) three Presidency High Courts *viz* Calcutta, Bombay and Madras were allowed to grant a certificate that the case is a fit case for an appeal to the Privy Council On such a certificate an appeal could lie to the Privy Council It may be noted that this section did not apply to other High Courts

An appeal in a criminal case was allowed only with the special leave of the Privy Council In granting such special leave, the Privy Council acted upon certain well established principles It followed the rule laid down by Lord Watson in *Dillett's* case [34] "His Majesty will not grant special leave in criminal cases unless it is shown that by a disregard of the forms of legal process, or by some violation of the principle of natural justice or otherwise substantial and grave injustice has been done "

In *Mohander Singh* v *Emperor*,[35] their Lordship of the Privy Council said "their Lordship have frequently stated that they do not sit as a court of Criminal Appeal" For them to interfere with a criminal sentence, "there must be something so irregular or so outrageous as to shock the very basis of justice "[36]

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34 (1887) 12 App Cas 450.
35 (1932) 59 IA 233
36 *See* also, *Muhammad Nawaz* v *Emperor* AIR 1941 PC 132 In the case the Privy Council specifically laid down grounds on which it will interfere in a criminal case

The Federal Court while exercising its criminal jurisdiction was guided by the principles already laid down by the Privy Council

(iii) Advisory Jurisdiction of the Federal Court —Section 213 of the Act of 1935 (as amended) empowered the Federal Court to give advisory opinion to the Governor General It provided, "If at any time it appears to the Governor-General that a question of law has arisen or is likely to arise which is of such a nature and of such public importance that it is expedient to obtain the opinion of the Federal Court upon it, he may refer the question to that court for consideration, and the court may after such hearing as they think fit report to the Governor General thereon"

The Governor General was not bound to accept the opinion of the Federal Court which was given under Section 213 An other important question for consideration is—whether the Federal Court was bound to give its opinion to the Governor-General? In order to give a suitable answer to this question it is necessary to go through the wordings of Section 213 carefully In this section the word "may' is used It meant that the court was not bound to give its opinion in every reference made to it by the Governor General "May" can also be interpreted as "shall". The real intention of this provision appears to be that the Federal Court would not refuse except for good reasons" [37] Although the Act imposed no obligation on the Federal Court to accede to every request of the Governor General for its opinion Chief Justice Spens once remarked that "we should always be unwilling to decline to accept a Reference, except for good reason' [38]

The Federal Court of India was called upon to give its advisory opinion in four cases[39] and in each case it gave its opinion but not without expressing, on occasion, some misgivings about both the expediency and utility of this consultive role [40]

3 Form of Judgment

The Federal Court of India, as provided by Section 209 of the Act of 1935, had no machinery of its own to execute its judg-

37 In *Re Levy of Estate Duty*, AIR 1944 FC 73

38 In Re Allocation of Lands and Buildings in a *Chief Commissioner's Province*, (1943) FCR 20 22

39 Four cases were—In *re The Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act*, 1938 (1939) FCR 18, In re *The Hindu Women's Right to Property Act*, 1937 *and Hindu Women's Right to Property (Amendment) Act* 1938, (1941) FCR 12, In *re Allocation of Lands and Buildings in a Chief Commissioner's Province* (1943) FCR 20 In *Re Levy of Estate Duty* (1944) FCR 317

40 *See* George H Gadbois Jr., "*The Federal Court of India*", (1964) 6 JILI 253, at p 280

ments It was sending back the case with its decision to the respective High Court so that its order may be substituted for the order of the High Court

The provisions of Section 209 were amended by "The Privy Council (Abolition of Jurisdiction) Act, 1949' Its effect was that the Federal Court's orders were made enforceable in the manner as provided by the Civil Procedure Code or by any law which was made by the Dominion Legislature

Section 215 empowered the Federal Legislature to make provision for conferring upon the Federal Court such supplementary powers not inconsistent with any of the Act as may appear to be necessary or desirable for the purpose of enabling the court more effectively to exercise the jurisdiction conferred upon it by or under the Act of 1935

4 Authority of Law laid down by Federal Court

Section 212 of the Government of India Act, 1935 provided that the law declared by the Federal Court and any judgment of the Privy Council will be binding on all the courts in British India It introduced the English Doctrine of Precedent in India Thus the High Courts and subordinate courts in British India were absolutely bound by the decisions of the Privy Council and the Federal Court

Even before the Government of India Act, 1935 the Privy Council laid down in *Mata Prasad* v *Nageshwar Sahai*,[41] " that it was not open to the courts in India to question any principle enunciated by this Board, although they have a right of examining the facts of any case before them to see whether and how far the principle on which stress is laid applies to the facts of the particular case"

C The Federal Court Expansion of Jurisdiction and its Abolition

The Federal Court of India, which was established under the Government of India Act, 1935, was initially given limited jurisdiction With the passing of the Indian Independence Act of 1947 a new chapter began, not only in the political history of India but also in the judicial history of India There was a geographical reduction in the jurisdiction of the Federal Court to the extent of those areas of the sub-continent which became Pakistan

Indian leaders declared to follow the Act of 1935 as the framework of government until a new constitution was drafted This

41 AIR 1925 PC 272 at p 279

policy declaration and the Federal Court Order, 1947[42] made remarkable contribution to the smooth transition in the judicial sphere The Federal Court and the High Courts continued as subordinate courts to the Judicial Committee of the Privy Council for the time being

The first significant step in the judicial sphere to bring autonomy was taken in December 1947 when the Federal Court (Enlargement of Jurisdiction) Act, 1947[43] was passed Its aim was to meet the growing national demand and satisfy public opinion in India It enlarged the appellate jurisdiction of the Federal Court so as to have civil appeals from the Indian High Courts It stopped the old system of direct appeals from the Indian High Courts to the Privy Council It was still possible to take a civil appeal from the Federal Court to the Privy Council Though this Act enlarged the jurisdiction of the Federal Court but in no way it severed India's ties with the Privy Council In Civil cases the Privy Council was still allowed to grant special leave after the judgment of the Federal Court All the remaining jurisdiction of the Privy Council continued as it was before 1947

In 1949 the Constituent Assembly decided to give full judicial autonomy to the Indian judiciary The draft of the new Constitution of India was at its final stage and the leaders wanted to give it a smooth transition The Assembly, therefore, passed the Abolition of the Privy Council Jurisdiction Act in 1949[44] The Act came into force from 10th October, 1949 and it severed all connections of the Indian Courts with the Privy Council The Act repealed Section 208 of the Government of India Act, 1935 which was the basis of the Privy Council's appellate jurisdiction over the Federal Court It transferred all the pending appeals, except those which were at an advanced stage, to the Federal Court of India for final disposal The last appeal disposed by the Privy Council was on 15th December, 1949 in the case of *N S Krishnaswami Ayyangar and Others v Perumal Goundan and Others*[45] With the enactment of the Act of 1949 began the "Period of Federal Court's Golden age" which lasted till the establishment of the Supreme Court of India on the 26th January, 1950 Under the Constitution of India India became a "Sovereign Democratic Republic'

The Federal Court An Assessment —The Federal Court

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42 Notification No G G O 3 published in the Gazette of India Extraordinary, August 11 1947

43 It is also known as Act I of 1948 See *Constituent Assembly of India (Legislative) Debates* III (1947) December 11 1947 pp 1708 1727

44 Act No V of 1949 published in the Gazette of India Extraordinary September 28 1949

45 AIR 1950 PC 105 *See also* J P Eddy *India and the Privy Council "The Last Appeal"* (1950) 66 LQR 214

of India was established in October 1937 and was superseded by the Supreme Court in 1950 During this short period of a little more than twelve years, it left a permanent mark on the legal history of India It was not only the first Constitutional Court but also the first all India Court of extensive jurisdiction

The Court was liberally conceived by the British Authorities as an indispensable adjunct to the Federation envisaged by the Government of India Act of 1935 During the transitional period in the Indian history, when there was no written Constitution, in a sense it was the product of a constitutional curiosity It functioned successfully and effectively in the absence of essential federal agencies such as a Federal Executive and Federal Legislature The Federation itself was incomplete Nevertheless the Federation of as many as eleven Indian Provinces into an organic whole was by no means negligible, and the situation enhances the importance of the role which the court played in somewhat difficult and depressing circumstances In spite of its limitations and short life it made a noteworthy contribution to the functioning of an all India court such as the Supreme Court

During the period 1937—50, two English Chief Justices[46] and six Indian Justices sat on the Federal Bench Sir Shah Sulaiman, Dr M R Jayakar,[47] S Varadachariar,[48] Sir Mohammad Zafrulah Khan, Sir Hari Lal J Kania[49] and Sir Fazal Ali were the six Indians who got the rare distinction of being a Judge of the Federal Court of India They maintained the noble traditions of the great Judges of Britain They contributed a great deal for the establishment of a sound federal judiciary in India The Federal Court built up great traditions of independence, impartiality and integrity which were inherited by its successor, the Supreme Court of India

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46. Sir Maurice Gwyer was the first Chief Justice of the Federal Court of India. He retired in 1943 and Sir Patrick Spens was appointed Chief Justice of the Federal Court
47. Dr M. R Jayakar was made Privy Councillor within a year after his appointment as Judge of the Federal Court
48. He was in the Federal Court for the longest term of office i.e. seven years.
49. He was made the first Chief Justice of the Supreme Court of India in 1950

10

The Supreme Court of India

Every country in the world has a supreme judicial authority to administer justice In England it is the House of Lords, in U S A the Judiciary Act of 1789 established the Federal Supreme Court The Supreme Court of Canada was established by an Act of the Imperial Parliament in 1875 In Burma the highest court of appeal is known as the Supreme Court of Burma In Australia, the highest court is known as the High Court of Australia while the State Courts are known as the Supreme Courts

As compared to the Supreme Courts of other countries, the Supreme Court of India is a unique judicial institution It is entrusted with large powers enjoying original, appellate, revisional and advisory jurisdictions and having the power to issue writs to the Union and State Governments and other authorities It can also interfere with decisions of courts and tribunals in appeal by special leave Thus it is at the apex of the entire judicial system of the country.

A Establishment of the Supreme Court

1 Origin of the Supreme Court

Even before the new Constitution of India came into force the question regarding the establishment of a Supreme Court engaged the attention of some Indian jurists[1] In previous chapters[2] a brief account of the constant efforts which were made from 1921 onwards, to establish a Supreme Court, is given[3] Commenting on Sir Hari Singh Gour's resolution in 1925 regarding the establishment of a Supreme Court in India, Pandit Moti Lal Nehru observed, " there is every reason at the

1 Sir Hari Singh Gour Sir Tej Bahadur Sapru, Pandit Moti Lal Nehru, M A Jinnah *etc See also*, Sir Hari Singh Gour, *Future Constitution of India*, Sir Tej Bahadur Sapru *The Indian Constitution*

2 Chapters VIII and IX

3 *See Legislative Assembly Debates* I, pp 1606 10, (1922) III, pp 712 840 (1924) IV p 191, V, pp 1160 1180, *Council of State Debates* (1927) II, pp 885 907, *Proceedings of the Indian Round Table Conference* (First to Third Sessions) K N Kaksar and K M Panikkar, *Federal India*, pp 20 129, George H Gadbois *Evolution of the Federal Court of India An Historical Footnote* (1963) 5 J ILI 19

present stage for us not to think of a Supreme Court in India The time for it will be when we are a self governing people and not a day before" [4] In 1937, the Federal Court of India[5] was established with limited powers under the Government of India Act, 1935

With the transfer of political power from the British Parliament to the people of India[6], under the Indian Independence Act, 1947, it was considered necessary to establish a separate judicial organ in India, supreme in authority and in jurisdiction The Indian leaders preferred a smooth transition in the judicial sphere also In the first instance, steps were taken to enlarge the jurisdiction of the Federal Court of India and the Federal Court (Enlargement of Jurisdiction) Act, 1947 was passed It stopped all direct appeals, in civil matters, to the Judicial Committee of the Privy Council from 1st February, 1948 It was provided that the appeals from the Indian High Courts will lie first to the Federal Court[7] and thereafter further appeal to the Privy Council was allowed When the draft constitution was about to be completed in its second stage, for smooth transfer of appellate jurisdiction of the Privy Council, it was considered necessary to abolish the system of appeals in civil and criminal matters to the Privy Council The Constituent Assembly of India, therefore, passed in October, 1949 the Abolition of the Privy Council Jurisdiction Act, 1949 The Federal Court of India was thus made the highest judicial authority as the jurisdiction of the Privy Council was transferred to it

A new era in the legal history of India began on 26th January, 1950 when the Constitution of India came into force Under Art 124 it provided for the establishment of a Supreme Court of India Article 130 states that the seat of the Supreme Court shall be in Delhi It further empowers the Chief Justice of India to hold the sitting of the Supreme Court at any other place or places subject to the prior approval of the President of India The Supreme Court of India was inaugurated on 28th January, 1950 in the Court House, New Delhi, which was once the Chamber of Princes It was presided over by Hon'ble Sri Harilal J Kania, Chief Justice of India Others who were present in the inauguration session included the Chief Justices of the State High Courts, Sri M C Setalvad, the Attorney General for India, the Advocates General of the States, Prime Minister Sri

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4 *Legislative Assembly Debates* (1925), V, Feb. 17, 1925 p 1172
5 For details *see* Chapter IX.
6 *Sri* V P Menon *The Transfer of Power in India*, E. W R. Lumby, *The Transfer of Power in India 1945-47*, Dwarkadas Kanji *Ten Years to Freedom.*
7 M P Pylee *The Federal Court of India*, pp 64 100, E. S. Sunda *Federal Court of India A Constitutional Study*

Jawaharlal Nehru, Deputy Prime Minister Sardar Patel and a large number of other distinguished persons

In his welcome address Sri M C Setalvad,[8] the Attorney-General, referring to the extensive jurisdiction conferred upon the Supreme Court, observed—

> "It can truly be said that the jurisdiction and powers of this Court, in their nature and extent, are wider than those exercised by the highest court of any country in the commonwealth or by the Supreme Court of the United States "

> "On the Court will fall the delicate, and difficult task of ensuring to the citizen the enjoyment of his guaranteed rights consistently with the rights of the society and the State. No less onerous though far less spectacular will be the task of adjudging the private rights of citizens and interpreting and administering the law of the land "

Sri Setalvad expressed the hope that, like all human institutions, the Supreme Court would earn reverence through truth

Chief Justice Kania[9], in his inaugural address, highlighted the status and independence of the Supreme Court as follows

> "The Supreme Court, an all India Court, will stand firm and aloof from party politics and political theories It is unconcerned with the changes in the government The Court stands to administer the law for the time being in force, has goodwill and sympathy for all, but is allied to none Occupying that position, we hope and trust it will play a great part in the building up of the nation, and in stabilizing the roots of civilization which have twice been threatened and shaken by two world wars, and maintain the fundamental principles of justice which are the emblem of God We hope and trust the Court will maintain the high traditions of the judiciary and perform its duties without fear or favour If we succeed in doing so we shall contribute our share to the progress of the Republic of India "[10]

2 The Constitution and the appointment of Judges

Article 124 of the Constitution of India provides for the establishment of the Supreme Court of India consisting of a

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8 Welcome Address of Sri M C Setalvad at the inauguration of the Supreme Court of India, (1950) SCR Vol I, p 3

9 Inaugural Speech of Chief Justice Kania, (1950) SCR, Vol I, pp 10-13

10 *Ibid*, p 13

Chief Justice of India and not more than seven other Judges until Parliament by law prescribes a larger number The prescribed limit of seven judges was raised to thirteen by the Supreme Court (Number of Judges) Act, 1960 The President of India appoints every Judge of the Supreme Court by warrant under his hand and seal after consultation with such of the Judges of the Supreme Court and of the High Courts in the States as the President considers necessary for such purpose While appoint ing a Judge other than the Chief Justice the Chief Justice of India will always be consulted by the President of India It is customary in India to raise the seniormost Judge to the office of the Chief Justice of India whenever a vacancy occurs in that office However a break in this practice was made on April 26, 1973 when Mr Justice A N Ray was appointed the Chief Justice in supersession of three senior Judges The retirement age of a Supreme Court Judge is fixed by the Constitution of India as sixty five years

Referring to the appointment of Judges, in his inaugural address Chief Justice Kania pacified the members of the legal profession by stating as follows

> "In theory it appears to be now accepted that appoint ments will be only on merits The policy however does not appear to have been completely abandoned We hope that political considerations will not influence appointments to High Courts It is necessary that for the High Courts merit alone should be the basis for selection, if the High Courts have to remain strong and independent and enjoy the confidence of the people Before the establishment of the Sovereign Democratic Republic of India, the relations between the Government and the court were regulated by conventions They have been established as a result of experience of several decades and were the basis of keeping the judiciary free from interference by the executive One of the conveniences was that the Chief Justice should be con sulted before the appointment of a High Court Judge It was understood that if the Chief Justice did not approve of an appointment, it was not made by the Government "[11]

As regards the qualifications for appointment of a judge of the Supreme Court the Constitution provides that only a citizen of India will be eligible for such appointment An Indian citizen is further required to have any of the following qualifications [12]

> (a) has been for at least five years a Judge of a High Court or of two or more such courts in succession, or

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11 *Ibid* p 10
12 Art 124(3)

(*b*) has been for at least ten years an advocate of a High Court or of two or more such courts in succession, or

(*c*) is in the opinion of the President, a distinguished jurist

A Judge of the Supreme Court holds office up to the age of sixty five years, but he may resign his office by writing under his hand addressed to the President or may be removed from office in the manner as provided under Art 124(4) The age of a Judge of the Supreme Court shall be determined by such authority and in such manner as Parliament may by law provide [13]

The President can remove a Judge of the Supreme Court on the ground of proved misbehaviour or incapacity For the removal of a Judge the Constitution specifically provides that a Supreme Court Judge cannot be removed from his office except by an order of the President of India passed after an address by each House of Parliament supported 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 [14]

No person who has held office as a Judge of the Supreme Court is permitted "to plead or act in any court or before any authority within the territory of India" [15] But a judge of the Supreme Court after retirement can do chamber practice as a lawyer as it is not prohibited by the Constitution provision A retired Judge of the Supreme Court may be invited by the Chief Justice of India, with the prior consent of the President, to act as a Judge of the Supreme Court for some particular business or for a fixed period [16]

(a) **Salary and allowances** —The salaries of the Judges and the Chief Justice of the Supreme Court are fixed by the Constitution [17] Second Schedule provides that the Chief Justice of India

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13 Sub-Art (2A) in Art 124 inserted by the Constitution (Fifteenth Amendment) Act 1963 Art 217(3) provides the age of a Judge of the High Court will be determined by the President after consultation with the Chief Justice and President's decision will be final This provision was inserted by the Constitution (Fifteenth Amendment) Act 1963 after the controversy raised in *Jyoti Prakash v H K Bose, C J*, AIR 1963 Cal 483

14 Art 124(4)

15 Art 124(7)

16 Art 128

17 Art 125(1)

will be paid Rs 5 000/ per month and the Judges of the Supreme Court will be paid Rs 4,000 per month Every judge of the Supreme Court is entitled to have rent free official residence [19]

Every Judge shall be entitled to such privileges and allowances and to such rights in respect of leave of absence and pension as may from time to time be determined by or under law made by Parliament But once a Judge of the Supreme Court is appointed, his salary, allowances privileges, leave and pension will not be changed to his disadvantage [19] Special emphasis is given to this provision as it will assist the Judges to maintain impartiality, independence and integrity There is only one exception to this general rule During the period of financial emergency the President of India is empowered under Art 360(4)(*b*) to reduce the salaries and allowances of the Judges of the Supreme Court

(ii) **Appointment of Acting Chief Justice and ad hoc Judges** —The Constitution empowers the President of India under Art 126 to appoint the Acting Chief Justice when the office of Chief Justice of India is vacant or when the Chief Justice is, by reason of absence or otherwise, unable to perform the duties of his office A healthy custom is developed in India to raise the senior-most Judge to the office of the Chief Justice of India whenever a vacancy occurs in the office

Ad hoc Judges can be appointed by the Chief Justice of India with the previous consent of the President in order to make the quorum of the Judges of the Supreme Court[20] and to enable them to hold or continue any session of the Court While appointing ad hoc Judges of the High Courts, the Chief Justice of the State High Court will always be consulted It is the duty of ad hoc Judges of the Supreme Court to attend its sittings for the period as required During their stay at the Supreme Court, they shall have all jurisdiction, powers and privileges of a Supreme Court Judge

B Jurisdiction and Powers of the Supreme Court

The Constitution of India has granted three types of jurisdiction to the Supreme Court, namely, Original, Appellate and Advisory It is also given special powers, *e g* to review its judgments, to punish the guilty for contempt of court, to issue writs, judicial review of legislation, etc

1 Original Jurisdiction

Under Art 131 the original jurisdiction of the Supreme Court

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18 Part D Second Schedule
19 Art 125(2) and (2) proviso
20 Art 127

extends to any dispute involving the existence or extent of a legal right

(*a*) between the Government of India (Union) and one or more States, or

(*b*) between the Government of India and any State or States on one side and one or more other States on the other, or

(*c*) between two or more States

But the original jurisdiction is excluded in cases of a dispute arising out of any treaty, agreement, covenant, engagement, *sannad* or other similar instruments which having been executed before the Constitution continue in force or which provide for such exclusion [21]

The Supreme Court, therefore, is not a Court of ordinary original jurisdiction in all matters and between all the parties In order to invoke its jurisdiction two conditions which are necessary relate (*a*) to parties, and (*b*) to the nature of dispute A suit cannot be filed before the Supreme Court simply on the basis that there is no other court in the land which can try the question raised in the suit [22]

The Constitution also empowers the Supreme Court to issue writs under Art 32 [23]

2 Appellate Jorisdiction

Articles 132 to 136 of the Constitution deal with the appellate jurisdiction of the Supreme Court in constitutional, civil and criminal cases

(i) **In Constitotional matters** —Art 132 deals with appeals involving interpretation of the Constitution, arising out of any proceedings in a High Court—civil, criminal or otherwise [24] It provides that an appeal shall lie to the Supreme Court from any judgment, decree or final order of any High Court, in the territory of India in any civil, criminal or other proceedings—provided it involves a substantial question of law as to the interpretation of the Constitution—

(*a*) if the High Court certifies to the above effect, or

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21 This proviso was substituted by Sec 5 of the Constitution (Seventh Amendment) Act, 1956

22 *Ramgarh State* v *Province of Bihar*, AIR 1949 FC 55

23 For details *see* under separate heading in this Chapter

24 *Election Commission* v *Venkata* AIR 1953 SC 210

(*b*) the Supreme Court grants special leave from the judgment decree or final order of the High Court if the High Court refuses to give such certificate

It is ensured by the provisions of this article that the decision of the High Court in constitutional matters will not be final and the final authority to interpret the Constitution rests with the Supreme Court whatever may be the nature of the suit or the proceeding where the question arises In this respect a right of the widest amplitude is allowed in cases involving interpretation of the constitutional questions [25]

Article 132 is not controlled by Art 133(3)[26] and the words "any judgment, decree or final order of a High Court" as used in Art 132, are wide enough in their meaning Hence appeal to the Supreme Court from constitutional decisions of Single Judges cannot be barred on the ground that appeal lies to a Division Bench from such decision An appeal will lie to the Supreme Court upon the certificate of the Single Judge of the High Court in constitutional matters [27]

Thus an appeal lies to the Supreme Court under Art 132 only when there is some substantial question of law as to the interpretation of some provision of the Constitution involved in the case [28] A question which has been settled by the previous decisions of the Supreme Court is not a substantial question and in such cases, therefore, appeal will not lie to the Supreme Court [29]

(ii) **In Civil matters** —Article 133 confers a constitutional right to appeal to the Supreme Court in civil matters It provides that apart from appeals by special leave under Art 136 and appeal on constitutional ground under Art 132, an appeal shall lie to the Supreme Court from a civil proceeding before any High Court in the territory of India, on the following conditions only

(*a*) the subject of appeal is a judgment, decree or final order',

(*b*) The High Court grants a certificate for such appeal—

(i) that the case involves a substantial question of law of general importance, and

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25 *Election Commission* v *Venkata* AIR 1953 SC 210 at p 212

26 Art 133(3) provides that merely in civil appeals appeal will not lie to the Supreme Court from the decision of Single Judge of the High Court unless Parliament provides by legislation

27 D D Basu *Commentary on the Constitution of India* 5th Edn Vol 3 p 110 see also *Hindustan Commercial Bank* v *Bhagwan Das* AIR 1965 SC 1142 at p 1143

28 *Sudhir* v *The King* (1948) 58 CWN (FR) 44

29 *State of J K* v *Ganga Singh* AIR 1960 SC 356 at p 359

(ii) that in the opinion of the High Court the said question needs to be decided by the Supreme Court

As the right to appeal is a constitutional right, it cannot be taken away by ordinary law [30] Revenue proceedings are considered civil proceedings under Art 133 In *C I T* v *Ishwarlal* [31] the Supreme Court held that an appeal under Art 133 was competent because such proceedings were civil proceedings that is, "proceedings in which a party asserts the existence of a civil right conferred by the civil law or by statute, and claims relief for breach thereof

(iii) In Criminal matters —The Constitution for the first time sets up a court of criminal appeal over the High Courts and creates a right of second appeal Art 134 empowers the Supreme Court to hear appeals from any judgment, final order or sentence in criminal proceedings of a High Court in three cases as follows

(*a*) If the High Court on appeal reverses the decision of acquittal of an accused person and sentences him to death This will be the case of second appeal in a criminal case

(*b*) If the High Court has withdrawn for trial (Section 526 of Criminal Procedure Code) to itself any case from a subordinate court and after trial sentences him to death

(*c*) If the High Court certifies that the case is a fit one for appeal to the Supreme Court This is subject to the rules framed by the Supreme Court

Under sub clauses (*a*) and (*b*), the appeal lies as of right both on questions of fact and of law while under sub clause (*c*) appeal lies only if the High Court certifies that the case is 'a fit one for appeal' [32]

In an appeal under Art 134, the Supreme Court will not reassess evidence and argument on a point of fact which did not prevail with the courts below The Supreme Court will not act as a third court of facts to set aside a concurrent finding of fact, in the absence of any compelling reason[33] or exceptional circumstances [34]

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30 *Mahant Moti Das* v *S P Sahi* (1959) Supp (2) SCR 568 581
31 (1966) 1 SCR 190 at p 196
32 *State of U P* v *Jagat* AIR 1961 All 630 see also *Tara Chand* v *State of Maharashtra* AIR 1962 SC 430
33 *Damodaran* v *State of T C* AIR 1953 SC 462
34 *Barsay* v *State of Maharashtra* AIR 1961 SC 1762

The Supreme Court is not necessarily bound to hear an appeal on the merits merely because a certificate has been granted by the High Court under Art 143(1)(c) If the Supreme Court is satisfied that the High Court has not properly exercised its discretion under this provision, the Supreme Court may either remit the case or exercise the discretion[35] itself, and treat the appeal as under Art 136 (Special Leave) [36] The Court may also dismiss[37] the appeal *in limine*[38] if it finds no sufficient reasons to interfere under Art 136

Parliament has enlarged the jurisdiction of the Supreme Court to entertain and hear appeals in criminal matters by the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 Now a right of appeal is provided if the High Court on appeal reverses the order of acquittal and awards a punishmeot of life imprisonment or imprisonment for a period of not less than ten years or gives such punishment in deciding cases withdrawn from lower courts for its decision [39]

(iv) Appeal by special leave —Art 136(1) confers on the Supreme Court overriding and extensive powers of granting special leave to appeal It provid s that the Supreme Court shall have the power to grant special leave to appeal from any judgment, decree, determination, sentence or order in any cause or matter passed or made by any court or tribunal in the territory of India,[40] This provision is not applicable to any court or tribunal constituted under any law relating to the Armed Forces [41]

Apart from the cases as covered under Arts 132, 133 and 134, there may still remain some cases where justice might require Supreme Court's interference To deal with such cases separate provision is made under Art 136 The power of the Supreme Court to grant special leave to appeal from the decision of any court or tribunal, except Military tribunals is not subject to any constitutional limitation and is left entirely to the discretion of the Supreme Court [42] This provision was introduced in order to empower the Supreme Court to give relief to any aggrieved party in cases where the principles of natural justice have been violated, even though the party may not have a right to appeal otherwise [43]

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35 *Nar Singh* v *State of H P*, AIR 1954 SC 457
36 *Govindlal* v *State of West Bengal* (1957) SC (Cr App 62, 55)
37 *Haripada* v *State of W B*, (1957) SCR 639, *Sunder Singh* v *State of U P*, AIR 1956 SC 411
38 *Khushal* v *State of Bombay*, AIR 1958 SC 22
39 Art 134(2)
40 See *Bharat Bank* v *Employees of Bharat Bank* AIR 1950 SC 188
41 *Durgashankar* v *Raghuraj*, AIR 1954 SC 520
42 *Ibid*
43 See *Kanhaiyalal* v *I T O* AIR 1962 SC 1323, *Baldeta Bros* v *Labr Mining Work*, AIR 1961 SC 100

In *Pritam Singh* v *The State*,[44] Fazal Ali, J , observed,

> " the wide discretionary power with which this Court is invested under it (Art 136) is to be exercised sparingly and in exceptional cases only, and as far as possible a more or less uniform standard should be adopted in granting special leave in the wide range of matters which can come up before it under this article By virtue of this article, we can grant special leave in civil cases, in criminal cases, in income tax cases, in cases which come up before different kinds of tribunals and in a variety of other cases Court should grant special leave to appeal only in those cases where special circumstances are shown to exist The Court will not grant special leave unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against "[45]

The Supreme Court has declined to fetter its discretionary power by laying down "principles " or "rules" [46]

In *Dhakeswari Cotton Mills Ltd* v *C I T , W B* [47] Mahajan, C J , said

> "It is not possible to define the limitation on the exercise of the discretionary jurisdiction vested in this Court by Art 136 The limitations whatever they be, are implicit in the nature and character of the power itself It being an exceptional and overriding power naturally it has to be exercised sparingly and with caution and only in special and extraordinary situations "

3 Advisory Jurisdiction

Article 143(1) provides that if at any time it appears to the President that a question of law or fact has arisen or is likely to arise, which is of such a nature and of such public importance that it is expedient to obtain the opinion the of the Supreme Court upon it he may refer the question to that court for consideration and the court may, after such hearing as it thinks fit, report to the President its opinion thereon

Clause (2) provides that the President may notwithstanding

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44 AIR 1950 SC 169
45 *Ibid* at p 171
46 H M Seervai *Constitutional Law of India A Critical Commentary* p 1017
47 AIR 1955 SC 65

anything in the proviso to Art 131[48] refer a dispute of the kind mentioned in the said proviso to the Supreme Court for opinion and the Supreme Court shall after such hearing as it thinks fit, report to the President its opinion thereon

Article 143 of the Constitution practically reproduces Section 213 of the Government of India Act, 1935 It is, therefore, natural that the principles laid down by the Federal Court regarding the advisory power will also be good guide for the Supreme Court of India [49]

Under clause (1) it is at the discretion of the Supreme Court to entertain a reference and to report to the President its opinion and the Court may in a proper case decline to express any opinion on the question submitted to it, *e g* where the question referred to is a political one [50] While under clause (2) it is obligatory on the Supreme Court to entertain a reference and to report to the President its opinion

The advisory opinion of the Supreme Court will not be binding on the President as it constitutes merely consultation between the Executive and Judiciary [51] It is also true that the opinion of the Supreme Court on a particular issue will not prevent the Supreme Court from giving a contrary judgment if in a proper case filed before it, the validity of the proposed enactment is challenged On these matters Art 143 provides no direction It is judicially acknowledged that the chief utility of an advisory judicial opinion is to enable the Government to secure an authoritative opinion as to the validity of a measure before initiating it in the Legislature [52] The advisory opinion is not a judicial pronouncement It is, therefore, not equivalent to the judgment of the Supreme Court and is not binding on either party [53] It is not binding upon the courts in India under Article 141 though it may have great persuasive force [54] In the *Kerala Education Bill case*, Das C J , observed that the Court would deal with a President's Reference bearing the principles laid down by the Judicial Committee and the Federal Court as valuable guides to the Court

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48. Proviso to Art 131, " the jurisdiction will not extend to a dispute arising out of any treaty agreement executed before the commencement of the Constitution continues in operation after such commencement
49 D D Basu *Commentary on the Constitution of India* Fifth Edn Vol 3 pp 218-19 *See also* Das C J , in *The Kerala Education Bill case* AIR 1965 SC 745
50 *Reference under Art* 143 AIR 1965 SC 745
51 *In re Estate Duty* AIR 1944 FC 73
52 *A C of Canada* v *A G of Ontario* AIR 1937 PC 36
53 *Reference under Art* 143 AIR 1965 SC 745
54 *Umaval* v *Lakshmi* AIR 1945 FC 25

So far the President of India has used his power under Art 143 in the following cases

(1) *In the Delhi Laws Act case*[55] —The question referred to the Supreme Court was regarding the constitutionality of the provisions of the Delhi Laws Act, 1912

(2) *In the Kerala Education Bill reference*[56] —It was a State Bill reserved by the Governor for the consideration of the President The President, on doubts, referred the Bill to the Supreme Court for its opinion on the question whether Clause 3(5) of the Bill offends Art 14 of the Constitution

(3) *In re Sea Customs Act*[57] —The President referred the question of constitutionality and views on a Draft to be moved in the Parliament, to the Supreme Court for its opinion

(4) *Re Berubari Union*[58] —It involved the questions of law regarding the implementation of an international agreement

(5) *Re Powers, Privileges and Immunities of State Legislatures*[59] —The President referred the question regarding the repective jurisdictions of the Legislature and the superior courts in relation to the power of the former to punish for contempt

(6) *In re Presidential Poll*[59a] —The President referred the question whether the election to fill the vacancy on the expiry of the term of the office of the President must be completed before the expiry of the term of office notwithstanding the fact the Legislative Assembly of one or more of the States is dissolved

In the Federal Constitution of America there is no provision for seeking advisory opinion from the Supreme Court and the Supreme Court has steadily refused to pronounce any opinion except as to the rights of litigants in actual controversies[60] Section 55 of the Canadian Supreme Court Act, 1952 empowers the Governor General in Council to refer to the Supreme Court for hearing and consideration "important questions of law or fact touching any matter" and the Governor General is the final authority on the question whether a matter so referred is an "important question" Under the Statute the Court is bound to answer each question referred to it[61] Section 56 of the 1952 Act

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55 *In re Delhi Laws Act 1912* (1950 51) SCR 747
56 1959 SCR 995
57 *In Re Sea Customs Act 1878* AIR 1963 SC 1760
58 *Re Berubari Union* AIR 1960 SC 845
59 AIR 1965 SC 745
59a (1974)2 SCC 33
60 *U S v Ferreira* (1852) 13 How 40 (52) See also D D Basu *Commentary on the Constitution of India* Fifth Edn Vol 3 p 215
61 *A G Ontario v G Canada* (1912) AC 571

also empowers either House of the Dominion Parliament to refer any question to the Supreme Court for its advisory opinion [62] The Australian High Court (which is equal to Supreme Court in status) has also refused to give advisory opinion on the ground that the essential function of the judiciary is the decision of matters between parties and not the consideration of abstract legal questions Even the Legislature cannot require the Court to exercise any such function [63] In England, Section 4 of the Judicial Committee Act, 1833 provides that His Majesty may refer to the Privy Council 'any such other matter whatsoever as His Majesty shall think fit' This provision empowers the Crown to refer to the judicial Committee any legal issue on which it desires advice This provision is used mostly on issues outside the United Kingdom [64] The House of Lords has refused to give any advisory opinion [65]

4 Power to Review Judgments

Article 137 enpowers the Supreme Court to review its own judgments, subject to the provisions of any law made by the Parliament or any rules made by the Supreme Court under Art 145 The Parliament has not made any rules Part VII, Order XI of the Supreme Court Rules, 1966, provides for Review Rule I provides that in civil cases no application will be entertained except on the grounds mentioned in Order 47, Rule 1 of C P C, and in criminal cases except on the grounds of error apparent on the face of the record

In civil cases the review of the Supreme Court orders and judgments is possible on any of the following grounds

(*a*) Discovery of new and important matter or evidence

(*b*) Mistake or error in the record

(*c*) Any other sufficient reason—a ground analogous to two above stated in (*a*) and (*b*) grounds

5 Enlargement of Jurisdiction

Article 138 of the Constitution provides for enlargement of the Supreme Court's jurisdiction with respect to matters in the Union List by a law made by Parliament, and in respect of any matter as the Government of India and the Government of any State may by special agreement confer if Parliament by law provides for the exercise of such jurisdiction

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62 Ref *re Validity of the Orderly Payment of Debts Act 1959* (1960) 23 DLR 2d 449 (Can) Ref *re Vehicles Act 1957* (1958) SCR 608 (Can)

63 *In re Judiciary and Navigation Acts (1921)* 29 CLR 257

64 For example reference was made *In re Samuel* (1913) AC 514, *Re Ontario v Manitoba* (1927) 43 TLR 289 Re *Piracy Jure Gentium*, (1934) AC 586, *Re MacMahon*, (1951) AC 161

65 Keith *Constitutional Law* (1939), p 286

In 1970 Parliament passed the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 (28 of 1970) whereby an additional right of appeal was given to the accused in cases where (1) the High Court reversed an order of acquittal and passed a sentence of imprisonment for life or for a period of not less than ten years and (2) where the High Court passed similar sentence in cases withdrawn from a lower court and tried by it

6 Power to punish for Contempt

The Supreme Court is declared a Court of Record under Art 129 Specific provision in the Constitution in this respect is introduced in order to remove any doubt [66] As a Court of Record it has all the powers of such a Court including the power to punish for its contempt This extraordinary power to punish for scandalizing the court is a weapon to be used sparingly and always with reference to the administration of justice[67] and not for personal insult of a Judge which is not affecting the administration of justice Where public interest demands it the Court will not shrink from exercising it and imposing even by way of imprisonment, in cases where a mere fine may not be adequate [68] No ordinary law enacted by the Parliament under Entry 77, List I can take away this power of the Supreme Court

7 Enforcement of Decrees, Orders etc

The Federal Court of India, under the Government of India Act, 1935, was not authorised to pronounce any judgment other than in a declaratory form

The Supreme Court, under Art 142 is empowered to pass decrees or make necessary orders for doing complete justice in the exercise of its jurisdiction The Supreme Court can make orders for the purpose of securing the attendance of any person the discovery or production of documents or any investigation The mode of execution of such decrees is left to the Union Parliament to pass necessary legislation The President has made the Supreme Court (Decrees and Orders) Enforcement Order, 1954 [69]

8 Ancillary Powers

Article 140 provides some elasticity to the original and appellate powers of the Supreme Court by permitting the Parliament[70] to pass legislation to supplement those provisions Under this Article

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66 *Hiralal* v *State of U P*, AIR 1954 SC 743
67 *Bathina Ramakrishna* v *State of Madras* AIR 1952 SC 149
68 *Rizan-ul Hasan* v *State of U P*, (1953) SCR 581, *Pratap Singh* v *Gurbash*, AIR 1962 SC 1172
69 *See D D Basu Acts, Rules and Order under the Constitution of India* Book 1 p 309
70 Parliament substituted S 527 of the Code of Criminal Procedure by enacting Code of Criminal Procedure (Amendment) Act, 1952

the Supreme Court has the power to transfer a criminal case or appeal from one High Court to another "whenever it is made to appear to the Supreme Court that an order under this section is expedient in the ends of Justice"

9 Power to Issue Writs

The Constitution of India has given very important and also very wide powers to the Supreme Court of India under Art 32.[71] It provides for the enforcement of Fundamental Rights, as conferred by Part III of the Constitution, by means of writs. The Supreme Court is empowered to issue appropriate writs, orders and directions for the purpose of enforcing Fundamental Rights. Clause (2) of Art 32 gives a very wide jurisdiction to the Supreme Court by empowering it to issue directions, orders or writs including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate for the enforcement of the Fundamental Right as conferred by Part III of the Constitution.[72] The right to constitutional remedies as provided by Art 32 is itself a Fundamental Right. The Supreme Court is constituted the protector and guarantor of Fundamental Rights[73] and it is the duty of the Supreme Court to grant relief under Art 32 where the existence of a Fundamental Right and its breach, actual or threatened,[74] is *prima facie* established.[75] In *Charanjit Lal's case*,[76] Mukherjea, J., said

> "Article 32 gives us very wide discretion in the matter of framing our writs to suit the exigencies of particular cases, and the application of the petitioner cannot be thrown out simply on the ground that the proper writ has not been prayed for"

Clause (4) of Art 32 specifically provides that the right to move the Supreme Court for the enforcement of fundamental rights which is guaranteed by this article shall not be suspended except as provided by Art 359 (in Emergency) of the Constitution. The power of the Supreme Court to issue writs cannot be taken away by any legislation. Any law which renders nugatory or illusory the exercise of the Supreme Court's power

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71 *Kochunni* v *State of Madras* AIR 1959 SC 725
72 See also *Rashid Ahmed* v *Municipal Board*, (1950) SCR 566, *Basappa* v *Nagappa* (1955) 1 SCR 250. *See also* A R Blackshield *Fundamental Rights and the Institutional Visibility of the Indian Supreme Court* (1966) 8 JILI 139-217
73 *Romesh Thappar* v *State of Madras* AIR 1950 SC 124
74 *Tata Iron and Steel Co* v *Sarkar* AIR 1961 SC 65 (68)
75 *Kochunni* v *State of Madras* AIR 1959 SC 725
76 *Charanjit Lal* v *Union of India* AIR 1950 SC 41 at p 53

under Art 32 is void [77] In *Kesavananda Bharati's case,*[78] the Supreme Court overruling *Golak Nath case*[78a] held that though Parliament can amend any part of it the Constitution, it cannot charge the "basic and essential" features of the Constitution The original writ jurisdiction under Art 32 will fall under this protection and be immune from Parliament's amending power

The jurisdiction of the Supreme Court to issue writs is concurrent and not exclusive Under Art 226 similar powers have been granted to the Indian High Courts It is established that an application under Art 32 lies in the first instance to the Supreme Court, without first resorting to the High Court under Art 226 [79]

Referring to the Supreme Court's power to issue writs, Sri M C. Setalvad (then Attorney-General) on the occasion of the inauguration of the Supreme Court observed [80]

> "The writ of this Court will run over territory extending to over two million square miles inhabited by a population of 330 millions It can truly be said that the jurisdiction and powers of this Court in their nature and extent are wider than those exercised by the highest court of any country in the Commonwealth or by the Supreme Court of U S A The detailed enumeration of the Fundamental Rights in the Constitution and the provisions which enabled them to be reasonably restricted will need wise discriminating decisions On the Court will fall the delicate and difficult task of ensuring the citizens the enjoyment of these guaranteed rights consistently with the rights of the society and the State "

Chief Justice Kania in his inaugural address highlighted the status of the Supreme Court as follows[81]

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77 *Gopalan* v *State of Madras* AIR 1950 SC 27

78 (1973) 4 SCC 225 A special bench of all the 13 Judges was constituted for this purpose *See* details in *Shukla Constitution of India (1975 Edn)*

78a *Golak Nath* v *State of Punjab,* AIR 1967 SC 1643 In this case a special Bench comprising all eleven judges of the Supreme Court was constituted Five Judges led by the then Chief Justice, Mr K Subba Rao voted to over rule *Shankari Prasad and Sajjan Singh*, Five others led by Mr *Justice* Wanchoo voted to affirm Mr Justice Hidayatullah agreed with the then Chief Justice, Mr Subba Rao, and held that the Parliament cannot "take away or abridge fundamental rights by amending *Part III of the Constitution*

79 *Romesh Thappar* v *State of Madras,* AIR 1950 SC 124 (per Patanjali Sastri, J) p 126

80 Welcome Address of *Sri M C Setalvad* on 28th January 1950 See (1950) SCR p 1 at pp 3-4

81 Inaug ural Address of Chief Justice Kania on 28-1-1950 *See* (1950) SCR at p 7

"Under the Constitution of India, the Supreme Court is established to safeguard the fundamental rights and liberties of the people"

10 Other powers

The Constitution of India has given, under different Articles, power to the Supreme Court to decide cases In all such cases the decision of the Supreme Court will be considered final Some of these provisions are discussed as below

According to Article 71 the Supreme Court is empowered to go into disputes arising out of or in connection with the election of the President or Vice-President The decision of the Supreme Court will be final in these cases Under Art 317 the Chairman or a member of the Public Service Commission will be removed on the ground of misbehaviour only when the Supreme Court, to whom the matter was referred by the President of India, holds on enquiry that such Chairman or member must be removed from office During the period of enquiry by the Supreme Court such members may be suspended by the President of India The Supreme Court can declare a law unconstitutional or *ultra vires* if the Parliament or State Legislature enacts a law on the subject which is not given in their respective Lists

11 Doctrine of Precedents and the Supreme Court

Article 141 of the Constitution of India provides that the law declared by the Supreme Court shall be binding on all courts within the territory of India This provision corresponds to Section 212 of the Government of India Act, 1935 which provided that the law declared by the Federal Court and by any judgment of the Privy Council was binding on all courts in British India [82]

The doctrine of precedents is given constitutional recognition under Art 141 of the Constitution of India The decisions of the Supreme Court are a source of law They are having the binding force of law The provisions of Art 141 show that even the *obiter dicta* of the Supreme Court, on a point raised and argued before it will be binding [83] Where there is a hierarchy of courts as in India the law declared by the superior court must be binding on inferior courts The Supreme Court has authority to reverse its own judgments [84] Only the *ratio decidendi* or the principle laid down in a case has the binding force of law and not the whole

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82 *Kishorilal v Debi Prasad* AIR 1950 Pat 53 *Mata Prasad v Nageshwar Sahai* AIR 1925 PC 272

83 See *Radharani v Sure Kumar* AIR 1953 Cal 524, *I T Commissioner v Tarr* AIR 1959 SC 814 (821)

84 *Bengal Immunity v State of Bihar*, (1955) 2 SCR 603 (623)

case Sometimes it becomes very difficult to find out the *ratio* of a case

The opinion of the Supreme Court under Art 143 is not binding on the subordinate courts It will have high persuasive authority The expression "all courts", as used in Art 141 does not include the Supreme Court Hence it follows that the Supreme Court will be free to overrule and reverse its previous judgments but it would be slow to take such a step The words "all courts in India" indicate that even the subordinate courts are bound to follow decisions of the Supreme Court in preference to the decisions of their respective High Courts in case there is any conflict between the two decisions It is the judgment of the majority in the Supreme Court which is binding on subordinate courts

As regards the binding effect of the pre Constitution Privy Council judgments, the view taken by the Nagpur[85] and Bombay[86] High Courts appears to be correct, that they are binding on all courts in India except the Supreme Court, till the Supreme Court takes a different view

C Recommendations of the Law Commission

Some important recommendations of the Law Commission[87] on Supreme Court are briefly stated as follows

The Law Commission has laid special emphasis on the fact that the Supreme Court Judges should not be appointed on the basis of communal and regional considerations It suggests that an effort should be made to recruit distinguished members of the Bar directly to the Supreme Court Bench by inviting them to accept the appointment at a time when they can look forward to a fairly long tenure on the Bench It is necessary that a Judge of the Supreme Court should have a tenure of at least ten years A judge who is appointed as Chief Justice of India should have a tenure of at least five to seven years It will assist in the stability of judicial administration The Commission is not in favour of raising the retiring age of the Judges of the Supreme Court The Commission is also against the existing practice of appointing the seniormost puisne Judge of the Supreme Court as Chief Justice of India Instead the Commission has suggested that the most suitable person whether from the Court, the Bar or from the High Courts should be chosen This has been done in the appointment of Chief Justice A N Ray in supersession

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85 *Punjabai* v *Shamrao* AIR 1955 Nag 293
86 *State of Bombay* v *Chagganlal*, AIR 1955 Bom 1, 6
87 Law Commission of India, *Reform of Judicial Administration, Fourteenth Report*, pp 32 57

of three senior judges, Justice J M Shelat, Justice K S Hegde and Justice A N Grover Considerable controversy was raised throughout the country on this issue Again when Chief Justice A N Ray retired on January 29 1977, Mr Justice M H Beg was appointed Chief Justice superseding Mr Justice H R Khanna who consequently resigned

As regards the salaries of the Judges of the Supreme Court, the Law Commission has not suggested any increase in the salaries of the Supreme Court Judges [88] Referring to the financial and economic situation of the country, the Commission observed "Our conditions demand that every one should in the interests of the nation put forward his best effort for the lowest remuneration possible" [89] Instead the Commission has suggested that the pensions payable to Judges of the Supreme Court should be increased on the basis of the tenure of service The leave privileges of the Judges should be at least as liberal as those of the Judges of the High Court

The Commission is against the Chamber practice[90] of the Judges of the Supreme Court after their retirement It has also suggested that the Judges should be barred from accepting any employment under the Union or a State after retirement other than employment as an ad hoc Judge of the Supreme Court under Art 128 of the Constitution

Regarding the jurisdiction of the Supreme Court, the Law Commission recommended that it is not necessary to enlarge the jurisdiction of the Supreme Court in criminal matters It was of the opinion that the Court might be more chary of granting special leave[91] in criminal matters as the practice of granting special leave freely has a tendency to affect the prestige of the High Courts As regards the petitions under Art 32, the Commission suggested that the Supreme Court may consider the desirability of instituting a system of preliminary hearing in such petitions and of enlarging the powers of a single Judge or of a Division Bench to deal with contested interlocutory and miscellaneous matters [92]

Comments —The Constitution of India has provided for a fixed salary and tenure for the Judges of the Supreme Court They retire on attaining the age of sixty five years So far as the question of salary is concerned one will hardly agree with the view of the Law Commission of India[93] that there should be no

"increase in the salaries of the Supreme Court Judges" Keeping in view the position of the Judges of the Supreme Court in our constitutional system and the nature of their judicial work one cannot ignore the fact that their duties and responsibilities are also much greater than any other high offices in the country At one place the Law Commission of India has itself stated "their remuneration was fixed at a time (1950) when the value of money was much higher It was actually reduced at a time when with much heavier taxation and the rise in prices the actual amounts received and their purchasing power had shrunk to a small proportion of what they were originally"[94] It may be noted that the service rendered by Judges demands the highest qualities of learning, training and character Though their qualities cannot be measured in terms of money, still in order to maintain their dignity and status it is essential that due consideration should be given and the salary must be raised The Bench must be of special attraction to the legal profession and the best legal brains must be given adequate salary

Fortunately some relief has been given by the passing of the Supreme Court (Conditions of Service) Amendment Act, 1976 (Act 36 of 1976) By this Act the provision of grant of family pension and death cum retirement gratuity is extended Also a conveyance allowance is given besides a sumptuary allowance Increase in pension and post retirement medical facilities are the other benefits given by this Act

D Changes made by the Constitution Forty Second Amendment Act, 1976

By the Forty Second Amendment Act, 1976 some drastic changes have been made in respect of the jurisdiction of the Supreme Court, with effect from February 1, 1977 These changes are

(1) By insertion of Arts 131A and 226A exclusive jurisdiction has been given to the Supreme Court with regard to constitutional validity of Central Laws For this purpose the High Court has to refer such cases for decision by the Supreme Court On application being made by the Attorney General, any case pending in the High Courts or subordinate court can be called for disposal by the Supreme Court

(2) New Art 139A provides for transfer of cases to itself for disposal when the same question of law is being agitated before more than one High Court The Supreme Court can also transfer any case, appeal, or proceedings from one High Court to another

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94 [illegible]

(3) Special provision has been made by inserting Art. 144A for disposing of cases relating to constitutional validity of laws. In such cases a bench consisting of a minimum of seven judges has been provided and no law, Central or of a State can be declared unconstitutional unless two thirds of the seven judges hold it to be so.

(4) Jurisdiction under Art. 136 stands enlarged by the provisions in new Arts. 323A and 323B providing for establishment of Administrative Tribunals and specialised Tribunals to deal with matters such as, taxation, customs, labour disputes, land reforms, urban ceiling, smuggling elections essential goods supply, etc.

E. The Supreme Court of India: Role in Democracy

Absolute power breeds corruption and ends in tyranny. Keeping this important factor in view, the framers of the Indian Constitution also provided for the establishment of a Supreme Court to control the Executive and Legislature of the country.

The Supreme Court was inaugurated on 28th January, 1950 under Art. 124 of the Constitution of India, 1950. The Constitution provides for its composition, appointment and removal of its Judges, jurisdiction and various other powers. It is the highest court of India which enjoys very wide jurisdiction, namely, original, appellate and advisory. Apart from this, under Art. 32 the Supreme Court is empowered to issue writs, orders and directions for enforcement of Fundamental Rights, when a citizen moves the Court for appropriate proceedings. Any law which transgresses the limits of the Constitution and as such is inconsistent with the chapter on Fundamental Rights, is void to the extent of inconsistency according to the provisions of Art. 13 and the Court has a right to make such pronouncement on this question. In case the Supreme Court declares a law as *ultra vires* of the Constitution all other courts are bound to obey it, for Art. 141 declares that "the law declared by Supreme Court shall be binding on all courts within the territory of India". It means that a void law cannot be applied by any subordinate court in India unless the law is suitably amended or the interpretation of the court is negatived by a suitable amendment made by the Legislature.

In accordance with the traditions in democratic countries the public in India treated the judiciary with respect, and naturally expected from them conduct which conformed to the highest traditions of judicial decorum and propriety. The function of judiciary in a democracy is to maintain the rule of law and freedom of speech, the press and the individual. In a democracy the people should have the right to discuss important issues, criticize the Government and even change it. But they should not

abuse the right The recognition of the supreme value of the individual human personality governed the rule of law It is the function of the judiciary in a modern democracy to interpret that spirit The Supreme Court of India safeguards the rights and liberties of the people and is always cautious to see that these are not taken away arbitrarily or capriciously or curtailed unreasonably

Independent and impartial judiciary is the pillar of liberty It is essential that the Judges must be secure in their tenure of office and they must have a salary commensurate with their responsibilities Lord Hewart[95] observed, "Independence of judiciary is essential because many of the most significant victories for freedom and justice have been won in the law courts and the liberties of the citizen are closely bound up with the complete independence of judges" L S Amery[96] said "Independence of the judiciary loses all meaning if any judicial decision unpleasing to the party leaders can at once be reversed by fresh and even retrospective legislation"

In India, the dominance of the Congress Party for so long had provided the country with a framework of unity which is now under strain after the 1967 elections There are three areas of friction which are likely to grow in importance under the existing structure of political organisation in the nation (i) the relationship between the Centre and the States, (ii) the political relationships within the States, and (iii) the coalition relationship between the political parties and dissident groups The framers of the Constitution did not take into account the great heterogeneity in the social and regional infrastructure of Indian politics, its potential for social and political collision and the difficulty of reconciling the conflicting interests within the framework of a quasi federal system which operates in India

Never before in the history of India, since Independence, was there such danger to the national unity as it is today The society is becoming more complex and so also the task of the Supreme Court has become complicated The Supreme Court of India still stands firmly as a symbol of national unity

Lord Denning while appreciating the independence of the judiciary in India, observed, "I am particularly happy to see how well the Judges here were upholding the independence with which they acted in their relations with the Government and the courage with which they dealt with cases"[97]

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95 Lord Hewart *The New Despotism* p 102
96 L S Amery *'Essay on British Parliamentary Government'*, in *Parliament A Survey* edited by Lord Campion p 54
97 Lord Denning Inaugural address on *'The Function of the Judiciary in a Modern Democracy'* in Madras University on 19th December 1963

11

Development of Criminal Law

A Ancient Hindu Criminal Law

Before the conquest of India by the Muslims, the penal law prevailing in India was the Hindu Criminal Law It is now well established that in ancient India there existed a systematic and well defined criminal law [1] The punishment of a criminal was considered to be a sort of expiation which removed impurities from the man of sinful promptings and reformed his character Ancient Smriti writers were also fully aware of various purposes served by punishing the criminals [2] Manu,[3] Yajnavalkya[4] and Brihaspati[5] state that there were four methods of punishment, namely, by gentle admonition, by severe reproof, by fine and by corporal punishment and declare that these punishments shall be inflicted separately or together according to the nature of offence The punishments served four main purposes, namely, to meet the urge of the person suffered, for revenge or retaliation as deterrent, and preventive measures and for reformation or redemption of the evil doer [6] The *Dandaviveka*,[7] quotes a verse in which the considerations that should weigh in awarding punishment are brought together, namely, the offender's caste, the value of the thing, the extent or measure, use or usefulness of the thing with regard to which an offence is committed, the person against whom an offence is committed, age, ability, qualities, time, place, the nature of the offence Certain classes of persons were exempt from punishment under the ancient criminal law

B Muslim Criminal Law in India

1 Nature of early Muslim Criminal Law

Before the advent of the British, the Mohammedan Criminal Law

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1 For details *see* Chapter I of this book at pp 11 15
2 Kautilya's Arthasastra Vol IV, p 10
3 Manusmriti, VII
4 Yajnavalkyasmriti I
5 Brihaspatismriti *See also* Max Muller edition *Sacred Books of the East* Vol XXXIII
6 P V Kane, *History of Dharmasastra* Vol III, pp 383 90
7 *Dandaviveka of Vardhamana* (Gaikwad Oriental Series), p 36

was prevailing in India Muslims after conquering India imposed their criminal law on Hindus whom they conquered The Mohammedan Criminal Law[8] was based on the *Quran*, a holy book of Muslims, which was believed to be of Divine origin The laws of the *Quran* were found inadequate to meet the requirements of a large and civilised community and therefore certain rules of conduct were introduced, called *Sunna* They were deduced from the oral precepts, actions and decisions of the Prophet They were considered to be secondary authority of Muslim Law and were regarded as conclusive in cases which were not expressly determined by the *Quran* Concurrence of the Companions of Muhammad and the aid of analogy became respectively third and fourth source of Muslim Law [9]

The Mohammedan Criminal Law was mainly expounded by the *Hidaya*[10] and the *Fatawa i Alamgiri*[11] which were considered to be the most authoritative written commentaries *Hidaya* expressed the views of Abu Hanifa and his two disciples, Abu Yusuf and Iman Mohammed, whom the Sunni sect regarded as the principal commentators on the Holy *Quran* *Hidaya* laid down the general rules, principles of Muslim criminal law and *Fatawa i Alamgiri* was a collection of case laws

Under four broad principles, the Mohammedan criminal law[12] classified all offences for punishment, namely, (i) *Qisas* or retaliation (ii) *Diya* or blood Money, (iii) *Hadd* or fixed penalties, and (iv) *Tazir* or discretionary punishment

Qisas or retaliation applied specially to offences against the person, *e g* wilful killing, maiming and grave injury It was classified into two, in cases of death and in cases short of death According to this principle the injured person had a right to inflict a similar injury on the wrong doer This right was regarded to be the right of man (*Haqqa Admi*) and not of public or of God[13] The right of the person murdered devolved on his legal heirs who represented him in the exaction of it Where some of the heirs were minors and some adult, *Abu Hanifa* was of opinion that the adult heirs alone might demand retaliation

In certain cases, where no retaliation was allowed, the injured party had a right to demand only blood money which was known

8 For the origin and nature of the Muslim Criminal Law *See* T K Banerjee *Background to Indian Criminal Law* pp 31 36

9 Fitzgerald *Muhammedan Law* pp 3 8, see also R K Wilson *An Introduction to the Study of Anglo Muhammedan Law* pp 14 18

10 It is a commentary upon the *Bidyul ul-Mooblades* composed by Shaikh Boorhan Uddin Ali son of Abu Bukr

11 It consisted of 61 books which were composed in Arabic under the authority of Emperor Aurangzeb and was later on translated into Persian

12 For details see in Chapter I of this Book at pp 33-34

13 *See* for details T K Banerjee *Background to Indian Criminal Law* pp 40 44

as *Diya*. The punishment of *Qisas* in all cases of wilful homicide was exchangeable with that of *Diya* if the person having the right of retaliation so wished. In cases of murder the heir of the deceased could accept blood money in lieu of retaliation. It was the most defective provision in the Mohammedan Criminal Law as in many cases the murderers escaped simply by paying money to the dependants of the murdered person. Many evil practices developed out of it.

In the case of *Hadd* the law prescribed and fixed the penalties for certain offences. In other words it meant boundary or fixed limit of punishment with reference to the right of God or to public justice. In such offences the Judge was not free to use either *Qisas* or *Diya* or his discretion but he was required to pass a sentence according to the provisions of the Law. Punishments under *Hadd* were given in offences of *Zina* (illicit intercourse), drinking wine, theft, highway robbery, accusing a married woman, etc. In case of *Zina* the punishment was death by stoning or scourging. If it was proved that the accused had committed theft, amputation of his hands was the only punishment. Similarly in other offences, punishments were specifically laid down by Muslim Criminal Law. As the punishments were very harsh and severe, the proof of the crime was made very essential under *Hadd*. For example, in the case of *Zina* or illicit intercourse four male witnesses of proved credit were necessary. In case of any doubt punishment was not given under *Hadd*.

Tazir meant discretionary punishment. Offences for which no punishment was prescribed were left at the discretion of the Judges to give any sort of punishment from imprisonment and banishment to public exposure. The circumstances of each case determined the *Tazir*. The conditions of conviction in *Tazir* were not so strict as for cases under *Hadd*. Above all these, the King had a right called "Right of *Siyasat*" to punish the guilty in the interest of general public.

Hidaya presents a curious mixture of great vagueness and extreme technicality of the Mohammedan Criminal Law.[14] According to *Hidaya*, offence of homicide to which Muslim Criminal law as administered in Bengal applies, is divided into five kinds as follows :—

(i) *Katl amd* or wilful homicide by a deadly weapon. It implies intention to kill followed by a voluntary act.

(ii) *Katl-Shabah amd*—It meant homicide like wilful homicide where the instrument used was not likely to cause death.

14 *See* J. F. Stephen *A History of Criminal Law of England* Vol. III, Chapter XXXIII "Indian Criminal Law", p. 292.

(iii) *Kail Khata*—It meant erroneous homicide, killing under a mistake either as to the person or the circumstances

(iv) Involuntary homicide by an involuntary act as for example where a man falls on another from the roof of a house

(v) Accidental homicide by an intervenient cause, as for example when a man unlawfully dug a well into which another person fell and was drowned

This sort of division clearly shows the extreme technicality of the Mohammedan Criminal Law which was in force specially in Bengal, Agra and Madras

2 Defective state of Mohammedan Criminal Law

Though certain broad principles of Mohammedan Criminal Law were laid down, as stated above, still in many cases the criminal law was not certain and uniform The basic principles of criminal law were stated in *Hidaya* and *Fatwa i Alamgiri* but it was very difficult to state beforehand what were the legal provisions for punishing the criminal till decision of the case by *Qazi* In actual practice it was realised that the law laid down in *Hidaya* and *Fatwa i Alamgiri* was mostly conflicting, confusing and incompatible Thus in each case the interpretation of law depended on *Qazi* who presided over the Court [16]

Apart from the defect of uncertainty of criminal law there were various other glaring defects Referring to the defective state of law Stephen observed,

> 'The Mohammedan Criminal Law was open to every kind of objection It was occasionally cruel It was frequently technical, and it often mitigated the extravagant harshness of its provisions by rules of evidence which practically excluded the possibility of carrying them into effect Thus for instance, immoral intercourse (*zina*) between a woman and a married man was in all cases punishable by death, whether violence was used or not, but punishment is barred by the existence of any doubt on the question of right or by any conception in the mind of the accused that the woman is lawful to him and by his alleging such idea as his excuse Moreover the evidence of women in such an accusation was rejected "[15]

The inherent defect of the Mohammedan Criminal Law was in its conception and classification of crimes Banerjee has

15 Sri Ram Sharma *Mughal Government and Administration* pp 200-201
16 See 'Indian Criminal Law' in Stephen *A History of Criminal Law of England* Vol III p 293

pointed out, "with exceptions crime was considered to be a wrong done to the injured party not an offence against the State and punishment was regarded as the private right of the aggrieved party"[17] There was no clear distinction between private and public law The basic notion in the Mohammedan jurisprudence was to secure satisfaction for the injured rather than to afford protection to the society at large The right of retaliation was regarded to be a right of man even in serious crimes, *e g*, in murders *etc* But in fact it was a crime against society for which the State was to punish the criminal This weakness of Mohammedan Law was sufficient to encourage many persons to commit murders

The law of *Diya* or blood money was also highly unsatisfactory in the interest of the society According to the Mohammedan Law, the son or the nearest kin of the murdered person was authorised to pardon the murderers of their parents It was wholly illogical and unreasonable One finds a large number of cases in the old records of the Muslim period where the next of kin of the deceased person pardoned the murderer and received some money in exchange It made the life of a human being very cheap to be assessed in money value The Mohammedan Law made no distinction between crime and tort

In cases, where the deceased person left no heirs to punish the murderer or to demand blood money no specific provision was laid down in the *Quran* Even if a person had left behind some minor heirs, it was necessary to wait until the infant heirs had grown up before a murderer could be capitally punished For a long period of time many such conflicting and important questions remained unsettled as there was no specific provision in the *Quran* This uncertainty led to injustice and corruption

The Mohammedan Criminal Law allowed distinction between the murder perpetrated with an instrument formed for shedding blood, and death caused by a deliberate act The punishment for these offences was also so severe as to check murders in the future We have already discussed above the technicality of the Mohammedan law of homicide The Mohammedan Law confused tort and crime As regards punishments, it was also irrational

Mutilation, *Tushier* or public exposure, use of *Corad* and flogging of females were other severe punishments and common for minor offences under Muslim Criminal Law

The law of *Tazir* which provided for discretionary punishment was also very vague which gave too much power to the

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17 T K Banerjee *Background to Indian Criminal Law* p 67

Judges On the one hand even innocent persons were punished by the courts while on the other hand it led to corruption, injustice and bribery in the courts and amongst police officers

The Law of Evidence, under Muslim Criminal Law, was also very technical, defective and unsatisfactory For example no Mohammedan could be convicted capitally on the evidence of an infidel In other cases a Mohammedan's words were regarded as being equivalent to those of two Hindus Evidence of two women was regarded as being equal to that of one man The defective state of the Law of Evidence also provided a large scope for corruption and bribery which ultimately resulted in injustice in many cases

In spite of all these defects in the Mohammedan Criminal Law it is also said that the defects were not peculiar to it but were the concomitant elements of the early law of every country including England [18] T K Banerjee[19] has pointed out, "in some respects, undoubtedly, the Mohammedan Law was superior to the English Criminal Law of that period which was still rude and crude, and far from perfect English Law would hang a man for stealing trivial things, but in Bengal a thief could never be capitally punished". Dr Aspinall[20] observes that in "prescribing the severest punishments for crimes against person, it was in advance of the English Criminal Law of the eighteenth century which punished offences against property with much greater severity"

However, the defects of the Mohammedan Criminal Law gradually led to a growing demand for reforms in it from every section of the society The Mohammedan administrators took no definite steps to improve the situation specially because of the strong ties between the religion and law It was only during the East India Company's administration under the Governorship of Warren Hastings and Cornwallis that strong reformative steps were taken to suppress the evils and punish the offenders by re-constituting the Mohammedan Criminal Law courts and by passing various regulations to remove the defective provisions of the Mohammedan Law

3. Reforms in Criminal Law by English Administrators

The Mohammedan Criminal Law, as we have stated above, suffered from many defects The English administrators of the

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18 For a detailed academic discussion on the point, see W A Robson *Civilization and the Growth of Law*, pp 88 89, 103 104

19 T K Banerjee, *Background to Indian Criminal Law*, p 67

20 A Aspinall, *Cornwallis in Bengal* p 61

East India Company realised from time to time that many provisions of the Mohammedan Criminal Law were repugnant to good government, natural justice and commonsense They introduced certain reforms from time to time to recald refashion and amend the Mohammedan Criminal Law so as to adapt it to their new conceptions of policy and behaviour, thnugh for a long time it continued to be the law of the land

(i) Reforms of Warren Hastings —Referring to the period before Warren Hastings came to Bengal Stephen observes, "Of the English Criminal Law practised in India it is needless to say more than that it was regarded as the English Criminal Law as it stood in 1726 when the Charter was granted by which the Mayor's Court and the Court of Quarter Sessions were established "[21]

Soon after the acquisition of *Diwani* by the East India Company, the question arose whether the Company could alter the criminal law then in force in India The first interference with the Mohammedan Criminal Law came in 1772 when Warren Hastings changed the existing law regarding *dacoity* to suppress the robbers and dacoits It was provided that the dacoits were to be executed in their villages, the villagers were to be fined, and the families of the dacoits were to become the slaves of the State Warren Hastings in his letter to the Directors dated 10 h July, 1773 maintained that the East India Company as the sovereign authority in the country could and should alter the rules of Mohammedan Law He pointed out, in his letter, "The Mohammedan Law often obliges the Sovereign to interpose and to prevent the guilty from escaping with impunity and to strike at the root of such disorders as the law may not reach " Hastings criticised the existing rules of Mohammedan Criminal Law boldly and attempted to introduce reforms in various ways To regulate the machinery of justice in Bengal, Warren Hastings prepared plans and introduced reforms in 1772, 1774 and 1780 respectively as well as suggested various reforms[22]

(ii) Reforms of Cornwallis —From 1772 to 1790 though steps were taken to reorganise and improve the machinery of justice no special effort was made to change the Mohammedan Criminal Law The problem of law and order as well as to

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21 It is controversial whether English Law was introduced in India in 1726 or later o This controversy became serious after the trial of Raja Nand Kumar in 1775 For details see Chapter V of this Book at pp 120-37 *See also* J F Stephen *The Story of Nuncomar and the Impeachment of Sir Elijah Impey* Beveridge, *The Trial of Maharaja Nand Kumar*, B N Pande, *Introduction of English Law into India*, and M C Setalvad, *The Common Law in India*

22 For details see 'Judicial Reforms of Warren Hastings' in Chapter IV of this Book at pp 94-108

improve the defective state of the Mohammedan Law were seriously considered by Lord Cornwallis when he came to India in 1790. Lord Cornwallis who succeeded Warren Hastings, concentrated his attention on removing two main defects, namely (*a*) gross defects in Mohammedan Criminal Law and (*b*) defects in the constitution of courts.

Lord Cornwallis' reforms in the Mohammedan Criminal Law were introduced on 3rd December, 1790 by a Regulation of the Government of Bengal. The Regulation made the intention of the criminal as the main factor in determining the punishment. The intention was to be determined from the general circumstances and proper evidence and not from the nature of the instrument used in committing crime.[23] To support this reform, Cornwallis proposed that the Doctrine of Yusuf and Mohammad must be the general rule 'in respect of trials for murder'. Abu Hanifa's doctrine laying emphasis on the instrument of murder was rejected. By another important provision of the Regulation, the discretion left to the next of kin of a murdered person to remit the penalty of death on the murderer was taken away and it was provided that the law was to take its course upon all persons who were proved guilty for the crime. Cornwallis further maintained, "Where Mohammedan Criminal Law prescribes amputation of legs and arms or cruel mutilation, we ought to substitute temporary hard labour or fine and imprisonment".[24] In this respect legislative steps were taken only in 1791.

Reforms were also introduced, by the Regulation of 3rd December, 1790, in the administration of justice in the *Foujdari* or criminal courts of Bengal, Bihar and Orissa. In 1791 a Regulation was passed which substituted the punishment of fine and hard labour for mutilation and amputation. The next important step was taken in 1792 when a Regulation provided that if the relations of a murdered person refused or neglected to prosecute the accused person, the Courts of Circuit were required to send the record of the cases to the Sadar Nizamat Adalat for passing final orders. In the same year it was also provided that in future the religious tenets of the witnesses were not to be considered as a bar to the conviction of an accused person. The Law Officers of the circuit Courts were required to declare what would have been their *fatwa* if the witnesses were Muslims and not in the case of Hindus. This provision modified the Muslim Law of Evidence in 1792.

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23 *See also* Aspinall *Cornwallis in Bengal*, p 69, Rankin, *Background to Indian Law*, p 170.

24 *See* Resolution in the Proceedings of the Governor General in Council dated 10th October, 1791.

On 1st May, 1793, the Cornwallis Code[25]—a body of forty-eight enactments—was passed Regulation IX of 1793 in effect restated the enactments which provided for modification of the Mohammedan Criminal Law during the last three years Thus it laid down the general principles on which the administration of criminal justice was to proceed

In order to make the law certain in 1793 it was also provided that the Regulations made by the Government were to be codified according to the prescribed form and they were to be published and translated in Indian languages [26]

The system which was provided under Cornwallis Code for Bengal was subsequently also adopted in Madras and Bombay Presidencies with certain amendments

(iii) Subsequent reforms in Muslim Criminal Law up to 1831 —The process of introducing reforms in the Mohammedan Criminal Law which began first of all during Warren Hastings' tenure continued till 1832 when the application of Muslim Law as a general law was totally abolished Various piecemeal reforms which were introduced from 1797 to 1832 in the Mohammedan Criminal Law were as follows

Regulation XIV of 1797 made certain reforms in the law relating to homicide where the persons were compelled to pay blood-money This Regulation granted relief to those persons who were not in a position to pay blood-money and were put in prison by setting them free It further provided that all fines imposed on criminals shall go to the Government and not to private persons If the fine was not paid, a definite term of imprisonment was fixed for the accused After the expiry of that fixed period of imprisonment the accused person was released from prison In cases where the application of Mohammedan Criminal Law led to injustice, the Judges were empowered to recommend mitigation or pardon to the Governor General in Council

The penalties prescribed by Mohammedan Law for false testimony, whether on oath or not, were corporal punishment, imprisonment, *Tashreen* or public exposure For perjury these punishments were considered by the Governor-General to be too severe In the interest of society reforms were made by Regulation XVII of 1793 Section 3 of this Regulation authorised the Court of Circuit to order that the word *'deroghgo'* (perjuror) or such words

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25 For details *see* Chapter VI of this Book
26 Regulation XII of 1793

should be marked, by the process of *Godna,* on the forehead of prisoner It was done in order to check the growth of the habit of giving false testimony Subsequently this practice of punish ment was also stopped and strict rules were framed to punish cases of perjury

Regulation IV of 1799 penalised the offence of treason By Regulation V of the same year *Dharna* was made an offence in Bengal and punishment for this offence was prescribed By Regulation II convicts sentenced to imprisonment who escaped from the jail before the expiry of the term of their punishment were declared liable to transporation to some place beyond the seas either for the remaining life or for a short term Regulation VIII of 1799 provided sentence of capital punishment in certain cases e g in cases where parent killed the child, master killed the slave *etc* Earlier these cases were considered as justifiable under the Muslim Law

Regulation VIII of 1801 distinguished involuntary nomicide in the prosecution of a lawful intention from involuntary homi cide in the prosecution of an unlawful and murderous intention The death sentence was prescribed where the unlawful and mur derous intention was proved Under Mohammedan Law there was no distinction between them and the innocent intention an l criminal intention were treated on equal basis

Regulation VI of 1802 prohibited the practice of infanticide by declaring it equivalent to wilful murder and on conviction the person responsible was liable to the punishment of death and all abettors and accomplices were also given the same punish ment Even an attempt to commit the crime of infanticide where the victim would escap death was given adequate punishment

In the principle of *Tazir* as allowed by Mohammedan Law certain important changes were made in 1803 As discussed before, the power of discretionary judgment of the Judge led to corrup tion, bribery and lack of uniformity which even defamed the judiciary Regulation III of 1803 was specially enacted to remove this evil and it provided that in cases where a person was liable to discretionary punish nent under the Mohammedan l aw, the *Fatwa* of the law officers was merely to declare the same in general terms stating the grounds why the prisoner was subject to discre tionary punishment and the punishm nt, short of death, was to be proposed by the Judge of Circuit or by the *Sadar Nizamat Adalat* [27]

27 *See* T K Banerji *Background to Indian Criminal Law* p 81

In case the particular offence was covered by some Regulation of the Company, the offender was to be punished accordingly Where the Regulation required reference to be made to the *Sadar Nizamat Adalat*, the Judge was required to act according to that. It was provided that "no punishment was to be inflicted only on suspicion, if in a particular case the evidence fell short of legal requisite for *Hadd* or *Kisa* but was nevertheless sufficient to convict the prisoner on strong presumptive proof or violent presumption, the Judge was to sentence the accused to the full amount as if the prisoner was convicted on full legal evidence"[28] In all other serious cases, where no penalty was fixed by any regulation the Regulation provided for a maximum punishment of seven years' hard labour and thirty nine stripes

Robbery was another most important offence which was common in the country at that time It attracted the attention of the Englishmen who were interested in law reforms in India Warren Hastings first of all recommended that robbers and dacoits must be punished severely But suitable legislation to deal with them was passed only as late as 1803 Regulation LIII of 1803 abolished the condition of the place of robbery which was given an important place in the Mohammedan Criminal Law It also abolished the necessity of evidence of special kind In all cases of murder committed in the prosecution of robbery, or aiding or abetting the same or being accessary thereto the offenders were to be sentenced to death Robbers included those also who were aiding or abetting, maiming and burning For habitual and notorious robbers, in consideration of circumstances, the *Nizamat Adalat* was empowered to inflict the capital sentence In simple robbery seven years' punishment was given

Dacoity was another major problem to be checked by law and punishment Regulation IX of 1808 provided that notorious dacoits were liable to imprisonment or transportation for life, if they would not surrender themselves within the specific period of the proclamation Laws were made more stringent to check dacoity

In order to check crimes of burglary, the existing Regulations for the punishment of persons convicted of the crime of burglary were modified Regulation I of 1811 provided for the punishment of imprisonment in banishment for 14 years and to the corporal punishment of 39 stripes for the offence of burglary between sunset and sunrise Similarly punishment was laid down for other types of attempts to commit burglary

The Mohammedan Law provided that in case of adultery, the punishment was stoning or scourging But the practical

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28 *See* T. K. Banerji, *Background to Indian Criminal Law*, p 81

enforcement of the rule was a very difficult task as the Mohammedan Law of Evidence provided for the presence of four competent male witnesses To remove this defect Regulation XVII was passed in 1817. It provided that the punishment could be given on confession, creditable testimony or circumstantial evidence It further laid down the maximum punishment of seven years' hard labour and thirty stripes for the offence of adultery and rape.

Other important Regulations were passed to stop slave trade in the country,[29] enticing away females and not maintaining the family,[30] to prohibit *Begari* [31] to punish for affrays with homicide [32] The use of *Corah* as an instrument of punishment in the execution of setences of any criminal court was prohibited by Section 4 of Regulation XII of 1825 and it substituted the use of *rattan* in its place By Section 3 corporal punishment was totally forbidden for female convicts The same Regulation further restricted the number of cases in which reference to Nizamat Adalat was necessary Similarly various other Regulations were passed in order to check various other types of criminal activities

The provisions made by the Regulations from time to time were like patchwork on the Mohammedan Criminal Law. Commenting on the state of criminal law, Stephen observed "Objectionable in all respects as this system was, it was considered necessary to make it the foundation of the criminal law administered by the Company's Courts, though its grosser features were removed in some cases by Regulations, in others by decisions of the Sudder courts and in others by circulars and orders of various kinds It became necessary in many instances besides correcting the law to supply its defects and for this purpose all sorts of expedients were devised, the law of England, instructions from the Government, general ideas of justice, analogies, in short almost anything which occurred to those by whom the system was administered were resorted to for that purpose The result was a hopelessly confused, feeble, indeterminate system of which no one could make anything at all" [33]

4 End of Muslim Law as the General Law—1832

So far, we have discussed the piecemeal reforms made by the English administrators to remove the defects of the Mohammedan Criminal Law The most remarkable and unique change

29 Regulation X of 1811
30 Regulation VII of 1819
31 Regulation III of 1820
32 Regulation II of 1823
33 *See* J F Stephen, *A History of the Criminal Law of England*, Vol III, Chap XXXIII "Indian Criminal Law", at pp 293 94

took place in 1832 when the application of Mohammedan Criminal Law as a general law to all persons in India was stopped. As stated in the preceding pages the Moghal conquerors forced on the people of India the Mohammedan Criminal Law irrespective of their religious beliefs It was forgotten that Arabia and not India was the birth place of Islam and of the law of *Quran* The Mohammedan Law was an anarchaic and primitive system which totally neglected the Hindu Criminal Law It was also highly objectionable in the interest of many persons who did not profess the Mohammedan faith to be liable to trial and punishment under the provisions of Mohammedan Criminal Law

Regulation VI of 1832 played a very important role in shaping the future course of criminal law in India It empowered the Judges of Nizamat Adalat to overrule *Fatwas* It also provided that non Muslims who were under trial could demand that they do not want to be tried according to the Mohammedan Law of crimes On such a request, the Regulation authorised the Judge to seek help of the natives in any of the following three ways

(i) By appointing the natives to the jury It was the duty of the Judge to appoint a jury and also to lay down the manner in which the jury was to give its verdict

(ii) By constituting two or more persons as assessors The opinion of each of the assessors was to be given separately

(iii) By referring any such case or any point to a panchayat of persons

On the whole, the ultimate responsibility to decide cases was exclusively given to the presiding officer In cases where the Judge was not competent to decide, reference was to be made to the Nizamat Adalat The obtaining of *Fatwa* in every case now became discretionary for the Judge Non Muslims were also made free from the jurisdiction of the Mohammedan Criminal Law But the Regulation VI of 1832 did not explain by what law a Hindu or European claiming exemption was to be tried [34]

After 1832, the Jury system as it prevailed in England,[35] was introduced in India In India the Judges usually appointed some pleaders to act as jury These persons generally approved the decision of the Judge This practice led to criticism of the jury system Campbell observed, 'No one is compelled to serve on the Jury, it is alien to the feeling and customs of the country, people cannot be induced voluntarily to sit upon it and for all practical purposes it is an entire failure In fact the Judge

34 Campbell *Modern India* pp 465-66

35 For details *see* V D Kulsreshtha *A Textbook of English Legal History* 2nd Edn, Chap VIII, pp 49-54

generally puts into the box some of the pleaders and such people They always agree with him He may decide as he chooses' [36]

5 Criminal Law in other parts of the Country

(i) **Criminal Law in Banaras and Agra** —The development of criminal law, as applicable to Banaras and other ceded and conquered territories was more or less on the steps similar to the development of the law of crimes in Bengal A short account of the criminal law in Bengal is already given above On certain matters special legislation was passed in Banaras, Agra and other ceded districts The British India legislators made the criminal law applicable to all castes In 1817 the throwing of children into the sea (*Sagar*) or other places was made a criminal offence The evil practice of burning of widows alive on the death of their husbands was made a criminal offence in 1830 By Section 23 of Regulation XVI of 1795, it was provided that in the province of Banaras Brahmins will not be punished with death and for them transportation was substituted for capital offence This privilege of Brahmins was abolished by Section 15 of the Regulation of 1817. In Banaras the authorities gave recognition to many Hindu ideas, feelings and practices

(ii) **Criminal Law in Madras** —In Madras Presidency, the Mohammedan Criminal Law was enforced in the same way as in the Presidency of Bengal The reforms made by the Bengal Regulations 1790 to 1803 and which were finally incorporated in Bengal in Regulation X of 1793 were also introduced in Madras with few (if any) material variations Regulations of 1808 and 1811 made some remarkable contribution but on the whole the law which was in force resembled the law in force in Lower Bengal and so closely as not to require any special notice

(iii) **Criminal Law in Bombay** —The administration of criminal justice proceeded in Bombay on different lines from those laid down for Bengal and Madras In Bombay the Mohammedan Criminal Law was not the general law of the land Section 36 of Regulation V in 1799 laid down a scheme for the application of personal laws in the cases of Hindus and Mohammedans while Parsees and Christians were to be governed by English law In Mohammedan Law, as it applied in Bombay, certain modifications were made on the lines of the Cornwallis Code of 1793 The main reason for this peculiarity was that at the time of annexation, Bombay was not under Muslim rule Therefore, the Hindu Law of crime developed in Bombay

When Mountstuart Elphinstone was Governor of Bombay, he passed a series of Regulations which came to be known as the

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36 For details *see* V D Kulsreshtha *A Textbook of English Legal History* 2nd End , Chap VIII pp 49-54

Elphinstone's Code of 1827 The preamble cited that it had been the practice of the British Government of Bombay to apply to its subjects respectively their peculiar laws, modified and amended as necessity required In this way Bombay was the first Province in India in which a Penal Code was enacted Anderson said, "There was no difficulty in applying in general code based upon European principles to the mixed population of the Presidency of Bombay" [37] The Elphinstone Code of 1827 was very simple and short and was written more in the style of a treatise than in that of a law Stephen said "It was, I believe, successful and effective, and it remained in force for upwards of thirty years, till it was superseded by the Indian Penal Code It applied only to the Company Courts" [38]

(vi) **Criminal Law in Punjab** —The Punjab had a peculiar position for the Company Lord Dalhousie annexed the Punjab to the British Empire on 29th March, 1849 after the Sikhs were defeated by the Company's army in the Second Sikh War After the death of Raja Ranjit Singh in 1839, various persons who controlled the Government of Punjab were faced with the problem of lawlessness and a variety of legal and other difficulties. Sikhs had their own customs and habits but after the annexation of the Punjab by the British it became necessary to introduce some sort of legal system to control them The Mohammedan Law which supplied a sort of guide in Bengal was not recognised by the Sikhs Therefore, it was considered impracticable to introduce the Mohammedan Law in the Punjab as was done in Bengal It was also not possible for the Legislative Council of the Governor General to pass immediately any other suitable code of laws to control administration of the Punjab

For the administration of the Punjab a Board of three Commissioners, namely, Lord Lawrence, Henry Lawrence and Mr Maunsell, was constituted Subsequently Lord Lawrence was appointed Chief Commissioner and later on Lt Governor of the Punjab Stephen states, "First the three Commissioners and afterwards Lord Lawrence proceeded to cause short treatises, which acted as codes, to be drawn up by some of the officers under their orders, by which codes the work of governing the Province was carried on" [39] They contained important points which were considered necessary for the purposes of administration

Sir Richard Temple prepared the first Code for the administration of the Punjab in 1853 It dealt with civil as well as criminal matters Sometimes later a part of the Code which

37 For details *see* C Anderson, *British Administration in India*
38 J F Stephen *A History of the Criminal Law of England* Vol III, Chap XXXIII 'Indian Criminal Law', at p 295
39 *Ibid*, p 296

dealt with criminal law and procedure was developed and recast by Sir Charles Aitchison They were confirmed later on by the Indian Council's Act of 1861

This position of the criminal law in the most important parts of India, namely, Bengal, Madras, Bombay the Punjab, Benares, Agra *etc* continued till 1858 when the Company's Government was taken over by the Crown

C Law Commissions and Indian Penal Code

1 Defects of Ceiminal Law before Charter Act of 1833

Before the enactment of the Charter Act of 1833, there were many discrepancies in the Regulations which stated the law relating to crimes Certain provisions of the Mohammedan Criminal law which were not changed by the Regulations were also in a defective state The result was utter chaos and confusion in the administration of criminal justice in India Stephen remarked, "The great defects of the old system, its weakness, its confusion, its utter want of principle and unity had long been recognised by all who had to do with Indian administration Different views prevailed when the Charter Act of 1833, the last, as it turned out of the Charter Acts, was passed "[40] George Campbell observed, "Our criminal law is very much a patchwork made up of pieces engrafted at all times and seasons on a ground nearly covered and obliterated the general result is that all the worst and most common crimes are satisfactorily provided for by special enactments but that there is a very great want of definition, accuracy and uniformity as to the miscellaneous offences it wants remodelling, classifiction and codification" [41]

The defects of the old system of Regulation law were, therefore, lack of uniformity, uncertainty which often resulted in confusion and injustice On many occasions it was very difficult to determine the actual provisions of law on a particular issue

2 Indian Law Commission[42] and the Penal Code

In order to tackle the existing defective state of legislation, the British Parliament passed the Charter Act of 1833 It changed the Governor General of Bengal into the Governor General of India For the first time in the legislative history of India, he was empowered to legislate for the whole of British India The powers of the Presidencies of Bombay and Madras to legislate

40 J F Stephen *A History of the Criminal Law of England*, Vol III, Chap. XXXIII "Indian Criminal Law , at pp 295 97

41 George Campbell *Modern India* p 465 *See also* Lord Bryce, *Studies in History and Jurisprudence* Vol 1, pp 129 199 200

42 For details *see* Chapter XII of this book

were abolished It led to the centralisation of legislative authority in India The Act also provided for the appointment of Fourth Member, as the Law Member, to the Council of the Governer General of India T B Macaulay was appointed the first Law Member Section 53 provided for the appointment of a Law Commission for the purposes of framing suitable legal codes for India

In 1834, the first Law Commission of India was constituted under the Chairmanship of Lord Macaulay The Commission was directed to take up the preparation of a Penal Code for India In the instructions to the Commissioners, drawn up by Macaulay, Bentham's 'principles of punishment and his criteria for a code' found clear expression The work on the Penal Code took over two years and the Commission submitted its final Report on 31st December, 1837 Its recommendations did not however find immediate acceptance of the Government but it was considered to be the most significant and historic contribution of the Commission It was to supersede the English Criminal Law in the Presidency towns and the Mohammedan and all other penal laws in the mofassil areas in the whole of British India Most of the opinions were received by 1840 but no concrete step towards their consideration was taken for some years While posterity hailed Macaulay's code as 'a work of genius',[43] the opposition it met with is hardly surprising The Draft of the Penal Code, when it was circulated for opinion, evoked a good deal of opposition and many eminent Judges and Advocate-General were against it "The saying in East Bengal is", said Sir C P Ilbert, "that every little herd boy carries a red umbrella under one arm and a copy of the Penal Code with the other" In the words of Fitzjames Stephen, "Lord Macaulay's great work was far too daring and original to be adopted at once and it is not surprising that the period of gestation was prolonged" For not less than twenty two years, the Code remained in the shape of a draft and it underwent minutely careful and elaborate revision at the hands of the Members of the Legislative Council[45] Before it was given a final shape, Macaulay's Draft was revised by Sir Barnes Peacock The suppression of the Mutiny and the transfer of the Government, from the Company to the Crown changed the conditions and its necessity was greatly realised Finally, the Indian Penal Code was passed into law on 6th October, 1860 as an Act XLV of 1860 It was translated into almost all the written languges of India and suitable steps were taken to make even zamindars and *pardanashin* women acquainted with its provisions

43 C P Ilbert *The Mechanics of Law Making* p 166
44 J F Stephen *Life and Letters of Macaulay* Vol IX p. 421
45 Second Law Commission also introduced changes in the draft Penal Code For details *see* Chapter XII of this book

In drafting the Indian Penal Code the Commissioners no doubt derived much valuable help from the French Penal Code and Livingston's Code of Louisiana but above all *the basis* of the Indian Penal Code was the criminal law of England. In the words of Stephen "The Indian Penal Code may be described as the *criminal law of England freed from all technicalities* and superfluities, systematically arranged and modified in some few particulars to suit the circumstances of British India I do not believe that it contains any matter whatever which have been adopted from the Mohammedan Law The Code consists of 511 sections and it deserves notice as a proof of the degree in which the leading features of human nature and human conduct resemble each other in different countries " [46]

Whitley Stokes observed, "Besides repressing the crimes common to all countries, it has abated, if not extirpated, the crimes peculiar to India, such as *thuggee*, professional sodomy, dedicating girls to a life of temple harlotry, human sacrifices, exposing infants, burning widows, burying lepers alive, gang robbery, torturing peasants and witnesses and sitting *dharna* "[47]

D Necessity of Reforms in the Penal Code

The Indian Penal Code, which was drafted by the First Indian Law Commission headed by Lord Macaulay and with subsequent changes, was passed in 1860 One cannot question the fact that it is by far the most important piece of Indian legislation It is also a fact that since then much water has flowed under the bridge It has also become an indisputable fact that it requires a thorough revision by an expert committee

As early as 1887 Whitley Stokes[48] remarked, "The time therefore has apparently *come for repealing Act XLV of 1860* and for re enacting it with the changes made by the Acts amending it and with such further improvements in arrangement, wording and substance as may commend themselves to the Government of India after consulting the learned Judges of the High Courts, and the ablest of the officers by whom the Code is administered in the mofassil" Whitley Stokes's remark was based on the fact that during the last 24 years *i e* from 1860 to 1884, a large number of important and sometimes conflicting decisions on the interpretation for the provisions of the Code were delivered by the High Courts of Calcutta, Bombay, Madras and Allahabad Stokes has also supported his suggestion by pointing out that "Macaulay

46 J F Stephen, *A History of the Criminal Law of England*, Vol III, Chap XXXIII "Indian Criminal Law" at p 300

47 *Whitley Stokes, The Anglo Indian Codes* Vol I, p 71 For details *see* the Indian Penal Code, 1860

48 Whitley Stokes, op cit , p 72

himself was of opinion that no point of law ought to continue to be a doubtful point for more than three or four years after it has been mooted in a court of justice' The main contention of Stokes still strongly supports those who advocate for introducing reforms in the Indian Penal Code Since 1860, the political, economic, social and other related circumstances have greatly changed The case law material on the provisions of the Penal Code has multiplied The decisions of the various High Courts, Privy Council and after 1950 of the Supreme Court of India have further contributed to the development of law and added to the large mass of case law The commentaries on the Indian Penal Code have also multiplied into several volumes A comprehensive amendment Bill (1974) for amending the I P C and introducing new offences is pending in Parliament

After Independence in 1947, India was declared a "Sovereign Democratic Republic' by the new Constitution of India on 26th January, 1950 Before Independence, India was a colony under the British domination In other words it was under a police state but after the new Constitution India was declared a "Welfare State The Constitution guaranteed Fundamental Rights to the citizens of India and also laid down "Directive Principles" of State policy Since then the implementation of the five year plans has led to unprecedented growth of industrialisation in India Rapid expansion of the automobile industry and a large number of new problems have changed the whole economic and social outlook of people Indian Parliament has enacted a large number of laws in various fields, namely, industrial, economic, social, etc It will be the greatest blunder to think that the conceptions of crime and punishment have not changed since 1860, when the Penal Code was enacted It is also worthwhile to note that even within a period of last 90 years, *i e*, from 1860 to 1950, the Indian Penal Code was amended somehow or other forty times by legislation From 1950 to 1973, seventeen Acts were passed which repealed and amended various provisions of the Penal Code [49]

In the light of modern developments which have changed Indian conditions in various ways, it has become also essential to reconsider afresh on the provisions of the Penal Code The Code needs re arranging of its many sections Many overlapping provisions require careful consideration Those sections which are extremely precue, bald and leave much to the ingenuity of construction, must be properly redrafted Apart from this, it is of great importance to reconsider the theory of punishment and

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49 For List of Amending Acts and Adaptation Orders affecting Indian Penal Code see the list enclosed to the *Indian Penal Code* (as modified up to 1st Oct 1973) published by the Ministry of Law & Justice, Government of India in 1970 *See also* Act (31 of 1972)

to introduce reformative element in it The question of abolition or retention of capital punishment requires serious consideration in the light of modern national and international developments Sentence of transportation, imprisonme nt fine, forfeiture, inequality of punishment, genesis of crime and their degree, etc are other very important matters involving major policy decision and on all India basis require a very careful consideration by experts Never before in the history, the Government of India had such responsibility as it is having now to deal with these vital issues in the interest of the common people, and the administrators alike

As such a revision of the century old Indian Penal Code, to bring it into line with the modern conceptions of crime and punishment has become a necessity in the best interest of the country It is heartening that a comprehensive amendment Bill to modernise the Penal Code is under consideration

E Reform of Criminal Procedure

The Code of Criminal Procedure, 1898 (5 of 1898) was repealed and the new Code of Criminal Procedure, 1973 (2 of 1974) brought into force from April 1, 1974 Comprehensive changes have been made in all the spheres, the executive set up, abrogation of committal proceedings sentencing practice and the like

12

The Charter Act of 1833 and Codification by Law Commissions

A System of Regulation Law up to 1833

1 Origin and Growth of Regulation Law

The earliest origin of the system of Regulation Law can be traced from the provisions of the first charter which was issued by Queen Elizabeth in 1601. It empowered the Governor and Company, "to make, ordain and constitute such and so many reasonable laws, constitutions, orders and ordinances for the good government of the said Company, and of all factors, masters, mariners and other officers, employed or to be employed in any of the voyages, and for the better advancement of the trade and traffic ..."[1] These provisions clearly state that in the beginning primary aim of the English Company was to work for the promotion of English trade in India. In this connection the Charter of 1601 gave necessary powers to the Company which regulated the working of its employees in India.

The Charters of 1609 and 1661 also empowered the Company with the same powers as were granted by the Charter of 1601. But in fact the powers of the Company's agent in India were for the first time provided by the Charter of 1726.[2] The charter established the Mayor's Court at Calcutta, Madras and Bombay, and gave powers to the Governor and Council of respective presidencies to make laws, "for the good Government and regulation of the several corporations hereby created, and of the inhabitants of the several towns, places and factories aforesaid respectively ..." These laws and penalties were required to be reasonable and in conformity with the laws of England.[3] The Charter of 1753, which re-established the Mayor's Courts at Calcutta, Madras and Bombay, also incorporated provisions similar to that of the Charter of 1726.

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1 Ilbert, *The Government of India* (1898), p. 464. For detailed study of Legislative System before 1834, see S. V. Desikachar, Centralised Legislation. A History of the Legislative *System of British India from* 1834-1861, Ch. I.

2 A. B. Keith observes that there is "no evidence of any serious claims to possess legislative authority proper" before 1726. See A. B. Keith, *Constitutional History of* India 1600-1936 (1937) pp. 42-3. See also Chapter II of this book pp. 65-69.

3 See Fawcett, *The Century of British Justice in India* (1934), pp. 273-74.

A new era in the political history of India began with the battle of Plassey and subsequent acquisition of the *Diwani* by the English Company.[4] The Company emerged out more stronger and its ambitious English Governors began to think in terms of laying a strong foundation for the British Empire in India.[5] Morley observed, 'From the date of the battle of Plassey in 1757 down to the subjugation of the Punjab in our own times, new provinces and new nations have constantly and successively been brought under British rule either by cession or conquest. They have been found to possess different laws and customs and distinct and various rights of property, they have consequently presented new facts requiring the introduction of fresh laws into our codes for their government". In order to administer the old and new territories the laws were not made by the Legislature, but the supervisors, who were the Company's servants prepared the necessary laws.

Warren Hastings, who was transferred from Madras to the Governorship of Calcutta, prepared a plan in 1772 for the proper administration of justice in Bengal. In order to regulate the working of the administrative machinery he made many rules and passed orders. In due course the Company's officials collected large sums of money either by their private trade or malpractices. Corruption and bribery became common. Due to their huge wealth the Company's servants were also nicknamed as "Nabobs".[6] Their stories regarding acquisition of wealth reached England also. In order to curb these malpractices and regulate the Company's administration in India, the British Parliament considered it necessary to intervene by enacting a new legislation.

The British Parliament enacted the Regulating Act in 1773.[7] It appointed a Governor General and Council for the Bengal Presidency at Calcutta. They were empowered to frame Regulations for controlling the administrative machinery. It also established a Supreme Court at Calcutta. Warren Hastings was appointed the first Governor General. Sections 36 and 37 of the Regulating Act empowered the Governor General and Council to make and issue the necessary Rules, Ordinances and Regulations as were just and reasonable and not repugnant to the laws of the realm, for the good order and civil government of the United Company's settlement at Fort William and to enforce them by reasonable fines and forfeiture. The proviso to these sections further laid

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4 See Chapter IV of this Book, pp. 83-86. Thornton, *History of British India*, Vol. I, pp. 410-20.

5 Lord Clive and Warren Hastings are famous as the founders of the British Empire in India.

6. See Mill, *History of British India*, Vol. III, pp. 376-27. P. E. Roberts, *History of British India*, p. 179.

7 See Chapter V of this Book, pp. 109-117.

down that such Rules, Regulations etc, should not be valid unless registered in the Supreme Court of Calcutta In due course the Supreme Court emerged out more powerful because of its power to give validity by registering the Regulations framed by the Governor General and Council The Government of Company's settlement at Bengal faced many difficulties Some very important cases also reflected on the defects and lacunas in the Regulating Act

The British Parliament enacted the Act of Settlement in 1781 in order to remove the defects of the Regulating Act and to meet the situation developed by it[8] As regards the power to frame Regulations, the Act of 1781 authorised the Governor General and Council to frame Regulations for the Provincial Councils and Courts Copies of such Regulations were sent to the Court of Directors and the Secretary of State within six months from the passing of such Regulation The veto of the Supreme Court did not extend to these Regulations It was clearly stated that the Regulations made by the Governor General in Council will have legal validity and their registration in the Supreme Court was not essential Only His Majesty in Council had the power either to disallow or amend them within two years[9] But in matters coming within the jurisdiction of the Supreme Court, it was essential for the Provincial Councils to get such Regulations registered in the respective Supreme Court It means in areas other than moffassil area the veto power of the Supreme Court was allowed to continue

The judicial and legislative systems evolved under the Act of 1781 in respect of Calcutta were extended later to the Presidency towns of Madras and Bombay A Recorder's Court was set up at each of these places in 1797[10] and it was replaced by a Supreme Court in Madras in 1800[11] and in Bombay in 1823[12] The provisions in respect of legislation were extended to them in 1807[13]

Under the authority of these statutes several Regulations were passed for the administration of justice and collection of revenue in India No doubt the standard of these Regulations deteriorated gradually as there was no prescribed uniform pattern laid down by any Regulation It was a sort of haphazard growth of Regulations and no proper care was taken to set them properly for future reference The Regulations existed partly in manuscript and partly on detached papers At times it was very difficult to sort out the relevant Regulation out of the bundle of the

8 See at p 148 of this Book
9 21 Geo III, C 70 S 23
10 37 Geo III C 142 S 9
11 39 and 40 Geo III, C 79, S 2.
12. 4 Geo IV, C 71 S 7
13 47 Geo III, C 68, Ss 1 2

Regulations Due to these difficulties it was considered necessary to improve the form of Regulations and to find out some ways and means so that the public at large, lawyers and Judges can also derive full advantage of the Regulations

The Reforms of Lord Cornwallis[14] played a very important role in the history of legislative drafting in India The real credit goes to Lord Cornwallis for taking special initiative to improve the legislative methods, forms and to introduce uniformity in the system of Regulation Laws in India While introducing his famous code in 1793 Cornwallis was very careful and introduced all the necessary reforms in the Regulations, a set of which subsequently became famous as "Cornwallis Code' It was in 1793 that the "Preamble" was added, for the first time, to the Regulations It was also provided by Regulation XLI of 1793 that at the expiry of each year the Regulations will be printed and bound up in volumes Lord Cornwallis's this sort of legislative wisdom was subsequently followed in Madras and Bombay Presidencies In the Preamble of Regulation XLI of 1793 Lord Cornwallis stated as follows

> "It is essential to the future prosperity of the British territories in Bengal that all Regulations which may be passed by Government affecting in any aspect the rights, persons or property of their subjects should be formed into a regular code and printed with the translations in the country languages that the grounds on which each Regulation may be enacted should be prefixed to it and that courts of justice should be bound to regulate their decisions by the rules and ordinances which regulations may contain A Code of Regulations framed upon the above principles will enable individuals to render themselves acquainted with the laws upon which the security of the many inestimable privileges and immunities granted to them by the British Government depends and the mode of obtaining speedy redress against every infringement of them, the courts of justice will be able to apply the Regulations according to their intent and importance, future administrations will have the means of judging how far Regulations have been productive of the desired effect, and when necessary, to modify or alter them as from experience may be found advisable, new Regulations will not be made, nor those which may exist be repealed, without due deliberations, and the causes of the future decline or prosperity of these Provinces will always be traceable in the code of their source"

In this way, the use of the Preamble made the Regulations very useful for the lawyers, Judges and the public in general

14 See Chap VI of this Book pp 164-172

Statute of 1797,[15] which was passed by the British Parliament, approved the method and form laid down by Lord Cornwallis in the Regulation XLI of 1793 Section 8 of the Statute of 1797 provided that all the Regulations issued by the Governor General-in Council at Fort William in Bengal shall be registered in the judicial department and formed into a regular code and printed, with translations in the country languages, and that the grounds of each Regulation shall be prefixed to it and all the Provincial Courts of Justice shall be bound and regulate their decisions by such rules and ordinances as contained in the said Regulations. It is important to note that these provisions of the Statutes of 1781 and 1797 were the main sources of legislative authority as derived from Parliament in respect of the mofassil areas

In Madras, Regulations were made under the authority of the Acts 39th and 40th of George III in 1800.[16] Section 11 of this Act empowered the Governor in Council at Fort St. George to frame Regulations for the Provincial courts and Councils in that Presidency Regulation I of 1802 further provided for the formation of a regular code on the basis of Lord Cornwallis' Plan (Bengal Regulation XLI of 1793) as adopted in Bengal

The Bombay Government was initially authorised to make Regulations by Section 11 of the Act of 1799.[17] Full authority to frame Regulations was granted to the Bombay Government by the Act of 1807.[18] Thus the system of legislation evolved in Bengal in respect of the mofassil areas was adopted by Bombay in 1799[19] with few alterations from the Bengal Code

In 1807, the British Parliament by an Act provided that the Governors and Councils at Bombay and Madras were empowered to frame Regulations independent of the Governor General in Council at Calcutta They were required to send a copy of such Regulations to the Governor General in Council at Calcutta Thus at the close of 1807 the three Presidencies were separately authorised to frame independent legislation for their territories On the other hand this practice of separate legislation created confusion in Regulations due to lack of correlation and co-ordination amongst them

The Charter Act of 1813 further extended the legislative powers conferred on the Provincial Councils All persons living under the protection of East India Company were required to obey these Regulations in their respective territorial limits The Act also provided for a strict control of the British Parliament

15 37 Geo. III C 142, S. 8
16 39 and 40 Geo III C 79
17 37 Geo III C. 142.
18 47 Geo III Sec. 2, C. 68
19 37 Geo III C 142.

over the three Presidency Councils by stating that copies of all the Regulations shall be annually placed before the British Parliament Thus the power of legislative control shifted to England No doubt the intention and aim of the Act was to improve the legislative activity in India, in practice it led to adverse reaction and created conflicts amongst the three Presidencies due to lack of uniformity and mutual understanding in their respective systems Each of them claimed independent outlook in India and subordination only to the British Parliament The Supreme Court also exercised its veto power and it was necessary for Provincial Regulations to be registered in respect of legislation affecting matters coming within their jurisdiction

2 An Assessment of the System of Regulation Law

During the period 1600 to 1833, the Regulations were made specially in the field of procedure and to deal with the current problems of the growing British Empire in India They were mostly issued to meet the conditions and situations which the British faced in administering India from time to time Apart from these there were also Regulations dealing with the substantive law In the sphere of administration of justice the Regulations were issued to establish both Civil and Criminal Courts of the mofussil area and determined the mode of their proceedings They dealt with Police, Revenue, Excise, Salt, Opium, Coins and many other similar subjects They respected personal laws of Hindus and Mohammedans and left untouched the laws of contracts and torts

The haphazard growth of Regulation Laws was given a proper shape by the reforms of Lord Cornwallis in 1793 "Preamble" was given in the beginning of every Regulation law in order to state reasons for their enactment They can give us an idea of the social, political and economic conditions and the problems of the country which the Englishmen were tackling in those days A study of the way in which new problems of administration were dealt with in those days may assist the administrators even today to control the new situation and emerging problems Morley[20] said that one 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 on human forethought 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 (in the expanding British Empire in India)" Their importance mainly lies in the fact that they show how and what attempts were made, from the very beginning of the British rule in India

20 See W. H Morley, *The Administration of Justice in British India*

to control Indian administration which suited their aims and interests

Appreciating the quality and role of the Regulation Laws, Lord Wellesley observed, "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, tranquility 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" [21]

Commenting on the contribution of the System of Regulation Law, Rankin said, "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" [22]

In spite of all the above stated qualities and the contribution which the system of Regulation Law made to Indian law, everything was not going on well with this system It suffered from grave defects also The system of Regulation Law became an unsystematic mass which was highly complicated It was also due to the fact that the Government framed, modified and abrogated laws to meet the peculiar circumstances from time to time The law, was only to be found in the wilderness of enactments and circular orders of the courts As the number of these laws multiplied, as Sir Henry Cunningham observed, "they became in course of time hopelessly unwieldy and confusing Human diligence shrank from the task of searching amid the voluminous provisions of obsolete or repealed legislation for a germ of living law, and grave illegality frequently occurred owing to ignorance which chaotic conditions of the Statute Book rendered almost inevitable" There appears great truth in this observation

The Regulation Laws were not only badly drafted but they also suffered from lack of uniformity The Regulation Laws 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 courts" [23] A little improvement was made only after

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21 Quotation cited by Morley in *The Administration of Justice in British India* at p 159

22 G C Rankin *Background to Indian Law* p 198

23 *Cambridge History of India*, Vol V. Edited by Dodwell at p 5

Lord Cornwallis' reforms and though they were given a better shape yet it was not satisfactory It was also because of the lack of knowledge in the art of legislative drafting As stated earlier three parallel Legislatures in each Province were established in India and while working in their law making process they did not have any due consideration for the laws made by each other At times it also gave rise to confusion resulting in serious conflicts amongst them Even on the same topics, the Regulations passed at Bombay, Madras and Calcutta greatly differed It is rightly said, "The Anglo Indian Regulations made by these different Legislatures contained widely different provisions many of which were amazingly unwise ' As such the system of Regulations greatly suffered from the lack of uniformity

"Uncertainty , was another grave defect of the system of Regulation Law As the records show, these Regulations were changed, amended, abrogated or cancelled so often that it was very difficult even to recollect and decide about the proper existence of a particular Regulation Law

The imperfections of the legislative system up to the enactment of the Charter of 1833 were, in the words of Sir Charles Grant, mainly three "The first was in the nature of the laws and regulations by which India was governed, the second was in the illdefined authority and power from which these various laws and regulations emanated, and the third was the anomalous, and sometimes conflicting, judicatures by which the laws were administered, or in other words the defects were in the laws themselves, in the authority for making them, and in the manner of executing them" [24]

On the whole, it can be concluded that due to uncertainty, lack of uniformity, diversity, as well as the confusing and conflicting nature of the Regulation Laws the demerits outweighed the merits of this system In practice it became extremely difficult for the lawyers, Judges and the public at large, to find out as to which law they must obey As a result of this state of the legal provisions, injustice was bound to come in It also gave rise to corrupt practices, bribery and chaos also gradually developed A stage was reached when the system of Regulation Law became a great danger not only to the administrative and judicial machinery but it gave a jolt even to the pillars of the British Empire in India

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24 Speech by Charles Grant in the House of Commons 13th June 1833 Hansard (III Series) Vol XVIII pp 727 9 Lord Macaulay declared that what is being administered as law was but a kind of rude and capricious equity Speech by Macaulay in House of Commons on 10th July 1833 Hansard (III Series) Vol XIX p 532

3 Charter of 1833 and Reforms in Legislation

The Charter Act of 1833 made many important reforms in the legislative set up of India It created, for the first time in history, an all India Legislature at Calcutta having authority to make laws and regulations for all territories under the Government of the Company at that time The Governments of Madras and Bombay were deprived of their legislative powers The legislative power was thus centralised and vested in the Governor General in Council at Calcutta Steps were also taken in the direction of achieving uniformity and certainty in the legislation Since then the laws passed by the Governor General were called "ACTS"

B The Charter Act of 1833

1 Factors which led to the Reforms of 1833

Though there were defects in the existing system of Regulation Law, but these alone were not responsible for the reforms which were introduced in 1833 There were other factors which compelled the British Government to introduce reforms.

It is interesting to note that the demand for reforms was not due to enlightened public opinion[25] in India but it was mostly from the public servants They realised the defects of the existing system The subject matter which received the greatest importance was the jurisdiction of the Supreme Court which was uncertain and anomalous Veto power of the Supreme Court relating to legislation affecting matters coming within their jurisdiction was another cause of trouble for the public servants in administration The Supreme Court's activities in matters affecting the mofassil areas were always a constant source of conflicts and irritation between the Judges of the Supreme Court and the Governor General or Governors[26]

The deteriorating economic condition of the Company was also responsible for the reforms of 1833 Due to deficit budgets Lord William Bentinck, the Governor General, was specially directed by the Directors to reduce the expenditure of the subordi

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25 Evils and oppressions were silently suffered by Indians even when there were extreme and they became intolerable only outbursts of local character sometimes violent were visible *See* S B Chaudhuri, *Civil Disturbances during the British Rule in India* 1765 1857 (1955)

26. Pete Auber's Evidence stated about the growing conflict between the Supreme Court of Bombay and the Government of Bombay Presidency *See Parliamentary Papers* (U K) H C No 735 I of 1831 32 Evidence of Sir Edward Ryan *Parliamentary Papers* H C No 20 of 1857 58 Q 2356 For detailed text of correspondence *see Pol Papers* H C No 370 E of 1831

nate Presidencies [27] Centralisation in administrative and financial matters also influenced the legislative sphere a great deal

The trend of public opinion in England also influenced the Company's policies in India The question of freely allowing Britishers and Europeans to settle and do enterprise in India was also gaining importance [28] It was also having legal and judicial reactions Englishmen who came to India insisted on the privilege of retaining English laws and English courts which should govern them in the absence of any specific legislation by the Parliament It was necessary to have legal reform and codification in order to bring them under the jurisdiction of the system of laws and courts which were at that time prevailing in mofassil areas In order to satisfy English public opinion an English lawyer was appointed as a member of the Governor General's Council It ensured Englishmen that due attention was given to their laws, customs and rights in India

An alliance between the British commercial interests and the Evangelicals (Methodists who wanted to spread Catholic faith in India[29]), in which the former wanted a free field for their investment in India and the latter considered it essential for spreading the Christian religion in India, necessitated the passing of a new charter As we will see later the provisions of the Charter of 1833 also safeguarded their aims and interests

Desikachar has pointed out, "The influence of the Whig liberals, the paternalists and the utilitarians can be clearly seen in the charter discussions and the various provisions of the Charter Act It is difficult to isolate in all cases the various strands of their influence or to label individuals as wholly belonging to this or that school but the broad trends are clear" [30] It is beyond any doubt that the influence of the utilitarians was at its peak at the time when the Charter was being discussed in England and most of those who played an important role in determining the policy were under the Benthamite spell [31]

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27 *See* C H Philips *The East India Company* 1784 1834 p 288 (1940) For instructions *see* Edward Thompson *The Life of Charles Lord Metcafe* (1937) Appendix A Amles Tripathi *Trade and Finance in the Bengal Presidency* (1956) p 218

28 *See Report of the Select Committee on the Affairs of the East India Company* Parl Papers H C No 734 of 1831 32 General App V pp 26-27 *See* also Minutes dated Dec 8 1829 and dated May 30 1829 in *Parl amentary Papers* H C No 734 App V at pp 286 and 279 respectively For the views of Raja Ram Mohan Roy and Dwarkanath Tagore see J K Majumdar *Indian Speeches and Documents on British Rule, 1821 1918* (1937) pp 42 5

29 Eric Stokes *The E glish Ut l tarians and India* (1959) p 40

30 S V Desikachar *Centralized Legislation A H story of the Legislative System of British Ind a from* 1834 1861 (1965) p 36

31 Namely Lord Brougham who introduced the Bill in Parliament , Charles Grant the Younger Hyde Villers , T B Macaulay Holt Mackenzie ,

2 Travails through which Charter Act of 1833 Passed

Before the final draft of the Charter Act of 1833 was prepared it passed through various expert committees, discussions, correspondence and spadework in India and England [32] The correspondence between the Governor General in Council and the Judges of the Supreme Court at Calcutta during 1829 30 initiated discussion on matters relating to legislative and judicial reforms A lot of necessary spadework was also done in India

In England, apart from the influence of Benthamites, the Government machinery and the various Select Committees of the Parliament from 1830 to 1832 considered the subject matter of reforms which was at its draft stage [33] All aspects of Indian administration and Company s affairs were studied in detail According to Thornton, the collection of the last of the Select Committees was ' the largest mass of evidence extant at that time On the basis of the negotiations between the British Government and the East India Company, many details of the Bill which was introduced in the Parliament were thrashed out Charles Grant, the President of the Board of Control, was the principal spokesman of the British Government in the House of Commons Macaulay, who was Under Secretary of State and a member of the Board of Control assisted Charles Grant in this respect Lord Lansdown was the Government spokesman on the Bill in the House of Lords The Bill was severely criticised by Charles W W Wyme in the House of Commons, and by the Duke of Wellington and Lord Ellenborough in the House of Lords On 13th June, 1833 the Parliament passed the famous resolutions of Charles Grant which provided for the termination of the trading activities of the Company and the continuation in its hands of the administration of India The Charter Bill which was introduced in the House of Commons on 28th June received the Royal assent and finally became law on 28th August, 1833 [34]

In the debates which preceded the passing of the Charter Act of 1833 Charles Grant, the President of the Indian Board called attention to "the defects in the laws of India, in the

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James M ll Edward Strachey Lord Bent nck Alexander Ross Elph nstone, *etc* were either strong Benthamites or had faith in it All these persons were directly or ind rectly related to the fram ng pass ng and implement ng of the provis ons of the Charter Act of 1833 For deta led study *see* Eric Stokes *The Engl sl Ut l tar ans and Ind a* El Halevy *The Growth of Ph losophic Rad cal sm* (1928)

32. For a deta led account, *see* Peter Auber *Rise and Progress of the Brt sh Power in Ind a* (1937) pp 658 713 and Edward Thornton *The History of the British Emp re in Ind a* (1943) Vol V Chap 28
33. Thornton op c t pp 282 315 353
34. 3 and 4 W lliam IV C 85

authority for making them and in the manner of executing them" [35]

Macaulay, who carried the Bill through the House of Commons during the illness of Charles Grant, in his speech on 10th July 1833 in the House of Commons, observed, "I believe that no country ever stood so much in need of a code of law as India and I believe also that there never was a country in which the want might be so easily supplied" He said, "our principle is simply this,—uniformity when you can have it, diversity when you must have it, but in all cases, certainty" [36]

3 Legislative Provisions of the Charter Act of 1833

The Charter Act of 1833 introduced important changes in the constitution of the Company as well as in the legislative machinery of India It aimed specially at the centralisation of the legislative activity "In 1833", says Cowell,[37] "the attention of Parliament was directed to three leading vices in the process of the Indian Government The first was in the nature of the laws and regulations, the second was in the ill-defined authority and power from which these various laws and regulations emanated, and the third was the anomalous and sometimes conflicting judicatures by which the laws were administered "

Certain basic principles, which formed the basis of the legislative provisions of the Charter Act of 1833, were as follows The restrictions on European settlement and enterprise were to be mostly abolished, making due provision for the protection of Indians The disjoined system of governing India with three practically independent Presidency Governments was to give place to a centralised system, and the control exercised from England was to be rationalised and confined to essential matters And, lastly, the legislative machinery was to be remodelled to effect necessary reforms in the field of law and justice [38] Rankin has, therefore, remarked "The Charter Act of 1833 forms a watershed in the legal history of India"

The Charter Act of 1833 made the following important provisions

(1) The territorial possessions of the Company were allowed to remain under its government for another term of twenty

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35 Speech of Charles Grant before House of Commons on 13-6-1833 Hansard *Parliamentary Papers* III, Vol 18, p 698

36 T B Macaulay's important role *see* C H Philips *The East India Company* 1784-1834 (1940) pp 290-95

37 H Cowell *History and Constitution of the Courts and Legislative Authorities in India* p 74

38 *See* S V Desikachar, *Centralised Legislation A History of the Legislative System of British India from* 1834 to 1861, p 41

years in "trust for His Majesty, his heirs and successors" The commercial functions of the Company were taken away and the Company remained only as a political functionary

(ii) The Act centralised administration of the country All the Presidencies of Bengal, Bombay and Madras were placed under the control of the Governor General He was given the powers to superintend, direct and control all the civil and military affairs of the country

(iii) The Governor General of Bengal became the 'Governor General of India' The powers of the Governor General were increased tremendously

(iv) A very important step was taken to achieve legislative centralisation in India Before the Charter Act of 1833 was passed there existed five different kinds of law which conflicted with one another They were—the Acts passed by the Parliament, the Charter Acts, the Orders of the Governor General in Council known as Regulations, the Orders of the Supreme Court and the laws made by the different Presidencies Now the Governor General in Council was alone empowered to make laws in India The enactments were no more called Regulations but they were called "Acts The powers of the subordinate governments of Madras and Bombay were limited The Governments of Madras and Bombay could make or suspend laws "in cases of urgent necessity" (Governor was required to submit proof of it to the Governor General) subject to the final approval of the Governor General They were also empowered to propose for consideration of the Governor General in Council such draft of laws as they considered expedient together with reasons for proposing the same

(v) The Act increased the members of the Council from three to four The fourth member was the Law Member specially appointed to fulfil the legislative duties of the Governor General His presence was made essential at the time of passing any legislation He had no power to sit or vote for other matters

(vi) Section 53 of the Act of 1833 empowered the Governor-General in Council to appoint a Law Commission from time to time The Commission was to enquire fully "into the jurisdiction, powers and rules of the existing courts of justice and police establishments in the said territories and all existing forms of judicial procedure and into the nature and operation of all laws, whether civil or criminal, prevailing in any part of the said territories in India"

(vii) Section 87 of the Act declared that "No Indian subject of the Company in India shall by reason only of his religion, place of birth, colour or any of them, be disabled from

holding any place, office or employment under the Company" This provision became very important as it was a bold step to remove disqualifications Lord Morley described the Act of 1833 as "the most important Act passed by the Parliament up to 1909

(*iii*) The Governor General was required forthwith to take into consideration the steps to mitigate the state of slavery and to ameliorate the condition of slaves This step was taken in order to abolish slavery throughout the British territories in India

The Charter Act of 1833 by Section 53 aimed at centralised legislation which had three phases—ascertainment, consolidation and amendment of the laws in India The old system of Regulation came to an end after 1833 and the laws passed by the Governor General in Council at Calcutta were known as "Acts" Rankin has rightly observed, "Section 53 of the Charter Act of 1833 was the legislative mainspring of the law reform in India"

C CODIFICATION AND LAW COMMISSIONS IN INDIA

1 Progress of Codification up to 1833

From the time, when Queen Elizabeth granted the first Charter of 1601 to the East India Company to the passing of the Charter Act of 1833 there was gradual development towards having a systematic and uniform system of law From the early Charter it appears that the Company never even had a dream to form a British Empire in India At that time it was purely a trading Company Various charters which were issued from 1601 to 1693 were purely of a commercial nature empowering the Company to control its employees by framing rules and regulations George I's Charter of 1726 created Corporations at Calcutta Bombay and Madras and established Mayor's Courts at three places The Governor and Council in these three places was authorised "to make, constitute and ordain by laws rules for the good government and to impose reasonable pains and penalties upon all persons offending against the same After the Battle of Plassey the Company emerged out more stronger and there appeared to be a slight change in its outlook from 'mere trading merchants' to 'gaining political power' in India Lord Clive and Warren Hastings laid down the real foundations of the British Empire in India The nature and contents of the Charters, which were granted to the Company after 1765 also changed So also the sphere of the rule making power of the Company was enlarged

In 1765, when the Company took over the responsibility of collecting *Diwani*, Company officials issued orders and framed rules and regulations for the people of Bengal in connection with the improvement of the administration It was not done through

any Legislature but was done through the servants of the Company Warren Hastings Plan of 1772 was the first British India Code consisting of 37 rules dealing with Civil and Criminal Law It was followed by the Regulating Act of 1773 which empowered the Governor General in Council to make and issue rules, regulations and ordinances for the good order and civil government of the United Company's settlement at Fort William in Bengal It was also provided that these rules etc will be valid only after their registration in the Supreme Court. The Supreme Court exercised veto power not to register the legislation framed by the Governor-General Reforms were introducedby the Act of Settlement in 1781 The Governor General was empowered to frame regulations for the Provincial courts in mofassil areas independently of Supreme Court but subject to the Executive Government in India In areas which were under the jurisdiction of the Supreme Court in a Presidency, it was still necessary to register legislation with the Court. Though the rules and regulations were formed and issued from time to time neither was there any set pattern nor division of the legislation Its growth was in a haphazard way which needed much improvement and reform

Credit goes to Lord Cornwallis who specially took initiative to improve the form and nature of the Regulations and Rules. Cornwallis Code of 1793 was a wonderful achievement in this direction Preamble was made compulsory in each legislation Other similar improvements were made At the end of 1807 a uniform system of legislation prevailed in the three Presidencies of Calcutta, Madras and Bombay Apart from the Governor-General's authority in Bengal to frame legislation, Governors in Council in Madras and Bombay were also empowered to enact legislation independently The Charter Act of 1813 also made certain alterations in the legislative power of the three Presidencies. Its result was that all the three Councils issued and framed a large number of Rules and Regulations Most of them were conflicting and created a lot of confusion Law became uncertain because of lack of uniformity and stability Even timely amendments and revisions were not incorporated in the original Rules and Regulations The system of Regulation Laws proved very defective In Bengal alone there were more than 675 Regulations which contained several sections. Thus they resulted in great uncertainty 'Diversity' prevailed where 'uniformity' was needed the most The personal laws of Hindus and Mohammendas were left untouched

In order to present the various laws in a nutshell various digests and collections of these Regulations were prepared and printed by individuals privately, *e g* Colebrooke's *Digest* of 180-, Harrington's *Analysis* of 1805, Auber's *Analysis* of 1826, Blunt and Shakespeare also prepared *Analysis* of 1824-28 Similarly D Dale

published an alphabetical index to the Regulations of the Government of Bengal

On the whole it can be concluded that within the period 1765 to 1833 the unprecedented growth of Regulations by the three Presidencies resulted in various evils of uncertainty and lack of uniformity Conflicting provisions created confusion This state of affairs compelled the British Parliament to take steps for the centralisation and regularisation of legislation for the whole of India

2 Charter Act of 1833 and Provision for Law Commission

The Charter Act of 1833 played a very important role in shaping and moulding the future course of law making in India Earlier, the important provisions of the Charter Act of 1833 were discussed in detail [39] As is well known, Section 40 of the Charter provided for the appointment of one additional member to the Governor General's Council He was not entitled to vote except in meetings called for making laws and regulations The Charter also appointed Babington Macaulay as the first Law Member of the Council of the Governor General The Act completely centralised the work of law making in India The laws passed by the Government of India after 1834 were called Acts instead of Regulations

It was considered very essential to prepare a code for criminal law, evidence, contracts, limitation and also codes to regulate the civil and criminal procedure in the whole of India by the same legislation Regarding the intention of the framers of the Act of 1833, Kaye said, "A comprehensive consolidation and codification of Indian laws was contemplated'

Section 53 empowered the Governor General to establish a Law Commission of India The main purpose entrusted to the Commission was to provide a common law and therefore, Section 53 provided, "Such laws as may be applicable to all classes of the inhabitants, due regard being had to the rights, feelings and peculiar usages of the people, shall be enacted and all laws and customs having the force of law within the territories shall be ascertained and consolidated and as occasion may require amended The Commission shall fully enquire into the jurisdiction, powers and rules of the existing courts of justice, police establishments and forms of the judicial procedure, due regard being had to the distinction of cases, religions manners and opinions prevailing amongst different races and in different parts of the said territories" Due to these provisions of far reaching consequences, Rankin remarked, "Section 53 of the Charter was the legislative mainspring of law reform in India"

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39 *See* under the title "B The Charter Act of 1833" in this Chapter

In his speech of 10th July, 1833 Lord Macaulay emphasised the necessity of codification of the Indian Law before the House of Commons thus "As I believe that India stands more in need of a code than any other country in the world, I believe also that there is no country on which that great benefit can more easily be conferred A code is almost the only blessing—perhaps it is the only blessing—which absolute Governments are better fitted to confer on a nation than popular Government" [40]

Lord Macaulay himself explained the underlying principle of codification thus 'We do not mean that all the people of India should live under the same law, far from it we know how desirable that object is but we also know that it is unattainable Our principle is simply this—Uniformity where you can have it—Diversity where you must have it—but in all cases Certainty"

While commenting on Macaulay's speech, Rankin said, "His speech betrays the limited character of his acquaintance with the Hindu and Mohammedan Law It was forgotten that Arabia and not India was the birth place of Islam He also disclosed a poor opinion of the Hindu and Mohammedan Law alike the defect in Macaulay's views was that he was a Benthamite"

3 The First Law Commission of India, 1834

According to the provisions of Section 53 of the Charter Act of 1833, the First Law Commission was appointed in India in 1834 with the fullest powers to inquire and report The Law Commission, was composed of T B Macaulay (as Chairman) and four members, namely, C H Cameron, J M Macleod, G W Anderson and F Millett The last three members represented Madras, Bombay and Calcutta respectively

(i) **Penal Code** —As the system of administration of criminal justice was most unsatisfactory, the local Government directed the Commission to take its first step to tackle this branch of law The members of the Commission prepared a draft Penal Code which they submitted to Lord Auckland, the Governor General, on 2nd May, 1837 In the forwarding letter the Commission remarked, 'The Penal Code cannot be clear and explicit while the substantive civil law and the law of procedure are dark and confused' [41] Lord Macaulay referred to the Penal Code of India as "a sort of work which must wait long for justice as I well knew when I laboured at it' Stokes made the observation, "Besides repressing the crimes peculiar to India such a Thuggee, dedicating girls to a life of temple harlotry, human sacrifices

40 *See* Hansard *House of Commons Debates* Third Series, Vol XIX, pp 531 33

41 Letter of 14th Oct., 1837 prefixed to the Draft Penal Code. For details of the letter *see* Whitley Stokes, *The Anglo-Indian Codes*, p. X.

burning of widows, gang robbery, sitting dharna, etc " In the words of Fitzjames Stephen, Lord Macaulay's great work was far too daring and original to be adopted at once,[42] and it is not surprising that the period of gestation was prolonged It did not become law till 1860

In due course certain changes were made in the member ship of the Commission Macaulay returned to England in 1837 and Andrew Amos became the Law Member and Chairman of the Commission After Amos Cameron succeeded him as Law Member in 1843 H Borradaile succeeded Anderson and Elliott succeeded Macleod Cameron and Millett were the two old members who remained in the Commission from 1834 to 1843

(ii) **Lex Loci Report** —Another important subject to which the Commission was required to devote its attention was the problem of uncertainty of the substantive civil law which was applicable to the Christians, Anglo Indians and Armenians As it involved personal laws of the different communities, it became a very difficult and complicated task for the Commission There was no *lex loci* or law of the land for persons other than Hindus and Mohammedans in the moffassil while the Presidency towns had a *lex loci* in English Law

After careful study and consideration the Law Commission submitted its report on 31st October 1940 to the Government The Law Commission, under the Chairmanship of Andrew Amos, recommended 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 in mofassil areas, which shall be applicable to all except Hindus and Mohammedans [43] The main recommendations of the Commission were as follows

(*a*) Such of the laws of England as were applicable to the condi tions of the people of India and not inconsistent with the Regulations and Acts in force in the country were to be extended over the whole of British India outside the Presi dency towns and all persons other than Hindus and Muslims were to be subject to them

(*b*) All questions concerning marriage, divorce and adoption concerning persons other than Christians were to be decided by the rules of the sect to which the parties belonged

(*c*) There was to be a College of Justice at each of the Presidencies with the Judges of the Supreme Court and Sadar Courts as members In all appeals from the decisions of the mofassil courts, the appellate court was to consist of one Judge of the Supreme Court, with or without associates

42 *See* Fi zjames Stephen *Life and Letters of Ma aulay*
43 *See also* Alan Gledhill *The Republic of Ind a* p 155

It can be concluded that the Commission's proposal was to make English law the *lex loci* of the mofussil areas as in the case of the Presidency towns The Law Commission also submitted a draft Bill on 22nd May, 1841 to the Government

The *Lex Loci* Report of the Indian Law Commission was sent to all the Presidencies in India for their opinion The progress in the direction of *lex loci* measure was halted by the preoccupations of Lord Auckland In due course it was realised that there were many objections to the Commission s recommendations The critics pointed out that "the English substantive law was a very wasteful affair and was not within the comprehension of ordinary people A life time was required to master it" There was a sharp difference of opinion as to the course of policy to be pursued between A Amos and H T Prinsep the latter being highly critical of the Commission's proposals W W Bird, the President of the Council, felt that it would be dangerous to legislate until opinions were less divided' In the meantime the Court of Directors ordered that no law for declaring *lex loci* of India should be passed without its prior sanction As such no decision was taken on this issue and the instructions of the Directors came at a time when it was difficult to prepare it The matter remained pending until the Second Law Commission was appointed

(iii) The Commission drafted a Code of Civil Procedure and suggested various reforms in the procedure of civil suits

(iv) **Law of Limitation** —The Law Commission prepared a valuable report on the Law of Limitation and with a draft Bill on it, submitted it to the Government on 26th February, 1842

(v) **Stamp Law** —Another matter referred to the Commission was stamp laws which were in a state of conflict and confusion The Commission submitted its report on 21st February 1837 It was not till 1860 that a comprehensive law relating to stamps was passed for the whole of British India

(vi) **Contribution of Law Commission** —The First Law Commission of India made unique contribution to Indian Law Though the drafts of various codes which it prepared with great labour and devotion of its members, were not immediately passed by the Legislature as codified law, the basic foundation of future codification was laid down by it Greatest credit goes to Macaulay for his initiative in preparing a draft code of Penal Law in India In fact subsequent Law Commissions built on the foundations laid by the First Law Commission After Macaulay's return to England activities of the Law Commissions lost their speed Rankin remarked, "The Commission had done brilliant work in drafting

Penal Code, a detailed and valuable but unpublished work

but the times were not propitious for law reform and the Law Commission was withering and losing influence for lack of success "[44]

The Commission made a unique contribution by submitting the *Lex Loci* Report It was a major step towards the Rule of Law Though at the instance of the Directors it was placed in cold storage yet it had the fortune of getting support from the Government of India It was really a practical solution to the ever-increasing problem of the administrators in controlling the activities of Europeans in India

It is also said that the labours of the Commission did not, on the whole, lead to the enactment of "any very large number of substantial Acts" which might have impressed contemporaries, and the Commission "left behind it only an impression that it was a failure, as costly as it was complete "[45] Referring to the reasons for the failure of the Law Commission, Desikachar observed, "The general charge against the Commissioners was that they were visionary, doctrinaire and impractical This was no doubt true to no small extent "[46]

On the whole, from the historical point of view, the First Law Commission did serve a useful purpose Its labour paved the way for the future codification of laws in India In the ultimate analysis, it can be stated that the fault was neither with the persons, nor with the political conditions but was the lack of power in the body which was empowered to prepare great schemes of reform The supreme legislative authority paid little attention to the schemes submitted to it for firm decisions The thinking and the willing parts of the legislative organism were very much out of joint [47]

Being encouraged with the Law Commission's work, the following digests and guides were published in India[48]

Marshman compiled in 1840, *A Guide to the Civil Law of the Presidency of Fort William* It contained all civil unrepealed Regulations, Acts and circular orders of the Government of India In the same year A D Campbell prepared *A Collection of the Regulations of the Madras Presidency from 1802* Fulwar Shipwith published an *Abridgement of the Criminal Regulations and Acts up to 1843* W Morley

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44 Rankin *Background to Indian Law* p 148
45 J W Kaye, *The Administration of the East India Company*, pp 106-7 *see also* Rankin op cit, p 21
46 Desikachar, *Centralised Legislation* p 212
47 For detailed analysis *see* the Evidence of F J Halliday, Parl Papers House of Commons No 426 of 1852 53
48 B K Acharya, *Codification In India*, Ch I

prepared *An Analytical Digest of the reported cases decided by the Supreme Courts* In it Morley has discussed in the beginning the laws enacted by the Regulations and Acts of the Legislative Council in India. In 1846 Beaufort published *A Digest of the Criminal Laws of the Presidency of Fort William*. Similarly Baynes, Richard Clarke, Fenwicke, Harrison, Southerland and Field gained inspiration and compiled and published various other digests and collections of Regulations

4 The Second Law Commission of India, 1853

The Charter Act of 1853 empowered Her Majesty to appoint a Law Commission in England for India It authorised Her Majesty to appoint as many members as were necessary for the Commission The task entrusted to the Commission was, "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 as might be referred to them for consideration" The life of the Second Law Commission was fixed at three years which was to expire in 1856 The Charter Act, 1853 further authorised Her Majesty to direct the Commission to submit reports on these matters and especially to report from time to time what laws or regulations should be made or enacted in relation to these matters, but every such report was to be submitted within a period of three years after the passing of this Act [49]

Accordingly, Her Majesty appointed the Second Law Commission in England on 29th November, 1853 It is a bit surprising to note that the Second Law Commission for India was appointed in England It was composed of Sir John Romilly, as President of the Commission, and other members were Sir John Jervis, Chief Justice of the Common Pleas, Sir Edward Ryan, Ex Chief Justice of the Supreme Court of Calcutta, Robert Lowe (later on became Lord Sherbooke) C H Cameron, President of the First Law Commission and Law Member of Calcutta Council, John M Macleod, of Civil Service Madras, and T F Ellis Hawkins was appointed Secretary to the Law Commission The Commission was composed of the best legal luminaries of England, and of persons with judicial experience in India and associated with the work of the First Law Commission The Commission was required to submit its reports within a period of three years *i e* up to 1856

The Second Law Commission submitted four Reports to the Indian Government The First Report was submitted in 1955 and the Second, in 1856 the Third and Fourth Reports were submitted in 1856

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49 Section 28 Charter Act, 1853

In the First Report the Commission submitted a plan for the amalgamation of the Supreme Court at Fort William in Bengal with the Sadar Diwani and Sadar Nizamat Adalats It also recommended preparation of simple and uniform codes of Civil and Criminal Procedures for the guidance of the Courts' procedure The Commission laid special emphasis on the constitution of a single tribunal in a Province in place of two separate courts

In its Second Report, the Commission agreed with the *Lex Loci* Report of the First Commission It suggested that there must be a substantive civil law for persons in the mofussil who had no law of their own It expressed the firm view that no attempt to codify the personal laws of the Hindus and Mohammedans should be made, because any such attempt "might tend to obstruct rather than promote the gradual process of improvement in the state of population" Two members of the Commission, namely Sir John Jervis and Robert Lowe, expressed the opinion that English Law should be recognised as the *lex loci* of the mofussil areas

The Third Report of the Commission contained a plan for establishing a judicial system and procedure in the North Western Provinces It was on the pattern of Bengal with slight changes to meet special conditions

The Fourth Report was concerning the judicial plan for the Presidencies of Bombay and Madras

The members of the Second Law Commission, after a detailed discussion laid down certain basic principles in their conclusion They recognised the fact that British India was in need of a body of substantive civil law and according to them the English Law was the only suitable basis for Indian Law Appreciating fully the necessity of codification, in its report the Commission laid down certain principles, as follows "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 unreported 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 conditions and institutions of India, the character and religious usages of the population would, we are convinced, be of great benefit to that country"

The Commission further pointed out—

"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' It is clear that the Second Law Commission was totally against codification of the Hindu Law and the Mohammedan Law The reasons given by the Commission were, "Such legislation, we think, might tend to obstruct rather than to promote the gradual progress of improvement in the state of the population It is open to another objection too which seems to us decisive The Hindu Law and the Mohammedan Law derive their authority respectively from the Hindu and Mohammedan religions It follows that as a British Legislature cannot make Mohammedan or Hindu religion, so neither can it make Mohammedan or Hindu Law A code of Mohammedan Law or a digest of any part of that law, if it were enacted as such by the Legislative Council of India would not be entitled to be regarded by Mohammedans as the very law itself but merely as an exposition of law, which might possibly be incorrect We think it clear that it is not advisable to make any enactment which would stand on such a footing"

Enactment of some Codes —No material progress was made in the codification of Indian Law even after the various reports of the First and Second Law Commissions The Government was less inclined to accept the drafts of the various codes Events of 1857 which are known as mutiny gave a shocking jolt to the British Government of India As a result of it the British Parliament dissolved the East India Company and the Crown took over the direct responsibility of the Government of India The administrators faced many difficulties in controlling the judicial administration of India in the absence of any suitable legislation—substantive as well as procedural

In 1859 the Indian Legislature enacted a Code of Civil Procedure (VIII of 1859) and a Limitation Act (X of 1859) A Code of Criminal Procedure was passed in 1861 (XXV of 1861) The Indian Penal Code, which was drafted by Lord Macaulay, was revised and enacted into law in 1860 The Penal Code was translated later into almost all the languages in India "The saying in Eastern Bengal is", says Sir C P Ilbert, "that every little herd boy carried a red umbrella under one arm and a copy of the Indian Penal Code with the other and thus its provisions were made known even to *purdanashin* ladies and Zamindars

too ' The Government made every effort to inform the general public about crimes which will be punishable under the Indian Penal Code of 1860 The bulk of the adjective law of India was thus for the first time codified

In Punjab, under the guidance of Lord Lawrence and his colleagues attempts were made towards the codification of certain provincial laws Sir Richard Temple prepared a book called *Principles of Laws*, which was later on known as the *Punjab Civil Code* The first draft of this Code was made in 1853 No doubt it was a praiseworthy attempt but the Government of India refused to recognise it as a code for Punjab Sometimes later after introducing certain modifications the Government passed this Code as Punjab Laws Act of 1872

5 The Third Law Commission of India, 1861

On 14th December, 1861 the Third Law Commission was appointed in India under the Chairmanship of Lord Romilly Its original members were, Sir W Erle, Sir E Ryan R Low, Justice Wills and John Macpherson Macleod Later on Sir W M James, John Henderson and Justice Lush respectively succeeded Sir W Erle, Justice Wills and John Henderson The Secretary of State for India directed the Commission to submit its report soon so that effect may be given to those recommendations at an early date The Commissioners were also asked to prepare for India a body of substantive law in the preparation of which the law of England should be used as a basis having due regard for the institutions, conditions and religions of the inhabitants of India It was based on the principles laid down by the Second Law Commission in its Second Report Rankin observed, "The appointment of the Third Law 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 ' [50]

The Third Law Commission, first of all concentrated its attention on the preparation of a Law of Inheritance and Succession which was to be applied generally to all classes of persons except Hindus and Mohammedans In its first report the Commission submitted a draft of the Law of Inheritance and Succession Later on in 1864, Sir H S Maine introduced these rules in the Indian Legislative Council as the Indian Civil Code In 1865 the title of the Bill was changed and it was called the Indian Succession Act, 1865 Rankin said, "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

50 Rankin *Background to Indian Law* p 45

knowledge and abilities to the cause of clearness and simplicity, and took right and bold decisions on major questions of principle Archaisms were rigidly eschewed "[51] The Indian Succession Act applied only to Europeans, Eurasians, Jews, Armenians and Indian Christians Hindus and Mohammedans were excluded as they had their personal laws in India

The Second Report of the Commission contained a draft of the Contract Bill, which was submitted in 1866 In 1867, the Commission prepared the Third Report on the draft of the Negotiable Instruments Bill Its Fourth Report, which was submitted in the same year, contained no draft of any code The Fifth Report was made in 1868 and contained a draft of the Evidence Bill Two years later in 1870, the Commission submitted its Sixth Report containing a draft of the Transfer of Property Bill The Commission submitted its Seventh and the last Report in 1870, which contained a revised draft of the Code of Criminal Procedure Thus within the period of ten years of the Commission submitted six drafts of various laws in its seven reports

As a consequence of the undue interference of the Select Committee of the Legislative Council, which made many changes in the draft submitted by the Third Law Commission conflicts arose between the members of the Law Commission and the Government of India Ultimately the members of the Commission submitted their resignation in 1870 In the words of Ilbert ' The Third Law Commission ended in a huff "

Apart from the Commission's contributions, the Legislative Department of the Government of India was also busy in its legislative activities under the guidance of Sir H S Maine and Sir James Stephen Sir H S Maine, Law Member of the Governor General s Council, introduced the Indian Companies Bill in 1865 which was finally passed on 9th March 1866 This Indian Companies Act of 1866 was mostly based on the English Companies Act of 1862, with few alterations here and there to meet the peculiar conditions of India In 1868, the First General Clauses Act was passed

In 1869, Sir James Stephens was appointed the Law Member of the Council of the Governor General in place of Sir H S Maine, who returned to England in the same year Sir James Stephens played an important role in preparing and passing the Indian Divorce Act of 1869 and the Code of Criminal Procedure of 1872

During the tenure of H S Maine and Sir James Stephens, the following other important Acts were passed by the Legislative

51 *Ibid.*, p 47

Council of India

(i) The Religious Endowments Act, 1863
(ii) The Official Trustees Act, 1864
(iii) The Carriers Act, 1865
(iv) The Indian Succession Act, 1865
(v) The Parsi Intestate Succession Act, 1865
(vi) The Parsi Marriage and Divorce Act, 1865
(vii) The Native Convert's Marriage Dissolution Act, 1866
(viii) The Indian Trustees Act, 1866
(ix) The Trustees and Mortgagees Powers Act, 1866
(x) The Public Gambling Act, 1867
(xi) The Press and Registration of Books Act, 1867
(xii) The Indian Divorce Act, 1869
(xiii) The Court Fees Act 1870
(xiv) The Female Infanticide Prevention Act, 1870
(xv) The Hindu Wills Act, 1870
(xvi) The Indian Evidence Act, 1872
(xvii) The Special Marriage Act, 1872
(xviii) The Punjab Laws Act, 1872
(xix) The Indian Contract Act, 1872

A study of the legislative activities of the period 1862 to 1872 points out that on the one hand the Third Law Commission was busy in making its contribution to the codification of the Indian Law, on the other hand, Sir H S Maine[52] and Sir James F Stephens,[53] both respectively as the Law Members of the Government, played a vital role in the sharping of the codification of law in various spheres As such this period also became famous as "the Golden Age of Codification in British India"

In 1873 Lord Hobhouse succeeded Sir James Stephens as Law Member of the Government of India The activities of the Third Law Commission and of both the previous Law Members of the Council created considerable uneasiness in India and England As a result of it, Lord Hobhouse received definite instructions "to go slow with the legislative machine in India" He acted according to the instructions of the Directors We, therefore, find that in Hobhouse's tenure of office "there evolved the

52 During Maine's tenure nearly two hundred eleven Acts were passed See Hunter *Seven years of Indian Legislation* (1870) Rankin *Background to Indian Law* p 73

53 See Ilbert *Sir James Stephen as a Legislator* (1894) 10 LQR 222 7; Hunter, *A Life of the Earl of Mayo* II 1876 pp 140 230

double process of repealing obsolete statutes and of re-enacting in an amended and simplified form of enactments which were already in force' The Specific Relief Act (I of 1877) was the only new enactment passed during Hobhouse's term of office

6 The Fourth Law Commission, 1879

The Government of India appointed the Fourth Law Commission on 11th February, 1879 It consisted of three members, namely Sir Charles Turner, Dr Whitley Stokes and Raymond West Earlier, as early as 1875, Lord Salisbury, the Secretary of State for India, pointed out to the Government of India that under the provisions of the Indian Council Act it was possible to appoint a Law Commission and to make suitable legislation for India He also proposed that a small body of eminent draftsmen may be entrusted with the task of preparing codes of some branches of the substantive law for the Legislative Council of India In 1877 the Government of India, while accepting the proposals of Lord Salisbury, entrusted Dr Whitley Stokes with the preparation of Bills dealing with Private Trusts, Easements, Alluvion and Diluvion, Master and Servant, Negotiable Instruments and Transfer of Property On 11th February, 1879 these Bills were referred to the Fourth Law Commission for its consideration and report The Commission submitted its report on 15th November, 1879

Some important recommendations of the Fourth Law Commission were as follows

(i) The process of codification of substantive laws should continue

(ii) The English Law should be made the basis of the future codes in India and its material should be recast

(iii) The eventual combination of those divisions as parts of a single and general code should be borne in mind

(iv) In recasting English materials due regard should be had to native habits and modes of thought The forms and propositions of codes should be broad, simple and readily intelligible

(v) Uniformity in legislation should be aimed at, but local and special customs should be treated with great respect

(vi) Existing law of persons should be not expanded at present by codification except that the operation of the European British Minors Act, 1874 should be extended

(vii) The laws relating to Negotiable Instruments, Transfer of Property, Trusts, Alluvion, Easements and Master and Servant should be codified and Bills already prepared should be passed into law subject to suggested amendments

(viii) Concurrently the laws relating to insurance, carriers and lien should be codified

(ix) The law of actionable wrongs should be codified

(x) The Legislature should then deal with the law of property in its whole extent

(xi) Preparation should be made for a systematic Chapter on Interpretation

The Legislative Council of India, on the recommendation of the Law Commission, passed codes relating to Negotiable Instruments in 1881 and those relating to Trusts, Transfer of Property and Easements in 1882 Certain revised editions of the law dealing with procedure, both civil and criminal, were also passed

Even after the Fourth Law Commission submitted its report, the Legislative Council continued to codify Indian Law in different spheres It became necessary in order to deal with the new problems and they were regulated by new legislations The Law Commissions' contribution to Indian Law proved the utility of codification in India Those who were opposed to codification of India realised its importance and utility in Indian affairs, administrative as well as judicial Montague remarked "Should the English Empire in India prove durable, the Indian Codes will do much to transform Indian civilisation Even should that empire pass away these codes will remain the first successful essays towards the recasting of English Law "[54]

The role of Law Commissions and their contribution to Indian Law was thus described by *M D Setalvad in the Hamlyn* Lectures

> "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 The Commissions became powerful instruments which injected English Common and statute law and equitable principles into the expanding structure of Indian jurisprudence "[55]

7 The Fifth Law Commission, 1955

On 5th August, 1955, Shri C C Biswas, the Law Minister, announced in the Lok Sabha the appointment of a Law Commission It was the Fifth Law Commission after 1883 but after

54 F C Montague *Introduction to Bentham's Fragment on Government* pp 56-57 *See* also Sir Frederick Pollock *The Expansion of Common Law* pp 16-17

55 M C Setalvad *The Common Law in India* pp 28 29 For the uniform rules followed by draftsmen of Indian Code *see* Whitley Stokes *The Anglo-Indian Codes* p XXII

independence of India it was the First Law Commission It consisted of eleven members including Sri M C Setalvad, the Attorney-General of India, who was appointed its Chairman. Ten eminent members of the Law Commission were selected from both the Bench and the Bar In the first instance the Commission was appointed for a short term, namely up to the end of 1956 The headquarter of the Law Commission was established in New Delhi

The appointment of a Law Commission by the Government of India after 76 years, to review the system of judicial administration and suggest ways to improve it and make it speedy and less expensive and to recommend on revision and consolidation of the Central Acts of general application, was most timely and essential After India's independence and under the new Constitution of 1950 it became necessary to reconsider the age-old Acts in the light of the new conditions Also with the emergence of new conditions and the growth of industrialisation and changed economic and social conditions it became essential The appointment of the Law Commission was received with great enthusiasm in the various circles of the Sovereign Democratic Republic of India

Sri C C Biswas, the Law Minister, made the following statement in the Lok Sabha

> "Suggestions have been made from time to time both in Parliament and outside that a Law Commission should be appointed for revising our statute law and suggesting ways and means of improving the system of judicial administration in the country A few months ago we had a discussion in the House on a resolution to that effect moved by Mr Thimmaiah On 3rd December 1954, the Prime Minister accepted the resolution in principle and stated that the Government was considering what exactly the terms of reference to the Law Commission should be, what should be its personnel and various other details "

(i) **Members of the Law Commission** —Eleven persons, who were appointed Members of the Law Commission, were as follows

Sri M G Setalvad, Attorney General of India (Chairman) Shri Mr M G Ghagla Chief Justice of Bombay High Court, Shri K N Wanchoo, Chief Justice of the Rajasthan High Court, Shri G N Das, Retired Judge of the Calcutta High Court, Sri P Satyanarayana Rao, Retired Judge of the Madras High Court, Dr N G Sen Gupta, Advocate, Calcutta, Shri V K T Ghari, Advocate-General, Madras, Sri Narasa Rajah, Advocate-General, Andhra, Sri S M Sikri, Advocate General, Punjab, Shri G S Pathak, Advocate, Allahabad, Shri G N Joshi, Advocate, Bombay and Shri N A Palkiwala, Advocate, Bombay, joined in 1957 as Part time Member

(ii) **Terms of reference**.—The terms of reference to the Commission were, first to review the system of judicial administration in all its aspects and suggest ways for improving it and making it speedy and less expensive, and secondly, to examine the Central Acts of general application and importance and recommend lines on which the should be amended, revised, consolidated or otherwise brought up-to-date

With regard to the first term of reference, the Commission's inquiry 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 eliminating 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 both civil and criminal, and

(*d*) the level of the Bar and of legal education

With regard to the second term of reference, the Commission's principal objectives in the provision of existing legislation was—

(*a*) to simplify the laws in general, and the procedural laws in particular,

(*b*) to ascribe if any provisions are inconsistent with the Constitution and suggest necessary alterations or omissions,

(*c*) to remove anomalies and ambiguities brought to light by conflicting decisions of High Courts or otherwise,

(*d*) to consider local variations introduced by State legislation in the concurrent field with a view to reintroducing and maintaining uniformity,

(*e*) to consolidate Acts pertaining to the same subject with such technical revision as may be found necessary, and

(*f*) to suggest modifications wherever necessary for implementing the Directive Principles of State Policy laid down in the Constitution

The Commission was required to function in two sections It was specially done so that it may perform its task expeditiously and effectively The first section consisted of the Chairman and the first named three Members and was to deal mainly with the question of reform of judicial administration While the second section of the Commission consisted of the remaining members who were mainly concerned with statute law revision on the lines as stated above The two sections, however, were required to work in close co-operation with each other under the direction of the Chairman The Chairman of the Commission was also

empowered to co-opt as members, one or two practising lawyers of a State to assist the Commission s inquiries in that State

(iii) Reports submitted from 13th August, 1955 to 19th December, 1958 —The Law Commission submitted fourteen Reports during its period of three years before it was reconstituted in December, 1958 The reports were as follows

Sl No	No of the Report	Subject	Date of submission
1	First Report	Liability of the State in Tort	11th May, 1956
2	Second Report	Parliamentary Legislation Relating to Sales Tax	2nd July, 1956
3	Third Report	Limitation Act	21st July, 1956
4	Fourth Report	On the proposal that High Courts should sit in Benches at different places in a State	1st Aug , 1956
5	Fifth Report	British Statutes Applicable to India	11th May, 1957
6	Sixth Report	Registration Act	13th July, 1957
7	Seventh Report	Partnership Act	13th July, 1957
8	Eighth Report	Sale of Goods Act	1st March, 1958
9	Ninth Report	Specific Relief Act	19th July, 1958
10	Tenth Report	Law of Acquisition and Requisition of Land	26th Sept , 1958
11	Eleventh Report	Negotiable Instruments Act	26th Sept , 1958
12	Twelfth Report	Income Tax Act	26th Sept , 1958
13	Thirteenth Report	Contract Act	26th Sept , 1958
14	Fourteenth Report	Report on the Reform of Judicial Administration	26th Sept , 1958

(iv) Reconstitution of the Fifth Law Commission —The term of the members of the Law Commission who were appointed in 1955, expired in 1958 It was, therefore, reconstituted in December 1958 and in place of the old members the new members appointed in the Commission were (1) Sri T L V Aiyar (Chairman) a retired Judge of the Supreme Court, (2) Sri P Satyanarayana Rao (he was later appointed Chairman of Andhra Law Commission), (3) Sri L S Misra, (4) Sri N A Palkiwala (Part time Member), (5) Sri Sachin Chowdhri (Part time Member), (6) Sri G R Rajagopaul, Special Secretary Legal Department and Ex Officio Member

The Commission was appointed for a term of three years from December 1958 to December 1961 The terms of reference to the reconstituted Law Commission were to examine the Central Acts of general application and importance and recommend the lines on which they should be amended, revised, consolidated, or otherwise brought up to date

The principal objectives of the reconstituted Commission, in the revision of the existing statute laws, were as follows

(*a*) to simplify the laws in general, and the procedural laws in particular,

(*b*) to ascertain if any provisions are inconsistent with the Constitution and suggest the necessary alterations or omissions,

(*c*) to remove anomalies and ambiguities brought to light by conflicting decisions of High Courts or otherwise,

(*d*) to consider local variations introduced by State legislation in the concurrent field, with a view to reintroducing and maintaining uniformity,

(*e*) to consolidate Acts pertaining to the same subject with such technical revision as may be found necessary,

(*f*) to suggest modifications wherever necessary for implementing the directive principles of State Policy laid down in the Constitution, and

(*g*) to suggest a general policy in revising the laws

The Commission was at liberty to devise its own procedure for its work, for collecting information and for ascertaining public opinion

The Government of India recognised the fact that the work of statute law revision which yet remained to be done was indeed voluminous and that in the meantime much new work would also arise The Commission was, however reconstituted for a period of three years from 20th December, 1958, in the first instance

Reports submitted by the Law Commission from 20th December, 1958 to 19th December, 1961 were eight in number, as follows

Sl No	No of the Report	Subject	Date of submission
1	Fifteenth Report	Law Relating to Marriage and Divorce Amongst Christians in India	19th Aug , 1960
2	Sixteenth Report	Official Trustees Act, 1913	25th Nov , 1960
3	Seventeenth Report	Trusts Act, 1882	6th Jan , 1961
4	Eighteenth Report	The Converts Marriage Dissolution Act, 1866	23rd Feb , 1961
5	Nineteenth Report	The Administrator General Act, 1913	19th June, 1961
6	Twentieth Report	Law of Hire-Purchase	19th June, 1961
7	Twenty first Report	Law of Marine Insurance	21st Sept , 1961
8	Twenty-second Report	Christian Marriage and Matrimonial Causes Bill 1961	15th Dec , 1961

(v) Reconstitution of the Commission (Second Time) — The term of the members of the Law Commission expired on 19th December, 1961 The Government, considering the necessity, reconstituted the Commission and appointed new members for a term of three years i e from 20th December, 1961 to 19th December, 1964

Sri J L Kapur, retired Judge of the Supreme Court, was appointed Chairman of the Law Commission Other members of the Commission were Sri K G Datar, Sri D Basu (he was later appointed as Judge of the Calcutta High Court and Shri S K Hiranandani took charge in his place as Member of the Commission), Sri Niren De (Part-time Member, but he was later appointed Additional Solicitor-General of India), Sri T K Tope (Part time Member), Sri G R Rajagopaul (Special Secretary Legislative Department and ex officio member but he retired after a year and Sri S P Sen Verma was appointed in his place as ex officio Member)

No new terms of reference were issued to the Commission by the Government and therefore it continued work on the terms which were referred to it in 1959 During its three-year period of tenure the Commission submitted the following five Reports

Sl No	No of the Report	Subject	Date of submission
1	Twenty third Report	The Law of Foreign Marriages	8th Aug , 1962
2	Twenty fourth Report	The Commissions of Inquiry Act 1952	26th Sept , 1963
3	Twenty fifth Report	Report of Evidence of Officers about forged stamps, currency notes, *etc*	27th Sept , 1963
4	Twenty sixth Report	Report on Insolvency Laws	23rd March, 1964
5	Twenty seventh Report	Report on the Code of Civil Procedure, 1908	13th Dec , 1964

(vi) ***Reconstitution of the Commission (Third Time)*** — The Commission's term of three years expired on 19th December, 1964 The Government reconstituted the Commission for the third time and appointed new members for a term of four years, i e from 20th December, 1964 to 1968

Shri J L Kapur, retired Judge of the Supreme Court, continued as Chairman of the Commission Other members of the Commission were as follows Shri K G Datar Sri S K. Hiranandani (after a year he retired and Shri S S Dulat was appointed as Member), Sri T K Tope (Part time Member), Shri R P Mukherji (Part time Member), Sri S P Sen Verma (Special Secretary, later appointed Secretary Legislative Department and Shri B N Lokur as Special Secretary took his place)

During the period of four years from 20th December, 1964 to 29th February, 1968 the Commission submitted Five Reports, as follows

Sl No	No of the Report	Subject	Date of submission
1	Twenty eighth Report	Reports on the Indian Oaths Act, 1873	22nd May, 1965
2	Twenty ninth Report	Report on the proposal to include certain Social and Economic Offences in the Indian Penal Code	11th Feb , 1966
3	Thirtieth Report	Report on Section 5, Central Sales Tax Act, 1956 (Taxation by States of sales in the course of import)	March, 1967

Sl No	No of the Report	Subject	Date of submission
4	Thirty first Report	Section 30(2), Indian Registration Act, 1908 (Extention to Delhi)	May, 1967
5	Thirty second Report	Section 9, Code of Criminal Procedure, 1898	29th May, 1967
6	Thirty third Report	Section 44 of Cr P C, 1898—Suggestion to add provision relating to reporting of, and disclosure in evidence about offences relating to *bribery*	15th Dec, 1967
7	Thirty fourth Report	Report on the Indian Registration Act, 1908	15th Feb, 1967
8	Thirty fifth Report	Report on Capital Punishment	19th Dec, 1967
9	Thirty sixth Report	Report on Sections 497, 498 and 499, Cr P C, 1898, Grant of bail with condition	9th Jan, 1968
10	Thirty seventh Report	Report on the Cr P C, 1898—(Sections 1 to 176)	19th Feb, 1968
11	Thirty-eighth Report	Report on the Indian Post Office Act, 1898	24th Feb, 1968

(*vii*) *Reconstitution of the Commission* (*Fourth Time*) —The Commission was reconstituted for the fourth time in March 1968. The terms of reference remain the same The time old practice of appointing a retired judge of the Supreme Court as Chairman of the Commission is not followed and Shri K V K Sundaram, a retired I C S, is appointed Chairman Other members are Shri S S Dulat, Shri B N Lokur (he was appointed Judge of Allahabad High Court and in his place Sri P L Narasimhan retired Chief Justice of Patna High Court, is recently appointed

Member), Mrs Anna Chandi, a retired Judge of Kerala High Court, Sri S Balakrishnan (Joint Secretary of the Law Ministry) On Shri S Balakrishnan, attaining superannuation, Shri D B Kulkarni, Joint Secretary and Legal Adviser, Ministry of Law, was appointed Member Apart from these full time members, Shri P M Baxi in the Ministry of Law and Legislative Council, is working as Secretary to the Law Commission

Up to September, 1971, the Commission submitted the following reports

Sl No	No of the Report	Subject	Date of submission
1	Thirty ninth Report	Report on the punishment of imprisonment for life under the I P C	15th July, 1968
2	Fortieth Report	Law relating to Attendance of Prisoners in Courts	10th March, 1969
3	Forty first Report	Cr P C, 1898	24th Sept, 1969
4	Forty second Report	The I P C 1860	2nd June, 1971
5	Forty third Report	Report on the Offences against the National Security	31st Aug, 1971
6	Forty fourth Report	Appellate Jurisdiction of the Supreme Court in Civil Matters	31st Aug, 1971

(viii) *Reconstitution of the Commission (Fifth Time)* —The Commission was reconstituted in September 1971 Dr P B Gajendragadkar, former Chief Justice of India was the Chairman The other members were Mr Justice V R Krishna Iyer, Judge, High Court of Kerala and Dr P K Tripathi, formerly Dean, Faculty of Law, Universities of Allahabad and Delhi respectively, Shri P M Bakshi was appointed the Secretary

Later, Shri S S Dhavan and Shri S P Sen Varma were appointed Members of the Commission Justice V R Krishna Iyer left the Commission on his appointment as Judge, Supreme Court in 1973 Shri P M Bakshi was appointed as Member secretary of the Commission

The Terms of Reference of the Law Commission re-constituted with effect from September 1 1971 were

(i) To simplify the laws in general and the procedural laws in particular,

(ii) to ascertain if any provisions are inconsistent with the Constitution and suggest the necessary alterations or omissions,

(iii) to remove anomalies and ambiguities brought to light by conflicting decisions in High Courts or otherwise,

(iv) to consider local variations introduced by State Legislation in the concurrent field with a view to re-introducing and maintaining uniformity,

(v) to consolidate Acts pertaining to the same subject with such technical revision as may be found necessary,

(vi) to examine existing laws in the background of the Directive Principles of State Policy contained in Part IV of the Constitution and to suggest amendments in so far as these laws are inconsistent with those Principles,

(vii) to suggest a general policy in revising the laws,

(viii) to consider the advisability or need for any fresh legislation to effectuate the Directive Principles, and

(ix) to review the working of the Constitution and suggest any amendments from the point of view of enabling the different authorities under the Constitution more effectively to implement the Directive Principles

The Commission had been very active and up to June, 1974 submitted the following reports

Sl No	No of the Report	Subject	Date of submission
1	Forty fifth Report	Civil Appeals to the Supreme Court on a Certificate of Fitness	28th Oct, 1971
2	Forty sixth Report	The Constitution (26th Amendment) Bill, 1971	28th Oct, 1971
3	Forty seventh Report	Trial and Punishment of Social and Economic Offences	28th Feb, 1972

Sl No	No of the Report	Subject	Date of submission
4	Forty eighth Report	Some questions under the Cr P C Bill, 1970	25th July, 1972
5	Forty ninth Report	The proposal for inclusion of agricultural income in total income for purposes of determining the rate of income-tax under the Income tax Act 1961	28th Aug , 1972
6	Fiftieth Report	The proposal to include persons connected with Public examinations within the definition of Public servant in the I P C	28th Aug , 1972
7	Fifty first Report	Compensation for injury caused by automobiles in hit and run cases	15th Sept , 1972
8	Fifty second Report	Estate Duty on property acquired after death	4th Dec , 1972
9	Fifty third Report	Effect of Pensions Act 1871, on the right to sue for pensions of retired members of the public services	4th Dec , 1972
10	Fifty fourth Report	Code of Civil Procedure, 1908	6th Feb , 1973
11	Fifty fifth Report	Report on the rate of interest after decree and interest on costs under Ss 34 and 35 of the C P C , 1908	14th May, 1973
12	Fifty sixth Report	Notice of suit required under certain Statutory provisions	14th May, 1973
13	Fifty seventh Report	Benami Transactions	7th Aug 1973

Sl No	No of the Report	Subject	Date of submission
14	Fifty eighth Report	Structure and Jurisdiction of the Higher Judiciary	8th Jan , 1974
15	Fifty ninth Report	Hindu Marriage Act, 1955 and the Special Marriage Act, 1954	6th March, 1974
16	Sixtieth Report	General Clauses Act, 1897	20th May, 1974
17	Sixty first Report	Certain Problems connected with power of the States to levy a tax on the Sale of goods and with the Central Sales Tax Act, 1956	20th May, 1974

D CODIFICATION OF LAW SOME OBSERVATIONS

A Code is a species of enacted law which purports so to formulate the law that it becomes in that area of the law the authoritative, comprehensive and exclusive source of that law It will be worthwhile to prepare a Code if it answers to this description Enactment necessarily means that the law is developed by the deliberate will of the Legislature Before it enacts a law, the Legislature will feel the need for advice on the views of economists, social scientists, interested bodies and ordinary citizens as well as lawyers Enactment enables a scientific planning and designing process, which taps the wisdom and experience of the whole community to be brought to bear on the formation of the law The Law Commission is the important instrument for ensuring that this planning and consultative process will be available to Parliament

In a developing country like India the growth of unprecedented legislative activity to control and regulate the changing industrial, economic and other conditions, has also created certain problems relating to codification of Indian laws A peculiar aspect of the country's legislative and regulatory output, which figures in the work of codification as well, is the special case given to linguistic and stylistic problems

Sometimes one wonders whether codification of law contains all that is good and perfect The main objection to codification

is based on the inherent incompleteness of Codes On the one hand Halsbury criticises, "A Code is a want developed by progressive and unscientific legislation and that it is impossible to have a Code which *shall be complete and self sufficing*

While the advocates of codification, admitting that to have an ideal code is almost impossible, state that its incompleteness can be removed by proper actions, *e g* by defining technical terms, adding illustrations and above all by making periodical revisions of the Code Appreciating codification, Pollock said, "*It is an instrument of new constructive power,* enabling the legislator to combine the good points of statute law and case law while avoiding almost all their respective drawbacks" In order to get rid of the accumulated mass of comments and decisions, Sir James F Stephen said that re enactment of the various codifying Acts is "as necessary as repairs are necessary to a railway If you want your laws to be really good and simple, you must go on re enacting them as often as such a number of cases are decided upon them"

Other objections to codification are that it checks the natural growth of law, it stereotypes the law and prevents its elasticity *But it should not be forgotten that codification brings certainty,* a very important factor, in law Many defects can be removed by revising and re-enacting the code from time to time

It is also said that codification makes the defects of the law more clear and thus it encourage knaves in their evil designs But there are in fact more chances to deceive others when the law is not codified than when it *is codified* This objection was also raised in India when the First Law Commission began its work and subsequently when the Indian Easement Act was passed It is also worth noting in this respect that the long, smooth and satisfactory working of the Act has by this time proved that this objection is baseless *The codes may prove* a bit of a failure due to their faulty construction but it can be improved subsequently

The modern trend in India is towards codifications of laws No doubt codification is a difficult road and yet it is the road along which the legislative work is now firmly proceeding in India *The advantages of the enacted law* so greatly outweigh its defects that there can be no doubt about its superiority over other forms of legal development and expression

Influence of English Law in India

A Introduction

From the twelfth to the sixteenth ceoturies principles and rules of Roman Law spread over Western Europe and influenced, in different degrees, the legal systems all over the world Similarly in India, the concepts principles and rules of the English Law initially spread over a few Provinces and gradually over all the States in India, and influenced the whole of Asia As is well known, the British came to India, to advance themselves, to establish themselves as traders and aquire power and having acquired power, to consolidate themselves as rulers of the whole country Some of those who were sent out from England to guide the destunies of India were actuated by the loftiest of motives while others were disinterested in the petty squabbles between individuals They, in effect, evolved an efficient system of administration of justice in which fair play predominated and which we have inherited, in India But English justice as we shall see, was always pragmatic even in their own country and necessarily so in India

Instructions were given to the English administrators and judges to decid cases according to justice, equity and good conscience for which no rule was clearly laid down in the Acts of Parliament or Regulations or customary law of India Pollock observed "Under the name of justice, equity and good conscience the general law of British India, save so far as the authority of native law was preserved, came to be so much of English law as was considered applicable or rather was not considered inapplicable to the conditions of Indian Society "[1]

According to Rankin, 'the influence of the Common Law in India is due not so much to a "reception", though that has played no inconsiderable part, as to a process of codification carried out on the grand scale "[2] But in fact the English Law in India like the Roman Law in Mediaeval Europe, "enjoyed a persuasive authority as being an embodiment of written reason, and

1 Pollock *Expansion of the Common Law* p 133
2 Rankin *Background to Indian Law* p 21

impressed its own character on a formally independent jurisprudence "[3]

While comparing the reception of English Law in India and the reception of Roman Law in Europe, Professor Holdsworth points out two reasons "In the first place, the States of modern Europe received Roman Law not because Roman Law was more fit, than any code of law of which they had knowledge but to solve the problems of the more advanced stage of civilisation to which they were attaining It is exactly the same reason that the rules of English law have been introduced into British India In the second place, the Roman law when it was received, was adapted to its new environment So, in India, we may expect to see that the needs of India may produce modification in English rules of law which, with the help of the technical reasoning of the Common law, will produce new developments of common law principles" [4] Setalvad observes, "the expectation has come true" [5]

The manner in which this permeation of English law took place was altered, but its extent was in no way diminished when in the nineteenth century the law was codified in India [6]

It is a paradox in history that the law and judicial system which the British had fostered in India should have helped Indians to obtain their freedom from Britain This strangely fascinating story of the transformation of the English Common Law into Indian jurisprudence forms the main theme of this chapter

B Introduction of English Law in India from 1600 to 1832

1 English Common Law its Meaning

The expression, "Common Law of England ', in fact refers to the unwritten legal doctrines which include English customs and traditions developed by the English courts in the past centuries It does not include the statute Law of England When the expression "English Common Law' is used with reference to India it includes the English Statute Law also The expression is used in a wider sense in India "In that wider means" said Setalvad, "the expression will include not only what in England is known

3 Pollock, op cit p 134 A Gledhill, *The Republic of India*, 2nd Edn , pp 211 212

4 W S Holdsworth Preface to the 1st ed of the *Law of Torts*, by S Rama swamy Iyer

5 M C Setalvad, *The Common Law in India, Hamlyn Lectures*, Twelfth series p 225

6 For deta ls regarding Codif cation in India ', *see* Chapter XII of this B ok

strictly as common law but also its traditions, some of the principles underlying the English statute law, the equitable principles developed in England in order to mitigate the rigours of the common law and even the attitudes and methods pervading the British system of the administration of justice "[7]

2 English Law and Crown's Charters

The powers granted by the Charter of Qeen Elizabeth in 600 to the East India Company were renewed in 1609 by a new charter of James I The charters empowered the Company to make and constitute laws and issue orders and ordinances It was specifically provided that "the said laws, orders, constitutions, ordinances imprisonments, fines and amerciaments be reasonable and not contrary or repugnant to the laws, statutes, customs of this our realm" It shows that the Company obtained permission from the British Crown to administer justice in its factories in Iodia To some extent it was an indirect import of the Engluh Law in India Sir Thomas Roe, Ambassador of James I secured from the Moghal Emperor under a treaty, authority to administer justice amongst English men employed in the Company's factory at Surat

The Charter of 1661, which was granted by Charles I to the Company, authorised the executive Government of the Company, *i e* the Governors and Councils "to judge all persons belonging to the said Government and Company or that should live under them in all causes whether civil or criminal" according to the laws of England In 1668 when Bombay was transferred to the Engluh Company hy the Portuguese, Charles II issued a charter providing for the application of Englub law to Bombay in place of the Portuguese law [8]

In 1726 George I granted a new charter[9] to the Company establishing three Crown's Courts, *i e* Mayor's Courts, one in each of the three Presidency towns of Calcutta, Bombay and Madras The Mayor's courts were authorised "to try, hear and determine all civil suits, actions and pleas between party and party and to give judgment and sentence according to justice and right" There was no specific mention in the provisions of the charter as to what law the Mayor's Courts will apply The Charter provided that justice will be administered "according to justice and right." It was an ambiguous expression In the absence of any set of rules or laws, the English men who presided over the Mayor's Courts depended more and more on the English common law and it was applied in so far as they considered suitable in the circumstances of

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7 M C Setalvad *The Common Law in India*, pp 3-4
8 For deta ls *see* Chapter II of this Book
9 George I issued the charter on 24th September, 1720

the country In *Mayor of Lyons* v *East India Company*,[10] Lord Brougham observed

> " 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 recognised private rights between party and party "

The Charter of 1726, therefore, indirectly, introduced the English Common Law, Equity or Statute Law which was in force in England at that time, so far as they were applicable to Indian circumstances

The Charter of 1753, issued by George II, reconstituted the Mayor's Courts in the three Presidency Towns of Madras, Bombay and Calcutta It was also expressly stated that these King's Courts will not try actions between Indians The actions between Indians were left to be determined amongst themselves unless both the parties agreed to submit the case to Mayor's Court to be decided But according to Morley,[11] it does not appear that the native inhabitants of Bombay, were ever actually exempted from the jurisdiction of the Mayor's Court or that any peculiar laws were administered to them in that Court

(i) **Controversy on the introduction of English Law in India** —In 1775, when Raja Nand Kumar was tried under the English Statute of 1729, for forgery and the Supreme Court passed sentence of death on him a great controversy arose regarding the year in which English Statutes were made applicable to India The main question for consideration was—whether the English Laws were introduced in 1726 or in 1753 [12] There was difference amongst judges of the Supreme Court on this point Chambers was of the view that the English Act of 1729 was not applicable to India—Impey, the Chief Justice of the Supreme Court and Hyde and Le Maistre held the view that the Statute of 1729 was applicable to India as its application was extended to India by the Charter of 1753 On the other hand, historians like Macaulary, Mill and Beveridge were of the view that the law rendering forgery a capital offence did not extend to India [13] Keith states ' English Law was

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10 1 MIA 272
11 Morley s Digest Introduction p cxxix
12 *See* for details B N Pandey *Introduction of English Law into India* pp 78, 80, 106, Chapter V of this Book at pp 130-136
13 *See* at p 132 *of this Book*

introduced by the Charter of 1726" [14] Fawcett[15] has pointed out, "The Act of 1726, meant the authoritative introduction of English law in the Presidency Towns " Solving the above controversy, Rankin specifically laid down, " and it has long been the accepted doctrine that this Charter (1726), introduced into the Presidency Towns the law of England—both common law and statute law—as it stood in 1726 "[16]

(ii) Warren Hastings' Plan of 1772 —After his transfer from the Presidency of Madras to Bengal, the first major step of Warren Hastings was to lay down a plan for the administration of justice in the mofassil of Bengal, Bihar and Orissa in 1772 It expressly safeguarded the application of the personal laws of Hindus and Mohammedans in certain respects Article 27 of the Plan of 1772 indicated "that suits regaeding inheritance, succession, marriage, caste and other religious usages and institutions shall be decided accoeding to the laws of *Shaster* with regard to Hindus and the law of *Qoran* with regard to Mohammedans"

The law which was brought into force by the Plan of 1772 to administer civil justice, had some special features It did not apply English law to the mofassil areas of the Province of Bengal The Hindu law and Mohammedan law, both were treated equally The scheme was limited in character The personal law of Hindus and Mohammedans was prescribed only in matters relating to inheritance, marriage, caste and religious institutions

Thus the scheme of law envisaged by the Plan of 1772 may be classified into three headings (*a*) Those Acts of Parliament which extended to India, either expressly or by necessary implication, were to be enforced by all courts in India In other matters the rules laid down by Regulations of the Local Government were to be applied, (*b*) Hindu law and Mohammedan law were to be applied respectively in matters relating to Hindus and Mohammedans regarding inheritance, marriage, caste and religious institutions, (*c*) on all matters the courts were required to act according to justice, equity and good conscience [17]

The Plan of 1772, therefore, indirectly introduced English Law in India In civil litigation, the personal laws of Hindus and Mohammedans were safeguarded only in few specified matters but for all other matters no specific direction regarding the law

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14 Keith *A Constitutional History of India* p 77 Thompson and Garrat, *British Rule in India* pp 325 357 9

15 Fawcett *First Century of British Justice in India*, p 215

16 Rankin, *Background to Indian Law* p 1

17 For details *see* G C Venkata Subba Rao "The Influence of Western Law on the Indian Legal System", 1965 *Aligarh Law Journal* at pp 3-4

was laid down The phrase "justice, equity and good conscience' meant only the discretion of the Judge who was having know ledge of English law only

(iii) **Reservation of Civil Law to Natives** —As stated earlier, the Charter of 1753 which reconstituted the Mayor's Courts in the Presidency Towns, exempted the natives of the Presi dency Towns in civil litigation from the jurisdiction of the Mayor s Courts The Courts were empowered to try such cases where both the parties consented to refer the matter to such Court The Regulating Act of 1773, was issued under the Crown s Charter of 1774 and established a Supreme Court at Calcutta superseding the Mayor's Court It also appointed a Governor General of Bengal and constituted his Council The conflicting provisions of the Charter of 1774 and the Regulating Act created conflict Apart from this, due to certain ill defined powers of the Supreme Court, it came into serious conflict with the Governor General and his Counc l The Council resisted the claim of the Supreme Court to introduce English law in the mofussil areas The Coun cil strongly opposed, "the attempt to extend to the inhabitants of these Provinces (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 "[18] In many leading cases[19], *e g*, trial of *Raja Nan l Kumar, Kossijurah case, Patna case, etc*, there was open conflict between the Supreme Court and the Governor General's Council The situation was further worsened due to the lack of any provision either in the Regulating Act of 1773 or in the Charter of 1774, regarding the law which the Court was required to administer Interference in each other's working became common which created a severe crisis [20]

In order to remedy this state of affairs, the Act of Settle ment[21] was passed in 1781 by the British Parliament It explain ed and defined the powers and jurisdiction of the Supreme Court at Fort William in Bengal Section 17 expressly stated that in dis putes between the native inhabitants of Calcutta, 'their inheri tance and succession to land, rents and goods and all matters of contract and dealing between party and party" shall be deter-mined in the case of Mohammedans and Hindus of their respec tive laws and where only one of the parties shall be a Moham medan or Hindu "by the laws and usages of the defendant"

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18 *See* Rankin, *Background to Indian Law* p 8
19 For details *see* in th s Book Chapter V (B) pp 125 143
20 *Ibid* at pp 113 150
21 21 *Geo III C 70 of* 1781 The word 's ccess ' was *added* to the word 'inheritance' by the Act of 1781

Section 18 of the Act of 1871, reserved to the natives their laws and customs, as follows "In order that regard should be had to the civil and religious usages of the said natives the rights and authorities of fathers of families and masters of families, according as the same might have been exercised by the Gentoo or Mohammedan law shall be preserved to them respectively within their said families, nor shall 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 may not be held justificable by the laws of England"

This reservation of the native laws to Hindus and Mohammedans was extended to Madras and Bombay by Sections 12 and 13 of the Act of 1797, which established the Recorder's Courts at Madras and Bombay Subsequently when the Supreme Court was established (in 1800) at Madras and (in 1823) at Bombay the provisions of the Act of 1781, were extended to them

This position continued up to 1832, in all the three Presidencies with slight modifications On the whole it is a fact that the native laws were respected So far as English notions are concerned, it may be submitted that in all other matters which were outside the sphere of the reserved matters, English notions were introduced

In Bombay, English law was given first preference, *e g* it was enacted, "the law to be observed in the trial of suits shall be Acts of Parliament and Regulations of Government applicable to the case, in the absence of such Acts and Regulations, the usages of the country in which the suit arose, if none such appears the law of defendant and in the absence of specific law and usage, 'justice, equity and good conscience' "[22] In the garb of the phrase "justice, equity and good conscience"[23] English notions of law and justice were introduced in India In 1887 Lord Hobhouse expressed the view that "justice, equity and good conscience" could be "interpreted to mean the rules of English law if found applicable to Indian society and circumstances "[23]

Apart from this, under the influence of English Judges, native law and usages were supplemented, modified and superseded by English law to a large extent without any express legislation in this respect

(iv) Modification of Criminal Law[24] by English notions —During its early period, one of the objects of the East

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22 For details *see* Appendix 'B' in this Book
23 *Waghela Rajsanji* v *Sheik Masludin* (1887) 14 Ind App 89, 96
24 For detailed account of Muslim Criminal Law and subsequent reforms *see* Chapter XI of this Book

India Company was to make as little alteration as possible in the existing state of the Mohammedan law and system of criminal courts The Mohammedan law, therefore, was administered by the criminal courts in India for long As soon as the Company gained some strength it realised the necessity to make important changes in certain matters of Mohammedan law of crimes as according to them no civilised Government would like to tolerate them As Sir Ilbert puts it, "It was impossible to enforce the law of retaliation for murder, of stoning for sexual immorality or of mutilation for theft or to recognise the incapacity of unbelievers to give evidence in cases affecting Mohammedans

Warren Hastings and Lord Cornwallis frequently criticised the provisions of the Mohammedan Criminal Law and whenever they got any opportunity they introduced changes in it In Harrington's *Analysis of the Bengal Regulations*, giving a true picture of the Mohammedan Criminal Law he states that it became "like a patchwork quilt" It was so because of the Regulations which amended, supplemented and modified the Mohammedan Criminal Law very frequently Regulation VI of 1832, marked the end of the Mohammedan Criminal Law as a general law applicable to all persons It stated the reason that the non Muslims might claim to be exempted from trial under the Mohammedan Criminal Law However, the Mohammedan Criminal Law was not completely set aside till the Penal Code of 1860, and the Criminal Procedure Code of 1861, were enacted and came into operation The process of superseding native law by English law, so far as the administration of criminal justice was concerned was completed after the enactment of the Indian Evidence Act in 1872

The development of criminal justice in the Presidency Towns and the influence of English notions on it were as follows

(a) *Bengal*—As a consequence of the Battle of Plassey (1757), and the Battle of Buxar (1764) and Lord Clive's successful effort for securing grant of Diwani rights of Bengal, Bihar and Orissa from the Moghal Emperor, the British rule in India began in effect The administration of these territories was in the name of the Moghal Emperor The Subedar, under these Moghul Rulers in Bengal, was authorised to administer criminal justice as well as the revenue and civil justice Regarding Nizamat', it is said "that in Feb 1765, Nujm ul Dowla, the Subedar entered into a treaty with the Company enabling them to exercise his authority, so that they could claim to hold the 'diwani from the Emperor and the 'Nizamat' from the Subedar"[25] But the Company's authorities finally took the administration of criminal justice in

25 Stephen *Nand Kumar and Impey* Vol I p 10

1790, from the Naib Nazim (who was head of the chief criminal court), in their own hands at Murshidabad In spite of all the defects, the Mohammedan Criminal Law was treated as part of the public law of the land It was applied in Bengal and Madras and gradually its application was extended to other parts of India except Bombay

It must be noted that the Mohammedan Criminal Law was unspeakably severe Therefore, the legislators in these three Provinces amended the Mohammedan Criminal Law, suiting to the conditions of their respective Provinces and also with a view to removing such severity of the Criminal Law Some legislators recommended its complete abolition, but however the principles of Edmund Burke were allowed to prevail, "a disposition to preserve and an ability to improve taken together, would be my standard of statesmen"

Warren Hastings in 1772 (Art 38), enacted that dacoits were to be executed in their village, the village was to be fined and the families of the dacoits were to he made slaves of the State This system was purely English in character Provision regarding slavery was not suitable to the conditions of India, therefore, it was abolished by the Charter Act of 1833

In his letter, dated 10th July, 1773, Hastings suggested many other reforms in the existing Mohammedan Criminal Law to the Government of Bengal He strongly criticised the refusal of the courts acting in accordance with the Mohammedan Criminal Law to pass sentence of death on dacoits unless murder had accompanied robbery "Hastings also objected to the distinction made by the courts following Abu Hanifa in cases of homicide, according to which the crime did not amount to murder if not committed with an instrument formed for shedding blood, with the result that though the intention of murder might be clearly proved, the penalty of death could not be imposed and the murderer escaped with the 'fine of blood He objected also to the option granted by the law to the next of kin to claim or waive their right of retaliation and to the rule that they should themselves take part in executing sentence of death"[26]

Lord Cornwallis, in his minute of 1st Dec., 1790, pointed out the gross defects of the Mohammedan Law and defects in the constitution of Mohammedan Criminal Courts He refused to accept the opinion of Abu Hanifa and adopted the opinion of Abu Yusuf and Imam Mohammed Thus he recognised the intent as the criterion of murder Similarly other proposals of Cornwallis were enacted in 1790 and finalized in the form of the Cornwallis Code of 1793 Lord Bryce observed "It was inevitable that the

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26 Rankin, *Background to Indian Law* p 170

English should take criminal justice into their own hands—the Romans had done the same in their provinces—and inevitable also that they should alter the penal law in conformity with their own ideas" [27]

Taking a bird's eye view of the 48 enactments of the Cornwallis Code, 1793, we can easily understand the extent to which the English Law had influenced the then prevailing Mohammedan Criminal Law Still the completion of the reforms in the Criminal Law was more complicated Rankin has well said "A procedure was required whereby the *'fatwa'* should be bye passed or circumvented so as to permit substantive reform," The religious persuasions of witnesses were not to be considered a bar to conviction of a prisoner, but where the evidence of a witness would be deemed incompetent by Mohammedan law because he was not a Mohammedan, the Law Officer was to say what would have been his *'fatwa'* had the witness been of that religion When the case was to be referred to the Nizamat Adalat, the trial court's power to pass sentence was taken away Thus the responsibility was shifted to the Judges of the Nizamat Adalat (*i e* members of the Council), from the shoulders of the Law Officers

Therefore, the Regulation I of 1810, empowered the executive to dispense with Law Officers altogether at any particular criminal trial and provided that in such cases no sentence should be passed by the Court of Circuit but that the case should be referred to the Nizamat Adalat, any witness whose competency might be in doubt having been examined But when the cases came before the Nizamat Adalat the Law Officers of this Court used to give further *'fatwa'* and the Nizamat Adalat was to give judgment accordingly It was by Regulation XVII of 1817, that the two or more Judges of the Nizamat Adalat were given the power to convict and pass sentence although its own Law Officers were in favour of acquittal Thus the verdict of Mohammedan Law Officers was not binding upon the Judges, on the other hand it was at the mercy of the Judges to accept their opinions or not Records of the Court are clear testimony to the fact that justice gained a lot under such reformed regulations

Now let us deal with the specific instances of the crimes and see what reforms were made by the English law over Mohammedan Criminal Law of Bengal

'Robbery and Dacoity' were the most serious crimes prevalent in those days The provisions of Mohammedan Criminal Law were utterly defective to check these crimes It was therefore necessary to have a much more strict and even justice, less barbarous and more effective law on this subject To tackle such a situation

27 Bryce, *Studies in History and Jurisprudence*, Vol I, p 120

Regulation LIII of 1803, was passed "It abolished the conditions as to place, all places being put on the same footing, whether or not they were on or near a highway or at a distance from any inhabited spot It also abolished the network of distinctions as to one of the robbers being a minor or lunatic or relation of the persons robbed or having an interest in the property or his share of the plunder being less than ten dirhams in value It abolished also 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 '*fatwa*' the Judge's sentence and the reference to the Nizamat Adalat were assigned their respective parts Mere secret larceny or theft, whether from a person or a house, was left by Section 5 of this regulation to discretionary punishment" [28]

The offences of 'perjury, forgery and their derivatives' were amongst those for which 'discretionary punishment' (Tazir), was laid down in Mohammedan Criminal Law Abu Hanifa was of the opinion that the 'Tusheer' or 'exposure in a public place' under circumstances of ignominy was the proper penalty for perjury under the Mohammedan Criminal Law Regulation XVII of 1797 and VIII of 1803, modified the law on this subject In 1807 Regulation II, provided the punishment of 'godena' Regulation XVII of 1817, by Section 12 abolished the 'godena' in such cases while it was retained for those sentenced to imprisonment for life In 1837, the accused was made to ride on an ass for exposure in a public place Ultimately Act II of 1849, totally abolished the evil punishments of marking by 'godena' and 'Tusheer' or 'public exposure' In the same way, gradual reforms were also made for the offences of homicide, adultery, *etc*, with the help of English laws and practices

In 1832, Regulation VI gave a death blow to the Mohammedan Criminal Law, the result being that the Mohammedan Criminal Law was no more applicable in the civil and criminal courts as a general law in British India This Regulation set out three ways for civil courts to administer justice (*a*) reference to Panchayat, (*b*) by having them assessors, (*c*) or employing them as a jury, but court's decisions in all cases were final Criminal court's were given full liberty according to their laws

(*b*) *Agra, Banaras and other ceded districts* —Bengal Regulations regarding Criminal Law were also applicable in Banaras (which in 1838 became a Province of Agra) and in ceded provinces Apart from these regulations, some new ones were also passed to check the peculiar evil practices, which were common in Banaras

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28 Rankin, *Background to Indian Law*, p 176

specially By Regulation III of 1804, the practice amongst Rajkoomars of starving female infants to death, was declared to be a crime equivalent to murder The evil practice of sitting 'dharna' was also abolished gradually by Regulations XXI of 1795, III of 1804, c f VII of 1820 and Section 508 of the Indian Penal Code In Banaras till 1817, Brahmins were not punished with death, though life sentence was substituted for the capital sentence This privilege of Brahmins was abolished by Regulation XVII of 1817 All these changes were the result of the influence of English legal notions in India

(c) *Madras* — To suppress crimes in Madras, legislation was passed more or less on the same lines as in Bengal and Banaras, having due consideration to the peculiar features of Madras As such the Bengal Regulation X of 1793 and the Cornwallis Code were also followed in Madras In 1803, Regulation XV repeated Bengal Regulation LIII of the same year which dealt with the doctrine of 'Tazir' and robbery with violence

(d) *Bombay* —In Bombay, criminal justice was administered upon lines different from those of Bengal and Madras In a letter of 1822 Elphinstone describes the Bombay system as follows

"We do not, as in Bengal, profess to adopt the Mohammedan Code We profess to apply that Code to Mohammedan persons, the Hindoo Code to Hindoos, who form by far the greatest part of the subjects The Mohammedan Law is almost as much a dead letter in practice with us as it is in Bengal and the Hindoo 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 "[29]

Elphinstone realised the necessity of a better and more uniform system of law, both civil and criminal, during his experience as Governor of Bombay Presidency In 1827 Elphinstone drafted a code of 30 regulations for Bombay, in certain matters it was also an improvement upon the Cornwallis Code of 1793 A biographer[30] has said about Sir George William Anderson (1791 1857)

"He was employed by Mr Elphinstone in passing 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 population of India "

29 J L Golebrooke *Life of Elphinstone* (1882) Vol II p 175
30 Sir Alexander Arbuthnot in D N B.

(v) State of law before the Charter Act of 1833.—The unsatisfactory state of law in British India at that time is quite clear from the various enquiries and reports which preceded the Charter of 1833. Particularly they pointed out the frequent difficulty of ascertaining what the law was and where it was to be found. At this time, the Governor General possessed a right to veto the legislation of subordinate Governments. Each of the three Presidencies enjoyed equal legislative powers.

In the laws of the Presidencies, lack of uniformity was the greatest defect. The law of England remained, in the three Presidency Towns, as the basis of the criminal jurisdiction of the Supreme Court. The system of Regulations which existed before 1833 was described by Morley as "incongruous and indigested mass".[31]

The judges of the Calcutta Supreme Court, while describing the state of law in India commented as follows:

"In this state of circumstances, no one can pronounce an opinion or form a judgment, however sound, upon any disputed right of persons respecting which doubt and confusion may not be raised by those who may choose to call it in question. There are English Acts of Parliament specially provided for India and others of which it is doubtful whether they apply to India wholly or in part or not at all. There is the English Common Law and Constitution, of which the application in many respects is still more obscure and perplexed. Mohammedan Law and usage, Hindu Law, usage and scriptures, Charters and Letters Patent of the Crown, and some made declaredly under the Acts of Parliament, particularly authorising them and others which are founded, as some say, on the general power of Government entrusted to the Company by Parliament and as others assert on their rights as successors of the old native Government. Some Regulations require registry in the Supreme Court, others do not, some have effect generally throughout India, others are peculiar to one Presidency or one town, treatises of the Crown, treatises of the Indian Governments, besides inferences drawn at pleasure from the application of 'droit public' and the law of the nations of Europe to a state of circumstances which will justify almost any construction of it, or qualification of its force".[32]

C. Codification in India: Systematic Import of English Law

The Charter Act of 1833, introduced important changes in

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31 Morley, *Administration of Justice of British India*, (1858) p. 158, *Digest*, Vol. I, p. clv.

32 Cited by C. Grant before Committee on the Charter Act, *Hansard* 3rd Series, Vol. 18, p. 729.

the constitution of the East India Company and the system of Indian administration It established, for the first time in the history of British India, a single Legislature for all the Presidencies which were under British control It was empowered to legislate for persons in the Presidency Towns as well as the mofassils Another landmark was provided under Section 53, which appointed the First Indian Law Commission, stating that it was expedient to enact "such laws as may be applicable in common to all classes of the inhabitants of the said territories, due regard being had to the rights, feelings and peculiar usages of the people"

By appointing the First Law Commission, the British Parliament tried to achieve, in the words of Lord Macaulay, "Uniformity where it was possible, diversity where it was necessary but in all cases certainty" The First Indian Law Commission, headed by Lord Macaulay, submitted many reports on various laws The reports were based on a detailed study primarily of the English Law The English Law, to the extent it suited Indian conditions, usages and customs, was thus systematically imported to India No doubt the Commissions' Reports were scrutinised several times at different stages but the fact remains that by the codification of Indian Law a systematic import of English Law was implemented Thus the English notions of law and justice were introduced in India through the four Law Commissions [33]

1 Penal Codes, Codes of Civil and Criminal Procedure

Though the First Indian Law Commission under the Chairmanship of Lord Macaulay submitted its Report on Penal Code, it was not until 1860, that the Indian Penal Code was placed on the Indian Statute Book It was the most important achievement of the Commission and the legal experts who scrutinised it at various stages Apart from English Law, the French Code was of great help as a model and on many questions it afforded valuable suggestions which were utilised by the Law Commission in framing the Indian Penal Code Whitley Stokes observed

> "Besides repressing the crimes common to all countries it has abated if not extirpated the crimes peculiar to India, such as *thugee*, professional sodomy, dedicating girls into a life of temple harlotry, human sacrifices, exposing infants burning widows, burying lepers alive, gang robbery, torturing peasants and witnesses, sitting *dharna* "

It shows that the Indian peculiar problems were tackled in the light of English notions of justice Accordingly punishment for each crime was also laid down in the Penal Code

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33 For the contributions of each Law Commission *see* Chap XII of this Book.

The Code of Civil Procedure was passed in 1832 and the Code of Criminal Procedure was passed in 1860 (now replaced by Act 2 of 1974) The Law of Procedure was supplemented by the Evidence Act (I of 1872), the Limitation Act (IX of 1908) and by the Specific Relief Act (I of 1877), which stands on the borderland of substantive and adjective law These Acts applied to all persons in British India whether European or native and wholly displaced and superseded native law on the subjects to which they related

2 Various other Acts

(i) Indian Succession Act, 1885 (X of 1965) —This Act is based on English Law but is declared by Section 2 to constitute, subject to certain exceptions, the law of British India applicable to all cases of inter state or testamentary succession But the exceptions are so wide as to exclude almost all natives of India The provisions of the Act are declared (Section 331), not to apply to the property of any Hindu, Mohammedan or Buddhist

(ii) Indian Contract Act (IX of 1872) —This Act does not cover the whole field of Contract Law but so far as it extends, is general in its application and supersedes the Native Law of Contract

In 1930 and 1932 separate Acts were passed, resting more fully and minutely the law on Sale of Goods (III of 1930) and Partnership (IX of 1932), on the lines of the English statute which codified the law upon these subjects in 1893 and 1890 The distinction between conditions and warranties—a specially valuable feature introduced into the law by the English Act of 1898—was not to be found in the Indian Act of 1872 and has now been adopted in India Indeed the Indian Sale of Goods Acts, 1930, keeps close contact with the English Act of 1893 The new Partnership Act has also derived similar advantage from the work done in England

We may also note that the principle in the case of partnership in making every partner liable for debts incurred while he is a partner in the usual course of business by or on behalf of the partnership, was in agreement with what was thought to be the Rule of Equity in England until 1879, when the House of Lords in *Kendall v Hamilton*, held that during his life a partner's liability was only joint and that he was not liable to be sued separately

(iii) Indian Evidence Act (1872) —It was drawn up by James Fitzjames Stephen Before the passing of this Act, the English rules had no authority As such in the county courts, certain Indian Acts, applied reforms to all courts in British India In the Presidency Towns the courts were governed by the English

Law of Evidence as part of the English Law which they administered A study of this Act will enable us to realise the extent to which English notions were incorporated in it Even Stephen himself pointed out, "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 "

(iv) **Transfer of Property Act, 1882** —This Act also contains certain provisions which reflect the influence of English notions, *e g* the provisions as to mortgage which recognises and regulates forms of security in accordance with native as well as English usage Saving clauses for Hindus, Mohammedans or Buddhists are also there, *e g* Section 2

(v) **Easement Act, 1882 (V of 1882)** —This Act is in force in the various parts of India It also embodies principles of English law but is not to derogate from certain governmental and customary rights

(vi) **Law of Torts** —The Law of Torts or Civil Wrongs as administered by the courts of British India, whether to Europeans or to natives, was practically English Law The draft of a bill to codify it was prepared some years ago, but further measures have never been taken for its codification

As regards the process of the expansion of the Common Law in India, in 1895, Sir Fredrick Pollock said, "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 in the course of this century, but much more rapidly within the last generation, covered the whole field of criminal law, civil wrongs, contract, evidence, procedure in the higher if not in the lower courts, and a good deal of the law of property It is not too much to say that a modified English Law is thus becoming the general law of British India The Indian Penal Code, which is English Criminal Law simplified and set in order, has worked for more than a generation, among people of every degree of civilization, with but little occasion for amendment In matters of business and commerce English Law has not only established itself but has been ratified by deliberate legislation, subject to the reform of some few anomalies which we might well have reformed at home are new, and to the abrogation of some few rules that had ceased to be of much importance at home, and were deemed unsuitable for Indian prudence which we seldom have occasion to remember in modern English practice have been successfully revived in Indian jurisdiction "[34]

34 Frederick Pollock, *The Expansion of the Common Law*, at pp 16 17

should be made by means of codes to define and simplify the leading rules of Hindu and Mohammedan Law The above suggestion could not be made practicable due to the natural sensitiveness of Hindus and Mohammedans to legislative interference in matters closely touching the r religious usages and observances However, we shall see at present the influence of English Law on Hindu and Mohahmmedan Law Further we shall also see that in spite of the failure of the above suggestions why English influence has been much in Indian law through specific enactments

(1) **Influence of English notions on Mohammedan Law**—Here we shall deal with two points *viz*, the State of Anglo Mohammedan Law and the British element in Anglo Mohammedan Law The former is best contained in the following verse by Tennyson in his *Akbar s Dream*

"Me too, the black winged Azrael overcome
But death had ears and eyes, I watched my son
And those that followed, loosen, stone from stone,
All my fair work, and from the ruin arose
The shriek and course of trampled millions, even
As in the time before, but while I groaned
From out the sunset poured an alien race
Who fitted stone to stone again, and truth,
Peace love and justice came and dwelt therein

But unfortunately *Akbar s Dream* remains a dream except encouraging our perseverance on the lines already marked out for us' We shall try to see how an alien race fitted stone to stone' with the help of Rules, Regulations and Acts

Though Warren Hastings Plan of 1772 by Rule 23 kept the reservation of personal laws of Mohammedans, still in those topics we find that the English law was gradually imported Judicial reforms of Cornwallis and subsequent Regulations and Acts have influenced Mohammedan criminal law to a great extent We shall analyse the British element in Anglo Mohammedan Law point by point as follows

1 The Muslim criminal law was first modified piecemeal (as seen above) and then it was superseded altogether by the Indian Penal Code

2 By Act V of 1843, abolishing slavery throughout British India, all the learning on that subject which was found in Muslim law books was rendered inoperative

3 The Indian Majority Act of 1875, raised in one sense and lowered in another the age in which a Muslim was to become capable of contracting and disposing of property Similarly the Act X of 1891, made punishable as rape, such early sexual intercourse (the woman being under twelve years of age) even between husband and wife which was not an offence in Muslim Law

4 The statutory provisions about pre-emption in the Punjab, the North West Frontier Provinces and Oudh have considerably modified the Mohammedan Law of Pre-emption enforced in those provinces

5 Another far reaching modification was the substitution of judiciary for professional case law

6 In the matter of Wakfs or public or private endowments, there was a progressive tightening of case law against the recognition of private settements Under pure Mohammedan Law a Wakf exclusively for the benefit of the settler's family was perfectly valid But the Privy Council, however, had held in *Abdul Fata Mahomed* v *Russomoy*[35] that "a Wakf for the benefit of the settler's family, children, descendants and for charity was valid only if there was a substantial dedication of the property to charitable uses in some period of time or other" This decision led to dissatisfaction amongst Muslims with the result that the Mussalman Wakf Validating Act was passed in 1913 But this had not provided for retrospective effect and so another Wakf Act (of 1923) was passed However, the Muslim law relating to wakf was modified in so far as 'reservation for the religious or pious purposes was made essential' is concerned

7 According to pure Mohammedan Law a sale is complete on payment of the price and transfer of possession There was no need of registration of the transaction whatever be the value of the subject matter But this has been superseded by the Transfer of Property Act according to which a sale of property of value of Rs 100 or upwards is not complete unless made by a registered instrument

8 The Shariat Act of 1937 and the Dissolution of Muslim Marriage Act also introduced certain changes in Mohammedan Law on the basis of English notions

On the whole, we may note the Mohammedan Law relating to marriage, paternity, wills, gifts, wakfs, sale and pre emption was greatly influenced by the English notions of justice through English judges and various Acts

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35 22 Ind App 7

(ii) **Influence of English notions on Hindu Law** —Rule 23 of the Warren Hastings' Plan of 1772 provided for the reservation of the personal laws of Hindus 'in suits regarding inheritance, marriage, caste and other religious usages or institutions' In the year 1781, the Act of Settlement laid down that in cases of contract, succession and dealings between parties, the Hindu Law was to be applied if both the parties were Hindus The Cornwallis Code of 1793, similarly provided for the reservation of the personal laws of Hindus Thus it is clear that in all other cases (topics not provided for in various Acts) English Law was to be applied and not the personal law of Hindus

The early English administrators also modified the rules of Hindu criminal law on the basis of English notions In 1817, they abolished the rule of exemption of Banaras Brahmins from death penalty They made the throwing of children into the sea at Sagar or other places a criminal offence and prohibited the burning of widows alive on the death of their husbands in 1830 Where the injustice was patent, they also modified the rules of succession, inheritance and marriage They repealed the religious law which compelled a person to pay the debts of his father and grandfather Widow marriage was also legalised Thus gradually English notions influenced the Hindu criminal law in Banaras and Bombay

Codification of laws further influenced and modified the Hindu substantive civil law to a great extent as follows

1 The Statute 20 Geo III C 70 safeguarded the personal laws of Hindus in matters of contract dealing between party and party, inheritance and succession This right was taken away by the Indian Contract Act IX of 1872, which was mostly based on English notions

2 The Caste Disabilities Removal Act of 1850, laid down that when one party shall be Hindu or Mohammedan the laws of those religions shall not be permitted to operate to deprive such party or parties of any property

3 The Indian Succession Act applies to Hindu wills (Section 82) and has the effect of partially abrogating the rule of Hindu Law, that gift by the husband of immovable property to the wife without express words creating an absolute estate, conveys only a limited interest It is another instance where codification affected Hindu Law

4 British Indian administrators changed the rules of Hindu marriage where it was incumbent on them on moral and equitable grounds to alter it The following Regulations and Acts were

passed which changed the structure of Hindu society and introduced the English notions

(i) Abolition of Sati (Reg XVII 1829)

(ii) Hindu Widows Remarriage Act (XV of 1856)

(iii) Native Converts Marriage Dissolution Act (XXI of 1866)

(iv) Civil Marriage Act (III of 1872)

(v) The Indian Criminal Law Amendment Act (X of 1891)

(vi) Marriage Act of Certain Malabar Hindus (Mad Act IV of 1896)

(vii) Anand Marriage Act (VII of 1909)

(viii) The Hindu Women's Right to Property Act of 1937

(ix) The Child Marriage Restraint Act, 1928 (Amended in 1938 and 1949)

(x) The Hindu Married Women's Right to Separate residence and Maintenance Act of 1946

5 The Guardians and Wards Act of 1890 is a complete code, which defined the rights and remedies of wards and guardians

6 The Indian Majority Act of 1875, has affected the rules of Hindu Law on the subject In Hindu Law, youths belonging to any of the three superior castes ceased to be minors upon ending their "studentship" *Sudra* youths attained their majority upon completing sixteen years[36] This Act fixed the age of majority at 18 years

7 The Indian Penal Code has changed the old Hindu Law of crimes and has also provided a uniform code for all the Presidencies and for all persons without any distinction

8 The constitution, jurisdiction and procedure of criminal courts in British India were regulated by the Code of Criminal Procedure (V of 1898) In the administration of criminal justice it superseded the native Hindu Law

9 The Indian Evidence Act of 1872, superseded all the native rules of evidence It was based mostly on the English Law of Evidence, modified to suit the people of this country The rule of Hindu Law requiring the lapse of 12 years before an absent person of whom nothing had been heard could be presumed to be dead, was applicable to the "presumption of Death" But the Evidence Act of 1872, changed the existing native rules

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36. (1) Manu. ch. VIII

and provided that a period of seven years' absence without any trace is sufficient to raise a presumption of death

Apart from codified laws, Indian courts also played an important role in introducing English and foreign notions of law *and justice in Indian Law* English notions were adopted by the Indian courts when on certain questions the Hindu Law was silent *and* litigation was before the courts for decision [37]

(iii) Reasons which saved Hindu law from complete change —In spite of the major forces which assited in introducing English notions of law and justice into Hindu Law, Hindu Law was not completely changed Hindu law was saved from the influence of foreign laws due to certain reasons First English common law was territorial while Hindu Law was not territorial but depended mostly on religion Cowell observed The laws which Hindus and Mohammedans obey, do not recognise territorial limits The *Shastras* and the *Quran* revealed religion and law to different peoples each of whom recognised a common faith as the only bond of union, but were ignorant of the novel doctrin that law and sovereignty could be co terminous with territorial limits "

D Influence of English Law on Indian Legislation after Independence

On 15th August, 1947 with the transfer of political power from the British to Indians, the Dominion of India was created The Indian Independence Act 1947, played vital role in regulating the new conditions of the Dominion of India Under the Act a Constituent Assembly was constituted to frame a new Constitution of India After three years' hard labour the Constituent Assembly of India passed the new Constitution of India which came into force on 26th January, 1950

From 1947 to 1950 the Dominion Legislature of India framed *various laws to tackle the problems* The *framework of the Dominion* and Provincial Legislatures remained the same as was under *the Government of India Act, 1935* The *federal structure* was accepted by the Constitution makers of India The Constitution *of India, 1950, created a Central Government* and the constituent regional units It provided for the distribution of powers between them *In his Hamlyn Lectures on the Common Law in India* M C Setalvad observed, ' The builders of the Indian Constitution not *only drew largely from* the collection of British ideas and institutions which was *India's heritage* from British rule but they *also took care to maintain a continuity* with the Governmental

37 See *Vedmayana Mudaliar v Vedammal* 27 Mad 59 *Gangu v Chandrabhagabai* 32 Bom 275

system which had grown up under the British They believed not in severing their links with the past but rather in treasuring all that had been useful and to which they had been accustomed The structure which emerged was, therefore, not only basically British in its framework but took the form of an alteration and extension of what had previously existed "[38]

The Constitution of India, 1950, is greatly influenced by the British principles of responsible government The Cabinet System in India is similar to that of British Cabinet system Instead of the King, India has chosen "The President" as the Constitutional Head of the State The general framework of the Constitution is based on the Act of 1935 and a federal structure of Government was accepted by the makers of the Constitution Jennings said, "The machinery of Government is essentially British and the whole collection of British constitutional conventions has apparently been incorporated as conventions "[39] The Parliamentary system, the Executive system, the Judicial system, all the three important wings of the Government, remained similar to that of British system of Government In *Rai Sahib Ram Jawaya Kapur v The State of Punjab*,[40] the Supreme Court of India stated that, "Our Constitution, though federal in its structure, is modelled on the British Parliamentary system we have the same system of parliamentary executive as in England and the Council of Ministers consisting as it does, of the members of the legislature is, like the British Cabinet, 'a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part"

Apart from this, the legislative powers of the two Houses of Parliament, *e g*, in relation to Money Bill, subordinate legislation, Administrative tribunals, judicial power, personal liberty are other important areas in which the English Law has greatly influenced the Consitution of India But it does not mean that we are solely dependant on English Law, traditions and conventions [41] The Indian Constitution has borrowed its provisions from the various Constitutions of the world It also reflects Indian traditions and ideas of justice

Article 372 of the Constitution of India provides for the continuance of the existing laws and their adaptation The object of clause (1) of this Article is to sanction the continuance of the existing laws until they are repealed or amended by a competent authority under the Constitution The expression "law in force"

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38 M C Setalvad, *The Common Law in India*, p 159
39 Sir Ivor Jennings, *Some Characteristics of the Indian Constitution*, p 7
40 (1955) 2 SCR 225, 236 237
41 The formulation of our Fundamental Rights and the judicial control over legislation are two important matters in which India has made a departure from English Law and tradition

includes not only the enactments of the Indian Legislature but also the Common law of the land which was being administered by the courts in India It includes not only personal laws, *viz.*, the Hindu and Mohammedan Laws, but also the rules of English Common law, *e g*, the Law of Torts as well as Customary Laws In 1955 the Government of India appointed a Law Commission to study and suggest necessary changes in the existing laws to suit Indian conditions

During the period 1950 to 1968 the Indian Parliament has passed a large number of Acts specially to deal with its emerging socio economic and political conditions The implementation of three Five Year Plans, has led to the unprecedented development of industrialisation and has created new problems and situations Amongst the existing Indian administrators, the persons who were specially trained by British, still dominate In certain respects the influence of English Law is more in the new Indian conditions where Indian problems are similar to those of the English

E SPECIAL FEATURES OF ENGLISH LAW IN INDIA

To the English Common law we owe the fundamental principles of our public law—The rule of law, individual freedom, limited powers of the Government In the sphere of administration of justice, the system of trial, the legal profession, the independence of judiciary, system of judicial precedents and justice according to law, are all based on the principles of English Law

The "Doctrine of Precedents" which is deep rooted in English Law, was first of all introduced in India in 1726, when the Mayor's Courts were established in India Since then the judicial precedents have played a very important role in shaping Indian Law Section 212 of the Government of India Act also provided that the law laid down by the Privy Council will be binding on all courts in India It also followed that every court was absolutely bound by the decisions of the superior courts Article 141 of the Indian Constitution 1950, provides, "the law declared by the Supreme Court shall be binding on all courts within the territory of India" This is based on English principles But by this provision there is some departure from the English practice In England the House of Lords, is bound by its own decisions but in India, the Supreme Court is not bound by its own decisions The Supreme Court of India, the highest judicial organ in India is free to change the law which it laid down in a case earlier In *Bengal Immunity Co* v *State of Bihar*,[42] Das, C J observed,

"There is nothing in our Constitution which prevents us

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42 AIR 1955 SC 661 at p 672, see also *Dwarka Das Srinivas* v *Sholapur Sp & Wg Co*, AIR 1954 SC 119 at p 127

from departing from a previous decision if we are convinced of its error and its baneful effect on the general interest of the public Article 141 which lays down that the law declared by this Court shall be binding on all courts within the territory of India quite obviously refers to courts other than this Court '

Concluding, it can be stated that the British Empire has left an imperishable contribution to the enrichment of India's legal heritage Apart from this, but equally of importance is the fact that with the ending of British Raj in India the time is ripe enough for us to make a beginning of a new understanding of India's national peculiarities in the legal sphere A study of India's ancient history will reveal the fact that what we now call "the unique principles of English Common law ' were in fact originated in India During the Mediaeval and British periods, we were made to forget our own "Ancient Hindu Period" which was our "glorious past" in various respects The principles of Indian philosophy, traditions, social and legal order, which formed the backbone of our glorious past can be co related to meet the growing problems and new conditions of India today Let us not forget that India still retains her intellectual treasure in spite of the influence of English Common law

A Origin of the Writ System in England

The writ process was in its origin continental, but it gradually developed on English soil in the twelfth century.[1] The writ was a command of the king in writing to the Sheriff addressed to the defendant to appear in the court within the specified period of time. It appears that while all writs were commands issued in the name of the Crown, only the writs which had a special relationship with the Crown came to be known as "prerogative writs". It was by this system that the King's Court made Royal justice, supreme over the justice administered in other courts. The Chancery was the writ office of the common law courts. Due to rapid increase in the number of suits, the writs were also issued in a large number. As complaints of the same kind came again and again before the Chancery, a common form of writ was drawn for them. The 'prerogative writs" were issued only when some cause was shown as distinguished from the original or judicial writs which were used for suits between party and party and which were issued as of course.[2] All the "prerogative writs ' were not discretionary, some of them were issued as a writ of right.

B History of legal provisions relating to Prerogative Writs in India (1726-1949)

1 Early Statutes and Charters

With the expansion of its territorial acquisition in India, the East India Company was also faced with the problem of administration of justice amongst Englishmen who were in the employment of the Company as well as those residing in the Presidencies under its control. In place of Company's Courts the Charter of 24th September, 1726 established King's Courts for the first time in the legal history of India. The Mayor's Courts which were established at Calcutta, Bombay and Madras, under the Charter of 1726, were considered to be the King's Courts as they derived authority from the King of England. This was also an

1 For details *see* V. D. Kulshrestha, *Text Book of English Legal History* Chapter XIII pp. 99 ff. Edward Texts ' *The Prerogative Writs in English Law*', 32 Yale L.J. 523.

2 *Halsbury's Laws of England* Edn. 3rd, Vol. XI, p. 23.

attempt to introduce English ideas and principles in the administration of justice of India The Mayor's Courts were authorised by the Charter of 1726 to try, hear and determine all civil suits, actions and pleas between party and party which arose within the Presidency towns The Charter of 1753 re-established the Mayor's Court in the Presidency towns and superseded the earlier Charter of 1726 It further limited their civil jurisdiction to suits between persons who were not natives of these towns and suits between the natives were directed not to be decided unless by consent of the parties On the findings and recommendations of the Committee of Secrecy, which was appointed by the House of Commons in 1772, British Parliament passed the Regulating Act of 1773 Under Section 13 of the Act of 1773, the King was authorised to establish a Supreme Court of Judicature at Fort William in Bengal in place of the Mayor's Court

2 Earliest Writ Jurisdiction of the Courts in India

(i) **Calcutta** —A Royal Charter, dated 26th March, 1774 was issued by George III in pursuance of the Act of 1773, which established the Supreme Court at Calcutta Its Judges were given the same jurisdiction and authority as were exercised by the King's Bench in England [3] Clause 4 of the Charter provided as follows—

> " and it is our further will and pleasure that the said Chief Justice and Puisne Justices shall severally and respectively to have such jurisdiction and authority as our Courts of King's Bench have and may lawfully exercise within that part of Great Britain called England by the Common Law thereof "

Clause 21 of the said Charter authorised the Supreme Court of Calcutta for the first time in the history of India to issue prerogative writs It provided "The Court of Requests and Court of Quarter Sessions established at Fort William and the Justices, Sheriffs and Magistrates appointed for the said districts are made subject to the order and control of the Supreme Courts in such manner and form as the inferior Courts and Magistrates in England were by law, subject to the order and control of the Court of King's Bench and to that end the Supreme Court is empowered to issue writs of *mandamus certiorari, procedendo* and *error* to be directed to such courts or Magistrates."

It is clear from the provisions of Clause 21 of the Charter that the Supreme Court at Calcutta was authorised to issue four types of writs, namely, *mandamus, certiorari, procedendo* and *error* It gave rise to another question—whether the jurisdiction of the

3 See *In re Justices of Supreme Court of Judicature* 1 Knapp PC 1

Supreme Court in the matter of issuing writs was confined to these four types of writs only In fact it is well known that the Supreme Court issued writ of *habeas corpus*, which is also a high prerogative writ From where did the Supreme Court derived authority and power to issue writ of *habeas corpus*? Justice Das[4] has pointed out that this power was enjoyed by the Supreme Court under Clause 4 of the Charter of 1774, which conferred on the Chief Justice and the Puisne Justices "severally and respectively such jurisdiction and authority as our (English) Justices of the Court of King's Bench have and may lawfully exercise within England" Clause 4 therefore gave to the Supreme Court of Calcutta very wide powers as the Court of King's Bench enjoyed in England

(ii) Madras and Bombay —In 1800 the Recorder's Court at Madras was abolished Regarding the powers of the Supreme Court at Madras the provisions of the Calcutta Charter of 1774 were repeated for Madras also Clause 4 of the Charter of 1774 was reproduced in Clause 8 of the Madras Charter of 1800 The provisions of Clause 21 of the Calcutta Charter were reproduced by Clause 47 of the Madras Charter

"The Charter of 1823 authorised the abolition of the Recorder's Court at Bombay and the establishment of the Supreme Court of Judicature in its place to consist of like number of Judges as the Supreme Court at Fort William in Bengal The provisions of Clause 4 and Clause 21 of the Calcutta Charter 1774 were also reproduced in Clause 13 of the Bombay Charter of 1823 Thus the powers of the Supreme Court at Madras and Bombay in issuing high prerogative writs were placed upon an equal footing with those of the Supreme Court at Calcutta "

3 The Indian High Courts and the Writ Jurisdiction under Acts of 1861, 1915, 1935

The Indian High Courts Act, 1861 empowered Her Majesty Queen Victoria to issue Letters Patent establishing High Courts in the three Presidency Towns in place of the existing Supreme Courts The Letters Patent were issued in 1862 which abolished the three Supreme Courts and in their place established High Courts of Judicature at Calcutta, Bombay and Madras

The jurisdiction and powers of the High Courts were provided under Section 9 of the Act of 1861 as follows

> "Each of the High Courts to be established under this Act shall have and exercise the High Courts to be established in each Presidency shall have and exercise all

4 See *In re Banwari Lal Roy's case* 48 CWN 766

jurisdiction and every power and authority whatsoever in any manner vested in any of the courts in the same Presidency abolished under this Act at the time of the abolition of such last mentioned Courts "

The Letters Patent of 1862 were superseded by fresh Letters Patent, dated 23rd December, 1865 and the powers and jurisdiction remained the same as were given under Section 9 of the Indian High Courts Act of 1861 These provisions were reproduced with slight modification in Section 106 of the Government of India Act, 1915 The same principle was maintained under the Government of India Act, 1935 and the powers and jurisdiction of the High Courts were given under Section 223, as follows

" the jurisdiction of and the law administered in, any existing High Court, and the respective powers of the Judges thereof in relation to administration of justice in the Court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in division Courts shall be the same as immediately before the commencement of Part III of this Act "

Thus the power to issue writs was limited to the three Presidency High Courts of Calcutta Bombay and Madras as successors of the old Supreme Courts From 1865 to 1947 though several High Courts were newly established by the Crown they were not given the power to issue prerogative writs in India Even the writs issuing power of the three Presidency High Courts was restricted by the Specific Relief Act, 1877 Section 45 of the Specific Relief Act, 1877 provided that the High Courts of Calcutta, Madras and Bombay will not have power to issue the writs of prohibition and *certiorari* or order outside the local limits of their original civil jurisdiction [5]

In *Mathen v District Magistrate of Trivandrum*,[6] the Privy Council pointed out that the Legislature had taken away the power of the High Courts to issue the writs of *habeas corpus* by the High Courts Act, 1861 and Section 491 of the Code of Criminal Procedure The High Courts had no jurisdiction to issue the writ of *certiorari* to any mofussil court or *quasi judicial* bodies exercising jurisdiction outside the original jurisdiction of the High Court The jurisdiction of High Courts to issue writs in the nature of *quo warranto* was confined to the limits of the Presidency town only

5 See *Ryot of Garabandho v Raja of Parlakimedi* (1913) 18 CWN 18 (PC) AIR 1913 PC 164

6 AIR 1939 PC 213

C Power of the Courts to issue writs under the Constitution of India, 1950

The Constitution of India, 1950 has empowered the Supreme Court and all the High Courts of India to issue writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* Under Article 32 any person can move the Supreme Court to issue directions or orders or writs for the enforcement of any of the Fundamental Rights as stated in Part III of the Constitution The right to move the Supreme Court is itself made a Fundamental Right which even the Government cannot take away except as provided by the Constitution Under Article 226 all the High Courts in India are empowered to issue writs for the enforcement of any of the Fundamental Rights as guaranteed under Part III of the Constitution In *Daryao* v *State of U P*,[7] the Supreme Court held that an applicant under Article 226 cannot apply on the same grounds under Article 32 without getting the adverse judgment, under Article 226 set aside on appeal It was based on the principle of *res judicata* which is of universal application

1 Power of the Supreme Court to issue writs

The Supreme Court of India[8] is the highest court in India Articles 124 to 145 deal with the constitution and powers of the Supreme Court Under Article 32 the right to move the Supreme Court for the enforcement of the Fundamental Rights is guaranteed and the Supreme Court has been expressly empowered to issue directions or writs, including writs of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto and certiorari* whichever may be appropriate The rights guaranteed under Articl 32 cannot be suspended except as provided by the Constitution The Supreme Court has no power to issue such direction, orders or writs for any other purpose unless the Parliament specifically empowers it under Article 139 of the Constitution

Article 32 of the Constitution provides as follows

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part (Part III) of the Constitution

(2) The Supreme Court shall have power to issue directions or orders or writs including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, whichever may be appropriate for the enforcement of any of the rights conferred by this Part

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7 AIR 1961 SC 1957 and (1969) 1 SCC 110, 115

8 For details *see* chapter on Supreme Court of India in this Book For Constitution and Powers of the Supreme Court *See* Chapter IV of Part V of the *Constitution of India* 1950

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (3)

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution

(5) Article 32A added by the Constitution (Forty-Second Amendment) Act, 1976 however provides that under Article 32 the constitutional validity of a State law will not be considered unless the constitutional validity of a Central law is also in issue in such proceedings

It is, therefore, clear that the jurisdiction of the Supreme Court is exercisable only for the enforcement of the Fundamental Rights as conferred by Part III of the Constitution.[9] Article 32 will not apply to all other matters.[10] The combined effect of clauses (1) and (2) of Article 32 is that if a petitioner makes out a case for the violation of Fundamental Rights the grant of the appropriate writ under Article 32 is not discretionary but is a matter of right.[11]

2 Power of the High Courts to issue writs

Article 226 as substituted by the Constitution (Forty Second Amendment) Act, 1976 now provides that every High Court shall have power to issue, throughout the territories in relation to which it exercises jurisdiction, to issue to any person, authority or Government, directions, orders or writs, including writs in the nature of *habeas corpus mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, (i) for the enforcement of fundamental rights conferred by Part III of the Constitution, (ii) for the redress of any injury of a substantial nature by reason of the contravention of any other provision of this Constitution or any provision of any enactment or Ordinance or any order, rule, regulation, bye-law or other instrument made thereunder, or for the redress of any injury by reason of any illegality in any proceedings by or before any authority under any provision referred to in sub-clause (*b*) where such illegality has resulted in substantial failure of justice

Clause (2) of Article 226 clarifies that the High Court will have jurudiction even in cases where the cause of action arises

within its territorial jurisdiction but the seat of the Government or authority or residence of the person petitioned against is not within those territories

Clause (3) very emphatically lays down that the jurisdiction under Article 226 would not be available if any other remedy for such redress is provided for by or under any other law for the time being in force

To prevent misuse of the Court's power to grant interim order by way of injunction or stay order, clause (4) makes it clear that no such order will be made without affording full opportunity to the other side by supply of copies of the petition and documents proposed to be relied upon This requirement can be postponed in exceptional circumstances upon reasons being recorded by the High Court, for a period of fourteen days only No interim order will be issued at all where such order will have the effect of delaying any enquiry into a matter of public importance or any investigation or enquiry into an offence punishable with imprisonment or any action for the execution of any work or project of public utility, or the acquisition of any property for such execution, by the Government or any corporation owned or controlled by the Government

Where any Fundamental Right is infringed, an application under Article 226 should not be thrown out simply on the ground that the proper writ has not been prayed for [14] [22] The Court should give suitable protection to Fundamental Rights [22] A High Court is bound as much as the Supreme Court to enforce the Fundamental Rights guaranteed under the Constitution [23]

New Article 226A, however, states, that the High Court shall not consider the constitutional validity of any Central law, which function has now been reserved for the Supreme Court

Subject to what has been stated above the jurisdiction of the Supreme Court is concurrent with the High Court for the enforcement of fundamental rights This is also made clear by clause (7) of Article 226

3 Comparison between the Supreme Court's writ jurisdiction with that of the High Courts

Prior to the Forty-Second Amendment, the writ jurisdiction of the High Court was considered wider than that of the Supreme Court Under new Article 226 the writ jurisdiction of High

14 21 *Charanjit Lal* v *Union of India*, 1950 SCR 869, *State of Mysore* v *Chandrasekhara* AIR 1965 SC 532(537)
22 *Himmat Lal* v *State of M P*, 1964 SCR 1122
23 *Ibid*, *see* also *Deolal* v *S T O*, AIR 1965 SC 1150

Courts has been drastically cut The High Courts cannot entertain the writ petition if there is alternative remedy available and if the constitutionality of any Central law is involved On the same lines if the constitutionality of a State law alone is involved, the Supreme Court cannot entertain the writ petition However the rule of exhaustion of statutory remedies, as now provided in Article 226 does not find place in Article 32 so that if a case does not involve the constitutionality of a State law alone, the writ petition can be entertained by the Supreme Court, without going into the question of existence of alternative remedy Also the limitations imposed on the issue of interim orders in the form of injunctions and stay orders do not restrict the power of the Supreme Court as they do that of the High Court

The High Courts under Article 226 and the Supreme Court under Article 32 are empowered not only to issue five "prerogative writs" of English Law but also such other directions, orders, as may be appropriate in the circumstances of each case [24] [27]

D History of the Nature and Scope of each Writ

1 Writ of Habeas Corpus

It is a prerogative writ by which a person, who is confined or detained by any authority or person, can apply to the court and the court may issue an order to produce the person, so confined and detained, before the court The court may thus know on what grounds that person is confined and if there is no legal justification, the court will set him free

Tracing back the history of the writ of *habeas corpus* in India before the Constitution of 1950, one finds that the earliest case was *R V Vaghan* in the matter of Canesh Sundari It was the first case which the court considered before 1870 Next leading case was of *Ameer Khan* [28] In this case the question was regarding the jurisdiction of the High Court in issuing the writ of *habeas corpus* outside the Presidency town Norman, J , concluded, "The power of the late Supreme Court to issue writ of *habeas corpus* to persons in the mofussil has been asserted from the time of promulgation of the Charter (1774) to the present day " It was held that the High Court's power to issue a writ of *habeas corpus* was not confined to the Presidency towns, but extended to the mofussil as well This Bengal decision was subsequently followed by the Madras and Bombay High Courts Thus the three High Courts in the Presidency towns of Calcutta, Madras and Bombay, which were established by the Charter Act of 1861 (but not the High

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24 27 *Anwar Ali* v *State of West Bengal* AIR 1959 Cal 150, *Ram* v *State of Madras* AIR 1961 SC 1738

28 1870 Beng LR 392

Courts which were established subsequently) got the power to issue prerogative writs as successors of the three Supreme Courts respectively within the limits of their original jurisdiction

As explained by the Privy Council in *Ryot of Gorabandho v Paslalnmedi*[29], the old Supreme Courts possessed the power of issuing prerogative writs within the limits of their original jurisdiction and outside that jurisdiction only as regards "European subjects"

The Code of Criminal Procedure of 1872 was only applicable to the mofussil courts and it was ultimately consolidated in Act X of 1875. The Legislature under Section 82 took away, for certain purposes, the powers of the three Chartered High Courts to issue the writ *habeas corpus* within the limits of their original jurisdiction and conferred instead the power to make 'an order in the nature of *habeas corpus* for those specified purposes' Though this Act was repealed by the Code of Criminal Procedure of 1882, the jurisdiction which was not existing was not freshly added

In 1898, the Code of Criminal Procedure codified the right to the writ of *habeas corpus* by inserting Section 491 but in the original Code of 1861 Section 491 was confined to the High Courts in the three Presidency towns of Calcutta, Madras and Bombay and the power was exercisable by them only in respect of their 'ordinary original civil jurisdiction' Hence Section 491 was not available when the person detained was outside the limits of the Presidency towns [30]

The Criminal Procedure Amendment Act, 1923 extended Section 491 to all the High Courts and in respect of their 'appellate criminal jurisdiction', so that all the High Courts in India could exercise the jurisdiction under Section 491 in respect of their respective territorial jurisdictions but not when the prisoner was detained beyond the limits of such jurisdiction [31]

By enacting Section 491 had the Legislature taken away the power of the Chartered High Courts to issue the old prerogative writ of *habeas corpus* which they had inherited from the Supreme Courts? The question arose after Section 491 was introduced in the Criminal Procedure Code On this point there was a difference of opinion between the Calcutta[32] High Court on the

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29 (1947) 78 IA 129(167)
30 *Tops v Emperor*, ILR (1918) 46 Cal 52 *See also*, D D Basu *Commentaries on the Constitution of India*, Fifth Edition Vol 3, pp 440 441
31 *Sarangapani v Emperor* AIR 1946 Nag 30
32 *Girindra Nath v Birendra Nath*, (1927) 31 CWN 594(613) 54 Cal 727 (per Rankin, C J)

one hand, and the Madras[33] and Bombay[34] High Courts on the other The matter went up to the Privy Council The Privy Council[35] agreed with the Calcutta view that the Legislature (in exercise of the powers conferred by the High Courts Act, 1861) had taken away the power to issue the prerogative writ of *habeas corpus* in matters contemplated by Section 491 of the Criminal Procedure Code

The High Court was authorised to issue in a proper case an order under Section 491, Cr P C , only with reference to persons who were within its appellate criminal jurisdiction and whom it regarded as cases of illegal detention That section does not authorise the High Court to deal with persons who are so detained or alleged to have been so detained beyond its jurisdiction Hence the Nagpur High Court had no jurisdiction under Section 491 to take any action regarding a person detained in the Rajahmundry Jail[36] To attract the application of Section 491, Cr P C the person was required to be within the limits of the appellate criminal jurisdiction of the Court at the time of hearing of the application[37]

Thus when the Constitution of India came into force in 1950, none of the High Courts was having the power to issue the "Prerogative Writ of *habeas corpus*" and the relief, if any, was to be obtained only within the limits of Section 491 of the Criminal Procedure Code

Constitution of India and writ of Habeas Corpus —The scope of the writ of *habeas corpus* is increased under the Constitution of India 1950 Article 32 empowers the Supreme Court and Article 226 empowers the High Courts to issue the writ of *habeas corpus* for the enforcement of the Fundamental Rights of a citizen as guaranteed under Part III of the Constitution of India The distinction of the powers of the High Courts, which existed when the new Constitution was made was removed and all the High Courts were granted the jurisdiction to issue writ of *habeas corpus* The writ may also be issued for the redress of any injury of a substantial nature by reason of the contravention of any other provision of this Constitution or any provision of any enactment or Ordinance or any order, rule, regulation, bye law or other instrument made thereunder, or for the redress of any injury by reason of any illegality in any proceedings by or before any authority under any provision referred to in sub-clause (*b*) where such illegality has resulted in substantial failure of justice

33 *Re Govindan* (1922) 45 Mad 922(FB)
34 *Mohomedalli v Ismailji* (1926) 50 Bom 616
35 *Mathon v District Magistrate* AIR 1939 PC 213 (1939) 3 All ER (PC). See also *Emperor v Sibnath Banerji* AIR 1945 PC 156(158)
36 *M Sarangapani v Emperor* AIR 1946 Nag 30
37 *Lukhambhar Dayal v Emperor*, 1915 Oudh 117 20 Luck 333

The Constitution has also narrowed down the scope for the issue of the writ of *habeas corpus* by empowering the Legislatures to enact laws under Schedule VII[38] like the Preventive Detention Act, etc During emergency petition will not lie even under Section 491, Cr P C , 1898 [38a]

However, it is the duty of the court to set free an individual when once the court comes to the conclusion that there has been violation of the constitutional provisions as discussed above It naturally leads to the very important extension of the jurisdiction of the *habeas corpus* under the Constitution The constitutionality of the very statute under which the person has been arrested or detained can be challenged in the proceedings of *habeas corpus* Article 21 guarantees that no person shall be deprived of his personal liberty 'except according to procedure established by law , and the Supreme Court held that such law must be a valid law [39] Thus the question for a court, deciding a *habeas corpus* case, is whether the person is lawfully detained? If he is lawfully detained, the writ will not be issued On the other land if the court holds that he is illegally detained the court will have to issue the writ of *habeas corpus* as it is a Fundamental Right guaranteed to a citizen of India under the Constitution

2 Writ of Mandamus

"*Mandamus*" literally means a command Blackstone said "A writ of *mandamus* is, in general, a command issuing in the King's name from the Court of King's Bench and directed to any person, corporation or inferior Court of Judicature within the King's Dominion, requiring them to do some particular thing therein specified which appertains in their office and duty " [40]

Articles 32 and 226 of the Constitution of India refer only to the 'prerogative writ of *mandamus*' as distinguished from other common law or statutory forms of a writ or order of *mandamus* obtained in England

(i) History before 1950 —The Chartered High Courts of Calcutta, Madras and Bombay were empowered to issue writs of *mandamus* within the local limits of their ordinary original civil jurisdiction *Justices of Peace* v *Oriental Company*, was the earliest case in which the Calcutta High Court issued writ of *mandamus* on Justices of the Peace who were within the town of Calcutta By Section 45 of the Specific Relief Act, 1877 completely took away the

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38 *The Constitution of India*, Sch VII List I Entry 9, List III, Entry 3

38a *Makhan Singh* v *State of Punjab* AIR 1964 SC 381

39 *Gopalan* v *State of Madras* AIR 1950 SC 27, *Ram Narayan* v *State of Delhi* (1953) SCR 652

40 3 *Blackstone's Commentaries*, 110

jurisdiction of the three High Courts to issue writ of *mandamus* It provided, "neither the High Court nor any Judge thereof shall hereafter issue any writ of *mandamus*" On the basis of the previous Charters of 1861, 1862 doubts were expressed whether the Specific Relief Act was entitled to take away the jurisdiction of the High Courts in this respect But Section 45 of the Specific Relief Act, 1877 empowered the three High Courts to issue *orders* in the nature of writ of *mandamus* It provided, "any of the High Courts of Judicature of (Calcutta, Madras and Bombay) may make an order requiring any specific act to be done or forborne, within the local limits at its ordinary civil jurisdiction, by any person holding a public office, whether of a permanent or temporary nature or by any corporation or inferior court of judicature, Provided " The proviso to Section 45 prevents any such order being made to the Secretary of State, the Central Government, Crown Representative or any Provincial Government The power to issue writ of *mandamus* was taken away by Section 50 but by Section 45 of the Specific Relief Act the High Courts were authorised to issue orders in the nature of *mandamus* Thus the change was in the form only

The jurisdiction of the three Chartered High Courts to pass an order under Section 45 was discretionary The jurisdiction was to be exercised for the protection of the rights of the public but condition was very necessary as remedy was of a summary nature and coercive in character [1] [2]

(ii) **Under Constitution of India** —The old difference amongst High Courts regarding the power to issue writ of *mandamus* was removed under the Constitution of 1950 The Constitution of India now confers under Article 32 and Article 226 powers on the Supreme Court and all the High Courts respectively to issue the writ of *mandamus* Under the Constitution the writ of *mandamus* can be issued for the enforcement of "Fundamental Rights" and for the redress of any injury of a substantial nature by reason of the contravention of any other provision of this Constitution or any provision of any enactment or Ordinance or any order, rule, regulation, bye-law or other instrument made thereunder, or for the redress of any injury by reason of any illegality in any proceedings by or before any authority under any provision referred to in sub-clause (*b*) where such illegality has resulted in substantial failure of justice Under Articles 32 and 226 the Supreme Court and the High Courts are under a duty to issue writ of *mandamus* for the enforcement of Fundamental Rights when an applicant whose rights are infringed applies for it

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41-46 *Shanker Lal* v. *M C Bombay* 1939 Lom 481

The object of the writ of *mandamus* is only to compel any public authority, including administrative and local bodies to act When it has been shown that a tribunal has declined to consider matter which it ought to have considered or has not decided the case according to law, the writ of *mandamus* will compel such authority to act

The writ of *mandamus* will not issue to correct an error or irregularity in the judgment of a court which could be corrected by appeal or revision,[47] where effective and convenient remedy is provided by the statute which created the right which is infring ed,[48] where the aggrieved party would get an adequate remedy by an ordinary action[49] *in the civil court*

The writ of *mandamus* will not be granted against some persons as follows (*a*) The President or the Governor of a State for the exercise and performance of the powers and duties of his office (*b*) Against the Legislature[50] (*c*) *Against persons who are not* holders of public offices[51] (*d*) Against an inferior or ministerial officer who is obeying the orders of his higher authority[52]

4 Writ of Prohibition

The writ of *prohibition* is a prerogative writ, issued by a superior Court to an inferior court directing the inferior court not to exceed from the limits of its jurisdiction in the performance of its judicial duties[53] In its origin in England its main object was the maintenance of the King's prerogative upon which depen ded public order in the administration of law[54]

The first case in which the Calcutta High Court asserted its jurisdiction to issue the writ of *prohibition* is to be found in *Re National Carbon Company*[55] In *Indumati Devi* v *Bengal Court of Wards*[56] prohibiting them from acting upon their order whereby they declared the petitioner as disqualified proprietor and taking possession of her properties situated outside Calcutta, the writ was

47 *Vishwanath* v *Second Additional D t Judge* AIR 1951 Nag [illegible]
48 *Rashid* v *I T I Comm on* 1954 SCR 738 *V ofa Ra an* 1953 SCR 583
49 *Moti Lal* v *U P* AIR 1951 All 257 (265) FB
50 *Choley Lal* v *State of U P* AIR 1951 All 228
51 *Laxman* v *Ra p amukh* AIR 1953 MB 54
52 *In re Babul Chand a* AIR 1953 Pat 303 (311)
53 *S r Mu I* v *Con ss one* AIR 1952 Mad 1113 (1117)
54 *Worthington* v *Jeffries* 1875 LR 10 CP 379 *Co* v *Mayor of London* (1867)2 HL 239 (254)
55 1934 C 725 61 C 450
56 42 CWN 230

issued Section 45, Specific Relief Act, which deals with the forbearing of an act does not in terms deal with the writ of *prohibition* This section has not restricted the jurisdiction of the High Court to issue a writ of *prohibition* and it cannot be said that the jurisdiction of the High Court to issue writ of *prohibition* has been impliedly taken away, particularly when the Legislature has deliberately provided in Section 50 of that Act that the writ of *mandamus* (only) could not be issued thereafter [57]

The Bombay High Court,[58] just like other Chartered High Courts, had authority to issue writ of *prohibition* to any subordinate court to stop proceedings in a suit pending before it

"*In re National Carbon Co* [59], the Calcutta High Court held that it had power in its ordinary original civil jurisdictions to issue a writ of *prohibition* against the Collector of Patents and Designs as it had inherited all the powers of the Supreme Court except such as might have been specifically taken away by statute Reference may be made in this connection to *Narayan Vithal* v *Janki Bai*,[60] where it was held by a Full Bench of the Bombay High Court that when sitting as an appellate Court the High Court was empowered to issue writ of *prohibition* to a court in the mofussil [61] This Court sitting as a Court of revision, and not as an original Court, had power to issue writ of *prohibition* in respect of proceedings in subordinate courts

The Constitution of India, 1950 has removed the old distinction of the High Courts and now all the High Courts enjoy the same powers Under Article 32 the Supreme Court, and under Article 226 the High Courts are given powers to issue writ of *prohibition* Now the writ of *prohibition* issues out of the High Court to prevent an inferior court or tribunal, judicial or *quasi* judicial, from exceeding its jurisdiction or acting contrary to the rules of natural justice, *e g* , to prevent a Judge from hearing a case in which he is personally interested [62] Writ of *prohibition* will issue to prevent the tribunal from proceeding further when the inferior court or tribunal proceeds to act—(*a*) without[63] or in excess of jurisdiction,[64] (*b*) in violation of the rules of natural justice,[65] (*c*)

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57 *Dinabai* v *M S Noronha* 1946 B 407
58 *Ahdoon & Co Ltd* v *Chief Revenue Authority Bombay* 50 I A 227
59 [1933 Cal 596 38 CW N 725]
60 [53 Bom 604]
61 *Sultan Ali* v *Nur Hussain* 1949 L 131 (147)
62 *Shantaram D Salvi* v *M M Chudasama* AIR 1954 Bom 361
63 *East Ind a Commercial Co* v *Collector of Customs*, AIR 1962 SC 1893
64 *Seripanrao* v *Collector of Customs* AIR 1958 SC 845 (855)
65 *Manak Lal* v *Prem Chand* AIR 1957 SC 425 (431)

under a law which is itself *ultra vires* or unconstitutional,[66] and (*d*) in contravention of Fundamental Rights.[67]

4 Writ of Certiorari

The writ of *certiorari* is a prerogative writ whereby the superior courts restrict the lower courts and courts of special jurisdiction from exceeding their function as prescribed by law.

Viscount Simon, L. C., in the leading case *Ryots of Garbandho v Zamindar of Parlakimedi*[68] described the nature and scope of the writ of *certiorari* thus: "The ancient writ of *certiorari* in England is an original writ which may issue out of a superior court requiring that the record of the proceedings in some cause or matter pending before an inferior court should be transmitted into the superior court to be there dealt with. The writ is so named because in its original Latin form it required that the King should 'be certified' of the proceedings to be investigated and the object is to secure by the exercise of the authority of a superior court, that the jurisdiction of the inferior tribunal should be properly exercised. Broadly speaking it may be said that if the act done by the inferior body is a judicial act, as distinguished from being a ministerial act, *certiorari* will lie. This remedy is derived from the superintending authority which the Sovereign's superior courts and in particular King's Bench possess and exercise over inferior jurisdiction. This principle has been transplanted to other parts of the King's dominions and operates, within certain limits, in British India."

The earliest case in which a writ of *certiorari* was issued by the Calcutta High Court was in *Sagar Dutt's case*. In this case Norman, Phear, JJ. removed the proceedings from the Court of the Justices of the Peace for the town of Calcutta and quashed the conviction. The jurisdiction of the three Chartered High Courts to issue the writ of *certiorari* was recognised by the judicial committee of the Privy Council which approved *Nand Lal Bose's case*.[69] A study of the cases decided by Calcutta High Court reveals that in no case the High Court issued writ of *certiorari* outside the town of Calcutta to any court or any person or body of persons exercising judicial functions.

In *Pennegonda Venkataraman v Secretary of State for India*[70]

66 *Sales Tax Officer v Budh Prakash* (1955) 1 SCR 243
67 *Bidi Supply Co v Union of India* 1956 SCR 267 (277 B)
68 AIR 1943 PC 164 70 IA 129
69 ILR 1885 Cal 975
70 ILR 1929 Mad 179

Venkata Subha Rao, J agreed with he view of Sadasiva Ayyer, J and the writ of *certiorari* was issued by the Madras High Court independently of its jurisdiction over the Presidency town and over British subjects or their servants It was the first case in which the Madras High Court issued writ of *certiorari*

The jurisdiction to issue writ of *certiorari* was vested in the Supreme Court of judicature at Bombay by clause (5) of the Charter which established the Supreme Court in Bombay The conditions necessary for the High Court to exercise this jurisdiction would appear to be that there should be a body of persons—(i) having legal authority (ii) to determine the questions affecting rights of subjects, (iii) having authority to act judicially, and (iv) they should act in excess of their authority If these conditions were fulfilled, there was a suitable case for the issue of writ of *certiorari* [71]

Thus the jurisdiction which the High Courts exercised in the matter of the issue of *certiorari*, which was invested in the old Supreme Courts and was invested in the High Courts (Chartered), was jurisdiction over the inhabitants of the Presidency towns and also persons who were amenable to that jurisdiction Where the Board of Revenue was situated within the limits of Presidency town, the Privy Council pronounced the scope of jurisdiction by Viscount Simon, L C "The Board of Revenue has always its officers in the Presidency town, and in the present case Collective Board which made the order complained issued that order in the town On the other hand, the parties are not subject to the original jurisdiction of the High Court and the estate of *Pralakimedi* lies in the north of the Province Their Lordships think 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 in the matter of settlement of Rents for Ryots holdings in Ganjam between parties not otherwise subject to its jurisdiction, which it would not have had over the Revenue Officer who dealt with the matter at first instance [72]

Under the Constitution of India, all High Courts of India are given powers to issue writ of *certiorari* under Article 226 Article 32 empowers the Supreme Court to issue writ of *certiorari* for the enforcement of Fundamental Rights Under the Constitutional provisions the writ of *certiorari* can be issued for mainly two purposes In the first instance both the Supreme Court and all the High Courts are empowered to issue writ of *certiorari* for the enforcement of Fundamental Rights It is not a discretion but

71 See *Jugal Lal Kamlapat v Collector of Bombay* 1946 F.280(290
72 *Ryots of Garibandha v Zamindar of Pralakimedi* 1943 PC 164 70 IA 123

it is a constitutional duty of the Supreme Court and High Courts to issue writ of *certiorari* where an applicant has applied and if it is a suitable case Secondly, only High Courts under Article 226 are given the power to issue the writ of *certiorari* for the redress of any injury of a substantial nature by reason of the contravention of any other provision of any enactment or Ordinance or any order, rule, regulation, bye law or other instrument made thereunder, or for the redress of any injury by reason of any illegality in any proceedings by or before any authority under any provision referred to in sub clause (*b*) where such illegality has resulted in substantial failure of justice In such cases the writ will lie according to the general principles governing *certiorari*

Writ of *certiorari* has so far been used in India to quash the decisions of inferior courts or tribunals It is not used for removing proceedings to the High Courts for trial, probably because that is possible under Article 268 of the Constitution[73] and Section 526[74] of the Criminal Procedure Code, 1898

In *T C Basappa* v *Nagappa*[75], Mukherjee, J of the Supreme Court said, "One of the fundamental principles in regard to the issuing of a writ of *certiorari* is that the writ can be availed of only to remove or adjudicate on the validity of judical acts The expression 'judicial acts' includes the exercise of quasi judicial functions by administrative bodies or authorities or persons obliged to exercise such functions and is used in contrast with what are purely ministerial acts"

Whenever a writ of *certiorari* is brought, the court must therefore determine, if the act complained of is judicial, quasi judicial or purely administrative The duty to act judicially may also arise by implication though the Act itself may not prescribe a procedure embodying the essential elements of judicial approach In a Calcutta case,[76] it has been held that the use of words like "adjudication" or "adjudges" in the provision conferring the power, indicated an intention that the authority was to act *judicially* In *Ishwari Prasad* v *Registrar of Allahabad University*[77], it was held that the Chancellor had to act judicially in deciding the reference made to him under Section 42 of the Allahabad University Act

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73 Article 228 empowers the High Court to transfer to itself any case pending in a court subordinate to it if it involves a substantial question of law as to the interpretation of the Constitution

74 Section 526 of the Cr P C empowers the High Court to transfer to itself for trial any criminal case or appeal

75 AIR 1954 SC 440

76 *Dipa Pal* v *University of Calcutta* AIR 1952 Cal 591

77 AIR 1955 All 13

The court issuing a writ of *certiorari* acts in exercise of a supervisory and not appellate jurisdiction One consequence of this is that the court will not review findings of facts reached by the inferior court or tribunal even if they be erroneous The purpose of the writ is to demolish the order which it considers to be without jurisdiction or palpably erroneous The Court will not substitute its own view on the merits [78]

The object of writ of *certiorari* is to restrain a tribunal established by law from usurping a jurisdiction which is not conferred by the Legislature It will not be issued, therefore, where the authority or body of persons whose decision, is complained of has no legal authority to act as a tribunal, i e to act in a judicial capacity In such a case its acts need not be quashed by *certiorari*

Difference between writs of Prohibition and Certiorari —In spite of some similarities between them there is great difference between the writs of *prohibition* and *certiorari* Both writs are available against the same class of persons, namely, authorities exercising judicial or quasi judicial powers And the ground of intervention of the superior court is the same, namely 'defect of jurisdiction' In India, violation of Fundamental Rights or unconstitutionality is another important ground for intervention

They still differ in various respects [79] The writs of *prohibition* and *certiorari* are issued at different stages of the proceedings before the inferior court or quasi judicial tribunal The object of *prohibition* is prevention while *certiorari* may serve the dual purpose of prevention or cure *Prohibition* restrains the tribunal from proceeding further in excess of jurisdiction, *certiorari* requires the record or the order of court to be sent to the superior court to have its legality inquired into, and if necessary, to have the order quashed [80] Where a final decision has been made by the inferior court, *Prohibition* is obviously useless, but *certiorari* is available to enable the High Court to quash the decision Where a decision has been given, *prohibition* will not lie unless there are pending proceedings for enforcement of that decision But if there are no such proceedings pending, it is too late to issue *prohibition* and the *certiorari* will be the proper remedy for it

5 Writ of Quo Warranto

In early times in England the writ of *quo warranto* was issued

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78 *Hari Vishnu v Ahmed Ishaque* AIR 1955 SC 233

79 *Hari Vishnu v Ahmed* (1955) 1 SCR 1104 (1117), *R Vaidyam v State of M P*, AIR 1959 SC 107 (115 117)

80 *R v Electricity Commissioners* (1924) 1 KB 171 (205) For details see D D Basu, *Commentaries on Constitution of India* Fifth Edn Vol III pp 516-518

at the instance of the King against any subject who claimed or usurped any office, franchise or privilege of the Crown to enquire by what authority he supported his claim The writ of *quo warranto* in due course fell into disuse and led to the substitution of the proceedings by way of information in the nature of *quo warranto* Since that time there has been a tendency to extend the remedy The remedy came to be available to private persons of usurpation of any office created by Charter or Statute provided that the office be of a public nature and a substantive office Under Section 9 of the Administration of Justice (Misc Provisions) Act, 1938 (1 2 Geo VI Ch 63) information in the nature of *quo warranto* was abolished The High Court granted an injunction restraining any person from acting in an office in which he is not entitled to act

Before the Constitution of 1950 the three High Courts in the Presidency towns were empowered to issue writ of *quo warranto* within the limits of their original jurisdiction

The Constitution of India, under Article 32(2) and Article 226 has empowered the Supreme Court and the High Courts to issue writ of *quo warranto* The object of this writ is to prevent a person who has wrongfully usurped an office from continuing in that office This writ calls upon the holder of the office to show the court under what authority he holds that office In India the writ of *quo warranto* has been used for two purposes, namely, in cases of (*a*) usurpations of a public office, which is filled by appointment, (*b*) election to a public office, including office in a public corporation The judicial decisions which will explain the nature and position of the writ of *quo warranto* are as follows

In *G D Karkare* v *T L Shevde*[81] the petitioner applied to the High Court for the issue of a writ of *quo warranto* against the Advocate General of the State on the allegation that he was guilty of intrusion into the office of the Advocate-General, for at the date of appointment he did not possess the necessary qualifications prescribed for that office It was held by the Nagpur High Court that a writ of *quo warranto* could issue as the office of the Advocate General was of a public nature It became, therefore clear that this will lie in respect of a public office of a substantial nature

In *Jamalpur Arya Samaj* v *Dr D Ram*,[82] the petitioner moved the High Court for issue of a writ of *quo warranto* against the members of the working committee of the Bihar Raj Arya Pratinidhi Sabha, a private religious association The High Court refused the writ on the ground that a writ of *quo-warranto* does not lie against offices of private nature

81 AIR 1952 Nag 330, *see also Hamid Hasan* v *Banwari Lal Ray* AIR 1947 PC 90

82 AIR 1954 Pat 297

The power under Article 226 is exercisable ordinarily for the enforcement of a right or performance of a duty at the instance of the person who has been personally affected But an application for the writ of *quo warranto* challenging the legality of an appointment to an office of a public nature is maintainable at the instance of any private person, although he is not personally interested or aggrieved in the matter In *G D Karkare* v *T L Shreds*[83] the Nagpur High Court observed thus "In proceedings for a writ of *quo-warranto* the applicant does not seek to enforce any right of his as such nor does he complain of any non performance of duty to him What is in question is the right of the applicant to hold the office and an order that is passed is an order ousting him from that office"

83 AIR 1952 Nag 330, see also *Bimal Chandra* v *Governor of West Bengal* AIR 1952 Cal 799

15

Constitutional History of India

The legacy which we have inherited from the ancient Hindu period is a very rich legacy [1] It is more socio religious than political The political institutions, built by Hindus during the period of their ascendancy in ancient days[2] and by the Muslims[3] when they wielded the sceptre, have become a thing of the past. The British, when they became politically strong in India, built a new constitutional structure on their experience in England to suit their political ends in India They realised great difficulty in completely ignoring the social inheritance of India The interaction between political institutions and the rest of human life has varied from time to time and country to country It is not a surprise if Indian peculiarities continued to mould and shape even English ideas and institutions which were gradually introduced by the British in India

A study of the landmarks in the "Constitutional History of India", relating to the British period and after Independence can be made under three parts, as follows

A India under East India Company, 1600-1858

B India under the Crown, 1858 1947

C Independent India, 1947-1976

A India under the East India Company 1600 1858

1 Early Charters and growth of Company's power

The English East India Company came to India as a trading body in 1601 Queen Elizabeth granted a Charter in 1600 to the Company for the purpose of trade in India and East Indies The Charter of 1600 empowered the Company "to make laws, ordinances, *etc* for the good government of the Company and its servants and to punish offences against them by fine or imprisonment according to laws, statutes and customs of the realm" The Charter was not intended to control any territorial acquisition by the Company in India James I granted a new Charter in 1609

1 *See* Kane, *History of Dharmasastra* Vol III, Chap XI, A L Basham *The Wonder that was Ind a* R C Dutt *The Early Hindu Civilisation*
2 For details *see* Chap I, at pp 1 6 of this Book
3. *See* Chap I, at pp 18 20 of this Book

to the Company which continued its privileges Subsequent Charters were granted to the Company in 1615, 1623 and 1635

The East India Company entered into a new era in 1660 when the Company regained its prosperity and changed its character from a purely trading concern to a territorial power In 1661 Charles I granted a new Charter to the Company It reorganised the Company's structure and authorised the Company to appoint Governors and other officers for the proper control and administration of the factories and trading centres They were also empowered to administer civil and criminal justice with respect to persons employed under them

From 1668 to 1726 various Charters[4] were granted to the Company from time to time in order to empower the Company to deal with new situations and to control its employees in India The Charter of 1726 reorganised the municipal and judicial institutions at Calcutta, Bombay and Madras At these three Presidency towns, Mayor's Courts were established to administer justice The Charter of 1753 reconstituted the Mayor's Court at the three Presidency towns The Battle of Plassey in 1757 and the Battle of Buxar in 1764 gave rise to serious political consequences In 1765 the Mughal Emperor granted Diwani of Bengal, Bihar and Orissa to the East India Company In 1772 Warren Hastings was transferred from Madras to the Governorship of Calcutta He strengthend the political power of the Company and laid a strong foundation for the British Empire in India

The mal administration of the Company's internal administration, led to the growth of corruption in the employees of the Company and other evils also followed The Company was also faced with financial difficulty The British Parliament, therefore, appointed a Select Committee and a Secret Committee to make intensive study of the Company s affairs On the findings and reports of the Committees the British Parliament passed the famous Regulating Act of 1773

2 Period of Parliamentary Control and the Company

(1) The Regulating Act, 1773—The enactment of the Regulating Act of 1773 was the first major intervention of the British Parliament in the Indian affairs of Company It was the beginning of Parliamentary control over Indian affairs Its historical importance lie in the fact that it played an important role in shaping and moulding the structure of the Company's Government in future The Regulating Act provided for three important, things

(*a*) It changed the structure of the Company in England

4 *See* at pp 37-40 of this Book

and also changed the structure of the Government of the Company in India

(*b*) It brought the Presidencies of Bombay and Madras to some extent under the control of the Governor-General of Bengal and thereby subjected the whole of the Company's territories to one supreme Council in India

(*c*) The supervision of the Company was entrusted to the Ministry in England

The Regulating Act[5] appointed a Governor General and four Councillors for the government of the Presidency of Fort William who were to hold office for five years and were made the supreme authority in India The Governor General and Council were authorised to make and issue rules, ordinances and regulations for the good order and civil government of the Company's settlements at Fort William and other factories in the Presidencies *The Regulating Act, therefore, for the first time introduced the idea of the federal system of Government in India*

It was also provided by the Regulating Act that, "no rules, ordinances and regulations made by the Governor General and his Council" will be valid and have effect until registered in the Supreme Court and approved by it

The Regulating Act also empowered the King to establish by Charter a Supreme Court at Bengal The Supreme Court was accordingly established by the Charter of 1774 Thus the Regulating Act created two authorities—Supreme Council and Supreme Court in India

Defects in the Regulating Act – The Regulating Act gave the first constitution to the Company's Government in India It is said that behind the British Parliamentary intervention in Indian affairs the main motive was financial and political Many grave defects in the Regulating Act came to light when the working of the two supreme authorities began according to the provisions of the Act

The Act required that all the decisions of the Governor General in Council will be made by a majority vote and the Governor General was not given power to override his Council It made the position of the Governor General weak and while taking any decision he depended mostly on his Council Apart from this, other defects were regarding (i) the nature and authority exercisable by the Governor General and his Council, (ii) the jurisdiction of the Supreme Court and (iii) the relation between

5 Chap V of this Book deals with a detailed account of the Regulating Act and the Supreme Courts of Judicature

the Bengal Government and the Court were not clearly defined and were defective

As a result of these defects several important cases *e g Trial of Raja Nand Kumar, Kamal ud din's Case, the Patna Case, The Cossijurah Case, etc*, became prominent The British Parliament also realized the defects in the Regulating Act and changes were introduced in 1781

Whatever may be the defects, the Regulating Act is a land mark in the constitutional development of India It introduced the principle of the federal type of Government It was the first constitutional Act which moulded and shaped the future structure of the Government of India

(ii) **Act of Settlement, 1781** [1]—It was passed by the British Parliament in order to define the powers of the Supreme Court and settle some of the conflicting issues which arose due to the defective provisions of the Regulating Act Its provisions were as follows

(*a*) It granted immunity to the Governor General and Council from the jurisdiction of the Supreme Court

(*b*) It provided that the Supreme Court will not have no jurisdiction in any matter concerning the revenue or any acts ordered or done in the collection of revenue

(*c*) It exempted *Zamindars* and the land holders from the jurisdiction of the Supreme Court

(*d*) It exempted judicial officers from the jurisdiction of the Supreme Court

(*e*) It recognised the Provincial Courts of the Company

(*f*) It stated that English Law was not applicable to natives.

(*g*) Where parties were of different religion, it provided that the law of the defendant should be applied.

(*h*) It authorised the Governor General and Council to frame independently regulations for the Provincial Councils and Courts It was not necessary for them to get the approval of the Supreme Court for the validity of their regulations

In the history of Indian legislation, the Act of 1781, is considered to be of great importance as it empowered the Governor-General and his Council to frame regulations independently for the Councils and Courts Earlier, the Regulating Act required that they will be registered with the Supreme Court The Act of 1781 abolished this provision and made the Governor General and Council independent of the Supreme Court Copies of the these

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[1] For details see Chap V (*e*) Act of Settlement 1781 at pp 148-151

regulations were required to be sent to the Court of Directors and the Secretary of State

(iii) **Pitt's India Act, 1784** —It is another landmark in the constitutional development of India It made important changes in the administrative system of the Company in India It reduced the strength of the Councils from four members to three The Governments of Bombay and Madras were made subordinate to the Governor-General in Council of Bengal Its special significance also lies in the fact that it subjected Company's Government to the British Government's superintendence and control The power of the Court of Directors in all political and diplomatic matters was transferred to the Board of Control This system of control continued in England up to 1858

The Board of Control was set up under the Pitt's Act, 1784 It was empowered 'to superintend, direct and control all acts, operations and concerns which in any way relate to the civil or military government or revenues of the British possessions in East Indies'.

The Act provided that a copy of all despatches from Company's Government in India will go to the Board of Control The Board of Control issued orders and instructions to and through the Court of Directors but it was also given power to send the orders directly to a Committee of Secrecy of three persons (which was newly established by this Act) to be sent to the Company's officers in India. By practice and by convention the powers of the Board were gradually concentrated in the President, a member of the cabinet The Directors were still given some powers to seek their co operation It is also said that the Pitt's Act of 1784 introduced dual or double Government because Indian affairs were managed in England by two authorities, namely, the Board of Control and the Court of Directors

The Act of 1784 increased the control of the Governor-General and his Council over the Governments of Bombay and Madras

The centralisation of the legislative and administrative machinery, and the steps towards unification which were initially taken by the Regulating Act were taken a step further by the Pitt's India Act of 1784.

(iv) **Act of 1786** —Lord Cornwallis accepted the Governor-General's office on two conditions, namely, that he would also be the Commander-in Chief, and the Governor-General should be given power to overrule his Council whenever he considered it necessary Lord Cornwallis laid down these two conditions after making intensive study of the frictions which developed during Warren Hasting's period The British Parliament, in order to

accomodate Lord Cornwallis passed the Act of 1785 It provides that the Governor General will also be the Commander in Chief of the Forces and it enabled the Governor General to override his council whenever he considered it necessary Lord Cornwallis became famous due to his important judicial reforms in Bengal He introduced the "Permanet Settlement of Bengal"

(v) **The Charter Act of 1793** —The Act of 1793 renewed the trade monopoly of the Company for another period of twenty years and changed the constitution of the Board of Control by reducing the number of its members from six to five It also provided for the payment of salaries and expenses of staff of the Board out of Indian revenues

The Charter Act of 1793 contributed to the growth of the central power in India. The Governor General of Bengal was not Governor General of India, still he and his Council were empowered to superintend, direct and control the Governments of Bombay and Madras The Act provided that the Governor-General will supersede the local Governors whenever he will be either in Bombay or Madras He was also authorised to supersede the local Governor as the head of the administration and preside at the meeting of the Council The Act also required that an annual statement about the affairs of the Company in both England and India will be placed before the Parliament

(vi) **Charter Act of 1813** —The Charter of 1813 renewed the Charter of the Company for a period of twenty years For the first time it asserted the sovereignty of the British Crown over the Indian territories and thus removed the doubts created by constitutional controversy

The Charter Act laid two restrictions on the patronage of the Company The appointment of the Governor General, Governors and the Commander-in Chief hereforward required the approval of the Crown, and that of members of the Councils the approval of the President of the Board of Control Secondly, it was made necessary for persons intended to join the Company's service to fulfil the requirement of four term's residence at Haileybury It was a sort of training for the members of the civil service

Several Acts were passed by the Parliament during the twenty years which followed the Charter Act of 1813 which gave additional powers to the Company authorities By an Act of 1814 the Governor General and Council and Governors in Council were authorized to impose taxes and duties within their respective Presidency towns Regulations were directed to be framed in this respect An Act of 1823 established a Supreme Court in Bombay in place of the old Recorder's Court The Company was also empowered to appoint Justices of the Peace from among Europeans

in India other than those under its service In 1823, many changes were introduced in the judicial administration of the country by various regulations

The Charter Act of 1813 also provided that the copies of all the laws made by the three councils should be laid annually before the Parliament It was done with a view to have strict control over the legislative powers of the Councils in India Thus there existed in India three separate legislative bodies to pass regulations for their respective territories By the experience of twenty years the necessity of a central Legislature to govern all the Presidencies was realised However, this matter was taken up by the Parliament at the time of granting a new Charter in 1833 to the Company

(vii) **Charter Act of 1833**[7] —It was passed by the British Parliament when "the Whig Liberal principles were politically victorious, when Macaulay was Secretary to the Board of Control, and James Mill, the disciple of Benthem and admirer of his views on legislation and codification was examiner of correspondence at the India House"[8]

The Charter Act of 1833[9] allowed the Company to retain its political and administrative power for the next twenty years *i e* till April 30, 1854 The Charter granted to the Company the power to administer the territory and revenue "in trust for His Majesty, his heirs and successors, for the service of the Government of India' It imposed a restriction on its commercial activities and the Company ceased to be a trading corporation The provisions of the Charter Act of 1833 are discussed in detail eailier in Chapter XI, it is proposed here to state briefly some important highlights of the provisions of the Charter of 1833, as follows

(*a*) It introduced changes in the constitution of the Board of trade The President of the Board became a Minister for Indian Affairs and two Assistant Commissioners were appointed to assist him

(*b*) The Act removed all restrictions on the admission of Britishers into India It also empowered the Governor General in Council to make law or regulation "to provide with all convenient speed for the protection of natives of the said territories from insults and outrages in their persons, religions or opinions"

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7 For detailed study *see* Chapter XII Charter Act 1833 and Codification by Law Commissions in India, in this Book

8 Keith *Constitutional History of India* p 131

9 It was passed on August 28 1833 and came into force on April 22, 1834

(c) The administration of India was centralised and various steps were taken in this direction The Governor-General of Bengal was designated as the Governor General of India The Governors and Councils of the Presidencies of Madras and Bombay were directed to obey all the orders and instructions issued by the Governor General in Council For the whole country only one budget was prepared by the Governor General in Council

The Governor General in Council at Calcutta was also empowered to make laws and regulations for all persons living in the Company's territories in India Thus the power of the Presidencies to make rules and regulations was taken away by the Act

The Indian Law Commission was appointed under Macaulay to study, collect and codify the various rules and regulations, civil and criminal after making a detailed study

Laws made by the Governor General in Council did not require registration in any court but they were to be placed before the British Parliament through the Board of Control All legislations were now called "Acts" instead of "Regulations"

(d) The Council of the Governor General was enlarged and a fourth member (known as Law Member) was added to it But the fourth member was not entitled to vote except when the Council met for the purposes of making laws

(e) It provided that no native or natural born subject of the Crown residing in India could "by reason only of his religion, place of birth, descent, colour or any of them", be disabled from holding any place, office or employment under the Company But in practice it was not implemented

(viii) **The Charter Act of 1853**.—When the time for the renewal of the Company's Charter came in 1853, there was opposition from Indians and Englishmen for leaving Indian territories in the hands of the Company Petitions from the residents of Calcutta, Bombay and Madras (duly signed) were presented to the British Parliament

However, the Charter Act of 1853 was passed It simply provided that the Company would retain possession of territories in India and govern them "in trust for Her Majesty, Her heirs and successors, until Parliament should otherwise direct" This time the Company's Charter was not renewed for any fixed time

It was left at the discretion of the British Parliament to terminate the Company's authority whenever it considered suitable The Act introduced changes in the Company's authorities in England

One of the important provision of the Act of 1853 made far-reaching changes in the machinery for legislation in India The Law Member of the Governor General's Council was given a status similar to the other three members of the Council He was now entitled to sit and vote at executive meetings of the Council The executive Council was enlarged for the purposes of legislation by adding six more members, namely, one Chief Justice one other Judge of a Supreme Court, and four provincial representatives Apart from these six members other six members were—the Gover nor General, the Commander in Chief, three ordinary members and one law member Thus in all the legislation making Council consisted of twelve members The quorum was fixed at seven It was the beginning of a distinction between executive and legisla tive functions of the Government of India In the legislative Council all the members were officially appointed and no non official member was appointed in it It, therefore is a landmark in the legislative history of India

The Charter Act of 1853 appointed a Second Law Commis sion Its members were required to work in England and give final form to the drafts prepared by the First Law Commission [10]

(ix) The Act of 1854 —The British Parliament by an Act of 1854 empowered the Governor General in Council to appoint spe cial administrative officers in certain areas and to delegate them the necessary powers These officers were appointed for Assam, Central Provinces, Burma, *etc* , and were called Chief Commis sioners

Summarising the constitutional position up to 1858, it can be stated that the sovereignty over the territories acquired by the East India Company, vested in the Crown but the territorial possession, their revenues and administration were left in the hands of the Company Thus the functions of Government and respon sibility were divided between three bodies, namely, the Court of Directors and the Board of Control in England and the Governor-General in India

3 Opposition of Company's rule and the Government of India Act, 1858

In England gradually steps were taken by the Charters of 1833 and 1853 to reduce the importance and power of the Court of

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10 For the contributions of the Second Law Commission, *see* Chap XII

Directors of the Company The grounds were prepared to abolish the East India Company and transfer the Government of the Indian territories to the British Crown

The events of 1857, which are known as the Sepoy Rebellion or Mutiny or the First War of Indian Independence, greatly influenced the English people and statesmen to think about the future relationship of the Crown with the Company's territories Its major effect on the growth of the constitution was that the British Government decided to take early steps to uproot the evils of the system of double Government which was introduced by the Pitt's India Act of 1784 The only solution they thought out was to transfer the Company's government of India to the Crown and to remove the long standing constitutional confusion Thus the Mutiny decided the fate of the Company's rule in India and the Government of India Act, 1858 transferred the Company's government of India to the Crown and abolished the Company

(i) **The Government of India Act, 1858** —Lord Palmerston, then Prime Minister of England, introduced a Bill for the transfer of the Government of India from the East India Company to the British Crown Referring to the grave defects in the existing system of government in India in his speech while introducing the Bill, Lord Palmerston said, "the principle of our political system is that all administrative functions should be accompanied by ministerial responsibility—responsibility to Parliament, responsibility to public opinion, responsibility to the Crown, but in this case the chief functions in the Government of India are committed to a body not responsible to Parliament, not appointed by the Crown, but elected by persons who have no more connection with India than consists in the simple possession of such stock "[11]

The enactment of the Government of India Act, 1858 by the British Parliament became an important landmark in the constitutional history of India Some of its main provisions of constitutional importance are briefly stated as follows

'(a) The Act declared that the Company's territories in India shall vest in Her Majesty and the Company shall cease to exercise its power and control over all these territories India will be governed in the name of the Queen

(b) Queen's Principal Secretary of State shall have all such powers and perform all such duties as were exercised by the Court of Directors or Court of Proprietors of

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11 Keith *Speeches on Indian Policy* Vol I, p 323 A C Banerjee, *Indian Constitutional Documents 1757 1947*, Vol II, pp 1 9 at p 5 *see* also Lord Derby's Speech on the Government of India Bill 1858 in the House of Lords July 15 1858 A C Banerjee, *Ibid* pp 22 26

the Company A Council of fifteen members was constituted to assist the Secretary of the State for India The Council became an advisory body on Indian affairs For all communications between England and India the Secretary of State became the real channel

(c) The Secretary of State for India was empowered to send some secret despatches to India directly without consulting the Council He was also authorised to constitute special committees of his Council

(d) The Crown was empowered to appoint the Governor General of India and the Governors of the Presidencies The appointments of the Lieutenant Governors of the Provinces or territories were made by the Governor General subject to the approbation of Her Majesty

(e) It also provided for the creation of Indian Civil Service of the Crown under the control of the Secretary of State for India

(f) All the property of the East India Company was transferred to the Crown All treaties, contracts, etc made by the Company remained binding on the Crown

Thus with the passing of the Government of India Act[12], an important era of the East India Company's rule in India came to an end

B India under the British Crown 1858 1947

The dawn of a new era in the constitutional development of India began with the transfer of power from the East India Company to the British Crown in 1858 The Government of India Act 1858, introduced many constitutional changes of far reaching consequences and became famous as an Act for the Better Government of India 1858

The period 1858 to 1947 was an era of direct government by the British Crown Some major policy decisions which were taken during this period played an important role in shaping and moulding the future constitutional development of India Three phases of the development during this period which came respectively may be stated as the growth of representative institutions self governing institutions and dominion status The national opinion and political situation in India were also greatly influenced by the reactions of the forces of British imperialism nationalism and communalism Some Acts of the British Parliament which are solely

12 *Report on Indian Constitutional Reforms, Section 59*

responsible for the growth of the above stated phases and which led to transition are discussed below

I The Indian Councils Act, 1861

(i) Circumstances —In India there was a strong feeling that when very far reaching changes had been introduced in the set up of India's Government in England under the Government of India Act, 1858 certain changes according to the circumstances, were necessary in the Government in India as well It was realised by the Mutiny of 1857 that if the public feeling in India had been properly gauged, and if certain means had been adopted to take regular councils with Indians, much of the trouble that the British faced in 1857 could have been avoided Montague and Lord Chelmsford also concluded that the terrible events of the Mutiny "brought home to men's minds the dangers arising from the entire exclusion of Indians from association with the legislation of their country "[13] Sir Charles Wood,[14] in his speech in the House of Commons on June 6, 1861 aptly remarked "It would be folly to shut our eyes to the increasing difficulties of our position in India and it is an additional reason why we should make the earliest endeavour to put all our institutions on the soundest possible foundations " The steps taken to centralise legislation under the Charter Acts of 1833 and 1853 were considered inadequate to meet the demand of a great country like India It was realised as necessary by the British statesmen to take non official Indians and Europeans in the legislative Councils of the country, "with a view to obtaining timely expressions of the feelings and sentiments of the members of the outside public concerning measures proposed to be taken by Government "[15]

(ii) Provisions of the Act of 1861 —The Act of 1861 reconstituted the Executive Council of the Governor General and the Act provided that it shall consist of five ordinary members three of whom shall be appointed by the Secretary of State for India with the concurrence of a majority of members present at the meeting, from among persons having at least ten year's service in India One of the remaining two members one was to be the Law Member and another Finance Member The Commander in chief was appointed as Extraordinary Member of the Council

The Act of 1861 increased the powers of the Governor General[16] and he was authorised to act alone in all matters except

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13 *Report on Indian Constitutional Reforms Section 57*

14 Sir Charles Wood s Speech on the Indian Councils Bill, 1861 in the House of Commons on June 6 1861 in A C. Banerjee, *Indian Constitutional Documents* Vol 2 pp 53-64

15 Cowell *History and Constitution of the Courts and Legislative Authorities in India p 83*

16 Lord Canning was appointed Governor-General

law making He was also empowered to appoint a President to preside over the meeting of the Council in his absence The port folios or departments of work were distributed amongst the mem bers of the Council Important matters were to be placed before the meeting of the Executive Council Lovett writes, "thus the Government of India became a cabinet Government presided over by a Governor General business being carried on departmentally and the Governor General taking a more active and particular share in it than is taken by the Prime Minister in a Western country or than had been taken by any of his predecessors "[17]

For the purposes of making law the Act empowered the Governor General to enlarge his Council by adding not less than six and not more than twelve members Not less than one half of the members so appointed were to be non officials (some of them Indians) for a term of two years Thus Indians were first of all associated with for the purposes of law making The new Legisla tive Council was authorised to make laws for all people Indians Britishers and foreigners and for all courts of justice and public servants within the territories of British India Certain limitations were placed on the power of the Central Legislature regarding the subjects just like that of the Charter Act of 1853 It was not em powered to make laws affecting public debt or revenues of India, religious rights military or naval forces, or relations between Indian States and the Government

It was made compulsory to secure the assent of the Governor General on every enactment passed by the Legislative Council The Governor General was empowered to decline his assent or to withhold to or reserve any Act for Her Majesty s pleasure and sanction The Governor General was also empowered to issue ordinances independently which were to remain in force for six months unless disallowed by the Crown In the mean time the Legislative Council was authorised to pass an Act on that subject

The Act also restored the legislative powers of the Provincial Legislatures of Bombay and Madras For the purpose of making Laws the Executive Council of a Governor was enlarged by an addition of not less than four and not more than eight members for a term of two years These members were to be non officials A Provincial Council empowered to enact laws for the Province only but it was not authorised to pass laws on subjects of national importance

Thus the Act of 1861 laid down the foundation of the legisla tive system as is adopted in India even today Coatman observed, "The whole effet of the Councils Act was to direct the political

17 Sir H Verney Lovett *Combridge History of India* Vol VI, pp 229-230

development of India, towards the goal of democratic government by a representative Legislature" [18]

2 The Indian High Courts Act, 1861

The Indian High Courts Act reorganised the judicial organisation in India by uniting the Company's Courts and the King's Courts. Three Presidency High Courts of Calcutta, Bombay and Madras were established in place of the old Supreme Courts and the Sadar Diwani and Nizamat adalats. The lacuna of the Indian Councils Act of 1861 was thus filled up by the Indian High Courts Act. It became easy for the legislators to enact uniform procedural laws to regulate civil and criminal courts.

3 The Government of India Act, 1870

It empowered the Governor General in Council to make laws for the less developed areas which were known as non Regulation areas. The Lieutenant Governor or the Chief Commissioners were required to submit drafts of Regulations to the Governor General in Council for approval and assent. After assent they were to be published in the Official Gazette.

4 The Indian Councils Act of 1892

The Indian Councils Act of 1892 was another important land mark which contributes to the growth of representative institutions in the constitutional history of India. Social and religious conditions were changing in India and Indian nationalism was emerging. The Indian National Congress[19] emerged out as a result of the social and religious reforms. Western system of education was gradually spreading the new political awakening from the Universities of Calcutta, Bombay and Madras. Apart from this European merchants wanted to have more representation in the Council. Lord Dufferin realised the necessity of a more powerful Legislative Council in India to have greater for freedom for the Government of India from the India office. As such Lord Dufferin appointed a Committee of his Council to examine the question and report. The recommendation of his Committee formed the basis of the principles on which the reforms were introduced by the Indian Councils Act of 1892.

(i) Its provisions —The reforms of the Act of 1892 were mainly in the Legislative Councils in India. The Act provided that the number of the Additional Members of the Governor General's Legislative Council will be not less than ten and not

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18. John Coatman, *The Road to self Government*, p. 22 *see also* K. V. Punniah, *Constitutional History of India* p. 104. R. Coupland *Indian Problem* p. 56.
19. The Indian National Congress was founded in 1885 as a result of the special efforts of A. O. Hume and Surender Nath Banerjee.

more than sixteen nominated members [20] The members were to be nominated subject to the approval of the Secretary of State It was laid down that two fifths of the Additional Members were to be non officials for whom the principle of election was conceded to a limited extent, though after being so elected, a member had to get himself nominated by the Government before he sat in the Council The Act increased the powers of the Legislative Council It was now permitted to discuss the annual financial statements under certain circumstances but without right to vote on it or divide the house on any matter related to it On matters of public interest the members were authorised to ask questions but this was subject to such conditions and restrictions as were prescribed in the rules made by the Governor General Six days notice was required for every question

In the provincial Councils of Bombay and Madras the number of Additional Members was also increased Their minimum number was fixed at eight and the maximum number was twenty The maximum number for Bengal was also fixed at the same level Their functions were enlarged under this Act

(ii) Its contribution —The Indian Councils Act of 1892 mainly contributed in three respects First, it increased the number of members in the Central and Provincial Legislative Councils Second, the principle of election was introduced indirectly through the garb of nomination on the recommendation basis Last, but most important, the functions of the Legislative Councils were greatly increased Thus it was for the first time that Indians were to be associated with the highest legislative functions in the right manner The productive seed of the principle of election of representatives which was thus sown in 1892 developed firmly in the direction of parliamentarian responsible self government of India

5 The Indian Councils Act of 1909 The Minto Morley Reforms

The political awakening of India[21] *towards the end of the nineteenth century led British administrators and politicians to think in terms of introducing more reforms and gain more support of landed aristocracy and the moderate elements in the Indian National Congress The unification of India and Indians under a strong and highly centralised government was no doubt introduced and strengthened gradually but a section of the British politicians*

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20 The Indian Councils Act 1861 provided for the minimum number of six members and the maximum of twelve members

21 The creation of Legislature, the rise of middle class university education improved communication system and a political press all these factors changed the Indian conditions and led to political awakening

as also aware of the danger of the political awakening and the unity of Indians They foresaw the danger to the British Empire and, therefore, as a matter of policy sought "to divide and rule" The vicious system of separate communal representation for the Muslims[22] was introduced in the legislative reforms of India This principle was gradually extended to the Sikhs, Europeans, *etc* which provoked other class interests and thus the Indians were divided amongst themselves

In England, fortunately enough, the conditions were in favour of Indian constitutional reforms Lord Morley, then Secretary of State for India and Lord Minto, the Viceroy of India agreed in principle to introduce major political and constitutional reforms Lord John Morley was a strong advocate of reforms and Gokhale also impressed him Lord Minto also felt that the permanence of the British Empire in India will depend upon a sound appreciation of the changing Indian conditions Lord Minto appointed a Committee under Sir Arundale to report on the necessity of reforms The report was submitted to the Viceroy in October 1906 and after discussion in his Council it was forwarded to Lord Morley, the Secretary of State In the meantime Lord Minto did all the needful to introduce the idea of separate representation of Muslims in the legislative reforms The Bill was drafted in the light of all the discussions and negotiations between Morley and Minto The Cabinet approved it and the British Parliament passed it in February 1909 to become an Act

(i) Provisions of the Act of 1909 —In certain respects the Indian Councils Act of 1909 was a significant improvement in the sphere of constitutional reforms Its important provisions are briefly stated as follows

(*a*) The Act increased the size of the Central as well as Provincial Legislative Councils For the Governor-General's Council the maximum number of members was raised from 18 to 60 and for the Provincial Legulative Councils of Bengal, Bombay and Madras from 20 to 50 and for U P from 15 to 50

(*b*) The Legislative Councils constituted under the Act of 1909 contained three types of members First, the members of the Executive Council of the Viceroy or of the Governor who were its *ex officio* members, second, nominated non official members and third, elected representatives of the people

(*c*) The Act recognised the principle of election in explicit and direct terms But it was qualified in two ways

22 The Muslim League came into existence in 1906 It laid special emphasis on the separate representation of Muslims in all Legislatures

In the first place the principle of nomination was recognised, and secondly, a large number of elected members were to be returned by indirect election

(*d*) For elected members it was declared that the territorial representation did not suit India and that "Representation by classes and interests is the only practicable method of embodying the elective principle in the constitution of the Indian Legislative Councils'

(*e*) The functions of the Legislative Councils, both Central and Provincial, were greatly increased The members were given the rights of discussion and supplementary questions

(*f*) The Act imposed certain restrictions within which the members of the Legislative Councils were required to work They were not authorised to discuss the foreign relations of the Government of India and its relations with the Indian Princes They could not discuss some other matters, *e g* matters under adjudication of a Court of Law, for which a Legislative Council was not competent, expenditure on Railways, *etc*

(ii) **Comments**—The Morley Minto Reforms, no doubt made significant improvements in the constitutional and legislative spheres in certain respects The nomination of non officials and the principle of election acquired indirect recognition though many restrictions were imposed Indians[23] were also appointed in the executive council of the Governor General

The greatest defect of the Morley Minto Reforms was the introduction of communal electorates for Muslims According to Sri Jawahar Lal Nehru 'a political barrier was created round them isolating them from the rest of India and revising the unifying and amalgamating process' Thus the national unity forged through centuries was broken with the blow in which specially Lord Minto played an important role The bitter seeds of strife and communal antagonism were sown which germinated and ultimately led to the creation of Pakistan in 1947 as a separate State

The constitutional reforms introduced were not because either the Secretary of State or the Viceroy were interested in giving India independent Parliament Morley[24] frankly declared in the House of Lords, " a Parliamentary system is not at all the goal to which I would for one moment aspire"

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23 In 1907 two Indians K G Gupta and Syed Hussain Bilgrami were made members of Ind a Council In 1907 Mr S P Sinha who later on became a Peer, was given a seat in the Viceroy s Executive Council

24 Morley s speech on Indian Council s Bill 1909 in the House of Lords on March 4 1909 *See* A C Banerjee *Indian Constitutional Documents* Vol 2, pp 238-241

The Morley-Minto Reforms failed to afford any solution to the Indian political problem The Nationalist leaders in India demanded after 1907 "*Swaraj* or Self Government" India was not satisfied with minor reforms in the Legislative Councils which had no power There was echo of the great declaration of Lokmanya Tilak "*Swaraj* is our birth right, and we shall have it" In the Morley Minto Reforms there was no place for responsibility which is "the savour of the popular government" [25]

6 The Government of India Act, 1919

(i) Circumstances and the Montague Declaration — The Indian Councils Act of 1909 was followed by the Delhi Durbar in 1911 for which George V the King of England, came to India for the first time in history In his first announcement the King transferred the Capital from Calcutta to Delhi It was also realised that in the course of time the just demands of Indian people for a large share in the government of their country would be satisfied It reflected a change of English policy in India.

The Government passed certain legislations to supress the rising Indian ambitions The Indian Press Act of 1910, the Act of 1913 were all aimed towards this direction The Defence of India Act, 1915 further empowered the Government and every effort was made to suppress the political awakening of the Indians Thus those Indian leaders who initially hailed the Morley Minto Reforms became very disappointed, dissatisfied and frustrated Indian nationalism rose very high under the impact of the First World War In 1916 the Indian National Congress asked the British Government to declare its future policy regarding self government in India The World War changed slightly the outlook of English people regarding constitutional reforms in India Britain wanted India's full co-operation, in terms of money and man power and army, in the First World War E D Montague, who succeeded Sir Austin Chamberlain as the Secretary of State for India, in his historic pronouncement before the House of Commons on August 20, 1917 declared the future policy of the British Government in India and said

> "The policy of His Majesty's Government, with which the Government of India are in complete accord, is that of increasing association of Indians in every branch of the administration, and the *gradual development of self governing institutions with a view to the progressive realisation of responsible Government in India as an integral part of the British Empire* The progress in this policy can only be achieved by successive stages The British Government and the Government of

25 J P Sinha, *Indian Constitutional Development 1773-1917*, p 143

India must be the judges of the time and measure of each advance "[26]

Montague's Declaration was considered to introduce "revolutionary changes" in the sense that it promised responsible Government "in the familiar British way" It was a clear repudiation of the Morley-Minto Policy which gave no concession for self-government within the British Empire

With a view to prepare a scheme of reforms Montague came to India in November 1917 He met top ranking Indian leaders and studied the whole problem personally In consultation with Viceroy, Lord Chelmsford, Montague drew up the Report on Indian Constitutional Reforms which became famous as the "Montford Scheme"[27] for India On the basis of this scheme, the Government of India Bill was drafted which became an Act in 1919

(ii) Main provisions of the Government of India Act, 1919 —In its "Preamble" the Act of 1919 laid down certain principles on the basis of which the reforms were to be introduced in India An analysis of the Preamble brings out the following points (*a*) British India would remain an integral part of the British Empire (*b*) The aim of the British Government is to establish a responsible Government of India (*c*) Progress in this direction will be achieved by successive stages (*d*) The time and manner of each advance will be determined only by Parliament (*e*) The Parliament would be guided by the co operation of Indians and the sense of responsibility shown by Indians (*f*) For the development of self-government it is necessary to have increasing association of Indians in every branch of administration and the gradual development of self governing institutions

The provisions of the Government of India Act, 1919 introduced vital changes in (*a*) the Home Government in England, (*b*) the Government of India—Executive and Central Legislature, (*c*) the Provincial Government, and (*d*) Civil Services The outlines of some important provisions of the Act are briefly stated as follows:

In England, the Indian affairs were controlled by the Secretary of State for India with the help of an India Council consisting of a minimum of ten and a maximum of fourteen members The Secretary of State for India was also a member of the British

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26 For full text of Montague's *Declaration*, 1917, *see* A C. Banerjee, *Indian Constitutional Documents* Vol III, pp 1 3

27 Montford Scheme was published in July 1918 It created differences between the extremists and the moderates in the Indian National Congress and affected the political unity of the Congress

Cabinet The Act of 1919 introduced some changes in the constitution of India Council It was to consist of not less than eight and not more than twelve members Their term of office was fixed at five years at a fixed salary The number of Indians on it was fixed as three The Secretary of State delegated some of the powers to the Governor General in Council. Now only certain classes of bills were to be referred to the Secretary of State for approval before their introduction into the Central Legislature Only in exceptional cases the Provincial bills were required to seek his prior approval [28-31] Similarly there was relaxation of control over financial matters The Act provided for the appointment of a High Commissioner for India who was to perform "agency functions" as distinguished from political functions

The Act of 1919 made certain important changes in the functions, structure and methods of the Government of India The Central Legislature was enlarged and made more representative and given larger opportunities to influence the Government Some changes were also made in the Central Executive but the relations between the Executive and the Legislature remained the same As regards the Central Executive authority, it continued to be vested in the Governor General in Council Due to changed relations with the Provincial Governments and possibility of increased work the statutory limit upon the membership of the Executive Council was removed Substantial representation was given to the members of the Indian Civil Service in the Executive Council and this practice continued for long till 1947 when after Independence ministers were appointed in their place The number of Indians in the Executive Council was increased to three members The members of the Viceroy's Council were appointed by the King on the recommendation of the Secretary of State for a period of five years The Act also defined the powers and relations between the Secretary of State and the Governor General.

The Governor General became a very important and powerful member of the Executive Council His unique importance was because of his power to over rule the decisions of the Executive Council The Governor General of India enjoyed very high status as he was considered the representative of the King and was entitled to have direct contact with the Secretary of State for India He was given wide powers in the legislative sphere The Governor General was given the power of putting on the statute book any Bill which is even rejected by the Legislature, if he thought that the Bill was essential for the administration and in the interests of British India This power popularly known as "power of certification" was used by him on several occasions He was also empowered to issue ordinances for the country

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28-31 *See* Punnial *The Constitutional History of India* p 179

As regards the Central Legislature, the Act of 1919 introduced several alterations in its constitution, composition and powers In place of the old Imperial Council of one House only, the Act of 1919 made the Central Legislature bicameral which was to consist of the Council of State Upper House and the Central Legislative Assembly (Lower House) The Legislative Assembly, consisted of 145 elected members and the Council of States consisted of 60 members Thus in all there were 205 members in the two Chambers of the Legislature The second Chamber was introduced to act as a check upon the lower house The principle of "Separate Communal Representation" was retained in the composition of the Legislative Assembly and the Council of States The elected seats were distributed among all Provinces and in each Province they were distributed on the basis of communities and interests Thus Landlords, Depressed classes, Muslims, Anglo Indians *etc*, many classes and interests were represented in the elected seats The franchise was direct but limited on the basis of the payment of income tax and municipal tax *etc*

There was a considerable increase in the functions of the Central Legislature The members were allowed to move motions for adjournment of the House to discuss urgent questions of public importance They were also given right to ask supplementary questions Except as regards finance, the two Houses had equal and concurrent power

The Governor General was empowered to prevent either Chamber from passing, discussing or permitting introduction of a Bill, clause or amendment, which in his opinion affected the safety or tranquility of any part of British India Matters relating to public debt and revenues of India, religions, wage of British subjects, army, navy and foreign relations *etc*, could not be introduced in the Legislature without the previous sanction of the Governor-General The Indian Legislature had no power to alter or amend the Government of India Act, 1919 or any other Act passed by the British Parliament for India

In order to remove the conflicts between the two Houses, the Act of 1919 provided for joint committees, joint conferences and joint sittings of the Houses

The Act of 1919 was not intended to introduce full responsible government in the Provinces where its growth was required to be gradual This object was secured by establishing a new system which was known as "Dyarchy" Taking first the executive side, the subjects of administration were already divided into two lists The Central and the Provincial The Provincial list was now further divided into two The Reserved and the Transferred subjects The Reserved subjects were of greater importance *e g*,

police, administration of justice, land revenue, administration *etc* were kept under the control of the Governor who was required to distribute them amongst the nominated members of his Executive Council The Transferred subjects were less important and were supposed to require local knowledge *e g*, roads, buildings local self government, sanitation health *etc* These matters were to be distributed to those ministers who were appointed from the elected members by the Governor The Governor in Council which administered the Reserved subjects was responsible to Parliament and consisted almost entirely of the Europeans If there was no minister to administer a department under Transferred subjects the Governor himself was empowered to assume its charge for the time being

The size of the Provincial Legislature was increased There was only one Legislature in each Province, known as Legulative Council Their total membership varied from Province to Province The nine Governor's Provinces were Bengal, Bombay, Madras, Bihar, Orissa, U P, C P, the Punjab, Assam and Burma The system of election introduced in the Councils was direct, the primary voters electing the members but their classification on the basis of community, classes and interests was allowed to continue The Councils were elected for three years The Governor was given power to dissolve it early The functions of these Councils were also increased, the Legislatures made laws on the subjects within their jurisdiction Their Bills required three readings before being sent to the Governor to secure his assent for the Bill to become law

The Governor was the pivot of all the administration He was the final authority in the Reserved as well as in the Transferred subjects He recommended names for appointment on his Executive Council and on the High Court He appointed Indian Ministers from among the elected members of the Legislature and distributed the portfolios among them He enjoyed very wide powers in the Provincial Legislature also

(iii) **Failure of the Montford Reforms** —The reforms introduced by the Act of 1919 failed to satisfy the Indian political leaders and they proved a failure due to various reasons The failure of the reforms was because of the external circumitances as well as some inherent defects of the system of Dyarchy It gave rise to friction It was an experiment made by the British in Constitution making In theory also Dyarchy was unsound as it presupposes perfect division of various departments which is impossible and impracticable The inherent defect of the system was aggravated by the way in which the Provincial subjects were divided into Transferred and Reserved The Ministers were also not given full powers over their departments They found

themselves greatly handicapped in the execution of their policies by financial stringency Due to the peculiar composition of the Legislative Councils, real ministerial responsibility was not possible Ministerial responsibility was more a myth than a reality The Governor and his nominated Ministers were very powerful The executive authorities never allowed the public to enjoy all that for which the Parliament enacted the Act of 1919 [32]

7 The Simon Commission and subsequent developments up to 1935

(i) The Simon Commission —The Government of India Act, 1919 provided under Section 84 for the appointment of a Statutory Commission "at the expiration of ten years after the passing of the Act for the purpose of enquiring into the working of the system of Government and development of the representative institutions in India, with a view to extend, modify or restrict the degree of responsible Government then existing in India" The Simon Commission was appointed in 1927, two years earlier due to certain reasons [33] The Commission came to India in February 1828 The terms of reference were based on the provision of Section 84 of the Act of 1919 Indians strongly opposed this Commission as no Indian was its member The Commission consisted of seven members under the chairmanship of Sir John Simon The Commission submitted its report on June 24, 1930 It recommended that dyarchy should be abolished in Provinces There should be no interference by the Centre in the administrative and legislative work of the Provinces The franchise in the Provincial Legislatures should be widened Communal electorate must be continued As regards Central Assembly, the Commission recommended that it should be called "Federal Assembly" and it must be constituted on the basis of representation of the Provinces and other areas in British India in proportion of the population The Provincial Councils must elect the members representing Governor's Provinces on the basis of proportionate representation ensuring minority's representation The official members of the Federal Assembly should consist of such members of the Governor General's Council, as sit in the Lower House together with the other nominated officials These were some of the important recommendations of the Simon Commission Though for the time being the Simon Report was shelved and not considered but some of its suggestions played a vital role when the Act of 1935 was framed

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32 For detail *see* Kerala Putra *The Working of Dyarchy in India* p 57

33 Pressure of public opinion in India, and there was likelihood of the Labour Party coming to power in England in the next general elections The Conservative Party, party in power, preferred to appoint the Commission during its tenure

(ii) **Nehru Report**—The repercussion of Simon Commission and the challenges of Lord Birkenhead the Secretary of State for India, to produce a Constitution which should be acceptable to all political parties in India, led the Indian National Congress to accept the challenge All Parties Conference met in Delhi on February 28, 1928 and in Bombay on May 19, 1928 and a small Committee[34] with Pandit Motilal Nehru as its Chairman, was set up to draft a Constitution for India The Committee produced a memorable report which was "masterly and statesmanlike" and presented a Constitution which in fact reflected the high standard of learning in India Nehru Report was unanimously accepted at Lucknow in August 1928 by the All Parties Conference When the time came for its ratification difficulty arose when the parties examined minutely from their selfish isolated interest However, at the Calcutta Session due to Mahatma Gandhi's intervention the Nehru Report was accepted in entirety It was presented to the British Parliament to be accepted by the end of 1929 The Nehru Report accepted dominion status as "the next immediate step" and not as an ultimate goal The Constitution was to be secular and the principal of communal electorate was to be dispensed with Instead the Report recommended the system of joint electorate Other recommendations were regarding Central Executive, Provinces and Princes of India The British Government failed to fulfil its promise

(iii) **Lord Irwin's Proclamation**—In England the Labour party won the election and the Conservatives were defeated Though the Nehru Report was not expressly accepted, the Labour Government was a bit sympathetic Wedgwood Benn, who was the Secretary of State for India called Lord Irwin, Viceroy of India and discussed intensively about Indian affairs On his return to India, Lord Irwin issued a proclamation on behalf of His Majesty's Government on October 31, 1929, as follows:

> "I am authorised on behalf of His Majesty's Government to state clearly that, in their judgment, it is implicit in the declaration of 1917 that the natural issue of India's constitutional progress, as there contemplated, is the attainment of dominion status"[35]

Lord Irwin further pointed out that as suggested in the Report of the Simon Commission, to which the Government had agreed, a Round Table Confereoce of the different Indian as well as British interests would be held in London to seek the greatest measure of agreement

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34 Its members were Pt. Motilal Nehru Sir Tej Bahadur Sapru Sir Ali Imam, M S Aney Sardar Mangal Singh, Shuaib Qureshi, G R. Pradhan and Subhash Chandra Bose

35 For details, *see* A C Banerjee, *Indian Constitutional Documents*, Vol. III, at p 209

Indian political leaders expressed their appreciation, by issuing a manifesto, of the sincerity underlying the declaration and the desire of His Majesty's Government to pacify Indian opinion

During the period 1930 to 1935, the "National Movement" was gaining strength It is also clear from the events and Conferences which followed Lord Irwin's Proclamation The First Round Table Conference, Civil Disobedience Movement, Gandhi Irwin Pact, the Second Round Table Conference, Local Civil Disobedience Mahatmaji's fast, the Poona Pact, the Third Round Table Conference, all these gradual historical steps and events prove that the British Government followed a dual policy in India On the one side it took the severest measures against the Congress and to suppress the Indian political movements, and on the other hand when it realised that suppression by force was not possible, it pushed on with the work of making a new Constitution which ultimately resulted in the Government of India Act, 1935

8 The Government of India Act, 1935

After the Act of 1919, the Government of India Act 1935[36] was the second important milestone on the road to full responsible Government in India It played a very important role in shaping and moulding the new Constitution of India of 1950 The Act of 1935 is said to be the product of four diverse forces, namely Indian nationalism, British imperialism, Indian communalism and Indian Princes. The Act kept intact the supremacy of the British Parliament Though the enactment of the Act disappointed ambitious Indian leaders and was forced upon the Indians by the British Parliament, it was definitely an advance towards the constitutional development of India The Act marked a radical change of policy in two respects first, it introduced a federal form of Government in place of the unitary form which was the British policy since long, and secondly, the provisions of the Act envisaged a federation to which the native States of India were to accede The Act introduced partial responsibility at the centre, established provincial autonomy and was aimed at forming an All India Federation but all of them were accepted in the Act subject to certain qualifications Some of the important provisions of the Act may be briefly stated as below

(i) Provisions of the Act of 1935 —(a) The Act provided for the formation of an All India Federation All the Provinces were to join the Federation automatically but a peculiar problem arose in the case of native Indian States It was purely on voluntary basis for the Indian States to join the Federation by an Instrument of Accession The Indian States and the Provinces were

36 Royal assent was given on August 2, 1935

separately allotted seats in the Federal Assembly and the Council of States The Viceroy was the representative of the Crown to perform all his functions in India

The Act of 1935 provided for the division of power between the Centre and the units under three lists namely, Federal List, Provincial List and the Concurrent List As regards the Concurrent List, both the Federal Legislature and the Provincial Legulatures were given the power to pass laws on subjects as stated in the list, but the Federal Legislature was in superior position

(*b*) The Act of 1935 established dyarchy at the Centre and the dyarcby which was establisbed in Provinces, under the Act of 1919, was abolisbed At the Centre a part of the Federal Executive was declared Reserved while another part was Transferred The Reserved part consisted of the important subjects of Defence External Affairs, *etc* In the administration of the other federal subjects, the Governor General was to be aided and advised by a Council of maximum ten ministers

(*c*) The Federal Legislature was to be bicameral, consisting of the Federal Assembly and the Council of States Life of the Federal Assembly was fixed for five years The Council of States was to be a permanent body of which one third members were to retire after every three years The members from States were to be nominated by the rulers The representatives from British India were to be elected Communal representation in elections was retained

(*d*) The powers of the Indian Legislatures were severally restricted There were certain subjects on which neither the Federal nor the Provincial Legislatures were authorised to legislate, *e g*, affecting the Sovereign or the Royal Family, *etc* There were many non votable items in the budget over which the Federal Legislature was given absolutely no control The Governor General was empowered to summon a joint sitting of the two Houses of the Federal Legislature when a Bill passed by one Chamber was rejected by the other, or was amended in a form to which tne first Chamber was not agreeable The Governor Gen-ral was required to assent the Bills but he had also the right to veto it or send back for reconsideration to the Chambers

(*e*) Another most important provision of the Act of 1935 was relating to the establisbment of autonomy in the Provinces This was in accordance with the August Declaration of 1917 The old dyarchial system in the Provinces was dropped and the distinction between the Transferred and the Reserved subjects was abolisbed The entire Provincial administration was placed

under the charge of the popular Ministers who were to be appointed by the Governor, from among the members of the Provincial Legislatures on the advice of a person who commanded majority They were responsible to the Legislature The Governors were empowered to take away, the whole business of the popular Ministers at any time and establish their administrative control This was the greatest defect of the constitutional system provided under the Act

(*f*) The Act abolished the Indian Council of the Secretary of State

(*g*) The Act established a Federal Court with original and appellate jurisdiction to decide disputes between the federating units, between the Federal Government and a unit or units and with regard to the interpretation of the Constitution However, the Privy Council remained the final Court of appeal [37]

(*h*) The Governor-General had vast administrative, legislative and financial powers under the Act of 1935 He was not merely a constitutional head even in regard to the administration of the Transferred subjects He was given very wide discretionary powers not only of legislation but also powers over the Legislatures He was empowered to enact Governor-General's Acts and promulgate Ordinances over the head of the Legislature

(ii) **Defects in the Act of 1935** —Some important defects of the Act of 1935 were as follows

(*a*) Indians were not given control over the Government of India They were not given power to amend the Constitution Dyarchy which was introduced in 1919 in the Provinces was introduced at the Centre with all its evil effects all over India

(*b*) The inauguration of the All India Federation depended upon the condition that a specified number of States joined the Federation The Act also gave the Indian States the choice to join or not to join the Federation

(*c*) In the matters of representation, *etc* the Indian States were given a privileged position The nominated members of the Indian States remained loyal to the British

(*d*) Indirect elections to the Federal Assembly were opposed The seats in the Legislatures were to be filled on the basis of the communal award Communalism influenced the Constitution in India and it was a hard blow to the Indian nationalism

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37 For data in regard ng the Federal Court of India *see* Chap IX of this Book at p 223

(e) The discretionary powers of the Governor General and the Governors were also criticised

(f) The Act of 1935 was based on the mistrust of Indians in their British masters

9 Constitutional Development from 1937 to 1947

The Government of India Act was passed in 1935 but only its part relating to the Provinces came into force in 1937 Consequently elections were held in the Provinces in the beginning of 1937 The Congress decided to accept the offices In September 1939 when World War II broke out, the British Government declared India a belligerent country without consulting Indian political parties The Congress strongly protested and the Congress Ministers resigned in the Congress majority Provinces The Congress asked the British Government to declare its war aims in clear words To meet the growing discontent Lord Linlithgow declared the goal of British policy in India in January 1940 as the "Dominion Status of the Westminister variety as soon as possible after the war "

(i) **The August Offer, 1940** —The Viceroy on behalf of the British Government, published a new Declaration of the British policy in India on August 8, 1940 It was declared on the eve of the Battle of Britain It became famous as "August offer" It mainly referred to the fact that the constitutional issue could not be decided at "a moment when the national life is engaged in a struggle for existence", but after the war a representative Indian body should be set up to formulate a new Constitution and in the meantime the British Government would welcome and assist any efforts to reach agreement as to the form and operation of the Constitution making body and as to the principles of the Constitution It was further stated that in the interval the British Government hoped that all parties and communities in India would co operate in India's war effort and by thus working together pave the way for India's attainment of free and equal partnership in the British Commonwealth of Nations

The 'August Offer' was considered an advance of great importance in the method of handling the constitutional problem of India by the British Government But the Congress refused to accept the offer

(ii) **The Cripps Mission (1942)** —The deadlock in Indian policies was continuing due to the refusal of the Congress to co operate The events of the Second World War and specially Japan s victories created new international situations On March 11, 1942 Mr Churchil announced to send Sir Strafford Cripps, the leader of the House of Commons (England) to India The

Cripps Mission[38] came to India in March 1942 with a Draft Declaration of the British Government and began constitutional negotiations but returned unsuccessfully and empty handed in April 1942

The failure of the Cripps Mission further added to the existing discontentment in the country against the British rule The All India Congress Committee passed the "Quit India" Resolution on August 8, 1942 The Resolution emphasized the necessity of immediate ending of the British rule in India This movement was violently suppressed by the Government The deadlock continued up to 1944 when Mahatma Gandhi was released In order to ease the political situation Mahatma Gandhi began negotiations with Lord Wavell Sri Rajagopalachari prepared a plan in 1944 for a settlement with the Muslim League He proposed a formula to which Mahatma Gandhi also agreed According to it the Muslim League was to endorse the Indian demand for independence and to co-operate with the Congress in the formation of a Provisional Interim Government for the transitional period subject to certain terms (as stated in the plan) Mr Jinnah refused to accept it

(iii) **The Wavell Plan, 1945 and the Simla Conference** — Lord Wavell, the Governor General and Viceroy of India gave a broadcast speech on June 14, 1945 to the people of India and on the same day L S Amery, Secretary of State for India made a similar statement in the House of Commons in England In both speeches the contents were the same The Wavell Plan provided for a conference of representatives chosen by the Viceroy for the purpose of obtaining from the leaders of various parties a joint list or separate lists of worthy persons in order to constitute a new Executive Council of the Viceroy Lord Wavell pleaded for "men of influence and ability to be recommended by the various parties who would be prepared to take decision and responsibility of administration of all portfolios"

The conference was called at Simla on June 25, 1945 under the Presidentship of Lord Wavell When it reassembled on July 14, 1945, Lord Wavell announced the failure of the conference to reach any agreed conclusion It failed mainly because the demands of Mr Jinnah were not acceptable to the Congress The Governor General was not prepared to have an interim settlement without the co operation and consent of the Muslim League

The failure of the Wavell Plan made it clear that the Pakistan

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38 *For full text of the Cripps Proposals 1942, see* A C Banerjee, *Indian Constitutional Documents*, Vol IV, p 152

issue had gained an importance and the Congress realised that it could not prevent its formation

(iv) The Cabinet Mission Plan, 1946 —The British Cabinet Mission consisting of Loed Patrik Lawrence, the Secretary of State, A V Alexander and Sir Stafford Cripps came to Delhi on March 24, 1946 Prolonged discussions took place between the members of the Mission, the Coogress leaders and the leaders of the Muslim League The two maio political parties could not come to any mutual understanding The Cahinet Missioo suggested its own formula on May 16, 1946 for solving the constitutional problem

The Cahinet Missioo ruled out the possihility of the formation of Pakistan as desired hy the Muslim League The Mission recommended that there should be a Union of India, embracing both British India and the Iodian States The Union should have an Executive and Legislature constituted from British Indian and State's representatives Any question raising a major communal issue in the Legislature should require the decision of the majority of the representatives present and voting of each of the two major communities as well as a majority of all the members present and voting Io order to frame a Constitution on the lines suggested hy the Mission, it suggested for a Constituent Assembly to consist of 389 members The Provincial representatives from British India were to he sent in the proportion of one member to every one million of population The seats allotted to every Province were to be divided between its different communities in proportion to their population The British Government would implement the Constitution drawn by the Constituent Assemhly These are some of the important recommendations of the Cahinet Mission Their s appeared to be ao honest effort to solve the political prohlem of India

(v) Attlee's Statement of February 1947 —In his statement Mr Attlee, the Prime Minister of England declared June 1948 as the last date up to which the British will transfer power to the responsihle Indian hands It was said that if a Constitution cannot be drafted hy a fully represeotative Assemhly as envisaged in the Cahinet Mission proposals hy that date, His Majesty's Government will "have to consider to whom the powers of the Central Government in British India should be handed over on the due date, whether as a whole to some form of Central Government for British India or in some areas to the existing Provincial Government, or in such other way as may seem most reasonable and in the best interests of the Indian people"

(vi) Lord Mounthatten and his Plan —Lord Mounthatten succeeded Lord Wavell in India on March 24, 1947 He declared

that he will complete the work of the transfer of power within the next few months Lord Mountbatten's Plan of June 3, 1947 as accepted by the Indian parties consisted of the following two essential proposals (*a*) The partition of India was inevitable (*b*) The representatives of the Muslim majority districts and those representing the rest of a Province in the Legislative Assemblies of both Bengal and Punjab would meet separately and decide by a simple majority vote whether their respective Provinces were to be divided or not If either part decided in favour of partition this would be made In the event of the partition being decided upon each part would then decide whether to join the existing Constituent Assembly in Delhi or the new Constituent Assembly to be set up Legislation was proposed for transfer of power

The Mountbatten Plan was accepted by the Muslim League and All-India Congress Committee Accordingly Bengal and the Punjab were partitioned, Sindh and the N W F Provinces decided to join Pakistan

The Indian Independence Bill[39] was passed by Parliament on July 18, 1947

10 The Indian Independence Act, 1947

The main object of the Act of 1947 was to give legal effect to the Plan of Lord Mountbatten

(1) **Its provisions** —Some important provisions of the Act of 1947 were as follows

(*a*) The Act provided for the partition of India and the establishment of two Dominions of India and Pakistan from the appointed day (August 15, 1947)

(*b*) The British Government was to have no control over the affairs of the Dominions, Provinces or any part of the Dominions after August 15, 1947

(*c*) Territories of the two Dominions were defined but they were empowered to include and exclude a territory themselves

(*d*) Until a new Constitution was framed for each Dominion, the Act made the existing Constituent Assemblies the Dominion Legislatures for the time being The Assemblies were to exercise all the powers which were formerly exercised by the Central Legislature, in addition to its powers regarding the framing of a new Constitution

(*e*) Pending the framing of a new Constitution, each of the Dominions and all the Provinces were to be governed in

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39 Introduced in the British Parliament on July 4, 1947

accordance with the Government of India Act, 1935 Each Dominion was authorised to make modifications in the Government of India Act, 1935 under the Indian Independence Act

(*f*) Each Dominion would have its own Governor General though one person could act for both in a dual capacity

(*g*) All laws in force in the two Dominions on August 15, 1947 would remain so until amended by the respective Legislatures

(*h*) The right was given to the Governor General to assent in the name of His Majesty to any law of the Dominion Legislature made in its ordinary legislative capacity

(*i*) The Act provided for the termination of the suzerainty of the Crown over the Indian States All treaties, agreements and functions exercisable by His Majesty with regard to States and their Rulers were to lapse from August 15, 1947 It was also stated that the existing arrangements between the Government of India and the Indian States were to continue pending detailed negotiations between the Indian States and the new Dominion

(*j*) The office of the Secretary of State for India was to be abolished and his work was to be taken over by the Secretary of State for Commonwealth

In the words of Michael Brecher, "The independence of India was the natural and inevitable outcome of the process of creating natural consciousness and common purpose, accompanied by Raj, unconsciously and by the Congress consciously, over an extended period of time In this sense the British Raj contained within itself the seeds of its own destruction "[40]

C INDIA SINCE INDEPENDENCE, 1947–1976

At zero hour on August 15, 1947 all the members of the Constituent Assembly were assembled in the Central Hall of Parliament to hear the formal announcement by Viceroy Lord Mountbatten of the end of the British dominion in India and the birth of her National Freedom It was a historic occasion After a thousand years India had secured the right to rule herself through her own elected representatives It was true that a large portion of Indian territories had been detached and constituted into an independent State of Pakistan However, the areas and populations left to Free India made her the biggest nation to make an experiment of the principles of democracy

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40 Micheal Brecher, *Nehru A Political Biography* p 573

The Indian Independence Act of 1947, which brought about this great change in the constitutional development of India, is indeed "the noblest and greatest law ever enacted by the British Parliament." It is a very important landmark in the constitutional history of India. In spite of the fact that the various political issues and events since 1947 kept the Indian leaders extremely busy, they also considered it worth while to devote their energies to the Constitution making task.

1 Role of the Constituent Assembly

The Constituent Assembly, formally the maker of constitutional documents was a body of varying size. Originally its members were elected indirectly by communal groups of Provincial Legislators in 1946 on an all India basis. It did little work before the British transferred power to Indians in 1947. After partition of the country in 1947, the representatives of the Pakistan areas went to form a separate Constituent Assembly at Karachi. The representatives of the Muslim League in Indian territories decided to join the Constituent Assembly. The composition of the Constituent Assembly changed as the representatives from the former princely State areas also joined it. A body of some 300 members, simultaneously acting as Legislature for the new State of India, required to have its task carefully organised if it was to be successful. Indian leaders were specially interested in its successful working and therefore, it was made possible in three main ways. First, committees were set up to report on the main issues of principle and in these, national leaders like Nehru and Patel played an important part. Second, the Assembly's Constitutional Adviser brought together a great deal of data on foreign constitutions and prepared on the basis of the committee reports, a rough draft. Third, a Drafting Committee under the valuable chairmanship of Dr. Ambedkar prepared the detailed Draft Constitution. Ample debate took place on the committee reports and above all on the Draft Constitution[41] of India. The third reading of the Draft was from November 14 to November 26, 1949. The new Constitution of India was signed by Dr. Rajendra Prasad as the President of the Constituent Assembly on November 26, 1949. The Constitution of India came into force on January 26, 1950.

Three important pillars of the Constitution to which special attention was given by the Committees of the Constituent Assembly were (*a*) a system of Government by ministers responsible to Legislatures chosen by adult franchise was established at the Centre and in the units (Provinces), (*b*) a federal relationship

41 On November 4, 1948 the general discussion on the Draft Constitution began in the Constituent Assembly. During the period November 15, 1948 to October 17, 1949 the Draft was thoroughly discussed by the Constituent Assembly.

between centre and units was worked out in detail, (c) the relations among citizens and between citizens and the State were set in a frame work provided by the chapters on Fundamental Rights, directive principles minority privileges and the independence of the judiciary [42] The Government of India Act, 1935 also furnished a model which with necessary alterations, enabled the Drafting Committee to introduce reforms for the new Constitution of India.

2 Salient Features of the Constitution of India, 1950

As stated in the famous *Fundamental Rights case* (*Kesavananda Bharati* v *State of Kerala*)[42a] by Shelat and Grover, JJ

"Our Constitution is unique, apart from being the longest in the world It is meant for the second largest population with diverse people speaking different languages and professing varying religions It was chiselled and shaped by great political leaders and legal luminaries, most of whom had takeo an active part in the struggle for freedom from the British yoke and who knew what domination of a foreign rule meant in the way of deprivation of the basic freedoms and from the point of view of exploitation of the millioos of Indians The Constitution is an organic document which must grow and it must take stock of the vast socio-ecooomic problems, particularly, of improving the lot of the common man consistent with his dignity and the unity of the nation"

"The Constitution being supreme all the organs aod bodies owe their existence to it None can claim superiority over the other and each of them has to fuoction within the four corners of the Constitutiooal provisions All the functionaries be they legislators, members, members of the executive or the judiciary take oath of allegiance to the Constitution and derive their authority and jurisdiction from its provisions The Constitution has entrusted to the judicature in this country the task of construing the provisions of the Constitution and of safeguarding the fundamental rights"

"The doctrine of parliamentary sovereignty as it obtains in England does not prevail here except to the extent provided by the Constitution The entire scheme of the Constitution is such that it ensures the sovereignty and integrity of the country as a Republic and the democratic way of life by parliamentary institutions based on free and fair elections"

Hegde and Mukherjea, JJ stated

"Our Constitution is not a mere political document. It is

42 *See* W H Morris Jones *The Government and Politics of India*, 2nd Edn , pp. 79-80

42a (1973) 4 SCC 225

essentially a social document It is based on a social philosophy and every social philosophy like every religion has two main features, namely, basic and circumstantial The former remains constant but the latter is subject to change The *core* of a religion always remains constant but the practices associated with it may change Likewise, a Constitution like ours contains certain features which are so essential that they cannot be changed or destroyed In any event it cannot be destroyed from within "

Mathew, J however stated

"The *Constitution* is a *framework of great governmental* powers to be exercised for great public ends in the future is not a pale intellectual concept but a dynamic idea which must dominate in any consideration of the width of the amending power No existing Constitution has reached its final form and shape and become, as it were a fixed thing incapable of further growth The Constitution of a nation is the outward and visible manifestation of the life of the people and it must respond to the deep *pulsation for change within A Constitution is not an end in* itself, rather a means for ordering the life of a nation The generation of yesterday might not know the needs of today, and, 'if yesterday is not to paralyse today', it seems best to permit each generation to take care of itself

The Constitution of India, 1950 is a written document containing 395 Articles and *nine* Schedules It has been amended forty-two times, the Forty Second Amendment being drastic and pervasive The Constitution has been refurbished to achieve the socio economic revolution envisaged in Part IV of the Constitution The salient features of the Constitution are

(i) The Preamble, as amended, states

> WE, THE PEOPLE OF INDIA having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens
>
> JUSTICE social, economic and political,
>
> LIBERTY of thought, expression, belief, faith and worship,
>
> EQUALITY of status of opportunity,
>
> and to promote among them all
>
> FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation,
>
> IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION

The Preamble shows that the authority of the Government of India is derived from the people The Constitution thus becomes a sacred document India is declared a "Sovereign Socialut Secular Democratic Republic" in the Constitution It also points out to the source of the Constitution The Preamble states the objective which the Constitution was designed to secure to all the people of India social, economic and political justice, freedom of thought, expression, belief, faith and worship, equality of status and of opportunity and equality before law, fraternity assuring the dignity of the individual and unity and integrity of the Nation

The Preamble to the Constitution helps the Judges of the High Courts and the Supreme Court of India to interpret the various provisions of the Constitution in a right manner The language of the Preamble will enable Judges to find out the real intention of the Fathers of the Indian Constitution and thus to remove any uncertainty and ambiguity

The Constitution makers gave to the Preamble the pride of place It embodies in a solemn form all the ideals aod aspirations for which the country had struggled during the British regime aod a Constitution was sought to be enacted in accordaoce with genius of the Indian people It certainly represented an amalgam of schemes and ideas adopted from the Constitution of other coun tries But the constant strain which runs throughout each and every article of the Constitution is reflected in the Preamble which could and can he made sacrosanct It is not without significance that the Preamble was passed only after draft articles of the Con stitution had heeo adopted with such modifications as were approved hy the Constituent Assemhly The Preamble was, therefore meant to embody in a very few and well defioed words the key to the understanding of the Constitution

The history of the drafting and the ultimate adoption of the Preamble shows —

(1) that it did not 'walk before the Constitution" as is said about the Preamble to the Uoited States Constitu tion,

(2) that it was adopted last as a part of the Constitutioo,

(3) that the principles embodied in it were taken mainly from the Objective Resolution,

(4) the Drafting Committee felt, it should incorporate in it "the essential features of the new State",

(5) that it embodied the fundamental concept of sover eignty being in the people

The Preamhle embodies the fundamentals underlying the structure of the Constitution

The Preamble was adopted by the Constituent Assembly after the entire Constitution had been adopted

It hardly makes any substantial difference whether the Preamble is a part of the Constitution or not

The Preamble serves several important purposes Firstly, it indicates the source from which the Constitution comes viz the people of India Next it contains the enacting clause which brings into force the Constitution In the third place, it declares the great rights and freedoms which the people of India intended to secure to all citizens and the basic type of Government and polity which was to be established

The true function of the Preamble is to expound the nature and extent and application of the powers actually conferred by the Constitution and not substantially to create them

(*ii*) India has been declared to be a *socialist republic* The thrust of Part IV is also towards the welfare of ommon man and bridging the gap between the rich and the poor

(iii) The Indian Constitution has been declared secular Secularism has been an important feature of the Indian Constitution affording freedom of religion and religious beliefs

The rights of minorities are specially guarded (Articles 29 and 30) The right of religious and linguistic minorities to establish and run educational institutions of their choice has been affirmed in the widest terms [44]

(*iv*) The Constitution establishes a democratic set up in the country The Legislatures of the States and the Parliament of India are both elected Provision is made for elections at regular intervals The people are given the opportunity to choose their masters after regular intervals The ministers are responsible to the Legislatures and through them to the people

(*v*) The Constitution provides for a federal form of Government in India In India the circumstances demanded the establishment of a strong Federal Government Every effort was made to make a strong Central Government It was done on the basis of experience gained through the Indian history It was also to maintain national unity against any foreign enemy and also against any internal enemy who may plan to separate any Province from the Central Government Thus the Parliament is given very wide powers to frame legislation under the Union List and the Concurrent List A final power to interpret this Constitution is given to the Courts The Constitution has combined certain unitary features also with the federal structure The President of

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44 *Ahmedabad St Xa er s College* v *State of Guj at* (1974) 1 SCC 717

India is authorised to take over administration of any State in case of the failure of constitutional machinery in that State

(ii) The Constitution provides for a combination of the Presidential and Parliamentary systems of Government in India. Though the President of India is the Constitutional head of the State yet the system of Government is just like that of the British Parliamentary system The Indian President is elected periodically

The Supreme Court in *Shamsher Singh* v *State of Punjab*,[43] held that

> The President as well as the Governor is the constitutional or formal head The President as well as the Governor exercises his powers and functions conferred on him by or under the Constitution on the aid and advice of his Council of Ministers, save in spheres where the Governor is required by or under the Constitution to exercise his functions in his discretion Wherever the Constitution requires the satisfaction of the President or the Governor for the exercise by the President or the Governor of any power or function the satisfaction required by the Constitution is not the personal satisfaction of the President or Governor but the satisfaction of the President or Governor in the constitutional sense in the Cabinet system of Government that is, satisfaction of his Council of Ministers on whose aid and advice the President or the Governor generally exercises all his powers and functions "

Neither the President nor the Governor is to exercise the executive function personally

This position has now been placed beyond doubt by the amendment of Article 74 by the Forty Second Amendment

(iii) The Indian Constitution is flexible It can be amended easily The Constitution provides that it can be amended in three ways according to the subject matter involved First a large number of amendmeots can be made by the Union Parliament by a simple majority Second a Bill to amend the Constitution may be passed by a two third majority of either House of Parliament and also ratified by the Legislatures of half the States Third the amendment should be passed by Parliament by a majority of two thirds of members present and voting In *Golak Nath* v *State of Punjab*[43a], it was held by the Supreme Court that Parliament cannot amend Part III of the Constitution so as to take away or abridge the Fundamental Rights

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43 (1974) 2 SCC 831

43a AIR 1967 SC 1643 In a Full Bench of Eleven Judges of the Supreme Court six Judges including the Chief Justice S Subba Rao gave the majority decision *See* separate judgment of Mr Justice Hidayatullah Also *see* V R Blackshield *Fundamental Rights and the Economic Evolution of the Indian Nation* 10 J I L I (1968) pp 1 170

However *Golak Nath case* was overruled by *Kesavananda Bharati case* which upheld Parliament's right to amend every part of the Constitution including the Fundamental Rights as long as it did not affect the "basic structure and essential features" of the Constitution This ratio of *Kesavananda Bharati* was applied in the *P M's Election case*[43b] while considering the constitutionality of the 39th Amendment

However Article 368 as amended by the Forty Second Amend ment seeks to place the entire matter beyond judicial review Clauses (4) and (5) of Article 368 as inserted by the Forty Second Amendment read as follows

"(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article (whether before or after the commencement of Section 55 of the Constitution (Forty Second Amendment) Act, 1976) shall be called in question in any court on any ground

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this Article '

(viii) An important feature added by the Forty Second amendment is the inclusion of the chapter on "Fundamental Duties" which reads

"**Fundamental Duties** —It shall be the duty of every citizen of India—

(*a*) to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem,

(*b*) to cherish and follow the noble ideals which inspired our national struggle for freedom,

(*c*) to uphold and protect the sovereignty, unity and integrity of India,

(*d*) to defend the country and render national service when called upon to do so,

(*e*) to promote harmony and the spirit of common brotherhood amongst all the people of India transcend ing religious, linguistic and regional or sectional diversities, to renounce practices derogatory to the dignity of women,

(*f*) to value and preserve the rich heritage of our compo ite culture,

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43b 1975 Supp SCC 1

(g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures,

(h) to develop the scientific temper, humanism and the spirit of inquiry and reform,

(i) to safeguard public property and to abjure violence,

(j) to strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher levels of endeavour and achievement"

The Fundamental Rights, then, are to be read subject both to Part IV and Part IV-A A citizen's rights cannot clearly run counter to his duties

(ix) Every effort is made in the Constitution to make the judiciary independent of executive The President appoints Judges of the Supreme Court and the High Court after due consultation with the judicial authorities

(x) The Constitution provides for the power of judicial review of the legislation passed by the Parliament or States Legislatures

Judicial review, both in the Supreme Court and in the High Courts, has been made subject to two-third majority holding against the enactment (Articles 144A and 228A)

(xi) Another important feature of the Constitution is constitutional guarantee for the safeguard of the Fundamental Rights of citizens as stated under Part III (Articles 12 to 35) of the Constitution Under Article 32 right to move the Supreme Court for safeguarding the Fundamental Rights, is itself a Fundamental Right The Supreme Court and High Courts are empowered to issue writs to safeguard the Fundamental Rights

But as already stated Fundamental Rights have now to be read subject to Fundamental Duties and the Directive Principles of State Policy, or at any rate, they cannot override Parts IV and IV-A

(xii) The Constitution of India also provides for the Directive Principles of State Policy which the Government has to keep in view as guide line for its policy and for the welfare of the people of the country

With the decision in *Kesavananda Bharati* v *State of Kerala*, the Directive Principles have emerged in a position of pre-eminence Said Justices Shelat and Grover, JJ that

"While most cherished freedoms and rights have been guaranteed the government has been laid under a solemn d-

to give effect to the Directive Principles Both Parts III and IV which embody them have to be balanced and harmonised —then alone the dignity of the individual can be achieved It was to give effect to the main objectives in the Preamble that Parts III and IV were enacted

Parts III and IV essentially form a basic element of the Constitution without which its identity will completely change A number of provisions in Parts III and IV are fashioned on the U N Declaration of Human Rights

Our Constitution makers did not contemplate any dishar mony between the Fundamental Rights and the Directive Principles They were meant to supplement one another It can well to be said that the Directive Principles prescribed the goal to be attained and the Fundamental Rights laid down the means by which that goal was to be achieved "

Hegde and Mukherjea, JJ however stated

"The Fundamental Rights and Directive Principles constitute the 'conscience of our Constitution The purpose of the Fundamental Rights is to create an egalitarian society, to free all citizens from coercion or restriction by society and to make liberty available for all The purpose of the Directive Principles is to fix certain social and economic goals for immediate attainment by bringing about a non violent social revolution Through such a social revolution the Constitution seeks to fulfil the basic needs of the common man and to change the structure of our society It aims at making the Indian masses free in the positive sense Without faith fully implementing the Directive Principles it is not possible to achieve the Welfare State contemplated by the Constitu tion Equally, the danger to democracy by an over emphasis on duty cannot be minimised Indeed the balancing process between the individual rights and the social needs is a delicate one This primarily is the responsibility of the State' and in the ultimate analysis of the courts as interpreters of the Constitution and the law "

Beg, J (as he then was) placed the matter in perspective by saying

"It is not right to characterise the Fundamental Rights contained in Part III, as merely the means whereas the Directive Principles, contained in Part IV as the ends of the endeavours of the people to attain the objectives of their Constitution On the other hand it would be more correct to describe the Directive Principles as laying down the path which was to be pursued by our Parliament and State Legislatures in moving towards the objectives contained in the Preamble Indeed, from the point of

view of the Preamble, both the Fundamental Rights and the Directive Principles are means of attaining the objective which were meant to be served both by the Fundamental Rights and Directive Principles Fundamental Rights are ends of endeavours of the Indian people for which the Directive Principles provided the guidelines It would be difficult to hold that, the necessarily changeable limits of the path, which is contained in the Directive Principles are more important than the path itself

Perhaps, the best way of describing the relationship between the Fundamental Rights of individual citizens, which imposed corresponding obligations upon the State and the Directive Principles, would be to look upon the Directive Principles as laying down the path of the country's progress towards the allied objectives and aims stated in the Preamble, with Fundamental Rights as the limits of that path, like the banks of a flowing river, which would be mended by displacements, replacements or curtailments or enlargements of any part according to the needs of those who had to use the path

Primarily the mandate in Article 37 was addressed to the Parliament and the State Legislatures, but, in so far as Courts of Justice can indulge in some judicial law making, within the interstices of the Constitution or any statute before them for construction, the Courts too are bound by this mandate"

The addition of Fundamental Duties has added a new dimension and the predominant feeling that has emerged has brought down fundamental rights from the pre-eminence they once held

3 Amendments to the Constitution of India from 1951 to 1974

The Constitution is a document of great importance which determines the composition and functions of the different organs of the Government and also states the relationship between the Government and the citizen It is said to be "The General Will of the people expressed in a National Assembly" of a country In an independent country, a written Constitution is the direct result of the determination of the people regarding the system according to which they want their Government to function According to Edmund Burke, Constitution is an ever growing thing and is perpetually conservous as it embodies the spirit of the nation It is enriched at present by the past influences and it makes the future richer than the present' It therefore means that the written Constitution should not be rigid but flexible The method of introducing changes by judicial interpretation

through decided cases, that come before the court, is slow as well as limited Instead of leaving the important task of amending the constitution entirely to the judiciary it is better if in the Constitution itself some provision is inserted to provide for the amendment of the Constitution

In India the Constitution of India, 1950 is fortunately a written document which was drafted by the Constitution makers in the Constituent Assembly of India during 1948 49 after India was declared independent from the British domination The Constitution under Article 368 provides for "Amendment of the Constitution" From 1950 to 1976 within a period of twenty seven years the Parliament has passed forty two amendments to the Constitution of India They were considered necessary by the members of Parliament and the Government due to the changing socio economic conditions of India Amongst the various factors responsible for this change, it will be worth while to mention that the implementation of three Five Year Plans led to the unprecedented industrialisation of the country and it has completely changed the whole outlook of the people The transition from feudal era to the industrial era and the declaration by the Government of the "Welfare State" as its goal, keeping in view the Directive Principles of State Policy as stated in the Constitution, made it necessary to introduce various reforms The Constitution of India was, therefore, amended several times to meet the requirements of the growing nation and its changing needs, during the past twenty seven years

The rapid succession of amendments during such a short life of the Constitution of India, is attacked by many critics as a sign of its weakness Some others feel that the Constitution should not be made so cheap as to introduce amendments so quickly and easily Still after a close examination and intensive study of the changing economic and political conditions of India, one will realise that the Constitution was amended under certain compelling circumstances only The Constitutional amendments through the Parliament and the judiciary, are important milestones on the road to the constitutional development of India

The Supreme Court overruling *I C Golaknath* v *State of Punjab*[15] has now held in a thirteen bench decision in *Kesavananda Bharati* v *State of Kerala*[16], that Parliament's power under Article 368 is of wide amplitude and it can amend every article of the Constitution, short of repealing the Constitution as a whole, as long as

15 AIR 1967 SC 1643
16 (1973) 4 SCC

it does not change the "basic structure", "frame work" or "essential features" of the Constitution The thirteen Bench decision was delivered in nine judgments Finding the ratio of the case is no easy task and critics disagree on what the Court has in fact held [47].

That Article 31 relating to right to property can be abrogated is undisputed but whether other fundamental freedoms can be abrogated is doubtful since they may relate to the "basic structure" or form one of "essential features" of the Constitution, such as the right of equality, freedom of speech and expression, association, movement and minority rights

Article 368 which related to amendment of the Constitution has itself been amended by the Twenty fourth and Forty-Second Amendments Newly added clause (4) exclude judicial review while clause (5) makes the power of Parliament without any limitation Article 368 reads

> **Power of Parliament to amend the Constitution and procedure therefor** —(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article,
>
> (2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House 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, the Constitution shall stand amended in accordance with the terms of the Bill
>
> Provided that if such amendment seeks to make any change in —
>
> (*a*) Article 54, Article 55, Article 73, Article 162 or Article 241, or
>
> (*b*) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
>
> (*c*) any of the lists in the Seventh Schedule, or
>
> (*d*) the representation of States in Parliament, or

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47 *See* K. Subba Rao, "*The Two Judgments Golaknath and Kesavananda Bharati* (1973)2 SCC (Jour)1, P K Tripathi '*Kesavananda Bharati v State of Kerala Who Wins*' , (1974) 1 SCC (Jour)3, Upendra Baxi, '*The Constitutional Quicksands of Kesavananda Bharati and the Twenty-fifth Amendment* (1974)1 SCC (Jour) 45, H M Seervai, "*The Fundamental Rights Case At the Cross Roads* (1973)75 Bom LR (Journal) 49, N A Palkivala '*The Fundamental Rights Case Comment* , (1973)4 SCC (Jour) 57, Joseph Minattur, '*The Ratio of Kesavananda Bharati Case* , (1974)1 SCC (Jour) 73, Surendra Malik, "*The Fundamental Rights Case* , (1973)2 SCC (Jour) 32, Shamful Hasan "*Judicial Review under Section 3 of 25th Constitution (Amendment) Act 1972*" , (1974)1 SCJ (Jour) 11 and Bakshish Singh, '*Is it a Judgment*' , (1974) 1 SCJ (Jour) 68

(ii) The Constitution (Second Amendment) Act, 1952 merely amended Article 81 because it was found that the limits laid down in it could not be adhered to in practice in the light of the actual size of the country's growing population The amendment omitted the words and figures "not less than one member for every 750,000 of the population"

(iii) The Constitution (Third Amendment) Act, 1954 brought about changes in the Seventh Schedule, consisting of the three Legislative Lists Its result was that the scope of the Union's legislative power was enlarged by the inclusion of certain items, which were originally in the State List, and in the Concurrent List

(iv) The Constitution (Fourth Amendment) Act, 1955 made changes in Articles 31 and 31 A It provided that no property shall be compulsorily acquired or requisitioned save for a public purpose and save by the authority of a law which provides for compensation No such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate The Ninth Schedule of the Constitution was also amended by adding a few matters The Amending Act of 1955 was specially passed due to the decision of the Supreme Court in *State of West Bengal* v *Bela Banerjee* [1]

(v) The Constitution (Fifth Amendment) Act, 1955 made changes in Article 3 of the Constitution It provided a new procedure for ascertaining the will of a State Legislature with respect to territorial or boundary changes which affected it

(vi) The Constitution (Sixth Amendment) Act, 1956 added entry No 92 A in the Union List of the Seventh Schedule So far as the State List was concerned it substituted another entry No 54 It also made changes in Articles 269 and 286 dealing with inter State Sales Tax

(vii) The Constitution (Seventh Amendment) Act, 1956 brought about the most comprehensive changes in the Constitution It was a result of the enforcement of the States Reorganisation Act, 1956 and the Bihar and West Bengal (Transfer of Territories) Act, 1956 by which the territorial basis of the Union has been fundamentally changed Part B and C States were abolished along with the elimination of the institution of Rajpramukh and a new category of States called Union Territories was brought into exutence It thoroughly overhaulded the Constitution

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1) 1954 SCR 558 Other cases were—*Dwarkadas* v *Sholapur Spg and Wvg Co Ltd* 1954 SCR 674 and *State of W B* v *Subodh Gopal Bose* 1954 SCR 587 and *Sajjad Ahmad* v *State of U P* (1955)1 SCR 707 *See also* AIR 1959 SC 308 AIR 1960 SC 160 and AIR 1961 SC 1619

the ninth place in the list of Union Territories in the First Schedule It will be recalled that Pondicherry was under French colonial rule and the French Government handed it over to India Following the *de jure* transfer of Pondicherry to the Government of India, constitutional steps were taken to provide for its integration with the motherland

Moreover, the Fourteenth Amendment Act also enabled the Parliament to provide the Union Territories of Himachal Pradesh, Manipur, Tripura, Goa, Daman and Din and Pondicherry with Legislatures and Councils of Ministers on the pattern of former Part C' states Parliament had already passed the Union Territories Act to provide these Union Territories with Legislative Assemblies and Council of Ministers

(xv) The Constitution (Fifteenth Amendment) Act, 1968 raised the retiring age of the Judges of State High Courts from 60 to 62 It also amends Article 311 relating to dismissal, removal or reduction in rank of persons employed in civil capacities under the Union or a State by making provision for service of one show-cause notice to the delinquent civil servant. It also amended Art. 217, Art. 226 and Sch VII, List I, Entry 78

(xvi) The Constitution (Sixteenth Amendment) Act, 1963 received the assent of the President along with the Fifteenth Amendment Act on October 7, 1963 It was passed to empower the Government to take action against secessionist propaganda and activities. It provides that candidates standing for election to Parliament and the State Legislatures, Ministers and Judges of the Supreme Court and High Courts should swear or affirm allegiance to the country's "sovereignty and integrity" It also amends Article 19 to exclude secessionist propaganda activities from freedom of speech and expression

(xvii) The Constitution (Seventeenth Amendment) Act, 1964 has enlarged the definition of 'estate' in Article 31 A and the Ninth Schedule by more than 100 enactments passed in various States The measure has aroused vehement opposition from the vested interests and big landholders [51]

(xviii) The Constitution (Eighteenth Amendment) Act, 1966 provided for the creation of the two States of Punjab and Haryana and constitution of Chandigarh as a Union Territory

(xix) The Constitution (Nineteenth Amendment) Act, 1966 amended clause (1) of Article 324 for abolition of the provisions

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51 Upheld in *Sajjan Singh v State of Rajasthan*, AIR 1965 SC 845 *See* also *Jagannath v Authorised Officer* (1971)2 SCC 893 905

for appointment of election tribunals for the decisions of doubts and disputes arising out of or in connection with election to Parliament and to the Legislatures of States

(xx) The Constitution (Twentieth Amendment) Act, 1967 amended Article 233 by adding the new Article 233-A in order to validate the appointment of certain District Judges in some States of India This was an amendment to supersede a judgment of the Supreme Court on the question [52]

(xxi) The Constitution (Twenty-first Amendment) Act, 1967 amended the Eighth Schedule to the Constitution of India and included Sindhi as the fifteenth language

(xxii) The Constitution (Twenty-second Amendment) Act, 1969 made on September 25, 1969, provided for the formation of an autonomous State comprising certain tribal areas in Assam and the creation of a local Legislature or a Council of Ministers or both for that State It was in pursuance of this Amendment that the state of Meghalaya came into existence on April 1, 1970

(xxiii) The Constitution (Twenty third Amendment) Act, 1970 made on 23rd January, 1970, amended Article 334 and the Amendment provided that the reservation of seats for the Scheduled Castes and the Scheduled Tribes in the House of the People and the Legislative Assemblies of the states and the representation of the Anglo Indian community in the Lok Sabha and in the Legislative Assemblies of the states by nomination shall continue up to 1980 instead of 1970 An amendment in Article 333 provided that the Governor of a state may, if he is of opinion that the Anglo-Indian community needs representation in the Legislative Assembly of the State and is not adequately represented therein, nominate one member of the community to the Assembly Formerly, the number was not specified Article 330 reserves certain seats for Scheduled Castes and Scheduled Tribes in the Lok Sabha A similar change was made in Article 332 which deals with the reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the States

(xxiv) The Constitution (Twenty fourth Amendment) Act, 1971 made on 5th November, 1971, establishes the sovereignty of Parliament to amend the Constitution and thus upsets the decision of the Supreme Court of India in the *Golak Nath case* After the Amendment, Parliament can amend even those articles which relate to fundamental rights guaranteed by the Constitution This Amendment provides that nothing in Article 13 of the Constitution of India shall apply to any amendment of the Constitution made under Article 368 of the Constitution The marginal heading of Article 368 was changed and it was to read as "Power of Parliament to amend the Constitution and procedure therefor" Article 368 itself was amended and the Amendment provided that

52 *Chanda Mohan* v *State of U P*, AIR 1966 SC 1987

notwithstanding anything in the Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of the Constitution in accordance with the procedure laid down in Article 368 When the Amendment is passed by Parliament, it shall be presented to the President who shall give his assent to the bill and thereupon the Constitution shall stand amended in accordance with the terms of the bill This Amendment was upheld in *Kesavananda Bharati Case* [(1973)4 SCC 225]

(xxv) The Constitution (Twenty fifth Amendment) Act, 1971 made changes in Article 31 and added a new Article 31 C Article 31(2) as amended provided that no property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for acquisition or requisitioning of the property for an amount which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law No such law shall be called in question in any court on the ground that the amount so fixed or determined is not adequate or that the whole or any part of such amount is to be given otherwise than in cash Article 31(2 B) provided that nothing in Article 19(1)(*f*) shall affect any such law as is referred to in Article 31(2) as amended The new Article 31 C provided that notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles specified in Article 39(*b*) or (*c*) shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Article 14, Article 19 or Article 31 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 Where such law is made by the Legislature of a State, the provisions of Article 31 C shall not apply thereto unless such law having been reserved for the consideration of the President has received his assent In *Kesavananda Bharati Case* the Supreme Court upheld the changes made in Art 31(2) but struck down the newly added Art 31 C

(xxvi) The Constitution (Twenty sixth Amendment) Act, 1971, omitted altogether from the Constitution Articles 291 and 362 Article 291 of the Constitution had guaranteed the payment of Privy Purses to the rulers of the Indian states and Article 362 had guaranteed them their personal rights, privileges and dignities The result of this Amendment was that the Privy Purses and the personal rights privileges and dignities of the Indian rulers were abolished A new Article 363 A was added It provided that notwithstanding anything in the Constitution or in any law for the time being in force, the Prince, Chief or other person who at any time before December 31, 1971, was recognised by

the President as the ruler of an Indian state or any person who at any time before that date was recognised by the President as the successor of such ruler, shall cease to be recognised as such ruler or the successor of such ruler after December 28, 1971 On and from December 31, 1971, the Privy Purses were abolished and all rights, habilities and obligations in respect of privy purse were extinguished and accordingly the ruler or the successor of such ruler or any other person was not to be paid any sum as privy purse

(*xxvii*) The Constitution (Twenty seventh Amendment) Act, 1971, amended Article 239 A and Mizoram was added to the list of the Union Territories A new Article 239 B was added

Article 240 was amended and Mizoram and Arunachal Pradesh were added to the list of the Union Territories It was also provided that whenever the Legislature of the Union Territory of Goa, Daman and Diu, Pondicherry or Mizoram is dissolved or the functioning of that body as Legislature remains suspended on account of any action taken under Article 239 A, the President may, during the period of such dissolution, or suspension, make regulations for the peace, progress and good government of that Union Territory A new Article 371 C was added by this Amendment It provided that notwithstanding anything in the Constitution the President may, by order made with respect to the State of Manipur provide for the constitution and function of a committee of the Legislative Assembly of the State consisting of members of that Assembly elected from the Hill Areas of that State, for the modification to be made in the rules of business of the Government and in the rules or procedure of the Legislative Assembly of the State and for any special responsibility of the Governor in order to secure the proper functioning of such a committee The Governor shall annually or whenever so required by the President make a report to the President regarding the administration of the Hill Areas in the State of Manipur and the executive power of the Union shall extend to the giving of directions to the state as to the administration of the said areas

(*xxviii*) By the Constitution (Twenty eighth Amendment) Act, 1972, a new article Article 312-A has been added empowering Parliament to vary or revoke conditions of service of officers of certain services Also Art 314 has been omitted

(*xxix*) The Constitution (Twenty ninth Amendment) Act, 1972 merely added the Kerala Land Reforms (Amendment) Act 1969 and the Kerala Land Reforms (Amendment) Act, 1971 in the Ninth Schedule to the Constitution The result is that these two laws cannot be challenged in any court of law This Act was upheld in *Kesavananda Bharati Case*[52a]

52a (1973) 4 SCC 225

(*xxx*) The Constitution (Thirtieth Amendment) Act, 1972 was passed by both houses of Parliament in August, 1972 Before this Amendment, an appeal could be taken to the Supreme Court of India on a certificate granted by a High Court that the amount or value of the subject matter of dispute was not less than Rs 20,000/- or that the judgment, decree or final order involved some claim to property of the like amount As a result of the Amendment, an appeal lies to the Supreme Court only if the High Court certifies that the case involves a substantial question of law of general importance and requires to be decided by the highest judiciary of the country The Amendment has removed the condition that an appeal lies only when the amount or value in dispute is not less than Rs 20,000/ The result is that in future all appeals, irrespective of their monetary value, can be taken to the Supreme Court provided they involve a substantial question of law It is pointed out that whatever might have been the original justification, cases of lesser value failed to get a verdict from the Supreme Court even if they involved important questions of law As a result of the Amendment, the doors of the Supreme Court will be open to all those who feel that they have a substantial question of law to be decided by the Supreme Court The Amendment is in keeping with the new trend that property is not so important a factor to be taken into consideration as it used to be

(*xxi*) By the Constitution (Thirty first Amendment) Act, 1973, Article 81 was amended to provide for 525 members elected by direct election instead of 500 while representation from Union Territories was reduced from 25 to 20 Consequent to the re-organisation of the N E Areas, Articles 330 and 332 were also amended

(*xxxii*) By the Constitution (Thirty second Amendment) Act, 1974 Article 371 was omitted and new Articles 371-D and 371 E added This was to solve the entangled problem of providing equitable opportunities and facilities for people belonging to different posts of the State in the matter of public employment and education

(*xxxiii*) By the Constitution (Thirty-third Amendment) Act, 1974, Articles 101 and 190 there amended and proviso, added providing for non acceptance of resignation if the speaker by information, or otherwise or upon enquiry is satisfied that the resignation is not voluntary or genuine

(*xxxiv*) By the Constitution (Thirty fourth Amendment) Act, 1974 the Ninth Schedule to the Constitution was amended by inserting 17 more State Acts in it All these Acts relate to land reforms and were inserted under the power given by Article 31B By this amendment the total number of entries reached 83

(*xxxv*) The Constitution (Thirty fifth Amendment) Act, 1974 provided for association with the independent State of Sikkim But since Sikkim became part of the Union of India, the changes made by the Thirty fifth amendment were repealed by the Thirty sixth amendment

(*xxxvi*) By the Constitution (Thirty sixth Amendment) Act, 1975 Sikkim became part of the Union of India as the twenty second State Special provision for Sikkim was made by inserting Article 371F

(*xxxvii*) By the Constitution (Thirty seventh Amendment) Act, 1975 the chapter on Union Territories was amended to include Mizoram

(*xxxviii*) By the Constitution (Thirty eighth Amendment) Act, 1975 the subjective satisfaction of the President and Governor was made final and conclusive and beyond scrutiny in a court of law Consequent changes were made in the chapter on Emergency provisions

(*xxxix*) By the Constitution (Thirty ninth Amendment) Act, 1975 disputes regarding the election of high dignitaries such as the President, Vice President, Prime Minister and the Speaker were placed outside the jurisdiction of the Courts and special provisions were to be made for decision by another authority No such law could be called in question in a court of law

This amendment further amended the Ninth Schedule by adding entries 87 to 124

(*xxxx*) By the Constitution (Fortieth Amendment) Act, 1976 it was declared that all things of value within the territorial waters or continental shelf and resources of the exclusive economic zone were to vest in the Union The limits of the territorial waters, the continental shelf and the exclusive economic zone are to be declared by law made by Parliament from time to time

By this amending Act Ninth Schedule was further amended to include entries 125 to 188

(*xxxxi*) By the Constitution (Forty first Amendment) Act, 1976 the age of retirement of members of a State Public Service Commission or Joint Commission was raised in Article 316 from sixty years to sixty-two years

(*xxxxii*) By the Constitution (Forty second Amendment) Act, 1976 wide ranging changes were introduced in the Constitution They came into force by February 1, 1977 The important changes were

(*a*) The Preamble was amended to constitute India into a

Sovereign Socialist Secular Democratic Republic' For the words 'unity of the Nation" the words "Unity and integrity of the Nation" were substituted

(*f*) Laws in respect of anti national activities and associations were made as exceptions to Articles 14, 19 and 31

(*g*) In matters of judging the constitutional validity of statutes the Supreme Court has been given the exclusive jurisdiction to decide upon the validity of Central laws while the High Courts are to exclusively decide upon the validity of State laws Only if alongwith the validity of the State law that of a Central law is also involved, the matter will fall within the Supreme Court's jurisdiction

No law can be struck down unless so held by two thirds majority Also if the same question is pending before several High Courts it can be called to the Supreme Court The Supreme Court can also transfer cases from one High Court to another

(*d*) The chapter on Directive Principles was amended to further include free legal aid for indigents, participation of workers in the management of industries and for protection and environment and safeguarding of forests and wild life Article 39 was amended to further safeguard children and youth

(*e*) A significant step has been the introduction of a separate chapter on Fundamental Duties of a citizen, which include the highest principles and ideals of nationalism, patriotism, civic sense, morality and decency

(*f*) It has been restated that the President has to function in accordance with the aid and advice of the Council of Ministers

(*g*) The duration of Houses of Parliament has been extended from five years to six years

(*h*) Changes have been introduced in Articles 103 and 192 to decide the question of disqualification

(*i*) A distinguished jurist can now also be appointed as a High Court Judge

(*j*) The writ petition of High Courts and their power to issue stay has been curtailed under the new Article 226 Their jurisdiction under Article 227 is also curtailed by excluding tribunals

(*k*) Provision has been made for forming special Tribunals to deal with service matters revenue ma

industrial and labour disputes, land reforms urban ceiling, offences against socio-economic legislation for cign exchange and smuggling etc

(*l*) Some changes have been made in the provision on emergency to permit it being declared in respect of any part of India

(*m*) The provisions for amendment in Article 368 have themselves been further amended to provide that there will be no limitations at all to the power of Parliament to make amendment Further no amendment can b called in question in any court on any ground

(*n*) There has been readjustment in the legislative lists in the Seventh Schedule Significant is the transfer of subjects of administration of justice and constitution of courts, education, forests, wild life, and weights and measures from State List to Concurrent List

16

Development of the Legal Profession

Development before 1926

Law, as a profession, appears to have been in vogue in ancient[1] and medieval[2] India though its concept was quite different from what it is today The legal profession as it exists in India today had its beginnings in the first years of British rule The Hindu Pandits, Muslim Muftis and Portugese lawyers who served under earlier regimes had little effect upon the system of law and legal practice that developed under the British administration

The first real step in the direction of organizing a legal profession in India was taken in 1774 when the Supreme Court was established in Calcutta pursuant to the Regulating Act of 1773

Clause 11 of the Supreme Court Charter empowered the Court "to approve, admit and enrol such and so many advocates and attorneys at law" as to the Court "shall seem meet" They were to be attorneys of record and were authorized "to appear and plead and act for the suitors" of the Court The Court could remove the said advocates and attorneys "on reasonable cause No other person whatsoever, but such advocates and attorneys so admitted and enrolled were to be "allowed to appear and plead or act" in the Court, for or on behalf of such suitors The "advocates" entitled, thus, to appear were only the English and Irish barristers and members of the Faculty of Advocates in Scotland the attorneys referred to were the British attorneys and solicitors The Court was thus an exclusive preserve for members of the British legal profession The same powers of enrolment were later conferred on the Supreme Courts established at Bombay and Madras An Indian lawyer had no right to appear before the Courts

The Bengal Regulation VII of 1793 created, for the first time, a regular legal profession for the Company's Courts The regulation gave power to Sadar Diwani Adalat to enrol pleaders for all Company's Courts Only Hindus and Muslims would be enrolled as pleaders The next important legislation was the

1 Supra p 7
2 Supra p 30

Bengal Regulation XII of 1833 which modified the provisions of the earlier Regulation in that only persons duly qualified, to whatever nationality or religion they might belong, could be enrolled as pleaders of the Sadar Diwani Adalat

The Legal Practitioners Act, 1846, made important innovations, namely, (1) the office of pleaders was thrown open to all persons of whatever nationality or religion duly certified by the Sadar Courts, (2) attorneys and barristers of any of Her Majesty's Courts in India were made eligible to plead in any of the Sadar Courts, (3) the pleaders were permitted to enter into agreements with their clients for their fees for professional services

The Legal Practitioners Act, 1853, also permitted barristers and attorneys of the Supreme Court to be admitted as pleaders in the Courts of the East India Company Thus barristers and attorneys were empowered to practise in the Company's Courts while the Indian legal practitioner could not appear before the Supreme Courts

The position clearly underwent a change after the British Crown took over the administration of the country from the Company in 1858 The Indian High Courts Act, 1861, authorized the setting up of High Courts in several Presidencies in place of the Supreme Courts and Sadar Adalats Clause 9 of the Letters Patents of 1865 which replaced the earlier Letters Patent creating a High Court in Calcutta, authorized it to approve, admit and enrol advocates, vakils and attorneys The persons so admitted were entitled to appear for the suitors of the High Court and to plead or act according to rules made by the High Court or directions issued by it Similar provisions were made in the Charters of the Courts of Bombay and Madras

In course of time other High Courts were established The Legal Practioners Act, 1879 was enacted to consolidate and amend the law relating to legal practioners of the High Court It empowered the High Court, not established under a royal charter, to make rules, with the previous sanction of the Provincial Government, as to the qualifications and admission of proper persons to be pleaders and Mukhtars of the High Court

In the chartered High Courts rules had been framed under which there were, apart from Atrorneys, two other classes of lawyers, Advocates and Vakils Advocates were to be barristers of England or Ireland or members of the Faculty of the Advocates of Scotland The High Courts, other than the Calcutta High Court, permitted non Barristers as well to be enrolled as advocates under certain circumstances, *e.g.* in Bombay, law graduates of the Bombay University, could be enrolled as Advocates The Vakils were the persons who had taken their law degree from an

Indian University and fulfilled certain other conditions In Madras, a law graduate qualified to be admitted as a vakil if he passed an examination in procedure and underwent practical training with a practising lawyer for a year Similarly rules had been made by the other High Courts also The High Courts were given the power, under Section 6 of the Legal Practitioners Act, 1879, to make rules as to the qualification, admission and certificates of proper persons to be Pleaders and Mukhtars of the subordinate courts Under the rules framed by the High Courts under the Legal Practitioners Act, law graduates who did not possess the additional qualification to enable them to be enrolled as the High Court Vakils, and non law graduates after passing the pleadership examination conducted by the High Court, were enrolled as Pleaders to practise before subordinate courts Besides the Pleaders, there were Mukhtars who passed the Mukhtarship examination held by the High Court after passing the matriculation or equivalent examination

Section 4 of the Legal Practitioners Act, 1879 empowered an advocate or vakil on the roll of any High Court to practice in all the Courts subordinate to the Court on the roll of which he was entered and in any court in British India other than a High Court on whose roll he was not entered and with the permission of the Court in any High Court on whose roll he was not entered There was a proviso however, to the effect that this power would not extend to the original jurisdiction of the High Court in a Presidency Town

On the original sides of the Calcutta High Court only the Advocates i e, the Barristers of England and Ireland and the Advocates of Scotland, were entitled to appear and plead, on the instructions of an Attorney These Advocates were also entitled to appear and plead on the appellate side of the High Court and subordinate courts The Vakils of the Calcutta High Court were not entitled to act or plead on the original side or in appeals from the original side The Madras High Court had, however, altered its rules, as early as 1886, and permitted the Vakils admitted under the Rules of 1833, and the Attorneys to appear, plead and act for suitors on the original side The result, therefore, was that in the Madras High Court there remained no distinction between Barristers, Vakils and Attorneys as regards their rights to appear and plead on the original side Under the new Rules, the Vakils and Attorneys could also act on the original side while the advocates had to be instructed by an attorney In the Bombay High Court the Vakils were not originally permitted to act or plead on the original side This position, however, later changed and a non Barrister, on passing an examination conducted by the High Court, became eligible for enrolment as Advocate entitled to appear and plead on the original side The only limitation was

that the Advocates of the Original side, whether Barristers or non-Barristers, had to be instructed by an Attorney before they could appear and plead on the original side

The Indian Bar Committee, 1923

The Vakils expressed dissatisfaction about the distinction that existed between barristers and vakils, and the special privileges enjoyed by the British barristers and solicitors There was also a demand for creating an all India Bar in the country Consequently, the Government of India in 1923, constituted the Indian Bar Committee under the Chairmanship of Sir Edward Chamier to go into these issues

The Committee did not consider it practicable at the time to organize the Bar on an all India basis or to constitute an all Indian Bar Council The significant recommendation of the Committee was regards the establishment of Bar Councils for the High Court The Committee recommended *inter alia*—

(1) that in all High Courts, a single grade of practitioners entitled to plead be established who should be called Advocates,

(2) that when special conditions are maintained for admission to plead on the original side of a High Court, the only distinction shall be within that grade which shall consist of advocates entitled to appear on the original side and advocates not so entitled,

(3) subject to certain conditions being fulfilled, Vakils would be allowed to plead on the original side of the three High Courts,

(4) that a Bar Council be constituted for each High Court having power to enquire into matters calling for disciplinary action against a lawyer,

(5) that the disciplinary powers would rest with the High Court but before taking any action, it should refer the case to the Bar Council for enquiry and report

The Indian Bar Councils Act, 1926

To implement the recommendations of the Chamier Committee, the Central Legislature enacted the Indian Bar Councils Act, 1926 The object of the Act was to provide for the constitution and incorporation of Bar Councils for certain Courts to confer powers and impose duties on such Bar Councils and to consolidate and amend the law relating to legal practitioners entitled to practice in such Courts

Revenue agents practising in the Mofussil Courts and revenue offices under its scope and consequently did not set up a unified Indian Bar Further the powers conferred on the Bar Councils constituted under the Act were limited and the Bar Councils were neither autonomous nor had any substantial authority The demand for a unified all India Bar which arose initially as a protest against the monopoly of the British barristers on the original sides of Calcutta and Bombay High Courts and the invidious distinctions between barristers and non barristers received a new orientation with the advent of independence and became a claim for the fulfilment of a cherished ideal", namely, an autonomous and unified all India Bar In response to this persistent and wide spread demand by the legal fraternity the Government of India in 1951, appointed the all India Bar Committee under the Chairmanship of Justice S R Das of the Supreme Court

The Committee, in its report, made detailed recommendations for the unification of the Bar providing for a common roll of advocates who would be entitled to practice in all courts in the country

The Committee recognized that the task of preparation of a common roll of advocates, who would be members of the unified all India Bar, would be difficult but not impossible Its principal recommendations in that behalf were

(i) Each State Council should maintain a register of all existing advocates entitled to practise in their respective High Courts

(ii) All vakils and pleaders, entitled to practise in the district and other subordinate courts, who are law graduates should be entitled to be included in the roll of advocates maintained by the State Bar Council on payment of certain fees

(iii) Vakils and Pleaders who are not law graduates but who under the existing rules, are entitled to be enrolled as advocates, should also be entitled to be placed on that register

(iv) The State Bar Councils should then send copies of such registers to the all India Bar Council who are to compile a common roll of advocates in the order of seniority according to the original enrolment of the advocates in their respective High Courts or the Supreme Court if they are not enrolled in any High Court

(v) New entrants possessing the required minimum qualifications may also apply to a State Bar Council for enrol-

ment and their names should be forwarded by the State Bar Council to the all India Bar Council for being entered on the common roll

The Committee also recommended that there should be no further recruitment of non graduate pleaders or mukhtars

The Committee also felt that the essence of an all India Bar is the capacity or the right of its members to practise in all the courts in the country, the highest to the lowest, and recommended that the requirement of leave for practising in any other High Court under Section 4 of the Legal Practitioners Act, 1879 should not exist

A majority of the Committee were of the opinion that the insistence on a certain number of years' practice in a High Court as a condition of eligibility of the Supreme Court had not yielded satisfactory results and that it was best to let an advocate have the freedom to practise in any court including the Supreme Court irrespective of his standing at the Bar

On the question of the continuance of the dual system in the High Courts of Calcutta and Bombay and their original sides the Committee concluded that there was no reason for the abolition of the system as "the dual system is nothing more than a division of labour which necessity enures for the better preparation of the case and enables the Advocate to effect a better and forceful presentation of the client's point of view before the Judge" The Committee was also of the view that the system would not in any manner be inconsistent with the creation of an all India Bar with a common roll of Advocates as the "right to practise in all Courts does not mean that the rules of the Courts where the Advocates go to practise may be ignored What is meant is that there should be no rule of any court preventing any advocate ordinarily practising in any other court from exercising his profession in the first mentioned court in the manner in which an advocate ordinarily practising in that Court may do"

The Committee also recommended creation of an all India Bar Council and State Bar Councils Under the Indian Bar Councils Act, 1926, the Bar Councils were merely advisory bodies and the power of admission, suspension and removal from the Roll of Advocates was entirely vested in the respective High Courts Subject to some safeguards, the Committee suggested that in the interests of an autonomous national Bar, the power of enrolement, suspension and removal of Advocates be vested in the Bar Councils The Committee did not feel the need for a separate Bar Council for the Supreme Court as every Advocate on the common Roll shall be entitled as of right to practice in the Supreme Court and would be

amenable to the jurisdiction of the appropriate State Bar Council and of the all India Bar Council

Law Commission

The Law Commission, 1955, considered this question in the famous fourteenth report on 'Reform of Judicial Administration, (1958) The Commission endorsed all of the recommendations of the Bar Committee with respect to the unification of the Bar and lamented that 'these proposals which were made as far back as March, 1953 should not have been given legislative effect'[7] The Commission also endorsed the recommendation of the Committee that there should be no further recruitment of non graduate pleaders or mukhtars

The Commission agreed with the Bar Committee that the dual system should continue in Calcutta or Bombay. The Commission in addition recommended a system closely analogous to the dual system for the Supreme Court "so that the Court may have the assistance of the Bar in a full measure in the discharge of its onerous task'[8] In the Commission's view, a large number of matters in the Supreme Court are matters of prime importance and substantial value, and it is very necessary for the efficient working of the Court that it should be assisted by a Bar which has given thought and labour to the preparation of a case'[9]

The Commission also favoured the division of the Bar into Senior Advocates and Advocates, the seniors being, by reason of their status, precluded from accepting certain types of work[10] and from appearing in cases unless briefed with a junior "This would result in achieving several objectives To the seniors it will mean the recognition of a successful career at the Bar by the conferment of a privilege which will give them an honoured position among members of the profession and enable them to concentrate on important work yielding as large or perhaps a larger income It should result in putting work in the hands of the junior members of the Bar This should hearten them and raise their morale, which in turn should attract an abler class of men to the profession The distribution of work among a large number should also help to prevent delays caused by adjournments"[11]

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7 The Law Commission, XIV Report, 558(1958)
8 *Ibid* 566
9 *Ibid*
10 According to the Commission, the seniors would be subject to the following obligations —
(i) they should not draft notices, pleadings, affidavits, or other documents nor advise on evidence,
(ii) they should not settle notices, pleadings, affidavits, or documents unless they have been drawn by an advocate who is not on the list of senior advocates
11 Commission Report, 568

The Commission emphasized the principle of autonomy of the Bar, in matters relating to the profession, sought to be given effect to by the Committee of 1951 Consequently, the Bar Councils were to be entirely autonomous bodies consisting wholly of the members of the profession The Bar Councils were to elect their own chairman

The Advocates Act, 1961

In 1961, Parliament enacted the Advocates Act to amend and consolidate the law relating to legal practitioners and to provide for the constitution of State Bar Councils and an All India Bar Council The Act establishes an all India Bar and a common roll of Advocates An advocate on the Common Rolls has the right to practise in all Courts in India from the Highest to the lowest The Bar has been integrated into a single class of legal practitioners known as Advocates

The Act creates a State Bar Council in each State and a Bar Council of India at the Centre The functions of a State Bar Council are *inter alia*—(*a*) to admit persons as Advocates on its roll, (*b*) to prepare and maintain such roll, (*c*) to entertain and determine cases of misconduct against advocates on its roll (*d*) to safeguard the rights, privileges and interests of advocates on its roll, and (*e*) to promote and support law reform The functions of the Bar Council of India are *inter alia*—(*a*) to prepare and maintain a common roll of advocates, (*b*) to lay down standards of professional conduct and etiquette for advocates, (*c*) to lay down the procedure to be followed by the disciplinary committee of each State Bar Council, (*d*) to safeguard the rights, privileges and interests of advocates, (*e*) to promote and support law reform, (*f*) to exercise general supervision and control over State Bar Councils, and (*g*) to promote legal education and to lay down standards of such education in consultation with the universities whose degree in law shall be a qualification for enrolment of an advocate

Any advocate may, with his consent, be designated as a Senior Advocate if the Supreme Court or a High Court is of opinion that by virtue of his ability, experience and standing at the Bar, he deserves such distinction

The Advocates Act, 1961, has marked the beginning of a new era in the history of the legal profession by vesting largely in the Bar Councils the power and the jurisdiction which the Courts till then exercised, by fulfilling the aspirations of those who had been demanding an All India Bar and affecting a unification of the Bar in India, by the creation of a single class of practitioners with power to practise in all the Courts and bound by rules made and a code of conduct laid down by their own bodies to which the

members could resort to for the protection of their rights, interests and privileges

The Legal Profession can play a vital role in upholding individual rights, promoting more efficient and widespread justice, and acting as an integrating force in national life It has great traditions on which to build It is now part of a modern legal system which provides both the personnel and techniques for effective rational unity The responsibility of this profession to the Indian society is indeed great, as has been its history

Appendix A
The Gentoo Code

'Gentoo' is a most controversial word as regards its meaning in the whole legal history of India Field has pointed out, "The word 'Gentoo' is derived from the Portuguese word *'Gentio'* or a *'Gentile'* which came to mean *'a native of India'* i e a Hindu "[1]

Nathanial Brassey Halhed in his *Translator's Preface to Gentoo Law* said, "The word 'Gentoo' has been and is still equally mistaken to signify the proper sense of the term as was used by the Professors of the Brahminical religion *In its* etymological sense the word 'Gent' or 'Gentoo' means 'animal' and *in its more confined sense*, ,mankind The four great tribes have each their own separate appellation, but they have no common or collective term that comprehends the whole nation under the idea affixed by Europeans to the word 'Gentoo' Possibly the Portuguese on *their first arrival* in India, hearing the word frequently in the mouths of the natives as applied to mankind in general, mistook it for the domestic appellation of the Indians themselves, perhaps also their bigotry might force them from the word 'Gentoo' a fanciful allusion to 'Gentile', a Pagan "

Sir E Hyde East in 1830, speaking before the Committee of the House of Lords, observed "Whether the term 'Gentoo', as used in the Warren Hastings Plan of 1772, was intended to comprehend all other descriptions of Asiatics who happend to be located within the British bounds of India, is perhaps very difficult to be told at this time of the day"

Some authorities are of the opinion "Hindoo is not the word by which the inhabitants of India originally styled themselves, but according to the idiom of the language 'Jamboodepee', and it is only since the era of the Tartar Government that they have assumed the name of Hindoos, to distinguish themselves from the conquerors, the Muslims",

1 Origin of Gentoo Code

Warren Hastings Governor of Bengal, first of all prepared a systematic plan in 1772 for the proper regulation of Judicial and Executive machinery of the Company's Government at Bengal Article 27 of the Plan of 1772 provided "That in all suits regarding inheritance, marriage, caste and other religious usages or institutions, the laws of Koran with respect to Mohammedans and

1 Field's *Regulation of Bengal*

tho e of Shastra with respect to 'Gentoo '' Thus the word 'Geotoo' was for the first time legally recognised by Warren Hastings He took the initiative to investigate the principles of the 'Gentoo Religion and to explore the customs of the Hindus

Warren Hastings, therefore invited some famous Brahmins, who were learned in the study of Shastras, from all parts of the kingdom at Fort William in Calcutta Apart from this many ancient and modern authoritative books were also collected They finally prepared a Code of Gentoo Laws' in Sanskrit Later on it was translated into Persian by one of its authors In 1775 it was translated from the Persian into English by Nathaniel Brassey Halhed, a young man who when at Oxford had been led to study Arabic by Sir William Jones and had as a 'Writer' in India attracted Hastings' attention This was published in London in 1776 Other editions of this Code appeared in 1777 and 1781 as well as a French translation at Paris in 1778 In the opinion of Rankin, "The Geotoo Code suffers from the Persian translation being but a loose and inaccurate version of the original"

' In this Code both Substantive and Adjective Laws are mixed up It is divided into twenty-one chapters and most of the chapters are sub divided into what is called by Halhed, 'Sections' and each section has been further sub-divided into 'paragraphs' corresponding to the sections of the modern Anglo-Indian Code "

2 Arrangement of Halhed's 'Gentoo Code'

Chapter 1 Lending and Borrowing (consisting of 5 sub-divisions or Sections)

Chapter 2 The Division of Inheritable Property (16 Sections)

Chapter 3 Justice (11 Sections)

Chapter 4 Trust or Deposit (one section divided into paragraphs)

Chapter 5 Selling a stranger's property (one Section divided into paragraphs).

Chapter 6 Shares (2 Sections)

Chapter 7 Gift or Alienation by Gift (one Section)

Chapter 8 Servitude (3 Sections)

Chapter 9 Wages Section 1 Wages of Servants, Section 2 Wages of Dancing Girls

Chapter 10 Rent and Hire (One Section)

Chapter 11 Purchase and Sale (2 Sections)

Chapter 12 Boundaries and Limits (one Section)

Chapter 13 Shares in the Cultivation of Lands (One Section)

Chapter 14 Cities and Town and the Fines for damaging a Crop (One Section)

Chapter 15 Scandalous and Bitter Expression (2 Sections)

Chapter 16 Assault (3 Sections)

Chapter 17 Theft (6 Sections)

Chapter 18 Violence (One Section)

Chapter 19 Adultery (8 Sections)

Chapter 20 What concerns Women (One Section)

Chapter 21 Sundry Articles (10 Sections)

Section 1—Of Gaming

Section 2—Finding anything that was lost

Section 3—The fines for cutting trees

Section 4—Tax upon buying and selling goods

Section 5—Quarrels between father and son

Section 6—Serving unclean victuals

Section 7—Punishment on a Soodar for reading Vedas

Section 8—Properties of punishment

Section 9—Adoption

Section 10—Sundries

3 Criticism of the Gentoo Code

The Hindoo criminal law was, in ancient times mostly based on the provisions of 'Dharam Shastras' under the heading of 'Vyavhara' The Gentoo Code was later on prepared during the Governorship of Warren Hastings to give a picture of Hindu criminal law No doubt Duncan, on the recommendation of Lord Cornwallis in 1783, was also indebted to the 'Code of Gentoo Law', still it was a defective Code as it was not the true representation of Hindu criminal law From the time the Dharam Shastras were first prepared to the year 1775 A D, much water had gone under the bridge for which no consideration was given by the authors of the Gentoo Code

Rankin has well remarked,[1] "The Hindu criminal law as presented in the 'Genteo Code' is full of impracticable and absurd directions which cannot represent any systematic practise The Gentoo Code in 1775 represented the notions of a long dead past as regards criminal law It is not easy to see how Hindu society with its multiplicity of independent Chiefs each exercising power, could very well give rise to a coherent system deserving to be

1 Rankin, *Background to Indian Law*, p 190

called a Hindu Law of Crime What is put forward by the text-writers as legal rule is often no more than the fanciful suggestion of a Brahmin writer legislating *in vacuo* A long *catena* of absurdities could be quoted from the Gentoo Code, in many cases the absurdity consists in a perverted notion of 'making the punishment fit the crime', in others in the minute distinctions upon which the tariff of fines is built, in others in the savagery with which the crimes are punished when committed against Brahmins or persons of higher caste than the wrongdoer '

Appendix B
The Union Territories

1 Origin and the Constitutional set up

The States Reorganisation Act 1956 played an important role in shaping the territories of Provinces in the Indian Union As a result of it substantial changes were made in the Constitution of India by the Constitution (Seventh Amendment) Act of 1956 The Amendment reduced the four categories of States to two only All the States under A, B, and C Parts were reorganised into one category States under Part D were treated separately as the Union Territories As a result of the States Reorganisation Act, 1956, six Union Territories were created, namely, Delhi, Himachal Pradesh, Manipur, Tripura, the Andaman and Nicobar Islands, and the Laccadive, Minicoy and Amindivi Islands

The Constitution (Seventh Amendment) Act, 1956 reconstituted the provisions of Articles 239 and 240 of the Constitution, as follows

Article 239 Administration of Union Territories

"(1) Save as otherwise provided by Parliament by law, every Union Territory shall be administered by the President acting to such extent as he thinks fit, through an administrator to be appointed by him with such designation as he may specify

(2) Notwithstanding anything contained in Part VI, the President may appoint the Governor of a State as the administrator of an adjoining Union Territory, and where a Governor is so appointed, he shall exercise his functions as such administrator independently of his Council of Ministers"

Article 240 empowered the President to make regulations for the peace, progress and good government of the Union Territories of (*a*) the Andaman and Nicobar Islands, (*b*) the Laccadive, Minicoy and Amindivi Islands

The Territorial Councils Act, 1956 provided for the establishment of Territorial Councils in certain Union Territories

The Constitutional (Tenth Amendment) Act, 1961 added Dadra and Nagar Haveli, which were so far under the domination of Portugal, to the list of the Union Territories Goa, Daman and Diu, which were liberated from Portuguese domination, were also added to the list of Union Territories by the Constitution (Twelfth Amendment) Act, 1962 Pondicherry and Karaikal, Yanam and Mahe were known as "French Settlements in India" and were actually under the French Government Under an agreement the Government of France handed over these to the Government of India in 1956[1] These areas were added to the list of the Union Territories[2] by the Constitution (Fourteenth Amendment) Act, 1962

The Government of India decided in 1962 to set up a representative form of Government in the areas under the list of Union Territories In this connection the Constitution (Fourteenth Amendment) Act, 1962 was enacted Its statement of object and reasons provided

> "It is proposed to create Legislatures and Council of Ministers in the Union Territories of Himachal Pradesh, Manipur, Tripura, Goa, Daman and Diu and Pondicherry broadly on the pattern of the scheme which was in force in some of the Part C States before the reorganisation of the States The Bill seeks to confer necessary legislative powers on Parliament to enact laws for this purpose through a new Article 239A which follows generally the provisions of Article 240 as it stood before the reorganisation of the States "

It was a very important landmark in the constitutional history of the Union Territories It gave them a representative form of Government based on adult franchise The Constitution (Fourteenth Amendment) Act, 1962 inserted new Article 293 A in the Constitution It provided for the creation of local Legislatures or Council of Ministers or both for certain Union Territories

The Union Territories Act, 1963 established a new legislative and administrative set up in the Union Territories It established Legislatures and Council of Ministers in the Union Territories just as in Part G States[3] Provision was also made to allot one seat to the Union Territory of Pondicherry in Lok Sabha and two seats to Goa, Daman, Diu by direct elections

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1 The representatives of India and France signed a Treaty on May 28, 1956 in New Delhi transferring the 'French Settlements in India' to India This Treaty was ratified by the French Parliament in July, 1962

2 Pondicherry, *etc* were added on November 6 1962 to the List of Union Territories

3 *See* The Government of Part C States Act, 1951

On June 9, 1966 the Government of India declared Chandigarh a Union Territory and to serve as the seat of Government for both Haryana and Punjab

In 1969, The Constitution (Twenty second) Amendment Act was passed in pursuance of which Parliament passed the Assam Reorganisation (Meghalaya) Act, 1969 for the creation of the Autonomous State of Meghalaya within Assam Then as an administration measure the North Eastern Council Act 1970 was passed extending over Meghalaya, Union Territories of Manipur and Tripura and N E F Agency This Act was replaced by a similar Act of 1971

District Councils were established in the Union Territory of Manipur by the Manipur (Hill Areas) District Councils Act 1971

However with the North Eastern Areas (Reorganisation) Act 1971 Manipur and Tripura ceased to be Union Territories and became States Two new Union Territories of Misoram and Arunachal Pradesh were established by the same Act The State of Meghalaya was also established For all these States the High Court at Gauhati has jurisdiction

The existing Union Territory of Himachal Pradesh became a State with the passing of the State of Himachal Pradesh Act, 1970

By Act 34 of 1973 the name of the Union Territories of Laccadive, Minicoy and Amindivi Islands was altered to ' Lakshadweep''

2 Legislative System

The Government of Union Territories Act, 1963 provided legislative bodies for Himachal Pradesh, Manipur, Tripura, Goa, Daman and Diu and Pondicherry The members are chosen by direct election and are forty in the case of Himachal Pradesh and thirty for Manipur, Tripura, Goa, Daman and Diu, and Pondicherry The Central Government is authorised to nominate three persons The term of the Assembly is five years

The Assembly can make laws for the whole or any part of the Union Territory with respect to any of the matters enumerated in the State List or the Concurrent List in the Seventh Schedule to the Constitution in so far as any such matter is applicable in relation to Union Territories This power does not derogate from the powers conferred on Parliament by the Constitution to make laws with respect to any matter for a Union Territory or any part thereof If any provision of a law made by the Legislative Assembly of a Union Territory is repugnant to any provision of a law

made by Parliament then the law made by the Parliament will prevail The Administrator can summon the Legislative Assembly, in the respective Union Territory He has also the power to prorogue and dissolve the Assembly

Delhi became a Union Territory on November 1, 1956 and since then it has been administered by the Union Ministry of Home Affairs with the aid of an Advisory Council The Delhi Administration Act, 1966 provided for a Metropolitan Council for Delhi consisting of fifty-six directly elected persons and five nominated persons It is empowered to make recommendations for proposals for undertaking legislation just like other Union Territories under the Constitution.

3 Judicial System

Before 1956 the Parliament was empowered to extend the jurisdiction of a High Court to any area outside the State where the main seat of the High Court was situated The Constitutional (Seventh Amendment) Act, 1956 restricted the power of Parliament to extend the jurisdiction of the High Court only to the Union Territories The Parliament is empowered under Article 231 to establish a common High Court for two or more States or for two or more States and a Union Territory The jurisdiction of some High Courts is extended to certain specified Union Territories

According to the Constitution the hierarchy of subordinate courts in the Union Territories is the same as in the rest of the country In every district, on the criminal side there is a great uniformity as the Code of Criminal Procedure applies to all courts In each district, the Session's Court presided by the Sessions Judge, is the highest court on the criminal side Below the Sessions Judge there are Courts of Magistrates of the First, Second and Third class

The Sessions Judge and the District Magistrate are empowered to superintend over the courts subordinate to them Appeals from the Magistrates of Second and Third class lie to the District Magistrate whereas appeals from the Magistrate of First class lie to the Sessions Judge Appeals against the decision of the Sessions Judge lie to the High Court

On the civil side, the Court of the District Judge is the principal civil court in the district In civil cases it exercises both original and appellate jurisdiction It has also power to superintend over the subordinate civil courts in the district In some Union Territories, Munsiff's Courts presided over by Munsiff exercise civil jurisdiction

The following statement shows the highest court in each Union Territory and the High Courts having jurisdiction upon them

Sl No	Name of Union Territory	Highest Court	High Court's Jurisdiction
1	Andaman and Nicobar Islands	Sessions Court	Calcutta
2	Arunachal Pradesh	District Court	Gauhati
3	Chandigarh	Sessions Court	Punjab and Haryana
4	Dadra and Nagar Haveli	District Court	Bombay
5	Delhi[4]	Sessions Court	Delhi
6	Goa, Daman and Diu	Judicial Commission's Court	——
7	Lakshadweep	Sessions Court	Kerala
8	Mizoram	District Court	Gauhati
9	Pondicherry	Sessions Court	Madras

The Court of Judicial Commissioner is the highest court in the Union Territories of Goa, Daman and Diu It exercises the same powers and has the same civil and criminal jurisdiction as a High Court Appeals from the decrees and order of the court of Judicial Commissioner lie to the Supreme Court

Goa, Daman and Diu —On December 20, 1961 after a lapse of over four hundred fifty years, Goa, Daman and Diu again became a part of India After its liberation from the Portuguese domination, its Military Administration was replaced by a Civil Administration on June 8, 1962[5] Since then the Government of India has taken various measures to advance the development activity in the Union territory

Important changes were introduced in the old set up by the Goa, Daman and Diu (Judicial Commissioner's Court) Regulation, 1963 In the sphere of judiciary, it provided for the establishment of the Judicial Commissioner The Goa Daman and Diu Judicial Commissioner's Court (Declaration as High Court)

4 The High Court of Delhi was newly created and it started functioning from 31 October, 1966

5 For details see Government of *Goa Daman and Diu A Review of Activities of the Government in* 1962-63

Act, 1964 declared the Judicial Commissioner's Court for these areas to be a High Court for the purposes of Articles 132, 133 and and 134 of the Constitution

All the courts including the Court of Comarca and Julgado, which were functioning before the Regulations of 1963 are declared subordinate to the Court of the Judicial Commissioner The Courts of Comarca are the principal civil courts of original jurisdiction The *Tribunal de Relacao* functioning in Goa, Daman and Diu was abolished with effect from December 11, 1973 Now there are seven Civil Judges and Junior Civil Judges appointed under the Goa, Daman and Diu Civil Courts Act, 1965

The judicial and executive functions in Union Territories (except Chandigarh) were separated by the Union Territories (Separation of Judicial and Executive Functions) Act, 1969

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