9

The Privy Council

"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... the Conciliar Courts. All the Royal Courts have the same origin but the date of their birth affected their growth and characteristics." Harold Potter: *An Historical Introduction to English Law and Its Institutions*, p. 99

"The British Parliament and the Privy Council are the two great institutions which the Anglo-Saxon race has given to mankind. The Privy Council during the last few centuries has not ony laid down law but co-ordinated the concept of right and obligations throughout all the Dominions and Colonies in the British Commonwealth. So far as India is concerned, the role of the Privy Council has been... a great unifying force and... the instrument and embodiment of the rule of law, a concept on which alone we have based the democratic institutions which we have set up in our Constitution".

K.M. Munshi: A Member of the Constituent Assembly and a Statesman, on the occasion of the P. C.'s jurisdiction over India

"King-in-Council or later called the Privy Council or the Judicial Committee of the Privy Council became the court of last resort against the decision of Courts in British possession overseas."

Rama Jois: *Legal & Constitutional History of India*, 1984 Edn., Vol. II, Pt. 3, Ch. 8, p. 190

SYNOPSIS

1. Origin

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.

(a) The curia regis.—The Normans ruled over England through *Curia Regis*[2], which was a sort of Supreme Feudal Council of Normans to control the adminis-

1. George W. Keeton, *The Norman Conquest and the Common Law*, 81-113, 201-22.
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 Edn., Ch. II.

tration of England. Out of the *Curia*, gradually two distinct bodies, namely, the Magnum Concilium, the larger Council and the *Curia Regis*, the smaller Council emerged. The smaller council consisted of some high officials of the State, members of the Royal Household and certain important clerks chosen by the Crown.

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 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]

(b) Three divisions.—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. The *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. Sometime 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.[6]

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 mostly laymen and it sat on an average of about nine days a year. This was severely criticised by Lord Brougham in his famous speech of Law Reforms in the House of Commons in 1828.[7]

(c) 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

3. Harold Pottor, *An Historical Introduction to English Law and Its Institutions*, 99.
4. George W. Keeton, *The Norman Conquest and the Common Law*, 102-13.
5. Appeals from the Channel Islands, the Islands of Man and 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.
7. Lord Brougham's speech quoted by J.P. Eddy in his article *"India and the Privy Council: The Last Appeal"*, 66 LQR 206, 208.
8. Statute 3 & 4 William IV.

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".

(d) Composition.—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. Oridinarily 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.[11]

(e) Procedure.—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.[12] 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[13] 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 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.

---

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, 210.
11. O. Hood Phillips, *A First Book of English Law*, 69-70.
12. *British Coal Corporation* v. *King* (1935) AC 500. *See also* S.G. Velinker, "*The First Centenary of the Judicial Committee of the Privy Council*", The Bombay Chronicle, August 1932.
13. Eddy has pointed out, "....The Judicial Committee sits in two rooms at the Downing Street and 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 the judges 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, "*India and the Privy Council: The Last Appeal*", 66 LQR 206, 211.

(f) Jurisdiction.—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 an 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 other words the jurisdiction is based on the royal prerogative of the sovereign as defined in *Reg.* v. *Bertrand*[15]. The King was considered to be the fountain of justice and it was his inherent right to do justice.

(g) Right of appeal.—In 1926 Lord Cave, then Chancellor, in the case of *Nadan* v. *King*[16] 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."

(h) Peculiar nature.—In a leading case, *Hull* v. *McKenna*[17], Lord Haldane stated the nature of the jurisdiction and constitution of the Privy Council.

> "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 Committee does not represent any single nation; it represents an Empire. It has no fixed location.... The Sovereign as 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."
>
> Putting it briefly one may say that (*i*) the Privy Council's report was in the form of an advice, (*ii*) only one opinion (without dissent) was pronounced, and (*iii*) it was not bound by precedents.[18]

---

14. Lord Brougham's *Speeches*, Vol. II, 356. *See also* H.Cowell: *Tagore Law Lectures*, 1872, 206-215; Setalvad: *The Common Law in India*, 1970, 33-34.
15. L.R. I P.C. 520, 529. *See* also *Fryer* v. *Bernard*, (1724) 2 P. Wims, 261 in Jain: *Indian Legal History*, 1972, 368.
16. 1926 AC 482.
17. *Alexander E. Hull & Co.* v. *A.E. McKenna*, 1926 IR 402.
18. *Compensation to Civil Servants, Re*, AIR 1929 PC 84, 87; *Phanindra Chandra* v. *King*, AIR 1940 PC 117; *A.G. Ontario* v. *C.T. Fed.*, AIR 1946 PC 88, 91.

(i) Three rules guiding appeals to the Privy Council.—There are three rules of practice which guided the Privy Council's appellate jurisdiction. Succinctly they may be presented as under :

(1) His Majesty's prerogative extends to criminal as well as to civil cases. (2) Interference in criminal cases would not be done unless it satisfies the rule in *Dillets case*[19], that is, unless the forms of legal process are disregarded or there is violation of the principles of natural justice, or (3) unless there is miscarriage of justice or violation of some legal principle or procedure.[20]

2. Appeals from India to the Privy Council

(a) 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 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 lie to the Governor-in-Council in the respective provinces. The second appeal from order of the Governor-in-Council would now lie 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 of the Regulating Act, 1773.

Appeals before 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.[21] However the old records of the Privy Council point out that before the Regulating Act, 1773 came into force, there were four appeals[22] filed by Englishmen before the Privy Council from India. These disputes were amongst English people and, therefore, cannot be considered as Indian cases, in appeal to the Privy Council.

(b) 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

19. *Dillett's case.* (1887) 12 App Cas 459.

20. J.P. Eddy, *"India and the Privy Council: The Last Appeal"*, 66 LQR 206.

21. *Id.*, at 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 an 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, 242-56.

22. The first appeal in *Barrington* v. *President and Council of Fort St. George* (P.C. 2. Vol. 91, 340), was filed by Barrington before the Privy Council in 1730 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* (P.C. 2, Vol. 91, 619), 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* (P.C. 2, Vol. 92, 482, 504), regarding a money dispute involving a sum of more than Rs. 8,000. In the fourth case *Moses Francia* filed an appeal to the Privy Council in March 1739 against *James Hope* (P.C. 2, Vol. 95. 664) The dispute was regarding a money transaction between them.

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 an 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.

By the Crown's Charter under an Act of 1797 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 the 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. 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 Moffussil 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 (equivalent to Rs. 50,000) or more.

In 1818 it was provided that an appeal from the Sadar Diwani Adalat at Madras 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 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 invoking huge expenditures.

(*i*) *Case of Andrews Hunter.*—It is a matter of interest to note that before 1833 only 14 appeals were filed to the King-in-Council, 11 from Calcutta, 1 from Madras and 2 from Bombay. *Andrews Hunter* v. *Rajah of Burdwan*[23] was the earliest case that went before the Privy Council. Facts of the case in brief are as follows. On 4-8-1790 Hunter filed a suit against the Rajah for recovery of money advanced to

23. P.C. 2, Vol. 150, 130-136; Rama Jois: *Legal and Constitutional History of India*, Edn. 1984, Vol. II, 191.

his grandmother. Moffussil Diwani Adalat at Burdwan dismissed it on 6-5-1791 holding that the Rajah was not answerable to the debts incurred by his grandmother. Sadar Diwani Adalat on 23-2-1792 reversed the above finding and remanded the case for trial on facts. It was again dismissed on 26-11-1793. The judgment was confirmed in appeal by Sadar Diwani Adalat on 22-11-1795. The Privy Council affirmed it on 6-2-1798. It took about eight years to finalise the case.

(ii) Reorganisation of the Privy Council.—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.[24] Under it a permanent body of the Judicial Committee was appointed to dispose of appeals and other matters of the Colonies. The Act provided for the 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. Thus the condition of valuation of the suit was again imposed. It also reduced the number of appeals from the courts in India to the Privy Council.

(c) Appeals to the Privy Council from High Courts.—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 chair 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 cricumstances 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. 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.

The Civil Procedure Code also provided for appeals from the High Courts to the Privy Council under Sections 109 to 112. 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.[25] The Criminal Procedure Amendment

---

24. For details *see* under the heading, "The Privy Council in England" in the earlier portion of this Chapter.
25. For appeals in criminal cases, the rule was laid down by Lord Watson in *Dillett's case*, (1887) 12 App case 459.

Act, 1943 by Section 411-A laid down certain conditions regulating appeals to the Privy Council.

(d) The Federal Court under 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.[26]

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, and for such an appeal a 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 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.

(*i*) *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 a 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.[27]

(*ii*) *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.

---

26. The first meeting of the Federal Court was held on 7th December, 1937; *See* Ch. 10 entitled *"The Federal Court of India"*.
27. 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.

(*iii*) *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 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[28] of India was then in the making.

The case of *N.S. Krishnaswami Ayyangar* v. *Perumal Goundan*[29], 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.

3. Privy Council: A Unique Institution

During the period 1726 to 1949 and especially from 1833 onwards, the Privy Council played a very important role in making a unique contribution to the Indian law and the judicial system as a whole. It has pronounced over 2500 judgments during its career. 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.[30] It shows the amount of respect which the Indian High Courts still have for the Privy Council judgments. In the fields of Hindu law and Mohammedan 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 constitution of the Privy Council *e.g.*, (*i*) for long it was staffed by English Judges only, (*ii*) its location was England, its appellate jurisdiction was considered a symbol of slavery, (*iii*) absence of local knowledge of the Court and the counsel engaged in England was a great hinderance and disadvantage to the litigant, (*iv*) consequently the Indian points of view could not be appreciated, (*v*) it put the poor at a great disadvantage, (*vi*) and in certain cases its view was not impartial.[31] Still, the Privy Council commanded great respect amongst lawyers, Judges and the Indian public as the highest judicial institution. Its contribution to statute law, personal law, commercial law and criminal law, was of

28. 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.

29. AIR 1950 PC 105 : 64 MLW 1.

30. 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 *Punjabai* v. *Shamrao*, AIR 1955 Nag 293; *State of Bombay* v. *Chagganlal*, 56 Bom LR 1034 (FB). See also *State of Gujarat* v. *Vora Fiddalli*, (1964) 6 SCR 461, 590 (Mudholkar, J.).

31. M.C. Setalvad: *War and Civil Liberties*, 66-67.

great importance. Even in Independent India up to 1949, the Privy Council decided many important cases.[32] 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 binding.

The Privy Council served the cause of justice for more than two hundred years. Shri K.M. Munshi, an eminent member of the legal profession, the Constituent Assembly and statesman of India, speaking on the occasion of the abolition of the Privy Council's jurisdiction over India said:

> "The British Parliament and the Privy Council are the two great institutions which the Anglo-Saxon race has given to mankind. The Privy Council during the last few centuries has not only laid down law, but co-ordinated the concept of right and obligations throughout all the Dominions and the Colonies in the British Commonwealth. So far as India is concerned the role of the Privy Council has been one of the most important one. It has been a great unifying force and for us Indians it became the instrument and embodiment of the rule of law, a concept on which alone we have based the democratic institutions which we have set up in our Constitution."[33]

As noted by Rama Jois[34], its contribution and model is of eternal value, and a source of inspiration to all those concerned with the administration of India.

---

32. A remarkable appeal which came before the Privy Council was in 1946 in *Srimati Bibhabati Devi* v. *Kumar Ramendra Narayan Roy*, AIR 1947 PC 19. Indian appeals heard by the Privy Council in the last four years were: 1946-47; 1947-48; 1948-49, 1949-50. *See* J.P. Eddy, "*India and the Privy Council: The Last Appeal*", 66 LQR 206, 214.
33. Rama Jois: *Legal and Constitutional History of India*, 1984 Edn., Vol. II, 198.
34. *Ibid.*

10

The Federal Court Of India

"A federal constitution involves a distribution of powers between the Centre and the Constituent units." — *Report of the Jt. Committee on Indian Constitutional Reform, p. 193 (1934)*

"...it is at once the interpreter and guardian of the Constitution as well as a tribunal for the determination of disputes which often arise between the constituent units and the Federation, or amongst the Constituent units inter se."

1 Fed. Law Jl., 27-36(1938); Pylee: *The Federal Court of India*, (1966); Jain: *Outlines of Indian Legal History* (1972), Ch. 20, p. 399.

The Federal Court was a product of constitutional curiosity...built up great traditions of independence, impartiality and integrity which were inherited by its successor, the Supreme Court of India.

—The Author, *infra*

SYNOPSIS

1. Public Opinion and early 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

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 for 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, 19-45. *See also* Legislative Assembly (India) Debates, 1921-27.
2. *Legislative Assembly (India) Debates* (1921), Vol. 1, 1606.

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 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 Mohammedan laws; and (*vi*) the Privy Council refused to hear any criminal appeal unless there had been a gross failure of justice in the Indian Court.[3]

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. Again in 1924[5] and 1925[6] he moved the resolution but without success.

In the Council of States a similar resolution was moved but the opinion was divided. The Indian Central Committee was convinced of the necessity for establishment of a Supreme Court. In the first and second session of the Indian Round Table Conference in 1930 and 1931 the importance of this issue was recognised while the Third Report expressed "a strong opinion" in favour of creating a Supreme Court.[7]

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 and it was fortunately passed in the Legislative Assembly.

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.[8] Accordingly the British Parliament passed the Government of India Act in 1935. It also provided for the establishment of a Federal Court of India.

2. Foundation of the Federal Court

The Government of India Act, 1935 changed the structure of the Indian Government from "Unitary" to that of the "Federal" type.[9] It established the foundation for a Federal framework in India. A Federal Constitution, it must be noted, involves a distribution of powers between the centre and the constituent units. As expressed by Pylee, it is at once the interpreter and guardian of the Constitution

3. *Legislative Assembly (India) Debates* (1921), Vol. I, 1606.
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 (India) Debates* (1922), III, September 20, 1922, 712.
5. *Legislative Assembly (India) Debates* (1924), IV, February 15, 1924, 191.
6. *Ibid.* (1925), V, February 17, 1925, 1160.
7. See *Legislative Assembly (India) Debates* (1924), IV, Feb. 15, 191, (1925), V Feb. 17, 1160; Council of States Debates, 1927, II Aug. 31 1927, 885, 967; Indian Round Table Conference (1st Session) Proceedings, Cmd. 3778 (1931), XII, 417; Cmd. 3997 (1932), para 52, 27, para 63, 31.
8. For details, *see* article by George H. Gadbois, *"Evolution of the Federal Court of India: An Historical Footnote"*, (1963) 3 JILI 19-44.
9. *See* M. Ramaswamy, *The Law of the Indian Constitution* (1938), 85-98.

as well as a tribunal for the determination of disputes which arise between the constituent units and the Federation, or amongst the constituent units inter se[10]. 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.[11]

(a) Inauguration.—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[12], and two puisne Judges, Sir Shah Muhammad Sulaiman[13] and Mukund Ramrao Jayakar[14]. 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 own and dividing with the Government of India the legislature and executive powers of Government."[15]

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. In words of Dr. Jain, the system of appeals from the High Courts to the Privy Council, which had been in operation hitherto, was left intact and unaffected. What was therefore done at the time was to interpose the Federal Court between the High Courts and the Privy Council for only that restricted category of cases in which a question of constitutional law was involved.[16]

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.

(b) Appointment of Judges.—The Federal Court was to consist of a Chief Justice and not more than six puisne judges, who were to be appointed by the King. The King could increase the number of judges. 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 could be removed 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.

(c) Qualifications.—For appointment of a Judge in the Federal Court, the qualifications were: (*i*) five years' experience as Judge of a 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.[17] As regards the appointment of the Chief Justice, it was provided that a person should have either fifteen years' experience of standing in a

10. 1 Fed. law J1., 27-36 (1938) Pylee, *The Federal Court of India* (1966); Jain, *Outlines of Indian Legal History*, 1972, Ch. 20, 399.
11. For details, *see* George H. Gadbois, Jr., *The Federal Court of India;* 1937-1950, (1964) 6 JILI 253-315. *See also* M.V. Pylee, *The Federal Court of India* (1966), 33-100.
12. He was an Englishman who had no Indian experience but was associated with the preparation of the Act of 1935. He retired in 1943.
13. He was Chief Justice of the Allahabad High Court.
14. He was a leading Advocate of Bombay. After a year he was promoted and made Privy Councillor due to his unique qualities.
15. F.L. J. Vol. I, 31-32.
16. Jain: *Outlines of Indian Legal History, 1972,* Ch. XX, 400.
17. The Government of India Act, 1935, Section 200(3) (*a*), (*b*), (*c*).

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.

(d) Salaries.—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.[18] 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 a month. They were specially paid high salaries so that they would keep a high standard of living, befitting their high positions.

3. 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 its 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.

(a) 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.

The original jurisdiction was however circumscribed by the provisions contained in Section 204. The Court was not authorised to enforce its own decisions directly but with the aid of civil and judicial authorities throughout the Federation. It was not to pronounce any judgment in its original jurisdiction[19], other than a declaratory judgment.

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.

---

18. Section 201.
19. The Federal Court exercised its original jurisdiction in three important cases, namely; *United Provinces* v. *Governor-General-in-Council*, 1939 FCR 124; *Governor-General-in-Council* v. *Province of Madras*, 1943 FCR 1 and *Ramgarh State* v. *Province of Bihar*, 1948 FCR 79.

(b) 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.

(*i*) *In constitutional cases.*—Section 205 of the Government of India Act, 1935[20] 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 to the effect laid down in the section."

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.[21] 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.* v. *King Emperor*[22], 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.[23]

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.

Under Section 205 of the Federal Court (Enlargement of Jurisdiction) Act, 1947, the Federal Court was empowered to consider appeals which were competent.

(*ii*) *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 said Act of 1947 provided that from 1st February, 1948 an appeal shall lie to the Federal Court, in civil cases, with or without the sepcial leave of the Federal Court as provided. No direct appeal shall lie to His Majesty-in-Council from such judgment. The Court was competent to consider the nature of question as mentioned in Section 205.

(*iii*) *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. From 1943 appeals could be made under a certificate granted by three Presidency High Courts (Section 411-A of the amended Cr. P.C.) No other High Courts had such power. The Privy Council could grant special leave for appeal following the principle laid

20. As amended in 1947.
21. *Pashupati Bharti* v. *Secretary of State for India-in-Council,* 1939 FCR 13; *Lukhat Ram* v. *Beharilal Misir,* 1939 FCR 121.
22. 1947 FCR 141; *S. Kuppuswami Rao* v. *King,* 1947 FCR 180; *Rex* v. *Abdul Majid,* 1949 FCR 29.
23. *See also* George H. Gadbois, Jr., *"The Federal Court of India"*, 1937-50, (1964) 6 JILI 262.

down in *Dillette case*[24]. Violation of the principles of natural justice and grave injustice were also the reasons for granting leave to appeal.

In *Mohinder Singh* v. *Emperor*[25], their Lordships of the Privy Council said: "Their Lordships 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."[26]

The Federal Court while exercising its criminal jurisdiction was guided by the principles already laid down by the Privy Council.

(c) Advisory jurisdiction.—Section 213 of the Act of 1935 (as amended) empowered the Federal Court to give advisory opinion to the Governor-General.

The Governor-General was not bound to accept the opinion of the Federal Court which was given under Section 213. Moreover the court was not bound to give its opinion in every reference made to it. The real intention of this provision appears to be that the Federal Court would not refuse "except for good reasons".[27]

The Federal Court of India was called upon to give its advisory opinion in four cases[28] 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.[29]

4. 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 judgments. It was sending back the case with its decision to the respective High Court so that its order could 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 Acts 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.

5. 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.*

---

24. (1887) 12 App Cas 450.
25. (1932) 59 IA 233.
26. See also *Muhammad Nawaz* v. *Emperor*, AIR 1941 PC 132. In this case the Privy Council specifically laid down grounds on which it will interfere in a criminal case.
27. *Levy of Estate Duty, Re*, AIR 1944 FC 43.
28. Four cases were—*Central Provinces and Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938, Re*, 1939 FCR 18; *Hindu Women's Right to Property Act, 1937, Re, and Hindu Women's Right to Property (Amendment) Act, 1938*, 1941 FCR 12; *Allocation of Lands and Buildings in a Chief Commissioner's Province, Re*, 1943 FCR 20 and *Levy of Estate Duty, Re*, 1944 FCR 317.
29. *See* George H. Gadbois, Jr., *The Federal Court of India*, (1964) 6 JILI 253, 280.

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*[30], "...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."

6. Expansion of Jurisdiction

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 policy declaration and the Federal Court Order, 1947[31] made a 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[32] 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 did it severe 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. The remaining jurisdiction of the Privy Council continued as it was before 1947.

7. Abolition of Federal Court

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.[33] 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

30. AIR 1925 PC 272, 279.
31. Notification No. G.G.O. 3, published in the Gazette of India, Extraordinary, August 11, 1947.
32. It is also known as Act I of 1948. See *Constituent Assembly of India (Legislative) Debates*, 111, (1947), December 11, 1947, 1708-27.
33. Act No. V of 1949, published in the Gazette of India, Extraordinary, September 28, 1949.

appeal disposed of by the Privy Council was on 15th December, 1949 in the case of *N.S. Krishnaswami Ayyangar* v. *Perimal Goundan*[34]. 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 of January, 1950. Under the Constitution of India, India became a "Sovereign Democratic Republic".

8. The Federal Court : An Assessment

The Federal Court 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[35] and six Indian Justices sat on the Federal Bench. Sir Shah Sulaiman, Dr. M.R. Jayakar,[36] S. Varadachariar,[37] Sir Mohammad Zafrullah Khan, Sir Harilal J. Kania[38] and Sir Fazal Ali were the six Indians who got the rare distinction of being Judges of the Federal Court of India. They maintained the noble traditions of the great Judges of Britain. They contributed a great deal to 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.

---

34. AIR 1950 PC 105. *See also* J.P. Eddy, *India and the Privy Council: The Last Appeal,* (1950) 66 LQR 214.
35. 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.
36. Dr. M.R. Jayakar was made Privy Councillor within a year after his appointment as Judge of the Federal Court.
37. He was in the Federal Court for the longest term of office *i.e.*, seven years.
38. He was made the first Chief Justice of the Supreme Court of India in 1950.

11

The Supreme Court of India

"Law declared by the Supreme Court shall be binding on all courts".

Article 141, Constitution of India

Special Courts Bill, 1978, Re, (1979)1 SCC 380

"The better wisdom of the Court below must yield to the higher wisdom of the Court above."

—O. Chinnappa Reddy in *Asstt. Collector* v. *Dunlop India Ltd.*, (1985) 1 SCC 260, 268

"The doctrine of binding precedent has the merit of promoting certainty and consistency in judicial decisions, and enables an organic development of the law, besides providing assurance to the individual as to the consequences of transactions forming part of his daily affairs."

Pathak C.J., (1989) 2 SCC 754, 766

"A decision is available as a precedent only if it decides a question of law."

L.M. Sharma, J., (1992) 1 SCC 489, 491

". . . . . a judgement should be understood in the light of facts of that case and no more should be read into it than what it actually says."

B.P. Jeevan Reddy, J., (1993) 2 SCC 368, 393

"Laws made by the Supreme Court are not merely matters of individual opinion, they are products of judicial functioning having binding force. In India, the Judges of the Supreme Court make law on the basis of objective test and nothing is left to chances. Faith, devotion and respect to the Supreme Court resulted in installing Article 141 in the Constitution. Article 141 is the heart and soul of the Constitution. Why should pure light of truth be broken up and impregnated and coloured with any element, when the light has come from the Supreme Court".

—K.N. Lahiri, Acting CJ in *Collector of Kamrup* v. *Anandi Devi,* AIR 1987 Gau 13, 16

"Precedents keep the law predictable and so more or less ascertainable."

—*Lord Devlin*

"Justice is not a cloistered virtue. She must be allowed to suffer the scrutiny and respectful, though outspoken comments of ordinary men."

—Privy Council in *Ambard* v. *A.G. for Trinidad & Tobago,* 1946 AC 335

"Judiciary is watching tower above all the big structures of the other limbs of the State from which it keeps a watch like a sentinel...."—Per Justice Untwalia in *Union of India* v. *Sankalchand H. Sheth,* (1977) 4 SCC 193

"...The judicial system only works if some one is allowed to have the last word and if that last word, once spoken, is loyally accepted".

—Lord Diplock, (1972) 1 All ER 801, 874

SYNOPSIS

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.

Its constitutional provisions are based on the analogous provisions contained in the Government of India Act, 1935 regarding the Federal Court. Compared to the Federal Court the Supreme Court exercises much wider powers, it is quite independent and it combines in itself the functions and powers both of the Federal Court and the Privy Council.

As compared to the Supreme Courts of other countries, the Supreme Court of India is a unique judicial institution, entrusted with large powers enjoying original, appellate, revisional and advisory jurisdictions and has 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.

1. Origin

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]

With the transfer of political power from the British Parliament to the people of India,[4] under the Indian Independence Act, 1947, it was considered necessary to establish a separate judicial organ in India, supreme in authority and in jurisdiction. 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 would lie first to the Federal Court[5] and thereafter a further appeal to the Privy Council was allowed. The Constituent Assembly of India, therefore, passed in October, 1949 the Abolition of the Privy Council Jurisdiction Act, 1949 which abolished the system of appeals in civil and criminal matters to the Privy Council. 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 Article 124 it provided for 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 IX and X.
3. *See* Legislative Assembly Debates, (1921), I, 1606-10; (1922) III, 712-840; (1924) IV, 191; V, 1160-80; Council of State Debates, (1927), II, 885-907; Proceeding of the Indian Round Table Conference (First to Third Sessions), K.N. Kaksar and K.M. Pannikar, *Federal India*, 20-129; George H. Gadbois, *"Evolution of the Federal Court of India: A Footnote"*, (1963) 5 JILI 19.
4. *See* 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*.
5. M.P. Pylee, *The Federal Court of India*, 64-100; E.S. Sunda, *Federal Court of India: A Constitutional Study*.

establishment of a Supreme Court of India. The seat of the Supreme Court as per Article 130 was to 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. It was presided over by Hon'ble Sri Harilal J. Kania, Chief Justice of India.[6]

Sri M.C. Setalvad[6] delivered the welcome address and Chief Justice Kania[7], 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."

2. Constitution

(*a*) *Number of Judges.*—Article 124 of the Constitution of India provides for a 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, and to seventeen by Act 48 of 1977 and to twenty five by Act 22 of 1986 and up to March, 1995 this number has remained constant.

(*b*) *Appointment of Judges.*—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 appointing a Judge other than the Chief Justice, the Chief Justice of India will always be consulted[8] 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[9] and again on his retirement Mr. Justice M.H. Beg superseded Mr. Justice H.R. Khanna. This shows that the promise[10] projected by the first Chief Justice of India, that the appointment would be on merits and without political considerations has not been honoured by the Government. *A non-political judiciary is desirable.*

(*c*) *Qualifications.*—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 an appointment. In addition, he should have been a High Court

6. The Chief Justices of the State High Courts; Sir M.C. Setalvad, the A.G. for India; the Advocates-General of the States, P.M. Jawaharlal Nehru; Dy. P.M. Sardar Patel and other distinguished persons were present at that time. Welcome Address of Sri M.C. Setalvad at the inauguration of the Supreme Court of India, (1950) 1 SCR (J) 3.
7. Inaugural Speech of Chief Justice Kania, (1950) 1 SCR (J) 10-13.
8. In this connection see *S.C.Advocates-on-Record Association* v. *Union of India*, (1993) 4 SCC 441 wherein this aspect has been reiterated by the Court.
9. For details about the controversy *see* Kuldip Nayar: *Suppression of Judges*, (1973); Kumar Mangalam: *Judicial Appointments* (1973); Palkhivala: *Our Constitution Defaced and Defiled*, (1974), 93-105 and *A Judiciary Made to Measure*.
10. Inaugural Speech of Chief Justice Kania, (1950) 1 SCR (J) 10.

judge for five years or an advocate of a High Court for ten years or he is, in the opinion of the President "a distinguished jurist."[11] This means that like America non-practising academic lawyers can have a place in the Supreme Court.

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 Article 124(4). The age of a Judge of the Supreme Court shall be determined by such an authority and in such a manner as Parliament may by law provide.[12]

(*d*) *Removal.*—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.[13]

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".[14] 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. Chamber practice involves advisory work. This concession is a lacuna in the system which impairs the guarantee of judicial independence of the Supreme Court Judges. Deploring this concession and pointing out its repercussions the Law Commission has remarked "The possibility of their being able to advise rich clients after their retirement may tend to effect their independence on the Bench. In any event... the public would be apt to to think that in dealing with the cases of such litigants whom they may hope after retirements to be asked to advise, the judges do not act impartially."[15] 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]

(*e*) *Salaries and allowances.*—The salaries of the Judges and the Chief Justice of the Supreme Court can after the Fifty-fourth Amendment (1986) be determined by Parliament by law. Earlier an amendment of the Constitution was necessary. The said amendment has raised the salary of the Chief Justice of India from Rs 5000 to Rs 10,000 and of the Judges of the Supreme Court from Rs 4000 to Rs 9000.[17]

11. Art. 124(3).
12. Sub-Art. (2-A) 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 the 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.
13. Art. 124(4). In this regard see *Sub-Committee for Judicial Accountability* v. *Union of India*, (1991) 4 SCC 699 : The case of Justice Ramaswami. Also see *Sarojini Ramaswami case*, (1992) 4 SCC 506.
14. Art. 124(7).
15. A.C.Kapoor, quoting from the *Law Commission Report*, in Ch. 26, 560, *Constitutional History of India*, Edn. 2, 1976.
16. Art. 128.
17. Art. 125(1).

Some improvements in the conditions of service has been made by the Supreme Court Judges (Conditions of Service) Amendment Act, 1976 (36 of 1976). The privileges and allowances and such rights in respect of leave of absence and pension are fixed by Parliament by law and they cannot be varied to his disadvantage.[18] 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 Article 360(4)(*b*) to reduce the salaries and allowances of the Judges of the Supreme Court. The expenses of the Supreme Court are charged upon the Consolidated Fund of India (a non-votable item).

(*f*) *Acting Chief Justice and ad hoc Judges*.—Under Article 126 the Acting Chief Justice is appointed 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. This healthy custom was departed from in 1974 and repeated in 1977 which became a matter of strong public criticism. It has been maintained since then.[19] 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. Here also the Chief Justice of the State High Court will always be consulted.

3. Jurisdiction and Powers

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.

(a) **Original jurisdiction**.—Under Article 131 the original jurisdiction of the Supreme Court extends to any dispute between the Centre and the constituent states or between the States inter se. The original jurisdiction is excluded in cases of a dispute arising out of any treaty, agreement, covenant, engagement, *sanad* 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 Article 32.[23]

(b) **Appellate jurisdiction**.—Articles 132 to 136 of the Constitution deal with the appellate jurisdiction of the Supreme Court in constitutional, civil and criminal cases.

---

18. Art. 125(2) and proviso; Sch. II of the Constitution.
19. *See* Supra footnote 9.
20. Art. 127.
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.

(*i*) *In constitutional matters.*—Article 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—But the High Court must certify to that effect. 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 proceedings 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 Article 133(3)[26] and the words "any judgment, decree or final order of a High Court" as used in Article 132, are wide enough in their meaning. Hence appeals to the Supreme Court from constitutional decisions of Single Judges cannot be barred on the ground that an appeal lies to a Division Bench from such a decision. An appeal will lie to the Supreme Court upon the certificate of the Single Judge of the High Court in constitutional matters,[27] certifying that 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, an 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 Article 136 and appeals on constitutional ground under Article 132, an appeal shall lie to the Supreme Court from a civil proceeding before any High Court in the territory of India, if (*a*) the subject of the appeal is a "judgment, decree or final order"; (*b*) the High Court grants a certificate for such an appeal (*i*) that the case involves a substantial question of law of general importance; and (*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 Article 133. In *C.I.T.* v. *Ishwarlal*[31], the Supreme Court held that an appeal under Article 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. Article 134 empowers the Supreme Court to hear appeals from any judgment, final order or sentence in the criminal proceedings of a High Court in three cases enumerated therein.

---

24. *Election Commission* v. *Venkata*, AIR 1953 SC 210.
25. *Election Commission* v. *Venkata*, AIR 1953 SC 210, 212.
26. Art. 133(3) provides that merely in civil appeals, an appeal will not lie to the Supreme Court from the decision of a 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, 110; see also *Hindustan Commercial Bank* v. *Bhagwan Das*, AIR 1965 SC 1142, 1143.
28. *Sudhir* v. *King*, (1948) 58 CWN (FR) 44.
29. *State of J. & K.* v. *Ganga Singh*, AIR 1960 SC 356, 359.
30. *Mahant Moti Das* v. *S.P. Sahi*, 1959 Supp 2 SCR 568, 581.
31. (1966) 1 SCR 190 (196).

Under sub-clauses (*a*) and (*b*) of Article 134 the appeal lies as of right both on questions of fact and of law while under sub-clause (*c*) the appeal lies only if the High Court certifies that the case is "a fit one for appeal".[32]

In an appeal under Article 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]

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 Article 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 Article 136 (Special Leave).[36] The Court may also dismiss[37] the appeal *in limine*[38] if it finds no sufficient reasons to interfere under Article 136.

By Article 134(2) this jurisdiction can be enlarged and 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 punishment of life imprisonment or imprisonment for a period of not less than ten years or gives such punishment in deciding cases withdrawn from the lower courts for its decisions.[39]

(*iv*) *Special jurisdiction.*—Article 136(1) confers on the Supreme Court overriding and extensive powers of granting special leave to appeal. It provides 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]

To deal with special cases separate provision is made under Article 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]

---

32. *State of U.P.* v. *Jairaj*, 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.
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; *P.S.R. Sadhanantham* v. *Arunachalam*, (1980) 3 SCC 141.
41. *Durgashankar* v. *Raghuraj*, AIR 1954 SC 520.
42. *Ibid.*
43. See *Kanhaiyalal* v. *I.T.O.*, AIR 1962 SC 1323; *Baldota Bros.* v. *Libra Mining Works*, AIR 1961 SC 100.

In *Pritam Singh* v. *State*[44] Fazal Ali, J. observed: "...the wide discretionary power with which this Court is invested under it (Article 136), is to be exercised sparingly and in exceptional cases only,... The Court will not grant special leave unless it is shown that exceptional and special circumstances exist, that substantial and grave injustice[45] has been done and that the case in question presents features of sufficient gravity to warrant a review of the decision appealed against."[46]

The Supreme Court has declined to fetter its discretionary power by laying down "principles" or "rules"[47] In *Dhakeswari Cotton Mills Ltd.* v. *C.I.T., W.B.*[48] Mahajan, C.J. said: "It is not possible to define...the limitation on the exercise of the discretionary jurisdiction vested in this Court by...Article 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."

(c) **Advisory jurisdiction**.—(*i*) *Article 143*.—This is provided by Article 143(1). Article 143(2) provides for refering a dispute to the Supreme Court for its opinion.[49]

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 a good guide for the Supreme Court of India.[50]

(*ii*) *Explanation*.—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.[51] 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.[52] 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 Article 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.[53] The advisory opinion is not a judicial pronouncement. It is, therefore, not equivalent to

---

44. AIR 1950 SC 169.
45. *Shaw Wallace* v. *Workmen*, (1978) 2 SCC 45.
46. AIR 1950 SC 169 (172).
47. H.M. Seervai, *Constitutional Law of India: A Critical Commentary*, 1017.
48. AIR 1955 SC 65; *see* also *Gujarat Steel Tubes Ltd.* v. *Mazdoor Union*, (1980) 2 SCC 593.
49. 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..."
50. D.D. Basu, *Commentary on the Constitution of India*, Fifth Edn., Vol. 3, 218-19. *See also* Das, C.J. in *Kerala Education Bill case*, AIR 1965 SC 745.
51. *Reference under Art.* 143, AIR 1965 SC 745.
52. *Estate Duty, Re*, AIR 1944 FC 73.
53. *A.G. of Canada* v. *A.G. of Ontario*, AIR 1932 PC 36.

the judgment of the Supreme Court and is not binding on either party.[54] It is not binding upon the courts in India under Article 141 though it may have a great persuasive force.[55] 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.

(*iii*) *Cases*.—The President of India has used this power under Article 143 in many cases.[56]

(*iv*) *Scope*.—The scope of the advisory jurisdiction was considered in depth in *Special Courts Bill, 1978, Re*, wherein the Supreme Court held that it would not consider a purely political question nor would it entertain hypothetical or speculative questions. That the Bill under reference could be subsequently amended does not make it hypothetical or speculative. The question should be specific and not general or vague. Questions of policy and wisdom of a particular action fall outside the purview of Article 143. The Court would proceed strictly by law. The law declared by the Supreme Court in giving its opinion under Article 143 would be binding under Article 141 on all courts in India.

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.[57]

(d) Power to review judgments.—Article 137 empowers the Supreme Court to review its own judgments, subject to the provisions of any law made by Parliament or any rules made by the Supreme Court under Article 145. Parliament has not made any rules. Part VII, Order XI of the Supreme Court Rules, 1966, provides for Review. Rule 1 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. Order XL, Rule 3 as amended in 1978 provides that the review petition may be disposed of only by circulation amongst the judges without oral arguments. This provision has been commended and upheld.[58]

---

54. *Reference under Art.* 143, AIR 1965 SC 745.
55. *Umayal* v. *Lakshmi*, AIR 1945 FC 25.
56. (1) *Delhi Laws Act, 1912 case, Re*, 1951 SCR 747 : AIR 1951 SC 332 (As to the Constitutionality of the provisions of the Delhi Laws Act, 1912);
(2) *Kerala Education Bill Reference, Re*, 1959 SCR 995 : AIR 1958 SC 956 (As to whether the Bill violated Art.14 of the Constitution);
(3) *Sea Customs Act, 1878, Re*, AIR 1963 SC 1760 (Question of Constitutionality of the draft of the Act);
(4) *Berubari Union, Re*, (1960) 3 SCR 250: AIR 1960 SC 845 (As to implementation of an international agreement);
(5) *Powers, Privileges and Immunities of State Legislatures, Re*, AIR 1965 SC 945 (U.P. Assembly Controversy);
(6) *Presidential Poll, Re*, 1974) 2 SCC 33 (As to filling the vacancy of the President);
(7) *Special Courts Bill, 1978, Re*, (1979) 1 SCC 380: AIR 1979 SC 478 (As to the validity of the Bill's provisions);
(8) *Ref. No. 1 of 1983, dt. 17-8-1983 under Art. 317(1) of Constitution*, (1983) 4 SCC 258 (A unique reference ever made);
(9) *Cauvery Water Disputes Tribunal, Re*, 1993 Supp (1) SCC 96 (II) : AIR 1992 SC 522 (As to Cauvery Waters sharing);
(10) *Sp. Ref. No. 1 of 1993, Ram Janma Bhumi-Babri Masjid matter*, (1993) 1 SCC 642.
57. *U.S.* v. *Ferresra*, (1852) 13 How 40 (52). *See also* D.D. Basu, *Commentary on the Constitution of India*, Fifth Edn., Vol. 3, 215.
58. *P.N. Eswara Iyer* v. *Registrar*, (1980) 4 SCC 680.

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 abovestated in (*a*) and (*b*) grounds.

There is no express provision in the Constitution of India, declaring the Constitution to be the Supreme Law of the land. The framers of the Constitution, it may be said, deemed such a declaration superfluous, because they might have believed the power to be clearly enough implied when all the organs of the Government, Federal and State, owe their origin to the Constitution and derive powers therefrom and the Constitution itself cannot be altered except in the manner specifically laid down in the Constitution as provided for in Article 368.[59]

Similarly the Constitution does not expressly empower the Courts to declare laws invalid. But, the absence of such a provision does not restrict the right of the courts to decide whether a piece of legislation is void or not. And this is a necessary consequence of the supremacy of the Constitution. Moreover, a Federal polity functions within demarcated and delimited spheres. The Constitution, as such, imposes definite limitations on the different organs of Government and exercise of any excess of authority by any organ of Government is transgression of the Constitutional limitations and, accordingly, void under the Constitution. It is for the Courts to determine whether any of the Constitutional limitations has been exceeded or not. Constitutionally there are two kinds of limitations on the powers of the Legislature : (1) Legislative Competence, and (2) Fundamental Rights conferred by Part III of the Constitution.[60]

(e) **Enlargement of jurisdiction**.—Article 138 of the Constitution provides for enlargement of the Supreme Court's jurisdiction. 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 two cases.

(f) Power to punish for contempt.—The Supreme Court is declared a Court of Record under Article 129. Specific provision in the Constitution in this respect is introduced in order to remove any doubt.[61] As a Court of Record it has all the powers of such a Court including the power to punish for its contempt. Guiding principles in this regard have been laid down by the Supreme Court.[62] 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[63] 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

---

59. *See* A.C.Kapoor : The Constitutional History of India, Ed. 2, Ch. 26, 569.
60. *Ibid.*
61. *Hiralal* v. *State of U.P.*, AIR 1954 SC 743.
62. *Ambard* v. *A.G. for Trinidad & Tobago*, (1946) AC 335; *Prospective Publication (P) Ltd.* v. *State of Maharashtra*, AIR 1971 SC 221, 230; *Sebastian M. Hongray* v. *Union of India*, AIR 1984 SC 1227, 1228; *M.R. Parashar* v. *Farooq Abdullah (Dr.)*, AIR 1984 SC 615, 617, 618. See also *Pritam Pal* v. *H.C. of M.P.*, (1993) 1 SCC 529 : 1993 SCC (Cri) 356 : AIR 1992 SC 904.
63. *Bathina Ramakrishna* v. *State of Madras*, AIR 1952 SC 149.

even by way of imprisonment, in cases where a mere fine may not be adequate.[64] No ordinary law enacted by Parliament under Entry 77, List I can take away this power of the Supreme Court.

(g) 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 Article 142 is empowered to pass decrees or make necessary orders for doing complete justice[65] 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.[66]

(h) Ancillary powers.—Article 140 provides some elasticity to the original and appellate powers of the Supreme Court by permitting the Parliament[67] to pass legislation to supplement those provisions. Under this Article 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."

(i) Power to issue writs.—The Constitution of India has given very important and also very wide powers to the Supreme Court of India under Article 32.[68] It provides for the enforcement of Fundamental Rights, as conferred by Part III of the Constitution, by means of writs when it is moved by "appropriate proceedings". This expression "appropriate proceedings" has been defined in the *Judges Appointment and Transfer case*[69]. This includes in its fold the Social Action litigation or popularly called the Public Interest Litigation.[70] The Supreme Court is empowered to issue appropriate writs, orders and directions for the purpose of enforcing Fundamental Rights. Clause (2) of Article 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 Rights as conferred by Part III of the Constitution.[71] The right to constitutional remedies as provided by Article 32 is itself a Fundamental Right. The Supreme Court is constituted the protector and guarantor of Fundamental Rights[72] and it is the duty of the Supreme Court to grant relief under Article 32 where the existence of a

64. *Rizan-ul-Hasan* v. *State of U.P.*, 1953 SCR 581; *Pratap Singh* v. *Gurbaksh*, AIR 1962 SC 1172.
65. *Mohd. Anis* v. *Union of India*, 1993 Supp (1) SCC 145. See also *Kashinath G. Jalmi (Dr.)* v. *The Speaker*, (1993) 2 SCC 703 : AIR 1993 SC 1873 (can make an order which is just).
66. *See* D.D. Basu, *Acts, Rules and Orders under the Constitution of India*, Book I, 309.
67. Parliament substituted S. 527 of the Code of Criminal Procedure by enacting Code of Criminal Procedure (Amendment) Act, 1952.
68. *Kochunni* v. *State of Madras*, AIR 1959 SC 725.
69. (1982) 2 SCR 365.
70. *Bandhua Mukti Morcha* v. *Union of India*, (1984) 3 SCC 161: AIR 1984 SC 802.
71. See also *Rashid Ahmed* v. *Municipal Board*, 1950 SCR 566; *Basappa* v. *Nagappa*, (1955) 1 SCR 250. *See also* A.K. Blackshield, *Fundamental Rights and the Institutional Viability of the Indian Supreme Court*, (1966) 8 JILI 139-217.
72. *Romesh Thappar* v. *State of Madras*, AIR 1950 SC 124.

Fundamental Right and its breach, actual or threatened,[73] is *prima facie* established.[74] In *Charanjit Lal case*[75], Mukherjea, J. explaining the scope and ambit of Article 32 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 Article 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 Article 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 under Article 32 is void.[76] In *Kesavananda Bharati case*[77], the Supreme Court overruling *Golak Nath case*[78] held that though Parliament can amend any part of the Constitution, it cannot change the "basic and essential" features of the Constitution. The original writ jurisdiction under Article 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 Article 226 similar powers have been granted to the Indian High Courts. It is established that an application under Article 32 lies in the first instance to the Supreme Court, without first resorting to the High Court under Article 226.[79] It has been said[80] that: "The writ of this Court will run over territory extending to over two million square miles....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...."

(j) **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 Article 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 a Chairman or member must be removed from office. During the period of enquiry by the Supreme Court

73. *Tata Iron and Steel Co.* v. *Sarkar*, AIR 1961 SC 65 (68).
74. *Kochunni* v. *State of Madras*, AIR 1959 SC 725.
75. *Charanjit Lal* v. *Union of India*, AIR 1951 SC 41, 53: 1950 SCR 869.
76. *Gopalan* v. *State of Madras*, AIR 1950 SC 27.
77. (1973) 4 SCC 225. A special Bench of all the 13 Judges was constituted for this purpose. *See* details in Shukla, V.N.: *Constitution of India* (1993 Edn).
78. *Golak Nath* v. *State of Punjab*, AIR 1967 SC 1643. In this case a special Bench comprising of all eleven Judges of the Supreme Court was constituted. Five Judges led by the then Chief Justice, Mr. K. Subba Rao, voted to overrule *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 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.) 126.
80. Welcome Address of Sri M.C. Setalvad on 28th January, 1950 *see* 1950 SCR 1, 3-4; Inaugural Address of Chief Justice Kania on Jan. 28, 1950. *See* 1950 SCR 7.

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.

(k) Conclusion.—An analysis of the provisions[81] abovesaid shows that the Supreme Court is constituted to function—

(*i*) as the protector of the fundamental rights and liberties of the individuals in exercise of its original as well as appellate jurisdiction;

(*ii*) as the ultimate authority to interpret and enforce the provisions of the Constitution and the laws;

(*iii*) as the final court of appeal in all matters, constitutional, civil, criminal, revenue, etc. against all decisions and orders of all courts and tribunals in the country, and

(*iv*) as the sole tribunal to decide Centre-State and inter-State disputes and to give an opinion in an advisory capacity on important questions of law or fact on reference by the President.

Thus the Supreme Court occupies the most vital and exalted position under our constitutional set up, entrusted with the power to utter the final word in all matters relating to the interpretation of the Constitution and the laws and their enforcement and constitutes the symbol of national unity in the field of administration of law and justice.[82]

4. 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.[83]

The doctrine of precedents is given constitutional recognition under Article 141 of the Constitution of India. The decisions of the Supreme Court are a source of law.[84] They have the binding force of law. The provisions of Article 141 show that even the *obiter dicta* of the Supreme Court, on a point raised and argued before it, will be binding.[85] Where there is a hierarchy of courts as in India the law declared by the superior court must be binding on inferior courts.[86] The Supreme Court has the authority to reverse its own judgment.[87] Only the *ratio decidendi* or the principle laid down in a case has the binding force of law and not the whole case. Sometimes it becomes very difficult to find out the *ratio* of a case.

The opinion of the Supreme Court under Article 143 is also binding on the subordinate courts.[88] It will have a high persuasive authority. The expression "all

81. Rama Jois: *Legal and Constitutional History of India*, 1984 Edn., 226.
82. *Ibid.*
83. *Kishorilal* v. *Debi Prasad*, AIR 1950 Pat 53; *Mata Prasad* v. *Nageshwar Sahai*, AIR 1925 PC 272.
84. *Bengal Iron Corpn.* v. *C.T.O.*, (1994) Supp (1) SCC 310 : AIR 1993 SC 2414.
85. See *Radharani* v. *Sisir Kumar*, AIR 1953 Cal 524; *I.T. Commissioner* v. *Vazir*, AIR 1959 SC 814 (821).
86. *Dwarkadas* v. *Sholapur Spg. Co.*, AIR 1954 SC 119.
87. *Bengal Immunity* v. *State of Bihar*, (1955) 2 SCR 603 (628). *Supreme Courts Advocates-on-Record Assn.* v. *Union of India*, (1993) 4 SCC 441 (guidelines for and legal effect of—given).
88. *Special Courts Bill, 1978, Re*, (1979) 1 SCC 380; *supra* Note 83. *S. Nagraj* v. *State of Karnataka*, 1993

courts", as used in Article 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.[89] However, as expressed by the Supreme Court itself if the subject is of such fundamental importance to national life or the reasoning is so plainly erroneous in the light of the later thought, that it is wiser to be ultimately right rather than to be consistently wrong, the Supreme Court may change or reverse its opinion.[90]

As regards the binding effect of the pre-Constitution Privy Council judgments, the view taken by the Nagpur[91] and Bombay[92] 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. The Calcutta High Court has held a contrary view.[93]

5. Recommendations of the Law Commission

Some important recommendations of the Law Commission[94] on Supreme Court are briefly stated as follows:

(*a*) Supreme Court Judges should not be appointed on the basis of communal and regional considerations.

(*b*) Best efforts should be made to recruit a member from distinguished members of the Bar.

(*c*) The tenure of the Judges should be of at least 10 years and that of Chief Justice should be 5 to 7 years.

(*d*) Increase in retiring age is not necessary.

(*e*) Instead of appointing a seniormost Judge as Chief Justice of India, the most suitable person from the Bench or Bar or from High Court be appointed.

(*f*) No suggestion regarding increase in salary is made.[95]

(*g*) A retired Judge should not indulge in chamber practice[96] and he should not accept any employment under the Union or the State.

(*h*) Enlargement of jurisdiction of Supreme Court in criminal matters is not necessary.[97]

(*i*) Before admitting petitions under Article 32 preliminary hearing was desirable.

Supp (4) SCC 595.

89. *Distt. Panchayat, Bhavnagar* v. *Muhamad Haji Gafur & Co.*, AIR 1984 Guj 98, 101.
90. *Ganga Sugar Corpn.* v. *State of U.P.*, AIR 1980 SC 286, 294; *Javed Ahmed* v. *State of Maharashtra*, (1985) 1 SCC 275.
91. *Punjabai* v. *Shamrao*, AIR 1955 Nag 293.
92. *State of Bombay* v. *Chagganlal*, AIR 1955 Bom 1, 6.
93. *Calcutta Corpn.* v. *Director of Rationing*, AIR 1955 Cal 282.
94. Law Commission of India, *Reform of Judicial Administration*, (Fourteenth Report), 32-57.
95. *Ibid.*, 43.
96. *Ibid.*, 45.
97. *Ibid.*, 46.

(*j*) Powers of a Single Judge or a Division Bench to deal with contested interlocutory and miscellaneous matter be increased.[1]

One may not agree with suggestions (*d*) and (*f*) stated above. Competence, sincerity and physical fitness should be the main considerations instead of age. As regards salary, as the value of rupee is decreasing and prices are soaring the salary should increase with the price index.

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.

6. Recent Changes

Amendments made in the Constitution by the Forty-Second Amendment Act, 1976 (18.12.1976) were the most far-reaching and drastic of all the amendments made since the inception of the Constitution.

By effecting a change in Article 39 immunity was granted in respect of all legislations meant to give effect to all or any of the principles set out in the Directive Principles. Consequently an effort was made to establish supremacy of legislative enactments over the Fundamental Rights.

The Forty-Second Amendment was made during emergency (August 1975 to December 1976). It was made by the ruling party, the Congress (I). However, after the General Elections of March 1977 the Janta Party was voted into power and it reversed the whole process by introducing the Forty-Third Amendment Act (13-4-1978). It deleted Articles 31-D, 32-A, 131-A, 144-A and 226-A and restored the jurisidiction of the Supreme Court and the High Courts. The Forty-Fourth Amendment Act, 1979 (30-4-1979) introduced a new Article 71 which gave power to the Supreme Court to decide disputes relating to the election of the President and the Vice-President. Article 134-A gave powers to High Courts either *suo motu* or on application to grant or refuse a certificate to appeal to the Supreme Court.[2] Article 139 was substituted to ensure speedy trial. Amended Article 359 provided that even during the emergency the right to personal liberty (Articles 20 and 21) shall not be curtailed. Thus the 43rd and 44th Amendments are a landmark in the history of our Constitution because the amendments had the full and unstinted backing of the people as a whole. It restored practically the status quo.

It is doubtless that 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 responsibilites. Lord Hewart[3] observed, "Independence of judiciary is essential because many of the most significant victories for freedom and justice have been won in law courts and the liberties of the citizen are closely bound up with the complete independence of judges". L.S.

1. *Law Commission of India, Reform of Judicial Administration*, (Fourteenth Report), 32-57.
2. *Keshava* v. *Ramachandra*, (1980) 2 Kar LJ 432 (FB).
3. Lord Hewart, *The New Despotism*, 102.

Amery[4] 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*".

4. L.S. Amery, "*Essay on British Parliamentary Government,*" *in Parliament: A Survey*, edited by Lord Campion, 54.

12

Development of Criminal Law

"...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".

T.K. Banerjee. *Background to Indian Criminal* Law, p. 62

No clear distinction existed between private and public law...between Crime and Tort. This led to injustice and corruption.

Infra, para 2(b)

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 application of Mohammedan Criminal law as a general law to all persons in India was stopped in 1832.

Rankin, p. 275

SYNOPSIS

1. 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] Yajnavalka[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

1. For details, *see* Chap. 1 of this Book at 11-15.
2. Kautilya's Arthasastra. Vol. IV, 10.
3. Manusmriti, viii.
4. Yajnavalkyasmriti, I.
5. Brihaspatismriti. *See also* Max Muller edition, *Sacred Books of the East*, Vol. XXXIII.

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 and the nature of the offence. Certain classes of persons were exempt from punishment under the ancient criminal law.

2. Early Muslim Criminal Law

Before the advent of the British, the Mohammedan Criminal Law was prevailing in India. Muslims after conquering India imposed their criminal law on Hindus whom they conquered.

(a) Sources.—*Quran,* is believed to be of divine origin. The Mohammedan Criminal law[8] is based on it. It is the first source of Muslim law. To meet the requirements of society this was felt to be inadequate. Consequently, rules of conduct (called *Sunna*) deduced from oral precepts, actions and decisions of the Prophet constituted the secondary source. Concurrence of the companions of Muhammad and the aid of anology constituted respectively the third and fourth source of the Muslim Law.[9]

Hidaya[10] and Fatawa-i-Alamgiri[11] expounded the Criminal law. The former laid down the general rules and principles while the latter was a collection of case-law.

(b) Classification of Offences:—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.

Hidaya presents a curious mixture of great vagueness and extreme technicality of the Mohammedan Criminal Law.[13]

Thus the Muslim criminal law tried to make the distinction between murder and culpable homicide but it did not rest on the intention or want of intention of the culprit. It rested on the method employed in committing the crime. This was

---

6. P.V. Kane, *History of Dharmasastra,* Vol. III, 388-90.
7. *Dandaviveka of Vardhamana* (Gaikwad Oriental Series), 36.
8. For the origin and nature of the Muslim Criminal Law, *See* T.K. Banerjee, *Background to Indian Criminal Law,* 34-36.
9. Fitzgerald, *Mohammedan Law,* 3-8; *see also* R.K. Wilson, *An Introduction to the Study of Anglo Mohammedan Law,* 14-18.
10. It is a commentary upon the *Bidyul-ul-Moobtadee* composed by Sheikh Boorhan-ud-Din 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 Chap. 1 of this Book at 33-34, *see also* Rama Jois : *Legal & Constitutional History of India, 1984,* 10-12.
13. The offence of homicide is divided into five kinds:
(*i*) *Katla-amd* or wilful homicide by a deadly weapon, (*ii*) *Katla-Shahab-amd* or wilful homicide, (*iii*) *Katla-Khata* or erroneous homicide, (*iv*) involuntary homicide by an involuntary act, (*v*) accidental homicide. *See* J.F. Stephen : *A History of Criminal law of England,* Vol. III, Ch. 33, 292.

peculiar and generated grave injustice. As pointed out by Banerjee[14] "with exceptions crime was considered to be a wrong done to the injured party, not an offence against the State and punishment was regarded the private right of the aggrieved party." There was no class distinction between private and public law...between crime and tort. This led to injustice and corruption.

(c) Punishments

(*i*) *Qisas.*—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. This right was regarded to be the right of man (*Hakka-Admi*) and not of public or of God.[14] The right of the person murdered devolved on his legal heirs who represented him in the exaction of it.

(*ii*) *Diya.*—In certain cases, where no retaliation was allowed, the injured party had a right to demand only blood-money which was known as *Diya*. Diya could be exchanged for Qisas. Blood-money could be accepted in lieu of retaliation. Due to this defective arrangement murderers could escape by payment of money. Many evil practices developed out of it.

(*iii*) *Hadd.*—In the case of *Hadd*, the law prescribed and fixed the penalties for certain offences. In such offences the Judge was required to pass a sentence according to the provisions of the law. Punishments under *Hadd* were given in offences like *Zina* (illicit intercourse), drinking wine, theft, highway robbery, accusing a married woman etc. In case of *Zina* death by stoning or scourging and in case of theft amputation of accused's hands were the punishments. These punishments were very harsh and the proof of offence was made very essential.

(*iv*) *Tazir.*—*Tazir* meant discretionary punishment. Offences for which no punishment was prescribed were left to 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 convictions 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 the general public.

(d) Criminal Law in other parts of the country

(*i*) *In Benaras and Agra.*—The development of criminal law, as applicable to Benaras 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 Benaras, 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.

14. T.K. Banerjee, *Background to Indian Criminal Law*, 40-44.

(*ii*) *In Madras.*—In Madras Presidency, the Mohammedan Criminal Law was enforced in the same way as in the Presidency of Bengal. 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*) *In Bombay.*—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 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".[15] The Code 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".[16]

(*iv*) *In Punjab.*—After the death of Raja Ranjit Singh in 1939 the Sikhs were defeated in the Second Sikh War and Lord Dalhousie annexed the Punjab to the British Empire on 29th March, 1849. However, it was difficult to control the Sikhs in absence of any legal system. The Mohammedan Law was not acceptable to the Sikhs and introduction of immediate legislation for the purpose was not possible. A Board of three Commissioners was therefore appointed. As 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".[17] 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. Some time later a part of the Code which 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.

---

15. For details *see* G. Anderson, *British Administration in India.*
16. J.F. Stephen, *A History of the Criminal Law of England,* Vol. III, Chap. XXXIII "*Indian Criminal Law*", at 295.
17. *Ibid.*, 296.

This position of the criminal law in the most important parts of India, namely, Bengal, Madras, Bombay, the Punjab, Benaras, Agra, *etc.*, continued till 1858 when the Company's Government was taken over by the Crown.

3. Defects of Mohammedan Criminal Law

(*a*) *Incomprehensibility of principle.*—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. In actual practice it was realised that the law laid down in *Hidaya* and *Fatawa-i-Alamgiri* was mostly conflicting, confusing and incompatible. In each case the interpretation of law depended on the *Qazi* who presided over the Court.[18]

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."[19]

(*b*) *Unscientific Classification.*—The inherent defect of the Mohammedan Criminal Law was in its conception and classification of crimes. Crimes were of three kinds: (*a*) Crimes against God; (*b*) against the State, and (*c*) against private individuals. Banerjee has 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".[20]

(*c*) *No distinction between private and public law.*— 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. This weakness of Mohammedan Law was sufficient to encourage many persons to commit murders.

(*d*) *Blood-money & Pardon.*—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. This 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

---

18. Sri Ram Sharma, *Mughal Government and Administration*, 200-201.
19. See *"Indian Criminal Law"* in Stephen, *A History of Criminal Law of England*, Vol. III, 293.
20. T.K. Banerjee, *Background to Indian Criminal Law*, 62.

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.

(*e*) *No distinction between murder and homicide.*—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 very severe but the Mohammedan Law confused sin and crime.

Mutilation, *Tusheer* or public exposure, use of *Corad* and flogging of females were other severe punishments and common for minor offences under Muslim Criminal Law.

(*f*) *Absolute discretion under Tazir.*—The law of *Tazir*, which provided for discretionary punishment was also very vague which gave too much power to the Judges. Even innocent persons were punished by the courts. This led to corruption, injustice and bribery in the courts and amongst police officers.

(*g*) *Irrational law of Evidence.*—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. Moreover the evidence must be direct (*i.e.* eye witness and not circumstantial) and in all cases of *Hadd* or *Kisa* and murder the evidence of a woman was inadmissible.[21] This led to corruption, bribery and injustice. It seemed as if the law was framed with a special care for the criminal to escape. It thus helped the accused and one who told the truth was punished.

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.[22] T.K. Banerjee[23] 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[24] 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 Lord Cornwallis that strong reformative steps were taken to suppress the evils and punish the offenders by reconstituting the Mohammedan Criminal Law courts and

21. Supra note 16.
22. For a detailed academic discussion on the point, *see* W.A. Robson, *Civilization and the Growth of Law*, 88-89, 103-104.
23. T.K. Banerjee, *Background to Indian Company Law*, 67.
24. A. Aspisnall, *Cornwallis in Bengal*, 61.

by passing various regulations to remove the defective provisions of the Mohammedan Law.

4. Reforms by English Administrators

The Mohammedan Criminal Law, as we have stated above, suffered from many defects. The English administrators of 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 mould, refashion and amend the Mohammedan Criminal Law so as to adapt it to their new conceptions of policy and behaviour, though for a long time it continued to be the law of the land.

(*a*) *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."[25]

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. 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 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.[26] His further proposals for reforms were not heeded because as expressed by Rankin G.C. in his *Background to Indian law* (1946, 169) "The cloudy title of the Company to the Nizamat made it slow to alter the criminal law."

(*b*) *Lord Cornwallis*.—From 1772 to 1790, no special effort was made to change the Mohammedan Criminal Law. The problem of law and order as well as to 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. (1) He introduced the importance of intention in committing a crime, instead of the weapon with which the crime was committed[27]. Consequently he rejected Abu Hanifa's doctrine and accepted Doctrine of Yusuf and Mohammad. (2) Sacking the next-of-

25. It is controversial whether English Law was introduced in India in 1726 or later on. This controversy became serious after the trial of Raja Nand Kumar in 1775. For details *see* Chapter V of this Book. *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.*
26. For details *see* "Judicial Reforms of Warren Hastings" in Chapter IV of this Book.
27. *See also* Aspinall, *Cornwallis in Bengal,* 69; Rankin, *Background to Indian Law,* 170.

kin's discretion to accept blood-money he decided to punish the wrong-doer. (3) Punishment of amputation and mutilation of organs were substituted by fine and hard-labour and imprisonment.[28] For this purpose a Regulation in 1791 was passed. (4) In case of refusal or neglect to prosecute the offender by relatives of the deceased the record was to be sent to Sadar Nizamat Adalat for passing final orders. This important step was taken in 1792. (5) Consideration of witnesses on religious grounds and gender basis were abolished. The Muslim law thus stood modified in 1792. (6) On 1st May, 1793, the Cornwallis Code[29] — 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. (7) 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.[30]

The system which was provided under Cornwallis Code for Bengal was subsequently also adopted in Madras and Bombay Presidencies with certain amendments.

(*c*) *Subsequent reforms up to 1831.*—The process of introducing reforms in the Mohammedan Criminal Law 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:

(1) Persons unable to pay blood-money were set free (Regulation XIV of 1797).

(2) Fine imposed on a criminal was to go to Government and not to private persons (Regulation XIV of 1797).

(3) Non-payment of fine was to result in a fixed term of imprisonment (Regulation XIV of 1797).

(4) Mitigation or pardon could be recommended to the Governor-General-in-Council in case of injustice (Regulation XIV of 1797).

(5) Penalities for false testimony being too severe were in the first instance replaced by imprinting (stamping) words on the culprit's forehead and later on this practice was also stopped and rules were framed for the purpose.

(6) Regulation IV of 1799 penalised the offence of treason.

(7) *Dharna* was made an offence by Regulation V of the same year. Punishment was prescribed for it.

(8) 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 transportation to some place beyond the seas either for the remaining life or for a short term.

(9) Regulation VIII of 1799 provided sentence of capital punishment in certain cases *e.g.* in cases where parent killed the child, master killed the

28. *See* Resolution in the proceedings of the Governor-General-in-Council, dated 10th October, 1791.
29. For details *see* Chapter VI of this Book.
30. Regulation XLI of 1793.

slave *etc.* Earlier, these cases were considered as justifiable under the Muslim Law.

(10) In committing homicide a distinction between innocent intention and criminal intention was made by Regulation VIII of 1801. The Mohammedan law had failed to distinguish between these. Death sentence was prescribed for the latter.

(11) Practice of infanticide and its abetment were declared equivalent to murder and were made punishable with death penalty. Even an attempt was punishable.

(12) Regulation III of 1803 provided that in cases where a person was liable to discretionary punishment under the Mohammedan Law, the *Fatwa* of the law officers was merely to declare the same in general terms, stating the grounds why the prisoner was subject to discretionary punishment and the punishment, short of death, was to be proposed by the Judge of Circuit or by the *Sadar Nizamat Adalat*.[31] This had the effect of removing bribery, corruption and lack of uniformity.

(13) 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 *Qisa* 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."[32] 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.

(14) Robbery was another very recurrent offence which was common in the country at that time. 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 any 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. For habitual and notorious robbers, in consideration of circumstances, the *Nazamat Adalat* was empowered to inflict the capital sentence. In simple robbery seven years' punishment was given.

(15) 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.

(16) In order to check crimes of burglary, the existing Regulations were modified. Regulation I of 1811 provided for the punishment of imprisonment in banishment for 14 years and to the corporal punishment of 39

31. *See* T.K. Banerji, *Background to Indian Criminal Law*, 81.
32. *Ibid.*

stripes for the offence of burglary between sunset and sunrise. Similarly punishment was laid down for other types of attempts to commit burglary.

(17) In case of punishing adultery the Regulation XVII of 1817 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.

(18) Other important Regulations were passed to stop slave trade in the country,[33] enticing away females and not maintaining the family,[34] to prohibit *Begari*,[35] to punish for affrays with homicide.[36] The use of *Corah* as an instrument of punishment in the execution of sentences 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.

(19) By Regulation XVII, on 4th December 1829, the practice of self-immolation on the funeral pyre of her husband (called Sati) was declared illegal. Madras and Bombay followed suit.[37]

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 Sadar 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."[38]

5. 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 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

33. Regulation X of 1811.
34. Regulation VII of 1819.
35. Regulation III of 1820.
36. Regulation II of 1823.
37. R.C. Majumdar : *The History & Culture of the Indian People*, Ed. 1965, Vol. X, Part II, 268-75.
38. *See* J.F. Stephen, *A History of the Criminal Law of England*, Vol. III, Chap. XXXIII "Indian Criminal Law", at 293-94.

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 archaic 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 did 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. 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.[39]

After 1832, the Jury system, as it prevailed in England,[40] was introduced in India. This system was highly criticised as an entire failure as the Judge generally put such persons in the box who always agreed with him.[41]

6. First Indian Law Commission and Indian Penal Code

(*a*) *General.*—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 pointed at its weaknesses, defects, confusion and utter want of principle and unity[42] while George Campbell recognised it as 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, classification and codification."[43]

39. Campbell, *Modern India*, 465-66.
40. For details *see* V.D. Kulshreshtha, *A Textbook of English Legal History*, 2nd Edn., Chap. VIII, 49-54.
41. *Ibid.*
42. J.F. Stephen, *A History of the Criminal Law of England*, Vol. III, Chap. XXXIII *"Indian Criminal Law"*, at 295-97.
43. George Campbell, *Modern India*, 465. *See also* Lord Bryce, *Studies in History and Jurisprudence*, Vol. I, 129,199-200; for a detailed account of the Administration of Criminal Justice during the period *see* R.C. Majumdar :*The History and Culture of the Indian People*, Vol. 9, 1963, 347-352.

(*b*) *The Indian Penal Code, 1860.*[44]—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 were abolished. It led to the centralisation of legislative authority in India. The Act also provided for the appointment of a Fourth Member, as the Law Member, to the Council of the Governor-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 Moffussil 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",[45] 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 the 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."[46] For not less than twenty-two years, the Code remained in the shape of a draft and it under-went minutely careful and elaborate revision at the hands of the Members of the Legislative Council.[47] 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 languages of India and suitable steps were taken to make even zamindars and *pardanashin* women acquainted with its provisions.

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

---

44. For details *see* Chapter XIV of this book.
45. C.P. Ilbert, *The Mechanics of Law Making*, 166.
46. J.F. Stephen, *Life and Letters of Macaulay*, Vol. IX, 421.
47. Second Law Commission also introduced changes in the Draft of Penal Code. For details *see* Chapter XII of this book.

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...."[48]

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.*"[49]

(*c*) *Necessity of Reforms.*—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[50] 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 moffussil". Whitley Stokess' 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 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.

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

48. J.F. Stephen, *A History of the Criminal Law of England,* Vol. III, Chap. XXXIII "Indian Criminal Law" at 300.
49. Whitley Stokes, *The Anglo Indian Codes,* Vol. I, 71. For details *see* the Indian Penal Code, 1860.
50. Whitley Stokes, op. cit., 72.

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 120 years, *i.e.* from 1860 to 1980, the Indian Penal Code was amended somehow or other fifty-eight times by legislation.

In the light of modern developments which have changed Indian conditions in various ways, it has also become 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 precise, 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 to introduce a reformative element into 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, imprisonment, fine, forfeiture, inequality of punishment, genesis of crime and their degree, etc. are other very important matters involving major policy decisions, and on an all-India basis require a very careful consideration by experts. Never before in history, the Government of India had such a responsibility as it has 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. A comprehensive amendment Bill to modernise the Penal Code was introduced in 1972 but lapsed. Recently the I.P.C has been amended by introducting new Sections 376-A to 376-D, S. 498-A, S. 304-B and S. 364-A but such piece-work is no substitute for a complete surgery.

(*d*) *Reform of Criminal Procedure Code.*—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.

13

Racial Distinction

"To give every English defendant in every Civil cause a right to bring the native plaintiff before the Supreme Court is to give every dishonest Englishman an immunity against almost all civil prosecution."

"...We proclaim to the Indian people that there are two sorts of justice, a coarse one which we think good enough for them, and another of superior quality which we keep for ourselves."

Macaulay: *infra* para 2, sub-para 5

SYNOPSIS

1. Origin

The grant of Diwani to the English not only spelled out the establishment of British Empire in India but also strengthened their belief in our shortsightedness and helplessness, the direct result of which was the practice of racial distinction. The British subjects in India were consequently originally exempt from jurisdiction of Company's Courts, whether civil or criminal.

It is the high executive officials that largely determine the nature and character of the Government. In the early days of the administration of the Company, as said by Macaulay, "even the character of the Governor-General was less important than the character and spirit of the servants of the Company by whom the administration of India was carried out."[1] This was so because the senior and junior merchants, factors and 'writers' performed commercial as well as administrative duties. Their selection was made in England, not on merits but on their 'requests' as ordered by the Court of Directors in 1731. This sort of 'patronage' which was believed by the Directors as their important privilege naturally led to favouritism and "The service became practically the monopoly of certain families." It resulted in corruption. Clive failed to check this and Hastings too was proved a failure in controlling it. It was Cornwallis who for the first time in 1793 took steps in this direction. The Charter Act of 1793 provided that all the vacancies in the offices etc. in the civil line of the Company's service would be filled from amongst the Company's servants, subject to their signing a covenant not to receive presents or to carry on private trade. Consequently the superior grade and offices were reserved for them.[2] This was so not because they were efficient or honest but because they had no faith in Indians. This system of nomination remained in vogue up to 1833.

---

1. Macaulay's Speech in the House of Commons, June, 1853 (quoted in Chap. I, VI, 358); R.C. Majumdar: *The History & Culture of Indian People*, 1963, Vol. IX, Pt. 1, 334-335.
2. *History & Culture of Indian People*, 1963, Vol. IX, Pt. 1, 335.

2. Distinction in Civil justice

(*a*) *Position up to 1813*: Under the Regulating Act the English were exempt from the jurisdiction of the Company's Courts. Only the Supreme Court of Judicature at Calcutta had jurisdiction over them. In so far as Bombay and Madras were concerned the position was the same. The Registration Act in Bengal also provided that the British born subjects would be subject to the jurisdiction of the Supreme Courts and not to Company Courts. In Bombay and Madras these provisions were implemented up to 1799 and 1802 under Regulation 18 of 1802 and Regulation 3 of 1799. In Bengal Lord Cornwallis in 1793 prohibited the English to reside beyond a distance of ten miles of Calcutta unless they executed a bond subjecting themselves to the jurisdiction of the Moffussil Diwani Adalats in cases where the amount in dispute did not exceed Rs. 500/-. This distinctive position was however sought to be changed by the Charter Act of 1813. It put restrictions on the patronage practiced by the Directors and made every British subject residing, trading or holding immovable property at a distance of more than ten miles from the Presidency towns, subject to the jurisdiction of the Company's Courts in civil matters filed against them by the natives. A right of appeal, however was granted to them whereby they could appeal to His Majesty's Courts (Supreme Courts) instead of Sadar Diwani Adalats. This was a privilege granted to them. This prevented proper administration of justice.

(*b*) *Position after 1813*: In 1814 the position was that the British could not be sued in a Moffussil Adalat below the rank of a District Court and for this purpose it was provided that the Indian Commissioners, Munsifs and Sadar Ameens were not to have any power to decide cases wherein the English, Americans and the Europeans were a party. However this state of affairs was removed and Regulation in 1827 extended the jurisdiction of Sadar Ameens over Europeans. This was to remain only up to 1831. In 1831, William Bentinck on reconstitution of the civil judiciary prohibited the Munsifs, Sadar Ameens and Principal Sadar Ameens to try such disputes where the Englishmen were parties. The privilege was thus restored.

The result was that the oppression and discrimination continued. The procedure in the Supreme Court was very slow and the expenses very great. Justice was thus ten times costlier than in England. The ministerial officers attached to the Supreme Court in Calcutta made scandalous fortunes. Natives in the moffussil were thus deterred by the expense of litigation before these tribunals with the result that Englishman might without danger, refuse to pay their debts.[3] The state of things was thus described by Macaulay:

> "Till the passing of Act XI of 1836 an Englishman at Agra or Benaras, who owed a small debt to a native, who had beaten a native, who had come with a body of bludgeon-man and ploughed up a native's land, if sued by the injured party for damages, was able to drag that party before the Supreme Court of Calcutta (a distance perhaps of 1000 miles), a Court which in one most important point—the character of the judges—stands as high as any court can stand, but which in every other respect I believe to be the worst in India, the most dilatory, and the most ruinously expensive. The expenses of litigation in England are so

3. *Ibid.*, 344-345: Joseph Chailley : *Administrative Problems of British India* (1910), 456-457.

heavy that people sit down quietly under wrongs and submit to losses rather than go to law, and yet the English are the richest people in the world. The People of India are poor and the expenses of litigation are five times as great as the expenses of litigation at Westminster....I speak of Bengal, where the system is now in full operation. At Madras, the Supreme Court has, I believe, fulfilled its mission. It has done its work. It has beggared every rich native within its jurisdiction, and is inactive for want of somebody to ruin."[4]

(*c*) *Charter Act of 1833 continues discrimination*: This was the state of affairs when the Charter Act of 1833 opened the doors of British India for the British subjects. The act granted them ample opportunities to acquire property and the problem of their rights *vis a vis* the native's bore a very complex and ugly character which if not controlled would create great disturbances. The English misbehaved and fully exploited the situation. This state of affairs had in its roots the following causes: eagerness to obtain quick monetary advantages, consciousness of power, pride of a fancied superiority of race, absence of adequate check of public opinion and the administration.

Section 85 of the Act of 1833 was therefore envisaged to protect the natives from insults and outrages of the English against their persons, properties, religions and opinions. However the apparent anomaly could be seen in the provision made by Section 46 of the Act which made one specific reservation, a judicial favour so to say, for the British subjects and it was that the Government of India could not make a law, without the previous sanction of the Directors, empowering any courts, other than the Supreme Courts, to sentence British subjects or their children to death or which shall abolish the courts so chartered. This made the Government to think as to what jurisdiction should be conferred on the Company Courts.

(*d*) *Macaulay's opinion*: Macaulay was in favour of elimination of discrimination. In his opinion discrimination in administering justice had a demoralising effect; not only this but it lowered down the prestige of Company Courts in the eyes of the natives that these courts which might be good for millions of Indians could not be trusted to administer common justice to a few hundred whitemen. In his words this was "to cry down the Company's Courts. We proclaim to the Indian people that there are two sorts of justice, a coarse one which we think good enough for them, and another of superior quality which we keep for ourselves. If we take pains to show that we distrust our highest courts, how can we expect that the natives of the country will place confidence in them....If [the Sadar Adalat] is not fit for the purpose, it ought to be made so. If it is fit to administer justice to the body of the people, why should we exempt a mere handful of settlers from this jurisdiction." The distinction in his opinion proclaims that "The natives of India may well put up with something less than justice or that Englishmen in India have a title to something more than justice .....*To give every English defendant in every civil cause a right to bring the native plaintiff before the Supreme Court is to give every dishonest Englishman an immunity against almost all civil prosecution.*"

(*e*) *Act of 1836 abolishes discrimination*: Consequently the privilege granted under the Charter Act of 1813 was abolished by Act XI of 1836 and it was provided that no person by reason of birth or descent should be exempt in any civil

4. *Ibid.*, 345: quoted in Strachey op. cit. 116-117.

proceedings from the jurisdiction of the Company's Courts above that of Munsif in Bengal, Sadar Ameens and District Munsiffs in Madras. Bombay also was no exception.

Against this measure a great hue and cry was raised by the white people and the Act was considered by them to be the "Black Act". However the Government did not budge and remained firm. Dr. Jain in this connection notes an interesting point that the agitation was carried out not by the whitemen in the moffussil to whom the Act affected so much, but by those white people in Calcutta who were to remain under the jurisdiction of the Supreme Court as usual. Any way this measure which was described as just and equitable had one important lacuna that it pertained to civil proceedings and consequently discrimination in the field of criminal law continued.

In 1839, it was provided that no person would be exempt from the jurisdiction of the revenue courts or Munsiffs in connection with proceedings for recovery of rent arrears. Finally by Act VI of 1843 the Englishmen were brought under the jurisdiction of Munsiffs Courts also. This gave the Munsiffs Courts jurisdiction on every person irrespective of birth, caste or creed. Thus the last trace and the remanant of distinction in civil matters was abolished. The same happened in Madras in 1850 by Act No. III.

3. Distinction in Criminal justice

(*a*) *Position up to 1836*: It must be noted that the special privileges or judicial favours which the English people enjoyed in the field of civil justice were abolished after 1843 but the favours in the field of criminal justice continued for a longer time after that. By Regulating Act 1773 the British subjects residing in the provinces of Bengal, Bihar and Orissa were under the jurisdiction of the Supreme Court so that no lower court could ever try them. This was a racial distinction. In 1790, however Lord Cornwallis made a provision whereunder the Magistrates in the moffussil could inquire into the charges against the British subjects and could apprehend them and send them for trial before the Supreme Court. But they could not try them. The racial distinction thus continued and by provisions of Section 10 of Regulation 5 in 1799 and by Section 19 of Regulation 6 in 1802 the same remained in life even in Bombay and Madras. This favour was meant for the British subjects only and for no other foreigners. It was provided in 1793 to appoint Justices of Peace from amongst the covenanted servants of the Company. These Justices of Peace in 1796 were given powers as said above but the defect was that they could not try the English. It was the Supreme Court only that could try them. In 1807 in Bombay and Madras the same provisions were enacted but it could make not an iota of reduction in practice of racial discrimination.

In 1813, the Charter Act instituted a licensing system for the Britishers who desired to come to India. Due to this the doors of India were opened for them to settle here and exploit. The English, as we have seen in previous paras misbehaved and the racial distinction provided them quite a nice opportunity. Assault, forcible entry and other injuries inflicted by the English on the Indians went unredressed. However it was provided by the Act to supply redress in such cases and it therefore gave powers to the magistrates who could act as Justices of Peace and try the English people and punish them by fine not exceeding five hundred rupees or imprison them

up to two months in case of non-payment of fine. Curiously enough, however, such convictions could be removed by a writ of certiorari into the Supreme Court as a Court of Oyer and terminer and gaol delivery. The writs were devised as a matter of check upon the powers of the Justices of Peace.

In 1832, the Justices of Peace could be appointed from any person residing in the territory of the Company (but not a foreigner), however, no Indian could be appointed. The functions of the Justice of Peace were threefold: to try and punish under certain Acts and Statutes under summary conviction without help of a jury; to investigate charges for committing or discharging the accused and to prevent breaches of peace. As observed by Ilbert[5], though the local magistrates had powers to send an Englishman for trial before the Supreme Court "*(yet) to impose upon the native complainant and witness the obligation of repairing many hundred miles to obtain redress was to subject them to delay, fatigue and expense which would be more intolerable than the injury they had suffered.*"

This was the position up to 1833. Thereafter taking into consideration Section 46 of the Charter of 1833 it was thought by the Directors that "they could not possibly fulfil the obligation of protecting the Indians from insult and outrage according to the direction in Clause 85 of the Act, unless they rendered both the natives and the Europeans responsible to the same judicial control." There can be no equality of protection where justice is not equally and on equal terms accessible to all...justice is to be distributed to men of every race, creed and colour, according to its essence, and with as little diversity of circumstances as possible."

(*b*) *Position after 1836*: The passing of the "Black Act" in 1836 accelerated the situation and Macaulay was not of the opinion of exempting a mere handful of the settlers without having regard to the interests of the Indians. Institutions exist for the benefit not of the few but of the many. The First Law Commission was of the opinion of subjecting the English to the jurisdiction of some courts (but not necessarily the moffussil criminal courts) for the protection of the English themselves. This showed their pride of race. For this purpose by Act IV of 1943 they issued Commission of Peace to presidency magistrates who could try the English for capital offences. Thus jurisdiction was conferred only on the English to try the English. None except a British subject could be made a Justice of Peace. For other crimes excepting capital crimes the courts of sessions could try them with the help of assessors of which at least one was to be an Englishman. From the judgments of these lower courts appeals could lie to the sessions court and from sessions court to the Sadar Nizamat Adalat. The check that was exercised by means of certiorari as said before was thus removed and the powers of the Justices of Peace in the moffussil were taken away. Now the appeal from the decision of Justices of Peace would lie to the same court according to the same rules. The result of these provisions was that even for minor and petty offences an Englishman could be tried by a Justices of Peace who had to be an Englishman or the Company's servant. This was a privilege causing distinction. Describing the state of racial distinction the Calcutta Review[6] of 1846 writes: "Innumerable instances are on record which show how

5. Ilbert: The Government of India, 1922, 75.
6. C.R. VI (1846), 145-6: R.C. Majumdar : *History & Culture of Indian People*, Vol. IX, 1963, Part 1, 345, 346.

lamentably this indulgence has been abused, and how frequently British Europeans, after the commission of outrages, which at Calcutta or at home would have been visited with the most condign punishment, have baffled the most strenuous efforts of justice. The only remedy at present is a prosecution in the Supreme Court, to which as it is not in the power of poor people living at a distance of several leagues to resort there is no real redress for wrongs; consequently that salutary influence which the presence of neighbouring and competent authority cannot fail to exert over a community is unfelt by British European subjects. Unrestrained in their actions — with large sums at their command — contaminated by daily intercourse with depravated natives and forgetful of their God, they had been known to equal the worst Zamindars in cruelty and oppression. False charges, connivance at perjury, even subornation of perjury — affrays — unnecessary disputes — have been as things of everyday occurance with them."

To remove this distinction, Law Member of the Government of India, Mr. Bethune drafted a bill. This and three other bills were proposed to end this glaring inequity but against these bills (called Black Acts) violent agitations were started and the British Parliament was informed. The Indians made counter-agitations[7] but it was of no avail. The bills were withdrawn from the Legislative Council. This distinction continued not only up to 1856 when the High Courts were established, but even the revised Criminal Procedure Code of 1872 failed to remove it and so it continued. The consequences were that the Englishmen could go into the interior, do any sort of mischief and assaults etc. and still were exempt from the jurisdiction of the local courts. It was like a licence to tyranny. This continued up to 1922. In 1923 the Code of Criminal Procedure made some improvements. Accordingly the accused Europeans and the Indians were placed on equal footings and could be tried by the same courts. However according to Section 275 of Cr. P.C. the only privilege allowed to the English was that they could be tried with the help of jury consisting of a majority of Europeans or Americans. A reciprocal provision existed for the Indians too.

(c) *Criminal law (Removal of Racial Discrimination) Act, 1949*: It was only in 1949 after independence that by passing of the Criminal Law (Removal of Racial Discrimination) Act that the remnants of the racial distinction in the field of criminal justice were abolished.

---

7. C.R. VI (1846), 145-6: R.C. Majumdar : *History & Culture of Indian People*, Vol. IX, 1963, Part I, 345, 346.

14

Charter Act, 1833 & Codification

"...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...Our principle is simply this—Uniformity when you can have, diversity when you must have it, but in all cases certainty." —Macaulay

C.H. Phillips: *The East India Company*, 1784-1834 (1940), p. 290

"The Charter Act of 1833 forms a watershed in the legal History of India."

"Section 53 of the Charter Act was the legislative mainspring of law reform in India."

Rankin G. C.: *Background to Indian Law*, (1946), p. 17

SYNOPSIS

1. System of Regulation Law up to 1833
   - (*a*) Charter of 1601
   - (*b*) Subsequent Charters
   - (*c*) Grant of Diwani
   - (*d*) Hasting's Plan
   - (*e*) Regulating Act, 1773
   - (*f*) Act of Settlement, 1781
   - (*g*) Cornwallis Code
   - (*h*) Statute of 1797
   - (*i*) Regulations of 1802 & 1807
   - (*j*) Charter Act, 1813
2. Defects of the System
   - (*i*) Faulty drafting
   - (*ii*) Lack of uniformity
   - (*iii*) Parallel legislation
   - (*iv*) Uncertainty
   - (*v*) Other vices
3. Charter of 1833 and Reforms in Legislation
   - (*a*) Factors leading to reforms of 1833
     - (*i*) Supreme Court's power & jurisdiction
     - (*ii*) Economic conditions
     - (*iii*) Public opinion in England
     - (*iv*) Favour to Christianity
     - (*v*) Travails through which it passed
   - (*b*) Provisions of the Charter Act, 1833
   - (*c*) Emanation of the idea of Codification
   - (*d*) Provision for Law Commission
4. Working of the Law Commissions
   - (*a*) The First Law Commission, 1834
     - (*i*) Penal Code
     - (*ii*) Lex Loci Report
     - (*iii*) Code of Civil Procedure
     - (*iv*) Law of Limitation
     - (*v*) Stamp Law
     - (*vi*) Contribution of Law Commission
   - (*b*) The Second Law Commission, 1853
     - (*i*) Reports
     - (*ii*) Enactment of some Codes
   - (*c*) The Third Law Commission, 1861: The Golden Age of Codification
   - (*d*) The Fourth Law Commission, 1879
5. Law Commission under Indian Constitution
   - (*a*) The Fifth Law Commission, 1955
     - (*i*) Members
     - (*ii*) Terms of Reference
     - (*iii*) Reports submitted
   - (*b*) Second Law Commission
   - (*c*) Third Law Commission
   - (*d*) Fourth Law Commission
   - (*e*) Fifth Law Commission
   - (*f*) Sixth Law Commission
   - (*g*) Seventh Law Commission
   - (*h*) Eighth Law Commission
   - (*i*) Ninth Law Commission
   - (*j*) Tenth Law Commission
   - (*k*) Eleventh Law Commission
   - (*l*) Twelfth Law Commission
   - (*m*) Thirteenth Law Commission
6. Codification
   - (*i*) Meaning and object
   - (*ii*) In favour of Codification
   - (*iii*) Against Codification
   - (*iv*) Technique of Drafting
   - (*v*) Modern Trends

1. System of Regulation Law up to 1833

(*a*) *Charter of 1601.*—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 the 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.

(*b*) *Subsequent Charters.*—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, also incorporated provisions similar to that of the Charter of 1726.

(*c*) *Grant of Diwani.*—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 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.

(*d*) *Hastings' Plan.*—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 however the Company's

---

1. Ilbert, *The Government of India* (1898), 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, *A Constitutional History of India,* 1600-1936 (1937), 42-3. *See also,* Ch. II of this Book.
3. *See* Fawcett, *The Century of British Justice in India* (1934), 223-24.
4. *See* Chapter IV of this Book. Thornton, *History of British India,* Vol. I, 410-20.
5. Lord Clive and Warren Hastings are famous as the founders of the British Empire in India.

officials collected large sums of money either by their private trade or malpractices. Due to their huge wealth the Company's servants were also nicknamed as "Nabobs".[6] Their stories regarding acquisition of wealth reached England also. The select committee and the Secret Committee appointed by Lord North in 1772 described in their reports the woeful state of affairs of the Company indicting Clive for his unpardonable sins in India.[7] As recorded by Horace Walpole 'Such a scene of tyranny and plunder has been opened up as makes us shudder.... *We are Spaniards in our lust for gold, and Dutch in our delicacy of obtaining it.*"[8] 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.

(e) Regulating Act, 1773.—The British Parliament enacted the Regulating Act in 1773.[9] 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 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, more powerful because of its power to give validity by registering the Regulations framed by the Governor-General and Council. The Government of the Company's settlement at Bengal faced many difficulties. Some very important cases also reflected the defects and lacunae in the Regulating Act.

(f) Act of Settlement 1781.—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.[10] 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 Regulations. 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 would 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.[11] 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 moffusil area the veto power of the Supreme Court was allowed to continue.

6. *See* Mill, *History of British India*, Vol. III, 326-27; P.E. Roberts, *History of British India*, 179.
7. Paget-Toyanbee: *Letters of Horance Walpole*, VIII, 149 quoted in A.C. Kapoor: *Constitutional History of India*, Edn. 1976, Ch. 1, 6.
8. Mill & Wilson: *The History of British India*, Vol. III, 257-60; Lecky W.E.H., *A History of England in Eighteenth Century*, Vol. IV, 263; Malcom, Sir John: *Life of Robert Clive:* Kapoor, 1976, 6.
9. *See* Chapter V of this Book.
10. *See infra.*
11. 21 Geo. III, C 70, S. 23.

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[12] and it was replaced by a Supreme Court in Madras in 1800[13] and in Bombay in 1823.[14] The provisions in respect of legislation were extended to them in 1807.[15]

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 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 could also derive full advantage of the Regulations.

(*g*) *Cornwallis Code.*—The Reforms of Lord Cornwallis[16] played a very important role in 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 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 would be printed and bound up in volumes. Lord Cornwallis' legislative wisdom of this sort was subsequently followed in Madras and Bombay Presidencies. In the Preamble of Regulation XLI of 1793 Lord Cornwallis stated all the Regulations passed by the Government should be formed into a regular code, should be translated in country languages with grounds of enactment prefixed to it and that courts should base their decisions thereon. A Code formed upon above principles will enable to defend privileges and obtain speedy redress against infringement thereof.

In this way, the use of the Preamble made the Regulations very useful for the lawyers, Judges and the public in general.

(*h*) *Statute of 1797.*—In Bengal Statute of 1797[17], 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. 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 Moffussil areas.

(*i*) *Regulations of 1802 & 1807.*—In Madras, Regulations were made under the authority of the Acts 39th and 40th of George III in 1800.[18] Section 11 of this Act

12. 37 Geo. III, C. 142, S. 9.
13. 39 and 40 Geo. III, C 79, S. 2.
14. 4 Geo. IV, C 71, S. 7.
15. 47 Geo. III, C 68, Ss. 1-2.
16. *See* Chapter VI of this Book under para 2(c).
17. 37 Geo. III, C 142, S. 8.
18. 39 and 40 Geo. III, C 79.

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.[19] Full authority to frame Regulations was granted to the Bombay Government by the Act of 1807.[20] Thus the system of legislation evolved in Bengal in respect of the moffussil areas was adopted by Bombay in 1799[21] 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 coordination amongst them.

(j) Charter Act, 1813.—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 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 an 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. Defects of the System

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 Moffussil 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.

19. 37 Geo. III, C 142.
20. 47 Geo. III, S. 2, C 68.
21. 37 Geo. III, C 142.

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[22] admired these efforts of the British in administration of justice as resulting in "prosperity and good government", Lord Wellesley[23] described them as "the noblest proof of just, wise and honest government restoring happiness, tranquillity and security" and Rankin[24] termed them as "a true method of progress and in general the only method which would work." However, the system suffered from grave defects.

(*i*) *Faulty drafting.*—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 Sir Henry Cunningham observed, "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 occured owing to ignorance which chaotic conditions of the Statute Book rendered almost inevitable." There appears great truth in this observation.

(*ii*) *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"[25]. A little improvement was made only after Lord Cornwallis' reforms and though they were given a better shape yet it was not satisfactory.

(*iii*) *Parallel legislation.*—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 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.

(*iv*) *Uncertainty.*—"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.

22. *See* W.H. Morley, *The Administration of Justice in British India.*
23. Quotation cited by Morely in *The Administration of Justice in British India,* at 159.
24. G.C. Rankin, *Background to Indian Law,* 198.
25. *Cambridge History of India,* Vol. V, Edited by Dodwell, 5.

(v) *Other vices.*—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 *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, or in other words the defects were in the laws themselves, in the authority for making them, and in the manner of executing them".[26]

Thus the demerits outweighed the merits of this system and it became extremely difficult for the lawyers, judges and public at large, to find out as to which law they must obey. As a result 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.

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".

(a) *Factors leading to 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.

(i) *Supreme Court's power & jurisdiction.*—It is interesting to note that the demand for reforms was not due to enlightened public opinion[27] in India but it was mostly from the public servants. They realised the defects of the existing system. The jurisdiction of the Supreme Court was uncertain and anomalous. Veto power of the Supreme Court relating to legislation was another cause of trouble for the public servants in administration. The Supreme Court's activities in matters affecting the moffussil areas were always a constant source of conflicts and irritation between the Judges of the Supreme Court and the Governor-General or Governors.[28]

---

26. Speech by Charles Grant in the House of Commons, 13th June 1833, Hansard (III Series), Vol. XVIII, 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 the House of Commons on 10th July, 1833, Hansard (III Series), Vol. XIX, 532.
27. Evils and oppressions were silently suffered by Indians even when they were extreme, and became intolerable; only outbursts of local character, sometimes violent were visible. *See* S.B. Chaudhuri, *Civil Disturbance during the British Rule in India* 1765-1857 (1955).
28. Peter 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 1852-53, Q. 2356. For detailed text of correspondence *see Parliamentary Papers*, H.C. No. 320-E of 1831.

(*ii*) *Economic conditions.*—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 subordinate Presidencies.[29] Centralisation in administrative and financial matters also influenced the legislative sphere a great deal.

(*iii*) *Public opinion in England.*—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.[30] It was also having legal and judicial reactions. 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.

(*iv*) *Favour to Christianity.*—An alliance between the British commercial interests and the Evangelicals (Methodists who wanted to spread Catholic faith in India[31]), 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.

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.[32] 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.[33]

(*v*) *Travails through which it 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.[34]

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.[35] According to Thornton, the collection of the last of the Select Committees was "the largest mass of evidence extant at the time". On 13th June, 1833 Parliament passed the famous resolutions

29. *See* C.H. Philips, *The East India Company*, 1784-1834, 288 (1940); For instructions, *see* Edward Thompson, *The Life of Charles Lord Metcalfe* (1937), Appendix A; Amles Tripathi, *Trade and Finance in the Bengal Presidency*, (1956), 218.
30. See *Report of the Select Committee on the Affairs of the East India Company*, Parliamentary Papers, H.C. No. 734 of 1831-32, General App. V, 26-27. *See* also Minutes dated Dec. 8, 1829, and dated May 30, 1829 in *Parliamentary Papers*, H.C. No. 734, App. V 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*, 1821-1928 (1937), 42-5.
31. Eric Stokes, *The English Utilitarians and India* (1959), 40.
32. S.V. Desikachar, *Centralized Legislation: A History of the Legislative System of British India from* 1834-1861, (1965), 36.
33. Namely, Lord Brougham, who introduced the Bill in Parliament; Charles Grant, the Younger; Hyde Villiers; T.B. Macaulay: Holt Mackenzie; James Mill; Edward Strachey: Lord Bentinck; Alexander Ross; Elphinstone, *etc.* were either strong Benthamites or had faith in it. All these persons were directly or indirectly related to the framing, passing and implementing of the provisions of the Charter Act of 1833. For detailed study, *see* Eric Stokes, *The English Utilitarians and India*; Elic Halevy, *The Growth of Philosophic Radicalism* (1928).
34. For a detailed account, *see* Peter Auber, *Rise and Progress of the British Power in India*, (1937) 658-713; and Edward Thornton, *The History of the British Empire in India*, (1943), Vol. V, Chap. 28.
35. Thornton, op. cit., 282, 315-353.

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 after a thorough inquiry into the affairs of the Company received the Royal assent and finally became law on 28th August, 1833".[36]

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"*.[37]

(b) Provisions of the Charter Act, 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,[38] "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: (1) The restrictions on European settlement and enterprise were to be mostly abolished, making due provision for the protection of Indians. (2) The disjointed 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. (3) And, lastly, the legislative machinery was to be remodelled to effect necessary reforms in the field of law and justice.[39] Rankin has, therefore, remarked, *"The Charter Act of 1833 forms a watershed in the legal history of India"*.[40]

The Charter Act of 1833 made the following important provisions:

(*i*) The territorial possessions of the Company were allowed to remain under its government for another term of twenty years (till 30-4-1854) 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.

---

36. 3 and 4 William IV, C 85.
37. T.B. Macaulay's important role, *see* C.H. Phillips, *The East India Company* 1784-1834 (1940), 290-95.
38. H. Cowell, *History and Constitution of the Courts and Legislative Authorities in India*, 74.
39. *See* S.V. Desikachar, *Centralised Legislation: A History of the Legislative System of British India from* 1834 to 1861, 41.
40. *Background to Indian Law*, 17, (1946).

(*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 laws 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 of any legislation. He had no power to sit or vote for other matters. Lord Macaulay was the first law member.

(*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. However this provision was merely a "grandiose gesture which signified nothing really". The object of the Act, it was emphasised was not to ascertain qualification but to remove disqualification. In application of the provision fitness alone was "henceforth to be the criterian of eligibility".[41] The excellent sentiment as Keith observed, "was not of much political importance, since nothing was done, despite the views of Munro, Malcolm, Elphinstone, Sleeman and Bishop Herber, to repeal the provision which excluded all but covenanted servants from occupying places worth over £ 500 a year.[42] In fact not a single Indian was appointed to the convenanted service during the Company's regime. The importance of this provision lies in the fact, according to Shri Ram Sharma[43] that it became the "sheet anchor of political agitation in India towards the end of the century. Almost all the political

41. Despatch of 10-12-1834, para 105: Kapoor: *Constitutional History of India*, 1976, Edn. 2, 30.
42. Supra note 2, 135.
43. *A Constitutional History of India*, 64: Kapoor, op. cit., 30.

activities in the earlier year of national awakening turned on this clause, which came very handy when demands were being made for giving Indians equal opportunities in administration."

(*viii*) 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 throughout the British territories in India (S. 88).

(*c*) *Emanation of the idea of Codification*

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 dreamt 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 were authorised "to make, constitute and ordain by-laws and 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 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 to 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., would 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 introduced by the Act of Settlement in 1781. The Governor-General was empowered to frame regulations for the Provincial courts in moffusil areas independently of the 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 the 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 Mohammedans 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.* Harrington's *Analysis* of 1805, Colebrooke's Digest of 1807, 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.

(d) 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.[44] As is well known, Section 40 of the Charter provided for the appointment of one additional member Thomas Babington Macaulay to the Governor-General's Council. He was not entitled to vote except in meetings called for making laws and regulations.

It was considered 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*

44. *See* under the title "3. *Charter Act of 1833*" in this Chapter.

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''.

In his speech of 10th July, 1833, Lord Macaulay emphasised the necessity and the underlying principle of codification of 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 Government are better fitted to confer on a nation than popular Government." "*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.*"[45]

4. Working of the Law Commissions

(*a*) *The First Law Commission, 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. It 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."[46] 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 as Thuggee, dedicating girls to a life of temple-harlotry, human sacrifices, 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,[47] 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 membership 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.

---

45. *See* Hansard, *House of Commons Debates*. Third Series, Vol. XIX, 531-33.
46. Letter of 14th Oct., 1837, prefixed to the Draft Penal Code. For details of the letter *see* Whitley Stokes, *The Anglo-Indian Codes*, X.
47. *See* Fitzjames Stephen, *Life and Letters of Macaulay*.

(*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 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 Moffussil 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, 1840 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 moffussil areas, which shall be applicable to all except Hindus and Mohammedans.[48] The main recommendations of the Commission were as follows:

(*a*) Such laws of England as were applicable to the conditions 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 Presidency 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 moffussil courts, the appellate court was to consist of one Judge of the Supreme Court, with or without associates.

It can be concluded that the Commission's proposal was to make English Law the *lex loci* of the moffussil areas as in the case of the Presidency towns. The Law Commission also submitted a draft Bill on 22nd May, 1841 to the Government.[49]

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. In the meantime the Directors ordered not to pass any law for declaring *lex loci* and the matter remained pending until the Second Law Commission was appointed.

(*iii*) *Code of Civil Procedure.*—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.

---

48. *See also,* Alan Gledhill, *The Republic of India,* 155.
49. For details of the provisions *see* Rama Jois : *Legal & Constitutional History of India,* 1984, 67-70.

(*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, were not immediately passed by the Legislature as codified law, the basic foundation of future codification was laid down by it. The greatest credit goes to Macaulay for his initiative in preparing a draft code of Penal Law in India. In fact subsequent Law Commissions were built on the foundations laid by the First 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."[50]

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 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."[51] 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."[52]

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 to the legislative organism were very much out of joint.[53]

Being encouraged with the Law Commission's work, various digests and guides were published in India.[54]

---

50. Rankin, *Background to Indian Law*, 148.
51. J.W. Kaye, *The Administration of the East India Company*. 106-7: *see also* Rankin. op. cit., 21.
52. Desikachar, *Centralised Legislation*, 212.
53. For detailed analysis, *see* the Evidence of F.J. Halliday, Parliamentary Papers, House of Commons No. 426 of 1852-53.
54. B.K. Acharya, *Codification in India*, Ch. 1; Marshman : A Guide to the Civil Law of the Presidency of Fort William (1840).
A.D. Campbell : A Collection of the Regulations of the Madras Presidency from 1802 (1840).
Fulwar Shipwith : Abridgement of the Criminal Regulations and Acts up to 1843.
W. Morley : An Analytical Digest of the reported cases decided by the Supreme Courts.
Beaufort : A Digest of the Criminal Laws of the Presidency of Fort William (1846).

(*b*) *The Second Law Commission, 1853*

The Charter Act of 1853 empowered Her Majesty to appoint a Law Commission in England for India. 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.[55]

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.[56] 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.

(*i*) *Reports.*—The Second Law Commission submitted four Reports to the Indian Government. The First Report was submittted in 1855 and the Second in 1856, the Third and Fourth Reports were submitted in 1856.

In the First Report the Commission submitted a plan for the reforms in judiciary and in courts' procedure.

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 moffussil 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 moffussil 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.

(*ii*) *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

---

Baynes, Richard Clarke, Fenwicke, Harrison, Sutherland and Field to prepared and published various other digests and collections of Regulations.

55. Section 28, Charter Act 1853.

56. It 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.

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 *pardanashin* 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. Sometime later after introducing certain modifications the Government passed this Code as Punjab Laws Act of 1872.

(c) *The Third Law Commission, 1861*

The Golden Age of Codification.—On 14th December, 1861, the Third Law Commission was appointed in India under the Chairmanship of Lord Romilly.[57] 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 a body of substantive law using law of England as a basis having due regard for the institutions. 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'."[58]

In seven reports the Third Law Commission prepared and submitted drafts of several codes as under:[59]

57. 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.
58. Rankin, *Background to Indian Law,* 45.
59. For details of reports *see* Rama Jois: *Legal & Constitutional History of India,* (1984), 73-79.

Sl. No.	No. of the Report	Subject	Year or Date of submission
1.	First	The Indian Succession Act	1864
2.	Second	The Contract Bill	1866
3.	Third	The Negotiable Instruments Bill	1867
4.	Fourth	(No draft of any Code submitted)	1867
5.	Fifth	The Evidence Bill	1868
6.	Sixth	The Transfer of Property Bill	1870
7.	Seventh	Revised draft of Criminal Procedure	1870

However, 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 a 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 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, 1865.
(*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[60] and Sir James F. Stephens,[61] both respectively as the Law Members of the Government, played a vital role in the shaping 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. As the activities of the Third Law Commission and of both the previous Law Members of the Council created considerable uneasiness in India and England he was given definite instructions "to go slow with the legislative machine in India". The Specific Relief Act (1 of 1877) was therefore the only new enactment passed during Hobhouse's term of office.

(*d*) *The Fourth Law Commission, 1879*

The Government of India appointed the Fourth Law Commission on 11th February, 1879.[62] 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 not be expanded at present by codification except that the operation of the European British Minors Act, 1874 should be extended.

---

60. During Maine's tenure nearly two hundred eleven Acts were passed. *See* Hunter, *Seven Years of Indian Legislation* (1870); Rankin, *Background to Indian Law*, 73.

61. *See* Ilbert, "*Sir James Stephens as a Legislator*" (1894) 10 LQR 222-7; Hunter, *A Life of the Earl of Mayo*, II, 1876, 140-230.

62. Sir Charles Turner, Dr. Whitely Stokes and Raymond West were its three members.

(*vii*) The laws relating to Negotiable Instruments, Transfer of Property, Trusts, Alluvion, Easements and Master-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. The law of Civil Wrong (Torts) was not codified though "Indian Civil Wrongs Bill" was prepared. Till today this area is uncodified and is mostly covered by English Law of Torts. The Commission also recommended for one CODE wherein all different kinds of law was to be incorporated in separate chapters. This and the above proposition about codification of civil wrongs remained without any practical shape. Even today in 1995 the position is the same. It should be noted that this was the last Commission appointed by the British in India. 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 in 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."[63]

The role of Law Commissions and their contribution to Indian Law was thus described by M.C. 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.*"[64]

5. Law Commission under Indian Constitution:

(*a*) *The Fifth Law Commission, 1955*

On 15th August 1947 India won independence and adopted the Indian Constitution by the Constituent Assembly on 26th November, 1949 which became effective

63. F.C. Montague, *Introduction to Bentham's Fragment on Government*, 56-57. *See* also Sir Frederick Pollock, *The Expansion of Common Law*, 16-17.
64. M.C. Setalvad, *The Common Law in India*, 28-29. For the Uniform rules followed by draftsmen of Indian Code, *See* Whitley Stokes, *The Anglo-Indian Codes*, XXII.

from 26th January 1950. Article 372 of the Constitution continued all the laws which were in force in India prior to the commencement of the Constitution subject to the provisions contained in the Constitution. In view of the provisions for Fundamental Rights and the Directive Principles contained in the Constitution re-examination of the prevailing laws was necessary. For this a Law Commission was a must. On 5th August, 1956, 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 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.

On 19th November, 1954 the Lok Sabha passed the following Resolution for the purpose.

(*i*) *Members.*—Eleven persons, who were appointed Members of the Law Commission, were as follows:

Shri M.C. Setalvad, Attorney-General of India (Chairman); Shri M.C. Chagla, 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; Shri P. Satyanarayana Rao, Retired Judge of the Madras High Court; Dr. N.C. Sen Gupta, Advocate, Calcutta; Shri V.K.T. Chari, Advocate-General, Madras; Sri Narasa Rajah, Advocate-General, Andhra; Shri 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 Members.

(*ii*) *Terms of reference.*—The terms of reference to the Commission were; (1) to review the system of judicial administration in all its aspects and suggest ways for improving it and making it speedy and less expensive; (2) to examine the Central Acts of general application and importance and recommend lines on which they 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. The Commission has been reconstituted from time to time and the reports so far made are numerous.

(*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	Liability of the State in Tort	11th May, 1956
2.	Second	Parliamentary Legislation Relating to Sales Tax	2nd July, 1956
3.	Third	Limitation Act	21st July, 1956
4.	Fourth	On the proposal that High Courts should sit in Benches at different places in a State	1st Aug., 1956
5.	Fifth	British Statutes Applicable to India	11th May, 1957
6.	Sixth	Registration Act	13th July, 1957
7.	Seventh	Partnership Act	13th July, 1957
8.	Eighth	Sale of Goods Act	1st March, 1958
9.	Ninth	Specific Relief Act	19th July, 1958
10.	Tenth	Law of Acquisition and Requisition of Land	26th September, 1958
11.	Eleventh	Negotiable Instruments Act	26th September, 1958
12.	Twelfth	Income Tax Act, 1922	26th September, 1958
13.	Thirteenth	Contract Act	26th September, 1958
14.	Fourteenth	Report on the Reform of Judicial Administration[65]	26th September, 1958

65. Students looking for details of recommendations should either *see* the Reports or may refer to Rama Jois: *Legal & Constitutional History of India,* Vol. 2 (1984) 88-91.

(b) Second Law Commission (Chairman: Justice T.L. Venkatarama Aiyar)

On expiry of the term of the members of the Law Commission, it was reconstituted in December 1958.

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 re-introducing 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.

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	Law Relating to Marriage and Divorce Amongst Christians in India	19th Aug., 1960
2.	Sixteenth	Official Trustees Act, 1913	25th Nov., 1960
3.	Seventeenth	Official Trusts Act, 1882	6th Jan., 1961
4.	Eighteenth	The Converts' Marriage Dissolution Act, 1866	23rd Feb., 1961
5.	Nineteenth	The Administrator-General Act, 1913	19th June, 1961
6.	Twentieth	Law of Hire-Purchase	19th June, 1961
7.	Twenty-first	Law of Marine Insurance	21st Sept., 1961
8.	Twenty-second	Christian Marriage and Matrimonial Causes Bill, 1961	15th Dec., 1961

(c) *Third Law Commission (Chairman: Justice J.L. Kapur)*

The term of the members on 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.

In the absence of new terms of reference the Commission continued to 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	The Law of Foreign Marriages	8th Aug., 1962
2.	Twenty-fourth	The Commissions of Inquiry Act, 1952	26th Sept., 1963
3.	Twenty-fifth	Report of Evidence of Officers about forged stamps, currency notes, *etc.*	27th Sept., 1963
4.	Twenty-sixth	Report on Insolvency Laws	23rd March, 1964
5.	Twenty-seventh	Report on the Code of Civil Procedure, 1908	13th Dec., 1964

(d) *Fourth Law Commission (Chairmam: Justice J.L. Kapur)*

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.

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 on the Indian Oaths Act, 1873	22nd May, 1965
2.	Twenty-ninth	Report on the proposal to include certain Social and Economic Offences in the Indian Penal Code	11th Feb., 1966
3.	Thirtieth	Report on Section 5, Central Sales Tax Act, 1956 (Taxation by States of sales in course of import)	March, 1967
4.	Thirty-first	Section 30(2), Indian Registration Act, 1908 (Extention to Delhi)	May, 1967
5.	Thirty-second	Section 9, Code of Criminal Procedure, 1898	29th May, 1967

Sl. No.	No. of the Report	Subject	Date of submission
6.	Thirty-third	Section 44 of Cr.P.C., 1898— Suggestion to and provision relating to reporting of, and disclosure in evidence about offences relating to *bribery*	15th Dec., 1967
7.	Thirty-fourth	Report on the Indian Registration Act, 1908	15th Feb., 1967
8.	Thirty-fifth	Report on Capital Punishment	19th Dec., 1967
9.	Thirty-sixth	Report on Sections 497, 498 and 499, Cr.P.C., 1898, Grant of bail with condition	9th Jan., 1968
10.	Thirty-seventh	Report on the Cr.P.C. 1898— (Sections 1 to 176)	19th Feb., 1968
11.	Thirty-eighth	Report on the Indian Post Office Act, 1898	24th Feb., 1968

The thirty-fifth report made a move for abolition of death sentence. Earlier moves in 1931, 1956, 1961 & 1962 to remove death sentence were rejected. Under the Penal Code death sentence is provided for offences under Sections 121, 132, 194, 302, 303, 305, 307 & 396. Making an elaborate report in this regard the Commission recommended that a person below the age of 18 shall not be sentenced to death but very recently the Supreme Court has upheld the validity of the death sentence in *Bachan Singh* v. *State of Punjab*[66].

(e) Fifth Law Commission

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 was not followed and Shri K.V.K. Sundaram, a retired I.C.S., was appointed Chairman. Apart from these full-time members, Shri P.M. Baxi in the Ministry of Law and Legislative Council, was appointed to work 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 on the punishment of imprisonment for life under the I.P.C	15th July, 1968
2.	Fortieth	Law relating to Attendance of Prisoners in Courts	10th March, 1969
3.	Forty-first	Cr. P.C., 1898	24 Sept., 1969

66. AIR 1980 SC 898.

Sl. No.	No. of the Report	Subject	Date of submission
4.	Forty-Second	I.P.C., 1860	2nd June, 1971
5.	Forty-third	Report on the Offences against the National Security	31st Aug., 1971
6.	Forty-fourth	Appellate Jurisdiction of the Supreme Court in Civil Matters	31st Aug., 1971

On recommendations of the Commission the 1898 Code of Criminal Procedure was repealed and the Cr.P.C. 1973 was enacted by Parliament.[67]

(f) Sixth Law Commission

The Commission was reconstituted in September 1971. Dr. P.B. Gajendragadkar, former Chief Justice of India was the Chairman.

The Terms of Reference of the Law Commission reconstituted with effect from Septermber 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 of 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 insofar 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 submitted the following reports:

Sl. No.	No. of the Report	Subject	Date of submission
1.	Forty-fifth	Civil Appeals to the Supreme Court on a Certificate of Fitness	28th Oct., 1971

67. For details *see* Rama Jois: *Legal & Constitutional History of India,* Vol. 2, 1984, 95-97.

Sl. No.	No. of the Report	Subject	Date of submission
2.	Forty-sixth	The Constitution (25th Amendment) Bill, 1971	28th Oct., 1971
3.	Forty-seventh	Trial and Punishment of Social and Economic Offences	28th Feb., 1972
4.	Forty-eighth	Some questions under Cr. P.C. Bill, 1970	25th July, 1972
5.	Forty-ninth	The proposal for inclusion of agricultual income in total income for purposes of determining the rate of income tax under the Income Tax Act, 1961	28th Aug., 1972
6.	Fiftieth	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	Compensation for injury caused by automobiles in hit-and-run cases	15th Sept., 1972
8.	Fifty-second	Estate Duty on property acquired after death	4th Dec., 1972
9.	Fifty-third	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	Code of Civil Procedure, 1908	6th Feb., 1973
11.	Fifty-fifth	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	Notice of suit required under certain Statutory provisions	14th May, 1973
13.	Fifty-seventh	Benami Transactions	7th Aug., 1973
14.	Fifty-eighth	Structure and Jurisdiction of the Higher Judiciary	8th Jan., 1974
15.	Fifty-ninth	Hindu Marriage Act, 1955 and the Special Marriage Act, 1954	6th March, 1974
16.	Sixtieth	General Clauses Act, 1897	20th May, 1974
17.	Sixty-first	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

(g) Seventh Law Commission

The Commission was reconstituted for the sixth time (being the Seventh Law Commission after Independence) under the Chairmanship of Dr. P.B. Gajendragadkar, former Chief Justice of India, who thus occupied the position of the Chairman for the second time. "The term of the Commission was for three years from 1-9-1974. P.M. Bakshi continued as Member Secretary of the Commission. The Commission functioned till 31-8-1977.

During its tenure, the Commission submitted the following reports:

Sl. No.	Name of the Report	Subject	Date of submission
1.	Sixty-second	Report on the Workmen's Compensation Act, 1923	15th Oct., 1974
2.	Sixty-third	Report on the Interest Act, 1839	21st Feb., 1975
3.	Sixty-fourth	Report on the Suppression of Immoral Traffic in Women and Girls Act, 1956	7th March, 1975
4.	Sixty-fifth	Report on Recognition of Foreign Divorces	5th April, 1976
5.	Sixty-sixth	Report on the Married Women's Property Act, 1874	12th May, 1976
6.	Sixty-seventh	Report on the Indian Stamp Act, 1899	1st March, 1977
7.	Sixty-eighth	Report on the Powers of Attorney Act, 1882	15th March, 1977
8.	Sixty-ninth	Report on the Indian Evidence Act, 1872	9th May, 1977
9.	Seventieth	To effect a change in electoral College	—

(h) Eighth Law Commission

The Commission was reconstituted for the seventh time (being the Eighth Law Commission after Independence) in 1977 under the chairmanship of Mr. Justice H.R. Khanna.

The Terms of Reference of the Law Commission with effect from 1-9-1977 were as under:

1. To keep under review the system of judicial administration to ensure that it is responsive to the reasonable demands of the times and in particular to secure—

(*a*) elimination of delays, speedy clearance of arrears and reduction in costs so as to secure quick and economical disposal of cases without affecting the cardinal principle that decisions should be just and fair;

(*b*) simplification of procedure to reduce and eliminate technicalities and devices for delay so that it operates not as an end in itself but as a means of achieving justice;

(c) improvement of standards of all concerned with the administration of justice.

2. To examine the existing laws in the light of Directive Principles of State Policy and to suggest ways of improvement and reform and also to suggest such legislation as might be necessary to implement the Directive Principles and to attain the objectives set out in the Preamble to the Constitution.

3. To revise the Central Acts of general importance so as to simplify them and to remove anomalies, ambiguities and inequities.

4. To consider and to convey to the Government its views on any other subject relating to law and judicial administration that may be referred to it.

After Mr. Justice Khanna resigned, Mr. Justice P.V. Dixit, former Chief Justice of the Madhya Pradesh High Court, took over as Chairman of the Commission on 17-11-1979. Shri P.M. Bakshi continued as Member-Secretary of the Commission. The Commission functioned till 31-8-1980.

During its tenure, the Commission submitted the following reports:

Sl. No.	No. of the Report	Subject	Date of submission
1.	Seventy-first	Report on the Hindu Marriage Act, 1955—Irretrievable breakdown of marriage as a ground of divorce	7th April, 1978
2.	Seventy-second	Report on Article 220 of the Constitution—Restriction on practice after being a permanent Judge	10th April, 1978
3.	Seventy-third	Report on Criminal Liability for failure by husband to pay maintenance or permanent alimony granted to the wife by the Court under certain enactments or rules of law	15th May, 1978
4.	Seventy-fourth	Report on the proposal to amend the Indian Evidence Act, 1872 so as to render admissible certain statements made by witnesses before the Commission of Enquiry and other statutory authorities	8th Aug., 1978
5.	Seventy-fifth	Report on the Disciplinary Jurisdiction under the Advocates Act, 1961	6th Nov., 1978
6.	Seventy-sixth	Report on the Arbitration Act, 1940	9th Nov., 1978

Sl. No.	No. of the Report	Subject	Date of submission
7.	Seventy-seventh	Report on Delay and Arrears in Trial Courts	27th Nov., 1978
8.	Seventy-eighth	Report on Congestion of under trial prisoners in jails	2nd Feb., 1979
9.	Seventy-ninth	Report on Delay and Arrears in High Courts and other Appellate Courts	10th May, 1979
10.	Eightieth	Report on the Method of Appointment of Judges	10th Aug., 1979

(*i*) *Ninth Law Commission (Chairman: Justice P.V. Dixit)*

Sl. No.	No. of the Report	Subject	Date of submission
1.	Eighty-first	Report on the Hindu Widows Remarriage Act, 1856	20th Dec., 1979
2.	Eighty-second	Report on the effect of nomination under Section 39, Insurance Act, 1938	2nd Feb., 1980
3.	Eighty-third	Report on the Guardians & Wards Act, 1890 and certain provisions of the Hindu Minority and Guardianship Act, 1956	26th April, 1980
4.	Eighty-fourth	Report on Rape and Allied Offences—some questions of substantive law, procedure and evidence	25th April, 1980
5.	Eighty-fifth	Report on claims for compensation under Chapter VIII of the Motor Vehicles Act, 1939	2nd June, 1980
6.	Eighty-sixth	Report on the Partition Act, 1895	4th Sept., 1980
7.	Eighty-seventh	Report on the Identification of Prisoners Act, 1920	4th Sept., 1980

(j) Tenth Law Commission (Chairman Justice K.K. Mathew)

Sl. No.	No. of the Report	Subject	Date of submission
1.	Eighty-eighth	Governmental privilege in Evidence: Sections 123-124 and 162, Indian Evidence Act, 1872 and Article 74 and 163 of the Constitution	10th Jan., 1983
2.	Eighty-ninth	The Limitation Act, 1963	28th Feb., 1983
3.	Ninetieth	The Grounds of Divorce amongst Christians in India: Section 10 of the Indian Divorce Act, 1869	17th May, 1983
4.	Ninety-first	Dowry deaths and Law reform: Amending the Hindu Marriage Act, 1955, the Indian Penal Code, 1860 and the Indian Evidence Act, 1872	10th Aug., 1983
5.	Ninety-second	Damages in application for Judicial Review: recommendations for legislation	16th Aug., 1983
6.	Ninety-third	Disclosure of sources of information by Mass Media	9th Sept., 1983
7.	Ninety-fourth	Evidence obtained illegally or improperly: proposed Section 166-A, Indian Evidence Act, 1872	28th Oct., 1983
8.	Ninety-fifth	Constitutional Division within the Supreme Court— A proposal for	1st March, 1984
9.	Ninety-sixth	Repeal of certain obsolete Central Acts	19th March, 1984
10.	Ninety-seventh	Section 28, Indian Contract Act, 1872, prescriptive clauses in contracts	31st March, 1984
11.	Ninety-eighth	Sections 24 to 26 Hindu Marriage Act, 1955: orders for interim maintenance and orders for the maintenance of children in matrimonial proceedings	17th April, 1984
12.	Ninety-ninth	Oral and Written arguments in the Higher Courts	26th April, 1984
13.	Hundredth	Litigation by and against the government: some recommendations for reforms	8th May, 1984

Sl. No.	No. of the Report	Subject	Date of submission
14.	Hundred-first	Freedom of Speech and Expression under Article 19 of the Constitution: recommendation to extend it to Indian Corporations	28th May, 1984
15.	Hundred-second	Section 122(1) of the Code of Criminal Procedure 1973: imprisonment for breach of bond for keeping the peace with sureties	2nd July, 1984
16.	Hundred-third	Unfair Terms in Contract	28th July, 1984
17.	Hundred-fourth	Judicial Officers' Protection Act 1850	10th Oct., 1984
18.	Hundred-fifth	Quality Control and inspection of consumer goods	27th Oct., 1984
19.	Hundred-sixth	Section 103-A, Motor Vehicles Act, 1939: effect of Transfer of a Motor Vehicle on insurance	30th Nov., 1984
20.	Hundred-seventh	Laws of Citizenship	3rd Dec., 1984
21.	Hundred-eighth	Promissory Estoppel	12th Dec., 1984
22.	Hundred-nineth	Indecent advertisements: Sections 292-293 of Indian Penal Code	8th Jan., 1985
23.	Hundred-tenth	Indian Succession Act, 1925	25th Feb., 1985
24.	Hundred and eleventh	Fatal Accidents Act, 1855	16th May, 1985
25.	Hundred and twelfth	Section 45 of the Insurance Act, 1938	6th June, 1985
26.	Hundred and thirteenth	Injuries in Police Custody—Suggested Section 114-B, Evidence Act	29th July, 1985

(*k*) *Eleventh Law Commission (Chairman Justice D.A. Desai)*

Sl. No.	No. of the Report	Subject	Date of submission
1.	Hundred Fourteenth	Gram Nyayalaya—Alternative Forum for Resolution of Disputes at Grass Roots Level	12th Aug., 1986
2.	Hundred fifteenth	Tax Courts	28th Aug., 1986
3.	Hundred sixteenth	Formation of an All India Judicial Service	27th Nov., 1986

Sl. No.	No. of the Report	Subject	Date of submission
4.	Hundred seventheenth	Training of Judicial Officers	28th Nov., 1986
5.	Hundred eighteenth	Method of Appointment to Subordinate Courts/Subordinate Judiciary	26th Dec., 1986
6.	Hundred nineteenth	Access to Exclusive Forum for Victims of Motor Accidents under Motor Vehicles Act, 1939	19th Feb., 1987
7.	Hundred twentieth	Manpower Planning in Judiciary: A Blueprint	31st July, 1987
8.	Hundred twenty-first	A New Forum for Judicial Appointments	31st July, 1987
9.	Hundred twenty-second	Forum for National Uniformity in Labour Adjudication	9th Dec., 1987
10.	Hundred twenty-third	Decentralisation of Administration of Justice : Disputes Involving Centres of Higher Education	15th Jan., 1988
11.	Hundred twenty-fourth	The High Court Arrears — A Fresh Look	29th Feb., 1988
12.	Hundred twenty-fifth	The Supreme Court — A Fresh Look	11th May, 1988
13.	Hundred twenty-sixth	Government and Public Sector Undertaking Litigation — Policy and Strategies	12th May, 1988
14.	Hundred twenty-seventh	Resource Allocation for Infrastructural Services in Judicial Administration (A continuuam of the Report on Manpower Planning in Judiciary : A Blueprint)	14th June, 1988
15.	Hundred twenty-eighth	Cost of Litigation	1st July, 1988
16.	Hundred twenty-nineth	Urban Litigation — Mediation as alternative to Adjudication	8th August, 1988
17.	Hundred thirteeth	Benami Transactions : A Continuuam	14th August, 1988
18.	Hundred thirty-first	Role of legal profession in Administration of Justice	31st August, 1988

(I) Twelfth Law Commission (Chairman Shri M.P. Thakkar)

Sl. No.	No. of the Report	Subject	Date of Presentation
1.	Hundred Thirty-second	Need for Amendment of the Provisions of Chapter IX of the Code of Criminal Procedure, 1973 in order to ameliorate the hardship and mitigate the distress of neglected women, Children and parents.	19th April, 1989
2.	Hundred thirty-third	Removal of Discrimination against women in matters relating to Guardianship and Custody of Minor Children and Elaboration of the Welfare Principles	29th Aug., 1989
3.	Hundred thirty-fourth	Removing deficiencies in certain provisions of the Workmen's Compensation Act, 1923	28th Sep., 1989
4.	Hundred thirty-fifth	Women in Custody.	14th Dec., 1989
5.	Hundred thirty-sixth	Conflicts in High Court decisions on Central Laws - How to foreclose and how to resolve.	21st Feb., 1990
6.	Hundred thirty-seventh	Need for creating office of ombudsman and for evolving legislative-administrative measure inter alia to relieve hardships caused by inordinate delays in settling provident fund claims of beneficiaries.	28th Sep., 1990
7.	Hundred thirty-eighth	Legislative Protection for Slum and Pavement Dwellers.	20th Dec., 1990
8.	Hundred thirty-nineth	Urgent need to amend under XXI Rule 92(2), Code of Civil Procedure to remove an anomaly which nullifies the benevolent intention of the Legislature and occasions injustice to judgment-debtors sought to be benefitted .	4th April, 1991
9.	Hundred fortieth	Need to amend Order V, Rule 19A of the Code of Civil Procedure, 1908 relating to service of summons by registered post with a view to foreclose likely injustice.	19th April, 1991

Sl. No.	No. of the Report	Subject	Date of Presentation
10.	Hundred forty-first	Need for amending the law as regards power of courts to restore criminal revisional applications and criminal cases dismissed for default in apperance.	31st July, 1991
11.	Hundred forty-second	Concessional treatment for offenders who, on their own initiative choose to plead guilty without any bargaining.	22nd Aug., 1991

(*m*) *Thirteenth Law Commission (Chairman Justice K.N. Singh)*

Sl. No.	No. of the Report	Subject	Date of Presentation
1.	Hundred forty-fourth	Conflicting judicial decisions pertaining to the Code of Civil Procedure, 1908	28th April, 1992
2.	Hundred forty-fifth	Article 12 of the Constitution and Public Sector Undertakings	26th Nov., 1992
3.	Hundred forty-sixth	Sale of Women and Children : Proposed Section 373-A, Indian Penal Code.	26th Feb., 1993
4.	Hundred forty-seventh	Specific Relief Act, 1963	6th Oct., 1993
5.	Hundred forty-eighth	Repeal of certain pre-Central Act	26th Nov., 1993
6.	Hundred forty-nineth	Removal of Certain deficiencies in the Motor Vehicles Act, 1988 (No. 59 of 1988)	11th Feb., 1994
7.	Hundred fiftieth	Suggesting some amendments to the Code of Civil Procedure (Act No V of 1908)	10th May, 1994
8.	Hundred Fifty-first	Admiralty Jurisdiction	
9.	Hundred Fifty-second	Custodial Crimes	
10.	Hundred Fifty-third	Inter-Country Adoption	

6. Codification

(*i*) *Meaning and object.*—Courtenay Ilbert described Bentham as the Chief Apostle of codification and to him, the word "codification" owes its origin. From the fifteenth century onwards the term came to be applied to a more or less comprehensive, systematic statement in a written form of major bodies of law, such as the Civil law or the Criminal law of a particular country, superseding the mixture of customs, decisions and bits of legislation which had previously applied.[68] A code is thus a species of enacted law which purports to formulate the law so that it becomes the authoritative, comprehensive and exclusive source of that law in the area.

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 an important instrument for ensuring that this planning and consultative process will be available to Parliament.

As quoted by Ilbert in *"Legislative Methods and Forms"*, 122 (1901),[69] (*i*) "A code is a complete digest. Such is the first rule. Whatever is not in the code of laws ought not to be the law" (p. 205). (*ii*) The object of the code is that everyone may consult the law which he stands in need of, in the least possible time (p. 193). (*iii*) The great *utility* of the code of laws is to cause the debates of lawyers and bad laws of former time to be forgotten (p. 208). (*iv*) A code framed upon these principles would not require schools for its explanation, would not require canonists to unravel its subtleties. It would speak a language familiar to everybody; each one might consult it at his need. It would be distinguished from all other books by its greater simplicity and clearness."

(*ii*) *In favour of Codification.*—As could be seen from the preceding chapters, before codification or at the beginning of the 19th century there were in action various laws, charters, statutes, regulations circulars and judge-made laws—(*i*) The Hindu law with its commentaries, (*ii*) The Muslim law and usage, (*iii*) Charters and Letters Patent of the Company, (*iv*) The English Common law and Statutes, (*v*) Regulations of the local governments, (*vi*) Circular orders of the Nizamat Adalats and Diwani Adalats, (*vii*) Decisions of courts applying the principles of Justice, Equity and Good Conscience. The consequences were that no pronouncement could be finally made which could not be objected to or called in question. As said by Charles Grant besides this there were commissions of the Governments and treaties of the Crown, treaties of the Indian Government and inferences could be drawn at pleasure. The position was that it led to a state of circumstances which would justify almost any construction of it or qualification of its force. What was administered in the Court was not law but a kind of rude and capricious equity. The decision in a

68. Walker : The Oxford Companion to Law, Ed. 1980, 234.
69. Rama Jois: *Legal & Constitutional History of India*, (1984), 62.

given case was like a lottery.[70] It was also necessary to remove the three inherent vices in law [supra para 2 (*v*)]. And Codification was therefore necessary.

In a despatch dated 10th March, 1877 from the Government of India to the Secretary of State it has been stated that:

(*i*) Codification would be of the utmost utility, not only to the judges and the legal profession, but also to the people and the Government;

(*ii*) It would save labour and thus facilitate the despatch of business and cheapen the cost of litigation;

(*iii*) It would tend to keep our untrained judges from error;

(*iv*) It would settle disputed questions on which our Superior Courts are unable to agree ;

(*v*) It would preclude the introduction of technicalities and doctrines unsuited to this country;

(*vi*) It would perhaps enable us to make urgently needed reforms without the risk of exciting popular opposition and it would assuredly diffuse among the people of India a more accurate knowledge of their rights and duties than they will ever attain if their law is left in its present state, i.e. partially codified.

(*vii*) Codification makes the law certain, uniform, accurate and concise, besides bringing about a sort of unity in the legal sphere.

(*viii*) According to Pollock 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.

(*iii*) *Against Codification:*

(*i*) Codification does not usher in all that is good and perfect. The first objection to codification is its inherent incompleteness. As criticised that "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. This idea, however, should not dishearten one from proceeding in the direction of codification.

(*ii*) Accumulation of comments and decisions would overburden codification, it is said, and the code would become useless. However, this drawback can be removed by re-enacting the Code.

(*iii*) Codification checks the natural growth of law, it stereotypes the law and prevents its elasticity. Against these drawbacks one should not forget that codification brings certainty, a very important factor in law. Elasticity can only be maintained by re-enaction of laws.

---

70. Hansard Debates, III series, Vol. XVIII, 698: Rama Jois : *Legal & Constitutional History of India*, (1984), 63-64.

(*iv*) It is also said that codification makes the defects of the law more clear and thus it encourages 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.

(*iv*) *Technique of Drafting*.—A careful enquiry into the Codes and enactments prepared and produced so far by the Law Commissions would reveal the general pattern and the drafting technique followed by it.

(*a*) The enactment at the very outset briefly lays down the object and purpose of the law and also states whether the measure is meant for consolidating, amending or repealing the existing law.

(*b*) Next in the line comes the nomenclature in the shortest possible manner indicating the subject matter of enactment.

(*c*) After a short title there follows the provision of the date from which all or any of the parts of the Act are to be effective. At times this function is left to the executive which declares the effective date for enforcement of the part or parts of the Act and also declares the whole, or part of the territory in which the Act is to become operative.

(*d*) Every enactment invariably lays down the definition clause which explains the meaning assigned to particular words and expressions used in the Act. This precaution has the benefit of avoiding unnecessary interpretations of words.

(*e*) The substantive part of the law is then conveniently divided into different topics, each topic into a chapter or chapters and each chapter into various sections. Sections may be divided into sub-sections. When necessary provisions and exceptions are inserted to make the sense of a section more clear and definite.

(*f*) Besides the use of sub-sections, provisos and exceptions, a method of illustrations is also used (as is done in the I.P.C. Evidence Act & Contract Act) which is useful in indicating application of the law. However, this method of illustrations (which was suggested by Bentham) is now not used. It has lost its importance altogether.

(*v*) *Modern Trends*.—The modern trend in India is towards codification 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.

However, it has to be noted that inspite of Codification in several important areas of law India has still to codify the area of Civil wrongs. This is an important and most useful branch wherein litigation is fast increasing. The Fourth Law Commission attempted here but the inaction of the Government is surprising. Till today nothing has been done in this direction. Besides, India now is in dire need of a *Common Civil Code* without which the whole nation might disintegrate. Such a need was never felt before.

15

Influence of English Law in India

English law in India, like the Roman law in Mediaeval Europe "enjoyed a persuasive authority as being an embodiment of written reason, and impressed its own character on a formally independent jurisprudence".

Pollock, op. cit p. 134 : A Gledhill: *The Republic of India*, Ed. 2, pp. 211-212

"Before the Plan of 1772 the phrase, "Justice, Equity and Good Conscience" meant only the discretion of the Judge who was having knowledge of English Law only."

Infra para 4(ii)

"There is nothing in our Constitution which prevents us 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."

Das C.J. in *Bengal Immunity Co.* v. *State of Bihar*, AIR 1955 SC 631

SYNOPSIS

1. General

From the twelfth to the sixteenth centuries 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 acquired 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 destinies 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 decide 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. "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 impressed its own character on a formally independent jurisprudence."[3]

As pointed out by Professor Holdsworth the English Law was "received" in India, exactly for the same reasons as the Roman Law was received in Europe. These reasons are, firstly to solve the problems of the more advanced stage of civilization and secondly to adapt it to new environment.[4] As observed by Setalvad "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.

2. English Common Law : 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 sense" said Setalvad, "the expression will include not only what in England is known 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]

---

1. Pollock, *Expansion of the Common Law*, 133.
2. Rankin, *Background to Indian Law*, 21.
3. Pollock, op. cit. 134: A. Gledhill, *The Republic of India*, 2nd Edn., 211-212.
4. W.S. Holdsworth, Preface to the 1st Edn. of the *Law of Torts*. by S. Ramaswamy Iyer.
5. M.C. Setalvad, *The Common Law in India, Hamlyn Lectures*, Twelfth series, 225.
6. For details regarding *"Codification in India"*, *see* Chapter XIV of this Book.
7. M.C. Setalvad: *The Common Law in India*, 3-4.

3. Principles of Justice, Equity and Good Conscience

The basic meaning of equity is evenness, fairness, justice and the word is used synonymously for natural justice. The term is also used as contrasted with strict rules of law, *acquitas* as against *strictum jus* or *rigor juris*. In this sense equity is the application to particular circumstances of the standard of what seems naturally just and right, as contrasted with the application to those circumstances of a rule of law, which may not provide for such circumstances or provide what seems unreasonable or unfair. A Court or tribunal is a court of equity as well as of law in so far as it may do what is right in accordance with reason and justice.[8] It was by the late seventeenth century in England that equity principles first evolved into a system. Till then its principles were hazy and unclear. In the beginning of the Adalat system in India, therefore, application of the principles of justice and fairplay mainly depended on the discretion of a judge. And the discretion of one judge in those times differed from the discretion of another judge. This resulted in confusion, uncertainty and injustice. This can be easily perceived from the administration of justice during the company regime. We shall now examine what role these principles and the common law of England played in developing the administration of law in India and the branches of law not covered by specific provisions of personal law. Moreover the haphazard growth of law prepared a ground for codification.

4. English Law and Crown's Charters up to 1832

The powers granted by the Charter of Queen Elizabeth in 1600 to the East India Company were renewed in 1609 by a new charter of James I. The charters permitted and empowered the Company to make and constitute laws and issue orders and ordinances for its internal administration in its factories in India those laws were to be reasonable and not contrary to customs and statutes of British realm. To some extent it was an indirect import of the English Law in India. Sir Thomas Roe, Ambassador of James I secured from the Moghul Emperor under a treaty, authority to administer justice amongst Englishmen 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 they 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 English Company by the Portuguese, Charles II issued a charter providing for the application of English law to Bombay in place of the Portuguese law.[9]

In 1726 George I granted a new charter[10] 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*". It was an ambiguous expression. In the absence of any set of rules or laws, the Englishmen who presided

8. David Walker: *The Oxford Companion to Law*, 1980, 424.
9. For details *see* Chapter II of this book.
10. George I issued the charter on 24th September, 1726.

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 the country. In *Mayor of Lyons* v. *East India Company*[11], 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 of 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 also expressly stated that these King's Courts would not try actions between Indians unless both the parties agreed to submit the case to the Mayor's Court to be decided. But according to Morley[12], 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[13] 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.[14] There was a difference of opinion amongst judges of the Supreme Court on this point. Chambers, Macaulay, Mill and Beveridge[15] opined that the Statute of 1729 was not applicable to India while Impey, Hyde, La Maisre, Keith[16], Fawcett[17] and Rankin[18] opined that it applied to India.

(*ii*) *Warren Hastings' Plan of 1772.*—

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

---

11. 1 MIA 272.
12. Morley's Digest, Introduction, cixix.
13. See ch. 5, para 6(*a*) supra.
14. *See* for details, B.N. Pandey, *Introduction of English Law into India*, 78, 80, 106; Chapter V of this Book.
15. *See* Supra, Ch. V, Regulating Act.
16. Keith, *A Constitutional History of India*, 77; Thompson and Garrat, *British Rule in India*, 125, 357-9.
17. Fawcett, *First Century of British Justice in India*, 215.
18. Rankin, *Background to Indian Law*, 1.

institutions, (*c*) on all matters the courts were required to act according to justice, equity and good conscience.[19]

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 was laid down. The phrase "justice, equity and good conscience" meant only the discretion of the Judge who was having knowledge of English law only.

(iii) Non-interference as to Personal laws.—As stated earlier, the Charter of 1753, which reconstituted the Mayor's Courts in the Presidency Towns, exempted the natives of the Presidency 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 Council. The Council resisted the claim of the Supreme Court to introduce English law in the moffussil areas. The Council 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."[20] In many leading cases[21], e.g., trial of *Raja Nand 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.[22]

In order to remedy this state of affairs, the Act of Settlement[23] was passed in 1781 by the British Parliament. It explained and defined the powers and jurisdiction of the Supreme Court at Fort William in Bengal. Section 17 expressly stated that in disputes between the native inhabitants of Calcutta, "their inheritance and succession to land, rents and goods and all matters of contract and dealing between party and party" shall be determined in the case of Mohammedans and Hindus of their respective laws and where only one of the parties shall be a Mohammedan or Hindu "by the laws and usages of the defendant". Similarly Section 18 of the Act of 1871, reserved for the natives their laws and customs.

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

19. For details, *see* G.C. Venkata Subba Rao, *"The Influence of Western Law on the Indian Legal System"*, 1965 Aligarh Law Journal 3-4; See also Ch. 4, para 6, supra for details of the plan.
20. *See* Rankin, *Background to Indian Law*, 8.
21. For details *see* in this Book Chapter V.
22. *Ibid.*
23. 21 Geo. III C 70 of 1781. The word "succession" was *added* to the word "inheritance" by the Act of 1781.

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 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'."[24] In the garb of the phrase "justice, equity and good conscience".[24] 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."[25]

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[26] *by English notions.*—During its early period, one of the objects of the East 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 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". Regulation VI of 1832, marked the end of the Mohammedan Criminal Law as a general law applicable to all persons. 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 Town and the influence of English notions on it were as follows:

24. For details *see* Appendix 'B' in this Book.
25. *Waghela Rajsanji* v. *Sheikh Masludin*, (1887) 14 Ind. App. 89, 96.
26. For detailed account of Muslim Criminal Law and subsequent reforms, *see* Chapter XII of this Book.

(*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 Moghul Emperor, the British rule in India began in effect. The administration of these territories was in the name of the Moghul Emperor. The Subedar, under these Moghul Rulers in Bengal, was authorised to administer criminal justice as well as 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."[27] But the Company's authorities finally took the administration of criminal justice in 1790, from the Naib Nazim (who was head of the chief criminal court), in their own hands at Murshidabad.

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 rcommended its compelte 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 be 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. "Hastings objected to the distinction made by the courts following Abu Hanifa in cases of homicide.[28] 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."[29]

Lord Cornwallis, in his minutes 1st Dec., 1790, pointed out the gross defects of the Mohammedan Law and 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 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".[30]

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

27. Stephen, *Nand Kumar and Impey*, Vol. I, 10.
28. See Ch. 12, 2(*C*), *supra*.
29. Rankin, *Background to Indian Law*, 170.
30. Bryce, *Studies in History and Jurisprudence*, Vol. I, 120.

required whereby the *'futwa'* should be bye-passed or circumvented so as to permit substantive reform." The religious persuasion of witnesses were not to be considered a bar for the 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 *'futwa'*, 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 the 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.

When the cases came before the Nizamat Adalat the Law Officers of this Court used to give further *'futwa'* 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.

Specific Instances of Reforms : To tackle **robbery and dacoity** 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 *'futwa'* 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."[31]

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, Regulations 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

31. Rankin, *Background to Indian Law*, 176.

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 the court's decisions in all cases were final. Criminal court's were given full liberty according to their laws.

(*b*) *Agra, Benaras and other ceded districts.*—Bengal Regulations regarding Criminal Law were also applicable in Benaras (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 Benaras 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 Regulation XXI of 1795, III of 1804; *c.f.*-VII of 1820 and Section 508 of Indian Penal Code. In Benaras 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 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 Benaras, giving 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."[32]

Elphinstone the Governor of Bombay Presidency realised the necessity of a better and more uniform system of law, both civil and criminal. In 1827 he drafted a code of 30 regulations for Bombay; in certain matters it was also an improvement upon the Cornwallis Code of 1793. A biographer[33] 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."

(*v*) *State of law up to 1832.*—The unsatisfactory state of law in British India at that time is quite clear from the various enquiries and reports which preceded the

32. J.E. Golebrook, *Life of Elphinstone*, (1882) Vol. II, 125.
33. Sir Alexander Arbuthnot in D.N.B.

Charter of 1833. 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, 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."[34]

The judges of the Calcutta Supreme Court, while describing the state of law in India, observed picturesquely the utter state of chaos in law and its administration.[35]

5. Application of English law

(*i*) *Cases wherein it produced injustice.*—Application of the principles of Justice, Equity and Good Conscience, produced, as said before uncertainty and injustice. The following cases explain the result of such application as illustrated by Rama Jois.[36]

In Musammat Khanum Jan[37] though contract was not one of the matter with respect to which Hindu or Muslim Law was made applicable, the said law was applied to the extent considered necessary. In *Deen Dayal* v. *Kylas Chunder*[38] and *Gopal Ram Chandar* v. *Gangaram Anand*[39], rule of Damdupat was not applied to Hindus, and higher interest was permitted to be collected in cases of usufructuary mortgage. In *Govind Dayal* v. *Inayatulla*[40] right of pre-emption contained in Muslim Law was applied in Bengal and United Provinces, but it was refused to be enforced in Madras[41] and Bombay, except in Gujarat[42] on the ground that it was not consistent with the principles of Justice, Equity and Good Conscience. In the absence of any specific law in certain matters customs were also enforced. For instance in *Rama Rao* v. *Rustum Khan*[43] the right of a muslim to perform rites of burial was recognised. This process of applying principles of Justice, Equity and Good Conscience was accelerated with the coming into existence of High Courts in 1862 to which English Barristers were appointed as judges and also due to Privy Council becoming the higher court of appeal for India since 1833 which pressed into service these principles.[44]

(*ii*) *Cases wherein the Courts refused to apply it.*—In the following cases[45] the courts refused to apply the principles of English law as they did not suit Indian conditions. In a well known case of *Nawab Khwaja Mohammad Khan* v. *Husaini Begum*[46] the rule that a third party to a contract cannot enforce it, was not applied

34. Morley, *Administration of Justice of British India* (1858), 158; *Digest*, Vol. 1, clv.
35. Cited by C. Grant before Committee on the Charter Act, *Hansard*, 3rd Series, Vol. 18, 729.
36. Legal & Constitutional History of India (Ed. 1984), Vol. II, 41.
37. 4 S.D.A. Rep. 212/1827; *Rajindar Narain Rao* v. *Bijoy Govind Sing*, 2 MIA 181.
38. ILR 1 Cal 92.
39. ILR 20 Bom 721.
40. ILR 7 All 775 (1870).
41. *Ibrahim Saib* v. *Muni Miruddin Saib*, 6 Mad HCR 26 (1870).
42. *Mohammad Beg* v. *Narain*, AIR 1929 Bom 255.
43. ILR 26 Bom 198.
44. M.C. Setalvad: *The Common Law in India*, 31-32 (1960).
45. Supra n. 33, 42-44.
46. 37 IA 152.

and the right of a woman for whose benefit her father entered into contract with another for payment of Rs. 500/- as a consideration for her marriage with his son was held enforceable at the instance of that woman. The Privy Council held that refusal to enforce such contract would result in grave injustice, regarding the fact that practice of entering into such contract was prevalent among the Muslims. In regard to the principle of English law that plea of special damages was necessary for damages for oral defamation. The same was held inapplicable in moffusil in case of *Parvathi* v. *Mannar*[47] but in so far as Presidency Towns were concerned it was strictly applied; *Bhoono Money Dassee* v. *Notobar Biswas*[48] being the case in point. On the claim of Shia Muslims to take out a religious procession on a public highway, the Privy Council held that distinction between indictment and action in regard to what is done on a public highway found in English law should not be applied in India, overruling several High Court decisions.[49] In *Khushalchand* v. *Mahadeogiri*[50] English law relating to superstitious uses was not applied in case of a Hindu religious endowment by the Bombay High Court. Similarly the distinction between English Common law and Equity was not recognised on the ground that there was no such dichotomy in India and there has been fusion of both the jurisdictions, *Juttender Mohun Tagore* v. *Ganendra Mohun Tagore*[51], being the case decided on the point. Consequently, as decided in *Rani Chhatra Kumari Debi* v. *Mohan Bikram Shah*[52], there could be only one owner and if the property was vested in a trustee then he himself was to be regarded as the owner. A Benami transaction was construed as having created a resulting trust and could not be treated as intended advancement as it was regarded under English law depending on the source of purchase money having regard to the large scale prevalence of benami transaction among the natives. This rule was applied to Hindus and Muslims as well.[53] However in *Kerwick* v. *Kerwick*[54] this rule was held inapplicable to Englishmen in India. Rule of Equity of redemption was not recognised on the ground that no such rule existed in Hindu Law.[55] However after 1858 the position changed and the Adalat started applying the principles of equity of redemption for the fact that many transactions had taken place on that basis. Consequently the Privy Council reluctantly accepted that position in law with respect to transactions which took place after 1858. In regard to the principle of the law of 'Maintenance and Champerty' it was held in *Pitchakutty* v. *Kamala Nayakkan*[56] that it should not be made applicable to Presidency towns; and the same position obtained in the Moffusil. In 1852 the Sadar Adalat held that it was not wrong for one party to advance money for meeting the cost of litigation of another.[57] The law in the Presidency was also brought in

47. ILR 8 Mad 175 (1884).
48. ILR 28 Cal 452.
49. *Manzur Hassan* v. *Mohammad Zaman*, 52 IA 61.
50. 12 Bom HCR 214 (1875).
51. (1872) IA Suppl 47, 71.
52. 58 IA 279.
53. *Gopi Krist Gosain* v. *Gangapersaud Gosain*, 6 MIA 53; *Moulvie Sayyud Uzhur Ali* v. *Bibi Ultaf Fatima*, 13 MIA 232.
54. 47 IA 275.
55. *Pattabhiramier* v. *Venkatrao Naicker*, 13 MIA 560; *Alexander John Forbes* v. *Ameroonissa Begum*, 10 MIA 348.
56. 1 Mad HCR 153.
57. *Kishanlal Bhoomick* v. *Peare Soondree*, SDA (1852) Beng 394; *Panchkowree Mehtoon* v. *Kaleecharan*

conformity with the moffusil holding that there existed no justification for difference in law between moffussil and Presidency Towns.[58]

(*iii*) *Cases*[59] *wherein it was successfully applied.*—On the basis of the principles of Justice, Equity and Good Conscience the Courts successfully applied the principles of English law in the following cases. In the first case a Muslim created a charge on his property by deposit of title deeds in favour of an Armenian. After some time the Muslim transferred the property in favour of a Hindu who in turn transferred it to a British subject. The Armenian filed a suit against all in the S.D.A. of Madras but the court dismissed it holding that the doctrine of constructive notice was not applicable in India. However the Privy Council, in appeal, held that direction to act according to Justice, Equity and Good Conscience required that the principles of English law *viz.*, that right created by deposit of title deeds could be deprived only by a subsequent bona fide purchaser for value without notice should be applied. The decision of the S.D.A. was therefore reversed.[60] The Bombay High Court followed this decision and applied the principle in *Dada Honaji* v. *Babaji*[61]. In *Waghela Rajsanji* v. *Shekh Masluddin*[62] a question was raised whether a guardian was competent to make covenants on behalf of the ward so as to create a personal liability on the ward. Applying the principles of English law on grounds of Justice, Equity and Good Conscience the Privy Council held that it would be improper to uphold the validity of such a covenant. In one case[63] the land was washed away by Ganges and later it was formed again. Applying the principles it was held that the land regained belonged to the owner. In the famous case of *Ram Coomar* v. *Macqueen*[64] the Privy Council applied the principle of estoppel by holding out. The principle is that where a person who is the real owner of property allows another to hold himself as the owner and that when a third person purchases the property believing that the apparent owner is the real owner, the latter was debarred to assert his undisclosed or secret title, in the absence of the knowledge on the part of the purchaser about the title of the real owner. In yet another important decision the Privy Council recognised the right of the Crown to escheat the property of a deceased Brahmin.[65] According to Hindu law this could not be done but that principle was excluded. Besides the principle of the clog on the equity of redemption[66] and restriction on alienation of property to strangers, and that transfer should be only to any one of the relatives were held valid and applied.[67]

(*iv*) *Criticism.*—On the whole the principles of Justice, Equity and Good Conscience had a very profound influence in developing the Indian Jurisprudence. Principles of English law were applied with necessary changes to the Indian

---

Suth 9, W.R. 490.

58. *Ram Coomar* v. *Chander Canto*, 4 IA 23 (1876-1877).
59. Supra n. 33, 41-42.
60. *Vardeu Seth Sau* v. *Luckpathy*, 9 MIA 307.
61. 2 Bom HCR 36 (1865).
62. 14 IA 89, 96 (1887).
63. *Felix Lopez* v. *Muddun Mohan Thakoor*, 13 MIA 467.
64. (1872) IA Supp. 40.
65. *Collector of Masulipattam* v. *Cavaly Venkcata*, 8 MIA 500; *Ranee Sonet Kowar* v. *Mirza Himmut*, 3 IA 92.
66. *Meharban Khan* v. *Makhana*, 57 IA 168.
67. *Mohmed Reza* v. *Abbas Bandi Bibi*, 59 IA 236.

conditions. In Torts as no Swadeshi law of torts existed on which improvement could be made the entire English law of torts was applied in India.[68] However, it would be seen that it took the Britishers in this country roughly a century to evolve a proper system of administration of justice. So far as this facet of their functions in India is concerned the credit goes to them but so far as the other facet of the picture is concerned its history is full of frauds and intrigues, full of breach of promises, and setting one community against the other for the sake of procuring, sustaining and consolidating their political power. The General Editor of "The History and Culture of the Indian People", prepared and published by the Bharatiya Vidya Bhavan under the directions of Dr. K.M. Munshi, in preface to volume nine, part one, has rightly expressed[69] that establishment of paramount authority of the British "created a frame work of an all India administration on a solid basis, such as India had probably never known, save under the Maurya and the Mughal Emperors" but the other side,—"the true colour (and) the colonial imperialism of British rule in India" should not be lost sight of. There is ample positive evidence as to the real nature of many aspects of British Imperialism which has thrown off the mask of benevolence under which it was successfully hidden for a long time.[70] For this purpose the writings of the English historians like George Thompson, John Bright, Henry Fawcett, Sir Charles Digby, Wyndham and Sir Henry Cotton cannot be lightly dismissed as irresponsible criticism. Some British scholars wrote books on select topics, primarily with a view to defend British officials and British policy in India against charges levelled by old writers. In general the writings of Englishmen from about the last quarter of the nineteenth century were tinged by the spirit of imperialism which was their legacy of the British rule. V.A. Smith's *Oxford History in India* (1919) and the *Cambridge History of India*, Vols. V(1929) and Vol. VI are from his point of view products of men who honestly believed in the doctrine—"my country, right or wrong."[71] One looks in vain in this history for the names and careers of men like Ram Mohan Roy, Ishwar Chandra Vidya Sagar, Bankim Chandra Chatterjee, Ramkrishna Paramhans, Keshav Chandra Sen, Swami Vivekanand, Dayanand Saraswati, Surendra Nath Banerjee, M.G. Ranade, Dadabhai Naoroji, Pherozshah Mehta, Bal Gangadhar Tilak and a host of others who will be remembered as makers of modern India.[72]

(*v*) *Advantages and disadvantages.*—However the advantages and disadvantages of the application of the English law may be recapitulated succinctly[73] as under: (*i*) It helped development of various branches of law not covered by either Hindu law or Mohammedan law. (*ii*) In the absence of sound provisions of personal laws it served as a valuable source of sound law. (*iii*) It removed uncertainty in law. (*iv*) Distinction between moffusil law and presidency towns law was removed.

---

68. Rama Jois: *Legal & Constitutional History of India* (1984), Vol. II, 44.
69. pp. xxi-xxxv.
70. *Ibid.*, xxii.
71. *Ibid.*, xxiii.
72. *Ibid.*, xxiv; Errors of Cambridge History are not of omission only, the errors of commission are equally, if not more, grave and serious; for the real account of the British political, social and legal atrocities the reader may refer to Pandit Sundarlal's two volumes titled "Bharat Men Angrezi Raj", which were banned in India before independence.
73. Rama Jois: *Legal & Constitutional History of India*, (1984), Vol. II, 44-45.

As to the disadvantages it may be said that (*i*) at times the rules applied by English Judges were not consistent with customs, habits and circumstances and were technical in nature which generated injustice. (*ii*) This resulted in judicial legislation by imposing rules foreign to this country.[74]

In spite of the above, *the fact remains that one law for the whole of British India made the march of the country towards independence quicker and systematic.*

6. Import of English Law and Codification

The Charter Act of 1833, introduced important changes in 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, empowered to legislate for persons in the Presidency Towns as well as the moffusils and appointed the First Indian Law Commission.

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 into India. The codification of Indian Law was a systematic import of English Law into India through the four Law Commissions.[75]

(*i*) *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. Apart from English Law, the French Code was of a 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*."

The Code of Civil Procedure was passed in 1859 and the Code of Criminal Procedure was passed in 1861 (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.

(*ii*) *Indian Succession Act, 1885 (X of 1885).*—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 intestate or testamentary succession.

---

74. Minute of Sir H.S. Maine, dt. 17-7-1879, quoted by Jain & by R. Jois in their works.
75. For the contribution of each Law Commission, *see* Chap. XIV of this Book.

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.

(*iii*) *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, resisting more fully and minutely of 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 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.

(*iv*) *Indian Evidence Act* (*1872*).—It was drawn up by James Fitzjames Stephen. Before the passing of this Act, the English rules had no authority. 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...."

(*v*) *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.

(*vi*) *Easement Act* (*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.

(*vii*) *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 or 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.[76]

7. Attempts to govern Natives and Englishmen by their respective laws—Causes of failure

We have already seen before that the East India Company began to govern natives by native law and Englishmen by English law. This is the natural system

76. Frederick Pollock, *The Expansion of the Common Law*, 16-17.

which is applied in a conquered country or in a vassal State (*i.e.* in a State where complete sovereignty has not been assumed by the dominant power), where local variations have however to be adjusted. The variations are important because the extent to which Native Laws and usages can be recognised and enforced depends materially on the degree of the civilisation which the vassal State has attained. Had this system been successful in India, the contribution of English law to India would have been less.

The system broke down in India due to various causes and so there was an opportunity for English Law to influence Indian Law. It will not be out of place to have a review of the causes of this failure.

Causes of failure of above attempts

(*a*) Difficulty of ascertaining the Native Law (various religions).

(*b*) Defects in the Native Law where they were ascertainable.

These defects had to be supplied by English Judges and Magistrates from their remembrance, often imperfect, of principles of English Law which were supplied under the name of Justice, Equity and Good Conscience.

(*c*) Native Laws often embodied rules repugnant to the traditions and morality of the ruling race. An English Magistrate could not enforce, and the English Government could not recognise, the degenerate criminal law in Indian Mohammedanism.

Thus the Native Law was beaten at every point by English case law and by Regulations of the Indian Legislatures.

8. Codification and Natives Laws

In India, as elsewhere, codification has been brought about by the pressure of practical necessity. In India it became necessary to draw up, for the guidance of untrained Judges and Magistrates, a set of rules which they could easily understand and which were adapted to the circumstances of the country. But since the framers have been English, it is a natural corollary that English notions must have been imported as has been the case (*infra*).

(*i*) *Influence of English notions on Mohammedan law.*—

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) *Indian Penal Code* : The Muslim criminal law was first modified piecemeal (as seen above) and then it was superseded altogether by the Indian Penal Code.

(2) *Slavery* : 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) *Age of Majority* : 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) *Pre-emption* : 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) *Case Law* : Another far-reaching modification was the substitution of judiciary for professional case law.

(6) *Wakfs* : In the matter of Wakfs or public or private endowments, there was a progressive tightening of case law against the recognition of private settlements. 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*[77] 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) *Sale* : 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) *Marriage etc.* : 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.

(*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 (1) the rule of exemption of Benaras Brahmins from death penalty. (2) They made the throwing of children into the sea at Sagar or other places a criminal offence, and (3) prohibited the burning of widows alive on the death of their husbands in 1830. (4) Where injustice

77. 22 Ind. App. 76.

was patent, they also modified the rules of succession, inheritance and marriage. (5) They repealed the religious law which compelled a person to pay the debts of his father and grandfather. (6) Widow marriage was also legalised. Thus gradually English notions influenced the Hindu criminal law in Benaras and Bombay.

Codification of laws further influenced and modified the Hindu substantive civil law to a great extent as follows:

(7) 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.

(8) 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.

(9) 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.

(10) 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 of 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.

(11) The Guardians and Wards Act of 1890 is a complete code, which defined the rights and remedies of wards and guardians.

(12) 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.[78] This Act fixed the age of majority at 18 years.

(13) 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.

78. (1) Manu., Ch. VIII.

(14) 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.

(15) 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 and provided that a period of seven years' absence without any trace is sufficient to raise a presumption of death.

(16) 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.[79]

(iii) What saved Hindu law from complete change.—In spite of the major forces which assisted 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 doctrine that law and sovereignty could be co-terminous with territorial limits."

9. English law: Influence on Indian Legislation

On 15th August, 1947, with the transfer of political power from the British to Indians, the Dominion of India was created. The India Independence Act, 1947, played a 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 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*

79. See *Vedenayaga Mudaliar* v. *Vedammal*, 27 Mad 59 ; *Gangu* v. *Chandrabhagabai*, 32 Bom 275.

emerged was, therefore, not only basically British in its framework but took the form of an alteration and extension of what had previously existed.''[80]

(*a*) The Constitution of India, 1950, has been greatly influenced by the British principles of a responsible government. The Cabinet System in India is similar to that of the 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.''[81] 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 Saheb Ram Jawaya Kapur* v. *State of Punjab*[82], 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*''.

(*b*) 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 Constitution of India. But it does not mean that we are solely dependent on English Law, traditions and conventions.[83] The Indian Constitution has borrowed its provisions from the various Constitutions of the world. It also reflects Indian traditions and ideas of justice.

(*c*) Article 372 of the Constitution of India provides for the continuance of the existing laws and their adaptation. The object of clause (*i*) 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'' 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 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.

(*d*) During the post-Constitution period 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 Years 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

---

80. M.C. Setalvad, *The Common Law in India*, 159.
81. Sir Ivor Jennings, *Some Characterstics of the Indian Constitution*, 2.
82. (1955) 2 SCR 225, 236, 237, see also *Shamsher Singh* v. *State of Punjab*, (1974) 2 SCC 831.
83. 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.

is more in the new Indian conditions where Indian problems are similar to those of the English.

10. 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 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 would 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, though 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 an earlier case. *Bengal Immunity Co.* v. *State of Bihar*[84], Das, C.J. observed:

> "There is nothing in our Constitution which prevents us 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."[85]

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 despite the influence of English Common law.

---

84. AIR 1955 SC 631, 672 ; *see* also *Dwarka Das Srinivas* v. *Sholapur Sp. & Wg. Co.*, AIR 1954 SC 119, 127. See also *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 SCC 625 : AIR 1980 SC 1789 ; *D.S. Nakara* v. *Union of India*, (1983) 1 SCC 305; *S.C. Verma* v. *Chancellor*, Nagpur University, (1990) 4 SCC 55 ; *Punjab Land Development and Reclamation Corporation Ltd.* v. *Presiding Officer*, Labour Court, Chandigarh, (1990) 3 SCC 682.
85. See Ch. XXI, 463-465, 414, 233, *infra*.